



The Law Society of  
Upper Canada

Barreau  
du Haut-Canada

**An Analysis of**  
***A Framework for Regulating Paralegal Practice in Ontario***

July 24, 2000

**AN ANALYSIS OF  
A FRAMEWORK FOR REGULATING PARALEGAL PRACTICE IN ONTARIO**

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**AN ANALYSIS OF  
A FRAMEWORK FOR REGULATING PARALEGAL PRACTICE IN ONTARIO**

***EXECUTIVE SUMMARY***

**Introduction**

On May 31, 2000, the Honourable Peter Cory delivered to the Attorney General a report setting out a framework for regulating paralegal practice in Ontario. The report contains recommendations on the scope of paralegal practice in Ontario, on a governance model for the regulation of paralegals and on educational and other requirements for paralegals.

Two themes are present in Mr. Cory's report: public protection and access to justice. Public protection is a minor theme in the report; access to justice is the major theme in the report providing the justification for the recommended scope of paralegal practice.

It is the Society's view that the regulation of paralegal practice in Ontario, including the scope of paralegal practice, should be resolved having regard only to the protection of the public. The Society's reasons for its views are threefold.

First, the available evidence (anecdotal, not empirical, evidence) concerning access to justice provides no clear sense as to why certain sectors of the population are being denied access to justice, and without such, it is not clear that permitting paralegals to practise in a particular area will in any way resolve the problems of lack of access to justice.

Second, the results of research conducted for the Society confirm that the question of whether paralegals play a role in facilitating access to justice is not one that comes with an easy "yes/no" answer. Contrary to what might be expected if paralegals were facilitating access to justice for people who could not afford to use lawyers, the research showed that there is a pattern of use of paralegals that seems to ignore the issue of costs; that only a minority of individuals who end up using a paralegal instead of a lawyer (after having considered using a lawyer) do so as a result of

the cost of using a lawyer; and that, all other things being equal, in most cases, a greater proportion of individuals (including those who use paralegals) would prefer to use lawyers over paralegals.

Third, resolving any problems of lack of access to justice by permitting paralegals to practise in certain areas (*e.g.*, family law, wills and estates) will, at worst, exclude persons relying on paralegals from access to justice and, at best, establish a two-tiered justice system. No amount of education and training short of that undertaken by individuals who later qualify to become lawyers can permit a paralegal to bring to a client's problem the knowledge, skills and abilities of a lawyer. A paralegal, practising in certain areas (*e.g.*, family law, wills and estates) stands to mire the administration of justice leaving his or her clients without any access to justice at all or with a level of access to justice far short of that obtained by a lawyer for his or her clients. It is not serving the public well to answer their call for access to justice, their need and wishes for the services of a lawyer, by saying that the public can have access to the services of a licensed paralegal.

The Society agrees with Mr. Cory that paralegal practice in Ontario should be regulated. It also agrees with Mr. Cory that individuals seeking to engage in paralegal practice in Ontario should be licensed, should be required to meet minimum educational and training requirements, should be of good character, should be required to carry professional liability insurance, should be bound by rules of professional conduct not dissimilar to the Society's rules of professional conduct and should be required to disclose, in a standard retainer letter, the limits of a paralegal's practice (including that a paralegal is not a lawyer). The Society further agrees with Mr. Cory that, for the benefit of the public, paralegals should be required to participate in the establishment of a compensation fund to reimburse any client of a paralegal for loss suffered as a result of the paralegal's practice and that clients of paralegals should be entitled to have a paralegal's fees bills assessed.

The Society believes that the public deserves to have the issue of the regulation of paralegal practice in Ontario resolved and to have any problems of lack of access to justice resolved. However, it is unfair to the public to merge the two matters. Such a merger results in the development of a framework for regulating paralegal practice in Ontario which inadequately

addresses risk of harm to the public. At the same time, the merger conveniently delays a comprehensive study and a complete solution of the problems of lack of access to justice. The Society would urge the Government of Ontario to continue to do right by the public.

What follows is a summary of the recommendations made by Mr. Cory with which the Society would agree if the recommendations were modified and with which the Society disagrees.

### **Agreement if Recommendations Modified**

If they were modified, the Society would agree with, among others, the following recommendations made by Mr. Cory:

- That only in specified areas of practice, licensed paralegals, who qualified for licensing by meeting the standard educational and mentoring requirements, should be required to pass special examinations before they could engage in practice in those areas. *(The Society would require a licensed paralegal to meet additional requirements, beyond the standard educational and mentoring requirements recommended by Mr. Cory, in every area in which the paralegal wanted to practise. In addition, the Society would require all licensed paralegals to pass an examination on professional responsibility and practice management issues.)*
  
- That only in specified areas of practice, licensed paralegals, who qualified for licensing as “grandfathers” should be required to pass special examinations before they could engage in practice in those areas. *(The Society would require “grandfathered” licensed paralegals to pass an examination in every area in which the paralegal wished to practise. In addition, the Society would require “grandfathered” licensed paralegals to pass an examination on professional responsibility and practice management issues.)*

- That licensed paralegals should be required, under their code of conduct, to keep strictly confidential information obtained from clients, subject to authorization from a client or an order of a court to disclose the information. *(The Society would include the duty of confidentiality in the legislation governing paralegals. Further, the Society would require licensed paralegals to advise their clients (ideally in the standard retainer letter) that communications between paralegals and clients may not be as secure as communications between lawyers and their clients and that, in specified circumstances, a paralegal would be required to divulge communications between the paralegal and his or her client.)*
- That the board of the governing body of paralegals should include only two representatives of the Law Society (at the beginning and interim stages). *(The Society would include, at the outset, during any interim period and when the governing body is fully functional, a significant representation from the Society.)*

## **Disagreement**

The Society disagrees with the following recommendations made by Mr. Cory:

- That a separate class of “secondary licences” be created for paralegal practice before specialized boards and tribunals.
- That paralegals should be permitted to practise before the Financial Services Commission of Ontario (Dispute Resolution Group).
- That paralegals should be permitted to appear on an appeal in the first instance from a decision of the Ontario Rental Housing Tribunal. *(The Society would permit licensed paralegals to appear on an appeal from a decision of a provincial board or tribunal only if the appeal was on a question of fact alone and the appeal was to another board or tribunal or the Ontario Court of Justice.)*

- That licensed paralegals should be permitted to appear at the first level of appeal from decisions of the Small Claims Court.
- That licensed paralegals should be permitted to prosecute and defend provincial offences in the Ontario Court of Justice and to appear at the first level of appeal from a conviction or acquittal on a provincial offence. *(The Society would permit licensed paralegals to practise in Provincial Offences Act matters only when the penalty being sought was not imprisonment or a fine greater than the monetary limit that may be claimed in a Small Claims Court proceeding. The Society would permit licensed paralegals to appear on an appeal only if the appeal was on a question of fact alone and the appeal was to the Ontario Court of Justice.)*
- That licensed paralegals should be authorized to appear as duty paralegals in the Ontario Court of Justice and, if future policy makes it possible, in the Superior Court of Justice.
- That licensed paralegals should be authorized to prepare and file the necessary papers and to do all that is required in completing an uncontested divorce in specified circumstances.
- That licensed paralegals should be authorized to draw a simple will in specified circumstances.
- That licensed paralegals should be authorized to advise regarding powers of attorney and living wills, to prepare these documents and to have them executed.
- That licensed paralegals should be authorized to act for a vendor on the sale of a residential property that is either clear of any mortgage encumbrances or subject to only one mortgage.
- That licensed paralegals should be authorized to undertake the simple incorporation of private companies.

Certain recommendations made by Mr. Cory contain references to the governing body of paralegals achieving self-regulatory status (*e.g.*, the recommendations dealing with the discipline procedure to be established for licensed paralegals and the composition of the board of the governing body of paralegals). There is currently no suggestion that paralegals will be self-regulating. The Society takes the position that recommendations should contain no reference to the eventual status of the governing body of paralegals. Further, the Society takes the position that before paralegals are permitted to become self-regulating, there must be a full public debate on the merits of such a move.

### **Unauthorized Practice**

The passage of legislation dealing with the regulation of paralegals will be an important statement as to who, other than lawyers, will be able to provide legal services to the public for a fee. The force of the statement will be lost if unauthorized practice, in all its forms, is not vigorously prosecuted. The result will be little if any improvement on the status quo: a variety of persons, with different levels of competence, offering the same legal services to the public for range of fees; public confusion as to what qualifies a person to provide legal services; and no public protection with respect to persons other than lawyers and licensed paralegals who provide poor legal services to the public or who are dishonest.

Unauthorized practice will occur in the following situations:

- A licensed paralegal practises outside the areas specifically authorized for licensed paralegals.
- A licensed paralegal practises in an area authorized for licensed paralegals without being qualified to do so.
- A person who is not a lawyer or a licensed paralegal practises in areas specifically authorized for licensed paralegals.

- A person who is not a lawyer or a licensed paralegal practises outside the areas specifically authorized for licensed paralegals.

Mr. Cory recommends that the legislation governing paralegals should make it an offence for a licensed paralegal to practise outside the areas specifically authorized for licensed paralegals.

Mr. Cory further recommends that, where a licensed paralegal practises outside the areas specifically authorized for licensed paralegals, the matter should be referred to the Attorney General for prosecution.

The Society takes the position that, with respect to prosecution of persons for unauthorized practice, there should be a “division of labour” as between the Society and the Attorney General (or the governing body of paralegals). The Society will be responsible for prosecuting persons who are not lawyers or licensed paralegals who engage in areas of practice outside those specifically authorized for licensed paralegals. It is suggested that the Attorney General (or the governing body of paralegals) should be responsible for prosecuting persons who are not lawyers or licensed paralegals who engage in areas of practice specifically authorized for licensed paralegals. It is suggested that the Attorney General (or the governing body of paralegals) and the Society should jointly be responsible for prosecuting licensed paralegals who engage in areas of practice outside those specifically authorized for licensed paralegals.

