

September 29, 2017

VIA E-MAIL

Malcolm Mercer, Chair
Advertising and Fee Arrangements Issues Working Group
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON
M5H 2N6

Dear Mr. Mercer:

RE: Contingency Fee Arrangements

The Advocates' Society is a not-for-profit association of more than 5,700 lawyers throughout Ontario and the rest of Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, The Advocates' Society's members have a keen interest in the effective judicial resolution of legal disputes.

For the past two years, The Advocates' Society has been keenly engaged in the issues under scrutiny by the Law Society's Advertising and Fee Issues Working Group (the "Working Group"), through attendance at focus group meetings and delivery of written submissions. Most recently, The Advocates' Society made submissions on September 30, 2016 with regard to, *inter alia*, contingency fees. Having now reviewed the Working Group's Report to Convocation of June 29, 2017, The Advocates' Society makes the following submissions in response to the Call for Comment.

Scope of submission

The comments of The Advocates' Society in this letter apply to personal injury litigation, which we understand is the key area of concern for the Law Society. These comments should not be taken to apply more broadly to other areas of law. Areas of law such as class actions, commercial insurance, and subrogation, for example, raise considerations related to contingency fees that have their own unique complexities. In The Advocates' Society's view, contingency fee agreements between lawyers and commercial clients do not require regulation.

Mandatory standard form contingency fee agreement

One of the new safeguards proposed to address concerns about contingency fee arrangements in Ontario is the introduction of a mandatory standard form contingency fee agreement ("CFA").

Mandating the use of a prescribed CFA could ensure clarity and transparency in such arrangements, and facilitate comparison of the cost of legal services being offered. It would also help to ensure that lawyers adhere to the requirements of the *Solicitors Act* (the “Act”) with respect to such agreements.

However, it should be noted that mandating the use of a standard form retainer agreement is completely unprecedented in Ontario’s legal services industry. There is no other field of law where standard form retainer agreements have been imposed.

The Advocates’ Society understands that the precise wording and form of a mandatory standard form CFA is yet to be drafted by the Working Group. That said, we are concerned that imposing a mandatory standard form CFA could have significant strategic implications in cases where the lawyer working on a contingency fee basis is in a position of conflict due to personal financial incentives. For example, in the vast majority of personal injury litigation, the plaintiff’s lawyer is retained on a contingency arrangement while the defendants or their insurers pay their lawyers an hourly rate. As is discussed in more detail below, depending on the structure of the CFA, there may be significant financial incentives for the plaintiff’s lawyer to settle a case before trial that do not exist for the defendants. If the defendants and their insurers and counsel know the terms of the plaintiff’s lawyer’s retainer, it would be open to them to use this information and any incentives created by the structure of the retainer to leverage a settlement of the matter below its fair value. A mandatory standard form CFA may also pose issues with regard to solicitor-client privilege in that it would expose to opposing litigants and their counsel the precise terms of the retainer of the party on a contingency fee. Ordinarily, retainer agreements are privileged.

Overall, in the interests of providing improved guidance to the profession and enhancing transparency and understanding surrounding CFAs, The Advocates’ Society does not necessarily oppose the introduction of a mandatory standard form CFA. However, while a standard form CFA may be appropriate in many cases, it will not be appropriate in every case.

Accordingly, The Advocates’ Society proposes that if a mandatory standard form CFA is introduced, there should also be introduced an expeditious and cost-effective mechanism whereby lawyers who employ CFAs can seek exemption from the use of the mandatory form in a given case in order to avoid the drawbacks that may attach to their use. Alternatively, the mandating of certain provisions for every CFA, as opposed to the implementation of a mandatory standard form CFA in its entirety, may well be sufficient to provide the desired transparency, flexibility, and confidentiality in appropriate cases.

