



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Report to Convocation November 27th, 2008

Paralegal Standing Committee

Committee Members

Paul Dray, Chair
Susan McGrath, Vice-Chair
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

**Purpose of Report: Decision
Information**

**Prepared by the Policy Secretariat
Julia Bass 416 947 5228**

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Paralegal Budget for 2009

COMMITTEE PROCESS

1. The Committee met on November 13th, 2008. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-chair), Marion Boyd, James Caskey, Seymour Epstein, Michelle Haigh, Glenn Hainey (by telephone), Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter and Stephen Parker. Staff members in attendance were Terry Knott, Zeynep Onen, Elliot Spears, Roy Thomas, Katherine Corrick, Michael Elliott, Naomi Bussin, Sybila Valdivieso, Arwen Tillman, Fred Grady, Sheena Weir, Lisa Mallia, and Julia Bass.

FOR DECISION

DELEGATION OF MEDIATIONS AT FSCO

Motion

2. **That By-law 7.1 be amended to provide that lawyers handling claims that involve catastrophic impairment at the Financial Services Commission of Ontario ('FSCO') be permitted to delegate the mediation of subsidiary issues to licensed paralegals employed by their firm.**

Background

3. A number of lawyers and paralegals have raised the issue of the change in the rules governing who may handle mediations of subsidiary issues on catastrophic files at FSCO, arising from the introduction of paralegal licensing. A letter on this topic from a licensed paralegal is attached at **Appendix 1**. Prior to paralegal licensing, although only lawyers could handle claims involving a 'catastrophic impairment', lawyers were permitted to delegate the mediation of subsidiary items on these files, such as payment for a specific prosthetic device, to staff at their firm.

History

4. Prior to the introduction of paralegal licensing under the *Law Society Act*, there was a limited form of licensing operated by FSCO. This took the form of a list of approved 'Statutory Accident Benefit Representatives,' known as 'SAB's Representatives.' Approved SAB's Representatives were permitted to handle all auto insurance files except those where the injured person was alleged to have suffered a 'catastrophic impairment', a defined term in the *Insurance Act* regulations.
5. Catastrophic cases are the most serious automobile accident cases and involve injuries such as paraplegia and quadriplegia. The determination of whether a person's injuries can be categorized as catastrophic is complex and has profound legal and financial consequences.

6. During the 2004 public consultations into the proposals for paralegal regulation, the Law Society received strong representations from both lawyers and paralegals concerning the scope of practice at FSCO. Lawyers argued that the paralegal scope should be further restricted, while paralegals argued that it should be broadened. In keeping with the general approach that the Task Force developed, the Task Force recommended that the scope of practice for all independent paralegals remain unchanged.
7. While the SAB's regulations provided that catastrophic files could only be handled by lawyers, lawyers could delegate certain parts of the work on a catastrophic case to a non-lawyer employed by their firm. This typically involved assisting with mediation of entitlement to items not central to the determination of the extent of the injury. For example, this might involve an issue of \$1,000 to \$2,000 for travel costs or specific assistive devices.
8. Since the introduction of paralegal regulation, licensed paralegals have been excluded from work on catastrophic files, even where they work under the supervision of a lawyer. This is based on the concept that a licensed paralegal is an independent advocate with a specific scope of practice, together with the policy decision to leave the paralegal scope of practice as it was – in the case of the Financial Services Commission, this meant that catastrophic cases were excluded.
9. This restriction seems to affect a relatively small number of law firms that primarily handle catastrophic cases, a specialized area of practice. These firms have a number of licensed paralegals who handle cases at FSCO and would like to handle mediations of subsidiary items on catastrophic files, where the issue does not involve the determination of the nature of the injury.

The Committee's Deliberations

10. The Committee was of the view that it would be in the interests of reduced costs and convenience to the client for lawyers handling catastrophic files to be able to delegate mediation of subsidiary items to licensed paralegals employed by their firm and that this

does not undermine the concept of a licensed paralegal as an independent advocate. The Committee did not favour permitting lawyers to delegate files to unlicensed staff members, nor to independent paralegals, in order to protect the integrity of the process and avoid creating an enforcement loophole.

