



The Law Society of
Upper Canada

Barreau
du Haut-Canada

August 23, 2012

Sent by email c/o
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Mr. Frederick W. Gorbet, Chair
Steering Committee
Ontario Automobile Insurance Anti-Fraud Task Force

***Re: Ontario Automobile Anti-Fraud Task Force Steering Committee
Status Update July 2012***

Dear Mr. Gorbet:

The Law Society of Upper Canada is pleased to have the opportunity to present comments and suggestions about the *Ontario Automobile Anti-Fraud Task Force Steering Committee Status Update*, which was presented to Mr. Steve Orsini, Deputy Minister of Finance on July 23, 2012.

The Law Society commends the work of the Ontario Automobile Anti-Fraud Task Force (the “Task Force”). The Law Society agrees that all Ontarians have a role to play in combating fraud in the auto insurance system.

This submission sets out the Law Society’s comments on the Task Force’s recommendations that relate to the Law Society and its licensees. The Law Society is concerned about the proposal to expand the scope of the Financial Services Commission of Ontario’s (“FSCO’s”) power to investigate the unfair or deceptive acts or practices (“UDAP”) provisions of the *Insurance Act* to persons not licensed by FSCO, including lawyers and paralegals licensed under the *Law Society Act*. In the Law Society’s view, the proposals unnecessarily overlap with the Law Society’s jurisdiction and mandate. The Law Society is also concerned that the provisions may intrude on the protection of solicitor-client privilege, a principle of fundamental justice embodied in section 7 of the *Charter of Rights and Freedoms* and integral to the proper functioning of our legal system¹.

¹ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574

LAW SOCIETY MANDATE

The Law Society has been the regulator of Ontario lawyers since 1797, and has regulated paralegals since 2007. We currently license approximately 42,000 lawyers and 3,500 paralegals.

The Law Society is governed by the *Law Society Act*. We have a statutory duty to regulate so as to protect the public interest (section 4.2.3).

The Law Society receives complaints about the conduct, capacity or competence of its licensees, conducts investigations and imposes discipline where required. Licensees have a detailed set of ethical rules that they must adhere to (*Rules of Professional Conduct* for lawyers, *Paralegal Code of Conduct* for paralegals). The *Law Society Act* grants extensive powers to the Law Society to investigate licensees (section 49.3). More than 3000 complaints about 2400 licensees are investigated each year.

The *Rules of Professional Conduct* and the *Paralegal Code of Conduct* contain a number of rules that are relevant to the subject of the Task Force's report. The following is a summary of the rules applicable to both lawyers and paralegals:

- **Assisting in fraud, crime or illegal conduct:** When acting for a client, a licensee shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment (Rule 2.02(5) lawyer / 3.02(3) paralegal);
- **Integrity:** A licensee shall conduct himself or herself in such a way as to maintain the integrity of the profession (Rule 6.01(1) lawyer / 2.01(1) paralegal);
- **Supervision:** A licensee shall assume complete professional responsibility for his or her practice of law/provision of legal services (Rule 5.01(2) lawyer / 8.01(1) paralegal);
- **Conflict of interest:** A licensee shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents (Rule 2.04(3) lawyer / 3.04(3) paralegal);
- **Charging unreasonable fees and disbursements:** A licensee shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion (Rule 2.08(1) – (2) lawyer/ Rule 5.01(1) – (3) paralegal);
- **Referral fees/fee splitting:** A licensee shall not directly or indirectly share, split, or divide his or her fees with any person who is not a licensee or give any financial or other reward to any person who is not a licensee for the referral of clients or client matters (Rule 2.08(8) lawyer / 5.01(11) paralegal);
- **Conduct unbecoming:** The Law Society may discipline a licensee for conduct unbecoming a licensee (Rule 6.11(3) lawyer / 9.01(12) paralegal).

LAW SOCIETY COMMENT ON TASK FORCE RECOMMENDATIONS

As a preliminary comment, while the Law Society repeats its support for anti-fraud measures, it notes that the Task Force Report includes no information that suggests widespread involvement of lawyers or paralegals in automobile fraud, or that the Law Society is failing in its

responsibility to address such conduct of its licensees. The Law Society's experience with respect to fraudulent activity of its licensees is that it is limited to a small number of rogue individuals whose conduct is effectively addressed by the Law Society.

The Law Society is concerned about the recommendation to expand the scope of the FSCO's authority to investigate unfair or deceptive acts or practices ("UDAP") of those unlicensed by FSCO. The Report recommends that lawyers and paralegals licensed under the *Law Society Act* be added as persons subject to the UDAP provisions. The UDAP prohibitions that the Report proposes to apply lawyers and paralegals would include: charging for goods and services not provided; requesting, accepting or paying referral fees; and unreasonably excessive charges compared to prices charged for similar good and services.²

Overlapping Jurisdiction

The Law Society has the jurisdiction and mandate to oversee the conduct of its licensees. The Law Society's mandate is very clear – to regulate lawyers and paralegals in the public interest. Flowing from this mandate are extensive powers to investigate.

