

FOR INFORMATION

**FIFTH REPORT OF THE ADVERTISING & FEE
ARRANGMENTS ISSUES WORKING GROUP****SUMMARY OF THE ISSUE UNDER CONSIDERATION**

143. In this fifth report to Convocation, the Advertising and Fee Arrangements Issues Working Group (“Working Group”)¹ is providing this status report on its work to date and proposed next steps with respect to its review of contingency fees.
144. As described further in this report, the Working Group has received a great deal of information regarding the current operation of contingency fees. Contingency fees remain an important means of facilitating access to justice for individuals who have legal claims and rights which they may otherwise be unable to advance. However, the Working Group has observed significant issues in the current operation of Ontario’s contingency fee regime.
145. The Working Group is concerned that there appears to have been widespread noncompliance with the current regulatory requirements governing Ontario’s contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements.
146. The Working Group is also of the view that change is necessary in order to protect consumers.
147. The Working Group recommends requiring a mandatory standard form contingency fee agreement to facilitate client understanding of contingency fee agreements (“CFAs”) and facilitate comparison of the cost of legal services being offered.
148. The Working Group is also considering recommendations for reforms to the *Solicitors Act*, R.S.O. 1990, c. S.15 (“*Solicitors Act*”) to ensure that fees are clear, fair and reasonable. It is currently considering a series of related recommendations, comprised of the following:

¹ The Advertising & Fee Arrangements Issues Working Group (“Working Group”) is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society’s website at <https://www.lsuc.on.ca/advertising-fee-arrangements/>. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

- a. Requesting that amendments be made to the *Solicitors Act* to require that contingency fees be calculated as a percentage of the all-inclusive settlement amount or all-inclusive amount awarded at trial, less disbursements. This method simplifies the calculation of fees and aligns the interests of clients and licensees. It would replace the current provision that the fee is based on a percentage of the total settlement amounts less recovery on account of disbursements and legal costs, which is difficult to calculate in practice for reasons explained further in the report, and which creates inherent conflicts between the licensee's interest and the client's interest.²
 - b. At the same time, introduce safeguards to ensure that costs are clear, fair and reasonable. The Working Group is considering a range of approaches, including:
 - i. A limit on fees by a percentage cap or other means;
 - ii. Requiring independent legal advice be provided to a client in certain situations before the fee is paid; and
 - iii. Introducing new client reporting requirements to ensure that fees are fair and reasonable.
149. With the agreement of the Committee, the Working Group proposes to seek further input with respect to reforms to Ontario's contingency fees system. Input will be accepted until Friday, September 29, 2017. The Working Group will then review the feedback it received before returning to Convocation with its recommendations.

BACKGROUND

150. Contingency fee agreements provide that the lawyer or paralegal's fee is "contingent, in whole or in part, on the successful disposition or completion of the matter for which the services are to be provided."³
151. The Working Group has been considering contingency fee issues since it was established in February 2016. It held a series of meetings in spring 2016 with plaintiff and defence side personal injury lawyers.
152. In June 2016 the Working Group reported on these meetings, and presented its initial findings with respect to contingency fees to Convocation ("June 2016 Report to Convocation").⁴

² The Working Group continues to consider approaches to ensure that there is access to justice in cases where there is a high likelihood of requiring a trial, but where legal fees under the proposed general approach may not be sufficient for the licensee to take the case to trial.

³ Rules of Professional Conduct, Rule 3.6-2 and Paralegal Rules of Conduct, Rule 5.01(7).

⁴ The June 2016 Report to Convocation can also be found online at <https://www.lsuc.on.ca/advertising-fee-arrangements/>.

153. In July 2016, the Working Group sought further input through a Call for Feedback, and at that time asked the following with respect to contingent fees:
- a. How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?
 - b. 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?
 - c. How is the *Solicitors Act* operating in practice?⁵
154. The Call for Feedback closed at the end of September 2016. In its February 2017 Report to Convocation, the Working Group attached a summary of the feedback it received (“Summary”), attached as **Tab 4.6.1**.⁶ As the Summary notes, the Working Group received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group and insurers.⁷ The Working Group again thanks all those who responded to its first Call for Input.
155. In addition to considering the feedback it received directly in 2016, the Working Group has also taken into account recent developments, including the following:
- a. Two private members’ bills which were introduced in the legislature in fall 2016 and in winter 2017, both of which, among other matters, recommended capping contingency fees with respect to motor vehicle actions at 15% and 33% respectively.⁸

⁵ Call for Feedback: Advertising and Fee Arrangements, online at <http://www.lsuc.on.ca/uploadedFiles/Fact-Sheet-Ad-and-Fee-Consultation-EN-July-2016.pdf>.

⁶ Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback (“Summary”), February 2017 Convocation – Professional Regulation Committee Report, pages 119-136, online at: www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

⁷ Summary, at para. 2.

⁸ Bill 103, *Personal Injury and Accident Victims Protection Act, 2017*, introduced March 8, 2017 by Mike Colle, MPP, Legislative Assembly of Ontario online at: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614; Bill 12, *Protection for Motor Vehicle Accident Victims and Other Consumers from Unfair Legal Practices Act, 2016*, introduced September 14, 2016 by Tim Hudak, MPP, Legislative Assembly of Ontario online at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4123.

- b. The Insurance Bureau of Canada's report, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario*, by Professor Allan C. Hutchinson ("Hutchinson Study").⁹
 - c. The report *Fair Benefits Fairly Delivered*, prepared by David Marshall, Ontario's advisor on auto insurance (the "Marshall Report").¹⁰
 - d. Recent cases addressing contingency fee costs, where there have been findings that fees were unreasonable and, in some cases, where the Court found that the lawyer violated s.28.1(8) of the *Solicitors Act* by including costs obtained as part of settlement as part of the lawyer's fee, without first obtaining approval of a judge of the Superior Court of Justice.¹¹
 - e. The Court of Appeal for Ontario's decision in *Hodge v. Neinstein*, released June 15, 2017.¹²
156. The Working Group has also considered academic articles and media reports, and has reviewed the operation of various types of contingency fee models in other jurisdictions, particularly in the United States, England & Wales and Australia.
157. This report provides the Working Group's analysis, preliminary recommendations and proposed next steps regarding its review of the current operation of contingency fees in Ontario other than in class actions.¹³

⁹ Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: <http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf>.

¹⁰ David Marshall, *Fair Benefits Fairly Delivered, A Review of the Auto Insurance System in Ontario*, Final Report, April 11, 2017, online at <http://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html>.

¹¹ For example: *Batalla v. St Michael's Hospital*, 2016 ONSC 1513 (CanLII), online: <http://canlii.ca/t/gnq6b>; *Edwards v Camp Kennebec (Frontenac) (1979) Inc.*, 2016 ONSC 2501 (CanLII), online: <http://canlii.ca/t/gpfzs>; *Hosseini v Anthony*, 2016 ONSC 5405 (CanLII), online: <http://canlii.ca/t/qt55s>; *Lopresti v Rosenthal*, 2016 ONSC 7494 (CanLII), online: <http://canlii.ca/t/gwlvvm>.

¹² *Hodge v. Neinstein*, 2017 ONCA 494, online at www.ontariocourts.ca/decisions/2017/2017ONCA0494.htm ["*Neinstein*"].

¹³ In light of the material differences between class actions, including the representative nature of class actions and judicial approval of fees paid to plaintiff's counsel, this report does not address class action contingency fees.

DISCUSSION

(1) Contingency Fees in Ontario

158. Contingency fees were introduced in Ontario in 1992 with respect to class proceedings and in 2004 with respect to claims being brought by individual litigants.¹⁴
159. The amendments to the *Solicitors Act* and the related regulation O Reg 195 / 04 came into force on October 1, 2004. On October 28, 2004, Convocation further amended the Rules of Professional Conduct regarding CFAs to ensure consistency with the legislative scheme.
160. Ontario was the last Canadian jurisdiction to permit and regulate contingency fees.¹⁵

(2) The Policy Rationale for CFAs: Facilitating Access to Justice

161. The basis for permitting contingency fees has been described in various ways, but at its core, CFAs are a means of providing clients with access to justice. As the Court of Appeal of Ontario stated in *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA):

There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the [page275] importance of contingency fees to the legal system in *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 at para. 14:

The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should

¹⁴ *Class Proceedings Act*, 1992, S.O. 1992, c.6; *Solicitors Act*; O Reg 195 / 04: *Contingency Fee Agreements under Solicitors Act*, R.S.O. 1990, c. S.15.

¹⁵ See *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA), <<http://canlii.ca/t/1fzl2>> at para. 56 (*McIntyre Estate*).

be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.¹⁶

162. The increased access to justice brought about by properly regulated CFAs has also been recognized as providing “compelling” advantages to the administration of justice.¹⁷

(3) The Challenge: Balancing Access to Justice and the Cost of Justice

163. The constant challenge is to balance access to justice and the cost of providing access to justice. This is a balance as to how licensees “should be remunerated fairly for their services, whilst simultaneously improving access to justice, but not at public expense.”¹⁸

(4) The Current Regulation of CFAs in Ontario

164. There are a range of options available to regulate contingency fees in ways to facilitate access to justice while protecting consumers. Ontario’s current CFA regime is set out in the *Solicitors Act* and O Reg 195 / 04 (the “Regulation”).
165. Under the *Solicitors Act*, CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters.¹⁹
166. A CFA must be in writing.²⁰ The Regulation requires that a CFA must include, among other information, statements:
- a. of the type of matter in respect of which services are being provided;²¹

¹⁶ *McIntyre Estate*, *supra* note 15 at para. 55.

