September 30, 2016

VIA E-MAIL: jstrawcz@lsuc.on.ca

Juda Strawczynski, Policy Counsel
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON
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Dear Mr. Strawczynski:

**RE: Advertising and Fee Arrangements**

The Advocates' Society is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of The Advocates' Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, The Advocates' Society's members have a keen interest in the effective judicial resolution of legal disputes.

For the past several months, The Advocates' Society has been keenly engaged in the issues under scrutiny by the Law Society's Advertising and Fee Issues Working Group (the "Working Group"). In particular, The Advocates' Society made submissions on November 3, 2015 with regard to proposed amendments to the *Rules of Professional Conduct* with regard, *inter alia*, to the advertising of legal services. Representatives of The Advocates' Society also attended a Focus Group organized by the Working Group on April 20, 2016. Having now reviewed the Working Group's Report to Convocation of June 23, 2016, The Advocates' Society makes the following submissions.

**1. Contingency Fees**

The vast majority of personal injury litigation in Ontario is funded by lawyers who are paid a fee based on a percentage of the settlement or judgment the client receives at the end of the case. Personal injury clients are often not able to afford a pay up front or pay-as-you-go arrangement based on hourly rates. Contingency fees are therefore very important in promoting access to justice for injury victims. Contingency fees may also serve to enhance access to justice in a variety of different areas of law.

Contingency fees were not expressly authorized by statute until the amendments to the *Solicitors Act*[1] in October 2004. Prior to these amendments, under the common law, plaintiff

[1] R.S.O. 1990, c. S.15.

personal injury lawyers usually deferred their fees until a matter concluded and they typically charged fees that were calculated based on a percentage of the recovery.[2] Such arrangements, including the percentage, would be agreed to by the client in advance. Also, prior to October 2004, "costs-plus" arrangements were common – the lawyer's fee would be the full amount of the partial indemnity costs recovered from the defendant plus an additional percentage of the damages recovered.

Costs-plus arrangements can create a conflict of interest for plaintiff lawyers. Most personal injury cases settle. Usually, negotiations evolve to an exchange of all-inclusive offers – offers that include damages, interest, fees and HST on fees.[3] The all-inclusive settlement figure must be divided between the plaintiff and the plaintiff lawyer to satisfy the costs owed to the lawyer. A defendant who makes an all-inclusive offer is indifferent to the breakdown as between damages and costs. Without a number specified for costs, the plaintiff's lawyer can advise his or her client that the breakdown included an excessive amount for costs, thus increasing the lawyer's share of the total settlement at the expense of the client. This is the so-called double-dipping referred to by Justice Molloy in the *Hodge v Neinstein* case.[4]

To illustrate, we provide an example of a costs-plus arrangement of costs plus 15% of the damages. If a settlement offer for $100,000 plus $15,000[5] for costs is made, the client would recover $85,000 and the lawyer $30,000.[6] If the offer is for $115,000 all-inclusive, the lawyer is free to characterize the breakdown as $95,000 for damages and $20,000 for costs, where the lawyer would recover $34,250 and the client only $80,750.

The Advocates' Society believes that costs-plus fee arrangements are problematic upon settlement. Requiring instead that an agreement be for a percentage of the entire settlement recovery[7] would remove an inherent conflict and is appropriate when there is a settlement. We will call this a "percentage-of-the-total" arrangement.

However, where a case proceeds to trial, a percentage-of-the-total arrangement will generally be highly unfavourable for the lawyer. This is best illustrated with another example. Assume that, at the end of a trial, the court awards $100,000 for damages and $100,000 for partial-indemnity costs. On the costs-plus 15% arrangement, the client would recover $85,000 and the lawyer $115,000. On the 30% percentage-of-the-total arrangement, the client would recover $140,000 and the lawyer only $60,000, even though the court considered $100,000 was the appropriate amount for the partial indemnity costs calculated based on the lawyer's efforts.[8] This would put the lawyer in a conflict, in that the lawyer would favour settling a case and avoiding days or weeks of trial without adequate compensation. This example could be

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[2] See *McIntyre (Estate) v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).
[3] Sometimes disbursements are included in the all-inclusive number, and sometimes they are separately listed.
[4] 2015 ONSC 7345
[5] On settlement, for partial indemnity costs, defendant's insurers have been frequently prepared to pay fees equal to 15% of the damages, plus disbursements agreed or assessed. For damages over $100,000, this percentage changes typically to 12% of the total or 15% on the first $100,000 of damages and 10% of damages above $100,000.
[6] In all of our examples, for simplicity, we have ignored disbursements and HST. This does not impact the conclusions
[7] After disbursements are paid, of course.
[8] For a reported example, see the *Meiklejohn* case.

applied to motions as well, thus incenting lawyers to avoid motions despite that they may be advisable for their clients.

