

The Law Society of British Columbia



Delivery of Legal Services Task Force Final Report For: The Benchers

Date: October 1, 2010

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Purpose of Report: Discussion and Decision

Prepared on behalf of: Delivery of Legal Services Task Force

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PREAMBLE

The purpose of this Report is to recommend changes to the model through which legal services are delivered in British Columbia in order to enhance the public's access to competent and affordable legal services. The approach focuses on incremental change, by increasing the roles that paralegals and articulated students can perform under the supervision of a lawyer. The delivery of legal services and the history of the profession has never been static. The profession has through its history, attempted, as necessary, to evolve with the needs of the public it serves. This Report represents a further stage in that evolutionary history.

The Task Force makes a series of recommendations in this Report. The rationale for the recommendations is explained in the body of the Report under the various relevant headings, and a Summary of the recommendations is included at the end of the Report for ease of reference.

In working through its mandate and in making its recommendations, the Task Force has tried to find the balance through which the public's access to competent and affordable legal services will be enhanced without introducing an unacceptable level of harm to those who need such services. The Task Force believes, however, that these suggested reforms must be tested in the market place in order to determine whether it has found the right balance.

1. BACKGROUND

The Delivery of Legal Services Task Force was created to advance Strategy 1-1 of the 2009-2011 Strategic Plan:

Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.

The Task Force issued a preliminary report to the Benchers in December 2009, and an interim report at the Benchers' Retreat in June 2010. The detailed analysis contained in those reports is not duplicated here, but a brief synopsis follows.

The concept for strategy 1-1 had its genesis in the work of the Law Society of British Columbia Futures Committee. After a lengthy analysis, that Committee recognized the time had come to explore broadening the range of people able to provide legal services. The Committee recommended that additional research be performed to assess the best way forward. On the strength of that recommendation the Benchers created the Delivery of Legal Services Task Force. The Task Force's initial mandate involved collecting missing information to assess the need for change. In addition to reviewing numerous reports and surveys, the Law Society commissioned an Ipsos Reid survey to get a better sense of how British Columbians of low, middle, and high income resolved their serious

legal problems. Following its report to the Benchers in December 2010 the Task Force was given a mandate to analyze the substantive issues involved in expanding the range of persons permitted to provide legal services. This stage involved select consultations and additional research and analysis, leading to the report to the Benchers in June 2010.

As a result of its research, the Task Force confirmed that access to justice and to lawyers is a challenge being tackled around the world. There exists a growing body of research and discussion of this topic. In light of this reality the Task Force decided to take an incremental approach to reform, rather than attempt to find a universal solution. This decision led the Task Force to focus on three topics:

1. Expanded roles for paralegals;
2. Expanded roles for articled students;
3. Issues relating to Community Advocates.

The Benchers' discussion in June 2010 focused on paralegals and articled students. The majority of the Benchers concluded that both paralegals and articled students should be able to perform additional duties, but that further details, particularly with respect to paralegals, had to be worked out.

2. PURPOSE OF THIS REPORT

This report contains recommendations of the Task Force for moving forward with the goal of enhancing access to affordable, competent legal services, in light of the Benchers' discussion of the topic on June 11, 2010.

3. ARTICLED STUDENTS

The vast majority of the Benchers were of the view that articled students should be allowed to perform enhanced functions, including acting as Commissioners for Oaths.

The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

The Law Society, as part of its request for amendments to the *Legal Profession Act*, has also asked that s. 60 of the *Evidence Act* be amended to allow articled students to act as commissioners for oaths.

4. PARALEGALS

As a result of the discussion and directions given by the Benchers at the June 2010 Retreat the Task Force takes it that a consensus has been reached, and therefore recommends, that it is time to enhance the permitted duties of paralegals acting under the supervision of a lawyer.

Issues relating to the definition of paralegal, as well as the scope of enhanced duties and nature of supervision need to be worked out. This section of the report attempts to synthesize the views of the Benchers and suggest a way forward.

A. *Definition of Paralegal*

The Benchers have recognized that it is important to define “paralegal”. Doing so will reduce the risk of public confusion concerning the roles of non-lawyers working at a law office. It will also allow lawyers to identify which employees lawyers can hold out as paralegals. This approach is consistent with earlier reports such as the *Proposal for a Law Society Paralegal Certification Scheme* (May 2003) (**Attachment 1**), although that report ultimately focused on credentialing.

