THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

MAKING SIMPLE CFAS A REALITY

CP22/04

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL19/04)

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The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) 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 enhancement of law reform;
- 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;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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MAKING SIMPLE CFAS A REALITY

1. APIL welcomes the opportunity to put forward its comments to the Department for Constitutional Affairs (DCA) in response to the consultation paper on making simple CFAs a reality. Please note, however, that APIL represents the interests of negligently injured claimants, and while APIL comments on CFAs and defamation, our primary focus will be on tackling the consultation from the viewpoint of how conditional fee agreements (CFAs) can be made simpler in respect of personal injury litigation.

2. In summary, APIL believes that all client care protections should be removed from the regulations and placed in the professional conduct code. In addition the indemnity principle should be abrogated via secondary legislation, such as the Civil Procedure Rules (CPR), as well as there being an explicit statement in the CPR allowing only clients to challenge the validity of a CFA. These measures will mean that CFAs should be simpler in structure and they will leave less room for unreasonable challenges by defendants.

3. APIL supports the provision and use of legal expenses insurance provided accident victims are not denied access to a solicitor of their choice or are not penalised for choosing their own solicitor[1]. In particular, we propose that where an injured person is a member of a union or membership organisation which finances legal services, any prior BTE policy which the injured claimant has will not be held to adversely affect the right to recover additional liabilities or even their solicitor's base costs, as some District Judges have been deciding[2]. This proposal is made in the light of the DCA choosing not to recommend the reversal of the *Sarwar v Alam* court guidance – a decision with which APIL disagrees – relating to before-the-event (BTE) insurance and union legal

[1] APIL believes that this would contravene a European Directive and the Insurance Companies (Legal Expenses Insurance) Regulations 1990.

representation. In addition, APIL considers that section 30 of the Access to Justice Act 1999 should be amended so as to allow "self-insured" trade unions to recover an allowance relating to the risk of paying disbursements.

4. APIL believes it is necessary to comment on CFAs and defamation as developments in this area may eventually 'feed through' to personal injury litigation. We consider that it is vital in the interests of access to justice that CFAs are offered as a general funding option, rather than only being available to those people who cannot afford representation. APIL is also concerned about the possible erosion of the 'polluter pays' principle, because it seems that in defamation cases large wealthy media concerns have tended to be treated as the victims. Within personal injury law the 'polluter pays' principle is of paramount importance as it enables the 'little man' to take on the significantly better financed defendants and their insurers.

5. Finally, APIL proposes that the operation of the proposed draft CFA regulations, if they are retained rather than moved into the professional code of conduct, should reflect the introduction of fixed success fee schemes. In particular regulation 4 (b) and 6 (b) should be retained, but only in the limited circumstances in which the success fees charges are higher than that set out within the fixed success fee schemes. In all other instances the requirement for a risk-assessment, or to give reasons, should not apply, and the regulations amended accordingly.

Introduction

6. Whilst APIL fought for the retention of legal aid, we now accept that Conditional Fee Agreements (CFAs) are here to stay and *"will remain the principal form of private contingent funding mechanism in the civil justice system"*[3] in the medium to long term. Consequently, APIL has sought to

[2] *Culshaw v Goodliffe* (Liverpool County Court) 24 November 2003 - Unreported
[3] Consultation document – David Lammy foreword – page 8

make CFAs, with recoverability, work as effectively and efficiently as possible, so as to deliver access to justice for anyone who has a personal injury claim.

7. Claimant solicitors are, however, finding it difficult to achieve this. Both the Access to Justice Act 1999, and the secondary legislation made under it, contain drafting uncertainties. In view of this, no-one could have blamed the insurance industry for seeking reasonable clarification through the courts. Instead, however, the insurance industry has launched a concerted campaign to undermine CFAs. This led to Baroness Scotland making the following statement at APIL's conference in 2003:

   "Some challenges to the new regime were inevitable. New legislation is invariably scrutinised and its parameters tested. However, what occurred went well beyond this and has been unreasonable and destructive."

