



Law Society of Ontario
Advertising and Fee Arrangements Working Group
Call for Comment: Title Insurance Practices

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Submitted by: The Ontario Bar Association



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Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to comment on issues raised in the call for comment (the “**Call for Comment**”) prepared by the Law Society of Ontario’s (the “**LSO**”) Advertising and Fee Arrangements Issues Working Group (the “**Working Group**”).¹

The OBA

Established in 1907, the OBA is Ontario’s largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA provides input and expert advice on a broad range of topics that affect the administration of justice in Ontario, including submissions the Law Society of Ontario, in the interest of the profession and in the interest of the public.

This response has been developed primarily by the OBA’s Real Property Law section, whose members regularly represent the broadest possible range of clients in residential real estate transactions across the province.

Background

The Call for Comment constitutes the latest phase of work by the Working Group of the LSO’s Professional Regulation Committee. In 2016, the Working Group sought further input from the professions with respect to a number of issues relating to licensee advertising, referral fees and contingency fee practices, in addition to the use of title insurance:²

The Working Group received reports of one title insurer having an arrangement whereby law firms could through various means seek to receive “legal fees” as part of the amounts charged to the client for the purchase of certain services. In addition, the Working Group learned that in the past certain suppliers offered law firm staff gift certificates for each purchase, one

¹ Law Society of Ontario, *Ninth Report of the Advertising and Fee Arrangements Issues Working Group*, 28 June 2018, Tab 3.2; online:

<<https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/convocation-june28-professionalregulationcommitteereport.pdf>>.

² Law Society of Ontario, *Report of the Advertising and Fee Arrangements Issues Working Group*, 23 June 2016, Tab 2.2, online: <<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-june-2016-professional-regulation-committee-report.pdf>>.



entry per order into a contest for a chance to win prizes, or possibly even a fee based on the volume of services purchased.³

The Working Group further indicated that it had received reports that some law firms receiving the compensation or other benefits related to the purchases of title insurance and other services would do so “without these practices necessarily being disclosed to the client.”⁴ The Working Group summarized the further input it requested as follows:

How can the Law Society eliminate reported issues with respect to “fees” and related practices with respect to title insurance and other services as described in the report?⁵

In its response to the Working Group, the OBA noted that the existing rules prohibit the receipt of fees and benefits by a lawyer from a title insurer relating the purchase of title insurance, and that the *Rules of Professional Conduct* (the “**Rules**”) and the lawyer’s fiduciary obligations require the lawyer to disclose any compensation or other benefits to the client. The OBA advised that effective enforcement of existing rules is key. The OBA also recommended the Law Society clarify the Rules to provide lawyers with greater certainty with respect to their obligations:

... Rule 3.2-9.6, either in its express language or commentary, may be clarified to explicitly include fees paid by the title insurer to the lawyer that pay the lawyer for legal services provided to the insurer (i.e. the “examining counsel” and similar fees).

In addition, the Law Society should consider strengthening enforcement of existing rules and/or clarifying penalties for breaches of Rule 3.2-9.5 and Rule 3.2-9.6.⁶

The Working Group now seeks further information with respect to modern title insurance practices.

³ Working Group Report, June 2016, at p. 8.

⁴ Working Group Report, June 2016, at p. 21.

⁵ Working Group Report, June 2016, at p. 23.

⁶ OBA, [Consultation on Advertising and Fee Arrangements](#), 2016 at p. 6.



Title Insurance in Residential Real Estate Transactions

The Law Society's Working Group is examining practices involving the payment of fees and offering of benefits by title insurers to real estate lawyers or their staff and is considering whether additional regulatory measures involving these practices are required.

Title insurance is used in most arm's length residential real estate transactions in Ontario. Accordingly, the rules respecting title insurance in Ontario affect all real estate practitioners who are called on to advise their client on title insurance options and to purchase title insurance on behalf of their clients.

Our members have emphasized that any rules with respect to title insurance must be clear and the Law Society's enforcement of these rules should be consistent.