The provision of legal services has always been tailored to the needs of the individual clients, based on the judgment and experience of the legal professional. While The Advocates’ Society recognizes that, with CFAs, oversight in the form of a mandatory standard form CFA may be needed to ensure clients are treated fairly and understand the cost of the services being provided to them, we also believe that such oversight should not deprive the legal professional of the means to exercise his or her professional judgement and depart from the standard retainer when necessary to better serve the client’s interests.

Reforms to the *Solicitors Act*

The Advocates' Society's position on contingency fees was set out in our letter dated September 30, 2016, a copy of which is attached for ease of reference. We maintain our position.

All lawyers have a professional and ethical obligation to act in their client's best interests and provide legal services on a cost-effective basis. This obligation is essential as any fee arrangement between lawyers and clients – whether it is on an hourly rate, block fee, or contingency fee basis – creates the potential for conflict. The hourly model for fees incentivizes thoroughness, potentially at the cost of efficiency. The block fee model incentivizes efficiency, potentially at the cost of work quality. Percentage contingency fees create an incentive to maximize client recovery and minimize inefficiency. In this sense, contingency fee arrangements typically reduce the potential for conflict of interest.

Another important fact to consider is that the vast majority of personal injury settlements involve amounts which are modest relative to the cost of trial. According to a 2014 closed claim study commissioned by FSCO for automobile injury claims, "The average gross payment to claimant was just under \$120,000, while the median payment was \$56,500."¹ A contingency fee system should be designed with these figures in mind.

The LSUC Working Group's call for comment indicates: "The Working Group is considering requesting that amendments be made to the 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."

The Advocates' Society agrees that the Act requires amendment to address "inherent conflicts between the licensee's interest and the client's interest" created by the Act. The Advocates' Society agrees that the Act should require that, when a case settles prior to trial, contingency fees should be calculated as a percentage of the all-inclusive settlement amount, less disbursements. However, we maintain our position that contingency fees should be calculated on a costs-plus basis when costs are adjudicated, such as after a trial, and not as a percentage of the all-inclusive amount. The approach of calculating costs on the all-inclusive amount awarded at trial, less disbursements, will perpetuate the conflict of interest problem faced by lawyers in the vast majority of personal injury litigation under the current legislative framework. Specifically, the lawyer will continue to have a significant financial disincentive to proceed to trial in most cases.

We include here the chart from our previous letter which demonstrates the incentives in a reasonable example case, in which the damages are properly valued at \$100,000. The chart shows how the total recovery is divided between the lawyer and client, with one column

¹ https://www.fSCO.gov.on.ca/en/auto/Documents/Abbreviated-Closed-Claim-Study-Report-2014-08-13.html#_Toc395273819. This study related to 2005 claims data, and there are undoubtedly limitations in the methodology, but it cannot be disputed that most personal injury cases involve amounts that are modest relative to the costs of a trial.

representing settlement and the other column representing trial.² Each row considers different methods of calculating a contingency fee.³

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

The first row shows what would happen if the calculation were based on a “costs plus 15%” contingency fee. This arrangement is prohibited under the current Act and would be prohibited under the Working Group’s proposal. The Advocates’ Society agrees that this type of arrangement should be prohibited if a case settles because only the lawyer benefits if the lawyer negotiates a higher amount for costs. Negotiations often start with offers which are broken down to separately identify the costs component of the settlement, but settlements very often end up being negotiated on an “all-inclusive” basis. This leaves the lawyer in a position to determine how much of the settlement is attributable to costs, and to also keep those costs. This is a conflict. Further, defendants can create an incentive that only benefits the lawyer by offering a high amount for costs, thereby creating a conflict of interest.

That said, a costs-plus arrangement is fair and appropriate if a case goes to trial and costs are adjudicated. With a “costs-plus” arrangement, whether the case goes to trial or not is neutral to the client in that the client will not get less if the case proceeds to trial (assuming the trial outcome is favourable). The lawyer will have a reasonable prospect for being properly compensated for the effort required to do a trial because the lawyer will recover the costs awarded (again, assuming the trial outcome is favourable). This encourages lawyers to proceed to trial if appropriate. If costs are adjudicated, the lawyer does not face the conflict of having to determine the costs portion of a settlement.

