FEDERATION OF ONTARIO LAW ASSOCIATIONS
FÉDÉRATION DES ASSOCIATIONS DU BARREAU DE L'ONTARIO

"The Voice of the Practising Lawyer in Ontario"

Response to the Working Group Call for Input on Advertising & Fees

Law Society of Upper Canada Advertising and Fee Issues Working Group

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

jstrawcz@lsuc.on.ca

Submitted September 30, 2016

EXECUTIVE SUMMARY

The Federation of Ontario Law Associations (FOLA) commends the Working Group for its ongoing consultation and its work relating to the issue of advertising and fee arrangements within the legal profession. As an organization that represents approximately 12,000 lawyers in private practice in Ontario, FOLA is pleased to provide its input into those areas identified by the Working Group.

The issues raised in this consultation are issues of great concern to many of our members and we see this issue as having great importance because the issues go to the heart of our profession and our ability to conduct business. Our commentary will address:

- Our consideration of "taste in advertising"
- Advertising and fees in real estate
- Contingent fees
- Personal injury advertising, and in particular our consideration of referral or brokerage services
- The advertising of second opinion services
- Clear identification of the type of law license held by the advertiser
- The appropriate use and promotion of awards received by a lawyer
- Referral fees

TASTE IN ADVERTISING

Before addressing the specific issues where input is sought in the consultation document, FOLA believes that it is important to provide comment relating to paragraphs 83 to 87 of the Working Group report dealing with taste in advertising. FOLA agrees with the Working Group proposition that the term "taste" is an inappropriate term to be used in regulating lawyer advertising. FOLA agrees that taste is highly subjective and evolves over time. However, FOLA is concerned that in focussing on taste in advertising, the real issue of concern, which is a high standard of professionalism in advertising, was not adequately addressed by the Working Group, despite the very real concerns expressed by a number of participants concerning the lack of professionalism in marketing.

As the Working Group correctly points out, the current lawyer and paralegal marketing rules require advertising to be consistent with a high standard of professionalism. FOLA submits that this is a much higher standard than "good taste" or "not in bad taste". If the discussion revolves around taste in advertising, the import of the message received from a number of participants in the process will be missed. The discussion should, and must, revolve around ensuring that advertising by lawyers and paralegals meets a high standard of professionalism. This is the standard that the Law Society has set and which it must be prepared to enforce.

It can be debated whether personal injury advertising in washroom facilities, in and around hospitals, etc. is in poor taste. FOLA submits that such advertising clearly fails to meet the high standard of professionalism. While matters of taste are highly subjective, a high standard of professionalism is much less so, and would be somewhat easier to enforce and maintain as a standard over time.

A high standard of professionalism is about as high a standard as the Law Society could set. That standard has been in the marketing rule for a number of years and FOLA submits that it is a standard which is supported by the vast majority of lawyers in private practice. FOLA's concern is not with the current rule, but rather with what is perceived to be a serious lack of enforcement. If the Law Society is not willing to enforce a high standard of professionalism in advertising, then the rule has no impact. Having a standard that is not enforced is no better than not having a standard at all. Therefore, FOLA respectfully suggests that the Working Group redirect the discussion from taste in advertising to high standards of professionalism in advertising and change the focus to how that standard is going to be applied and enforced. Respectfully, FOLA believes that the Working Group did not give this standard the serious consideration that it deserves.

ADVERTISING AND FEES

Advertising and Fees in Real Estate Law

In our original submissions, FOLA expressed specific concerns regarding 'all inclusive' fees in real estate transactions and with respect to the definition of disbursements. In paragraphs 57 to 59 the Working Group is looking for further feedback on how to make 'all in' fee quotes "more consistent so that consumers may more easily compare services".

FOLA maintains the position that 'all inclusive' fee quotes in real estate transactions should be prohibited. Real estate transactions can quickly and easily transform from simple to complex. A simple residential transaction can suddenly become a difficult and challenging file for a myriad of reasons, including without limitation, if a title problem is discovered, a writ of execution is found, an encroachment revealed, an easement is claimed, mortgage conditions are not satisfied or a closing needs to be extended. None of these issues can be identified at the outset of the retainer, so when fees are quoted as 'all inclusive' and the transaction becomes more difficult , some lawyers either increase the quoted fees or try to minimize additional disbursements to keep the legal fee portion of the 'all inclusive' quote as high as possible. Neither of these are in the public interest.

As noted by the Working Group, 'all-in' pricing can be misleading if it is not transparent and can result in deceptive pricing, with lawyers charging more than the 'all-in' price. This happens because additional legal fees are charged as a result of certain complexities not known at the outset, or because certain disbursements were not included in the fee quote in the first place. Either way, the public is not paying the quoted fee.