The relatively clear definition, in the legislation governing paralegals, of the areas in which licensed paralegals will be permitted to practise will greatly assist the Attorney General (or the governing body of paralegals) in the prosecution of certain forms of unauthorized practice. A definition, in the *Law Society Act*, of the practice of law will further strengthen the Attorney General’s (or the paralegals’ governing body’s) ability, and that of the Society, to prosecute the remaining forms of unauthorized practice. It is recommended that the *Law Society Act* should be amended to include a definition of the practice of law.

## Other Matters

In establishing a framework for regulating paralegal practice in Ontario, there are matters that have not been highlighted by Mr. Cory that will have to be addressed. These include certain “cross-profession” issues (*i.e.*, issues that may arise as a result of the co-existence or interaction of two classes of regulated legal services providers); the prohibition contained in the *Solicitors Act* against lawyers entering into contingent fee agreements; and the application of the prohibition, contained in the *Business Corporations Act*, against a corporation practising a profession. With respect to the last two issues, the Society takes the position that licensed paralegals should be subject to the prohibitions against entering into contingent fee agreements and incorporating a practice just as, on public protection grounds, lawyers currently are. When lawyers are finally permitted to enter into contingent fee agreements and to incorporate a practice, licensed paralegals should then be permitted to do so as well, subject to all restrictions on doing so that will apply to lawyers.

**AN ANALYSIS OF  
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**A. INTRODUCTION**

On May 31, 2000, the Honourable Peter Cory delivered to the Attorney General a report setting out a framework for regulating paralegal practice in Ontario. The report contains recommendations on the scope of paralegal practice in Ontario, on a governance model for the regulation of paralegals and on educational and other requirements for paralegals. The report is the result of Mr. Cory's consideration of written and oral submissions made to him by, among others, judges, boards and tribunals, legal organizations, paralegal organizations and other organizations involved in the administration of justice.

In late Fall 1999, when the Attorney General announced Mr. Cory's work on paralegal regulation, the Society had already embarked on an in-depth examination of paralegal practice in Ontario. The goal of the Society's work was to learn about existing paralegal practice in Ontario and to determine how, if at all, the status quo should be changed so as to ensure that the public received the legal services appropriate to address their needs and that the public, when relying on paralegals to provide legal services, was adequately protected. The Society's work resulted in two lengthy documents: The first document was a research report to the Society from The Strategic Counsel entitled *Environmental Scan and Review of Awareness and Attitudes Pertaining to the Regulation of Paralegal Service Providers in Ontario*. The second document was the Society's own report on the regulation of paralegal practice in Ontario, including recommendations on the scope of paralegal practice and on a model for regulating paralegals. Both documents were provided to Mr. Cory with the hope that they would lay the ground for his work.

Two themes are present in Mr. Cory's report: public protection and access to justice. Public protection is a minor theme, appearing only in the initial chapters where educational, training and other licensing requirements are discussed. Access to justice is the major theme in the report providing the justification for the recommended scope of paralegal practice.

The Society's work on paralegals was grounded solely in the protection of the public. It was the Society's view at the time it was doing its work, and it remains the Society's view, that the regulation of paralegal practice in Ontario, including the scope of paralegal practice, should be resolved having regard only to the protection of the public. The Society's reasons for its view are threefold.

First, there is no proof that the scope of paralegal practice is related in any way to access to justice. At present, there is very little, if any, empirical evidence concerning access to justice and the extent to which paralegals are the solution to any problem of lack of access to justice. To date, there is more anecdotal evidence than empirical evidence on these issues. Nonetheless, the anecdotal evidence by itself points out the intricate nature of the problem of lack of access to justice and leads one to question the validity of the commonly held view that the existence of paralegals is a response to a need for access to justice. Anecdotal evidence suggests that access to justice depends as much on the nature of a client's legal problem, the availability of legal aid, the client's ethnic and cultural background and the client's perceptions of lawyers and paralegals, in terms of their accessibility and cost, as on the cost of legal services. The anecdotal evidence provides no clear sense as to why certain sectors of the population are being denied access to justice, and without such, it is not clear that permitting paralegals to practise in a particular area will in any way resolve the problems of lack of access to justice.

Second, the results of research conducted by The Strategic Counsel (for the Society) confirm that the question of whether paralegals play a role in facilitating access to justice is not one that comes with an easy "yes/no" answer. Contrary to what might be expected if paralegals were facilitating access to justice for people who could not afford to use lawyers, the research showed:

- There is a pattern of use of paralegals that seems to ignore the issue of costs. Paralegals are most often used to resolve traffic ticket disputes, financial problems, immigration matters and landlord/tenant disputes. By contrast, lawyers are most often used for real estate matters, wills and estate planning matters and family law matters (including divorce, separation and child custody cases).

- Individuals who use paralegals tend to consider using a lawyer before seeking help from a paralegal. Interestingly, only a minority of individuals who end up using a paralegal instead of a lawyer do so as a result of the cost of using a lawyer. Reasons cited by the majority of individuals who end up using a paralegal instead of a lawyer include the accessibility of the paralegal and/or a referral to the paralegal by a friend or peer and the perception that the matter at issue does not require a lawyer.
  
- All other things being equal, in most cases, a greater proportion of individuals (including those who use paralegals) would prefer to use lawyers over paralegals. The areas in which lawyers are overwhelmingly preferred include serious criminal matters, obtaining financial compensation from an accident, child support or child custody cases. Lawyers are also preferred to paralegals for minor criminal matters.

Finally, resolving any problems of lack of access to justice by permitting paralegals to practise in certain areas (*e.g.*, family law, wills and estates) will, at worst, exclude persons relying on paralegals from access to justice and, at best, establish a two-tiered justice system. No amount of education and training short of that undertaken by individuals who later qualify to become lawyers can permit a paralegal to bring to a client's problem the knowledge, skills and abilities of a lawyer. A paralegal, practising in certain areas (*e.g.*, family law, wills and estates) stands to mire the administration of justice leaving his or her clients without any access to justice at all or with a level of access to justice far short of that obtained by a lawyer for his or her clients. The Society's research showed that, all other things being equal, individuals would prefer to have the services of a lawyer instead of the services of a paralegal. It is not serving the public well to answer their call for access to justice, their need and wishes for the services of a lawyer, by saying that the public can have access to the services of a licensed paralegal.

Although a major theme in Mr. Cory's report, access to justice is given less than adequate consideration. There is little mention in the report of the provision of legal services in areas of legal practice, such as protracted civil, personal injury and family litigation and criminal

proceedings having serious consequences, where the legal costs to the public can be quite high and where, as a result, there may be problems with access to justice.

By contrast, great focus is given to the provision of legal services in areas of legal practice, such as wills, powers of attorney, real estate sales, incorporations and uncontested divorces, where the costs to the public from using lawyers may be quite low and where, as a result, the introduction of paralegals into the areas of practice will not increase the public's access to justice (and may very well decrease it). With only lawyers currently lawfully permitted to offer legal services in the areas of wills, powers of attorney, real estate sales, incorporations and uncontested divorces, there is no empirical evidence that the public is being denied access to justice in these areas. (Indeed, if paralegals who today practise unlawfully in these areas enjoy a competitive edge over lawyers in terms of cost of services, this competitive edge is more than likely due to the unregulated status of paralegals. Once paralegals are regulated, and are responsible for the costs associated with regulation, this competitive edge will disappear.) There is no empirical evidence that permitting paralegals to practise in these areas will increase the public's access to justice in these areas. Indeed, since paralegals (even when regulated) will never be able to bring to a client's problem the knowledge, skills and abilities of a lawyer, the provision of services by paralegals in these areas will lower the level of justice that the public today has access to.

The Society agrees with Mr. Cory that paralegal practice in Ontario should be regulated. It also agrees with Mr. Cory that individuals seeking to engage in paralegal practice in Ontario should be licensed, should be required to meet minimum educational and training requirements, should be of good character, should be required to carry professional liability insurance, should be bound by rules of professional conduct not dissimilar to the Society's rules of professional conduct and should be required to disclose, in a standard retainer letter, the limits of a paralegal's practice (including that a paralegal is not a lawyer). The Society further agrees with Mr. Cory that, for the benefit of the public, paralegals should be required to participate in the establishment of a compensation fund to reimburse any client of a paralegal for loss suffered as a result of the paralegal's practice and that clients of paralegals should be entitled to have a paralegal's fees bills assessed.

The remaining sections of this paper set out those recommendations in Mr. Cory's report with which the Society would agree, if the recommendations were slightly modified, or with which the Society disagrees, chiefly on the basis that protection of the public is given short shrift at the expense of an attempt to resolve perceived problems of access to justice without a complete examination of those perceived problems.

The Society believes that the public deserves to have the issue of the regulation of paralegal practice in Ontario resolved and to have any problems of lack of access to justice resolved. However, it is unfair to the public to merge the two matters. Such a merger results in the development of a framework for regulating paralegal practice in Ontario which inadequately addresses risk of harm to the public. At the same time, the merger conveniently delays a comprehensive study and a complete solution of the problems of lack of access to justice. The Society would urge the Government of Ontario to continue to do right by the public.

## ***B. LICENSING REQUIREMENTS***

### **Good Character** (Recommendation #2)

Mr. Cory recommends that all candidates for licensing as paralegals, including new entrants and "grandfathers", be of good character, as that term has been interpreted by the Society. Mr Cory notes that the Society has stated that,

... character is a combination of features which distinguish one person from another: "Good character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which undoubtedly include, among others, integrity, candour, empathy, and honesty."<sup>1</sup>

Mr. Cory would not absolutely bar persons with criminal convictions or disbarred persons from being licensed as paralegals. Mr. Cory notes that, under the Society's interpretation of good character, the Society does not absolutely bar persons with criminal convictions from being

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<sup>1</sup> Ontario Ministry of the Attorney General, *A Framework for Regulating Paralegal Practice in Ontario* by The Hon. P. deC. Cory (Toronto: Queen's Printer, 2000) at 9.

admitted to membership. Similarly, the Society permits disbarred lawyers to be readmitted to membership. “The determination of what constitutes good character in the paralegal context should be precisely the same as that required for the legal profession. It would be unfair to require a higher standard for licensed paralegals, yet anything less would be inadequate”.<sup>2</sup>

### *Society’s Response*

In its March 2000 report on paralegals, the Society identified the requirement of good character as a minimum element that any regulatory scheme for paralegals must contain if it is to ensure the protection of the public.

