



Five-Year Review of Paralegal Regulation

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Submitted to: **The Law Society of Upper
Canada, Paralegal Standing
Committee**

Submitted by: **The Ontario Bar Association**



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Table of Contents

The OBA.....	2
Introduction.....	2
Training and Mentoring.....	3
(a) Small Claims Court.....	3
(b) Immigration.....	4
Enforcement.....	5
(a) Timing.....	5
(b) Advertising.....	6
(c) Front-line Enforcement.....	7
Providing Legal Services without a License (“Exemptions”).....	7
Conclusion.....	9



The Ontario Bar Association (“OBA”) appreciates the opportunity to assist the Law Society of Upper Canada (the “Law Society”) with the five-year review of its paralegal regulation. We congratulate the Law Society on the decision to consult broadly as part of the review process. Broad consultation will help to ensure effective achievement of the Law Society’s crucial public-protection goals.

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and the Law Society with several policy initiatives - both in the interest of the profession and in the interest of the public.

This submission was formulated by the OBA’s Paralegal Taskforce and Access to Justice Standing Committee, with input from the Young Lawyers Division and several practice sections whose members have had the opportunity to observe the work of licensed paralegals over the course of the last five years. The submission has had the benefit of review and comment from all 37 of our practice sections.

Introduction

In this submission, we have addressed:

1. Suggestions regarding additional training or guidance to assist with competencies in those paralegal environments that have changed in the last five years, such as the Small Claims Court and Immigration;
2. Issues concerning the enforcement of the Paralegal Rules of Professional Conduct (the “Rules”), the By-Laws and other regulations; and
3. Experiences and suggestions regarding the existing exemptions from the paralegal licensing requirement.

We understand this is a retrospective review of the Law Society’s regulatory role over the last five years, rather than a review of the initial policy decisions. We have not, therefore, dealt with areas such as paralegal scope of practice. If the Law Society intends to deal with the scope of practice issues, as part of this review or otherwise, we understand we will have an additional opportunity to address this issue.



Training and Mentoring

Within the paralegal scope of practice, there have been some significant changes that have rendered more substantively complex the issues with which paralegals are dealing. These changes include:

- (a) the increased monetary jurisdiction of the Small Claims Court; and
- (b) the addition of Ontario's paralegals to the list of those permitted to appear before tribunals on immigration matters.

These changes do not alter the need for paralegals to be regulated or the appropriateness of the Law Society's role in such regulation. Rather, these changes require an augmentation of the Law Society's efforts to ensure competency. In each of these shifting areas, additional college curriculum topics, continuing legal education programs and, possibly, supervision/mentoring and testing requirements need to be implemented.

(a) Small Claims Court

The increase in the jurisdiction of the Small Claims Court, from \$10,000 to \$25,000, has seen an increase in the complexity of matters with which that court deals. Higher-value contracts tend to have more complicated provisions such as specified damages clauses, waivers and indemnities. In addition, certain substantive practice areas, most notably wrongful dismissal claims, were rarely before the court in the \$1 to \$10,000 range but are more common with the new \$25,000 cap.

Those who practice in Small Claims Court have noted a gap in the knowledge of some paralegals, particularly with respect to the alleged breach of employment contracts. To give a particular example, mitigation of damages is a potential factor in any contract case but is often *central* to employment cases. The experience from the front lines indicates that the concept of mitigation is not understood by some paralegals. Clients are not well protected in these circumstances as they are advised to proceed when the damages would not, after mitigation is factored in, justify proceeding.

The increased value of claims in the Small Claims Court also tends to increase the assessment of "reasonable costs" that can be awarded to a successful party. Costs are, therefore, a more significant factor in the small-claims context than they were when paralegal licensing was first initiated. Experiences from the front lines indicate that a client represented by a paralegal is less likely to be advised of his or her potential liability for costs. This is a clear disservice to the client who makes a decision to proceed without full knowledge of the risks. In addition, successful parties have been finding it more difficult to enforce costs awards in cases where the client did not anticipate, and does not understand, the requirement to pay costs. The resulting necessity for enforcement proceedings are a drain on public and private resources and undermine the intended cost-effectiveness of Small Claims Court.



The college curriculum and continuing legal education programs for paralegals should be reviewed to ensure that they reflect the added complexities of Small Claims Court practice.

(b) Immigration

Another fundamental change in the landscape since the advent of paralegal regulation is in the field of immigration law. As a result of Bill C-35, Law-Society licensed paralegals will now be permitted to act on Immigration and Refugee Board matters on behalf of clients. Prior to the passage of Bill C-35, insufficient federal regulation and lax enforcement allowed unqualified and sometimes unscrupulous consultants to take advantage of people in a vulnerable position. This damaged the reputation of all service providers in this area. The OBA is encouraged by the Law Society's new role in the immigration field. With the involvement of an experienced regulator, we are confident that the provision of services will improve and the reputation of legal-service-providers will be restored. In order to fulfill these goals, however, the following must be considered:

- (a) decisions regarding residency, refugee status and deportation alter the lives of clients in the most fundamental ways. The stakes are arguably higher in this area than any other in the paralegal scope of practice ;
- (b) the clients are disproportionately vulnerable in that they often do not have resources, facility with the language, personal or institutional support networks or familiarity and comfort with federal and provincial processes and institutions;
- (c) more than criminal and civil law, the highly standardized form of applications/pleadings in this area sometimes gives the false impressions that it is a *pro forma* process when, in fact, a high degree of expertise and careful judgment is required to complete the paperwork in the best interests of clients.