The LSO's *Rules of Professional Conduct* specifically address the use of title insurance in real estate practice in Rules 3.2-9.4 to 3.2-9.7 under the heading "Title Insurance in Real Estate Conveyancing" (the "**TI Rules**"). Rule 3.2-9.5 states:

"A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client."

Rule 3.2-9.6 states:

"A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage."

While these Rules explicitly prohibit compensation for recommending a specific title insurance product and prohibit the receipt of fees or commissions in respect of any title insurance coverage, some title insurers provide compensation to lawyers for providing the certificate of title required under Ontario Regulation 69/07⁷ of the *Insurance Act*.⁸ As set out in the Call for Comment:

At the operational level, based on the rules, the Law Society has taken the view since at least the late 1990s that the lawyer is not prohibited from accepting fees from a title insurer for services actually rendered to the title insurer.

⁷O.Reg. 69/07, s. 1.

⁸ R.S.O. 1990, c. I.8.



However, the lawyer must disclose such fees and relationship to all clients in the retainer.⁹ (Emphasis in original)

Consistent with our previous submission, it is our view that Rules 3.2-9.5 and 3.2-9.6, either in their express language or commentary, should be clarified to explicitly address fees paid by the title insurer to the lawyer for legal services provided to the insurer.

As stated in our previous submission, the lawyer's fiduciary duty to the client and the *Rules of Professional Conduct* require disclosure any fees or compensation received from a title insurer relating to the purchase of title insurance.¹⁰ Of particular concern is the Working Group's reporting that "for audits conducted in 2016 and 2017, among audited firms who handle title insured real estate transactions and receive fees from a title insurer, approximately one third were found not to have disclosed the fees in writing to their clients."¹¹

The TI Rules and the existing disclosure requirements relating to fees and benefits received by real estate lawyers from title insurers should be both clarified and enforced, and our submission provides recommendations on this with respect to existing disclosure requirements (see part E). The Commentary for Rules 3.2-9.5 and 3.2-9.6 emphasizes the importance of full disclosure considering the lawyer's fiduciary obligations to the client:

[1] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.¹²

It is our view that the lawyer's role as fiduciary is of paramount importance and any fees or benefits flowing from title insurers to real estate lawyers must be considered in light of the lawyer's fiduciary obligations.

A. Rules of Professional Conduct

How are Rules 3.2-9.4 to Rule 3.2-9.7 operating in practice? Are parts of these rules difficult to interpret or practically apply? Do they reflect the realities of real estate practice?

⁹ Call for Comment at p. 3. Emphasis in original.

¹⁰ See note 6.

¹¹ Call for Comment at p. 3.

¹² Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014, amendments current to 25 January 2018), online: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>>, commentary to rule 3.2-9.6.



Any change to the TI Rules should consider the realities of modern real estate practice.

As noted above, the TI Rules do not explicitly address fees paid by the title insurer to the lawyer for services provided to the insurer.

Rule 3.2-9.4 requires a lawyer to assess all reasonable options to assure title and advise the client that title insurance is not the only option available to protect the client's interests. Most practitioners discharge this obligation by outlining the client's options in an initial letter and/or phone call. In the experience of our members, clients generally defer to their lawyer's recommendations regarding title insurance, given the complexity of the subject matter and because title insurance is a practical necessity in the vast majority of arm's length residential real estate transactions.

B. Title Insurance Recommendations

Do you routinely recommend a particular title insurer? If so, why?

Many real estate lawyers routinely recommend the same title insurer to clients, mainly because of familiarity with the title insurer's search requirements, coverage, policy wording and claims handling. Many firms also integrate a title insurer's online/electronic or other order processes with their own workflow and software, and ordering from that title insurer leads to efficiencies and reduced overall cost for the client. Our members have advised that the various title insurers have similar standard covered risks and exclusions for title and off-title issues in residential real estate transactions.

