Tab 4.2

FOR DECISION

REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

MOTION

25. **That Convocation:**

    a. **approve one of the following options with respect to referral fees between licensees:**

        i. **Prohibit referral fees between licensees, or**

        ii. **Impose a monetary cap on referral fees between licensees and transparency measures for client protection;**

    b. **approve amendments to the Rules of Professional Conduct regarding advertising in Rule 4.1-2 as set out in Tab 4.2.1; and**

    c. **approve amendments to the Paralegal Rules of Conduct regarding advertising in Rule 8.03 as set out in Tab 4.2.3 and request the Paralegal Standing Committee to amend the related Guidelines as set out in Tab 4.2.5.**

SUMMARY OF ISSUES UNDER CONSIDERATION

26. In this second report, the Advertising and Fee Issues Working Group ("Working Group")[1] reports its findings and recommendations addressing advertising and fee issues, other than issues related to real estate practice, and contingency fee arrangements which the Working Group continues to explore. The Working Group reports through the Professional Regulation Committee with the concurrence of the Paralegal Standing Committee.

[1] 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.

27. The Committee recommends that Convocation decide as a matter of policy whether referral fees should be prohibited or regulated by capping them and introducing transparency measures to protect consumers of legal services.

28. In either case, the Committee would return with recommended rule changes. If Convocation decides to permit referral fees subject to a cap, then the Working Group would continue to develop this system, and the Committee would return to Convocation with specific recommendations as to:

    i. The appropriate amount of a cap;

    ii. Additional means of enhancing the transparency of the referral fee system in order to protect consumers of legal services; and

    iii. Whether more limited prohibitions may be warranted in certain circumstances, such as with respect to up-front referral fees, and fees received by a licensee when the matter falls outside of the referring licensees' scope of practice and/or insurance coverage.

29. The Committee also recommends to Convocation the following with respect to lawyer and paralegal advertising and marketing:

    i. Lawyers and paralegals should be required to identify their type of license;

    ii. The Law Society should amend the Rules of Professional Conduct, Paralegal Rules of Conduct and the Paralegal Professional Conduct Guidelines to guide licensees as to the appropriate use of awards and honours, and to protect the public from misleading use of awards and honours when necessary;

    iii. Lawyers and paralegals should not be permitted to advertise for work that they are not licensed to do, not competent to do or do not actually intend to do; and

    iv. The advertising of second opinion services should be prohibited.

BACKGROUND

30. In June 2016, the Working Group delivered its first report to Convocation 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 ("First Report").[2] In July 2016, the Working Group sought further input with respect to specific issues related to advertising, referral fees, and contingency and other fee

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

arrangements through a Call for Feedback.

31. The Call for Feedback closed at the end of September 2016. The Working Group received comments from nearly 60 individuals and 20 organizations, including legal organizations, a consumer group and insurers. The Working Group has greatly benefited from the thoughtful feedback it received in response to its Call for Feedback, and thanks all who provided input. A summary of the comments received in response to the Call for Feedback ("Summary") is attached at **Tab 4.2.7**.

32. The Working Group has met several times since the close of the Call for Feedback to consider appropriate recommendations. Its findings and recommendations with respect to referral fees and advertising (other than issues specific to real estate practice) follow.

REFERRAL FEES

(a) REFERRAL FEE RULES

33. Before outlining the Working Group's findings, it is useful to set out the existing rules which are the same for lawyers and paralegals[3]. Rule 3.6-5 of the *Rules of Professional Conduct* provides that:

> With the client's consent, fees for a matter may be divided between licensees who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

34. Rule 3.6-6 permits referral fees where the referral is made because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest:

> A lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that
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> (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and
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> (b) the client is informed and consents.

[3] Rules 5(11) and 5(14) of the *Paralegal Rules of Conduct* are to the same effect as the *Rules of Professional Conduct* referred to here.

35. Referral fees must be reasonable and not increase the total amount of the fee charged to the client. Informed client consent is required.

(b) WORKING GROUP FINDINGS WITH RESPECT TO CURRENT REFERRAL FEES

36. The Working Group is of the view that there are significant issues in the current operation of referral fee practices, and apparent non-compliance with existing rules by some licensees.

37. The Working Group is concerned by what appears to be a lack of transparency in current practices and a resultant lack of consumer awareness about licensee referrals of clients for fees. As the Working Group noted in its First Report, "Consumers naturally expect that lawyers advertising the provision of personal injury legal services are offering to represent them."[4] However, it also noted that "the information obtained through the Law Society's regulatory experience and from advocacy groups suggest that in many cases clients are not sufficiently aware of the fact that they are being referred to another lawyer, that there is a referral fee or the quantum of the fee."[5]

38. The Working Group has significant concerns that the lack of transparency has in some instances been fueled by misleading advertising. In its First Report, the Working Group indicated that, in its view, "lawyers and paralegals soliciting work that they […] do not intend to provide are misleading consumers. The public is entitled to expect that lawyers and paralegals are themselves offering to provide the legal services that they advertised."[6]

39. The Working Group is also concerned by the quantum of referral fees. In its First Report, the Working Group noted that "[R]eferral fees that were once commonly in the range of 10 or 15% of the ultimate fee have reportedly commonly become 25 or 30% of the ultimate fee."[7]

40. The Working Group heard a range of views regarding referral fees. As indicated in the Summary, several submissions favoured leaving the referral system as is as a matter to be negotiated between referrer and referree. However, the Working Group also learned in the course of its Call for Feedback that the amount that a licensee will pay to be referred a file can vary. The Working Group has heard that referral fees may be higher for cases that are in respect of more serious injuries (and will result in a higher

[4] First Report at para. 64.

[5] *Ibid.* at para. 28.

[6] *Ibid.* at para. 63.

[7] *Ibid.* at para. 100.

recovery). The amount of work performed by the referring lawyer does not necessarily vary with the seriousness of the injury although the reward will be higher. The Working Group is of the view that the amount received by the referring lawyer is seriously disproportionate to the value provided to the client in many cases.

41. Some of the factors that a licensee might consider in negotiating the fee for a particular case may negatively impact on the delivery of the service provided. A higher referral fee also creates pressure on the licensee to charge a higher fee to the client. While individual licensees may (or may not) resist this pressure, it is reasonable to be concerned that the trend toward increased referral fees has resulted in a trend toward increased contingent fees. This directly impacts the recovery obtained by injured people and is especially of concern in more serious cases.

42. The Working Group is also concerned that the amounts at issue create an incentive for the referring licensee to refer to the highest bidder primarily or solely on this basis, rather than on the basis of the competency of the licensee.

43. As the cost to the licensee to obtain the file increases, so too do risks to how the file may be handled. As the Working Group has noted, "the cost of acquiring the file through payment of referral fees may economically limit the ability of a counsel who has accepted the referral to take the matter to trial."[8] This limitation would have an even greater adverse impact as the amount of the referral fee increases.

44. The Working Group is also deeply concerned by the reported prevalence of up-front referral fees. Up-front referral fees present several related issues, previously described by the Working Group as follows:

> The Working Group recognizes the concern that up-front flat referral fees incent referrals to the lawyer who will pay the most for the referral and provide no incentive to refer to the lawyer who will achieve the best result for the client. Payment of up-front flat fees, and/or referral fees that are a significant percentage of the fee charged by the referree may be disproportionate to the value provided by the referrer, and may compromise the net fee earned by the referree to an extent that compromises quality of service. The cost of acquiring the file through payment of referral fees may economically limit the ability of a counsel who has accepted the referral to take the matter to trial. These risks are of concern.[9]

45. Some Working Group members are also concerned that currently licensees may receive a referral fee for referring work that is beyond the licensee's scope of practice, or relates

[8] *Ibid.* at para. 90.

[9] *Ibid.* at para. 90.

to a matter which the licensee would not be able to address because the licensee has a restricted practice and accompanying limited insurance.

46. In light of the significant concerns described above with respect to referral fees and related advertising practices, the Working Group has considered a range of options. While several observed practices are, in the Working Group's view, contrary to the current rules, given current advertising and marketing practices as a whole, the Working Group recommends that Convocation reform the regulation of referral fees and related advertising, by either (i) prohibiting referral fees, or (ii) capping referral fees and introducing related enhanced transparency measures.

47. Each option is presented below in turn.

(c) PROHIBITING REFERRAL FEES

48. Arguments favouring prohibiting referral fees include the following:

    a. Licensees are already required to refer files they are not competent to handle or which fall outside of their scope of practice. There should be no need to provide an economic benefit to a licensee to do what is already required. Referrals can and will happen without a fee. Most licensees will refer a file when the licensee, while competent to handle a matter, is unable or does not wish to handle the file without seeking a referral fee. Consumers will therefore not be harmed by prohibiting referral fees, and may benefit if licensees are not motivated by pecuniary interests, but rather are motivated solely on referring to the best licensee(s) who may handle the file.

    b. An absolute prohibition would be clear to the public and the professions. It would be relatively simple to introduce and would be relatively simple to enforce. Where possible, the simplest approach is the best regulatory approach.

49. However, there are concerns raised by an absolute prohibition, including the following:

    a. Reasonable referral fees align economic incentives and regulatory objectives by reducing the risk that licensees keep files they are not best equipped, or even competent, to handle. Prohibiting referral fees therefore increases the risk that a licensee may keep a file that they should not handle.

    b. An absolute prohibition may be an overreaction to a new problem and may not be "proportionate to the significance of the regulatory objectives sought to be realized"[10]. What has changed is the emergence of significant direct advertising and marketing which has been effective in attracting clients with limited ability to

[10] See section 4.2 of the *Law Society Act.*

assess quality. Prohibiting referral fees will bring an end to previous referral fee practices that did not appear to be problematic and which were thought to be advantageous.

c. Prohibiting all referral fees may risk throwing out good referral systems with the bad. In the course of its research, the Working Group has learned of licensees who have specialized in developing referral systems to facilitate access to justice for consumers. Certain licensees treat referrals as part of the service they provide to clients, and one that facilitates access to legal services. Developing expert referral systems requires time, effort and capital. Prohibiting referral fees may make it economically unviable for licensees to develop expert referral systems designed to assist Ontarians. Access to justice research has demonstrated the difficulties faced by ordinary people in accessing legal services.

d. An absolute prohibition may also lead to undisclosed cash referrals or other undisclosed illicit means to circumvent the prohibition.

50. Prohibiting referral fees may also have unintended consequences, such as market consolidation. This may happen in two ways. Firms operating as brokerages may consolidate to enjoy the returns to advertising no longer available through referral fees. Second, those practicing in partnerships are able to refer matters internally, and be compensated for doing so. Those in sole practice or smaller firms with no internal referral systems would be unable to do so, and, facing this comparative disadvantage, may enter partnerships. It is arguable that the Law Society, as regulator, ought not to bias the market in favour of larger (or smaller) firms and that unnecessary regulatory intervention may limit innovation. While some would be concerned by market consolidation generally or in personal injury practice, others believe it may bring benefits to consumers.