The Society has no concerns with Mr. Cory’s suggestion that licensed paralegals should be of good character, nor with his suggestion that, for purposes of the regulation of paralegals, good character should be interpreted as it has been by the Society. Paralegals, together with lawyers, should be subject to one high standard of good character.

However, it is unclear whether Mr. Cory intends for the good character requirement to apply to paralegals applying for a secondary licence. **Assuming that secondary licences are permitted, the Society is of the view that the good character requirement should apply to all licensed paralegals, including new entrants, “grandfathers” and holders of secondary licences.**

### **Mentoring Program** (Recommendation # 3)

Mr. Cory recommends that all candidates for licensing as paralegals should be required to complete three months of mentoring. This would involve the candidate working under the supervision of a licensed paralegal who has five years of experience, working under the supervision of a lawyer who has five years of experience or monitoring the proceedings of a specialized board or tribunal.

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<sup>2</sup> *Ibid.*

Mr. Cory would exempt from the mentoring requirement persons who have accumulated at least two years experience prior to January 1, 2000, by working under the supervision of a lawyer or as an independent paralegal. (See section on “grandfathers”.)

### ***Society’s Response***

In its March 2000 report on paralegals, the Society identified “appropriate educational and training requirements” as a minimum element that any regulatory scheme for paralegals must contain if it is to ensure the protection of the public. The Society did not provide further details as to these educational and training requirements, assuming that these would be developed by the body charged with regulating paralegals.

With respect to Mr. Cory’s specific recommendations on mentoring, the Society is concerned that the mentoring should be structured (*i.e.*, mentoring should include approval of all mentors by the governing body of paralegals, the filing of education plans by the mentors and the monitoring of the mentoring to ensure that education plans are being followed). A “simple association” between the mentor and the candidate for licensing as a paralegal should not be sufficient to satisfy the mentoring requirement. As well, the Society questions the sufficiency of a three month period of mentoring.

**In summary, the Society agrees with Mr. Cory that all candidates for licensing as paralegals (except “grandfathers”) should be required to complete a period of mentoring. However, the Society takes the position that the nature and duration of the mentoring should be left to be determined by the governing body of paralegals. The legislation governing paralegals should provide that all candidates for licensing as paralegals should be required to complete a mentoring program established or approved, and regulated, by the governing body of paralegals.**

**Additional Examinations** (Recommendations # 18, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41; Suggestion #1)

In specified areas of practice, Mr. Cory recommends that licensed paralegals should be required to pass special examinations before they may engage in practice in those areas.

A licensed paralegal, who obtains his or her licence by meeting the standard educational and mentoring requirements, will, without more, be permitted to practise in the following areas:

- Non-specialized boards and tribunals (where the empowering statute of the board or tribunal permits appearance by agent).
- Construction liens (including preparation and filing of liens and acting for lien claimants in court where claim does not exceed the jurisdiction of the Small Claims Court).
- Criminal pardons.
- Change of name applications.
- “Simple” wills.
- Powers of attorney.
- Living wills.
- Commissioner for oaths.
- Acting for vendor on sale on residence.
- “Simple” incorporations.

The same licensed paralegal will only be able to practise in areas outside the aforesaid if the paralegal passes a special examination relating to the area. This “special examination requirement” applies with respect to the following areas of practice:

- Specialized boards and tribunals: Ontario Rental Housing Tribunal (including first level of appeal); Ontario Labour Relations Board; Financial Services Commission of Ontario (Dispute Resolution Group) (including first level of appeal); Ontario Workplace Safety and Insurance Appeals Tribunal; Ontario Municipal Board; Ontario Highway Transport Board; Commercial Registration Appeal Tribunal; Consent and Capacity Board; Ontario Civilian Commission on Police Services; Licence Suspension Appeal Board; other boards and tribunals designated as specialized boards and tribunals by the governing body of paralegals.
- Immigration and Refugee Board.
- Small Claims Court (including first level of appeal).
- *Provincial Offences Act* (including first level of appeal).
- Specified summary conviction *Criminal Code* matters: vagrancy; fraudulently obtaining food, beverage or accommodation; fraudulently obtaining transportation; using slugs and tokens; defacing coins; duty to safeguard on ice; failure to keep watch on person towed; falsifying employment records; nudity in a public place.
- Duty counsel (for Legal Aid Ontario) in the Ontario Court of Justice with respect to family law matters.
- Uncontested divorces.

### ***Society’s Response***

**The Society takes the position that, in every area in which a licensed paralegal wishes to practise, the paralegal should be required to meet additional requirements beyond the standard educational and mentoring requirements recommended by Mr. Cory.**

Assuming that the scope of paralegal practice will be as recommended by Mr. Cory, the Society takes no issue with the list of areas of practice in respect of which Mr. Cory would require licensed paralegals to pass special examinations before qualifying to practise in those areas. It is clear that, in these areas of practice, consistent with the Society's position, paralegals will be required to meet additional requirements beyond the standard educational and mentoring requirements to qualify to practise in those areas.

The Society disagrees with Mr. Cory's recommendation that, in other areas of practice, licensed paralegals should qualify to practise in those areas simply by successfully completing a two-year paralegal program at an accredited community college and a three-month period of mentoring. At the very least, the paralegals should be required to pass a general licensing examination touching on all the areas of practice.

**As well, the Society believes that all licensed paralegals (*i.e.*, those seeking to practise in an area in which Mr. Cory would require paralegals to pass special examinations and those seeking to practise in an area in which Mr. Cory would not require paralegals to pass special examinations) should be required to pass an examination on professional responsibility and practice management issues.**

The Society notes that regulated professions (including the legal profession) require candidates for licensing to meet separate educational and licensing requirements. The typical educational requirement is a degree from an accredited educational institutional. Typical licensing requirements include a period of apprenticeship and passing one or more licensing examinations (with or without accompanying preparatory courses). This "licensing model" recognizes that there is a difference between educating a person to qualify to practise a regulated profession and licensing the person to practise the profession. The latter function focuses more on the protection of the public and ensuring that the person is competent in a broad sense to practise the profession.

There appears to be no good reason why paralegals should not be licensed in the same manner as other regulated professionals are licensed.

**Grandfathers** (Recommendations # 4, 5, 21, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 43, 44, 45, 46, 48, 55; Suggestion #1)

Mr. Cory recommends that persons who have accumulated at least two years experience prior to January 1, 2000, by working under the supervision of a lawyer or as an independent paralegal, should be permitted to qualify as “grandfathers” for licensing as paralegals without having successfully completed the two-year paralegal program at an accredited community college and without participating in any period of mentoring.

Under Mr. Cory’s recommendations, it appears that a “grandfathered” licensed paralegal will, without more, be permitted to practise in the following areas:

- Construction liens (including preparation and filing of liens and acting for lien claimants in court where claim does not exceed the jurisdiction of the Small Claims Court).
- Criminal pardons.
- Change of name applications.
- Powers of attorney.
- Living wills.
- Commissioner for oaths.

A “grandfathered” licensed paralegal will be permitted to practise in other areas of practice if the paralegal passes a special examination relating to the area. This “special examination requirement” applies with respect to the following areas of practice:

- Non-specialized boards and tribunals. (The paralegal will not be required to pass a special examination in this area if he or she passes a special examination relating to at least one specialized board or tribunal.)
- Specialized boards and tribunals: Ontario Rental Housing Tribunal (including first level of appeal); Ontario Labour Relations Board; Financial Services Commission of Ontario (Dispute Resolution Group) (including first level of appeal); Ontario Workplace Safety and Insurance Appeals Tribunal; Ontario Municipal Board; Ontario Highway Transport Board; Commercial Registration Appeal Tribunal; Consent and Capacity Board; Ontario Civilian Commission on Police Services; Licence Suspension Appeal Board; other boards and tribunals designated as specialized boards and tribunals by the governing body of paralegals.
- Immigration and Refugee Board.
- Small Claims Court (including first level of appeal).
- *Provincial Offences Act* (including first level of appeal).
- Specified summary conviction *Criminal Code* matters: vagrancy; fraudulently obtaining food, beverage or accommodation; fraudulently obtaining transportation; using slugs and tokens; defacing coins; duty to safeguard on ice; failure to keep watch on person towed; falsifying employment records; nudity in a public place.
- Duty counsel (for Legal Aid Ontario) in the Ontario Court of Justice with respect to family law matters.

- Uncontested divorces.
- “Simple” wills.
- Acting for vendor on sale of residence.
- “Simple” incorporations.

### *Society’s Response*

**Assuming that the scope of paralegal practice will be as recommended by Mr. Cory, the Society takes the position that a “grandfathered” licensed paralegal should be required to pass an examination in every area in which the paralegal wishes to practise. In addition, a “grandfathered” licensed paralegal should be required to pass an examination on professional responsibility and practice management issues.**

### **Secondary Licences** (Recommendations #18, 19, 25, 26, 27, 28, 30, 31, 32, 33; Suggestion #1)

Mr. Cory recommends that a separate class of “secondary licences” be created for paralegal practice.

A holder of a secondary licence would be limited to practising before one or more named specialized boards or tribunals and/or before the Immigration and Refugee Board of Canada (in Ontario).

A secondary licence would be valid for one year only, but it could be renewed.

