

CHAPTER 2

The Paralegal as Advocate

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LEARNING OUTCOMES

After reading this chapter, you will understand

- the paralegal licensing process
- the permitted scope of paralegal practice
- the key provisions of Rule 2 of the *Paralegal Rules of Conduct*
- the key provisions of Rule 4 of the *Paralegal Rules of Conduct*

Paralegals who appear as advocates before a court or tribunal in Ontario must be licensed by the **Law Society of Upper Canada** (LSUC) by successfully completing its licensing requirements. Once licensed, paralegals are regulated by the LSUC and must abide by its by-laws¹ and the *Paralegal Rules of Conduct* (the Rules)², which set out a paralegal's professional and ethical obligations. Paralegals who appear as advocates before a court or a tribunal have an important impact on the administration of justice and are therefore subject to increased scrutiny and responsibility when appearing on behalf of clients. As advocates, paralegals owe duties to their clients, the courts, tribunals, other licensees, court staff, and the Law Society of Upper Canada.

This chapter provides an overview of the paralegal licensing process, the permitted scope of paralegal practice, and the *Paralegal Rules of Conduct* that apply to advocacy-related matters.

Paralegal Licensing

Since 2007, the Law Society of Upper Canada has been responsible for the regulation of all paralegals in Ontario. The LSUC is authorized to educate and license Ontario's paralegals and to regulate their conduct. In order to qualify for admission as a licensed paralegal, an applicant must graduate from a LSUC-accredited paralegal education program, successfully pass the Paralegal Licensing Examination, and be of good character as determined by the LSUC. The licensing application form includes questions relating to the applicant's character. If an applicant's answers raise questions as to the applicant's character, the LSUC will conduct an investigation, and the matter may be referred to the LSUC's Hearing Panel for a hearing.

Law Society of Upper Canada: a self-governing body created by statute that educates, licenses, regulates, and disciplines paralegals and lawyers in Ontario in accordance with the *Law Society Act*.³ its regulations, by-laws, and rules

Permitted Scope of Paralegal Practice

The **permitted scope of practice for licensed paralegals** is limited to the representation of clients before certain courts and tribunals as advocates. By-Law 4, section 6(2) authorizes licensed paralegals to represent parties before the Ontario Small Claims Court, the Ontario Court of Justice for proceedings under the *Provincial Offences Act* and for summary offences under the federal *Criminal Code*, and various administrative tribunals established by provincial or federal legislation, such as the Human Rights Tribunal and the Landlord and Tenant Board. Licensed paralegals are also eligible to represent clients in limited areas of immigration and refugee law, including hearings before the Immigration and Refugee Board.

Paralegals are not authorized to appear in the Ontario Superior Court of Justice (other than the Small Claims Court), nor are they authorized to appear on behalf of a client in any family law proceeding, including a proceeding in the Ontario Court of Justice.

The LSUC has signalled its commitment to study the expansion of the paralegal scope of practice over the coming years as part of its commitment to provide increased access to justice.⁴ In 2016, the Ministry of the Attorney General and the Law Society of Upper Canada appointed the Honourable Justice Annemarie E. Bonkalo to lead a review into whether paralegals and other non-lawyer legal service providers should be permitted to handle certain family law matters.

Paralegal Advocacy Rules and Guidelines

Licensed paralegals are required to abide by the LSUC's **Paralegal Rules of Conduct**. The Rules set out a paralegal's professional and ethical obligations and include rules that provide specifically for advocacy-related matters. Rule 2 sets out a paralegal's duties of professionalism, including integrity and civility, while Rule 4 sets out a paralegal's duties toward clients, courts, tribunals, other licensees, and the administration of justice. The LSUC has also created **Paralegal Professional Conduct Guidelines**⁵ to assist paralegals in interpreting and applying the Rules.

What follows is an overview of some of the provisions of Rule 2 and Rule 4. Specific provisions of the rules will be discussed in more detail throughout this text as we discuss the steps in the proceedings to which they apply. Appendixes A and B contain the Rules and Guidelines that are relevant to advocacy-related matters.

permitted scope of practice for licensed paralegals: areas of law in which licensed paralegals may represent clients as set by the Law Society of Upper Canada in its by-laws and rules

Paralegal Rules of Conduct: set of rules created by the Law Society of Upper Canada that establish ethical and professional standards of conduct for licensed paralegals in Ontario

Paralegal Professional Conduct Guidelines: Guidelines created by the Law Society of Upper Canada to assist paralegals with the interpretation of their professional obligations under the *Paralegal Rules of Conduct*

The Duty of Civility (Rule 2)

Licensed paralegals are officers of the court and, as such, owe important duties to the courts and tribunals before which they appear, to other paralegals and to lawyers. One of those duties is the duty of civility. Rule 2.01(3) of the Rules explicitly sets out a paralegal's mandatory obligations to be courteous, civil, and act in good faith with anyone he or she deals with. As set out in Guideline 1, that duty extends to the judge or adjudicator, court clerk and staff, other paralegals and lawyers, and clients and other parties including self-represented litigants. Paralegals are expected to conduct themselves with the highest standards of professionalism and civility in accordance with the Rules. Failure to do so can result in disciplinary action by the LSUC.