The broad mandate of FSCO, as set out in the *Financial Services Commission of Ontario Act*, section 3(a), is to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors. It is not a conflict for two regulators to exercise public interest functions where the public interests that they seek to protect are not the same. However, it is the Law Society's submission that, given its mandate, it is unnecessary to have another regulator that purports to also regulate in the same field, thus creating overlapping jurisdiction. In particular:

- It would be unnecessary for FSCO to investigate referral fees in light of the long-standing Law Society rules for lawyers and paralegals regarding referral fees.
- It would be unnecessary for FSCO to investigate the unreasonableness of fees in light of the Law Society's jurisdiction, as well as the Court's jurisdiction, over fees.

These concerns would be reduced if FSCO's expanded jurisdiction was limited to lawyers and paralegals who are not acting in a professional capacity on behalf of a client. A similar exemption is found in the *Mortgage Brokerages, Lenders and Administrators Act, 2006* ("*Mortgage Brokerages Act*"). Under O. Reg 407/07, section 3, lawyers are exempt from the requirement to have a brokerage licence or a mortgage broker's or agent's licence if the lawyer is acting in his or her professional capacity as a lawyer on behalf of a client. Lawyers who are not acting in the specific capacity set out in section 3 of O. Reg 407/07 are required to be licenced, and are subject to the regulation and enforcement provisions found in the *Mortgage Brokerages Act*.

² Currently, there are UDAP prohibitions that apply to lawyers and paralegals. These include: use of unapproved insurance forms; and failure to disclose a conflict of interest where required.

Should a similar provision be adopted, then lawyers and paralegals that are, for example, acting as insurance brokers or owners of health care clinics rather than acting for clients, would be subject to the proposed UDAP provisions. The Law Society would receive information from FSCO about regulatory action taken against these lawyers and paralegals, and if appropriate could deal with the issues as conduct unbecoming a licensee rather than professional misconduct.

Solicitor-Client Privilege

Under the proposed recommendations, solicitor-client privileged information could be requested specifically or required in order for a lawyer to provide a complete response to FSCO. This is of significant concern to the Law Society.

Solicitor-client privilege is a principle of fundamental justice embodied in section 7 of the *Charter of Rights and Freedoms*³ and is of supreme importance in Canadian law. Solicitor-client privilege has been held by the Supreme Court of Canada as all but absolute⁴ in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.

The client is the holder of the privilege and the lawyer is the trustee of that privilege. Solicitor-client privileged information cannot be disclosed by the lawyer; only the client may give informed consent to the disclosure of his or her privileged information.

The *Law Society Act* provides specific protection for confidential and solicitor and client privileged information. The Law Society is permitted to obtain confidential or privileged information during an investigation (section 49.8 of the *Law Society Act*). This is a narrow exception to the general rules surrounding privilege. This intrusion into privileged information is required for the Law Society to carry out its mandate to regulate the legal professions by investigating allegations of professional misconduct, incapacity or incompetence. The Law Society is subject to strict confidentiality requirements regarding the information collected during an audit or investigation (section 49.12 of the *Law Society Act*). The Law Society is required to apply to Court to disclose confidential information and must continue to protect solicitor-client privilege even if disclosure is ordered (section 49.13 of the *Law Society Act*). The Court is statutorily prohibited from permitting the Law Society to disclose information in its possession to which privilege attaches.

A grant of authority to FSCO to investigate, such as recommended by the Task Force, does not confer upon FSCO the right to access solicitor-client privileged information. This is true even if

³ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, paragraph 16, *per* Justice Arbour, speaking for the Court, (it is a “fundamental civil and legal right” and a “principle of fundamental justice under s. 7 of the *Charter*”.)

⁴ The Court may determine that solicitor-client privilege should yield or does not exist in cases where the Court finds the existence of “criminal purpose.” The Court may determine that solicitor-client privilege should yield in cases where the Court determines that “innocence is at stake” or that “public safety is at stake.”

only to determine the legitimacy of a privilege claim. The determination of the legitimacy of privilege claims is for the Courts. The Court alone is the sole arbiter of solicitor-client privilege⁵. In summary, the Law Society is concerned that the proposed expanded UDAP provisions would:

- Put lawyers and paralegals in a position where their legal and fiduciary obligations to their clients and compliance with the regulatory scheme conflict
- Undermine the solicitor-client relationship
- Compel lawyers to violate the law
- Purport to give FSCO the authority to seek and obtain information that it is not permitted by law to seek or to hold.

CONCLUSIONS

The Law Society appreciates the opportunity to make submissions on these important matters. Subject to the concerns raised in this submission, the Law Society supports the Task Force Report and its recommendations.

We look forward to meeting with you on August 28, 2012.

Yours truly,

A handwritten signature in black ink, appearing to read "R.G.W. Lapper". The signature is written in a cursive, flowing style with a large, decorative flourish at the end.

Robert G.W. Lapper, Q.C.
Chief Executive Officer

⁵ *Canada (Privacy Commissioner) v. Blood tribe Department of Health*, [2008] 2 S.C.R. 574