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Paralegal proposal a recipe for havoc

Non-lawyers may soon handle real estate sales

Last month, the Law Society, the Ontario Bar Association and a paralegal group announced an agreement on a plan to regulate the province's independent paralegal industry.

In last week's Title Page column, I suggested the agreement stands little chance of being implemented because the key player the Ontario government was not represented at the negotiating table.

But if the tentative pact ever sees the light of day in one form or another, it could create havoc in the field of real estate conveyancing and expose the public to needless risk and expense.

The paralegal consultation process, which began last July, grew out of the badly flawed report of retired Supreme Court Justice Peter Cory in May, 2000.

Cory was asked by the Ontario government to provide recommendations on regulating the currently unregulated paralegal industry, and his final report raised serious concerns about, among other things, whether Cory understood how a real estate transaction is processed and how the public is protected.

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

Strangely, this recommendation was never specifically proposed by any of the paralegal groups that made submissions to the Cory commission. After the Cory report came out last year, Paul McCarten, then president of the real property section of what's now the Ontario Bar Association, shared my fears, and acknowledged the public interest in secure real property transactions was his primary concern.

"Cory has made a breathtaking leap into an area without any sort of knowledge or foundation to support his argument," McCarten told me. "He completely fails to understand the things he said he agrees with in our presentation. I'm astounded he would actually make those statements. This is most devastating from a public perspective."

Now, the lawyer-paralegal working group has swallowed Cory's ill-conceived real estate plan, and proposed that independent paralegals could handle residential real estate sales on behalf of a vendor where the property is either clear of any mortgage or subject to only one.

The paralegal, who would be called an accredited licensed paralegal (non-advocacy), would perform services under an "affiliation agreement" with a practising lawyer.

The lawyer, paralegal and client would have to enter into a written joint retainer agreement setting out their roles and responsibilities, and the fees to be charged by each. A committee of paralegals and lawyers would define the nature of the joint retainer and the requirements of the affiliation agreement between the lawyer and paralegal.

This scheme is so cumbersome it's doomed to failure. It would allow paralegals to control the lawyer's practice, no matter what the contract between them says.

And it doesn't begin to address the mechanics of trust fund protection, negligence insurance, a compensation fund, certifying Planning Act compliance (which only a lawyer can do), resolving complicated title problems, enforcing undertakings to rectify titles, practitioner discipline and legal education.

The proposed agreement conveniently makes no reference how this scheme will be funded. With countless sectors screaming for government money, it's hard to imagine Premier Ernie Eves throwing millions at a plan to regulate 800 to 1,200 independent Ontario paralegals.