

## Crackdown on referral fees

# New rules mean added bureaucracy?

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For Law Times

Some personal injury lawyers are worried the Law Society of Upper Canada's new referral fee rules have added an unnecessary layer of bureaucracy for boutique firms and their clients.

At its April Convocation, the regulator's benchers imposed a sliding scale for referral fees, with a limit of 15 per cent on the first \$50,000 in legal fees paid by clients, plus a further five per cent on anything over that amount, up to a hard cap of \$25,000.

Darcy Merkur, a partner at Toronto boutique Thomson Rogers, says he supports the crackdown on excessive referral fees, but he would have preferred a simpler cap, such as the 10-per cent flat rate advocated by the Ontario Trial Lawyers Association in advance of the LSUC vote.

However, his real beef is with the standardized referral agreement prepared by the LSUC as part of its move to increase transparency in the process, which must be signed in every case by the client and the referring licensee, as well as by the law society member taking the referral.

"This is going to add an element of extra work and complication that is not welcome," Merkur says.

"By implementing these additional hurdles, it may encourage some people to hold on to files which they would have referred out in the past.

"That's contrary to the original goal of referral fees, which was to have the most qualified lawyers dealing with the most complicated cases.

"In my view, it will significantly reduce the number of people who would otherwise have accepted or engaged in referral fee situations," he adds.

Adam Wagman, a senior

partner at Toronto personal injury boutique Howie Sacks & Henry LLP, is also concerned about the new forms.

"The process they have devised, while well intentioned, may have solved one problem by creating new ones," says Wagman, who is also the immediate past president of the OTLA.

"When you create rules that impact on members of the public, you should be looking at principles of simplicity and transparency. Respectfully, I think these principles could have been satisfied without requiring lawyers to hand over five or six pages of additional material to clients at the outset of a case," he says.

"We all know that people don't read the fine print, and this is not going to do much more than add to the confusion that a potentially seriously injured person, with all the stress and uncertainty that comes with that, is already feeling when they meet with a lawyer."

At Will Davidson LLP, partner Paul Cahill and some of the firm's other personal injury lawyers have responded to the new referral fee rules by creating a lunch-time CPD offering that helps lawyers comply.

He says his own firm does not rely heavily on referrals, but it has already made changes to its standard contingency fee agreement to include appropriate language for those cases when they do come in.

Cahill and his colleagues discuss the ethics and history of referral fees in the sessions, travelling to the offices of interested lawyers, including non-personal injury firms where the chances of lawyers making referrals are higher.

"We anticipated referral fees were going to be a hot topic last year and got approval from the law society to offer the program," Cahill says, adding that he was



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pleased to see the regulator impose a cap on the fees.

"It is important to compensate lawyers who make a referral, but there can be a concern when the compensation is out of proportion with what they are actually doing," he adds.

A recent case highlights just how competitive the referral fee market got before the LSUC stepped in.

*Srebrolov Lebowitz Spadafora PC v PW Lawyers Professional Corporation et al.* involved a dispute between the personal injury law firm SLS and Paul Wilkins, one of its former lawyers who left to start his own firm.

According to Ontario Superior Court Justice Jasmine Akbarali's May 19 endorsement, Wilkins said under cross-examination that he was unable to function at SLS because the firm's policy to pay referral fees of 15 per cent put him in danger of losing his own referral sources, who wanted 33 per cent.

In an interview with *Law Times*, Wilkins says most of his own firm's business is cur-

rently generated through word of mouth and marketing efforts, rather than paid referrals.

As part of the separation agreement between the two parties, Wilkins was required to hand over 50 per cent of the net fees he received on files that left SLS with him, after the payment of any referral fees.

Wilkins in turn was due 20 per cent of SLS' recovery on files of which he initially had carriage but that remained with the firm after his departure.

However, last summer, SLS launched an action after seeing a notice on Wilkins' new firm's website about a \$6-million settlement for one of the clients that transferred with him.

While the legal fees collected on the file added up to \$1.4 million, Wilkins claimed his net fees should be reduced by almost \$470,000 to account for 33-per cent referral fees paid out in the accident benefit and tort matters concerning the same client.

However, SLS used the LSUC's new rules governing referral fees to argue that both referral fees were unreasonable.

According to Akbarali's judgment, an immigration lawyer was originally approached by the accident victim, who in turn referred him to a paralegal who worked at SLS.

The paralegal later moved with Wilkins to his new firm.

"There is very little evidence before me, and no jurisprudence, as to what constitutes 'fair and reasonable' in the context of a referral fee," Akbarali wrote, noting that the rules were not in effect at the time the fees were paid.

The judge approved the \$95,000 Wilkins paid out to the immigration lawyer, which accounted for one-third of the fees collected on the accident benefits file, rejecting SLS' suggestion that she cut it to 15 per cent.

Despite coming in at almost four times the new referral fee limit, Akbarali wrote: "SLS has failed to prove that the referral fee at 33% was not fair and reasonable at the time that it was paid."

However, Akbarali sided with SLS when it came to the \$372,000 Wilkins paid to his paralegal as a referral fee on the tort file.

Using an exclusion in the LSUC's new rules for work "done through the same law firm" in which the referring licensee practises, she found the payment to the paralegal was "not properly a referral fee but was compensation" because he worked for SLS at the time the referral was made.

"Internal referrals may be relevant for assessing compensation of firm members, but in my view, they are not referrals that attract referral fees," she added, ordering Wilkins to pay half of the funds that went to the paralegal to SLS instead.

Altogether, the judgment says Wilkins owes his old firm just short of \$600,000 in legal fees and payments due under the separation agreement, after offsets for amounts SLS had yet to pay him.

"It is what it is," Wilkins says of Akbarali's decision, adding that he has appealed it.

SLS partner James Srebrolov declined an opportunity to comment.

Merkur says the cut in the going rate for referral fees is good for all parties except those whose business models depend on referring out work for a profit.

"I think limiting referral fees is in the interest of society and also in the interest of lawyers," says Joseph Campisi, principal at personal injury law boutique Campisi LLP. "It is imperative that our goals align with our clients. Anything that keeps lawyers focused on this imperative is welcome." **LT**