A secondary licence would be issued by the governing body of paralegals on the recommendation of a board or tribunal or on the recommendation of the Immigration and Refugee Board of Canada.

It might be necessary for a candidate for a secondary licence to pass a special examination as a condition of being granted a secondary licence for the first time. The necessity for writing a special examination would be determined by the insurer.

### *Society's Response*

The Society has several concerns about secondary licences. Chief among these is that a system of licensing which gives a board or tribunal an absolute discretion to determine who should be licensed to represent parties appearing before it will erode the independence of legal advisors and the rule of law. Further, such a system of licensing will not provide for adequate public protection. With the licensing of paralegals dispersed among many different bodies, there can be no guarantees that all licensed paralegals will be required to meet the same minimum standards.

**The Society recommends that only the governing body of paralegals should be permitted to determine who may be licensed as a paralegal. In the case of the persons for whom secondary licences were created, the Society recommends that these persons be required to apply to the governing body of paralegals for licensing in the same manner as all other persons. The standard educational, mentoring and licensing requirements would apply. The Society notes that provision has been made for the governing body of paralegals to exempt persons from the educational requirement on an individual basis. A similar provision could be made for the governing body of paralegals to exempt persons from the mentoring requirement on an individual basis. Together, these provisions could be used as deemed appropriate in the case of the persons for whom secondary licences were created. However, these persons, like all other licensed paralegals seeking to represent parties before a named specialized board or tribunal, would be required to pass a special examination relating to the board or tribunal and an examination on professional responsibility and practice management issues. Once licensed and qualified to practise before the specialized board or tribunal, all**

**regulatory controls applicable to other licensed paralegals would apply to this group of licensed paralegals.** The Society's recommendation is made with a view to safeguarding the independence of legal advisors, safeguarding the rule of law and securing to the public competent paralegals.

### ***C. PROVISIONS FOR PROTECTION OF THE PUBLIC***

#### **Discipline Procedure** (Recommendations # 8, 9, 10, 11)

Mr. Cory recommends as follows:<sup>3</sup>

- "A procedure for disciplining licensed paralegals should be developed."
- "The procedure for discipline should include, until the paralegal organization becomes self-regulatory, a panel consisting of three members: one lawyer; one licensed paralegal; and one member of the public to review complaints."
- "The discipline panel should be authorized to impose an appropriate punishment, including licence suspension or revocation, fine and reprimand, or any other disposition that it deems appropriate".
- "There should be provision for an appeal of the decision of the discipline panel to the governing body or to the Divisional Court; the appellate body should be authorized to adopt, rescind or vary the decision of the discipline body as it sees fit and impose such sanctions as it deems appropriate".

#### ***Society's Response***

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<sup>3</sup> *Ibid.* at 20.

In its March 2000 report on paralegals, the Society identified as minimum elements that any regulatory scheme for paralegals must contain if it is to ensure the protection of the public the following:

- “[S]ufficient resources for ... the disciplining of independent paralegals violating the Rules of Professional Conduct ... ”.
- “[A]n appeal process”.

**With the exception of Mr. Cory’s recommendation on the composition of the discipline panel, the Society agrees with Mr. Cory’s recommendations respecting the establishment and functioning of a discipline process for paralegals. With respect to the composition of the discipline panel, the Society takes the position that the participation of the public and the Society on the discipline panel should not be provisional. At this point in time, there is no suggestion that paralegals will be self-regulating. As such, the composition of the discipline panel should address only the current model of regulation of paralegals; no reference should be made to other models of regulation.**

### **Confidentiality** (Recommendation # 7)

In the text of his report, Mr. Cory states that,

... the legislation pertaining to licensed paralegals should ensure that they cannot be required to divulge the confidential information they have received, unless a judge of the Ontario Court of Justice or Superior Court of Justice finds that, in the interest of the due administration of justice, it must be disclosed.<sup>4</sup>

Following from this discussion, Mr. Cory’s recommendation is that,

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<sup>4</sup> *Ibid.* at 17.

[t]he code of conduct for licensed paralegals should include a provision that information obtained by a licensed paralegal from a client in the course of providing services to the client must be held in the strictest of confidence and not be divulged unless authorized by the client or required by an order of a court.<sup>5</sup>

### *Society's Response*

The Society is concerned about the lack of detail provided in Mr. Cory's report with respect to the duty of confidentiality that it is proposed should apply to paralegals.

Information which a client provides to a lawyer is protected against disclosure, not only by the lawyer's duty of confidentiality, but also (and more importantly) by solicitor-client privilege. Privilege provides greater protection against disclosure of information than confidentiality. The circumstances under which a lawyer may disclose privileged information are more circumscribed than the circumstances under which a lawyer may disclose information that is not privileged but is merely confidential.

Solicitor-client privilege is not a creature of legislation; it was created by the courts. Solicitor-client privilege cannot be extended to protect communications exchanged between paralegals and their clients. This is not to say that, over time, the courts will not create a new privilege to apply to such communications.

The duty of confidentiality that it is proposed should apply to paralegals would impose a stricter duty of confidentiality than is imposed on lawyers; at the same time, it would provide less protection to paralegal-client communications than is provided to solicitor-client communications.

**The Society takes the position that any duty of confidentiality applicable to paralegals should be contained in the legislation governing paralegals. The Society further takes the position that paralegals should be required to advise their clients (ideally in the standard retainer**

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<sup>5</sup> *Ibid.* at 20.

letter) that communications between paralegals and clients may not be as secure as communications between lawyers and their clients. As well, paralegals should be required to advise their clients (again, in the standard retainer letter) of the circumstances under which a paralegal will be required to divulge communications between the paralegal and his or her client.

#### *D. PERMISSIBLE AREAS OF PRACTICE*

**Provincial Boards and Tribunals** (Recommendations #17, 18, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33)

Mr. Cory recommends that licensed paralegals should be permitted to practise before any provincial board or tribunal the empowering statute of which provides that parties may appear by agent. Further, in some instances, Mr. Cory recommends that licensed paralegals should be permitted to appear on an appeal in the first instance from a decision of the board or tribunal.

Mr. Cory creates two classes of boards and tribunals: Non-specialized boards and tribunals and specialized boards and tribunals. The class of specialized boards and tribunals includes the Ontario Rental Housing Tribunal, the Ontario Labour Relations Board, the Financial Services Commission of Ontario (Dispute Resolution Group), the Ontario Workplace Safety and Insurance Appeals Tribunal, the Ontario Municipal Board, the Ontario Highway Transport Board, the Commercial Registration Appeal Tribunal, the Consent and Capacity Board, the Ontario Civilian Commission on Police Services, the Licence Suspension Appeal Board and any other board or tribunal designated as a specialized board or tribunal by the governing body of paralegals. The class of non-specialized boards and tribunals includes all boards and tribunals that are not specialized boards and tribunals the empowering statute of which provides that parties may appear by agent.

The significance of the two classes of boards and tribunals is that licensed paralegals will be required to pass a special examination on each specialized board and tribunal before which they wish to practise in order to qualify to practise before the board or tribunal. Licensed paralegals

(other than those who qualified for licensing as grandfathers) will not be required to pass any examination in order to qualify to practise before a non-specialized board or tribunal. As well, a special class of paralegals, holders of secondary licences, will be permitted to practise before named specialized boards and tribunals without having to meet any of the requirements other licensed paralegals will have to meet (*e.g.*, two-year paralegal program; three-month period of mentoring).

Mr. Cory recommends that licensed paralegals (holders of secondary licences) be permitted to appear on an appeal in the first instance from the decisions of the following specialized boards and tribunals: the Ontario Rental Housing Tribunal and the Financial Services Commission of Ontario (Dispute Resolution Group).

### *Society's Response*

#### **Financial Services Commission of Ontario (Dispute Resolution Group)**

**In its March 2000 report on paralegals, the Society provided that, subject to forum specific regulation, paralegals should be permitted to represent the public before administrative tribunals excluding the Financial Services Commission of Ontario (Dispute Resolution Group). The Society stands firm on its position.**

The Society notes that, currently, section 398 of the *Insurance Act* appears to prohibit anyone but a lawyer from negotiating the settlement of a claim for damages arising out of a motor vehicle accident – hence from representing the public before the Financial Services Commission of Ontario (Dispute Resolution Group). Section 398 reads as follows:

398. (1) Subject to subsection (2), no person shall, on the person's own behalf or on behalf of another person, directly or indirectly,
- (a) solicit the right to negotiate, or negotiate or attempt to negotiate, for compensation, the settlement of a claim for loss or damage arising out of a motor vehicle accident resulting from bodily injury to or death of any person or damage to property on behalf of a claimant;

(b) hold himself, herself or itself out as an adjuster, investigator, consultant or otherwise as an adviser, on behalf of any person having a claim against an insured for which indemnity is provided by a motor vehicle liability policy.

(2) This section does not apply to a barrister or solicitor acting in the usual course of the practice of law.

In order for Mr. Cory's recommendation, that licensed paralegals should be permitted to practise before the Financial Services Commission of Ontario (Dispute Resolution Group), be implemented, section 398 of the *Insurance Act* will have to be amended. This is a clear departure from Mr. Cory's approach respecting permitting licensed paralegals to practise before other provincial boards and tribunals. There, Mr. Cory recommends that licensed paralegals should be permitted to practise before any board or tribunal if the empowering statute currently provides that parties may appear by agent. The Society takes the position that before the *Insurance Act* is amended and the current scope of paralegal practice is extended, an in depth examination ought to be undertaken of the nature of practice before the Financial Services Commission of Ontario (Dispute Resolution Group) and consideration ought to be given, in view of the results of the examination, to the ability of paralegals to provide service to the public in a manner that does not put them at risk. It is the Society's position that such an examination and consideration will lead to the conclusion that paralegals should not be practising before the Financial Services Commission of Ontario (Dispute Resolution Group).

