The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 2

Report to Convocation
June 23, 2016

Professional Regulation Committee

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Purpose of Report: Decision and Information

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Tab 2.2

FOR INFORMATION

ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP REPORT

SUMMARY

Issue Under Consideration

16. The Advertising & Fee Arrangements Issues Working Group ("Working Group") is providing this status report through the Professional Regulation Committee ("the Committee") to Convocation on its work and proposed next steps. The Working Group has received a great deal of information about issues that are of significant importance to the public, the Law Society and to the professions. These are further described in this Report but include advertising by lawyers and paralegals that may be false or misleading and fees charged to clients that appear to impact on the way in which legal services are being provided and may not be transparent.

17. With the agreement of the Committee, the Working Group proposes, in accordance with its Terms of Reference, that it seek further input with respect to potential regulatory responses to a number of issues relating to licensee advertising, referral fees and fee arrangements, as described in the "Next Steps" section of this report, with responses requested by September 30, 2016.

18. Changes to the Law Society's rules or by-laws, if required, would then be proposed for consideration by the Committee and Convocation.

BACKGROUND

19. The Working Group was established in February 2016 by the Committee[1] in order to obtain a better understanding of current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, and to determine whether any regulatory responses are required with respect to them. The Working Group was created after Convocation approved a Call for Input in 2015 and received input from the professions. The 2015 Call for Input Document can be viewed at https://www.lsuc.on.ca/uploadedFiles/For_the_Public/News/Consultations/call-for-input-

[1] The Working Group is chaired by Malcolm Mercer. The Working Group members are Robert Burd, Paul Cooper, Carol Hartman, Jacqueline Horvat, Jan Richardson and Andrew Spurgeon.

document.pdf. The Working Group's Terms of Reference are attached at **Tab 2.2.1**.

20. In recent years, some stakeholders have been urging the Law Society to limit referral fees and take enforcement action to ensure truth and clarity in advertising practices. The Law Society was concerned that it did not have sufficient information about current practices regarding referral fees or the impact of changes on the profession or on the public. Further information was required about advertising, referral fees and relationships between lawyers and non-licensees in personal injury, criminal and real estate practice, among others. The Working Group undertook this review.

21. The following discussion is based on information the Working Group obtained from its own research, operational input and information received from focus group participants.

Personal Injury

22. There has been a significant increase in advertising of personal injury legal services in recent years. At the same time, there have been changes in referral fee arrangements with referral fees often taking a larger proportion of the contingent fee and with up-front referral fees sometimes being required.

23. There are a number of perspectives from which these changes may be considered:

    a. The firms who are significant advertisers seek to generate sufficient business to make their advertising expenses worthwhile, whether from fees earned on work done or from referral fees received.

    b. As a result of the entry of firms who are significant advertisers, firms who traditionally attracted their clients without engaging in significant advertising face new competition for clients. Some of these firms have advertised in response. Paying referral fees is another way of obtaining clients as are focused advertising and marketing in the health care sector. Some firms have strong reputations for experience and expertise which will attract clients who have the ability and motivation to search out these firms.

    c. Increasing referral fees suggests that attracting clients is increasing costly and that the fees earned on referred matters can support that cost despite decreased profitability for the referee. Incumbents will naturally be concerned about increased costs of attracting work.

    d. The consumer response to advertising suggests that advertising is either suggestive of expertise or that alternatives are not easily known. The consumer

response may also suggest that some injured people are seeking legal remedies and would not otherwise have done so. The increasing cost of obtaining clients, whether by advertising, referral fees or otherwise, may be reducing firm profitability but may also affect the work being done for clients or the contingent fees that are charged. There is reason to be concerned that clients are not aware that they have been referred or that significant referral fees are being paid for referrals. Similarly, there is reason to be concerned that contingent fee arrangements are not clear and comparable so that prospective clients can make informed choices.

24. The trend in personal injury advertising appears to be similar to that observed in the United States, where lawyer advertising is "big business."[2] The U.S. experience shows that all high volume practices typically engage in mass advertising.[3] High volume practices include what are at times described as "brokerage houses" where advertisers screen cases and refer them for a referral fee, and "settlement mills", which run high volume, low value cases.[4] Overall, there are, in fact, "relatively few personal injury lawyers" engaging in expensive mass advertising.[5]

25. In Ontario, lawyer advertising appears to have rapidly become "big business". There are a few high volume personal injury law firms that are leaders in mass advertising and that operate a hybrid of the "brokerage house" and "settlement mill" models. These firms engage in mass advertising campaigns both in order to take on certain cases internally, and in order to earn revenue by referring certain cases out to selected licensees for a referral fee. In response to the entry of these direct to consumer firms, certain market incumbents focusing on larger and more specialist cases have also entered the mass advertising market.[6]

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[2] Nora Freeman Engstrom, "Legal Access and Attorney Advertising" Journal of Gender, Social Policy and the Law, Vol. 19 Iss. 4 [2011], Art. 4 at 1084.

[3] *Ibid.*

[4] *Ibid.* See also Sara Parikh, "How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar" New York Law School Law Review Vol. 51, 2006/07 244-283.

[5] Nora Freeman Engstrom, "Legal Access and Attorney Advertising" Journal of Gender, Social Policy and the Law, Vol. 19 Iss. 4 [2011], Art. 4 at 1084.

[6] See, for example, Shannon Kari, "The Battle for the Personal Injury Dollar" Canadian Lawyer, November/December 2012.

26. Firms providing referral services can provide a point of entry for people with potential claims. Personal injury law firm advertising can bring awareness to potential claimants of the option of personal injury legal services. It may be the case that broad based advertising has increased awareness of legal services and that referral fee arrangements provide a way of funding these costs. That said, studies show that the public's view of lawyer and paralegal advertising is not clear.[7]

27. From a public policy perspective, it is noteworthy that consumers, particularly those without experience with lawyers or paralegals, may be particularly drawn to advertising, for example, to heavy advertising campaigns that suggest a firm is large and successful. Most consumers have little, if any, advance knowledge or information as to the nature and expertise of personal injury firms, as to referral fees paid or received by lawyers or as to the fees charged for personal injury work.

28. Although the *Rules of Professional Conduct* require disclosure and client consent, the information obtained through the Law Society's regulatory experience and from advocacy groups suggest that in many cases clients are not sufficiently aware of the fact that they are being referred to another lawyer, that there is a referral fee or the quantum of the fee. The Law Society's regulatory experience supports current concerns about advertising and the structure of some law firms, and whether there is sufficient transparency regarding the business arrangement from a consumer point of view.

29. The provincial government has been studying the role of legal services providers, in the context of automobile insurance fraud, as indicated in the 2012 Report of the Ontario Automobile Insurance Anti-Fraud Task Force.[8] The Task Force studied the role of various players in the personal injury field including tow truck drivers, health care clinics and lawyers and paralegals. The Report considered the role of lawyers and paralegals in insurance fraud, referral fees paid to non-licensees and conflicts of interest. The report mentioned that legal services providers were involved in paying and receiving referral fees with other interested parties such as auto body storage and repair shops and health care clinics. It is suggested that referral fees paid increased the overall cost of claims.

