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Lawyers should handle real estate deals

Paralegals don't have the same training

It's the only way to adequately protect the public

Should non-lawyers be able to handle real estate transactions? Will the public be adequately protected if paralegals are allowed to handle trust funds, process real estate purchases and sales and discharge vendor mortgages?

For decades, the role of the paralegal in providing services has been the subject of much debate in the legal profession and among the judiciary.

That debate was revived on Jan. 22 when Michael J. Bryant, Ontario's attorney general, attended Convocation, a meeting of the Law Society's board of governors, and asked the society to take on the role of governing paralegals.

His request was overwhelmingly approved in principle. Bryant's surprise appearance at Convocation was the first time an incumbent attorney general had exercised his right to attend the meeting in nearly 30 years. Regular readers of this column know that I am an elected governor (called a Bencher) of the Law Society.

After years of government inaction on the paralegal front, it was refreshing to hear the new attorney general say "an absence of regulation of paralegals, to me, is not in the public interest."

Back in 1999, the Ontario Court of Appeal pointed out that "a person who decides to sell T-shirts on the sidewalk needs a licence and is subject to government regulation. That same person can, however, without any form of government regulation, represent a person in a complicated criminal case where that person may be sentenced to up to 18 months' imprisonment."

The court might well have added that unlicensed and unregulated paralegals can, and do, act for parties in six- and seven-figure real estate transactions without any form of regulation or insurance.

I have spoken out before in public and in this column about my opposition to lawyers governing paralegals. But after listening to the attorney general, I was happy to vote in support of the proposal, along with most of my Bencher colleagues.

In 2000, retired Supreme Court Justice Peter Cory presented a report to Queen's Park recommending a regulatory regime for the province's paralegals. In many ways particularly in real estate the report was badly flawed.

Among his recommendations, Cory proposed that licensed, independent paralegals be authorized to act for a vendor on the sale of residential property that is either clear of any mortgages, or subject to only one mortgage.

None of the presentations to the Cory commission made that recommendation. It met with widespread condemnation among the real estate bar as a measure that would fail to protect the public interest.

Cory failed to explain how independent paralegals could handle real estate transactions without a trust account (another of his recommendations). He also failed to mention other necessary components of a regime to protect the public in real estate transactions, all of which are in place with Ontario's lawyers:

- errors and omissions insurance
- years of education required before licensing
- a compensation fund for losses created by wayward practitioners
- numerous statements in electronic real estate documents that can only be made by a lawyer
- enforcement of undertakings and other promises, and
- and the depth of legal knowledge and experience required when a transaction is about to go off the rails.

In the wake of the Cory report, a Law Society and paralegal working group in 2002 produced a consultation document that swallowed Cory's real estate recommendations and again proposed that independent paralegals could handle real estate transactions, if they signed an "affiliation agreement" with a practising lawyer.

When I spoke during the debate on the proposal to have the Law Society regulate paralegals, I emphasized that only lawyers should handle real estate transactions not in our self-interest, but in the public interest.

Lawyers already have in place the extensive education and training, insurance, compensation fund, and discipline and regulatory procedures necessary to provide the public with a full measure of protection.

In approving the motion to govern paralegals, the society's board accepted my amendment that it did not imply acceptance of the proposals by Cory or the 2002 consultation document.

Whatever the paralegal regulation system eventually looks like, and it is all contingent on government approval and financing, negotiations involving the permitted areas of paralegal practice will start off with a clean slate.