(d) CAPPING REFERRAL FEES

51. The arguments in favour of capping referral fees are premised on the principles that "if referral fees are to be permitted, then, in the Working Group's view, they should be transparent, consensual and fully align with the client's interests. Licensees should be encouraged to refer matters where they are not competent to take them on. Providing clients with referrals to competent counsel is an important service if done properly at a reasonable cost."[11]

52. Arguments in support of a capped referral fee system include the following:

[11] First Report at para. 88.

a. While unlimited referral fees are problematic, capped referral fees may facilitate access to legal services by allowing innovative referral systems to develop.

b. A cap on referral fees addresses the problem raised by the excessive referral fees that can be demanded as a result of significant “brand” investment through direct advertising. A cap may be used to restore better proportionality between the amount of the referral fee and the nature of the service provided.

c. A cap aligns economic incentives with the regulatory priority of reducing the risk of licensees keeping files that should be referred.

d. A cap, rather than an absolute prohibition, has regard for the principle that regulation should be proportionate to the regulatory objectives sought to be realized and does not interfere with economic relationships more than is required.

53. However, there are concerns raised by a capped referral fee system, including the following:

a. Even a capped referral fee system may be seen as rewarding choices that should be made by a professional thereby arguably corroding professionalism and public confidence in the professions;

b. A capped system may be overly complex, causing confusion for consumers and licensees alike and creates the risk that some licensees will seek to avoid the cap through new approaches.

c. A capped referral system is more complicated and therefore makes it more difficult for licensees to comply, the public to understand and the Law Society to enforce.

54. If Convocation approves the policy direction to adopt a capped referral fee system, then the Working Group would give further consideration to the appropriate cap and related enhanced transparency measures, and would also consider areas where prohibiting referral fees may be warranted.

55. The Working Group has already considered these issues. Its preliminary assessment is as follows:

<u>Considering the appropriate cap</u>

a. While submissions to the Working Group in response to its Call for Feedback recommended caps ranged from the 5-10% level at the lower end to 30% of the net legal fee, the Working Group favours a fee cap at the lower range.

b. The Working Group would continue to consider whether to have a straight cap based as a percentage of fees, or some other model, and would report its recommendation in due course.

Transparency measures

c. The Working Group has previously stated that "Referral fees are opaque to consumers, clients and to the Law Society."[12] As noted above, in its First Report, the Working Group stated that "that if referral fees are to be permitted, then, in the Working Group's view, they should be transparent, consensual and fully align with the client's interests."[13] The Working Group believes that a series of transparency measures would support a capped referral fee system, including:

   i. Changes to the advertising rules:

      The continuation of paid referral fees would warrant a change to advertising rules. The Working Group is of the view that it is misleading for firms to advertise in order to refer files in exchange for a referral fee when the advertisement does not disclose that the advertising firm will not be doing the work on the files. The Working Group is of the view that failing to clearly say so is misleading and contrary to the current rules.

      However, given current advertising and marketing practices, if Convocation approves the policy direction to adopt a capped referral fee system, then the Working Group would recommend that additional guidance be provided to better ensure that all licensees are aware of their existing obligations.

      The Working Group would return with recommended rule changes.

   ii. A mandatory tripartite referral agreement:

      The Working Group recommends that no referral fee be permitted unless the licensee referring a client, the licensee accepting the client referral, and the client have signed a Law Society issued standard form referral agreement. This agreement would be required to plainly state how the referral fee is to be determined, that the client is not required to accept the referral and that the client is free to retain other counsel. This agreement would be required to be signed at the time of the referral by all parties.

      The Working Group would return with recommended rule changes.

   iii. Providing clients with choices of referral

      In a referral fee model, when a licensee suggests that a client be referred

[12] *Ibid.* at para. 92.

[13] *Ibid.* at para. 88.

to another licensee, the client should be provided with more than one name wherever possible. This will enhance client input and choice and the value of the referral.

The Working Group recognizes that in some geographic locations and some areas of speciality, this may not be practical. If so, the standard form referral agreement should confirm the reason that providing more than one name was not practical.

The Working Group would return with recommended rule changes.

iv. Enhanced record keeping

The Working Group recommends that if a capped referral system is adopted, then licensees making or accepting a client referral for a fee should be required 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. This will facilitate transparency and accountability.

Subject to further input from staff as to the practicability of this proposal, the Working Group expects it would propose an amendment to Part V of By-Law 9 to require appropriate recording of referral fees.

Potential prohibitions of referral fees in specific areas

d. The Working Group recommends prohibiting up-front referral fees in contingency fee matters. The Working Group sees no compelling reasons for permitting up-front referral fees. The Working Group is deeply concerned that up-front fees risk misaligning client and licensee interests, and detrimentally impacting the quality of service the client may receive.

As noted at the outset of this report, whether certain more limited prohibitions may be warranted would also be considered further by the Working Group.

The Working Group would bring forward proposed specific amendments to the lawyer's Rules of Professional Conduct and Paralegal Rules of Conduct through the Professional Regulation and Paralegal Standing Committees.

ADVERTISING AND MARKETING

(a) ADVERTISING AND MARKETING RULES

56. The current rules for advertising and marketing of services for lawyers and paralegals have the same effect[14]. Rule 4.2-0 of the *Rules of Professional Conduct* addresses "Marketing of Professional Services" as follows:

> **4.2-0** In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.
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> **4.2-1** A lawyer may market legal services if the marketing
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> (a) is demonstrably true, accurate and verifiable;
>
> (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and
>
> (c) is in the best interests of the public and is consistent with a high standard of professionalism.

57. In addition, both lawyers and paralegals have a duty to carry out their professional obligations with integrity.[15] Licensees have "special responsibilities by virtue of the privileges afforded" being in a legal profession, and are expected to act in a manner that inspires "confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety."[16]

58. The Working Group is extremely concerned about the proliferation of advertising by Ontario lawyers and paralegals that may be false or misleading and fees that are not transparent and appear to have an impact on the way in which legal services are being provided. The Law Society expects licensees to comply with the letter and spirit of the ethical rules applying to its licensees. The recommendations in this report are designed to further emphasize and clarify these responsibilities.

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[14] Rules 8.03(1) and (2) of the *Paralegal Rules of Conduct* are to the same effect as the *Rules of Professional Conduct* referred to here, but apply to the "Marketing of Legal Services".

[15] Rule 2.1-1 of the *Rules of Professional Conduct;* Rule 2.01(1) of the *Paralegal Rules of Conduct.*

[16] Commentary to Rule 2.1-1 of the *Rules of Professional Conduct*. Guideline 1: Professionalism – Integrity & Civility, General, Rule Reference Rule 2.01(1)&(2) at paras. 1-2 of the *Paralegal Professional Conduct Guidelines*.

(a) IDENTIFICATION OF TYPE OF LICENSE

59. The Working Group recommends that all licensees should be specifically required to identify the type of license they have in their advertising and marketing materials (i.e. lawyer or paralegal).

60. In its First Report the Working Group expressed support for this recommendation as follows:

> Consumers of legal services are entitled to know whether a service is being provided by a lawyer or a paralegal. In other professions where there are overlapping scopes of practice, it is standard for the service providers to state their professions. For example, while a doctor and a nurse both provide health services, and share the ability to engage in certain prescribed activities, patients are entitled to know the nature of the professional offering services. This promotes patient knowledge and trust in health providers and the health system more generally.[17]

61. It further stated that "This would not be onerous but would enhance awareness of the availability and licensing of paralegal services, and of the range of services which paralegals are permitted and able to offer consumers."[18]

62. The responses received in the Call for Feedback were generally supportive of this change. Having considered the issue further, the Working Group remains of the view that this change would enhance transparency, ensure that the attributes of the provider are true, accurate and verifiable, and that the identification of license would reduce the risk of misleading, confusing or deceptive practices. The Working Group believes that this measure will enhance the public's awareness of the different categories of license and the distinctions between them, and reduce confusion in the marketplace.

63. The Working Group has heard that there may not be clear equivalents to the terms "lawyer" and "paralegal" in other languages. If licensees market their services in other languages, the Working Group is of the view that they are responsible to ensure that the type of license and scope of the services offered are clear and do not mislead.

64. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 4.2.1 to 4.2.6**.

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[17] First Report at para. 75.

[18] *Ibid.* at para. 76.

(b) USE OF AWARDS

65. In its First Report, the Working Group expressed concern with the use of awards as follows:

> Lawyers and paralegals often rely on awards and honours to suggest quality. However, not all awards are necessarily indicative of quality alone, or at all. While some awards are based on third party evaluation, peer recognition or consumer recognition, some "awards" are essentially received for payment or other inducement. The Working Group is of the view that using these awards without disclosure or disclaimer is misleading.
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> The Working Group recognizes that there are real issues as to how awards are used by lawyers and paralegal licensees, and grappled with what the Law Society could do to address the issues. The Working Group recognizes that the public may view awards as a proxy for expertise or quality of service. The Working Group is concerned about the use of awards or honours that do not appear to be credible or have merit, and/or cannot be shown to be made on some transparent or objective criteria. Given these significant concerns, the Working Group has not ruled out proposing that the use of awards in advertising be banned altogether. If advertising of such awards is to be permitted, then, in the Working Group's view, using such awards or honours without full disclosure should be prohibited.[19]

66. The Working Group indicated that it would consider a range of options, including:

a. Requiring full disclosure of the nature of the award or honour on the firm website, including any fees paid or other arrangements with the firm which may have affected the making of the award or honour;

b. Whether to prohibit the use of awards;

c. Whether to develop principles to limit the nature of awards and honours which may be included in advertising and marketing; and

d. Whether a personal injury designation should be created within the Law Society's Certified Specialty in civil litigation, as another objective qualitative measure for consumers.[20]

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[19] First Report at paras. 78-79.

[20] *Ibid.* at paras. 80-82.

67. Most submissions responding to the Working Group's Call for Feedback expressed concerns over the current use of awards and honours. Respondents provided a full range of recommended actions for the Working Group to consider, including prohibiting the use of awards and honours, prohibiting certain awards, or only permitting objectively verifiable awards.

68. The Working Group continues to have serious concerns about the use of awards and honours, and carefully considered the options available.

69. The Working Group considered prohibiting the use of awards in marketing outright. The Working Group was mindful of the need to have due regard to licensee freedom of expression, informed consumer choice, and consumer protection.