¹⁷ *Raphael Partners v. Lam*, 2002 CanLII 45078 (ON CA), <<http://canlii.ca/t/1cnns>> at para. 54 [“Lam”]; *McIntyre Estate*, *supra*.

¹⁸ Marshall, Glen, “The Economics of Speculative Fee Arrangements”, *Civil Justice Quarterly*, vol. 21 (Oct), 2002, p.326.

¹⁹ *Solicitors Act*, at s.28.1(3).

²⁰ *Ibid.* at s. 28.1(4).

²¹ *Regulation*, at s.2.2.

- b. indicating that the client and solicitor have discussed options for retaining the solicitor other than by contingency fee agreement, including by doing so by hourly rate;²²
- c. setting out how the fee is to be determined, and a simple example of how the contingency fee is calculated;²³
- d. outlining how the client or solicitor may terminate the contingency fee agreement, the consequences of termination and the manner in which the solicitor's fee is to be determined if the agreement is terminated;²⁴
- e. informing the client of the right to ask the Superior Court of Justice to review and approve of the solicitor's bill;²⁵ and
- f. if the client is a plaintiff, that the solicitor shall not recover more in fees than the client recovers.²⁶

167. Currently fees under CFAs are regulated by the *Solicitors Act* as follows:

- a. Fees shall not be more than the value of the property recovered in the action or proceeding, unless, within 90 days of the CFA being executed, the lawyer and client bring an application to have the agreement approved by the Superior Court of Justice.²⁷
- b. The CFA shall not include in the fee "any amount arising as a result of an award of costs or obtained as part of a settlement" unless the lawyer and client jointly apply to a Judge of the Superior Court of Justice for approval of the costs because of "exceptional circumstances".²⁸

168. CFAs are subject to an assessment of the lawyer's bill on application to the Superior Court of Justice.²⁹

169. The *Solicitors Act* provides that the Lieutenant Governor in Council may make regulations governing CFAs, including with respect to:

²² *Ibid.* at s.2.3.

²³ *Ibid.* at s.2.3-2.4.

²⁴ *Ibid.* at s.2.9.

²⁵ *Ibid.* at s.2.8.

²⁶ *Ibid.* at s.3.

²⁷ *Solicitors Act*, at s.28.1(6).

²⁸ *Ibid.* at s.28.1(8).

²⁹ *Ibid.* at s.28.1(11).

- a. the maximum percentage or amount that may be a contingency fee;
 - b. the lawyer's remuneration pursuant to a CFA; and
 - c. the form of the CFA and terms to be included.³⁰
170. The Law Society's lawyer and paralegal conduct rules also regulate licensees providing services pursuant to contingency fee agreements. The general conduct rules related to fees and disbursements apply to contingency fees; fees and disbursements must be fair and reasonable and disclosed in a timely fashion.³¹ In addition, the conduct rules specifically relating to contingency fees and contingency fee agreements apply. The Law Society's Rules of Professional Conduct provide as follows:

Contingency Fees and Contingency Fee Agreements

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended - November 2002, October 2004]

Commentary

[1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. Such agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

³⁰ *Ibid.* at s.28.1(12).

³¹ Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.

[New - October 2002, Amended October 2004, October 2014]

171. As paralegals are not included in the *Solicitors Act*, the CFA regulations provided under it do not apply to paralegals. However, Paralegal Rule 5.01 regarding Fees and Retainers permits paralegals to enter into contingency fee agreements as follows:

Contingency Fees

(7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided.

(8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.

(9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

(5) The Operation of CFAs in Ontario

172. The Working Group has considered the following major themes related to the current operation of contingency fee arrangements:

- (i) Access to justice;
- (ii) Transparency of CFAs;
- (iii) Contingency Fees:
 - a. Simplification;
 - b. Ensuring that licensee and client interests are aligned; and
 - c. Ensuring that contingency fees are clear, fair and reasonable.

(i) Access to Justice

173. The Working Group reaffirms the Law Society's support for properly regulated

contingency fee agreements as a means of facilitating access to justice.

174. The Law Society was an early advocate for properly regulated contingency fees as a means of facilitating access to justice. In May 1988, the Law Society first recommended that the Attorney General be urged to permit contingency fee arrangements to facilitate access to justice, and subsequently reaffirmed its support for the regulation of contingency fees.³²

175. The Law Society was also a participant in the Attorney General's Joint Committee on Contingency Fees which recommended the introduction of contingency fees on an access to justice basis as follows:

One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries...³³

176. This rationale is as applicable today as it was when contingency fees were first recommended. Contingency fees enable clients to seek redress without incurring the up front costs and risks of litigation.

177. Since contingency fee agreements were introduced in Ontario, the *Law Society Act* (the legislation granting the Law Society's statutory authority to license and regulate lawyers and paralegals in the public interest) has been amended such that the Law Society, in carrying out its functions, "has a duty to act so as to facilitate access to justice for the people of Ontario."³⁴ It must also "maintain and advance the cause of justice and the rule of law"³⁵ and act in a manner that protects the public interest.³⁶

178. Given the Law Society's statutory responsibility, the continued access to justice crisis,

³² See *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA), <<http://canlii.ca/t/1fzl2>> at para. 63.

³³ *Ibid.*

³⁴ *Law Society Act*, R.S.O. 1990, c.L.8, s.4.2(2).

³⁵ *Ibid.* s.4.2(1).

³⁶ *Ibid.* at s.4.2(3).

the vital access to justice role played by contingency fees to advance both class action and individual claims, and the related benefits that access to justice brings to the administration of justice, the Working Group continues to support the availability of contingency fees in Ontario.

179. The Working Group also reaffirms that contingency fees must be properly regulated. Contingency fees must be regulated in a way that protects consumers, so that consumers understand contingency fee arrangements, and consumer protections are in place to ensure that contingency fees are transparent, fair and reasonable.

(ii) Transparency of CFAs

180. In June 2016, the Working Group stated that from a policy perspective it “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.”³⁷ It further stated as a general principle that “fees should be on an agreed upon and transparent basis.”³⁸
181. The Working Group expressed concern that “contingency fee pricing is not currently sufficiently transparent at the outset to consumers” and that “it is difficult to determine whether a competitive fee structure is being proposed”.³⁹
182. The Working Group reported that it was of the “preliminary view that lawyers and paralegals typically operating on contingency fee arrangements should be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites” on the basis that “This would facilitate greater transparency for prospective clients.”⁴⁰ The Working Group also indicated that it “welcomes input on other means of enhancing transparency and the availability of information about contingent fees and the contingent fee market.”⁴¹
183. The Working Group’s further study of contingency fee issues has reinforced its view that action is necessary to ensure that contingent fee structures are transparent and that the total costs associated with contingent fees are clear to the consumer at the outset. It has, however, shifted its views on what are appropriate actions to foster such transparency and consumer protection.

³⁷ June 2016 Report to Convocation at para. 60.

³⁸ *Ibid.* at para. 102.

³⁹ *Ibid.* at para. 61.

⁴⁰ *Ibid.* at para. 62.

⁴¹ *Ibid.* at para. 109.

184. The Working Group initially considered requiring the publication of standard contingency and disbursement arrangements on licensee websites. This was intended as a means of fostering transparency. However, in the Call for Feedback, several responses noted that licensees and firms generally do not have one standard contingency fee rate. The rate will depend on a range of factors specific to the particular case, such as the nature of the claim and the risk involved.
185. The Working Group recognizes that a published standard rate could have unintended consequences. If licensees were required to offer services for all matters at their published standard rate, this may limit the types of cases that licensees would be willing to take, or lead to licensees charging a higher standard rate in order to cover high-risk cases. If licensees were permitted to publish a standard rate but depart from it based on the nature of the case, then the published rate would be of little use to consumers. Given the uncertainties of contingent fee files, and the need for licensees with contingent fee practices to be able to manage the risk not only of individual cases but their portfolios of cases, licensees must be permitted to tailor their contingency fees. Ultimately the Working Group believes that requiring the publication of a standard rate would not be an appropriate recommendation.

Recommendation: A Standard Form Contingency Fee Agreement

186. There is nearly universal recognition that contingency fee agreements are unduly complex, and that enhanced transparency is necessary. In the current marketplace, the different approaches make it difficult for consumers to compare services. The Working Group has also heard that current contingency fee agreements are difficult for consumers to understand.
187. In addition, it is the Law Society's experience that there are a range of contingency fee agreements in use in the marketplace, and many licensees have not complied with all of the technical statutory requirements in their standard contingency fee agreements. In many cases licensees may have inadvertently not complied with all of the technical requirements under the *Solicitors Act* and the Regulation.
188. Several submissions in response to the Call for Feedback expressed support for an approved standard form contingency fee agreement to be used by all licensees. Under such a model, consumers could more easily compare the cost of legal services between firms.
189. The Working Group sees great value in the development of a mandatory standard form contingency fee agreement. This could be drafted to simplify the agreement to highlight key consumer rights and responsibilities. A mandatory standard form would also ensure that all client retainer agreements meet all of the technical requirements under the *Solicitors Act* and its Regulation. This would enhance consumer protection, foster consumer choice and ensure that licensees fully comply with the *Solicitors Act* requirements.

