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FOLA'S RESPONSE TO LSO'S ADVERTISING AND FEE ARRANGEMENTS ISSUES WORKING GROUP

Submitted to: Advertising and Fee Arrangements Issues Working Group
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FOLA Response to Call for Comment: Title Insurance 2018

Task Force 2018

ADVERTISING AND FEE ARRANGEMENTS ISSUES WORKING GROUP

SUMMARY

The Working Group is currently examining practices involving the payment of fees, and the offering of benefits by title insurers to real estate lawyers or their staff. The Federation of Ontario Law Associations ("FOLA") represents the interests of the practicing bar in Ontario. A significant proportion of the practicing bar in Ontario consists of solicitors who practice real estate law on a full time or part-time basis.

In considering the questions posed by the Advertising and Fee Arrangements Committee in its review of the practices of title insurers, FOLA has consulted widely with the Bar via our 46 real estate representatives, who are located in all areas of the province, in rural and urban centres alike. It is recognized that it is unlikely that the Bar, or Convocation, will come to a completely unanimous point of view on the issues being considered by the Working Group. There are lawyers who feel the current rules are sufficient and appropriate; some who feel the current Rules go too far, and some who feel more is needed. That said, the views expressed herein reflect the views of the vast majority of lawyers who shared their views on the issues with FOLA. FOLA also recognizes that there are lawyers who prefer the products, and/or levels of service of TitlePLUS, First Canadian Title, Stewart Title and Chicago Title.

It is the submission of FOLA that the current Rules of Professional Conduct, when combined with the Financial Services Commission of Ontario's oversight of title insurers, provide sufficient guidance to lawyers in their dealings with the title insurance industry. Moreover, the current rules provide proper protection for the public and there is no evidence of any significant number of complaints, or other issues at this time.

FOLA further submits that it is not advisable for the Law Society of Ontario (the "Law Society") to prohibit specific commercial transactions between independent lawyers and any client, including title insurers. The professional obligations of a lawyer to prioritize the interests of their clients and to be honest, candid and fair in their dealings protects the public while also allowing and requiring lawyers to make independent professional judgments.

LAW SOCIETY ROLE

In carrying out its statutory functions, the Law Society has a duty to protect the public interest. Notwithstanding that duty, the Law Society has long held, and repeated, the proper position that its role is not to interfere in the market place. It does not regulate fees charged by lawyers to any particular client for any particular task, nor should it do so.



WORKING GROUP BACKGROUND

The Working Group has, as part of the lead up to its review published a “Background” which indicates, in part, the impetus behind the current review. This material indicates that:

The Law Society has taken the view since at least the late 1990’s that the lawyer is not prohibited from accepting fees from a title insurer for services actually rendered to the title insurer. However, the lawyer must disclose such fees and relationship to all clients in the retainer.

The Working Group has heard that the practice of some lawyers has been to receive fees from title insurers without disclosing the fee to the client. It has also heard reports of benefits and incentives, such as contest opportunities, volume discounts and gift cards, offered to lawyers and their staff by certain title insurers.

If the reports received by the Working Group are accurate, and FOLA, based on input from individual lawyer licencees, believes that the reports are accurate, but limited to a small number of lawyers, then this is a matter of enforcement of the existing Rules, not additional regulation.

CURRENT RULES OF PROFESSIONAL CONDUCT

The current Rules of Professional Conduct require that lawyers be honest, candid and fair with respect to their dealings with clients, including the charging of fees for services. The following rules are relevant to the issue of lawyers maintaining business relationships with service providers, receiving benefits from title insurers, and/or providing professional services to title insurers during the completion of purchase and sale transactions.

SECTION 2.1 INTEGRITY

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Honesty and Candour

3.2-2 When advising clients, a lawyer shall be honest and candid.

Commentary

[1] [FLSC - not in use]

[1.1] A lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter.



[1.2] In some limited circumstances, it may be appropriate to withhold information from a client. For example, with client consent, a lawyer may act where the lawyer receives information on a "for counsel's eyes only" basis. However, it would not be appropriate to act for a client where the lawyer has relevant material information about that client received through a different retainer. In those circumstances the lawyer cannot be honest and candid with the client and should not act.

[2] The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

Title Insurance in Real Estate Conveyancing

3.2-9.4 A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

[1] A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

[2] The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

3.2-9.5 A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client.

3.2-9.6 A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

[1] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

3.2-9.7 If discussing TitlePLUS insurance with a client, a lawyer shall fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LawPRO).



Reasonable Fees and Disbursements

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.

Unfortunately, the reality is that not all lawyers follow the Rules of Professional Conduct in each and every circumstance but FOLA believes that the vast majority of real estate practitioners are honest, candid and serve the interests of their clients with integrity. Those who fail to follow the Rules in relation to fees and benefits received from title insurers should be sanctioned; however, to repeat a point already made, this should be a matter of enforcement and not prohibition.

OTHER PROFESSIONS

In considering whether or not to regulate the interactions of individual lawyers with title insurers, it may be instructive to review whether other professions regulate such matters.

A cursory review of the Codes of Conduct or Ethics of other professions indicates that the professions are unanimous in requiring their members to be honest, candid, fair and independent in their dealings with clients, however none prohibit specific interactions. It is submitted that the proper approach to regulating the conduct of professionals is to establish principles or “high level” guidance, and then to expect that the professionals being regulated will examine specific interactions and transactions to determine how best to comply with the relevant guiding principles.

