

13 August 2003

Bronwen Still
Professional Ethics
The Law Society
DX 19114 Redditch

Dear Ms Still

Solicitors' Introduction and Referral Code

APIL welcomes this opportunity to comment on the amendment of the Law Society's rules on introductions and referrals, although we should note that we can only comment on the issues insofar as they relate to personal injury claims. As we have previously stated, APIL believes that personal injury solicitors should be able to pay for referrals, subject to the introduction of targeted client protections, such as transparency. Any rule should also seek to prevent an introducer from influencing or constraining a solicitor's professional judgement. It is important to note that it is not only introducers that can exert influence in this way. Both before-the-event and after-the-event legal expenses insurers can influence a solicitor's conduct of a case and whilst we do not suggest that the Law Society can address this issue in the amendment of the rule on payment for referrals, it should certainly be considered in the future.

We recognise that drafting a rule to allow payment for referrals is extremely difficult. One reason for this is that allowing solicitors to pay for referrals raises issues about the conduct of the introducers, often claims management companies. It is paradoxical for solicitors to be able to pay for referrals from companies that do not have to comply with the same or similar rules. Not only does this create an un-level playing field for solicitors, but it undermines the purpose and effectiveness of solicitors' professional rules of conduct, which exist to protect clients. The regulation of claims management companies must have a bearing on the drafting of the relevant rule.

In considering versions A and B of the draft rule in the consultation paper, APIL prefers version A. This version is relatively simple and would, in our view, be easier for the Law Society to enforce than version B. Whilst the issue of enforceability is important, the issue of enforcement action is equally so. The Law Society must enforce any revised rule on the payment for referrals.

In relation to the Law Society's specific questions on version A, we believe the use of the word 'payment' is appropriate. We agree that terms such as 'inducement' and 'reward' are unclear and could complicate matters. We also support the transparency requirement and the requirement that the introducer should not have publicised the solicitors' practice in a way which is contrary to the Solicitors' Publicity Code, which would preclude cold-calling. We are concerned, however, that the rule, as currently drafted, could still allow solicitors to pay for referrals from introducers that have cold-called clients. The current rule mentions the paying solicitor's practice specifically and would certainly prevent a solicitor from paying for a referral where the introducer had publicised his particular practice in a way which contravened the Publicity Code. A solicitor could, however, pay for a referral, despite a breach of the Publicity Code, where the introducer had publicised both his and solicitors' services on a more general level. The rule should, in our view, make it clear that a solicitor should not pay for a referral where the introducer has obtained the claim to be referred by means the solicitor could not employ himself under the Publicity Code.

We do feel, however, that version A could be anti-competitive, as it prevents introducers providing services they may want to develop. Whilst it may be possible to justify such an anti-competitive rule on public interests grounds in the current personal injury market, it would be extremely difficult to do so if claims management companies were properly regulated. In summary, therefore, unless and until claims management companies are properly regulated, APIL supports version A.

If and when they are regulated, however, we believe the rule on payment for referrals should reflect that suggested by the Institute of Chartered Accountants, which states:

"For work, other than insolvency, members or members firms should not give, share or offer any commission, fee or reward to a third party, other than an employee), in return for the introduction of a client unless: the client is aware of the arrangements with that third party, and in particular with regard to payments for introductions, and

- (i) either the third party is a member of a body which has prescribed ethical standards comparable to those set out in this Guide; or*
- (ii) the third party complies with ethical standards comparable to those set out in this Guide and the member or member firm accepts*

responsibility for ensuring that the introduction is carried out in accordance with such standards.”

This draft rule would, of course, need to be amended to refer to the Law Society's professional rules of conduct.

On a final point, APIL believes that any rule on the payment for referrals should include two further client protections. Firstly, the rule should prevent any link between the referral fee paid and the damages claimed or received in the referred claim. 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 compensation that can be claimed on the fast track is limited. 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. Secondly, the referral fee should not be deducted from a claimant's damages, as damages are intended to meet the losses and expenses incurred, such as loss of earnings and the cost of care, as a result of the defendant's negligence or breach of statutory duty.

I hope that this is helpful but please do not hesitate to contact Lorraine Gwinnutt, APIL's press and parliamentary manager, if you require any further information.

Yours sincerely

David Marshall
President, APIL