8. As these problems have continued, claimant solicitors have found it increasingly difficult to conduct personal injury litigation, complex or otherwise, on a conditional fee basis. The problem is made more acute by the continuing increase in after the event insurance (ATE) premiums, the variability and restriction involved in before the event (BTE) insurance and the lack of public funding for personal injury cases. More and more, the personal injury victim's access to justice is being restricted. For these reasons APIL believes that it is essential that the CFA regime should be made to work, and one of the first steps to achieving this aim is to simplify the CFA itself. Any system of CFAs must, in APIL's view:

   - Be clear;
   - Be certain;
   - Be simple and easy to use; and
   - Provide appropriate consumer protection.

Move client care protections into Professional Conduct Rules

9. APIL believes that the client care protections should be removed from secondary legalisation – the CFA regulations – where they have provided a tool for unreasonable defendant challenges, and placed in professional rules of conduct where their proper purpose of client protection can be attained. APIL is encouraged to note that this view is supported by the majority of respondents to the 'simplifying CFAs' consultation paper:

   "Most respondents agreed that the Professional Conduct Rules are sufficient to cover the consumer protection provision and that most of the client care protections could be contained in the professional rules"[4].

10. The Supreme Court Costs Office (SCCO) has stated that the Professional Conduct Rules would *"sufficiently protect the client"*[5], while the Law Society recognised that many of the current CFA regulations largely duplicate Professional Conduct Provisions and are therefore *"unnecessary"*[6].

11. Many of the client protections contained within secondary legislation are aimed at the risks posed by CFAs without recoverability under the old pre-April 2000 regime. Whilst APIL believes that many of these contractual and client care safeguards remain necessary, it is excessive and unnecessary for them to be enshrined in legislation. In view of the fact that recoverability has reduced the risks posed to clients by CFAs, it would be proportionate for many of the protections to be contained within the professional rules of conduct.

12. APIL believes that client care is a professional obligation, and this can be seen by the extensive range of professional practice rules which exist, including the Solicitor's Practice Rules 1990, Solicitors' Costs Information and Client Care Code 1999 and the recent Guide to the Professional

[4] Consultation document – page 49
[5] Ibid

Conduct of Solicitors. APIL has confidence that the Law Society – which currently monitors the use of private retainers via on-site audits, etc. - will be capable of monitoring and regulating any newly amended professional rules in a similar fashion. In fact, dependant on the outcome of the ongoing Clementi review, regulation within the legal services arena may become significantly more stringent, ensuring the interests of the consumer are rightly protected. There seems to be little justification for placing tighter restrictions on solicitors using CFAs than on solicitors using alternate funding mechanisms.

13. In addition, APIL believes that the provision of customer care provisions within the professional conduct rules will mean that clients will not have to gain an understanding of the complex 'ins and outs' of CFAs in order to bring a complaint, but will only have to be dissatisfied with how the solicitor has conducted the case. This should act as a deterrent to lawyers as they may be disciplined or struck off for any breach of the client care provisions.

Indemnity Principle

14. APIL feels that the most significant factor still preventing the development of a simple CFA is the continuing influence of the indemnity principle. If the indemnity principle were to be either abrogated or abridged, CFAs would be easier for solicitors to use, harder for defendants to unreasonably challenge, and more importantly, easier for clients to understand.

15. APIL believes that the indemnity principle can be easily abridged through secondary legislation – for example through the Civil Procedure Rules. Precedent for this can be seen to lie with the fact that the indemnity principle has been abridged for legal aid. Interestingly, however, the statement within the consultation document that the *"amendments introduced in June 2003 to the Civil Procedure Rules to ensure that the*

[6] Ibid

[indemnity] *principle was at least abrogated fully in respect of CFAs left untouched the vestiges of the principle outside of regulated CFAs"*[7] would seem to indicate that this may have already happened. It is, however, very unclear and needs to be clarified. In respect of how, and where, this abrogation of the indemnity principle has taken place it has been explained to APIL in relation to Civil Practice Rule 43.2 (3)[8]. While APIL is encouraged by this interpretation, and its intention to abrogate the indemnity principle, we feel it is too opaque and needs to be clarified urgently. It should be made crystal clear that the indemnity has been abridged for all CFAs.

16. If the aforementioned rule is accepted as abrogating the indemnity principle, APIL notes that the court will still be able to order that reasonable and proportionate costs be paid by the loser. Under the legal aid scheme, the courts regularly determined reasonable hourly rates for the assessment of costs to be paid by the loser, even in the absence of any agreement with the client and the express delinking of rates to be paid by the loser from the rates paid by the Legal Services Commission.

