



September 30, 2016

**Request for Feedback on Advertising and Fee Arrangements
The Law Society of Upper Canada**

Osgoode Hall
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Via email: jstrawcz@lsuc.on.ca

Dear Working Group Members:

Thank you for providing members of the profession with the opportunity to provide feedback to the Working Group on the important issues of licensee advertising and fee arrangements. The practice of law is evolving rapidly as it attempts to keep pace with the demands of clients who seek clarity and certainty regarding the legal expenses they will incur, while at the same time they are looking for alternatives to hourly billing. The business of law is also impacted by ever-evolving technology and changing norms and mores revolving around communications. The profession has recognized that it is failing to meet the needs of clients, and must look for new ways to provide effective and meaningful access to legal services for all members of society. How the Law Society chooses to regulate advertising and fees for services will necessarily have a forceful impact going to the heart of the business of law.

The Toronto Lawyers' Association is therefore pleased to provide the Working Group with its comments on these important issues. We have been provided with a copy of the submissions of the Federation of Ontario Law Associations, of which we are a member, and the TLA largely endorse FOLA's comments and responses. To the extent that the TLA has any differing views, they are incorporated into our submissions, below.

Advertising and Fees in Real Estate Law

There is no "one size fits all" real estate transaction. Like every other form of commercial transaction, each one is unique. It is therefore a fallacious premise to assume that pricing for real estate transactions can or should be priced uniformly. It is also unreasonable and anticompetitive to impose any form of tariff or fee structure on real estate transactions. The Law Society did away with real estate tariffs decades ago for valid reasons, and now, in a time of heightened competition and with the value of the transactions - and associated liability risks - skyrocketing, it is inappropriate to consider or impose on real estate practitioners arbitrary limits on the way in which they choose to price their services.

In the opinion of the TLA, the more important issue, and the one upon which the Law Society should be focusing, is professionalism in advertising. This includes providing clarity with respect to the legal fees to be charged for the services rendered, and greater

transparency with respect to the nature and associated costs of the disbursements that will be incurred for the real estate transaction. Many members of the public lack the sophistication to distinguish between fees and disbursements, and may be misled by advertising that references fees alone and does not alert the consumer to the fact that they will also be charged for the necessary disbursements that must be incurred to competently complete the transaction.

Contingency Fees

The TLA whole-heartedly agrees with the submissions of FOLA with respect to the need to overhaul the Solicitors Act and Regulations regarding contingency fee agreements. The legislation compels lawyers to prepare agreements that are excessively long and confusing. Rather than providing certainty and clarity to clients, the mandated form of contingency agreement is a monster of complexity. It does not enhance confidence in the legal system but stands as a shining example of how engaging a lawyer can be intimidating and confusing. Particularly at a time when, in the case of personal injury in particular, the client is particularly vulnerable, requiring them to read, understand and agree to the terms of an agreement that goes on for multiple pages is contrary to the objectives of enhancing access to justice and confidence in the legal system. Permitting lawyers to prepare simple and readily comprehensible agreements would improve transparency and access to justice.

That said, the TLA does agree that the terms of the Solicitors Act provide important protections to clients who enter into contingency fee agreements. It is not necessary that those terms be translated into the actual fee agreement, but it is important that licensees know and abide by the terms of the legislation. However, that does not mean that every agreement requires review and approval by the court. To impose such a condition would be antithetical to the objective of access to justice by inserting an additional layer of delay and complexity for the client, and it would add another unnecessary burden on an already over-taxed civil justice system. Rather, as part of the spot audits the Law Society performs (or under the proposed new system of compliance based entity regulation), particular attention should be paid to reviewing how law firms that provide services under contingency fee agreements are in fact charging and collecting those fees. Additional education and practice advisory measures that assist in educating licensees in understanding the acceptable parameters of a contingency fee arrangement would be highly desirable, and well-received by the Bar.

The TLA understands anecdotally that, in practice, some members of the plaintiff's side personal injury bar are entering into contingency fee agreements that may not be in compliance with the Solicitors Act, at the outset. However, we have no information that would support a general assumption that the fees that are ultimately charged by the licensees are in keeping with those agreements, or whether the agreements are modified based upon the ultimate results of the proceeding. We understand that the issue is being considered by the Bench and Bar committee as well as by OTLA, both of which are working towards establishing best practices and precedents. Again, this demonstrates that additional education and enforcement of a best practices regime are the best means of achieving a high level of compliance with the legislation and providing protection to the public.

