The Importance of ADR for Legal Representatives

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Learning Outcomes

After reading this chapter, you will be able to:

- Understand the historical tendencies and systemic challenges to alternative dispute resolution (ADR).
- Recognize the changing nature of settlement within the litigation process.
- Consider how access to justice and paralegals are linked.
- Assess the importance of ADR within the context of the legal representative and client.
- Understand the function and principles of the Law Society of Ontario and how they impact the regulation of legal representatives.
- Assess the regulatory framework as it relates to paralegals and ADR.
- Define the purpose of the code of conduct established by the Law Society of Ontario for its licensees and the ethical responsibilities it imposes on them.
- Fulfill a paralegal's duties as set out in the *Paralegal Rules of Conduct* and its specific sections that engage ADR duties and responsibilities.
- Comprehend the paralegal's duty to advise clients about dispute resolution options, including negotiation, mediation, and arbitration, as alternatives to litigation.
- Apply the concepts from this chapter to a recurring conflict case scenario.

Introduction

There is little question that over the last 30 years, there has been a widening gap between the delivery of legal services and the citizens who rely on them. The traditional users of legal services have required strong advocates, lawyers who fight for their clients in an adversarial system that pits one party against another in a courtroom before a judge. Regrettably, the traditional legal resolution system no longer reflects the needs and interests of ordinary folks. Throughout this chapter, we will explore the impact of these changes on society and the complex correlation between the growing need for alternative methods to resolve these disputes and the increasing use of the legal representatives who offer them.

As court costs rise and the courtroom backlog causes longer delays, the adjudicative system heads further and further out of reach for the average person. The result is a noticeable trend toward the use of alternative methods to resolve disputes—**alternative dispute resolution, or ADR**. Increasing delays, excessive and unknown costs, and the unpredictable nature of outcomes in court have forced the average person to seek alternatives to traditional adjudication. The legal industry has responded by requiring more alternatives as part of the litigation process. In fact, the regulating body for paralegals and lawyers, the **Law Society of Ontario (LSO)**, under its codes of conduct such as the ***Paralegal Rules of Conduct*** and the ***Rules of Professional Conduct***, requires these legal representatives to inform clients of ADR options for every dispute.[1] Similarly, choosing the right legal representative in a dispute may depend on factors such as affordability and accessibility for many people faced with the rising costs of adjudication and high lawyer fees.

alternative dispute resolution (ADR)
the use of methods such as negotiation, mediation, and arbitration as alternatives to litigation to resolve disputes

Law Society of Ontario (LSO)
the regulatory agency for paralegals in Ontario

Rules of Professional Conduct* and *Paralegal Rules of Conduct
codes of conduct set out by the LSO that lawyers and paralegals are required to adhere to or risk losing their licence to practise law

This book will help legal representatives and supporting roles in the legal industry—including lawyers, paralegals, law clerks, legal assistants, etc.—to not only focus on understanding ADR in conflict but also outline how to apply these skills at each stage of a dispute in order to successfully represent clients in dispute resolution settings.

The History of ADR in Law

The Traditional Practice of Law

A brief look at our legal system will quickly show how adjudication has dominated conflict resolution and the legal community. Training for legal representatives has focused primarily on legal theory and trial advocacy. This of course is peculiar since only a fraction of disputes end up in court. In fact, statistics in some jurisdictions show that 98.2 percent of all adjudicated disputes are resolved outside the courtroom and involve some manner of negotiated settlement.[2] "And yet, the reality of the legal practice is that we spend most of our lives as lawyers negotiating with others."[3]

1 Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 24 February 2022), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct>. For the most up-to-date material, please visit the website referenced in this footnote.

2 M Galanter, "The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State Courts" (2004) 1 J Empirical Legal Stud 459.

3 CB Wiggins & RL Lowry, *Negotiation and Settlement Advocacy: A Book of Readings* (St Paul, Minn: West Group, 1997) at v.

Notwithstanding that statistic, the training and education of legal professionals focus little on conflict resolution as an important skill to develop, nurture, and teach.

It is only in recent years that negotiation has been acknowledged as an important skill to the legal profession and a positive alternative to adjudication. Law schools now offer courses in alternative dispute resolution and negotiation. Change is slow, and most Canadian law schools continue to focus their legal education on an adjudicative, individual rights–based model of justice.[4] A **rights-based model** of justice emphasizes an individualistic approach wherein the rights of the individual are protected against the oppressive assertion of another's rights. It is this model that fits the stereotype of the adversarial lawyer and accentuates characteristics of aggression, "winning," tenacity, and avoidance of cooperation in order to push clients' rights ahead of all others. It will take much change within the legal profession before any attitudinal shift from the adversarial practitioner trickles down to the education of legal students.

rights-based model
a model of justice in which the rights of the individual are protected against the oppressive assertion of another's rights

Economic and Social Changes in the Legal Profession

A study of the legal profession has shown that historically it has responded to current events and changes in its environment, albeit slowly. The more recent impact of the pandemic necessitated more immediate, drastic, and much needed changes to a very reluctant system. The nature of the legal profession requires the role of legal representatives to be concerned with following changes to a client's environment and less with initiating change or with innovation within the legal system itself.[5] Unfortunately, that change is not always in the best interests of all clients that require legal professional services.

One of the most significant and noticeable changes has occurred with the kind of clients being served by the profession. Increasingly competitive economic markets in Western countries have produced large corporations and a demand for corporate and commercial law services and practitioners. Consequently, the legal industry has responded with the establishment of new and highly specialized legal services such as intellectual property law and securities law, among many others. Large legal firms have begun to emerge in response to increasing demands from corporate clients.[6] The result of this trend toward large firms has been the absorption of sole practitioners.

The resulting impact of these changes to the organizational and economic structure of law firms is significant. While the number of corporate files increases in line with the emergence of and demand for corporate law, the number of personal client work decreases, much to the dissatisfaction of those clients. Personal clients can no longer afford the rising per-hour legal fees of the mega-firm lawyers, and they have a smaller number of sole practitioners to choose from.

The problem of access to affordable legal fees is exacerbated by the cost of the traditional method of resolving conflicts by lawyers: going to trial. The average cost of a five-day trial in Canada is 2021 was $75,000–95,0000,[7] more than the annual

4 J Noonan, "Holistic Legal Training: When Should ADR Training Be Introduced?" (March 2009) 17:2 OBA Alternative Dispute Resolution Section Newsletter.

5 J Macfarlane, *The New Lawyer* (Vancouver: University of British Columbia Press, 2008) at 3.

6 *Ibid* at 4.

7 "2021 Legal Fees Survey: Results" (last visited 28 July 2022), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/news/features/2021-legal-fees-survey-results/362970>.

after-tax income of many Canadian families in recent years.[8] Fees have shown a continued rising trend year over year. It is difficult to tell how the impact of the global pandemic and slowdown of the economy will shift legal spending.[9] Despite the fact that the number of matters that settle before trial is so high, there continue to be long waits for trials across Canada's legal system. An issue that was attempted to be addressed by criminal courts when strict timelines of 18 months were imposed on criminal trials following the *R v Jordan*[10] decision. Unfortunately, the COVID-19 pandemic only exacerbated the delays causing a tremendous backlog of cases. In-person court proceedings were suspended during lockdowns and only urgent matters were attended to remotely. Of course, the pandemic has also helped jurisdictions to adapt and press for changes such as running hearings electronically in order to address the backlog. Going to trial is simply unattainable for many.

It is clear that for those unable to access a lawyer in private practice through the traditional methods, the delivery of legal services will have to evolve to meet their demands. Many organizations have reacted to what the market is now demanding, and progressive employers such as the LCBO, the Canada Post Corporation, the National Capital Commission, our national banks, and even sports organizations such as the Ontario Hockey League are all employing conflict resolution methods to resolve disputes outside the legal system. Adjudicative justice may no longer appear to be the preferred method to resolve disputes where obtaining closure and preserving long-term relationships may be more important.

LEGAL SERVICES IN A POST-PANDEMIC ERA

The COVID-19 pandemic has had a significant impact on the delivery of legal services. The pandemic brought closures to hearings, courtrooms, administrative offices, and many physical spaces for dispute resolution. Legal professionals continued to serve their clients in an online environment by adapting their business practices and scope of practice. They often struggled to assist their clients to access justice despite the lengthening delays. With the closure of courts and limits to in-person appearances, all in-court proceedings became virtual using remote teleconferencing or videoconferencing such as Zoom. Many court appearances were initially restricted to urgent matters only, causing a significant backlog in cases that may take years to reduce. Parties, witnesses, and legal representatives could attend court appearances from the comfort of their home and did not incur travel costs to the courthouse. Printing and binding documents were no longer required as documents were filed electronically saving significant disbursement costs. Legal representatives now worked from home offices.

It is not known what long-term impact the pandemic will have on legal fees and areas of practice. While legal service rates have increased marginally since the pandemic, the total bills have often lowered due to pandemic related efficiencies. While *The Canada Lawyer's* 2021 Legal Fees Survey have noted a continued rising trend

8 Statistics Canada, *Canadian Income Survey, 2020 (CIS)* (Ottawa: Statistics Canada, March 2022), online: <https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=5200>.

9 "Fees Rising Before Downturn—2020 Legal Fees Survey" (last visited 28 July 2022), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/surveys-reports/legal-fees/fees-rising-before-downturn-2020-legal-fees-survey/329033>.

10 2016 SCC 27.

of slight fee increases by legal representatives, there has also been an increasing percentage of legal service providers that have lowered their fees as a result of these savings.[11] Many legal representatives may choose not to return to the office and continue to work from home thus reducing general overhead business costs such as disbursements and court appearances. Even costs of renting a room for an arbitration or mediation no longer applies. The demand for particular areas of practice was also affected by the pandemic. Personal injury law has become increasingly competitive as a result of fewer matters. Pandemic related lockdowns and travel restrictions reduced the number of car accidents and personal injury claims. Conversely, other pandemic related closures, layoffs, lockdowns, school and business closures, and vaccination requirements have increased the level of crisis and conflict within many personal and business relationships leading to an increase in legal actions and claims.