190. The Working Group therefore recommends a mandatory standard form contingency fee agreement to be used by both lawyers and licensed paralegals.

(iii) Contingency Fees

191. The Law Society has observed that the single greatest issue in the operation of contingency fee agreements relates to the calculation of the contingency fees.
192. The Working Group has learned of different practices with respect to the calculation of contingency fees.
193. Currently a range of contingency fee rates are being charged in the marketplace based on a range of factors. The Working Group has learned that contingency fees for tort claims generally range between 25 – 35%. A contingency fee of 15% is often applied by paralegal licensees handling statutory accident benefits schedule (“SABS”) matters; however, that amount can be significantly higher. Different types of claims appear to bear different risk; for example motor vehicle tort claims and medical malpractice claims.
194. In some cases, however, licensees have entered into CFAs whereby they charge a percentage fee but also claim some or all legal costs, without obtaining approval of a judge of the Superior Court of Justice, contrary to s.28.1(8) of the *Solicitors Act*.
195. The Court of Appeal stated in *Neinstein* that “it appears that non-compliance with the Act is widespread”.⁴²
196. The Working Group notes that in some cases non-compliance with all of the regulatory requirements have been inadvertent and with respect to technical areas. However, non-compliance with respect to the calculation of fees is not a minor breach of the requirements. In some cases, the Working Group has learned, licensees shifted to non-compliant practices because of the difficulties created by the current requirements. However, there are also numerous cases, as noted above, where Courts have found that the fees charged were not compliant with the *Solicitors Act*, were unreasonable in the circumstances, and were accordingly reduced.
197. The Working Group is concerned by noncompliance with the current regulatory requirements governing Ontario’s contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements. Lawyers and paralegals must follow the *Solicitors Act*, the Regulation and the professional conduct requirements; failure to do so erodes the public’s respect for the administration of justice.
198. At the same time, as described further below, the Working Group is of the view that the current requirement that legal costs belong to the client has had unintended consequences. The rule results in an unnecessarily complex calculation to determine a client’s net recovery and counsel’s fees. The rule also creates inherent conflicts of

⁴² *Neinstein*, at para. 170.

interest for licensees during settlement negotiations and when considering whether to take a matter to trial, and fundamentally misaligns the client and licensee interests at these stages. The requirement increases risks of licensee/client miscommunication, enshrines inherent conflicts of interest between the licensee, and at times has enabled unprofessional conduct by licensees putting their interests above their client's interest. The Working Group therefore is of the view that change is necessary.

a) Simplification

199. In *Neinstein*, the Court of Appeal stated that the *Solicitors Act* language “has created difficulties for lawyers and clients for many years”, and that “much in the Act is not clear [...] This case before this court represents another struggle to make sense of the Act.”⁴³
200. The Law Society has seen in the complaints it has received from clients and from its discussions with counsel the difficulties that the *Solicitors Act* language has created for lawyers and clients. The current rule regarding legal costs belonging to the client is difficult to explain at the outset of the retainer, and clients often do not understand the equation when it is applied at settlement. The Working Group is of the view that the calculation of legal fees is unduly complex, and should be simplified.

b) Ensuring that licensee and client interests are aligned

201. The Working Group notes that licensee and client interests should be aligned to the greatest degree possible. However, the current *Solicitors Act* structure creates unnecessary inherent conflicts of interest between licensees and clients at key points in the course of a contingency fee matter.

i) Inherent Conflict #1: Settlement Negotiations

202. Many if not most of the complaints received by the Law Society with respect to contingency fee matters relate to issues arising at the time of settlement.
203. Clients often do not appreciate at the time of settlement what net amount they will receive.
204. There are also significant issues which arise at the time of settlement due to the inherent conflict between the lawyer and client interests embedded in the current *Solicitors Act*.
205. Under the current rule, legal costs “belong” entirely to the client and are not included in the calculation of the contingency fee. This creates an inherent conflict that arises during settlement negotiations between the licensee's economic interests and the client's interest. During settlement negotiations, defendants regularly offer a global settlement amount, inclusive of legal costs. This leaves the plaintiff's counsel and the plaintiff to determine what part of the settlement offer amount should be attributed to legal costs. The licensee's interest and the client's interests are misaligned at this point,

⁴³ Ibid. at para 12.

as any increase in the licensee's fee comes from the plaintiff's net recovery, and vice versa.

206. To further complicate this issue, there are no standard formulae on which the plaintiff's counsel and plaintiff can calculate the amount of an "all-in" settlement offer that should be treated as legal costs. Some lawyers reported that there is an industry "rule of thumb", but such standards are unwritten, shifting, and are not prescribed rules.
207. One practical option to attempt to address the inherent conflict is for the plaintiff to ask a defendant to apportion the "all in" settlement amounts, that is, to ask the defendant to set out the amounts intended to cover legal fees, damages, disbursements and other amounts totalling the "all in" amount. But at that point, certain defendants have reportedly sought to take advantage of the inherent conflicting interests of the lawyer and client by deliberately apportioning the amounts in ways that can help realize a settlement. The Working Group heard that in some cases, defendants can use the apportionment of legal fees as a means of seeking to push for a settlement; however, the defendant has no interest or duty in ensuring that the amounts they offer as fees are fair and reasonable. The apportioning of legal fees by the defendant may make the fees transparent, but does little to ensure that the net amount received by the plaintiff is fair and reasonable.
208. In short, the Working Group is concerned that the current *Solicitors Act* requirement that legal costs belong to the client has caused a significant inherent conflict for lawyers and paralegals during settlement negotiations.
209. The danger of having the licensee and client interests misaligned during settlement is compounded by the fact that the vast majority of matters (>95%) settle before trial. Other than for certain limited circumstances, such as settlements involving a party under disability, which require Court approval, the costs amounts are not subject to judicial review or any review to ensure that they are fair and reasonable.
210. While most licensees attempt to navigate the ethical Catch-22 that the current *Solicitors Act* requirement creates during settlement negotiations, this has led to instances of unprofessional conduct. The Law Society has been addressing these issues as they arise. At times cases related to CFAs have led to hearings and findings of misconduct.⁴⁴

⁴⁴ The following are recent decisions of the Law Society Tribunal related to contingency fee issues: *Law Society of Upper Canada v Jesudasan*, 2016 ONLSTH 181 (CanLII), online: <<http://canlii.ca/t/qvtf1>>. Summary: In finding that the lawyer had engaged in professional misconduct, the Hearing Division of the Law Society Tribunal commented that the contingency fee agreements at issue were not in compliance with the *Solicitors Act* or the Regulation. The lawyer in this case had, without prior judicial approval, taken costs awarded to his client in addition to a percentage of the damages, contrary to the *Solicitors Act*. The panel also noted that the lawyer had further contravened the *Solicitors Act* and the Regulation by failing to ensure that the contingency fee agreements were fully explained to and

Moreover, as the Working Group has previously reported, a specialized investigations team has been established with respect to advertising and fee issues, and there are ongoing investigations.

ii) Inherent Conflict #2: Whether to Take a Matter to Trial

211. In its June 2016 Report, the Working Group noted that it had heard from several personal injury lawyers 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."⁴⁵

212. In certain circumstances, particularly when there is an existing reasonable offer to settle on the table or the case is a relatively small value case, the client and licensee may have quite divergent incentives.

213. The difficulties arising out of the current contingency fee requirements were summarized by the Canadian Defence Lawyers Association ("CDL") as follows:

CDL members have pointed out three (perhaps dissociated) problems with this provision in the Act as currently formulated:

o The requirement for prior judicial approval interferes with the freedom of contract and creates a disincentive for lawyers to

understood by his client. The lawyer was suspended for one month, and ordered to repay his client \$5,750.00 and pay the Law Society's costs of \$3,500.

Law Society of Upper Canada v Meiklejohn, 2015 ONLSTH 193 (CanLII), online: <<http://canlii.ca/t/gm2qn>>. Summary: The lawyer in this case had entered into a contingency fee agreement with his client, at which time it was not contemplated by either party that the lawyer would take all or any portion of any costs award made by the court. The lawyer later disregarded the agreement, choosing instead to charge, as his fee, the sum awarded to his client for costs. The Hearing Division of the Law Society Tribunal ultimately concluded that the lawyer had engaged in professional misconduct by: (1) failing to advise his client of the requirement under the *Solicitors Act* to obtain prior judicial approval of a contingency fee agreement in circumstances where it was contemplated that the contingency fee would apply to an award of costs; and (2) disregarding a signed contingency fee agreement and charging fees contrary to that agreement. The Tribunal made a finding of professional misconduct, and ordered that the lawyer be reprimanded and that he pay the Law Society \$2,500.