70. 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".[21]

71. The Supreme Court of Canada considered advertising by professionals in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 1990 CanLII 121 (SCC) ("*Rocket*"). In *Rocket*, Justice McLachlin (as she then was) concluded for the court that professional advertising was, ordinarily, commercial expression protected by section 2(b) of the *Charter*. In considering regulation of professional advertising, the question became whether the regulation was permitted by section 1 of the Charter. As she said:

> … the Court must be satisfied of three things:
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> 1. the measures designed to meet the legislative objective must be rationally connected to the objective;
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> 2. the means used should impair as little as possible the right or freedom in question; and,
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> 3. there must be proportionality between the effect of the measures which are responsible for limiting the *Charter* right and the legislative objective of the limit on those rights. In effect, this involves balancing the invasion of rights guaranteed by the *Charter* against the objective to which the limitation of those rights is directed.

72. She went on to say:

> The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if

[21] *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*").

> prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or the "marketplace of ideas", or to realize one's spiritual or artistic self-fulfillment: see *Irwin Toy*, *supra*, at p. 976. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of s.2(*b*).
>
> On the other hand, it cannot be denied that expression of this kind does serve an important public interest by enhancing the ability of patients to make informed choices. Furthermore, the choice of a dentist must be counted as a relatively important consumer decision. To the extent, then, that this regulation denies or restricts access of consumers to information that is necessary or relevant to their choice of dentist, the infringement of s.2(*b*) cannot be lightly dismissed. …

73. Holding that regulation of professional advertising was rationally connected to "maintenance of a high standard of professionalism (as opposed to commercialism) in the profession" and "[protection of] the public from irresponsible and misleading advertising", Justice McLachlin concluded that the issue was "whether the means used impair the freedom as little as possible". She held that:

> The aims of promoting professionalism and preventing irresponsible and misleading advertising on matters not susceptible of verification do not require the exclusion of much of the speech which is prohibited by s. 37(39). In the result, the effect of the impugned provision is disproportionate to its objectives. … Useful information is restricted without justification. …

74. As noted above, the Working Group recognizes that there are significant issues in how awards are currently being used in marketing. However, it has concluded that an outright prohibition of using awards in marketing should not be recommended, primarily because that would unnecessarily restrict disclosure of useful information. The Working Group recognizes that, while there are serious issues with certain awards and honours as currently being used, disclosure of many awards and honours does, in fact, provide useful qualitative information that can benefit consumers. Ultimately the Working Group concluded that an absolute ban of the use of awards and honours in marketing would constitute a disproportionate regulatory response.

75. The Working Group also considered creating and managing a list of permitted awards and the converse, of prohibiting certain types of awards based on certain criteria. Ultimately the Working Group rejected these options. Both of these models would require significant regulatory resources to implement, monitor and continually update to consider new types of awards, and new types of advertisements and marketing. Moreover, some Working Group members were uncomfortable with the Law Society engaging to this extent in prescribing permitted commercial expression on the part of

licensees.

76. The Working Group is of the view that the lawyer and paralegal rules already provide important guidance as to how awards and honours may be used in advertising and marketing. As noted above, lawyers and paralegals may not market their services unless the marketing is "demonstrably true, accurate and verifiable", is "neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive" and "is in the best interests of the public and is consistent with a high standard of professionalism".[22]

77. However, the Working Group also believes that the rules can be amended to more effectively guide licensees to meet their professional obligations with respect to the use of awards and honours. The Working Group recommends that the lawyer Rules of Professional Conduct and Paralegal Professional Conduct Guidelines be amended to provide more specific guidance related to the use of awards and honours.

78. The proposed amendments:

    a. State that references to awards and rankings are intended to be interpreted broadly, and include superlative titles such as "best", "super", "#1" and similar indications;

    b. Provide examples of awards and rankings which contravene the rule; and,

    c. Remind licensees that they should take particular care with respect to use of awards and rankings in mass advertising, such as advertising on television, billboards, and buses.

79. In short, the Working Group is of the view that, while existing rules and regulatory resources can and should address problematic marketing in this area, more can be done to provide guidance to licensees and the public as to what types of use of awards and honours is permissible in marketing.

80. Specific amendments to the lawyer's Rules of Professional Conduct and Paralegal Professional Guidelines are attached at **Tabs 4.2.1**, **4.2.5** (redline) and **Tabs 4.2.2** **and** **4.2.6** (clean).

81. The Working Group also recommend that the Professional Regulation Division provide guidance to the professions, where appropriate, as to awards and honours which staff consider should not be included in marketing in light of the rules.

[22] Lawyer Rules of Professional Conduct, Rules 4.2-0 and 4.2-1 and Paralegal Rules of Conduct, Rules 8.03(1) and (2).

(c) NATURE OF THE SERVICES BEING PROVIDED: PROVIDING FURTHER GUIDANCE

82. In its First Report to Convocation, the Working Group made the following policy statement with respect to lawyer and paralegal advertising:

> The Working Group is of the view that lawyers and paralegals soliciting work that they are not permitted to provide, are not competent to provide, or do not intend to provide are misleading consumers. The public is entitled to expect that lawyers and paralegals are themselves offering to provide the legal services that they advertised.

83. The position of the Working Group is that lawyers and paralegals soliciting work that they are not permitted to provide, or are not competent to provide are not acting in the best interests of the public or within acceptable standards of professionalism, contrary to the current rules. Similarly, all licensees must be transparent as to the type of service they are providing. Licensees should not be advertising a service that they are not intending to perform. Given current advertising and marketing practices, the Working Group recommends that additional guidance be provided to better ensure that all licensees are aware of their existing obligations.

84. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 4.2.1 to 4.2.6**.

(d) NATURE OF THE SERVICES BEING OFFERED: PROHIBITING ADVERTISING SECOND OPINION SERVICES

85. The Working Group recommends prohibiting second opinion advertising.

86. The Working Group did not come to this decision lightly. It once again carefully considered freedom of expression, informed consumer choice and consumer protection.

87. In its review of current advertising practices, the Working Group has serious concerns that the marketing of second opinion services is not truly intended to market second opinion services, but rather is intended to attract clients who are already represented by counsel with the intention of having the client switch firms. The Working Group expressed its concerns with this practice at paragraphs 54-57 of its First Report.

88. The responses to its Call for Feedback generally confirmed that current second opinion advertising practices are problematic. The further input also supports curtailing advertising in this area. In particular, there was no evidence from those responding to its Call for Feedback or otherwise of a lack of consumer awareness as to the right to seek a

second opinion or change counsel. On the contrary, dissatisfied clients in personal injury and other matters often consider, and do seek a second opinion, and may also change counsel. Thus, when considering consumer choice and consumer protection, the Working Group has determined that prohibiting this particular form of advertising will not have any or any significant detrimental impact on consumer choice in a highly competitive personal injury market, or other markets. However, it will protect consumers from a form of misleading advertising that appears designed to "bait" through the advertising of second opinion services, when the intent is to have the client "switch".

89. The Working Group considered permitting second opinion advertising but prohibiting the provider of the second opinion from being retained further. The intent of this approach would be to permit advertising for the particular service rendered, but to curtail "bait and switch" practices. Under such an approach, the advertising would align with the intended services provided.

90. However, the Working Group has several concerns with this approach. It would be difficult to enforce. This model also presents challenges for the consumer. Clients who seek the second opinion from a licensee based on that licensee's advertisement would receive a second opinion, but then would be required to choose between returning to their initial counsel and seeking a third counsel to take over the matter. This is inefficient, and would deprive the client of the opportunity to select the provider of the second opinion as counsel, despite having already shared the file with that counsel, and possibly developed trust in that professional.

91. In summary, the Working Group recognizes that providing second opinions is a worthy service in many instances and an important client right. Prohibiting second opinion advertising will not prevent or deter clients from seeking second opinions. Nor does it prevent a dissatisfied client from switching to a licensee who has provided a second opinion. Second opinion services are available and appear to be accessible to consumers. Prohibiting the advertising of these services is unlikely to deter dissatisfied clients from seeking second opinions. But it will stop misleading advertising practices.

92. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 4.2.1 to 4.2.6**.

NEXT STEPS

93. Following Convocation's policy decision with respect to referral fees, the Working Group will develop for the Committee proposed rule amendments and other recommendations as may be necessary to implement Convocation's decision, and promptly present them to Convocation for its consideration.

94. The Working Group's consideration of advertising and fee issues in real estate and current practices related to contingency fee arrangements, and the operation of the

Solicitors Act is ongoing. The Working Group will report to and through the Professional Regulation Committee and the Paralegal Standing Committee once it has considered these issues further.

Redline Showing Proposed Amendments to the Rules of Professional Conduct

CHAPTER 4 The Practice of Law

SECTION 4.1 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

Restrictions

4.1-2 In offering legal services, a lawyer shall not use means that

(a) ~~that~~ are false or misleading;

(b) ~~that~~ amount to coercion, duress, or harassment;

(c) ~~that~~ take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(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; or

(e) ~~that~~ otherwise bring the profession or the administration of justice into disrepute.

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

[*Amended - October 2014*]

SECTION 4.2 MARKETING

Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

Redline Showing Proposed Amendments to the Rules of Professional Conduct

4.2-1 A lawyer may market legal services only if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Commentary

[1] This Rule establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing, including advertisements about the size, location and nature of the lawyer's practice and about awards, rankings and endorsements from third parties.

[2] Examples of marketing that may contravene this rule include

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless the ~~such~~ statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations ~~unjustifiably~~;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

~~(f) taking advantage of a vulnerable person or group;~~

(f~~g~~) using testimonials or endorsements which contain emotional appeals.

[3] Examples of marketing that do contravene this rule include

(a) marketing services that the lawyer is not currently able to perform to the standard of a competent lawyer;

(b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;

Redline Showing Proposed Amendments to the Rules of Professional Conduct

(c) marketing that fails to clearly and prominently disclose a practice that the lawyer has of referring clients for a fee, or other consideration, to other licensees;

(d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both, as the case may be;

(e) referring to awards, rankings and third party endorsements that are not bona fide or are likely to be misleading, confusing, or deceptive; and

(f) taking advantage of a vulnerable person or group.

[4] Paragraphs (a) to (d) of Commentary [3] are intended to ensure that marketing does not mislead by failing to make clear what services are actually available and are intended to be provided. It is important that there be no “bait and switch” aspect to marketing. Paragraph (d) is intended to better ensure that prospective clients are aware whether the marketed services being offered will be performed by lawyers or paralegals.

[5] Paragraph (e) of Commentary [3] addresses marketing by reference to awards, rankings and third party endorsements. The terms “awards” and “rankings” are intended to be interpreted broadly and to include superlative titles such as “best”, “super”, “#1” and similar indications. Awards, rankings and third party endorsements which contravene this rule include those that:

(a) do not genuinely reflect the performance of the lawyer and the quality of services provided by the lawyer but appear to do so;

(b) are not the result of a reasonable evaluative process;

(c) are conferred in part as a result of the payment of a fee or other consideration rather than as a result of a legitimate evaluation of the performance and quality of the lawyer; or

(d) the lawyer could not have demonstrated, at the time of reference, were compliant with this rule.