The delivery of legal services has also been affected by the pandemic. As the courts have adjusted to remote and electronic processes, it has become increasingly difficult for the unrepresented person to navigate the legal system, necessitating a legal representative. Even legal representatives have had to adapt to constantly changing methods of the delivery of legal services. One particular legal "blooper" went viral as a lawyer in Texas was unable to remove a filter during a virtual legal proceeding over Zoom that turned his face into a cat. "I'm here live. I'm not a cat,"[12] the lawyer Rod Ponton stated while the judge attempted to guide him through removing the filter on Zoom. Courts and tribunals were regularly updating and changing legal procedures in response to COVID-19 as staff and adjudicators continued to work remotely, and all in-person service counters were closed.

11 Z Olijnyk, "Legal Services in a Most Unusual Year—2021 Legal Fees Survey" (25 May 2021), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/surveys-reports/legal-fees/legal-services-in-a-most-unusual-year-2021-legal-fees-survey/356483>.

12 Guardian News, "'I'm Not a Cat': Lawyer Gets Stuck on Zoom Kitten Filter During Court Case" (9 February 2022), online (video): *YouTube* <https://youtu.be/lGOofzZOyl8>.

A BRIEF HISTORY OF PARALEGALS IN ONTARIO

Alternative justice comes in many forms. Much like the existence of the need for alternative *methods* to the adversarial system for resolving disputes, there is equally a need for alternative *service providers*. For many people, when lawyers are inaccessible and unaffordable, the options are limited.

The road to the regulation of the paralegal has been a long and complex one. The paralegal industry began without much in the way of a consistent definition of what exactly a paralegal is. Adding to the confusion, the parameters of practice provided by paralegals differed significantly from one region to another across North America. Ontario legislation often referred to non-lawyers who represent clients before courts and tribunals as "agents."

During those early decades, the traditional practice and regulation of lawyers in Ontario was conducted by the self-governing LSO. Any unauthorized practices of law, including those practices of the paralegal, would be prosecuted by the LSO. As there was no specific definition of the "practice of law," it was unclear what fell under those specific parameters and how it affected the services of paralegals. While some statutes specified the representation by "solicitors" in certain proceedings, others allowed for representation by "agents," such as the *Statutory Powers Procedure Act*.[13] Representation by "agents" in these tribunals, however, seemed to be in direct contravention of the *Law Society Act*.[14]

Despite strong public support for the use of paralegals, there was much concern about the accountability and regulation of paralegal activities. These concerns continued and came to a head following the 1987 Ontario *Pointts* decision wherein the right of an agent to provide legal services for a fee in Ontario was tested.[15] The impact of that decision was enormous, and it was widely—but, by many, erroneously—interpreted as sanctioning a host of agency-related activities for paralegals. Consequently, independent paralegal activity flourished in traditional areas of paralegal services and expanded to other areas of representation such as family law, incorporations, and wills.

There was an immediate response. Independent paralegals were suddenly investigated and charged by the LSO for unauthorized practices that were not approved in the *Pointts* decision. Despite increasing numbers of prosecutions pending across the province, the number of independent paralegals grew markedly, along with the provision of a wider spectrum of legal services to the public.

The pressure was evident, but despite the conclusion of the report by the Ianni Task Force on Paralegals in 1990 that paralegals provide an important service to the public for many reasons and should be allowed to deliver a limited range of legal services within a regulated environment, no forward movement was made. Almost ten years after the Ianni report, in May 2000, the Honourable Peter Cory was tasked to deliver yet another report to the Ontario Ministry of the Attorney General outlining recommendations to regulate the paralegal practice in Ontario. His framework was based on the same two themes as the Ianni report: "to extend access to justice and

13 RSO 1990, c S.22.

14 RSO 1990, c L.8.

15 *Regina v Lawrie and Pointts Ltd*, 1987 CanLII 4173, 59 OR (2d) 161 (CA).

to ensure the protection of the public."[16] More submissions followed, from both the LSO and paralegal organizations, that supported some kind of regulation of paralegals, but the organizations disagreed as to which body would control that regulation and oversee the paralegal profession.

Finally, amid growing pressure, the Ontario government decided that the LSO would be the most experienced and affordable option—and least burdensome on the public purse—for regulation. On October 19, 2006, Bill 14 was enacted by the Ontario legislature, expanding the mandate of the LSO to provide for the regulation of paralegals in the public interest.[17] Today, according to the LSO Annual Report 2020, more than 9,607 paralegals are licensed in Ontario, providing consumers with more choice, more protection, and improved access to justice.[18]

Access to Justice

The effectiveness of the legal system cannot be scrutinized without proper consideration of its consumers: the general public. In fact, the importance of accessing justice by the public is an integral part of the democratic process and one of our society's most fundamental values. Arguably, the meaning of section 7 of the *Canadian Charter of Rights and Freedoms*,[19] which guarantees that individuals have a right to "fundamental justice," implies a right to "reasonable access to law in a free and democratic society governed by the rule of law."[20] While all Canadians have the right to know the law and represent themselves before court, they still require much assistance in navigating through legal and judicial processes. Without proper access to legal services, full and meaningful participation in a democratic society is questionable and a potential breach of fundamental rights. As former Chief Justice Beverley McLachlin of the Supreme Court of Canada observed:

> Statistics support the view that accessing the justice system with the help of a legal professional is increasingly unaffordable to most people. Nearly 12 million Canadians will experience at least one legal problem in a given three-year period, yet few will have the resources to solve them. … Among the hardest hit are the middle class—who earn too much to qualify for legal aid, but frequently not enough to retain a legal representative for a matter of any complexity or length. Additionally, members of poor and vulnerable groups are particularly prone to legal problems, and legal problems tend to lead to problems of other types, such as health issues. …
>
> Fulfilling the public's expectations for justice—in a phrase, providing "access to justice"—is vital. It is vital to providing the justice to which every person is entitled.

16 PD Cory, *A Framework for Regulating Paralegal Practice in Ontario: Report* (Toronto: Ministry of the Attorney General, 2000) at 19.

17 Bill 14, *An Act to Promote Access to Justice by Amending or Repealing Various Acts and by Enacting the Legislation Act, 2006,* 2nd Sess, 38th Parl, Ontario, 2006 (first reading 27 October 2005).

18 Law Society of Ontario, "Annual Report 2020" (last visited 17 May 2022), online: *Law Society of Ontario* <https://lso.ca/annualreport/2020/home>.

19 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

20 RW Ianni, *Report of the Task Force on Paralegals Prepared for the Ontario Ministry of the Attorney General* (Toronto: Queen's Printer, 1990) at 14 [Ianni report].

Former SCC Chief Justice Beverley McLachlin

> Statistics show that people who get legal assistance in dealing with their legal problems are much more likely to achieve better results than those who do not. As servants of justice, legal representatives have a duty to help solve the access to justice crisis that plagues our legal systems. It is vital to the rule of law.[21]

Although there are many definitions of what access to justice means, for the purposes of this book, **access to justice** is defined as the ability to use the legal system to obtain justice. It is important to understand that *access to courts* is not the same as *access to justice*. Access to courts has been defined more simply as the equal right of citizens to participate in all institutions of law as an integral part of a constitutional democracy. However, this does little to address a more comprehensive understanding of how to access our legal system. Access to justice ensures not only greater physical accessibility to the courts and rules; it involves further steps to go beyond the legal system and respond to ways that the legal system impedes or promotes economic or social justice. Instead, the challenge is to focus on the structure of justice and how it can better accommodate the diversity, values, and aspirations of different communities and individuals.

The concern is that unresolved legal problems can often lead to great personal hardship for some individuals. Research conducted by the Ontario Civil Legal Needs Project finds a strong correlation between access to justice issues and broader issues of health, social welfare, and economic well-being.[22] The research confirms that the poorest and most vulnerable Ontarians face the greatest barriers to accessing justice, such as persons with disabilities, people whose first language is neither English nor French, persons with limited literacy, people living in remote communities, older people, and women.[23] Additional obstacles of real and perceived costs of legal services, and the lack of access to legal aid and legal information and resources, only amplify these existing barriers.

access to justice
the ability to use the legal system to obtain justice

Unfortunately, the pool of lawyers who have traditionally responded to the legal needs of these vulnerable Canadians is shrinking. Traditionally, small firms and sole practitioners have been the primary providers of legal services to lower- and middle-class Canadians. In the past, these firms have reported that 77 percent of their clientele are individuals.[24] Regrettably, trends show significant decreases in the number of existing and new lawyers practising in small firms, as sole practitioners, and within legal aid organizations. The impact of this decrease is increasingly felt in more remote geographic areas where families and individuals often lack access to legal

21 B McLachlin, "The Legal Profession in the 21st Century," Remarks at the 2015 Canadian Bar Association Plenary, Calgary (14 August 2015), online: Supreme Court of Canada <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx>.

22 Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) at 44, online: *Canadian Commons*.

23 *Ibid* at 46.

24 *Ibid* at 48.

representatives. These supply problems leave a vulnerable group of people even more exposed and further threaten their ability to access justice.

For low- and middle-income Canadians, civil legal needs arise frequently in their lives, and these needs touch upon fundamental issues and life circumstances. According to the research cited above, over a three-year period, one in three low- and middle-income Ontarians had non-criminal legal issues, and one in ten had multiple legal issues.[25] The existence of public disputes and the need to resolve these disputes will not simply disappear or resolve on their own. For many, the mere complexity of the legal system has been a significant barrier to access to justice. Members of the public often turn to self-representation as an immediate alternative and survival measure, though in most cases it does not serve their interests well. Studies on the impact of self-representation on case outcomes show that a person's chance of success in a legal action is automatically lowered if they represent themselves—some by as much as 90 percent depending on the type of hearing (see Table 1.1).[26] Despite the poor results, self-represented litigants continue to grow. In fact, in Canada, almost 60 percent of litigants in family law are unrepresented,[27] a shocking statistic that has forced the LSO to consider licencing of additional Family Law Service Providers.