“Legal Assistant” is the term the Law Society uses at present for the services that are permitted under the *Professional Conduct Handbook*. The Law Society does not define the term or set criteria for the application of that term however, so there is a wide range of people providing legal assistant services. In essence, lawyers have been left on their own to determine who is a legal assistant. The Task Force recommends keeping the term “legal assistant” for the category of existing functions in the *Handbook*, and creating a new category of “paralegal” that could perform the expanded functions proposed by the Task Force, as well as the current functions allowed for legal assistants. In order to distinguish between paralegals and legal assistants, at a minimum the term “paralegal” should be defined.

A relatively straightforward approach would be to modify the proposed credentialing criteria detailed in Attachment 1, turning the criteria into guidelines that a lawyer must consider in deciding whether to hold someone out as a paralegal.

The Paralegal Task Force also recognized in 2003 that a paralegal requires knowledge of not only substantive and procedural law but also practical and analytical skills. A definition based on these four pillars might look something like this:

A paralegal is a trained professional who:

- works under the supervision of a lawyer;
- possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
- possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and

- carries out his or her work in a competent and ethical manner.

This definition might be supplemented by a rule and guidelines that state:

A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [**refer to guidelines**]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

An alternative approach is to set (objective) criteria in the definition and then provide guidelines for the lawyer to make the subjective determination as to whether a staff member can be held out as a paralegal. Such an approach might look like this:

A paralegal is a person who is qualified by virtue of education,¹ training and experience to provide services normally performed by a lawyer, provided those services are delivered under the supervision of a lawyer.²

The guidelines could then set out factors for a lawyer to take into account, such as the bulleted points above and the list of acceptable schools/education contained in the Paralegal Task Force report.

The Task Force discussed the “training” requirements for paralegals. The Task Force recognized that not all legal assistants have completed a paralegal training course. Many legal assistants will have developed their experience over a number of years working in a firm setting. The Task Force believes that education is an important part of training, but an allowance has to be made for people who have achieved adequate substantive and analytical skills through work experience. One possibility is to set education as a requirement moving forward, and to grandfather in experienced legal assistants as of a certain date. The Task Force considered whether a certain number of years experience should be required, but did not arrive at a conclusion. Ultimately, the Task Force believes the onus will lie on the supervising lawyer to ascertain whether the staff member possesses the requisite skills to function as a paralegal.

¹ Education could be described in greater detail (e.g. with a degree or diploma in legal studies from a recognized university or college, etc.).

² Should “character” also be included?

I. Recommendations regarding definition of “paralegal”

The Task Force recommends that:

- a) the term “paralegal”, or a new coined term, be defined in the *Professional Conduct Handbook* to make it clear which staff can perform enhanced paralegal functions. Two options for definitions are set out above. Consideration should be given whether to set out criteria for the training of paralegals as well as whether to refer to them as “professionals”;
- b) a rule or guidelines similar to that set out above accompany the definition in order to assist lawyers in identifying which staff can be held out as paralegals, and to put lawyers on heightened notice of their professional obligations regarding supervising these paralegals.

The Task Force believes that option (b) is the better choice and should be coupled with the bulleted definition on page 4.

B. *What expanded duties should paralegals be allowed to perform?*

At present, the three main prohibitions contained in the *Professional Conduct Handbook* relate to giving undertakings, acting as an advocate, and providing legal advice.

I. *Undertakings*

The consensus view of the Benchers was that paralegals should not be allowed to provide undertakings. A concern relating to undertakings is that they are a personal obligation of the lawyer, and therefore might not easily transfer to the paralegal. Perhaps more significantly, undertakings are often related to monies in trust and that calls for a heightened degree of protection. Lastly, requiring lawyers to provide undertakings creates a mechanism to involve the lawyer in the file, thereby dovetailing with the object of properly supervising the paralegal.

II. *Advocacy*

With respect to advocacy, the Task Force is of the opinion that the extent to which a non-lawyer can appear in court depends on what the courts are prepared to allow. It does not make sense for the Law Society to create a list of permissible advocacy functions at this time only to risk having them rejected by the courts. As the Benchers are aware, the Task Force laid the ground work for future consultations with the British Columbia Supreme Court and the Provincial Court of British Columbia on this subject. The Task Force believes the Law Society should work with the courts to ascertain what advocacy

functions should be permitted, and that the Law Society should adopt the findings from that work.

