

# The Law Society of British Columbia



## **INTERIM REPORT TO BENCHERS ON DELEGATION AND QUALIFICATIONS OF PARALEGALS**

**March 29, 2005**

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**Purpose of Report:      Bencher Information**

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## **I: INTRODUCTION**

The Benchers considered the Paralegal Task Force Report dated October 27, 2003 at their meeting of November 14, 2003. The Benchers resolved to ask the Paralegal Task Force to consider revisions to Chapter 12 of the *Professional Conduct Handbook* to expand the range of services that could be delegated by lawyers to their non-lawyer employees. They also asked the Task Force to consider defining the qualifications of the non-lawyer employees to whom particular services could be delegated.

This is the Paralegal Task Force's interim report on that dual mandate.

The Task Force had hoped to submit its final report at this time. The Task Force has substantially completed what it was asked to do. However, it has not reached a final position and recommendations on the role of paralegals in Small Claims Court matters.

The Task Force has consulted with Chief Judge Baird Ellan and Associate Chief Judge Spence regarding possible services an employed paralegal could provide in relation to Small Claims Court matters. It is our hope that we can reach agreement with the Provincial Court judiciary on guidelines for these services as we have on criminal and provincial court family matters. The judiciary is currently conducting a review of its services and is discussing the services that may be provided by employed paralegals in Small Claims Court matters as part of that review. We understand that the review should be completed in the fall.

The Task Force is accordingly delivering an interim report at this time. We hope to deliver our final report by the end of the year following further consultations with the Provincial Court judiciary in the fall.

## **II. QUALIFICATIONS FOR PARALEGALS**

The Benchers asked the Task Force to consider defining qualifications for non-lawyer employees to whom particular duties may be delegated. The Task Force considered setting out specific qualifications for such paralegals and also considered approving particular paralegal programs. However, in the Task Force's experience, paralegals who were suitable candidates for delegation of particular matters, did not necessarily share the same background. The Task Force noted that paralegals in this province may come from a variety of educational backgrounds and have quite varied experience. Some paralegals may be qualified in only one area; some paralegals may be qualified in several. Some have completed formal extensive paralegal programs; others may have little formal paralegal education but may have extensive on the job experience and training in a given area.

The Task Force was of the view that the key to appropriate delegation was to require the lawyer to evaluate the non-lawyer employee's abilities to perform the duty to be delegated. In each case, the lawyer would be responsible and accountable for the decision.

The Task Force recognized that there may be concerns about lawyers who may improperly delegate tasks to their non-lawyer employees. The Law Society's Discipline Committee has considered situations of lawyers delegating particular services to employees who were not qualified by education, training or experience to provide the service delegated. Accordingly, the Task Force concluded that the test for delegation to a paralegal should contain some objective elements by which to evaluate the lawyer's judgment to delegate work.

The Task Force considered various descriptions and definitions of paralegals. The Task Force adopted the following definition of "paralegal" which in its view contains objective elements coupled with flexibility. "A paralegal is a non-lawyer employee who is competent to carry out legal work that, in the paralegal's absence, would need to be done by the lawyer. A lawyer must be satisfied that the paralegal is competent by determining that one or more of the paralegal's training, work experience, and education is sufficient for the paralegal to carry out the work delegated."

The Task Force is of the view that it is in the public interest that paralegals, like lawyers, should maintain and improve their skills by taking courses and pursuing programs that are available in their practice area.

### **III: THE TASK FORCE'S CONSIDERATIONS**

The Paralegal Task Force agreed that the key to determining what services may appropriately be delegated to paralegal staff was to articulate principles which balanced the risk in delegating certain services to paralegals with the benefit to the public in having access to those services.

The Paralegal Task Force noted that using lawyers for all legal matters is not always economical or affordable. Some cases simply do not warrant payment of a lawyer's fees. An obvious example is a Small Claims matter, particularly where the amount in issue is significantly less than the current \$10,000.00 jurisdictional limit. Another example is a parking violation ticket. In these cases, the alternative to having a lawyer provide the services is for the client to be self-represented.