Even when a file remains 'simple', there are numerous due diligence searches that should be reasonably incurred to protect real estate clients. With 'all-in' fees, the types of due diligence searches that are completed may be compromised, as the cost of each additional search erodes the

fees payable to the lawyer. In addition, the amount of time that is spent on such a file may be reduced, as there is no greater fee to be paid regardless of the amount of time spent on the matter.

In summary, 'all inclusive' fees may compromise the quality of service to the public, as they encourage lawyers to keep disbursements and attention to the file to a minimum. While this may not be the response of all lawyers providing 'all inclusive' quotes, this manner of quoting fees does allow some lawyers to respond this way.

The Working Group notes at paragraph 58 that Rule 4.2-2 already provides helpful general guidance, and suggests that although issues with these types of misleading fee arrangements are recognized, maintaining the status quo is a viable option. The Working Group also "does not believe that there is a need for the Law Society to fundamentally revise its complaints handling processes or significantly increase enforcement actions" (paragraph 113). These positions seem incongruous. If the Rules are sufficient to guide lawyers with all-inclusive pricing in real estate transactions, then there would not be a prevalence of misleading 'all-inclusive' fee quotes. If there will be no greater enforcement of the existing rules, then the existing rules need to be revised to address the issues.

Fixed or block fee quotes in real estate (excluding disbursements) are standard for residential transactions and are far more common than 'all-inclusive' fee quotes. Most block fee quotes are for residential transactions of ordinary complexity with one mortgage. With such a quote, there is some expectation by the consumer that the fees will be higher if any out-of-the-ordinary complexities arise or if there are additional mortgages involved. With 'all inclusive' fee quotes, the consumer is expecting to pay only the quoted amount, and no more, which is not always being honoured.

FOLA also maintains its original position that disbursements need to be defined in the interest of consistency among lawyers so that members of the public can adequately compare fee quotes. This cannot be done if what is treated as overhead by one lawyer is charged as a disbursement by another lawyer. At a minimum, disbursements should be defined to exclude overhead or costs not actually incurred. As noted in our original submission, with basically no definition of disbursements by the Law Society, some solicitors in the real estate bar have taken to liberally interpreting the terms and passing onto the public costs which should normally be considered overhead. The simplest examples of these are references to "Document Preparation Fees" and "E-Reg User Fee" as disbursements, despite no actual disbursement having been incurred.

Contingent Fees

The current regulatory framework under the *Solicitor's Act* and the Regulations of the *Solicitor's Act* make contingent fee agreements more complicated and difficult to understand than they need to be. The requirements for a contingency fee agreement, particularly as outlined in Regulation 195/04, go far beyond what any lawyer would have to include in any other type of retainer agreement and borders on paternalistic. As a result, a retainer agreement that should be two or three pages in length, suddenly becomes a complicated and cumbersome document that is multiple pages in length. In no other type of retainer agreement are the provisions in Regulation 195/04 required. Some examples of the mandatory provisions include:

- Section 2, article 3 relating to what must be contained within the agreement.

- Section 2, article 7 relative to structured settlements. Since the vast majority of personal injury settlements and judgments do not involve a structured settlement, particularly in this age of low bond rates, such a provision unduly complicates the agreement.

- Section 2, article 10 relative to the client retaining the right to make all critical decisions. Would this not be a part of all retainer agreements?

- Section 3 in its entirety makes a contingency fee agreement unduly cumbersome.

In FOLA's view, the legal consumer, particularly in personal injury cases, is far more sophisticated than the Working Group credits. It is becoming quite common for those seeking representation in a personal injury matter to interview a number of lawyers before deciding on a retainer. This is particularly the case where a client has serious injuries. If the Working Group is interested in making contingent fees more transparent to consumers, a starting point would be to relax some of the provisions in the Solicitor's Act and Regulation 195/04. In combination, this legislation and regulation, if followed in every contingent fee agreement, complicates what should otherwise be a relatively straightforward transaction.

FOLA does not believe that lawyers and paralegals should be required to disclose their standard contingency fee agreement on their website. No other area of law has such a provision. The consuming public can, and does, ask questions about contingency fee agreements. A contingency fee agreement is a transaction between a solicitor and a client and should not be mandated to be accessible to the entire public. Mandating that a contingency fee agreement be included on a firm's website means that it is also available to the insurance company and its counsel retained to defend the action. How is it any business of the insurance industry or insurance defence bar what retainer agreement the plaintiff has with his/her solicitor? In fact, such information could become relevant to the legal negotiation and prejudice the outcome. Would the plaintiff and his/her counsel equally have the right to know the retainer agreement between defence counsel and the insurer client?