It is important to realize that working with the courts will require an allocation of resources, and will require both Benchers and staff time, and that this needs to be reflected in the Law Society's Strategic Plan. The Task Force therefore recommends that the Strategic Plan be amended to include the following initiative in furtherance of Strategy 1-1:

A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.

III. *Giving legal advice*

When the Task Force discussed this topic it decided that the best approach is to allow the supervising lawyer to determine the circumstances under which it is appropriate for the paralegal to give legal advice. The reason for this conclusion is largely pragmatic. To attempt to chart out every conceivable circumstance for providing legal advice (taking into account such matters as the areas of law involved in the retainer, the seriousness of the matter, the complexity of the matter, the implications to the justice system, and the implications to the parties involved), would be to embark on an epic enterprise around which consensus would never be achieved. The more rigid the codification, the less ability there is for a lawyer to recognize the varied skill between individual paralegals. At present there are some lawyers who rely tremendously on the work of a paralegal in certain areas because the paralegal is the "go-to" source at the firm. A rigid codification would almost certainly stifle the level of existing functions being performed in those settings, and apparently being performed without great harm to the public.

Every additional administrative layer will act as a deterrent to the profession in using paralegals to perform enhanced functions. The rules will either be ignored (if they constrict existing practices), or not embraced (if they are perceived to be too cumbersome to learn and apply in practice). The Task Force remains of the opinion that protection of the public is better achieved through properly defining who can perform enhanced functions, providing rules and guidelines for supervision, and ensuring our regulatory process is robust enough to deal with complaints against lawyers about substandard paralegal work.

IV. *Recommendations regarding expanded duties for paralegals*

The Task Force recommends:

- a) Paralegals should not be allowed to give or receive undertakings;
- b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
- c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.
- d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

C. *Supervision of Paralegals*

Supervision is the critical part of expanding roles for paralegals. The key is to find a balance between rules for supervision, which create safeguards, and flexibility which increases the likelihood lawyers will use paralegals for enhanced roles, thereby enhancing access to justice. If the balance is cast too far in either direction we will either create reforms that will not be embraced and therefore accomplish nothing, or that are too unstructured and therefore introduce a level of risk to the public that is unacceptable. The Benchers considered a number of concepts that are central to the issue of supervision.

When the Task Force discussed supervision it considered a number of concepts that might fit within a general framework of supervision, including:

- A supervising lawyer should be aware of what functions staff are performing, what files are assigned to staff, etc;
- The supervising lawyer must establish effective communication with staff;
- The supervising lawyer should engage in file triage and to determine proper delegation to staff;
- The supervising lawyer should ensure staff are trained and competent to undertake assigned functions;
- The supervising lawyer should engage in periodic file review and debriefing sessions (scaled to the experience and qualifications of the staff being supervised and the nature of the files assigned to staff);
- The supervising lawyer should provide ongoing skills training for staff;
- The supervising lawyer would benefit by asking the clients to give feedback regarding the quality of services received;

- The supervising lawyer would benefit from creating written supervision policy & procedure document.

The Benchers may wish for any, or all, of these concepts to be expressed in guidelines for lawyers' supervision of paralegals.

In addition to these concepts, the Task Force explored whether there should be a limit on the number of paralegals a lawyer can supervise, and whether remote supervision should be permitted. These topics led to a variety of views expressed by the Benchers, and are analyzed in more detail in the following sections.

(i). *Should there be a limit on the number of paralegals a lawyer can supervise?*

When the Benchers discussed the idea of capping the number of paralegals a lawyer can supervise, approximately 60% were in favour of a cap for paralegals performing enhanced roles.

At both the Task Force level, and the Bencher level, the concept of capping the number of paralegals has presented challenges for achieving unanimity. A cap has merit because logic tells us that at some point supervision becomes fraught with risk as the ratio of staff to supervising lawyer grows. The challenge is that a hard cap is inflexible, and fails to recognize that effective supervision is about more than ratios. Some lawyers will be able to competently supervise many paralegals while others will struggle supervising one. Competency to supervise is not dictated by a cap. Recognizing this tension, the challenge becomes identifying the number, or whether to identify a number at all.

