

26 July 2012

SRA
Ipsley Court
Berrington Close
Redditch
B98 0TD
consultation@sra.org.uk



Discussion document on the proposed ban on referral fees in personal injury cases

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 in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,300 members in the UK and abroad who represent hundreds of thousands of injured people a year.

We are happy to provide our initial thoughts on the ban on referral fees as proposed within the discussion document.

Following the discussions already held with the SRA, APIL proposes that the following are key to consistent regulation of any ban on referral fees:

- The proposals must mirror the principles of outcome focussed regulation.
- There must be a set of mandatory outcomes drafted specific to the ban (rather than the general outcome of 'comply with the law').
- There must be a clear definition of what constitutes a service as described in paragraph 24 of the discussion paper. There needs to be real clarity as to what will and will not be exempt, including reference to how services will be priced.

There is a professional need for clarity and consistency. We would expect the SRA to seek Counsels advice on its interpretation of the ban to avoid any legal challenge come April. In terms of the ban, the SRA could develop a short series of rules describing

models that will be forbidden to ease enforcement in spite of rules not being the starting point for outcome focussed regulation. The SRA can then investigate a breach of that rule rather than the Act. The SRA should also develop model frameworks which comply with the ban. What solicitors and the public need is absolute clarity as to what is allowed. For example, a leading Q.C. has suggested that the wording of the Act disallows collective marketing schemes, whereas Government minister, Mr Djanogly, is on record in the House of Commons as stating that this is not intended. It is essential that practitioners are clear about the extent of the ban.

APIL members have provided us with various descriptions of existing business models currently in use as follows, and clarity is necessary in respect of the legality of each:

- A Claims Management Company (CMC) supplies a panel of solicitors. The CMC provides marketing support for every firm on its panel by marketing under one brand. The CMC leaflet drops a geographic area for noise induced hearing loss cases. The CMC employs office staff to initially screen the clients' calls in response to the leaflets. They then set up a clinic day with an audiologist to screen clients further. If the client passes all this screening, they are then passed on to a solicitor the solicitor pays per-referral.
- A marketing co-operative whereby a number of law firms form an organisation for the purposes of advertising in the local hospital and Citizens Advice Bureaux (CABs). Calls go to a dedicated number based in one of the firms and after a minimum of information is gathered the case is put on to the next firm on the rota.
- A CMC charges a yearly membership fee; the cases are then distributed on a rota basis to a number of panel firms throughout the year.
- A CMC supplies a number of solicitors; they do the fact finding and sign the clients up to the Conditional Fee Agreement (CFA), they then pass the file on for a fee.
- A non-profit making company set up for solicitors to pool money to advertise for personal injury work.
- Sales representatives visiting garages to generate work.
- An electronic sign in the waiting room of an NHS hospital which gives waiting times and also advertises firms' services.
- Inducing a client to use a particular firm by offering cash or an iPad.

- A referral from a trade union to a law firm.
- Solicitors practice setting up a charity. (MARS was set up to attract members of the public. It intended to provide accident victims with a £250 donation to assist them in bringing a legal claim.)
- A charity charging a flat annual fee to a solicitors firm in return for the firms' name appearing on the charity's panel. This generates income for the charity by offering to provide injured people with the details of law firms that may be able to assist them following an injury.
- A charity or organisation refers the injured person to a legal professional who would then pursue their claim. If the claim was successful the referring charity or organisation would receive a share of the fee recovered (for example the referring organisation would always receive 15% of legal costs in all successful cases; however they would receive no payment at all in unsuccessful cases).
- A fee sharing model can also exist between two law firms. For example, a firm may agree to refer cases to a firm they consider to be more experienced in a particular area of personal injury law such as clinical negligence or catastrophic injury cases. Should this fee sharing model not be allowed to exist there is a risk that the first firm will simply continue to deal with the case themselves which could possibly result in the client receiving a poorer service than if the case had been referred to a firm with more expertise in the area.

Many different business models exist and clarity is much needed prior to regulation to ensure solicitors can comply. One of our main concerns is that it is still not clear so far what business models will fall foul of the referral fee ban.

APIL shares the SRA's concerns over the impact of the ban. Whilst it will deliver competitive advantage to ABSs the effect on small firms who rely on referral fees to generate business could be devastating. A clear policy is essential as to what ABS model(s) will be allowed, for example will an ABS between a CMC and law firm be treated any differently from an ABS between a law firm and an insurer. Furthermore, the work that charities conduct can be vital to an injured person. It is essential that the funding they receive to conduct this work is not damaged by the referral fee ban.

A perception already exists that the regulation of CMCs, insurers and solicitors is inconsistent and does not provide a level playing field. This will only be exacerbated further unless the Claims Management Regulator and Financial Services Authority all take the same approach to regulation.

It is essential that there is clarity over what business models are caught by the ban and consistency in approach to enforcement by the regulators can be achieved through:

- Guidance as to examples of what is allowed;
- Guidance as to examples of what is not allowed;
- A pre-authorisation procedure allowing firms to seek clearance of a business model before they embark on it;
- A helpline/advice line;
- Seminars or roadshows by the SRA on what is permitted and why; and
- Ongoing updates to the profession on developing models and thinking – what is and isn't compliant.

Current business models may need to change, APIL therefore suggests that the SRA remains aware of this fact and gives the earliest possible indication of what the ban will entail to allow legal professionals the time to amend their business practices as necessary.

We hope that our comments prove helpful to you and look forward to engaging with you further in the future.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Abi Jennings', with a stylized flourish at the end.

Abi Jennings
Head of Legal Affairs
Association of Personal Injury Lawyers
3 Alder Court
Rennie Hogg Road
Nottingham

NG2 1RX
DX: 716208 Nottingham 42
Email: abi.jennings@apil.org.uk