



TORONTO LAWYERS' ASSOCIATION SUBMISSIONS RELATING TO THE
ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP CALL FOR
COMMENT: CONTINGENCY FEE ARRANGEMENTS

The Toronto Lawyers' Association ("TLA") is the voice of its 3,200 members who practise law in all disciplines across the Greater Toronto Area. The TLA is pleased to provide comments to the Law Society of Upper Canada ("LSUC") regarding the Advertising & Fee Arrangements Issues Working Group's call for comments on contingency fee arrangements ("CFAs").

The TLA has carefully reviewed the "Call for Comment: Contingency Fee Arrangements" document and the Professional Regulation Committee Report to Convocation dated June 29, 2017.

Context

The TLA recognizes that the Court of Appeal in *Hodge v. Neinstein*^a found that "it appears that non-compliance with the [*Solicitors Act*] is widespread" in relation to CFAs. While the TLA is not aware of what evidence may or may not support the finding of non-compliance with the *Solicitors Act* relating to CFAs, we do agree and are concerned that such a perception exists in the eyes of the public.

In order to better protect consumers of legal services, the TLA agrees that changes to the system of CFAs are necessary.

^a 2017 ONCA 494

TLA Comments on Proposed Recommendations

The TLA notes the Working Group's recommendation for a mandatory standard form CFA to facilitate client understanding of CFAs and a comparison of the cost of legal services being offered. While the TLA supports measures to ensure that clients can readily understand CFAs and compare costs, the TLA is concerned that a formulaic approach may not be possible and/or may not be the preferable approach if the manner in which lawyers and clients choose to contract with one another is to remain an important facet of the lawyer/client relationship, which the TLA believes is important.

Rather than standardized CFAs, the TLA believes that lawyers should be obligated to prominently disclose certain information in a standardized format about client rights in each CFA. While the prominent disclosure would be mandatory, the form and substance of the CFA as a whole would be up to the parties, within the limits prescribed by the *Solicitors Act*.

The TLA strongly supports the Working Group's recommendation that amendments should be made to the *Solicitors Act* requiring that the contingency fee shall be: (a) disclosed up front and (b) calculated as a percentage of the total (rather than "all-inclusive") settlement amount or all-inclusive amount awarded at trial, less disbursements. The TLA believes that calculating the contingency fee as a percentage of the total settlement would strengthen the prohibition on payment of "costs" to lawyers and would also prevent a client from knowingly or unknowingly agreeing in advance that "costs" would be paid to their lawyers.

The TLA believes that there may be other approaches for calculating contingency fees for cases that actually go to trial. For example, for cases that proceed to trial, the lawyer could be paid the amount in respect of "costs" awarded to the client together with a lower percentage of the damages awarded than would otherwise be paid in a settlement.

The TLA does not agree with the recommendation to set a limit on fees by a percentage cap or other means. The TLA shares the concerns raised within the attachment to the aforementioned Report to Convocation that there is some evidence that representation of certain groups may be

reduced if a hard cap were imposed on CFAs.

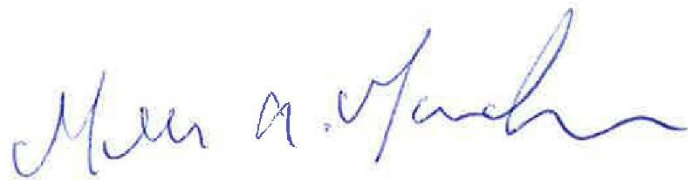
Commensurate with the early disclosure requirements discussed above, the TLA supports the notion of clear client reporting requirements that would enable clients to ascertain whether fees are fair and reasonable themselves.

Enforcement of Existing Regime

In addition to the comments on the proposed recommendations above, the TLA also believes that additional resources should be made available to enforce the existing CFA regime to prevent the abuses that the public perceives to be occurring. If there are abuses of the current regime, those need to be addressed in and of themselves. Any new regime should similarly be enforced in order to protect the public.

The TLA appreciates the opportunity to comment on the pressing and important issues raised in the Call for Comment. The TLA looks forward to a continuing discussion with the LSUC on matters of importance to the public and our profession.

Sincerely and on behalf of the Toronto Lawyers Association,



Melanie A. Manchee
President
Toronto Lawyers Association