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[7] In a 2014 report by Advertising Standards Canada, the report states that a significant majority of Canadians (67%) have at least a "somewhat favorable" impression of advertising, however, in the category of advertising for law firms and legal services, only 37% of those polled were "comfortable" with the levels of trust and accuracy in advertising - 2014 Consumer Perspectives on Advertising, Advertising Standards Canada, p. 7.

[8] Final Report of the Ontario Automobile Insurance Anti-Fraud Task Force Steering Committee, October 2012, online: http://www.fin.gov.on.ca/en/autoinsurance/final-report.pdf.

30. These issues are not unique to Ontario. An overview of legislative and regulatory requirements relating to personal injury practice in other jurisdictions was provided to the Committee in November 2015 and is summarized as follows:

    a. In England and Wales, legislation bans referral fees in the personal injury field and restricts contingency fee arrangements in personal injury cases.

    b. In Australia, legislation severely restricts advertising personal injury services and prohibits solicitation of claims or payment of same, which could be interpreted as prohibiting referral fees.

    c. In Scotland, referral fees to non-lawyers are prohibited although they are entitled to pay referral fees to other lawyers and to pay a fee to be on a referral panel. A recent government report recommended that the ban on referral fees should be lifted.

    d. In Ireland, legislation specifically prohibits advertising personal injury services.

    e. In the United States, the Association of Professional Responsibility Lawyers published a June 2015 report calling for streamlining the advertising rules to focus on advertising that is false and misleading. The Committee deferred consideration regarding the regulation of lawyer referral services. More recently, however, the Supreme Court of Florida rejected a petition by the Florida Bar to loosen the restrictions on referrals from for-profit lawyer referral services.

Real Estate

31. There has also been an increased volume of advertising for real estate work. However, the context of real estate advertising is very different than for personal injury advertising.

32. Many consumers are prepared to select their real estate lawyers on the basis of price. Fixed price services are commonly advertised by real estate lawyers to attract residential real estate work. However, there is concern whether some fixed-price advertising honestly and accurately discloses what costs are included in the fixed price and what are in addition. In a price sensitive market where relatively small price differences can affect consumer choices, it may be particularly important to ensure that consumers are not misled as to what is promised and what is not.

33. In addition, concern has also been expressed about the relationship between some real estate lawyers and the providers of services to their clients. At issue are incentives paid to lawyers or their staff where the lawyer is involved in the retainer of the third party. These reported practices raise transparency and conflict of interest issues.

Other issues

34. While a particular issue in personal injury given the volume of mass advertising, there are concerns generally about advertising and marketing on the basis of awards or honours. It appears clear that establishing and promoting awards have become a significant business. This presumably reflects that consumers have difficulty determining which lawyer or paralegal to retain and see awards as providing useful information. Similarly, advertisers seek to demonstrate quality by disclosing awards and honours. However, it is often unclear that awards being advertised have much, if anything, to do with quality. The American Bar Association is currently considering these very issues.

35. Another advertising and marketing issue that has arisen is common to personal injury and other areas. Where personal injury advertising is intended to generate referral fees rather than work for the firm being advertised, there is concern that the advertising can be misleading. Consumers can be misled into thinking that the advertiser will provide the advertised services. This issue also applies outside of personal injury where services are advertised that the advertiser does not intend to provide, is not competent to provide or is not licensed to provide. This has been raised as an issue for paralegals where scope of practice is limited and, accordingly, it has been said that care should be taken to ensure that consumers are not misled by overbroad advertising.

Regulatory Response to Changes in Advertising and Marketing

36. Unlike some other jurisdictions, Ontario has few rules on marketing, advertising or fees-related issues directed specifically to particular areas of practice.

37. Advertising complaints historically represent a very small percentage of complaints received. However, the number of complaints has been growing, particularly those initiated by the Law Society. In 2011, the Law Society received 68 complaints involving an allegation of advertising and initiated an additional 47 complaints, for a total of 115. In 2013, the Law Society received 73 and initiated an additional 64, for a total of 137. In 2015, the Law Society received 53 complaints and initiated 88, for a total of 141.

38. A specialized team in the Investigations Department has been established to respond to these issues. The approach is:

- Identification of licensees who may be in breach of the current advertising rules.
- Where the issues are considered minor, for example minor wording, contact is made with the licensee with a view to resolving the matter. If the matter cannot be resolved it is referred for further investigation.
- Developing a process to follow up on resolved matters.

- Where the issues identified are more significant, a matter is investigated.
- If after investigation, further regulatory action is required, the matter may be addressed by staff or referred to the Proceedings Authorization Committee.
- In serious cases, discipline proceedings may be initiated.

39. As with the majority of complaints, most of the complaints about advertising have been resolved based on compliance. Few cases about advertising result in formal disciplinary proceedings although there was a recent case before the Law Society Tribunal in *Law Society of Upper Canada v. Zappia*, 2015 ONLSTH 34. Generally, when staff discussed the requirements of the rule with the individual licensees in question, the licensees amended their advertising appropriately.

WORKING GROUP ACTIVITIES AND INPUT RECEIVED

40. The Working Group met a number of times from March to May 2016.

41. In order to obtain a better understanding of current advertising, referral fee and contingency fee practices, the Working Group arranged a series of meetings with the assistance of a "knowledgeable intermediary", James Caskey.[9]

42. Through these meetings, the Working Group received candid information from legal organizations and associations, law firms, hospital General Counsel, individual lawyers and paralegals. The Working Group thanks all those who shared their time, expertise, experiences and views, which have been invaluable in shaping the Working Group's consideration of current practices and appropriate regulatory responses. A more detailed summary of the input received is attached at **Tab 2.2.2.**

(i) Advertising and Marketing

43. Meeting participants reported a clear increase in advertising in Ontario, particularly in personal injury, with a shift by some firms towards direct to consumer marketing. Meeting participants gave numerous examples of what they considered to be misleading advertisements, including advertising of "all in" pricing that excluded disbursements, misleading claims as to the service being offered or the level of expertise, paralegal advertising outside of the scope of paralegal practice, and reference to awards without disclosing that a direct or indirect payment was made for its use. Several participants

[9] Most stakeholder meetings were facilitated by James Caskey, a senior partner with Siskinds LLP, London, Ontario, who facilitated the exchange of information between the Law Society and the professions. The Working Group wishes to thank Mr. Caskey for his valuable assistance.

gave examples of what they considered were tasteless or offensive advertisements, such as concerns about the location of advertising (such as within a hospital, on billboards next to highways or in washrooms), the use of actors in advertising and attractive women in marketing.

(ii) Referral Fees

44. Meeting participants raised a wide range of concerns about the referral fee rules[10] and practices. A major concern was that referral fees in personal injury law have become unreasonable and disproportionate, with several participants relating that some referring firms are currently negotiating up-front flat-fee payments that are sometimes very large, in addition to up to a 30% share of the fee at the successful conclusion of the matter. Referrals to the highest bidder might not be based on the competency of counsel, or made to counsel with requisite expertise. Moreover, counsel accepting these referrals might not be able to vigorously advocate on behalf of the client or be prepared to take the case to trial if necessary due to the high costs of acquiring the case.

