The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 4

Report to Convocation
June 29, 2017

Professional Regulation Committee

Committee Members
William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
Seymour Epstein
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
Margaret Drent (416-947-7613)

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For Decision

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on June 8, 2017. In attendance were William C. McDowell (Chair), Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, John Callaghan, Gisèle Chrétien, (by telephone), Suzanne Clément, Seymour Epstein, Michael Lerner (by telephone), Virginia MacLean, Susan Richer, and Jerry Udell (by telephone). Robert Evans also attended the meeting.

2. Law Society staff members Karen Manarin, Caterina Galati, Juda Strawczynski, and Margaret Drent also attended the meeting.

Tab 4.1

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT - COMMENTARY REGARDING INCRIMINATING PHYSICAL EVIDENCE

MOTION

3. **That Convocation approve amendments to Commentary paragraph [5] to Rule 5.1-2A of the Rules of Professional Conduct (Incriminating Physical Evidence) as set out at Tabs 4.1.1 and 4.1.2 (English and French).**

Nature of the Issue

4. In March 2017 the Council of the Federation of Law Societies of Canada (FLSC) approved amendments to the Model Code of Professional Conduct in several areas. The following sentence has been added to paragraph [5] of the Commentary: "the lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation".

5. In 2016 the Committee reviewed a FLSC consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. At that time, a notice and an e-bulletin were circulated to legal organizations, lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.

Summary of Proposed Amendments

6. A "clean" version of the proposed amendment is available at **Tab 4.1.3**. A French language version is shown at **Tab 4.1.4**.

7. According to materials provided by the Model Code Standing Committee, the Nova Scotia Barristers Society had suggested the proposed amendment to reflect the constitutionally-protected right against self-incrimination, and to emphasize that the lawyer's advice to this effect does not place the lawyer outside the Rule (i.e. obstructing justice).

8. The Committee has reviewed the proposed amendment and is of the view that it would enhance the existing guidance to lawyers in this area.

TAB 4.1.1

REDLINE SHOWING PROPOSED CHANGES TO THE RULES OF PROFESSIONAL CONDUCT – AMENDMENTS TO THE COMMENTARY REGARDING INCRIMINATING PHYSICAL EVIDENCE

Incriminating Physical Evidence

5.1-2A A lawyer shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:

(a) considering whether to retain independent legal counsel to provide advice about the lawyer's obligations. If retained, the lawyer and independent legal counsel should consider

> (i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and
>
> (ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances
>
> > (I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or
> >
> > (II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

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Tab 4.1.2

VERSION MONTRANT LES CHANGEMENTS PROPOSÉS AU CODE DE DÉONTOLOGIE – MODIFICATIONS AU COMMENTAIRE CONCERNANT LA PREUVE MATÉRIELLE INCRIMINANTE

Preuve matérielle incriminante

5.1-2A L'avocat ne conseille pas de dissimuler, de détruire ou de modifier une preuve matérielle incriminante et n'y participe pas ou n'agit pas de façon à entraver ou à tenter d'entraver le cours de la justice.

Commentaire

[1] Dans la présente règle, la « preuve matérielle » ne repose pas sur l'admissibilité devant un tribunal ni sur l'existence d'accusations criminelles. Elle vise les documents, l'information électronique, les objets ou les substances ayant trait à un acte criminel, à une enquête ou à une poursuite criminelle. Elle ne vise pas les documents ou les communications qui sont protégés par le privilège du secret professionnel ou que les autorités peuvent se procurer autrement, selon l'avis raisonnable de l'avocat.

[2] Cette règle ne s'applique pas lorsqu'un avocat a en sa possession une preuve qui tend à établir l'innocence d'un client, comme la preuve concernant un alibi. Cependant, un avocat doit faire preuve de prudence dans son jugement lorsqu'il s'agit de déterminer si une telle preuve est en fait disculpatoire et, par conséquent, ne relève pas de l'application de la présente règle. Par exemple, si la preuve est à la fois incriminante et disculpatoire, une mauvaise utilisation de cette règle pourrait constituer une violation de la règle et exposer l'avocat à des accusations criminelles.

[3] Un avocat n'est jamais tenu de prendre possession ou de conserver une preuve matérielle incriminante ni d'en divulguer l'existence. La possession d'objets illégaux pourrait constituer une infraction. Un avocat qui est en possession d'une preuve matérielle incriminante devrait examiner soigneusement l'une ou l'autre des mesures possibles suivantes, notamment en faisant appel à un praticien juridique chevronné :

a) Envisager d'obtenir des conseils juridiques indépendants quant à ses obligations. Le cas échéant, l'avocat et son conseiller juridique indépendant devraient

> (i) décider si le conseiller juridique indépendant devrait être informé de l'identité du client et instruit de ne pas divulguer l'identité de l'avocat aux autorités policières ou au procureur;
>
> (ii) décider si le conseiller juridique indépendant devrait, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances, faire l'une ou l'autre des choses suivantes :
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> > (I) divulguer ou remettre la preuve aux autorités policières ou au procureur,
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> > (II) divulguer et remettre la preuve aux autorités policières et au procureur;

b) Remettre la preuve aux autorités policières ou au procureur et, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances;

c) Présenter la preuve au tribunal dans l'instance applicable et notamment solliciter une directive du tribunal pour faciliter l'accès par le procureur ou la défense aux éléments de preuve afin qu'ils puissent les vérifier et les examiner;

d) Informer le procureur de l'existence de la preuve et, s'il y a lieu, être prêt à soutenir devant un tribunal les moyens d'utiliser la preuve et d'en disposer, ainsi que sa recevabilité.

[4] L'avocat devrait trouver le juste équilibre entre l'obligation de loyauté et de confidentialité envers le client et les obligations envers l'administration de la justice. Lorsqu'un avocat divulgue ou présente une preuve matérielle incriminante aux autorités policières ou au procureur, l'avocat a l'obligation de protéger la confidentialité des renseignements concernant le client, y compris son identité, et de préserver le privilège du secret professionnel.

[5] L'avocat n'est pas tenu d'aider les autorités à recueillir des éléments de preuve matérielle d'un crime, mais ne peut agir de façon à entraver une enquête ou une poursuite, ou conseiller à une personne d'agir ainsi. Ne constitue pas une entrave à une enquête le fait pour l'avocat d'informer son client que celui-ci a le droit de refuser de révéler où se trouvent certains éléments de preuve matérielle. L'avocat qui apprend l'existence d'une preuve matérielle incriminante ou qui refuse d'en prendre possession ne doit pas conseiller de la dissimuler, la détruire ou la modifier, ni participer à de tels actes.

[6] L'avocat peut déterminer qu'il est nécessaire de vérifier, de reproduire ou d'examiner de façon non destructive des documents ou de l'information électronique. L'avocat devrait s'assurer que la preuve n'est pas dissimulée, détruite ou modifiée et doit agir avec prudence à cet égard. Par exemple, ouvrir ou reproduire un document électronique pourrait l'altérer. L'avocat qui décide de reproduire, de vérifier ou d'examiner la preuve avant de la présenter ou de la divulguer doit le faire sans tarder.

Tab 4.1.3

"CLEAN" VERSION SHOWING PROPOSED CHANGES TO THE RULES OF PROFESSIONAL CONDUCT – AMENDMENTS TO THE COMMENTARY REGARDING INCRIMINATING PHYSICAL EVIDENCE

Incriminating Physical Evidence

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Commentary

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[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is in fact exculpatory and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

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(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege.

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[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

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Tab 4.1.4

VERSION MONTRANT LES CHANGEMENTS PROPOSÉS AU CODE DE DÉONTOLOGIE – MODIFICATIONS AU COMMENTAIRE CONCERNANT LA PREUVE MATÉRIELLE INCRIMINANTE

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Commentaire

[1] Dans la présente règle, la « preuve matérielle » ne repose pas sur l'admissibilité devant un tribunal ni sur l'existence d'accusations criminelles. Elle vise les documents, l'information électronique, les objets ou les substances ayant trait à un acte criminel, à une enquête ou à une poursuite criminelle. Elle ne vise pas les documents ou les communications qui sont protégés par le privilège du secret professionnel ou que les autorités peuvent se procurer autrement, selon l'avis raisonnable de l'avocat.

[2] Cette règle ne s'applique pas lorsqu'un avocat a en sa possession une preuve qui tend à établir l'innocence d'un client, comme la preuve concernant un alibi. Cependant, un avocat doit faire preuve de prudence dans son jugement lorsqu'il s'agit de déterminer si une telle preuve est en fait disculpatoire et, par conséquent, ne relève pas de l'application de la présente règle. Par exemple, si la preuve est à la fois incriminante et disculpatoire, une mauvaise utilisation de cette règle pourrait constituer une violation de la règle et exposer l'avocat à des accusations criminelles.

[3] Un avocat n'est jamais tenu de prendre possession ou de conserver une preuve matérielle incriminante ni d'en divulguer l'existence. La possession d'objets illégaux pourrait constituer une infraction. Un avocat qui est en possession d'une preuve matérielle incriminante devrait examiner soigneusement l'une ou l'autre des mesures possibles suivantes, notamment en faisant appel à un praticien juridique chevronné :

a) Envisager d'obtenir des conseils juridiques indépendants quant à ses obligations. Le cas échéant, l'avocat et son conseiller juridique indépendant devraient

> (i) décider si le conseiller juridique indépendant devrait être informé de l'identité du client et instruit de ne pas divulguer l'identité de l'avocat aux autorités policières ou au procureur;
>
> (ii) décider si le conseiller juridique indépendant devrait, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances, faire l'une ou l'autre des choses suivantes :
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(II) divulguer et remettre la preuve aux autorités policières et au procureur;

b) Remettre la preuve aux autorités policières ou au procureur et, directement ou anonymement, en tenant compte de la procédure adéquate dans les circonstances;

c) Présenter la preuve au tribunal dans l'instance applicable et notamment solliciter une directive du tribunal pour faciliter l'accès par le procureur ou la défense aux éléments de preuve afin qu'ils puissent les vérifier et les examiner;

d) Informer le procureur de l'existence de la preuve et, s'il y a lieu, être prêt à soutenir devant un tribunal les moyens d'utiliser la preuve et d'en disposer, ainsi que sa recevabilité.

[4] L'avocat devrait trouver le juste équilibre entre l'obligation de loyauté et de confidentialité envers le client et les obligations envers l'administration de la justice. Lorsqu'un avocat divulgue ou présente une preuve matérielle incriminante aux autorités policières ou au procureur, l'avocat a l'obligation de protéger la confidentialité des renseignements concernant le client, y compris son identité, et de préserver le privilège du secret professionnel.

[5] L'avocat n'est pas tenu d'aider les autorités à recueillir des éléments de preuve matérielle d'un crime, mais ne peut agir de façon à entraver une enquête ou une poursuite, ou conseiller à une personne d'agir ainsi. Ne constitue pas une entrave à une enquête le fait pour l'avocat d'informer son client que celui-ci a le droit de refuser de révéler où se trouvent certains éléments de preuve matérielle. L'avocat qui apprend l'existence d'une preuve matérielle incriminante ou qui refuse d'en prendre possession ne doit pas conseiller de la dissimuler, la détruire ou la modifier, ni participer à de tels actes.

[6] L'avocat peut déterminer qu'il est nécessaire de vérifier, de reproduire ou d'examiner de façon non destructive des documents ou de l'information électronique. L'avocat devrait s'assurer que la preuve n'est pas dissimulée, détruite ou modifiée et doit agir avec prudence à cet égard. Par exemple, ouvrir ou reproduire un document électronique pourrait l'altérer. L'avocat qui décide de reproduire, de vérifier ou d'examiner la preuve avant de la présenter ou de la divulguer doit le faire sans tarder.

Tab 4.2

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING COMPETENCE AND THE PROVISION OF LEGAL OPINIONS

MOTION

9. **That Convocation approve amendments to paragraphs [8] and [9] of the Commentary to Law Society Rule 3.1-2 (Competence) as set out at Tab 4.2.1 and 4.2.2. (English and French).**

Nature of the Issue

10. These amendments are intended to provide additional guidance to lawyers about the provision of legal opinions, and would reflect amendments to the Model Code of Professional Conduct of the Federation of Law Societies of Canada approved by Federation Council in March 2017.

11. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. A notice was also sent to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.

12. According to the FLSC consultation report, the impetus for this proposed amendment regarding the provision of legal opinions is a recommendation of the Canadian Bar Association (CBA) Legal Futures Initiative ("Futures"). The "Futures" Report emphasized the importance of lawyer independence and raised the possibility of undue influence being exercised by powerful clients over lawyers' legal opinions.

13. The proposed amendment to the Commentary would, if approved by Convocation, also provide greater guidance on the issue of a lawyer making unreasonable assurances to a client.

14. A "clean" version is attached as **Tab 4.2.3.** A French language version is shown at **Tab 4.2.4**.

Tab 4.2.1

REDLINE SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ARISING FROM MODEL CODE AMENDMENTS

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

(a) decline to act;

(b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of ~~bold~~ providing ~~and~~ unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensee. Advice or services from non-licensee members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] Incompetence, Negligence and Mistakes – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[15.1] The *Law Society Act* provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer's knowledge, skill, or judgment,

(b) the lawyer's attention to the interests of clients,

(c) the records, systems, or procedures of the lawyer's professional business, or

(d) other aspects of the lawyer's professional business,

and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]

Tab 4.2.2

VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE DÉCOULANT DES MODIFICATIONS DU CODE TYPE APPROUVÉES EN MARS 2017 – Commentaire sur la compétence

Compétence

3.1-2 Un avocat doit fournir tous les services juridiques entrepris au nom d'un client conformément à la norme de compétence exigée d'un avocat.

Commentaire

[1] À titre de membre de la profession juridique, l'avocat est censé avoir les connaissances, l'expérience et les aptitudes requises pour exercer le droit. Ses clients sont donc en droit de croire qu'il a les aptitudes et qualités requises pour traiter convenablement toutes les affaires juridiques dont ils le saisissent.

[2] La compétence est fondée sur des principes déontologiques et juridiques. La présente règle traite des principes déontologiques. La compétence est plus qu'une affaire de compréhension des principes du droit ; il s'agit de comprendre adéquatement la pratique et les procédures selon lesquelles ces principes peuvent s'appliquer de manière efficace. Pour ce faire, l'avocat doit se tenir au courant des faits nouveaux dans tous les domaines du droit relevant de ses compétences.

[3] En décidant si l'avocat a fait appel aux connaissances et habiletés requises dans un dossier particulier, les facteurs dont il faudra tenir compte comprennent

a) la complexité et la nature spécialisée du dossier ;

b) l'expérience générale de l'avocat ;

c) la formation et l'expérience de l'avocat dans le domaine ;

d) le temps de préparation et d'étude que l'avocat est en mesure d'accorder au dossier ;

e) s'il est approprié et faisable de renvoyer le dossier à un titulaire de permis dont les compétences sont reconnues dans le domaine en question, de s'associer avec ce dernier ou de le consulter.

[4] Dans certaines circonstances, une expertise dans un domaine du droit particulier pourrait être requise ; dans bien des cas, le niveau de compétence nécessaire sera celui du généraliste.

[5] L'avocat ne devrait donc pas accepter une affaire s'il n'est pas honnêtement convaincu de posséder la compétence nécessaire pour la traiter ou de pouvoir l'acquérir sans délai, sans frais et sans risques excessifs pour son client. Il s'agit là d'une considération d'ordre éthique, distincte des normes de diligence que pourrait invoquer un tribunal pour conclure à la négligence professionnelle.

[6] L'avocat doit reconnaitre son manque de compétence pour une affaire déterminée et que s'il s'en chargeait, il desservirait les intérêts de son client. Si son client le consulte au sujet d'une telle affaire, l'avocat doit :

a) refuser le mandat ;

b) obtenir les directives du client pour engager un titulaire de permis ayant les compétences pour prendre en charge cette affaire ou consulter ou collaborer avec un tel titulaire de permis ;

c) obtenir le consentement du client afin d'acquérir les compétences sans délai, sans risques et sans frais pour le client.

[7] L'avocat devrait également reconnaitre que, pour avoir les compétences nécessaires à une tâche en particulier, il devra peut-être demander conseil à des experts dans le domaine scientifique, comptable ou autre domaine non juridique, ou collaborer avec de tels experts. De plus, il ne doit pas hésiter à demander au client la permission de consulter des experts lorsque cela est approprié.

[7A] Lorsqu'un avocat envisage la possibilité de fournir des services juridiques en vertu d'un mandat à portée limitée, il doit évaluer soigneusement pour chaque cas si, dans les circonstances, il est possible de rendre ces services de manière compétente. Une entente visant à fournir ce type de service n'exonère pas un avocat de son obligation de représenter un client avec compétence. Comme dans tout mandat, l'avocat devrait tenir compte des connaissances juridiques, des aptitudes, de la rigueur et de la préparation raisonnablement nécessaires pour assurer une représentation compétente. L'avocat devrait veiller à ce que le client comprenne complètement et clairement la nature de l'entente et la portée des services, y compris les limites. Voir aussi les règles 3.2-1A à 3.2-1A.2.

[8] L'avocat devrait préciser clairement les faits, les circonstances et les hypothèses sur lesquels une opinion est fondée, particulièrement lorsque les circonstances ne justifient pas une enquête exhaustive ainsi que les dépenses qui en résultent et qui seraient imputées au client. Toutefois, à moins d'indication contraire de la part du client, l'avocat devrait mener une enquête suffisamment détaillée afin d'être en mesure de donner une opinion, plutôt que de faire de simples commentaires assortis de nombreuses réserves. L'avocat ne devrait donner d'autre opinion juridique que celle qui est véritablement la sienne et qui satisfait à la norme de l'avocat compétent.

[8.1] Ce qui est considéré comme une communication efficace avec le client variera selon la nature du mandat, les besoins et les connaissances du client ainsi que la nécessité pour le client de prendre des décisions bien éclairées et de fournir des directives.

[9] L'avocat devrait faire attention de ne pas faire de promesses ~~excessives et~~ présomptueuses et déraisonnables au client, surtout lorsque l'emploi ou le mandat de l'avocat peut en dépendre.

[10] En plus de demander à l'avocat de donner son avis sur des questions de droit, on pourrait lui demander de donner son avis sur des questions de nature non juridique – comme les complications commerciales, économiques, politiques ou sociales que pourrait comporter l'affaire – ou sur le plan d'action que devrait choisir le client, ou s'attendre à ce qu'il donne son avis sur de telles questions. Dans bien des cas, l'expérience de l'avocat sera telle que le client pourra tirer profit de ses opinions sur des questions non juridiques. L'avocat qui exprime ses opinions sur de telles questions devrait, s'il y a lieu et dans la mesure nécessaire, signaler tout manque d'expérience ou de compétence dans le domaine particulier et devrait faire nettement la distinction entre un avis juridique ou un avis autre que juridique.

[11] Dans le cas d'un cabinet multidisciplinaire, l'avocat doit veiller à ce que le client sache que l'avis ou les services d'un non-titulaire de permis pourraient s'ajouter à l'avis juridique donné par l'avocat. Un avis ou les services de membres non avocats du cabinet qui n'ont aucun lien avec le mandat des services juridiques doivent être fournis à l'extérieur du cadre du mandat des services juridiques et à partir d'un endroit distinct des lieux du cabinet multidisciplinaire. La prestation d'avis ou de services non juridiques qui n'ont aucun lien avec le mandat de services juridiques sera également assujettie aux contraintes énoncées dans les règlements administratifs et les règlements régissant les cabinets multidisciplinaires.

[12] En exigeant un service consciencieux, appliqué et efficace, on demande que l'avocat fasse tout effort possible pour servir le client en temps opportun. Si l'avocat peut raisonnablement prévoir un retard dans l'exécution de ses tâches, il devrait en aviser le client de sorte que ce dernier puisse faire un choix éclairé quant à ses options, comme la possibilité de retenir les services d'un autre avocat.

[13] L'avocat devrait s'abstenir de toute conduite qui pourrait gêner ou compromettre sa capacité ou son empressement à fournir des services juridiques satisfaisants au client et devrait être conscient de tout facteur ou de toute circonstance pouvant avoir cet effet.

[14] L'avocat incompétent nuit à ses clients, déshonore sa profession et risque de jeter le discrédit sur l'administration de la justice. En plus de compromettre sa réputation et sa carrière, il peut aussi causer du tort à ses associés et aux professionnels salariés de son cabinet.

[15] Incompétence, négligence et erreurs – La présente règle ne vise pas la perfection. Une erreur ou une omission, bien qu'elle puisse donner lieu à une action en dommages-intérêts pour cause de négligence ou de rupture de contrat, ne constituera pas forcément un manquement à la norme de compétence professionnelle décrite dans la règle. Bien que des dommages-intérêts puissent être accordés pour cause de négligence, l'incompétence peut aussi entrainer une sanction disciplinaire.

[15.1] La *Loi sur le Barreau* prévoit qu'un avocat ne respecte pas les normes de compétence de la profession s'il existe des lacunes sur l'un ou l'autre des plans suivants :

a) ses connaissances, ses habiletés ou son jugement ;

b) l'attention qu'il porte aux intérêts de ses clients ;

c) les dossiers, les systèmes ou les méthodes qu'il utilise pour ses activités professionnelles ;

d) d'autres aspects de ses activités professionnelles,

et que ces lacunes soulèvent des craintes raisonnables quant à la qualité du service qu'il offre à ses clients.

[Modifié – Juin 2009, Octobre 2014]

Tab 4.2.3

"CLEAN" VERSION SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ARISING FROM MODEL CODE AMENDMENTS

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

(a) decline to act;

(b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or

(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensee. Advice or services from non-licensee members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] Incompetence, Negligence and Mistakes – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[15.1] The *Law Society Act* provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer's knowledge, skill, or judgment,

(b) the lawyer's attention to the interests of clients,

(c) the records, systems, or procedures of the lawyer's professional business, or

(d) other aspects of the lawyer's professional business,

and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]

Tab 4.2.4

VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE DÉCOULANT DES MODIFICATIONS DU CODE TYPE APPROUVÉES EN MARS 2017 – Commentaire sur la compétence

Compétence

3.1-2 Un avocat doit fournir tous les services juridiques entrepris au nom d'un client conformément à la norme de compétence exigée d'un avocat.

Commentaire

[1] À titre de membre de la profession juridique, l'avocat est censé avoir les connaissances, l'expérience et les aptitudes requises pour exercer le droit. Ses clients sont donc en droit de croire qu'il a les aptitudes et qualités requises pour traiter convenablement toutes les affaires juridiques dont ils le saisissent.

[2] La compétence est fondée sur des principes déontologiques et juridiques. La présente règle traite des principes déontologiques. La compétence est plus qu'une affaire de compréhension des principes du droit ; il s'agit de comprendre adéquatement la pratique et les procédures selon lesquelles ces principes peuvent s'appliquer de manière efficace. Pour ce faire, l'avocat doit se tenir au courant des faits nouveaux dans tous les domaines du droit relevant de ses compétences.

[3] En décidant si l'avocat a fait appel aux connaissances et habiletés requises dans un dossier particulier, les facteurs dont il faudra tenir compte comprennent

a) la complexité et la nature spécialisée du dossier ;

b) l'expérience générale de l'avocat ;

c) la formation et l'expérience de l'avocat dans le domaine ;

d) le temps de préparation et d'étude que l'avocat est en mesure d'accorder au dossier ;

e) s'il est approprié et faisable de renvoyer le dossier à un titulaire de permis dont les compétences sont reconnues dans le domaine en question, de s'associer avec ce dernier ou de le consulter.

[4] Dans certaines circonstances, une expertise dans un domaine du droit particulier pourrait être requise ; dans bien des cas, le niveau de compétence nécessaire sera celui du généraliste.

[5] L'avocat ne devrait donc pas accepter une affaire s'il n'est pas honnêtement convaincu de posséder la compétence nécessaire pour la traiter ou de pouvoir l'acquérir sans délai, sans frais et sans risques excessifs pour son client. Il s'agit là d'une considération d'ordre éthique, distincte des normes de diligence que pourrait invoquer un tribunal pour conclure à la négligence professionnelle.

[6] L'avocat doit reconnaitre son manque de compétence pour une affaire déterminée et que s'il s'en chargeait, il desservirait les intérêts de son client. Si son client le consulte au sujet d'une telle affaire, l'avocat doit :

a) refuser le mandat ;

b) obtenir les directives du client pour engager un titulaire de permis ayant les compétences pour prendre en charge cette affaire ou consulter ou collaborer avec un tel titulaire de permis ;

c) obtenir le consentement du client afin d'acquérir les compétences sans délai, sans risques et sans frais pour le client.

[7] L'avocat devrait également reconnaitre que, pour avoir les compétences nécessaires à une tâche en particulier, il devra peut-être demander conseil à des experts dans le domaine scientifique, comptable ou autre domaine non juridique, ou collaborer avec de tels experts. De plus, il ne doit pas hésiter à demander au client la permission de consulter des experts lorsque cela est approprié.

