579A Lakeshore Road E. PO Box 39522, Mississauga, ON L5G 4S6

FAIR Association of Victims for Accident Insurance Reform (FAIR)

Submission to the Law Society of Upper Canada

Request for Feedback on Advertising and Fee Arrangements

October 2016

FAIR is a grassroots not-for-profit organization of MVA (Motor Vehicle Accident) victims who have been injured in motor vehicle collisions, their care-givers, and supporters.

We will be commenting on personal injury issues only.

Contingency fees

According to TAG who conducted a poll of 1500 Ontarians in August 2016, "3 in 10 Ontarians have little confidence in their ability to access a legal professional or being treated fairly by the legal system. A majority have little to no confidence that they would be able to afford the services of a lawyer or paralegal."

There is already a serious lack of access to justice in Ontario and across Canada. Contingency fees in the personal injury context allow MVA victims to access legal representation that they otherwise might not be able to afford.

Injured auto accident victims are often in the dark when it comes to contingency fees. Much of the uncertainty is due to a lack of information coming from their legal representative. Many of the problems that exist with Contingency Fee Agreements (CFA) can be overcome with the creation of standardized forms with a clear explanation of services and the types of disbursement costs that consumers might be asked to pay.

Over the course of a claim that can last many years, personal injury clients are often unaware of mounting costs or the amount of work done on their file. The disbursement costs are not well understood and often come as a surprise to victims at the time of billing. These costs are not communicated at the time of the expenditure and since clients are on the hook for those costs they really ought to be discussed in some detail before the cost is incurred and before becoming a significant problem at the end of a claim. Lawyers can easily call a client, discuss how much and why those costs are necessary and that would leave accident victims with a better sense of the financial outcome. A statement of the cost/disbursement should be sent to a client afterward to avoid confusion.

We hear a wide variety of CFA percentages being charged to victims, anywhere from 15% to 30% so it is unclear what the standard of rate actually is. It seems to vary even within a firm, depending on the size of the potential award and the complexity of the case. It would be very difficult to have a set standard; the suggestion that these fees should be detailed on a firm's website would imply that these variables don't exist and if a "usual rate" were published it could lead to higher prices for consumers and ultimately more referrals. Perhaps the best approach would be a standardized form explaining the contingency fee itself and allow flexibility in pricing percentage as a blank space on the form. All of these fees, when files move or are closed out, are paid by the client, it is their money and they should be better informed.

A standard list of the types of potential disbursements a victim may have to pay for in the course of their claim would be helpful. Lawyers should be obligated to discuss the particulars of any specific disbursement with a client before laying out the funds which ultimately come out of any final settlement.

Referral / Brokerage Services and Fees

Law firms who are specializing in referrals and whose income is predominately drawn from referring clients should absolutely be required to advertise that that is the core of their business. It is misleading and unethical to offer personal injury legal services when the sole intent is to act as a referral service in exchange for payment or commission without a client's full understanding. It must be made clear that the advertiser may not provide the legal services itself and may refer clients to others for a fee. From a consumer perspective a firm ought not to take a case that they knowingly are unprepared to take to conclusion, period. We recognize that cases evolve and that some referrals are unavoidable, as is the case in all areas of law, but it should not be so common as to support the growth of referral brokerages that take advantage of unsophisticated and disadvantaged injured customers.

Both "brokerage house" and "settlement mill" models bring the legal industry into disrepute and harm innocent and legitimately injured auto accident victims who may not get the quality representation or the full value of the settlement they deserve.

We would be hard-pressed to find an MVA 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.

Much of the relationship between lawyer and the injured client is based on trust. Many FAIR members are upset when they are transferred from one lawyer to another within a firm itself as it is often viewed as lost ground and adding additional cost to them. So it is with referral services so we feel that advertising for the purpose of referring vulnerable and often cognitively impaired clients in exchange for a referral fee should be banned.

Advertising second opinion services

Clients who seek a second opinion can usually find a reputable lawyer to review their file at little to no cost and seeking a second opinion is an indicator that there are already problems with the file or with the lawyer/client relationship. Advertising in this regard would not substantively change anything for the client and many clients do not change their representation after hearing a second opinion.

Banning second opinion vendors from taking on that client comes down to standing in the way of consumer choice and it is not clear whether this would just be applicable to advertisers or anyone who gives a paid-for second opinion.

In a worst case scenario, a dissatisfied CFA client who seeks a second opinion about their case and who was unable to retain that lawyer due to an imposed ban and was referred on could unknowingly end up at a referral brokerage and at each level a portion of his/her settlement funds could be lost in fees along the way. How much would be left for real representation at that point?

Behind this second opinion issue and the referral brokerage issue is a fundamental problem with legal representatives taking on more work than they can possible handle without quality control failures. There are plenty of cases out there in respect to missing deadlines and losing track of clients over the years an auto insurance claim can take. The outcome for these claimants who lose opportunities when deadlines are missed has devastating consequences for their health and financial welfare. Taking on too many claims means that some will have to be marginalized or referred on during the course of a claim. If a lawyer has 250 claims on the go at any given time, there is little doubt that some of those client files are not getting attention.