11. The Financial Services Commission of Ontario was consulted about the proposed change and agrees with this approach.

Sent: Wednesday, August 20, 2008 11:20 AM
Law Society of Upper Canada
Paralegal Standing Committee
Osgoode Hall
130 Queen St. West
Toronto, Ontario
M5H 2N6

Attn. Mr. Paul Dray, Committee Chair

Dear Paul,

Thank you for taking the time to speak to me in July regarding the above subject. I enclose a copy of a letter from our firm's managing partner, Alan Farrer dated December 13, 2007 addressing this issue. Here is a summary of the outstanding problem:

* Prior to paralegal licensing, law clerks/paralegals *in the employ of law firms were permitted* to work on Catastrophic injury claim at FSCO, however independent paralegals were not. This exemption existed within FSCO's own Paralegal Code of Conduct. The exemption reflected the existence of lawyer supervision.

* Since licensing, FSCO has rescinded the Paralegal Code of Conduct and now defers to the LSUC to regulate licensed paralegals, both independent and employed in law firms.

* The LSUC regulations prohibit *any* paralegal from representing catastrophically impaired claimants at FSCO, regardless if the paralegal is in the employ of a law firm.

* *We submit that the LSUC regulations should mirror the FSCO Paralegal Code of Conduct in allowing licensed paralegals in the employ and under the supervision of a lawyer to represent catastrophic claimants before FSCO.*

Many of the issues at FSCO are disputes that do not go to the issue whether a claimant is deemed Catastrophic or not (and therefore entitled to a higher level of benefits). Here's an extreme example of how the current regulation impacts paralegals, lawyers and clients....We have a case where a young man suffered severe injuries in a car accident. He is deemed Catastrophic and therefore all FSCO work, Mediation etc.. must be conducted by a lawyer. The latest dispute is over a therapeutic bed mattress at a cost of \$2,154.56. The auto insurer is refusing reimbursement despite it being prescribed by the claimant's doctors. Our firm has filed for Mediation at FSCO on the issue. The dispute is as much about principal as money. Previously, this mediation would have been conducted by a law clerk / paralegal in the employ of Thomson, Rogers, now it must be handled by a lawyer.

In the future I expect our firm and others will be interested in employing graduates of paralegal programs. The graduates will leave the programs trained in the Statutory Accident Benefits and the FSCO Dispute Resolution Code, which makes them very attractive in our area of law. However, since our clients are primarily catastrophic, future graduates will substantially be unable to utilize their license. Paralegal employment in a law firm will be less attractive to graduates. That outcome would be detrimental to paralegals, lawyers, clients and the mandate of affordable legal services.

The details of our firm's submission and proposed amendment is outlined in Mr. Farrer's correspondence below. If you wish to discuss this issue please call or email me. I ask that you acknowledge receipt of this email and advise if this topic can appear on the September agenda of the Paralegal Standing Committee. I would be happy to attend at that meeting to explain the issue.

Thank you.

Mike Holden

Michael G. Holden

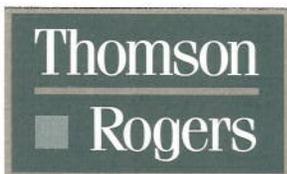
Licensed Paralegal

Thomson, Rogers

Barristers & Solicitors

Ste. 3100, 390 Bay Street, Toronto, Ontario, M5H 1W2

Firm: <http://www.thomsonrogers.com>

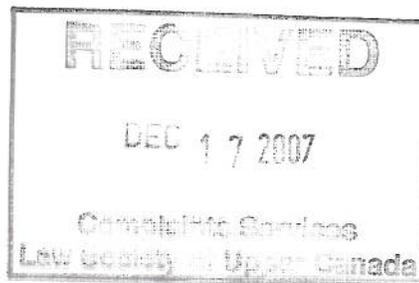


Alan A. Farrer
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Certified by the Law Society of Upper Canada
as a Specialist in Civil Litigation

December 13, 2007

DELIVERED

Law Society of Upper Canada
Paralegal Standing Committee
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N6



Attention: Mr. Paul Dray, Committee Chair

Dear Mr. Dray:

We are writing to propose an exception to the By-Law regarding the restrictions being imposed on law clerks employed in our firm and in firms like ours that specialize in personal injury law.