The Task Force agreed that in cases where the risks to the public in being represented by a non-lawyer are relatively small, it is better for members of the public to be represented by a trained paralegal acting under the supervision of a lawyer than for the person to be unrepresented. Because the paralegal would be acting under the supervision of a lawyer, the public would be protected. The lawyer would oversee the services delivered by the paralegal: issues requiring legal judgment would be identified and dealt with by the lawyer as required. Because lawyers are responsible for all work entrusted to them, the services are regulated and insured. The clients have recourse in the event that services are not properly delivered.

The key to making sure that the public is protected is to require the lawyer to oversee any work delegated and to only delegate work to employees whose training, education, and experience is appropriate to the work being delegated.

#### **IV. CHAPTER 12 OF THE PROFESSIONAL CONDUCT HANDBOOK**

Chapter 12 of the *Professional Conduct Handbook* deals with the supervision of employees. Chapter 12 is attached as Appendix “A” to this Report. The Chapter contains a number of principles together with lists of services that may be appropriately delegated by lawyers to their employees and lists of what the lawyer must do personally.

A significant limitation on what may be delegated to a non-lawyer employee is Ruling 9(i) which prohibits a non-lawyer employee from appearing before any Court, Registrar, or administrative tribunal or at an examination for discovery, except in support of the lawyer.

The Task Force was of the view that some of the items contained in the list of services the lawyer must handle personally were not always provided by the lawyer. For example, the Task Force noted that Ruling 9(b) specifies that only a lawyer can review a title search report. In the Task Force’s experience, such reports are routinely reviewed by legal assistants with the legal assistant reporting on his or her review to the lawyer in charge. The Task Force concluded that the time was right to revise Chapter 12 in order to better reflect appropriate practice by lawyers. The Task Force has not produced an alternative to Chapter 12. It has, however, developed principles for the delegation of work to paralegals. It has not developed principles for delegation of work to or supervision of other employees. If the principles are adopted by the Benchers, Chapter 12 will have to be revised.

#### **V. DISCUSSIONS WITH THE CHIEF JUDGE OF THE PROVINCIAL COURT**

The Chair of the Task Force, Brian Wallace, Q.C., met with Chief Judge Baird Ellan and Associate Chief Judge Anthony Spence on October 2, 2004. Both the Chair and Ralston Alexander, Q.C., met with Chief Judge Baird Ellan and Associate Chief Judge Spence on February 24, 2005 to discuss the issue of paralegals employed by lawyers representing clients on provincial Court matters. The discussions as they relate to particular types of matters are set out below. We anticipate meeting with the Chief Judge again in the fall of 2005 after the Provincial Court concludes its review of its services.

#### **VI. CONSIDERATION OF ACTIVITIES TO BE DELEGATED**

The lists of activities in Chapter 12 of the *Professional Conduct Handbook* provided a starting point for the Task Force’s discussions on what services could appropriately be delegated to paralegals.

##### **(a) Solicitor’s Services**

The Task Force noted that a great deal of solicitor’s work is currently done by non-lawyer employees working under the supervision of a lawyer. The Task Force discussed the appropriateness of having paralegal employees meet with clients in the absence of a lawyer to take instructions with respect to uncontested divorces, simple conveyances, simple wills, and other services that might be provided by a notary public. The Task

Force is of the view that it is appropriate for lawyers' paralegals to provide services in relation to these matters where the issues are not complex and the amounts in question are not large, provided the matters are appropriately supervised by the lawyer.

Ruling 9(a) requires a lawyer to attend personally on a client to advise and take instructions on all substantive matters. The Task Force is of the view that there is a role for paralegal employees to attend on the client in the absence of a lawyer in appropriate cases.

**(b) Supreme Court Matters**

The Task Force is of the view that, generally, representation on matters which proceed in the Supreme Court are not tasks which could suitably be delegated to paralegal employees. The Task Force considered whether uncontested or consent Chambers matters could be suitably handled by a paralegal employee. The Task Force noted that most consent orders are now done by way of desk order. They noted that even on uncontested matters, issues can arise and a lawyer should be available to respond to a Supreme Court Justice's questions. The Task Force concluded that there was little scope for lawyers to delegate representation on Supreme Court matters to their paralegals.

The Task Force noted that the issue of paralegals providing some representation in relation to Supreme Court matters could be revisited if there was a demand for employed paralegals to provide these services.