45. Most recognized that referral fees should be permitted, but noted that the rules were never intended to create a law firm line of business based on the selling of claims. Some questioned whether referral fees should be permitted at all, and were of the view that referring matters to other licensees when necessary is the licensee's professional obligation. Certain meeting group participants also expressed the concern that although it is prohibited, licensees may be paying referral fees to non-licensees, and that non-licensee referral services have emerged.

46. Participants raised concerns arising in real estate practice and the use of title insurance. The Working Group received reports of one title insurer having an arrangement whereby law firms could through various means seek to receive "legal fees" as part of the amounts charged to the client for the purchase of certain services. In addition, the Working Group learned that in the past certain suppliers offered law firm staff gift certificates for each purchase, one entry per order into a contest for a chance to win prizes, or possibly even a fee based on the volume of services purchased.

[10] The lawyer and paralegal rules permit licensees to refer matters to other licensees because of the expertise and ability of the other licensee to handle the matter, and to receive a referral fee for doing so if the referral was not made because of a conflict of interest, the fee is reasonable and does not increase the total fee charged to the client, and the client is informed and consents: Rule 3.6-6 of the Rules of Professional Conduct; Rule 5.01(14) of the Paralegal Rules of Conduct. Licensees are prohibited from entering into referral fee arrangements with non-licensees. Rule 3.6-7 of the Rules of Professional Conduct; Rules 5.01(12) of the Paralegal Rules of Conduct.

(iii) Contingency Fee Agreements

47. All of the personal injury law firms who participated in the meetings typically operate under contingency fee arrangements. They reported that personal injury lawyers' contingency fee rates range from 20% to 30% of the award. Some personal injury lawyers reported that they do not charge the client for anything, including disbursements, if there is no recovery. Others expect the client to pay disbursements even if no recovery is made.

48. Several personal injury lawyers suggested that the current requirements under the *Solicitors Act* are difficult for clients to understand, that strict compliance with the *Solicitors Act* has historically been the exception to the rule, and that the current *Solicitors Act* requirements are unworkable for certain cases, particularly those requiring a trial. This is because, under the *Solicitors Act,* legal costs belong to the client. When a matter goes to trial, and the plaintiff is successful, the licensee is compensated as a percentage of the award alone, and the legal costs, which may be significant given the trial that took place, belong to the client. The result is that in certain cases, the law firm's time and expertise may dramatically enhance the client's recovery, at the cost of the law firm's time and effort. It was suggested by some that there may be better ways to align the interests of counsel and client in such circumstances.

DISCUSSION

49. The Working Group has carefully considered all of the input received, keeping in mind the Law Society's regulatory experience as well as the regulatory experiences and academic research from other jurisdictions. The following sets out the Working Group's views on these issues. The Working Group has not arrived at a definitive position in some areas, and proposes to seek input from the professions before any regulatory changes are proposed.

50. The *Law Society Act* provides that in carrying out its regulatory functions, the Law Society should have regard to its duties to maintain and advance the cause of justice and the rule of law, to facilitate access to justice, to protect the public interest, to act in a timely, open and efficient manner, and to regulate in a manner that is proportionate to the significance of the regulatory objectives sought to be realized.[11] These overarching principles were used by the Working Group to distill underlying general principles and to

[11] *Law Society Act,* R.S.O. 1990 c.L.8 at s.4.2.

formulate policy statements that in its view apply to considering advertising and marketing, referral fees and fees.

(i) Advertising and Marketing

General Principles

51. The rules already clearly state that marketing of legal services must be true, accurate and verifiable, must not be misleading, confusing or deceptive, and be in the best interests of the public and consistent with a high standard of professionalism.[12]

52. In the Working Group's view, the rules as currently stated capture the core principles that must apply to advertising and marketing by lawyers and paralegals.

Advertising & Marketing the Cost of Legal Services

(i) Real Estate "All In" Pricing

Policy Statement

53. The Working Group believes that the advertising of "all in" real estate pricing should be transparent, and that consumers should be able to effectively compare offered prices.

Discussion

54. Real estate legal work is price sensitive with the result that price advertising is important. Most consumers of real estate legal services will only use a real estate lawyer once or a few times in their lives. Consumers will not necessarily be aware of differences between fees and disbursements,[13] or that the nature of legal services provided will change, and so too will the fees and disbursements, depending, for example, on whether a purchase is with or without mortgage financing.

55. The Working Group recognizes that real estate advertising of "all in" pricing can be misleading if it is not transparent about additional fees, disbursements or charges which

[12] Rule 4.2-1 of the Rules of Professional Conduct; Rule 8.03(2) of the Paralegal Rules of Conduct.

[13] In fact, the Working Group heard different views expressed by real estate lawyers as to what might reasonably be a disbursement that can be charged to a client, and what should be considered general overhead that is intended to be covered by the lawyer's fee. Some suggested that fixed prices, if offered, should include costs for services, such as law clerk work, that lawyers could choose to do within their firms or to out-source to independent contractors.

will ultimately lead to the client receiving a bill that exceeds the quoted “all in” price. Clients usually do not meet with the lawyer at the outset of the retainer, so once a client is “in the door” through deceptive advertising, by the time the real price is revealed, it is often too late to change lawyers. Moreover, the difference between the “all in” price and the actual invoice may be relatively minor, such that individual clients may not take recourse, leaving possibly deceptive pricing unchecked.

56. The Working Group notes that Rule 4.2-2 of the *Rules of Professional Conduct* already provides that a lawyer may advertise fees, but only if the advertising is “reasonably precise as to the services offered for each fee quoted”, the advertising “states whether other amounts, such as disbursements and taxes will be charged in addition to the fee” and “the lawyer strictly adheres to the advertised fee in every applicable case”. The determination of what constitutes a "disbursement" in many instances is the crux of the issue.

Options

57. The Working Group is interested in further considering how “all in” pricing in real estate law could be made consistent and comparable so that consumers may more easily compare services.

58. There are various ways whereby “all in” pricing could be regulated.

    a. Rule 4.2-2 already provides helpful general guidance. The *status quo* could be maintained.

    b. The Law Society could require that any reference to a price must be the total maximum cost that the client will pay for the transaction, inclusive of tax and disbursements. Consideration would need to be given to whether “all in” pricing should include the cost of a financing transaction, given that the substantial majority of residential purchase transactions are on the basis of mortgage financing, and, if so, whether lawyers could disclose that a discount is available for an all-cash transaction, and be required to disclose, where applicable, that additional costs are required for additional mortgages.

    c. The Law Society could require that any reference to a price must be the total maximum cost that the client will pay for the transaction, exclusive of taxes.

    d. If a fixed fee exclusive of disbursements is advertised then disclosure of the typical amount of disbursements could be required. If a fixed fee is advertised for

a purchase then a fixed fee for a mortgage financing could be required.[14]

59. The Working Group seeks input into what approaches, including but not limited to the above, might be considered to allow comparison when lawyers choose to advertise on a fixed-fee basis.