Civility refers to the manner in which a paralegal conducts himself or herself during the course of his or her practice, including conduct before a court or a tribunal. Civility demands that a paralegal communicate politely and respectfully with the court, opposing advocates and all persons he or she comes into contact with in the course of practice. A paralegal's general duty of civility is further elaborated in Rule 7: Duty to Licensees and Others and specifically Rule 7.01: Courtesy and Good Faith. Rule 7.01 details specific types of behaviour that a paralegal is prohibited from engaging in.

Examples of incivility include the following behaviours:

- Making personal attacks on an opposing advocate
- Making uninformed criticism of the competence, conduct, or advice of another advocate
- Lying to an opposing advocate and the court
- Failing to consult with an opposing advocate regarding the scheduling of dates
- Refusing to agree to reasonable requests from an opposing advocate, such as reasonable requests for time extensions and adjournments
- Using offensive, rude, or profane language
- Making faces, rolling eyes, tapping fingers or shoes, or engaging in other distracting behaviour during a hearing or a trial

There is nothing to be gained by engaging in rude and demeaning conduct. A paralegal can be a zealous advocate for his or her client without resorting to rude and disrespectful behaviour. While a paralegal is not required to help his or her adversary, neither should he or she take advantage of an adversary by attempting to wear him or her down using offensive and derogatory language or making unfounded allegations. This kind of behaviour adversely affects the administration of justice because it takes the adjudicator's attention away from resolving the legal issues. It also causes delay in the legal proceeding by distracting the advocates who may become embroiled in a war of words and animosity, thereby leading to a breakdown in communication. Finally, incivility in the courtroom can decrease the public's confidence in the justice system. (See Guideline 17.)

If a paralegal encounters rude and disrespectful conduct by another advocate in the courtroom, he or she should not engage. Rather, civility requires that the para-

legal demonstrate patience and respect even when dealing with rude and disrespectful behaviour from another advocate.

The Duties of a Paralegal in the Role of Advocate (Rule 4)

Rule 4 of the *Paralegal Rules of Conduct* and Guideline 12 provide specifically for advocacy-related matters, including the paralegal's duties toward clients, tribunals, other licensees, and the administration of justice while acting as an advocate. Special duties also arise with respect to witnesses and unrepresented persons and in the context of negotiating a guilty plea on behalf of a client in a quasi-criminal or criminal matter.

Duty to Clients, Tribunals, and Others

When acting as an advocate, a paralegal is expected to act in a way that favours his or her client rather than the opposing party. A paralegal has no obligation to assist the opposing party. The Rules are clear that paralegals have a duty to represent their clients fearlessly. For example, Rule 4.01(4)(a) requires a paralegal to raise every issue, put forward every argument, and ask every question that the paralegal thinks will help the client's case, however distasteful that issue, argument, or question may be.

However, in representing his or her client fearlessly, a paralegal cannot behave in any manner that he or she wishes. The paralegal also has a duty to represent the client *within the limits of the law*. In other words, a paralegal cannot break the law or violate the Rules while advocating on behalf of his or her client (Rule 4.01(1); Guideline 12).

In addition to the paralegal's duties to his or her client, Rule 4.01 sets out his or her duties to the tribunal, the tribunal process, and other paralegals and lawyers. Under this rule, a paralegal is required to treat the tribunal and other licensees with "candour, fairness, courtesy, and respect" at all appearances and proceedings before all tribunals in which the paralegal may appear. "Tribunal" is defined in the Rules to include "courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures" (Rule 1.02). A paralegal therefore should never assume that a different standard of behaviour applies to appearances before administrative tribunals, boards, and agencies. All bodies that resolve disputes, including administrative boards and agencies, should be treated with the same respect as a court.

