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

"The Voice of the Practising Lawyer in Ontario"

FOLA's Response to the Advertising & Fee Arrangements Issues Working Group Relative to Contingency Fees

Submitted to:

The Advertising & Fee Arrangements Issues Working Group
The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

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Corporate Mailing Address:
731 9th Street West, Owen Sound, ON N4K 3P5
Phone: (519) 270-4283

www.fola.ca
@ont_law_assoc

Thank you for the opportunity to provide written submissions on this very important issue impacting the practising bar across Ontario.

The Federation of Ontario Law Associations (FOLA) is an organization that represents the associations and members of the 46 local law associations found across Ontario. Together with our associate member, the Toronto Lawyers' Association, we represent approximately 12,000 lawyers, most in private practice in firms across the province as they provide service to the public and operate their businesses. These lawyers are on the front-lines of the justice system and see its triumphs and shortcomings every day.

We are an advocate for a better justice system that recognizes the crucial role competent and professional lawyers play in that system and of the important role that alternative compensation arrangements, such as contingency fees, play in allowing lawyers to provide access to justice and to operate successful businesses in their own right.

An organization of our breadth and size, with members in diverse practices throughout Ontario, cannot hope to provide a consensus position on what changes, if any, are needed to existing rules around contingency fees. What is clear from discussions that we have had at our own meetings – both formal and informal - as well as the dialogue that took place at the various venues throughout this consultation process is that there is a great deal of misunderstanding and misconception around the issues and widespread fear that any further regulation in this space could have unintended consequences or over-reach in an effort to assuage a public that does not fully understand the issues. Of course, the viewpoints of the citizens of Ontario – our clients and potential clients, the people we serve – need to be understood and respected in this process, but those views need to be informed by fact.

Introduction

In its report to Convocation, the Working Group expressed a concern that there may be widespread non-compliance with the *Solicitor's Act* relative to contingency fee agreements. Specifically, a concern was expressed that the requirements under the *Solicitor's Act* and Regulations thereunder were not being adhered to by lawyers and paralegals. The Working Group quite rightly expressed the need to address any such non-compliance.

To the extent that there has been non-compliance with the *Solicitor's Act*, and to the extent that any such non-compliance must be addressed in a serious way, FOLA would suggest that the horse pretty much bolted the barn with the release of the Court of Appeal decision in *Hodge v. Neinstein*[1] on June 15th, 2017. If there is anything that is going to compel a licensee to adhere to the regulatory requirements of the *Solicitor's Act* in their contingency fee agreements, surely the prospect of becoming a defendant in a class action proceeding brought by former clients is going to do the trick.

[1] 2017 ONCA, 494

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However, as the Working Group expressed, and as was addressed by the Court of Appeal in *Hodge*, the language in the *Solicitor's Act* has created difficulties for lawyers and clients and these difficulties should be addressed. To that end, FOLA supports the concept of a mandatory, easily understood, contingency fee agreement (CFA). In combination between the chilling effect of the *Hodge* decision and a standardized CFA, FOLA suggests that much of the harm surrounding CFA's will be addressed. As will be articulated ahead, FOLA has significant concerns over some of the Working Group's recommendations and considerations, particularly relating to enhanced client reporting. Such considerations are likely to have very negative unintended consequences and, to some extent, would result in substantial unfairness to those licensees who are prepared to offer their services on a contingency fee basis.

FOLA will address the Working Group's recommendations and considerations in the same order in which they were presented to Convocation in the Working Group's Fifth Report.