[7A] Lorsqu'un avocat envisage la possibilité de fournir des services juridiques en vertu d'un mandat à portée limitée, il doit évaluer soigneusement pour chaque cas si, dans les circonstances, il est possible de rendre ces services de manière compétente. Une entente visant à fournir ce type de service n'exonère pas un avocat de son obligation de représenter un client avec compétence. Comme dans tout mandat, l'avocat devrait tenir compte des connaissances juridiques, des aptitudes, de la rigueur et de la préparation raisonnablement nécessaires pour assurer une représentation compétente. L'avocat devrait veiller à ce que le client comprenne complètement et clairement la nature de l'entente et la portée des services, y compris les limites. Voir aussi les règles 3.2-1A à 3.2-1A.2.

[8] L'avocat devrait préciser clairement les faits, les circonstances et les hypothèses sur lesquels une opinion est fondée, particulièrement lorsque les circonstances ne justifient pas une enquête exhaustive ainsi que les dépenses qui en résultent et qui seraient imputées au client. Toutefois, à moins d'indication contraire de la part du client, l'avocat devrait mener une enquête suffisamment détaillée afin d'être en mesure de donner une opinion, plutôt que de faire de simples commentaires assortis de nombreuses réserves. L'avocat ne devrait donner d'autre opinion juridique que celle qui est véritablement la sienne et qui satisfait à la norme de l'avocat compétent.

[8.1] Ce qui est considéré comme une communication efficace avec le client variera selon la nature du mandat, les besoins et les connaissances du client ainsi que la nécessité pour le client de prendre des décisions bien éclairées et de fournir des directives.

[9] L'avocat devrait faire attention de ne pas faire de promesses présomptueuses et déraisonnables au client, surtout lorsque l'emploi ou le mandat de l'avocat peut en dépendre.

[10] En plus de demander à l'avocat de donner son avis sur des questions de droit, on pourrait lui demander de donner son avis sur des questions de nature non juridique – comme les complications commerciales, économiques, politiques ou sociales que pourrait comporter l'affaire – ou sur le plan d'action que devrait choisir le client, ou s'attendre à ce qu'il donne son avis sur de telles questions. Dans bien des cas, l'expérience de l'avocat sera telle que le client pourra tirer profit de ses opinions sur des questions non juridiques. L'avocat qui exprime ses opinions sur de telles questions devrait, s'il y a lieu et dans la mesure nécessaire, signaler tout manque d'expérience ou de compétence dans le domaine particulier et devrait faire nettement la distinction entre un avis juridique ou un avis autre que juridique.

[11] Dans le cas d'un cabinet multidisciplinaire, l'avocat doit veiller à ce que le client sache que l'avis ou les services d'un non-titulaire de permis pourraient s'ajouter à l'avis juridique donné par l'avocat. Un avis ou les services de membres non avocats du cabinet qui n'ont aucun lien avec le mandat des services juridiques doivent être fournis à l'extérieur du cadre du mandat des services juridiques et à partir d'un endroit distinct des lieux du cabinet multidisciplinaire. La prestation d'avis ou de services non juridiques qui n'ont aucun lien avec le mandat de services juridiques sera également assujettie aux contraintes énoncées dans les règlements administratifs et les règlements régissant les cabinets multidisciplinaires.

[12] En exigeant un service consciencieux, appliqué et efficace, on demande que l'avocat fasse tout effort possible pour servir le client en temps opportun. Si l'avocat peut raisonnablement prévoir un retard dans l'exécution de ses tâches, il devrait en aviser le client de sorte que ce dernier puisse faire un choix éclairé quant à ses options, comme la possibilité de retenir les services d'un autre avocat.

[13] L'avocat devrait s'abstenir de toute conduite qui pourrait gêner ou compromettre sa capacité ou son empressement à fournir des services juridiques satisfaisants au client et devrait être conscient de tout facteur ou de toute circonstance pouvant avoir cet effet.

[14] L'avocat incompétent nuit à ses clients, déshonore sa profession et risque de jeter le discrédit sur l'administration de la justice. En plus de compromettre sa réputation et sa carrière, il peut aussi causer du tort à ses associés et aux professionnels salariés de son cabinet.

[15] Incompétence, négligence et erreurs – La présente règle ne vise pas la perfection. Une erreur ou une omission, bien qu'elle puisse donner lieu à une action en dommages-intérêts pour cause de négligence ou de rupture de contrat, ne constituera pas forcément un manquement à la norme de compétence professionnelle décrite dans la règle. Bien que des dommages-intérêts puissent être accordés pour cause de négligence, l'incompétence peut aussi entrainer une sanction disciplinaire.

[15.1] La *Loi sur le Barreau* prévoit qu'un avocat ne respecte pas les normes de compétence de la profession s'il existe des lacunes sur l'un ou l'autre des plans suivants :

a) ses connaissances, ses habiletés ou son jugement ;

b) l'attention qu'il porte aux intérêts de ses clients ;

c) les dossiers, les systèmes ou les méthodes qu'il utilise pour ses activités professionnelles ;

d) d'autres aspects de ses activités professionnelles,

et que ces lacunes soulèvent des craintes raisonnables quant à la qualité du service qu'il offre à ses clients.

[Modifié – Juin 2009, Octobre 2014]

Tab 4.3

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT - NEW RULE REGARDING LEAVING A LAW FIRM

MOTION

15. **That Convocation approve amendments to the Rules of Professional Conduct that would incorporate new sub-rules and Commentary describing a lawyer's obligations when leaving a law firm, as set out at Tabs 4.3.1 and 4.3.2 (English and French).**

Nature of the Issue

16. According to materials provided by the Standing Committee on the Model Code of Professional Conduct of the Federation of Law Societies of Canada, these Model Code amendments are intended to ensure that the Rules and Commentary address issues of client choice of counsel, how a lawyer and a law firm should interact when a lawyer departs, and how lawyers should provide notice of their departure to clients.

17. The Model Code was amended in March 2017 to incorporate a new sub-rule and Commentary regarding leaving a law firm. At that time, paragraph [4] of the Commentary to Model Code Rule 3.7-1 (Withdrawal from Representation) was deleted, since the content of the Commentary is now addressed in the new Rule.

18. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC in June 2016. A notice was also circulated to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.[1]

Issue Under Consideration

19. The Committee has reviewed the Model Code amendments and recommends their adoption to Convocation, with some modifications. Proposed subrule 3.7-7A(1) would, if approved by Convocation, define the terms "affected client", "relevant matter", and "remaining lawyers" for the purpose of the Rules.

[1] Reports regarding additional guidance in the Commentary on the provision of legal opinions, and an amendment to the Commentary regarding Incriminating Physical Evidence appear elsewhere in these materials.

20. Proposed new subrule 3.7-7B would require a lawyer and the "remaining lawyers" to provide reasonable notice of their departure to all affected clients and take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters. These modifications have been drafted with a view to ensuring that the new subrule and Commentary do not impose an undue obligation on lawyers.

21. New Rule 3.7-7A(3) would also be unique to the Law Society and would provide that these obligations would also apply in the event that a paralegal left a law firm.

22. Paragraph [2] of the proposed Commentary begins with the following: "The client's interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm". The proposed Commentary reinforces the principle, set out in *Robert Findlay Law Office Professional Corporation* v. *Werner*, that the interests of clients must be protected when a lawyer leaves a law firm.[2] The Commentary makes it clear that clients must be provided with adequate information to make informed decisions about their representation and that lawyers have a duty to work cooperatively and professionally with their law firms to ensure that clients are not negatively affected.

23. Paragraph [3] of the proposed Commentary addresses the issue of notification to clients about their available options. In some cases, it may be preferable to prepare a joint notification. Commentary paragraph [8] provides that the principles outlined in the rule and commentary apply to the dissolution of a law firm.

24. Proposed subrule 3.7-7B provides that Rule 3.7-7A does not apply to a lawyer leaving a government, Crown corporation or other public body; nor does it apply to a corporation or other organization where a lawyer is employed as in-house counsel.

25. The Law Society of Upper Canada's *Closing Down Your Practice Guideline* is available at http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/File-Management/Closing-Down-Your-Practice-Guideline/. The Committee recommends the adoption of the proposed new subrules and Commentary to Convocation to provide additional guidance to lawyers regarding their ethical obligations in these circumstances.

26. A "clean" version of the Rules of Professional Conduct is attached as **Tab 4.3.3**. A French language "clean" version is available at **Tab 4.3.4**.

[2] *Robert Findlay Law Office Professional Corporation* v. *Werner* (2015) ONSC 2955, online at https://www.canlii.org/en/on/onsc/doc/2015/2015onsc2955/2015onsc2955.html. .

Tab 4.3.1

REDLINE SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

[Amended – October 2014]

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[4] ~~When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.~~

[Amended – October 2014]

Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1]A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

[Amended – October 2014]

Non-payment of Fees

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

[Amended – October 2014]

Withdrawal from Criminal Proceedings

3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

[Amended – June 2007]

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

[Amended – October 2014]

Commentary

[1] A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

3.7-5 A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests.

3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;

(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007, October 2014]

Commentary

[1] Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client;

(b) the client's instructions require the lawyer to act contrary to these rules or by-laws under the *Law Society Act*; or

(c) the lawyer is not competent to continue to handle the matter.

[Amended – March 2004, October 2014]

Leaving a Law Firm

3.7-7A(1) In this subrule

(a) "affected client" means a client for whom the law firm has a relevant matter:

(b) "relevant matter" means a current matter for which the lawyer who is leaving the law firm has conduct or substantial responsibility;

(c) "remaining lawyers" means the lawyers who have, or are intended by the law firm to have, conduct of a relevant matter and the lawyers in the law firm who have direct and indirect management responsibility in respect of the practice of the lawyer who is leaving the law firm.

(2) When a lawyer leaves a law firm to practice elsewhere, the lawyer and the remaining lawyers shall

(a) ensure that affected clients are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and

(b) take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters.

(3) The obligations in Rules 3.7-7A(2)(a) and (b) also apply to the departure of a paralegal from a law firm to practice elsewhere.

Commentary

[1] When a lawyer leaves a law firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The client's interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information by the lawyer and the remaining lawyers to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

[3] The lawyer and the remaining lawyers should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer's work for the client, the client's relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement between the departing lawyer and the remaining lawyers as to who will notify the clients, both the departing lawyer and the remaining lawyers should provide notification.

[4] If a client contacts a law firm to request a departed lawyer's contact information, the remaining lawyers should provide the professional contact information where reasonably possible.

[5] Where a client decides to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

[6] In advance of providing notice to clients or his or her intended departure the lawyer should provide such notice to the firm as is reasonable in the circumstances.

[7] When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

[8] The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of the lawyers involved in the retainer. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

[9] See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

[10] Lawyers are reminded that Rules 3.08(13.1) and (13.2) of the Paralegal Rules of Conduct and paragraphs 18-25 of Paralegal Guideline 11 describe similar obligations for paralegals.

3.7-7B Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in-house counsel.

Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(a) notify the client in writing, stating

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all information that may be required in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

[Amended – June 2009, October 2014]

Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor legal practitioner will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009, October 2014]

Duty of Successor Licensee

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

[Amended – June 2007]

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Tab 4.3.2

VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE SUIVANT LES DISCUSSIONS DU PSC LE 10 MAI 2017, PRC 11 MAI ET PSC 7 JUIN

SECTION 3.7 LE RETRAIT DE L'AVOCAT

Retrait de l'avocat

3.7-1 L'avocat ne peut se retirer d'une affaire que pour des motifs valables et après en avoir convenablement avisé son client.

[Modifié – octobre 2014]

Commentaire

[1] Bien que le client puisse mettre fin à son gré à ses rapports avec son avocat, ce dernier ne jouit pas de la même liberté. L'avocat qui a accepté une affaire doit la mener à terme le mieux possible, à moins qu'il n'ait des raisons légitimes de mettre fin à son mandat.

[2] Un élément essentiel du préavis raisonnable est l'avis au client, à moins que l'avocat n'arrive pas à trouver le client après avoir déployé des efforts raisonnables. Il n'existe pas de règle stricte pour déterminer ce qui constitue un préavis raisonnable avant un retrait, et le moment où l'avocat pourra cesser d'agir à la suite de l'avis dépendra de toutes les circonstances pertinentes. Lorsque la situation est régie par des dispositions législatives ou des règles de procédure, celles-ci s'appliqueront. Sinon, le principe directeur veut que l'avocat protège de son mieux les intérêts de son client et n'abandonne pas son client à une étape critique ou à un moment où son retrait mettrait le client dans une position désavantageuse ou périlleuse.

[3] L'avocat devrait déployer tous les efforts nécessaires pour s'assurer de se retirer en temps opportun au cours de l'instance, conformément à ses obligations en tant qu'avocat. La cour, les parties adverses et autres parties directement concernées devraient également être avisées du retrait.

[4] ~~La dissolution d'un cabinet juridique ou le fait qu'un avocat quitte un cabinet pour exercer ailleurs entraine généralement la fin de la relation du client avec un ou plusieurs des avocats concernés. Dans une telle situation, la plupart des clients préfèrent faire appel aux services de l'avocat qu'ils considéraient comme responsable de leur dossier avant le changement. Cependant, le client a le dernier mot et les avocats n'agissant plus pour ce client devraient se conformer aux principes énoncés dans la présente règle et, en particulier, tenter de réduire au minimum les frais engagés et éviter de nuire au client. Puisque les intérêts du client passent avant tout, la décision de conserver les services de l'avocat doit être prise par le client sans qu'il ne soit influencé ou harcelé par l'avocat ou le cabinet. En outre, l'avocat et le cabinet qui se retirent, ou l'un des deux, pourraient être tenus d'aviser les clients par écrit que l'avocat quitte le cabinet et de leur indiquer les solutions possibles, soit de continuer de faire appel aux services de l'avocat qui quitte le cabinet, continuer de faire appel aux services du cabinet ou engager un nouvel avocat.~~

[Modifié – octobre 2014]

Retrait facultatif

3.7-2 Sous réserve des règles de procédure criminelle et des directives du tribunal, l'avocat peut se retirer d'une affaire lorsque lui et le client perdent fondamentalement confiance l'un dans l'autre.

Commentaire

[1] L'avocat pourrait avoir des motifs valables de se retirer d'une affaire dans des circonstances où la confiance ne semble plus exister, telles que dans les cas d'un avocat trompé par son client, d'un client qui refuse d'accepter ou de suivre les conseils de l'avocat sur un point important, d'un client qui persiste à agir de façon déraisonnable ou à ne pas coopérer ou d'un avocat qui a de la difficulté à obtenir des directives adéquates de la part de son client. Toutefois, l'avocat ne devrait pas menacer de se retirer d'une affaire pour forcer son client à se prononcer à la hâte sur une question complexe.

[Modifié – octobre 2014]

Non-paiement d'honoraires

3.7-3 Sous réserve des règles de procédure criminelle et des directives du tribunal, si, à la suite d'un préavis raisonnable, le client refuse de lui verser une provision ou des fonds pour débours ou honoraires, l'avocat peut se retirer, à condition toutefois que le client ne subisse pas de ce fait un préjudice grave.

[Modifié – octobre 2014]

Retrait d'instances criminelles

3.7-4 Si un avocat a accepté de représenter un client dans une affaire criminelle et si l'intervalle entre son retrait et la date du procès est suffisant pour permettre au client de trouver un autre titulaire de permis pour le représenter et permettre au nouveau titulaire de permis de se préparer pour le procès, l'avocat peut alors se retirer pour cause de non-paiement d'honoraires par le client ou autre raison suffisante pourvu que l'avocat :

[Modifié – juin 2007]

a) avise le client, de préférence par écrit, qu'il se retire de l'affaire en raison du non-paiement des honoraires ou pour un autre motif suffisant ;

b) lui rend compte de toute provision versée pour ses honoraires et débours ;

c) avise par écrit l'avocat de la poursuite qu'il n'agit plus pour le client ;

d) avise par écrit le greffe du tribunal compétent qu'il n'agit plus dans l'affaire, si son nom figure aux dossiers du tribunal comme avocat de la défense ;

e) respecte les règlements applicables du tribunal.

[Modifié – octobre 2014]

Commentaire

[1] L'avocat qui s'est retiré en raison d'un conflit avec son client ne devrait en aucun cas en préciser la cause dans l'avis adressé au tribunal ou à l'avocat de la poursuite, ni faire mention d'une question visée par le secret professionnel. L'avis précise simplement que l'avocat n'agit plus pour le client et se retire.

3.7-5 Un avocat qui a consenti à représenter un client ne peut se retirer d'une affaire criminelle en raison du défaut de paiement des honoraires lorsque la date prévue du procès n'est pas assez éloignée pour permettre à son client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès et que le report de la date du procès nuirait aux intérêts du client.

3.7-6 Si le retrait de l'avocat d'une affaire criminelle est justifié pour des raisons autres que le défaut de paiement des honoraires et que l'intervalle entre l'avis donné au client de son intention de se retirer et la date du procès est insuffisant pour permettre au client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès :

a) l'avocat devrait tenter, à moins d'indication contraire de la part du client, de faire reporter la date du procès ;

b) l'avocat ne peut se retirer de l'affaire qu'avec la permission du tribunal qui est saisi de cette affaire.

[Modifié – juin 2007, octobre 2014]

Commentaire

[1] L'avocat qui s'estime tenu de demander au tribunal l'autorisation de se retirer, en raison des circonstances, devrait en aviser sans délai l'avocat de la poursuite et le tribunal afin d'éviter ou de limiter les inconvénients que sa demande pourrait occasionner au tribunal et aux témoins.

Retrait obligatoire

3.7-7 Sous réserve des règles de procédure criminelle et des directives du tribunal, l'avocat se retire si, selon le cas :

a) il est dessaisi d'une affaire par un client ;

b) un client lui demande d'agir de façon contraire à la déontologie professionnelle ou aux règlements administratifs pris en application de la *Loi sur le Barreau* ;

c) il n'a pas les compétences requises pour continuer à s'occuper du dossier en question.

[Modifié – mars 2004, octobre 2014]

Quitter un cabinet

3.7-7A (1) Dans ce paragraphe,

a) « client concerné » s'entend d'un client qui a un dossier pertinent avec le cabinet ;

b) « dossier pertinent » s'entend d'une affaire en cours que l'avocat qui quitte le cabinet mène ou dont il a la responsabilité principale ;

c) le « cabinet » s'entend des avocats qui ont la conduite d'un dossier pertinent, ou à qui le cabinet destine un dossier pertinent, et des avocats du cabinet qui ont la responsabilité de la gestion directe ou indirecte à l'égard de la pratique de l'avocat qui quitte le cabinet.

(2) Lorsqu'un avocat quitte un cabinet juridique pour exercer ailleurs, l'avocat et le cabinet doivent :

a) s'assurer que tous les clients concernés reçoivent un préavis raisonnable du départ de l'avocat et soient avisés des options qui s'offrent à eux pour se faire représenter ;

b) prendre des mesures raisonnables pour obtenir de chaque client concerné des instructions quant à sa représentation dans des dossiers pertinents.

(3) Les obligations des règles 3.7-7A (2) a) et b) s'appliquent également dans le cas d'un parajuriste qui quitte un cabinet juridique pour pratiquer ailleurs.

Commentaire

[1] Le fait qu'un avocat quitte un cabinet pour exercer ailleurs peut entrainer la fin de la relation avocat-client entre cet avocat et un client.

[2] Les intérêts du client passent avant tout. Les clients doivent être libres de décider qui va les représenter, sans aucune influence ou pression indues de la part de l'avocat ou du cabinet. Le client doit recevoir suffisamment d'information pour pouvoir prendre une décision éclairée sur le choix qu'il a entre suivre l'avocat qui part, rester avec le cabinet, si c'est possible, ou engager un nouvel avocat.

[3] L'avocat et le cabinet doivent collaborer pour s'assurer que le client reçoit l'information nécessaire quant à ses options. Bien qu'il soit préférable de préparer un avis conjoint contenant cette information, les facteurs dont il faut tenir compte pour déterminer qui devrait aviser le client comprennent l'ampleur des travaux de l'avocat pour le client, les rapports du client avec les autres membres du cabinet et l'accès aux coordonnées du client. Faute d'entente, l'avis doit être donné à la fois par l'avocat qui part et le cabinet.

[4] Si un client contacte un cabinet juridique pour obtenir les coordonnées d'un avocat qui est parti, le cabinet doit fournir les coordonnées professionnelles de cet avocat dans la mesure du possible.

[5] Si le client choisit de suivre l'avocat qui part, les instructions mentionnées dans la règle doivent être assorties d'autorisations écrites pour le transfert des dossiers et des biens du client. En chaque cas, la situation doit être gérée de sorte à réduire au maximum les dépenses et à éviter de porter préjudice au client.

[6] Avant même d'aviser ses clients de son intention de quitter le cabinet, l'avocat devrait donner au cabinet le préavis qui convient dans les circonstances.

[7] Si le client choisit de maintenir sa relation avec le cabinet, ce dernier doit se demander s'il est raisonnable dans les circonstances de facturer au client le temps mis par un autre membre du cabinet à se familiariser avec le dossier.

[8] Les principes énoncés dans la présente règle et le présent commentaire s'appliquent à la dissolution d'un cabinet juridique. À la dissolution du cabinet, la relation avocat-client peut prendre fin à l'égard d'un ou de plusieurs avocats qui s'occupaient des affaires du client. Le client devrait être avisé de la dissolution et recevoir suffisamment d'information pour pouvoir décider qui retenir pour continuer de le représenter. Les avocats qui ne sont plus retenus par le client devraient s'efforcer de réduire au maximum les dépenses et éviter de désavantager le client.

[9] Reportez-vous également aux règles 3.7-8 à 3.7-10 et aux commentaires afférents en ce qui concerne l'exercice d'un privilège d'avocat et les obligations de l'ancien avocat et du nouvel avocat.

[10] Il est rappelé aux avocats que les règles 3.08 (13.1) et (13.2) du *Code de déontologie des parajuristes* et les paragraphes 18 à 25 de la Ligne directrice 11 sur le Code des parajuristes décrivent des obligations similaires pour les parajuristes.

3.7-7B La règle 3.7-7A ne s'applique pas à un avocat qui quitte a) un gouvernement, une société de la Couronne ou tout autre organisme public ou b) une société ou autre organisation qui l'emploie comme avocat interne.

Devoirs liés au retrait

3.7-8 L'avocat qui se retire d'une affaire tente de réduire au minimum les frais encourus par le client et d'éviter de lui nuire ; il fait tout ce qu'il est raisonnable de faire pour faciliter le transfert ordonné de l'affaire au praticien juridique ou à la praticienne juridique qui lui succède.

3.7-9 L'avocat qui est dessaisi de l'affaire par le client, ou qui s'en retire fait ce qui suit :

a) il avise le client par écrit :

(i) qu'il se retire de l'affaire ;

(ii) des raisons, s'il y a lieu, de son retrait ;

(iii) dans le cas d'un litige, que le client devrait s'attendre à ce que l'audience ou le procès commence à la date prévue et que celui-ci devrait trouver un autre praticien juridique sans tarder ;

b) sous réserve de son privilège, il remet au client tous les documents et biens auxquels ce dernier peut prétendre, ou en dispose selon ce qu'il lui ordonne ;

c) sous réserve de toutes conditions fiduciaires applicables, il donne au client tous les renseignements nécessaires sur l'affaire ;

d) il rend compte de tous les fonds du client qu'il détient ou qu'il a administrés, et il rembourse notamment toute rémunération à laquelle il n'a pas droit pour ses services ;

e) il produit sans délai le compte de ses honoraires et débours impayés ;

f) il collabore avec le praticien juridique qui lui succède de façon à réduire au minimum les frais encourus par le client et à éviter de lui nuire ;

g) il respecte les règlements applicables du tribunal.

[Modifié – juin 2009, octobre 2014]

Commentaire

[1] Si l'avocat qui est dessaisi d'une affaire ou qui se retire d'une affaire fait partie d'un cabinet, le client devrait être avisé que l'avocat et le cabinet n'agissent plus pour lui.

[2] Lorsque l'avocat est dessaisi d'une affaire ou se retire d'une affaire et que des honoraires et débours demeurent impayés, il devrait considérer comment l'exercice de son droit à un privilège pourrait avoir une incidence sur la situation de son client. En règle générale, un avocat ne devrait pas exercer son droit à un privilège si celui-ci risque de compromettre gravement la position du client dans une affaire en cours.

[3] L'obligation de rendre au client ses documents et ses biens s'applique sous réserve du privilège de l'avocat. Dans le cas où plusieurs parties réclameraient les documents ou les biens, l'avocat devrait prendre toutes les mesures requises pour les amener à une entente.

[4] Lorsque l'avocat initial est appelé à collaborer avec le nouveau praticien juridique, il devrait généralement fournir tous les mémoires exposant les faits et le droit qu'il a préparés relativement à l'affaire, mais ne devrait pas divulguer des renseignements confidentiels qui n'ont aucun lien direct avec l'affaire sans le consentement écrit du client.

[5] L'avocat qui représente plusieurs parties dans une affaire et qui cesse d'agir pour une ou plusieurs d'entre elles devrait collaborer avec le ou les praticiens juridiques qui lui succèdent dans la mesure permise par le Code et chercher à éviter toute rivalité, réelle ou apparente.

