

## Referral fees: Lawyers obtaining work by way of payment to a third party

### Obtaining work by paying a financial benefit to a third party.

This is a guidance note for Tasmanian lawyers and law practices that provide payment of a 'fee' or other benefit to a third party for the referral of clients.

#### Introduction

Recent public commentary across Australia raised concerns about 'claim farming' involving lawyers. The Legal Profession Board has become aware of concerns about practitioners and law practices in Tasmania being approached to pay a fee to a third party for the referral of clients.

Lawyers paying for client introductions should be aware of and consider the extent to which such a marketing tactic may involve:

- A breach of conduct rules;
- A breach of client-lawyer confidentiality obligations;
- Compromising your obligation to provide independent advice to your client;
- A conflict of interest; or,
- A breach of privacy under the *Personal Information Protection Act 2004* (Tas).

#### What are referral fees or 'claim farming'?

Where a client or their details are referred to a lawyer or law practice as a result of a payment of a fee to a third party, this constitutes a paid referral.

Other similar practices are variously called 'claims farming/harvesting', 'cold-calling', 'direct marketing' and 'ambulance chasing'. They invariably involve a third party seeking out potential clients and encouraging them to make legal claims. Those claims are then on sold to lawyers.

#### Legislative considerations

In Tasmania, lawyers have a legislative obligation under the *Rules of Practice 1994* not to do any act or thing, or permit or cause any act or thing to be done, that may be reasonably regarded as attracting business in an offensive manner.<sup>1</sup> This could include for example: approaching a person at a funeral or receiving a referral of a vulnerable person who may not fully understand the situation.

Other Australian jurisdictions have professional rules which require the lawyer to disclose to prospective clients any referral fee agreement in place.

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<sup>1</sup> *Rules of Practice 1994*, Rule 8(b).

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The *Australian Solicitor Conduct Rules 2012* (‘the Rules’) although not yet adopted in Tasmania, do not forbid a lawyer paying a third party to refer potential clients to them, provided the arrangement is fully disclosed to the potential client and the client is aware that they do not have to accept an invitation by the lawyer to act for them.

A lawyer has an obligation to a client to not permit his/her own personal interests to conflict with the obligation to act in the best interests of the client.<sup>2</sup> Lawyers must disclose to their client, any interest in a matter he/she acts for the client in, or any interest which may be reasonably regarded as a conflict of interest.<sup>3</sup>

Similarly the *Legal Profession (Barristers) Rules 2016* (Tas) provide that a barrister may not make a payment or gift to any person by reason of or in connection with the introduction of professional work by that person to the barrister: Rule 46.

## Questions to consider

Lawyers should critically assess whether paying for the referral of clients will breach their ethical duty to their client. The lawyer should consider:

- Will the referral affect my ability to provide independent advice?
- Is it clear how the referrer obtained the client and their details?
- Is the client aware that their details are being referred on and to what extent?
- Is the client fully aware of the referral relationship and the financial benefit?

It is important to note that these questions alone may not be sufficient to determine whether there is a breach of an ethical duty.

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<sup>2</sup> *Australian Solicitor Conduct Rules 2012*, Rule 12.1.

<sup>3</sup> *Rules of Practice 1994*, Rule 11(1). See also, *Australian Solicitor Conduct Rules 2012*, Rule 12.4.4.

<sup>4</sup> Gino Dal Pont, *Lawyers’ Professional Responsibility* (Lawbook Co, 6<sup>th</sup> ed. 2017) [4.65].

Lawyers need to be aware that a situation may arise whilst acting for their client where their obligation to act in the client’s interests is in conflict with their loyalty to the referrer or their personal interests in securing further referrals.

## Confidentiality and privacy obligations of lawyers

Lawyers should have regard to the *Personal Information Protection Act 2004* (‘PIPA’) and should not act in a way, or cause any act to, disclose any person’s information which may breach the PIPA.

Furthermore, a lawyers duty of confidentiality is often branded as being fiduciary by nature of lawyer-client loyalty.<sup>4</sup> A lawyer is therefore required to preserve the confidentiality of information in respect to their clients.

## Other considerations

In some cases, a client may provide consent for the receipt of a financial benefit and later perceive that a conflict has arisen during the course of that lawyer acting for them.

Clients who may have consented from the outset can and do make complaints about lawyers and circumstances of conflict, whether or not the lawyer received fully informed consent or not.

In circumstances where the client has been obtained by dishonest measures, it is relevant to note that any claim under the public indemnity insurance policy may be excluded.<sup>5</sup>

<sup>5</sup> Law Society of Tasmania Professional Indemnity Insurance Master Policy 2017-2018. See clause 4(iii) with respect to dishonest or fraudulent actions.

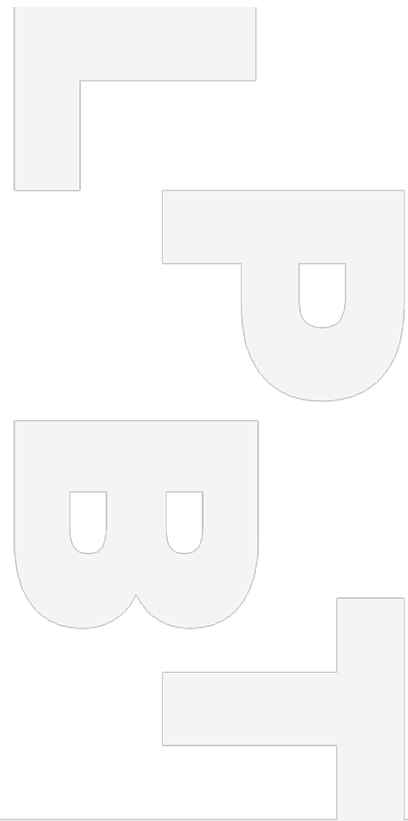
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This guideline does not create a new professional standard for lawyers in Tasmania. The Board considers the payment of fees for the referral of clients has ethical aspects which need to be properly considered to prevent disciplinary action being taken against the lawyer.

## Further information

The Queensland Law Society has a detailed guidance note for its members on referral fees.

The Victorian Legal Services Board + Commissioner has also produced guidance notes to practitioners cautioning lawyers from engaging in such a practice. The Law Institute of Victoria has produced an ethics guideline on direct marketing.



## Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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