17. APIL believes the ability for unreasonable challenges to be made by defendants can be restricted further by amending the CPR so that breaches of the professional conduct code cannot be taken into account by a costs officer on an inter partes assessment, but that breaches of the code can be taken into account by a costs officer on a solicitor/client assessment[9]. This will effectively mean that the only person who may

[7] Consultation document – paragraph 19, page 22.
See also paragraph 22, page 22 – *"DCA was pleased to be able to work with the Civil Procedure Rule Committee to ensure that the indemnity principle was abrogated for CFAs".*

[8] This rule – which details 'Scope of Costs Rules and Definitions' – states: *"Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 48 notwithstanding that the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise."*
The interpretation of the first half of the above rule – up to the end of *"Parts 44 to 48"* – indicates that costs may be recoverable by reason of rule rather than by reason of the indemnity principle. Furthermore, the term *"notwithstanding"* has traditionally been interpreted as meaning *"provided that"* – i.e. the first half of the rule is conditional on the second half of the rule. Yet it has been suggested to APIL that the correct interpretation of *"notwithstanding"* is actually *"even if".* This would mean that the indemnity principle doesn't apply as you are entitled to recover costs in all CFAs regardless of the client being liable to pay his legal representative's fees and expenses. This would also apply even where you have a specific agreement – for example a CFA 'lite' arrangement.

[9] In relation to inter partes costs, the proposed suggestion probably amounts to a breach of the indemnity principle, but as long as the provisions were contained in the CPR they would be made by the Rules Committee and so constitute no more than a further restriction of the indemnity principle as authorised under s.31 Access to Justice Act 1999. We believe that a practice direction would, however, be insufficient.

challenge the validity of a CFA due to a breach of the professional practice rules is a party to the CFA itself. The reason for such a proposal is that there has been some suggestion that simply moving the client care provisions from secondary legislation into the professional rules will not necessarily prevent defendant challenges. APIL is concerned that defendants will argue that due to the fact that the professional conduct provisions are made pursuant to a statutory instrument, non-compliance with any client care provision contained within the professional conduct provisions is open to challenge[10]. Naturally this problem will be exacerbated if the indemnity principle is still widely considered to be valid. Essentially claimant solicitors will be fighting the current battles, but in respect of the professional conduct rules rather than the CFA regulations. APIL believes that the suggested CPR amendment – restricting challenges to clients only – provides an effective solution to this issue.

Reversing the guidance on before the event (BTE) insurance provided by the Court of Appeal in *Sarwar v Alam*

18. APIL is disappointed to note that the consultation's conclusions and proposals fail to recommend the reversal of the *Sarwar v Alam*[11] court guidance relating to the use of before the event (BTE) insurance policies, in particular with reference to "*cases funded by trade unions*"[12]. APIL supports the provision and use of legal expenses insurance provided accident victims are not denied access to a solicitor of their choice or are not penalised for choosing their own solicitor. We believe that the *Sarwar* decision should be reversed in order to ensure that an injured client's ability to choose his own legal representative is retained as this represents a vital component of access to justice. The general principle in *Sarwar* is that parties who have suitable BTE legal expenses insurance should look to that in the first instance to fund their claim. The problem exists, however, that BTE policies will often state that the

[10] See *Awwad v Geraghty & Co* [2002] 1 All ER at 695
[11] [2002] 1 WLR 125; [2001] 4 All ER 541

insurer's panel solicitors have to be used for all pre-proceeding legal work on a claim. This stipulation means that the client does not have the freedom to choose a solicitor, and there are instances where panel solicitors are appointed whose offices are located many miles away from the client. This makes it very difficult for the client – who may well be injured and incapacitated – to see his solicitor without having to travel extensively.

