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The SALS Working Party on Ethics and Lawyer Fee Arrangements' first report ('The ethics of conditional fee arrangements') will be launched at a SALS seminar early in the new year. The working party, chaired by Richard Southwell QC, includes among its members a High Court judge, senior solicitors, barristers and academics specialising in legal ethics.

To order your copy of the report or attend the seminar, please contact the Society for Advanced Legal Studies (tel: 020 7862 5865 fax: 020 7862 5855; email: sals@sas.ac.uk).

ETHICS AND CONDITIONAL FEE AGREEMENTS

Until now, debates on conditional fee arrangements (CFAs) have focused on the access to justice implications of replacing legal aid. This is a paradigm shift in the resourcing of civil cases, which the Government argues will increase access to justice across all income groups. There are two elements of this change which deserve stronger attention. The first is the effect of heightening lawyers' self-interest in the cases that they take on. This is not simply an unwanted by-product of a shift to CFAs. It is a deliberate attempt to ensure lawyers share the risks of litigation with clients, but it raises crucial problems. The second element is the involvement of insurance companies in the funding of justice.

There are virtues and problems in the CFA approach. Insurers understandably take a narrow commercial view of risk which means the harder or more costly cases are discouraged regardless of a broader notion of the interests of justice. It is likely that worries about risk will mean that insurance acts as a heavy filter on the more difficult cases, while providing an affordable route to courts for people who would not previously have qualified for legal aid. Similarly, some extra money is freed up for other areas of legal aid expenditure.

These pros and cons are well-explored, but the ethical dilemmas faced by lawyers operating under CFAs are new. As a result, the need to understand and evaluate them is pressing. CFAs raise inevitable and sometimes serious conflicts of interest between clients and lawyers.

A strong undercurrent in the report is that simply restating a lawyer's ethical duties to the court and to the client is not sufficient to address the problems caused by CFAs. CFAs may have brought real benefits to some clients, but the commercialisation of key aspects of the justice process bring attendant dangers which need closer scrutiny. The existence of lawyers' strong financial interests in the outcome of cases, will heighten pre-existing tensions in the lawyer-client relationship, and create new conflicts of interest. Furthermore, the financial interests of insurance companies, which will now occupy a central role on both sides in legal actions, will have a profound impact on access to justice and the ethics of practice. Insurance companies underwriting claims under CFAs have very similar interests to insurance companies defending those claims: they want to win or they want the to settle early. Only the latter option minimises their risk. That is the most worrying of the conflicts of interest. New systems for organising the funding of legal services need clear conduct rules to balance the interests of parties' lawyers, insurers and ultimately justice.

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