Consultation on Contingency Fee Arrangements

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Submitted to: Law Society of Upper Canada Advertising and Fee Arrangements Working Group

Submitted by: Ontario Bar Association

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Table of Contents

Introduction

The Ontario Bar Association ("OBA") is pleased to provide comments to the Law Society of Upper Canada on issues and concerns raised in the Law Society's Advertising and Fee Arrangements Working Group Call for Comment on Contingency Fee Arrangements ("Call for Comment").

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision makers with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

This submission was primarily prepared by members of the OBA Insurance Law section, which comprises approximately 450 lawyers whose practices and clients are directly affected by rules around contingency fee arrangements, including in all areas of personal injury law, both plaintiff- and defence-side. The submission has also received valuable input from lawyers practicing in diverse areas of law, including medical malpractice, class actions, and employment law through the OBA Labour and Employment Law section.

Background

In 2015, the Law Society's Professional Regulation Committee ("the PRC") proposed amendments to the *Rules of Professional Conduct* responding to several advertising issues that had been brought to the Law Society's attention, including the use of endorsements and awards, use of hyperbole, advertising about fee arrangements, advertising that is misleading, and a lack of professionalism.

After receiving feedback on these proposed changes, the PRC determined that further study was required before finalizing any changes to existing advertising and marketing rules. The Advertising and Fee Arrangements Working Group ("the LSUC Working Group") was subsequently established to gain a better understanding of current practices and potential regulatory responses to issues relating to advertising, referral fees, and contingency and other fee practices.

The LSUC Working Group made a series of recommendations in the Third and Fourth Reports to Convocation (in February and April 2017, respectively), primarily with respect to advertising and referral fees. In June 2017, the LSUC Working Group released its Fifth Report to Convocation ("Fifth Report"), providing a status report regarding its work to date on contingency fees and, at the same time, issuing the current Call for Comment.

General Comments

Both the current Call for Feedback and the LSUC Working Group's Fifth Report note the important role contingency fees play in enhancing access to justice. They also note that the LSUC Working Group has received a great deal of information about contingency fee arrangements, including instances of noncompliance with amendments to the *Solicitors Act* (effective October 1, 2004) as they relate to the application of costs to contingency fee arrangements. Even where the requirements of the *Solicitors Act* are followed, the LSUC Working Group notes that they cause confusion, as well as unnecessary conflicts of interest between lawyers and clients.[1]

OBA members participating in this submission are aware of these concerns and agree that additional regulatory action might be warranted to help ensure that contingency fee arrangements can be simplified and structured in a manner that is consistent with overriding concerns respecting access to justice. In striking the appropriate balance, it is critical under the contingency fee regime that lawyers can expect reasonable and predictable compensation for their services, commensurate with the risks associated with contingency-based litigation, while ensuring that clients clearly understand the terms of the arrangement at the time the agreement is finalized. Contingency fee structures and total associated costs must be transparent at the outset and should not be easily rejected after the fact.

The LSUC Working Group has conducted its work regarding advertising and fee arrangements issues in Ontario "primarily in the personal injury sector,"[2] though it has also examined advertising and fees in residential real estate transactions. To that end, this submission seeks to identify the general principles regarding contingency fee arrangements that should inform amendments to the *Solicitors Act*, O. Reg. 195/04 ("the Regulation"), and the *Rules of Professional Conduct* within the personal injury context. This submission also sets out our members' views as to the options that are most likely to be practicable and effective solutions to the issues of concern.