The Society notes that, notwithstanding section 398 of the *Insurance Act*, many paralegals are currently practising before the Financial Services Commission of Ontario (Dispute Resolution Group). This poses a grave risk to the public. Paralegals are not now, nor will they be under Mr. Cory's regulatory regime, competent to practise in this area

The area of accident benefits law is very complex. The relevant legislation is highly detailed and knowledge and understanding of limitation periods is required. Further, a person representing an accident victim must be able to negotiate skilfully with the insurer prior to formal mediation or settlement. And, if the matter moves to arbitration, evidence is presented in the usual way before a

tribunal, requiring a good understanding of the rules of evidence. An ill-informed choice made by the representative of an accident victim may result in uncorrectable consequences.

Currently, many paralegals process all the paperwork for claiming accident benefits, they assist accident victims in completing applications and they participate in mediations and pre-arbitrations. Such paralegals pose a great risk to an accident victim when they advise on the seriousness of the victim's physical and psychological ailments and whether or not the injuries surpass the threshold for a tort claim. There is anecdotal evidence that, in settling a claim for accident benefits, a number of paralegals make their own evaluation of what a claim is worth without taking into consideration any relevant law, particularly as it relates to the threshold for a tort claim. An accident victim represented by such a paralegal stands to lose out on making a successful tort claim and may well end up under-compensated for his or her injuries.

At present, the *Insurance Act* requires insurers to make certain that an accident victim claiming accident benefits receives legal advice before accepting a lump sum settlement. There is anecdotal evidence that insurance companies do not insist that victims obtain legal advice prior to a settlement.

The Financial Services Commission of Ontario clearly has a vested interest in settling damage claims. It should not be surprising that they would support the use of paralegals who would be unfamiliar with the thresholds for tort claims and would be quick to settle for a lower amount when there is a guarantee of a percentage fee. The Society regrets that Mr. Cory chose to give the weight he did to the testimony of the Financial Services Commission of Ontario and to insurance industry representatives. The Society also regrets that Mr. Cory chose to believe that the Society's position on the ability of paralegals to practise before the Financial Services Commission of Ontario was not solely reflective of the Society's interest in protecting the public.

Aside from the testimony of the Financial Services Commission of Ontario and insurance industry representatives, there is no empirical evidence that there is any need for paralegals to practise in the area of accident benefits. In fact, the Society's research showed that, amongst users of paralegals and users of lawyers, there is a marked preference for lawyers' services respecting

“financial compensation from an accident”: Twelve percent of users of paralegals would hire a paralegal while 82 percent would hire a lawyer. Seven percent of users of lawyers would retain a paralegal while 88 percent would hire a lawyer.

### Appeals

**The Society takes the position that licensed paralegals should only be able to appear on an appeal from a decision of a provincial board or tribunal if,**

- **the appeal is on a question of fact alone; and**
- **the appeal is to another board or tribunal or to the Ontario Court of Justice.**

**In no case should a licensed paralegal be permitted to appear on an appeal from a decision of a provincial board or tribunal if the appeal is on a question of law alone or is on a question of mixed fact and law or if the appeal is to the Superior Court of Justice or the Divisional Court.**

The Society is of the view that appeals on questions of law or mixed fact and law require more extensive and comprehensive education than that proposed for paralegals by Mr. Cory.

The Society notes that there appears to be an inconsistency in Mr. Cory’s report with respect to a paralegal’s ability to appear on appeals. In discussing a licensed paralegal’s ability to practise before the Ontario Municipal Board, Mr. Cory states that a licensed paralegal should not be allowed to appear on appeals from the Board to the Divisional Court on questions of law<sup>6</sup>. This statement suggests that there may be something inherent in appeals on questions of law which disqualifies paralegals from appearing on them, with which suggestion the Society agrees. However, in discussing a licensed paralegal’s practice before the Ontario Rental Housing Tribunal, Mr. Cory recommends that a license paralegal should be permitted to appear on appeals

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<sup>6</sup> *Ibid.* at 34.

involving questions of law.<sup>7</sup> Appeals from decisions of the Ontario Rental Housing Tribunal are to the Divisional Court and are only allowed on questions of law.<sup>8</sup>

**Small Claims Court** (Recommendations # 34, 35)

Mr. Cory recommends that licensed paralegals should be permitted to practise before the Small Claims Court. Mr. Cory further recommends that licensed paralegals should be permitted to take appeals at the first level of appeal from decisions of the Small Claims Court.

***Society's Response***

In its March 2000 report on paralegals, the Society took the position that, subject to forum specific regulation, paralegals should be permitted to practise in Small Claims Court. The Society did not specifically address whether paralegals should be permitted to take an appeal at the first level of appeal from decisions of the Small Claims Court.

An appeal from a decision of the Small Claims Court is available in two instances: Where the Small Claims Court claim was for the payment of money in excess of \$ 500 (excluding costs); and where the Small Claims Court claim was for the recovery of possession of personal property exceeding \$ 500 in value. The appeal is to the Divisional Court.<sup>9</sup>

**The Society agrees with Mr. Cory that licensed paralegals should be permitted to practise before the Small Claims Court.**

**The Society does not agree with Mr. Cory that licensed paralegals should be permitted to take an appeal at the first level of appeal from decisions of the Small Claims Court.**

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<sup>7</sup> *Ibid.* at 31.

<sup>8</sup> *Tenant Protection Act*, s. 196.

<sup>9</sup> *Courts of Justice Act*, s. 31.

**Provincial Offences** (Recommendations #37, 38)

Mr. Cory recommends that licensed paralegals should be permitted to prosecute and defend provincial offences in the Ontario Court of Justice. Mr. Cory further recommends that licensed paralegals should be permitted to appear at the first level of appeal from a conviction or acquittal on a provincial offence in the Ontario Court of Justice.

*Society's Response*

**In its March 2000 report on paralegals, the Society recommended that, subject to forum specific regulation, paralegals should be permitted to practise in *Provincial Offences Act* matters subject to the following limitation: Paralegals should be prohibited from representing persons charged with offences under the *Provincial Offences Act* where the prosecutor indicates that, upon conviction, the following penalties might be sought:**

- **Imprisonment.**
- **A fine greater than the monetary limit that may be claimed in a Small Claims Court proceeding in the jurisdiction in which the matter is heard.**

**The Society stands firm on this recommendation. Further, the Society takes the position that a paralegal should only be permitted to appear on an appeal from a conviction or acquittal of a provincial offence if,**

- **the appeal is on a question of fact alone; and**
- **the appeal is to the Ontario Court of Justice.**

Prosecutions under the *Provincial Offences Act* can vary enormously in terms of factual, evidentiary and legal complexity. Many matters prosecuted under the *Provincial Offences Act*

require the same range of skills for a proper defence as are required for a proper defence of a *Criminal Code* offence. Further, the possible penalties resulting from a conviction of a *Provincial Offences Act* offence can vary significantly and include substantial fines and even imprisonment.

Due to the substantial risks to persons charged with *Provincial Offences Act* offences, the Society is of the view that practice by paralegals in this area must be carefully regulated in harmony with the Society's approach in the area of Small Claims Court matters and *Criminal Code* proceedings.

### **Family Law** (Recommendations # 40, 41)

Mr. Cory recommends that licensed paralegals should be authorized to appear as duty paralegals in the Ontario Court of Justice and, if future policy makes it possible, in the Superior Court of Justice.

Mr Cory further recommends that licensed paralegals should be authorized to prepare and file the necessary papers and to do all that is required in completing an uncontested divorce in circumstances which meet the following conditions:

- where the parties have no children and no significant assets or the assets are jointly held, and where there is no need for, or there is no issue outstanding as to, spousal support and there are no outstanding collateral issues (for example, division of pensions);
- where the parties have a separation agreement resolving all collateral issues with a certificate of independent legal advice executed within one year of the commencement of the divorce action; and
- where there is a court order resolving all of the ancillary issues granted within one year of the commencement of the divorce action.

### ***Society's Response***

**In its March 2000 report on paralegals, the Society stated that paralegals should be prohibited from practising in the area of family law.**

**The Society maintains this position.**

Lawyers, paralegals, stakeholders and tribunal representatives all agree that there is potential for abuse in the area of family law. In fact, the Society's research showed that stakeholders classify family law issues as falling within the "high risk" category. Important rights are at stake in family law matters, such as property issues, financial support and child-related matters. The area of family law, which includes, among other things, marriage or cohabitation agreements, separation agreements and divorces, is a highly complex area. Family law also involves tax planning, which if done improperly may have disastrous consequences for spouses and children.

A professional providing services in the area of family law would need to be familiar with at least 35 statutes.<sup>10</sup>

The loss of spousal status as a result of a divorce judgment can pose serious financial risk and hardship to former spouses and their dependants, including,

- loss of possessory right to a matrimonial home or homes;
- loss of rights restraining alienation of a matrimonial home or homes before property issues have been resolved;

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<sup>10</sup> *Divorce Act, 1985; Family Orders and Agreements Enforcement Assistance Act; Garnishment, Attachment and Pension Diversion Act; Income Tax Act; Pension Benefits Division Act; Annulment of Marriages Act; Bankruptcy and Insolvency Act; Canada Evidence Act; Criminal Code; Marriage (Prohibited Degrees) Act; Pension Act; Pension Benefits Standards Act, 1985; Change of Name Act; Child and Family Services Act; Children's Law Reform Act; Courts of Justice Act; Rules of Civil Procedure; Family Court Division Rules; Family Law Act; Family Responsibility and Support Arrears Enforcement Act, 1996; Marriage Act; Reciprocal Enforcement of Support Orders Act; Succession Law Reform Act; Business Corporations Act; Creditors' Relief Act; Dower and Miscellaneous Abolition Act; Evidence Act; Habeas Corpus Act; Partition Act; Pension Benefits Act; Proceedings Against the Crown Act; Vital Statistics Act; Wages Act; Workplace Safety and Insurance Act.*

- loss of insurable benefit coverage (*i.e.*, medical, dental) since many plans do not include “former” spouses as eligible dependants;
- loss of survivor pension coverage by a non-owner spouse;
- loss of statutory rights to compel the other spouse to remove religious barriers to remarriage (section 21.1 of the *Divorce Act*); and
- abridgment of the limitation period under subsection 7 (3) of the *Family Law Act* dealing with equalization rights to two years following a divorce from six years after separation (*i.e.*, whichever is the lesser period).