Particular care should be taken in respect of awards, rankings and third party endorsements referenced in mass advertising, such as in newspaper and internet advertising and advertising on television, billboards, taxis, buses and the like. In such contexts, references to awards, rankings and third party endorsements must be particularly clear and straightforward as there is little opportunity for reflection or appreciation on the part of the potential client or to provide context.

References to awards and honours that are genuine reflections of professional or civic service do not contravene this rule. For example, a potential client may consider it useful to know that a lawyer has been honoured for their service by the Canadian or the Ontario government, the Law Society or a professional organization. However, the

Redline Showing Proposed Amendments to the Rules of Professional Conduct

lawyer should take care to ensure that such awards and honours reflect a genuine and responsible assessment of the lawyer in the public interest.

In any event, any reference to awards, rankings and third party endorsements must comply with all of the provisions of Rule 4.2-1.

[6] This Rule also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of lawyers, the legal profession and the administration of justice. The Law Society has acknowledged in the Rules the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in force in Ontario.

[7] Examples of marketing practices that may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, that take advantage of a vulnerable person or group or that refer negatively to other licensees, the legal profession or the administration of justice.

4.2-1.1 A lawyer marketing legal services shall specifically identify in all marketing materials that they are licensed as a lawyer.

Commentary

[1] It is important that the public be aware that both lawyers and paralegals are licensed by the Law Society, and of whether it is a lawyer or a paralegal who is offering to provide services.

4.2-1.2 The marketing of second opinion services is prohibited.

Commentary

[1] The provision of second opinions is a valuable service to clients. However, second opinion marketing is commonly undertaken with a view to obtaining the retainer rather than providing a second opinion. Such “bait and switch” marketing is inappropriate. The marketing of second opinions is prohibited under this rule, whatever the intent of the marketing.

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;

Redline Showing Proposed Amendments to the Rules of Professional Conduct

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

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

CHAPITRE 4 L'exercice de la profession

ARTICLE 4.1 L'ACCESSIBILITÉ DES SERVICES JURIDIQUES

Accessibilité des services juridiques

Restrictions

4.1-2 Lorsqu'il offre ses services juridiques, l'avocat évite tout moyen qui entre dans l'une ou l'autre des catégories suivantes :

a) faux ou trompeurs ;

b) constituant de la coercition, de la contrainte ou du harcèlement ;

c) exploitant une personne qui est vulnérable ou qui n'a pas encore eu le temps de se remettre d'une expérience traumatisante ;

d) visant à convaincre une personne qui a retenu les services d'un autre avocat dans une affaire donnée de changer d'avocat pour cette affaire, sauf si le changement est amorcé par la personne ou l'autre avocat ;

e) jetant autrement le discrédit sur la profession ou sur l'administration de la justice.

Commentaire

[1] Une personne vulnérable ou qui a vécu une expérience traumatisante et ne s'en est pas encore remise peut fort bien avoir besoin de l'aide professionnelle d'un avocat. La présente règle n'empêche pas ce dernier d'offrir son aide à une telle personne. Un avocat peut offrir son aide à une personne si un proche parent ou un ami personnel de la personne communique avec l'avocat à cette fin. L'avocat peut également offrir son aide à une personne avec qui il a un lien de parenté ou entretient une étroite relation professionnelle. La règle interdit à l'avocat d'avoir recours à des moyens inacceptables, abusifs ou autres qui jettent le discrédit sur la profession ou sur l'administration de la justice.

[*Modifié – octobre 2014*]

SECTION 4.2 MARKETING

Marketing des services professionnels

4.2-0 Dans la présente règle, « marketing » comprend les publicités et d'autres communications de même type sous diverses formes ainsi que le nom des cabinets (y

compris la raison sociale commerciale), le papier à en-tête, les cartes professionnelles et les logos.

4.2-1 Un avocat peut faire la promotion de ses services juridiques seulement si la publicité :

a) est manifestement vraie, précise et vérifiable ;

b) n'est ni trompeuse ni déroutante, et ne risque pas de tromper ou de dérouter ;

c) est conforme à l'intérêt public et à une norme élevée de professionnalisme.

Commentaire

[1] Cette règle établit, entre autres choses, les critères de communication dans la promotion des services juridiques. Ces critères s'appliquent aux différentes formes de marketing, y compris les annonces concernant la taille, l'endroit et la nature de la pratique de l'avocat et les récompenses, les classements et les endossements de tierces parties.

[2] Voici des exemples de marketing qui peut contrevenir à cette règle :

a) annoncer un montant d'argent recouvré pour un client ou son succès dans d'anciennes causes, à moins que cette annonce soit accompagnée d'une déclaration indiquant que ces résultats ne sont pas nécessairement révélateurs de résultats futurs et que la somme recouvrée et tout autre résultat de litiges varieront selon la cause ;

b) se vanter d'offrir des services de qualité supérieure à ceux offerts par d'autres avocats ;

c) élever les attentes ;

d) suggérer que l'avocat a un tempérament combatif ;

e) se montrer méprisant envers des personnes, groupes, organisations ou institutions ;

~~f) tirer profit d'une personne vulnérable ou d'un groupe vulnérable;~~

f) se servir de témoignages ou d'endossements qui font appel aux émotions.

[3] Voici des exemples de marketing qui contrevient à cette règle :

a) annoncer des services que l'avocat n'est pas en mesure de fournir conformément à la norme de compétence exigée d'un avocat ;

b) faire de la publicité-leurre, c'est-à-dire une publicité qui attire les clients par des offres de services, de prix ou de conditions autres que les offres normalement faites aux clients qui répondent à la publicité ;

c) faire des annonces qui omettent manifestement de divulguer la pratique de l'avocat de renvoyer des clients à d'autres titulaires de permis, moyennant des frais ou toute autre contrepartie ;

d) omettre de déclarer expressément que les services annoncés seront fournis par des avocats ou des parajuristes autorisés, ou les deux, selon le cas ;

e) faire état de récompenses, d'un classement et d'endossements ds tierces parties qui ne sont pas authentiques ou qui risquent d'induire en erreur, de dérouter ou de tromper ;

f) tirer profit d'une personne vulnérable ou d'un groupe vulnérable.

[4] Les alinéas a) à d) du commentaire [3] visent à faire en sorte que le marketing ne soit pas trompeur en omettant d'indiquer clairement les services qui sont effectivement offerts et qui seront fournis. Il est important d'éviter la publicité-leurre. L'alinéa d) vise à s'assurer que les clients éventuels savent que les services annoncés seront offerts par des avocats ou des parajuristes.

[5] L'alinéa e) du commentaire [3] aborde la question de la publicité par la mention des récompenses, des classements et des endossements de tierces parties. Les termes « récompenses » et « classement » devraient être interprétés au sens large, comprenant l'usage de superlatifs comme « le meilleur », « super », « n° 1 » et indications de cette nature. Les récompenses, les classements et les endossements de tierces parties qui contreviennent à cette règle comprennent les suivants :

a) ceux qui ne reflètent pas véritablement la performance de l'avocat et la qualité des services qu'il offre, mais qui semblent le faire ;

b) ceux qui ne sont pas le fruit d'un processus d'évaluation raisonnable ;

c) ceux qui sont remis sur paiement d'une contrepartie quelconque plutôt qu'après une évaluation légitime de la performance et de la qualité de l'avocat ;

d) ceux que l'avocat n'aurait pas pu prouver conformes à cette règle au moment où il en a fait l'annonce.

Il faut porter une attention particulière aux récompenses, classements et endossements de tierces parties mentionnés dans la publicité de masse, comme dans les journaux et sur Internet, et à la télévision, babillards, taxis, autobus, etc. Dans ces contextes, les mentions de récompenses, de classements et d'endossements de tierces parties

doivent être particulièrement claires et directes pour tenir compte du temps de réflexion ou d'évaluation limité dont dispose le client éventuel ou pour donner un contexte.

La mention des récompenses et des honneurs qui reflètent véritablement un service professionnel ou civique ne contrevient pas à cette règle. Par exemple, un client éventuel peut trouver utile de savoir que le gouvernement de l'Ontario ou du Canada, le Barreau ou une autre association professionnelle a remis un honneur à un avocat pour ses services. Cependant, l'avocat devrait s'assurer que ces récompenses et ces honneurs font effectivement état d'une évaluation véritable et responsable de l'avocat dans l'intérêt public.

Quoi qu'il en soit, toute mention de récompenses, classements et d'endossements de tierces parties doit être conforme à toutes les dispositions de la règle 4.2-1.

[6] Cette règle exige aussi que la publicité soit conforme à une norme élevée de professionnalisme. Une publicité non professionnelle n'est pas dans l'intérêt véritable du public. Elle nuit à la réputation des avocats, de la profession juridique et de l'administration de la justice. Le Barreau a inscrit dans le *Code* le rôle particulier de la profession pour reconnaitre et protéger la dignité des personnes et la diversité de la communauté en Ontario. Les pratiques de marketing doivent être conformes aux exigences des lois sur les droits de la personne en vigueur en Ontario.

[7] Des pratiques de marketing qui n'exprimeraient pas un haut degré de professionnalisme seraient des images, un langage ou des déclarations de nature violente, raciste ou dégradante sexuellement, qui tireraient profit d'une personne vulnérable ou d'un groupe vulnérable ou qui mentionneraient négativement d'autres titulaires, la profession juridique ou l'administration de la justice.

4.2-1.1 L'avocat qui annonce ses services juridiques doit indiquer spécifiquement dans tous ses documents publicitaires qu'il est titulaire d'un permis d'avocat.

Commentaire

[1] Il est important que le public sache que le Barreau délivre des permis aux avocats et aux parajuristes, et si les services seront offerts par un avocat ou un parajuriste.

4.2-1.2 Il est interdit de faire la publicité de services de seconde opinion.

Commentaire

[1] La prestation de secondes opinions est un service précieux pour les clients. Cependant, la publicité des secondes opinions se fait souvent dans le but d'obtenir un mandat et non de fournir une seconde opinion. Ce genre de publicité-leurre est déplacé. La publicité des secondes opinions est interdite en vertu de la présente règle, peu importe l'intention de la publicité.

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 et les taxes, sont facturés en sus ;

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

Proposed Amendments to the Rules of Professional Conduct – Clean Version

CHAPTER 4 The Practice of Law

SECTION 4.1 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

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(e) otherwise bring the profession or the administration of justice into disrepute.

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

[*Amended - October 2014*]

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Proposed Amendments to the Rules of Professional Conduct – Clean Version

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[1] This Rule establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing, including advertisements about the size, location and nature of the lawyer's practice and about awards, rankings and endorsements from third parties.

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(f) using testimonials or endorsements which contain emotional appeals.