The current legislative scheme does not provide for either a costs-plus or a percentage-of-the-total arrangement. The current scheme permits the lawyer to charge a fee that is based on a percentage of the damages and interest recovered, but all of the costs recovered must be excluded. All of the costs recovered must go to the client.

Section 28.1(8) of the *Solicitors Act* reads:

> (8) A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless,
>
> (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
>
> (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of them.

Section 6 of the regulation under the *Solicitors Act* reads:

> 6. A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

Molloy J. in the *Neinstein* case referred with apparent approval to *Du Vernet, Stewart v. 1017682 Ontario Ltd*,[9] in which it was held that s. 6 of the regulation:

> obliges the solicitors acting on a proposed settlement for a plaintiff to separately identify the amount agreed to in respect of costs and disbursements in advising plaintiff/clients. It is not possible to fulfill the solicitors' obligations by simply coming to an all-inclusive number for settlement purposes, as was apparently the case here.

Thus, a lawyer is expected to determine the amount paid for costs and disbursements, subtract that from the all-inclusive settlement number, then charge the client a percentage of the remaining amount. On a settlement, a lawyer would have an incentive to characterize very little of the all-inclusive settlement amount as costs. For cases that proceed to trial, a lawyer would face the problem of receiving no compensation whatsoever for conducting the trial. The lawyer would have an enormous incentive to settle rather than to proceed to trial.[10]

We provide another example to illustrate. Assume an agreement is compliant with the current scheme and calls for a 30% contingency fee. At the conclusion of a trial the court awards $100,000 for damages and $100,000 for costs. The lawyer will recover 30% of the $100,000 damages award, or $30,000, and the client will recover the rest, or $170,000. The client will

[9] 2009 CanLII 29191

[10] In fact the incentive to settle under the current scheme is greater than under a percentage-of-the-total arrangement, because the lawyer does not even get a percentage of the costs awarded.

recover all of the costs awarded and the lawyer would not benefit from having done a trial or from the costs award.

The Advocates' Society is concerned that the current scheme poses inherent conflicts. Contingency fee arrangements which comply with the current legislation inevitably impose an acute disincentive for plaintiffs' lawyers to proceed to trial in modest injury claims.

The Advocates' Society proposes that lawyers' contingency fee retainer agreements be percentage-of-the-total arrangements if a case settles, and costs-plus arrangements if costs are adjudicated by the court or a competent tribunal.[11] To effect such a requirement, legislative change would be required.

The chart below illustrates through examples that our proposal is the most effective means to minimize circumstances of conflict for the lawyer. We have used an example of a 26% of the total arrangement so that the numbers are consistent in all three examples of settlement.

| Nature of retainer agreement: | Settlement for $100,000 plus $15,000 costs or $115,000 all inclusive | Trial result – $100,000 plus $100,000 costs |
|---|---|---|
| **Costs plus 15%** | Lawyer gets: $30,000<br>Client gets: $85,000 | Lawyer gets: $115,000<br>Client gets: $85,000 |
| | Only lawyer benefits from higher amount for costs | Whether trial takes place is neutral to client. Lawyer can benefit if lawyer wins trial. |
| **26% of the total** | Lawyer gets: $30,000<br>Client gets: $85,000 | Lawyer gets: $52,000<br>Client gets: $148,000 |
| | Effect of higher costs in breakdown is neutral to client. | Lawyer has no real incentive to proceed to trial. |
| **Compliant agreement: 30% of recovery but no amount included for costs** | Lawyer gets: $30,000<br>Client gets: $85,000 | Lawyer gets: $30,000<br>Client gets: $170,000 |
| | Lawyer benefits if breakdown shows lower amount for costs. | Lawyer has zero incentive to proceed to trial – does not benefit from a trial. |

In the interests of providing improved guidance to the profession, The Advocates' Society would support the publication by the Law Society of a precedent agreement, incorporating basic elements of a contingency fee agreement, as a recommended document for use by litigators who enter into contingency fee arrangements with their clients. This would enhance transparency and understandability from the client's perspective, and would allow clients to more easily compare fees. It would also provide comfort to a lawyer that the agreement complies with the *Solicitors Act*. The Advocates' Society recommends that this agreement be drafted on the basis of consultation with relevant stakeholders, and would be pleased to take part in such consultation.

[11] This should apply to any adjudicated costs awarded. Specifically, lawyers should be allowed, in the event of a motion or appeal, to also charge the client a fee that is equivalent to the costs awarded to the client.

A special mention about the use of contingency fees in family law cases is warranted. In family law, some form of contingency fee arrangement may provide litigants with the ability to pursue complicated equalization entitlements in complicated situations that might otherwise require the client to invest heavily in legal and accounting fees. Even for less complicated situations, a litigant might prefer a kind of contingency fee arrangement to a more classic "fee for service" model. Certain family law issues may lend themselves to a contingency fee model, including equalization, unjust enrichment claims (claiming proprietary or monetary relief) and, in some cases, spousal support claims and a determination of quantum of child support. That said, other issues, like custody, access and many other issues relating to child support, do not. In any event, the contingency fee structure would have to be clear, fair and transparent, and perhaps even subject to court approval.