Recommendation for a Standard Form Contingency Fee Agreement (CFA)

FOLA is assuming that the Working Group is considering that a standard form CFA be crafted and then submitted to government with a recommendation that the *Solicitor's Act* be amended to make use of the agreement mandatory. FOLA supports the concept of a simplified, easy to understand and relatively brief (2 to 3 pages) standard form CFA, so long as the agreement retains some level of flexibility, particularly relative to how the fees are to be calculated. A potential problem with a rigid mandatory standard form CFA is that a one size fits all fee agreement is not always workable in practice because of the myriad of facts, causes of action and litigation risks that can come into play. For example, in some cases, it may be most appropriate to charge a variable contingency fee rate, depending on the stage in the litigation at which the file was concluded. Different contingency fee rates may apply if the file is concluded prior to pleadings being completed, prior to discovery, after discovery, after mediation, after pre-trial, or after trial. In other cases, it may be appropriate to have a sliding scale contingency percentage, depending on the quantum of compensation received by the client. For example, the agreement may provide for 30% of the first $500,000.00 realized, 25% of $500,000.00 to $1,000,000 and 20% for anything over $1,000,000.

Each action for which a contingency fee agreement is appropriate has its own unique set of facts. Each action has its own level of risk. Some actions, such as medical negligence, are fraught with risk. Other actions, such as cases where a seat belted passenger is seriously injured in a motor vehicle accident, have little to no risk. A mandatory form CFA should not be too rigid for the realities of the real world. In addition, there must be consideration to the client who may wish to change lawyers. Most well considered Contingency Fee Agreements have provisions to allow a client to understand the fees that will be charged if the retainer is terminated. For cases in which the client disagrees with the lawyer's recommendation, Contingency Fee Agreements must consider how a lawyer can be extricated as solicitor of record without rendering the work in progress and disbursements incurred uncollectable.

Contingency fee agreements need to be flexible and nimble enough to effectively address the case to which it applies. Licensees have to be allowed some level of discretion and maneuverability on

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the fee structure to ensure that the CFA is appropriate for the case at hand, while at the same time, obviously, complying with the *Solicitor's Act*. While FOLA would like to work with the Working Group to develop a more easily understood CFA, that agreement needs to be fair to both sides of the contract.

Calculating Contingency Fees as a Percentage of an All-Inclusive Settlement

FOLA agrees with the Working Group that, in practice, insured defendants make settlement offers that are inclusive of damages, partial indemnity costs, H.S.T. and disbursements, otherwise known as "all-inclusive offers". FOLA tends to agree with the Working Group that this practice can create practical difficulties for the licensee acting on behalf of the plaintiff. FOLA tends to support the Working Group's recommendation for a reform to the *Solicitor's Act* to allow the contingency fees to be calculated as a percentage of the all-inclusive settlement, less disbursements. This would certainly simplify the calculation of fees and would address some of the concerns raised by the Working Group.

Although FOLA is generally supportive of contingency fees being calculated as a percentage of an all-inclusive settlement, FOLA wants to be very clear that the current provisions in section 28.1(8) of the *Solicitor's Act*, or something similar thereto, must remain in effect. That is to say, the provision in the *Solicitor's Act* which would allow a joint application to a judge of the Superior Court to allow for costs obtained by the client to be paid to the licensee must remain in effect. The Working Group did mention this in paragraph 211 of its report. However, to drive home the importance of section 28.1(8), FOLA would reference a case such as *Valentine v. Rodriguez-Elizalde*[2]. In that car accident case, the defendant's insurer admitted liability but forced a trial on damages. After a two week jury trial, the plaintiff was awarded $55,000.00 after statutory deductions. However, the trial judge assessed costs at over $172,000.00. If the plaintiff lawyers were retained by a contingency fee agreement without costs, they would be entitled to only a percentage of the damages. A 30% contingency fee agreement would pay the solicitors $16,500.00 in fees for a trial that, on a partial indemnity basis, cost $172,000.00 to litigate. In contrast, the plaintiff would receive his damages net of fees plus costs of $172,000.00, giving him a total recovery of about $200,000.00 on a $55,000.00 verdict. This is obviously unfair to the solicitor, who would effectively be penalized for successfully prosecuting the claim on his client's behalf when an insurer was playing hardball and forced a trial.