⁴⁵ June 2016 Report to Convocation at para. 48.

work on and advance personal injury claims where liability may be strongly disputed but damages are likely modest. In such instances, the ability to recover a contingency plus partial indemnity costs would reflect fair remuneration for the lawyer's efforts and allow access to justice for accident clients who do not have permanent or catastrophic injuries. The potential for abuse can be accomplished by reversing the onus from the solicitor to the client, to complain to the court as opposed to requiring prior court approval.

o If costs are paid to the lawyer in addition to the percentage of recovery, the practice offends the indemnity principle of court-awarded costs and thus artificially drives up the settlement value of every claim in which there is a contingency fee arrangement. Claimants and lawyers are encouraged to inflate damage assessments, to employ future care and other damage assessors with an incentive to facilitate inflated claims, and to delay the resolution of claims until after lengthy and costly examinations for discovery.

o There appears to be no consistent standard on the recovery on which the contingency fee is calculated. Is the rate to be applied to damages and interest only, or is it applied to damages, interest and costs? Whatever solicitors and clients bargain for, the result must be fair and reflect the indemnity principle of costs.

These problems also involve potential conflicts of interest between the lawyer and client between the economic interest of lawyers and their clients' interest in obtaining fair and prompt settlement of claims. Although the responses from our members are, on the surface, contradictory in some respects, they can be reconciled if the unifying law reform goal is to allow solicitors to be paid for their effort in bringing modest claims, without causing inflation of more significant ones.⁴⁶

214. The Working Group is of the view that express changes to the fee requirements are necessary to remove the inherent conflict of interest scenarios described above, to protect the public and balance access to justice and reasonable legal costs.

⁴⁶ Canadian Defence Lawyers, October 3, 2016 Submission to the Advertising and Fee Issues Working Group, Canadian Defence Lawyers online at <https://www.cdlawyers.org/?page=16#a452>.

c) Ensuring that Contingency Fees are Clear, Fair and Reasonable

215. The Working Group stated in its June 2016 Report to Convocation as a general principle that “fees should be on an agreed upon and transparent basis.”⁴⁷ As per existing Law Society professional conduct rules, fees and disbursements must be fair and reasonable and disclosed in a timely fashion.⁴⁸
216. As the above discussion highlights, under current requirements:
- a. Clients often do not have a full understanding of contingent fees;
 - b. The current requirement that costs belong to the client creates inherent conflicts of interest for licensees;
 - c. The current requirements misalign the interests of licensees and clients;
 - d. There is unnecessary risk that fees will not be fair and reasonable, unfairly compensating a licensee at the expense of the net amount recoverable by a client; and
 - e. There is also an unnecessary risk that a client may receive a windfall amount for legal costs reflecting work performed by a licensee.
217. The Working Group is also concerned because of the lack of checks on legal fees for matters that settle before trial, and which are not subject to a mandatory Court approval process. Lawyers’ fees are subject to oversight by courts, and clients can have their fees assessed. The Courts will consider whether the fee is fair and reasonable in the circumstances.⁴⁹ However, most claims do not *require* Court approval, and in a properly functioning system, clients should not have to resort to assessment processes to be assured that the fees at the conclusion of the matter were reasonable.
218. The Working Group is therefore considering recommending that the *Solicitors Act* fee requirements should be amended so as to align licensee and client interests and ensure that contingency fees are clear, fair and reasonable. The Working Group is considering three related recommendations in this regard:
- i. Request amendments to the *Solicitors Act* to calculate fees based on a percentage of the total settlement amount or amount awarded at trial, less disbursements;
 - ii. Introduce, under the Regulation or the *Rules of Professional Conduct* as may be appropriate, new safeguards to ensure that fees are fair and reasonable; and
 - iii. Introduce enhanced client reporting requirements.

⁴⁷ June 2016 Report to Convocation at para. 102.

⁴⁸ Rules of Professional Conduct Rules 3.6-1 and 3.6-2; Paralegal Rules of Conduct Rule 5.01.

⁴⁹ See generally *Lam, supra*.

(i) Simplifying the Calculation of Fees

219. Calculating fees based a percentage of the total amount offered on settlement or awarded at trial, less disbursements, is a simple means of calculating fees. Settlement calculations would not be dependent on a preliminary arbitrary determination of what amount from a settlement offer should be treated as legal costs. Any amounts inclusive of legal costs awarded at trial would be included in the calculation of the licensee's fee. This approach also aligns the interests of clients and licensees.
220. The Working Group recognizes that there are certain cases where there is a high likelihood of requiring a trial, but relatively low to mid value compensatory damages at issue which present a particular challenge to the proposed approach. Under the current regime, where the client receives all of the costs, the limit on compensation may prevent licensees from taking the case to trial. Under the above proposed approach, the award and the costs would be combined, but the legal fees may still not be sufficient for the licensee to take this type of case to trial. Such cases may be logically turned down if the fees are not reasonable given the particular risks, time and effort required to take the matter to trial. The Working Group is seeking input into potential approaches to address this category of cases. One option may be to have the lawyer and client jointly apply for approval to charge a CFA above a prescribed limit if the case goes to trial in order to ensure access to justice in such higher risk cases.

(ii) New Safeguards to Ensure Fees are Fair and Reasonable

221. The Working Group is unanimous in its view that an amendment to simplify the calculation of fees should be accompanied by new safeguards to ensure that fees are fair and reasonable.
222. The Working Group is considering a range of options, including:
- a. A percentage cap on contingency fees, either on a fixed or sliding scale;
 - b. Requiring independent legal advice ("ILA") before a client agrees to the payment of legal fees in certain circumstances; and
 - c. Disclosure before payment of legal fees of the value of the time actually spent on the matter at the licensee's agreed hourly rates.
223. A review of the history with respect to the consideration of fair and reasonable contingency fees in Ontario and approaches in other jurisdictions is attached as **Tab 4.6.2**.
224. The Working Group is also considering the appropriateness of different types of safeguards by area. The Working Group is considering the possibility of different approaches to a limitation on fees for tort and other contingency fee matters and SABS cases.
225. Assuming a limit on contingent fees, the Working Group is of the view that there should

still be a means for the lawyer and the client to jointly apply to court for approval to charge a contingency fee rate above any prescribed limit. This will be necessary to ensure that access to justice is still available for higher risk cases, such as medical malpractice claims where liability and/or causation may be at issue.

226. Clients would continue to be able to seek an assessment of their account.

(iii) Enhanced Client Reporting Requirements

227. The Working Group is also considering further transparency measures through new client reporting requirements. Enhanced transparency measures are intended to ensure that clients have a sense of the cost of the services provided, and may act as a further check on the reasonableness of fees.

228. The Working Group is currently considering a range of new regulatory requirements which would promote clear communication to clients about the basis for fees, ensure that the fees charged are related to the value of the services provided and otherwise generally ensure that fees are reasonable. The Working Group is considering a range of measures to enhance transparency and client understanding of fees and their rights, including requiring licensees to:

- a. Explain in the client reporting letter the basis for the fee by reference to the agreed percentage under the CFA, and by reference to the factors used to generally consider the reasonableness of a fee. These factors could be those found in the case law assessing contingency fees, and/or pursuant to the factors provided for in the lawyer and paralegal conduct rules, and could include factors such as the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the recovery that was expected, and who was expected to receive an award of costs.⁵⁰
- b. Record the professional and paraprofessional time spent on CFA matters;
- c. Report the amount and value of time spent on the matter on the final account to the client; and
- d. Advise the client on the final account of the right to apply to have the legal fees assessed.

NEXT STEPS – A CALL FOR FEEDBACK

229. The Working Group is issuing a Call for Feedback with respect to the recommendations contained in this report to Convocation. The Call for Feedback will remain open through to Friday, September 29, 2017. The Working Group will consider the feedback it receives, before reporting to Convocation with its recommendations regarding the operation of the *Solicitors Act*.

⁵⁰ These factors are examples taken from the Commentary to Rule 3.6-2 of the Rules of Professional Conduct and Rule 5.01(8) of the Paralegal Rules of Conduct.

230. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue in due course.

SUMMARY OF FEEDBACK RECEIVED IN RESPONSE TO THE
ADVERTISING AND FEE ISSUES WORKING GROUP JULY 2016 CALL FOR FEEDBACK

Contents

(i)	Introduction	2
(ii)	Overview of Feedback.....	2
(iii)	Advertising and Marketing.....	2
	Identification of type of license	2
	Advertising: General Comments and Regulatory Options.....	3
	Use of Awards	4
	Advertising Second Opinion Services in Personal Injury Law	5
(iv)	Advertising and fees in real estate law	6
	“All in” pricing	6
	Payments / Other Benefits.....	8
	Advertising of Referral / Brokerage Services	8
(v)	Referral Fees	9
	Up-Front Referral Fees.....	9
	Referral Fees Generally.....	9
	Support for Referral Fee Arrangements	9
	Support for Banning or Capping Referral Fees	11
	Enhancing Transparency Related to Referral Fees	12
	Other Issues: Paid Referrals from Non-Licensees.....	13
(vi)	Contingent Fees	13
	Transparency and Potential Disclosure of Standard Arrangements.....	14
	The <i>Solicitors Act</i> in Practice	15
	Gaps in Data	15
	Potential Abuses of the <i>Solicitors Act</i>	16
	Difficulties in the Treatment of Legal Costs under the <i>Solicitors Act</i>	16
	Capping Contingent Fees	18
	Other Options	18

(i) Introduction

1. The following memorandum provides a detailed summary of feedback received by the Advertising and Fee Arrangements Working Group (“Working Group”) in response to its July 2016 Call for Feedback.

(ii) Overview of Feedback

2. The Working Group issued a Call for Feedback in July 2016, and requested input by the end of September 2016. It received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group, and insurers.

(iii) Advertising and Marketing

3. The feedback addressed several different issues related to advertising and marketing.

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)?

