DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

REGULATION OF CLAIMS MANAGEMENT SERVICES

CONSULTATION ON PART 2 OF THE COMPENSATION ACT 2006
RULES OF CONDUCT AND FOR HANDLING COMPLAINTS

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2006

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 members in preparing this response:

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APIL welcomes the opportunity to comment on the revised 28 September drafts of the rules of conduct and for dealing with complaints in relation to claims management companies (CMCs).

We are pleased that the new draft rules of conduct continue to address the key issues of providing information, advertising and accountability. We are very concerned however, that the rules are not stringent enough. To be effective in providing protection for the consumer, regulation must be watertight from the very start. We are concerned that many of the draft rules are too general, and that loopholes may be found and exploited by some CMCs.

The vast majority of people who are considering starting a personal injury claim will never have made a claim before. They are often still suffering from the effects of their injuries, and can be in financial need. Potential claimants can therefore be vulnerable, and there is a need for them to be protected from exploitation. If solicitors are approached directly, potential clients are protected by the strict rules governing solicitors' conduct. The same standards of conduct should also be required of other businesses who deal with claims, including CMCs.

CMCs must therefore be required to provide a potential client with all relevant information from the outset so that he can make an informed decision about whether he should proceed with that CMC; advertising needs to be accurate and not misleading; and CMCs need to be held accountable for the information and services they provide directly, or that which is provided on their behalf.

CMCs are commercial entities and there is a need for strict regulation to ensure that their interests are not met at the expense of potentially vulnerable individuals. The changes to the draft rules that we are asking for do not place undue burdens on CMCs and are proportionate to the aim of protecting the consumer.

For clarification, the numbering below refers to the 28 September draft of the client specific rules.

General rules

Principles

Whilst the principles set out are laudable, and point to the ideology behind regulation, they are too general to assist with the regulation of CMCs. Any attempt at enforcing these rules of conduct could be met with a raft of legal challenges. We do not think that they add anything to the law regulating CMCs, and hope that there is no intention to rely on these principles in enforcing perceived breaches of the code of conduct that cannot be pinned down to any specific rules.

Professional indemnity insurance

We note from your letter that you "recognise that a requirement [for professional indemnity insurance] cannot be introduced on Day 1". This requirement must be introduced straight away. We are aware that in the past, insurers and their representatives have argued that there is no market for professional indemnity insurance for claims management companies, but that it is now accepted that such insurance is available. Indeed, many 'big players' in the industry already have insurance. The absence of a requirement for indemnity insurance, from a set of rules which has been introduced to regulate CMCs, is an invitation for those who already have indemnity insurance in place to stop paying the premiums. If this happens the products currently available to CMCs may well disappear from the market place, making it harder to introduce this requirement at a later date. At the very least, uninsured CMCs must make it clear to clients that they are uninsured so clients have a choice about whether to continue with that CMC, and under no circumstances should an uninsured CMC be allowed to handle a client's money.

The requirement for indemnity insurance should be included in the rules at the start of regulation. This sends out a clear signal that the rules are intended to protect the consumer from the very beginning.

A CMC which cannot obtain such insurance should not be trading. Indeed, the availability and cost of such insurance would be a commercial brake on those with poor claims histories or risky operating procedures. A CMC can act negligently in many ways, for example, failing to provide accurate information, failing to advise about limitation periods, misappropriation of damages etc. A client who suffers is bound to look to the regulator for redress.

Client accounts

CMCs dealing with personal injury and accidental death claims should not handle client money. All client money should be handled by the solicitor dealing with the case, who is subject to stringent rules on professional conduct.

Appointed representatives

Draft rule 18a) is not strong enough. Regulated businesses should be responsible for all appointed representatives' activities, not just advertising and marketing. To allow agents to act on a regulated business's behalf without that business taking responsibility for them leaves a huge hole in regulation.

Appointed representatives have direct contact with potential clients. They need to be subject to the same standards of conduct as CMCs. They introduce clients to regulated businesses and generate revenue for them: why should these businesses not therefore be held accountable for their representatives' behaviour?

There is a danger that unscrupulous CMCs may use appointed representatives to do things that CMCs are prevented from doing under the rules, on the basis that they can not be held accountable for their agents' activities.

Client specific rules

General principles

1d) If regulation is going to work and the public's perception of CMCs is to improve, not only should actual conflicts of interests be avoided, but perceived conflicts must be avoided as well. If a solicitor has two clients between whom a significant risk of conflict of interest arises, the solicitor has to stop acting for one or both clients. This is to maintain the solicitor's ability to act in the best interests of all his clients. CMCs should have to meet this same standard. We therefore think that this rule ought to be amended to read "Avoid perceived or actual direct or indirect conflicts of interests".

1e) We do not understand what constitutes official means of redress, and think the rule would work better if the word "official" is removed.

1e & f) We are concerned that there will be differences in opinion as to whether a CMC is giving advice or not. We believe that passing a case to a solicitor is implicit advice to pursue a case. Removing the words "Where advice is given" from both these rules would require CMCs to clearly tell clients about means of redress and act in the client's best interests in all cases. This could only benefit the consumer by adding further clarity to the rules and is not onerous to the CMCs.

1f) Whilst we course support the aim of this rule, to put the interests of a client first, we are concerned that a CMC will not know what is in a client's best interests. There is no obligation upon a CMC to undertake a cost benefit analysis, and tell the client the advantages and disadvantage of his case, as solicitors are required to do. How then can they advise a client if pursuing a case is in their best interests?

Advertising and marketing

2. For the sake of clarity, this should read "All advertising and marketing must confirm to the relevant code*s, which are as follows:* … For the purposes of this rule a business's website *and all other promotional material* shall be deemed to constitute advertising."