Cap the Contingency Fee Percentage

FOLA does not agree with this consideration. To quote the Working Group's Chair in his article posted in Slaw, relative to a percentage cap on contingency fees: "The question is tricky and…a cap may have unintended consequences and may not actually address the genuine issue at hand".

[2] [2016] O.J. No. 5353

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731 9th Street West, Owen Sound, ON N4K 3P5
Phone: (519) 270-4283
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FOLA would submit that one of the unintended consequences of a contingency fee percentage cap, is potentially reducing access to justice in more modest type cases. We would offer, by way of illustration, recently released data relative to motor vehicle accidents.

It is generally recognized that a significant number of contingency fee agreements in Ontario arise from people injured in motor vehicle accidents. Reading some of the comments made in the press or by Members of Provincial Parliament, one would think that most people involved in car accidents have serious injuries and receive very large settlements. In actual fact, nothing could be further from truth.

The recently released Ontario Road Safety Annual Report 2014[3], being the most up to date detailed statistics relative to fatalities and injuries on Ontario roadways, demonstrates that the number of fatalities and injuries has steadily declined over the past decade. In 2014, the number of injuries on Ontario roads was 25% less than the prior decade. This put the number of injuries on the province's roadways at its lowest level since 1964.[4]

Relative to the severity of injury in car accidents, the Annual Report notes that of all injuries or fatalities sustained in traffic accidents, only 2.3% (a total of 2,282 people for the entire province, including those drivers who were at fault for the accident) were admitted to hospital; 45.6% (45,778 people) had no injury; 27.8% (27,937 people) had minimal injury (did not go to a hospital at all) and 23.8% (23,862 people) had a minor injury (were treated in an emergency room but not admitted).[5]

What these statistics tell us is that the vast majority of people involved in car accidents have no or very modest injuries. To the extent that those people who have minimal or minor injuries seek compensation for those injuries, their claims are going to have a limited value. The value of those claims is negatively affected by two provisions in the *Insurance Act*. First, in order to be entitled to any compensation for pain and suffering, the injured party must meet a statutory threshold of permanent and serious impairment of function.[6] Second, any claim for general damages for pain and suffering is reduced by a statutory deductible, which currently stands at $37,385.17[7].

The combined effect between fewer major injuries in car accidents, the statutory threshold and the statutory deductible is that a great many personal injury cases flowing from motor vehicle accidents have modest value. If a contingency fee percentage cap is set at a level that is too low, those injured plaintiffs will have difficulty accessing legal services to advocate for compensation on their behalf, for the simple fact that the licensee will not be able to provide services for such a modest fee. A higher contingency fee percentage is entirely appropriate in such modest cases as opposed to a lesser percentage where the plaintiff suffers serious injury. All too often it is assumed that the risk taken by the licensee in accepting the file is relative to liability. In the case of more moderately injured plaintiffs in motor vehicle accidents, the risk to the licensee often relates to the risk of no compensation at all, not because of a liability issue, but because of the combined effect between

[3] http://www.ontario.ca/orsar
[4] at pgs. 9 and 15 respectively
[5] http://www.ontario.ca/orsar, at pgs. 25 and 26
[6] *Insurance Act*, R.S.O. 1990, s. 267.1(2)
[7] *Insurance Act*, sec. 267.5(7) as amended

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the statutory threshold and monetary deductible. A contingency fee cap that is set too low creates a serious access to justice issue for the more modestly injured.

In FOLA's submission, the contingency fee percentage should be flexible and should reflect the type of action taken on by the licensee and the risk assumed by the licensee in accepting the retainer.