Chartered Professional Accountants of Ontario – CPA Code of Professional Conduct

<https://www.cpaontario.ca/stewardship-of-the-profession/governance/code-of-professional-conduct>

Royal College of Dental Surgeons of Ontario – Code of Ethics

<https://www.rcdso.org/en-ca/rcdso-members/your-responsibilities/code-of-ethics>

Canadian Medical Association – CMA Code of Ethics

https://www.cma.ca/Assets/assets-library/document/en/advocacy/policy-research/CMA_Policy_Code_of_ethics_of_the_Canadian_Medical_Association_Update_2004_PD_04-06-e.pdf

UNINTENDED CONSEQUENCES

It is the submission of FOLA that the involvement of lawyers in the title transfer system in Ontario is an important safeguard to the public who are transferring title to real property. Lawyers ensure that individuals engaging in one of the more significant transactions of their lives have full and complete information, avoid expensive issues with title problems in the future, and protect the



public from fraud. One of the fundamental legislative provisions which ensures that lawyers remain in their role of ensuring a properly functioning system of title transfers is O. Reg, 69/07, which provides:

Limitation and condition

1. A licence issued to an insurer to undertake title insurance in Ontario is subject to the limitation and condition that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to be insured from a solicitor then entitled to practise in Ontario and who is not at that time in the employ of the insurer. O. Reg. 69/07, s. 1.

There is a concern that if lawyers are prohibited from being compensated for providing legal services to title insurers, then the government may be persuaded to revoke this regulation. Title insurers could argue that it is no longer possible to comply with the regulation requiring a certificate of title from an independent lawyer if lawyers are no longer able to accept compensation for providing such services, since most lawyers do not work for free.

If this regulation were to be revoked, there is a genuine fear that lawyers will no longer be involved in most residential real estate transactions, to the detriment of the public.

In considering the outright prohibition of commercial transactions between lawyers and title insurers, the Committee should reflect on the myriad of possible commercial interactions which may occur between lawyers and title insurers. Title insurers may retain private counsel to:

- 1) Investigate title to particular properties prior to the issuance of a policy;
- 2) Review specific aspect of claims;
- 3) Engage in the repair of title problems; and
- 4) Conduct off title searches in relation to a property.

The above list is not exhaustive. It is the understanding of FOLA that the Working Group is not considering prohibiting lawyers from providing specific services to title insurance companies in exchange for remuneration.

Each of the title insurance companies, including TitlePLUS, engages in activities designed to encourage lawyers to consider their insurance product(s) for the clients' transactions. If the Working Group recommends that the LSO intervene in the marketplace by banning lawyers from receiving any benefits of any kind, including fees for services provided, it will impact the competitive environment among the title insurers and that may impact the public in ways which cannot be reasonably foreseen, as the title insurers and lawyers adjust to whatever new rules are imposed. In one simplistic possibility, new rules may result in many lawyers replacing revenue no longer received from title insurers with additional fees charged to their clients. Real estate law remains a profession and a business. The lawyers of Ontario have long reported to FOLA that there is ever growing pressure to limit fees for real estate transactions and this severely impacts the profitability of many law practices in smaller and larger communities alike. It is FOLA's



concern that such unknown and unintended consequences are not in the interest of the bar, nor the public.

FORMS OF BENEFITS

The consideration which may be received by lawyers from title insurers takes different forms such as:

- 1) Promotional items from pens to sports tickets and other social functions;
- 2) Volume based payments for placing numerous orders;
- 3) Fees for services provided such as the Examining Counsel Fee offered by Stewart Title and Elite Program Fee offered by Chicago Title;
- 4) Free or sponsored CPD programs;
- 5) Additional free insurance coverage for lawyers who can avoid claims to LawPro; and
- 6) Payments to counsel for work undertaken to correct title issues.

Once again the above list is not necessarily exhaustive, but intended to illustrate the myriad of ways that there may be commercial interactions between individual lawyers and title insurers. In the event that the Working Group recommends any new restrictions or prohibitions, it is recommended that there be a careful analysis of each form of potential benefit, and very specific rules developed to prevent a perceived harm or risk. In addition, it is important to distinguish between a commercial fee for service payment(s) and other forms of benefits.

FSCO REVIEW

The legislative mandate of the Financial Services Commission of Ontario (“FSCO”) is to provide regulatory services that protect the public interest and enhance public confidence in the sectors it regulates.

FSCO has specifically reviewed compensation arrangements between title insurers and lawyers. The Report on FSCO’s Review of Residential Title Insurance dated September 2015 (the “2015 Report”) notes the following at page 6:

“... it should be noted that from LSUC’s perspective these fees that are paid to lawyer are not considered referral fees. LSUC considers these fees to be payments for the lawyers’ legal services and/or administrative/processing services. “

It concluded, at page 10 of the 2015 Report, that “[c]ompensation arrangements between title insurance companies and lawyers may result in potential conflicts of interest which are not a problem if they are appropriately identified and managed. Lawyers have an obligation to their clients based on their own professional code of conduct and oversight by the Law Society of Upper Canada”.



CONCLUSION

FOLA believes that the current Rules of Professional Conduct are sufficient to appropriately govern lawyers with respect to their dealings with title insurers.

The current Rules provide proper protection for the public and there is no evidence of any significant number of complaints or other issues relating to title insurance incentives.

FOLA was unable to locate any discipline decisions relating to lawyers' arrangements with title insurers and FSCO notes in its 2015 Report that it continues to receive few complaints about title insurance, and those few complaints relate to claims for issues that were not covered by the title insurance policy or exclusions listed in the policy (on page 3).

Concerns regarding breaches of the existing Rules of Professional Conduct should be met with stricter enforcement, rather than additional regulation.