[Modifié – juin 2009, octobre 2014]

Devoirs du titulaire de permis qui prend la succession de l'affaire

3.7-10 Le titulaire de permis qui prend la succession d'une affaire s'assure, avant d'accepter le mandat, que le titulaire de permis initial y consent, s'est bien retiré de l'affaire ou en a été dessaisi par le client.

[Modifié – juin 2007]

Commentaire

[1] Il convient également que le titulaire de permis qui prend la succession incite fortement le client à régler ou à garantir les honoraires de son collègue, ou à prendre des mesures raisonnables en ce sens, surtout si cette personne s'est retirée de l'affaire pour un motif valable ou en a été dessaisie pour des motifs futiles. Néanmoins, l'existence d'un compte en souffrance ne devrait pas empêcher le titulaire de permis qui prend la succession d'agir pour le client si le procès ou l'audience est en cours, ou sur le point de s'ouvrir, ou encore si son refus d'agir risque de nuire au client.

[Modifié – juin 2007]

(...)

Tab 4.3.3

"CLEAN" VERSION SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

[Amended – October 2014]

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[Amended – October 2014]

Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1]A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

[Amended – October 2014]

Non-payment of Fees

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

[Amended – October 2014]

Withdrawal from Criminal Proceedings

3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

[Amended – June 2007]

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

[Amended – October 2014]

Commentary

[1] A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

3.7-5 A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests.

3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;

(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007, October 2014]

Commentary

[1] Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client;

(b) the client's instructions require the lawyer to act contrary to these rules or by-laws under the *Law Society Act*; or

(c) the lawyer is not competent to continue to handle the matter.

[Amended – March 2004, October 2014]

Leaving a Law Firm

3.7-7A(1) In this subrule

(a) "affected client" means a client for whom the law firm has a relevant matter:

(b) "relevant matter" means a current matter for which the lawyer who is leaving the law firm has conduct or substantial responsibility;

(c) "remaining lawyers" means the lawyers who have, or are intended by the law firm to have, conduct of a relevant matter and the lawyers in the law firm who have direct and indirect management responsibility in respect of the practice of the lawyer who is leaving the law firm.

(2) When a lawyer leaves a law firm to practice elsewhere, the lawyer and the remaining lawyers shall

(a) ensure that affected clients are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and

(b) take reasonable steps to obtain the instructions of each affected client as to whom they will retain to act in relevant matters.

(3) The obligations in Rules 3.7-7A(2)(a) and (b) also apply to the departure of a paralegal from a law firm to practice elsewhere.

Commentary

[1] When a lawyer leaves a law firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The client's interests are paramount. Clients should be free to decide whom to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information by the lawyer and the remaining lawyers to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

[3] The lawyer and the remaining lawyers should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer's work for the client, the client's relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement between the departing lawyer and the remaining lawyers as to who will notify the clients, both the departing lawyer and the remaining lawyers should provide notification.

[4] If a client contacts a law firm to request a departed lawyer's contact information, the remaining lawyers should provide the professional contact information where reasonably possible.

[5] Where a client decides to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

[6] In advance of providing notice to clients or his or her intended departure the lawyer should provide such notice to the firm as is reasonable in the circumstances.

[7] When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

[8] The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of the lawyers involved in the retainer. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

[9] See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

[10] Lawyers are reminded that Rules 3.08(13.1) and (13.2) of the Paralegal Rules of Conduct and paragraphs 18-25 of Paralegal Guideline 11 describe similar obligations for paralegals.

3.7-7B Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in-house counsel.

Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(a) notify the client in writing, stating

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all information that may be required in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

[Amended – June 2009, October 2014]

Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor legal practitioner will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009, October 2014]

Duty of Successor Licensee

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

[Amended – June 2007]

(. . .)

Tab 4.3.4

VERSION « AU PROPRE » DES MODIFICATIONS AU CODE DE DÉONTOLOGIE

SECTION 3.7 LE RETRAIT DE L'AVOCAT

Retrait de l'avocat

3.7-1 L'avocat ne peut se retirer d'une affaire que pour des motifs valables et après en avoir convenablement avisé son client.

[Modifié – octobre 2014]

Commentaire

[1] Bien que le client puisse mettre fin à son gré à ses rapports avec son avocat, ce dernier ne jouit pas de la même liberté. L'avocat qui a accepté une affaire doit la mener à terme le mieux possible, à moins qu'il n'ait des raisons légitimes de mettre fin à son mandat.

[2] Un élément essentiel du préavis raisonnable est l'avis au client, à moins que l'avocat n'arrive pas à trouver le client après avoir déployé des efforts raisonnables. Il n'existe pas de règle stricte pour déterminer ce qui constitue un préavis raisonnable avant un retrait, et le moment où l'avocat pourra cesser d'agir à la suite de l'avis dépendra de toutes les circonstances pertinentes. Lorsque la situation est régie par des dispositions législatives ou des règles de procédure, celles-ci s'appliqueront. Sinon, le principe directeur veut que l'avocat protège de son mieux les intérêts de son client et n'abandonne pas son client à une étape critique ou à un moment où son retrait mettrait le client dans une position désavantageuse ou périlleuse.

[3] L'avocat devrait déployer tous les efforts nécessaires pour s'assurer de se retirer en temps opportun au cours de l'instance, conformément à ses obligations en tant qu'avocat. La cour, les parties adverses et autres parties directement concernées devraient également être avisées du retrait.

[Modifié – octobre 2014]

Retrait facultatif

3.7-2 Sous réserve des règles de procédure criminelle et des directives du tribunal, l'avocat peut se retirer d'une affaire lorsque lui et le client perdent fondamentalement confiance l'un dans l'autre.

Commentaire

[1] L'avocat pourrait avoir des motifs valables de se retirer d'une affaire dans des circonstances où la confiance ne semble plus exister, telles que dans les cas d'un avocat trompé par son client, d'un client qui refuse d'accepter ou de suivre les conseils de l'avocat sur un point important, d'un client qui persiste à agir de façon déraisonnable ou à ne pas coopérer ou d'un avocat qui a de la difficulté à obtenir des directives adéquates de la part de son client. Toutefois, l'avocat ne devrait pas menacer de se retirer d'une affaire pour forcer son client à se prononcer à la hâte sur une question complexe.

[Modifié – octobre 2014]

Non-paiement d'honoraires

3.7-3 Sous réserve des règles de procédure criminelle et des directives du tribunal, si, à la suite d'un préavis raisonnable, le client refuse de lui verser une provision ou des fonds pour débours ou honoraires, l'avocat peut se retirer, à condition toutefois que le client ne subisse pas de ce fait un préjudice grave.

[Modifié – octobre 2014]

Retrait d'instances criminelles

3.7-4 Si un avocat a accepté de représenter un client dans une affaire criminelle et si l'intervalle entre son retrait et la date du procès est suffisant pour permettre au client de trouver un autre titulaire de permis pour le représenter et permettre au nouveau titulaire de permis de se préparer pour le procès, l'avocat peut alors se retirer pour cause de non-paiement d'honoraires par le client ou autre raison suffisante pourvu que l'avocat :

[Modifié – juin 2007]

a) avise le client, de préférence par écrit, qu'il se retire de l'affaire en raison du non-paiement des honoraires ou pour un autre motif suffisant ;

b) lui rend compte de toute provision versée pour ses honoraires et débours ;

c) avise par écrit l'avocat de la poursuite qu'il n'agit plus pour le client ;

d) avise par écrit le greffe du tribunal compétent qu'il n'agit plus dans l'affaire, si son nom figure aux dossiers du tribunal comme avocat de la défense ;

e) respecte les règlements applicables du tribunal.

[Modifié – octobre 2014]

Commentaire

[1] L'avocat qui s'est retiré en raison d'un conflit avec son client ne devrait en aucun cas en préciser la cause dans l'avis adressé au tribunal ou à l'avocat de la poursuite, ni faire mention d'une question visée par le secret professionnel. L'avis précise simplement que l'avocat n'agit plus pour le client et se retire.

3.7-5 Un avocat qui a consenti à représenter un client ne peut se retirer d'une affaire criminelle en raison du défaut de paiement des honoraires lorsque la date prévue du procès n'est pas assez éloignée pour permettre à son client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès et que le report de la date du procès nuirait aux intérêts du client.

3.7-6 Si le retrait de l'avocat d'une affaire criminelle est justifié pour des raisons autres que le défaut de paiement des honoraires et que l'intervalle entre l'avis donné au client de son intention de se retirer et la date du procès est insuffisant pour permettre au client de changer de titulaire de permis et à ce nouveau titulaire de permis de bien se préparer en vue du procès :

a) l'avocat devrait tenter, à moins d'indication contraire de la part du client, de faire reporter la date du procès ;

b) l'avocat ne peut se retirer de l'affaire qu'avec la permission du tribunal qui est saisi de cette affaire.

[Modifié – juin 2007, octobre 2014]

Commentaire

[1] L'avocat qui s'estime tenu de demander au tribunal l'autorisation de se retirer, en raison des circonstances, devrait en aviser sans délai l'avocat de la poursuite et le tribunal afin d'éviter ou de limiter les inconvénients que sa demande pourrait occasionner au tribunal et aux témoins.

Retrait obligatoire

3.7-7 Sous réserve des règles de procédure criminelle et des directives du tribunal, l'avocat se retire si, selon le cas :

a) il est dessaisi d'une affaire par un client ;

b) un client lui demande d'agir de façon contraire à la déontologie professionnelle ou aux règlements administratifs pris en application de la *Loi sur le Barreau* ;

c) il n'a pas les compétences requises pour continuer à s'occuper du dossier en question.

[Modifié – mars 2004, octobre 2014]

Quitter un cabinet

3.7-7A (1) Dans ce paragraphe,

a) « client concerné » s'entend d'un client qui a un dossier pertinent avec le cabinet ;

b) « dossier pertinent » s'entend d'une affaire en cours que l'avocat qui quitte le cabinet mène ou dont il a la responsabilité principale ;

c) le « cabinet » s'entend des avocats qui ont la conduite d'un dossier pertinent, ou à qui le cabinet destine un dossier pertinent, et des avocats du cabinet qui ont la responsabilité de la gestion directe ou indirecte à l'égard de la pratique de l'avocat qui quitte le cabinet.

(2) Lorsqu'un avocat quitte un cabinet juridique pour exercer ailleurs, l'avocat et le cabinet doivent :

a) s'assurer que tous les clients concernés reçoivent un préavis raisonnable du départ de l'avocat et soient avisés des options qui s'offrent à eux pour se faire représenter ;

b) prendre des mesures raisonnables pour obtenir de chaque client concerné des instructions quant à sa représentation dans des dossiers pertinents.

(3) Les obligations des règles 3.7-7A (2) a) et b) s'appliquent également dans le cas d'un parajuriste qui quitte un cabinet juridique pour pratiquer ailleurs.

Commentaire

[1] Le fait qu'un avocat quitte un cabinet pour exercer ailleurs peut entrainer la fin de la relation avocat-client entre cet avocat et un client.

[2] Les intérêts du client passent avant tout. Les clients doivent être libres de décider qui va les représenter, sans aucune influence ou pression indues de la part de l'avocat ou du cabinet. Le client doit recevoir suffisamment d'information pour pouvoir prendre une décision éclairée sur le choix qu'il a entre suivre l'avocat qui part, rester avec le cabinet, si c'est possible, ou engager un nouvel avocat.

[3] L'avocat et le cabinet doivent collaborer pour s'assurer que le client reçoit l'information nécessaire quant à ses options. Bien qu'il soit préférable de préparer un avis conjoint contenant cette information, les facteurs dont il faut tenir compte pour déterminer qui devrait aviser le client comprennent l'ampleur des travaux de l'avocat pour le client, les rapports du client avec les autres membres du cabinet et l'accès aux coordonnées du client. Faute d'entente, l'avis doit être donné à la fois par l'avocat qui part et le cabinet.

[4] Si un client contacte un cabinet juridique pour obtenir les coordonnées d'un avocat qui est parti, le cabinet doit fournir les coordonnées professionnelles de cet avocat dans la mesure du possible.

[5] Si le client choisit de suivre l'avocat qui part, les instructions mentionnées dans la règle doivent être assorties d'autorisations écrites pour le transfert des dossiers et des biens du client. En chaque cas, la situation doit être gérée de sorte à réduire au maximum les dépenses et à éviter de porter préjudice au client.

[6] Avant même d'aviser ses clients de son intention de quitter le cabinet, l'avocat devrait donner au cabinet le préavis qui convient dans les circonstances.

[7] Si le client choisit de maintenir sa relation avec le cabinet, ce dernier doit se demander s'il est raisonnable dans les circonstances de facturer au client le temps mis par un autre membre du cabinet à se familiariser avec le dossier.

[8] Les principes énoncés dans la présente règle et le présent commentaire s'appliquent à la dissolution d'un cabinet juridique. À la dissolution du cabinet, la relation avocat-client peut prendre fin à l'égard d'un ou de plusieurs avocats qui s'occupaient des affaires du client. Le client devrait être avisé de la dissolution et recevoir suffisamment d'information pour pouvoir décider qui retenir pour continuer de le représenter. Les avocats qui ne sont plus retenus par le client devraient s'efforcer de réduire au maximum les dépenses et éviter de désavantager le client.

[9] Reportez-vous également aux règles 3.7-8 à 3.7-10 et aux commentaires afférents en ce qui concerne l'exercice d'un privilège d'avocat et les obligations de l'ancien avocat et du nouvel avocat.

[10] Il est rappelé aux avocats que les règles 3.08 (13.1) et (13.2) du *Code de déontologie des parajuristes* et les paragraphes 18 à 25 de la Ligne directrice 11 sur le Code des parajuristes décrivent des obligations similaires pour les parajuristes.

3.7-7B La règle 3.7-7A ne s'applique pas à un avocat qui quitte a) un gouvernement, une société de la Couronne ou tout autre organisme public ou b) une société ou autre organisation qui l'emploie comme avocat interne.

Devoirs liés au retrait

3.7-8 L'avocat qui se retire d'une affaire tente de réduire au minimum les frais encourus par le client et d'éviter de lui nuire ; il fait tout ce qu'il est raisonnable de faire pour faciliter le transfert ordonné de l'affaire au praticien juridique ou à la praticienne juridique qui lui succède.

3.7-9 L'avocat qui est dessaisi de l'affaire par le client, ou qui s'en retire fait ce qui suit :

a) il avise le client par écrit :

(i) qu'il se retire de l'affaire ;

(ii) des raisons, s'il y a lieu, de son retrait ;

(iii) dans le cas d'un litige, que le client devrait s'attendre à ce que l'audience ou le procès commence à la date prévue et que celui-ci devrait trouver un autre praticien juridique sans tarder ;

b) sous réserve de son privilège, il remet au client tous les documents et biens auxquels ce dernier peut prétendre, ou en dispose selon ce qu'il lui ordonne ;

c) sous réserve de toutes conditions fiduciaires applicables, il donne au client tous les renseignements nécessaires sur l'affaire ;

d) il rend compte de tous les fonds du client qu'il détient ou qu'il a administrés, et il rembourse notamment toute rémunération à laquelle il n'a pas droit pour ses services ;

e) il produit sans délai le compte de ses honoraires et débours impayés ;

f) il collabore avec le praticien juridique qui lui succède de façon à réduire au minimum les frais encourus par le client et à éviter de lui nuire ;

g) il respecte les règlements applicables du tribunal.

[Modifié – juin 2009, octobre 2014]

Commentaire

[1] Si l'avocat qui est dessaisi d'une affaire ou qui se retire d'une affaire fait partie d'un cabinet, le client devrait être avisé que l'avocat et le cabinet n'agissent plus pour lui.

[2] Lorsque l'avocat est dessaisi d'une affaire ou se retire d'une affaire et que des honoraires et débours demeurent impayés, il devrait considérer comment l'exercice de son droit à un privilège pourrait avoir une incidence sur la situation de son client. En règle générale, un avocat ne devrait pas exercer son droit à un privilège si celui-ci risque de compromettre gravement la position du client dans une affaire en cours.

[3] L'obligation de rendre au client ses documents et ses biens s'applique sous réserve du privilège de l'avocat. Dans le cas où plusieurs parties réclameraient les documents ou les biens, l'avocat devrait prendre toutes les mesures requises pour les amener à une entente.

[4] Lorsque l'avocat initial est appelé à collaborer avec le nouveau praticien juridique, il devrait généralement fournir tous les mémoires exposant les faits et le droit qu'il a préparés relativement à l'affaire, mais ne devrait pas divulguer des renseignements confidentiels qui n'ont aucun lien direct avec l'affaire sans le consentement écrit du client.

[5] L'avocat qui représente plusieurs parties dans une affaire et qui cesse d'agir pour une ou plusieurs d'entre elles devrait collaborer avec le ou les praticiens juridiques qui lui succèdent dans la mesure permise par le Code et chercher à éviter toute rivalité, réelle ou apparente.

[Modifié – juin 2009, octobre 2014]

Devoirs du titulaire de permis qui prend la succession de l'affaire

3.7-10 Le titulaire de permis qui prend la succession d'une affaire s'assure, avant d'accepter le mandat, que le titulaire de permis initial y consent, s'est bien retiré de l'affaire ou en a été dessaisi par le client.

[Modifié – juin 2007]

Commentaire

[1] Il convient également que le titulaire de permis qui prend la succession incite fortement le client à régler ou à garantir les honoraires de son collègue, ou à prendre des mesures raisonnables en ce sens, surtout si cette personne s'est retirée de l'affaire pour un motif valable ou en a été dessaisie pour des motifs futiles. Néanmoins, l'existence d'un compte en souffrance ne devrait pas empêcher le titulaire de permis qui prend la succession d'agir pour le client si le procès ou l'audience est en cours, ou sur le point de s'ouvrir, ou encore si son refus d'agir risque de nuire au client.

[Modifié – juin 2007]

(...)

Tab 4.4

FOR DECISION

REPORT OF THE ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP

MOTION

27. **That Convocation approve that licensees may deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such organizations in order to facilitate access to justice.**

SUMMARY OF ISSUE UNDER CONSIDERATION

28. In September 2015, the Alternative Business Structures Working Group ("Working Group")[1] reported to Convocation that it would not continue to consider majority non-licensee ownership of traditional law firms in Ontario for the time being, but would continue to explore ABS options with the potential to foster innovation or enhance access to justice, including:

    a. minority ownership by non-licensees;
    b. franchise models;
    c. ownership by civil society organizations such as charities, not-for-profits and trade unions in order to facilitate access to legal services; and
    d. new forms of legal service delivery in areas not currently well served by traditional practices.[2]

29. In this report, the Working Group provides its recommendations regarding direct delivery of legal services through civil society organizations such as charities, not for profit organizations and trade unions (hereinafter "CSOs") in order to facilitate access to justice.

30. The Working Group recommends that Convocation approve the policy decision to enable the direct delivery of legal services[3] to CSO clients by lawyers and paralegals providing services through such organizations.

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[1] The Working Group is chaired by Malcolm Mercer and Susan McGrath. Current members are Fred Bickford, Marion Boyd, Suzanne Clément, Cathy Corsetti, Janis P. Criger, Carol Hartman, Brian Lawrie, Jeffrey Lem, Joanne St. Lewis and Anne Vespry.

[2] ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 56-58, online at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.

31. The Working Group reports to Convocation through the Committee, with the concurrence of the Paralegal Standing Committee. The Access to Justice Committee has also reviewed the report and is in agreement with these recommendations.

32. If approved, it is proposed that the Law Society amend its By-Laws to permit CSOs to register with the Law Society. Lawyers and paralegals would be permitted to provide legal services directly to clients through the registered CSOs.

33. It is proposed that CSOs would register with Law Society if the circumstances under which legal services would be provided to CSO clients (by "embedded" lawyers and paralegals) meet the requirements prescribed by new by-laws to be adopted by Convocation. The requirements will focus, among other things, on ensuring that:

    a. the licensee has control over their delivery of legal services;
    b. solicitor-client privilege will be protected; and
    c. the fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.

34. A registered CSO would be de-registered if the prescribed circumstances under which legal services may be provided to CSO clients by "embedded" licensees were no longer present.

35. Lawyers and paralegals providing legal services through registered CSOs would continue to be fully regulated by the Law Society.

BACKGROUND

36. The Working Group was established by Convocation in September 2012 to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts.[4]

[3] For the purpose of this report, the phrase "legal services" includes services provided by both lawyers and paralegals.
[4] For general background information related to the work of the ABS Working Group, please see "Alternative Business Structures", Law Society of Upper Canada online at http://lsuc.on.ca/abs/.

37. From September 2012 to January 2014, the Working Group researched structures for the delivery of legal services, held an initial consultation session, and held a full day symposium with 70 attendees from various aspects of practice.[5]

38. In its February 2014 Report to Convocation, the Working Group described in detail the relationship between ABS and access. It observed that while ABSs are not a "panacea" and are not "the sole, nor likely the most important" access to justice solution, ABSs nevertheless have "real potential" to enhance access to justice.[6]

39. In February 2014, Convocation approved a consultation with the professions and others on the delivery of legal services through alternative business structures. In September 2014, the Working Group began a broad consultation process by releasing a Discussion Paper on potential models for ABS in Ontario.[7] The Working Group continued to hold meetings with legal organizations through the fall of 2014 and early 2015 to continue to hear perspectives regarding ABS.[8]

40. The Working Group received over 40 responses to the Discussion Paper from individuals and legal and other organizations. The Working Group provided a summary of these responses in its February 2015 Report to Convocation.[9]

41. In its September 2015 Report to Convocation, based in large part on the responses it received from the professions, the Working Group stated that it "did not propose to further examine any majority or controlling non-licensee ownership models for traditional law firms in Ontario at this time." [10]

42. The Working Group determined that it would continue its mandate by exploring options with the potential to foster innovation or enhance access to justice, including minority ownership by non-licensees, franchise models, ownership by civil society organizations such as charities, and new forms of legal service

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[5] For more information about this stage, see the ABS Working Group February 2014 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 6-89, online at http://lsuc.on.ca/uploadedFiles/ABS-report-to-Convocation-feb-2014.pdf.
[6] *Ibid.* at paras. 107, 119 and 120.
[7] ABS Working Group, "Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper", September 2014, online at http://lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf.
[8] ABS Working Group, January 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, online at http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-january-2015-professional-regulation.pdf.
[9] ABS Working Group, February 2015 Report to Convocation, online at http://www.lsuc.on.ca/uploadedFiles/ABS-full-report.pdf. The submissions are also available at www.lsuc.on.ca/abs.
[10] ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at para. 56, online at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.

delivery in areas not currently well served by traditional practices.[11]

43. The Working Group's decision to focus on charities and other CSOs was informed by the recommendation made in the responses to the Discussion Paper that ABS regulation could be developed in a manner to facilitate access to justice. As the Working Group noted in September 2015 (at para. 137):

> One submission coined the phrase "ABS+". An ABS+ regulatory approach would build on the following statement by Nick Robinson that was adopted by many responding to the ABS Discussion Paper:
>
> > For policymakers the goal should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental commitment. Carefully regulated non-lawyer ownership may be a part of achieving this larger goal, but only a part.[12]

44. In September 2015, the Working Group also recognized that:

a. Although ABS efforts in Australia and England and Wales were not designed to facilitate access to justice *per se,* there have been practices which have emerged to provide legal assistance to vulnerable persons;
b. There may be an opportunity to build from these experiences in a way that seeks to harness ABS as one means of addressing the significant access to justice barriers in Ontario; and
c. Civil society organizations might be able to provide access to legal services at the same time that their clients are provided access to other services.[13]

45. The Working Group posited that "External ownership by particular civil society groups may be one way of leveraging non-legal networks and expertise to

[11] *Ibid.* at paras. 56-58.
[12] Nick Robinson, "When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access and Professionalism", (August 27, 2014). Harvard Law School Program on the Legal Profession Research Paper No. 2014-20, at page 53.
[13] ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 139, 140 and 143, online at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.

facilitate access to legal services provided by licensees."[14]

46. Based on the above, the Working Group determined that it would "consider eligibility criteria and how an ABS+ regulatory structure could facilitate access to justice while protecting core professional values."[15]

DISCUSSION

47. The Working Group has continued to regularly meet since its last report to Convocation in September 2015. It has considered the opportunities and risks associated with permitting the delivery of legal services by or through charities, not for profit organizations and other CSOs by:

    a. Studying how charities and other civil society entities currently seek to connect their clients to legal services;
    b. Exploring examples of innovative models whereby civil society entities directly deliver legal services;
    c. Conducting a series of focus group meetings with charities and other civil society organizations, "embedded" lawyers, front line social service workers, social innovation leaders and supporters of social and legal services; and
    d. Deliberating on the appropriateness of recommending potential new models based on set criteria.