Although competency is not dictated by a cap, capacity to supervise is influenced by the number of staff a lawyer is responsible for. As a result there are insurance implications if the number is not capped. This is because for each additional staff providing legal services the risk profile of the lawyer increases without a commensurate increase in insurance fees. The opinion the Task Force received from the Lawyers Insurance Fund recognized that a cap would have a mitigating effect.

One perspective raised by the Benchers was that it is preferable not to institute a cap, and that the decision should be left to lawyers. It was noted that the key would be to make it clear to lawyers that they carried the responsibility for the work performed by the paralegal, and liability for the work performed. The argument is that properly instructed, lawyers will not take on the risk associated with supervising too many paralegals. This approach allows for a case-by-case flexibility.

One suggestion considered by the Task Force was to limit the number of supervised paralegals performing enhanced functions to two, similar to the number of articulated students that a principal may supervise. When the Task Force discussed this concept it considered the similarities and differences between the principal/articled student relationship and the lawyer/paralegal relationship. If the theory behind a cap is that the public is at risk if a lawyer supervises too many paralegals, how do we deal with

situations where the lawyer also acts as a principal? If the paralegal cap was set at two, one could envision a situation where the lawyer is acting as principal for one student while supervising two paralegals. This would effectively mean the lawyer was supervising three people who are allowed to provide lawyer-like services. Is the public more at risk in this situation as compared to a lawyer supervising two paralegals? If not, then might we allow a lawyer to supervise three paralegals?

A possible way around this discrepancy would be to say that a lawyer can supervise up to four paralegals and articulated students, provided no more than two are articulated students. Another possibility is to allow a lawyer who has supervised the maximum number of paralegals for a set period of time without a founded complaint to be able to apply for an expansion of the cap. This would allow lawyers on a case-by-case basis to expand the delivery model, but with a safeguard based on past performance.

While the Task Force was alive to arguments both in favour of and opposed to capping, it ultimately concluded the insurance issues arising from not having a cap, together with the resulting adverse effect on the protection of the public interest, spoke in favour of a cap. The Benchers may wish to consider whether a process for applying for an exemption should be created.

I. Recommendation regarding capping the number of paralegals a lawyer can supervise

There are essentially three options the Task Force considered regarding a cap:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of paralegals performing enhanced functions a lawyer can supervise;
3. Absent obtaining permission from the Law Society, a lawyer can supervise a maximum of four paralegals performing enhanced functions and articulated students, with no more than 2 being articulated students.

The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

(ii). *Should remote supervision be permitted?*

Similar to the issue of capping, neither the Benchers nor the Task Force had unanimity regarding remote supervision. Approximately 56% of the Benchers favoured allowing remote supervisions.

In determining the best approach, it is worth considering the extent to which remote supervision occurs at present. If one considers the amount of communications where instructions are provided by way of phone and/or email to staff, it is clear that a measure of delegation and supervision is already occurring via telecommunication devices.

It is also important to be mindful that people are increasingly communicating through digital technologies. It is becoming the norm, and people are developing greater fluency with the technology.

When the Task Force discussed Community Advocates with Wayne Robertson, QC, Executive Director of the Law Foundation of British Columbia, he explained that there are some communities, such as Haida Gwaii, where the advocate is currently being supervised remotely by lawyers in Vancouver. This is because there are no lawyers in Haida Gwaii. This is similar to the observation, made by Pamela Shields at the Benchers' Retreat, that there are paralegals working in some aboriginal communities where there are no lawyers. An absolute restriction on the ability to remotely supervise paralegals would have a detrimental effect on these important services.

One concern raised by some Benchers is that if remote supervision was allowed, then large firms would set up paralegals in smaller communities, providing lower cost legal services that harm the viability of local lawyers. In determining the weight to be given to this concern, the Benchers need to be guided by the mandate to protect the public interest in the administration of justice. If the conclusion is that the remotely supervised paralegal cannot provide services competently, then the services should not be permitted. If the services can be provided competently, then the services should be allowed. If the Society is seen to be protecting the economic interest of lawyers over the access to justice needs of British Columbians it will create negative optics for the profession and the future of self-regulation.