**(c) Small Claims Court Matters**

The Task Force considered that, for the most part, it is not economical for clients to retain lawyers in relation to Small Claims matters. It was also noted that, under the *Small Claims Rules*, a party to an action if a company, a partnership or a business may be represented by an employee as well as, in the case of a company, an officer or director. Accordingly, at this time, there is significant non-lawyer representation in Small Claims Courts. The Task Force is of the view that allowing paralegals employed by a lawyer to represent clients in Small Claims Court would enhance the public's right to affordable, trained, and regulated legal assistance. The supervising lawyer would be available to review and consider the issues raised in the smalls claims action and instruct a paralegal on how to conduct a matter. Given the amounts in issue, the Task Force is of the view that the benefits to the public outweigh the risk to the public in being represented by a paralegal employed and supervised by a lawyer.

In the course of its discussions, the Task Force considered that the Small Claims Court monetary jurisdiction could be raised, perhaps significantly. Indeed, while the discussions were ongoing, the *Justice Modernization Statutes Amendment Act, 2004*, S.B.C. 2004 c. 65 was passed. The Act allows the Small Claims monetary jurisdiction to be raised up to \$50,000.00 by regulation. The Task Force thought that the issues and the analysis remain the same. As the amount in issue increases, it makes more economic sense for a lawyer to provide the services. However, even at \$50,000.00, it may be uneconomic to hire a lawyer. In all cases, the lawyer would still be responsible for the matter and the client would thus be protected.

The Chief Judge and the Associate Chief Judge expressed concerns about allowing paralegal representation in Small Claims matters. They noted that the issues in Small Claims Court are often as complex as in Supreme Court matters – the only difference is the amount in issue.

The Task Force agrees with the Chief and Associate Chief Judges that the issues in Small Claims matters can be complex. However, in the Task Force's opinion, even when the issues are complex, it remains uneconomic to hire a lawyer to provide representation. The Task Force is of the view that it is important to provide the public with an economical, but nonetheless regulated, alternative to hiring a lawyer.

The Task Force notes that the *Small Claims Act* and *Rules* do not allow a party to be represented by a paralegal employed by a lawyer. It also notes that a Judge is not required to provide a privilege of audience to a non-lawyer. Before a lawyer could allow his or her paralegal to represent a party in Small Claims Court, there would have to be a legislative amendment allowing for such representation. As set out above, the Provincial Court judiciary is currently considering the issue of employed paralegal representation on Small Claims matters as part of its review. The Task Force will continue to work to try to achieve consensus with the Provincial Court on that issue.

#### **(d) Criminal Matters**

The Task Force considered what representation, if any, could appropriately be delegated by a lawyer to a paralegal on criminal or quasi-criminal matters. The Task Force noted that sections 800 and 802 of the *Criminal Code*, which deal with summary convictions, allow for an accused to appear by agent. In *R. v. Romanowicz* [1999] O.J. 3191, the Ontario Court of Appeal found that those provisions allowed paid agents to act for an accused in summary conviction proceedings.

The Task Force is of the view that paralegals ought not to act on behalf of a client with respect to an indictable offence, where the risks to the client upon conviction are significant and the issues are generally more complex.

Initially, the Task Force considered recommending that a lawyer be allowed to delegate representation of a client to his or her paralegal only on uncontested interlocutory matters or on summary conviction matters when, in the lawyer's opinion, the client faced no significant risk of imprisonment or a monetary risk exceeding the monetary jurisdiction of the Provincial Court. The Task Force's view was that it was only appropriate for a lawyer to delegate a criminal or quasi-criminal matter to a paralegal where there was no risk that the client might be imprisoned or face a significant fine or other serious consequence (e.g. the loss of a driver's license). The Chief Judge and Associate Chief Judge shared our concerns about paralegal representation in this area. They suggested that lawyers should only allow their paralegals to represent clients on "ticket offences" where there is no risk of imprisonment or significant fines or other serious consequences. They noted that these cases are the ones that the Chief Judge assigns to Sitting Justices of the Peace, who may not have been lawyers.

The Task Force agrees with and has adopted the Chief Judge's suggestion that lawyers only be allowed to delegate to their paralegals those classes of cases that the Chief Judge assigns to Judicial Justices of the Peace, from time to time.

The Task Force also considered whether lawyers should only be entitled to delegate adult criminal matters to paralegals. The Task Force is of the view that, given the limited delegation contemplated, delegation to a paralegal should not be restricted in that way.