4. As we stated in our response to the July consultation paper, APIL believes that all cold calling should be prohibited in relation to personal injury claims. If it is to be allowed, in any way, then the code of practice which governs it must be stringent and accessible to all.

   Whilst the Direct Marketing Association's Direct Marketing Code of Practice seems robust, it can only be obtained by buying a copy (at a cost of £58) or becoming a member of the association (at a cost of £1000/year). It is therefore difficult for a member of the public to gain access to the code, if he has a potential complaint. If this code is to govern CMC cold calling practices, it must be widely available at no cost to the public.

5. Approval for the solicitation of business in medical facilities or public buildlings should be obtained from the management of the facility or building in writing.

6. Advertising must clearly state the work that a CMC will do and state whether the advertiser plans to move the case on for money or money's worth.

   We support the use of 'health warnings' on all advertising, as this would send a cautionary message to people considering using CMCs. We are aware that some research suggests that words may not be as powerful as visual images. Health warnings are, however, still required on financial advertisements and so must, in the financial sector at least, be considered effective. APIL believes that they are essential to alert members of the public to the nature of work that CMCs carry out. A requirement for a

health warning should therefore be added to this rule. The warning should clearly state whether the CMC is qualified in any way (including a clear statement that it has no qualifications, if this is the case), what the CMC will do with the client's case (ie sell it on), and who to refer any complaints to. Without such a specific requirement APIL believes there will be no transparency when CMCs deal with their customers. Moreover there are Solicitors' Referral Code issues to consider; see paragraph 10 below.

7. This rule about the expression "no win, no fee" is confusing. Paragraph 6b) of the Client Specific Model Rules produced in July was well drafted and very clear. Referring to another external document is unnecessary in this case when the rule it has replaced was self explanatory. Although we think that some of the guidance in the help note would be of practical use to an advertiser, the note does not add anything to the now replaced draft rule.

8. We are concerned that regulated business must only "seek to" ensure that publicity issued by a third party complies with the rules. Removing "seek to" would make this rule must stronger and make regulated businesses responsible for all publicity from which it will make commercial gain. A regulated business must not simply try to do something – it must be required to achieve this. This is consistent with achieving the level playing field which applies to the regulated legal profession.

Taking on business

We note the distinctions that the DCA has made between companies which take on business and those which do not. As we said in our response to the consultation paper, we think that the distinction between different types of companies needs to be clearly recognisable to the public.

9. CMCs should not only ascertain whether a client has alternative funding, but also tell the client, impartially, of the relative merits and costs implications of each type of funding. The availability of different means of

funding will determine how much the case will cost, which is something that the CMC needs to be aware of as part of the cost benefit analysis they will need to carry out in order to determine what is in the best interests of the client. It is crucial that clients have all the facts necessary to make an informed decision about how to fund their case.

10. A business must be required to tell a client what it is doing with his case, for example, selling it to solicitors. For a client to make an informed decision about how to proceed with their case, it is necessary for the client to know who is dealing with his case, what the representatives' qualifications are, and what is paid for their case.

When a CMC makes a referral, it should be required to tell the client how much the referral fee is, and any other relevant information. The Solicitors' Introduction and Referral Code 1990 requires solicitors to ensure that referrers provide the client with "all information relevant to the client concerning the referral… and in particular the amount of any payment". This should, at the very least, be replicated in these rules. If solicitors are required to ensure that the referrer carries out this practice, surely the referrer's rules should meet the same requirements. To have inconsistent codes would be nonsensical and can only lead to confusion.

In the previous draft of these conduct rules (at 9(g)) there was a requirement that the client be told how the business was remunerated. This has been removed, although is not clear why. Not telling the client how the business makes its profit, especially as this is mostly through commissions and referral fees which are often taken from payments made by clients to other organisations, makes the whole industry seem clandestine and untrustworthy.

10f) Different charges may apply if a case is won, lost, or otherwise concluded (ie withdrawn). This rule should make clear that a CMC should be required to tell clients the costs in each of these 3 instances. Early information about fees and charging is crucial to the client.

11. The inclusion of this paragraph will allow CMCs dealing with cases which do not fall within the specified categories to suggest that if a client uses that particular CMC's services they will achieve a more favourable outcome than they would otherwise. This could be inherently misleading. The rule should prevent CMCs from saying this in any case.

13. Ensuring a client has enough information about his claim from the start is crucial. It is not good enough for a CMC to have taken "reasonable steps" to ensure a client is able to understand a contract. In the vast majority of cases, potential clients have no prior experience of making a personal injury claim. A commitment to paying insurance premiums, loan repayments or disbursements puts a financial burden on the client. The CMC must be sure that the client has understood the contract, the obligations of each party, and that the contract is intended to be legally binding.

Representing a client

16. This rule requires CMC to limit charges to what is reasonable if the client withdraws from the contract and chooses to pursue the claim in another way. This should be expanded to cover the event of a client choosing not to pursue a claim at all. In addition, the rule should make clear that charges should not penalise the client for discontinuing the case. We therefore think the following wording should be added to the end of this rule: "*and should be no more that the provable loss to the business*".

17. This rule should specify to whom the information should be forwarded, ie "forward *to any person acting on the client's behalf* any relevant information".

19. A CMC must stop acting for one or both clients if a significant risk of conflict of interest arises, as solicitors are required to do. Once a conflict of interests has arisen a CMC can no longer be seen to be acting in each

client's best interests. There can be no suitable steps which the CMC can take to remove the conflict, except to stop acting in each case where a conflict has arisen.

Rules for dealing with complaints

Record keeping

This rule ought to specify how long the business should maintain records. For consistency with solicitors, this should be for at least 6 years from the conclusion of the involvement of the business.