Predicting the likelihood of harm to practices outside major urban centres is not a scientific enterprise. One may reasonably take the position that remote supervision of paralegals will harm legal practices in smaller communities, but one may equally take a contrary view. The decision to implement a cap would have a mitigating effect on the potential materialization of that risk, however. It is highly unlikely that a lawyer in Vancouver would use his or her limited cap space to seed remote communities with paralegals. The cost of operating the law practice from one office with four paralegals is less than operating five offices (one with the lawyer, and four remote offices). Profit margins would be seriously impacted, and it would not in most cases be a good business decision. Another consideration is that the retainer will continue to be between the lawyer and the client, and if the client lives in a remote community and wants to speak to

the lawyer, odds are they would prefer having the lawyer's office located within (or proximate) to the community where the client lives. The local firm's presence in, and connection to, the community gives it an advantage that the remotely supervised satellite office cannot likely match.

Recognizing, however, that a decision either way is speculative, one possibility is to place an additional cap on the number of remotely supervised offices a lawyer (or law firm) can have.

II. Recommendation regarding remote supervision of a paralegal

The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

D. General issues

If the Benchers adopt the approach recommended by the Task Force there are several factors to bear in mind:

1. It would be important to make it clear that lawyers remain responsible for the actions of non-paralegal staff. While the wording of Chapter 12, Rule 1 of the *Professional Conduct Handbook* covers this, it is a point worth emphasizing in communications about the changes.
2. The requirements for supervision should be set out in rules (the *Handbook*?), guidelines, or both.
3. The more a paralegal is a proxy for the lawyer, particularly in giving legal advice or appearing in court, the more important good character becomes. Without regulating paralegals directly, how can the good character of a paralegal be assured? One possibility is to require lawyers who use paralegals to require the paralegal to sign an oath or affirmation to subscribe to certain standards of conduct.
4. Because "paralegal" is already in common usage, the Benchers might want to consider whether a new term should be coined. The risk in using an existing term is that some firms will have multiple people using the term already, many of whom might not qualify as paralegals under the new scheme. Using adjectival descriptors might similarly cause problems. For example "Advanced Paralegal" or "Enhanced Paralegal" might have pejorative connotations for ordinary paralegals. Because we don't certify paralegals, "Certified Paralegal" is not an option. "Registered Paralegals" might also require a scheme. One possibility would be to call them "Professional Paralegals" to connote a higher standard.
5. An idea the Task Force approved of, but which was not debated by the Benchers, is the idea of requiring the supervising lawyer to submit a form to the Law Society that sets out important information about the supervision arrangement. If the form were automated through the member login portion of the website, it

would be easier to analyze information than if the form is a paper form. This will likely add administrative functions to the Law Society's operations, and at some point the cost and resource implications for Member Services needs to be considered. The form might include:

- a. The names of the paralegals the lawyer is supervising;
 - b. The areas of law in which the lawyer is using the paralegals;
 - c. The types of enhanced services the paralegal will perform;
 - d. The education and experience of the paralegal;
 - e. A copy of the oath/affirmation of conduct;
 - f. The location of the office the lawyer & paralegals work in;
 - g. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;
 - h. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.
6. It is important to ensure that any changes to the roles of paralegals do not harm existing programs provided by the Legal Services Society or funded agencies, or the community advocate work funded by the Law Foundation. Poverty law services fill an important gap in the access to justice landscape, and it is important to avoid unintended consequences arising from the proposed changes.

I. Recommendations regarding general issues

- a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook*.
- b) [Optional] The supervising lawyer should be required to submit a form to the Law Society electronically that includes:
 - i. The names of the paralegals the lawyer is supervising;
 - ii. The areas of law in which the lawyer is using the paralegals;
 - iii. The types of enhanced services the paralegal will perform;
 - iv. The education and experience of the paralegal;
 - v. A copy of the oath/affirmation of conduct;
 - vi. The location of the office the lawyer & paralegals work in;
 - vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;
 - viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

The Task Force did not determine that the form was required. It is provided as an optional recommendation because the Benchers have not made a determination as to whether it is desirable.

E. *Regulatory Process*

In the past, an allegation of failure by a lawyer to supervise staff has never led to a disciplinary process more severe than a Conduct Review. As the Task Force observed in its June 11, 2010 report:

If the supervised paralegal engages in activity that would lead to a suspension or disbarment if performed by a lawyer, but the result is never more severe than a conduct review for the supervising lawyer, we have arguably created a weaker regulatory function with respect to those services. (p. 17)

Either the rules (the *Handbook*?) or the guidelines should make it clear that if a paralegal performs a task incompetently the lawyer may be treated, for regulatory purposes, as if the lawyer performed the task incompetently. In other words, our regulatory process must not allow for a two-tiered model of regulation based on whether the services were provided by a lawyer or a paralegal. Such a result cannot be permitted because we have no means to directly sanction the paralegal. Serious errors by a paralegal must have the potential to carry serious consequences for the supervising lawyer. Public confidence in the regulatory system requires this safeguard and lawyers must be made to understand this necessity and the risk associated with it. The disciplinary process must be commensurate with the gravity of the complaint, and the process must be as transparent as possible in order to ensure the public has confidence in the regulatory model.

