

**LAW SOCIETY – REGULATION REVIEW WORKING PARTY
CONSULTATION**

SOLICITORS' INTRODUCTION AND REFERRAL CODE

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

APRIL 2001

The executive committee would like to acknowledge the assistance of following people for assisting with the preparation of this response:

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SOLICITORS' INTRODUCTION AND REFERRAL CODE

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents around 5000 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To promote health and safety;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.
2. APIL welcomes the opportunity to respond to this consultation paper, which seeks views on the removal of the current ban on payment for referrals within the solicitors' code of professional conduct, as it is an issue that has concerned our members for some time.
3. The views expressed in this response are limited to the field of personal injury practice. APIL cannot, therefore, choose one of the four outlined options or answer the consultation questions, as these implicitly incorporate reference to other areas of legal practice, on which we cannot comment.
4. In summary, we view the removal of the current ban on the payment for referrals with concern. Due, however, to the difficulties in interpreting and enforcing the current code on this issue and external pressures to level the playing field for solicitors in the personal injury field, in the public interest, APIL feels forced to accept that the current ban should be removed.

5. The current code attempts to prevent solicitors from paying for the referrals of claims. As noted on page 8 of the consultation paper, however, the code is difficult to interpret and enforce. This has resulted in the emergence of claims management companies, who refer claims to solicitors but circumvent the code by relating charges to marketing or training costs, for example. The current ban on referrals is not effective. There can, therefore, be little justification in retaining it. It could be argued that the effectiveness of the current ban could be increased through redrafting the relevant clause. It is not believed, however, that any form of wording in a professional code of conduct for solicitors will be able to stem the emergence and operation of claims management companies and we do not, therefore, view redrafting as a viable solution.
6. In addition, pressure has been exerted on the legal profession to level the playing field, in the public interest, amongst solicitors and other providers of personal injury services.
7. In February 2000, the Blackwell Committee reported on non-legally qualified claims assessors that act for reward. The issue of non-legally qualified claims assessors is, of course, inextricably linked with the issue of referrals. The Blackwell Committee recommended that “the Law Society should reconsider its practice rule barring payment for referrals, in the light of activities in the personal injury market of claims management companies and their panel solicitors” as it was believed that this would “allow solicitors to compete on a level playing field with their rivals in the field of personal injury and take account of commercial business development practices.” In stating that “the public interest might well benefit from a system that encouraged non-qualified persons to refer to more specialist ones”, the Committee made clear its belief that a removal of the ban on referrals would assist, amongst others, personal injury victims by hindering the amount of claims dealt with by non-legally qualified claims assessors.

8. Just over a year later, in March 2001, an Office of Fair Trading report entitled “Competition in the Professions” was published. This report followed research conducted by LECG Consultants who identified the ban on referrals as a professional rule that restricted competition. The OFT concluded:

“The current regime also prevents solicitors from making payment for work that is referred to them by a third party. This may be hampering inter alia the development of an on-line marketplace that could bring clients and solicitors together. As with advertising restrictions, there are welcome indications that this restriction may be abolished.”

9. APIL views payment for referrals with concern and agrees with many of the arguments put in favour of retaining the ban on referrals. We do not feel, however, that those arguments have sufficient force, either independently or cumulatively, to overcome the external pressures outlined above. This is largely because retaining the ban will not remedy the mischiefs identified.

10. For example, some argue that removing the ban on payment for referrals will only replace one unlevel playing field with another, as it will result in the richer, probably, larger firms being able to pay for more claims than the smaller firms. The risk of this occurring is accepted. As the retention of the ban does not actually create a level playing field, however, between personal injury solicitors and other providers of personal injury claims services, APIL does not believe that this argument actually justifies a retention of the ban.

11. It is also agreed that a removal of the ban may well damage the reputation of the profession. The public and the media may perceive a conflict of interest between solicitor and client if solicitors pay for their claims. The current ban on referrals, however, has not protected the profession from attacks on reputation, especially within the field of personal injury law where lawyers are seen as ‘ambulance chasers’ and encouraging a ‘compensation culture’. In addition, solicitors can already pay for referrals from other solicitors. Whilst removing the ban, therefore, could further damage the reputation of solicitors, retaining the ban will certainly not protect the profession.

12. Further, APIL believes there is a risk that clients will be misled into thinking that they are being referred on the basis of the quality of the solicitor's work when it will really be for the introducer's financial benefit. Such problems relate to consumer issues that can be monitored and could, to some extent, be remedied through the requirement of transparent referral schemes. The most important point is that personal injury victims should be advised by sufficiently experienced and knowledgeable solicitors. The retention of the ban on referrals does not ensure this and is a matter of public education, a role APIL takes extremely seriously. Removing the ban on payment for referrals would not ensure a referral to a solicitor with specialist expertise but should ensure more referrals to qualified solicitors rather than unqualified claims assessors. In addition, it cannot be denied that referral schemes, through effective marketing and advertising, have successfully raised public awareness of the right to pursue compensation for personal injury caused through the fault of another.

13. The acceptability of payment for referrals depends, to a large extent, upon the individual terms of referral schemes and their operation in practice. We believe that it is of paramount importance that referral schemes are transparent, as recommended by the Blackwell Committee. In addition, the referral fee charged to a solicitor should be charged on a flat basis and should in no way be linked to the amount of damages recovered. If such a link were allowed, solicitors may be tempted or perceived to be tempted to conduct a claim against their clients' best interests so as to keep the fee charged as low as possible. For example, if the referral fee for a claim on the fast track is less than the fee for a claim on the multi track, a solicitor may be encouraged to inappropriately keep the claim on the fast track. This would be against the client's best interests as the amount of damages recoverable on the fast track are limited, whereas on the multi track they are not. Alternatively, if the referral fee is charged on a graduated basis in connection with the amount of damages recovered, a solicitor may be encouraged to advise a client to accept lower damages than the client may be entitled to.

14. If payments can be made for referrals, a change in culture will be necessary.
The Law Society and solicitors will have to be vigilant to ensure that conflicts of interest are not generated through ongoing relationships between solicitors and referrers. If, for example, a referrer provides additional services such as the provision of insurance, there is much greater scope for that referrer to exert control over the conduct of a claim, which may not be in the client's best interests. Much more emphasis would be placed on ensuring solicitors acted in compliance with practice rule 1 of the professional code of conduct for solicitors.
15. An unexpected effect of relaxing the ban on payment for referrals may be that law centres, advice agencies and charities might seek to charge solicitors for referrals or even auction high value cases amongst specialist solicitors. We are concerned that this would commercialise the relationship between advisors and solicitors. We are not sure of the solution to this. Conflict may arise, which should be considered by the Charities Commission and the Legal Services Commission who fund many of these agencies.
16. In summary, our views above are influenced by irresistible forces in the market place. We believe that the Blackwell Committee should be reconvened to consider these developments in the market since they last reported and the proper licensing of all participants: solicitors, claims assessors, insurers, advisers and charity workers.
17. APIL would like to stress that, if the ban on the payment for referrals is removed, we intend to make vigorous efforts to ensure that personal injury victims do not suffer in any way and that APIL members act properly in the conduct of their personal injury claims.