

Legal Services Board

Referral fees, referral arrangements and fee sharing consultation



A response by the Association of Personal Injury Lawyers

December 2010

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,700 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Muiris Lyons- President

Stuart Kightley- Additional officer

Karl Tonks- Additional officer

Any enquiries in respect of this response should be addressed, in the first instance, to:

Abi Jennings

Head of Legal Affairs

APIL

11 Castle Quay, Nottingham NG7 1FW

Tel: 0115 958 0585; Fax: 0115 958 0885; e-mail: abi.jennings@apil.org.uk

Executive summary

Introduction

Referral arrangements continue to be a contentious area of business amongst our members. We are pleased therefore that research is being conducted and this feature of legal services is being examined from the perspective of the injured person.

Defining referral arrangements

The definition of referral fees and arrangements given by the Legal Services Board (LSB) in our view is misleading. The discussion paper defines referral fees and arrangements as “Any payment for the referral or introduction of any client or potential client”¹. We agree that there is an inherent difficulty in providing a definition because of the different arrangements from which benefits or clients are derived. For example, in return for personal injury work a firm will provide non contentious legal advice for free such as will writing or conveyancing. Other arrangements may tie a firm to a particular medical agency or insurance provider. Firms on a before the event insurance panel will agree to not make a claim against the policy in return for the work. Because of this complexity in the market we would argue that there should be no distinction between a referral fee and referral arrangements when regulating this area. In our view both fees and arrangements should be regulated and transparent.

We have said before, and it bears repeating, that with the imminent introduction of Alternative Business Structures the definition is particularly important. The market is likely to become blurred even further with introducer-owned firms or full multi-disciplinary practices not needing to pay for such arrangements. The risk is that they may provide a mechanism for legitimate but less transparent arrangements.

¹ Paragraph 2.2, LSB Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing.

Operation of referral arrangements

Our fundamental concern is that the injured person should have access to the best possible advice by investigating which solicitor is best for them in their situation.

We continue to remain concerned that the injured person does not always have freedom to choose a solicitor of his choice nor does he often know the full extent of the arrangement under which the claim has been referred. We fully concur with the LSB's observations that consumers should not be deterred from shopping around and that referral arrangements should not prevent consumer choice. We do not, however, agree with the conclusion reached that there is no evidence of consumer choice being undermined by referral arrangements.

We wrote to more than 4,500 members in August 2010 asking for evidence of how legal expense insurers deal with consumers' requests for freedom to choose their own lawyer under a policy. The response from our solicitor members not on before the event insurance panels indicated that BTE insurer's refusal to allow complete freedom of choice was consistent².

Transparency and disclosure to consumers

APIL wholeheartedly agrees that there should be full transparency around referral arrangements to the client. It is suggested in the LSB paper that the legal service provider should disclose:

- Whom the **referral fee (our emphasis)** is paid to and for what services
- The value of the referral fee in pounds
- Consumers right to shop around for alternative legal services provider

We raised earlier in this paper the complexity and difficulty in defining referral of work just by reference to a fee. We therefore believe that the guidance given above is not

² Appendix A

broad enough and should encompass all type of referral arrangement. We would suggest amending the wording to read:

- Whom the referral arrangement is with and for what services
- The nature of the referral agreement, for example, the value of referral fee in pounds or agreement between the referrer and the legal service provider, such as whether there is an agreement, not to make a claim against a policy in the event that the claim is unsuccessful or to restrict choice of expert or future conduct of the case
- Consumers right to shop around for an alternative legal services provider

We also remain concerned that the emphasis remains firmly with lawyers to police these activities³. If arrangements are to be transparent they should be described and disclosed at all stages of the transaction, that way consumers will know exactly how their claim is being handled throughout. We do not believe that this will add any additional administrative cost to a case.

Transparency and disclosure in the market

We have real concerns about the proposal to collate and publish agreements between introducers and lawyers. Whilst we acknowledge that it would be transparent, these contracts are likely to be commercially sensitive. Transparency is about the need for the client to understand the relationships and agreements between the referrer and the solicitor not around transparency in the market. We cannot think of any other examples of where businesses have to publish their business arrangements on a website. We believe that there may well be competition law issues here that need consideration, but these are outside our expertise. On this basis we do not believe that this is a viable option. However, one solution may be for the legal expense provider to provide the client with a copy of the relevant arrangement.