19. APIL has always interpreted the *Sarwar* decision as being applicable only to the issues that the case originally dealt with - i.e. relating only to additional liabilities, not base costs, and confined to road traffic accident (RTA) cases. APIL members have reported, however, that there appears to be some confusion about how the decision should be applied. In particular some judges are suggesting that an exhaustive 'treasure hunt' needs to undertaken in order to fully determine if the client has a BTE policy. The Court of Appeal's decision in *Sarwar* actually discouraged the exhaustive search for BTE policies – this exhaustive search being referred to as a 'treasure hunt' by the court – and proposed various less stringent measures to be undertaken to locate a client's BTE policy. APIL feels, in the absence of the DCA reversing the *Sarwar* decision, that there needs to be clarification from the judiciary in respect of the Court of Appeal judgement and its application. In particular it needs to be made crystal clear that the decision only applies to additional liabilities and RTA cases, and that there is no need for an exhaustive 'treasure hunt' to be conducted in order to locate BTE policies.

20. APIL proposes that where an injured claimant is a member of a union or membership organisation, and is able to gain access to union or membership legal services, this fact will nullify the need for him to rely on any BTE policy which he may have. While the consultation suggests that this problem is best addressed by *"unions ensuring that members are aware of the legal services available with the membership of the union*

[12] Consultation document – paragraphs 55, page 32

concerned"[13], it fails to appreciate that most people have BTE insurance, not by choice, but by accident. Typically BTE insurance is attached to a wide general overall insurance package – i.e. BTE insurance is often included as a standard add-on within household insurance policies. Due to the fact that BTE insurance is 'rolled' into many of these general insurance packages, purchasers do not actively select to have BTE insurance cover provided. Indeed most purchasers will select an insurance product based on more general issues – i.e. how cheap is the policy in relation to covering my house contents – and will be completely ignorant of the BTE cover which is offered. Therefore, the insurance premium the person pays is for the general insurance cover, and does not truly reflect the person 'buying' BTE insurance, as the presence of BTE insurance will often not even be considered when choosing the product.

21. In contrast, APIL believes that unions already act as BTE insurance for all of their members. A union has to make provision for the individual claim when a member has a claim to make. This represents a more genuine "insurance" provision than the aforementioned BTE insurance cover as the service being offered and delivered is easily identifiable and the payment made under section 30 of the Access to Justice Act 1999 to the union is for the services the union has delivered to the union member.

22. APIL is further concerned that the requirement to use a BTE legal expenses insurance policy prior to going to your respective union will lead to poor representation of union members' claims. For example, due to the fact that BTE panel solicitors do not work under any type of conditional fee agreement, there will be no success fee generated. The lack of a success fee will mean that in order to keep solvent, panel solicitors have to deal only with cases which have a high degree of certainty in respect of winning. This will inevitably lead to risk averse practices when considering cases – i.e. only cases with an 80 or 90%

[13] Ibid – paragraph 57, page 33

chance of success will be considered. Any cases which are risky, yet meritorious, will not be taken on. Clear evidence to this effect is given by the success rates of BTE insurers quoted in *Sarwar*. This will have a direct effect on peoples', and particular union members', access to justice. Unions have been financing litigation for a very long time and it has long been accepted that this is in the public interest[14].

23. In addition, due to the need to generate cash flow, panel solicitors may be more willing to settle a case early for a lesser amount in order to avoid the risk of higher costs of the case proceeding. Again this will adversely affect meritorious cases, with injured people being under-compensated.

Membership organisations' self-insurance

24. APIL believes that section 30 should be amended so as to allow trade unions to recover from the paying party an allowance relating to the risk of paying disbursements. Therefore we are disappointed to note that the DCA does not believe that *"there is a case to amend the legislation"*[15] in respect of section 30[16] and the ability of "self-insured" trade unions to recover an allowance relating to the risk of paying disbursements. Of particular concern is the DCA's assertion that the lack of amendment is due to the needs of membership organisations being balanced with those of defendants. APIL believes that the principle of 'polluter pays' should be paramount in determining the fairness of any actions within personal injury law, and by restricting the ability of the injured person's representative to recoup justifiably incurred costs may hinder peoples' access to justice. Self-insured unions are going to be less likely to take on cases, though meritorious, which have a lower chance of success because of the potential adverse financial implications of not receiving an allowance against their disbursements.

[14] For example, see *Adams v London Improved Motor Coaches* [1921] 1 KB at 495
[15] Consultation document – paragraph 65, page 34
[16] Access to Justice Act 1999

25. In addition, APIL feels that CCFAs should more closely reflect the provisions contained within a private CFA as the restriction of self-insured trade unions claiming an allowance against disbursements does not reflect the equivalent protection provided within private CFAs.