48. The Working Group reports on each of these stages below.

a. Current Efforts to Connect Legal and Other Community Services

49. To date, community service providers and legal organizations have worked to develop connections to serve their clients in a variety of ways, including the following:

    a. Front line workers such as social workers and settlement workers, at times described as "trusted intermediaries", refer individuals to legal clinics and/or the private bar when their clients require legal advice.[16]

[14] ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at para. 142, online at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.
[15] *Ibid*. at para. 144.
[16] The Law Foundation has developed The Connecting Project, an innovative initiative designed to improve access to legal information and legal services for people who do not speak English or French, and for people who live in rural or remote areas, in part by improving the capacity of such frontline workers to provide basic legal information and legal referrals, and to enhance coordination to ensure that clients receive continuous assistance. See "The Connecting Project",

b. Certain legal aid lawyers are able to meet clients at civil society settings such as settlement services offices, community centres, health centres and shelters.
c. Two Legal Aid Ontario staff lawyers work as counsel "embedded" in civil society settings. A Staff Lawyer at the ARCH Disability Law Centre is the Onsite Lawyer for the Health Justice Program at St. Michael's Hospital in Toronto.[17] Another legal aid lawyer works on-site at Sound Times, a mental health support services provider in Toronto.
d. Pro Bono Ontario staff lawyers are embedded in children's hospitals (an approach described further below).
e. Pro Bono licensees at times volunteer to provide services to clients who have been referred by CSOs, and/or make themselves available in shelters or other settings to provide pro bono services through their firms.
f. There are government funded programs providing legal services pursuant to s.30 of By-Law 4.

50. The Working Group believes that the above models should be encouraged, as they facilitate access to justice. However, the Working Group also recognizes that there may be new models which could be developed to facilitate access to legal services.

b. Examples of Civil Society Delivery of Legal Services

51. In its September 24, 2015 Report to Convocation, the Working Group provided examples of types of ABS innovations involving CSOs. This section provides further detail regarding certain examples noted by the Working Group at that time and new examples of structures which have emerged.

(i) Law Firm Ownership by Trade Unions and Associations

52. In its September 24, 2015 Report to Convocation, the Working Group noted that in England and Wales, a trade union and British Medical Association had set up alternative business structures in order to serve their members.[18]

Law Foundation of Ontario, online at http://www.lawfoundation.on.ca/what-we-do/the-connecting-project/. See also Community Legal Education Ontario ("CLEO"), "Connecting Communities initiative", online at http://www.cleo.on.ca/en/projects/connecting-communities.
[17] "Department of Family and Community Medicine and St. Michael's Academic Family Health Team Health Justice Program", St Michael's Hospital, online at http://www.stmichaelshospital.com/programs/familypractice/legal-education-and-advice.php.
[18] ABS Working Group, September 2015 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 113-114, online at: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.

53. The trade union ABS, Unionline,[19] is wholly owned by two unions to provide legal services to their members.[20] It has been reported that any profits would be returned to the unions.[21]

54. The British Medical Association created BMA Law as an in-house team of lawyers who provided legal advice to UK doctors.[22] In 2015, it converted into an ABS.[23] It now serves the medical community and other clients. It operates on a not-for-profit basis, and is reportedly owned by the British Medical Association through a trust.[24] Any profits appear to be reinvested in the BMA.[25]

(ii) Aspire Law LLP: A Joint Venture Between a Charity and a Law Firm

55. Aspire Law LLP is an ABS that operates as a "joint venture between Aspire, the national spinal cord injury charity and Moore Blatch" a personal injury firm.[26] It describes itself as: "specialist spinal cord injury lawyers".[27] In addition to providing legal services, it works "with Aspire [the charity] to provide a service that tackles every issue arising from spinal cord injury including housing, education, care, and rehabilitation as well as emotional and family support".[28] Half of Aspire Law LLP's profits go back to Aspire "the charity, to provide support, funding and housing for people with spinal cord injury."[29]

56. Aspire Law LLP provides services throughout England and Wales.[30] In addition to its spinal cord injury practice, it is licensed to undertake a range of related reserved legal activities, such as conveyancing, employment, and wills and

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[19] Register of licensed bodies (ABS) Trade Union Legal LLP (trading as Unionline), Solicitors Regulatory Authority, online at http://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/608309.page.
[20] "About Us", Unionline, online at: http://www.unionline.co.uk/about-us/.
[21] Neil Rose, "Leading trade unions make ABS play", Legal Futures, May 23, 2014, online at: http://www.legalfutures.co.uk/latest-news/leading-trade-unions-make-abs-play.
[22] "About Us", BMA Law, online at: http://bmalaw.co.uk/about/.
[23] *Ibid.* See also: Register of licensed bodies (ABS) BMA Law Limited (trading as BMA Law), Solicitors Regulatory Authority, online at: http://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/619810.page.
[24] *Ibid.*; Nick Hilborne, "The solicitor will see you now: British Medical Association sets up ABS for doctors", Legal Futures, May 6, 2015, online at: http://www.legalfutures.co.uk/latest-news/the-solicitor-will-see-you-now-british-medical-association-sets-up-abs-for-doctors/print.
[25] BMA Law states that "We are proud to operate on a not-for-profit basis, reinvesting any surpluses back into services for you and your colleagues. So, by working with us, you're supporting the wider medical community": About Us", BMA Law, online at: http://bmalaw.co.uk/about/.
[26] "About Us", Aspire Law, Solicitors for People with Spinal Cord Injury, online at: https://www.aspirelaw.co.uk/about-us.
[27] "What makes Aspire Law unique?", Aspire Law, Solicitors for People with Spinal Cord Injury, online at: https://www.aspirelaw.co.uk/about-us.
[28] *Ibid.*
[29] *Ibid*.
[30] "Contact Us", Aspire Law, online at: https://www.aspirelaw.co.uk/contact-us.

probate services.[31]

(iii) The Salvation Army Australia Model: Cross Subsidizing Pro Bono Services

57. The Working Group's September 24, 2015 Report to Convocation provided general background information about Salvos Legal and Salvos Legal (Humanitarian) (collectively the "Salvos Entities"), two law firms owned by The Salvation Army Australia Eastern Territory. Salvos Legal is a not-for-profit firm. Salvos Legal (Humanitarian) is structured as a Public Benevolent Institution.[32] The profits from Salvos Legal fund the work of Salvos Legal (Humanitarian).

58. As part of its ongoing review of different potential civil society legal service delivery models, the Working Group reviewed the Salvos model on a more in-depth basis. The Working Group consulted with Luke Geary, the Managing Partner of Salvos Legal and Salvos Legal (Humanitarian).[33]

59. The Working Group Co-Chairs have also met with representatives of the Salvation Army Canada who have expressed interest in adopting the Salvos Legal model to Ontario if it can be done in a manner that complies with Law Society and other regulations.

60. The Working Group is grateful to Mr. Geary for the time and expertise that he provided, and to the Salvation Army Canada.

61. In order to launch the Salvos Legal initiative, the Salvation Army Australia provided seed funds to cover start-up costs.

62. The two entities are organized and operated as traditional law firms. [34] They are managed as two separate firms, with separate staff. [35] Both address issues such as avoiding conflicts, and protecting confidentiality and solicitor-client privilege in

[31] "Other legal services", Aspire Law, online at: https://www.aspirelaw.co.uk/how-we-can-help/other-legal-services. See also: Register of licensed bodies (ABS) Aspire Law LLP, Solicitors Regulation Authority, online at: http://www.sra.org.uk/solicitors/firm-based-authorisation/abs-register/613424.page.
[32] A Public Benevolent Institution is "one of the categories or 'subtypes' of charity that can register with the Australian Charities and Not-for-profits Commission" […] which has as its main objective "to relieve poverty or distress": Factsheet: Public benevolent institutions and the ACNC, Australian Charities and Not-for-Profits Commission, online at http://www.acnc.gov.au/ACNC/FTS/Fact_PBI.aspx.
[33] At the request of the Salvation Army Canada, the Chairs of the ABS Working Group have also met with senior staff and counsel from the Salvation Army Canada regarding potential opportunities for adopting a Salvos Entities' model to provide legal services in Ontario.
[34] Working Group meeting with Luke Geary, Managing Partner of the Salvos Entities.
[35] *Ibid.*

the same ways that such issues would be addressed in traditional law firm settings.[36]

63. Salvos Legal offers legal advice in corporate / commercial, property, not-for-profit, intellectual property and technology law.[37] It is now fully self-sustaining and profitable. Its client base includes "ASX200 companies, federal & state government agencies, not-for-profit organisations, small to medium enterprises and individuals."[38]

64. Salvos Legal (Humanitarian) has expanded over the years, and has provided legal services to thousands of individuals at no cost to clients or governments. It provides legal advice with respect to a range of matters including police matters, debt, family law (other than property disputes), housing matters, and immigration and refugee law.[39]

65. Salvos Legal (Humanitarian) operates "Advice Bureaus" at multiple Salvation Army locations in New South Wales and Queensland. For clients in rural and regional areas, or for individuals who cannot attend due these locations due to age, disability or incarceration, services can also be accessed by telephone. Salvos Legal (Humanitarian) will provide summary advice to anyone through its "Advice Bureaus", but will only provide full-time representation to individuals requiring further assistance if the individual does not qualify for legal aid, cannot afford a private lawyer, and meets other screening requirements set out in the firm's Means and Merits Test Assessment.[40]

66. The Salvos Legal (Humanitarian) firm reports the following:

    a. It has handled over 17,000 cases since it was founded in 2010.
    b. It provides free advice on 150-200 humanitarian cases each week;
    c. It has 19.8 full time lawyers who provided legal advice in 2016; and
    d. It provided over 36,000 hours of pro bono services in 2016.[41]

67. In addition, Salvos Legal (Humanitarian) works in close collaboration with related Salvation Army services to address clients' other needs. It "can engage clients with other Salvation Army social and pastoral services such as drug & alcohol

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[36] *Ibid.*
[37] "Our story", Salvos Legal, online at https://www.salvoslegal.com.au/our-story/.
[38] *Ibid.*
[39] "Humanitarian", Salvos Legal, online: https://www.salvoslegal.com.au/expertise/humanitarian-free-legal-service/.
[40] "How We Work", Salvos Legal, online https://www.salvoslegal.com.au/expertise/humanitarian-free-legal-service/getting-advice/; See also "Means and Merits Test", Salvos Legal online: https://www.salvoslegal.com.au/wp-content/uploads/2017/02/170206-Means-and-Merits-Test.pdf
[41] "Humanitarian", Salvos Legal, online: https://www.salvoslegal.com.au/expertise/humanitarian-free-legal-service/.

recovery, employment assistance, housing, welfare, counselling, financial management and aged care."[42]

68. Salvos Legal has been named Australian Law Firm of the Year 2016 (up to 100 lawyers) in the *Australasian Law Awards,* and in both 2015 and 2016 was named Corporate Citizen Firm of the Year 2016 & 2015 in the *Australasian Law Awards.* It is also a certified B Corporation.[43]

(iv) The Lawyer Owned Limited Profit Law Firm and Not for Profit Law Firms

69. In the United States, lawyer owned limited profit law firms and not for profit law firms have recently emerged. These entities are addressing the unmet legal needs of people who cannot afford an attorney but are not eligible for free legal services.

70. As an example, Open Legal Services, described as "Utah's first non-profit law firm for clients", provides "low bono" legal services to low to moderate income people who are ineligible for pro bono assistance.[44] The firm provides a sliding "low bono" rate depending on income and family size. It offers services in family law and criminal defense, as well as public guardian services to represent the interests of children in high conflict divorce and custody cases. As an incorporated non-profit it can also accept donations to support its work.

71. While some of these non-profit law firms rely mostly on the fees received from clients in order to operate, some have received funding from additional sources. Louisiana's SWLA Law Center, for example, was established in 1967 and provides reduced fee legal services for those who cannot afford the regular fees of a private attorney but do not qualify for legal aid. It receives funding from the United Way, the City of Lake Charles (through its Office of Community Development) and other grants and donations.[45]

(v) Medical-Legal Partnership Models

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[42] *Ibid.*
[43] *Ibid*. "B Corps are for-profit companies certified by the non-profit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency": B Lab online: https://www.bcorporation.net/what-are-b-corps.
[44] Open Legal Services, online at http://openlegalservices.org/.
[45] SWLA Law Center, online at http://www.swla-law-center.com/index-2.html. To learn more about American not-profit law firms, see the Open Legal Services Nonprofit Law Firm Directors, which provides a non-exhaustive list of similar non-profit law firms: http://openlegalservices.org/nonprofit-law-firm-directory/.

72. The Medical-Legal Partnership ("MLP") is a relatively new model that is being called "a cornerstone of access to justice."[46] It has been described as follows:

> MLP is a healthcare delivery model that integrates legal assistance as a vital component of healthcare. The power of the MLP model lies in its cross-disciplinary, *leveraging* nature, which aligns the legal community with a range of stakeholders and professions that are unified in seeking to improve the health conditions and systems for vulnerable populations.
>
> MLPs are built on the understanding that social determinants of health often manifest in the form of legal needs, and that attorneys have special tools and skills to address these needs.
>
> […]
>
> MLP practice has multiple impacts for patient-clients and communities, as well as for the professions and the legal and health institutions that partner together. A key outcome is the improved capacity of both legal and health professionals to screen, triage, and resolve problems that overlap legal and health domains […]"[47]

73. In the United States, the American Bar Association passed a resolution in 2007 encouraging lawyers, law firms and other members of the legal professions to develop MLPs with hospitals, community-based health care providers and social service organizations.[48] There are now hundreds of MLPs operating in the United States, with a wide range of structures.[49] MLPs have been established in a range of settings, including children's hospitals, health centers, veteran health care settings and behavioural health settings.[50]

74. In Ontario, Pro Bono Law Ontario, now Pro Bono Ontario ("PBO"), has developed MLPs at children's hospitals in Ontario, beginning with its program at Toronto's SickKids Hospital. This program, initially known as the "PBLO at SickKids" program, was described in a report to Convocation in January 2011 as follows:

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[46] Lawton and Sandel, *Investing in Legal Prevention: Connecting Access to Civil Justice and Healthcare through Medical-Legal Partnership,* 2014 Journal of Legal Medicine 35:29-39 at 33.
[47] *Ibid.*
[48] American Bar Association Health Law Section Report to the House of Delegates, Recommendation and Report 120A, American Bar Association online at: http://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/medlegal/120a.pdf.
[49] See generally "Partnerships Across the U.S." National Center for Medical Legal Partnership, online at http://medical-legalpartnership.org/partnerships/.
[50] For further resources, and examples, see generally "Setting-Specific Resources" National Center for Medical Legal Partnership, online at http://medical-legalpartnership.org/resources/.

> The PBLO at SickKids program was created as a 2-year pilot project by PBLO and launched in January 1, 2009. Based on a successful program model from Boston, Medical-Legal Partnerships, the SickKids' program delivers free legal services to low-income families whose children receive treatment at The Hospital for Sick Children ("SickKids Hospital").
>
> The program enables the integration of legal advocacy into clinical practice. It provides legal resources to families and also supports clinicians who provide services to families with children seeking treatment at the hospital. The governing principle is that legal issues affecting families during the time when a child is seeking medical treatment can have an adverse effect on the child's health as well as impact a family's capacity to manage the child's care. According to PBLO, the program served 624 families from its launch in January 2009 until December 31, 2010.
>
> The program has one staff person, a Triage Lawyer, who works as part of a patient's care team with the SickKids Hospital medical and social work staff. The Triage Lawyer assesses the legal needs of the child-patient and the patient's family, provides brief legal services for accepted clients and refers clients to the *pro bono* legal partners where appropriate. […][51]

75. At that time, Convocation was asked to consider providing $90,000 to support the program while PBLO worked to secure permanent financial support for the initiative. Convocation approved the funding of this "extremely important and successful access to justice program."[52]

[51] Access to Justice Committee January 27, 2011 Report to Convocation, Law Society of Upper Canada online for download from Convocation Decisions, January 2011, "Law Society Funds Free Legal Services Program at SickKids Hospital" Release at http://www.lsuc.on.ca/convocationdisplay.aspx?id=2147484241 at paragraphs 9-11.
[52] Treasurer Laurie Pawlitza, News Release, Law Society Funds Free Legal Services Programs at SickKids Hospital, January 27, 2011, Law Society of Upper Canada online for download from Convocation Decisions, January 2011, "Law Society Funds Free Legal Services Program at SickKids Hospital" Release at http://www.lsuc.on.ca/convocationdisplay.aspx?id=2147484241.

76. The PBO at SickKids program has been evaluated and is considered an overwhelming success.[53] An independent evaluation found that "The project works extremely well in a clinical setting at the hospital and enjoys the full confidence of hospital clinicians", that it "has steadily enlarged its service capacity" and that "The program has a good record of achieving resolution to clients' legal problems, which in turn has created significant impacts for families."[54]

77. Today PBO operates five MLPs at the following children's hospitals: SickKids (Toronto), Children's Hospital (London), the Children's Hospital of Eastern Ontario (Ottawa), Holland Bloorview Kids' Rehabilitation Hospital (Toronto) and McMaster Children's Hospital (Hamilton). They are staffed by five Triage Lawyers. These MLPs are LawPRO approved Pro Bono Ontario projects.[55]

78. In addition to the PBO MLPs, a medical-legal partnership, known as the Health Justice Program, has been established as a partnership between St. Michael's Hospital Academic Family Health Team, St. Michael's Hospital (Toronto), and four legal clinics. An Onsite Lawyer is able to provide legal services at St. Michael's Hospital directly to clients. As the Health Justice Program explains:

> **Who do you provide service to?**
>
> We aim to support patients who are low-income and have legal issues affecting their well-being, such as experiences of discrimination, personal safety, and problems with employment, housing, etc. Services are directed towards preventative legal information, advice and brief services. We encourage patients who are in unstable housing, identify as aboriginal, as having a disability and/or identify as having HIV/AIDS to access our services.[56]

(vi) Summary of Types of New Means of Delivering Legal Services

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[53] Focus Consultants, PBLO at Sick Kids: A Phase II Evaluation of the Medical-Legal Partnership between Pro Bono Law Ontario and Sick Kids Hospital, Toronto, Final Report, February 17, 2012, online at: http://www.probono.net/va/search/download.225017.
[54] *Ibid.* at page 61.
[55] LawPRO, LawPRO approved Pro Bono Ontario projects (Last Updated: December 2016), LawPRO online at http://www.lawpro.ca/insurance/pdf/LawPRO_approved_ProBonoProjects.pdf at page 1.
[56] Department of Family and Community Medicine and St. Michael's Academic Family Health Team, Health Justice Program, St. Michael's Hospital, online at: http://www.stmichaelshospital.com/programs/familypractice/legal-education-and-advice.php.

79. The above non-exhaustive examples show that innovative structures are being developed by or in partnership with a range of different types of CSOs to provide access to affordable and specialized legal services.

80. The ownership structures are varied. In some cases, legal services are delivered by a traditional firm that is fully owned by the CSO. In other instances, legal services are delivered through an "embedded" staff lawyer of a CSO.

81. There are different approaches to legal service delivery. In some of the examples described above, only legal services are made available. In other examples, a range of services are available, including but not limited to legal services.

c. Focus Group Meetings

82. In late 2016 and early 2017 the Working Group held a series of by invitation focus group meetings to further consider the possibility of licensee delivery of legal services through civil society organizations to facilitate access to justice. Attendees included front line workers, "embedded lawyers" (lawyers who provide services from offices within a hospital or not for profit organization's physical space), directors of not for profit organizations with mandates to assist vulnerable populations and public policy / funding organizations. A list of meeting participants is found at **Tab 4.4.1.**

83. Meeting participants were overwhelmingly supportive of the idea of permitting the delivery of legal services by licensees through CSOs. As the attached summary notes, the strengths and opportunities were seen by nearly all meeting participants as greatly exceeding identified potential challenges and risks, which meeting participants strongly maintained could be overcome.

84. Meeting participants noted the following potential strengths and opportunities to permitting delivery of legal services through CSOs:

    a. This approach could facilitate access to justice by providing legal services through trained, licensed lawyers and paralegals.
    b. On-site delivery of legal services in locations that are trusted by vulnerable individuals will facilitate access to justice.
    c. CSOs are often ideally suited to help clients address multiple, interconnected issues, which could include legal issues.
    d. Licensees providing legal services within CSOs to clients would also be able to teach clients and CSO staff about legal rights; licensees embedded in CSO environments can also learn more about the client.
    e. CSO delivery of on-site legal advice to clients would foster efficient service delivery. It would reduce hidden costs, provide opportunities for effective delivery of appropriate services, and ultimately benefit the client and the

providers of legal and other services.

85. Meeting participants raised a range of concerns and risks, but also suggested that they can be addressed, and should not be treated as “show stoppers”. Participants noted the following:

a. With respect to conflicts of interest, there may be settings where conflicts could arise and protocols would be necessary to address this. There might be instances where an inherent conflict may need to be considered, but this would arise on a case-by-case basis.
b. Clients need to have the role of counsel clearly communicated to them.
c. The parameters of the provision of legal services within a civil society structure would need to be clearly developed.
d. Licensees working with vulnerable clients will need specialized expertise and a high level of cultural competency.
e. Licensees working in embedded environments are at risk of feeling isolated. Consideration should be given to how such licensees can be supported.
f. CSOs and licensees must recognize potential duty to report issues. One way of addressing this may be to develop appropriate protocols.

86. While seeing considerable advantage in allowing CSO clients to receive legal services together with other CSO services, the meeting participants noted that lifting regulatory limitations would not necessary result in the delivery of legal services by CSOs because of the need for funding. However, meeting participants nevertheless encouraged the Law Society to address regulatory limitations to enable delivery of legal services where possible.

87. Meeting participants also encouraged the Law Society to be open to experimenting with new options in this area, and to evaluate these initiatives.

d. Analysis: Applying the Criteria for Considering ABS Options

88. In September 2015, the ABS Working Group confirmed that it will continue to consider potential models with regard to the following criteria:

a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.

b. Responsive to the public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of

legal and other services with appropriate quality and adequate financial assurance of legal services.

c. Professionalism: The fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice should be safeguarded in any move to liberalize ownership and structure.

d. Protection of Solicitor-Client Privilege: Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.

e. Promote Innovation: New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.

f. Orderly transition: The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.

g. Efficient and Proportionate Regulation: Any changes should improve the Law Society's ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.

89. The Working Group considered the above criteria and reached the unanimous view that the Law Society should use its regulatory tools in ways that may enable the delivery of legal services through charities and other CSOs. As described further below, the Working Group is satisfied that legal services could be delivered through charities and other CSOs in new ways which could bring access to justice to Ontarians, including to some of our most vulnerable segments of society, in a manner whereby professionalism and solicitor-client privilege are safeguarded.

a. Access to Justice

90. The acute unmet legal needs in Ontario are well documented. The Working Group addressed this in its February 2014 Report to Convocation, and in its

Unmet Legal Needs in Ontario backgrounder.[57] Justice, including access to legal services, remains a significant challenge in Ontario.

91. Against this backdrop, the direct delivery of legal services by civil society groups, properly structured, could have several access to justice benefits. Many of the benefits were highlighted in the focus group meetings, and are noted above. Potential benefits may include, for example:

    a. Providing a new inclusive entry point for vulnerable people to find legal services (described further below);
    b. Reducing the number of referrals a client must receive in order to access legal services;
    c. Delivering integrated and holistic services to clients, to address "clusters of problems", whether legal or non-legal, in recognition of the fact that client problems are often multifaceted and interconnected;
    d. Identifying and assessing legal issues at the outset before they contribute to a "cascade" of legal and other problems; and
    e. Providing leveraged services, with appropriate professional expertise, provided by the appropriate professional, at the appropriate times.

92. Legal service delivery models through the charity and CSO sector could be designed with the client's needs at the core of the program design. The specific needs of different populations could lead to a range of different types of means of delivering legal services through CSOs.

93. Ultimately access to justice considerations strongly favour action.

    b. <u>Responsive to the public</u>

94. As described above, CSO delivery of legal services could be highly responsive to the needs of vulnerable sectors of the population and the public in general. By embedding lawyers and paralegals where charities or other CSOs are located (such as in shelters, hospitals, community centres, drop-in centres, public libraries or other similarly accessible environments), it is expected that legal services would become more readily accessible and available to the public.

95. This is a particular advantage when seeking to deliver legal services to particularly vulnerable populations. In the course of its focus group meetings, the Working Group heard examples of situations where a person in need of legal services may be unable to visit a lawyer or paralegal's office. Under this model, these clients would be able to receive legal services where they are comfortable

[57] ABS Working Group, Unmet Legal Needs in Ontario, online at: http://lsuc.on.ca/uploadedFiles/abs-unmet-legal-needs-oct16-2014.pdf/

and able to receive them.

96. This approach also ensures that clients are receiving appropriate legal services from professionals licensed to provide such services. The Working Group learned that for some of our most vulnerable, there is often no access to legal help. In such instances, efforts to provide initial legal assistance may come from other service providers. While no doubt well intentioned for the most part, in some cases such efforts to assist can make legal matters worse for the client. A CSO model may enable clients to receive legal assistance from trained, regulated legal professionals. It would also free up the time of other service providers to provide their expert services without having to extend to seek to fill a legal services gap.

97. The Working Group also expects that services provided through CSOs would be delivered at no cost or at a highly subsidized cost to the client.

98. All of these factors strongly point towards permitting CSO direct delivery of legal services.

c. Professionalism

99. The Working Group has considered the key fundamentals of professionalism.

100. The Working Group notes that under this proposal the licensee would be required to have independence over the legal services being provided. The lawyer or paralegal would continue to be required to deliver services competently, with integrity, and with full candour to the client. The lawyer or paralegal would be required to maintain client confidences, and avoid conflicts of interests.