TABLE 1.1 Self Represented Litigants versus Represented Party Outcomes, Ontario Superior Court, January 2012–April 2016

	All hearings	Motions	Trials	Applications
Total Hearings	1192	989	120	72
Win	163	124	30	9
Loss	865	720	94	56
Split	33	26	3	4
No order	93	80	5	2

National Self Represented Litigants Project, "Finally, Canadian Data on Case Outcomes: SRL vs. Represented Parties" (18 April 2016), online: *NSRLP Blog* <https://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties>.

Many litigants try to resolve legal matters by themselves with legal assistance but not necessarily with the assistance of legal representatives. One in three low- and middle-class Ontarians say they prefer to resolve their legal needs by themselves without legal advice.[28] The Ontario Civil Legal Needs Project researched low- and middle-income Ontarians about their preferred way of resolving legal problems. Interestingly, the majority indicated they would prefer to resolve their problems themselves with

25 *Ibid* at 3.

26 National Self Represented Litigants Project "Finally, Canadian Data on Case Outcomes: Self Represented Litigants vs. Represented Parties" (18 April 2016), online: *NSRLP Blog* <https://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties>.

27 "Just Facts: Self Represented Litigants in Family Law" (June 2016), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.

28 McMurtry, *supra* note 22 at 4.

legal advice (34 percent), a smaller proportion said they would prefer to resolve their problems through an informal process such as mediation (22 percent), 13 percent said they would prefer to resolve their problems through a formal process such as a court or tribunal, and only 6 percent said they would prefer to resolve their legal problems on their own without any help. See the table below for more details.

TABLE 1.2 Preferred Way of Resolving Legal Problem, June 2009

By self with legal advice	34%	By self with no help	6%
Informal process (mediation)	22%	Other/depends	2%
By self with family/friends	16%	Doing nothing	3%
Formal process (court, tribunal)	13%	Don't know/not applicable	4%

Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) at 26.

As public pressure for access to justice continues to mount, judicial systems across North America have responded. Civil justice reform has included changes such as case management programs to set timelines, early exchange of documents, and increased encouragement to settle. "Simplified rules" for certain civil litigation matters in Ontario within a monetary range of $35,000 to $200,000 have been legislated as a means of simplifying procedures, eliminating unnecessary and costly steps such as limiting the discovery processes, and requiring mandatory meetings and settlement discussions.[29] The limit for the Ontario Small Claims Court has steadily increased, and is now $35,000, which will allow businesses and individuals to resolve their disputes in a less formal, and affordable way. Some provinces, such as Alberta, have seen small claims court claim limits increase as high as $50,000. Areas of law such as family and criminal law have responded and are steering away from purely adversarial methods. Collaborative family law lawyers and criminal restorative justice measures both seek to reduce judicial time arguing cases and to spend more time negotiating an appropriate outcome that meets the needs of the parties. Other initiatives, such as mandatory mediation, are similarly being used to divert matters away from trial toward settlement discussions. Since 1999, Ontario has imposed mandatory mediation in civil lawsuits within certain jurisdictions. Not all provinces require mandatory mediation prior to trial. Many administrative tribunals offer voluntary or mandatory mediation and arbitration streams as attempts to resolve disputes earlier.

Several other legal organizations already have in place a comprehensive range of programs and services designed to provide legal assistance to low- and middle-income residents. Legal Aid programs can be found in almost every province and territory. The LSO, Legal Aid Ontario, and Pro Bono Law Ontario all share a common goal to improve access to justice for all Ontarians and have implemented corresponding programs. While their services are heavily utilized, there has been little empirical data to determine if the services are meeting the needs of Ontarians effectively, if there are unmet legal needs,

29 Ministry of the Attorney General of Ontario, "Civil Claims: Simplified Procedure" (4 March 2022), online: *Government of Ontario* <https://www.ontario.ca/page/civil-claims-simplified-procedure>.

and if there are many people who have been unable to access them. Unfortunately, these programs and incentives are limited and are surely only the beginning of a process to address the barriers the public encounters in accessing justice.

The importance of justice for individuals and for Canadians as a whole cannot be understated. While the solution of improving access to justice for all people may be obvious, implementing a solution is not easy. Legal service models should be designed to target and respond appropriately to the specialized needs of those communities. This would require removing economic and geographic barriers to legal services. Specifically, the legal system would need to have multiple, diverse, and integrated access points and service responses. It would include an alternative system of justice that helps people identify and resolve issues outside the traditional system.

As so aptly described by the Supreme Court of Canada in its 2014 decision *Hryniak v Mauldin*:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.[30]

The Evolution of ADR and Conflict Resolution

According to a symposium organized by the Department of Justice Canada in 2000, "the most significant barriers to access can only be overcome through a reorientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies."[31] At the symposium, lecturer Jacques Dufresne argued that an alternative process treats access to the legal system as a means of last resort, with self-regulation at the base, preventive law and alternatives in the middle ground, and the court at the apex. Disputes that cannot be settled first by alternative means such as conciliation, mediation, and arbitration should go to trial only as a last resort.

The movement toward mediation and acceptance of other alternatives within the legal community has been a slow one. Mandatory mediation was first brought into the civil justice system in Ontario in 1999. Currently, Ontario and Quebec offer mandatory mediation. Some provinces such as Alberta are reintroducing mandatory mediation pilot programs in civil and family litigation. British Columbia offers it only if one party requests it.[32] Judicial pre-trials were the closest precursor to mediation. The pre-trials were meant to be neutral evaluations whereby a judge would express their non-binding opinion on a case as a means of encouraging early settlement and avoiding a long, expensive trial. When mandatory mediation was finally introduced into the civil justice system, a significant change to the justice system began to take place.

30 *Hryniak v Mauldin*, 2014 SCC 7 at para 2.

31 Department of Justice Canada, Symposium, *Expanding Horizons: Rethinking Access to Justice in Canada* (31 March 2000) at 4, online (pdf): <http://publications.gc.ca/collections/collection_2010/justice/J4-4-2000-eng.pdf>.

32 B Harrison & G Ivanovic, "When is Mediation Mandatory? A Comparative Analysis of Mandatory Mediation Across Canada" (October 2019), online: *McMillan LLP* <https://mcmillan.ca/insights/publications/when-is-mediation-mandatory-a-comparative-analysis-of-mandatory-mediation-across-canada>.

mediation
a process that occurs before a non-partisan third party who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent

Mediation is a process that occurs before a mediator, someone who is not a judge but instead a non-partisan third party, who assists the parties in reaching a settlement by facilitating their negotiations with their joint consent. Both counsel and their clients are authorized and encouraged to attend. Mediation can be used for a wide range of conflicts, including civil, criminal, commercial, employment, and family matters, as well as in private disputes, administrative tribunals, and many other areas. It is sometimes a mandatory part of the court process or can be sought on a voluntarily basis by parties wanting to resolve their dispute outside litigation.

Unfortunately, mediation is a process that has long been opposed by many lawyers and judges. For some judges, who were familiar with the traditional and formal process of a courtroom, the informal mediation setting was unacceptable. Their preference was for a formal legal proceeding in a courtroom with all parties present, applying the proper rules of courts and rules of evidence, and with representatives acting in accordance with their traditional roles. Informal mediation simply lacked the proper dignity and decorum of the courtroom. Many lawyers expressed the same sentiment, albeit for slightly different reasons. When mediation was first introduced, many lawyers loathed the process and avoided it as much as possible. They saw it simply as an additional cost and administrative step that did not contribute to the action. Lawyers who attended mediation with their clients present and active felt a loss of control over the proceedings. As one lawyer describes:

> The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client-control problem.[33]

THE TOUGH TRANSITION TO MEDIATION

Much of the early antipathy toward mediation was the result of a lack of any foundation from schooling or early mentoring because most lawyers truly did not have any idea how to work within the mediation forum. Solicitor and now mediator Joy Noonan recounts her personal experience:

> I have no doubt that had I been fortunate enough to have received even a small fraction of the ADR training I now have and employ daily—there would have been fewer anxious nights preparing for mediations and clients would have been better served, faster.[34]

Another lawyer put it this way:

> I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and stronger and better than you are.[35]

33 J Macfarlane, "Culture Change: A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2002:2 J Disp Resol 241 at 301, online: <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1415&context=jdr>.

34 Noonan, *supra* note 4.

35 Macfarlane, *supra* note 5 at 12.

The role of the judge in our justice system is evolving in response to managing conflicts outside of trial. There is an increasing use of what is known as **judicial mediation**, in which a judge acts as a mediator in facilitating settlement between the parties. This is used as an option prior to proceeding to trial. Former Chief Justice of Ontario Warren K. Winkler reflected that judicial mediation will continue to be expanded beyond its present form and will only enhance access to justice.[36] The compelling factor for many of the clients is that the judicial mediation process is free, in contrast to ordinary mediation, which the parties must fund themselves. The process of judicial mediation has been particularly effective and widely used in matters before small claims courts and administrative tribunals.

judicial mediation
a process in which a judge acts a mediator in facilitating settlement between the parties

Judges themselves have also evolved to meet the changing needs of ADR within our justice system. In fact, in many more informal tribunal or small claims court settings where the litigants are often unrepresented and have little of no pre-trial discussions, the judges will refuse to proceed with the trial until the parties have confirmed they have attempted negotiation or mediation. Judges will ask the parties if they have met beforehand to discuss settlement. If the answer is no, the judge might send them out to the hallway of the courtroom to attempt settlement and refuse to begin a trial until the parties have confirmed their attempt.

Similarly, administrative tribunals may use a number of ADR mechanisms to encourage parties to settle disputes before a hearing, such as negotiation, mediation, conciliation, and arbitration. These methods may be mandatory or voluntary, depending on the particular rules of that tribunal. In Ontario, ADR is specifically addressed in the overarching statutory rules governing administrative tribunals. Sections 4.8 and 4.9 of the Ontario *Statutory Powers Procedure Act* allow tribunals to make their own rules respecting the use of alternative dispute resolution mechanisms. Tribunals also employ a similar style of judicial mediation, which allows adjudicative board members and/or tribunal staff to act as mediators or other facilitators in ADR processes. Although mediation may simply lead to more cost and delay before the inevitable hearing, an effective tribunal will not usually impose mediation in all cases. This will largely depend on the particular tribunal. Administrative tribunals account for a significant number of legal actions across Canada. Subsequent chapters in this book will consider the dispute resolution methods within administrative tribunals.