Defamation

26. While APIL's response represents the interests of personal injury (PI) victims, we would like to respond to several issues regarding CFAs and defamation due to the possibility that work within this area may subsequently be used, or attempt to be used, in the PI field. In particular, APIL is concerned about two issues. Firstly, the use of CFAs in defamation has so far been restricted to those who cannot afford their own representation. APIL would strongly resist any such a move within personal injury law, and feels that developments in this area should be confined to defamation. We believe that in order for CFAs to provide proper access to justice the CFA regime must be used as an unfettered general funding option, open to all.

27. Secondly, recent CFA defamation cases have attempted to paint wealthy and prosperous media giants as victims due to the issue of freedom of speech. APIL feels this emphasis within defamation – i.e. sympathising with 'goliath' – fails to fully appreciate the 'polluter pays' doctrine. We are concerned that this emphasis should not spread to the field of personal injury litigation. Within PI law, large and wealthy insurers are liable for the damages caused by the negligence of their clients; APIL feels it would be grossly unfair if the individual personal injury victim were to be marginalised due to the vocal objections of wealthy insurers.

28. APIL fully appreciates the difficulties that the uses of CFAs in defamation are causing, having fought many similar battles ourselves. The situation within personal injury law has been eased, however, by concerted attempts to reach agreement between the parties, and this has been achieved via the use of mediation. APIL would advise all parties involved

in the ongoing debate and controversy surrounding CFAs and defamation that mediation may be a worthwhile option for all concerned.

Consultation Questions

Question 1: Do you think the proposed regulations could be simplified further?

29. APIL believes that the use of CFAs, rather than the regulations themselves, can be simplified further by:

- Placing all client care protections into the professional conduct rules;
- Significantly amending, or even revoking, the current CFA regulations to compensate for moving of the client care provisions into the professional conduct code;
- Clarifying, or re-instating, within the Civil Procedure Rules (CPR) that the indemnity principle has been abrogated for all CFAs;
- Establishing within the Civil Procedure Rules that defendants are prohibited from challenging a CFA, regardless of whether the rules are contained within regulations or the professional conduct code, and that only clients are allowed to challenge the validity of a CFA.

30. APIL believes that if these various measures are combined, the use of CFAs will be significantly simplified and the ability to fund litigation will be made easier.

Question 2: Do you have any comments on the detail of the regulations, and have you any suggestions for amendment?

31. As discussed above, APIL feels that the majority of the regulations should be incorporated into professional conduct rules. This is to prevent unnecessary and unwarranted challenges, remove a direct legislative burden on lawyers concerning all aspects of using a CFA, and because many of the regulations are already detailed in the professional conduct

rules. Therefore any discussion concerning the proposed regulations must be prefaced by the fact that APIL feels it would simpler to move the necessary client care provision into the professional conduct rules.

Regulation 1 – Citation, commencement and interpretation

32. APIL questions whether it is necessary to include the definition of *'client'* as there is no such requirement in other funding mechanisms. For example it is not necessary to define what a client is within a private retainer.

33. In addition, the definition of *'client'* does not specify either a plural clause – i.e. more than one client – and does take account of litigation friends, who may also enter into a CFA.

34. APIL is concerned with the use of the terms *'advocacy or litigation services'* within regulation 1 (3) (a) because, if the case does not continue to proceedings and trial, the lawyer will not be providing either advocacy or litigation services. Using this interpretation of the terms a 'client' could only be defined as someone post-issue of proceedings. APIL proposes that a more appropriate term would be 'legal services' as this would reflect the legal process pre- and post-issue.

35. Regulation 1 (3) defines a funder as being the only party liable to pay the lawyer's fees. APIL contends that a client may be liable for the fees in some circumstances – i.e. they lie, mislead medical experts – and this is also true when being represented by a union – i.e. some unions will hold the client liable for legal fees if they have left the union. A more appropriate definition, APIL feels, would be: "*funder' means a party to a collective conditional fee agreement who, under that Agreement, may be liable to pay the legal representative's fees."*

36. APIL contends that the definition of *'legal representative'* does not adequately deal with a legal representative on a delegated basis. Also

the use of the terms *'advocacy or litigation services'* should be replaced with *'legal services'* for the same reasons detailed above. Finally, it is unclear whether the *'legal representative'* signing the CFA needs to be an individual *'person'* – as stipulated in the regulations – or the firm can sign a CFA. APIL feels there needs to be further clarification in this area.