With these factors in mind, and in order to avoid the mistakes made in this area by the previous federal regulators, the following should be considered as prerequisites to paralegal practice in the area of immigration law:

- (a) curriculum and CLE programs specifically targeted at immigration law for paralegals;
- (b) elements of the paralegal ethics examination and a substantive examination geared specifically at immigration issues; and
- (c) a period of apprenticeship with, or supervision by, a lawyer specializing in immigration law.

Details of these would need to be discussed further among relevant experts and stakeholders.



The Law Society's unique role as regulator of two professions offers a distinct advantage in this area. Unlike the federal regulators, the Law Society is in a good position to facilitate training, mentoring, supervision and assistance between its paralegal licensees who wish to practice immigration law and its certified specialists.

Given both the increased jurisdiction of the Small Claims Court and the addition of life-altering immigration matters to paralegal practice, it is appropriate at this stage for the Law Society to consider a requirement that a certain number of substantive CLE hours must be targeted to the areas in which a paralegal intends to practice. This is particularly crucial with those paralegals who were licensed as a result of the "grandfathering" provisions, as they have never been required to receive education in, or been tested on, the substantive areas in which they may practice. We acknowledge that lawyer licensees are not technically required to target their CLE hours. However, the Law School curriculum includes mandatory subjects such as Civil Procedure and lawyers are tested in a broad range of substantive areas.

OBA members have been happy to work alongside very competent paralegals in many contexts. These suggestions are not designed to be critical of the work of paralegals but, rather, to foster a sustained, productive relationship between the two professions and with the public.

Enforcement

Issues that have arisen with respect to the enforcement of the Rules and other regulation include:

- (a) delay in discipline proceedings, final determinations and enforcement of those determinations as well as an absence of interim measures to protect the public;
- (b) a lack of clarity in the Rules regarding misleading advertising and an absence of timely, summary cease and desist procedures for ongoing breaches such as confusing advertising; and
- (c) a lack of uniformity in upholding regulations and restrictions by courts and tribunals.

Once again, these issues confirm the need for the Law Society's regulation of paralegals. Calls for more vigorous enforcement speak to the OBA's support for the existence of the regulatory scheme.

(a) Timing

Concerns have been raised by different practice areas and from various regions of the province with respect to the time it takes to complete a discipline matter. Paralegals, some of whom have even been recognized by local courts as being unsuitable, are allowed to continue practicing in the lengthy interim period between complaint and disposition or disposition and review. A more significant shift in resources may be necessary to shorten these timeframes. In addition, there



should be consideration given to the imposition of practice prohibitions or restrictions on an interim basis in clear and egregious cases. Admittedly, the bar for imposition of these interim measures would have to be high and clearly defined, both in terms of the danger to the public and the preponderance and strength of the evidence. It is trite to say that delay in prosecuting complaints in cases where the public and even the courts have expressed concerns, jeopardizes the reputation of the regulatory scheme.

(b) Advertising

Concerns have been raised regarding the enforcement of subrule 8.03 (2) of the Rules, which provides that:

A paralegal may market legal services if the marketing is neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive.

These concerns fall into two categories:

- (a) the need for more guidance regarding what can be considered confusing marketing and how it can be avoided; and
- (b) a process for dealing with confusing advertising in a timely manner given that infringements will generally be a continuing offence rather than a discrete one.

The confusion most often mentioned to lawyers by clients stems from the “licensed by the Law Society” designation on business cards, letterhead and other marketing materials. Clients have indicated that this led them to believe they were dealing with a lawyer rather than a paralegal. This confusion became relevant to clients when mistakes were made or the matter grew beyond the paralegal’s competence. It is at this stage that the matter was raised with a lawyer. The confusion threatens the public’s confidence in the regulatory scheme.

It is suggested that the commentary for Rule 8.03 be amended to include some guidance in avoiding this confusion by, for example, distinguishing the nature of the license. Marketing material that refers to the license should specify that one is “licensed by the Law Society of Upper Canada *as a paralegal.*” Similarly, marketing materials that refer to a place of business as a “law office” should indicate that the services being provided are paralegal services. While there is no doubt that many paralegals provide valuable services, the public should be entitled to make informed choices regarding whether their matter is being handled by a lawyer or a paralegal.



In addition to this confusing marketing, lawyers in various practice areas have reported seeing the misleading use of the term “specialist” or “certified specialist” on paralegal letterhead or other marketing material. This is clearly a breach of Rule 8.03.