² We assume that if the case settles, the defence will pay \$15,000 in costs, and if the case proceeds to trial, the court will award \$100,000 in costs. These are reasonable assumptions about how a modest personal injury case would play out.

³ For simplicity, we have ignored interest, disbursements and HST. This does not impact the conclusions.

The second row of the chart shows what would happen if the calculation is based on a percentage of the total settlement or judgment. This is the arrangement apparently favoured by the LSUC Working Group.⁴ This arrangement prevents a conflict in the event that the case settles, because the settlement breakdown as between damages and costs does not matter. As the vast majority of cases settle, the lawyer will not be in a conflict in determining the amount of the lawyer's fee. However, the lawyer will face a different kind of conflict in the vast majority of cases. Specifically, because the lawyer will not be properly compensated if the case proceeds to trial,⁵ the lawyer will have a powerful disincentive to proceed to trial. In many if not most cases, the lawyer will face the prospect of doing a trial without being meaningfully paid to do so, and thus the lawyer will have a strong incentive to settle, even if the settlement offered is on the lowest end (or worse) of reasonable. We emphasize this important point: *with this arrangement, in the vast majority of personal injury cases, the lawyer will face a conflict of interest in that it will be contrary to the lawyer's financial interests to proceed to trial.* The conflict will become more acute as the case gets closer to trial.

The third row of the chart shows what would happen if the calculation is based on a percentage of the settlement or judgment, excluding costs (*i.e.*, all of the costs go to the client). This is the arrangement required by the current legislative framework. Under this arrangement, the lawyer benefits and the client is harmed if the case settles and the settlement breakdown includes an artificially *low* amount for costs. There is no financial incentive for the lawyer to negotiate for costs. Similarly, the lawyer will again have a powerful disincentive to proceed to trial. This again must be emphasized: *under the current legislative framework, in the vast majority of personal injury cases, the lawyer faces a conflict of interest in that it is contrary to the lawyer's financial interests to proceed to trial.*

The Advocates' Society believes that the regulatory framework for contingency fee arrangements should strive to minimize conflicts of interest, not to create them, and it is clear that the current and the proposed arrangements create a conflict of interest in most personal injury cases in that plaintiffs' lawyers will not want to take cases to trial because they will not be compensated for doing so. Indeed, many if not most counsel would be financially prevented from proceeding to trial in any one case and certainly few could afford to try any number of cases at such a significant financial loss when compared to the hourly rate model. Defendants could take advantage of this conflict because they will know that the lawyer will have this powerful disincentive (or even financial inability) to proceed to trial in modest cases. This is especially so if there is a mandatory CFA as the Working Group is proposing. The defence will know the precise terms of the plaintiff's lawyer's retainer – a matter which until now has been subject to privilege and which most plaintiff's lawyers keep strictly confidential.

The legislative framework governing contingency fees should be amended to require that contingency fees be calculated as a percentage of the total settlement if the case settles, and that they be calculated on a costs-plus basis if costs are adjudicated.

⁴ In order for the compensation to be comparable in the event of a settlement, we have used 26% of the total for this example.

⁵ In this example, the client actually will have an incentive to proceed to trial because the client's recovery will significantly increase in that the client will get to keep 74% of the costs award. The client will actually prefer a long trial.

The Advocates' Society also submits that there should be no cap on lawyer's fees beyond the existing requirement⁶ if the fee is calculated as a percentage of the total settlement,⁷ but lawyer's fees should be capped at a maximum of 15% of the damages recovered if costs are adjudicated.⁸

In the vast majority of cases, such a rule will: (a) safeguard clients; (b) create certainty for clients and lawyers; (c) provide for fair compensation for lawyers; (d) provide incentives which align the interests of lawyers and clients and thereby minimize conflicts of interest.