(ii) Contingency Fee Pricing

Policy Statement

60. The Working Group believes that contingent fee structures should be transparent, and that the total costs associated with contingent fees should be clear to the consumer at the outset. Consumers should be able to evaluate proposed fees against the fees being offered by others.

Discussion

61. While the contingency fee model facilitates access to legal services, it reduces the perceived importance at the outset of the basis on which the fees will eventually be charged. When fees are deducted from ultimate recovery and not paid directly by the client, transparency is reduced. The Working Group is concerned that contingency fee pricing is not currently sufficiently transparent at the outset to consumers. In the personal injury market, for example, where firms are typically operating on a contingency fee basis, the contingent fee that a prospective client can expect to ultimately be charged often remains opaque and it is difficult to determine whether a competitive fee structure is being proposed.

Options

62. The Working Group is of the preliminary view that lawyers and paralegals typically operating on contingency fee arrangements should be required to disclose their standard

[14] While the Working Group considered the concept of a tariff that would set what constitutes disbursements in real estate and include permissible price points for them, the Working Group does not believe that the Law Society should introduce such a system. The Law Society previously considered such tariffs in real estate law, and decided against their introduction. The Working Group is concerned that tariffs risk adding regulatory burden, may not be able to account for market variations, and risk inadvertently leading to a tariff price point becoming the new price floor, which would be anti-competitive and against the best interests of clients.

arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites. This would facilitate greater transparency for prospective clients.

Nature of the Services Being Offered

Policy Statement

63. The Working Group is of the general view that lawyers and paralegals soliciting work that they are not permitted to provide, are not competent to provide, or do not intend to provide are misleading consumers. The public is entitled to expect that lawyers and paralegals are themselves offering to provide the legal services that they advertised.

(i) Personal injury

(a) Referral / Brokerage Services

Discussion

64. Consumers naturally expect that lawyers advertising the provisions of personal injury legal services are offering to represent them. However, where referral fees are a material part of the revenue generated from advertising, the service actually offered to the client may be a referral rather than legal representation.

Options

65. One option is to require fair disclosure of the service that will be delivered. Where a significant portion of the revenue generated by advertising is from referral fees, the advertiser could be required to advertise on that basis, making it perfectly clear that the advertiser may not itself provide the legal services and in such a case may refer clients to others for a fee.

66. This option is premised on the proposition that it is misleading to purport to offer personal injury legal services while in fact the intent is to refer work to be done for others in exchange for payment.

67. Another option is simply to ban advertising for the purpose of obtaining work to be referred to others in exchange for a referral fee.

68. This option is premised on the proposition that, in the personal injury law sector, little real value is provided by mere brokerage and that the costs of advertising and brokerage

fees may well add to the ultimate fee to the client or affect the legal services that are ultimately provided. However, there may be circumstances where a brokerage model may provide valuable service. For example, brokerage may provide value where referrals are made solely in the best interests of the client or where the brokerage helps to manage the issues faced by the client including when legal and other services are required, the nature of those services and who should provide them.

(b) Second Opinion Advertising

Discussion

69. Clients are entitled to seek second opinions with respect to their cases. They may wish to do so for a variety of valid reasons, including as a check on the level of service being provided by their current counsel, or in order to consider multiple legal opinions before making crucial decisions related to their legal matters.

70. However, there is reason to think that some second opinion services currently being advertised are truly intended to entice clients who are already represented by legal counsel to switch lawyers rather than to provide a second opinion. Current Rule 4.1-2(d) clearly prohibits offering legal services using means that are intended to influence a person who has retained another lawyer to change their lawyer.[15]

71. The Working Group has considered how to balance consumer rights with maintaining lawyer professionalism around providing second opinions. The Working Group recognizes that advertising should only be limited where there is a legitimate public interest objective to do so. In this case, the Working Group is concerned by a potential "bait and switch" on the part of law firms purporting to offer second opinions when they may be using such advertising to entice a client of another lawyer to switch firms. The Working Group is also concerned about the conflict of interest inherent in providing a second opinion where part of the intent is to obtain the work. That said, the availability of second opinions is important for clients who may wish independent assistance in assessing their options including with respect to settlement.

Options

72. The Working Group seeks input about whether this rule is sufficient or whether the Law

[15] Rule 8.02(d) of the Paralegal Rules of Conduct similarly prohibit offering legal services using means "that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative […]"

Society should permit second opinions on the condition that the provider of the second opinion who advertises or markets "second opinion" services be prohibited from taking on the cases where a second opinion is given.

(ii) Paralegal Advertising of Services that are Outside of the Scope of Practice Violates the Paralegal Rules

73. Concerns have been raised with respect to paralegal advertising soliciting work outside of the permitted scope of practice. This includes advertising "criminal law" or "impaired driving". The concern could also include using words in other languages which are ambiguous as to whether they refer to a lawyer or paralegal. At times, this may simply be inadvertent. However, in other instances the advertising appears to be designed to generate referral fee revenues rather than to offer legal services. Paralegal Rule 8.02(3) is clear: "A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal."

Advertising the Attributes of the Provider

Policy Statement

74. The Working Group is of the general view that the attributes of the provider must be true, accurate and verifiable, and should not be misleading, confusing or deceptive.

(a) Identifying the Licensee's Class of License

Discussion

75. Consumers of legal services are entitled to know whether a service is being provided by a lawyer or a paralegal. In other professions where there are overlapping scopes of practice, it is standard for the service providers to state their professions. For example, while a doctor and a nurse both provide health services, and share the ability to engage in certain prescribed activities, patients are entitled to know the nature of the professional offering services. This promotes patient knowledge and trust in health providers and the health system more generally.

Option

76. The Working Group is considering proposing that all licensees be required to identify the type of license they have in their advertising and marketing materials (e.g. lawyer or paralegal). This would not be onerous but would enhance awareness of the availability and licensing of paralegal services, and of the range of services which paralegals are

permitted and able to offer consumers.

(b) Awards and the Risk of Misleading Attributes of the Provider

Discussion

77. Consumers commonly have difficulty selecting as between providers based on quality, and that there is little objective criteria on which to assist. For example, hospital counsel expressed frustration as to the lack of a well-accepted, externally validated award or recognition through which leading personal injury lawyers could be identified.

78. Lawyers and paralegals often rely on awards and honours to suggest quality. However, not all awards are necessarily indicative of quality alone, or at all. While some awards are based on third party evaluation, peer recognition or consumer recognition, some "awards" are essentially received for payment or other inducement. The Working Group is of the view that using these awards without disclosure or disclaimer is misleading.

79. The Working Group recognizes that there are real issues as to how awards are used by lawyers and paralegal licensees, and grappled with what the Law Society could do to address the issues. The Working Group recognizes that the public may view awards as a proxy for expertise or quality of service. The Working Group is concerned about the use of awards or honours that do not appear to be credible or have merit, and/or cannot be shown to be made on some transparent or objective criteria. Given these significant concerns, the Working Group has not ruled out proposing that the use of awards in advertising be banned altogether. If advertising of such awards is to be permitted, then, in the Working Group's view, using such awards or honours without full disclosure should be prohibited.

