September 28, 2016

CANADIAN DEFENCE LAWYERS

THE LAW SOCIETY OF UPPER CANADA
130 Queen Street West
Toronto, ON
M5H 2N6

Attention: *Juda Strawczynski JStrawcz@lsuc.on.ca*

Dear Mr. Strawczynski:

Re: Advertising and Fee Issues Working Group, Call for Input

The Law Society of Upper Canada's Advertising and Fee Issues Working Group is seeking input from the profession. (Ref. https://www.lsuc.on.ca/advertising-fee-arrangements/) Canadian Defence Lawyers (CDL) is pleased to offer the following input.

WHO WE ARE

CDL is an association of civil defence litigation lawyers with members in all Canadian provinces and territories. We speak for a membership of over 1,400 lawyers across Canada. CDL is affiliated with the Defense Research Institute, a U.S. association of defence lawyers boasting over 22,000 members. For the most part, our members' clients are corporations, including but not limited to insurers, self-insured companies and reciprocal defence associations. Through a Joint Education Committee and Roundtable Committee, CDL has a privileged leadership role in sharing insurance industry information, claims practices and education with the Canadian Insurance Claims Managers Association and the Canadian Independent Insurance Adjusters Association.

Our members in private practice are not precluded from acting for personal injury clients, but none of our members are under the commercial pressures of a volume plaintiff personal injury practice. Perhaps because of the defence practice, our members in centres across Canada are courted for referrals from plaintiff injury firms. Indeed, CDL cooperates extensively with its main plaintiff counterpart, the Ontario Trial Lawyers Association (OTLA). To its knowledge, CDL does not believe any of its members operate as a business model a referral-fee based practice.

CDL members can therefore provide a unique perspective on these emergent regulatory issues concerning the consumer protection, because they generally act for the adversaries of the consumers of

personal injury law. Lawyers practising in the area of civil defence litigation are usually acting for sophisticated consumers of legal services. The objective view from across the negotiating table, tribunal hearing room or the courtroom is seldom articulated to members of the plaintiff bar or to the regulator, because of the confidential and closed nature of the institutional defence retainer. The Public will not see CDL members holding scrums for TV reporters at the court house steps publicizing how little their clients had to pay out to someone injured in an accident, or advertising on talk radio stations expressing empathy for their corporate clients. Defence lawyers' mandate is to contain and reduce claims and litigation, not to encourage demand in the legal market or seek publicity. Our members do not sell litigation, but rather an end to litigation.

Despite the adversarial role our members play in relation to plaintiff personal injury lawyers, CDL members are proud to foster lasting collegial relationships with their plaintiff counterparts as part of striving for just and fair results for the clients of CDL members. The commercial aspects of retail personal injury law do have an impact on our members' ability to work on litigation efficiently and to settle claims based on objective, evidence-based norms and standards. CDL members are therefore aware of the impact that the commercialization of retail practice has on the legal process.

CDL RESPONSE

CDL's response to the Law Society's Questions for Consideration are as follows:

1. Advertising and fees in real estate law.

CDL does not express an opinion on this subject.

2. Contingency Fees

In consulting with our membership, we asked the following questions, with a view to obtaining answers that deal with the topics raised by the Law Society:

How can contingent fee structures, including the total costs associated with contingent fees be made more transparent to consumers at the outset? 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? How is the Solicitors Act operating in practice?

The CDL members responding to our survey voiced the need for greater standardization and transparency, while at the same time respecting solicitor-client confidentiality. One member pointed out that it was not long ago that the Law Society was sanctioning retail law firms for posting their fees for standard services. Indeed, previous strict limits on advertising until late in the 20th century were a paternalistic way of protecting an unsophisticated public from hiring lawyers based on their own ideas of what they wanted in a lawyer. In fact, the limits protected

traditional referral networks ("I'll scratch your back …") and prevented new lawyers, especially women and those from diverse and racialized backgrounds, from directly marketing their expertise to the public. These arguments are part of the historical debate, and there is no need to revisit the basic concept that lawyers should be allowed to advertise as part of the mandate to inform the public about their rights. The right to advertise is a constitutionally protected form of speech, and there is no turning back that clock.