³ Paragraph 1.19 LSB Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing

Delivering active regulation

Active regulation is an essential part of ensuring transparency and consumer confidence in the market. There is merit in enhancing visibility of the action being taken by regulators to ensure compliance through a clear strategy for dealing with this.

We have already said that we have concerns about business agreements being published, therefore we do not believe that this should form part of the compliance strategy. What would be more effective is surveying consumers to find out what information has been given to them and if the information provided was clear. This would provide stronger evidence of the success of the regulation.

Low levels of compliance by introducers with their solicitors about contractual arrangements are of concern⁴. Current rules require solicitors to 'police' compliance because of the rules that currently govern them. However, we have said earlier in this paper that there needs to be greater parity between the regulation of solicitors and referrers. We believe that this is something the LSB should seek to achieve through partnership with regulators.

We agree that where there is evidence of low compliance, targets should be introduced to tackle this, it is through this pro-active management that consumers will develop confidence in the market.

⁴ Paragraph 8.11

Appendix A

Our Reference: ARC/025/007669/RAC
Your Reference: NM [REDACTED]

Neil Millar & Company solicitors
No 2 Universal Square,
Devonshire Street,
Manchester,
M12 6JH



7 December 2009

Dear Sirs

Motor - LV= - Legal Expenses Insurance
Your Client: [REDACTED]
Incident Date: 8 August 2009

Thank you for your recent enquiry.

Please note that LV= have appointed Arc Legal Assistance to administer claims made under their Legal Expenses Insurance contracts.

Whilst your client does have the benefit of Legal Expenses, the policy states that the insurance only covers legal costs incurred by one of LV= panel solicitors, appointed by us, until court proceedings are issued. If you require a copy of the policy wording, please contact us.

On this basis, if the indemnity is to be used, we will need to refer it to our panel Solicitor.

If your client wishes for you to continue to act for him in this matter, we confirm that, subject to our final assessment of the claim and agreement with you as to costs, we will only be able to consider indemnifying costs that you or the third party incur after our agreement that court proceedings need to be issued.

Therefore, in the event that it does become necessary for you to issue proceedings, please contact us again so that we may consider this claim in further detail. Until such time, underwriters are not liable for any costs incurred in this case.

If of course your client is prepared to instruct a panel firm to act for him and therefore potentially receive the full benefit of his legal costs insurance prior to the issue of court proceedings, please advise us as soon as possible and we shall send his details to the appropriate firm.

24 December 2008

Your Ref:

Our Ref: 20081224 -ck-hi36653953- [REDACTED]

FirstAssist Legal Protection
Marshall's Court, Marshall's Road
Sutton, Surrey SM1 4DU
T 020 8652 1313
F 020 8661 7604
www.firstassistlegal.co.uk

[REDACTED]
Neil Millar & Co
Barlow House
Minshull Street
Manchester
M1 3DZ



Dear Mr Kennedy

[REDACTED]
Policy Number: HI36653953

We write further to this matter and your telephone call of 18 December 2008.

We can confirm that the insured's policy does have the benefit of legal expenses cover. However, with regards to the issue of legal representation we would advise that this policy does not give the policyholder the freedom to appoint their own legal representative in the period before it is necessary to issue legal proceedings.

In the period before we agree it is necessary to issue we do refer claims of this nature to our panel solicitors, Irwin Mitchell, in accordance with the policy terms and conditions. Should they be unable to settle this matter, and we agree it is necessary to issue, our insured is then free to instruct your firm to act in the legal proceedings. In the intervening period we regret to advise we cannot consider your firm acting before it is necessary to issue.

Therefore, should the insured wish to continue to instruct Neil Millar & Co we would kindly request you revert to us should it become necessary to issue legal proceedings.

For your information please note that the policy does not cover any costs incurred before we have given our express written consent to incur the same. We trust you will advise the insured accordingly.

In the meantime, we reserve our position in accordance with all policy terms and conditions.