4. A significant majority of those who provided feedback on this issue recommended that licensees should be required to identify the type of license they have.
5. Several rationales were provided in support of this measure, including that it would foster transparency, enhance the public’s awareness of the different categories of license and the distinctions between them / reduce confusion in the marketplace.
6. It was also noted that in personal injury this transparency is necessary to protect injured plaintiffs. In certain personal injury cases, a paralegal considering representing a prospective client may be presented with a conflict of interest, and might persuade the client to pursue a smaller claim within the Small Claims jurisdiction notwithstanding that the injuries might warrant an action in the Superior Court. This would be a disservice to the client.
7. Certain submissions also noted that certain licensed paralegal practices may be engaging in misleading advertising that give the impression that the licensee is a lawyer.
8. Submissions also noted that misleading advertising at times targets vulnerable groups, such as linguistic minorities, equity seeking groups and others. Disclosure of the type of license in these settings was supported.

9. Two individuals opposed to the measure noted that (i) certain clients may be prejudiced towards one profession or another and (ii) as most members of the public probably do not know the differences in scope of practice, requiring the licensee to state whether the licensee holds a P1 or an L1 license is unlikely to significantly advance the public interest.

Advertising: General Comments and Regulatory Options

10. The Call for Feedback did not ask about the state of advertising of legal services in Ontario generally, nor did it pose questions related to taste, both of which were addressed in the June 2016 Report. However, these issues were frequently raised in the feedback received.
11. There were different views expressed about advertising in general. As has been a consistent theme heard by the Working Group to date, many individuals and organizations raised concerns regarding the rise of personal injury advertising. Some described personal injury advertisements as misleading / false / embarrassing / degrading and provided specific examples in support of this general concern. A few submissions suggested that the Law Society should ban advertising because it is not helping the public understand the role of lawyers. However, most feedback on advertising principles opined that advertising should remain, but be regulated in the public interest.
12. Certain submissions suggested that although the regulator should not be concerned with matters of taste in advertising, advertising does raise professionalism issues, and the regulator should be ensuring that advertising operates in the public interest. Many noted that advertising should be verifiable and objective, but suggested that the marketplace is currently overrun by big brand advertisers engaging in misleading advertising.
13. The feedback provided a range of regulatory options for the Law Society to consider, including the following:
 - (i) Determine the total amounts spent on advertising in personal injury matters, require both law firms and licensees to report how much they are spending on advertising, and benchmark these amounts to the broader legal profession and other industries;
 - (ii) Use existing regulatory tools to address inappropriate advertising, dedicating additional regulatory resources to enforce existing rules if necessary;
 - (iii) Give further regulatory consideration to misleading advertising that may be targeting equity seeking groups and prospective equity seeking clients who may face additional barriers, such as by engaging in more proactive enforcement, including random periodic checks on racialized or ethnic advertising;
 - (iv) Regulate personal injury firm advertising in hospital and health care facilities or ban such advertising in or near hospitals;

- (v) Engage in “swifter” and “clearer” enforcement of distasteful advertising;
- (vi) Engage in enhanced communications with the professions and the public regarding permitted and impermissible advertising. Options include, for example:
 - a. Developing clear advertising guidelines as have developed by others (e.g. the Real Estate Council of Ontario);
 - b. Communicating regulatory actions, and publishing determinations and findings related to unacceptable advertising and marketing practices more generally;
- (vii) Engage in public education efforts about misleading advertising practices;
- (viii) Further consider regulating the use of search engine optimization and Google advertising (as one firm described, the misuse of its firm name and goodwill to redirect searches to competitors); and
- (ix) Develop a pre-approval process whereby the Law Society will review advertisements in advance.

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?

14. A few submissions suggested that the current general rules governing advertising suffice. However, many submissions expressed concerns over the current use of awards and recommended new regulatory responses. Many who provided feedback expressed concern that certain awards being advertised are misleading, bought or do not provide any objectively helpful information for the public.
15. The feedback featured a range of options, including:
 - (i) Banning the advertising of awards entirely;
 - (ii) Banning advertising of all awards other than the Law Society’s Certified Specialist designation;
 - (iii) Banning “bought” awards;
 - (iv) Limiting the advertising of awards to those based on peer review;
 - (v) Permitting all awards, so long as the law firm’s website provides full disclosure regarding the relationship, if any, between the award recipient and the entity granting the award;
 - (vi) Only permitting objectively verifiable awards;
 - (vii) Considering the creation of a personal injury designation within the Law Society’s Certified Speciality in civil litigation which could serve as a clear mechanism for assessing the quality and experience of lawyers; and
 - (viii) Having the Law Society develop a list of permitted awards that have been granted based on verifiable criteria, which can be used by licensees in advertising and marketing.
16. The Working Group was invited to consider rules from other jurisdictions, such as Rule

7.1 of the New York Rules of Professional Conduct, which permits advertisements to include information as to “bono fide professional ratings” and which defines “bona fide” as follows:

[A] rating is not ‘bona fide’ unless it is unbiased and non-discriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered.

Advertising Second Opinion Services in Personal Injury Law

- 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?*
17. A few submissions maintained that current requirements balance consumer rights with professionalism around providing second opinions.
 18. However, many submissions expressed concerns over the risks of abuse involved in advertising with respect to second opinion work.
 19. Most participants who considered second opinion advertising in personal injury law expressed concerns that current advertising efforts are really an attempt to induce a person who already has counsel to change counsel, and that it would be unethical to advertise in a manner that sows client dissatisfaction with current counsel.
 20. Certain feedback submitted that second opinion advertising offends Rule 4.1-2(d) of the Rules of Professional Conduct:

In offering legal services, a lawyer shall not use means
[...]
(d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer.
 21. Submissions generally noted that curtailing advertising in this area would be reasonable in the circumstances. Another noted that there is no evidence of consumers being unaware of their right to consult another lawyer if they have concerns with respect to

their representation. One suggested it would be naïve to believe that second opinion advertising is for any other reason than to obtain a file from an existing lawyer.

22. There were different solutions proposed to address advertising of second opinions in personal advertising, including:
- Clearly banning second opinion advertising;
 - Permitting second opinion advertising on the basis that the licensee advertising such services may charge a fee for providing a second opinion, but should not be able to take on the case nor receive a referral fee after a second opinion prompts the client to seek a referral to different counsel; and
 - Banning advertising of second opinion services, but permitting the provider of the second opinion to be able to take on the file if requested to do so by the client.

(iv) Advertising and fees in real estate law

o 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?

o How can the Law Society eliminate reported issues with respect to “fees” and related practices with respect to title insurance and other services where law firms receive compensation or other benefits related to the purchase of services.

“All in” pricing

23. The feedback received in this area provided divergent views.
24. The input confirmed that “all in” real estate advertising practices present several challenges, including the following:
- a. A lack of consistency in the marketplace as to what is included in “all in” pricing. Variations depend, for example, on whether all disbursements are included, whether certain costs are categorized as disbursements and not included in the up-front quote, and how the lawyer decides to treat amounts received from a title insurer or other third party.
 - b. “Bait and switch” techniques / deceptive “all in” pricing: There is a concern that prospective clients may retain a firm on the basis of one price and then be billed a different amount due to the nature of the transaction or because of disbursements.
 - c. Threats to ethical and professional practice:
 - i. Many expressed the concern that the advertising of all-in fees has fueled price competition that has created disincentives for real estate lawyers to spend money to conduct searches or spend the necessary time on matters.

- ii. Many noted that the downward cost pressure and current uneven advertising practices causes a race to the bottom.
 - d. Focusing solely on price to the detriment of other considerations: Some expressed concern that a regulatory focus on price risks detracting from other important consumer considerations such as professionalism, service and expertise, and consumer evaluation of real estate legal services on price and other considerations.
- 25. There were differences in approaches regarding how to address the above pricing issues.
- 26. Some noted that existing rules can be used to enforce transparency in real estate pricing.
- 27. Certain legal organizations are opposed to permitting any “all-in” fee quotes in real estate transactions unless there are regulatory changes. Another legal organization appeared to take issue with regulation of pricing, stressing that there is no “one size fits all” real estate transaction, and that it would be a mistake to assume that real estate transactions can or should be subject to uniform pricing.
- 28. In contrast, some of the feedback received generally recognized that if it were possible to easily compare prices on an “all in” basis, this would give prospective clients choice and peace of mind. Some therefore recommend regulating “all in” pricing, with the caution that if the rationale of “all in” pricing is to foster reasonable price comparisons, then any regulatory approach would need to ensure that there are not hidden fees or inconsistencies in approach which could skew the marketplace.
- 29. Options for considering “all in” real estate pricing include, for example:
 - a. Taking no further action with respect to real estate pricing;
 - b. Educating consumers on real estate advertising and the costs of real estate transactions;
 - c. Regulating what is included in any price quote, and what categories of costs are not included and should be paid by the client;
 - d. Regulating whether a lawyer should be required to abide by an all-in legal fee in all cases without exception;
 - e. Defining what constitutes disbursements;
 - f. Re-introducing a tariff with respect to disbursements or otherwise regulating disbursements; and/or
 - g. Developing different “all in” requirements for different types of common real estate transactions; and
 - h. Banning “all in” pricing.