PERSONAL INJURY ADVERTISING

Referral/Brokerage Services

In FOLA's submission, absent some special case, the only circumstance in which a referral fee should be paid is when the referring lawyer is not competent to deal with the matter, is unable to fully serve the client for reasons such as a health issue, a pending retirement or the referring lawyer is referring the client outside her or his geographic area of practice, in which case the file should be referred to competent counsel. (For clarification, the hiring of more senior counsel to aid at trial should not be considered a "referral fee", especially if retaining that senior counsel did not increase the fee to the client.) Therefore, in FOLA's submission, advertising for the purpose of obtaining work to be referred to others in exchange for a referral fee should be banned. Permitting mass advertising for the sole purpose of obtaining a file to refer out is clearly not in the best interest of the public. It is a classic "bait and switch" tactic. It does not enhance the reputation of the profession in the eyes of the public, and it misleads the public into thinking that the advertising firm will have carriage of the action when it will not.

If the Law Society is not going to ban advertising for the purpose of obtaining work to be referred to others, it should at least set very strict requirements on the advertising firm to make it perfectly clear that it will be referring the client out to another firm. If such restrictions are not imposed the result is advertising which is inaccurate, is misleading and is a disservice to the legal consumer.

Advertising Second Opinion Services

It would be the height of naivety to believe that second opinion service advertising is for any other reason than to obtain a file from an existing lawyer. A true second opinion, particularly in personal injury matters, would involve the secondary lawyer obtaining a full copy of the file, reviewing that file (which literally could be boxes in length or involve terabytes of data and documentation), sitting down with the client and providing a second opinion. Such a process would take any competent counsel many hours. How would the client, who has presumably retained their current lawyer on a contingency fee basis due to a lack of funds, pay for the second opinion? The only reason a law firm would advertise second opinions would be to obtain the file from the handling lawyer.

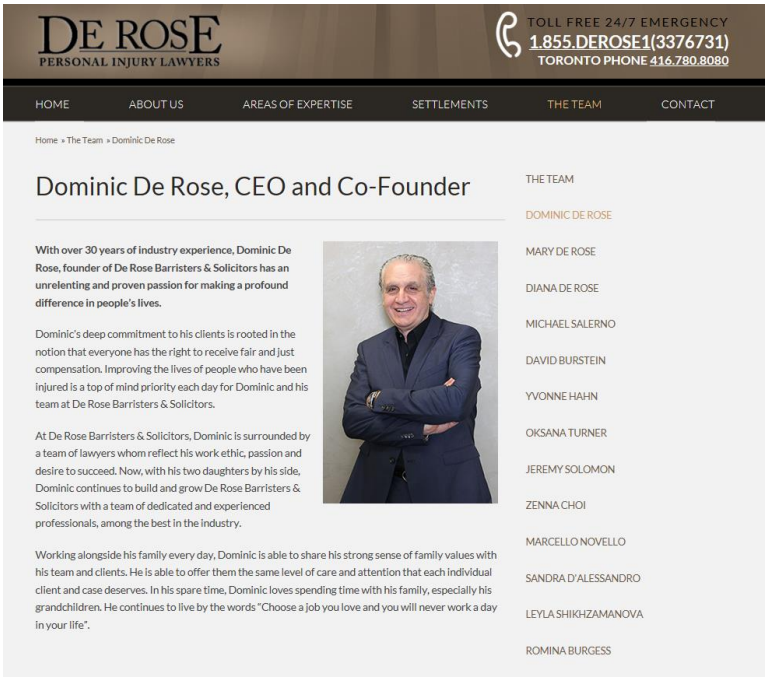
One Toronto law firm actually takes second opinion advertising one step further, by suggesting that other lawyers are incompetent: *"At Mazin & Associates PC, we are frequently retained to take corrective action to fix the damage done by a less qualified lawyer. Unfortunately, in many of these situations when we are not retained first, only some of the damage done by the first personal injury lawyer can be rectified"*. See http://www.mazinlawyers.com/ This type of second opinion advertising, in our view, brings disrepute to the profession and hurts both the profession and consumers.

Second opinion advertising should either be banned outright or, if not, the second opinion counsel should be prohibited from taking the file from the handling lawyer. FOLA would suggest that if the provider of the second opinion is prohibited from taking on the file, second opinion advertising will disappear overnight. Obviously, to suggest that other lawyers ought not to be retained because

their work requires to be "fixed" is totally improper and violates the current Rule 4.2 of the Rules of Conduct. This is but one example of just how aggressive personal injury advertising is becoming.

Identification of Type of Licence

In its original submissions, FOLA (then CDLPA), argued that paralegals should be mandated to identify themselves as such in all advertising. We continue to maintain that position. To make our point, we enclose a portion of a web page from De Rose Personal Injury Lawyers and the profile page of Dominic De Rose. We would encourage members of the Working Group to look at the De Rose Personal Injury Lawyers website and then determine whether Mr. De Rose is a lawyer or a paralegal. Would a member of the public understand? This is just one of many examples of paralegals who, we contend, deliberately mislead the public into believing they are lawyers.