## 2. Referral fees

Prior to the amendment to the *Rules of Professional Conduct* around 2001, payment of a referral fee of any nature was prohibited. Lawyers had the option to make co-counsel arrangements, whereby the referring lawyer and the receiving lawyer would work together on the file, and the arrangement might be structured such that the referring lawyer would receive a larger portion of the fee than his or her work might properly justify. Co-counsel arrangements were subject to assessment. Assessment officers could be asked to examine whether the referring lawyer did any work of value, and if not that portion of the fee could be reduced accordingly.

The amendment of the rule to allow referral fees in limited circumstances was considered justified on the basis that it created an incentive for lawyers to refer files where appropriate. A lawyer who might not have adequate expertise in an area would be more inclined to refer the matter to a lawyer with more appropriate expertise and less inclined to attempt to handle the matter him or herself. The client would benefit from being directed to a lawyer with appropriate expertise.

As will be discussed below, it is The Advocates' Society's view that the justification for referral fees is questionable.

Clients very frequently contact a lawyer with whom they have had previous dealings. The client often has no knowledge whether the lawyer has expertise in a particular area. Thus, there is often a need for referrals driven by client needs. One might expect, however, that clients would consider it inappropriate that a large referral fee would be paid to the referring lawyer simply based on the referral, and where the referring lawyer has done little or no work on the case.

When the amendments to the *Rules* were under consideration, a concern with allowing referral fees was that through the rule amendment, lawyers would be given an incentive to refer matters to the highest bidder. This concern remains valid. Although blatant bidding wars are likely rare, referral fees have become widespread.[12] Many plaintiffs' firm's websites actively promote that they offer referral fees to lawyers who refer matters to them.

[12] "Case offers window into widespread referral fee use", the Globe & Mail: http://www.theglobeandmail.com/news/toronto/case-offers-window-into-widespread-referral-fee-use/article5083777/. "Going from the exception to the rule: As amounts have risen and competition grows

Referral fees are a particular issue in the personal injury field. Firms may advertise heavily and then regularly refer out cases to lawyers who will gladly pay a significant percentage for the referral. As a result, referral fees have encouraged extensive advertising by personal injury firms. Referrals are, for some firms, a business model. Firms can refer out much of their work and, in essence, collect a large fee for merely finding the client or case.

This business model is entirely divorced from the theoretical justification of referral fees. That is, this business model is not based on the incentive for which referral fees were designed. Instead of being about ensuring the client is represented by a lawyer competent in the field, referral fees have become a means to collect revenue by referring matters received through extensive advertising.

Although the existing rule prohibits charging the client more because of the referral fee, it is logical to expect that significant referral fees must play a role in the economics of personal injury litigation. Where, for instance, a lawyer is paying 30% of the fee to the referring lawyer, the lawyer who has done the work may not be able to offer any discount to the client, even where a discount may be appropriate in the circumstances.[13] At least in some cases, client costs must be negatively affected due to referral fees.

The Advocates' Society believes that the incentive for a lawyer who has no expertise in a particular area of law to refer rather than to keep a lucrative file will only be marginally lessened by banning referral fees altogether. The lawyer with no competence in the field has a significant incentive not to take on such a case in that they may face discipline or sanction if they do not act competently. The *Rules of Professional Conduct* require lawyers to meet the standard of competence in the area of law for each case and to decline retainers when they do not meet that standard by means of their education and experience. They are obliged to consider a referral to another lawyer of appropriate expertise.

Further, a referral fee does not eliminate the incentive that a lawyer would have to keep the file in order to benefit from a much larger fee.

Elimination of referral fees will eliminate the incentive for firms to be heavy advertisers of nothing more than referral services. This in turn will reduce the incentive for extensive advertising. Referral fees also discourage co-counsel arrangements which may provide opportunities for less experienced practitioners to be mentored by more experienced lawyers when the less experienced practitioner is in a position to refer a good case.

The Advocates' Society considered the alternative of recommending that referral fees be allowed so long as they were accompanied by a requirement directing firms that refer work to other firms for a fee to disclose this arrangement in their marketing materials. The Advocates' Society felt that such a recommendation would be unworkable as policing this type of practice would be impractical.

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keener, lawyer-to-lawyer referral fees have become the norm.", The Lawyer's Weekly: http://www.advocatedaily.com/img/site/2013/10/tlw-p16_nov1_13.pdf.

[13] Note that in this way the cost of advertising must, to some extent, be getting passed on to the consumer.