**(e) Provincial Family Court Matters**

The Task Force considered the issues that proceed in Provincial Family Court. The Task Force noted that many of the issues dealt with in Provincial Family Court are very serious ones which have major consequences for the clients. For example, custody, guardianship, and access are all matters dealt with in Provincial Family Court. These are many of the same issues in Supreme Court family matters. The Task Force concluded that there was only a very limited role for paralegal representation in family court. In Provincial Family Court matters, the Task Force concluded that lawyers should only allow their paralegals to represent clients on uncontested or consent applications. The Chief Judge agreed with the Task Force's position on paralegal representation in provincial family court matters.

**(f) Administrative Tribunals**

The Task Force noted that some administrative tribunals allow non-lawyers to represent clients in proceedings before tribunals. They also noted that because of the provisions of Chapter 12 of the *Professional Conduct Handbook*, non-lawyers employed by lawyers may not represent clients in administrative hearings although if they were not employed by lawyers they could do so. Allowing paralegals employed by lawyers to represent clients before administrative tribunals would provide the public with access to paralegals who are regulated and supervised in their delivery of services.

The Task Force observed that the provincial government appears to be interested in allowing for increased representation by non-lawyers, as illustrated by the government's amendments to the *Workers Compensation Act*. In the case of the *Workers Compensation Act*, while non-lawyer representation is allowed, no regulatory scheme has been put in place to protect the public in the delivery of those services.

The Task Force is of the view that lawyers should be permitted to allow their paralegals to represent clients before administrative tribunals if permitted by the tribunals and not prohibited by law. The client is protected by having services delivered through a responsible lawyer. The client is in a better position than if he or she retains a "consultant" as the paralegal employed by a lawyer is supervised and the lawyer employer is regulated and insured and responsible for all work done by his or her employees.

## VII. PRINCIPLES OF DELEGATION

### (a) New Principles

The Task Force considered that Chapter 12 already contained a number of principles pursuant to which a lawyer can delegate services to a non-lawyer employee. The Task Force has revised the principles to accord with its conclusions that more services can be appropriately delegated to non-lawyer staff. The Task Force also concluded that lawyers should only be able to delegate advocacy functions to paralegals who met the definition and not to other non-lawyer employees.

Set out below are the principles of delegation to paralegals which the Task Force has developed. Principle 4(a)(i) which deals with Small Claims Court matters may have to be revised following our further consultations with the Provincial Court judiciary.

“It is in the interests of the profession and the public in the efficient delivery of legal services that lawyers be permitted and encouraged to delegate legal tasks to their paralegals.

By delegating work to paralegals, lawyers can ensure the legal services they provide are delivered cost-effectively to clients. A “paralegal” in this context is a non-lawyer employee who is competent to carry out legal work that, in the absence of a paralegal, would need to be done by a lawyer. A lawyer must be satisfied that the paralegal is competent by determining that one or more of the paralegal’s training, work experience or education is sufficient for the paralegal to carry out the work delegated.

A lawyer who delegates work to paralegals should do so in accordance with the following principles:

1. A lawyer is responsible for all work delegated.
2. A lawyer must be satisfied that a paralegal is qualified to competently carry out the work delegated to the paralegal by one or more of education, training and work experience.
3. A lawyer must appropriately supervise and review the work of a paralegal taking into consideration that person’s qualifications and skills and the tasks that the lawyer delegates.
4. The lawyer may, with the consent of the client, allow a paralegal to perform certain advocacy work on behalf of that client. Because a lawyer cannot directly supervise a paralegal’s advocacy work, the delegation of such work is permitted only as follows:
  - (a) A paralegal may represent a client in Provincial Court:
    - (i) in the Small Claims Division;

- (ii) in criminal or quasi-criminal matters:
  - a. on uncontested interlocutory applications;
  - b. on those hearings that the Chief Judge of the Provincial Court assigns to Judicial Justices of the Peace<sup>1</sup>;
- (iii) in the Family Division, only on uncontested matters;
- (b) A paralegal may represent a client on matters before administrative tribunals if permitted by the tribunal and not prohibited by legislation;
- (c) A paralegal may give or receive an undertaking in a hearing described in (a) or (b) if the circumstances require it and only then. When a paralegal gives an undertaking, it is given or received on behalf of the lawyer.