Our members frequently report paralegals who sign their e-mail and post correspondence with a salutation such as "Of the Law Society of Upper Canada" or "Licensed by the Law Society of Upper Canada", without distinguishing that they are paralegals. In these cases, the paralegals are deliberately trying to obfuscate the difference between their license, and associated scope of practice, and that of a lawyer. This is misleading to the consumer.

The protection of the public interest should be a focus of the Law Society of Upper Canada, particularly for vulnerable groups. Those members of the public who have difficulties with the English language are particularly at risk of being deceived or misled by references in advertising to "membership" or "licencing" by the Law Society.

In FOLA's view, the simple solution to this problem is to make a rule that no licensee of the Law Society (lawyer or paralegal) should be permitted to use the name of the Law Society of Upper Canada in their advertising unless it is to confirm their status as a "specialist". There is simply no legitimate need to invoke the name of the professional regulator in legal services advertising.

Use of Awards

If the Working Group considers that awards be allowed to be included in lawyer advertising, only those for which the lawyer has not paid for in any way (either to receive the award or so the award can be used in advertising) should be permitted in public-facing ads. "Consumer choice" awards are rarely, if ever, based on merit and are very often awards for which the lawyer has paid a fee.

As an example, one member of our Committee has been listed by "Best Lawyers in Canada". He did not submit an application for the award and, to the best of his knowledge, has never had his skills or practice reviewed by his peers in an objective manner. However, he has been advised that he can, for a fee, include the Best Lawyers' logo in his advertising. The consuming public would have no idea that such an award is not based on any type of legitimate peer review or objective analysis.

In FOLA's submission, it is not enough that the recipient of an award be made to disclose the source of the award. The problem will lie in how full disclosure will be implemented. On websites, for example, the full disclosure could be buried in the small print, while the award itself is prominent and on the home page. Additionally, the Law Society does not have the resources to properly police and monitor the disclosure concerning these awards. The best approach to regulating the advertising of awards is to ban the practice of advertising any award for which the lawyer pays a fee to be considered for the award, and to enforce strict guidelines with stiff penalties for contravention of that professional standard.

REFERRAL FEES

In FOLA's submission, absent some special case, the only circumstance in which a referral fee should be paid is when the referring lawyer is not competent to deal with the matter, is unable to fully serve the client for reasons such as a health issue, a pending retirement or the referring lawyer is referring the client outside her or his geographic area of practice, in which case the file should be referred to competent counsel. By implication therefore, advertising expertise in an area of law for the purpose of referring the file out should be banned. If the advertising lawyer has expertise in personal injury and advertises as such, other than in a conflict, the advertising lawyer would have no reason to refer the file out.

A referral fee is appropriate in circumstances where the referring lawyer is not competent to take on the file, or is unable to serve on the matter. However, the fee should be limited to 10% to 15% of the ultimate fee charged by the handling lawyer. Any fees above this threshold, even if disclosed and agreed to, represent a payment which far exceeds the value to the client and inevitably leads to a reduction in the public's respect for the profession.

When a file is referred, and the referral fee is paid, the transaction should be fully transparent to the client. The client should be made aware of the fact that the referring lawyer will receive the fee, exactly what percentage of the final fee the referring fee will be and all fees paid and received should be recorded in the respective lawyer's financial records. Lastly, in no circumstance should the fee paid to the referring lawyer be an additional fee to the client. The referral fee should come

out of the fee that would otherwise have been earned by the handling lawyer. To the client, the referral fee should be neutral. It should not cost the client more money because his/her file was referred from a lawyer who did not have competence in the matter to a lawyer who did.

An example of a circumstance where referral fees are appropriate, and fit within the circumstance noted above, is the case of a retiring lawyer or a lawyer who is transitioning out of practice but has not sold (or is unable) to sell her/his practice. This is a common occurrence in smaller centres. After many decades of building up a practice, a lawyer may want to slow down but still wants to ensure their long-standing clients are well cared for. In these cases, a lawyer with a long-standing relationship with the client may refer to another lawyer "in town" and it would be appropriate for the referring lawyer to receive a reasonable referral fee. In fact, in this circumstance, these referral fees may be the only way the retiring lawyer may be able to fully realize the equity built up in their business over time, especially during a transition to retirement.

CONCLUSION

At FOLA we are grateful that the Working Group has devoted significant time and attention to these very important issues. We have attempted to summarize the position of our members in a thoughtful and constructive way while recognizing that there is some difference of opinion among individual lawyers regarding the issues addressed above. Nevertheless, we feel that the changes proposed and the enforcement requested are vital to maintaining the reputation of the profession and to the protection of the public who we serve. We hope that the Working Group and the Law Society will consider carefully the input of our members and look forward to receiving the final report.