New Brunswick is a jurisdiction in which a standard-form contingency fee agreement has been adopted by the law society. The diversity of cases as well as the established experience with contingency fees in Ontario would likely make a mandatory agreement cause more difficulties than the problems it would solve. Nevertheless, coming at the problem from the consumer perspective, there is a need to overcome a general lack of public understanding of how contingency fee arrangements are regulated under the arcane legalese of the *Solicitors Act* requirements.

Given that the plaintiff bar has employed widespread conventional formulae for engaging with the defence bar on settlements, there is no reason why the Law Society cannot impose minimum expectations for contingency fee arrangements, in order to level the bargaining positions between clients and law firms when negotiating a retainer. The Law Society can also provide explanatory public information in the form of website information and brochures for use in law offices. This is the type of effort needed to restore public confidence in the balance between the commercial interests of lawyers and the ethical obligations created by lawyers contracting with vulnerable parties.

CDL has watched with interest the class proceedings in *Hodge v. Neinstein*, where the issue is the ability under s. 28.1 of the *Solicitors Act* of a lawyer to collect costs in addition to a contingency fee, without prior approval of the court. CDL members have pointed out three (perhaps dissociated) problems with this provision in the Act as currently formulated:

- The requirement for prior judicial approval interferes with the freedom of contract and creates a disincentive for lawyers to 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.

- 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.

- 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. Most likely, the use of a plain-language and standard contract template with multiple options would allow lawyers to adapt permissible contingency fee arrangements to allow modest but meritorious cases to be advanced, while not distorting the economic incentives in the case of cases involving catastrophic damages.

3. Personal Injury Advertising

In consulting with our membership, we asked the following questions, with a view to obtaining answers that deal with the topics raised by the Law Society:

Personal Injury Advertising: 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 services 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?

Advertising second opinion services: 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?

Much of the law firm advertising in major centres is geared toward name recognition, not public legal education about their right to pursue compensation from tortfeasors. Indeed, "victims" are often encouraged to sue despite the absence of a legal cause of action against any defendant. It is for this reason that most advertising in public spaces is purchased by personal injury firms and referral firms: to create demand for legal services, not simply to inform the public that legal services are available. Much of it is presented in poor taste. However, regulation of taste has always been fraught with many perils, not the least of which is the wide latitude for commercial speech protected by s. 2(b) of the *Charter*. Anecdotally, CDL members are aware of concerns among their plaintiff counterparts that questionable advertising by law

firms may have the effect of lessening the credibility of lawyers appearing before juries. Most likely, it would be a waste of revenue from members' levies to police good taste if the plaintiff bar regulates itself through these corrective "market" effects.

CDL members surveyed did express considerable concern over the ethical dimension of advertising by referral or injury brokerage firms. Many were of the view that such advertising should be banned outright, as opposed to regulating the practice. Others expressed the view that the practice should be permitted, provided the public is made aware in a clear manner that the sponsor of the advertising will be making a referral for a fee. The rationale behind the calls for a ban is that of bait and switch, an unlawful commercial practice under competition and consumer protection law. Bait and switch is a concept members of the public readily understand. That lawyers seem to be allowed to get away with a breach of consumer law derogates from the public image of lawyers.

This discomfort would be mitigated if advertisers were required to be clearer in stating their role in the legal marketplace. Transparency would also have the effect of encouraging lawyers to whom referrals are made to establish at least a minimum level of relationship-building and empathy with their clients, as opposed to the impersonal commoditized relationship between a service provider and a referred customer. A personal injury law suit is not like installing a pre-fab kitchen or a ride to the airport. It should not be a commodity, but rather a legal proceeding dealing with people when they are most vulnerable. The reason this is of importance to CDL members is that defence counsel need to engage with their counterparts with some level of confidence that personal injury plaintiffs have some reasonable expectations of possible outcomes of the legal process for the purpose of pretrial disclosure and settlement.

