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Law Students, Legal Services, and Access to Justice

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Legislation and Rules Commented On: *Legal Profession Act*, RSA 2000, c L-8; *Rules of the Law Society of Alberta*; *Law Society of Alberta Code of Conduct*

In June, an ABlawg post reviewed the decision of *R v Hanson*, 2015 ABPC 118, written by Judge Gaschler. The judgment included an analysis of Calgary based court agent Emmerson Brando's personal history, his ability to appear as agent on behalf of his client, and the factors that should be considered in making this decision. Judge Gaschler denied Mr. Brando's leave to appear, finding that to do so would undermine the integrity of the justice system due in part to Mr. Brando's criminal past as well as the deceptive information found on Mr. Brando's website where he advertised his agent services (at paras 21 & 22). In their blog post (read the post here), Heather White and Sarah Burton discuss Judge Gaschler's decision in relation to the unregulated nature of agents and paralegals in Alberta, access to justice, and the disparity in the quality of justice for the those who can afford lawyers and those with lower incomes who cannot. They conclude with the hope that Judge Gaschler's decision will facilitate a conversation surrounding the regulation of agents in Alberta. In this post, I highlight an additional important player in the conversation surrounding the provision of legal services by non-lawyers and access to justice, the Alberta law student.

Legal Profession Act

Section 106(1) of the *Legal Profession Act* provides that only "active members" of the Law Society may practice as a "barrister and solicitor" as well as provide specific legal services. Section 106(2) provides an exception under which students may provide legal services "in respect of services permitted to be provided by that student by the rules that are provided in accordance with the conditions prescribed by the rules." The exception, besides being abstruse, does not provide direction to any other specific rule within the *Legal Profession Act* that delineates the scope of the legal services that students are permitted to perform. Of note, this is not true of all the exceptions under section 106(2); for instance, the exception for students-at-law (i.e. articling students) directs us to another section within the *Legal Profession Act*.

Rules of the Law Society of Alberta

The *Rules of the Law Society of Alberta* provide the framework that specifies who has the authority to provide legal services in Alberta. Rule 81(1)(a) permits a law student enrolled in the faculty of law at a university in Alberta to provide legal services in the "student's capacity as a member of a student legal services society" or in a "course of practical instruction approved by the faculty" if the student is under the supervision of an active member of the law society. At the University of Calgary, students who provide legal services with Student Legal Assistance fall into the former category and students who provide legal services through the Environmental Clinical course fall into the latter.

Rule 81(1)(b) permits a law student enrolled in a faculty of law at a university in Canada to provide legal services if the services are provided as an "employee of a society that provides legal services to indigent persons" and, again, the student is under the supervision of an active member of the law society. An Ontario law student who works during the summer at Calgary Legal Guidance, a non-profit society that provides legal services, would fall under this rule.

Rules 52 and 53: Authority to Provide Legal Services as a Student-At-Law

Rule 81 is silent as to the scope of legal services that a law student may provide. Section 47(m) of the Interpretation section of Part 2, under which Rule 81 falls, states that "provide legal services" means:

> to engage in the practice of law
>
> > (i) physically in Alberta, except with respect to the law of a home jurisdiction, or
> >
> > (ii) with respect to the law of Alberta physically in any jurisdiction,
>
> and includes to provide legal services respecting federal jurisdiction in Alberta.

This section speaks to what providing legal services covers regarding where the services are carried out, but it does not delineate what a law student, not being an active member of the Law Society of Alberta, may carry out. Ostensibly the scope of services that a law student may provide is narrower than that of an active member of the Law Society.

Rules 52 and 53, which delineate what legal services a student-at-law may provide, also fall under Part 2 of the *Rules of the Law Society of Alberta*. A law student is not a student-at-law, but one could interpret rule 81 by referring to rules 52 and 53. This interpretation would assume that a law student could not have a scope of services broader than that of a student-at-law, and as such the legal services that a law student is permitted to provide would be no greater than those indicated in rule 53, although a law student's services must be under the supervision of an active member of the Law Society. Accordingly, for example, a law student, like a student-at-law, cannot act as agent in the Court of Queen's Bench during pre-trial conferences or in a judicial dispute resolution (rule 53(3)(a)). In Provincial Court, a student-at-law, and hence presumably a law student, may not act as agent in proceedings pertaining to an indictable offence unless a Provincial Court judge has absolute jurisdiction (Rule 53(5)(c). (See rule 53, *Rules of the Law Society of Alberta*, for a compete reference to the legal services a student-at-law may provide.) It would be preferable if the *Rules* would clarify the scope of legal services that a law student may provide, but since they do not, this post will assume that the scope is not greater than that of a student-at-law.