Options

80. The Working Group is considering whether full disclosure of the nature of the award or honour should be available on the firm website including any fees paid or other arrangements with the firm which may have affected the making of the award or honour.

81. The Working Group is also considering whether principles should be developed to limit the nature or awards and honours that may be included in advertising and marketing. The Working Group leaves open the option of recommending banning the use of awards.

82. The Working Group is further considering whether a personal injury designation could and should be created within the Law Society's Certified Speciality in civil litigation, to achieve another objective qualitative measure for consumers.

Taste in Advertising

Discussion

83. The Working Group heard repeated stakeholders concerns about “tasteless” advertising. The Working Group notes that the term “taste” does not appear in the lawyer or paralegal rules. In the Working Group’s view, this is with good reason. Taste is highly subjective and evolves.

84. However, as noted above the lawyer and paralegal marketing rules require the marketing of services to be demonstrably true, accurate and verifiable, should not mislead, and should be in the best interest of the public and consistent with a high standard of professionalism. The Working Group considers that the nature of the current rules is not the problem. The Working Group considers that detailed regulation in matters of taste is not realistically possible and that the current rules set an appropriate standard.

85. The Working Group however observes that at least some of the concern about “taste” is actually about the volume of advertising which is in turn driven by the ability to turn work achieved through advertising into referral fees without providing material value and without transparency. The volume of advertising may also relate to profitability of contingent fee work and the relative absence of transparency sufficient to permit the market to operate effectively.

Options

86. While the Working Group has considered the concept of pre-approval of advertising and marketing such as is currently done in Florida on a voluntary basis, the Working Group is not persuaded that issues of taste are effectively or properly addressed through prior restraint and micro-regulation. The Working Group is inclined to the view that pursuing the options discussed under other topics is the better course, at least for the time being.

87. That said, it appears that the Investigations Department is involved in many more dealings with advertising than is commonly known. It may be useful for there to be greater transparency as to what has been seen to be unacceptable as a way of signalling standards more generally.

(ii) Referral Fees

General Principles

88. The Working Group has distilled the underlying principles to guide referral fees, again based on section 4(2) of the *Law Society Act.* If referral fees are to be permitted, then, in the Working Group's view, they should be transparent, consensual and fully align with the client's interests. Licensees should be encouraged to refer matters where they are not competent to take them on. Providing clients with referrals to competent counsel is an important service if done properly at a reasonable cost.

Discussion

89. In Ontario, the amounts being charged for referral fees appear to have sharply increased in the past few years based on the information provided to the Law Society.

90. The Working Group recognizes the concern that up-front flat referral fees incent referrals to the lawyer who will pay the most for the referral and provide no incentive to refer to the lawyer who will achieve the best result for the client. Payment of up-front flat fees, and/or referral fees that are a significant percentage of the fee charged by the referree may be disproportionate to the value provided by the referrer, and may compromise the net fee earned by the referree to an extent that compromises quality of service. The cost of acquiring the file through payment of referral fees may economically limit the ability of a counsel who has accepted the referral to take the matter to trial. These risks are of concern.

91. The Working Group is also concerned by claims that referrals are being made in some cases without the client's knowledge or express consent.

92. Referral fees are opaque to consumers, clients and to the Law Society. If consumers knew that their claims were being referred to other licensees, and the size of the referral fees, they might not accept the referral. The Working Group is concerned that it is difficult to ascertain how referral fees are operating, and whether they currently, on balance, act in a manner that serves the public interest.

93. Given the increasing and evolving changes in how referral fees are arranged, the Working Group considered whether the referral system should be maintained as is, scrapped, capped, made more transparent or otherwise subjected to increased regulatory safeguards.

94. The Working Group considered following in the footsteps of England and Wales and

recommending an absolute ban on referral fees in personal injury law.[16] Referrals would then be required purely as a matter of professional obligation. But the Working Group is also aware that banning referral fees in England and Wales raised presumably unintended consequences as discussed below.

95. The Working Group is of the view that, despite current imperfections in practice, referral fees can be used to align licensee and client interest, and provide value to clients. It notes that the academic literature indicates that referral fees that are limited to a proportion of the ultimate contingent fee align the interests of the client, the referring lawyer and the lawyer accepting the referral. Referral fees are less problematic if the interests of all actors are aligned.[17]

96. The Working Group recognizes that some lawyers, particularly lawyers in smaller communities, and paralegals throughout Ontario consider referrals to be part of the service they provide to clients. These are often the first legal professional encountered by a consumer, and can play an important service by referring prospective clients to other licensees where appropriate. Referrals in contexts such as these add value both by assisting the individual receiving the service and by generally facilitating access to justice. In the Working Group's view, while such services may be provided for free, they should be open to being compensated.

97. Moreover, if referral fees are banned, the risk increases that some lawyer and paralegals will keep files that they are not competent to handle.

98. The Working Group therefore concludes that abandoning referral fees entirely is undesirable in some respects and may not be required.

99. The Working Group also recognizes that banning referral fees would not bring an end to the economic advantage of brand recognition of firms engaged in referral practices, but rather would likely simply change how the advantage is exploited. In England and Wales, the referral fee ban in personal injury resulted in rapid growth in the size of some personal injury firms. Similarly, brand leaders in Ontario might simply expand their practices if referral fees were absolutely prohibited. If the reality is that advertising generates profitable work, banning referral fees will likely just change how that profit is

[16] Solicitors Regulatory Authority, "Ban on referral fees in personal injury cases", online: http://www.sra.org.uk/referralfees/.

[17] See generally Zamir, Eyal, Medina, Barak and Segal, Uzi, *The Puzzling Uniformity of Lawyers' Contingent Fee Rates: An Assortative Matching Solution* (January 16, 2012). SSRN: 1986491; Sara Parikh, "How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar" New York Law School Law Review Vol. 51, 2006/07 244-283.

realized.

100. Moreover, there are more moderate regulatory approaches which could be implemented to curb referral fee practices to ensure that they operate in the public interest. In addition to achieving better transparency for consumers, the Working Group considers that limiting the proportion of the ultimate fee that may be charged as a referral fee may be worthwhile. It appears that mass advertising in the personal injury sector has been highly effective at attracting prospective clients, with many of these prospective clients then referred to others. But referral fees that were once commonly in the range of 10 or 15% of the ultimate fee have reportedly commonly become 25 or 30% of the ultimate fee. Constraining the proportion of the ultimate fee that may be charged as a referral fee is worthy of serious consideration given that the increased costs of referral may impact the client in significant ways, such as by impacting selection of counsel and limiting the ability of counsel to take the matter to trial, as noted above.

Options

101. The Working Group seeks input with respect to the following options under consideration:

a. Banning up-front flat referral fees on contingent fee matters.
b. Limiting the referral fees that may be charged as a percentage of the ultimate fee in contingent fee and other matters.
c. Requiring referrees to fully disclose their standard referral fee arrangements.
d. Requiring the client, the referrer and the referree to enter into a standard form agreement at the time that the referral is made, fully disclosing the nature of the referral and the referral fee.
e. Requiring licensees to record referral fees paid or received in their financial records in a manner to be maintained and accessible to the Law Society on request.

