Contingency Fee Reforms Consultation
Winter 2018

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Submitted to: Law Society of Ontario Advertising and Fee Arrangements Working Group

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

Introduction

The Ontario Bar Association ("OBA") is pleased to provide comments to the Law Society of Ontario with respect to the Advertising and Fee Arrangements Working Group Call for Comment on Contingency Fee Reform, Winter 2018 ("Call for Comment").

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and law students in Ontario. OBA members are on the frontlines of our justice system in every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision makers with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

This submission was primarily prepared by members of the OBA Insurance Law section, which comprises almost 700 lawyers whose practices and clients are directly affected by rules around contingency fee arrangements, including in all areas of personal injury law, both plaintiff- and defence-side. The submission has also received valuable input from lawyers practicing in diverse areas of law, including civil litigation, class actions, and employment law.

Background

The current Call for Comment, issued February 20, 2018, constitutes the most recent phase of work by the Advertising and Fee Arrangements Working Group ("the Working Group") of the Law Society's Professional Regulation Committee. It flows from a series of policy directions regarding the reform of contingency fee agreements ("CFAs") put forward in the Working Group's Seventh Report to Convocation and approved in principle in November 2017.

The CFA reforms proposed in the Working Group's Seventh Report were guided by a number of imperatives, including achieving better transparency of CFAs for clients and protecting meaningful access to justice for high-risk, low-recovery claims for compensation. As a preliminary matter, we were pleased to see the Working Group's strong recognition in the Seventh Report of the important role contingency fees play in enhancing access to justice and the inherent difficulty of a "one-size fits-all" approach to contingency fee agreements. Our position remains consistent, as indicated in our earlier submission, that CFAs across different areas of law can carry unique considerations and implications in practice, and that changes to contingency structures across different areas of law should be approached carefully to avoid unintended consequences.

The current Call for Comment takes the shape of two versions of a mandatory standard form CFA, two versions of a "Know Your Rights" guide for the public, and proposed supporting amendments to the *Rules of Professional Conduct and* Commentary. Our members have reviewed this material closely, in conjunction with the policy direction approved in principle in the Seventh Report. It is clear that the Working Group has invested considerable time and effort in the drafts, and we thank them for their work in this regard. We have raised four issues below for consideration, which relate to the implementation of the Seventh Report's recommendations.

Timing and Content of Disclosure of Fee Breakdown

The policy direction approved by Convocation in the Seventh Report stated that "when the contingency fee is ultimately charged to the client," counsel will be required to provide "a clear breakdown of the total amount of the settlement or award, the net amount that will actually be received by the client, itemized and clearly identified disbursement costs, legal fees, and taxes."[1] As indicated in that Report, the mandatory breakdown of the settlement or award "is intended to provide clients with a full and clear account of all amounts."[2] Consistent with that direction, the proposed Rule 3.6-2.1(2)(c) repeats this language, stating that the breakdown must be provided "when the contingency fee is ultimately charged."[3]

Paragraph 4 of the Commentary to Rule 3.6-2.1 applies a broader lens, stating that when a lawyer is

> providing advice to the client about settlement of the client's matter, the lawyer should provide the client a written estimate of the approximate net amount to be received by the client on the basis of the settlement offer(s). This estimate should include information sufficient for the client to make an informed decision, and include a breakdown of the lawyer's fees, disbursements, and/or any other charge that will be deducted from the amount the client will receive.[4]

Providing the client with an approximate breakdown of how much they will receive, in advance of finalizing the settlement, is appropriate not only for the purpose of obtaining instructions but also to ensure transparency and clarity from the client's perspective.

In our view, however, the language that is proposed to be included in the mandatory standard form CFA is problematic. It states:

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[1] Seventh Report to Convocation, November 2017, para. 13.b.iv.
[2] Ibid., para. 56.
[3] Contingency Fee Reforms Consultation Document, February 2018, p. 48.
[4] Ibid., p. 49 [emphasis added].

> We will only settle your matter with your consent after we provide you with the proposed settlement amount, and a detailed breakdown of the proposed settlement, including the amount you will actually receive.[5]

This statement simply does not reflect the reality of the settlement negotiation process. It is impossible in practice to provide a client with this level of certainty at this stage in the proceedings, given the fluid and rapidly-evolving nature of settlement negotiations, particularly given an approaching trial date. While counsel must have instructions from their clients in relation to an approximate settlement amount during negotiations, it is not possible for a lawyer to guarantee recovery of an *exact* amount prior to final settlement. This kind of rigidity has the potential to interfere with the flexibility of the settlement negotiation process, to the detriment of the client's potential recovery.

In our view, alternative wording should replace the above passage in the mandatory standard form CFA:

> We will only settle your matter with your consent after we provide you with the ~~proposed~~ approximate net settlement amount, and a detailed breakdown of the proposed settlement, including the minimum amount that you have agreed to accept.

