LET RIGHT PREVAIL

w Society of per Canada | Barreau du Haut-Canada

TAB 5.2

SECOND REPORT OF THE ADVERTISING AND FEE ISSUES WORKING GROUP FEBRUARY 2017

Working Group Members
Malcolm Mercer (Chair)
Jack Braithwaite
Paul Cooper
Jacqueline Horvat
Michael Lerner
Marian Lippa
Virginia Maclean
Jan Richardson
Jonathan Rosenthal
Andrew Spurgeon
Jerry Udell

Prepared by the Policy Secretariat
(Juda Strawczynski – 416-947-3997)

FOR DECISION

ADVERTISING & FEE ARRANGMENTS ISSUES WORKING GROUP

MOTION

1. **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 5.2.1; and**

   c. **approve amendments to the Paralegal Rules of Conduct regarding advertising in Rule 8.03 as set out in Tab 5.2.3 and request the Paralegal Standing Committee to amend the related Guidelines as set out in Tab 5.2.5.**

SUMMARY OF ISSUES UNDER CONSIDERATION

2. 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.

3. The Committee recommends that Convocation decide as a matter of policy whether

[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.

referral fees should be prohibited or regulated by capping them and introducing transparency measures to protect consumers of legal services.

4. 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.

5. 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

6. 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 arrangements through a Call for Feedback.

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

7. 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 5.2.7**.

8. 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

9. 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.

10. 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
>
> (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and
>
> (b) the client is informed and consents.

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

[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.

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

12. 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.

13. 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]

14. 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]

15. 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]

16. 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 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

[4] First Report at para. 64.

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

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

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

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.

17. 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.

18. 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.

19. 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.

20. 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]

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

---

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

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

22. 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.

23. Each option is presented below in turn.

(c) PROHIBITING REFERRAL FEES

24. 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.

25. 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 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

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

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.

26. 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

27. 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]

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

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

[11] First Report at para. 88.

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.

29. 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.

30. 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.

31. 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.

<u>Transparency measures</u>

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

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

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

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

32. 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.
>
> **4.2-1** A lawyer may market legal services 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.

33. 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]

34. 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.

---

[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

35. 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).

36. 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]

37. 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]

38. 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.

39. 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.

40. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 5.2.1 to 5.2.6**.

---

[17] First Report at para. 75.

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

(b) USE OF AWARDS

41. 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.
>
> 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]

42. 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]

---

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

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

43. 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.

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

45. 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.

46. 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]

47. 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:
>
> 1. the measures designed to meet the legislative objective must be rationally connected to the objective;
>
> 2. the means used should impair as little as possible the right or freedom in question; and,
>
> 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.

48. 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. …

49. 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. …

50. 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.

51. 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.

52. 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]

53. 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.

54. 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.

55. 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.

56. Specific amendments to the lawyer's Rules of Professional Conduct and Paralegal Professional Guidelines are attached at **Tabs 5.2.1, 5.2.5** (redline) and **Tabs 5.2.2 and 5.2.6** (clean).

57. 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

58. 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.

59. 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.

60. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 5.2.1 to 5.2.6**.

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

61. The Working Group recommends prohibiting second opinion advertising.

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

63. 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.

64. 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".

65. 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.

66. 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.

67. 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.

68. Specific amendments to the lawyer's Rules of Professional Conduct, Paralegal Rules of Conduct and Paralegal Professional Conduct Guidelines are attached at **Tabs 5.2.1 to 5.2.6**.

NEXT STEPS

69. 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.

70. 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.