(iii) Fees

Policy Statement

102. As a general principle, fees should be on an agreed upon and transparent basis.

(a) Real Estate Fees

103. As noted above, the Working Group believes that “all in” real estate pricing should be transparent, and that the total costs associated with fixed fee real estate transactions

should be agreed upon and clear to the consumer.

(b) "Fees" and related practices with respect to title insurance and other services

Discussion

104. As noted above, the Working Group received reports of law firms receiving compensation or other benefits related to the purchase of services, without these practices necessarily being disclosed to the client. The Working Group is of the view that these practices breach the real estate lawyer's fiduciary duty to the client.

Options

105. To add greater certainty in this regard, the Working Group welcomes feedback regarding whether the Rules of Professional Conduct require amendment, and/or any other potential regulatory responses to this issue.

(c) Personal Injury Law

Policy Statement

106. As noted above, as a general principle, fees should be on an agreed upon and transparent basis. This applies in personal injury law and contingent fee based practices.

Discussion

107. The Working Group is concerned by the lack of transparency of the operation of contingency fees in the marketplace. Contingency fees were developed to facilitate access to justice, but there is very little economic data with respect to the contingency fee market in Ontario. It is difficult to determine the price elasticity of contingency fee arrangements, the frequency of fixed percentage fee contingency agreements compared to contingency fee agreements with different fees applying depending on the stage at which the matter settles, or when non-contingency fee arrangements may be used in personal injury matters.[18] It is therefore difficult to assess the impacts of contingency fee

[18] There is little information about these questions generally. For an example of a study of contingency fees, see Herbert M. Kritzer, Seven Dogged Myths Concerning Contingency Fees, 80 Wash. U. L. Q. 739 (2002). Available at: http://openscholarship.wustl.edu/law_lawreview/vol80/iss3/4

arrangements on justice outcomes.

108. The Working Group considered various additional means of enhancing their transparency. It considered whether to recommend additional reporting requirements on licensees who provide services under contingency fee agreements in order to contribute towards a better understanding of the contingency fee regime in Ontario. The Working Group recognizes that certain reporting requirements may be difficult to report, particularly as some of this information might be reportable on a firm basis but difficult to consider on a licensee basis. Ultimately the Working Group decided not to recommend seeking such input from licensees at this time, although as reporting systems change, the regulatory burden of seeking such information may decrease, and it may be worth seeking this information at a later date.

Options

109. As noted above, the Working Group welcomes input on the possibility of requiring licensees offering contingency fee arrangements to disclose their standard arrangements and typical contingent rates on their websites in order to facilitate greater transparency. The Working Group welcomes input on other means of enhancing transparency and the availability of information about contingent fees and the contingent fee market.

(iv) Enforcement Issues

110. The Working Group acknowledges that a major theme that arose in the focus group meetings with respect to advertising is the perception that the Law Society has not been doing enough to enforce the rules already in place, and has permitted a proliferation of unprofessional advertising.

111. The Working Group considered whether, as a matter of policy, the Law Society should engage in further efforts with respect to advertising issues.

112. The Working Group again notes the invaluable feedback received from lawyers, paralegals and legal organizations. The information obtained provided further detail as to current advertising practices, and the issues described in this report will assist the Law Society in its ongoing operational efforts to address advertising issues as they arise.

113. However, the Working Group does not believe that there is a need for the Law Society to fundamentally revise its complaints handling processes or significantly increase enforcement actions. The Working Group is mindful of the Law Society's resources, and the need to consider regulatory proportionality. Enforcement measures are always

available, and may be used on a case by case basis, but the Working Group was not convinced that, as a matter of policy, the Law Society should increase regulatory resources to intake or prosecution, which represent the start and end points of regulatory complaints processes.

114. The Working Group recommends however, that the Law Society do more to communicate its concerns about these issues and its regulatory responses to them. There is value in greater transparency about concerns that are raised and how they are addressed as this would provide better practical guidance to lawyers and paralegals.

NEXT STEPS

115. In summary, the Working Group seeks further input with respect to the following areas at this time:

Advertising and Fees

- Advertising and fees in real estate law:
    - How could pricing in real estate law be made consistent so that consumers may more easily compare services? Should the Law Society take further action regarding “all in” pricing in real estate transactions?
    - How can the Law Society eliminate reported issues with respect to “fees” and related practices with respect to title insurance and other services as described in the report?
- Contingent fees:
    - How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?
    - Should lawyers and paralegals typically operating on contingency fee arrangements be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites?
    - How is the *Solicitors Act* operating in practice?
- Personal injury advertising:
    - Referral / brokerage services:
        - Where a significant portion of the revenue generated by advertising is from referral fees, should the advertiser be required to advertise on

that basis, making it perfectly clear that the advertiser may not itself provide the legal services and in such a case may refer clients to others for a fee?
        - In the alternative, should advertising for the purpose of obtaining work to be referred to others in exchange for a referral fee simply be banned?

    - Advertising second opinion services:
        - Do current requirements balance consumer rights with maintaining professionalism around providing second opinions?
        - If not, should the provider of the second opinion who advertises or markets "second opinion" services be prohibited from taking on the cases where a second opinion is given?

- Identification of type of license:

    - Should all licensees be required to identify the type of license they have in their advertising and marketing materials (e.g. lawyer or paralegal)?

- Use of awards:
    - Should the Law Society ban the use of awards and honours, limit the nature of awards and honours that may be included in advertising and marketing, or require full disclosure of the nature of an award or honour, such as on a licensee website, including any fees paid or other arrangements which may have affected the making of the award?

Referral Fees

Should the Law Society:

a. Ban up-front flat referral fees on contingent fee matter?
b. Limit the referral fees that may be charged as a percentage of the ultimate fee in contingent fee and other matters?
c. Require referees to fully disclose their standard referral fee arrangements?
d. Require the client, the referrer and the referree to enter into a standard form agreement at the time that the referral is made, fully disclosing the nature of the referral and the referral fee?
e. Require licensees to record referral fees paid or received in their financial records in a manner to be maintained and accessible to the Law Society on request?

116. The Working Group is inviting feedback with respect to whether the issues discussed are applicable in other areas of practice, such as employment law and family law.

117. As noted at the outset of this report, the Working Group is seeking further input with respect to the above noted issues by September 30, 2016. The Working Group will then carefully consider all input it receives and report back to the Professional Regulation Committee with recommendations.

Tab 2.2.1

ADVERTISING AND FEE ARRANGEMENTS ISSUES WORKING GROUP

TERMS OF REFERENCE

APRIL 2016, REVISED JUNE 2016

1. The Advertising and Referral Arrangements Issues Working Group was established in February 2016 by the Professional Regulation Committee. Convocation received an information report regarding the establishment of the Working Group on February 25, 2016.

2. The Working Group is chaired by Malcolm Mercer. The members of the Working Group are Robert Burd, Paul Cooper, Carol Hartman, Jacqueline Horvat, Jan Richardson and Andrew Spurgeon.