Where there are meaningful differences in the coverage and premiums offered by the different title insurers, our members have advised that they are knowledgeable about the differences and will recommend a different title insurer than the one normally used by their office. In some cases, a title insurer may insure a transaction that another insurer has declined. In other cases, a title insurer may be willing to "insure over" an issue that another title insurer will not insure or will not insure without additional due diligence. Our members have emphasized that real estate lawyers endeavor to recommend the best title insurance policy for the transaction and that title insurance recommendations are made in the client's best interests.



C. Fees offered by Title Insurers

Are you aware of fees being offered by title insurers for services?

- *For what services are fees being offered?*
- *How much are the fees / what is the range of the fee per transaction?*
- *If you accept fees what is the process for disclosing them to your client? What do you do with the fees? Does the fee affect the amount charged to your client?*
- *If you do not accept the fee, why do you decline it?*

Our members are aware of fees, typically ranging from \$25.00 to \$150.00 per policy, paid by title insurers to lawyers for providing a certificate of title required under Regulation 69/07 of the *Insurance Act*. If the lawyer does not accept such a fee, the title insurer provides a corresponding discount on the policy premium price for the client.

Where the lawyer accepts the fee, it may be explained to the client when giving the initial quote, in the retainer letter, on the statement of account, at the meeting with the client, and/or in the final reporting letter. It may not be certain at the outset of the retainer which title insurer will be used as a title insurance policy cannot be obtained before the lawyer has completed various searches and received mortgage instructions. Where the fee is explained in the initial quote or retainer letter, the lawyer can advise that a given title insurer may pay the lawyer a fee for services if the client uses that title insurer on the transaction.

D. Benefits Offered by Title Insurers

Are you aware of benefits being offered by title insurers for arranging title insurance policies?

- *What benefits are offered (e.g. discounts for volume of policies issued, gifts, referral payments, incentives to staff including gift cards and contest opportunities, waiver of deductibles or insurance levies on errors and omission claims etc.)?*
- *How much is the benefit / what is the range of the benefit per transaction?*
- *If you accept such benefits, what is the process for disclosing them to your client? What do you do with the benefit? Does the benefit affect the amount charged to your client?*
- *If you do not accept such benefits, why do you decline them*

The Law Society is seeking input on benefits received from title insurers and has identified various benefits such as gifts, office stationary/supplies and contest opportunities. We were not able to identify the value and prevalence of such benefits.



It is unlikely that certain non-monetary benefits offered by some title insurers, such as office stationary and educational activities, need to be disclosed as they are unlikely to influence, or appear to influence, the lawyer's choice of title insurer.

E. Existing Disclosure Requirements

Do you think that the existing disclosure requirements should be enhanced? If so, how?

The Commentary on Rules 3.2-9.5 and 3.2-9.6 clearly requires full disclosure in all financial dealings and prohibits the acceptance of any hidden fees by lawyers.

If the LSO maintains its position that that the lawyer is not prohibited from accepting fees from a title insurer for services rendered to the title insurer, the existing disclosure requirements should be clarified in the Rules or the commentary to the Rules.

The TI Rules or commentary should clarify what is required for "full disclosure." Where the lawyer is receiving, directly or indirectly, a fee, payment, or other compensation from the title insurer, the lawyer should disclose the following information in writing to the client:

- the amount of the anticipated fee or payment that the lawyer will receive;
- that the lawyer has the option of declining the fee or payment; and
- that the title insurance premium may be lower for the client if the lawyer declines such fee or payment.

The timing of any disclosure is also relevant. Our members have expressed the view that disclosure must be made in a manner and at a time that permits the client to make informed decisions and act on the information provided if the client so chooses. For example, disclosure on the eve of closing may be problematic for a client who objects to the lawyer's fee arrangement with a title insurer.

The LSO should clarify the TI Rules and its disclosure requirements with respect to the benefits that may be received by lawyers from title insurers.

F. Disclosure and Consent

Do you think clients should consent in writing to payment of a fee or conferral of benefits to their lawyers by title insurers? How would this work in practice?