Payments / Other Benefits

30. On the issue of other payments or benefits received from title insurers or other vendors, the Working Group received feedback from the two legal organizations and individual lawyers, but did not hear from title insurers. One individual commented that a title insurance legal fee received by the lawyer should be included as a fee rather than as a disbursement. One legal organization suggested it would be unethical and a breach of the lawyer's fiduciary duty not to disclose fees received from a title insurer. One submission provided a draft rule intended to expressly prohibit a lawyer's law firm to receive any fee, reward or other compensation from a title insurer, agent or other party relating to the application for or purchase of a title insurance policy.

Advertising of 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 service 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?*
31. Several submissions expressed concern that it is misleading for firms to advertise in order to refer many of the files in exchange for a referral fee.
32. Certain responses also highlighted broader impacts of mass advertising for the sole purpose of obtaining a file to refer out, including that this approach has:
- fueled litigation generally;
 - increased costs in the personal injury law system; and/or
 - contributed to negative public perception of plaintiff side lawyers, which may impact jury perceptions of plaintiff cases generally.
33. Several submissions advocated for an outright ban on advertising for the sole purpose of obtaining work to be referred to others in exchange for a fee, also referred to as the "brokerage model". Some were of the view that licensees should not be permitted to advertise for work that they are not permitted to provide, are not competent to provide or do not intend to provide. The practice was described by many as a misleading "bait and switch", a tactic which is unlawful in consumer law and competition law.
34. A consumer organization submitted "We would be hard-pressed to find an MVA [motor vehicle accident] victim who was pleased to find that their case was taken on by a firm who intends to refer them on for a fee. It would likely be less common if the intended 'referral fee' were demanded of the potential client at the time of signing the contract".

35. Many submissions recommend that if the practice of advertising in order to obtain files to refer to others is to be permitted, then the advertising must be transparent; it must be made clear that the advertising firm intends to or may refer the client out to another firm.
36. Some submissions noted that certain practices refer some files and keep some within the firm, which raises the question as to how to define what constitutes brokerage services and when disclosure of such practices in advertising could / should be required.

(v) Referral Fees

Should the Law Society:

o Ban up-front flat referral fees on contingent fee matters?

o Limit the referral fees that may be charged as a percentage of the ultimate fee in contingent fee and other matters?

o Require referees to fully disclose their standard referral fee arrangements?

o Require the client, the referrer and the referee 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?

o 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?

Up-Front Referral Fees

37. Some submissions expressed the view that up-front referral fees are a business transaction between the referrer and referee and should not be banned.
38. However, several submissions expressed support for a ban of all up-front referral fees. Charging up-front fees, it has been suggested, may not align the interests of the referring licensee and the receiving licensee, and also adds economic pressure on counsel which potentially compromise the quality of service the counsel is then able to provide.

Referral Fees Generally

39. There were nuanced and divergent submissions on issues related to the use of referral fees in general.

Expanding Referral Fee Arrangements to Non-Licensees

40. One individual suggested that referral fees should be permitted to be paid to non-licensees.

Support for Referral Fee Arrangements

41. Some submissions favoured the use of referral fees for a variety of reasons, including the following:

- a. The rules are clear and sufficient;
 - b. Paid referrals can align the interests of the licensee and the client;
 - c. Paid referrals for sole and small lawyers provide the same benefit that lawyers in a large firm receive from internally transferring matters;
 - d. Paid referrals help sole and small lawyers: For some licensees, particularly sole and small practitioners, paying for referrals is a vital way to attract business. Moreover, a ban may disproportionately burden sole and small practitioners, and as equity seeking groups are more likely to be in sole practice, this raises equity-related concerns;
 - e. Freedom of contract of licensees: According to some, licensees (who are sophisticated parties) should be able to make referral arrangements and should not be subject to additional Law Society regulation, as long as the referrals do not increase the cost to the client. As one organization put it, payment of a referral fee “is a business transaction, nothing more or less”;
 - f. There is no consumer risk: The client in practice does not care about the referral arrangement because it will not add to the cost of the legal services received. Moreover, consumers can choose whether or not to accept the practice, if fully disclosed.
 - g. Paid referrals enhance access to justice:
 - i. According to some submissions, the service of providing a proper referral is, in and of itself, a valuable service. The development of effective systems to identify legal issues and refer prospective clients to licensees is a valuable service, and one that depends on paid referrals.
 - ii. A mass advertising personal injury firm similarly noted that its referral of a wide range of inquiries to competent lawyers serves a valuable access to justice goal.
42. Several licensees submitted that the referral system as currently permitted works well. According to these submissions, there are costs to finding clients. Not every firm, particularly small firms, have the resources to seek business on their own and rely on referrals to maintain a client base. For some licensees, referral fee arrangements are viewed as economically efficient and fair. One firm reported that referral fees had contributed to that firm’s growth.
43. One licensee explained that decisions with respect to the *amount* to pay for a referral fee are complex. The factors considered in negotiating the fee for a particular case include, for example, the complexity of the case, the volume of cases in the office, and staff availability. Certain responses therefore cautioned against regulatory micromangement of this area.
44. Finally, certain submissions highlighted that paid referral fees reduce the incentive for licensees to hold onto cases that they are not competent to handle.

Support for Banning or Capping Referral Fees

45. Others support banning or capping referral fees.
 - (i) *Banning referral fees*
46. Some licensees submitted that referring matters as required is a professional obligation and should not be something for which the referring professional receives payment. Some suggested that the time and effort to refer a matter is typically minimal and does not warrant a fee.
47. Many submissions taking issue with referral fees in general or their amounts were concerned by brokerage practices. One submission described the practice as advertising in order to have a client's issue "sold off" in a manner that is unprofessional and that should be prohibited. Another submission stated that referral fees disempower consumers to make informed choices about their legal representation.
48. One legal organization concluded that permitting referrals to other firms for a fee as long as this is disclosed in marketing materials would be too difficult to enforce and therefore recommends banning referral fees outright (although further consideration of such a rule in the class action litigation would need to be undertaken). It also supported a ban in part because:
 - a. referral fees are a factor driving the increase in volume of advertising in personal injury law and creating an economic incentive for law brokerages; and
 - b. referral fee structures have also negatively impacted the professions, as they discourage co-counsel opportunities, which provide a means to mentor less experienced counsel.
49. One submission put the issue as follows:

We would be very content to see the 15-year experiment with referral fees end, as the negatives outweigh the positives. Referral fees were allowed to provide a public service and to increase access to justice. This goal has not been achieved. If we reflect on the health of the profession in 2000, before referral fees were permitted, and contrast it with the current state of affairs, we can only conclude that the profession was healthier before referral fees arrived. There is no risk that the elimination of referral fees will in any way harm the public or create any limitation on access to justice. We believe the public would be best served with an outright ban on referral fees. To the extent however that the Law Society concludes there is some remaining role for formal referral fees, we would recommend a referral fee cap of 10% of the overall fees generated in the action, coupled with an outright ban on upfront referral fees.

50. The submissions from the insurance industry suggested that referral fees should be banned or made more transparent on the theory that referral fees are a factor driving up settlement costs which, in turn, is increasing insurance costs.

(ii) *Banning flat fees*

51. One consumer organization recommended banning flat fees, on the assumption that such fees create a cost that is ultimately incurred by the client regardless of outcome.

(iii) *Capping referral fees*

52. Several submissions supported a cap on referral fees, with the recommended cap ranging from 5-30%, with different ranges supported as follows:

- 5-10% cap
 - o A law professor noted that excessive referral fees may reduce the net fee to the paying firm to the point that quality of service may be impacted in some cases. He recommended the 5-10% cap. He also recommended changes to, *inter alia*, expressly require that all paid referrals are made solely on the basis of the best interests of the client; expressly prohibit choosing a referral based on the referral fee offered; and requiring the referring firm to identify at least three firms that could competently assist the client, together with service price information regarding each, as well as advantages and disadvantages of each, in order to facilitate client choice.
- 10-15% cap:
 - o Some supported a cap at 10% or 15% of the fee charged on a file as a form of “modest” compensation for referring lawyers without exceeding the value to the client. Some noted that it would also discourage the operation of brokerage firms.
- 30% cap:
 - o One law firm recommended a cap on referral fees of 30% of the net legal fee to promote access to justice for the public and align financial incentives with the goal of referring a matter to a capable licensee at no cost to the client.

Enhancing Transparency Related to Referral Fees

53. Several submissions supported enhanced transparency. As one submission noted, “in any referral situation the net cost to the client – has to be readily apparent and fully explained to the client before the retainer is finalized. If the lawyers / paralegals involved

are unwilling to do this openly – it should cause concern. It isn't rocket science nor should it be. A simple requirement that any and all referral fees be broken out and shown separately ought to do it.”

54. One stakeholder's survey found that over three-quarters of respondents supported requiring licensees to record referral fees paid or received in their financial records in a manner that would allow review by the Law Society. Similarly, a consumer organization noted that such fees “should be recorded as such and clients should be advised before such costs are paid out, as any other disbursement on their account should be, and to whom”.
55. In contrast, one legal organization noted that more information is required as to what use the Law Society would make of data collected before endorsing such a measure.