Requiring Independent Legal Advice in Certain Situations

We are uncertain as to what "certain situations" the Working Group may have in mind that would require independent legal advice. In settlements involving a person under disability, which would include minors and mentally incapable persons, Rule 7.08 of the *Rules of Civil Procedure* already requires the approval of a judge before the settlement can be concluded. A plaintiff who is under a disability would bring the action by a litigation guardian. Rule 7.08(4)(a) requires that the litigation guardian swear an affidavit citing the reasons he/she supports the proposed settlement. In FOLA's submission, independent legal advice would not be required in those cases involving plaintiffs under disability, given the requirements of Rule 7.08.

Another concern FOLA would have is the cost associated with a licensee providing properly informed ILA. Any licensee who is going to provide ILA needs to be fully informed on the file. That means reading the file. This is not remotely similar to giving ILA in something like a straightforward real estate transaction, for example. In a personal injury action, particularly where the injury is significant and/or where liability is in issue, the file contents are usually voluminous. To provide informed ILA, the licensee must be knowledgeable on the file, including the risks associated with the file, the value of the claim and the nuances of the evidence. That requires a review of the entire file. Is the handling lawyer just to turn over the entire file contents to the ILA lawyer? More important, how and when does the ILA lawyer get paid for what may well be a great many hours of work?

We find it difficult to anticipate what other circumstances the Working Group may have in mind when making this recommendation. One thing the Working Group should note is that the *Rules of Professional Conduct* were recently amended to prohibit second opinion advertising, since it was felt that licensees who provide a second opinion may actually be doing so as a means to take over the file. Whatever direction the Working Group is going with respect to requiring ILA, we would stress that any lawyer who provides ILA relative to a contingency fee agreement, be prohibited from taking carriage of the file.

Ultimately, FOLA cannot support the requirement of independent legal advice in "certain circumstances" when those circumstances have not been articulated by the Working Group and when the practicalities of providing such advice, including the cost, have not been fully explored.

Enhanced Client Reporting Requirements

The Working Group is considering introducing new client reporting requirements. FOLA has significant concerns over where this may lead. There is a fine line between advising a client of his/her right to have a licensee's account assessed and actually encouraging the client to have the

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account assessed. Some of what the Working Group is considering is getting very close to that line. Additionally, why restrict enhanced client reporting requirements to lawyers working under CFA's? Should not all clients have the same information, whether they retain their lawyer under a CFA or some other type of agreement?

a) <u>The Client Reporting Letter</u>

The Working Group is considering requiring licensees to explain in the client reporting letter the basis for the quantum of fees that is being charged. FOLA does not have any particular objection to this consideration so long as the requirements are not overly onerous and detailed. Ultimately, the client should be able to easily understand what they are being billed and the basis for doing so.

b) and (c) <u>Record and Report the Amount and Value of Time Spent on the File by the Professional and Para-Professional</u>

FOLA does not support this consideration. Currently, Regulation 195/04 of the *Solicitor's Act* requires that a contingency fee agreement must include an indication "that the client and solicitor have discussed options for retaining the solicitor other than by contingency fee agreement, including by doing so by hourly rate".[8] The Working Group is considering mandating that lawyers record and report their time spent on a file when the client has specifically rejected paying on an hourly rated basis. This is completely unfair to the licensee. The client had an opportunity to pay on a periodic basis during the course of the file based on the licensee's hourly rate. The client declined an hourly based retainer in favour of a contingency fee agreement. One trade-off of such an election was that the licensee would wait some time, typically years, before being paid on the file. The obvious implication of having the lawyer record and report the time spent on the file, is for the client to then try to use that information to assess the lawyer's account and have it reduced as being other than fair and reasonable. Having rejected the opportunity to pay on an hourly rated basis, it is unfair to then allow the client to use the time spent on the file to reduce the licensee's fee.

The current Commentary to Rule 3.6-2 of the *Rules of Professional Conduct* quite correctly lists the primary factors that should be considered in setting an appropriate contingency fee. Those factors are: likelihood of success, nature and complexity of the claim, the expense and risk in pursuing the claim, the amount of the expected recovery and who is to receive costs. The element of time spent is not enumerated and for good reason. This is not to say that the time spent on the file is not relevant. However, time spent on a file is the least important factor in determining whether a contingency fee is fair and reasonable.