At the same time, OBA members recognize the inherent difficulty in applying a "one-size fits-all" approach to contingency fee arrangements, not only within the personal injury context but across diverse areas of law. Some areas of practice involve inherently higher litigation cost and complexity, and therefore more risk, than others. For example, medical malpractice cases generally require much greater investment (for example, disbursements for expert reports) and entail much greater risk than the common personal injury case. Large institutional clients (for example, in subrogation actions) will likely approach contingency fee arrangements with a different level of sophistication

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[1] Partial indemnity costs typically constitute only a portion of full indemnity costs (in the neighbourhood of 50-60%). In accordance with Rule 1.03 of the *Rules of Civil Procedure*, substantial indemnity costs are approximately 150% higher than partial indemnity costs but are generally only awarded in limited circumstances. Neither scenario usually result in the winning party recovering all of their litigation costs.
[2] Professional Regulation Committee Report: Advertising and Fee Arrangements Issues Working Group, February 2016, Tab 3.6, para. 73.

than individual clients. In class actions, the supervisory function of the court is engaged under the *Class Proceedings Act, 1992* with regard to agreements respecting fees and disbursements. Given the possible impact across different areas of law, widespread changes to the contingency structure should be approached with caution to avoid inadvertent consequences.

Mandatory Standard Form Contingency Fee Agreement

The LSUC Working Group has repeatedly highlighted concern regarding the need for greater transparency of contingency fee agreements, noting that the potential total costs associated with the contingency fee arrangement (as opposed to hourly rates) should be clear to the consumer at the outset.

Our members agree with the LSUC Working Group that contingency fee agreements are complex and that the considerable range of agreements on the market may make it difficult for individual clients to compare services. For this reason, our members support the development of a standardized contingency fee agreement targeted to individual clients in personal injury cases that is relatively brief, written in plain language, and easy to understand. As noted above, it is imperative that clients have a clear understanding of the terms of the agreement at the time they enter into the arrangement. A standardized form may support this additional transparency, as well as predictability and consistency for both lawyers and clients.

Calculating Contingency Fees

The LSUC Working Group has observed that the calculation of the final fee is the "single greatest issue" respecting the operation of contingency fee agreements. As with many of the issues discussed throughout the Working Group's examination of advertising and fees issues, a significant element in the regulation of contingency fees lies in the mechanisms of calculation. Contingency fees are currently regulated through the *Solicitors Act*, the related Regulation, and professional conduct requirements. In particular, the *Solicitors Act* and the Regulation provide detailed explanation regarding the form and conduct of contingency fee arrangements.

As noted by the Court of Appeal in *Hodge v. Neinstein*, however, the complex language of the *Solicitors Act* has created confusion for lawyers, clients, and the courts "for many years."[3] On balance, our members agree with the LSUC Working Group's view that "the current requirement that legal costs belong to the client has had unintended consequences," in terms of the reality of the litigation process, the complexity of the contingency fee calculation, and in the creation of unnecessary conflicts of interests between lawyers and clients. As the Fifth Report notes, this is particularly true at the settlement negotiation stage, when the rule that legal costs "belong" entirely

[3] *Hodge v. Neinstein*, 2017 ONCA 494, para. 12.

to the client contributes to the misalignment of lawyer and client interests, as well as to clients' misunderstanding at the time of settlement of what net amount they will receive.

Our members agree that the calculation of contingency fees should be simplified in order to improve transparency and predictability for lawyers and clients, and support the LSUC Working Group's proposal that contingency fees be calculated based on a percentage of the total amount offered on settlement, less disbursements.

Our members agree that the current *Solicitors Act* requirements create inherent difficulties in ensuring that clients with certain kinds of matters – those with a high likelihood of requiring a trial, but a modest potential for recovery – are able to access the justice system to pursue their claims. These cases require careful consideration to ensure that lawyers are reasonably compensated for their efforts in risky situations on behalf of litigants who generally cannot afford to retain a lawyer.

Our members agree with the LSUC Working Group that the proposed all-in method of calculating contingency fees may not go far enough to ensure that client and lawyer interests are aligned in these matters that proceed to trial. The unavoidable reality is that trials are expensive, complex, and extremely high-risk, and that lawyers incur considerable expense both in the preparation and in the conduct of a trial. In these cases, the cost of bringing a matter to trial often exceeds what one can reasonably expect to recover in damages. Moreover, assuming a successful result in the outcome – far from a certainty, in most cases – the amount that will be recovered in damages and costs remains unknown until the verdict, and indeed the appeal. In the interests of access to justice, lawyers must have an incentive to take on these types of cases.