Alternative forms of justice such as mediation are now considered an essential service that is embedded in our justice system. Many regard mediation as the most significant change to occur to the justice system in the past 50 years. Currently, mediation is a mandatory step in the civil litigation process. The *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* enforced by the LSO require lawyers and paralegals to advise their clients of ADR methods. ADR is often a policy requirement for many corporations in their policy manuals. Business and employment agreements use ADR as a required initial pre-litigation step in their agreements and as a preventive measure to deal with potential conflicts. For many tribunals, such as the Human Rights Tribunal and the Landlord and Tenant Board in Ontario, mediation and arbitration are important and sometimes mandatory parts of the tribunal process.

36 WK Winkler, "Some Reflections on Judicial Mediation: Reality or Fantasy?" (24 March 2010), online: *Court of Appeal for Ontario* <https://www.ontariocourts.ca/coa/about-the-court/archives/reflections_judicial_mediation/#:~:text=Is%20Court%2DBased%20Judicial%20Mediation,is%20distinct%20from%20its%20availability>.

Thus, the issue is not whether ADR is necessary or vital to our system of justice. The issue is how our legal services providers and the legal industry are adapting to meet the demand for these holistic practices. Alternatives such as mediation are here to stay. With the proper ADR training, legal services providers such as lawyers and paralegals will be better prepared and able to best represent their clients' interests.

The Role of Paralegals in ADR

The correlation between alternative methods of resolving disputes and the use of paralegals comes from the very essence of the paralegal practice, by its own definition, and the need for regulation. In order to understand how paralegals and ADR are so closely intertwined, we need to consider how many of the factors noted above have jointly and simultaneously led to the growth of both alternative methods and alternative service providers, such as paralegals.

One need only look at the people who use paralegals and ADR to quickly see the similarities. Affordability is one of the key reasons that people use paralegals and seek alternatives to resolving disputes. Middle-income Canadians are unable to access legal aid as a means of using the court system. Yet, Chief Justice McLachlin expressed that Canadians of average means may have to consider remortgaging their homes, gambling their retirement savings, or forsaking their children's post-secondary education funds to pursue justice.[37] The hourly rate of a paralegal is significantly more affordable than that of a lawyer. The cost of legal services does limit access to justice for many Canadians. Thus it is those same people who will seek alternative methods such as ADR to avoid going to trial and use alternative service providers such as paralegals to represent them. As former Chief Justice McLachlin says:

> In the age of the Internet, people are questioning why they, the consumers of legal product, should be forced to go to expensive lawyers working in expensive office buildings located in expensive urban centres. Why, they ask, should a client retain lawyers, when integrated professional firms can deliver accounting, financial and legal advice? Why are simple disputes not resolved in simple, cost-effective mediation rather than by elaborate and expensive court proceedings? Public attitudes and demands are changing.[38]

Since one of the primary goals of ADR is to improve access to justice, the ADR process has relied—and continues to rely—heavily on the services of paralegals. Paralegals can participate in the ADR process in several ways. First, paralegals can act in support of a lawyer as they do in other litigation matters. This means that through the entire ADR process, paralegals are often directly involved in gathering and preparing materials that will be presented to the arbitrator or mediator. They assist with administrative arrangements of the ADR proceedings, including preparing clients and other witnesses for what to expect from the ADR proceedings. Finally, they often prepare the documents required once a decision has been made or a settlement has been reached.

37 Canwest News Service, "Access to Justice Is Critical for Canadians" (9 March 2007).

38 *Supra* note 21.

The involvement of paralegals assisting lawyers in ADR proceedings closely parallels their functions in assisting lawyers in traditional litigation.

Second, in addition to assisting the representation of clients in ADR proceedings, paralegals can also act as third-party facilitators, arbitrators, or mediators. Because arbitrators and mediators do not have to be lawyers, with the proper training and experience, paralegals may be able to qualify for such positions. Since mediators are not regulated, there are no standards that currently exist regarding the certification of mediators. However, paralegals have a tremendous opportunity to fill the void for mediators, as their analytical abilities, legal training, and education in mediation will make them desirable candidates.

Finally, paralegals can represent their own clients in many ADR proceedings. As referenced above, ADR proceedings are conducted privately, within judicial processes, such as our court systems, and in administrative tribunals. As licensed representatives, paralegals can fully and effectively act for their clients in these ADR proceedings. No matter where the paralegal turns, most of their practice as a representative, will involve some form of ADR (e.g., small claim courts, provincial offences court, summary conviction offence matters, or administrative tribunals).

ADR Standards of Practice and Ethics

Legal representatives entering the profession must ask themselves how they can represent their clients effectively without ending up in court. There are many alternatives to going to court that representatives can use to resolve their client's disputes, such as negotiation, mediation, and arbitration. Strong negotiation and mediation skills are key to a representative's success. Legal representatives must clearly understand both their ethical and professional obligations to the profession and their clients, related to the use of ADR options. Codes of conduct within the legal profession ensure that legal representatives inform and encourage their clients to use these alternatives and, if so instructed by the client, take steps to pursue those options.

Governance of Legal Representatives

A centrepiece of Canada's legal system is to ensure that the public have the right to fundamental justice by obtaining legal advice and legal representation. In 1797, Canada's oldest law society, the LSO (formerly called the Law Society of Upper Canada) was founded as a way to regulate the legal profession. Over the next 200 years, Canada's law society leaders from around the country established the Federation of Law Societies of Canada as a vehicle to share ideas and common experiences. This non-profit agency is now the national coordinating body. Every legal representative in Canada, including lawyers, paralegals in Ontario, and Quebec's notaries are required by law to be a member of a law society and governed by its rules. The function of these law societies is to regulate the legal professional in the public interest. Canadians expect to be served by legal professionals with honesty and integrity in the provision of their services. Canada's law societies have an important role in hearing and investigating public complaints, and where necessary, impose discipline on legal representatives. The Federation works with law societies to develop high national standards of

regulation "to ensure that all Canadians are served by a competent, honourable and independent legal profession."[39]

Self-Regulation

self-regulated body
an organization that has the power to create and enforce industry standards and regulations with its members

The LSO is considered a **self-regulated body**, which requires that lawyers and paralegals be licensed in order to provide legal services. As a self-regulating body, lawyers and paralegals oversee their own regulation through the LSO in accordance with the *Law Society Act*. The LSO is funded through lawyer and paralegal licensing fees. Members of the LSO elect their own members to become *benchers*, who make up a small executive group to regulate and supervise the legal profession in Ontario. These benchers form a variety of committees, such as the discipline committee, and may also serve as adjudicators at discipline hearings.

professional conduct
the accepted conduct or actions of professionals during the course of activities in their profession

The licensing process is an important one as it ensures that its members have a certain level of training and education, experience, competence, and **professional conduct**. Based on the authority prescribed by the *Law Society Act*, the *Paralegal Rules of Conduct*, the *Rules of Professional Conduct* for lawyers, the LSO's By-Laws, and the *Paralegal Professional Conduct Guidelines* set out further professional and ethical obligations of lawyers and paralegals. Thus, legal representatives must carefully consider their codes of conduct and by-laws within their profession in the provision of legal services to the public. In view of the principles of the LSO noted above, it is therefore critical for the LSO and its regulated members to consider all methods of conflict resolution, including ADR methods, in the course of their legal practice.

Codes of Conduct

Codes of conduct were introduced to the legal profession in the late 1800s for many lawyers in common law jurisdictions to guide their members. The purpose of a code of conduct is to set out, usually in written form, rules that outline specific professional norms, practices, and responsibilities of an individual or organization. Its purpose is to protect the public and to hold, in this case, legal professionals, to a high ethical standard. By nature of their profession and in acting as an "agent" for parties, lawyers and paralegals exercise considerable power. Not only are they privy to sensitive personal and financial information, but they also often deal with clients who may be vulnerable or unsophisticated.[40] The public therefore requires a way to ensure proper accountability and protection of legal professionals. Prior to the 19th century, there was a common assumption that honour and integrity governed the legal practice and its practitioners. Inappropriate conduct was defined and disciplined through statute law and case law. Today, codes of conducts are used to guide many legal professionals, including lawyers, paralegals, mediators, and notaries. While each law society has its own specific rules of conduct that apply to particular members, all members of the legal profession are required to conduct themselves in accordance with the Federation's basic principles as follows:

- Act honourably and with integrity;

39 "What is the Federation of Law Societies of Canada?" (2022), online: *Federation of Law Societies of Canada* <https://flsc.ca/about-us/what-is-the-federation-of-law-societies-of-canada>.

40 J Fairlie & P Sworden, *Introduction to Law in Canada* (Toronto: Emond Montgomery, 2014) at 414.

- Provide competent legal services;
- Serve clients in a courteous and prompt manner;
- Respect client confidences;
- Maintain loyalty to clients and avoid conflicts of interest;
- Ensure that fees for services are fair and reasonable;
- Safeguard and preserve funds and property entrusted to them by their clients;
- When acting as advocate, treat Courts with civility and respect; and
- Encourage public respect for the administration of justice.[41]

The Federation created a Model Code of Professional Conduct[42] as a national code for Canadian lawyers. Its rules are designed to establish an ethical standard for the practice of law in Canada while recognizing that regional differences may exist in the application of some ethical standards.

The Function and Principles of the Law Society of Ontario

Paralegals and lawyers in Ontario must look to the LSO for guidance as to the provision of legal services, including any form of ADR. As part of its regulatory function, the LSO is responsible for ensuring that lawyers and paralegals meet its high standards of learning, competence, and professional conduct. In Ontario, it is through the *Law Society Act* that the LSO is empowered to regulate, license, and discipline its members. According to the *Law Society Act*, the function of the LSO is as follows:

> 4.1 It is a function of the Society to ensure that,
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

While the function of the LSO is clearly focused on paralegals and lawyers, the LSO must always keep the public interest of paramount concern. This is echoed quite clearly in the principles to be applied by the LSO and set out in the *Law Society Act*:

> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
> 3. The Society has a duty to protect the public interest.