Law Society of Alberta's Code of Conduct

The *Law Society of Alberta's Code of Conduct* defines the manner in which legal services are to be provided and consequently guides the terms under which law students may provide legal services. The *Code* provides the *how* that accompanies the *who* stipulated by the *Rules of the Law Society of Alberta*.

Definitions: Lawyers, non-lawyers, law students, and students-at-law

The *Code of Conduct* differentiates between a lawyer and a non-lawyer. Lawyer, under the *Code*, is defined as:

> an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at-law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta.

A law student is classified as a non-lawyer and must be supervised in accordance with rule 5.01(1) and the *Commentary* to the *Code*, discussed below.

Lawyer Delegation and Supervision of Law Students

Within the *Code*, there are two conditions that affect the ability of law students to provide legal services: rule 5.01(1) on the "specialized training, education, and competence of the non-lawyer" and rule 5.01(3) on "the extent of the supervision" of the non-lawyer. Further, there are specific tasks that a lawyer must not permit a non-lawyer to do.

The *Commentary* following rule 5.01(1) clarifies the extent of supervision required by a lawyer when delegating particular tasks and functions to a non-lawyer. Generally, a lawyer must maintain a direct relationship with the client; however, the extent of the supervision depends on [1] the type of legal matter – "degree of standardization and repetitiveness" and [2] the experience of the non-lawyer given the legal matter. It is the responsibility of the lawyer to both educate the non-lawyer about the task and to gauge the extent of the supervision required given the task as well as the experience and education of the non-lawyer. Independent work may only be delegated from a lawyer to a non-lawyer where the non-lawyer has received specialized training and education and is competent to do that work under the general supervision of the lawyer.

Further, rule 5.01(3) lists 14 tasks and functions that a lawyer must not permit a non-lawyer to do as well as some narrow exceptions to those specific tasks and functions. For instance, rule 5.01(3)(a) reads:

> 5.01 (3) A lawyer must not permit a non-lawyer to:
>
> > (a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences; …

Other tasks and functions are complete prohibitions, for instance rule 5.01(3)(b), which provides that a lawyer must not permit a non-lawyer to give legal advice.

The Criminal Code

The *Criminal Code* of Canada, RSC 1985, c C-46, ss 800(2) and 802.1, permit an agent (who could be a student) to appear for a defendant who on summary conviction may be liable to imprisonment for a term not exceeding six months. The agent may not, however, appear or examine or cross-examine witnesses if on summary conviction the defendant may be liable to

imprisonment for a term exceeding six months. Exceptions are permitted where the defendant is a corporation or the Lieutenant Governor in Council of a province approves the agent.

To summarize, the *Rules of the Law Society of Alberta*, the *Legal Profession Act*, the *Criminal Code*, RSC 1985, c C-46, and other laws that govern courtroom procedures generally must permit a task for it to be undertaken. Beyond that, the general tone of the *Code of Conduct* is that assuming a task assigned to the law student is not expressly prohibited in 5.01(3), a law student, if competent and supervision is appropriate, may perform that legal task.

Liberalizing the *Rules*

In my view, the current *Rules of the Law Society of Alberta* that apply to law students are out of date. The *Rules* came into force on August 15, 1994 and those rules applicable to law students have remained in their original form (see the Rules of the Law Society of Alberta Amendment History). As such, they fail to reflect the current state of the justice system and the influx of individuals who are forced to navigate the courts without counsel. I argue for a liberalization of the *Rules* so that they [1] better permit the legal community more generally to employ law students to provide legal services and [2] better permit law students to appear as agents for self-represented individuals on a wider array of matters and at more levels of court, both of which would increase law students' ability to better effect access to justice.