Additionally, the profession is quite rightly moving away from a time-based billing model. This is an important step to improve access to justice and should be encouraged.

[8] at s. 2.3

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731 9th Street West, Owen Sound, ON N4K 3P5
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The value of time is impossible to calculate. One brilliant hour may be worth 20 mediocre hours. Is thinking about a file on a long car drive worth more or less than thinking about the file while sitting at one's desk? Should the time in the car be docketed?

Further, many licensees have what are effectively block fee retainers. Criminal lawyers may charge a set fee to defend a charge such as a drinking and driving offence. The fee is paid regardless of how long the lawyer takes to defend the charge. The criminal lawyer is not tasked by the Law Society to report the hours spent on the final account. Real estate lawyers may charge a set fee to act on a residential closing, regardless of time spent. The same can be said for preparing wills, powers of attorney, incorporations, securities filings, separation agreements, etc. Many circumstances can be found within the legal profession where fees are charged based on the service provided and not on time spent on the service. This should be encouraged as it does not require the licensee to waste valuable time docketing to a ridiculous degree of meticulousness and obviates those cases where the client complains that the licensee has padded the dockets. The old joke of Saint Peter telling the lawyer at the gates of heaven that, according to his dockets, he was 108 years old when he died comes to mind.

As Cory J. wrote in *Coronation Insurance Company v. Florence*, the aim of contingency fees:

> *is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal and should be encouraged. For years it has been rightly observed that only the very rich and those who qualify for legal aid can afford to go to court.*[9]

A licensee who has accepted a retainer on a contingency fee basis and is prepared to wait years to be paid, when the client declined to pay by the hour, should not then be faced with the expectation of keeping meticulous time dockets so that the very same client can subsequently argue on an assessment that the lawyer's contingency fee account should be reduced, based on the number of hours spent on the file, especially in a time when the profession should be encouraged to move away from the hourly rated billing model.

(d) Advise the Client on the Final Account of the Right to Apply to Have the Legal Fees Assessed

[9] [1994] S.C.J. No. 116 at para. 14

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FOLA is not fundamentally opposed to this consideration so long as what is required of the licensee is meant to be informative and not almost encouraging an assessment. The combination of discussing fees in the final reporting letter, having to account for time spent on the file and again advising the client of the right to have the fees assessed on the final account could easily cross the line between advising the client to inviting or encouraging the client to have the account assessed. We are concerned that this will lead to a significant increase in solicitor and client assessments. We would point out the following potential consequences of such an increase in assessments:

(i) An Increased Burden in the Superior Court of Justice

The Court of Appeal has made it very clear that assessment officers do not have jurisdiction over contingency fee agreement assessments. The enforceability of a contingency fee agreement, including as to whether the agreement is both fair and reasonable, lies within the exclusive jurisdiction of the Superior Court and not with an assessment officer.[10] Therefore, if a client is going to have the solicitor's contingency fee account assessed, that assessment will be before a Superior Court judge. The Working Group should not need to be reminded of the current stress on the Superior Court of Ontario when it comes to resources and time. The delay in getting a trial date, particularly in the Greater Toronto Area, but also in courts across the province, is at a crisis level. If clients are practically encouraged to have their accounts assessed, the expected increase to an overburdened Superior Court system would not be well received, as the last thing the Superior Court bench in the province needs is to be bogged down and to be turned into assessment officers. One is left to wonder about the delays both the licensee and client would face in getting an account assessed, not to mention the resulting delays to other pressing matters.

(ii) An Increase in Self-Representatives before the Superior Court of Justice

If the client does assess the lawyer's account, this could lead to an increase in self-represented litigants in Superior Court. Again, the province's overburdened Superior Court system does not need more self-represented litigants.

