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

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FOLA's Response to the Supplementary Report to the 7th Report of the Advertising & Fee Arrangements Issues Working Group

Submitted to:

The Advertising & Fee Arrangements Issues Working Group
The Law Society of Ontario
130 Queen Street West
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The Federation of Ontario Law Associations (FOLA) would like to respond to the Supplementary Report to the 7th Report of the Advertising & Fee Arrangements Issues Working Group ("Working Group"). Our primary concerns are two-fold: the mandatory standard form Contingency Fee Agreement ("CFA") risks being unduly complicated and lengthy and, secondly, the recommendations relative to disbursements is, at least in part, in conflict with Tariff A and unfairly targets licensees who offer legal services through a CFA retainer.

CONCERN OVER THE MANDATORY STANDARD FORM CFA

In FOLA's original submission to the Working Group, we supported a "simplified, easy to understand and relatively brief (2-3 pages) standard form Contingency Fee Agreement". We are becoming concerned that the mandatory standard form CFA will ultimately become an unduly complicated, confusing and very lengthy document that any member of the public would have difficulty understanding. With respect, the Working Group is seemingly trying to address every troublesome issue it can contemplate and have it addressed within the mandatory CFA, thus adding more layers of information on an already overly burdensome document.

The current requirements for a CFA, under Ontario Regulation 195/04 to the *Solicitors Act* (a copy of which is attached for ease of reference), results in a CFA that is unnecessarily complicated. Under the current requirements, lawyers must take a prospective client through a retainer agreement that covers a whole host of matters, whether they are relevant to the case at hand or not, that covers such topics as:

- Hourly rates, despite the fact that the lawyer is not being retained by the hour;
- Structured settlements, despite the fact that the vast majority of settlements will not involve a structure;
- A statement as to how the client or the solicitor may terminate the agreement;
- Statements relative to how much the solicitor will receive in fees, disbursements and taxes;
- Statements about party and party costs;
- Provisions if a party is under disability despite the fact that in the vast majority of cases, the primary plaintiff is not under disability.

In our submission, the Working Group is seemingly contemplating a mandatory standard form CFA that is even more lengthy, complicated and confusing to the public than what is already mandated through the *Solicitor's Act*. The Working Group is considering going from bad to worse.

On top of what is already demanded under the *Solicitors Act*, the Working Group is contemplating adding even more:

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- That the CFA address interim and interlocutory costs;
- That the CFA go so far as to address appeals;
- That the CFA delineate those disbursements that are chargeable to the client from those that are not.

Respectfully, the Working Group is going backwards. The end product for a contemplated mandatory CFA is going to be a multi-page document that is going to have the collective heads of the public spinning out of control. In our submission, the Law Society would be better off advocating for amendments to Regulation 195/04 to reduce the requirements for what must be included in a CFA. The Law Society should not be adding to an already cumbersome document.

Without doubt, through its various reports, the Working Group has identified some areas of concern in the manner in which some licensees are structuring their CFA's and billing their clients. However, in our submission, to try to address every conceivable evil in a standard form document is a mistake. Rather, FOLA would submit that a preferable approach would be to address those concerns through one or a combination of the following:

- Amendments to the Rules of Professional Conduct
- Additional Commentaries to the Rules of Professional Conduct
- Addressing the issues in the Know Your Rights document that must be provided to the client when the CFA is executed

Addressing the areas of concern raised by the Working Group through one or more of the above means has two advantages. First, it takes the more serious of transgressions from being matters of contractual breach to a matter of discipline. Second, the client is left with a retainer agreement that is brief, to the point and comprehensible.

DISBURSEMENTS

Footnote 9 in the Supplementary Report states: "Disbursement costs are typically repaid from the proceeds of a settlement when a claim is successful". With respect, and certainly in the context of personal injury matters where most CFA's apply, this statement is wrong. When a personal injury matter is settled, most to all disbursements are paid by the defence because the disbursements are payable by the defence as part of a party and party assessment under Rule 57.01 of the *Rules of Civil Procedure* and Tariff A.

For ease of reference, we are enclosing a copy of Tariff A. Items 31 and 32 of Tariff A provide that copies of documents, records, appeal books, etc. are assessable disbursements so long as the amount claimed is reasonable. Item 35 of the Tariff A is an essential basket clause that allows a judge or assessment officer to order payment for any other disbursement that is reasonably necessary for the conduct of the proceeding, so long as the amount claimed is reasonable.

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The standard of reasonableness that exists in Tariff A is also found in Rule 3.6-1 of the *Rules of Professional Conduct*. Simply put, a licensee's fees and disbursements must be reasonable.

It is interesting that the commentary to Rule 3.6-1 speaks to what is fair and reasonable in relation to a licensee's fees but there is no commentary that relates to the reasonableness of a licensee's disbursements. To the extent that the Working Group is concerned about licensees charging unreasonable disbursements to clients, FOLA would suggest that the preferable course of action would be to amend the commentary section to Rule 3.6-1 so as to give direction as to what is considered to be a reasonable amount to charge a client for disbursements.

FOLA sees no principled reason why reasonable disbursements, whether they be for photocopies or any other disbursement that was reasonably necessary to conduct an action, should be allowed on a party and party assessment, payable by the opposing side, but would not be payable by the client. It is inconsistent for the *Rules of Civil Procedure* and for Tariff A to permit the reasonable cost of, say, photocopying being passed onto the opposing side when it could not be passed onto the client.

The Working Group is recommending a prohibition against charging a client other disbursements such as fax costs. However, fax costs have been ruled to be a reasonable disbursement under a party and party assessment.[1]

FOLA would agree with the Working Group that such matters as secretaries and overtime should be considered as office expenses and not as disbursements. However, again, this is a matter that is better dealt with in the Rules of Professional Conduct and in the commentaries rather than adding to the mandatory standard form CFA.

Finally, FOLA cannot think of any principled reason why there would be a prohibition against charging certain disbursements under the CFA when that prohibition would not apply to other forms of retainers such as a traditional hourly rated retainer agreement. FOLA does not understand why a member of the public who retains a lawyer under a CFA would not have to pay certain disbursements but a member of the public who retains a lawyer in a matrimonial, criminal, estate litigation or other type of litigation file would not have the same protection. If disbursements meet the standard of being reasonably necessary for the conduct of a proceeding and the amount claimed is reasonable, it ought not to matter what type of retainer agreement the licensee is retained under. A reasonable disbursement is a reasonable disbursement, regardless of the nature of the retainer.

FOLA would like to thank the Working Group for the many hours it has dedicated to the issues of lawyer marketing, advertising, referral fees and contingency fees. These are very important issues and we look forward to maintaining our strong working relationship on an ongoing basis.

[1] Mercer v. Abbot [2008], O.J. No. 1873; Dulong v. Merrill Lynch Canada Inc. [2006], O.J. No. 1064

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