Yours sincerely



Chanda Kaluba

Claims Negotiator

FirstAssist Insurance Services Limited

Direct Dial No: 020 8652 1397

Email: chanda.kaluba@firstassistlegal.co.uk

Your ref: [REDACTED]
Our ref: [REDACTED]

13 November 2009

Messrs SnipeLaw Solicitors
Thompson Road,
Whitehills Business Park,
Blackpool
FY4 5PN



direct line

Direct Line Insurance plc
Direct Line House
1 Cathedral Square
Trinity Street
Bristol BS1 5DL
Telephone 0117 984 3313
Facsimile 0117 930 4938
DX 122110 Bristol 12

Dear Sirs

Legal Expenses Claim – [REDACTED]

Thank you for returning the completed claim form and from the information provided, our customer's policy does provide cover for this type of dispute.

However, the policy terms and conditions must be adhered to if the policyholder wishes to be indemnified and have their legal costs paid by us. The policy provides that we are entitled to restrict freedom of choice of solicitor pre issue in certain circumstances.

The issue regarding freedom of choice of solicitor has been debated for some time now and the Financial Ombudsman Service (FOS) gave guidance to the industry on this point in their bulletin in March 2003.

As a result of their guidance we will allow freedom of choice of solicitor only on the following types of claim: -

- Personal injury cases where general damages exceed £10,000 and where the case is non-routine
- Clinical negligence claims
- Significant boundary, employment or contract disputes (where there is a considerable history or high value).

Any decision we make regarding legal representation is made with these guidance points in mind, where we consider that the FOS would support our position.

From the information provided to us regarding our customer's dispute, we do not consider their case to be one where we would be expected to allow freedom of choice.

We would, therefore, not allow for your appointment and would insist on appointing one of our nominated solicitors to handle this claim up to the point of issue.



072076

DAS Group
DAS House, Quay Side, Temple Back, Bristol BS1 6NH
Telephone: 0117 934 2000 Fax: 0117 934 2109 DX141841 Bristol 19 www.das.co.uk

A member of the international DAS organisation

Private and Confidential

[Redacted]

Your Ref:
Our Ref: [Redacted]
Date: 03 June 2010
Email: ccpc@das.co.uk

Dear [Redacted]

Your Claim for Personal Injury

We have recently received notification of a potential personal injury claim on your behalf.

At this stage we are unable to confirm whether cover may be available under your legal expenses policy and you will need to report the claim directly to us if you would like us to consider the matter further. Please telephone the number given in your policy schedule, quoting the above reference, and we will be pleased to take your claim details. Your claim will be allocated to a Claims Handler who will review the details and decide whether the circumstances are covered by your policy.

If cover is confirmed, we would look to appoint one of our Preferred Solicitors to investigate your claim and deal with the matter until such time as legal proceedings are issued. Depending on the circumstances, we may not be in a position to consider the appointment of the solicitors you have already contacted at this stage. We have enclosed a leaflet outlining the benefits of using a DAS Preferred Solicitor.

It would not take our Preferred Solicitor long to become acquainted with your case. Once cover has been confirmed, they will request the file from the solicitor so you won't have to provide the information again.

If we appoint one of our Preferred Solicitors to act on your behalf, then funding for your legal expenses can begin immediately. This will include your costs, any costs incurred from the other side (should they be awarded against you), and the funding of expert reports (e.g. medical reports) up to the limit of indemnity given in your policy. If you continue to instruct the solicitors you have already contacted, you will need to cover these costs on a private basis until such time as proceedings are issued.

We look forward to hearing from you.

Yours sincerely

Personal Injury Team
Claims Department

enc: Why Use Panel Firms?

DAS Legal Expenses Insurance Company Limited is authorised and regulated by the Financial Services Authority and is a member of the Association of British Insurers.

Head and Registered Office:
DAS House, Quay Side, Temple Back, Bristol BS1 6NH



11 none



28th September 2009

Snipelaw Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs,

Re : - Claimant:
Accident Date:
Our Ref:
Registration:
Your Ref:

[REDACTED]

We refer to the above matter.

Under the terms of the policy the insured would normally be referred to one of our panel solicitors.

The client does not have freedom of choice regarding legal representation prior to the issue of proceedings. This is supported by section 7 of the Insurance Companies (Legal Expense) Regulations.

If the client wishes for you to continue then we are unable to offer indemnity and we trust you will discuss alternative arrangements with them.

We trust you note our position.

Yours faithfully

AB

Personal Injury Department.

