The Importance of ADR for Paralegals

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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 paralegal–client context.
- Examine the kinds of legal matters that may arise and apply to ADR.

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 growing use of paralegals 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 delay, 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, the **Law Society of Upper Canada (LSUC)**, under its *Paralegal Rules of Conduct*, requires paralegals to inform clients of **alternative dispute resolution (ADR)** options for every dispute.[1] Similarly, choosing a paralegal as a representative in a dispute is more affordable and accessible for many people faced with the rising costs of adjudication and high lawyer fees.

Law Society of Upper Canada (LSUC)
the regulatory agency for paralegals in Ontario

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

This book will help paralegals 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 lawyers 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, 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] Notwithstanding that statistic, the training and education

1 Law Society of Upper Canada, *Paralegal Rules of Conduct* (adopted by Convocation 29 March 2007, effective 1 May 2007; amendments based on the Federation of Law Societies of Canada *Model Code of Professional Conduct* adopted by Convocation 27 February 2014, effective 1 October 2015) r 3.02(12).

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

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

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 it has responded to current events and changes in its environment, albeit slowly. The nature of the legal profession requires a lawyer's role to be concerned mostly with following changes to a client's environment and less with initiating change or with innovation.[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. Those 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 cost of a five-day trial in 2015 was $56,439,[7] more than the annual after-tax income of many Canadian

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 M McKiernan, "The Going Rate" (June 2015) 39:6 Can Law 33-37 at 33, online: <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>.

families in recent years.[8] Despite the fact that the number of matters that settle before trial is so high, there continue to be long waits for trial. A trial is simply unattainable for many.

It is clear that for those who are unable to access a lawyer in private practice through the traditional methods, the delivery of legal services will have to evolve to meet that demand. 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 no longer appears to be the preferred method to resolve disputes where obtaining closure and preserving long-term relationships are more important.

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 Law Society of Upper Canada (LSUC). Any unauthorized practices of law, including those practices of the paralegal, would be prosecuted by the LSUC. 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*. Representation by "agents" in these tribunals, however, seemed to be in direct contravention of the *Law Society Act*.

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.[9] 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.

8 Statistics Canada, "Canadian Income Survey, 2013," *The Daily* (8 July 2015) at 8, online: <http://www.statcan.gc.ca/daily-quotidien/150708/dq150708b-eng.htm>.

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

There was an immediate response. Independent paralegals were suddenly investigated and charged by the Law Society of Upper Canada 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 to ensure the protection of the public."[10] More submissions followed, from both the Law Society 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 LSUC 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 LSUC to provide for the regulation of paralegals in the public interest.[11] Today, according to the LSUC, more than 7,400 paralegals are licensed in Ontario, providing consumers with more choice, more protection, and improved access to justice.[12]

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*, 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."[13] 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 Chief Justice Beverley McLachlin of the Supreme Court of Canada observed:

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

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

12 Law Society of Upper Canada, "FAQs," online: <http://www.lsuc.on.ca/faq.aspx?id=1275#q1266>.

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

> 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 lawyer 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. …
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> 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. 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, lawyers have a duty to help solve the access to justice crisis that plagues our legal systems. It is vital to the rule of law.[14]

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

Although there are many definitions of what access to justice means, for the purposes of this text, **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 often can lead to great personal hardship. 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.[15] 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.[16] 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.

Unfortunately, the pool of lawyers who have traditionally responded to the legal needs of these vulnerable Ontarians is shrinking. Traditionally, small firms and sole

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

15 R McMurtry et al, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 44, online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>.

16 *Ibid* at 46.

practitioners have been the primary providers of legal services to lower- and middle-class Ontarians. In the past, these firms have reported that 77 percent of their clientele are individuals.[17] 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 to access lawyers. 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 Ontarians, 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.[18] 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. Many try to resolve legal matters by themselves with legal assistance but not necessarily with the assistance of lawyers. One in three low- and middle-class Ontarians say they prefer to resolve their legal needs by themselves without legal advice.[19] 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 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:

Preferred Way of Resolving Legal Problem, June 2009[20]

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%

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

17 *Ibid* at 48.