I. Recommendations regarding the regulatory process

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

5. EXEMPTIONS

As noted, the intention of the proposed reforms is to enhance access to competent and affordable legal services. The object is not to harm the existing practices of lawyers and law firms, nor to harm important public interest work that is being performed. Because of this the Task Force considered whether exemptions should be permitted.

As the Task Force observed in its June 11, 2010 report, community advocates perform an important function in the access to justice landscape. In particular, they provide legal assistance to the poor and marginalized members of society who will rarely have access to a lawyer. While expanding the permissible duties of paralegals and articulated students might allow for a marginal increase of legal services to the poor, the Task Force does not anticipate the recommendations contained in this report will have a meaningful impact on access to justice for the poor. In light of this, it is essential that any reforms do not hinder the important work that is being done by lawyer supervised community advocates.

The Law Foundation has been funding and developing programs for the training of community advocates. To date, the feedback on that work has been very positive. The reality of this niche legal service, however, is that it might not be possible to deliver existing community advocacy services under a model of heightened paralegal services unless the Benchers create exemptions for the community advocate services. The example of direct supervision by a lawyer and the situation in Haida Gwaii is one such example. Care has to be taken to ensure that in our efforts to improve access to legal services for people of moderate and middle-class means, we do not create a supervisory model that extinguishes much needed services for the poor.

In addition, there are clinical programs such as the Law Students' Legal Advice Program and the Aboriginal Law Clinic, that provide valuable legal services to the public. These programs should be exempted, and clinics should be able to apply to a committee as designated by the Benchers for consideration of an exemption. The key components will be that the non-lawyers providing services at the clinic are supervised by a lawyer and properly trained, and that the lawyer is satisfied the staff are able to provide services in a competent and ethical manner. These services must also comply with the restrictions on the practice of law as contained in the *Legal Profession Act*.

I. Recommendation regarding community advocates

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

6. CONCLUSION

Access to justice and legal services challenges are occupying governments, policy-makers, legal professionals and the public in jurisdictions around the world. For a variety of reasons, many people with serious legal problems are unable to secure the services of a

lawyer. For many people the cost of legal services present a barrier. Yet these people are dealing with legal issues that can impact adversely on their private lives as well as their ability to function in society. While the Benchers realize that in a perfect world these people would have recourse to the services of a lawyer, we know as a practical matter this is not always the case. It is therefore incumbent on the profession to examine its delivery model and ask how it can respond to the needs of the public in the 21st Century, while still ensuring that the safeguards of competency and proper regulation are met.

The recommendations in this report are incremental rather than revolutionary, and the Task Force does not purport to hold them out as a cure for all the challenges associated with access to justice. The Task Force does believe, however, that it is an important step in the right direction. The Law Society's mandate requires it to protect the public interest in the administration of justice. This mandate was the focal lens through which the Task Force examined its work. Once the profession embarks down this road the Law Society needs to monitor the changes to ensure the public is being well-served and that the regulatory mechanism is properly protecting the public from harm. This examination may involve an initial survey of the profession, and a follow-up survey of both the profession and the public down the road. It is important to receive feedback as to what is working and what is not with respect to these changes, in order that the Law Society can ensure the public is well served.

The object of these reforms is to enhance the public's access to competent and affordable legal services. The object is not to constrain existing practices. Similar to the Benchers' decision to provide guidelines for lawyers to provide limited scope legal services, the intention is to enable lawyers to modify their practices to meet the legal service needs of the public, while ensuring that safeguards exist to protect the public from harm. The Task Force believes the recommendations contained in this report are small but important steps the profession should take to better meet the legal needs of the public it serves.

SUMMARY OF RECOMMENDATIONS

Expanded Roles for Articled Students:

Recommendation 1:

The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

Expanded Roles for Paralegals:

Recommendation 2:

The Task Force recommends the following definition of paralegal:

A paralegal is a trained professional who:

- works under the supervision of a lawyer;
- possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
- possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
- carries out his or her work in a competent and ethical manner.