41 "Law Society Codes of Conduct" (last visited 27 July 2022), online: *Federation of Law Societies of Canada* <https://flsc.ca/national-initiatives/model-code-of-professional-conduct/law-society-codes-of-conduct/>.

42 "Model Code of Professional Conduct" (October 2019), online: *Federation of Law Societies of Canada* <https://flsc.ca/national-initiatives/model-code-of-professional-conduct>.

4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

When paralegals were first regulated and licensed in 2007, the *Paralegal Rules of Conduct* (Rules) were also created by the LSO to set out the high ethical standards of Ontario's paralegals. This **code of ethical conduct** places an emphasis on the relationship between paralegals and those with whom paralegals deal in their practice and employment. While there is a separate code for lawyers, entitled the *Rules of Professional Conduct*, both lawyers and paralegals share many of the same standards imposed by the same regulatory body. The LSO is thus responsible for handling any complaints against lawyers and paralegals and breaches of their respective codes of conduct.[43]

code of ethical conduct
set of written rules that regulate the ethical conduct of an individual, party, or organization such as a professional body

The Rules aim to ensure that legal representatives observe professional conduct that includes ADR methods. These requirements are woven throughout the Rules to promote and educate the public about ADR as an important and viable option for resolving conflicts and disputes.

The Paralegal Rules of Conduct and ADR

The *Paralegal Rules of Conduct* set out the professional and moral standards that paralegals are required to follow in order to maintain their licence with the LSO. There are nine rules of conduct, which are set out in the box, the *Paralegal Rules of Conduct*. The following discussion in this chapter will focus on specific aspects of the *Paralegal Rules of Conduct* as they relate to a paralegal's responsibilities and connection with ADR. The full *Paralegal Rules of Conduct* are available on the LSO website.[44]

THE PARALEGAL RULES OF CONDUCT

Rule 1: Citation and Interpretation—Definitions for key terms used throughout the Rules

Rule 2: Professionalism—Issues related to professionalism, such as integrity and civility, undertakings, harassment, and discrimination

Rule 3: Duty to Clients—Client-related issues such as competence, confidentiality, conflict of interest, client property and withdrawal from representation

Rule 4: Advocacy—Duty to clients, tribunals and others, disclosure of documents, interviewing witnesses, communication with witnesses giving testimony, the paralegal as witness and dealing with unrepresented persons

Rule 5: Fees and Retainers—Issues including contingency fees, joint retainers, fee splitting and referral fees

Rule 6: Duty to the Administration of Justice—General duty, security of court facilities, public appearances and statements, and unauthorized practice

43 Fairlie & Sworden, *supra* note 40 at 414.

44 *Supra* note 1.

Rule 7: Duty to Licensees and Others—Duty to act with courtesy and good faith

Rule 8: Practice Management—General obligations, marketing, advertising and insurance

Rule 9: Responsibilities to the Law Society—Communications from the Law Society, duties to report, professional misconduct and conduct unbecoming a paralegal

Competence

Rule 3 of the *Paralegal Rules of Conduct* recognizes the duties that paralegals owe to clients. This duty to the client is paramount and is one of the most important duties of the paralegal. As described by Guideline 5 of the *Paralegal Professional Conduct Guidelines*:

> This duty includes obligations to be competent, maintain confidentiality, avoid conflicts of interest and continue to represent the client unless the paralegal has good reason for withdrawing. As a result, it is important for the paralegal to know exactly who is a client because it is to the client that most of the duties outlined in the *Rules* are owed.

According to Rule 1.02:

> "client" means a person who:
>
> (a) consults a paralegal and on whose behalf the paralegal provides or agrees to provide legal services; or
>
> (b) having consulted the paralegal, reasonably concludes that the paralegal has agreed to provide legal services on his or her behalf
>
> and includes a client of the firm of which the paralegal is a partner or associate, whether or not the paralegal handles the client's work;[45]

An essential part of the duty to the client requires that a paralegal be competent. Thus Rule 3.01(1) requires that "[a] paralegal shall perform any services undertaken on a client's behalf to the standard of a competent paralegal." Clients who hire a paralegal do so because they do not have the knowledge or expertise in the legal industry to represent themselves. As a result, they expect the paralegal to have a certain level of competency and skill to deal with their case. A level of competence is important on the basis of both ethical and legal principles. Legal principles suggest that paralegals must adhere to a certain standard of care to avoid any negligence. Paralegals must also consider their ethical responsibilities and use self-assessment to determine if they feel competent to handle the legal matter without undue delay, risk, or expense to the client (Rule 3.01(2)). A lack of competence not only has an impact on the client, to whom there is a disservice, but also brings discredit to the entire legal profession.

According to Rule 3.01(4)(c), a **competent paralegal** is someone who has and applies the relevant knowledge, skills, and attributes appropriate to each matter undertaken on behalf of a client. This includes "implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including … (v) negotiation [and] (vi) alternative dispute resolution."

competent paralegal
a licensed paralegal who has and applies the relevant knowledge, skills, and attributes appropriate to each matter undertaken on behalf of a client

45 *Paralegal Professional Conduct Guidelines* (1 October 2014; amendments current to 24 February 2022), online: *Law Society of Ontario* <https://lso.ca/about-lso/legislation-rules/paralegal-professional-conduct-guidelines>. For the most up-to-date material, please visit the website referenced in this footnote.

substantive law
the statutory law and jurisprudence that creates, defines, and interprets the rights and obligations of those who are subject to it

procedural law
the practice and procedural rules that a court or tribunal uses to prescribe the steps to enforce legal rights

Being a competent paralegal requires knowledge of general legal principles and procedures, as well as the substantive law and procedures for the legal services provided. **Substantive law** comprises the statutory law and jurisprudence that creates, defines, and interprets the rights and obligations of those who are subject to it. **Procedural law** comprises the methods and procedures for enforcement of the rights and obligations set out in substantive law.

It is here that the responsibilities to ADR are clearly set out. A competent paralegal will ensure that, once the necessary information has been gathered and investigated, and the correct procedural and substantive law considered, they will properly contemplate the chosen course of action to recommend to the client. Like advocacy (Rule 3.01(4)(c)(vii)), alternative dispute resolution is a chosen course of action that must be considered by the competent paralegal (Rule 3.01(4)(c)(vi)).

At any stage of the retainer, paralegals would also need to communicate the procedural laws, such as statutes and rules of procedure, that impose certain conflict resolution methods on any given legal action. At the outset of any potential legal action, the paralegal must review the procedural act or rules applicable to that particular court or tribunal to determine all the steps of the litigation process, including ADR methods. Each tribunal, court, and jurisdiction has different rules with respect to the use of ADR. Some require that mediation is mandatory, while in others it is voluntary participation by the parties. Each one may have a different procedure that is required during the course of the action and may include or exclude specific ADR methods.

Moreover, it is the paralegal's duty to ensure that the client is aware of all foreseeable risks, costs, and consequences associated with each course of action. The benefits of ADR will vary at different stages of the litigation process. For example, mediation should be conducted early enough in the litigation process to be cost effective to the parties settling and avoid the excessive costs of litigating the matter in court. Arbitration is advantageous to parties that seek a private adjudicator with a particular specialization, to conduct a hearing that can be tailored to the time and needs of the parties involved. Once all options are explored, the legal representative should not only clearly express a **legal opinion** about the substantive legal implications of the client's case, but also provide a clear assessment of the pros and cons, including costs, associated with the different courses of action. It is through such a legal opinion that the legal representative can provide **professional judgment** to the client. Professional judgment is the paralegal's capacity to assess situations or circumstances carefully and to make sensible decisions about client matters and conduct.[46]

legal opinion
a written or oral opinion given by a licensed paralegal or lawyer to the client that expresses their judgment or advice based on the law that applies to a particular case

professional judgment
the capacity to assess situations or circumstances carefully and to make sensible decisions about matters and conduct

The competent paralegal must also apply effective communication skills. It is no surprise that one of the leading sources of misconduct and client complaints relates to poor communication with the client. This impacts all stages of the litigation process. Guideline 6 notes the following:

> 10. Rule 3.01(4) contains important requirements for paralegal–client communication and service. In addition to those requirements, a paralegal can provide more effective client service by
>
> 10.1 keeping the client informed regarding his or her matter, through all relevant stages of the matter and concerning all aspects of the matter,

46 S Knight, *Ethics and Professional Practice for Paralegals*, 3rd ed (Toronto: Emond Montgomery, 2015) at 94.

10.2 managing client expectations by clearly establishing with the client what the paralegal will do or accomplish and at what cost, and

10.3 being clear about what the client expects, both at the beginning of the retainer and throughout the retainer.[47]

Regardless of how a legal opinion and professional judgment are expressed, either in writing or orally, the paralegal must carefully and clearly communicate ADR options with the client. Any recommendations about ADR should be provided not only at the commencement of the retainer but also during the course of the retainer. As knowledge of the facts and issues evolves in a case, both the client and paralegal may find that outcomes anticipated at the outset of the retainer change. In particular, the client's expectations can alter drastically due to a number of factors. At the outset of a legal action, some clients firmly believe that they want to "have their day in court" and will "go all the way to the Supreme Court of Canada" to resolve their case. They are emotionally attached to their position and do not necessarily understand the impact of going to court in terms of the costs, as well as the impact on future relationships with the opposing party. They have little experience or understanding of the harsh realities of taking an action to court.

Another factor that can affect the application of ADR is information or a lack thereof. It takes time to gather all the facts of a case in order to consider the possibility of a negotiated settlement. Many cases are simply not ready to contemplate any possible settlements early in the case. Mediation for a legal action regarding a motor vehicle accident, for example, would likely not be appropriate until the parties have obtained a doctor's report clearly outlining the injuries of the plaintiff.

Similarly, paralegals need to consider these same factors as part of communicating any ADR recommendations to the client during the course of the retainer. For example, mediation would not be appropriate at the early stages of a legal action when not enough information is available, but it might be beneficial at later stages.