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(b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;

(c) marketing that fails to clearly and prominently disclose a practice that the lawyer has of referring clients for a fee, or other consideration, to other licensees;

Proposed Amendments to the Rules of Professional Conduct – Clean Version

(d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both, as the case may be;

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[4] Paragraphs (a) to (d) of Commentary [3] are intended to ensure that marketing does not mislead by failing to make clear what services are actually available and are intended to be provided. It is important that there be no “bait and switch” aspect to marketing. Paragraph (d) is intended to better ensure that prospective clients are aware whether the marketed services being offered will be performed by lawyers or paralegals.

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In any event, any reference to awards, rankings and third party endorsements must comply with all of the provisions of Rule 4.2-1.

[6] This Rule also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of lawyers, the legal profession and the administration of justice. The Law Society has acknowledged in the Rules the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in force in Ontario.

[7] Examples of marketing practices that may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, that take advantage of a vulnerable person or group or that refer negatively to other licensees, the legal profession or the administration of justice.

4.2-1.1 A lawyer marketing legal services shall specifically identify in all marketing materials that they are licensed as a lawyer.

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[1] It is important that the public be aware that both lawyers and paralegals are licensed by the Law Society, and of whether it is a lawyer or a paralegal who is offering to provide services.

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Commentary

[1] The provision of second opinions is a valuable service to clients. However, second opinion marketing is commonly undertaken with a view to obtaining the retainer rather than providing a second opinion. Such “bait and switch” marketing is inappropriate. The marketing of second opinions is prohibited under this rule, whatever the intent of the marketing.

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 and taxes will be charged in addition to the fee; and

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

Proposed Amendments to the Rules of Professional Conduct Fr – Clean Version

CHAPITRE 4 L'exercice de la profession

ARTICLE 4.1 L'ACCESSIBILITÉ DES SERVICES JURIDIQUES

Accessibilité des services juridiques

Restrictions

4.1-2 Lorsqu'il offre ses services juridiques, l'avocat évite tout moyen qui entre dans l'une ou l'autre des catégories suivantes :

a) faux ou trompeurs ;

b) constituant de la coercition, de la contrainte ou du harcèlement ;

c) exploitant une personne qui est vulnérable ou qui n'a pas encore eu le temps de se remettre d'une expérience traumatisante ;

d) visant à convaincre une personne qui a retenu les services d'un autre avocat dans une affaire donnée de changer d'avocat pour cette affaire, sauf si le changement est amorcé par la personne ou l'autre avocat ;

e) jetant autrement le discrédit sur la profession ou sur l'administration de la justice.

Commentaire

[1] Une personne vulnérable ou qui a vécu une expérience traumatisante et ne s'en est pas encore remise peut fort bien avoir besoin de l'aide professionnelle d'un avocat. La présente règle n'empêche pas ce dernier d'offrir son aide à une telle personne. Un avocat peut offrir son aide à une personne si un proche parent ou un ami personnel de la personne communique avec l'avocat à cette fin. L'avocat peut également offrir son aide à une personne avec qui il a un lien de parenté ou entretient une étroite relation professionnelle. La règle interdit à l'avocat d'avoir recours à des moyens inacceptables, abusifs ou autres qui jettent le discrédit sur la profession ou sur l'administration de la justice.

[*Modifié – octobre 2014*]

ARTICLE 4.2 MARKETING

Marketing des services professionnels

4.2-0 Dans la présente règle, « marketing » comprend les publicités et d'autres communications de même type sous diverses formes ainsi que le nom des cabinets (y

compris la raison sociale commerciale), le papier à en-tête, les cartes professionnelles et les logos.

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c) est conforme à l'intérêt public et à une norme élevée de professionnalisme.

Commentaire

[1] Cette règle établit, entre autres choses, les critères de communication dans la promotion des services juridiques. Ces critères s'appliquent aux différentes formes de marketing, y compris les annonces concernant la taille, l'endroit et la nature de la pratique de l'avocat et les récompenses, les classements et les endossements de tierces parties.

[2] Voici des exemples de marketing qui peut contrevenir à cette règle :

a) annoncer un montant d'argent recouvré pour un client ou son succès dans d'anciennes causes, à moins que cette annonce soit accompagnée d'une déclaration indiquant que ces résultats ne sont pas nécessairement révélateurs de résultats futurs et que la somme recouvrée et tout autre résultat de litiges varieront selon la cause ;

b) se vanter d'offrir des services de qualité supérieure à ceux offerts par d'autres avocats ;

c) élever les attentes ;

d) suggérer que l'avocat a un tempérament combatif ;

e) se montrer méprisant envers des personnes, groupes, organisations ou institutions ;

f) se servir de témoignages ou d'endossements qui font appel aux émotions.

[3] Voici des exemples de marketing qui contrevient à cette règle :

a) annoncer des services que l'avocat n'est pas en mesure de fournir conformément à la norme de compétence exigée d'un avocat ;

b) faire de la publicité-leurre, c'est-à-dire une publicité qui attire les clients par des offres de services, de prix ou de conditions autres que les offres normalement faites aux clients qui répondent à la publicité ;

c) faire des annonces qui omettent manifestement de divulguer la pratique de l'avocat de renvoyer des clients à d'autres titulaires de permis, moyennant des frais ou toute autre contrepartie ;

d) omettre de déclarer expressément que les services annoncés seront fournis par des avocats ou des parajuristes autorisés, ou les deux, selon le cas ;

e) faire état de récompenses, d'un classement et d'endossements de tierces parties qui ne sont pas authentiques ou qui risquent d'induire en erreur, de dérouter ou de tromper ;

f) tirer profit d'une personne vulnérable ou d'un groupe vulnérable.

[4] Les alinéas a) à d) du commentaire [3] visent à faire en sorte que le marketing ne soit pas trompeur en omettant d'indiquer clairement les services qui sont effectivement offerts et qui seront fournis. Il est important d'éviter la publicité-leurre. L'alinéa d) vise à s'assurer que les clients éventuels savent que les services annoncés seront offerts par des avocats ou des parajuristes.

[5] L'alinéa e) du commentaire [3] aborde la question de la publicité par la mention des récompenses, des classements et des endossements de tierces parties. Les termes « récompenses » et « classement » devraient être interprétés au sens large, comprenant l'usage de superlatifs comme « le meilleur », « super », « n° 1 » et indications de cette nature. Les récompenses, les classements et les endossements de tierces parties qui contreviennent à cette règle comprennent les suivants :

a) ceux qui ne reflètent pas véritablement la performance de l'avocat et la qualité des services qu'il offre, mais qui semblent le faire ;

b) ceux qui ne sont pas le fruit d'un processus d'évaluation raisonnable ;

c) ceux qui sont remis sur paiement d'une contrepartie quelconque plutôt qu'après une évaluation légitime de la performance et de la qualité de l'avocat ;

d) ceux que l'avocat n'aurait pas pu prouver conformes à cette règle au moment où il en a fait l'annonce.

Il faut porter une attention particulière aux récompenses, classements et endossements de tierces parties mentionnés dans la publicité de masse, comme dans les journaux et sur Internet, et à la télévision, babillards, taxis, autobus, etc. Dans ces contextes, les mentions de récompenses, de classements et d'endossements de tierces parties

doivent être particulièrement claires et directes pour tenir compte du temps de réflexion ou d'évaluation limité dont dispose le client éventuel ou pour donner un contexte.

La mention des récompenses et des honneurs qui reflètent véritablement un service professionnel ou civique ne contrevient pas à cette règle. Par exemple, un client éventuel peut trouver utile de savoir que le gouvernement de l'Ontario ou du Canada, le Barreau ou une autre association professionnelle a remis un honneur à un avocat pour ses services. Cependant, l'avocat devrait s'assurer que ces récompenses et ces honneurs font effectivement état d'une évaluation véritable et responsable de l'avocat dans l'intérêt public.

Quoi qu'il en soit, toute mention de récompenses, classements et d'endossements de tierces parties doit être conforme à toutes les dispositions de la règle 4.2-1.

[6] Cette règle exige aussi que la publicité soit conforme à une norme élevée de professionnalisme. Une publicité non professionnelle n'est pas dans l'intérêt véritable du public. Elle nuit à la réputation des avocats, de la profession juridique et de l'administration de la justice. Le Barreau a inscrit dans le *Code* le rôle particulier de la profession pour reconnaitre et protéger la dignité des personnes et la diversité de la communauté en Ontario. Les pratiques de marketing doivent être conformes aux exigences des lois sur les droits de la personne en vigueur en Ontario.

[7] Des pratiques de marketing qui n'exprimeraient pas un haut degré de professionnalisme seraient des images, un langage ou des déclarations de nature violente, raciste ou dégradante sexuellement, qui tireraient profit d'une personne vulnérable ou d'un groupe vulnérable ou qui mentionneraient négativement d'autres titulaires, la profession juridique ou l'administration de la justice.

4.2-1.1 L'avocat qui annonce ses services juridiques doit indiquer spécifiquement dans tous ses documents publicitaires qu'il est titulaire d'un permis d'avocat.

Commentaire

[1] Il est important que le public sache que le Barreau délivre des permis aux avocats et aux parajuristes, et si les services seront offerts par un avocat ou un parajuriste.

4.2-1.2 Il est interdit de faire la publicité de services de seconde opinion.

Commentaire

[1] La prestation de secondes opinions est un service précieux pour les clients. Cependant, la publicité des secondes opinions se fait souvent dans le but d'obtenir un mandat et non de fournir une seconde opinion. Ce genre de publicité-leurre est déplacé. La publicité des secondes opinions est interdite en vertu de la présente règle, peu importe l'intention de la publicité.

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 et les taxes, sont facturés en sus ;

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

Redline Showing Proposed Amendments to the Paralegal Rules of Conduct

8.02 MAKING LEGAL SERVICES AVAILABLE

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

(2) In offering legal services, a paralegal shall not use means that

(a) ~~that~~ are false or misleading,

(b) ~~that~~ amount to coercion, duress or harassment,

(c) ~~that~~ take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) ~~that~~ are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) ~~that~~ otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal.

[Amended - November 2008]

Redline Showing Proposed Amendments to the Paralegal Rules of Conduct

8.03 MARKETING OF LEGAL SERVICES

(1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

(2) A paralegal may market legal services only if the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal may advertise fees charged by the paralegal 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 and taxes will be charged in addition to the fee, and

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

[Amended - November 2008]

Identification of the Type of License

(4) A paralegal marketing legal services shall specifically identify in all marketing materials that he or she is licensed as a paralegal.

Second Opinion Services

(5) The marketing of second opinion services is prohibited.

Proposed Amendments to the Paralegal Rules of Conduct FR- Red lined

8.02 L'ACCESSIBILITÉ DES SERVICES JURIDIQUES

8.02 (1) Les parajuristes veillent à ce que les services juridiques soient accessibles au public, d'une manière convenable et efficace.