There are also significant risks and potential costs associated with poorly drafted, improperly understood or legally unenforceable domestic contracts, including,

- the loss by a non-owner spouse of an equal possessory right of occupation of a matrimonial home or, where the right of equal possession is not released, the continuance of that right (section 18 of the *Family Law Act*);
- the loss by a non-owner spouse of the statutory restraint on alienation of a matrimonial home or, where no release of Part II *Family Law Act* rights is contained in the separation agreement, the continuance of that restraint;
- the waiver or release of beneficial interests in property to which claims of resulting or constructive trust could be advanced;
- the waiver or release of pension benefits or entitlements; and
- ineffective or unforeseen tax consequences involving the transfer of capital property such as the matrimonial home, investment properties, marketable

securities, registered retirement savings plans, shares in private and public companies, and income or capital gain attribution.

The waiver or release of spousal support rights or, conversely, the failure to obtain such a waiver or release, particularly where property entitlement is foregone or other benefits conferred may be disastrous.

Potential problem areas involving children include,

- failure to distinguish adequately between “custody” and “joint custody” and to clearly allocate parental decision-making responsibilities in circumstances where variables to “custody” or “joint custody” are involved, and failure to identify specific areas of parental responsibility (*e.g.*, choice of child’s religious upbringing);
- absence of mobility limitation (or restriction) provision;
- absence of provision restraining surname change application by custodial parent; and
- absence or failure to consider entitlement to obtain passport or travel authorization.

Risk also arises around familiarity with limitation periods. These could affect property rights such as the right to possession of the matrimonial home, and support rights such as the right to make a *Family Law Act* claim for support. A spouse could also lose medical coverage and pension entitlements if limitation periods are not met.

The application of sophisticated and knowledge-based judgment must be exercised in relation to most family law matters.

Finally, there is no empirical evidence that there is any need for paralegals to practise in the area of family law, particularly in one of the areas reserved for paralegals by Mr. Cory (namely, uncontested divorces). In fact, the Society's research showed that, amongst users of paralegals and users of lawyers, uncontested divorce was identified as an area where lawyers' services are much desired: Only 30 percent of users of paralegals would retain a paralegal to provide services on an uncontested divorce matter, while 61 percent would hire a lawyer. Likewise, 30 percent of users of lawyers would obtain the services of a paralegal, while 64 percent would engage a lawyer.

### **Will and Estates** (Recommendations # 42, 43)

Mr. Cory recommends that licensed paralegals should be authorized to draw a simple will in the following circumstances:

- where the assets consist of no more than the matrimonial home, bank accounts, life insurance policies, RRSPs, annuities and personal chattels; and
- where the distribution of those assets is straightforward, for example, all to a spouse and if the spouse should predecease the testator, or if there is no spouse, to be divided in equal shares per stirpes among the children.

### ***Society's Response***

**In its March 2000 report on paralegals, the Society recommended that paralegals should be prohibited from practising in the area of wills and estates.**

**The Society stands firm on its recommendation.**

A will, whether simple or complex, can only be produced as an end product of a comprehensive client interview. Proper advice requires a thorough knowledge of at least 12 statutes.<sup>11</sup> The person giving advice should also be familiar with the common law concepts of testamentary capacity, undue influence, duress, abatement, incorporation by reference, voidance for uncertainty or public policy, conflicts of laws and the legal principles set out in *Saunders v. Vautier*.

The assessment of issues of capacity, undue influence and suspicious circumstances is key to the creation of a valid will and makes the potential risk to the consumer greater than some people may recognize. Incompetent practice in this area can harm not only the testator, but also innocent third parties such as beneficiaries. It is remarkably easy to err in drafting a will, as many do-it-yourself wills and wills drafted by non-lawyers have amply demonstrated.

There is no consensus about whether will drafting is an appropriate area for paralegal practice. Some propose allowing paralegals to do “simple” wills. It has been argued that paralegals could receive adequate training through available college courses. Others argue that without a working knowledge of the statutory and case law in the area of wills interpretation, family law, dependants’ relief, *etc.*, a will drafter will not be able to properly assess whether the contemplated will is in fact “simple”. Thus, will drafting can be quite routine, or highly specialized, depending on the testator’s specific circumstances. However, the determination can only be made after a thorough legal assessment of all the circumstances.

Although, in British Columbia, the *Notaries Act* allows notaries to draft and supervise the execution of wills under certain circumstances, the Society has been made aware that there is concern that notaries are not careful in situations where the needs of clients are not simple. This is particularly true for clients with blended families or those who have disabled dependants.

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<sup>11</sup> *Succession Law Reform Act, the Family Law Act, Substitute Decisions Act, Estate Administration Tax Act, Income Tax Act, Children’s Law Reform Act, Insurance Act, Accumulations Act, Perpetuities Act, Registry Act, Land Titles Act and the Estate Administration Act.*

Any service requiring judgments respecting issues such as capacity and the relevance of other areas of law (for example, family, income tax and insurance law) raises sufficient potential risk to conclude that only lawyers should provide this service.

Finally, there is no empirical evidence that there is any need for paralegals to practise in the area of wills and estates, particularly in the area reserved for paralegals by Mr. Cory (namely, drafting of simple wills). In British Columbia, where both lawyers and notaries draft wills, there appears to be no cost differences between what lawyers charge and notaries charge for “simple” wills. This will likely be the case in Ontario. With no difference in cost, access to lawyers at comparable rates will be a reality. Why would the public need the option of going to someone with less training who charges the same fee? As well, the Society’s research showed that, amongst users of paralegals and users of lawyers, there was a preference for hiring a lawyer to do wills or estate planning work.: Only 28 percent of users of paralegals would retain a paralegal for wills or estate planning work, while 68 percent would hire a lawyer. Likewise, 22 percent of users of lawyers would obtain the services of a paralegal, while 75 percent would engage a lawyer.

### **Powers of Attorney** (Recommendation # 44)

Mr. Cory recommends that licensed paralegals should be authorized to advise regarding powers of attorney and living wills, to prepare these documents and to have them executed.

### ***Society’s Response***

**In its March 2000 report on paralegals, the Society took the position that paralegals should be prohibited from practising in the area of powers of attorney.**

**The Society maintains this position.**

Powers of attorney, while conceptually simple, represent powerful documents by which broad powers are given to others. Many individuals who wish to grant a power of attorney over their

affairs may be in vulnerable circumstances, often by virtue of advanced age or illness. As a result, the ability of a practitioner to assess issues of capacity, undue influence and suspicious circumstances becomes critical, and potential risk to the public becomes more apparent.

**Real Estate** (Recommendations # 47, 48)

Mr. Cory recommends that licensed paralegals should be authorized to act for a vendor on the sale of a residential property that is either clear of any mortgage encumbrances or subject to only one mortgage.

***Society's Response***

**In its March 2000 report on paralegals, the Society took the position that paralegals should be prohibited from practising in the area of real estate law.**

**The Society maintains this position.**

In the area of real estate law, the risks to clients arise primarily in the context of the agreement of purchase and sale, title searches, requisitions on title, zoning compliances, outstanding work orders and the ability to marshal funds for a successful closing of the transaction.

The risk to the client in residential real estate arises not so much from problems related to title but from non-title issues, which require knowledge of many inter-related areas of law. Examples of non-title issues on which a client might need to be advised include,

- deciding whether or not to close a deal;
- irregularities discovered upon examination of a survey;
- issues relating to the goods and services tax;

- the vendor's liability in certain contractual situations; and
- correcting title problems and answering requisitions.

Handling a real estate transaction requires a thorough knowledge and appreciation of areas of law involving contracts, mortgages, easements, estates, powers of attorney, family rights and responsibilities, income tax, land transfer, construction liens, planning law and sub-division control, environmental and soil contamination, corporations, landlord and tenant and civil litigation.

Because of the complexities of both title and non-title matters, and the related skill sets required to address these matters, the public interest requires the involvement of a lawyer.

The Society's research indicates that there may not be a need for paralegals to practise in this area. Members of the public seem to favour the services of lawyers over those of paralegals in the real estate area: Only twenty-five percent of users of paralegals reported that they would use paralegal services on real estate matters, while 69 percent would retain a lawyer. Among users of lawyers, 18 percent said that they would hire a paralegal for a real estate matter, while 80 percent said that they would prefer to obtain the services of a lawyer.

In British Columbia, the *Notaries Act* allows notaries to "draw instruments relating to property which are intended to be registered in a registry or other public office in British Columbia". This means that, in British Columbia, notaries, non-lawyers, can act for both vendors and purchasers on real estate matters. The fees charged by notaries and lawyers are competitive; there is, therefore, no price advantage to using a notary instead of a lawyer. However, there may well be a quality advantage to using a lawyer instead of a notary. The Society of Notaries of British Columbia indicates that, each year, seventy percent of insurance claims against notaries relate to real estate work.

The Society was rather surprised to read Mr. Cory's recommendation that licensed paralegals should be able to represent vendors in residential real estate transactions. This matter was not raised at the hearings held by Mr. Cory.