101. There may be particular risks or factors to consider when delivering legal services through a CSO, or in a multidisciplinary environment. However, many of these professionalism issues have already been successfully addressed by innovative providers of legal services. For example:

a. Legal clinics providing legal services through a holistic approach have been able to do so successfully. Issues related to different professionals having different duties to report are addressed by communicating the risks to the client, and having systems in place for professionals to seek independent legal advice should there ever be a situation where conflicting duties may arise.
b. MLPs have already developed protocols to address how the medical-legal partners will operate. Clients are advised as to the role of counsel and the MLP, and necessary consents or ethical screens are put in place as are

necessary.

102. In short, risks related to potential inherent conflicts of interest between a CSO's legal interests and that of a client served by the CSO, and potential risks related to multidisciplinary services and different professional duty to report requirements appear to have been managed in multidisciplinary environments.

103. The Working Group is unaware of any significant challenges to professionalism arising out of the operation of any of the CSO models, discussed above, including in MLP environments already in operation in Ontario.

104. The Working Group also notes that service to the public good through client relationships, which is one of the elements of professionalism that it identified as a factor to consider, may be enhanced by providing service to individuals who otherwise may not receive needed services.

105. As described further below, the Working Group's proposed model would introduce a framework within which lawyers and paralegals "embedded" within a CSO could provide legal services to CSO clients. The Law Society would continue to require licensees practicing in CSO settings to meet their full professional obligations. The Working Group is of the view that the fundamentals of professionalism can be safeguarded appropriately under this proposal.

d. Protection of Solicitor-Client Privilege

106. The Working Group views the protection of solicitor-client privilege much in the same way as it views issues related to professionalism; changes must not jeopardize the protection of solicitor-client privilege, and change can be introduced while meeting this requirement. The Working Group recognizes that multidisciplinary partnerships have operated without raising solicitor-client privilege concerns for some time. Multidisciplinary service delivery models require clear protocols and client communication, but can be developed in ways which do not significantly add risk to the protection of solicitor-client privilege.

107. The Working Group's proposed model would require steps to be taken to ensure solicitor-client privilege is protected. The individual licensee practising in the CSO setting would ultimately be responsible for ensuring that client privilege is protected to the same extent as it would be within any other practice setting.

e. Promote Innovation

108. The Working Group views the potential of delivery of legal services through CSOs as a means of promoting innovation for the purpose of facilitating access to justice. The models described above demonstrate that legal services can be

delivered efficiently to underserved populations, and that tailored solutions can be crafted to best meet the needs of vulnerable groups. Innovation might involve technology, but can in these cases include new processes to more seamlessly provide legal services where they were previously unavailable, difficult to access, or provided in a silo. It is expected that changes to permit delivery of legal services through CSOs would enhance the delivery of legal services to the public, and thus this factor strongly favours regulatory change.

f. Orderly transition

109. The proposed new approach is intended to facilitate the development of new service models to address unmet legal needs. It is focusing on a part of the market for legal services that is generally not being served by for-profit sectors. It is not expected that it would create disruptions for the regulator (as the Law Society would continue to regulate the licensees providing the legal services), for current providers of legal services (as this proposal seeks to address areas of service where they do not currently operate), for licensees (who would simply have new opportunities to provide legal services in the public interest) or for the public in general (who would have new means of accessing legal services). The Working Group has every confidence that the proposed approach can be introduced in an orderly manner, and in a manner that ultimately could directly contribute to seeing more people accessing the legal services they need. As such, this factor strongly supports regulatory action.

g. Efficient and Proportionate Regulation

110. With the above factors on balance strongly pointing towards regulatory action, the Working Group considered what options would be both efficient and proportionate to the regulatory objective of facilitating access to legal services through charities and other CSOs in a manner that effectively protects the public.

111. The Working Group therefore considered the full range of options available.

112. The Working Group considered amending the Multi-Discipline Practice requirements in order to facilitate charity and CSO delivery of legal services, but ultimately concluded that the MDP is not the appropriate vehicle to drive such change. The MDP model is premised on legal services being the core service being provided, with ancillary services also available through the MDP. However, the involvement of charities and CSOs in the delivery of legal services would represent a fundamental shift from the MDP model; in these settings legal services could be provided as a related service, as part of a holistic service, or as an ancillary service delivered to CSO clients.

113. The Working Group therefore considered options for developing a brand new approach, and developed the following model which it believes is both efficient and proportionate to the access to justice and public protection objectives it seeks to achieve.

e. The Recommended Approach: By-Law Amendments to Enable Licensee Delivery of Legal Services Through Charities and Other CSOs

114. As stated at the outset of this report, the Working Group recommends amending Law Society By-Laws to enable lawyers and paralegals to directly deliver legal services through CSOs.

115. Under this approach, the Law Society would specify the circumstances under which legal services could be provided to CSO clients (by "embedded" lawyers and paralegals). If those circumstances were present in a CSO, and the CSO wished its clients to have access to legal services from a lawyer or paralegal embedded in the CSO, the CSO would register with the Law Society. The prescribed circumstances will focus on ensuring that, among other things:

a. the licensee has control over the delivery of their professional services;
b. solicitor-client privilege will be protected; and
c. the fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.

116. A registered CSO would be de-registered if the prescribed circumstances under which legal services may be provided to CSO clients by "embedded" licensees were no longer present.

117. On registering, lawyers and paralegals would be permitted to provide legal services directly to clients through the registered CSOs. Licensees providing legal services through registered entities would continue to be fully regulated by the Law Society.

118. Complaints regarding legal services provided by licensees through registered CSOs could still be made to the Law Society.

119. The proposed model would seem to integrate easily with current insurance requirements, as the licensee would carry coverage as required by the By-Laws, in order to protect clients. With LawPRO's new 75% discount risk-rated group for selected government agency lawyers having come into effect this year, LawPRO could be approached to consider whether the lawyers employed by CSOs could

also be evaluated for risk rating in this fashion.

120. The Working Group is of the view that this approach provides an innovative, proportionate regulatory option. It has been designed to encourage innovation and new means of delivering legal services where services are required. The registration requirement is intended to meet Law Society public protection and regulatory requirements without imposing overly bureaucratic application requirements or unnecessarily complex legal requirements on charities and CSOs.

NEXT STEPS

121. If approved, the Committee would return with recommended By-Law changes.

122. The Working Group is continuing to consider minority ownership by non-licensees and franchise models, and new forms of legal service delivery in areas not currently well served by traditional practices. It will report further with respect to these issues in due course.

Tab 4.4.1

Civil Society Meetings, December 2016 – January 2017 Attendees

Name of Contact	Organization Name	Role/Title
Jacquie Bohnhardt and Janet Wilson	Family Service Toronto	Janet Wilson, Manager, Violence Against Women Program
Graham Brown	John Howard Society of Ontario	Policy Analyst, Centre of Research, Policy & Program Development
Lynn Burns	Pro Bono Law Ontario	Executive Director
Bonnie Cole	Akwesasne Justice Department	Legal Counsel & Prosecutor
JoAnne Doyle	United Way	Chief of Operations and Strategy Officer
Mary Jane Ellis	Canadian Mental Health Association – Toronto Branch	Court Coordinator, Mental Health Court Support
Lana Frado	Sound Times	Executive Director
Allyson Hewitt	JW McConnell Family Foundation Senior Fellow, Social Innovation @MaRS	Academic / Innovation strategist
Johanna Macdonald	ARCH / Health Justice Initiative	Onsite Lawyer
Kirsti Mathers McHenry	Law Foundation of Ontario	Director, Policy & Programs
Marian MacGregor	Law Society of Upper Canada	Equity Advisor, Equity Initiatives
Elizabeth McIsaac	Maytree	President
Juliette Nicolet and Chelsea Krahn	Ontario Federation of Friendship Centres	Director of Policy / Justice Policy Analyst
Gita Schwartz	Elizabeth Fry Toronto	Interim Executive Director
Amy Slotek	Legal Aid Ontario	LAO lawyer at Sound Times 4 days per week

Tab 4.5

FOR DECISION

FOURTH REPORT OF THE ADVERTISING & FEE ARRANGMENTS ISSUES WORKING GROUP

MOTION

123. **That Convocation approve amendments to the Rules of Professional Conduct regarding price advertising for legal services with respect to residential real estate transactions as set out at Tabs 4.5.1 and 4.5.2 (English and French).**

SUMMARY OF ISSUE UNDER CONSIDERATION

124. In this fourth report to Convocation, the Advertising and Fee Arrangements Issues Working Group ("Working Group")[1] reports its recommendation that all inclusive advertising with respect to residential real estate transactions should be permitted, subject to new requirements that promote disclosure and consistency so that consumers may more easily compare services. The Working Group has developed draft amendments to the advertising of fees rule, and to the Commentary to Rule 3.6 regarding reasonable fees and disbursements. The draft amendments are attached as **Tab 4.5.1** (English) and **Tab 4.5.2** (French) to this report.

BACKGROUND

125. In June 2016, the Working Group reported to Convocation through the Professional Regulation Committee, and presented its proposal to seek further input with respect to the potential regulatory responses to a number of issues relating to licensee advertising, referral fees and fee arrangements ("June 2016 Report to Convocation").[2]

126. At that time, the Working Group described issues with respect to real estate advertising

[1] The Advertising & Fee Arrangements Issues Working Group ("Working Group") is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

[2] The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.

and fee issues as follows:

> **Real Estate**
>
> There has also been an increased volume of advertising for real estate work. However, the context of real estate advertising is very different than for personal injury advertising.
>
> Many consumers are prepared to select their real estate lawyers on the basis of price. Fixed price services are commonly advertised by real estate lawyers to attract residential real estate work. However, there is concern whether some fixed-price advertising honestly and accurately discloses what costs are included in the fixed price and what are in addition. In a price sensitive market where relatively small price differences can affect consumer choices, it may be particularly important to ensure that consumers are not misled as to what is promised and what is not.[3]

127. The Working Group stated that as a matter of policy, it "believes that the advertising of "all in" real estate pricing should be transparent, and that consumers should be able to effectively compare offered prices".[4]

128. It described the "all in" pricing issue in detail as follows:

> Real estate legal work is price sensitive with the result that price advertising is important. Most consumers of real estate legal services will only use a real estate lawyer once or a few times in their lives. Consumers will not necessarily be aware of differences between fees and disbursements, or that the nature of legal services provided will change, and so too will the fees and disbursements, depending, for example, on whether a purchase is with or without mortgage financing.
>
> The Working Group recognizes that real estate advertising of "all in" pricing can be misleading if it is not transparent about additional fees, disbursements or charges which will ultimately lead to the client receiving a bill that exceeds the quoted "all in" price. Clients usually do not meet with the lawyer at the outset of the retainer, so once a client is "in the door" through deceptive advertising, by the time the real price is revealed, it is often too late to change lawyers. Moreover, the difference between the "all

[3] *Ibid.* at paras. 31-32.

[4] *Ibid.* at para. 53.

> in" price and the actual invoice may be relatively minor, such that individual clients may not take recourse, leaving possibly deceptive pricing unchecked.
>
> The Working Group notes that Rule 4.2-2 of the Rules of Professional Conduct already provides that a lawyer may advertise fees, but only if the advertising is "reasonably precise as to the services offered for each fee quoted", the advertising "states whether other amounts, such as disbursements and taxes will be charged in addition to the fee" and "the lawyer strictly adheres to the advertised fee in every applicable case". The determination of what constitutes a "disbursement" in many instances is the crux of the issue.[5]

129. The Working Group also noted that it heard divergent views by real estate lawyers as to what might reasonably be a disbursement that can be charged to a client.[6]

130. The Working Group recognized that there are a range of ways to potentially regulate "all in" pricing, and indicated that it would be seeking input into what might be appropriate approaches which may facilitate comparison when lawyers advertise on a fixed-fee basis.[7]

131. In July 2016, the Working Group sought further input with respect to specific issues related to advertising, referral fees, and contingency and other fee arrangements through a Call for Feedback. In its Call for Feedback document, the Working Group asked for input on the following issues with respect to advertising in real estate law:

> How could pricing in real estate law be made consistent so that consumers may more easily compare services? Should the Law Society take further action regarding "all in" pricing in real estate transactions?[8]

132. The Call for Feedback closed at the end of September 2016. The summary of the comments received in response to the Call for Feedback ("Summary"), attached to the Working Group's February 2017 Report to Convocation provided the following overview with respect to the issue of advertising "all in" fees in real estate:

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[5] *Ibid.* at paras. 54-56, footnotes omitted.

[6] *Ibid.* at footnote 13.

[7] *Ibid.* at paras. 58-59.

[8] Call for Feedback: Advertising and fee arrangements, online at http://www.lsuc.on.ca/uploadedFiles/Fact-Sheet-Ad-and-Fee-Consultation-EN-July-2016.pdf.

The feedback received in this area provided divergent views.

The input confirmed that “all in” real estate advertising practices present several challenges, including the following:

a. A lack of consistency in the marketplace as to what is included in “all in” pricing. Variations depend, for example, on whether all disbursements are included, whether certain costs are categorized as disbursements and not included in the up-front quote, and how the lawyer decides to treat amounts received from a title insurer or other third party.
b. “Bait and switch” techniques / deceptive “all in” pricing: There is a concern that prospective clients may retain a firm on the basis of one price and then be billed a different amount due to the nature of the transaction or because of disbursements.
c. Threats to ethical and professional practice:
    i. Many expressed the concern that the advertising of all-in fees has fueled price competition that has created disincentives for real estate lawyers to spend money to conduct searches or spend the necessary time on matters.
    ii. Many noted that the downward cost pressure and current uneven advertising practices causes a race to the bottom.
d. Focusing solely on price to the detriment of other considerations: Some expressed concern that a regulatory focus on price risks detracting from other important consumer considerations such as professionalism, service and expertise, and consumer evaluation of real estate legal services on price and other considerations.

There were differences in approaches regarding how to address the above pricing issues.

Some noted that existing rules can be used to enforce transparency in real estate pricing.

Certain legal organizations are opposed to permitting any “all-in”

fee quotes in real estate transactions unless there are regulatory changes. Another legal organization appeared to take issue with regulation of pricing, stressing that there is no "on size fits all" real estate transaction, and that it would be a mistake to assume that real estate transactions can or should be subject to uniform pricing.

In contrast, some of the feedback received generally recognized that if it were possible to easily compare prices on an "all in" basis, this would give prospective clients choice and peace of mind. Some therefore recommend regulating "all in" pricing, with the caution that if the rationale of "all in" pricing is to foster reasonable price comparisons, then any regulatory approach would need to ensure that there are not hidden fees or inconsistencies in approach which could skew the marketplace.

Options for considering "all in" real estate pricing include, for example:

a. Taking no further action with respect to real estate pricing;
b. Educating consumers on real estate advertising and the costs of real estate transactions;
c. Regulating what is included in any price quote, and what categories of costs are not included and should be paid by the client;
d. Regulating whether a lawyer should be required to abide by an all-in legal fee in all cases without exception;
e. Defining what constitutes disbursements;
f. Re-introducing a tariff with respect to disbursements or otherwise regulating disbursements; and/or
g. Developing different "all in" requirements for different types of common real estate transactions; and
h. Banning "all in" pricing.[9]

133. The Working Group has considered appropriate recommendations with respect to real

[9] Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback, February 2017 Convocation – Professional Regulation Committee Report, at paras. 23-29, online at: www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

estate advertising. In addition to relying on Working Group member Jerry Udell's real estate expertise, the Working Group invited benchers Sidney Troister and Jeffrey Lem to participate in these meetings given their real estate expertise. Ross Earnshaw also participated in one meeting given his role as Chair of the Law Society's Real Estate Liaison Group.

DISCUSSION

134. The Working Group has considered the issue of advertising of pricing in real estate, particularly with respect to residential real estate matters. It remains of the view that there are concerns in this area. As the Working Group has previously noted:

    a. Advertising can be misleading if it is not clear as to what is included and what is not included in the price.

    b. There are issues arising due to a lack of consistency in the marketplace as to what is included in an advertised price.

    c. Clients who may have been attracted to a lawyer through misleading advertising have few options once in the door. Due to the timing of residential real estate transactions, clients are unlikely to be in a position to change lawyers once they become aware of issues regarding the cost of the services being provided.

    d. It is difficult for consumers to compare services.

135. The Working Group has concluded that change is warranted.

136. Banning advertising of pricing in real estate law would be inappropriate. As the Working Group has previously noted,[10] lawyer and paralegal commercial expression is protected by s.2(b) of the *Charter of Rights and Freedoms,* which protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".[11] A ban on advertising price would likely violate the *Charter*. Moreover, a ban on advertising price would be a disservice to consumers of real estate legal services.

137. The Working Group was invited by some to define what constitutes a disbursement, with some also recommending a Law Society tariff on disbursements. The Working Group does not believe that such Law Society micro-regulation is necessary or in the public interest. Any list of permitted disbursements would need to be constantly revised. A tariff approach would similarly need constant updating. Moreover, tariffs risk being anti-

[10] See generally the Working Group's February 2017 Report to Convocation, at paras. 70-73, online at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

[11] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. ("Charter").

competitive. The rates risk becoming ceilings, such that real estate lawyers who do not currently charge for certain matters, or do not charge at the tariff rate may then choose to charge at the prescribed tariff rate.

138. Ultimately the Working Group is of the view that a rule amendment provides the simplest way to encourage the advertising of pricing that facilitates transparency and consumer choice.

139. The proposed rule does not require real estate lawyers to advertise, or to advertise on the basis of price. However, it provides that if a lawyer advertises a price for the completion of a residential real estate transaction, then the lawyer must meet the following requirements:

    a. The price must be inclusive of all fees, disbursements, third party charges and other amounts *except* for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium.

    b. The advertised price must clearly state that the harmonized sales tax and the permitted disbursements noted above are not included in the price.

    c. The lawyer must adhere to the price in every applicable case.

    d. In the case of a purchase transaction, the price is for acting on the purchase and one mortgage.

140. The proposed Commentary states that the lawyer who provides services pursuant to an advertised price must meet the standard of a competent lawyer. It explains that the intent of the rule is to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. It also makes it clear that the rule applies to all forms of advertising, and provides that when a lawyer chooses to advertise a price, the lawyer should ensure that all the relevant information is provided. The Commentary makes it clear that the rule applies for providing a price on a website, whether the price is listed on the site, or make available in response to a request made on a webpage. The rule does not apply to a specific price quotation, so long as the lawyer provides a specific quotation based on an actual assessment of the work and disbursements required, and that the types of anticipated disbursements are disclosed.

141. The Working Group also proposes an amendment to Commentary to Rule 3.6 (the rule relating to fees,) to remind lawyers that they must comply with the provisions of Rules 4.2.2 and 4.2.2.1 regarding advertising of fees.

NEXT STEPS

142. The Working Group continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and

other services. It also continues to consider current practices related to contingency fee arrangements and the operation of the *Solicitors Act*, which is the subject of the Working Group's fifth report to Convocation, which is also being presented in June 2017. The Working Group will report in due course once it has considered these issues further.

Tab 4.5.1

REDLINE SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium;
(b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;
(c) the lawyer strictly adheres to the price for every transaction; and
(d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer's own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work

and disbursements required for the transaction provided that full disclosure is made of the anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer's title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.

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.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

(a) the time and effort required and spent,

(b) the difficulty of the matter and the importance of the matter to the client,

(c) whether special skill or service has been required and provided,

(c.1) the amount involved or the value of the subject-matter,

(d) the results obtained,

(e) fees authorized by statute or regulation,

(f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,

(h) any relevant agreement between the lawyer and the client,

(i) the experience and ability of the lawyer,

(j) any estimate or range of fees given by the lawyer, and

(k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and

interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[4.2] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising of fees.

“CLEAN” VERSION SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

(a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors’ lawyers regarding similar name executions and any title insurance premium;
(b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;
(c) the lawyer strictly adheres to the price for every transaction; and
(d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer’s own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work and disbursements required for the transaction provided that full disclosure is made of the

anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer's title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.

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.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

(a) the time and effort required and spent,

(b) the difficulty of the matter and the importance of the matter to the client,

(c) whether special skill or service has been required and provided,

(c.1) the amount involved or the value of the subject-matter,

(d) the results obtained,

(e) fees authorized by statute or regulation,

(f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,

(h) any relevant agreement between the lawyer and the client,

(i) the experience and ability of the lawyer,

(j) any estimate or range of fees given by the lawyer, and

(k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and

interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[4.2] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising of fees.

TAB 4.5.2

VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE CONCERNANT LA PUBLICITÉ DES HONORAIRES ET LES HONORAIRES ET DÉBOURS RAISONNABLES

Publicité des honoraires

4.2-2 L'avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

a) l'annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;

b) l'annonce des honoraires indique si d'autres montants, tels que les débours, les frais payables à des tiers et les taxes, sont facturés en sus ;

c) l'avocat s'en tient strictement aux frais annoncés dans toutes les circonstances applicables

4.2-2.1 L'avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

a) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l'exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d'inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, paiement pour lettres d'avocat de créanciers concernant des exécutions envers des noms similaires et primes d'assurance de titre ;
b) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe a) de la présente règle ne sont pas compris dans le prix ;
c) L'avocat adhère strictement aux prix annoncés pour chaque transaction ;
d) Dans le cas d'une transaction d'achat, le prix comprend le prix pour agir à la fois dans la transaction d'achat et une transaction hypothécaire.

Commentaire

[1] L'avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d'un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d'un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s'applique lorsque l'avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s'applique à toutes les formes d'annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l'avocat et dans des listes standardisées

de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s'applique pas si une estimation spécifique des honoraires est fournie par suite d'une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l'avocat décide d'annoncer un prix pour faire une opération immobilière résidentielle, l'avocat devrait s'assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n'auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l'impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l'objet du paragraphe a) de règle 4.2-2.1 est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d'administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.

Honoraires et débours raisonnables

3.6-1 L'avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n'ont pas été divulgués en temps utile.

3.6-1.1 L'avocat ne peut percevoir d'intérêts sur les comptes en souffrance qu'aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d'honoraires justes et raisonnables tient compte des facteurs suivants :

a) le temps et les efforts consacrés à l'affaire ;

b) la difficulté de l'affaire et son importance pour le client ;

c) la prestation de services inhabituels ou exigeant une compétence particulière ;

c.1) les montants en cause ou la valeur de l'objet du litige ;

d) les résultats obtenus ;

e) les honoraires prévus par la loi ou les règlements ;

f) les circonstances particulières, comme la perte d'autres mandats, les retards de règlement, l'incertitude de la rémunération et l'urgence ;

g) la probabilité, si divulguée au client, que l'avocat ne puisse accepter d'autre travail s'il accepte ce mandat ;

h) toute entente pertinente entre l'avocat et le client ;

i) l'expérience et l'aptitude de l'avocat ;

j) toute estimation ou échelle d'honoraires donnée par l'avocat ;

k) le consentement préalable du client relativement aux honoraires..

[2] Le rapport de confiance qui existe entre l'avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l'avocat d'accepter le moindre honoraire caché. L'avocat ne peut, à l'insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d'un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d'aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.

[3] Avant ou dans un délai raisonnable après le début d'un mandat, l'avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L'avocat devrait être en mesure d'expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l'avocat devrait tout de suite expliquer la situation au client. L'avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l'affaire et peut réviser l'estimation initiale des honoraires et des débours.

[4.1] L'avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la *Loi sur les procureurs*.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l'égard de la publicité des honoraires.

VERSION « AU PROPRE » DES MODIFICATIONS AU CODE DE DÉONTOLOGIE CONCERNANT LA PUBLICITÉ DES HONORAIRES ET LES HONORAIRES ET DÉBOURS RAISONNABLES

Publicité des honoraires

4.2-2 L'avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

a) l'annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;

b) l'annonce des honoraires indique si d'autres montants, tels que les débours, les frais payables à des tiers et les taxes, sont facturés en sus ;

c) l'avocat s'en tient strictement aux frais annoncés dans toutes les circonstances applicables

4.2-2.2 L'avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

e) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l'exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d'inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, paiement pour lettres d'avocat de créanciers concernant des exécutions envers des noms similaires et primes d'assurance de titre ;
f) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe 4.2-2.1 ne sont pas compris dans le prix ;
g) L'avocat adhère strictement aux prix annoncés pour chaque transaction ;
h) Dans le cas d'une transaction d'achat, le prix comprend le prix pour agir à la fois dans la transaction d'achat et une transaction hypothécaire.

Commentaire

[1] L'avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d'un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d'un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s'applique lorsque l'avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s'applique à toutes les formes d'annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l'avocat et dans des listes standardisées de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s'applique pas si une estimation spécifique des honoraires

est fournie par suite d'une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l'avocat décide d'annoncer un prix pour faire une opération immobilière résidentielle, l'avocat devrait s'assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n'auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l'impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l'objet du paragraphe 4.2-2.1 a) est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d'administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.

Honoraires et débours raisonnables

3.6-1 L'avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n'ont pas été divulgués en temps utile.