Restrictions

(2) Lorsqu'il offre ses services juridiques, le parajuriste évite tout moyen qui entre dans l'une ou l'autre des catégories suivantes

a) faux ou trompeur,

b) constituant de la coercition, de la contrainte ou du harcèlement,

c) exploitant une personne qui est vulnérable ou qui n'a pas encore eu le temps de se remettre d'une expérience traumatisante,

d) visant à convaincre une personne qui a retenu les services d'un autre parajuriste ou avocat ou avocate dans une affaire donnée de changer de représentation pour cette affaire, sauf si le changement est amorcé par la personne ou l'autre représentation,

e) jetant ~~par ailleurs~~ autrement le discrédit sur la profession parajuridique ou sur l'administration de la justice.

(3) Le parajuriste ne doit pas annoncer des services qui sortent du champ permis de l'exercice de la profession de parajuriste.

[Modifié - novembre 2008]

Proposed Amendments to the Paralegal Rules of Conduct FR- Red lined

8.03 MARKETING DES SERVICES JURIDIQUES

(1) Dans la présente règle, « marketing » comprend ~~la~~ les publicités et d'autres communications de même type sous diverses formes ainsi que le nom des cabinets (y compris la raison sociale commerciale), le papier à ~~l'~~en-tête, les cartes professionnelles et les logos.

(2) Un ~~avocat~~ parajuriste peut faire la promotion~~le marketing~~ de ses services juridiques seulement si la publicité

a) est manifestement vraie, précise et vérifiable,

b) n'est ni trompeuse ni déroutante, et ne risque pas de tromper ou de dérouter,

c) est conforme à l'intérêt public et à une norme élevée de professionnalisme.

Publicité des honoraires

(3) Le parajuriste 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 et les taxes, sont facturés en sus

c) Le parajuriste s'en tient aux frais annoncés dans tous les cas applicables.

[Modifié - novembre 2008]

Identification du type de permis

(4) Le parajuriste qui annonce ses services juridiques doit indiquer spécifiquement dans tous ses documents publicitaires qu'il est titulaire d'un permis de parajuriste.

Services de seconde opinion

(5) Il est interdit de faire la publicité de services de seconde opinion.

Proposed Amendments to the Paralegal Rules of Conduct - Clean

8.02 MAKING LEGAL SERVICES AVAILABLE

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

(2) In offering legal services, a paralegal shall not use means that

(a) are false or misleading,

(b) amount to coercion, duress or harassment,

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal.

[Amended - November 2008]

Proposed Amendments to the Paralegal Rules of Conduct - Clean

8.03 MARKETING OF LEGAL SERVICES

(1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

(2) A paralegal may market legal services only if the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal may advertise fees charged by the paralegal 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 and taxes will be charged in addition to the fee, and

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

[Amended - November 2008]

Identification of the Type of License

(4) A paralegal marketing legal services shall specifically identify in all marketing materials that he or she is licensed as a paralegal.

Second Opinion Services

(5) The marketing of second opinion services is prohibited.

Proposed Amendments to the Paralegal Rules of Conduct FR- Clean

8.02 L'ACCESSIBILITÉ DES SERVICES JURIDIQUES

8.02 (1) Les parajuristes veillent à ce que les services juridiques soient accessibles au public, d'une manière convenable et efficace.

Restrictions

(2) Lorsqu'il offre ses services juridiques, le parajuriste évite tout moyen qui entre dans l'une ou l'autre des catégories suivantes

a) faux ou trompeur,

b) constituant de la coercition, de la contrainte ou du harcèlement,

c) exploitant une personne qui est vulnérable ou qui n'a pas encore eu le temps de se remettre d'une expérience traumatisante,

d) visant à convaincre une personne qui a retenu les services d'un autre parajuriste ou avocat ou avocate dans une affaire donnée de changer de représentation pour cette affaire, sauf si le changement est amorcé par la personne ou l'autre représentation,

e) jetant autrement le discrédit sur la profession parajuridique ou sur l'administration de la justice.

(3) Le parajuriste ne doit pas annoncer des services qui sortent du champ permis de l'exercice de la profession de parajuriste.

[Modifié - novembre 2008]

Proposed Amendments to the Paralegal Rules of Conduct FR- Clean

8.03 MARKETING DES SERVICES JURIDIQUES

(1) Dans la présente règle, « marketing » comprend les publicités et d'autres communications de même type sous diverses formes ainsi que le nom des cabinets (y compris la raison sociale commerciale), le papier à en-tête, les cartes professionnelles et les logos.

(2) Un parajuriste peut faire la promotion de ses services juridiques seulement si la publicité

a) est manifestement vraie, précise et vérifiable,

b) n'est ni trompeuse ni déroutante, et ne risque pas de tromper ou de dérouter,

c) est conforme à l'intérêt public et à une norme élevée de professionnalisme.

Publicité des honoraires

(3) Le parajuriste 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 et les taxes, sont facturés en sus

c) Le parajuriste s'en tient aux frais annoncés dans tous les cas applicables.

[Modifié - novembre 2008]

Identification du type de permis

(4) Le parajuriste qui annonce ses services juridiques doit indiquer spécifiquement dans tous ses documents publicitaires qu'il est titulaire d'un permis de parajuriste.

Services de seconde opinion

(5) Il est interdit de faire la publicité de services de seconde opinion.

Redline Showing Proposed Amendments to the Paralegal Professional Conduct Guidelines

GUIDELINE 19: MAKING LEGAL SERVICES AVAILABLE AND MARKETING OF LEGAL SERVICES

Making Legal Services Available

Rule References:

Rule 8.02

Rule 8.03

1. Rule 8.02(1) describes the paralegal's obligation to make legal services available and the manner in which he or she must do so. A paralegal has a general right to decline a particular representation (except when assigned as representative by a tribunal), but it is a right that should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the paralegal should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the paralegal's private opinion about the guilt of the accused. A paralegal declining representation should assist in obtaining the services of a lawyer or another licensed paralegal qualified in the particular field and able to act.
2. A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a paralegal. A paralegal is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the paralegal for this purpose, and to offer assistance to a person with whom the paralegal has a close family or professional relationship. Rules 8.02 and 8.03 prohibit the paralegal from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

Marketing of Legal Services

Rule References:

Rule 8.02

Rule 8.03

3. In presenting and promoting a paralegal practice, a paralegal must comply with the *Rules* regarding the marketing of legal services.

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4. Rules 8.02 and 8.03 impose certain restrictions and obligations on a paralegal who wishes to market and/or advertise his or her legal services. The *Rules* help to ensure that a paralegal does not mislead clients or the public while still permitting the paralegal to differentiate himself or herself and his or her services from those of lawyers or other paralegals. A paralegal should ensure that his or her marketing and advertising does not suggest that the paralegal is a lawyer and should take steps to correct any misapprehension on the part of a client or prospective client in that respect.

5. Examples of marketing practices that may contravene Rule 8.03(1) include:

    (a) ◦ Stating an amount of money that the paralegal has recovered for a client or refer to the paralegal's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases.

    (b) ◦ Suggesting qualitative superiority to lawyers or other paralegals

    (c) ◦ Raising expectations ~~unjustifiably~~;

    (d) ◦ Suggesting or implying the paralegal is aggressive;

    (e) ◦ Disparaging or demeaning other persons, groups, organizations or institutions;

    (f) ◦ Using testimonials or endorsements which contain emotional appeals.

    ~~◦ Taking advantage of a vulnerable person or group.~~

6. Examples of marketing that do contravene Rule 8.03(1) include

    (a) marketing services that the paralegal is not currently able to perform to the standard of a competent paralegal;

    (b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;

    (c) marketing that fails to clearly and prominently disclose a practice that the paralegal has of referring clients for a fee, or other consideration, to other licensees;

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(d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both as the case may be;

(e) referring to awards, rankings and third party endorsements are not bona fide or are likely to be misleading, confusing, or deceptive; and

(f) taking advantage of a vulnerable person or group.

7. Rule 8.03(2) establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing including advertisements about the size, location and nature of the paralegal's practice and awards and endorsements from third parties.

8. Paragraphs 6(a-d) of these Guidelines are intended to ensure that marketing does not mislead by failing to make clear what services are actually available and are intended to be provided. Paragraph (d) is intended to better ensure that prospective clients are aware whether the marketed services are being offered will be performed by lawyers or paralegals.

9. Paragraph 6(e) of these Guidelines addresses marketing by reference to awards, rankings and third party endorsements. The terms "awards" and "rankings" are intended to be interpreted broadly and to include superlative titles such as "best", "super", "#1" and similar indications. Awards, rankings and third party endorsements which contravene this rule include awards or rankings that:

(a) do not genuinely reflect the performance of the paralegal and the quality of services provided by the paralegal but appear to do so;

(b) are not the result of a reasonable evaluative process;

(c) are conferred in part as a result of the payment of a fee or other consideration rather than as a result of a legitimate evaluation of the performance and quality of the paralegal; or

(d) the paralegal could not have demonstrated, at the time of reference, were compliant with this rule.

10. Particular care should be taken in respect of awards and rankings referenced in mass advertising, such as in newspaper and internet advertising and advertising on television, billboards, taxis, buses and the like. In such contexts, references to awards, rankings and third party endorsements must be particularly clear and straightforward as there is little opportunity for reflection or appreciation on the part of the potential client or to provide context.

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11. References to awards and honours that are genuine reflections of the professional or civic service do not contravene this rule. For example, a potential client may consider it useful to know that a paralegal has been honoured for their service by the Canadian or the Ontario government, the Law Society or a professional organization. However, the paralegal should take care to ensure that such awards and honours reflect a genuine and responsible assessment in the public interest.

12. Rule 8.03(2) also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of paralegals, the legal professions and the administration of justice. The Law Society has acknowledged in the Rules the special role of the professions to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in Ontario.

13. Examples of marketing practices which may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other licensees, the legal professions or the administration of justice.

14. Rule 8.03(4) and Guideline 6(d) to Rule 8.03(1) foster public awareness that both lawyers and paralegals are licensed by the Law Society, and transparency as to who is offering to provide services.

15. Rule 8.03(5) prohibits the marketing of second opinion services. The provision of second opinions is a valuable service to clients. However, second opinion marketing is commonly with a view to obtaining the retainer, rather than providing a second opinion. Such “bait and switch” marketing is inappropriate. The marketing of second opinions is prohibited under this rule, whatever the intent of the marketing.