Finally, the Society wishes to point out that, although Mr. Cory recommends that licensed paralegals should be able to represent vendors in residential real estate transactions, the recommendations dealing with public protection are, in fact, insufficient to adequately protect the public and other recommendations fail to recognize the realities of paralegals completing real estate transactions. For example, Mr. Cory recommends that paralegals should not have a trust fund even when handling real estate transactions. The report is silent on how a paralegal, in completing a real estate transaction, would handle sale proceeds and pay off any mortgages, real estate commissions and other liens and arrears without the use of a trust account. As a second example, Mr. Cory fails to specify how licensed paralegals would be able to find affordable insurance to adequately cover the potential claims of clients in residential transactions. Without doubt, real estate is a "high risk" area from an insurance point of view. (Notaries in British Columbia who engage in real estate work pay an annual insurance premium of more than \$1,600 for coverage of \$2 million.) As a third example, Mr. Cory fails to provide how the governing body of paralegals will be able to establish a sufficient compensation fund to cover client loss arising as a result a paralegal's work in real estate law. As a final example, Mr. Cory fails to address how a paralegal, acting for a vendor, will be able to fulfil certain obligations currently satisfied by a lawyer (*e.g.*, certifying compliance with the *Planning Act*).

### **Incorporations** (Recommendations # 54, 55)

Mr. Cory recommends that licensed paralegals should be authorized to undertake the simple incorporation of private companies, where, for example, there is only one shareholder and one class of shares.

### ***Society's Response***

**In its March 2000 report on paralegals, the Society took the position that paralegals should be prohibited from incorporating businesses and giving legal advice on business matters and legal opinions on tax law.**

**The Society maintains this position.**

A determination that a “simple” incorporation is appropriate cannot be made without a full review of the client’s circumstances.

Incorporation, and determining whether a “simple” incorporation is appropriate, requires a sophisticated knowledge of the *Business Corporations Act* (provincial or federal), the *Income Tax Act*, the *Corporations Information Act*, the *Securities Act* and family and estates law.

The risk to consumers in receiving legal advice about an incorporation arises at several points in a typical case. A person providing advice about an incorporation should:

- inquire about the client’s business plan and the need to incorporate;
- advise the client about different classes of shares for tax planning purposes (which requires familiarity with the *Income Tax Act*);
- explain the proprietary rights that attach to names and trademarks arising from a NUANS report;
- give advice about the obligations and responsibilities of shareholders, directors and officers (*e.g.*, the potential liability if they do not withhold taxes);
- give advice about the organizational structure of the corporation;
- inform the client about statutory filing obligations and other continuing obligations of the company;

- give advice about financing arrangements and rollover provisions under Section 85 of the *Income Tax Act*;
- design shareholder agreements to meet the needs of the corporate client and
- give advice about the separate legal personality of a corporation and its liability under commercial leases.

### ***E. GOVERNANCE***

#### **Nature of Governing Body** (Recommendations # 49, 50, 51)

Mr. Cory recommends that paralegals should be governed by a corporation independent of the Government of Ontario and of the Society.

At the beginning, the corporation would be governed by a board consisting of fifteen persons as follows:

- Four persons representing the Attorney General.
- Four persons representing the public.
- Four persons representing the paralegals.
- Two persons representing the Society.
- An independent chair.

All board members would be appointed by the Attorney General.

At some later date, perhaps two years after the establishment of the corporation, the composition of the board would be altered. The four persons representing the Attorney General would be reduced to two, and the four persons representing the paralegals would be increased to six. In addition, the six persons representing the paralegals would no longer be appointed by the Attorney General but would be elected from and by licensed paralegals.

At some still later date, perhaps ten years after the establishment of the corporation, the governing body of paralegals could become “fully functional as a self-governing institution”.<sup>12</sup> At that time, presumably, the composition of the board of the corporation would be altered to reflect that it was a self-governing institution.

### ***Society’s Response***

In its March 2000 report on paralegals, the Society took the position that paralegals should be regulated by a corporation independent of both the Government of Ontario and the Society. The Society proposed that the board of the corporation should be composed of some combination of Government nominees, representatives elected or nominated by paralegal organizations, representatives elected or nominated by the Society and, perhaps, representatives of other constituencies. The Society foresaw the Government wanting to preserve its authority to nominate all members of the Board; however, it suggested that the authority to nominate might be exercised on the recommendation of other bodies.

In discussing the board of the corporation, the Society cited the board of Legal Aid Ontario as an example of a board that appears to work well. The board of Legal Aid Ontario is composed of eleven persons appointed by the Lieutenant Governor in Council. Five persons are appointed on the recommendation of the Attorney General. Five further persons are appointed on the recommendation of the Attorney who selects from a list proposed by the Society. The chair of the board is nominated by the Treasurer, the Attorney General and a third party agreed upon by them. The majority of the board can not be lawyers.

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<sup>12</sup> *Supra* note 1 at 86.

The composition of the board of Legal Aid Ontario is intended to include stakeholders who have a significant interest in the business of Legal Aid Ontario as well as persons who have experience in the business of Legal Aid Ontario.

The Society is of the view that the composition of the board of the governing body of paralegals should include stakeholders who have a significant interest in the “business” of the governing body of paralegals as well as persons who have experience in the “business” of the governing body of paralegals.

The Society agrees with Mr. Cory that the board of the governing body of paralegals should include representatives of the Attorney General, paralegals, representatives of the public and representatives of the Society.

However, the Society takes the position that Mr. Cory’s recommendation as to how many persons from each group should be appointed to the board does not accurately reflect either interest in the regulation of paralegals or experience in regulation. In particular, the Society’s experience in self-regulation of the legal profession, and the use that could be made of that experience in establishing a new governing body of legal service providers, were undervalued.

**The Society proposes that, at the outset, during any interim period and when the corporation is fully functional, the board of the corporation should include a significant representation from the Society. Further, the Society proposes that the persons appointed to the board to represent the Society should be nominated by the Society.**

**The Society takes the position that, at the present time, it is premature to anticipate that the corporation set up to govern paralegals will become “fully functional as a self-governing institution”. The corporation should be established without reference to what its final form might be. The issue of self-regulation of paralegals should not be provided for at this time; the issue should be left to be dealt with at a later date after the regulated paralegal industry**

has matured and following a full public debate on whether it is appropriate for paralegals to be self-regulating.

***F. RIGHTS OF TRIBUNALS AND BOARDS  
TO CONTROL OWN PROCESS***

**Right to Expel Licensed Paralegals and to Order Costs against Licensed Paralegals**

(Recommendations # 23, 23)

At present, tribunals which are subject to the *Statutory Powers Procedure Act*, are entitled to exclude from a hearing,

... anyone, other than a barrister and solicitor qualified to practise in Ontario, appearing as an agent on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.<sup>13</sup>

Mr. Cory recommends that, building upon their existing powers, “[b]oards and tribunals should be authorized to expel a licensed paralegal on a temporary basis where the behaviour of the licensed paralegal is incompetent, dishonest or disruptive”.<sup>14</sup>

In addition, Mr. Cory recommends that “[b]oards and tribunals should be authorized to order costs against a licensed paralegal if his or her conduct is extremely disruptive, misleading, mendacious or unscrupulous”.<sup>15</sup>

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<sup>13</sup> S. 23 (3).

<sup>14</sup> *Supra* note 1 at 40.

<sup>15</sup> *Ibid.*

### *Society's Response*

The Society agrees with Mr. Cory's recommendations with respect to a tribunal's right to control its own process. The Society would further recommend that,

- courts be given the same authority as will be given to boards and tribunals to expel a licensed paralegal on a temporary basis;
- courts be given the same authority as will be given to boards and tribunals to award costs against a licensed paralegal;
- courts, boards and tribunals be given the authority to expel unlicensed paralegals and non-lawyers on a temporary basis; and
- courts, boards and tribunals be given the authority to award costs against unlicensed paralegals and non-lawyers.

### ***G. UNAUTHORIZED PRACTICE***

#### **Mr. Cory's Recommendation** (Recommendation # 52)

Mr. Cory recommends that the legislation governing paralegals should make it an offence for a licensed paralegal to practise outside the areas specifically authorized for licensed paralegals.

Mr. Cory further recommends that, where a licensed paralegal practises outside the areas specifically authorized for licensed paralegals, the matter should be referred to the Attorney General for prosecution.

### *Society's Response*

Mr. Cory's recommendation, whether deliberately or not, does not address the entire scope of unauthorized practice. The following situations are not addressed:

- A licensed paralegal practising in an area authorized for licensed paralegals without being qualified to do so.
- A person who is not a lawyer or a licensed paralegal practising in areas specifically authorized for licensed paralegals.
- A person who is not a lawyer or a licensed paralegal practising outside the areas specifically authorized for licensed paralegals.

The first situation set out above should be specifically addressed in the legislation governing paralegals. It could be identified as an instance of professional misconduct for which a licensed paralegal will be disciplined.

The second situation set out above falls within the scope of section 50 of the *Law Society Act*, in that (with some exceptions) the activities that are reserved for licensed paralegals constitute the practice of law. The Society could prosecute this type of unauthorized practice. However, the Society questions whether it would be more appropriate to address the prosecution of this type of unauthorized practice in the legislation governing paralegals. It is suggested that the governing body of paralegals should be statutorily mandated to refer this type of unauthorized practice to the Attorney General for prosecution.

The third situation set out above also falls within the scope of section 50 of the *Law Society Act*. The Society will continue to prosecute such breaches of section 50 of the Act.

**In summary, the Society takes the position that, with respect to prosecution of persons for unauthorized practice, there should be a “division of labour” as between the Society and the Attorney General (or the governing body of paralegals). The Society will be responsible for prosecuting persons who are not lawyers or licensed paralegals who engage in areas of**

**practice outside those specifically authorized for licensed paralegals. It is suggested that the Attorney General (or the governing body of paralegals) should be responsible for prosecuting persons who are not lawyers or licensed paralegals who engage in areas of practice specifically authorized for licensed paralegals. It is suggested that the Attorney General (or the governing body of paralegals) and the Society should jointly be responsible for prosecuting licensed paralegals who engage in areas of practice outside those specifically authorized for licensed paralegals.**

The passage of legislation dealing with the regulation of paralegals will be an important statement as to who, other than lawyers, will be able to provide legal services to the public for a fee. The force of the statement will be lost if unauthorized practice, in all its forms, is not vigorously prosecuted. The result will be little if any improvement on the status quo: a variety of persons, with different levels of competence, offering the same legal services to the public for range of fees; public confusion as to what qualifies a person to provide legal services; and no public protection with respect to persons other than lawyers and licensed paralegals who provide poor legal services to the public or who are dishonest.