37. The definition of *'percentage increase'*, APIL feels, is badly drafted, unclear and redundant. The requirement that the CFA must state the amount of fees is contained in the primary legislation[17], so does not need to be repeated here. In addition, APIL considers that the final mention of *'agreement'* within the definition must relate directly to a conditional fee agreement. If a definition were to be put forward, therefore, APIL proposes that it would make more sense if it was amended as follows: *"percentage increase' means that percentage by which the amount of the fees which would be payable if the retainer were not a conditional fee agreement is to be increased under the conditional fee agreement".*

Regulation 2 – Transitional provisions

38. APIL has no comments to make concerning regulation 2 at this time.

Regulation 3 – Requirement for the contents of conditional fee agreements: general

39. Regulation 3 deals with what is included within a solicitor's retainer. APIL sees no reason why there is a need for this information to be detailed within the regulations as the Law Society Professional Code of Conduct[18] effectively defines what is required within a retainer. APIL believes that the use of the imperative *'must'* within regulation 3 may lead to defendants arguing about the non-inclusion of a minor piece of information within the claim and attempt to invalidate the CFA. While it was important to specify within a Legal Aid certificate the exact identity of

[17] Courts and Legal Services Act 1990 – see section 58 (2)
[18] Chapter 12.08 – Care and Skill

the defendant, it should be remembered that the Legal Services Commission (LSC) acted as a cost shield. A CFA, however, does not act as a shield against costs, so the need for such stringent requirements seem unnecessary and unwieldy. APIL accepts that it is necessary to include details about a claim, but we feel that the regulations should keep these requirements to a minimum and that the term *'must specify'* should be amended to *'should identify'*.

40. In a similar vein to APIL's previous concern over the use of the terminology *'advocacy or litigation services'*, the use of the phrase *'proceedings'* does not adequately define the circumstances to which the regulations need to apply. There has been considerable debate about what stage within the claims process is covered by the term proceedings – i.e. does it refer only to matters after a case has been issued or matter prior to the issuing of a case. In order to avoid confusion APIL proposes the term *'claim'* should be used in its place. The use of this terminology will allow for all stages of a claim to be considered – for example it can refer to just the client and their injury.

Regulation 4 – Requirement for contents of conditional fee agreements providing for success fees

41. As explained above, APIL feels that there is no necessity for the use of the imperative article *'must specify',* and regulation 4 should be amended with the term *'should identify'* replacing *'must specify'*. Also, as with previous instances, the term *'proceedings'* in regulation 4 (a) should be replaced by *'claim'*.

42. APIL feels that regulation 4 duplicates provisions within primary legislation[19], and also within current cost rules, so is unnecessary. In current cases a statement of reason has to be presented by a solicitor when they produce a bill for payment by the other side. The producing of this statement of reason is governed by costs rules and practice

directions. Therefore, there seems to be little reason to complicate matters by placing a duplicate requirement into the new CFA regulations.

43. In addition, if regulation 4 is to be retained it should reflect the fact that primary legislation does not require the reason for setting a percentage increase to be given. By adopting this position the regulations would reflect the requirement of private retainers where there is also no requirement to detail reasons for solicitors' billing.

44. APIL is further concerned that by placing the requirement to give reasons within secondary legislation – i.e. the regulations – defendants will be able to challenge the success fee on the basis of these reasons. It is therefore essential that the majority of the clauses in the regulations be placed in the professional guidance and the CPR is amended to restrict CFA challenges to clients only.

45. The issue concerning whether a risk assessment – i.e. the need to give reasons – is needed in light of the fixed success fee regime which is coming into force within various areas of personal injury litigation – will be discussed later in relation to consultation question 3.

Regulation 5 – Definition and requirement of collective conditional fee agreements

46. As with regulation 4, APIL believes that regulation 5 is largely unnecessary as it duplicates what is in primary legislation. There is also a need to change the regulation to reflect the earlier suggested amendment of replacing *'proceedings'* with *'claim'*.

