

OBA Presentation to the Ontario Automobile Anti-Fraud Task Force

August 28th, 2012



ONTARIO BAR ASSOCIATION

L'ASSOCIATION DU BARREAU DE L'ONTARIO

A Branch of the Canadian Bar Association

Une division de l'Association du Barreau canadien

Introduction

- The OBA
 - 17,000 members
 - Lawyers who represent every stakeholder (insurers and injured parties, consumers, insurance corporations etc.) at virtually every stage of the insurance claim process
- OBA agrees with the need to tackle fraud and the general intent of the Ontario Automobile Anti-Fraud Task Force (the “Taskforce”) - to balance reducing upward pressure on premiums and ensuring rights of MVA victims
- OBA’s approach based on balancing the three “P’s”
 - Protection for consumers;
 - Premium affordability; and
 - Profitability for the insurance industry .



Outline

- Principle Suggestions to be Addressed:
 - I- Expansion of FSCO's power: the investigation, discipline and regulation of Lawyers under the *Insurance Act's* Unfair or Deceptive Acts or Practices ("UDAP") provisions
 - II- Classification of lawyer-to-lawyer referral fees under the UDAP regime
(Steering Committee Status Update, July 2012, at pp. 32-34 and Appendix 5)

- Other Issues to be Addressed
 - Need for evidence-based information on the specific methods of fraud and their costs
 - Ensuring balance – solutions cannot unduly impact on legitimate claimants



I - FSCO's Regulation of Lawyers under UDAP Regime

- The suggestion that FSCO's regulatory authority be increased and expanded to include the regulation of lawyers presents three significant problems:
 - It would be duplicative of an existing regulatory regime and therefore wasteful of scarce government resources;
 - It would violate solicitor-client privilege and other client protections;
 - There is no public policy rationale – no indication of a connection to fraud issues or their solutions.



I - FSCO's Regulation of Lawyers under UDAP Regime

- Duplication and Waste of Scarce Government/Tax-payer Resources
 - The Law Society of Upper Canada (“LSUC”) has a well-entrenched and tested regime for disciplining lawyers
 - This regime includes discipline for unfair and deceptive practices
 - The discipline process is part of a self-regulatory regime that is funded by licensing fees
 - The proposed FSCO process would be duplicative of the LSUC’s process without LSUC’s specific expertise in public protection on legal matters
 - These matters will be specifically addressed by LSUC



I - FSCO's Regulation of Lawyers under UDAP Regime

■ Solicitor and Client Privilege

- The client is protected by solicitor-client, litigation and other privileges in his/her dealings with his/her lawyer
- This protection has been found by the highest courts to be a fundamental right and to be essential for the fair and efficient operation of the justice system
- The protection of solicitor-client privilege is firmly entrenched and can only be abridged in the most extreme circumstances with clear proof of justification
- Responding to a FSCO investigation could require lawyer to compromise the client's privilege
- FSCO's process does not allow for the protection of privilege that the current LSUC disciplinary regime provides



I - FSCO's Regulation of Lawyers under UDAP Regime

- No Public Policy Rationale
 - There is no indication that lawyers are involved in auto-insurance fraud schemes
 - Evidence presented by LSUC to the Task Force's Regulatory Working Group indicated the contrary
 - No justification for abridging solicitor-client privilege or use of tax-payer's money on duplicative regulatory scheme



II - Referral Fees as UDAP

- Referral Fees paid by one Lawyer to another:
 - Encourage efficiency by incentivizing transfer of files to more experienced lawyers:
 - Better service to the clients;
 - More efficient use of court time;
 - More productive and efficient interaction with insurance industry and their counsel.
 - Do not affect net recovery for clients:
 - The payment comes out of the receiving lawyers fee – any affect on net recovery to the client is prohibited by the Law Society rules
 - Lawyer services to clients are not goods and services payable under SABS:
 - All fees to lawyers are paid under privileged contract with client
 - Referral and other fees are not an addition to benefit entitlement and do not create an opportunity for fraud



Other Issues

- Need for evidence-based research on the precise methods of fraud and their costs:
 - Aggregate figures do not indicate significant methods of fraud or guide priorities and solutions
 - Research on methods of fraud necessary to:
 - develop most effective solutions for industry and consumers; and
 - ensure best use of scarce government/tax-payer resources

- Ensuring solutions do not have undue impact on legitimate claims
 - Reasonable and necessary claims must continue to be paid;
 - Additional burdens on legitimate claimants must demonstrably, appreciably reduce opportunities for fraud



**Thank you for the opportunity to
make this presentation
We would be pleased to answer
questions or assist further
Contact: ehall@oba.org**



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