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Federation of Ontario Law Associations

Paralegal Committee

Response to "Family Legal Services Review"

Report by Justice Annemarie E. Bonkalo

Submitted to: Access to Justice Committee, Law Society of Upper
Canada

Submitted May 25, 2017

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EXECUTIVE SUMMARY

Please accept this submission on behalf of the Paralegal Committee of the Federation of Ontario Law Associations, (“FOLA”). We endorse the submission of the Family Law Committee of FOLA, but have chosen in this submission to focus our comments on what we believe the regulatory regime for specialized family law paralegals should look like, in the event that the Law Society chooses to accept the recommendations of Justice Bonkalo.

FOLA is made up of the members of the 46 local law associations spread across Ontario. In total, we represent approximately 12,000 lawyers who are, by-in-large, practising in private practice in firms of all sizes across Ontario. Many of our members practice in small communities or service neighbourhoods in larger centres where they are pillars of their community. Our members are on the front-lines of the justice system and see its triumphs and shortcomings every day.

FOLA is an advocate, on behalf of practising lawyers, for a better justice system that recognizes the crucial role competent and professional lawyers play in our system of justice. Many of our members are professionals who specialize in family law either exclusively or as part of a broader general practice, but regardless of area of practice, this topic and the potential to expand the scope of practice for non-lawyers is of great interest – and concern – to nearly all our members.

Our Position in Brief

As noted, we wholeheartedly endorse the position of the FOLA Family Law Committee, but in fairness to their position which opposes the expansion of paralegal scope of practice, and in fairness to the question before the Access to Justice Committee of the Law Society, which is charged with the question of “how” to implement her recommendations, the Paralegal Committee is offering this report.

In short, we believe that the regulatory regime developed and overseen by the Law Society should include nine critical elements:

1. Very high standards for admission to the training program for a specialized paralegal license.
2. High standards for the specialized paralegal courses offered only in accredited, public colleges or universities in Ontario.
3. Post-education experiential learning.
4. Very high standards of testing before licensing.
5. Ongoing CPD requirements that are focused on family law throughout the tenure of the specialized paralegal licensee.



6. Insurance requirements that are the same as for any lawyer who practises family law.
7. Frequent practice audits to ensure ongoing compliance with the best practices in family law service provision.
8. Rigorous and rigorously enforced rules of advertising and marketing to ensure some of the same excesses in other areas of law do not creep into the family law space.
9. The paralegals who choose to pursue this specialized license should pay all the costs of the Law Society to govern such a regulatory regime.

High Admission Standards

One of the more commonly heard concerns from lawyers and other stakeholders in the family law system with the idea of a specialized paralegal family law license is the notion that a very young and very inexperienced person could, conceivably, become licensed. Given the highly emotionally charged nature of family law, as well as the high stakes involved (child custody, division of property, etc.), we believe that any specialized paralegal licensee should be mature and committed to her or his profession.

We understand that 25% or more of paralegals who take the training and are licensed drop out of the profession within a few years. This is a somewhat expected rate of attrition for individuals who are just starting out in their career and finding their way. It is not an attribute, however, that inspires confidence in the area of family law. As such, we recommend a standard of a minimum five years in practice as a licensed paralegal with at least 5,000 hours of practice and at least an undergraduate degree, with preference given for a graduate degree.

We further recommend entrance exams to the specialized paralegal licensing programs that would be offered in colleges and universities and that a standard be set so that only the top quintile of applicants are accepted into the program. Preference should also be given to those applicants who have undergraduate or graduate degrees and/or work experience in areas relevant to family law such as social work, psychology, child welfare or family counselling.

We believe these standards would send the appropriate signal that (a) experience counts in family law; (b) licensees should demonstrate a long-term commitment to the profession; and (c) that opportunity exists to insert professionals into the system that can fill gaps (such as skills in social work or counselling) and that specialized education in family law can enhance these skills.



High standards for the specialized paralegal courses offered only in accredited, public colleges or universities in Ontario

Over the years that paralegals have been licensed in Ontario, a number of private career colleges have offered programs of dubious quality and the Law Society has been forced to step up enforcement and is working to raise standards. We further believe that the take-up for a specialized paralegal license in family law will be relatively modest and it would be unwise to dilute training or oversight resources in many institutions.

For these reasons, we recommend that the Law Society work with a select and small number of public institutions to offer up programming and education of the highest possible standards and employ rigorous admission standards (as set out above) to ensure the candidates selected to the program are of the highest calibre.

The programs offered at these colleges or universities should include a rigorous course of study that includes (but not limited to):

- fundamentals of family law
- ethical considerations in the provision of family law
- training in how to identify matters in a file that are inside and outside the allowed scope of practice
- courtroom behaviour and etiquette
- rules of evidence
- identification of signs of domestic violence and family power structures
- how to deal with highly charged emotional clients

Post-education experiential learning

We believe there is no substitute for experience. We strongly encourage the Law Society to implement a system of post-graduate experiential learning – similar to articles or the LPP program – that would have the specialized family law candidates working for a minimum of one year in the office of an experienced family law lawyer or family law firm. In that year of work experience, the candidate should only be allowed to work on matters that would fit within the scope of practice laid out in the recommendations by Justice Bonkalo (so they become more familiar with the prescribed scope and will know when to turn a matter over to a lawyer) and that all their work in this year of experiential learning be done under the supervision of a lawyer.