In an attempt to illustrate some of these challenges, we have provided two examples of low-recovery matters requiring a trial. We note however that these are just two examples among many, all with unique facts and diverse ranges of possible outcomes.

In the first example, assume that following trial, $75,000 is awarded in damages while $60,000 is awarded for costs exclusive of disbursements.[4]

	Lawyer recovers	**Client recovers**
30% contingency arrangement	$22,500, being 30% of the $75,000 damages award	$112,500 (70% of the $75,000 damages award – $52,500 – plus $60,000 in costs)
All-in calculation	$40,500, being 30% of the total amount of $135,000 ($75,000 in damages plus $60,000 in costs)	$94,000, being 70% of the total amount of $135,000

[4] See the damages and costs awards in *Gardner v. Giovinazzo*, 2005 CanLII 34805 (ONSC), although numbers have been rounded to simplify the calculations.

Neither the contingency fee arrangement nor the all-in calculation would appear to be sufficient to permit the access to justice such a case would require. In other words, few lawyers will be prepared to fund the disbursements and carry the matter for three to five years through the trial for this kind of return, given the very real risk of no recovery at all. In both cases, the lawyer's recovery is well below the partial indemnity costs awarded by the court.

As a second example, assume that $65,000 is awarded in damages, while costs are awarded in the amount of $25,000.[5]

	Lawyer recovers	**Client recovers**
30% contingency arrangement	$19,500, being 30% of the $65,000 damages award	$70,500 (70% of the $65,000 damages award – $45,500 – plus $25,000 in costs)
All-in calculation	$27,000, being 30% of the total amount of $90,000 ($65,000 in damages and $25,000 in costs)	$63,000, being 70% of the total amount of $90,000

On the contingency fee arrangement, the lawyer's recovery is below the partial indemnity costs awarded by the court, while on the all-in calculation, it is slightly higher. Moreover, these examples do not account for the significant disbursements which must be incurred in order to successfully bring a matter to trial. Again, few lawyers will be prepared to take on this risk. These scenarios illustrate the difficulty in moving these actions through to trial without a reasonable economic basis or expectation that lawyers will be able to recover their trial-related expenses or for their work over three to five years, especially having regard to the risks of losing the case. It is of considerable significance that, where the plaintiff cannot retain a competent lawyer, the only option is to accept a defendant's final settlement position, which in practice can result in little or no compensation.

As a potential solution to this type of problem, the LSUC Working Group could consider supporting the ability to recover partial indemnity costs plus a percentage of the damages where a matter proceeds to trial. This model would ensure compensation for the efforts required to take matters to trial, thereby ensuring access to justice in these types of cases.

Take once more the first scenario, where damages are awarded in the amount of $75,000, while $60,000 is awarded for costs. Assume for the purposes of this exercise that the lawyer will recover 15% of the damages awarded, plus partial indemnity costs.

[5] See the damages and costs awards in *Henhawk v. Brantford (City)*, 2006 CanLII 84474 (ON SC), although numbers have been rounded to simplify the calculations.

	Lawyer recovers	Client recovers
30% contingency arrangement	$19,500, being 30% of the $65,000 damages award	$70,500 (70% of the $65,000 damages award – $45,500 – plus $25,000 in costs)
All-in calculation	$27,000, being 30% of the total amount of $90,000 ($65,000 in damages and $25,000 in costs)	$63,000, being 70% of the total amount of $90,000
Costs plus 15% arrangement	$71,250, being 15% of the $75,000 damages award – $11,250 – plus $60,000 in costs	$63,750, being 85% of the $75,000 damages award

And the second scenario, where damages are awarded in the amount of $65,000, while costs are awarded in the amount of $25,000, again assuming that the lawyer will recover 15% of the damages awarded, plus partial indemnity costs.