Proposed Amendments to the Paralegal Professional Conduct Guidelines FR - redlined

LIGNE DIRECTRICE 19 : L'ACCESSIBILITÉ ET LE MARKETING DES SERVICES JURIDIQUES

Accessibilité des services juridiques

Règle 8.02

Règle 8.03

1. La règle 8.02 (1) décrit l'obligation du ou de la parajuriste d'offrir des services juridiques et la manière de le faire. Le parajuriste a un droit général de refuser une représentation particulière (sauf lorsqu'assigné à titre de représentant par un tribunal), mais il s'agit d'un droit qui devrait être exercé avec prudence, surtout si le résultat probable serait de rendre la tâche difficile à une personne qui cherche à obtenir des conseils juridiques ou une représentation juridique. En général, le parajuriste ne doit pas exercer ce droit simplement parce que la personne qui a besoin de services juridiques ou parce que sa cause est impopulaire ou notoire, ou parce que des intérêts puissants ou des allégations de manquement ou de malfaisance sont en jeu, ou en raison de son opinion privée quant à la culpabilité de l'accusé. Le parajuriste qui refuse de représenter une personne doit aider celle-ci à obtenir les services d'un avocat ou d'un autre parajuriste autorisé qui a les compétences requises dans le domaine en question et qui est capable d'agir.
2. Une personne vulnérable ou qui a vécu une expérience traumatisante et ne s'en est pas encore remise peut fort bien avoir besoin de l'aide professionnelle d'un parajuriste. La présente règle n'empêche pas ce dernier d'offrir son aide à une telle personne. Un parajuriste peut offrir son aide à une personne si un proche parent ou un ami personnel de la personne communique avec le parajuriste à cette fin. Le parajuriste peut également offrir son aide à une personne avec qui il a un lien de parenté ou entretient une étroite relation professionnelle. Les règles 8.02 et 8.03 interdisent au parajuriste d'avoir recours à des moyens inacceptables, abusifs ou autres qui jettent le discrédit sur la profession ou sur l'administration de la justice.

Marketing des services juridiques

Règle 8.02

Règle 8.03

3. Le ou la parajuriste qui souhaite présenter son cabinet ou en faire la promotion doit respecter les dispositions du Code concernant le marketing des services juridiques.

Proposed Amendments to the Paralegal Professional Conduct Guidelines FR - redlined

4. Les règles 8.02 et 8.03 imposent certaines restrictions et obligations aux parajuristes qui désirent promouvoir leurs services juridiques ou en faire la publicité. Le Code permet d'assurer qu'un parajuriste ne trompe pas ses clients ou le public tout en permettant aux parajuristes de se distinguer et de distinguer ses services de ceux des avocats ou d'autres parajuristes. Un parajuriste doit s'assurer que son marketing et sa publicité ne suggèrent pas que le parajuriste est un avocat et doit prendre des mesures pour corriger tout malentendu de la part d'un client ou d'un client éventuel à cet égard.

5. Voici des exemples de pratiques de marketing qui peuvent contrevenir à la règle 8.03 (1) :

    a) annoncer un montant d'argent recouvré pour un client ou son succès dans d'anciennes causes, à moins que cette annonce soit accompagnée d'une déclaration indiquant que ces résultats ne sont pas nécessairement révélateurs de résultats futurs et que la somme recouvrée et tout autre résultat de litiges varieront selon la cause ;

    b) se vanter d'offrir des services de qualité supérieure à ceux d'autres avocats ou parajuristes ;

    c) élever les attentes ;

    d) suggérer que le parajuriste a un tempérament combatif ;

    e) se montrer méprisant envers des personnes, groupes, organisations ou institutions ;

    f) se servir de témoignages ou d'endossements qui font appel aux émotions.

    ~~tirer profit d'une personne vulnérable ou d'un groupe vulnérable~~

6. Voici des exemples de marketing qui contrevient à la règle 8.03 (1) :

    a) annoncer des services que le parajuriste n'est pas en mesure de fournir conformément à la norme de compétence exigée d'un parajuriste ;

    b) faire de la publicité-leurre, c'est-à-dire une publicité qui attire les clients par des offres de services, de prix ou de conditions autres que les offres normalement faites aux clients qui répondent à la publicité ;

    c) faire des annonces qui omettent manifestement de divulguer la pratique du parajuriste de renvoyer des clients à d'autres titulaires de permis, moyennant des frais ou toute autre contrepartie ;

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d) omettre de déclarer expressément que les services annoncés seront fournis par des avocats ou des parajuristes autorisés, ou les deux, selon le cas ;

e) faire état de récompenses, d'un classement et d'endossements de tierces parties qui ne sont pas authentiques ou qui risquent d'induire en erreur, de dérouter ou de tromper ;

f) tirer profit d'une personne vulnérable ou d'un groupe vulnérable.

7. La règle 8.03 (2) établit, entre autres choses, les critères de communication dans la promotion des services juridiques. Ces critères s'appliquent aux différentes formes de marketing, y compris les annonces concernant la taille, l'endroit et la nature de la pratique du parajuriste et les récompenses, les classements et les endossements de tierces parties.

8. Les alinéas 6 a) à d) des présentes lignes directrices visent à faire en sorte que le marketing ne soit pas trompeur en omettant d'indiquer clairement les services qui sont effectivement offerts et qui seront fournis. L'alinéa d) vise à s'assurer que les clients éventuels savent que les services annoncés seront offerts par des avocats ou des parajuristes.

9. L'alinéa 6 e) des présentes lignes directrices aborde la question de la publicité par la mention des récompenses, des classements et des endossements de tierces parties. Les termes « récompenses » et « classement » devraient être interprétés au sens large, comprenant l'usage de superlatifs comme « le meilleur », « super », « no 1 » et indications de cette nature. Les récompenses, les classements et les endossements de tierces parties qui contreviennent à cette règle comprennent les suivants :

a) ceux qui ne reflètent pas véritablement la performance du parajuriste et la qualité des services qu'il offre, mais qui semblent le faire ;

b) ceux qui ne sont pas le fruit d'un processus d'évaluation raisonnable ;

c) ceux qui sont remis sur paiement d'une contrepartie quelconque plutôt qu'après une évaluation légitime de la performance et de la qualité du parajuriste ;

d) ceux que le parajuriste n'aurait pas pu prouver conformes à cette règle au moment où il en a fait l'annonce.

10. Il faut porter une attention particulière aux récompenses, classements et endossements de tierces parties mentionnés dans la publicité de masse, comme

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dans les journaux et sur Internet, et à la télévision, babillards, taxis, autobus, etc. Dans ces contextes, les mentions de récompenses, de classements et d'endossements de tierces parties doivent être particulièrement claires et directes pour tenir compte du temps de réflexion ou d'évaluation limité dont dispose le client éventuel ou pour donner un contexte.

11. La mention des récompenses et des honneurs qui reflètent véritablement un service professionnel ou civique ne contrevient pas à cette règle. Par exemple, un client éventuel peut trouver utile de savoir que le gouvernement de l'Ontario ou du Canada, le Barreau ou une autre association professionnelle a remis un honneur à un parajuriste pour ses services. Cependant, le parajuriste devrait s'assurer que ces récompenses et ces honneurs font effectivement état d'une évaluation véritable et responsable du parajuriste dans l'intérêt public.

12. La règle 8.03 (2) exige aussi que la publicité soit conforme à une norme élevée de professionnalisme. Une publicité non professionnelle n'est pas dans l'intérêt véritable du public. Elle nuit à la réputation des parajuristes, de la profession juridique et de l'administration de la justice. Le Barreau a inscrit dans le Code le rôle particulier de la profession pour reconnaitre et protéger la dignité des personnes et la diversité de la communauté en Ontario. Les pratiques de marketing doivent être conformes aux exigences des lois sur les droits de la personne en vigueur en Ontario.

13. Des pratiques de marketing qui n'exprimeraient pas un haut degré de professionnalisme seraient des images, un langage ou des déclarations de nature violente, raciste ou dégradante sexuellement, qui tireraient profit d'une personne vulnérable ou d'un groupe vulnérable ou qui mentionneraient négativement d'autres titulaires, la profession juridique ou l'administration de la justice.

14. La règle 8.03 (4), la ligne directrice 6 d) et la règle 8.03 (1) soulignent l'importance que le public sache que le Barreau délivre des permis aux avocats et aux parajuristes, et si les services seront offerts par un avocat ou un parajuriste.

15. La règle 8.03 (5) interdit de faire la publicité de services de seconde opinion. La prestation de secondes opinions est un service précieux pour les clients. Cependant, la publicité des secondes opinions se fait souvent dans le but d'obtenir un mandat et non de fournir une seconde opinion. Ce genre de publicité-leurre est déplacé. La publicité des secondes opinions est interdite en vertu de la présente règle, peu importe l'intention de la publicité.

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GUIDELINE 19: MAKING LEGAL SERVICES AVAILABLE AND MARKETING OF LEGAL SERVICES

Making Legal Services Available

Rule References:

Rule 8.02

Rule 8.03

1. Rule 8.02(1) describes the paralegal's obligation to make legal services available and the manner in which he or she must do so. A paralegal has a general right to decline a particular representation (except when assigned as representative by a tribunal), but it is a right that should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the paralegal should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the paralegal's private opinion about the guilt of the accused. A paralegal declining representation should assist in obtaining the services of a lawyer or another licensed paralegal qualified in the particular field and able to act.
2. A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a paralegal. A paralegal is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the paralegal for this purpose, and to offer assistance to a person with whom the paralegal has a close family or professional relationship. Rules 8.02 and 8.03 prohibit the paralegal from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

Marketing of Legal Services

Rule References:

Rule 8.02

Rule 8.03

3. In presenting and promoting a paralegal practice, a paralegal must comply with the *Rules* regarding the marketing of legal services.

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4. Rules 8.02 and 8.03 impose certain restrictions and obligations on a paralegal who wishes to market and/or advertise his or her legal services. The *Rules* help to ensure that a paralegal does not mislead clients or the public while still permitting the paralegal to differentiate himself or herself and his or her services from those of lawyers or other paralegals. A paralegal should ensure that his or her marketing and advertising does not suggest that the paralegal is a lawyer and should take steps to correct any misapprehension on the part of a client or prospective client in that respect.

5. Examples of marketing practices that may contravene Rule 8.03(1) include:

    (a) Stating an amount of money that the paralegal has recovered for a client or refer to the paralegal's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases.

    (b) Suggesting qualitative superiority to lawyers or other paralegals

    (c) Raising expectations;

    (d) Suggesting or implying the paralegal is aggressive;

    (e) Disparaging or demeaning other persons, groups, organizations or institutions;

    (f) Using testimonials or endorsements which contain emotional appeals.

6. Examples of marketing that do contravene Rule 8.03(1) include

    (a) marketing services that the paralegal is not currently able to perform to the standard of a competent paralegal;

    (b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;

    (c) marketing that fails to clearly and prominently disclose a practice that the paralegal has of referring clients for a fee, or other consideration, to other licensees;

    (d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both as the case may be;

    (e) referring to awards, rankings and third party endorsements are not bona fide or are likely to be misleading, confusing, or deceptive; and

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(f) taking advantage of a vulnerable person or group.

7. Rule 8.03(2) establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing including advertisements about the size, location and nature of the paralegal's practice and awards and endorsements from third parties.

8. Paragraphs 6(a-d) of these Guidelines are intended to ensure that marketing does not mislead by failing to make clear what services are actually available and are intended to be provided. Paragraph (d) is intended to better ensure that prospective clients are aware whether the marketed services are being offered will be performed by lawyers or paralegals.