The relatively clear definition, in the legislation governing paralegals, of the areas in which licensed paralegals will be permitted to practise will greatly assist the Attorney General (or the governing body of paralegals) in the prosecution of certain forms of unauthorized practice. A definition, in the *Law Society Act*, of the practice of law will further strengthen the Attorney General's (or the paralegals' governing body's) ability, and that of the Society, to prosecute the remaining forms of unauthorized practice. **It is recommended that the *Law Society Act* should be amended to include a definition of the practice of law which definition should include the following activities:**

- **Appearing on behalf of any person in a proceeding in any federal or provincial court or tribunal.**
  
- **Drawing, revising or settling,**

- a petition, memorandum or articles, application, statement, affidavit, minute, resolution, by-law or other document relating to the incorporation registration, organization, re-organization, dissolution or winding up of a corporate body pursuant to any federal or provincial statute relating to incorporations;
  - a legal document required in a proceeding in a federal or provincial court or tribunal;
  - a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person; or
  - an instrument relating to real or personal property that is intended, permitted or required to be registered, recorded or filed in a registry or other public office.
- Doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages; insurance benefits, accident benefits; or other legal or equitable relief.
  - Advising, acting, assisting any person respecting rights to real or personal property.
  - Making an offer to do anything referred to above, or making a representation that one is qualified or entitled to do anything referred to above.
  - Giving legal advice or assistance to a party in a family law matter including the drafting and executing of agreements.

- **Providing legal advice or opinions.**

**To further strengthen the ability of the Attorney General (or the governing body of paralegals) and of the Society to stop instances of unauthorized practice, sections 50, 50.1 and 50.2 of the *Law Society Act* should be amended and provisions similar to the amended sections 50, 50.1 and 50.2 of the *Law Society Act*, as they relate to lawyers, should be included in the legislation governing paralegals. The amendments to sections 50, 50.1 and 50.2 of the *Law Society Act* that are recommended are: an increase in the maximum fine (to \$50,000); inclusion of an authority to obtain an injunction against any person engaging in unauthorized practice regardless of whether the person has already been convicted for unauthorized practice; and the authority to obtain an injunction on affidavit evidence. For ease of reference, sections 50, 50.1 and 50.2 of the *Law Society Act* currently read as follows:**

50. (1) Except where otherwise provided by law,
- (a) no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold themselves out as or represent themselves to be a barrister or solicitor or practise as a barrister or solicitor; and
- (b) no temporary member shall act as a barrister or solicitor or practise as a barrister or solicitor except to the extent permitted by subsection 28.1 (3).
- 50.1 (1) Every person who contravenes section 50 is guilty of an offence and on conviction is liable to a fine of not more than \$10,000.
- (2) Every person who gives legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws is guilty of an offence and on conviction is liable to a fine of not more than \$10,000.
- (3) The court that convicts a person of an offence under this section may prescribe as a condition of a probation order that the person pay compensation or make restitution to any person who suffered a loss as a result of the offence.

(4) A proceeding shall not be commenced in respect of an offence under this section after two years after the date on which the offence was, or is alleged to have been, committed.

50.2 (1) The Society may apply to the Ontario Court (General Division) for an order prohibiting a person from contravening section 50 or from giving legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws, if,

- (a) the person has been convicted of an offence under section 50.1; or
- (b) the person was a member of the Society and,
  - (i) the person's membership in the Society has been revoked, or
  - (ii) the person has been permitted to resign his or her membership in the Society.

(2) An order may be made under clause (1) (b) if the court is satisfied that the person is contravening or has contravened section 50 or is giving or has given legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws, whether or not the person has been prosecuted for or convicted of an offence under section 50.1.

(3) Any person may apply to the Ontario Court (General Division) for an order varying or discharging an order made under subsection (1).

## ***H. MISCELLANEOUS MATTERS***

### **“Cross-profession” Issues**

One significant problem in establishing two separate bodies each regulating a separate class of legal services provider is that, while each body may deal with issues particular to its class of regulated legal services provider, there is no body that deals with issues that may arise as a result of the co-existence or interaction of the two classes of regulated legal services providers and there is no guarantee that such issues will be dealt with at all or in a manner that ensures adequate public protection.

For example, the Society (in its new Rules of Professional Conduct) directs that,

... a lawyer or law firm may advertise their services or fees in any medium including the use of brochures and similar documents provided that the advertising:

- (a) is not false or misleading;
- (b) is in good taste and is not such as to bring the profession or the administration of justice into disrepute; and
- (c) does not compare services or charges with other lawyers or law firms.

Assuming that Mr. Cory's recommendation that the governing body of paralegals adopt rules of professional conduct similar to those of the Society is implemented, licensed paralegals will also be directed that they may advertise their services and fees so long as, among other things, the advertising does not compare services or charges with other licensed paralegals or licensed paralegal firms.

Neither the Society's rule on advertising by lawyers, nor the hypothetical rule governing advertising by licensed paralegals, addresses lawyers comparing charges with licensed paralegals or vice versa. The Society's prohibition against comparative advertising amongst lawyers is justified on the basis that it protects the public. Arguably, comparative advertising amongst lawyers and licensed paralegals should also be prohibited so as to protect the public. However, with the Society and the governing body of paralegals existing separately and each authorized to prepare its own rules of professional conduct, there is no assurance that this would occur.

As a second example, the Society's Rules of Professional Conduct specifies a lawyer's responsibilities to a client (and the client's "new" lawyer) upon withdrawing from a matter or being discharged by the client. Among other things, the withdrawing lawyer is directed to deliver to the client (or to the client's "new" lawyer) all papers and property to which the client is entitled, to give the client (or to the client's "new" lawyer) all information that may be required in connection with the matter and to co-operate with the client's "new" lawyer so as to avoid expense and avoid prejudice to the client. Assuming that Mr. Cory's recommendation that the

governing body of paralegals adopt rules of professional conduct similar to those of the Society is implemented, a licensed paralegal who withdraws from a matter or is discharged by the client will have similar responsibilities.

However, neither the Society's rule on a lawyer's responsibilities upon withdrawing, or being discharged, from a matter, nor the hypothetical rule governing a licensed paralegal's responsibilities upon withdrawing, or being discharged, from a matter, addresses a lawyer's responsibilities to a licensed paralegal retained by the lawyer's former client or vice versa. Transfers of files from licensed paralegals to lawyers (and vice versa) is likely to occur frequently given the restrictions placed on a licensed paralegal's activities. In the interest of the public, there must be some assurance that such transfers will occur in a manner that will avoid prejudice to the client. However, with the Society and the governing body of paralegals existing separately and each authorized to prepare its own rules of professional conduct, there is no assurance that this would occur.

At present, the Society is not offering an exhaustive list of "cross-profession" issues that will arise with the establishment of a regulated paralegal industry, nor is it offering any solutions to the issues. The Society is drawing attention to the fact that, once a regulated paralegal industry is established, there will be many "cross-profession" issues that will have to be addressed so as to ensure that the interests of clients of both licensed paralegals and lawyers are protected.

### **Solicitors Act** (Contingency Fees)

In very general terms, the *Solicitors Act* governs agreements between lawyers and clients as to compensation. Among other things, the Act prohibits lawyers from entering into contingency fee arrangements with clients in contentious matters. As well, the Act permits lawyers to apply to the court for a declaration that the lawyer is entitled to a charge on property recovered or preserved through the instrumentality of the lawyer for the lawyer's fees, costs, charges and disbursements in the matter.

**The Society takes the position that the provisions of the *Solicitors Act* which prohibit lawyers from entering into contingency fee arrangements with clients should apply equally to prohibit licensed paralegals from entering into contingency fee arrangements with their clients.** There is anecdotal evidence that, in the accident benefits area, paralegals charge contingency fees of 15 to 35 percent of the accident benefits granted to their clients. Often, the contingency fee is for no more than completing an application form. Research commissioned by the Society also showed that paralegals engaged in, among other work, accident benefits work were more likely than others to charge their clients a percentage of the total compensation package. Given that the *Solicitors Act* prohibits lawyers from charging contingency fees, presumably based on the protection of the public, the contingency fee billing practices of paralegals, without strict controls and safeguards, are not in the best interest of the public and should be prohibited in the same way as they are prohibited amongst lawyers.

**At present, proposals have been made to amend the *Solicitors Act* so as to permit lawyers to enter into contingency fee arrangements, subject to a number of restrictions. Should these proposals (or others) be implemented, so that lawyers are finally permitted to enter into contingency fee arrangements, licensed paralegals should then be permitted to enter into contingency fee arrangements as well, subject to all the restrictions that would apply to lawyers.**

With respect to the remaining provisions of the *Solicitors Act*, consideration should be given as to whether the application of any should be extended to licensed paralegals.

### **Incorporation**

Many paralegals currently operate through a corporation.

The *Business Corporations Act* prohibits a corporation from practising a profession unless the Act which regulates the profession permits it. It is unclear whether what licensed paralegals will be

permitted to do will be considered to be practising a profession; therefore, it is unclear whether paralegals will be able to continue to operate through a corporation.

**For public interest reasons, lawyers currently are not permitted to incorporate. Since licensed paralegals will be providing legal services and advice not unlike lawyers, for public interest reasons, licensed paralegals, like lawyers, should be prohibited from incorporating.**

**Recently, the Government of Ontario undertook to permit professionals to incorporate. When lawyers are finally permitted to incorporate, licensed paralegals should then be permitted to incorporate as well, subject to all the restrictions that would apply to lawyers.**