3. In 2015, the Professional Regulation Committee developed proposed amendments to the Rules of Professional Conduct to respond to the following advertising issues which had been brought to the Law Society's attention.

    a. Use of Endorsements and Awards: Advertising often includes awards or endorsements by professional publications and organizations such as Consumers Choice and Readers Choice. There is generally insufficient detail about the award. For example, it is often not clear to consumers whether the lawyer paid to receive it (directly or indirectly through advertising).

    b. Use of Hyperbole: Advertisements may contain exaggerated comparisons to other lawyers and statements or suggestions that the lawyer is aggressive.

    c. Advertising about fee arrangements (contingency fees) without a disclaimer: (an example would be "you don't pay unless we win"). The advertising contains no reference to the client's responsibility to pay the lawyer's disbursements. For example, the client may well be required to cover the costs incurred by the lawyer such as photocopying, even if the litigation is unsuccessful.

    d. Advertising that is misleading about the size of the firm, number of offices, and areas of practice.

    e. A lack of professionalism in the location, context and images used.

4. In 2015, the Law Society of Upper Canada conducted a consultation on the proposed amendments. Feedback was requested by October 16, 2015.

5. In early 2016, the Law Society of Upper Canada conducted a Call for Input regarding proposed amendments to the Paralegal Rules on the same subject. Feedback was requested by April 15, 2016.

6. The Professional Regulation Committee discussed the feedback regarding proposed amendments to the Rules of Professional Conduct at its November 11, 2015, meeting. At that time, it was decided that further study was required of related issues before a decision could be made about advertising and marketing rules.

7. The Working Group's mandate is to

   a. obtain a better understanding of current advertising, referral fee and contingency fee practices and issues that may arise in personal injury, criminal defence, real estate, paralegal practices and other areas by speaking with lawyers and paralegals;
   b. better understand the relationship between (i) referral fee arrangements and contingency fees; and ii) contingency fees and the requirement that fees are fair and reasonable, and then, to consider whether additional guidance is required on these issues;
   c. propose final amendments to the advertising rules;
   d. propose amendments, as appropriate, relating to referral fees, contingent fees, and law brokerages;
   e. propose a report including, as appropriate, proposals for consultations on new or amended Rules on these subjects.

8. The Advertising and Referral Fee Arrangements Working Group will gather information from stakeholders and will provide interim reports to the Professional Regulation Committee as its work progresses. Interim reports to Convocation will be provided to Convocation to regularly update Convocation and the public as to the progress of the Advertising and Referral Fee Arrangements Working Group.

9. It is expected that the Advertising and Referral Fee Arrangements Working Group will complete its information gathering by the end of April 2016, that it will report on its work to the Professional Regulation Committee at its June 8, 2016 meeting, and that a report will be provided to Convocation on June 23, 2016. Subject to Convocation's direction, the Advertising and Referral Arrangements Issues Working Group expects to consult and seek feedback from the professions by the fall of 2016, and will report to the Professional Regulation Committee thereafter. It is anticipated that a subsequent report with appropriate recommendations will be provided to Convocation no later than early 2017.

Tab 2.2.2

SUMMARY OF INPUT RECEIVED THROUGH THE ADVERTISING AND FEE ARRANGEMENTS WORKING GROUP FOCUS GROUP AND RELATED MEETINGS

1. The following is a detailed summary of input received by the Advertising and Fee Arrangements Working Group through its focus group and related meetings.

(i) Advertising and Marketing

2. Meeting participants reported a clear increase in the volume of advertising for legal services in Ontario, particularly in the area of personal injury. In the past, lawyers typically received referrals from past clients, from other lawyers, by other professionals (such as physicians seeking a personal injury lawyer to assist a patient) or by word of mouth. Lawyer advertising, if any, was limited to perhaps placing an advertisement in the Yellow Pages.

3. Today, however, some lawyers and paralegals market directly to consumers. Today lawyers and paralegals may advertise directly to prospective clients in innumerable ways. Law firms, lawyers and paralegals are advertising in newspapers and magazines, online and through social media, on television, radio, billboards, buses, bus shelters, benches in front of hospitals and in hospitals.

4. Only a few law firms tend to be heavy advertisers. In personal injury law, some firms are understood to heavily advertise both to attract work that they can take on themselves and to attract clients who could be referred to other personal injury lawyers in exchange for referral fees.

5. Most participants accepted that advertising is here to stay, although some would seek to ban it outright on the claim that it has led to the commoditization of personal injury and other practice areas, eroded the public perception of lawyers, and threatens the administration of justice.

6. Meeting participants gave examples of what they considered to be misleading advertisements, such as:

- “All-in” pricing for real estate closings or other transactions, without including disbursements or other amounts;
- Claims that “We win or it’s free”;
- Claims by law firms to have personal injury expertise when the lawyers are recently licensed and/or have never conducted a trial;
- Advertising suggesting that a lawyer or law firm will act as the prospective client’s tough, trusted advocate, without disclosing that the lawyer or law firm may refer the

client to a different firm in exchange for a referral fee;
- Paralegals advertising for services that are outside of the their scope of practice;
- Paralegal advertising that disparages lawyers or that indicates that the cost of paralegal services is less than lawyers;
- Displaying an award without disclosing that payment was made (directly or indirectly) for the use of the award name or logo;
- Reference to being "#1", "expert", or to being the "best";
- Suggesting that a "second opinion" would be in an injured parties' best interests to attract new clients.

7. Several participants gave examples of what they considered were tasteless or offensive advertisements. These included concerns about the volume of advertising, the location of advertising (such as within a hospital, on billboards next to highways or in washrooms), the use of actors in advertising and attractive women in marketing.

8. Many participants urged the Law Society to do more to educate about the existing rules, and enforce them. Suggestions included the following:

   a. Some participants suggested that the Law Society should make it easier to complain about advertising practices, perhaps by permitting people to take photos of advertisements and email them to the Law Society for the regulator to consider. Others noted, however, that policing the marketplace at this level could have major cost implications, and may not be effective, as it could lead to what has been described as "regulatory whack-a-mole".

   b. As an alternative pro-active measure, it was suggested that the Law Society could pre-approve all proposed advertising, either through a voluntary or mandatory process, which could be more efficient than repeatedly responding to complaints about the same advertisements. This could be administered as a user-pay system so that the cost of administering the program would not be borne by all licensees. However, it was also noted that this could lead to the Law Society assuming risks associated with legal advertising.

(ii) Referral Fees

9. Meeting participants raised a wide range of concerns about the referral fee rules and practices.

10. Some participants questioned whether referral fees should be permitted at all. It was suggested that there should not be a referral fee for complying with one's professional obligations; if a licensee has no ability to handle a client's problem (because it is beyond their expertise or their capacity), it is the licensee's professional responsibility to refer the client to another licensee who has the expertise and ability to handle the matter.

11. Some suggested that if an economic incentive is necessary to align licensee interests with their professional responsibility, then referral arrangements should be minimal, and perhaps capped.

12. Several participants suggested that the referral fee rules have led to the emergence of "legal brokerage" law firms where referring files represents a significant part of the law firm's business.[1] These participants strongly maintained that referral fees were never intended to permit licensees to simply resell claims, particularly in the personal injury market, but that this has become big business for some firms.