3.6-1.1 L'avocat ne peut percevoir d'intérêts sur les comptes en souffrance qu'aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d'honoraires justes et raisonnables tient compte des facteurs suivants :

a) le temps et les efforts consacrés à l'affaire ;

b) la difficulté de l'affaire et son importance pour le client ;

c) la prestation de services inhabituels ou exigeant une compétence particulière ;

c.1) les montants en cause ou la valeur de l'objet du litige ;

d) les résultats obtenus ;

e) les honoraires prévus par la loi ou les règlements ;

f) les circonstances particulières, comme la perte d'autres mandats, les retards de règlement, l'incertitude de la rémunération et l'urgence ;

g) la probabilité, si divulguée au client, que l'avocat ne puisse accepter d'autre travail s'il accepte ce mandat ;

h) toute entente pertinente entre l'avocat et le client ;

i) l'expérience et l'aptitude de l'avocat ;

j) toute estimation ou échelle d'honoraires donnée par l'avocat ;

k) le consentement préalable du client relativement aux honoraires..

[2] Le rapport de confiance qui existe entre l'avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l'avocat d'accepter le moindre honoraire caché. L'avocat ne peut, à l'insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d'un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d'aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.

[3] Avant ou dans un délai raisonnable après le début d'un mandat, l'avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L'avocat devrait être en mesure d'expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l'avocat devrait tout de suite expliquer la situation au client. L'avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l'affaire et peut réviser l'estimation initiale des honoraires et des débours.

[4.1] L'avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la *Loi sur les procureurs*.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l'égard de la publicité des honoraires.

Tab 4.6

FOR INFORMATION

FIFTH REPORT OF THE ADVERTISING & FEE ARRANGMENTS ISSUES WORKING GROUP

SUMMARY OF THE ISSUE UNDER CONSIDERATION

143. In this fifth report to Convocation, the Advertising and Fee Arrangements Issues Working Group ("Working Group")[1] is providing this status report on its work to date and proposed next steps with respect to its review of contingency fees.

144. As described further in this report, the Working Group has received a great deal of information regarding the current operation of contingency fees. Contingency fees remain an important means of facilitating access to justice for individuals who have legal claims and rights which they may otherwise be unable to advance. However, the Working Group has observed significant issues in the current operation of Ontario's contingency fee regime.

145. The Working Group is concerned that there appears to have been widespread noncompliance with the current regulatory requirements governing Ontario's contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements.

146. The Working Group is also of the view that change is necessary in order to protect consumers.

147. The Working Group recommends requiring a mandatory standard form contingency fee agreement to facilitate client understanding of contingency fee agreements ("CFAs") and facilitate comparison of the cost of legal services being offered.

148. The Working Group is also considering recommendations for reforms to the *Solicitors Act,* R.S.O. 1990, c. S.15 ("*Solicitors Act*") to ensure that fees are clear, fair and reasonable. It is currently considering a series of related recommendations, comprised of the following:

[1] The Advertising & Fee Arrangements Issues Working Group ("Working Group") is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

a. Requesting that amendments be made to the *Solicitors Act* to require that contingency fees be calculated as a percentage of the all-inclusive settlement amount or all-inclusive amount awarded at trial, less disbursements. This method simplifies the calculation of fees and aligns the interests of clients and licensees. It would replace the current provision that the fee is based on a percentage of the total settlement amounts less recovery on account of disbursements and legal costs, which is difficult to calculate in practice for reasons explained further in the report, and which creates inherent conflicts between the licensee's interest and the client's interest.[2]

b. At the same time, introduce safeguards to ensure that costs are clear, fair and reasonable. The Working Group is considering a range of approaches, including:

   i. A limit on fees by a percentage cap or other means;

   ii. Requiring independent legal advice be provided to a client in certain situations before the fee is paid; and

   iii. Introducing new client reporting requirements to ensure that fees are fair and reasonable.

149. With the agreement of the Committee, the Working Group proposes to seek further input with respect to reforms to Ontario's contingency fees system. Input will be accepted until Friday, September 29, 2017. The Working Group will then review the feedback it received before returning to Convocation with its recommendations.

BACKGROUND

150. Contingency fee agreements provide that the lawyer or paralegal's fee is "contingent, in whole or in part, on the successful disposition or completion of the matter for which the services are to be provided."[3]

151. The Working Group has been considering contingency fee issues since it was established in February 2016. It held a series of meetings in spring 2016 with plaintiff and defence side personal injury lawyers.

152. In June 2016 the Working Group reported on these meetings, and presented its initial findings with respect to contingency fees to Convocation ("June 2016 Report to Convocation").[4]

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[2] The Working Group continues to consider approaches to ensure that there is access to justice in cases where there is a high likelihood of requiring a trial, but where legal fees under the proposed general approach may not be sufficient for the licensee to take the case to trial.

[3] Rules of Professional Conduct, Rule 3.6-2 and Paralegal Rules of Conduct, Rule 5.01(7).

[4] The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.

153. In July 2016, the Working Group sought further input through a Call for Feedback, and at that time asked the following with respect to contingent fees:

    a. How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?

    b. Should lawyers and paralegals typically operating on contingency fee arrangements be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites?

    c. How is the *Solicitors Act* operating in practice?[5]

154. The Call for Feedback closed at the end of September 2016. In its February 2017 Report to Convocation, the Working Group attached a summary of the feedback it received ("Summary"), attached as **Tab 4.6.1**.[6] As the Summary notes, the Working Group received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group and insurers.[7] The Working Group again thanks all those who responded to its first Call for Input.

155. In addition to considering the feedback it received directly in 2016, the Working Group has also taken into account recent developments, including the following:

    a. Two private members' bills which were introduced in the legislature in fall 2016 and in winter 2017, both of which, among other matters, recommended capping contingency fees with respect to motor vehicle actions at 15% and 33% respectively.[8]

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[5] Call for Feedback: Advertising and Fee Arrangements, online at http://www.lsuc.on.ca/uploadedFiles/Fact-Sheet-Ad-and-Fee-Consultation-EN-July-2016.pdf.

[6] Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback ("Summary"), February 2017 Convocation – Professional Regulation Committee Report, pages 119-136, online at: www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.

[7] Summary, at para. 2.

[8] Bill 103, *Personal Injury and Accident Victims Protection Act, 2017,* introduced March 8, 2017 by Mike Colle, MPP, Legislative Assembly of Ontario online at: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614; Bill 12, *Protection for Motor Vehicle Accident Victims and Other Consumers from Unfair Legal Practices Act, 2016,* introduced September 14, 2016 by Tim Hudak, MPP, Legislative Assembly of Ontario online at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4123.

b. The Insurance Bureau of Canada's report, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario,* by Professor Allan C. Hutchinson ("Hutchinson Study").[9]

c. The report *Fair Benefits Fairly Delivered,* prepared by David Marshall, Ontario's advisor on auto insurance (the "Marshall Report").[10]

d. Recent cases addressing contingency fee costs, where there have been findings that fees were unreasonable and, in some cases, where the Court found that the lawyer violated s.28.1(8) of the *Solicitors Act* by including costs obtained as part of settlement as part of the lawyer's fee, without first obtaining approval of a judge of the Superior Court of Justice.[11]

e. The Court of Appeal for Ontario's decision in *Hodge v. Neinstein,* released June 15, 2017.[12]

156. The Working Group has also considered academic articles and media reports, and has reviewed the operation of various types of contingency fee models in other jurisdictions, particularly in the United States, England & Wales and Australia.

157. This report provides the Working Group's analysis, preliminary recommendations and proposed next steps regarding its review of the current operation of contingency fees in Ontario other than in class actions.[13]

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[9] Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf.

[10] David Marshall, *Fair Benefits Fairly Delivered, A Review of the Auto Insurance System in Ontario,* Final Report, April 11, 2017, online at http://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html.

[11] For example: *Batalla v. St Michael's Hospital,* 2016 ONSC 1513 (CanLII), online: http://canlii.ca/t/gnq6b; *Edwards v Camp Kennebec (Frontenac) (1979) Inc.,* 2016 ONSC 2501 (CanLII), online: http://canlii.ca/t/gpfzs; *Hosseini v Anthony,* 2016 ONSC 5405 (CanLII), online: http://canlii.ca/t/gt55s; *Lopresti v Rosenthal,* 2016 ONSC 7494 (CanLII), online: http://canlii.ca/t/gwlvm.

[12] *Hodge v. Neinstein,* 2017 ONCA 494, online at www.ontariocourts.ca/decisions/2017/2017ONCA0494.htm ["*Neinstein*"].

[13] In light of the material differences between class actions, including the representative nature of class actions and judicial approval of fees paid to plaintiff's counsel, this report does not address class action contingency fees.

DISCUSSION

(1) Contingency Fees in Ontario

158. Contingency fees were introduced in Ontario in 1992 with respect to class proceedings and in 2004 with respect to claims being brought by individual litigants.[14]

159. The amendments to the *Solicitors Act* and the related regulation O Reg 195 / 04 came into force on October 1, 2004. On October 28, 2004, Convocation further amended the Rules of Professional Conduct regarding CFAs to ensure consistency with the legislative scheme.

160. Ontario was the last Canadian jurisdiction to permit and regulate contingency fees.[15]

(2) The Policy Rationale for CFAs: Facilitating Access to Justice

161. The basis for permitting contingency fees has been described in various ways, but at its core, CFAs are a means of providing clients with access to justice. As the Court of Appeal of Ontario stated in *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA):

> There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the [page275] importance of contingency fees to the legal system in Coronation Insurance Co. v. Florence, [1994] S.C.J. No. 116 at para. 14:
>
> > The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim 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 that should

[14] *Class Proceedings Act,* 1992, S.O. 1992, c.6*; Solicitors Act;* O Reg 195 / 04: *Contingency Fee Agreements* under *Solicitors Act,* R.S.O. 1990, c. S.15.

[15] See *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA), <http://canlii.ca/t/1fzl2> at para. 56 (*McIntyre Estate*).

> be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.[16]

162. The increased access to justice brought about by properly regulated CFAs has also been recognized as providing "compelling" advantages to the administration of justice.[17]

(3) The Challenge: Balancing Access to Justice and the Cost of Justice

163. The constant challenge is to balance access to justice and the cost of providing access to justice. This is a balance as to how licensees "should be remunerated fairly for their services, whilst simultaneously improving access to justice, but not at public expense.[18]

(4) The Current Regulation of CFAs in Ontario

164. There are a range of options available to regulate contingency fees in ways to facilitate access to justice while protecting consumers. Ontario's current CFA regime is set out in the *Solicitors Act* and O Reg 195 / 04 (the "Regulation").

165. Under the *Solicitors Act*, CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters.[19]

166. A CFA must be in writing.[20] The Regulation requires that a CFA must include, among other information, statements:

    a. of the type of matter in respect of which services are being provided;[21]

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[16] *McIntyre Estate, supra* note 15 at para. 55.

[17] *Raphael Partners v. Lam,* 2002 CanLII 45078 (ON CA), <http://canlii.ca/t/1cnns> at para. 54 ["*Lam*"]; *McIntyre Estate, supra*.

[18] Marshall, Glen, "The Economics of Speculative Fee Arrangements", *Civil Justice Quarterly, vol. 21* (Oct), 2002, p.326.

[19] *Solicitors Act,* at s.28.1(3).

[20] *Ibid.* at s. 28.1(4).

[21] *Regulation,* at s.2.2.

b. indicating 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;[22]'
c. setting out how the fee is to be determined, and a simple example of how the contingency fee is calculated;[23]
d. outlining how the client or solicitor may terminate the contingency fee agreement, the consequences of termination and the manner in which the solicitor's fee is to be determined if the agreement is terminated;[24]
e. informing the client of the right to ask the Superior Court of Justice to review and approve of the solicitor's bill;[25] and
f. if the client is a plaintiff, that the solicitor shall not recover more in fees than the client recovers.[26]

167. Currently fees under CFAs are regulated by the *Solicitors Act* as follows:

a. Fees shall not be more than the value of the property recovered in the action or proceeding, unless, within 90 days of the CFA being executed, the lawyer and client bring an application to have the agreement approved by the Superior Court of Justice.[27]

b. The CFA shall not include in the fee "any amount arising as a result of an award of costs or obtained as part of a settlement" unless the lawyer and client jointly apply to a Judge of the Superior Court of Justice for approval of the costs because of "exceptional circumstances".[28]

168. CFAs are subject to an assessment of the lawyer's bill on application to the Superior Court of Justice.[29]

169. The *Solicitors Act* provides that the Lieutenant Governor in Council may make regulations governing CFAs, including with respect to:

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[22] *Ibid.* at s.2.3.

[23] *Ibid.* at *s.*2.3-2.4.

[24] *Ibid.* at s.2.9.

[25] *Ibid.* at s.2.8.

[26] *Ibid.* at s.3.

[27] *Solicitors Act,* at s.28.1(6).

[28] *Ibid.* at s.28.1(8).

[29] *Ibid*. at s.28.1(11).

a. the maximum percentage or amount that may be a contingency fee;
b. the lawyer's remuneration pursuant to a CFA; and
c. the form of the CFA and terms to be included.[30]

170. The Law Society's lawyer and paralegal conduct rules also regulate licensees providing services pursuant to contingency fee agreements. The general conduct rules related to fees and disbursements apply to contingency fees; fees and disbursements must be fair and reasonable and disclosed in a timely fashion.[31] In addition, the conduct rules specifically relating to contingency fees and contingency fee agreements apply. The Law Society's Rules of Professional Conduct provide as follows:

> **Contingency Fees and Contingency Fee Agreements**
>
> **3.6-2** Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.
>
> [*Amended - November 2002, October 2004*]
>
> **Commentary**
>
> [1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. Such agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

[30] *Ibid.* at s.28.1(12).

[31] Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.

[*New - October 2002, Amended October 2004, October 2014*]

171. As paralegals are not included in the *Solicitors Act*, the CFA regulations provided under it do not apply to paralegals. However, Paralegal Rule 5.01 regarding Fees and Retainers permits paralegals to enter into contingency fee agreements as follows:

> **Contingency Fees**
>
> (7) Except in quasi-criminal or criminal matters, a paralegal may enter into a written agreement that provides that the paralegal's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the paralegal's services are to be provided.
>
> (8) In determining the appropriate percentage or other basis of a contingency fee under subrule (7), the paralegal shall advise the client on the factors that are being taken into account in determining the percentage or other basis, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery, who is to receive an award of costs and the amount of costs awarded.
>
> (9) The percentage or other basis of a contingency fee agreed upon under subrule (7) shall be fair and reasonable, taking into consideration all of the circumstances and the factors listed in subrule (8).

(5) The Operation of CFAs in Ontario

172. The Working Group has considered the following major themes related to the current operation of contingency fee arrangements:

- (i) Access to justice;
- (ii) Transparency of CFAs;
- (iii) Contingency Fees:
  - a. Simplification;
  - b. Ensuring that licensee and client interests are aligned; and
  - c. Ensuring that contingency fees are clear, fair and reasonable.

(i) Access to Justice

173. The Working Group reaffirms the Law Society's support for properly regulated

contingency fee agreements as a means of facilitating access to justice.

174. The Law Society was an early advocate for properly regulated contingency fees as a means of facilitating access to justice. In May 1988, the Law Society first recommended that the Attorney General be urged to permit contingency fee arrangements to facilitate access to justice, and subsequently reaffirmed its support for the regulation of contingency fees.[32]

175. The Law Society was also a participant in the Attorney General's Joint Committee on Contingency Fees which recommended the introduction of contingency fees on an access to justice basis as follows:

> One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries…[33]

176. This rationale is as applicable today as it was when contingency fees were first recommended. Contingency fees enable clients to seek redress without incurring the up front costs and risks of litigation.

177. Since contingency fee agreements were introduced in Ontario, the *Law Society Act* (the legislation granting the Law Society's statutory authority to license and regulate lawyers and paralegals in the public interest) has been amended such that the Law Society, in carrying out its functions, "has a duty to act so as to facilitate access to justice for the people of Ontario."[34] It must also "maintain and advance the cause of justice and the rule of law"[35] and act in a manner that protects the public interest.[36]

178. Given the Law Society's statutory responsibility, the continued access to justice crisis,

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[32] See *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 4506 (ON CA), <http://canlii.ca/t/1fzl2> at para. 63.

[33] *Ibid.*

[34] *Law Society Act,* R.S.O. 1990, c.L.8, s.4.2(2).

[35] *Ibid.* s.4.2(1).

[36] *Ibid.* at s.4.2(3).

the vital access to justice role played by contingency fees to advance both class action and individual claims, and the related benefits that access to justice brings to the administration of justice, the Working Group continues to support the availability of contingency fees in Ontario.

179. The Working Group also reaffirms that contingency fees must be properly regulated. Contingency fees must be regulated in a way that protects consumers, so that consumers understand contingency fee arrangements, and consumer protections are in place to ensure that contingency fees are transparent, fair and reasonable.

(ii) Transparency of CFAs

180. In June 2016, the Working Group stated that from a policy perspective it "believes that contingent fee structures should be transparent and that the total costs associated with contingent fees should be clear to the consumer at the outset. Consumers should be able to evaluate proposed fees against the fees being offered by others."[37] It further stated as a general principle that "fees should be on an agreed upon and transparent basis."[38]

181. The Working Group expressed concern that "contingency fee pricing is not currently sufficiently transparent at the outset to consumers" and that "it is difficult to determine whether a competitive fee structure is being proposed".[39]

182. The Working Group reported that it was of the "preliminary view that lawyers and paralegals typically operating on contingency fee arrangements should be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites" on the basis that "This would facilitate greater transparency for prospective clients."[40] The Working Group also indicated that it "welcomes input on other means of enhancing transparency and the availability of information about contingent fees and the contingent fee market."[41]

183. The Working Group's further study of contingency fee issues has reinforced its view that action is necessary to ensure that contingent fee structures are transparent and that the total costs associated with contingent fees are clear to the consumer at the outset. It has, however, shifted its views on what are appropriate actions to foster such transparency and consumer protection.

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[37] June 2016 Report to Convocation at para. 60.

[38] *Ibid.* at para. 102.

[39] *Ibid.* at para. 61.

[40] *Ibid.* at para. 62.

[41] *Ibid.* at para. 109.

184. The Working Group initially considered requiring the publication of standard contingency and disbursement arrangements on licensee websites. This was intended as a means of fostering transparency. However, in the Call for Feedback, several responses noted that licensees and firms generally do not have one standard contingency fee rate. The rate will depend on a range of factors specific to the particular case, such as the nature of the claim and the risk involved.

185. The Working Group recognizes that a published standard rate could have unintended consequences. If licensees were required to offer services for all matters at their published standard rate, this may limit the types of cases that licensees would be willing to take, or lead to licensees charging a higher standard rate in order to cover high-risk cases. If licensees were permitted to publish a standard rate but depart from it based on the nature of the case, then the published rate would be of little use to consumers. Given the uncertainties of contingent fee files, and the need for licensees with contingent fee practices to be able to manage the risk not only of individual cases but their portfolios of cases, licensees must be permitted to tailor their contingency fees. Ultimately the Working Group believes that requiring the publication of a standard rate would not be an appropriate recommendation.

Recommendation: A Standard Form Contingency Fee Agreement

186. There is nearly universal recognition that contingency fee agreements are unduly complex, and that enhanced transparency is necessary. In the current marketplace, the different approaches make it difficult for consumers to compare services. The Working Group has also heard that current contingency fee agreements are difficult for consumers to understand.

187. In addition, it is the Law Society's experience that there are a range of contingency fee agreements in use in the marketplace, and many licensees have not complied with all of the technical statutory requirements in their standard contingency fee agreements. In many cases licensees may have inadvertently not complied with all of the technical requirements under the *Solicitors Act* and the Regulation.

188. Several submissions in response to the Call for Feedback expressed support for an approved standard form contingency fee agreement to be used by all licensees. Under such a model, consumers could more easily compare the cost of legal services between firms.

189. The Working Group sees great value in the development of a mandatory standard form contingency fee agreement. This could be drafted to simplify the agreement to highlight key consumer rights and responsibilities. A mandatory standard form would also ensure that all client retainer agreements meet all of the technical requirements under the *Solicitors Act* and its Regulation. This would enhance consumer protection, foster consumer choice and ensure that licensees fully comply with the *Solicitors Act* requirements.

190. The Working Group therefore recommends a mandatory standard form contingency fee agreement to be used by both lawyers and licensed paralegals.

(iii) Contingency Fees

191. The Law Society has observed that the single greatest issue in the operation of contingency fee agreements relates to the calculation of the contingency fees.

192. The Working Group has learned of different practices with respect to the calculation of contingency fees.

193. Currently a range of contingency fee rates are being charged in the marketplace based on a range of factors. The Working Group has learned that contingency fees for tort claims generally range between 25 – 35%. A contingency fee of 15% is often applied by paralegal licensees handling statutory accident benefits schedule ("SABS") matters; however, that amount can be significantly higher. Different types of claims appear to bear different risk; for example motor vehicle tort claims and medical malpractice claims.

194. In some cases, however, licensees have entered into CFAs whereby they charge a percentage fee but also claim some or all legal costs, without obtaining approval of a judge of the Superior Court of Justice, contrary to s.28.1(8) of the *Solicitors Act*.

195. The Court of Appeal stated in *Neinstein* that "it appears that non-compliance with the Act is widespread".[42]

196. The Working Group notes that in some cases non-compliance with all of the regulatory requirements have been inadvertent and with respect to technical areas. However, non-compliance with respect to the calculation of fees is not a minor breach of the requirements. In some cases, the Working Group has learned, licensees shifted to non-compliant practices because of the difficulties created by the current requirements. However, there are also numerous cases, as noted above, where Courts have found that the fees charged were not compliant with the *Solicitors Act*, were unreasonable in the circumstances, and were accordingly reduced.

197. The Working Group is concerned by noncompliance with the current regulatory requirements governing Ontario's contingency fee regime. Lawyers and paralegals are expected to adhere to the current requirements. Lawyers and paralegals must follow the *Solicitors Act,* the Regulation and the professional conduct requirements; failure to do so erodes the public's respect for the administration of justice.

198. At the same time, as described further below, the Working Group is of the view that the current requirement that legal costs belong to the client has had unintended consequences. The rule results in an unnecessarily complex calculation to determine a client's net recovery and counsel's fees. The rule also creates inherent conflicts of

[42] *Neinstein,* at para. 170.

interest for licensees during settlement negotiations and when considering whether to take a matter to trial, and fundamentally misaligns the client and licensee interests at these stages. The requirement increases risks of licensee/client miscommunication, enshrines inherent conflicts of interest between the licensee, and at times has enabled unprofessional conduct by licensees putting their interests above their client's interest. The Working Group therefore is of the view that change is necessary.

a) Simplification

199. In *Neinstein,* the Court of Appeal stated that the *Solicitors Act* language "has created difficulties for lawyers and clients for many years", and that "much in the Act is not clear […] This case before this court represents another struggle to make sense of the Act."[43]

200. The Law Society has seen in the complaints it has received from clients and from its discussions with counsel the difficulties that the *Solicitors Act* language has created for lawyers and clients. The current rule regarding legal costs belonging to the client is difficult to explain at the outset of the retainer, and clients often do not understand the equation when it is applied at settlement. The Working Group is of the view that the calculation of legal fees is unduly complex, and should be simplified.

b) Ensuring that licensee and client interests are aligned

201. The Working Group notes that licensee and client interests should be aligned to the greatest degree possible. However, the current *Solicitors Act* structure creates unnecessary inherent conflicts of interest between licensees and clients at key points in the course of a contingency fee matter.

i) Inherent Conflict #1: Settlement Negotiations

202. Many if not most of the complaints received by the Law Society with respect to contingency fee matters relate to issues arising at the time of settlement.

203. Clients often do not appreciate at the time of settlement what net amount they will receive.

204. There are also significant issues which arise at the time of settlement due to the inherent conflict between the lawyer and client interests embedded in the current *Solicitors Act*.

205. Under the current rule, legal costs "belong" entirely to the client and are not included in the calculation of the contingency fee. This creates an inherent conflict that arises during settlement negotiations between the licensee's economic interests and the client's interest. During settlement negotiations, defendants regularly offer a global settlement amount, inclusive of legal costs. This leaves the plaintiff's counsel and the plaintiff to determine what part of the settlement offer amount should be attributed to legal costs. The licensee's interest and the client's interests are misaligned at this point,

[43] Ibid. at para 12.

as any increase in the licensee's fee comes from the plaintiff's net recovery, and vice versa.

206. To further complicate this issue, there are no standard formulae on which the plaintiff's counsel and plaintiff can calculate the amount of an "all-in" settlement offer that should be treated as legal costs. Some lawyers reported that there is an industry "rule of thumb", but such standards are unwritten, shifting, and are not prescribed rules.

207. One practical option to attempt to address the inherent conflict is for the plaintiff to ask a defendant to apportion the "all in" settlement amounts, that is, to ask the defendant to set out the amounts intended to cover legal fees, damages, disbursements and other amounts totalling the "all in" amount. But at that point, certain defendants have reportedly sought to take advantage of the inherent conflicting interests of the lawyer and client by deliberately apportioning the amounts in ways that can help realize a settlement. The Working Group heard that in some cases, defendants can use the apportionment of legal fees as a means of seeking to push for a settlement; however, the defendant has no interest or duty in ensuring that the amounts they offer as fees are fair and reasonable. The apportioning of legal fees by the defendant may make the fees transparent, but does little to ensure that the net amount received by the plaintiff is fair and reasonable.