(iii) A potential for abuse by Licensees

An increase in the number of solicitor/client assessments in Superior Court could spawn a cottage industry of lawyers who advertise to assess the

[10] *Evans Sweeny Bordin LLP v. Zawadzki et al*, 127 O.R. (3d), 510 at para. 16 and 17

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accounts of those lawyers retained under a contingency fee agreement – "www.AssessYourLawyer.com". As mentioned, the Law Society recently prohibited second opinion advertising. The type of lawyer who would advertise second opinion services may very well be the type of lawyer who would start advertising to assess other lawyers' accounts. That leaves one to wonder how such lawyers would be paid by the client. Would it be on a contingency fee basis?

(iv) A client is in a worse position if the licensee upholds the account and is awarded costs of the assessment

If a lawyer is going to be made to advise the client on the final account of the right to apply to have the legal fees assessed, in the interest of full disclosure, surely the lawyer should also advise the client that if the account is upheld on assessment, the lawyer has a *prima facie* right to demand costs.[11] There should be no assumption within the Working Group that licensee's accounts on assessments are typically reduced. Very often, the accounts are upheld.

Effectively telling a client that they have the right to have the final account assessed but if they do, and the account is upheld, the lawyer has the right to ask for costs, is a terrible way to end a solicitor and client relationship. One would think that in the vast majority of cases, the relationship has ended on very good terms. To mandate that the lawyer must tell the client that they can have the account assessed but then for the lawyer, in the interest of full disclosure, to advise that if the account is upheld, they can claim costs, is a sure way to spoil what was otherwise a very satisfactory solicitor and client relationship. Why make an otherwise happy and satisfied client unhappy?

Conclusions

In conclusion, relative to the enhanced reporting requirements being considered by the Working Group, FOLA submits that in combination, these requirements go too far and they go from advising a client of the right to assessment to effectively inviting or even encouraging the client to go to assessment. Ontario Regulation 194/04 of the *Solicitor's Act* already requires that a contingency fee agreement inform the client of the right to ask the Superior Court of Justice to review and

[11] See for example *Chen v. Singer, Kwinter* [2013] O.J. No. 5553

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www.fola.ca
@ont_law_assoc

approve the solicitor's bill.[12] What is being contemplated by the Working Group relative to recording and reporting hours spent and again advise the client on the final account of the right to apply to have the legal fees assessed is going too far, is inviting an assessment and operates in a way that is extremely unfair to the lawyer, who has (in many cases) waited years to be paid and, in almost all cases, has carried the disbursements on the file.

The Working Group would be quite justified in trying to come up with some reasonable means by which to inform the public that they have a right to have their lawyer's accounts assessed. However, this should include all lawyers, not just lawyers under a retained on a CFA. Why should clients under a CFA be better informed than any other client? If the Working Group is going to consider means by which clients are informed of their assessment rights, any changes to the reporting requirements should apply across the entire profession.

FOLA would propose that the preferable approach to any concerns over CFA's is to first develop the standard, mandatory agreement. A standardized agreement, in combination with the Court of Appeal decision in *Hodge v Neinstein*, should address the current concerns surrounding CFA's. If, in the fullness of time, there are still concerns over the fairness of the standardized CFA's, the issue of enhanced client reporting can be revisited. However, again, FOLA would point out that clients who have retained a lawyer under a CFA should not be placed on some type of information pedestal. Any enhanced client reporting requirements that are meant to fully inform a client of his/her rights to have an account assessed, should apply to all licensees and not just those who are retained under a CFA.

We look forward to further discussion and debate on this important topic.

Respectfully submitted,

Jaye Hooper, Chair
Federation of Ontario Law Associations

Mike Winward, 1st Vice Chair
FOLA

cc. FOLA Executive
FOLA Presidents

[12] at section 2.8

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731 9th Street West, Owen Sound, ON N4K 3P5
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@ont_law_assoc