This wording would conform with the new Commentary, para. 4, while providing certainty and transparency for clients in terms of the amount they will recover. It also conforms with current practice of counsel who engage in settlement negotiations based on an approximate overall settlement figure and having received instructions from their clients that they agree to accept no less than a specific amount, which has the effect of encouraging further negotiations, to the benefit of the client.

Calculation of Contingency Fee and Maximum Recovery

The policy direction approved by Convocation in the Seventh Report recommended that s. 28.1 of the *Solicitors Act* be amended to provide that where the merits of a matter are adjudicated, the lawyer can choose between receiving either of the following:

1. The agreed CFA amount.
2. An amount equal to full indemnity determined based on the amount awarded by the court against the defendant for legal costs.
    - Where only partial indemnity costs are awarded, full indemnity costs would be deemed to equal the partial indemnity costs awarded together with a gross-up equal to two-thirds of the partial indemnity costs awarded.

[5] Contingency Fee Reforms Consultation Document, February 2018, p. 7 [emphasis added].

- The gross-up shall not exceed one-half of the contingency fee that the licensee would otherwise be able to charge under their CFA.

We agree with the Working Group that this approach lends reasonableness and flexibility to the contingency fee calculation, with a view to ensuring that clients with high-risk, complex matters are able to bring those matters forward.[6]

However, two passages in the draft standard form CFA and the "Know Your Rights" do not appear to reflect the reality of this anticipated new approach under proposed amendments to the *Solicitors Act* and regulation. In the draft standard form CFA, we find the following:

> You understand that we will not recover more in contingency fees than you recover in damages or receive through a settlement.[7]

And in the "Know Your Rights" document, we find the following:

> A lawyer or paralegal's fees cannot be more than the amount that you recover in a proceeding or receive as a settlement, unless you agree and the court approves the agreement.[8]

While these statements are accurate within the *current* legislative context, given ss. 3.1 and 7 of O. Reg. 195/04, they are in conflict with the Law Society's contemplated amendments to the *Solicitors Act* regarding the calculation of contingency fees for adjudicated matters, as described above.

Objectively, these statements cannot be accurate under the new regime in any matter where a full indemnity costs award exceeds the award of damages. Moreover, certain matters where the damages award exceeds the partial indemnity costs award will also prove these statements inaccurate. Consider an example where damages are awarded in the amount of $75,000, while $60,000 is awarded for costs on a partial indemnity basis.[9] Also assume that the agreed CFA amount is 30%.

	Lawyer recovers	**Client recovers**
Agreed CFA amount (30%)	**$40,500**, being 30% of the total amount of $135,000 ($75,000 in damages and $60,000 in costs)	**$94,500**, being 70% of the total amount of $135,000
Partial indemnity costs award	$60,000 (partial indemnity) + $40,000 ("gross-up" – two-thirds of partial indemnity award) = $100,000	

[6] Seventh Report to Convocation, November 2017, para. 86.
[7] Contingency Fee Reforms Consultation Document, February 2018, p. 19.
[8] Ibid., p. 41.
[9] See the damages and costs awards in *Gardner v. Giovinazzo*, 2005 CanLII 34805 (ONSC), although numbers have been rounded to simplify the calculations.

	This calculation cannot be used because the "gross-up" is more than half of the CFA amount. Therefore: $60,000 (partial indemnity) + $20,250 (1/2 of CFA amount) = **$80,250**	$135,000 - $80, 250 = **$54,750**

In our view, the statements in the versions of the standard form CFA and the "Know Your Rights" document – drafted to conform with proposed amendments to the *Solicitors Act*, O. Reg. 195/04, and Law Society requirements – must be removed. Failing to do so would effectively place a cap on contingency fees (a concept specifically considered and rejected by the Working Group in the Seventh Report) and prevent the application of the lawyer's choice regarding fees should the matter be adjudicated, as contemplated by the proposed *Solicitors Act* amendments.

Mandatory Website Disclosure

The proposed Rule 3.6-2.2(1) and accompanying Commentary propose to require lawyers who intend to enter into a contingency fee agreement to disclose the maximum percentage of any fee that a client will be charged, either by publication on the lawyer's website or by providing that information when the lawyer is first contacted.

The requirement flows from the Working Group's perspective that the contingency fee structure should be transparent and clear to the consumer at the outset. As stated in our previous submission, our members share these goals. However, we foresee challenges with respect to both efficacy and enforceability of the proposed website requirement.

In furtherance of its transparency goals, the Working Group initially considered whether lawyers should be required to disclose their standard arrangements, including their usual contingent rates and disbursements arrangements, on their websites.[10] Ultimately, the Working Group heard from stakeholder feedback that contingency rates vary considerably, and depend on "range of factors specific to the particular case, such as the nature of the claim and the risk involved."[11] The Working Group further recognized the following principles, among others:

- Requiring lawyers to offer services for all matters at their published standard rate could limit the types of cases that licensees would be willing to take, or lead to lawyers charging a higher standard rate in order to cover high-risk cases.