The ongoing or continuing nature of the breach occasioned by confusing or misleading letterhead, business cards and other adjustable, frequently-distributed marketing material requires a more agile response than is available through the full discipline-hearing process. The well-established health professional colleges, such as the College of Dental Hygienists, have an immediate cease and desist procedure for dealing with marketing materials that may cause public confusion about the kind of license held by a dental professional. Dental Assistants, for example, whose marketing material may lead to confusion in this regard, are sent a letter requiring them to immediately desist in using the material. While this procedure likely exists at the Law Society for non-licensed individuals, it does not appear to be used for cases of license confusion.

(c) Front-line Enforcement

The frontlines of regulatory compliance are often Ontario’s courts or tribunal hearing rooms. Those practicing in criminal courts and employment-related tribunals have found that there is a broad variance in adjudicators’ reactions to potential or actual breaches of licensing requirements and restrictions.¹ On one extreme, some adjudicators, as a preliminary matter, make inquiries to ensure the legitimacy of claimed exemptions and refuse to hear an unlicensed paralegal who is acting without an allowable exemption, while, at the other extreme, an adjudicator may proceed with a matter despite a clear breach and may or may not alert the Law Society to the issue.

We recognize that, to some extent, the case-by-case judicial or quasi-judicial discretion to deal with these compliance issues may not be fettered. It is suggested, however, that, in order to introduce as much consistency as possible, the Law Society work with the judiciary and the Executive Chairs of the tribunal clusters to provide guidance. To the extent possible, dealing with appearances by non-licensed, non-exempt individuals should be a matter of consistent court or tribunal policy.

Providing Legal Services without a License (“Exemptions”)

Members of certain OBA practice sections, such as the Worker’s Compensation Section, have had considerable experience with representatives who are exempt from licensing requirements by

¹ We are not referring here to consistency in cases where compliance with the Rules is itself the substantive subject-matter (such as judicial reviews from Law Society discipline cases or cases related to breaching of the *Law Society Act* or By-Laws by practicing without a license). We are referring to cases in which someone is representing a client on a substantive matter unrelated to the Rules and his or her ability to legally represent this client is considered as a preliminary matter by the court.



virtue of their affiliation with an organization or institution. The regulation of paralegals has had a very positive effect in this area of the law and certain institutional exemptions have also worked very well. Representatives from the Office of the Worker Advisor, the Office of the Employer Advisor and legal clinics have provided a high level of service and the exemption for these representatives should be maintained. With respect to the other institutional exemptions in By-Law 4, it is suggested that the public would be well-served by making some ethics and professionalism training a prerequisite of the ability to rely on an institutional exemption. In order to be exempted, those wishing to provide legal services without a license (on a regular basis) should both fall into one of the existing exemption categories **and** demonstrate that they have completed some continuing education in the ethics and professionalism issues inherent in the provision of legal services.

In contrast to the institutional exemptions, the *ad hoc* exemptions, most notable the friend/relative exemption, do not appear to be working effectively. Problems relate both to the substance of the exemption and enforcement.

In terms of substance, across the province, people have witnessed non-licensed paralegals appearing in court regularly claiming to be friends or relatives of several different defendants or litigants. Anecdotally, there appear to be various schemes by which these agents skirt the regulations, including claims that the remuneration received by these agents was for the ride to court or other non-legal service rather than for the in-court representation or legal advice. While the exemption provision does appear to be carefully tailored and clear, perhaps additional amendments are necessary. The prohibition against remuneration for agents acting as a “friend”, for example, should be broadened or “indirect” remuneration more specifically delineated to catch the current trends. In addition, compliance has been a matter of subjective and difficult-to-verify criteria such as the nature of the relationship between the agent and his “friend”. The addition of some objective criteria, such as a 3-matter annual maximum, is a good first step but additional, easy-to-verify compliance criteria should be considered.

The principal issue with the *ad hoc* exemptions is an issue of enforcement that renders even a carefully tailored By-Law almost meaningless. In larger jurisdictions where there are multiple court sites and in areas that allow for commutes between multiple judicial regions, agents are able to act habitually as “friends” without being detected by those they appear before or oppose. In order to enforce the licensing requirements, protect the public and maintain the significance of the licenses held by legitimate paralegals, it is necessary to improve the regulators’ and courts’ ability to detect those who inappropriately rely on this exemption to practice without a license. It is suggested that the Law Society work with the Ministry of the Attorney General’s Court Services Divisions to determine the feasibility of collecting aggregate data that would allow for the detection of abuses of the *ad hoc* exemptions across jurisdictions.



Conclusion

Once again, the OBA appreciates the opportunity to assist with this review and we look forward to on-going dialogue on the issues raised. While the Law Society is currently conducting the last of its legislated reviews, we expect that the conversation will continue in formal and informal fora.

Paralegal regulation is an important consumer-protection initiative and we congratulate the Law Society for undertaking this significant responsibility.