208. In short, the Working Group is concerned that the current *Solicitors Act* requirement that legal costs belong to the client has caused a significant inherent conflict for lawyers and paralegals during settlement negotiations.

209. The danger of having the licensee and client interests misaligned during settlement is compounded by the fact that the vast majority of matters (>95%) settle before trial. Other than for certain limited circumstances, such as settlements involving a party under disability, which require Court approval, the costs amounts are not subject to judicial review or any review to ensure that they are fair and reasonable.

210. While most licensees attempt to navigate the ethical Catch-22 that the current *Solicitors Act* requirement creates during settlement negotiations, this has led to instances of unprofessional conduct. The Law Society has been addressing these issues as they arise. At times cases related to CFAs have led to hearings and findings of misconduct.[44]

[44] The following are recent decisions of the Law Society Tribunal related to contingency fee issues: *Law Society of Upper Canada v Jesudasan*, 2016 ONLSTH 181 (CanLII), online: <http://canlii.ca/t/gvtf1>.Summary: In finding that the lawyer had engaged in professional misconduct, the Hearing Division of the Law Society Tribunal commented that the contingency fee agreements at issue were not in compliance with the *Solicitors Act* or the Regulation. The lawyer in this case had, without prior judicial approval, taken costs awarded to his client in addition to a percentage of the damages, contrary to the *Solicitors Act*. The panel also noted that the lawyer had further contravened the *Solicitors Act* and the Regulation by failing to ensure that the contingency fee agreements were fully explained to and

Moreover, as the Working Group has previously reported, a specialized investigations team has been established with respect to advertising and fee issues, and there are ongoing investigations.

ii) Inherent Conflict #2: Whether to Take a Matter to Trial

211. In its June 2016 Report, the Working Group noted that it had heard from several personal injury lawyers that the current *Solicitors Act* requirements are unworkable for certain cases, particularly those requiring a trial:

> This is because, under the *Solicitors Act*, legal costs belong to the client. When a matter goes to trial, and the plaintiff is successful, the licensee is compensated as a percentage of the award alone, and the legal costs, which may be significant given the trial that took place, belong to the client. The result is that in certain cases, the law firm's time and expertise may dramatically enhance the client's recovery, at the cost of the law firm's time and effort."[45]

212. In certain circumstances, particularly when there is an existing reasonable offer to settle on the table or the case is a relatively small value case, the client and licensee may have quite divergent incentives.

213. The difficulties arising out of the current contingency fee requirements were summarized by the Canadian Defence Lawyers Association ("CDL") as follows:

> CDL members have pointed out three (perhaps dissociated) problems with this provision in the Act as currently formulated:
>
> o The requirement for prior judicial approval interferes with the freedom of contract and creates a disincentive for lawyers to

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understood by his client. The lawyer was suspended for one month, and ordered to repay his client $5,750.00 and pay the Law Society's costs of $3,500.

Law Society of Upper Canada v Meiklejohn, 2015 ONLSTH 193 (CanLII), online: <http://canlii.ca/t/gm2qn>.Summary: The lawyer in this case had entered into a contingency fee agreement with his client, at which time it was not contemplated by either party that the lawyer would take all or any portion of any costs award made by the court. The lawyer later disregarded the agreement, choosing instead to charge, as his fee, the sum awarded to his client for costs. The Hearing Division of the Law Society Tribunal ultimately concluded that the lawyer had engaged in professional misconduct by: (1) failing to advise his client of the requirement under the *Solicitors Act* to obtain prior judicial approval of a contingency fee agreement in circumstances where it was contemplated that the contingency fee would apply to an award of costs; and (2) disregarding a signed contingency fee agreement and charging fees contrary to that agreement. The Tribunal made a finding of professional misconduct, and ordered that the lawyer be reprimanded and that he pay the Law Society $2,500.

[45] June 2016 Report to Convocation at para. 48.

work on and advance personal injury claims where liability may be strongly disputed but damages are likely modest. In such instances, the ability to recover a contingency plus partial indemnity costs would reflect fair remuneration for the lawyer's efforts and allow access to justice for accident clients who do not have permanent or catastrophic injuries. The potential for abuse can be accomplished by reversing the onus from the solicitor to the client, to complain to the court as opposed to requiring prior court approval.

o If costs are paid to the lawyer in addition to the percentage of recovery, the practice offends the indemnity principle of court-awarded costs and thus artificially drives up the settlement value of every claim in which there is a contingency fee arrangement. Claimants and lawyers are encouraged to inflate damage assessments, to employ future care and other damage assessors with an incentive to facilitate inflated claims, and to delay the resolution of claims until after lengthy and costly examinations for discovery.

o There appears to be no consistent standard on the recovery on which the contingency fee is calculated. Is the rate to be applied to damages and interest only, or is it applied to damages, interest and costs? Whatever solicitors and clients bargain for, the result must be fair and reflect the indemnity principle of costs.

These problems also involve potential conflicts of interest between the lawyer and client between the economic interest of lawyers and their clients' interest in obtaining fair and prompt settlement of claims. Although the responses from our members are, on the surface, contradictory in some respects, they can be reconciled if the unifying law reform goal is to allow solicitors to be paid for their effort in bringing modest claims, without causing inflation of more significant ones.[46]

214. The Working Group is of the view that express changes to the fee requirements are necessary to remove the inherent conflict of interest scenarios described above, to protect the public and balance access to justice and reasonable legal costs.

[46] Canadian Defence Lawyers, October 3, 2016 Submission to the Advertising and Fee Issues Working Group, Canadian Defence Lawyers online at https://www.cdlawyers.org/?page=16#a452.

c) Ensuring that Contingency Fees are Clear, Fair and Reasonable

215. The Working Group stated in its June 2016 Report to Convocation as a general principle that "fees should be on an agreed upon and transparent basis."[47] As per existing Law Society professional conduct rules, fees and disbursements must be fair and reasonable and disclosed in a timely fashion.[48]

216. As the above discussion highlights, under current requirements:

    a. Clients often do not have a full understanding of contingent fees;

    b. The current requirement that costs belong to the client creates inherent conflicts of interest for licensees;

    c. The current requirements misalign the interests of licensees and clients;

    d. There is unnecessary risk that fees will not be fair and reasonable, unfairly compensating a licensee at the expense of the net amount recoverable by a client; and

    e. There is also an unnecessary risk that a client may receive a windfall amount for legal costs reflecting work performed by a licensee.

217. The Working Group is also concerned because of the lack of checks on legal fees for matters that settle before trial, and which are not subject to a mandatory Court approval process. Lawyers' fees are subject to oversight by courts, and clients can have their fees assessed. The Courts will consider whether the fee is fair and reasonable in the circumstances.[49] However, most claims do not *require* Court approval, and in a properly functioning system, clients should not have to resort to assessment processes to be assured that the fees at the conclusion of the matter were reasonable.

218. The Working Group is therefore considering recommending that the *Solicitors Act* fee requirements should be amended so as to align licensee and client interests and ensure that contingency fees are clear, fair and reasonable. The Working Group is considering three related recommendations in this regard:

    i. Request amendments to the *Solicitors Act* to calculate fees based on a percentage of the total settlement amount or amount awarded at trial, less disbursements;

    ii. Introduce, under the Regulation or the *Rules of Professional Conduct* as may be appropriate, new safeguards to ensure that fees are fair and reasonable; and

    iii. Introduce enhanced client reporting requirements.

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[47] June 2016 Report to Convocation at para. 102.

[48] Rules of Professional Conduct Rules 3.6-1 and 3.6-2; Paralegal Rules of Conduct Rule 5.01.

[49] See generally *Lam, supra.*

(i) Simplifying the Calculation of Fees

219. Calculating fees based a percentage of the total amount offered on settlement or awarded at trial, less disbursements, is a simple means of calculating fees. Settlement calculations would not be dependent on a preliminary arbitrary determination of what amount from a settlement offer should be treated as legal costs. Any amounts inclusive of legal costs awarded at trial would be included in the calculation of the licensee's fee. This approach also aligns the interests of clients and licensees.

220. The Working Group recognizes that there are certain cases where there is a high likelihood of requiring a trial, but relatively low to mid value compensatory damages at issue which present a particular challenge to the proposed approach. Under the current regime, where the client receives all of the costs, the limit on compensation may prevent licensees from taking the case to trial. Under the above proposed approach, the award and the costs would be combined, but the legal fees may still not be sufficient for the licensee to take this type of case to trial. Such cases may be logically turned down if the fees are not reasonable given the particular risks, time and effort required to take the matter to trial. The Working Group is seeking input into potential approaches to address this category of cases. One option may be to have the lawyer and client jointly apply for approval to charge a CFA above a prescribed limit if the case goes to trial in order to ensure access to justice in such higher risk cases.

(ii) New Safeguards to Ensure Fees are Fair and Reasonable

221. The Working Group is unanimous in its view that an amendment to simplify the calculation of fees should be accompanied by new safeguards to ensure that fees are fair and reasonable.

222. The Working Group is considering a range of options, including:

a. A percentage cap on contingency fees, either on a fixed or sliding scale;

b. Requiring independent legal advice ("ILA") before a client agrees to the payment of legal fees in certain circumstances; and

c. Disclosure before payment of legal fees of the value of the time actually spent on the matter at the licensee's agreed hourly rates.

223. A review of the history with respect to the consideration of fair and reasonable contingency fees in Ontario and approaches in other jurisdictions is attached as **Tab 4.6.2**.

224. The Working Group is also considering the appropriateness of different types of safeguards by area. The Working Group is considering the possibility of different approaches to a limitation on fees for tort and other contingency fee matters and SABS cases.

225. Assuming a limit on contingent fees, the Working Group is of the view that there should

still be a means for the lawyer and the client to jointly apply to court for approval to charge a contingency fee rate above any prescribed limit. This will be necessary to ensure that access to justice is still available for higher risk cases, such as medical malpractice claims where liability and/or causation may be at issue.

226. Clients would continue to be able to seek an assessment of their account.

(iii) Enhanced Client Reporting Requirements

227. The Working Group is also considering further transparency measures through new client reporting requirements. Enhanced transparency measures are intended to ensure that clients have a sense of the cost of the services provided, and may act as a further check on the reasonableness of fees.

228. The Working Group is currently considering a range of new regulatory requirements which would promote clear communication to clients about the basis for fees, ensure that the fees charged are related to the value of the services provided and otherwise generally ensure that fees are reasonable. The Working Group is considering a range of measures to enhance transparency and client understanding of fees and their rights, including requiring licensees to:

a. Explain in the client reporting letter the basis for the fee by reference to the agreed percentage under the CFA, and by reference to the factors used to generally consider the reasonableness of a fee. These factors could be those found in the case law assessing contingency fees, and/or pursuant to the factors provided for in the lawyer and paralegal conduct rules, and could include factors such as the nature and complexity of the claim, the expense and risk of pursing it, the amount of the recovery that was expected, and who was expected to receive an award of costs.[50]

b. Record the professional and paraprofessional time spent on CFA matters;

c. Report the amount and value of time spent on the matter on the final account to the client; and

d. Advise the client on the final account of the right to apply to have the legal fees assessed.

NEXT STEPS – A CALL FOR FEEDBACK

229. The Working Group is issuing a Call for Feedback with respect to the recommendations contained in this report to Convocation. The Call for Feedback will remain open through to Friday, September 29, 2017. The Working Group will consider the feedback it receives, before reporting to Convocation with its recommendations regarding the operation of the *Solicitors Act*.

[50] These factors are examples taken from the Commentary to Rule 3.6-2 of the Rules of Professional Conduct and Rule 5.01(8) of the Paralegal Rules of Conduct.

230. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue in due course.

SUMMARY OF FEEDBACK RECEIVED IN RESPONSE TO THE
ADVERTISING AND FEE ISSUES WORKING GROUP JULY 2016 CALL FOR FEEDBACK

Contents

(i) Introduction

1. The following memorandum provides a detailed summary of feedback received by the Advertising and Fee Arrangements Working Group ("Working Group") in response to its July 2016 Call for Feedback.

(ii) Overview of Feedback

2. The Working Group issued a Call for Feedback in July 2016, and requested input by the end of September 2016. It received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group, and insurers.

(iii) Advertising and Marketing

3. The feedback addressed several different issues related to advertising and marketing.

Identification of type of license

Should all licensees be required to identify the type of license they have in their advertising and marketing materials (e.g. lawyer or paralegal)?

4. A significant majority of those who provided feedback on this issue recommended that licensees should be required to identify the type of license they have.

5. Several rationales were provided in support of this measure, including that it would foster transparency, enhance the public's awareness of the different categories of license and the distinctions between them / reduce confusion in the marketplace.

6. It was also noted that in personal injury this transparency is necessary to protect injured plaintiffs. In certain personal injury cases, a paralegal considering representing a prospective client may be presented with a conflict of interest, and might persuade the client to pursue a smaller claim within the Small Claims jurisdiction notwithstanding that the injuries might warrant an action in the Superior Court. This would be a disservice to the client.

7. Certain submissions also noted that certain licensed paralegal practices may be engaging in misleading advertising that give the impression that the licensee is a lawyer.

8. Submissions also noted that misleading advertising at times targets vulnerable groups, such as linguistic minorities, equity seeking groups and others. Disclosure of the type of license in these settings was supported.

9. Two individuals opposed to the measure noted that (i) certain clients may be prejudiced towards one profession or another and (ii) as most members of the public probably do not know the differences in scope of practice, requiring the licensee to state whether the licensee holds a P1 or an L1 license is unlikely to significantly advance the public interest.

Advertising: General Comments and Regulatory Options

10. The Call for Feedback did not ask about the state of advertising of legal services in Ontario generally, nor did it pose questions related to taste, both of which were addressed in the June 2016 Report. However, these issues were frequently raised in the feedback received.

11. There were different views expressed about advertising in general. As has been a consistent theme heard by the Working Group to date, many individuals and organizations raised concerns regarding the rise of personal injury advertising. Some described personal injury advertisements as misleading / false / embarrassing / degrading and provided specific examples in support of this general concern. A few submissions suggested that the Law Society should ban advertising because it is not helping the public understand the role of lawyers. However, most feedback on advertising principles opined that advertising should remain, but be regulated in the public interest.

12. Certain submissions suggested that although the regulator should not be concerned with matters of taste in advertising, advertising does raise professionalism issues, and the regulator should be ensuring that advertising operates in the public interest. Many noted that advertising should be verifiable and objective, but suggested that the marketplace is currently overrun by big brand advertisers engaging in misleading advertising.

13. The feedback provided a range of regulatory options for the Law Society to consider, including the following:

(i) Determine the total amounts spent on advertising in personal injury matters, require both law firms and licensees to report how much they are spending on advertising, and benchmark these amounts to the broader legal profession and other industries;
(ii) Use existing regulatory tools to address inappropriate advertising, dedicating additional regulatory resources to enforce existing rules if necessary;
(iii) Give further regulatory consideration to misleading advertising that may be targeting equity seeking groups and prospective equity seeking clients who may face additional barriers, such as by engaging in more proactive enforcement, including random periodic checks on racialized or ethnic advertising;
(iv) Regulate personal injury firm advertising in hospital and health care facilities or ban such advertising in or near hospitals;

(v) Engage in "swifter" and "clearer" enforcement of distasteful advertising;
(vi) Engage in enhanced communications with the professions and the public regarding permitted and impermissible advertising. Options include, for example:
   a. Developing clear advertising guidelines as have developed by others (e.g. the Real Estate Council of Ontario);
   b. Communicating regulatory actions, and publishing determinations and findings related to unacceptable advertising and marketing practices more generally;
(vii) Engage in public education efforts about misleading advertising practices;
(viii) Further consider regulating the use of search engine optimization and Google advertising (as one firm described, the misuse of its firm name and goodwill to redirect searches to competitors); and
(ix) Develop a pre-approval process whereby the Law Society will review advertisements in advance.

Use of Awards

Should the Law Society ban the use of awards and honours, limit the nature of awards and honours that may be included in advertising and marketing, or require full disclosure of the nature of an award or honour, such as on a licensee website, including any fees paid or other arrangements which may have affected the making of the award?

14. A few submissions suggested that the current general rules governing advertising suffice. However, many submissions expressed concerns over the current use of awards and recommended new regulatory responses. Many who provided feedback expressed concern that certain awards being advertised are misleading, bought or do not provide any objectively helpful information for the public.

15. The feedback featured a range of options, including:

(i) Banning the advertising of awards entirely;
(ii) Banning advertising of all awards other than the Law Society's Certified Specialist designation;
(iii) Banning "bought" awards;
(iv) Limiting the advertising of awards to those based on peer review;
(v) Permitting all awards, so long as the law firm's website provides full disclosure regarding the relationship, if any, between the award recipient and the entity granting the award;
(vi) Only permitting objectively verifiable awards;
(vii) Considering the creation of a personal injury designation within the Law Society's Certified Speciality in civil litigation which could serve as a clear mechanism for assessing the quality and experience of lawyers; and
(viii) Having the Law Society develop a list of permitted awards that have been granted based on verifiable criteria, which can be used by licensees in advertising and marketing.

16. The Working Group was invited to consider rules from other jurisdictions, such as Rule

7.1 of the New York Rules of Professional Conduct, which permits advertisements to include information as to "bono fide professional ratings" and which defines "bona fide" as follows:

> [A] rating is not 'bona fide' unless it is unbiased and non-discriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered.

Advertising Second Opinion Services in Personal Injury Law

- *Do current requirements balance consumer rights with maintaining professionalism around providing second opinions?*
- *If not, should the provider of the second opinion who advertises or markets "second opinion" services be prohibited from taking on the cases where a second opinion is given?*

17. A few submissions maintained that current requirements balance consumer rights with professionalism around providing second opinions.

18. However, many submissions expressed concerns over the risks of abuse involved in advertising with respect to second opinion work.

19. Most participants who considered second opinion advertising in personal injury law expressed concerns that current advertising efforts are really an attempt to induce a person who already has counsel to change counsel, and that it would be unethical to advertise in a manner that sows client dissatisfaction with current counsel.

20. Certain feedback submitted that second opinion advertising offends Rule 4.1-2(d) of the Rules of Professional Conduct:

> In offering legal services, a lawyer shall not use means
> […]
> (d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer.

21. Submissions generally noted that curtailing advertising in this area would be reasonable in the circumstances. Another noted that there is no evidence of consumers being unaware of their right to consult another lawyer if they have concerns with respect to

their representation. One suggested it would be naïve to believe that second opinion advertising is for any other reason than to obtain a file from an existing lawyer.

22. There were different solutions proposed to address advertising of second opinions in personal advertising, including:

- Clearly banning second opinion advertising;
- Permitting second opinion advertising on the basis that the licensee advertising such services may charge a fee for providing a second opinion, but should not be able to take on the case nor receive a referral fee after a second opinion prompts the client to seek a referral to different counsel; and
- Banning advertising of second opinion services, but permitting the provider of the second opinion to be able to take on the file if requested to do so by the client.

(iv) Advertising and fees in real estate law

o How could pricing in real estate law be made consistent so that consumers may more easily compare services? Should the Law Society take further action regarding "all in" pricing in real estate transactions?
o How can the Law Society eliminate reported issues with respect to "fees" and related practices with respect to title insurance and other services where law firms receive compensation or other benefits related to the purchase of services.

"All in" pricing

23. The feedback received in this area provided divergent views.

24. The input confirmed that "all in" real estate advertising practices present several challenges, including the following:

a. A lack of consistency in the marketplace as to what is included in "all in" pricing. Variations depend, for example, on whether all disbursements are included, whether certain costs are categorized as disbursements and not included in the up-front quote, and how the lawyer decides to treat amounts received from a title insurer or other third party.
b. "Bait and switch" techniques / deceptive "all in" pricing: There is a concern that prospective clients may retain a firm on the basis of one price and then be billed a different amount due to the nature of the transaction or because of disbursements.
c. Threats to ethical and professional practice:
    i. Many expressed the concern that the advertising of all-in fees has fueled price competition that has created disincentives for real estate lawyers to spend money to conduct searches or spend the necessary time on matters.

ii. Many noted that the downward cost pressure and current uneven advertising practices causes a race to the bottom.

d. Focusing solely on price to the detriment of other considerations: Some expressed concern that a regulatory focus on price risks detracting from other important consumer considerations such as professionalism, service and expertise, and consumer evaluation of real estate legal services on price and other considerations.

25. There were differences in approaches regarding how to address the above pricing issues.

26. Some noted that existing rules can be used to enforce transparency in real estate pricing.

27. Certain legal organizations are opposed to permitting any “all-in” fee quotes in real estate transactions unless there are regulatory changes. Another legal organization appeared to take issue with regulation of pricing, stressing that there is no “on size fits all” real estate transaction, and that it would be a mistake to assume that real estate transactions can or should be subject to uniform pricing.

28. In contrast, some of the feedback received generally recognized that if it were possible to easily compare prices on an “all in” basis, this would give prospective clients choice and peace of mind. Some therefore recommend regulating “all in” pricing, with the caution that if the rationale of “all in” pricing is to foster reasonable price comparisons, then any regulatory approach would need to ensure that there are not hidden fees or inconsistencies in approach which could skew the marketplace.

29. Options for considering “all in” real estate pricing include, for example:

a. Taking no further action with respect to real estate pricing;
b. Educating consumers on real estate advertising and the costs of real estate transactions;
c. Regulating what is included in any price quote, and what categories of costs are not included and should be paid by the client;
d. Regulating whether a lawyer should be required to abide by an all-in legal fee in all cases without exception;
e. Defining what constitutes disbursements;
f. Re-introducing a tariff with respect to disbursements or otherwise regulating disbursements; and/or
g. Developing different “all in” requirements for different types of common real estate transactions; and
h. Banning “all in” pricing.

Payments / Other Benefits

30. On the issue of other payments or benefits received from title insurers or other vendors, the Working Group received feedback from the two legal organizations and individual lawyers, but did not hear from title insurers. One individual commented that a title insurance legal fee received by the lawyer should be included as a fee rather than as a disbursement. One legal organization suggested it would be unethical and a breach of the lawyer's fiduciary duty not to disclose fees received from a title insurer. One submission provided a draft rule intended to expressly prohibit a lawyer's law firm to receive any fee, reward or other compensation from a title insurer, agent or other party relating to the application for or purchase of a title insurance policy.

Advertising of Referral / Brokerage Services

- *Where a significant portion of the revenue generated by advertising is from referral fees, should the advertiser be required to advertise on that basis, making it perfectly clear that the advertiser may not itself provide the legal service and in such a case may refer clients to others for a fee?*
- *In the alternative, should advertising for the purpose of obtaining work to be referred to others in exchange for a referral fee simply be banned?*

31. Several submissions expressed concern that it is misleading for firms to advertise in order to refer many of the files in exchange for a referral fee.

32. Certain responses also highlighted broader impacts of mass advertising for the sole purpose of obtaining a file to refer out, including that this approach has:

- fueled litigation generally;
- increased costs in the personal injury law system; and/or
- contributed to negative public perception of plaintiff side lawyers, which may impact jury perceptions of plaintiff cases generally.

33. Several submissions advocated for an outright ban on advertising for the sole purpose of obtaining work to be referred to others in exchange for a fee, also referred to as the "brokerage model". Some were of the view that licensees should not be permitted to advertise for work that they are not permitted to provide, are not competent to provide or do not intend to provide. The practice was described by many as a misleading "bait and switch", a tactic which is unlawful in consumer law and competition law.

34. A consumer organization submitted "We would be hard-pressed to find an MVA [motor vehicle accident] victim who was pleased to find that their case was taken on by a firm who intends to refer them on for a fee. It would likely be less common if the intended 'referral fee' were demanded of the potential client at the time of signing the contract".

35. Many submissions recommend that if the practice of advertising in order to obtain files to refer to others is to be permitted, then the advertising must be transparent; it must be made clear that the advertising firm intends to or may refer the client out to another firm.

36. Some submissions noted that certain practices refer some files and keep some within the firm, which raises the question as to how to define what constitutes brokerage services and when disclosure of such practices in advertising could / should be required.

(v) Referral Fees

Should the Law Society:
o Ban up-front flat referral fees on contingent fee matters?
o Limit the referral fees that may be charged as a percentage of the ultimate fee in contingent fee and other matters?
o Require referees to fully disclose their standard referral fee arrangements?
o Require the client, the referrer and the referee to enter into a standard form agreement at the time that the referral is made, fully disclosing the nature of the referral and the referral fee?
o Require licensees to record referral fees paid or received in their financial records in a manner to be maintained and accessible to the Law Society on request?

Up-Front Referral Fees

37. Some submissions expressed the view that up-front referral fees are a business transaction between the referrer and referee and should not be banned.

38. However, several submissions expressed support for a ban of all up-front referral fees. Charging up-front fees, it has been suggested, may not align the interests of the referring licensee and the receiving licensee, and also adds economic pressure on counsel which potentially compromise the quality of service the counsel is then able to provide.