We understand that, under this proposed model, the lawyer may have an incentive to proceed to the verdict so that costs can be adjudicated if a trial is imminent or in process. In some cases, this might lead to a higher fee for the lawyer than if the case had settled. The Task Force has considered this possibility and believes that it would be a relatively straightforward matter to create powerful disincentives to lawyers who might consider such an inappropriate tactic, without discouraging settlement or permitting conflicts of interest to influence lawyer's actions. The Advocates' Society would be pleased to participate in the development of policies and/or regulations surrounding this concern.

In order for the profession to transition from a costs-plus contingency fee arrangement model to one which is based on a percentage of the total award or settlement, transitional provisions would need to be implemented. The Advocates' Society would be pleased to participate in a discussion around what those transitional provisions may entail.

Disbursements

Regulation of disbursements that lawyers can charge their clients where there is a CFA may also be appropriate, particularly in light of abuses brought to light in recent cases. Specifically, it may be appropriate to prohibit lawyers who have entered into a CFA with a client from charging for items which may be disguised fees, such as administration or file opening expenses.

Similarly, it may be appropriate to prohibit lawyers from charging for items which are properly overhead, such as scanning charges, and to prohibit them from charging excessive amounts for expenses like photocopies. In addition, lawyers should not be able to charge for interest on disbursements incurred by the lawyer if they are also permitted to set the rate of interest to be charged. If this is to be permitted, interest should be charged at a rate determined by regulation. Minimizing or regulating charges of this nature will further facilitate the client's ability to compare lawyer's fees in CFAs.

⁶ The current rules require that "a solicitor who is a party to a contingency fee agreement made in respect of a litigious matter shall ensure that the agreement includes the following: 1. If the client is a plaintiff, a statement that the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement." Section 3, O. Reg. 195/04 under the *Solicitor's Act*.

⁷ If the fee is calculated as costs plus an adjudicated amount, there should be no cap on the overall fee, as costs are often adjudicated at amounts which rival the amounts of an award in modest personal injury cases.

⁸ See the section above regarding the mandatory CFA, which will create transparency and facilitate comparison by clients. The 15% cap where costs are adjudicated will further facilitate comparison by clients.

Safeguards to ensure fees are clear, fair and reasonable

Cap

The Advocates' Society notes that there is already a legislated cap of 50% which applies to contingency fee agreements. The Advocates' Society does not propose a change to this cap at this time.

Independent legal advice

In order to be effective, the system should be designed in such a way that the need for independent legal advice ("ILA") is exceptional. The Advocates' Society is concerned that imposing ILA as a requirement for contingency fee agreements would be problematic and unworkable. The Advocates' Society notes that any requirement for ILA would likely be obviated given that:

- Lawyers would be required to adhere to a mandatory form CFA (if implemented);
- The client always has the right to have costs assessed; and
- There is a procedure for the Court to review CFAs in cases where the clients are most vulnerable (minors and parties under a disability).

It is not clear what information would need to be provided to the lawyer giving ILA. If only the settlement details were provided, counsel providing ILA would likely be unable to appreciate the time and effort expended on the matter. The Advocates' Society believes that effective ILA cannot be provided unless the advising lawyer is provided with details beyond merely settlement figures (e.g. details of the injuries and evidence). But in that case, the profession could see an increase in unfounded lawyer negligence actions. The lawyer giving ILA would be obliged to assess the merits of the settlement (and whether the matter was improvidently settled) rather than just give advice on the fee split. If the lawyer giving ILA determines the case was settled for less than it should have been, this poses an issue for the client. The client would have to determine whether to refuse to proceed with the settlement and face a motion to enforce, or proceed with the settlement in the face of the ILA given and then bring an action in negligence against their lawyer.