In addition, when considering whether to proceed with mediation or negotiation, paralegals should be aware of **sharp practice** from the opposing counsel that may seek mediation as a means of trying to obtain an advantage by using dishonourable means. This includes tactics such as attempting to raise the overall legal costs to the party by scheduling mediation when the parties are clearly not ready or prepared to reach a settlement. Some may utilize it as a delaying tactic by sending opposing clients who do not necessarily have the proper authorization to enter into a settlement, such as a junior-level employee who is representing the client on behalf of the party who is a company. Specifically, Rule 7.01 of the *Paralegal Rules of Conduct* reinforce the general professional courtesy that legal representatives are expected to follow.

sharp practice
when a paralegal obtains, or tries to obtain, an advantage for the paralegal or client(s), by using dishonourable means

(1) A paralegal shall avoid sharp practice and shall not take advantage of or act without fair warning on slips, irregularities or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.

(2) A paralegal shall agree to reasonable requests concerning trial dates, adjournments, waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

(3) A paralegal shall not, in the course of providing legal services, communicate, in writing or otherwise, with a client, another licensee, or any other person in a

47 *Supra* note 45, Guideline 6.

manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a paralegal.

(4) A paralegal shall not engage in ill-considered or uninformed criticism of the competence, conduct, advice or charges of other licensees, but should be prepared, when requested, to represent a client in a complaint involving another licensee.

(5) A paralegal shall answer, with reasonable promptness, all professional letters and communications from other licensees that require an answer, and a paralegal shall be punctual in fulfilling all commitments.[48]

SHARP PRACTICE

Fact Scenario

You have been contacted by the opposing party, a large company, to attend a mediation with your client. As you are preparing for the mediation, the opposing party discloses the name of the person who will be attending the mediation on behalf of the company. You quickly recognize the name of the person and realize that the person has a very junior-level position with that company.

Question for Discussion

What should you be concerned about with respect to the representative that the company is sending?

Advising Clients

Honesty and Candour

A paralegal has a duty to advise clients on matters that are relevant to the retainer. According to the *Paralegal Rules of Conduct*, a paralegal shall be honest and candid when advising clients (Rule 3.02(2)). Specifically, according to Guideline 7,

1. A paralegal has a duty of candour with the client on matters relevant to the retainer. A paralegal is required to inform the client of information known to the paralegal that may affect the interests of the client in the matter.

2. A paralegal must honestly and candidly advise the client regarding the law and the client's options, possible outcomes and risks of his or her matter, so that the client is able to make informed decisions and give the paralegal appropriate instructions regarding the case. Fulfillment of this professional responsibility may require a difficult but necessary conversation with a client and/or delivery of bad news. It can be helpful for advice that is not well-received by the client to be given or confirmed by the paralegal in writing.[49]

It goes without saying that a paralegal's job is a business, and the expectation is to earn a profit. The longer a client's matter is in conflict, the more legal services the client requires, and the more income that client's paralegal may earn. In situations where an hourly rate is applied by the paralegal, a paralegal may earn more money in an

48 *Supra* note 1, r 7.01.

49 *Supra* note 45, Guideline 7.

action that heads to court rather than to an early settlement through ADR processes. Nevertheless, a paralegal must not let their interests interfere with what is in the best interests of the client. Being honest and candid means that the paralegal must be truthful and forthright in advising their client about all matters, including options that may shorten the duration of a legal action or lower its cost, even if it might mean less profit for them in the long run. It is important that clients have a clear understanding of all possible outcomes. Guideline 7 specifies the following:

> When advising a client, a paralegal
>
> - should explain to and obtain agreement from the client about what legal services the paralegal will provide and at what cost. Subject to any specific instructions or agreement, the client does not direct every step taken in a matter. Many decisions made in carrying out the delivery of legal services are the responsibility of the paralegal, not the client, as they require the exercise of professional judgment. However, the paralegal and the client should agree on the specific client goals to be met as a result of the retainer.[50]

ADVISING CLIENTS

Fact Scenario

Sue is a newly licensed paralegal. She started her own firm, including hiring a part-time assistant and renting an office space. She is trying her best to market the new firm and generate new clients. One of her clients has submitted an application with the Human Rights Tribunal of Ontario. The client was fired as a result of her poor work skills. The client experienced a miscarriage six months ago. She was required to go back to work immediately, and has since experienced severe depression as a result of the miscarriage. Sue's client is claiming that the miscarriage should be considered a disability under the Ontario *Human Rights Code* and she should not have been fired. The mediation in this matter is scheduled next week. Sue feels that this would be a great case to argue at the tribunal and she could really start to make a name for herself. She is hoping that the matter does not settle at the mediation. In addition, Sue's monthly expenses seem to be piling up, and she would earn more legal fees if the matter continues to the hearing stage. Sue decides not to spend much time preparing or rehearsing for the mediation.

Question for Discussion

Discuss the possible ethical breaches in accordance with the *Paralegal Rules of Conduct* and other issues that may be of concern.

Confidentiality

Many clients that participate in ADR have concerns about the degree of confidentiality that may be experienced during these procedures. As a result, they may be less open to actively participating in ADR. This may be due to their perception of the more informal nature of ADR and a fear of revealing too much about their case during

50 *Ibid*, Guideline 7.

ADR. A paralegal should inform and remind their clients of their duties with respect to confidentiality. The paralegal's duty of confidentiality is set out in the *Paralegal Rules of Conduct*:

> Rule 3.03(1) A paralegal shall, at all times, hold in strict confidence all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless:
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law or by order of a tribunal of competent jurisdiction to do so;
>
> (c) required to provide the information to the Law Society; or
>
> (d) otherwise permitted by this rule.[51]

The duty of confidentiality commences at the very outset of the paralegal–client relationship, even prior to a retainer, and continues indefinitely after the paralegal has ceased acting for the client. This means it applies to all stages of the legal action, including ADR, and even applies to prospective clients, whether or not a paralegal–client retainer is engaged. In addition, it applies to all information acquired during the paralegal–client relationship, whether or not the information is relevant to the matter for which the paralegal is retained. This is reinforced in Guideline 8: Confidentiality. According to the *Paralegal Professional Conduct Guidelines*:

> 1. A paralegal cannot render effective professional service to a client, unless there is full and unreserved communication between them. The client must feel completely secure that all matters discussed with the paralegal will be held in strict confidence. The client is entitled to proceed on this basis, without any express request or stipulation.
>
> 2. A paralegal's duty of loyalty to a client prohibits the paralegal from using any client information for a purpose other than serving the client in accordance with the terms of the retainer. A paralegal cannot disclose client information to serve another client or for his or her own benefit.[52]

The paralegal must be sure to obtain clear instructions from the client as to what information the paralegal can disclose during any form of ADR. This can be done as part of the early preparation with the client ahead of any ADR process. This understanding will reduce risk to both the client and the paralegal during an ADR session. The client will be less likely to make a statement in error that may jeopardize their position. Having a clear understanding of the information the client wants to keep confidential will reduce the risk of the paralegal breaching the *Rules of Conduct* during ADR processes by stating something that the client wanted to remain confidential.

Settlement and Dispute Resolution (Rule 3.02)

The duty to clients in Rule 3 further requires that paralegals advise their clients about settlement and dispute resolution:

> (11) A paralegal shall advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis, and shall discourage the client from commencing or continuing useless legal proceedings.

51 *Supra* note 1, r 3.03(1).

52 *Supra* note 45, Guideline 8.

(12) The paralegal shall consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options.[53]

Commencing and settling legal proceedings are an important part of the paralegal's responsibilities to the client. At the outset of a retainer, the paralegal should assist the client in the decision of whether to begin a legal proceeding. Part of that decision will require a discussion about the various pros and cons of substantive and procedural law, discussed earlier in this chapter. However, as the proceedings continue, the paralegal should advise and encourage settlement as soon as reasonably possible. This can be achieved through the various forms of ADR discussed throughout this book, such as negotiation, mediation, arbitration, or similar means, instead of by going to litigation.

Early settlement may be successful through negotiation between the parties. To achieve this, the paralegal should first seek instructions from the client to make an offer of settlement to the other party as soon as reasonably possible. The opposing party may accept the offer or may counteroffer. The negotiations may continue back and forth until settlement is reached. According to Guideline 7:

> 10. In the course of the proceedings, the paralegal should seek the client's instructions to make an offer of settlement to the other party as soon as reasonably possible. After receipt of an offer of settlement from the other party, the paralegal must explain to the client the terms of the offer, the implications of accepting the offer and the possibility of making a counter-offer. When making an offer of settlement, a paralegal should allow the other party reasonable time for review and acceptance of the offer. The paralegal should not make, accept or reject an offer of settlement without the client's clear and informed instructions. To avoid any misunderstandings, the paralegal should confirm the client's instructions in writing.[54]

Not accepting a reasonable offer of settlement may expose the client to significant cost consequences. This concept is explored in more detail in Chapter 11, "Selecting the Right ADR Process."

For the client who is expecting to head to court, settlement at any stage of the proceeding may be difficult to comprehend. Clients are used to what they see on television or in the movies and expect a judge to ultimately resolve their dispute. There may be some disappointment from the client when the decision is settled without heading to court. Yet the reality is that the majority of cases settle before going to court. Therefore, it becomes the paralegal's responsibility to convey this reality to the client so they are comfortable with that outcome. There continue to be many provincial initiatives focused on encouraging settlement and resolving cases outside of court.

Can Paralegals Be Mediators?

Rule 2.01(6) recognizes that paralegals can also act as mediators. Traditionally, lawyers have often filled the role of a mediator. However, in recent years, as the demand for mediation has expanded, many others from different professions have also filled that

53 *Supra* note 1, rr 3.02(11) and (12).

54 *Supra* note 45, Guideline 7.

role, including psychologists, social workers, therapists, faith community leaders, and now paralegals. Some paralegals choose to turn mediation into their career, while others act as a mediator on a part-time basis while continuing their primary profession.