The Law Society Rules in Practice

According to rule 81(1)(b) of the *Rules of the Law Society of Alberta*, Canadian law students must meet two criteria to provide legal services. They must be (i) an "employee of a society that provides legal services to indigent persons" and (ii) "be under the supervision of an active member." The wording suggests that this rule was put in place either so that law students could assist poor Albertans by providing legal services through a society that provides legal services or, perhaps more broadly, so that law students could assist societies that provide legal services to "indigent persons," thereby assisting both the society and "indigent persons." Either reading would appear to come down to law students assisting "indigent persons."

This rule stipulates a very narrow scope within which law students can provide legal services. They must be employees, rather than volunteers. The employer must be a society, rather than a firm or a sole practitioner. The society must provide legal services, rather than other types of services. The student must be helping "indigent" persons rather than non-indigent persons.

The *Rules* greatly limit the opportunities for law students to provide legal services and one may raise a number of questions regarding the restrictions set out in rule 81(1)(b). Why should a law student who volunteers with a society that provides legal services not be permitted to provide legal services to an "indigent" person? Why should a law student who is employed at a law firm not be permitted to provide legal services to an "indigent" person? Why should a law student employed by or volunteering with an organization that provides, instead of legal services, for example, housing services, not be permitted to provide legal services to an "indigent" person? If an active member of the law society supervises a law student, why should she not be permitted to provide legal services to "indigent" persons and thereby increase access to justice in all of these contexts?

Of particular concern is the fact that a law firm cannot employ a law student and have her provide legal services to "indigent" persons. The consequence is that if a law firm's summer law

student employees cannot fit within rule 81(1)(b), this rule arguably has the additional effect of stifling *pro bono* project innovations that are aimed at providing legal services to "indigent" persons, since engaging law firms in the promotion of access to justice is an ongoing objective for *pro bono* law organizations (see e.g. the work of Pro Bono Law Alberta).

Although it is significant that law students see their lawyer colleagues and mentors providing *pro bono* services and see that these activities are supported and encouraged by their law firms, it is also critical that law students have opportunities to fully participate in these activities. Beyond providing legal services for "indigent" persons who need assistance today, this is also about instilling the sense of a professional responsibility to provide *pro bono* legal services in the next generation of lawyers, an opportunity we cannot afford to miss given the abysmal state of access to our justice system.

The *Rules* should adapt to the current need to increase access to justice for many Albertans. Twenty years ago, the best estimates indicated that less than 5% of litigants were unrepresented. Today, that number ranges from 10% to 80% depending on the claim type and level of court. For instance, it is estimated that half of all family law litigants in Canada are self-represented (see the Canadian Bar Association, "Reaching equal justice: an invitation to envision and act," The Canadian Bar Association, Access to Justice Committee (2013), p 42). It is likely that when these rules were implemented twenty years ago, one could not foresee the exponential growth of self-representation within the court system. However, in 2015 this growth is unmistakable and if law students were permitted to provide a greater range of legal services (with supervision), many individuals who would otherwise be forced to represent themselves could choose the option of having a law student appear on their behalf.

Impacts of Individuals Without Counsel on the Legal System and the Social System

A law student's ability to provide legal services that increase access to justice not only benefits self-represented individuals during their legal proceedings but also the community more generally, since the effect of this assistance goes beyond the courtroom and the legal system. Within the courtroom there is a perception among judges and lawyers that self-represented individuals generally take up more court time and court services since proceedings take longer for self-represented individuals (see the Canadian Bar Association, "Reaching equal justice: an invitation to envision and act," The Canadian Bar Association, Access to Justice Committee (2013), p 43). Further, foundational tenets of our legal system are affected by the influx of self-represented individuals. Although procedural fairness and judicial neutrality sit at the core of the legal system, studies have found that the increased number of self-represented individuals has altered this central judicial role. For instance, it has been found that judges find themselves in challenging positions where one side is represented by counsel and the other is not, and thus judicial intervention, such as providing procedural advice and coaching, has become an inevitable reality in many courtrooms (see Julie Macfarlane, (2013) *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Treasurer's Advisory Group on Access to Justice Working Group Report, p 14). Hence, permitting law students to provide an expanded range of legal services in more courtrooms would have a positive impact on court resources. Additionally, through explaining court procedure and advocacy law, students can create a more balanced courtroom, thereby decreasing the pressures felt by many judges.