FAMILYPLUS

KIRCAM HOUSE
5 WHIFFLER ROAD
NORWICH
NR3 2AJ.
TELEPHONE: 01603 420080
FAX: 01603 420010
email: fpclaims@ulr.co.uk

Freeth Cartwright Llp
Cumberland Court
80 Mount Street
Nottingham
NG1 6HH

Our Ref: FP0239511/OS/003

12th August 2010

Dear Sirs,

Re : Our Mutual Client : [REDACTED]
: Your Ref : [REDACTED]

Thank you for your recent correspondence the contents of which we note.

As you are not on our panel of solicitors, there will be no cover for your costs under the policy.

If your client wishes to utilise their legal expenses insurance with us, please have them contact us directly and we will consider the position further. If we do not hear from you, we assume that you will continue to deal under some other method of funding. Should your client wish to retain your services then we would ask that you recontact us at the point where it becomes necessary to issue whereby we will consider the matter further.

We trust this explains our position. However should you wish to take the matter further then please write to our Chief Executive at the address above or alternatively direct your correspondence to Lloyds of London claims department.

Yours faithfully,


FamilyPlus.

Freethcartwright LLP

16 AUG 2010



Allianz Insurance plc

Legal Protection

Our Reference: [REDACTED]
Your Reference: [REDACTED]
Date: 14th July 2010

Snipelaw Solicitors
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs,

Claimant : [REDACTED]
Accident Date: [REDACTED]

Thank you for your letter dated 8th July 2010.

Unfortunately we are unable to confirm your appointment to act under the terms of the policy at this stage.

The policy states that the insured is free to choose a legal representative of their choice when there is a need to start legal proceedings. Up until that stage we will only agree to indemnify the costs of solicitor representation through the use of an approved panel solicitor.

When considering our decision we have taken into account whether this claim has exceptional circumstances.

We understand that this is not the response you had hoped for and that you will need to discuss the position further with your client. If the insured wishes to proceed we would be happy to appoint an approved panel firm to act.

If we do not hear from you within 14 days we will assume our assistance is no longer required.

Yours faithfully



Sue Powell
Claims Handler

Direct Dial: 01454 455651
Email: susan.powell@allianz.co.uk



Your ref: [REDACTED]
Our ref: [REDACTED]

22 December 2009

Snipe Law
Thompson Road
Whitehills Business Park
Blackpool
FY4 5PN

Dear Sirs

Legal Expenses Claim: [REDACTED]

Thank you for your letter of 7th October 2009. Your comments have been noted.

As the policy allows for freedom of choice once proceedings are issued, we are able to allow for your instruction at that point. We can confirm that, on the basis you agree to our Terms of Appointment, costs will be covered from the date the terms are signed.

However prior to that point, we ask that you provide a full update on the present position to include your opinion on prospects of success, an idea of quantum to include any supporting medical evidence where possible, and a copy of counsel's advice if there is any dispute on liability. If you believe it reasonable to issue proceedings at that juncture and this is in line with CPR guidelines, then we may be able to offer indemnity for this claim.

Once we are in receipt of the above information we will then contact you with our decision. We look forward to hearing from you.

Yours faithfully,

Legal Expenses Claims Department
Your Contact: Natalie Thomas
Direct dial: 0845 878 1847
(Monday – Friday 9am – 5pm)

Helen Blundell

From: Paul Balen [Paul.Balen@freethcartwright.co.uk]
Sent: 23 September 2010 17:23
To: Helen Blundell
Subject: LEI

Further response as below!

ACROMAS

INSURANCE COMPANY LTD

Freeth Cartwright LLP Solicitors

DX: 10039 Nottingham 1

Direct Dial:

Your Ref:

Our Ref:

0845 366 1100

PB/0601

Always quote our reference

Dear Sirs:

Policyholder:

Claim:

Medical Negligence

21 st September 2010

Thank you for advising us of the work done on the file which was forwarded on to the underwriters for their considerations.

The underwriters have stated that at this stage they still uphold their decision to refuse funding Freeth Cartwright in representing Mrs. in her claim. It is their belief that given the recent guidance, prior to the point when attempts to negotiate have been exhausted and proceedings have to be issued they can refuse a policyholders freedom of choice. As you have advised us that you are not at the point of issue and are still following the pre-action protocol stages, the underwriters are only agreed to funding panel solicitors.

We have written to Mrs. to advise her of the underwriters decision and again put forward to her the opportunity to utilise upon the offer of panel solicitors. Should Mrs. indicate her intention is to continue to instruct you in this claim, we invite you to revert back to us if a settlement cannot be reached and proceedings have to be issued when we will be happy to refer your request for funding subject to reasonable prospects continuing to exist.

