



Submissions

Respecting the Ontario Automobile Anti-Fraud Task Force Status Update

Date: August 24, 2012

Submitted to: The Ontario Automobile Anti-Fraud Task Force

Submitted by: The Advocates' Society



INTRODUCTION

The Advocates' Society is pleased to offer the following written submissions regarding the recommendation to extend FSCO regulatory control over lawyers and paralegals in the Ontario Automobile Anti-Fraud Task Force Status Update (the "Status Update").

The Advocates' Society (the "Society") is a not-for-profit association of over 4,600 lawyers throughout Ontario and the rest of Canada. Our members practice as advocates in the resolution of disputes involving the Courts, administrative tribunals, government bodies, arbitrations and other forums for dispute resolution. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect the legal profession, the administration of justice and access to justice.

Over 1800 of our members practice in the personal injury field, both as plaintiff's counsel and as defence counsel. The members of the task force that drafted this submission (see list at the end of the submission) represent both sides of the bar, and this submission is the product of vigorous debate on the competing interests. As a result, we believe that our comments represent a unique and balanced perspective.

Recommendation to Extend FSCO Regulatory Control Over Lawyers and Paralegals

These submissions will focus only on those issues raised by the Status Update that specifically relate to lawyers and paralegals. The Anti-Fraud Task Force makes a number of recommendations with respect to the conduct and regulation of accident benefits in Ontario and the question of fraud in the automobile insurance industry, some of which are relevant to our membership. Our organization would be happy to participate and provide more detailed analysis with respect to these recommendations when the proposals in this area are more defined. However, our main concern respecting the Status Update relates to what appears to be an effort to extend FSCO regulatory control over lawyers and paralegals.

Presently, the Unfair or Deceptive Acts or Practices Regulation under the *Insurance Act* ("UDAP") excludes lawyers and paralegals who are licensed under the *Law Society Act*. It is our understanding that UDAP is primarily intended to provide regulatory control over various practices for individuals who are considered to be engaged in the insurance business. It is also intended to provide the Superintendent's office with the powers to receive complaints under UDAP, to examine and investigate those complaints, and, in certain circumstances, to provide penalties that may include monetary penalties.

UDAP is governed by part XVIII of the *Insurance Act* (Sections 438 through to 448). It is notable that these provisions provide extensive powers to the Superintendent to:

- Investigate "the affairs of every person engaged in the business of insurance in Ontario" in order to determine whether that individual has been engaged in an unfair or deceptive act;
- Conduct hearings;
- Request production of various books and records;
- Make use of a search warrant to enter the premises of individuals suspected of violating UDAP; and



- Provide for the power of the Superintendent to fine \$100,000.00 on the first conviction and up to \$200,000.00 on the second as well as to make orders for compensation or restitution.

As we understand the proposals set out in the Status Update, the Superintendent would be able to exercise the powers listed above on both lawyers and paralegals. It is our submission that such additional regulation is unnecessary given a) that the Status Update presents no evidence of lawyer or paralegal participation in automobile insurance fraud, and b) lawyers and paralegals are already subject to an extensive and effective regulatory regime.

The right to investigate and control the conduct and behaviour of lawyers and paralegals has been placed within the hands of The Law Society of Upper Canada pursuant to the provisions of The *Law Society Act*. Section 4.1 of that Act provides that the Law Society is responsible for ensuring that all people who practice law or provide legal services in Ontario meet specific standards with respect to learning, professional competence and professional conduct.

Section 4.2 of the Act sets out the principles to be applied by the Society in carrying out its duties and functions. These principles have been developed through a long history of both common law and regulatory law and include the duty to maintain and advance a cause of justice in the rule of law, facilitate access to justice, and protect the public interest. In our view, it is clear that these provisions provide an all encompassing right of the Law Society to control its members and regulate its members' conduct pursuant to long entrenched principles developed over the centuries.