Other Issues: Paid Referrals from Non-Licensees

56. Certain submissions cautioned that non-licensees are referring cases to licensees in exchange for payment, despite the prohibition against licensees paying referral fees to non-licensees. This practice was reported to be used in various equity seeking communities.
57. The Working Group also received feedback from a therapist who reported a law firm referring their personal injury clients to particular health professionals, and only submitting invoices from the therapists to whom they referred clients.
58. These submissions recommended that the Law Society be more active in addressing licensee arrangements / paid referrals with non-licensees. It was suggested that the Law Society could do more to educate licensees about the prohibition against paying referrals to non-licensees, and should participate in initiatives to educate health care facilities and health care providers about the prohibition through collaborative, interdisciplinary regulatory efforts.

(vi) Contingent Fees

o How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?

o 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?

o How is the Solicitors Act operating in practice?

59. Although the Call for Feedback sought input on the use of contingency fees in all areas, virtually all of the feedback received focused on the personal injury sector. The

submissions noted that the introduction of contingency fee arrangements in personal injury was intended to provide access to justice. As described further below, most submissions addressing this area described issues related to the transparency of contingency fee arrangements, and the costs arising in this model.

Transparency and Potential Disclosure of Standard Arrangements

60. The responses to the Call for Feedback nearly universally confirmed that contingency fee agreements are complex and that enhanced transparency is necessary. The submissions did not generally support disclosure of standard arrangements, although other options were suggested to enhance transparency.

(i) Disclosure of Standard Contingent Fee Arrangements, Including Rates and Disbursements

61. There were divergent views as to whether standard contingency arrangements, including rates and disbursements, should be disclosed. While there was some support for requiring the publication of standard contingency and disbursement arrangements on websites, and one law professor recommending required disclosure of pricing and disbursements of all firms, and disclosing this information to the Law Society, several submissions noted that transparency initiatives alone will not necessarily lead to increased public understanding around fees arising in personal injury matters. Contingency fee agreements are complex documents and simply requiring their publication online would not necessarily sufficiently address issues related to consumer education and empowerment. Moreover, as some law firms, (particularly in remote and rural areas) may not have websites, this requirement could raise accessibility concerns.

62. Several submissions noted that there simply is no standard contingency fee rate. The rate will depend on a range of factors. Moreover, requiring plaintiff firms to publish their fees would risk providing defendants with access to privileged information and a tactical advantage. One consumer group cautioned that there does not appear to be a “usual rate” and that requiring the publication of such a rate could lead to higher prices for consumers.

63. Insurers generally recommend that contingency fee arrangements should be filed with the Law Society, the Court, the Financial Services Commission of Ontario (FSCO) or a ministry within government.

(ii) Other Options

64. Other potential means of enhancing transparency include the following:

a. Public education efforts:

Some suggest that the regulator must engage in greater public legal education efforts around the use of contingency rates. For example, the Law Society could develop brochures for use in law offices that explain the contingency fee system.

b. Licensee education efforts / ongoing monitoring of compliance with the *Solicitors Act*:

It has been suggested that the Law Society could develop educational tools to assist licensees in meeting the requirements under the *Solicitors Act* and pay particular attention to contingent fee agreement practices when conducting spot audits. It could also review contingency fee agreements to monitor levels of compliance under the *Solicitors Act*.

c. Encourage Clients to Compare Rates and Services

Another organization suggested that the Law Society should educate consumers on the importance of meeting with several lawyers before deciding on who to retain. This is a way to compare contingency fee rates and consider different approaches to service delivery.

d. Development of a Standard Form Contingency Fee Agreement Approved by the Law Society

Several submissions expressed support for a standard form contingency fee agreement that would be approved by the Law Society and used by the entire profession. Under this model, consumers could easily compare the cost of legal services between firms.

In addition, a consumer group recommended developing a standard list of potential disbursements and requiring lawyers to discuss specific disbursements before spending funds which would come out of final settlement funds.

The *Solicitors Act* in Practice

65. Certain submissions noted that while there may be difficulties in the operation of the *Solicitors Act*, the introduction of contingency fee arrangements has ensured that there is access to legal services in personal injury.

Gaps in Data

66. Both the Ministry of Finance and insurers expressed concern that there are gaps in the available data, making it difficult to determine how much money in the personal injury

system is being paid to accident victims. There is an incomplete picture as to how the *Solicitors Act* is working as an access to justice tool.

Potential Abuses of the *Solicitors Act*

67. Insurers and defense counsel raise concerns about the *Solicitors Act* being abused. What was established to facilitate access to justice has, according to some, been used by plaintiff personal injury lawyers to improperly and excessively bill clients. Several submissions noted that the troubling facts alleged in the case of *Hodge v. Neinstein*, 2015 ONSC 7345.
68. Insurers expressed concern that a high percentage of total damage awards would go towards legal and other costs instead of directly to the plaintiffs, and suggested that more research is necessary in this regard.

Difficulties in the Treatment of Legal Costs under the *Solicitors Act*

69. Several submissions addressed s.28.1(8) of the *Solicitors Act* and s.6 of the regulations made pursuant to it. These key provisions are as follows:

Solicitors Act, s.28.1(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 the 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 portion of them.

O.Reg. 195/04: Contingency Fee Agreements, s.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.

70. Read together, these provisions indicate that, as a general rule, the legal costs incurred belong to the client under a contingency fee agreement, unless a Court orders otherwise.
71. Plaintiff-side lawyers raised concerns with the current requirements under the *Solicitors*

Act. They note that in some cases, this creates an imbalance and potential inherent conflicts between counsel's interest and their client's interest.¹ For the purpose of settlement, it creates an incentive for the lawyer to treat little of the all-inclusive settlement amount as costs. Some raised the concern that it also creates the risk of lawyers settling cases heading for trial for lower amounts to avoid, as one submission put it "their own economic disaster". They also note that this raises access to justice issues, as injured persons may risk losing the "leverage of taking a matter to trial".

72. To address this issue, plaintiff-side counsel made different recommendations, including the following:
- Set a sliding scale with a maximum contingency fee, increasing the contingency fee from something less than the maximum for cases that settle at stages prior to trial, to a maximum fee for matters that proceed to trial;
 - Permitting a "fees plus costs" model, with a cap on the total percentage fee lawyers may charge in excess of the cost contribution;
 - Amending the *Solicitors Act* and regulations concerning contingency fee rates to consider the total recovery, after deduction of disbursements, rather than distinguishing between damages and legal fees; and
 - Amending the *Solicitors Act* to permit contingency fee retainer agreements based on percentage-of-the-total agreements if the case settles, and costs-plus arrangements if costs are adjudicated by a court or tribunal.
73. Certain legal organizations support the Law Society proposing changes to the *Solicitors Act* and regulations in order to maintain access to justice for modest value cases.
74. In contrast, insurers take a markedly different approach. For example:
- a. One insurer recommends amending s.28.1(8) of the *Solicitors Act* in order to eliminate the ability of lawyers to apply for court approval of contingency fee agreements, including the award of costs as part of the settlement.
 - b. One insurance association submits that "the government should consider the appropriateness of [contingency fee] arrangements to compensate legal representatives for work relating to the no-fault medical and income replacement benefits provided through Ontario's automobile insurance system".
75. The Law Society is also urged by the insurance industry to apply additional resources to ensure high compliance with the current rules governing contingency fee agreements.

¹ One example provided by a legal organization is illustrative: The lawyer and client enter into a 30% contingency fee. The matter goes to trial, where the Court awards \$100,000 in damages and a further \$100,000 for costs. In this situation, the lawyer receives \$30,000, while the client receives \$170,000.

Capping Contingent Fees

76. In light of these issues, several submissions suggested that there should be a cap on contingency fees. Some endorsed amounts under 25%. One insurer recommended a 25% cap as found in New Brunswick, with controls so that this does not become the new floor. Others suggested 33% as proposed in BC and more recently in Ontario by Tim Hudak in *Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016*.² One law firm suggested a cap could be 33% up to trial, and 45% at trial.

Other Options

Use tools already within the Solicitors Act Regulation

77. One insurer suggested that consideration should be given to using tools already provided for in the *Solicitors Act Regulation*.

Simplify the Solicitors Act

78. Several submissions noted that contingent fee arrangements and the *Solicitors Act* requirements are complex. Some encourage the Law Society to work with the Ministry of the Attorney General to simplify the legislation.

Other Factors Requiring Further Consideration

79. A few submissions noted the rapidly changing environment for funding cases. In Ontario, adverse costs insurance is available. This product reduces plaintiff counsel's risk and may reduce the justification for high contingency fees. Third party litigation financing is also available in certain instances. Consideration of potential changes to the *Solicitors Act* may require consideration of other means of seeking to facilitate access to justice, and the relative costs and risks related to these other options.

² Bill 12, *Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016*, online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4123.