Requiring the client to sign an acknowledgment or consent regarding the payment of a fee or conferral of benefits to their lawyers by title insurers may facilitate disclosure to the client. The signed consent document should include the required disclosure information set out in Section E above.



G. The Effect of a Ban on accepting Fees and Benefits

What do you think about banning the acceptance of fees and benefits from title insurers? How would this work in practice? What would the effect of a ban be?

The lawyer's role as fiduciary is of paramount importance and any fees or benefits flowing from title insurers to real estate lawyers must be considered in light of the lawyer's fiduciary obligations.

Currently, if the lawyer does not accept a fee from the title insurer for providing the title insurer a certificate of title required under Regulation 69/07 of the *Insurance Act*, the title insurer provides the client a corresponding discount on the policy premium. In the event of a ban, the lawyer would still need to provide a certificate of title to secure title insurance and complete the transaction on behalf of the client, and lawyers who currently accept fees from the title insurer may increase their legal fees to the client to compensate for lost income. It is assumed that the market dictates the cost of the policy, and that the premium will ultimately reflect the true cost of the policy and coverage provided to the client.

H. Legal Services Coverage in Title Insurance Policies

Are you aware that legal services coverage offered by some title insurance policies benefit the lawyer by waiving deductibles and insurance levies? If so, do you explain the potential benefits to the client and/or to you to the client?

Our members are aware that some title insurers offer different kinds of legal services coverage. Legal services coverage benefits the client who may not need to sue the lawyer in the event of loss caused by lawyer negligence and may instead make a title insurance claim to obtain compensation. The lawyer benefits as well, as he or she may not need to report a claim to his or her malpractice insurer and potentially pay higher deductibles and insurance levies in the event of a successful negligence claim. We note that the benefit to the lawyer is not at odds with the client's interests and coincides with the benefit to the client.

Our members advise that if such legal services coverage is offered, the lawyer will explain to the client the potential benefit to both client and lawyer. As noted above, lawyers consider the requirements of the particular transaction when recommending title insurance. Legal services coverage, when it is considered, is just one of the various factors contemplated. Some title insurers charge an additional fee for legal services coverage and, as noted above, it is assumed that the cost of the policy ultimately reflects the coverage provided to the client.

Conclusion

The OBA appreciates the opportunity to provide these submissions and looks forward to any opportunity to discuss them in further detail with the LSO.



Appendix A – The LSO Consultation Questions

- a) How are Rules 3.2-9.4 to Rule 3.2-9.7 operating in practice? Are parts of these rules difficult to interpret or practically apply? Do they reflect the realities of real estate practice?
- b) Do you routinely recommend a particular title insurer? If so, why?
- c) Are you aware of fees being offered by title insurers for services?
 - i) For what services are fees being offered?
 - ii) How much are the fees / what is the range of the fee per transaction?
 - iii) If you accept fees what is the process for disclosing them to your client? What do you do with the fees? Does the fee affect the amount charged to your client?
 - iv) If you do not accept the fee, why do you decline it?
- d) Are you aware of benefits being offered by title insurers for arranging title insurance policies?
 - i) What benefits are offered (e.g. discounts for volume of policies issued, gifts, referral payments, incentives to staff including gift cards and contest opportunities, waiver of deductibles or insurance levies on errors and omission claims etc.)?
 - ii) How much is the benefit / what is the range of the benefit per transaction?
 - iii) If you accept such benefits, what is the process for disclosing them to your client? What do you do with the benefit? Does the benefit affect the amount charged to your client?
 - iv) If you do not accept such benefits, why do you decline them?
- e) Do you think that the existing disclosure requirements should be enhanced? If so, how?
- f) Do you think clients should consent in writing to payment of a fee or conferral of benefits to their lawyers by title insurers? How would this work in practice?
- g) What do you think about banning the acceptance of fees and benefits from title insurers? How would this work in practice? What would the effect of a ban be?
- h) Are you aware that legal services coverage offered by some title insurance policies benefit the lawyer by waiving deductibles and insurance levies? If so, do you explain the potential benefits to the client and/or to you to the client?