[10] Report to Convocation, June 2016, para. 62.
[11] Fifth Report to Convocation, June 2017, para. 184.

- Permitting lawyers to depart from a published standard rate based on the nature of the case would make the published rate of little use to consumers.

- The uncertainties of contingent fee files, and the need for lawyers to be able to manage the risk not only of individual cases but of their portfolio of cases, make it necessary for lawyers to be able to tailor their contingency fee.[12]

Ultimately, the Working Group decided that publication of a standard rate would not be appropriate.

Nevertheless, the Working Group returned to the concept as a transparency measure in the Seventh Report, in an effort to help consumers determine whether services being offered are competitive. It specifically rejected requiring lawyers to post a general "range" of contingency fee rates or an average percentage that the lawyer or firm charges, because "this would likely be of limited value and potentially problematic."[13] The Working Group ultimately recommended that lawyers be required to disclose their "personal cap," as proposed by the new Rule 3.6-2.2.

In our view, many of the same objections identified by the Working Group regarding the publication of a "standard" or "average" contingency fee also apply to the publication of a "personal cap." In particular, given the range of potential rates in the context of the facts of each case and the level of risk involved, it is unclear how the publication of a "maximum" rate will provide any value to consumers. At best, it is hard to see the benefit that such a requirement would provide to the public; at worst, the requirement would provide consumers with misleading information presented in a way that incentivizes the choice of legal counsel based on the lowest "maximum" rate that can be found (which may have little bearing on the actual contingency rate that would be charged to that specific client). Moreover, the enforceability of this requirement appears problematic, given that the actual rate charged in any given matter would typically be subject to solicitor-client privilege. As a result, we believe disclosure of a personal cap is neither necessary nor helpful.

In our view, there are more effective, less misleading ways to satisfy the goals of this requirement, which are to facilitate transparency and help consumers determine whether the services being offered are competitive. For example, there could be a requirement to post on the website (or otherwise advise the prospective client) that other lawyers and law firms may charge different rates for any given matter, and that clients have the right to consider rates between different lawyers. This would ensure that the prospective client has the ability "to compare fees as one factor … while shopping for legal services," as indicated by the Working Group.[14]

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[12] Fifth Report to Convocation, June 2017, paras. 184-85.
[13] Seventh Report to Convocation, November 2017, para. 41.
[14] Seventh Report to Convocation, November 2017, para. 43.

Finally, Rule 3.6-2.2(2) will further require lawyers who market services charged on a contingent basis to "publish" a general maximum contingency fee percentage or a percentage applicable to each of the lawyer's practice areas. The Rule is silent on what "publish" means in this instance. It could be inferred that the options from Rule 3.6-2.2(1) would apply, but explicit clarification would be helpful if the requirement in Rule 3.6-2.2 is to be retained.

Broad Application of the Website Requirement

Finally, if the website requirement is to be retained, in our view its scope should be narrowed to conform with the policy direction approved by Convocation in November. At that time, the direction regarding the scope of CFA reform was as follows:

> Any changes to the contingency fee regime should not apply in all contexts. They should apply to individuals and small businesses. They should not apply:
>
> i) In the class action context;
> ii) When the client is a sophisticated entity (such as a sizeable corporation); or
> iii) Where the court has approved the CFA or the ultimate contingency fee.[15]

To implement this direction, the new Rule 3.6-2.1 (which will make the standard CFA, the "Know Your Rights" document, and disclosure of the contingency fee breakdown mandatory) contains the following exception in Rule 3.6-2.1(2):

> (2) Rule 3.6-2.1(1) does not apply
>
> a) To class action matters,
> b) Where the client is an organization, including a corporation (i) with more than 99 employees (ii) or that has gross annual revenues in excess of $10 million (iii) or that employs in-house counsel, and
> c) Where the court has or will necessarily approve the ultimate contingency fee.[16]

Rule 3.6-2.2, which will require that lawyers publicly disclose their maximum contingency fee, contains no similar exception. In our view, a similar exception should be built in to Rule 3.6-2.2 in order to conform with the policy direction as approved in the Seventh Report.

Conclusion

OBA members are keenly interested in ensuring that clients have a clear understanding of the options available to them when engaging legal services. We encourage the LSO to consider the

[15] Seventh Report to Convocation, November 2017, para. 13.a.
[16] Contingency Fee Reforms Consultation Document, February 2018, p. 50.

practical application of the proposed requirements with a view to ensuring that clients have the information they need to make informed choices while protecting lawyers' ability to advance meritorious claims. We thank the LSO for this opportunity to provide comments on this important work.