Referral Fees Generally

39. There were nuanced and divergent submissions on issues related to the use of referral fees in general.

Expanding Referral Fee Arrangements to Non-Licensees

40. One individual suggested that referral fees should be permitted to be paid to non-licensees.

Support for Referral Fee Arrangements

41. Some submissions favoured the use of referral fees for a variety of reasons, including the following:

a. The rules are clear and sufficient;
b. Paid referrals can align the interests of the licensee and the client;
c. Paid referrals for sole and small lawyers provide the same benefit that lawyers in a large firm receive from internally transferring matters;
d. Paid referrals help sole and small lawyers: For some licensees, particularly sole and small practitioners, paying for referrals is a vital way to attract business. Moreover, a ban may disproportionately burden sole and small practitioners, and as equity seeking groups are more likely to be in sole practice, this raises equity-related concerns;
e. Freedom of contract of licensees: According to some, licensees (who are sophisticated parties) should be able to make referral arrangements and should not be subject to additional Law Society regulation, as long as the referrals do not increase the cost to the client. As one organization put it, payment of a referral fee "is a business transaction, nothing more or less";
f. There is no consumer risk: The client in practice does not care about the referral arrangement because it will not add to the cost of the legal services received. Moreover, consumers can choose whether or not to accept the practice, if fully disclosed.
g. Paid referrals enhance access to justice:
    i. According to some submissions, the service of providing a proper referral is, in and of itself, a valuable service. The development of effective systems to identify legal issues and refer prospective clients to licensees is a valuable service, and one that depends on paid referrals.
    ii. A mass advertising personal injury firm similarly noted that its referral of a wide range of inquiries to competent lawyers serves a valuable access to justice goal.

42. Several licensees submitted that the referral system as currently permitted works well. According to these submissions, there are costs to finding clients. Not every firm, particularly small firms, have the resources to seek business on their own and rely on referrals to maintain a client base. For some licensees, referral fee arrangements are viewed as economically efficient and fair. One firm reported that referral fees had contributed to that firm's growth.

43. One licensee explained that decisions with respect to the *amount* to pay for a referral fee are complex. The factors considered in negotiating the fee for a particular case include, for example, the complexity of the case, the volume of cases in the office, and staff availability. Certain responses therefore cautioned against regulatory micromanagement of this area.

44. Finally, certain submissions highlighted that paid referral fees reduce the incentive for licensees to hold onto cases that they are not competent to handle.

Support for Banning or Capping Referral Fees

45. Others support banning or capping referral fees.

(i) Banning referral fees

46. Some licensees submitted that referring matters as required is a professional obligation and should not be something for which the referring professional receives payment. Some suggested that the time and effort to refer a matter is typically minimal and does not warrant a fee.

47. Many submissions taking issue with referral fees in general or their amounts were concerned by brokerage practices. One submission described the practice as advertising in order to have a client's issue "sold off" in a manner that is unprofessional and that should be prohibited. Another submission stated that referral fees disempower consumers to make informed choices about their legal representation.

48. One legal organization concluded that permitting referrals to other firms for a fee as long as this is disclosed in marketing materials would be too difficult to enforce and therefore recommends banning referral fees outright (although further consideration of such a rule in the class action litigation would need to be undertaken). It also supported a ban in part because:

a. referral fees are a factor driving the increase in volume of advertising in personal injury law and creating an economic incentive for law brokerages; and
b. referral fee structures have also negatively impacted the professions, as they discourage co-counsel opportunities, which provide a means to mentor less experienced counsel.

49. One submission put the issue as follows:

> We would be very content to see the 15-year experiment with referral fees end, as the negatives outweigh the positives. Referral fees were allowed to provide a public service and to increase access to justice. This goal has not been achieved. If we reflect on the health of the profession in 2000, before referral fees were permitted, and contrast it with the current state of affairs, we can only conclude that the profession was healthier before referral fees arrived. There is no risk that the elimination of referral fees will in any way harm the public or create any limitation on access to justice. We believe the public would be best served with an outright ban on referral fees. To the extent however that the Law Society concludes there is some remaining role for formal referral fees, we would recommend a referral fee cap of 10% of the overall fees generated in the action, coupled with an outright ban on upfront referral fees.

50. The submissions from the insurance industry suggested that referral fees should be banned or made more transparent on the theory that referral fees are a factor driving up settlement costs which, in turn, is increasing insurance costs.

(ii) Banning flat fees

51. One consumer organization recommended banning flat fees, on the assumption that such fees create a cost that is ultimately incurred by the client regardless of outcome.

(iii) Capping referral fees

52. Several submissions supported a cap on referral fees, with the recommended cap ranging from 5-30%, with different ranges supported as follows:

- 5-10% cap
    - A law professor noted that excessive referral fees may reduce the net fee to the paying firm to the point that quality of service may be impacted in some cases. He recommended the 5-10% cap. He also recommended changes to, *inter alia,* expressly require that all paid referrals are made solely on the basis of the best interests of the client; expressly prohibit choosing a referral based on the referral fee offered; and requiring the referring firm to identify at least three firms that could competently assist the client, together with service price information regarding each, as well as advantages and disadvantages of each, in order to facilitate client choice.
- 10-15% cap:
    - Some supported a cap at 10% or 15% of the fee charged on a file as a form of “modest” compensation for referring lawyers without exceeding the value to the client. Some noted that it would also discourage the operation of brokerage firms.
- 30% cap:
    - One law firm recommended a cap on referral fees of 30% of the net legal fee to promote access to justice for the public and align financial incentives with the goal of referring a matter to a capable licensee at no cost to the client.

Enhancing Transparency Related to Referral Fees

53. Several submissions supported enhanced transparency. As one submission noted, “in any referral situation the net cost to the client – has to be readily apparent and fully explained to the client before the retainer is finalized. If the lawyers / paralegals involved

are unwilling to do this openly – it should cause concern. It isn't rocket science nor should it be. A simple requirement that any and all referral fees be broken out and shown separately ought to do it."

54. One stakeholder's survey found that over three-quarters of respondents supported requiring licensees to record referral fees paid or received in their financial records in a manner that would allow review by the Law Society. Similarly, a consumer organization noted that such fees "should be recorded as such and clients should be advised before such costs are paid out, as any other disbursement on their account should be, and to whom".

55. In contrast, one legal organization noted that more information is required as to what use the Law Society would make of data collected before endorsing such a measure.

Other Issues: Paid Referrals from Non-Licensees

56. Certain submissions cautioned that non-licensees are referring cases to licensees in exchange for payment, despite the prohibition against licensees paying referral fees to non-licensees. This practice was reported to be used in various equity seeking communities.

57. The Working Group also received feedback from a therapist who reported a law firm referring their personal injury clients to particular health professionals, and only submitting invoices from the therapists to whom they referred clients.

58. These submissions recommended that the Law Society be more active in addressing licensee arrangements / paid referrals with non-licensees. It was suggested that the Law Society could do more to educate licensees about the prohibition against paying referrals to non-licensees, and should participate in initiatives to educate health care facilities and health care providers about the prohibition through collaborative, interdisciplinary regulatory efforts.

(vi) Contingent Fees

o How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset?
o Should lawyers and paralegals typically operating on contingency fee arrangements be required to disclose their standard arrangements, including their usual contingent rates and arrangements with respect to disbursements on their websites?
o How is the Solicitors Act operating in practice?

59. Although the Call for Feedback sought input on the use of contingency fees in all areas, virtually all of the feedback received focused on the personal injury sector. The

submissions noted that the introduction of contingency fee arrangements in personal injury was intended to provide access to justice. As described further below, most submissions addressing this area described issues related to the transparency of contingency fee arrangements, and the costs arising in this model.

Transparency and Potential Disclosure of Standard Arrangements

60. The responses to the Call for Feedback nearly universally confirmed that contingency fee agreements are complex and that enhanced transparency is necessary. The submissions did not generally support disclosure of standard arrangements, although other options were suggested to enhance transparency.

(i) Disclosure of Standard Contingent Fee Arrangements, Including Rates and Disbursements

61. There were divergent views as to whether standard contingency arrangements, including rates and disbursements, should be disclosed. While there was some support for requiring the publication of standard contingency and disbursement arrangements on websites, and one law professor recommending required disclosure of pricing and disbursements of all firms, and disclosing this information to the Law Society, several submissions noted that transparency initiatives alone will not necessarily lead to increased public understanding around fees arising in personal injury matters. Contingency fee agreements are complex documents and simply requiring their publication online would not necessarily sufficiently address issues related to consumer education and empowerment. Moreover, as some law firms, (particularly in remote and rural areas) may not have websites, this requirement could raise accessibility concerns.

62. Several submissions noted that there simply is no standard contingency fee rate. The rate will depend on a range of factors. Moreover, requiring plaintiff firms to publish their fees would risk providing defendants with access to privileged information and a tactical advantage. One consumer group cautioned that there does not appear to be a “usual rate” and that requiring the publication of such a rate could lead to higher prices for consumers.

63. Insurers generally recommend that contingency fee arrangements should be filed with the Law Society, the Court, the Financial Services Commission of Ontario (FSCO) or a ministry within government.

(ii) Other Options

64. Other potential means of enhancing transparency include the following:

a. Public education efforts:

Some suggest that the regulator must engage in greater public legal education efforts around the use of contingency rates. For example, the Law Society could develop brochures for use in law offices that explain the contingency fee system.

b. Licensee education efforts / ongoing monitoring of compliance with the *Solicitors Act*:

It has been suggested that the Law Society could develop educational tools to assist licensees in meeting the requirements under the *Solicitors Act* and pay particular attention to contingent fee agreement practices when conducting spot audits. It could also review contingency fee agreements to monitor levels of compliance under the *Solicitors Act*.

c. Encourage Clients to Compare Rates and Services

Another organization suggested that the Law Society should educate consumers on the importance of meeting with several lawyers before deciding on who to retain. This is a way to compare contingency fee rates and consider different approaches to service delivery.

d. Development of a Standard Form Contingency Fee Agreement Approved by the Law Society

Several submissions expressed support for a standard form contingency fee agreement that would be approved by the Law Society and used by the entire profession. Under this model, consumers could easily compare the cost of legal services between firms.

In addition, a consumer group recommended developing a standard list of potential disbursements and requiring lawyers to discuss specific disbursements before spending funds which would come out of final settlement funds.

The *Solicitors Act* in Practice

65. Certain submissions noted that while there may be difficulties in the operation of the *Solicitors Act,* the introduction of contingency fee arrangements has ensured that there is access to legal services in personal injury.

Gaps in Data

66. Both the Ministry of Finance and insurers expressed concern that there are gaps in the available data, making it difficult to determine how much money in the personal injury

system is being paid to accident victims. There is an incomplete picture as to how the *Solicitors Act* is working as an access to justice tool.

Potential Abuses of the *Solicitors Act*

67. Insurers and defense counsel raise concerns about the *Solicitors Act* being abused. What was established to facilitate access to justice has, according to some, been used by plaintiff personal injury lawyers to improperly and excessive bill clients. Several submissions noted that the troubling facts alleged in the case of *Hodge v. Neinstein,* 2015 ONSC 7345.

68. Insurers expressed concern that a high percentage of total damage awards would go towards legal and other costs instead of directly to the plaintiffs, and suggested that more research is necessary in this regard.

Difficulties in the Treatment of Legal Costs under the *Solicitors Act*

69. Several submissions addressed s.28.1(8) of the *Solicitors Act* and s.6 of the regulations made pursuant to it. These key provisions are as follows:

> *Solicitors Act, s*.28.1(8):
>
> A contingency fee agreement shall not include in the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of the settlement, unless,
> (a) the solicitor and client jointly apply to a judge of the Superior Court of Justice for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and
> (b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a portion of them.
>
> O.Reg. 195/04: Contingency Fee Agreements, s.6:
>
> A contingency fee agreement that provides that the fee is determined as a percentage of the amount recovered shall exclude any amount awarded or agreed to that is separately specified as being in respect of costs and disbursements.

70. Read together, these provisions indicate that, as a general rule, the legal costs incurred belong to the client under a contingency fee agreement, unless a Court orders otherwise.

71. Plaintiff-side lawyers raised concerns with the current requirements under the *Solicitors*

Act. They note that in some cases, this creates an imbalance and potential inherent conflicts between counsel's interest and their client's interest.[1] For the purpose of settlement, it creates an incentive for the lawyer to treat little of the all-inclusive settlement amount as costs. Some raised the concern that it also creates the risk of lawyers settling cases heading for trial for lower amounts to avoid, as one submission put it "their own economic disaster". They also note that this raises access to justice issues, as injured persons may risk losing the "leverage of taking a matter to trial".

72. To address this issue, plaintiff-side counsel made different recommendations, including the following:

- Set a sliding scale with a maximum contingency fee, increasing the contingency fee from something less than the maximum for cases that settle at stages prior to trial, to a maximum fee for matters that proceed to trial;
- Permitting a "fees plus costs" model, with a cap on the total percentage fee lawyers may charge in excess of the cost contribution;
- Amending the *Solicitors Act* and regulations concerning contingency fee rates to consider the total recovery, after deduction of disbursements, rather than distinguishing between damages and legal fees; and
- Amending the *Solicitors Act* to permit contingency fee retainer agreements based on percentage-of-the-total agreements if the case settles, and costs-plus arrangements if costs are adjudicated by a court or tribunal.

73. Certain legal organizations support the Law Society proposing changes to the *Solicitors Act* and regulations in order to maintain access to justice for modest value cases.

74. In contrast, insurers take a markedly different approach. For example:
    a. One insurer recommends amending s.28.1(8) of the *Solicitors Act* in order to eliminate the ability of lawyers to apply for court approval of contingency fee agreements, including the award of costs as part of the settlement.
    b. One insurance association submits that "the government should consider the appropriateness of [contingency fee] arrangements to compensate legal representatives for work relating to the no-fault medical and income replacement benefits provided through Ontario's automobile insurance system".

75. The Law Society is also urged by the insurance industry to apply additional resources to ensure high compliance with the current rules governing contingency fee agreements.

[1] One example provided by a legal organization is illustrative: The lawyer and client enter into a 30% contingency fee. The matter goes to trial, where the Court awards $100,000 in damages and a further $100,000 for costs. In this situation, the lawyer receives $30,000, while the client receives $170,000.

Capping Contingent Fees

76. In light of these issues, several submissions suggested that there should be a cap on contingency fees. Some endorsed amounts under 25%. One insurer recommended a 25% cap as found in New Brunswick, with controls so that this does not become the new floor. Others suggested 33% as proposed in BC and more recently in Ontario by Tim Hudak in *Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016*.[2] One law firm suggested a cap could be 33% up to trial, and 45% at trial.

Other Options

Use tools already within the Solicitors Act Regulation

77. One insurer suggested that consideration should be given to using tools already provided for in the *Solicitors Act Regulation*.

Simplify the Solicitors Act

78. Several submissions noted that contingent fee arrangements and the *Solicitors Act* requirements are complex. Some encourage the Law Society to work with the Ministry of the Attorney General to simplify the legislation.

Other Factors Requiring Further Consideration

79. A few submissions noted the rapidly changing environment for funding cases. In Ontario, adverse costs insurance is available. This product reduces plaintiff counsel's risk and may reduce the justification for high contingency fees. Third party litigation financing is also available in certain instances. Consideration of potential changes to the *Solicitors Act* may require consideration of other means of seeking to facilitate access to justice, and the relative costs and risks related to these other options.

[2] Bill 12, *Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016,* online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4123.

TAB 4.6.2

A History of the Consideration of Contingency Fee Rates in Ontario and Approaches in other Jurisdictions

Early Consideration of Appropriate Contingency Fee Rates

1. The notion that contingency fee agreements ("CFAs") should be capped or otherwise prescribed in Ontario is not new.

2. In July 1992, a Law Society Special Committee on Contingency Fees recommended (and Convocation subsequently approved) a maximum cap of 20%, with party and party costs awarded to the client to go to the lawyer. Notwithstanding the cap, a lawyer would be permitted to apply to court, at the time of entering the CFA for approval to charge a higher contingency fee rate.[1]

3. In June 2000, a Joint Committee on Contingency Fees comprised of representatives from the Advocates' Society, the Canadian Bar Association (Ontario), the Law Society and the Ministry of the Attorney General recommended a 33 1/3 % cap, and that the client alone should be entitled to receive the award of costs. Under this approach the lawyer could apply to court for approval to charge a contingency fee in excess of the cap.[2]

4. In September 2002, the Professional Regulation Committee again recommended that the maximum contingency fee rate should be capped at 20%, with the lawyer entitled to receive the costs award. The lawyer could apply to court to charge a fee in excess of the cap. However, with the Court of Appeal's *McIntrye v. Attorney General of Ontario* decision being released thereafter, this proposed approach was tabled.[3]

5. In October 2002, the Professional Regulation Committee ultimately recommended new rules that did not specify a maximum percentage or require that costs be either included in or excluded from the lawyer's fee. The rule simply required fees to be fair and reasonable.[4]

The *Solicitors Act*

6. The *Solicitors Act* did not set a maximum percentage cap. However, costs belong to the client, and a lawyer's fee cannot exceed the amount paid to the client.

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[1] Report to Convocation June 23, 2000, Report from Society's Representative on Joint Committee on Contingency Fees at para. 14.

[2] *Ibid*.

[3] Report to Convocation on Regulation of Contingent Fees, Professional Regulation Committee, October 10, 2002, at paras. 14-17.

[4] *Ibid.* at para. 22.

Recent Calls for a Cap

7. There have been recent calls to cap CFA fees. For example:

- In submissions to the Working Group, one insurer recommended a cap of 25%;
- The Insurance Bureau of Canada recommends a sliding cap;
- The Hutchison Study similarly recommends that if a fee-multiplier for successful cases is not adopted, then a maximum percentage of 25% may be appropriate;[5]
- *Bill 12, Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016,* introduced by Tim Hudak, would introduce a 33% cap;[6]
- Bill 103, *Personal Injury and Accident Victims Protection Act*[7]*,* introduced by Mike Colle, proposes an amendment to the *Solicitors Act* to cap CFAs in personal injury claims to no more than 15% of the value of the property recovered in the action or proceeding.

Approaches to Caps / Limiting Fees in Other Jurisdictions

8. A comparative approach provides some assistance in considering options. The following are examples from Canada, the United States, Australia and England and Wales.

Canada

9. There are limits for contingency fees in British Columbia and New Brunswick.

10. In British Columbia, CFAs for motor vehicle accident claims are capped at one third of the amount recovered. In all other personal injury / wrongful death claims, the cap is 40% of the amount recovered. There are no other CFA caps.[8]

11. In New Brunswick, there is a CFA cap of 25% of the amount recovered, exclusive of costs, taxes and disbursements, which increases to 30% if the matter proceeds to appeal. If a lawyer and client wish to enter into a CFA with a higher contingent fee amount, they must apply to the Law Society and file a $150 deposit. An appointed reviewing officer will provide written reasons approving or denying the request.[9]

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[5] Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf.

[6] Bill 12, *Protection for Motor Vehicle Accident Victims and other Consumers from Unfair Legal Practices Act, 2016,* online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4123.

[7] Bill 103, *Personal Injury and Accident Victims Protection Act* online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614.

[8] Law Society of British Columbia, "Lawyers' Fees", online at https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees/.

[9] Law Society of New Brunswick, "Contingent Fee Agreements", online at http://lawsociety-barreau.nb.ca/en/public/contingent-fee-agreements.

USA: CFAs and Percentage Caps

12. In the United States contingency fees are permitted, but given high damage awards in areas such as medical malpractice, fees have been capped in certain States for personal injury or solely for medical malpractice claims on a flat or sliding basis. Flat fee caps are generally 1/3 of the amount recovered (although in Oklahoma the cap is 50%). Sliding fees range by State, as demonstrated in this chart providing a few examples of sliding caps for medical malpractice claims:[10]

STATE	**CAP**
California	40% of first $50k, 1/3 of next $50k, 25% of next $500K, 15% of amounts >$600K
Delaware	35% of first $100k, 25% next $100K, and $10% thereafter
Massachusetts	40% of first $150k, 1.3 of next $150k; 30% of next $200k, and 25% thereafter
New York	30% of first $250k; 25% of second $250k; 20% of next $500k; 15% of next $250k; 10% over $1.25M

Australia

13. In Australia, while CFAs are prohibited, conditional cost agreements are permitted in certain states. Conditional cost agreements are agreements where payment of some or all of the legal cost is conditional upon the successful outcome of the matter.[11] A conditional cost agreement may include an “uplift” fee, an additional amount payable on successful outcome of the matter. However, an uplift fee can only be included in litigation if the lawyer has a reasonable belief that a successful outcome of the matter is likely, and must not be more than 25% of the legal costs payable, excluding disbursements.[12]

England and Wales

14. In England and Wales, following the Jackson reforms, lawyers may enter into conditional fee agreements, where the lawyer can claim costs plus a “success fee”, which can be up

[10] Hyman, David A., Bernard Black, and Charles Silver. “The Economics of Plaintiff-Side Personal Injury Practice”. *University of Illinois Law Review*, vol. 2015, no. 4, pp. 1563-1603, at Table 1, page 1574. Further examples are provided in Table 1 of this article.

[11] *Legal Profession Uniform Law*, s 181(1),(6); Western Australia Legal Profession Complaints Committee, “Fact Sheet: Types of Costs and Costs Agreements” (updated 23 May 2014), online: <https://www.lpbwa.org.au/Documents/Complaints/Information-for-Consumers/Fact-Sheet-Types-of-costs.aspx>.

[12] *Legal Profession Uniform Law*, s.182(1).

to 100% of the lawyer's regular fees. For personal injury cases, the "success fee" remains up to 100% of the lawyer's regular fees, but is also subject to being capped at no higher than 25% of the damages awarded.[13]

15. Contingency fees (known as "Damages-Based Fees") are permitted such that clients do not pay legal fees unless they are successful in their matter. These are capped at 50% in certain areas, 35% for employment tribunal cases, and 25% on personal and clinical negligence claims. There is no cap for appeal proceedings.[14]

Ratio Based on the Net Amount to the Client

16. Another potential option could include, for example, setting a percentage or comparative ratio of the net amount that will be paid from the settlement funds to the client to the gross amount of the lawyer's fees.

Summary of Options to Limit Fees

17. As the above jurisdictional scan indicates, there are a range of approaches taken in different jurisdictions, including:

i) A straight cap on the contingency fee percentage;
ii) A sliding cap based on the stage of proceedings;
iii) Limiting the contingency fee to a multiple of the "normal fee";
iv) Permitting a "success fee" that is tied to the "normal fee" and that can only be provided if the lawyer has a reasonable belief that the outcome will likely be a successful for the client (thereby aligning plaintiff counsel screening functions with risk and reward);
v) Setting a cap based on a ratio of the net amount that will be paid to a client out of settlement funds to the lawyer's fees; and
vi) Setting a cap based on the type of legal matter (ex. Tort, employment).

Potential benefits to limiting legal fees

18. Proponents of a cap generally argue that they "fix" the problem of high legal fees, and make sure that more settlement or awarded amounts end up in the hands of plaintiffs.

Potential risks to limiting legal fees

19. "Fixing" legal fee issues by capping them comes with the risk of creating an imbalance impacting the entire CFA system to the detriment of those who rely on it to be able to access the justice system.

20. Studies have shown that there are important indirect effects to caps. Where there are damage caps, for example, which effectively limit the lawyer's contingency fee amount, the evidence is that this causes lawyers who rely on contingency fees to stop

[13] *The Conditional Fee Agreements Order 2013,* 2013 No. 689 online at: http://www.legislation.gov.uk/uksi/2013/689/contents/made.

[14] *The Damages-Based Agreements Regulations 2013,* 2013 No. 609, online at: http://www.legislation.gov.uk/uksi/2013/609/contents/made.

representing certain clients in such cases, and to handle fewer malpractice cases generally.[15] Tort reforms based on caps may "disproportionately reduce contingent fee lawyers' willingness to represent lower-income groups" due to the lower potential recovery.[16]

21. This research is particularly salient to the Ontario experience, as new caps in auto insurance benefits were recently introduced, taking effect on June 1, 2016. The impact of these new caps have yet to be determined. The key changes to Ontario's Statutory Accident Benefits Schedule ("SABS") include a reduction in standard medical, rehabilitation and attendant care benefits for non-catastrophic injuries from $86,000 in total to $65,000 in total, and a reduction in these benefits for catastrophic injuries from $2 million to $1 million.[17]

[15] Stephanie Daniels & Joanne Martin, "It is No Longer Viable from a Practical and Business Standpoint": Damage Caps, "Hidden Victims," and the Declining Interest in Medical Malpractice Cases, 17 INT'L J. LEGAL PROF. 59 (2010).

[16] Joanna Shepherd, "Uncovering the Silent Victims of the American Medical Liability System", 67 VAND. L. REV. 151, 154 (2014). While a bodily injury may be identical in two cases, the claim by a lower-income person will be lower than that of a higher-income person if there is a loss of income claim that can be advanced. For the lower-income person, the loss of income is either zero (not working) or lower compared to that of the higher-income person.

[17] Financial Services Commission of Ontario, "Important Changes to Auto Insurance", online: www.fsco.gov.on.ca/en/auto/brochures/pages/brochure_changes10.aspx.