Leading a full-time career in mediation is possible and growing in a number of areas. A mediator may choose to work in private practice, specializing in a particular area such as commercial, family, or workplace mediation. Other mediators may choose to work for government organizations such as administrative tribunals and agencies. There are numerous government-based organizations at which paralegals are authorized to practise, such as human rights commissions (Canada and Ontario), the Landlord and Tenant Board, and the Workplace Safety and Insurance Board (Ontario). Still others may choose to work with private firms and organizations, such as school boards, universities and colleges, or other associations that use mediation and conflict resolution regularly.

The Paralegal Rules of Conduct and Paralegal-Mediators

Outside Interests

outside activity
an activity that may overlap or be connected with the provision of legal services

For paralegals who wish to practise as mediators, the *Paralegal Rules of Conduct* determine how such an activity should take place. This practice is considered an **outside activity**, which Guideline 2 defines as an activity that may overlap or be connected with the provision of legal services. When participating in such activities, paralegals must carefully adhere to the Guidelines to ensure that the outside activity does not impair their ability to provide legal services to their clients. For example, if a paralegal is scheduled as a mediator in a mediation that involves the client in another matter, it may give rise to a conflict of interest. Either way, a paralegal that chooses to continue in another role, such as a mediator, must, according to the Guidelines, continue to fulfill their obligations under the *Paralegal Rules of Conduct*. This includes duties such as the following:

- act with integrity,
- be civil and courteous,
- be competent in providing legal services,
- avoid conflicts of interest, and
- maintain confidentiality.[55]

Whether the activity gives rise to a conflict of interest or causes any impairment, a paralegal would need to consider whether to withdraw from representation of the client or from the outside interest.

Conflict of Interest

The *Paralegal Rules of Conduct* state that paralegals, whether acting as mediators or not, must disclose any possible conflict of interest as soon as possible. The concern, according to Guideline 2, is that "[a] paralegal should not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in

55 *Supra* note 45, Guideline 2(4).

which capacity the paralegal is acting, or that would give rise to a conflict of interest or duty to a client."[56] The Guidelines further explain:

> When acting as a mediator, the paralegal should guard against potential conflicts of interest. For example, neither the paralegal nor the paralegal's partners or associates should provide legal services to the parties. Further, a paralegal-mediator should suggest and encourage the parties to seek the advice of a qualified paralegal or a lawyer before and during the mediation process if they have not already done so. Refer to Guideline 9: Conflicts of Interest for more information on how a paralegal's outside interests may conflict with the paralegal's duty to his or her clients.[57]

In the event of a conflict of interest, the paralegal acting as a mediator should withdraw from the mediation process unless the parties unanimously consent to continue with the paralegal as mediator despite the conflict of interest. Nevertheless, in this situation, paralegals should always use their judgment to determine whether such a conflict of interest would impair their professionalism and ability to remain impartial. If at any point a paralegal-mediator determines that they can no longer remain impartial, they should withdraw from the mediation.

Acting as a Mediator

Once the paralegal chooses to act as a mediator, further rules are engaged to set out the responsibilities of the paralegal as a mediator:

> 2.01(6) A paralegal who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that the paralegal is not acting as a representative for either party but, as mediator, is acting to assist the parties to resolve the issues in dispute.[58]

The objective here is to ensure that there is no confusion on the part of the parties as to what role the paralegal has in the mediation. It is important for the parties to understand that a paralegal–client relationship does not exist, and that the paralegal acting as a mediator is not providing legal services or legal opinions to either party. Keep in mind that according to the Guidelines, "this does not preclude the mediator from giving information on the consequences if the mediation fails."[59]

OUTSIDE INTERESTS

Fact Scenario

You have been hired as a mediator in a personal injury case. You are also a partner with a paralegal firm and have had many years of experience dealing with personal injury cases. Clients continue to hire you as a result of your extensive experience.

56 *Ibid* at 2(2).

57 *Ibid* at 2(6).

58 *Supra* note 1, r 2.01(6).

59 *Supra* note 45, Guideline 2(5).

Question for Discussion

As a mediator, what are your obligations according to the *Paralegal Rules of Conduct*? Be sure to reference the section numbers that may apply and describe their application.

Confidentiality

Like paralegals, mediators are required to keep any client information confidential unless the parties consent. For the paralegal-mediator, this responsibility not only is set out in the *Paralegal Rules of Conduct*, which the paralegal must follow, but also is included in other aspects of the mediation, including the mediation agreement prepared by the mediator. The mediation agreement clearly sets out the obligations of confidentiality that bind both the mediator and the parties involved during the mediation and subsequent to the mediation. Any information that the parties may discuss while in caucus is confidential unless the parties involved consent to disclosure. Any information about the mediation itself, such as any information and documents during the mediation and post-mediation, is confidential. Parties choose mediation often because of its private nature. Mediators should inform the parties of this duty at the outset of the mediation and also in the mediation agreement.

CONFIDENTIALITY

Fact Scenario

You are a paralegal representing a client in a mediation in a landlord and tenant matter. Your client is the tenant in this dispute who is defending an application by the landlord about unpaid rent. The client has told you that he would like to do everything possible to stay in the apartment, and has some money set aside to pay the rent for the next three months. He was behind a week every month only because of the timing of when he was paid. However, he recently found out that his workplace, which has been under significant economic strain, may be cutting employees, and he may be one of them. He does not want the landlord to know about the fact that he may be unemployed. He is concerned that, because the mediation is informal, the information may be used against him and he will be kicked out of his apartment.

Question for Discussion

What can you do to assure your client that both you and the mediator will keep all information and documents confidential?

RECURRING CASE STUDY

Angela is a student who lives in the basement apartment of a house owned by her landlords, Mary and Leo. Angela has lived in the apartment for the past nine months while attending college. Overall, Mary has been happy with the living arrangement and her landlords are much nicer and more reasonable than her previous landlord. This apartment is quiet and Angela has a lot of privacy so that she can concentrate on her school work. The rent is reasonable and within her very limited budget. She has also found Mary to be easy to talk to when any minor issues arose.

Mary and Leo began renting out their basement apartment earlier this year. They needed some extra income and Mary likes knowing that someone else is in the house when Leo goes away on business. Both Mary and Leo like their current tenant, Angela. She is always on time with her rent, is very polite, and seems to be trustworthy.

Last month, there was a leak that completely flooded one of the closets in the basement. Unfortunately, there was water damage to Angela's personal belongings, including her special, prized competitive figure skates. Angela would like to be compensated approximately $1,000 for all of the damage, stress, and inconvenience. She has obtained a written estimate that it would cost $600 to replace the skates alone.

Mary was shocked that her tenant asked for $1,000 to cover the damages that she had suffered. She spoke to Leo about it and he insisted that skates cost less than $100 and said that Angela is trying to take advantage of them.

Leo ended up offering Angela $60 so that she could buy a new pair of skates at Canadian Tire. Angela was offended by the insulting offer. She has temporarily borrowed a pair of skates from a friend, but really needs her own pair of customized figure skates as soon as possible because her next skating competition is just six weeks away.

Angela is considering taking the matter to small claims court, but she doesn't know anything about law and she cannot afford to hire a lawyer. Her lease will be up in three more months, but she had hoped to extend the lease because she still has two semesters before she finishes her college program.

The parties have not decided whether they will continue with this living arrangement—it will depend upon on the outcome of this dispute.

Discussion of Scenario

- *Retaining a Paralegal*: If Angela cannot afford to hire a lawyer, she could consider representing herself. However, since Angela doesn't know anything about law, a paralegal would be an affordable option.
- *Consider ADR*: It would take too long to get a small claims court date since Angela needs the money to replace the skates as soon as possible. She should discuss ADR options with her paralegal.
- *Quick Resolution with Lower Cost*: The paralegal will likely suggest negotiation or mediation as good options for Angela to consider in an effort to resolve this dispute. Both of these processes have the potential to resolve the matter quickly and at a lower cost than going to court.

CHAPTER SUMMARY

Over the last 30 years, significant changes to the justice system have affected the way legal services are delivered and used. Economic and societal pressures have led to a "corporatization" of lawyers and law firms, reduced numbers of sole practitioners, and resulted in excessive legal fees and increasing costs and delays for trials to resolve disputes. The consequence of these changes in the legal industry has been significant. Hardest hit have been average Canadians who can no longer afford to access the justice system through the traditional methods of legal representation and adjudicative court systems. The COVID-19 pandemic has continued to highlight significant changes to the Canadian legal system both for the better and worse as legal services had to adapt to an online environment and delays grew.

Unfortunately, the traditional legal industry itself has been slow to respond and often reluctant to change. Many lawyers avoid using alternative methods such as mediation and seek to resolve disputes through the singular method of adjudication, much to the detriment of their clients.

As public pressure for access to justice continues to mount, the legal industry has responded in numerous ways to meet this demand. ADR methods are increasingly used to find affordable and effective ways to resolve disputes without going to court. The shift to problem-solving as a way of providing legal services is a significant development away from the traditional professional practice of "adversarialism." Similarly, the demand for paralegals has grown as people seek alternative service providers to lawyers and self-representation. This has in turn led to the regulation of paralegals in Ontario and the acknowledgment of paralegals as authentic participants in the legal system.

The licensing of paralegals by the LSO and the provision of legal services to clients give rise to important duties for the paralegal in the resolution of disputes. At a time when legal costs are excessive and scheduled court appearances are delayed for long periods, alternatives to resolving disputes are an important consideration and benefit for parties in the long run.

As a result, the regulatory framework of the paralegal profession is set up to ensure that paralegals inform, encourage, and implement the use of ADR methods. Beginning with the regulatory body of paralegals, the LSO recognizes that its primary duty is to protect the public interest. This duty is clearly reinforced in section 4 of the *Law Society Act*, which outlines the functions and principles of the LSO and its members. Based on the authority prescribed in the *Law Society Act*, paralegals must adhere to specific ethical obligations as set out in codes of conduct and other statutory regulations. Specifically, the *Paralegal Rules of Conduct* set out the professional and moral standards that paralegals are expected to follow. The Rules further aim to ensure that paralegals observe professional conduct that includes ADR methods.