CDL is concerned about advertising for second opinion services in the personal injury field. There is no evidence that consumers of legal services are unaware of their right to consult another lawyer if they are unsure whether their current lawyer is advising or representing them in the best way. Our members voiced the opinion that it appears unethical for lawyers to advertise legal services on the basis of seeding dissatisfaction with clients' current lawyers. If the Law Society were to restrict advertising of such services on that basis and charge a fee for that service but should not be able to take on the case in which they have given an opinion. Nor should the Law Society permit lawyers to accept a referral fee after a second opinion prompts the client to seek a referral to different counsel.

4. Identification of Type of Licence

The following response has also been informed by responses to the questions posed in Topic #3:

Protection of the public means the elimination of confusion in the legal marketplace. Not only should paralegals identify themselves as such, they should avoid confusing words such as 'Law Office,' 'licensed to provide legal services,' and the like.

In the personal injury field, there is potential for conflict of interest or disservice where clients might be short-changed into pursuing a smaller claim within the Small Claims jurisdiction when their injuries might in fact require an action in the Superior Court.

5. Use of Awards

The following response has also been informed by responses to the questions posed in Topic #3:

Awards recognizing legal excellence should never be available for sale or tied to the purchase of advertising. The Law Society should investigate the market in questionable awards, not only in personal injury but throughout the legal profession.

CDL itself confers two awards on deserving members:

- The Lee Samis Award of Excellence is CDL's award for distinguished service, named after the founding President of CDL. It recognizes exceptional contributions and/or achievements by members of CDL for contribution to the legal profession, Canadian jurisprudence and law reform, and benefits to the association and/or the insurance industry.

- The Richard B. Lindsay Q.C. Exceptional Young Lawyer Award is named in honour of a Past President of CDL. The award recognizes exceptional contributions by a Young Lawyer member of CDL based on published criteria similar to those governing the Lee Samis Award, but for young members.

The purpose of these awards is to recognize and encourage a career based on lifelong service, collegiality and excellence. Commercial concerns to not play a factor in selection. Given the fact that defence lawyers are often called on to take positions that are not popular, there is no element of "people's choice" or questionable public input based on "likes."

For its part, OTLA confers various awards on members and holds an annual event to celebrate the accomplishments of both plaintiff and defence lawyers (https://www.otla.com/index.cfm?pg=AwardsAndHonours). While it is possible some of the recipients of recognition from OTLA are also recipients of tabloid advertising awards or 'rate my lawyer' websites, the lists of recipients do not appear to name lawyers or firms whose advertising appears in public spaces associated with the words 'Top Rated' or similar expressions.

There appears to be a disconnect between lawyers actually recognized through real committees of peers, and the lawyers and firms promoting themselves as being highly rated or achieving the

best results. If there were not such a divergence between actual deserving lawyers and those advertising themselves as deserving, there would be no need for the Law Society to scrutinize this area of lawyer and law firm advertising. However, this divergence does appear to exist and constitutes a potential harm to the public in diverting consumer choices toward firms boasting about successes and away from those actually achieving them while maintaining a threshold level of professionalism.

6. Referral Fees

The following response has also been informed by responses to the questions posed in Topic #3:

The practice of referral fees remains controversial because it is a safety valve against lawyers holding on to files in which they are out of their depth. CDL members surveyed identified the potential for members of the public to feel deceived if the arrangement is not properly informed of referral fees. Some have recommended putting an end to the practice, while others voiced the view that percentages should be capped.

In order to maintain referral fees for the beneficial purpose they serve, without eroding further public confidence in the provision of legal services in the personal injury sector, the Law Society should require greater information and transparency. Negative public perceptions of professions arise from the notion that someone might be making a secret profit out of a transaction. If there is an active expectation on the part of the referring lawyer, the onus should be placed not only on the lawyer receiving the referral but on the referring lawyer to explain to the client that the referral may result in a financial reward to the referring lawyer, without increasing the overall fee. This type of sharing of information would be seen as invoking a higher level of professional integrity than among realtors, interior designers, and other sectors where referral fees are common but rarely disclosed. The Law Society should also consider caps, either on the rate or the total amount, or some combination of both. This way, the referral fee would compensate the referring lawyer for the commercial value of the referral and the work that goes into a pre-retainer interview, but not more.

Respectfully,

David W. Festeryga
President, Canadian Defence Lawyers

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