18 *Ibid* at 3.

19 *Ibid* at 4.

20 *Ibid* at 26.

increased encouragement to settle. "Simplified rules" for certain civil litigation matters in Ontario within a monetary range of $25,000 to $100,000 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.[21] Pursuant to recommendations in the 2007 Civil Justice Reform Project report, the limit for Small Claims Court was increased from $10,000 to $25,000, "to allow individuals and businesses to resolve more claims in a simple and inexpensive way."[22] Some 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 law suits within certain jurisdictions. 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. The Law Society of Upper Canada, 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, 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 Ontarians 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 services 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

21 Ministry of the Attorney General of Ontario, "Fact Sheet: Simplified Procedure Under Rule 76 of the *Rules of Civil Procedure*," online: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_simplified_procedure_76.pdf>.

22 Ministry of the Attorney General of Ontario, "Small Claims Court: Increase in Monetary Limit from $10,000 to $25,000," online: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/scc_increase_limit.asp>.

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.[23]

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 re-orientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies."[24] 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. Prior to that time, judicial pre-trials were the closest precursor to mediation. The pre-trials were meant to be neutral evaluations whereby a judge would express his or her 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.

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.

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

Unfortunately, mediation is a process that has long been opposed by many lawyers and judges. For many 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 in Ontario, 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

23 *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87.

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

action. Lawyers who attended mediation with their clients present and actively participating 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.[25]

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.[26]

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 strong and better than you are.[27]

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

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.[28] The compelling factor for many of the clients that paralegals serve 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 Court and provincial offences courts, where paralegals often represent clients.

25 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>.

26 *Supra* note 4.

27 *Supra* note 5 at 12.

28 WK Winkler, "Some Reflections on Judicial Mediation: Reality or Fantasy?" (24 March 2010), online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca/coa/en/ps/speeches/reflections_judicial_mediation.htm>.

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.[29] 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.

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 Law Society of Upper Canada in Ontario require lawyers and paralegals to advise their clients of alternative dispute resolution methods. Alternative dispute resolution 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 Ontario tribunals, such as the Human Rights Tribunal and the Landlord and Tenant Board, mediation and arbitration are important and sometimes mandatory parts of the tribunal process.

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

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 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,

29 *Statutory Powers Procedure Act*, RSO 1990, c S.22.

gambling their retirement savings, or forsaking their children's post-secondary education funds to pursue justice.[30] 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 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.[31]

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. 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 his or her practice, particularly as a representative, will involve some form of ADR. Whether in Small Claims Court, provincial offences court, summary conviction offence matters, or administrative tribunals, most proceedings involve some form of ADR.

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30 Canwest News Service, "Access to Justice Is Critical for Canadians" (9 March 2007), online: <http://www.canada.com/topics/news/national/story.html?id=3582f5a0-20b8-492c-9c9a-59b78459307a&k=50196>.

31 *Supra* note 14.

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.

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. Alternative dispute resolution 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 and the acknowledgment of paralegals as authentic participants in the legal system.

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 paralegals. 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 paralegals with these skills, they will be better prepared to meet the needs of all Ontarians.

KEY TERMS

access to justice, 6
alternative dispute resolution (ADR), 2
judicial mediation, 10
Law Society of Upper Canada (LSUC), 2
mediation, 9
rights-based model, 3
Rules of Professional Conduct and *Paralegal Rules of Conduct*, 11

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 alternative dispute resolution practices.
3. How has the legal industry responded to the need to provide more alternatives to our justice system and improve the public's access to justice?
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. Outline how Canadian legal services providers and the legal industry have adapted to implement alternative dispute resolution practices.
7. List the possible roles and methods of participation of a paralegal within the ADR process.
8. What is *judicial mediation*? Describe how it is used as a method of ADR in our legal system.

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APPENDIX A Definition of a Paralegal

Law Society Act, RSO 1990, c L.8

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.