Outside of the courtroom, self-represented individuals may experience negative personal and economic outcomes as a result of their courtroom involvement. Personal savings are depleted

and many find it difficult to maintain employment while managing their legal matters. In some cases, self-represented individuals struggle to preserve relationships with families and friends and experience emotional isolation (*The National Self-Represented Litigants Project* at p 14). Inevitably, what happens inside the courtroom affects lives beyond the courthouse, and therefore the increased assistance of law students can also positively impact communities more generally.

Risk Assessment: Law Student Delivery of Legal Services

Currently law students assist individuals in Provincial Court by providing legal services relating to a variety of legal matters. These legal matters have outcomes for those individuals that vary in risk and severity. It might well be argued that some legal matters have outcomes such that law students should not assist with them. A common position is that a law student should not act where an individual faces a risk of a custodial sanction. However, given the financial and systemic barriers and the lack of prohibitions on an individual representing herself at any level of court in Canada, the only option for many is to proceed without counsel. In this case, she will present evidence, cross-examine witnesses, and perhaps testify, all unaided. Accordingly, she will be responsible for the outcome of her trial regardless of whether she understood court procedures, rules of evidence, or even the very offence for which she was tried. The reality of the current situation is that law student assistance may well be better than the alternative, which is nothing. In fact, where individuals properly understand the risks of their situation and provide informed consent to being assisted by a law student, to deny them this last remaining option and effectively force them to proceed without counsel only makes more unjust the inaccessibility of access to justice.

For some, there remains the worry that allowing a law student to provide legal services comes with ethical concerns. Of course, it is true that a law student is at risk of committing ethical transgressions in the provision of legal services. However, expanding the scope of legal services beyond what they currently are able to provide does not increase these risks. As it stands, in the work that law students currently do, law student's conduct is not regulated by the law society and not subject to professional misconduct hearings. Consequently, an increase in the range of legal services that a law student could provide does not alter the status quo nor increase the risk that a law student will breach her ethical duties. The risk of a breach of confidentiality is not altered whether a law student is in Provincial Court or Queen's Bench Court.

Another potential concern is that if law students are permitted to provide more services, this may preclude the exploration of other options – e.g. regulating paralegals (as explored in the White and Burton post) or expanding legal aid coverage – which might be better for self-represented litigants than having law students do the work. However, increasing the services that law students can provide can still usefully add to the overall range of service providers without detracting from conversations about the need for regulation or an expansion of legal aid coverage.

Additionally, this post is not advocating an expansion of the *Rules* beyond what a law student is competent to provide. It goes without saying that the student must be adequately supervised, just as is any law student who currently provides legal services in the province. Equally important, the student must be competent to perform the legal service required, just as any law student or any lawyer who provides any legal services must be. Accordingly, expansion of the *Rules* to increase the services that a law student may provide will require an increased involvement from the legal community. At a minimum, it will require increased supervision and guidance by lawyers and education, training, and structural support, as well as coordination between law

schools and *pro bono* oriented student legal organizations. Essentially, expansion of the scope of legal services that law students may provide will require a community effort. This position echoes Supreme Court of Canada Chief Justice Beverley McLachlin and the active role she has played in raising awareness of the state of access to justice in Canada. Specifically, the Chief Justice has repeatedly told Canadian lawyers that they have a responsibility to provide legal services to all Canadians (see Law Times, Chief Justice Beverley McLachlin, "Lawyers integral in making justice accessible" February 20, 2011). Changing the *Rules of the Law Society of Alberta* to increase the range of legal services law students may provide is one way to help meet this responsibility.

Lastly, I am not advocating that law students put more on their already busy plates, risk burning out, or sacrificing their academic performance. Nor am I advocating that law students necessarily do more work or take on more files. Rather, I would like to add to the conversation the idea that law students, in partnership with the greater legal community, have the ability, if given the resources, to take on a greater range of files and assist a greater range of Albertans needing legal services in our community.