Yours faithfully,



Acromas

All correspondence to be sent to

Saga Legal Expenses 8 Bedford Park Croydon eRG 2AP

DX: 144482 Croydon 25

info@sagalegal.co.uk

Paul Balen

Partner
Litigation
Direct Dial: 0845 050 3289
Direct Fax: 0845 050 3249

www.freethcartwright.co.uk



Freeth Cartwright LLP
Solicitors
Cumberland Court
80 Mount Street
Nottingham
NG1 6HH
United Kingdom



The **co-operative** legal services

2nd Floor
Aztec Centre
Aztec West
Almondsbury
Bristol
BS32 4TD

Telephone:
01454 466910
Facsimile:
01454 466090

[REDACTED]
Solicitors

[REDACTED]
**Brighton
East Sussex**
[REDACTED]

Our Reference: [REDACTED]
Your Reference: [REDACTED]

8th September 2010

Dear Sirs

Re: Notification of Claim under the Legal Expenses Section of [REDACTED] Co-operative Insurance Popular Buildings/Contents Insurance Policy Number: [REDACTED]

Thank you for your letter dated 20th August 2010.

Appointment of your firm under the terms of the insurance policy is not covered at this point in time.

The Legal Expenses Section of our Policyholder's Co-operative Insurance Household Insurance Policy, which we administer, only provides a freedom for the policyholder to choose a solicitor to pursue their claim when it becomes necessary to issue proceedings in order for the claim to progress.

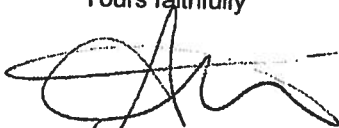
Where there remains an opportunity for the claim to be settled by negotiation, the Policy-wording allows us to appoint a member of our panel to conduct the claim through negotiation until such a time that it is clear that no remedy can be obtained without the issue of proceedings at which point we would be pleased to endorse appointment of your firm to deal with the case if our policyholder so wishes subject to the claim meeting the criteria for success required under the policy.

As we are presently unwilling to appoint your firm under the policy, we will be unable to consider payment of any costs incurred by your firm on our policyholder's behalf. You should also note that we have not yet agreed that the claim meets the prospects of success required under the policy and, as a result, if you wish to apply for appointment for us to support the issue of proceedings, please contact us once all pre-action steps have been carried out, but before proceedings are actually issued. We will make consideration of the claim's merits at that point.

We attach a copy of the relevant section of our Policyholder's Policy for your information.

Please note that we have recorded your application as a notification of claim under the Policy.

Yours faithfully



Alexandria Wainwright
LEI Administrative Assistant
Co-operative Legal Services
Direct Dial: 01454 466474



[REDACTED]
Brighton
East Sussex
BN1 1AZ

HOWLETT CLARKE
25 AUG 2010
[REDACTED]

Address Barclays Insurance
Legal Expenses and Claims
Administration
PO Box 417
Bristol, BS32 4WW
Telephone number 0800 051 1712
Fax number 0844 8911119
E-mail advice@legal-services-advisor.co.uk
Our reference LEI/10077687
Your reference FAO: [REDACTED]

24 August 2010

Dear Sirs

Re: [REDACTED] Incident Date 20/10/2009

We write having received recent communication requesting your appointment under the terms of the legal expenses insurance policy held by our policyholder.

It would appear from the information provided that the claim may fall within this policy.

We would like to inform you, however, that this legal expenses policy held by our policyholder does not provide for freedom of choice of solicitor. As per the terms and conditions of the policy, we are only obliged to consider the policyholder's request to use their own solicitor when it becomes necessary to start court proceedings.

We will not consider payment of any costs incurred by the policyholder or yourselves whilst pursuing this claim, until commencement of proceedings (and only then if authorised by our claims-handling agents).

To protect our policyholder's interests, however, we have referred this matter to our claims handling agents.

The claims-handling agents are:

DAS
DAS House
Quay Side
Temple Back
Bristol
BS1 6NH

Telephone 0117 934 2000

Our claims handlers will be in touch with you shortly to confirm how best to proceed in line with the terms and conditions of your policy. If appropriate, they will also be able to inform you of their terms of engagement.