The definitions in L.S.U.C. By-Law 4 [Section 6(1)] and in By-Law 7.1 [Section 6(b)] might together be interpreted to exclude licensed paralegals employed by law firms from appearing before FSCO to deal with even ancillary matters related to claims involving catastrophically impaired clients. This restriction might needlessly (and perhaps unintentionally) limit the ability of our law firm and other law firms specializing in personal injury litigation, to economically deliver services to our clients.

It is our view that there should be a distinction between an independent P1 license holder and a P1 license holder employed in a full time capacity by a law firm and directly supervised by a lawyer. The By-Laws should reflect that P1 license holders employed by law firms and supervised by lawyers should be permitted to continue to advocate many aspects of claims on behalf of catastrophically impaired clients before FSCO.

The majority of motor vehicle accident personal injury claims advanced by this firm are catastrophic ones as defined in the S.A.B.S. By potentially disallowing our experienced

and capable law clerks to represent clients at FSCO, lawyers will be obliged to participate in each and every Mediation, regardless of the lack of complexity of the issue, or the monetary value at stake. This will unnecessarily (in our view) cost claimants money by adding to the cost of litigation. For example, it is sometimes necessary to mediate, usually by telephone, the reimbursement of certain expenses ostensibly payable by the insurer to a catastrophically injured person. The person representing the insurer on these issues is invariably a paralegal or an adjuster employed, in house, by the insurer. Properly supervised paralegals are competent to deal with these discreet issues.

We do agree that Paralegals should not be acting as advocates on the issue, for example, of CAT determination. The provisions of By-Law 7.1 [Section 4] already properly regulate matters that can be assigned to competent non lawyers.

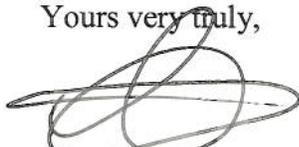
Paralegal licensing is designed to protect the public and provide cost effective legal services. The exception to the current By-Law we advocate (as the Ontario Trial Lawyers did in submissions to you) is designed to achieve that goal while properly protecting the public interest. We believe that this is an access to justice issue.

The exception we propose is that paralegals employed by a lawyer or law firm and supervised by a lawyer, be permitted to mediate ancillary claims of any individual who has or appears to have a catastrophic impairment within the meaning of the SABS, other than issues relating directly to the issue of CAT determination. The exception we propose could appear as part of Section 6(2) (iv) of By-Law 4.

There are lawyers and paralegals in our firm who would be pleased to meet with the Paralegal Standing Committee to discuss this issue further. Please contact the writer at your convenience if you wish to discuss this further.

We look forward to receiving any reply to our submission.

Yours very truly,



Alan A. Farrer
Managing Partner

AAF/bl

REVISED WORDING OF AMENDMENT TO RULE 8

Motion

12. That Convocation approve the revised version of Rule 8 shown at Appendix 2.

Background

13. On October 30, Convocation approved the Committee's recommendation to amend Rule 8 (marketing and advertising), subject to final wording being prepared by the Law Society's Rules drafter, Don Revell. Mr. Revell has now provided the attached draft.
14. The draft is being submitted for Convocation's approval, together with the corresponding amendments to Rule 3 of the lawyers' *Rules of Professional Conduct* submitted by the Professional Regulation Committee.

The Committee's Deliberations

15. The Committee was of the view that the revised version should be approved.

PROPOSED NEW WORDING OF RULE 8 – REVISED BY DON REVELL

Rule 8 – Practice Management

Making Legal Services Available

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

- (2) In offering legal services, a paralegal shall not use means
 - (a) that are false or misleading,
 - (b) that amount to coercion, duress or harassment,
 - (c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,
 - (d) that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or
 - (e) that otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal shall not advertise services that are beyond the permissible scope of practice of a paralegal.

Marketing

8.03 (1) In this Rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

- (2) A paralegal may market legal services if the marketing
 - (a) is demonstrably true, accurate and verifiable,

- (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and
- (c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

- (3) A paralegal may advertise fees charged by the paralegal for legal services if
 - (a) the advertising is reasonably precise as to the services offered for each fee quoted,
 - (b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and
 - (c) the paralegal adheres to the advertised fee.

In Camera Items - pages 13 - 68

FOR INFORMATION

PARALEGAL BUDGET AND FEES FOR 2009

25. The Committee approved the paralegal budget, which is being presented to Convocation by the Finance Committee as part of the overall budget for 2009.

11/19/2008 7:05 AM