13. Meeting participants raised the following concerns with "legal brokerage" approaches in personal injury law:

    a. Referral fees have become unreasonable and disproportionate. Several participants related that some referring firms are currently negotiating up-front flat-fee payments that are sometimes very large, in addition to up to a 30% share of the fee at the successful conclusion of the matter.
    b. Referrals to the highest bidder might not be based on the competency of counsel, or made to counsel with requisite expertise.
    c. Counsel accepting these referrals might not be able to vigorously advocate on behalf of the client or be prepared to take the case to trial if necessary due to the high costs of acquiring the case.

14. It was suggested by many participants that the risks arising out of the current referral practices may outweigh the risks that an incompetent counsel would keep a case were counsel not permitted to receive a referral fee.

15. Some participants suggested that all licensees should be required to disclose in their annual reports information related to the extent to which they refer files, accept referrals, and the amounts of referral fees received.

16. Participants also raised issues related to the obligation to disclose referral fees. Some senior members of the personal injury bar advised that in practice, historically the amount of a referral fee was not discussed in advance of the result being known. The client only became aware of the amount on the final account. "Fair and reasonable" was the criteria and was based on result and complexity. Disclosure to the client that some referral compensation would be paid from the final fee was considered to be sufficient and appropriate.

[1] While the Working Group did not hear of any law firms currently operating solely as legal brokerages, it did hear from law firms that refer cases to others in exchange for a referral fee.

17. One senior lawyer questioned the need to disclose referral fees to the client, on the basis that since the referral will not increase the cost, the client does not need to know. This lawyer advised that because of the difficulties in explaining the referral concept, and in order to facilitate referrals by sole practitioners and small firms, the referral fee disclosure requirement should be revisited.

18. Meeting group participants also engaged in considerable discussion about payment of referral fees to non-licensees. Those attending from the personal injury bar suggested that the rule is honoured in the breach, although the examples focused on anecdotal and unconfirmed reports. Certain focus group participants suggested that health providers, rehab companies, tow truck drivers, paramedics, hospital workers, physiotherapists, social workers and even doctors have been paid by lawyers for directing injured people to them.

19. Several participants reported the emergence of non-licensee referral services such as toll free numbers and websites operated by non-licensees offering to direct callers to personal injury lawyers for a fee. Some suggested that licensee referrals are not an issue, but that referral systems from non-licensees should be more strictly policed by the Law Society. It was acknowledged, however, that it is difficult to police “indirect” referrals and referrals from non-licensees.

20. The Working Group also heard from in-house counsel at major hospitals. Hospital patients frequently suffer an injury in circumstances that may give rise to a legal claim. Hospital counsel explained that hospital staff at times view the referral of patients to competent counsel as part of ensuring a full, holistic patient recovery. Competent, trusted counsel can advocate on behalf of a patient to seek the recovery of expenses and seek damages to compensate the patient for the physical injury sustained and other resulting losses.

21. Hospital in-house counsel noted that from time to time they receive a claim from a plaintiff personal injury lawyer that hospital staff improperly referred their client to a different lawyer or firm but have not found these to be of merit. They advise that these referrals would be contrary to hospital policies.

22. Meeting participants also discussed current referral fee practices whereby licensed paralegals refer matters outside of their scope of practice to lawyers and receive a referral fee. These fees reportedly could be hundreds of dollars or higher. Lawyers were concerned about paralegals deliberately advertising for work that falls outside of the scope of their license in order to then receive a referral fee. There was less concern about paralegals who occasionally encounter a file that falls outside of their scope and then seek a referral fee.

23. Finally, participants raised concerns arising in real estate practice and the use of title insurance. Rule 3.2-9.5 provides that a lawyer "shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product". Rule 3.2-9.6 further states that the lawyer "shall disclose to the client that no commission or fee is being furnished […] to the lawyer with respect to any title insurance coverage" and the accompanying Commentary notes that this is a matter of fiduciary duty and that the lawyer must fully disclose all financial dealings.

24. Against this backdrop the Working Group received reports of one title insurer having an arrangement whereby law firms could through various means seek to receive "legal fees" as part of the amounts charged to the client for the purchase of certain services. Similarly, the Working Group learned that in the past certain suppliers offered law firm staff gift certificates for each purchase, one entry per order into a contest for a chance to win prizes, or possibly even a fee based on the volume of services purchased.

(iii) Contingency Fee Agreements

25. All of the personal injury law firms who participated in the meetings typically operate under contingency fee arrangements. It was common ground for personal injury firms that contingency fee agreements generally improve access to justice for people who are injured, but do not have the financial resources to conduct the litigation necessary to achieve a just and equitable result.

26. Personal injury lawyers reported that competition can impact the percentage amount of the fee, and that typically personal injury lawyers' contingency fee rates range from 20% to 30% of the award. Some personal injury lawyers reported that they do not charge the client for anything, including disbursements, if there is no recovery. Others expect the client to pay disbursements even if no recovery is made.

27. Although contingency fee agreements appear to be the standard approach to personal injury practices, most personal injury counsel were of the view that the current requirements under the *Solicitors Act* are difficult for clients to understand, and that strict compliance with the requirements has historically been the exception to the rule.

28. Counsel noted that under the *Solicitors Act,* when a lawyer and client enter into a contingency fee retainer agreement, the lawyer's costs belong to the client. However, in practice, whether proper or not, many personal injury firms have traditionally charged the client on the basis of legal costs plus a percentage fee, known as the "costs-plus" model. This practice may be continuing at some firms, particularly for cases that go to trial. However, all plaintiff personal injury bar participants were aware of the Divisional Court's recent decision of *Hodge v. Neinstein,* 2015 ONSC 7345, which certified a class action

against a personal injury law firm for having allegedly collected fees on a “costs-plus” basis.

29. Several plaintiff personal injury bar participants suggested that the current *Solicitors Act* requirements are unworkable for certain cases, particularly those requiring a trial. When a matter goes to trial, and the plaintiff is successful, because the *Solicitors Act* provides that legal costs belong to the client, the result is that the law firm’s time and expertise may dramatically enhance the client’s recovery at the expense of the law firm’s time and effort.

30. Participants raised a range of potential actions related to contingency fee arrangements, including that:

- Personal injury lawyers could simply enter into retainer agreements providing for escalating fee arrangements depending on when and how the case resolves to avoid billing on a “costs-plus” model;
- The Law Society should seek an amendment to the *Solicitors Act* to expressly permit “costs plus” fee arrangements; and/or
- The Law Society should develop a standard retainer agreement for contingency fee arrangements.

31. Although most participants expressed frustrations related to the application of the *Solicitors Act,* certain plaintiff personal injury lawyers suggested that the *Solicitors Act* can be complied with by the personal injury bar, and that they do so in their practices. Others noted that while a strict contingency fee arrangement may not be viable for certain cases, alternative approaches can be adopted. One option would be to return to a traditional billable hour approach where the client is almost certain to succeed, perhaps with a deferral on collecting until the conclusion of the matter.