



TAB 3

**Report to Convocation
December 1, 2017**

Paralegal Standing Committee

Committee Members
Michelle Haigh, Chair
Janis Criger, Vice-Chair
Marion Boyd
Robert Burd
Cathy Corsetti
Ross Earnshaw
Brian Lawrie
Marian Lippa
Susan McGrath
Barbara Murchie
Jan Richardson
Baljit Sikand
Anne Vespry

Purpose of Report: Decision

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COMMITTEE PROCESS

1. The Committee met on November 8, 2017. Committee members present were: Michelle Haigh (Chair), Janis Criger (Vice-Chair), Robert Burd, Cathy Corsetti, Brian Lawrie, Marian Lippa, Susan McGrath, Barbara Murchie, Jan Richardson and Baljit Sikand and Anne Vespry. The Treasurer also attended. Staff in attendance were: Priya Bhatia, Lesley Cameron, Margaret Drent and Sheena Weir.

FOR DECISION

PARALEGALS AS OFFICERS OF THE COURT

MOTION

2. **That Convocation endorse the proposition that licensed paralegals be recognized as officers of the court in every court of record in Ontario in which a paralegal is authorized to provide legal services.**

ISSUE UNDER CONSIDERATION

3. Ontario lawyers are officers of the court. However, it is still unclear whether paralegals are officers of the court in every court of record in Ontario in which they are authorized to provide legal services. The Paralegal Standing Committee, Professional Regulation Committee and the Government Relations Committee support the proposition that paralegals should be recognized as officers of the court in every court of record in Ontario in which they are authorized to provide legal services.
4. Such an endorsement would recognize all Law Society licensees as officers of the court, and would reinforce and confirm the duties that paralegals have as participants in the administration of justice. Such an endorsement would not impact the courts' power to control their own processes, nor would it change the paralegal scope of practice in any way, which is a separate regulatory issue.

BACKGROUND

Historical Background – Officer of the Court

5. The concept of an officer of the court has its origins in the common law and the organisation of the legal profession in the United Kingdom, with its distinction between barristers and solicitors. In the U.K., barristers were not officers of the court, whereas solicitors were enrolled as officers of the courts in which they appeared.
6. Initially this historical distinction between barristers and solicitors was preserved in Ontario law, even though Ontario lawyers were able to do the work of both barrister and solicitor. Section 2 of the *Solicitors Act*¹ provided that solicitors were subject to the control of the court. Section 70 said that “nothing in this Act interferes with the jurisdiction over solicitors as officers of court”. However, the *Barristers Act*² did not contain similar provisions.

¹ RSO 1960, c 378

² RSO 1960, c 30

7. Whether a barrister in Canada was an officer of the court has not always been clear,³ although there was some authority for this proposition, which relied in part on the fact that barristers took an oath of office.⁴
8. One of the reasons for the 1970 amendment of the *Law Society Act* was the need to update Ontario statutes to eliminate the differences between barristers and solicitors to reflect Canadian practice.⁵ The 1970 amendments clarified that all members of the Law Society were officers of the court:
 29. Members are officers of the court.
9. This section remained unchanged until 2006, when it was amended to its current reading⁶:
 29. Every person who is licensed to practise law in Ontario as a barrister and solicitor is an officer of every court of record in Ontario.⁷

It is unclear whether paralegals are officers of the court

10. Prior to paralegal regulation, there was significant doubt that paralegals were officers of the court, and some doubt persists after regulation. A summary of Ontario cases addressing this issue before and after paralegal regulation is attached at **Tab 3.1.1**.⁸

Other officers of the court

11. Lawyers are not the only profession that has the duties of an officer of the court. Case law makes clear that court ordered receivers and court ordered monitors are also officers of the court.
12. There is also an appointment of officers of the court in sections 21 and 24 of the *Supreme Court Act*⁹:

³ M Orkin, *Legal Ethics*, 2nd ed (Canada Law Book, 2011) at 11.

⁴ *Ibid*, quoting the extra-judicial opinion of Chief Justice Mathers in “Legal Ethics”, 40 CL Times 809 at 820.

⁵ Ontario, Professional Organisations Committee, *Professional regulation: a staff study of accountancy, architecture, engineering and law in Ontario, Appendix B, History and Organisation of the Legal Profession in Ontario*, (Toronto, Ministry of the Attorney General, 1979) at 20.