	Lawyer recovers	Client recovers
30% contingency arrangement	$19,500, being 30% of the $65,000 damages award	$70,500 (70% of the $65,000 damages award – $45,500 – plus $25,000 in costs)
All-in calculation	$27,000, being 30% of the total amount of $90,000 ($65,000 in damages and $25,000 in costs)	$63,000, being 70% of the total amount of $90,000
Costs plus 15% arrangement	$34,750, being 15% of the $65,000 damages award – $9,750 – plus $25,000 in costs	$55,250, being 85% of the $65,000 damages award

It is true that the first scenario reflects the reality that under this approach there is potential for lawyers, in being compensated for their costs and a percentage of recovery, to receive a sum total in excess of the client's recovery. While this is appropriate in these type of situations, two supporting principles are essential. First, the percentage of damages recoverable in addition to partial indemnity costs could in some cases be lower than a standard contingency fee percentage to ensure that the alignment of client and lawyer interests during settlement negotiations is protected. Second, it is critical that the client have a clear understanding of the implications of the arrangement as the route to access to the justice system and potential recovery. Transparency and full disclosure regarding potential outcomes, as best can be anticipated, are essential.

This scenario raises the question of whether a similar approach would be appropriate for other steps of the proceeding where costs are adjudicated by a court or tribunal, such as summary judgment motions or appeals. Similarly, any approach seeking to distinguish between the calculation of a contingency fee based on a settlement offer and an adjudicated cost award will need to address cases that settle mid-trial. We anticipate that further consultation will be required on both these issues to ensure consistency and a balancing client and lawyer interests.

Any new approach must recognize the reality that the risk for any plaintiff, and that of their lawyer, on any given matter on contingency can change quickly and significantly as the lawsuit progresses. Moreover, as noted above, it is difficult to anticipate what amount (if any) will be awarded in terms of damages and costs until the verdict. In the final analysis, the underlying goal must be to ensure that clients clearly understand the terms of the agreement while achieving reasonable compensation for lawyers' trial costs and recovery for clients.

Calculating Contingency Fees in the Employment Law Context

Special mention about the calculation of contingency fees in the employment context is warranted, and highlights some of the unique considerations regarding contingency arrangements in this area of law. From time to time contingency fee agreements are drafted in such a way as to allow recovery of the greater of counsel's hourly rate or a percentage contingency fee on final disposition, whether by way of settlement or court order. While this practice does not appear to be expressly prohibited by the *Solicitors Act* or Regulation, it is suspect on a contextual reading as it appears to eliminate the shared risk that the contingency fee arrangement is meant to reflect.

In addition, some clarity may be warranted in the employment context with respect to the practice of contingency fees calculated in part based on amounts obtained by the client prior to the lawyer's involvement with the file. Take the following example: a client approaches a lawyer with an offer of three months' severance, and the lawyer assists the client to obtain a package of six months' severance, plus $10,000 in general damages. The contingency fee should be calculated only with respect to the amount that the lawyer helped recover; in this example, with reference to the three additional months – not the total six months – plus the $10,000 in damages.

Both of these issues could potentially be addressed by standardized language in a mandatory contingency fee form.

Safeguards

Percentage Cap

The LSUC Working Group is considering imposing a percentage cap as a means of ensuring that contingency fees are fair and reasonable.

Our members note the potential unintended consequences that could flow from a cap on contingency fees that is arbitrary or too low. We also question whether a cap could accurately reflect the reality that every matter involves a different level of risk, and indeed that the risk fluctuates periodically throughout the course of the proceeding.

As noted in the Working Group's Fifth Report, currently a wide range of contingency fee rates are being charged in the marketplace, with numerous factors causing these rates to vary widely,

including the risk involved, the type of claim being litigated, and the experience of the lawyer. Any proposed cap on contingency is impossible in the context of current market-driven fees and access to justice concerns if we are to ensure that we do not create additional barriers to the justice system for litigants, primarily those with high-risk, modest-recovery cases.