The Task Force further recommends that the following instructions supplement the definition, potentially by way of an annotation or footnote:

A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [refer to guidelines]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

Recommendation 3:

The Task Force recommends:

- a) Paralegals should not be allowed to give or receive undertakings;
- b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
- c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme

- Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.
- d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

Recommendation 4:

The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

“Enhanced functions” consist of giving legal advice and/or engaging in advocacy functions permitted by courts or tribunals.

Recommendation 5:

The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

Recommendation 6:

- a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook*.
- b) **[Optional]** The supervising lawyer should be required to submit a form to the Law Society electronically that includes:
 - i. The names of the paralegals the lawyer is supervising;
 - ii. The areas of law in which the lawyer is using the paralegals;
 - iii. The types of enhanced services the paralegal will perform;
 - iv. The education and experience of the paralegal;
 - v. A copy of the oath/affirmation of conduct;

- vi. The location of the office the lawyer & paralegals work in;
- vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals.
- viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs

Recommendation 7:

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

Recommendation 8:

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

ATTACHMENT 1

Proposal for a general certification scheme

The Paralegal Task Force has determined that the curricula of the Capilano College legal assistant diploma and certificate programs should serve as the benchmark for paralegal education in British Columbia. The Task Force anticipates that other colleges in the province will develop curricula to meet specific criteria the Paralegal Task Force expects to develop based on this benchmark.

Categories of applicants for general certification

Subject to the [grandparenting certification scheme](#), the Task Force proposes that the following categories of applicants be eligible to apply for general certification:

- Graduates of Canadian law schools

Graduates of Canadian law schools may apply for certification, provided they have completed one year of legal or paralegal work experience in British Columbia in the preceding five years.

- Graduates of approved Canadian paralegal programs

Graduates of recognized Canadian paralegal programs that meet specified criteria may apply for certification, provided those graduates have completed one year of paralegal work experience in British Columbia in the preceding five years.

At present, the Task Force views the Capilano College Legal Assistant diploma and certificate programs as the benchmark for paralegal education in BC, and graduates of either of those programs who have completed one year of paralegal work experience in BC accordingly may apply for certification.

- Applicants who graduate from Canadian paralegal programs of recognized Canadian institutions but which programs do not meet specified criteria

Graduates of paralegal programs that do not meet specific criteria set by the Law Society may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Graduates of paralegal programs from other common law jurisdictions

Graduates of paralegal programs offered by recognized institutions in other common law countries may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Applicants holding an LL.B or equivalent degree from common law jurisdictions outside Canada

Applicants who hold an LL.B. or equivalent degree from a law school in a common law jurisdiction may apply for certification provided they:

- have completed one year of legal or paralegal work experience in British Columbia in the preceding five years; or
- have completed one year of legal or paralegal work experience outside British Columbia in the preceding five years and have successfully passed a challenge exam.

Proposal for a grandparenting certification scheme

The Paralegal Task Force recognizes that BC paralegals have diverse backgrounds, including those who have graduated from the Capilano College, Selkirk College, Vancouver Community College or other college legal assistant programs, those who have an LL.B from a common law jurisdiction and those who have legal work experience and no formal legal training.

The Paralegal Task Force identified four factors that must be considered when evaluating the different work and educational experience of paralegals for the purpose of certification. The Task Force considers of key importance an applicant's:

- knowledge of procedural law;
- knowledge of substantive law;
- practical skills; and
- analytical skills.

In recognition of the diversity of paralegal backgrounds, the Paralegal Task Force is proposing two categories of applicants who may apply for paralegal certification through special grandparenting provisions, provided they do so within five years of the commencement of a general paralegal certification program. After the five-year period, the grandparenting provisions would expire and applicants would have to meet general certification requirements.

Categories of applicants for certification through grandparenting

- Graduates of the Vancouver Community College or Selkirk College legal assistant programs

Graduates of the legal assistant programs of either Vancouver Community College or Selkirk College who have three years of paralegal work experience in British Columbia in the preceding five years may apply for certification.

- Paralegals with work experience only

Persons who have completed 10 years of legal work experience in British Columbia, including at least five years of paralegal work experience, in the preceding 15 years may apply for certification.