Consultation on Advertising and Fee Arrangements

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

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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 Report ("the Consultation Report").[1]

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 jointly prepared by members of the OBA Insurance Law and Real Property Law sections, which together comprise almost 700 lawyers whose practices and clients are directly affected by rules around advertising and fee arrangements, including personal injury litigation and residential real estate transactions.

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 and held focus group meetings in the Spring of 2016 to gain a better understanding of current practices and issues.

[1] Advertising & Fee Arrangements Issues Working Group Report, Tab 2.2 of the Report to Convocation June 23, 2016.

The LSUC Working Group subsequently issued the current call for feedback about potential regulatory responses to issues relating to advertising, referral fees, and contingency and other fee practices.

At the conclusion of this consultation, the PRC is expected to receive feedback from the LSUC Working Group, and then report to Convocation with appropriate recommendations by early 2017.

General Comments

The Consultation Report notes that the nature and volume of advertising for legal services is evolving rapidly, along with the legal services marketplace.

The report also notes that the Law Society has received a great deal of information about fees and advertising issues, including advertising that may be false or misleading and fees that are not transparent and appear to have an impact on the way in which legal services are being provided, including:

- Advertising for legal services with a view to obtaining referral fees
- Use of endorsements and awards that are not objectively verifiable
- Lack of clarity in "all-in" pricing for legal services
- Disproportionate referral fees, both upfront and as a percentage of the result in a contingency fee matter
- Lack of transparency in contingent and referral fee arrangements

OBA members participating in this submission are aware of the concerns outlined above and share the Law Society's view that additional regulatory action might be warranted to help ensure that advertising and fee arrangements are accurate and transparent, and structured in a manner that is in the public interest and maintains the integrity of the profession.

The Consultation Report refers to limited annual statistics on the number of advertising complaints received and initiated by the Law Society, the approach by the Investigations Department, and provides a general comment that the majority of complaints are resolved based on compliance.

However, our members believe that a better understanding of the Law Society's past experiences enforcing the existing Rules and regulations with respect to fees and advertising is essential to effectively assessing what by-law, rule amendments or other actions are appropriate to pursue. In short, without a strong understanding of the specific ways in which the current Rules and regulations are insufficient, it is difficult to determine the extent to which the drafting, underlying policy, or enforcement of the provisions needs to be addressed.

With respect to enforcement, our members agree with the LSUC Working Group recommendation that "the Law Society do more to communicate its concerns about these issues and its regulatory responses to them. There is value in greater transparency about the concerns that are raised and how they are addressed as this would provide better practical guidance to lawyers and paralegals."

Based on the preponderance of anecdotal evidence in the report and on advertising and fee information readily available in the marketplace, this submission seeks to identify the general principles that should inform any remedial efforts, and our members' views as to the options that are most likely to be practicable and effective solutions to the problems outlined.

Advertising and Fees – Personal Injury Law

A. Use of Awards & Establishment of Personal Injury Designation

The Consultation Report highlights a concern that some licensees use awards and honours that do not appear to be credible or have merit, and/or cannot be shown to be made on some transparent or objective criteria.

Our members agree with the LSUC Working Group that the public may view awards as a proxy for quality, competence and expertise of a lawyer or a law firm and share a concern that certain types of awards might mislead the public. However, our members also recognize that there may be circumstances in which it is entirely appropriate to reflect meritorious awards and honours received, and that it would be especially limiting to prohibit reference to such in the biographical information commonly found in lawyer webpages.

Our members support the development of approaches that would limit the reference of awards or honours that are likely to mislead the public, and note that there are examples of other jurisdictions in which the criteria for appropriate honours and awards are better particularized, either in the Rule itself, or through accompanying commentary.

For example, Rule 7.1 of the New York Rules of Professional Conduct permits advertisements to include information as to "bona fide professional ratings." Accompanying commentary to Rule 7.1 explains the meaning of "bona fide" as follows:

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

As with many of the issues discussed in the Consultation Report, a significant element in the regulation of awards and honours lies in the mechanisms of enforcement. To the extent that enforceability of these provisions is determined to be impracticable, the Law Society might consider taking a proactive approach of pre-approving awards and honours to determine which are objectively meritorious and relevant and therefore permitted to be referenced in an advertising or marketing materials. We recognize that such an approach could entail a significant investment of resources required to evaluate potential awards and honours. At this time, it is not clear from the Law Society's past experience whether that is indeed warranted, but it may merit further investigation in light of the clear and transparent process that would result.

In addition to the above, our members believe there is merit in the Law Society considering whether to create a personal injury designation within the Law Society's Certified Specialty in civil litigation, since such designation could function as a clear and objective mechanism for the public to use in assessing quality and expertise of individual lawyers.

