

Solicitors Regulation Authority

Consultation Paper

Proposed amendments to rule 3 (conflicts of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007



A response by the Association of Personal Injury Lawyers

March 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises solicitors, barristers, legal executives and academics, who are all committed to serving the needs of people injured through the negligence of others.

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:

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|------------------|-----------|--------------------------|
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Executive Summary

We believe that the proposals for change are unlikely to affect injured people pursuing claims for personal injury, as they are stated to apply in circumstances ‘... not involving litigation...’ and where clients are ‘... sophisticated ...’.¹ Nevertheless we feel that the definition of these terms must be precise to ensure that there is no confusion on implementation.

We believe that all personal injury claims, at all stages, should remain outside the scope of the proposed exceptions to rule 3 of the Solicitors’ Code of Conduct 2007 (‘the code’).

We are concerned that one of the potential consequences of the proposed changes to rule 4 of the code is that it may encourage the practice by insurers of third party capture (TPC) with referral of cases to their own panel solicitors who are already acting for the insurers. Any changes to rule 4 should be implemented only where litigation, or contemplated litigation, is excluded, in the same way as in rule 3, above. This would ensure that all personal injury claims, at all stages, remain outside the scope of the proposed exceptions to rule 4 of the code.

Introduction

APIL welcomes the opportunity to respond to the Solicitors Regulation Authority (SRA) Consultation paper on proposed amendments to rules 3 and 4 of the Solicitors’ Code of Conduct 2007 (‘the code’).

APIL’s interest is in protecting the needs of people injured through the negligence of others. In the circumstances we do not feel that it is appropriate for us to submit a response to every question posed and our response is of a more general nature.

¹ SRA Consultation paper, page 6, paragraph 3.1.2

Rule 3 – conflicts of interest

We believe that the proposals for change are unlikely to affect injured people pursuing claims for personal injury, as they are stated to apply in circumstances ‘... not involving litigation...’ and where clients are ‘... sophisticated ...’.¹ Nevertheless we feel that the definition of these terms must be precise to ensure that there is no confusion on implementation.

The current guidance note to rule 3 indicates that the existing exceptions, namely the ‘common interest’ exception in rule 3.02(1) and the ‘same asset’ exception in rule 3.02(2), are intended to apply to specialised users of legal services where the clients are sophisticated users of those services. As the proposals for change are intended to substantially extend these exceptions, the definition of ‘sophisticated’ must be made abundantly clear in the rules themselves, rather than in the guidance note.

The proposal for change in rule 3 is stated to apply in any situation ‘... not involving litigation ...’² and ‘... in any situation of conflict (litigation excluded) where the clients consented ...’.³ Again, we believe that ‘litigation’ must be precisely defined in these circumstances to ensure that it not only covers cases where proceedings have been, or are about to be, issued but also cases where litigation is in contemplation. Many personal injury cases are settled without recourse to proceedings and it is essential in our view that all personal injury claims, at all stages, remain outside the scope of the proposed exceptions to rule 3.

Rule 4 - duty of confidentiality

We are concerned that one of the potential consequences of the proposed changes to rule 4 is that it may encourage the practice by insurers of third party capture (TPC), by

¹ SRA Consultation paper, page 6, paragraph 3.1.2

² Ibid

³ Ibid, page 8, paragraph 3.2.7

referring captured cases to their own panel solicitors who are already acting for the insurers.

TPC is the process by which an insurer approaches a person knowing that they have been involved in an accident with their insured and in the knowledge that they could be injured and may want to make a claim for personal injury. The insurer then offers a sum of money to settle the claim immediately or offers to refer the claim to their panel firm of solicitors. The insurer 'captures' the claim to deal with it, generally before independent legal representation can be obtained.

The way the proposed changes are explained in the consultation paper at paragraph 4.1.1 could potentially allow a firm to act for both a claimant and defendant in a personal injury claim, provided an information barrier is put in place, and this, in turn, may encourage more insurers to practice TPC.

We believe that any changes to rule 4 should be implemented only where litigation, or contemplated litigation, is excluded, in the same way as in rule 3, above. This would ensure that all personal injury claims, at all stages, remain outside the scope of the proposed exceptions to rule 4.

- Ends -

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