Identification of type of license

All licensees should be required to disclose their qualifications in any advertising or marketing materials. Consumers should know who they are hiring from the outset. A common complaint from our members is that their file is often handed down to a lesser experienced lawyer or paralegal without their being informed and without their consent. It should be made clear by the intake or initially hired legal representative that others will be involved in the relationship and the qualifications of those individuals, as they are brought in, should be disclosed to the client.

Use of awards

There is a disturbing trend in the personal injury field of donation dollars leading to awards given by the recipient of the donation. Initially these awards can artificially inflate the reputation of a particular firm or lawyer and should be viewed as misleading paid-for advertising rather than an award for quality of services. Accident victims eventually see this pay for PR/award loop and while the charitable organizations may be good causes it does cheapen the view of the legal profession overall. The client may initially be impressed by the awards on the wall and on the website so the posting of these questionable awards should be seen as manipulative and therefore unacceptable.

This is not to say that the best and brightest should not be formally recognized by their peers or supporters but those deserving of attention are far eclipsed by the sheer volume of the bought and paid for variety. The Law Society should come up with parameters that cite what awards are of merit and identify what make the awards just public relations that are based on donations and those should be excluded from any advertising.

Referral Fees

"If consumers knew that their claims were being referred to other licensees, and the size of the referral fees, they might not accept the referral." This sentence is a clear indicator that the LSUC is aware that people are entering CFAs without adequate knowledge; the danger isn't in the referral but that they entered into the contingency fee agreement without knowing about the possibility of a referral or what it might cost them. Whether a high price or not, clients don't understand the risk and that these 'fees' and percentages can eat up their settlement dollars each time someone moves the file.

Auto insurance claims are time sensitive with a multitude of deadlines and the false representation of a referral brokerage mill represents a risk to clients. On the other hand there are a significant number of MVA victims who find out that their injuries are far more serious than originally thought and their changing needs should be accommodated with more experienced representation. Just as lawyers should have the option of referring clients so do clients have the right to change their lawyer if they desire. What does need to be banned is the businesses built around these referrals and where the main source of income is derived from referrals. It should not be that a lawyer takes on a file knowing full well that there is no intention of representing the client who believes they have hired the lawyer to represent them.

A flat referral fee would allow a disturbing trend to continue, that of the original intake legal representative taking on a file and doing little to advance the client's case with an eye to greater profit. It's a case of doing the work that is needed or nothing at all and still receiving the same fee. There has to be a scale of ascertaining the value of the legal work performed and perhaps a system of assessment of the charges would be a possible path to fairness. Too many times we hear stories of a file sitting in an office without any contact with an insurer, no visible or substantive work done on the case and the client is left with paying what is virtually a non-working lawyer through an inflated referral fee. This cannot be allowed to continue.

Since the promise is "if we don't win, you don't pay", then it stands to reason that if a lawyer doesn't follow through as representative, they should not be paid on a contingency basis. A cost assessment in which the client participates would assure that whatever work was done is compensated for in fair way and this model would be used whether the lawyer refers on or the client moves on.

Ontario's personal injury clients often believe that they are 'not allowed' to change legal representatives part way through their auto insurance claim. They feel stuck with a lawyer with whom they are not satisfied and are under the impression that if they change lawyers the bill will have to be paid in full at a time when they are suffering significant financial hardship. Those clients who do change lawyers mid-stream in a claim are very likely to be uninformed about what that actual cost to the initial lawyer is or what is in the agreement between their new and old representatives. Again, there is a lack of inclusion of the client in respect to financial matters that affects them personally.

Limiting the referral fees as a percentage of the ultimate fee is likely too broad and consideration of the work performed vs. what still needs to be done to settle a case is lost in a percentage arrangement. Flat fees in this regard can inhibit the ability of the second lawyer to fully maximize the case if the profit has already been accorded to the initiating lawyer, whether it be at the beginning of a case or even mid-stream. Disclosure of referral fees to clients, as with other disbursements, should always be paramount as these are ultimately costs paid by the client.

There is a long list of those who have benefited from referrals such as tow truck drivers, paramedics, hospital workers, physiotherapists, social workers, healthcare providers, rehab companies, and doctors and it is only the client, who is paying these costs, that is the unwitting participant; it is time to end this unsavory practice. The LSUC should consider following the Australian model, restricting advertising and prohibiting solicitation of claims or payment of same.

Flat referral fees should be banned and a proper accounting of services provided to achieve a more fair financial arrangement when clients move to a new representative.

If referral fees are to remain as part of the CFA totality then those 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. This would afford some transparency and it stands to reason that lawyers should also be keeping accurate dockets of time and expenses put out on a claim and reasonably provide that docket to clients during the course of the relationship and always at the time of billing or when a client moves on.

Thank you for the opportunity to have our voice heard and we would welcome providing further input as needed.

Rhona DesRoches
Board Chair
FAIR Association of Victims for Accident Insurance Reform