In the Fifth Report, the Working Group notes that if a cap on contingency fees were imposed, "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." Our members concur that if a cap were imposed, the ability to bring a joint application would be essential, though challenges around practicality and timing are still anticipated. For example, were a lawyer to receive a file just prior to the expiration of the applicable statute of limitations, or just prior to trial because of a previous lawyer's decision to be removed from the record, there may not be time to bring a motion for judicial approval of a contingency fee above the set limit. One potential solution could be to allow the client and lawyer to agree to a fee above the limit, subject to subsequent judicial approval, although this scenario involves additional complications and uncertainty for both clients and lawyers. Rather than presenting a solution, a cap is ultimately more likely to result in additional difficulties and should be avoided.

Independent Legal Advice

The LSUC Working Group is considering requiring independent legal advice (ILA) before a client agrees to the payment of legal fees "in certain circumstances," though is not clear from the Fifth Report at what stage of the proceeding ILA would be required and in what circumstances.

Without further details it is difficult to assess the feasibility of the proposal and, in particular, how mandatory ILA would improve access to justice. Our members express caution that making ILA a prerequisite to the client's receipt of settlement funds could act as a genuine barrier or delay to what often constitutes a very significant payment to the client. We also question whether such a requirement would put the onus on the client to pay for ILA from a second lawyer, where the first lawyer is already working on contingency. It is not clear why this extra cost to the client is justified.

Finally, our members note that clients always have the right to a second opinion in the event of a disagreement, as well as the right to have legal accounts assessed. It is unclear what outcomes a mandatory requirement for ILA would achieve that are not already accomplished by these tools.

Enhanced Client Reporting Requirements

The Working Group is considering enhancing the transparency of contingency fee agreements through a variety of new client reporting requirements, including

- requiring lawyers to explain in the reporting letter the basis for the fee by reference to the agreed percentage under the contingency fee agreement, as well as the factors used to generally consider the reasonableness of the fee; and
- advising the client on the final account of the right to apply to have the legal fees assessed.

We note that the contingency fee agreement is already required by the Regulation to contain some of this same information, including a statement setting out the method for calculating the contingency fee, as well as the client's right to have the court review and approve the lawyer's bill. Our members agree that the proposed requirements regarding the reporting letter could support enhanced transparency for clients, provided this is done without undue administrative burden for lawyers.

Reporting the Amount and Value of Time Spent

The LSUC Working Group is considering requiring that a lawyer disclose to the client the amount and value of the time actually spent on the matter at the lawyer's agreed hourly rates, either before the payment of legal fees or on the final account to the client. The LSUC Working Group is considering this measure as a way to enhance transparency and client understanding of the cost of the services provided.

The Regulation currently requires that a contingency fee agreement include an acknowledgment that the lawyer and client have discussed other methods of retaining the lawyer, including on an hourly rate basis, and that the client has been advised of their ability to compare rates as between different solicitors. It would be appropriate for any mandatory standard form contingency fee agreement retain these requirements, so that the client has a clear understanding of the advantages and disadvantages of the contingency fee arrangement.

However, it is not clear how requiring disclosure of the fees on an hourly rate basis as suggested by the LSUC Working Group would advance the central goal of ensuring that clients clearly understand the basis of the contingency fee. From the client's perspective, the main advantage to the contingency fee agreement is the more flexible approach to the payment of legal services, though the tradeoff for this arrangement is that the risk of litigation is shifted from the client to the lawyer. The lawyer shoulders the burden of financing the matter for the client until the case is resolved.[6] It is unclear how the proposal by the LSUC Working Group will take into account the often considerable risk incurred by the lawyer in taking the matter on contingency, without introducing additional confusion and room for dispute.

Conclusion

OBA members are keenly interested in ensuring that clients have a clear understanding of the options available to them when engaging legal services. We thank the LSUC for this opportunity to identify the general principles we feel should inform any reforms. We believe that our members' views set out above describe the options that are most likely to be practicable and effective

[6] See comments from the Attorney General's Joint Committee on Contingency Fees in *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ONCA).

solutions to the issues outlined, while protecting the overriding goal of advancing access to justice for litigants.