It is also unclear when ILA would be required. If the client were sent for ILA after a settlement is agreed upon, the issues above would arise, along with an increase in assessing lawyers' accounts. If the client were sent for ILA before an offer is formally accepted, the negotiation process would be delayed (and the settlement may never come to fruition) because it would require the approval of two lawyers and the client.

Client reporting requirements

The Working Group has recommended that enhanced client reporting requirements be implemented where there is a CFA, including:

- An explanation in the client reporting letter of 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;

- A record of the professional and paraprofessional time spent on CFA matters;
- A report on the amount and value of time spent on the matter in the final account to the client; and
- Advice to the client in the final account of the client's right to apply to have legal fees assessed.

The Advocates' Society agrees that these enhanced reporting requirements can enhance transparency. However, their implementation would impose different client reporting requirements in one practice area (*i.e.* personal injury and insurance) over others. The Advocates' Society emphasizes that regulation of this practice area should not infringe significantly on the freedom of contract between clients and their lawyers, and notes that the most vulnerable among the personal injury client population already have significant protection through the requirement for court intervention in the event of a resolution and/or a dispute regarding the lawyer's proposed fees.

In *Hodge v. Neinstein*,⁹ the Court of Appeal for Ontario noted that there has been apparent widespread non-compliance with the Act. However, non-compliance with the Act does not necessarily result in the charging of fees that are excessive. The *Hodge* case has brought an important focus to the issues and has forced a renewed look at the contingency fee provisions of the Act. As discussed above, The Advocates' Society believes that these provisions are deeply flawed.

Personal injury practitioners provide an important public service. It is vital that they be permitted to structure their agreements with their clients in a way that allows the clients' and lawyers' interests to be better aligned throughout the retainer, including if a trial takes place. The Act must be amended to achieve this goal.

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

Yours truly,



Sonia Bjorkquist
President

Task Force Members:

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 Stephen G. Ross, *Rogers Partners LLP*, Toronto
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⁹ 2017 ONCA 494.

September 30, 2016

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

Juda Strawczynski, Policy Counsel
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON
M5H 2N6

Dear Mr. Strawczynski:

RE: Advertising and Fee Arrangements

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

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

1. Contingency Fees

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

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

¹ R.S.O. 1990, c. S.15.

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

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

To illustrate, we provide an example of a costs-plus arrangement of costs plus 15% of the damages. If a settlement offer for \$100,000 plus \$15,000⁵ for costs is made, the client would recover \$85,000 and the lawyer \$30,000.⁶ If the offer is for \$115,000 all-inclusive, the lawyer is free to characterize the breakdown as \$95,000 for damages and \$20,000 for costs, where the lawyer would recover \$34,250 and the client only \$80,750.

The Advocates’ Society believes that costs-plus fee arrangements are problematic upon settlement. Requiring instead that an agreement be for a percentage of the entire settlement recovery⁷ would remove an inherent conflict and is appropriate when there is a settlement. We will call this a “percentage-of-the-total” arrangement.

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

² See *McIntyre (Estate) v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (C.A.).

³ Sometimes disbursements are included in the all-inclusive number, and sometimes they are separately listed.

⁴ [2015 ONSC 7345](#)

⁵ On settlement, for partial indemnity costs, defendant’s insurers have been frequently prepared to pay fees equal to 15% of the damages, plus disbursements agreed or assessed. For damages over \$100,000, this percentage changes typically to 12% of the total or 15% on the first \$100,000 of damages and 10% of damages above \$100,000.

⁶ In all of our examples, for simplicity, we have ignored disbursements and HST. This does not impact the conclusions

⁷ After disbursements are paid, of course.

⁸ For a reported example, see the *Meiklejohn* case.

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

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

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

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

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

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

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

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

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

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

⁹ [2009 CanLII 29191](#)

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

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

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

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

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

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

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

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

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

2. Referral fees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Marketing of Legal Services

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

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

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

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

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

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

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

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

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

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

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

Yours very truly,



Bradley E. Berg
President

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