This experiential learning should also include some form of training in practice management and training in how to properly refer matters that are outside of their scope of practice, such as tax and estate matters.



The lawyer who employs the paralegal candidate should be required to provide an evaluation of the candidate’s fitness to practice, similar to the report provided by an articling principal.

Very high standards of testing before licensing

The final hurdle to a specialized paralegal family law license should be a rigorous exam that includes testing in the fundamentals of family law, ethical considerations in the provision of family law, testing in how to identify matters in a file that are inside and outside the allowed scope of practice (such as tax and estate matters), courtroom behaviour and etiquette, rules of evidence, identification of domestic violence and family power structures and in how to deal with highly charged emotional clients.

Ongoing CPD requirements that are focused on family law throughout the tenure of the specialized paralegal licensee

Current CPD requirements state that paralegals who are practising law or providing legal services must complete in each calendar year at least 12 CPD Hours in eligible educational activities consisting of a minimum of three Professionalism Hours on topics related to professional responsibility, ethics and/or practice management and up to nine Substantive Hours per year.

We submit that specialized family law paralegals should be required to fulfill their “substantive hours” on family law-related topics only. If a paralegal has a practice that includes non-family work, CPD hours for that practice should be separate.

We further recommend that the Law Society closely monitor these programs for quality and that, consideration be given to further refining the requirements so that a certain number of hours (perhaps six of the twelve) be delivered in programming by family law judges or senior family law lawyers.

Insurance requirements same as for any lawyer who practises family law

To ensure a family law litigant is protected equally, regardless of whether they hire a lawyer or paralegal, the specialized paralegal licensee should be required to carry the same levels of insurance coverage as any lawyer who practices family law.

We further recommend, however, that this insurance be offered in different insurance pools to ensure there is no undue cost burden on lawyers or paralegals (and their clients) when a professional in either pool is sued for damages. The lawyers’ professional liability pool has been developed and refined for many years and insurers are well aware of the risks. Adding paralegals to that pool – no matter what level of education and training they receive - would introduce a great deal of uncertainty, especially in the early years, and history tells us that as a program is ramped up, there will likely be higher claims for negligence and competence. To ensure these costs are not borne by lawyers and their clients, we recommend separate insurance pools.



Frequent practice audits to ensure ongoing compliance with the best practices in family law service provision

We recommend that newly licensed specialized paralegals be subjected to frequent practice audits in the early years of their practice to ensure the highest standards are adhered to as they establish their practices.

Rigorous and rigorously enforced rules of advertising and marketing

To ensure some of the same excesses in other areas of law do not creep into the family law space, we recommend a rigorous and rigorously enforced set of rules for advertising and marketing of family law services. As our colleagues in the FOLA Family Committee have noted:

... we do wish to point out that allowing a paralegal to call themselves “specialized” in family law could create very serious regulation problems and further confuse the public.

Even lawyers who have practiced family law for many years are not permitted by the Law Society to call themselves “specialized” without going through a rigorous (some would say, impossible) application process. If paralegals can or are required to call themselves, “specialized” it may give the impression to the public that they are a better option rather than retaining a lawyer.

There is already a great deal of confusion for the public because of how paralegals have been allowed to market themselves. (A point that FOLA has made in its submissions to the Advertising and Referral Fee Working Group.) Many new Canadians or citizens that speak English (or French) as a second language – or not at all – already find it difficult to differentiate between a paralegal and a lawyer. This sector of the public is already very vulnerable to abuses in this area of law because they may be alone and without family supports.

We recommend that special consideration of advertising rules related to family law be made a topic for the agenda of the Advertising and Referral Fees Working Group.

We further recommend that the Law Society take steps to more rigorously enforce obvious breaches of scope of practice that complainants have found advertised by paralegals already. (We would be pleased to provide at least one specific example of a paralegal who was advertising his services in family law (“simple divorces”) in 2016.)



Full cost recovery

Paralegals who seek a specialized family law license should pay the full cost of developing and maintaining the regulatory regime that governs their license. Lawyers, who are strongly opposed to this expanded scope of practice for paralegals, should not be forced through their Law Society dues, to pay this cost. If it is deemed that this cost is too high for paralegals to bear alone, the Province of Ontario should step forward and cover some of this cost, but we trust that this will not be money taken out of other aspects of the justice system.

Conclusion

We recognize that with these recommendations and, on this last point especially, lawyers might come across as self-serving and seeking to protect “our monopoly”. We beg to differ. Lawyers have no interest in keeping our profession closed. Anyone who meets the high standards demanded by the complexity of the matters dealt with in law is welcome to join the legal profession as a lawyer

OUR INTEREST IS SIMPLY IN MAINTAINING A VERY
HIGH STANDARD OF COMPETENCE AND
PROFESSIONALISM IN SERVICE TO THE PUBLIC

and to practice family law – or any other area of law. If the path is chosen to further expand the roster of professionals who can practice in the area of family law, we simply believe that it would behoove the regulator of lawyers and paralegals to ensure the highest possible standards of competence and professionalism are maintained and that it would only be fair

that the costs to develop and maintain these standards are borne by those who seek to practice. Finally, we believe that maintaining these high standards – especially in an area of law so complicated and fraught with deep and lasting consequences as family law – is the best way to protect the public interest and ensure every litigant has access to justice.

Respectfully submitted by the Paralegal Committee of the Federation of Ontario Law Associations.

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