The public and the profession do not materially benefit from referral fees. As such, it is The Advocates' Society's view that there is a benefit to having a bright line that referral fees are simply not allowed. However, further consideration of the effect of such a bright line on class actions litigation should be undertaken.

On a separate but related note, The Advocates' Society encourages investigation into allegations of the payment of referral fees to non-lawyers and non-paralegals. Moreover, The Advocates' Society supports continuous education and frequent warnings to the profession that such conduct is unprofessional and prohibited. We would encourage ongoing and sustained education through bulletins, advertising, professional education and other programs.

### 3. Marketing of Legal Services

In our November 3, 2015 letter, The Advocates' Society endorsed the proposed amendments to Rule 4.2 of the *Rules of Professional Conduct*, and stated as follows:

> The Society is concerned with some advertising and marketing practices that have become more prevalent, particularly in the area of personal injury litigation. One of those practices includes lawyers and firms who act as brokers. These lawyers or firms advertise as leading plaintiff personal injury counsel but actually refer their legal work to other lawyers or firms. This type of practice is deceptive and should be regulated. Another concern is the advertising of awards and endorsements, the source of which may be questionable and can be misleading to the public.

The Advocates' Society reiterates its position on these issues. The proposed Commentary states that a marketing practice which "may contravene" the advertising requirements is "failing to disclose that the legal work is routinely referred to other lawyers for a fee rather than being performed by the lawyer". As stated above, The Advocates' Society supports the elimination of referral fees altogether. If a law firm does not intend to handle the client's file, it is inappropriate to seek to secure the client in the first place. If referral fees are not eliminated, we believe the language in the proposed commentary should be strengthened to require full disclosure of any referral practice engaged in by a lawyer for a fee.

With regard to mentioning awards in advertising, we endorse the proposed amendment in Rule 4.2-1.1(f) which proposes to require a licensee to include "information for the public to make an informed assessment of the award, the nomination process and any fees paid by the lawyer, directly or indirectly". This language addresses the proliferation of professional "nominations" which require the nominee to purchase space in a publication or lawyers' directory. It also permits a lawyer who has received a peer-association award, such as the Law Society Medal, to briefly explain its provenance. The Commentary adds marketing practices that might contravene the rule include "d) advertising awards and endorsements from third parties without disclaimers or qualifications." An award from a media outlet might seem authoritative and reliable to the public, but be awarded based on a small survey sample size, or on the amount of advertising space purchased by the firm in the outlet's publications. Even a general advertising statement that a law firm or lawyer is "award-winning" is not likely to be caught by these two criteria. Broader and clearer language about mentioning awards in advertising is desirable, in order for the profession to understand what would constitute a violation of this Rule.

In addition, The Advocates' Society believes that the profession would benefit from clearer language around what constitutes marketing initiatives "suggesting qualitative superiority to other lawyers". This particular proposed amendment does not provide adequate guidance with regard to the meaning of "qualitative superiority" and risks creating confusion over acceptable marketing practices.

The Advocates' Society would support the implementation of a regulatory process whereby the Law Society would pre-approve marketing material submitted by a practitioner or firm where the practitioner or firm, of its own initiative, was seeking guidance as to the appropriateness of the marketing material.

Advertising that specifically solicits "second opinion" clients should be specifically prohibited in the Commentary. It is not uncommon for clients to seek an independent view of their case and this is often encouraged by their lawyer. Lawyers have often provided this kind of second opinion about a plaintiff personal injury matter while encouraging the client to remain with the current lawyer. But, advertising for second opinion clients should be discouraged because it is a targeted attempt to solicit clients away from their current lawyers. A simple Google search reveals many websites of firms competing for second opinion business by offering free second opinions.

Personal injury law firms advertising in hospital and health care facilities is something that should be regulated in the revised Rule. Injury victims and their families are at their most vulnerable at this point, post-accident. Marketing, subtly or aggressively, to potential clients in the acute health care setting can be problematic and risks taking advantage of accident victims who are not yet prepared or equipped to make decisions about their legal rights.

That said, there is a public education benefit to "know your legal rights" pamphlets in hospital and health care facilities reception areas. To this end, there are associations which have as their mandate to educate the public, including the Law Society. Many personal injury law firms publish similar literature (especially emphasizing limitation periods and urgent time limits) for marketing purposes with their firm name and contact information displayed on the publication. Some hospitals have rules about how firms can distribute their materials but they vary and are disparately enforced. We encourage the Law Society to monitor this type of advertising very closely.

We would also encourage the Law Society to participate in the education of health care facilities and health care providers that lawyers are prohibited from soliciting and restricted in paying referral fees. The Advocates' Society recognizes that this may require coordination by the Law Society with the regulatory bodies of other professions (in particular health professions), and encourages a collaborative, interdisciplinary regulatory approach to address this important issue.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

Bradley E. Berg
President

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