[Note: A straw vote conducted at the April 8, 2005 Benchers meeting indicated that the Benchers were not in favour of allowing non-lawyers to give undertakings. The Task Force has agreed to take that feedback into account when making its final report.]

5. A paralegal must be identified as such in correspondence and documents that he or she signs, and in any appearance before a Court or tribunal on behalf of a client.”

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<sup>1</sup> Pursuant to Chief Judge Baird Ellan’s Assignment of Duties September 1, 2004 the following types of hearings are assigned to Judicial Justices of the Peace:

- “(a) Hearings in respect of all provincial offences in which proceedings are commenced by ticket information;
- (b) Hearings in respect of all traffic-related municipal bylaw offences;
- (c) Hearings in respect of any traffic-related offence under the *Government Property Traffic Regulations* and *Airport Traffic Regulations* made pursuant to the *Government Property Traffic Act of Canada* (adult only).”

## **(b) Discussion**

Many of the principles that are currently contained in Chapter 12 of the *Professional Conduct Handbook* are reflected in the revised principles set out above. The principles developed by the Task Force, however, are limited to the principles of delegation to paralegals. Delegation to and supervision of other non-lawyer employees are not

included. If the Benchers adopt the principles, Chapter 12 would have to be revised. The significant changes on delegation to paralegals are highlighted in this section.

As in Chapter 12 of the *Professional Conduct Handbook*, the revised principles recognize the value of using paralegal employees in the delivery of legal services. The principles also repeat the overarching principle that a lawyer is responsible for all legal work which is performed by his or her employees.

While the determination that a paralegal is qualified for delegation of certain work is still left to the lawyer, the paralegal's qualifications now includes reference to the paralegal's education as well as training and work experience. This makes it clear that formal education is one of the elements that a lawyer should take into account in considering whether the work should be delegated.

Under the revised principles, lawyers are still required to provide an appropriate level of supervision. Principle 4, however, recognizes that direct supervision is inconsistent with the expanded services that may be delegated to paralegals. Accordingly, the requirement for direct supervision is removed and the principle is revised to require appropriate supervision and review.

The revised principles do not contain the prohibition contained in Chapter 12 against a paralegal acting finally without reference to the lawyer in matters involving professional legal judgment. The Task Force is of the view that this limitation is inconsistent with advocacy functions performed by a paralegal and not always necessary in relation to solicitor's work that may be appropriately delegated to a paralegal as set out above.

The revised principles also no longer contain the requirement that a lawyer maintain a direct relationship with the client. The revised principles recognize that some work may be largely conducted by paralegals directly with the client.

The prohibition against paralegals giving legal advice has been taken out of the revised principles. Paralegals who have conduct of a matter which the lawyer deems appropriate for delegation may be required to give advice to the client.

The Task Force also considered the prohibition against a non-lawyer employee giving or receiving undertakings [Ch. 12 Ruling 6(a)(ii)]. The Task Force noted that the lawyer would be responsible for the undertaking even if given by a non-lawyer employee. The Task Force was nonetheless concerned about allowing paralegals to give or receive undertakings. They noted that lawyers are well aware of the sanctity and importance of undertakings. The Task Force believes that lawyers should be involved when undertakings are given or received by their offices.

The one exception to this general rule is advocacy situations where circumstances may require a paralegal to give or receive an undertaking. The Task Force is of the view that it is not always practical for a paralegal to consult with his or her employer in those circumstances. Accordingly, the Task Force concluded that paralegals should be entitled to give or receive undertakings in the context of a hearing where the circumstances

require it. In such circumstances, the paralegal would be giving or receiving the undertaking on behalf of the lawyer.

Finally, the Task Force has not developed specific lists of tasks that paralegals can or cannot do as found in Chapter 12. While the Task Force is of the view that such lists are not necessary as the principles should determine what may or may not be done by a paralegal, they also recognize that members and their employees may find such lists helpful. The Task Force defers to the views of the Benchers and the Ethics Committee on that issue.

### **VIII. STEPS TO BE TAKEN**

This is an interim report for your information. As set out above, the report will not be finalized until the Task Force meets with the Chief Judge following the Provincial Court's review of its services.

However, the Task Force would be pleased to receive the Benchers' views, if any, on the principles they have developed thus far.