The following behaviours may constitute failure to treat the tribunal with candour, fairness, courtesy, and respect:

- Repeatedly failing to attend mandatory court appearances
- Habitually arriving late to mandatory court appearances
- Engaging in disruptive behaviour in the courtroom

- Failing to stand when addressing the court
- Relying on evidence that is inflammatory or unreliable
- Arguing with the judge or adjudicator after a ruling has been made

In addition to duties to the tribunal itself, a paralegal appearing as an advocate also has duties to the tribunal process and the administration of justice. Rule 4.01(5) explicitly prohibits certain types of behaviours when appearing before a tribunal including the following:

- Abusing the tribunal process by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party
- Knowingly assisting or permitting the client to do anything that the paralegal considers to be dishonest or dishonourable
- Knowingly attempting to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any deception, crime, or illegal conduct
- Deliberately refraining from informing the tribunal of any binding authority that the paralegal considers to be directly on point and that has not been mentioned by an opponent
- Appearing before a judicial officer when the paralegal, a partner of the paralegal, a paralegal employed by the paralegal firm, or the client has a business or personal relationship with the officer that gives rise to, or might reasonably appear to give rise to, pressure, influence, or inducement affecting the impartiality of the officer
- Knowingly asserting as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal
- Endeavouring or allowing anyone else to endeavour, directly or indirectly, to influence the decision or action of the tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate
- Knowingly misstating the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority
- Knowingly permitting a witness or party to be presented in a false or misleading way or to impersonate another
- Needlessly abusing, hectoring, harassing, or inconveniencing a witness
- Dissuading a witness from giving evidence or suggesting that a witness be absent
- When representing a complainant or potential complainant, attempting to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge

- Appearing before a court or tribunal while under the influence of alcohol or a drug

Disclosure, Witnesses, and Guilty Pleas

Under Rule 4, a paralegal appearing as an advocate in a proceeding also has duties with respect to the disclosure of information and documents to the opposing party, the interviewing of witnesses, the communication with witnesses giving testimony, and the entering of a guilty plea in a quasi-criminal or criminal matter.

A paralegal representing a client in a court or tribunal proceeding has a duty to comply with the rules of that court/tribunal that require one or both sides to provide information or documents to the other side. The paralegal's duties with respect to the disclosure of documents are discussed more fully in Chapter 7.

A paralegal can contact and interview all possible witnesses for both sides of a proceeding, subject to the rules regarding communications with represented persons, in order to prepare a theory of a case, to advise his or her client regarding possible and likely outcomes and settlement options, and, if necessary, to prepare for a hearing or trial. A paralegal's professional obligations with respect to interviewing and communicating with witnesses are discussed more fully in Chapter 7.

As set out in Rule 4.03, once a matter reaches a hearing or a trial, a paralegal's ability to speak with a witness giving testimony is very limited. The purpose of these limitations is to ensure that a witness's testimony is not influenced in a manner that would mislead the tribunal. Whether a paralegal can speak to a particular witness during the trial or hearing depends on two factors: (1) the stage of the witness's testimony and (2) whether or not the witness is providing evidence that supports the paralegal's case. Where the rules prohibit a paralegal from communicating with a witness giving evidence, the paralegal must not do so unless the opposing licensee consents or the judge, justice of the peace, or adjudicator allows it. A paralegal's duties under Rule 4.03 will be further examined throughout Chapters 11, 12, and 13.

Finally, a paralegal representing a client in a criminal or quasi-criminal proceeding has special duties before entering into an agreement about a **guilty plea** on behalf of his or her client. A paralegal cannot simply do what a client says with respect to negotiating a guilty plea. The paralegal is required under the rules to take steps to ensure that the client is informed about the consequences and implications of a guilty plea and that the necessary admissions required for the offence charged are voluntary. Before entering into an agreement with a prosecutor about a guilty plea, Rule 4.01(9) requires the paralegal to

1. advise the client about the prospects for an acquittal or finding of guilt;
2. advise the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

guilty plea: a voluntary admission, by a defendant in a criminal or quasi-criminal case, of the essential factual and mental elements of an offence, thereby giving up the right to a trial

3. be satisfied that the client is prepared voluntarily to admit the necessary factual and mental elements of the offence charged; and
4. be satisfied that the client has voluntarily instructed the paralegal to enter into an agreement as to a guilty plea.

The Paralegal as Witness

A paralegal who appears as an advocate before a court or tribunal should avoid making statements about his or her personal opinions or beliefs. This includes stating facts that have not been presented in evidence (either by way of affidavit or oral testimony) in the proceeding. Facts relied upon in a legal proceeding should be subject to legal proof by way of cross-examination.

In addition, according to Rule 4.04, a paralegal who appears as an advocate in a proceeding before a tribunal must not testify or submit his or her own affidavit evidence before the tribunal except where

1. the paralegal is permitted by law to do so;
2. the paralegal is permitted by the tribunal to do so;
3. the paralegal is permitted to do so by the rules of procedure of the court or tribunal before which the paralegal appears; or
4. the matter on which the paralegal appears is purely formal or uncontested.

It is considered unacceptable practice for a paralegal to submit his or her own affidavit to a tribunal in a contentious or contested matter because it requires the paralegal to undertake two different roles in the same proceeding—that of an advocate and that of a witness who may be subject to cross-examination (see Guideline 12). A paralegal should strive to obtain evidence from a witness with direct and actual knowledge of the facts being relied upon, usually the client, who will have first-hand knowledge of the events that have led up to the particular proceeding.