47. APIL feels that regulation 5 (2) is contradictory in nature and therefore redundant. It states that there can be a CCFA if the client is named and there can be a CCFA if the client is unnamed; these two possibilities seem to cover all eventualities, so their inclusion is superfluous.

[19] Section 58 (4) (b)

Regulation 6 – Requirements for contents of collective conditional fee agreements providing for success fees

48. In line with earlier comments, APIL proposes that the term *'proceedings'*[20] should be replaced with *'claim'*, and that the term *'must'*[21] should be replaced by the term *'should'* throughout regulation 6. APIL also feels that the comments made in relation to question 4 – in particular with reference for the need to give reasons – are of relevance to this regulation. Discussion concerning the operation of regulation 6 with the fixed success fee scheme will be included within APIL's response to consultation question 3.

Regulation 7 – Form of agreement

49. While APIL concedes that the necessity to have a conditional fee agreement signed by the client and legal representative is good practice, and we would endorse it fully, it should be noted that there is no such requirement relating to private retainers. A CFA represents a simple contract, and as with other contracts there is not always the need for there to be a signature. We are therefore very wary of placing a higher duty on solicitors using CFAs compared with those accepting clients on private retainers as this would be unfair.

50. APIL also proposes that the term *'must'*[22] should be amended and replaced by the term *'should'* throughout regulation 7.

Regulation 8 – Amendment of agreement

51. APIL has no comments to make concerning regulation 8 at this time.

[20] See regulation 6 – opening paragraph – and 6 (a)
[21] See regulation 6 – opening paragraph
[22] See regulation 7 (1) and 7 (2)

Regulation 9 – Revocation of 2000 and 2003 Regulations

52. Returning to APIL's original comments, we believe that the majority of the regulations can be subsumed into the professional conduct rules. This will in turn make all previous regulations obsolete. In order to effectively achieve this, APIL proposes that regulation 9 should be amended to state that regulations 1 to 8 of the current proposed draft regulations should be deleted and inserted into the professional practice rules and that all previous regulations should be revoked.

Question 3: In circumstances where fixed recoverable success fees will apply (fixed recoverable success fees for all RTA claims brought on a CFA came into force on 1 June 2004) should the requirement for a risk assessment in regulations 4(1) and 6(1) be dis-applied?

53. APIL proposes that the draft regulation 4 (b), and regulation 6 (b), (if required at all – see paragraph 51 above) should not be dis-applied, but simply amended so that reasons need to be given in circumstances where the success fee is higher than that prescribed by agreement – for example, if the success fee to be recovered is higher than the 12.5% pre-trial success fee prescribed by the RTA agreement. In terms of the circumstances which would allow for a higher success fee to be applied these would include if a postponement fee was being charged or the case was over a set amount in value and fell within the exceptionality clause. Other than in circumstances where the success fee is going to be higher, APIL sees little reason for a risk assessment to be completed for cases where there is a fixed prescribed success fee.

54. In addition to the circumstances for an increased success fee detailed above, there are instances where a subsidy may be charged to a client and this may form part of the eventual success fee. In this instance APIL believes it is essential for there to be a risk assessment giving reasons for the amount charged. A subsidy is an amount which is charged back to the client which will compensate the law firm for the disbursements

which it is paying over the duration of a case. For example, if a case were to run for three years the cost of disbursements would be met by the firm. These costs may, in turn, involve the firm incurring interest charges on its over-draft facility. A subsidy, in this example, could simply represent the amount of money charged in overdraft interest. By providing reasons for the inclusion of this within the CFA, it will enable both the client and the paying party to identify what their respective liabilities are.

Question 4: It is likely that Rule 44.16 will need to be amended if these regulations are introduced. What other consequential amendments, if any, would need to be made to the Civil Procedure Rules or Practice Directions?

55. APIL agrees that Rule 44.16 should be substantially amended to reflect the fact that solicitors are prevented from charging anything to their clients. It should, however, be made clear to all clients that their right to solicitor-client assessment applies not only to any base costs incurred but also to any additional success fee.

56. In terms of further amendments to the CPR, APIL re-iterates its view that there should be an amendment stating that only clients are allowed to challenge the validity of a CFA and, if not already present in the CPR, and in any event with much greater clarity, that the indemnity principle is abrogated for all CFAs.