9. Paragraph 6(e) of these Guidelines addresses marketing by reference to awards, rankings and third party endorsements. The terms "awards" and "rankings" are intended to be interpreted broadly and to include superlative titles such as "best", "super", "#1" and similar indications. Awards, rankings and third party endorsements which contravene this rule include awards or rankings that:

(a) do not genuinely reflect the performance of the paralegal and the quality of services provided by the paralegal but appear to do so;

(b) are not the result of a reasonable evaluative process;

(c) are conferred in part as a result of the payment of a fee or other consideration rather than as a result of a legitimate evaluation of the performance and quality of the paralegal; or

(d) the paralegal could not have demonstrated, at the time of reference, were compliant with this rule.

10. Particular care should be taken in respect of awards and rankings referenced in mass advertising, such as in newspaper and internet advertising and advertising on television, billboards, taxis, buses and the like. In such contexts, references to awards, rankings and third party endorsements must be particularly clear and straightforward as there is little opportunity for reflection or appreciation on the part of the potential client or to provide context.

11. References to awards and honours that are genuine reflections of the professional or civic service do not contravene this rule. For example, a potential client may consider it useful to know that a paralegal has been honoured for their service by the Canadian or the Ontario government, the Law Society or a professional organization. However, the paralegal should take care to ensure that such awards and honours reflect a genuine and responsible assessment in the public interest.

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12. Rule 8.03(2) also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of paralegals, the legal professions and the administration of justice. The Law Society has acknowledged in the Rules the special role of the professions to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in Ontario.

13. Examples of marketing practices which may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other licensees, the legal professions or the administration of justice.

14. Rule 8.03(4) and Guideline 6(d) to Rule 8.03(1) foster public awareness that both lawyers and paralegals are licensed by the Law Society, and transparency as to who is offering to provide services.

15. Rule 8.03(5) prohibits the marketing of second opinion services. The provision of second opinions is a valuable service to clients. However, second opinion marketing is commonly with a view to obtaining the retainer, rather than providing a second opinion. Such “bait and switch” marketing is inappropriate. The marketing of second opinions is prohibited under this rule, whatever the intent of the marketing.

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LIGNE DIRECTRICE 19 : L'ACCESSIBILITÉ ET LE MARKETING DES SERVICES JURIDIQUES

Accessibilité des services juridiques

Règle 8.02

Règle 8.03

1. La règle 8.02 (1) décrit l'obligation du ou de la parajuriste d'offrir des services juridiques et la manière de le faire. Le parajuriste a un droit général de refuser une représentation particulière (sauf lorsqu'assigné à titre de représentant par un tribunal), mais il s'agit d'un droit qui devrait être exercé avec prudence, surtout si le résultat probable serait de rendre la tâche difficile à une personne qui cherche à obtenir des conseils juridiques ou une représentation juridique. En général, le parajuriste ne doit pas exercer ce droit simplement parce que la personne qui a besoin de services juridiques ou parce que sa cause est impopulaire ou notoire, ou parce que des intérêts puissants ou des allégations de manquement ou de malfaisance sont en jeu, ou en raison de son opinion privée quant à la culpabilité de l'accusé. Le parajuriste qui refuse de représenter une personne doit aider celle-ci à obtenir les services d'un avocat ou d'un autre parajuriste autorisé qui a les compétences requises dans le domaine en question et qui est capable d'agir.
2. Une personne vulnérable ou qui a vécu une expérience traumatisante et ne s'en est pas encore remise peut fort bien avoir besoin de l'aide professionnelle d'un parajuriste. La présente règle n'empêche pas ce dernier d'offrir son aide à une telle personne. Un parajuriste peut offrir son aide à une personne si un proche parent ou un ami personnel de la personne communique avec le parajuriste à cette fin. Le parajuriste peut également offrir son aide à une personne avec qui il a un lien de parenté ou entretient une étroite relation professionnelle. Les règles 8.02 et 8.03 interdisent au parajuriste d'avoir recours à des moyens inacceptables, abusifs ou autres qui jettent le discrédit sur la profession ou sur l'administration de la justice.

Marketing des services juridiques

Règle 8.02

Règle 8.03

3. Le ou la parajuriste qui souhaite présenter son cabinet ou en faire la promotion doit respecter les dispositions du Code concernant le marketing des services juridiques.

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4. Les règles 8.02 et 8.03 imposent certaines restrictions et obligations aux parajuristes qui désirent promouvoir leurs services juridiques ou en faire la publicité. Le Code permet d'assurer qu'un parajuriste ne trompe pas ses clients ou le public tout en permettant aux parajuristes de se distinguer et de distinguer ses services de ceux des avocats ou d'autres parajuristes. Un parajuriste doit s'assurer que son marketing et sa publicité ne suggèrent pas que le parajuriste est un avocat et doit prendre des mesures pour corriger tout malentendu de la part d'un client ou d'un client éventuel à cet égard.

5. Voici des exemples de pratiques de marketing qui peuvent contrevenir à la règle 8.03 (1) :

    a) annoncer un montant d'argent recouvré pour un client ou son succès dans d'anciennes causes, à moins que cette annonce soit accompagnée d'une déclaration indiquant que ces résultats ne sont pas nécessairement révélateurs de résultats futurs et que la somme recouvrée et tout autre résultat de litiges varieront selon la cause ;

    b) se vanter d'offrir des services de qualité supérieure à ceux d'autres avocats ou parajuristes ;

    c) élever les attentes ;

    d) suggérer que le parajuriste a un tempérament combatif ;

    e) se montrer méprisant envers des personnes, groupes, organisations ou institutions ;

    f) se servir de témoignages ou d'endossements qui font appel aux émotions.

6. Voici des exemples de marketing qui contrevient à la règle 8.03 (1) :

    a) annoncer des services que le parajuriste n'est pas en mesure de fournir conformément à la norme de compétence exigée d'un parajuriste ;

    b) faire de la publicité-leurre, c'est-à-dire une publicité qui attire les clients par des offres de services, de prix ou de conditions autres que les offres normalement faites aux clients qui répondent à la publicité ;

    c) faire des annonces qui omettent manifestement de divulguer la pratique du parajuriste de renvoyer des clients à d'autres titulaires de permis, moyennant des frais ou toute autre contrepartie ;

    d) omettre de déclarer expressément que les services annoncés seront fournis par des avocats ou des parajuristes autorisés, ou les deux, selon le cas ;

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e) faire état de récompenses, d'un classement et d'endossements de tierces parties qui ne sont pas authentiques ou qui risquent d'induire en erreur, de dérouter ou de tromper ;

f) tirer profit d'une personne vulnérable ou d'un groupe vulnérable.

7. La règle 8.03 (2) établit, entre autres choses, les critères de communication dans la promotion des services juridiques. Ces critères s'appliquent aux différentes formes de marketing, y compris les annonces concernant la taille, l'endroit et la nature de la pratique du parajuriste et les récompenses, les classements et les endossements de tierces parties.

8. Les alinéas 6 a) à d) des présentes lignes directrices visent à faire en sorte que le marketing ne soit pas trompeur en omettant d'indiquer clairement les services qui sont effectivement offerts et qui seront fournis. L'alinéa d) vise à s'assurer que les clients éventuels savent que les services annoncés seront offerts par des avocats ou des parajuristes.

9. L'alinéa 6 e) des présentes lignes directrices aborde la question de la publicité par la mention des récompenses, des classements et des endossements de tierces parties. Les termes « récompenses » et « classement » devraient être interprétés au sens large, comprenant l'usage de superlatifs comme « le meilleur », « super », « no 1 » et indications de cette nature. Les récompenses, les classements et les endossements de tierces parties qui contreviennent à cette règle comprennent les suivants :

a) ceux qui ne reflètent pas véritablement la performance du parajuriste et la qualité des services qu'il offre, mais qui semblent le faire ;

b) ceux qui ne sont pas le fruit d'un processus d'évaluation raisonnable ;

c) ceux qui sont remis sur paiement d'une contrepartie quelconque plutôt qu'après une évaluation légitime de la performance et de la qualité du parajuriste ;

d) ceux que le parajuriste n'aurait pas pu prouver conformes à cette règle au moment où il en a fait l'annonce.

10. Il faut porter une attention particulière aux récompenses, classements et endossements de tierces parties mentionnés dans la publicité de masse, comme dans les journaux et sur Internet, et à la télévision, babillards, taxis, autobus, etc. Dans ces contextes, les mentions de récompenses, de classements et d'endossements de tierces parties doivent être particulièrement claires et

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directes pour tenir compte du temps de réflexion ou d'évaluation limité dont dispose le client éventuel ou pour donner un contexte.

11. La mention des récompenses et des honneurs qui reflètent véritablement un service professionnel ou civique ne contrevient pas à cette règle. Par exemple, un client éventuel peut trouver utile de savoir que le gouvernement de l'Ontario ou du Canada, le Barreau ou une autre association professionnelle a remis un honneur à un parajuriste pour ses services. Cependant, le parajuriste devrait s'assurer que ces récompenses et ces honneurs font effectivement état d'une évaluation véritable et responsable du parajuriste dans l'intérêt public.

12. La règle 8.03 (2) exige aussi que la publicité soit conforme à une norme élevée de professionnalisme. Une publicité non professionnelle n'est pas dans l'intérêt véritable du public. Elle nuit à la réputation des parajuristes, de la profession juridique et de l'administration de la justice. Le Barreau a inscrit dans le Code le rôle particulier de la profession pour reconnaitre et protéger la dignité des personnes et la diversité de la communauté en Ontario. Les pratiques de marketing doivent être conformes aux exigences des lois sur les droits de la personne en vigueur en Ontario.

13. Des pratiques de marketing qui n'exprimeraient pas un haut degré de professionnalisme seraient des images, un langage ou des déclarations de nature violente, raciste ou dégradante sexuellement, qui tireraient profit d'une personne vulnérable ou d'un groupe vulnérable ou qui mentionneraient négativement d'autres titulaires, la profession juridique ou l'administration de la justice.

14. La règle 8.03 (4), la ligne directrice 6 d) et la règle 8.03 (1) soulignent l'importance que le public sache que le Barreau délivre des permis aux avocats et aux parajuristes, et si les services seront offerts par un avocat ou un parajuriste.

15. La règle 8.03 (5) interdit de faire la publicité de services de seconde opinion. La prestation de secondes opinions est un service précieux pour les clients. Cependant, la publicité des secondes opinions se fait souvent dans le but d'obtenir un mandat et non de fournir une seconde opinion. Ce genre de publicité-leurre est déplacé. La publicité des secondes opinions est interdite en vertu de la présente règle, peu importe l'intention de la publicité.

SUMMARY OF FEEDBACK RECEIVED IN RESPONSE TO THE
ADVERTISING AND FEE ISSUES WORKING GROUP JULY 2016 CALL FOR FEEDBACK

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(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.