Dealing with Unrepresented and Represented Persons

As an advocate, a paralegal will likely deal on a client's behalf with a party who does not have legal representation. For example, an opposing party in a Small Claims Court proceeding may not be represented by a paralegal or a lawyer. In such a case, the paralegal will have to deal directly with the unrepresented opposing party regarding all matters relating to the proceeding, including the scheduling of dates and engaging in settlement negotiations. A paralegal who represents a client in a matter has special duties toward **unrepresented persons**. Rule 4.05 requires a paralegal to do the following when dealing with an unrepresented person:

1. Take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the paralegal.

unrepresented persons: individuals involved in a legal proceeding without legal representation by a lawyer or paralegal

2. Make clear to the unrepresented person that the paralegal is acting exclusively in the interests of the client and, accordingly, the paralegal's comments may be partisan.

If the opposite party does have legal representation, Rule 7.02 requires the paralegal to deal with the legal representative and not to approach or communicate or deal with the party directly on the matter (unless the legal representative consents).

NOTES

- 1 Law Society of Upper Canada, “By-Laws,” online: <<http://www.lsuc.on.ca/by-laws>>.
- 2 Law Society of Upper Canada, *Paralegal Rules of Conduct* (Toronto: LSUC, 2007), online: <<http://www.lsuc.on.ca/paralegal-conduct-rules>>.
- 3 *Law Society Act*, RSO 1990, c L.8.
- 4 Law Society of Upper Canada Priority Planning Committee, “Report to Convocation” (4 December 2015).
- 5 Law Society of Upper Canada, *Paralegal Professional Conduct Guidelines* (Toronto: LSUC, 2008), online: <<http://www.lsuc.on.ca/paralegal-conduct-guidelines>>.

KEY TERMS

guilty plea, 17

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REVIEW QUESTIONS

1. What must an applicant for a paralegal licence do in order to qualify for admission to the Law Society of Upper Canada as a licensed paralegal?
2. What is the permitted scope of practice for licensed paralegals?

DISCUSSION QUESTIONS

1. Licensed paralegal Harry Hothman is appearing before the Landlord and Tenant Board on behalf of a tenant. The adjudicator renders her decision against Harry’s client. Harry slams his hand down on the table, shouts, “What a load of garbage!” and storms out of the hearing room. What has Harry done wrong? Explain your answer with reference to the *Paralegal Rules of Conduct*.
2. Licensed paralegal Saher Henry represents the defendant, Lionel Lee, in Small Claims Court. The trial was held recently, and a judgment was made by Deputy Judge LaSalle in favour of the plaintiff. Saher now brings a motion for a new trial following the judgment on the basis that the plaintiff failed to produce a certain document and that the defendant could not have discovered this new document prior to the trial. The plaintiff opposes the motion. Saher prepares an affidavit in her own name that attests to Lionel’s discovery of the document after trial and the circumstances surrounding Lionel’s discovery, as told to her by Lionel. The affidavit is commissioned by Saher’s associate and is served on the plaintiff and then filed

with the court. Saher appears before the court to argue the motion, and she relies upon her own affidavit in support of the motion.

- a. What, if anything, has Saher done wrong? Explain your answer with reference to the *Paralegal Rules of Conduct*.
 - b. If Saher has done something wrong, what could she have done in order to avoid it?
 3. Licensed paralegal Wilma Henderson is appearing before the Ontario Court of Justice on behalf of her client who has been charged with an offence under the *Highway Traffic Act*. The client authorized Wilma to resolve the case for him, in his absence, at the trial. It is the morning of the trial and Wilma arrives at the Ontario Court of Justice. She checks in with the prosecutor to advise that she is ready to proceed with the trial. The prosecutor and Wilma enter into a plea negotiation in an attempt to resolve the case without a trial. The proposed plea deal would involve Wilma's client pleading guilty to a different offence under the *Highway Traffic Act*. Wilma accepts the deal on behalf of her client without consulting with him.
 - a. What, if anything, has Wilma done wrong? Explain your answer with reference to the *Paralegal Rules of Conduct*.
 - b. If Wilma has done something wrong, what should she have done in this situation?
 4. Licensed paralegal Lynette Vu is representing her client, a landlord, at the Landlord and Tenant Board. There is a hearing scheduled for today; however, Lynette realizes she double-booked herself and decides instead to speak at a conference in downtown Toronto. Lynette calls the Landlord and Tenant Board to advise the board that she is stuck in traffic and unable to arrive on time for the hearing. The hearing is adjourned for two weeks. On the morning of the hearing two weeks later, Lynette realizes she has client meetings booked all day. She calls the Landlord and Tenant Board to advise that she is out of the country and will not be returning until tomorrow. What, if anything, has Lynette done wrong? Explain your answer with reference to the *Paralegal Rules of Conduct*.