TAB 4.6.2

A History of the Consideration of Contingency Fee Rates in Ontario and Approaches in other Jurisdictions

Early Consideration of Appropriate Contingency Fee Rates

1. The notion that contingency fee agreements (“CFAs”) should be capped or otherwise prescribed in Ontario is not new.
2. In July 1992, a Law Society Special Committee on Contingency Fees recommended (and Convocation subsequently approved) a maximum cap of 20%, with party and party costs awarded to the client to go to the lawyer. Notwithstanding the cap, a lawyer would be permitted to apply to court, at the time of entering the CFA for approval to charge a higher contingency fee rate.¹
3. In June 2000, a Joint Committee on Contingency Fees comprised of representatives from the Advocates’ Society, the Canadian Bar Association (Ontario), the Law Society and the Ministry of the Attorney General recommended a 33 1/3 % cap, and that the client alone should be entitled to receive the award of costs. Under this approach the lawyer could apply to court for approval to charge a contingency fee in excess of the cap.²
4. In September 2002, the Professional Regulation Committee again recommended that the maximum contingency fee rate should be capped at 20%, with the lawyer entitled to receive the costs award. The lawyer could apply to court to charge a fee in excess of the cap. However, with the Court of Appeal’s *McIntyre v. Attorney General of Ontario* decision being released thereafter, this proposed approach was tabled.³
5. In October 2002, the Professional Regulation Committee ultimately recommended new rules that did not specify a maximum percentage or require that costs be either included in or excluded from the lawyer’s fee. The rule simply required fees to be fair and reasonable.⁴

The Solicitors Act

6. The *Solicitors Act* did not set a maximum percentage cap. However, costs belong to the client, and a lawyer’s fee cannot exceed the amount paid to the client.

¹ Report to Convocation June 23, 2000, Report from Society’s Representative on Joint Committee on Contingency Fees at para. 14.

² *Ibid.*

³ Report to Convocation on Regulation of Contingent Fees, Professional Regulation Committee, October 10, 2002, at paras. 14-17.

⁴ *Ibid.* at para. 22.

Recent Calls for a Cap

7. There have been recent calls to cap CFA fees. For example:
- In submissions to the Working Group, one insurer recommended a cap of 25%;
 - The Insurance Bureau of Canada recommends a sliding cap;
 - The Hutchison Study similarly recommends that if a fee-multiplier for successful cases is not adopted, then a maximum percentage of 25% may be appropriate;⁵
 - *Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016*, introduced by Tim Hudak, would introduce a 33% cap;⁶
 - *Bill 103, Personal Injury and Accident Victims Protection Act*⁷, introduced by Mike Colle, proposes an amendment to the *Solicitors Act* to cap CFAs in personal injury claims to no more than 15% of the value of the property recovered in the action or proceeding.

Approaches to Caps / Limiting Fees in Other Jurisdictions

8. A comparative approach provides some assistance in considering options. The following are examples from Canada, the United States, Australia and England and Wales.

Canada

9. There are limits for contingency fees in British Columbia and New Brunswick.
10. In British Columbia, CFAs for motor vehicle accident claims are capped at one third of the amount recovered. In all other personal injury / wrongful death claims, the cap is 40% of the amount recovered. There are no other CFA caps.⁸
11. In New Brunswick, there is a CFA cap of 25% of the amount recovered, exclusive of costs, taxes and disbursements, which increases to 30% if the matter proceeds to appeal. If a lawyer and client wish to enter into a CFA with a higher contingent fee amount, they must apply to the Law Society and file a \$150 deposit. An appointed reviewing officer will provide written reasons approving or denying the request.⁹

⁵ Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: <http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf>.

⁶ *Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016*, online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4123.

⁷ *Bill 103, Personal Injury and Accident Victims Protection Act* online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614.

⁸ Law Society of British Columbia, "Lawyers' Fees", online at <https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/>.

⁹ Law Society of New Brunswick, "Contingent Fee Agreements", online at <http://lawsociety-barreau.nb.ca/en/public/contingent-fee-agreements>.

USA: CFAs and Percentage Caps

12. In the United States contingency fees are permitted, but given high damage awards in areas such as medical malpractice, fees have been capped in certain States for personal injury or solely for medical malpractice claims on a flat or sliding basis. Flat fee caps are generally 1/3 of the amount recovered (although in Oklahoma the cap is 50%). Sliding fees range by State, as demonstrated in this chart providing a few examples of sliding caps for medical malpractice claims:¹⁰

STATE	CAP
California	40% of first \$50k, 1/3 of next \$50k, 25% of next \$500K, 15% of amounts >\$600K
Delaware	35% of first \$100k, 25% next \$100K, and \$10% thereafter
Massachusetts	40% of first \$150k, 1.3 of next \$150k; 30% of next \$200k, and 25% thereafter
New York	30% of first \$250k; 25% of second \$250k; 20% of next \$500k; 15% of next \$250k; 10% over \$1.25M

Australia

13. In Australia, while CFAs are prohibited, conditional cost agreements are permitted in certain states. Conditional cost agreements are agreements where payment of some or all of the legal cost is conditional upon the successful outcome of the matter.¹¹ A conditional cost agreement may include an “uplift” fee, an additional amount payable on successful outcome of the matter. However, an uplift fee can only be included in litigation if the lawyer has a reasonable belief that a successful outcome of the matter is likely, and must not be more than 25% of the legal costs payable, excluding disbursements.¹²

England and Wales

14. In England and Wales, following the Jackson reforms, lawyers may enter into conditional fee agreements, where the lawyer can claim costs plus a “success fee”, which can be up

¹⁰ Hyman, David A., Bernard Black, and Charles Silver. “The Economics of Plaintiff-Side Personal Injury Practice”. *University of Illinois Law Review*, vol. 2015, no. 4, pp. 1563-1603, at Table 1, page 1574. Further examples are provided in Table 1 of this article.

¹¹ *Legal Profession Uniform Law*, s 181(1),(6); Western Australia Legal Profession Complaints Committee, “Fact Sheet: Types of Costs and Costs Agreements” (updated 23 May 2014), online: <<https://www.lpbwa.org.au/Documents/Complaints/Information-for-Consumers/Fact-Sheet-Types-of-costs.aspx>>.

¹² *Legal Profession Uniform Law*, s.182(1).

to 100% of the lawyer's regular fees. For personal injury cases, the "success fee" remains up to 100% of the lawyer's regular fees, but is also subject to being capped at no higher than 25% of the damages awarded.¹³

15. Contingency fees (known as "Damages-Based Fees") are permitted such that clients do not pay legal fees unless they are successful in their matter. These are capped at 50% in certain areas, 35% for employment tribunal cases, and 25% on personal and clinical negligence claims. There is no cap for appeal proceedings.¹⁴

Ratio Based on the Net Amount to the Client

16. Another potential option could include, for example, setting a percentage or comparative ratio of the net amount that will be paid from the settlement funds to the client to the gross amount of the lawyer's fees.

Summary of Options to Limit Fees

17. As the above jurisdictional scan indicates, there are a range of approaches taken in different jurisdictions, including:
 - i) A straight cap on the contingency fee percentage;
 - ii) A sliding cap based on the stage of proceedings;
 - iii) Limiting the contingency fee to a multiple of the "normal fee";
 - iv) Permitting a "success fee" that is tied to the "normal fee" and that can only be provided if the lawyer has a reasonable belief that the outcome will likely be a successful for the client (thereby aligning plaintiff counsel screening functions with risk and reward);
 - v) Setting a cap based on a ratio of the net amount that will be paid to a client out of settlement funds to the lawyer's fees; and
 - vi) Setting a cap based on the type of legal matter (ex. Tort, employment).

Potential benefits to limiting legal fees

18. Proponents of a cap generally argue that they "fix" the problem of high legal fees, and make sure that more settlement or awarded amounts end up in the hands of plaintiffs.

Potential risks to limiting legal fees

19. "Fixing" legal fee issues by capping them comes with the risk of creating an imbalance impacting the entire CFA system to the detriment of those who rely on it to be able to access the justice system.
20. Studies have shown that there are important indirect effects to caps. Where there are damage caps, for example, which effectively limit the lawyer's contingency fee amount, the evidence is that this causes lawyers who rely on contingency fees to stop

¹³ *The Conditional Fee Agreements Order 2013*, 2013 No. 689 online at: <http://www.legislation.gov.uk/uksi/2013/689/contents/made>.

¹⁴ *The Damages-Based Agreements Regulations 2013*, 2013 No. 609, online at: <http://www.legislation.gov.uk/uksi/2013/609/contents/made>.

representing certain clients in such cases, and to handle fewer malpractice cases generally.¹⁵ Tort reforms based on caps may “disproportionately reduce contingent fee lawyers’ willingness to represent lower-income groups” due to the lower potential recovery.¹⁶

21. This research is particularly salient to the Ontario experience, as new caps in auto insurance benefits were recently introduced, taking effect on June 1, 2016. The impact of these new caps have yet to be determined. The key changes to Ontario’s Statutory Accident Benefits Schedule (“SABS”) include a reduction in standard medical, rehabilitation and attendant care benefits for non-catastrophic injuries from \$86,000 in total to \$65,000 in total, and a reduction in these benefits for catastrophic injuries from \$2 million to \$1 million.¹⁷

¹⁵ Stephanie Daniels & Joanne Martin, "It is No Longer Viable from a Practical and Business Standpoint": Damage Caps, "Hidden Victims," and the Declining Interest in Medical Malpractice Cases, 17 INT'L J. LEGAL PROF. 59 (2010).

¹⁶ Joanna Shepherd, "Uncovering the Silent Victims of the American Medical Liability System", 67 VAND. L. REV. 151, 154 (2014). While a bodily injury may be identical in two cases, the claim by a lower-income person will be lower than that of a higher-income person if there is a loss of income claim that can be advanced. For the lower-income person, the loss of income is either zero (not working) or lower compared to that of the higher-income person.

¹⁷ Financial Services Commission of Ontario, "Important Changes to Auto Insurance", online: www.fsco.gov.on.ca/en/auto/brochures/pages/brochure_changes10.aspx.