Personal Injury Advertising

There can be no doubt that advertising is an important part of the business of law in modern society. It can, and should be encouraged, as it allows the public to make more informed choices about the legal service providers they will engage. Advertising also encourages competition, which should also translate to the consumer being more aware of the alternative services and pricing they can obtain. The TLA therefore is of the opinion that professional advertising enhances access to justice and can improve the quality of service provided to the public.

That said, the TLA agrees with FOLA that the Law Society should take an active role in enforcing professionalism in advertising by all licensees. It is important that advertising not be misleading in any respect. Advertising should not make false claims, denigrate other members of the profession or otherwise bring the administration of justice into disrepute. The TLA is of the view that the current terms of the Code of Professional Conduct are sufficient to meet these objectives, but that greater resources may need to be expended to actively monitor advertising, rather than awaiting complaints from the public or other licensees.

The TLA is particularly concerned about misleading advertising by paralegals. As FOLA has identified in its submissions, many paralegals' advertisements are highly misleading – giving the impression that they are lawyers. This becomes even more problematic when the advertisements are directed at immigrant members of the public who may have a less sophisticated understanding of the distinction between lawyers and paralegals in Ontario, and the limitations on practices permitted for paralegals. Indeed if the advertisement is not in either official language, there is a heightened need for any advertisement by a paralegal to clearly identify that they are not a lawyer and they are only qualified to provide a limited range of services. This is essential for the protection of the public in general, and particularly vulnerable and often unsophisticated clients.

Awards and Honours in Advertising

In the opinion of the TLA, there is nothing inherently inappropriate in a lawyer including in their advertisements any legitimate awards or honours that have been bestowed upon them. Again, so long as the advertisement is professional and is not misleading, the fact that a lawyer has been peer ranked or bestowed with a particular honour is important and meaningful information for the public to know when they are making an informed choice. "Bought" awards, i.e. awards that are only bestowed because a financial contribution has been made, are not professional and are misleading.

Referral Fees

As a general principle, the TLA takes no objection to the concept of referral fees, or advertising that results in the referral of a client to another licensee. As referenced above, in our view, advertising enhances access to justice and provides for greater competition, all of which is to the public good. Here, again, professionalism in advertising would mandate that if the advertising licensee intends only to refer the client to another practitioner, that should be made clear from the outset.

However, in the broader scheme of things, if advertising (or any other situation) results in a lawyer being contacted by a client for whom the lawyer is unable or unwilling to act, there

should be no limits on the lawyer's ability to seek or be paid a referral fee by the licensee who is willing and able to take on the client's case. Referral fees should not be limited to situations where the referring lawyer is not competent to perform the requested services. There is no principled basis for making this distinction from any other situation in which the referring lawyer is not able to act. Put plainly, if the lawyer cannot serve the potential client for any reason, then the lawyer should be permitted to seek and receive a referral fee from the referred licensee. Whether or not any licensee wishes to seek or pay a referral fee should be left to the licensees to work out between themselves. The payment of a referral fee does not, in our view, diminish the reputation of the profession, create conflicts of interest, or bring the administration of justice into disrepute. It is a business transaction, nothing more or less.

The TLA does agree, however, that the fact that a referral fee will be paid should be disclosed to the potential client, and the transaction should be transparent to the client. The TLA also agrees with FOLA that the cost of the referral fee should never be borne by the client, rather it is a cost of doing business that must be borne by the referred lawyer who accepts the retainer. Whether the referral fee is paid as a fixed sum or a percentage of the total fees earned by the referred lawyer matters not, as long as the referral fee does not increase the cost of the legal services paid by the client.

The TLA objects to the concept of the Law Society imposing limits on the quantum of referral fees, or a requirement that such fees be disclosed as a separate income line item in financial records. The quantum of the fee will be regulated by the market, just as hourly rates are driven by market forces. If the fee sought is excessive so as to make the retainer unprofitable, the referred lawyer will not pay it. As long as there is transparency in the transaction between all three parties to the arrangement, the TLA asserts that the market will serve as the best regulator of the business for those that choose to participate in the process of acquiring clients through this business model.

Conclusion

The TLA is pleased that the Law Society has identified the issues of advertising and fees as areas in need of additional scrutiny, and we thank you for the opportunity to share our views on these pressing aspects of the legal practice. We strongly encourage the Law Society to take a more active role in supervising misleading advertising practices, work towards simplifying contingency fee agreements so that they are plainly comprehensible to the average consumer, and that it refrain from over-regulating the practice of referral fees, which will be sufficiently addressed through market forces and informed consumer choices.

Yours very truly,



Stephen Mullings
President
Toronto Lawyers Association

cc: Federation of Ontario Law Associations (FOLA)