Despite current changes to the legal industry, much needs to be done to continue the trend away from advocacy and toward the encouragement of settlement. In order to improve access to justice, changes need to be reinforced at the earliest stages of education and training of legal representatives. Proper education and training in ADR can shape professional attitudes and help practitioners develop crucial conflict resolution skills. The hope is that in a growing industry of ADR, by providing legal representatives with these skills, they will be better prepared to meet the needs of all Canadians.

KEY TERMS

access to justice, **8**
alternative dispute resolution (ADR), **2**
code of ethical conduct, **18**
competent paralegal, **19**
judicial mediation, **13**
Law Society of Ontario (LSO), **2**
legal opinion, **20**
mediation, **12**
outside activity, **26**
procedural law, **20**
professional conduct, **16**
professional judgment, **20**
rights-based model, **3**
Rules of Professional Conduct and *Paralegal Rules of Conduct*, **2**
self-regulated body, **16**
sharp practice, **21**
substantive law, **20**

REVIEW QUESTIONS

1. Describe how a rights-based model of justice has slowed the change to employ methods of alternatives to adjudication.
2. Outline and describe the economic and social changes in the legal profession that have led to the increasing use of ADR practices.
3. What programs has our legal industry provided in response to the need to provide more alternatives to our justice system and improve the public's access to justice?
   a. Case management.
   b. Legal Aid Ontario.
   c. Pro Bono Law Ontario.
   d. Mandatory mediation.
   e. All of the above.
4. Differentiate between the terms *access to justice* and *access to courts* and describe why they are different.
5. Describe why lawyers and judges were reluctant to embrace mediation as a mandatory part of the litigation process.
6. What are the possible roles and methods of participation of a paralegal within the ADR process?
   a. Paralegals can act in support of a lawyer as they do in other litigation matters.
   b. Paralegals can also act as third-party facilitators, arbitrators, or mediators.
   c. Paralegals can represent their own clients in many ADR proceedings.
   d. All of the above.
7. What is *judicial mediation*? Describe how it is used as a method of ADR in our legal system.
8. How has the global pandemic affected the delivery of legal services in Canada?
9. Discuss the impact of the *R v Jordan* decision on criminal trials.
10. What legislation provides the LSO with the power and authority to regulate the legal profession in Ontario?
11. What are the guiding principles of the LSO? Provide the statutory or other authority for your answer.
12. The LSO is considered a "self-regulated body." Describe what that means and how such a body would function.
13. As members of the LSO, paralegals must adhere to professional and ethical obligations. List the various authorities that set out those obligations.
14. Define a code of conduct and list the elements of the code of conduct that applies to paralegals and to lawyers. Describe the purpose of that code of conduct as it relates to paralegals.
15. Which specific sections of the *Paralegal Rules of Conduct* make reference to ADR?
16. Describe and distinguish between substantive and procedural law.
17. Generally, when should ADR be considered during the litigation process? Describe the advantages and disadvantages and what factors should be considered in your answer.
18. What is the paralegal's responsibility with respect to the client and settlement?
19. Can a paralegal be a mediator? Provide the statutory or other authority for your answer.
20. You have been hired as a paralegal to represent a new client and bring an action before the small claims court. At issue is the fact that your client was hired to renovate a house, and the owner has refused to pay him saying that it was "shoddy workmanship." Your client is quite angry and is eager to take this case "all the way to the Supreme Court of Canada" if he has to. You decide to file the claim immediately without properly discussing the possible courses of action with your client. Discuss the possible ethical breaches in accordance with the *Paralegal Rules of Conduct*.

EXERCISES

1. Position Activity: Take a Stand (see Appendix B)
2. Negotiation Role Play: Sell That Stroller (see Appendix C)

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Interpretation

1(1) In this Act, …

"person who is authorized to provide legal services in Ontario" means,

(a) a person who is licensed to provide legal services in Ontario and whose licence is not suspended, or

(b) a person who is not a licensee but is permitted by the by-laws to provide legal services in Ontario;

• • •

Provision of legal services

(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Same

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.
2. Selects, drafts, completes or revises, on behalf of a person,
   i. a document that affects a person's interests in or rights to or in real or personal property,
   ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,
   iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,
   iv. a document that relates to a matter under the *Bankruptcy and Insolvency Act* (Canada),
   v. a document that relates to the custody of or access to children,
   vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or
   vii. a document for use in a proceeding before an adjudicative body.
3. Represents a person in a proceeding before an adjudicative body.
4. Negotiates the legal interests, rights or responsibilities of a person.

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.
2. Conducting an examination for discovery.
3. Engaging in any other conduct necessary to the conduct of the proceeding.

Appendix B Activity: Take a Stand

Type: Position Activity

Participants: Each student working with a partner

Level of Difficulty: Introductory

Time: Set aside approximately 20 minutes for this activity, including 10–15 minutes for the questions and answers and 5–10 for the debrief.

Objectives

- Introduce ADR and conflict.
- Allow participants to take a position and discuss the reasons (interests) why they took that position.
- Allow students an opportunity to take a position and understand the reasons "why" they are taking it.
- Begin to understand the reasons for positions and how they are similar to conflict.

Procedure

- Can be used as an in-person activity or virtual in breakout groups of two people.
- Use an open area large enough for people to move freely on two sides of an imaginary line in the middle of the room.
- The educator instructs the groups by saying the following: "I am going to ask a few questions that require students to choose a position on a particular topic. Each side of the room will be assigned a particular position on that topic." Then ask students to move to the side of the room that most applies to them.
- After students have moved to the position, casually ask students why they took a certain position and what motivated them.
- You can go as long as you would like with this activity. The point is to get people talking about why they took certain positions (e.g., finances, culture, education, family).

Questions to Get You Started

The educator asks, "What is your preference?" between:

- tea or coffee
- beer or wine
- dog or cat
- car or bike
- breakfast or no breakfast
- sugar or salt
- chocolate or chips
- meat eater or vegetarian
- morning person or night hawk
- introvert or extrovert
- city living or country living
- homework or no homework
- Tim Hortons or Starbucks
- thrift shop or name brand shop
- book or movie person

Debriefing with Students:

- Ask the students what the factors led them to take a certain position. What motivated them to take that position?
- They should begin to list the following:
- Beliefs/values/morals
- Religion
- Background
- Personal life/experiences
- Expectations
- Finances
- Environment
- Experiences
- Physical state
- Education
- Culture
- Convenience
- Ask students why we have conflict. What are the main causes of conflict in the world?
- Point out to students that the two lists are very similar. Often the positions we take lead us to conflict.
- Advise students that conflict will be explored in the next class.

Appendix C Role Play: Sell that Stroller Negotiation

Type: Negotiation Role Play

Participants: Two Parties

Level of Difficulty: Introductory

Time: Set aside approximately 30–40 minutes for this activity, including 5 minutes to read, 20 minutes for the negotiation, and 5–10 minutes for the debrief.

Objectives

- Conduct a simple negotiation without any prior instructions about negotiation.
- Refer back to this negotiation following future lessons and role plays for comparison purposes.

Procedure

- Ask students to break out into groups of two (should be different partners for every activity).
- Each group of two should select a role as either buyer or seller.
- Begin negotiation with minimal instructions:
  1. Read the role play: 5 minutes.
  2. Negotiate a potential agreement: 15 minutes.
  3. Debrief: 10 minutes.

Debriefing with Students

- Ask students to share their group's settlement agreement.
- Discuss the interests of both the buyer and seller. Determine which ones are compatible. Draw up a list for all the students to see.
- What factors influenced the buyer and seller? What was important to them?
- Why is there a range in the prices and settlements that different groups reached?

Sell that Stroller

Buyers: Asmita and Neelabh

Asmita and Neelabh are expecting their first child. They would like to buy a stroller for their new baby. They live in a small town that is quite a distance from the big city. They are a new couple, and money is quite tight these days. They have a lot of items that they need to buy for the baby. They decide that they can only afford to buy a used stroller. However, safety is a huge priority and they have heard that some older models may not meet current safety standards. The baby's due date is in less than a month, so they need to find something quickly. They heard about a store that sells new and second-hand strollers called Go Baby. Inside the store, they notice that there are all kinds of new strollers with a variety of features. Most are new, with very few used strollers. The new ones are quite pricey. There are some shops nearby that sell new strollers but they would likely be out of their price range. Asmita notices one in the corner that is quite dusty. The stroller is made by Prego and seems to be an older version. There is not a price listed on the stroller. Asmita fondly remembers the stroller that her mom used in her childhood with her siblings that was made by Prego. It seemed to last forever. She knows from the flyers she has seen that most strollers cost around $400. Asmita checked Kijiji before coming to the shop and found that many used strollers are usually half the price of a new one. However, this one is a much older model and likely has been sitting there for a while. Asmita and Neelabh would like to negotiate a good price for the used Prego stroller. As new buyers, they do not want to be taken in this deal. If they do not buy a stroller here, they would have to drive an hour and a half into the city. Gas prices have risen lately and their vehicle is not good. It would likely cost them $100 in gas alone!

Seller: Maurice, Go Baby

Maurice started Go Baby a few years ago after having his own kids and realizing there was a huge market for new and used baby gear. He does have some concerns about selling used strollers and always makes sure that the strollers meet the current safety standards. However, he is finding that most new parents want the newest stroller on the market and that there is not a big market for older strollers even if they meet the safety standards. Maurice would like to clear out any older stroller models as soon as possible, and move the inventory. His shop is filling up and they are taking up too much space. At 8 p.m., a couple enters the store (Asmita and Neelabh) and inquires about the old used stroller in the corner. Maurice thinks this is his lucky day since he would really like to sell the Prego stroller as it is an eyesore in his shop. He bought the used stroller for $200 from a distributor. A few months after he bought the used stroller, Prego suffered some bad press due to some stroller recalls and he has not been able to sell it since. He would like to sell the stroller

Appendix C Continued

that has been sitting in his store now for three years. Three years ago Maurice did a maintenance check on it, but has not done one since then. Every penny counts, so he would like to sell the stroller for a profit or at least not lose his money. Maurice also knows that the stroller is an older model and he is not sure when he would get another interested buyer. However, he would rather do without the sale then sell it for less than he bought it for. The closest used stroller store is in the big city—at least an hour and a half drive.