B. Charging Referral Fees

On balance, our members agreed with the LSUC Working Group view that, "despite current imperfections in practice, referral fees can be used to align licensee and client interest, and provide value to clients". The OBA concurs with the Law Society Working Group's conclusion that the banning of referral fees entirely is undesirable in some respects, and may not be required. Within that framework, there is value in permitting transparently communicated referral fees that are consensual and are aligned with the client's interests. There are, though, distinctions between the merits of up-front referral fees and those that are charged as a percentage of the ultimate fee in contingent fee and other matters.

The Law Society's report posits that charging up-front referral fees in contingent fee matters potentially compromises the quality of service the referee lawyer provides by imposing economic incentives on counsel's decision-making abilities. Our members concur that referral fees structured in this manner should not be permitted.

However with respect to referral fees that are charged as a percentage of the ultimate fee in contingent fee matters, the consensus view of our members is that there is merit in considering whether the Law Society should establish caps on the percentage of the referral fee that may be charged. Such an approach would encourage alignment of licensee and client interests by promoting the best practice of referrals being made to lawyers best suited to a case, rather than referrals being made to the highest bidder. Establishing a cap on the referral fees to be charged would achieve more transparency for consumers and also ensure that referral fees are charged in a manner that operates in the public interest.

C. Identification of Type of License in Advertisements

It is clear that there are significant differences in the qualifications of lawyers and paralegals and the services that they are permitted to offer to the public. Given that paralegals have a limited scope of practice, our members see merit in requiring paralegals practising independently to unambiguously identify themselves as such in advertising and marketing so as to avoid any misperception by the public as to the scope of services that they may provide.

Advertising and Fees – Real Estate Law

D. Advertising & Marketing the Cost of Legal Services – Real Estate "All-In" Pricing

The OBA concurs with the LSUC Working Group's conclusion that transparency and effective communication with respect to fee quotes are important.

With respect to fee arrangements, misleading advertising may be dealt with through enforcement of existing rules. We agree that Rule 4.2-2 of the *Rules of Professional Conduct* provides parameters on how a lawyer may advertise fees. While Rule 4.2-2 does not require the lawyer to specify the amounts of disbursements, lawyers are not permitted to charge clients for disbursements or expenses that were not, in fact, incurred and cannot describe legal fees and operating costs as disbursements [see Rules 3.6-1[2] and 3.6-3[3]].

We agree that when a lawyer quotes an "all in" price that purports to be inclusive of disbursements, the lawyer should clearly indicate any additional legal fees and disbursements that may be payable in addition to the "all-in" fee, regardless of whether these additional amounts ultimately appear on the lawyer's statement of account or the lawyer's statement of trust receipts and disbursements.

The LSUC Working Group should avoid making any recommendation that limits the lawyer's ability to charge reasonable legal fees and recover disbursements, and should keep in mind the following:

1. The complexity and amount of legal work on a real estate transaction cannot always be predicted at the outset of a transaction;
2. Lawyers should not be restricted from charging additional fees when complications arise, in accordance with their agreements with clients;
3. Disbursements are expenses incurred on behalf of the client;
4. The amounts of disbursements incurred on a real estate transaction cannot always be predicted at the outset of the transaction.

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[2] Rule 3.6-1: A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.
[3] Rule 3.6-3: In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

We note that many real estate lawyers provide flat legal fee billing, exclusive of taxes and disbursements, and will provide clients with (1) a reasonable estimate of anticipated disbursements, and (2) an explanation of the circumstances when the flat fee would not apply and/or an explanation of what the fee covers.

The LSUC Working Group should avoid dictating billing structures that may limit the reasonable compensation of real estate lawyers (for example, proposals relating to discounts for an "all cash" transaction, as in para. 58(b)). We note that flat fee billing in real estate law practice tends to result in depressed legal fees, rather than overbilling.

In making recommendations on real estate legal fees and disbursements, the Working Group should:

1. consider the broader goal of enabling real estate lawyers to set fair and reasonable fees that reflect the value of the services provided; and,
2. discourage consumer evaluation of real estate legal services solely based on price considerations.

E. Fees and related practices with respect to title insurance and other services

The OBA concurs with the LSUC Working Group's view that lawyers receiving compensation or other benefits related to the purchase of services such as title insurance, without these practices necessarily being disclosed to the client, likely breach the real estate lawyer's fiduciary duty to the client as well as the Rules of Professional Conduct. The OBA believes that the existing rules already prohibit these fees and other practices compensating lawyers for use of title insurance and other services, and that effective enforcement of the existing rules is key.

However, 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. For instance, upon complaint or discipline, without limiting recourse to other remedies, the *prima facie* remedy in relation to a referral fee or other benefit would be disgorgement of the unauthorized fees or benefits in favour of the client.

Conclusion

OBA members share a keen interest in ensuring that consumers of legal services receive factually accurate, non-misleading information about available services. In our view, a better understanding of the Law Society's past experiences enforcing the existing Rules and regulations with respect to

these problems is essential to effectively assessing what by-law, rule amendments or other actions are appropriate to pursue. Based on the largely anecdotal information available, we have sought to identify the general principles that should inform any remedial efforts, along with our members' views as to the options that are most likely to be practicable and effective solutions to the problems outlined.