Section 33 of the *Law Society Act* specifically states that a Law Society licensee shall not engage in professional misconduct or conduct unbecoming a licensee. While the Act itself does not provide specific regulations with respect to that conduct, every lawyer in Ontario is bound by the Rules of Professional Conduct (the "Rules") and every paralegal by the Paralegal Rules of Conduct (the "Paralegal Rules"). These rules provide extensive regulation of the conduct of lawyers and paralegals, including:

- Licensees may not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct; nor may they instruct their clients on how to violate the law and avoid punishment (R 2.02(5) of the Rules; 3.02(3) of the Paralegal Rules)
- Licensees must maintain the integrity of the profession (R 6.01(1) of the Rules; 2.01(1) of the Paralegal Rules) and may be disciplined for conduct unbecoming a licensee (R 6.11(3) of the Rules; R 9.01(12) of the Paralegal Rules)
- Avoiding of conflicts of interest (R 2.04 of the Rules; R 3.04 of the Paralegal Rules);
- Appropriate conduct of any business falling outside of the practice of law or provision of legal services (R 2.01 of the Rules and its commentary; R 3.02 of the Paralegal Rules);
- Charging unreasonable fees, including referral fees (R 2.08 of the Rules; R 5.01 of the Paralegal Rules); and
- The principle of an independent bar (R 6.04 of the Rules).

The Law Society also requires an ongoing legal education commitment on behalf of all its members which includes an ethical component. In order for lawyers and paralegals to renew their licences each year, they must satisfy the Law Society that they have participated in the appropriate number of hours of programming, including a component relating to ethics and professionalism.



It is also important to point out that, pursuant to Section 35 of the *Law Society Act*, the Law Society is given the power to receive complaints and to prosecute its members if the complaint so warrants. The Law Society has the power to revoke a licence, suspend a licence, impose a fine, direct treatment and counseling, and/or direct additional legal education or professional training.

It is our respectful submission that the Law Society is and has always been responsible for the conduct of its members and that it is inappropriate for the Superintendent and/or FSCO to interfere in that regulatory process. We therefore strongly oppose any suggestion that UDAP be amended to remove the exclusion of lawyers and paralegals.

The appropriate redress for individual lawyers or paralegals who have participated in automobile insurance fraud is to pursue disciplinary proceedings under the existing regulation. If the Task Force has evidence of pervasive or systematic fraud on the part of lawyers or paralegals it may then be appropriate to work with the Law Society in determining whether changes to the *Law Society Act*, regulations under the Act, the Rules of Professional Conduct, or the Paralegal Rules of Conduct are required to address the conduct of concern.

The Status Update does not specify which provisions under UDAP would apply to lawyers and paralegals, although Appendix 5 appears to propose UDAP would apply in its entirety, including the provisions that would give the Superintendent's office the power to request production of the books and records of individuals suspected of violating UDAP. This raises serious concerns about potential violation of solicitor-client privilege. Privilege can only be waived by a client or ordered waived by the Court in limited circumstances. A lawyer who is requested to produce records that are subject to privilege would therefore be unable to comply without breaching privilege, which the Supreme Court of Canada has called "a principle of fundamental justice and civil right of supreme importance in Canadian law." (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 ¶136).

The Society strongly rejects this proposal.

CONCLUSION

Legal service providers should not be regulated by two separate statutory bodies to which complaints can be made, hearings conducted and punishments enforced. While the Society supports the appropriate regulation of lawyers' and legal service providers' conduct, it is our submission that such responsibility has and should remain with the Law Society. We further submit that regulation purporting to allow the Superintendent's office to demand a lawyer's records violates the principle of solicitor-client privilege.

The Society therefore submits that there should not be any amendments to the UDAP provisions or the *Insurance Act* to expand its provisions with respect to lawyers and legal service providers. If there is evidence of pervasive or systematic lawyer and paralegal conduct contributing automobile insurance fraud, then we recommend consultation with The Law Society, The Canadian Bar Association, The Ontario Trial Lawyers Association, The Canadian Defence Lawyers Association and The Advocates' Society with a view to addressing those concerns through our governing body.

Thank you for the opportunity to comment on the Status Update put forth by the Anti-Fraud Task Force.



The Advocates' Society's submissions were prepared by:

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