⁶ Repealed and amended to its current reading by the *Access to Justice Act, 2006*, SO 2006, c 21 Sched C, s 26

⁷ In the context of section 29 of the *Law Society Act*, it is most likely that “court of record” means the following adjudicative bodies: the Court of Appeal for Ontario, the Superior Court of Ontario and the Ontario Court of Justice; the Supreme Court of Canada; the Federal Court and the Federal Court of Appeal; and any tribunal in Ontario (established under an Act of Parliament or under an Act of the Legislature of Ontario) that is, by statute, designated as or given the powers of a “court of record”.

⁸ The issue is also considered in articles such as Omar Ha-Redeye, *Are Paralegals Officers of the Court?* Slaw, Posted July 14, 2013, online at: <http://www.slw.ca/2013/07/14/are-paralegals-officers-of-the-court/>; Edward W (Ted Claxton), *Status of Paralegal’s within the Legal Profession*, Published on December 22, 2015, online at <https://www.linkedin.com/pulse/paralegals-officers-court-edward-w-ted-claxton/>;

⁹ RSC 1985, c S-26.

21. The Sheriff of the County of Carleton, in the Province of Ontario, is *ex officio* an officer of the Court and shall perform the duties and functions of a sheriff in connection therewith.

24. All persons who may practice as barristers, advocates, counsel, attorneys, solicitors or proctors in the Court are officers of the Court.

Duties and obligations of officers of the court

13. Officers of the court are bound by certain duties and obligations with respect to the court and the court can enforce the fulfillment of those duties and obligations.
14. The duties and obligations that have been found to attach to lawyers as officers of the court appear to be of two sorts. First, there are duties of candor and fairness, which include duties to be honest with and not mislead the court. Second, there are duties of integrity and respect for the administration of justice. These duties and obligations are all contained in the rules of conduct that lawyers (and licensed paralegals) are required to observe.¹⁰
15. Examples of failures to observe the duties of candor and fairness include: obtaining an *ex parte* order from a judge by submitting misleading facts, submitting a deceptive affidavit, failing to disclose relevant facts to the court, failing to notify the court that the legal issue before it is moot, failing to correct false statements, arguing personal opinions, and failing to bring errors in a charge to the jury to the trial judge's attention.
16. Examples of failures to observe the duties of integrity and respect for the administration of justice include: failing to appear in court, failing to use civil language and conduct, engaging in sharp practice, acting as both an advocate and a witness, counselling a witness to deceive and mislead, and failing to notify the court of a potential conflict of opposing counsel.

The importance of the officer of the court in the administration of justice

17. Officers of the court play an important role in the effective administration of justice. In [Klein and Law Society of Upper Canada](#)¹¹, the Divisional Court stated:

[81] Effective and fair adjudication by the courts of criminal and civil cases depends fundamentally on what I might call the judicial triangle - a judge (including a jury) and two adversary parties, each ideally represented by counsel as an officer of the court.

[82] Counsel's duty is to the client but also to the court; indeed because he is an officer of the court his duty to the court is paramount.

¹⁰ Note that the Law Society is already able to prosecute paralegals for failing to meet such duties and obligations pursuant to the Paralegal Rules of Conduct regardless of whether paralegals are officers of the court.

¹¹ 1985 CanLII 3086 (ONSC DC), 50 OR (2d) 118.

18. In a speech given by G. Arthur Martin, a former judge and Treasurer of the Law Society, he quoted an English judge about the role of an officer of the court:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is not sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.¹²

19. In [R v. Sweezey](#),¹³ a lawyer counselled a witness to give evasive testimony and was convicted for attempting to obstruct justice. In its reasons on sentence, the court stated:

[6] The Canadian justice system relies on the honesty and integrity of counsel who practice within it. To that end, every lawyer is made an officer of the courts in which he will practise. A lawyer who attempts to obstruct justice by wilfully counselling evasive evidence not only commits an offence contrary to s. 127 of the *Criminal Code* but also breaches his solemn duty as an officer of the court.

20. On appeal, the court reduced the sentence but found it "quite impossible to disagree" with the trial judge's comments on this point.¹⁴
21. As the above makes clear, lawyers have a dual role as an officer of the court and representative of their client, and the duty to the court takes precedence, reflecting the importance of the effective administration of justice to society.

DISCUSSION

22. A formal Law Society endorsement that licensed paralegals should be recognized as officers of the court would signal to courts and the Attorney General that all Law Society licensees should be officers of the court. Recognizing paralegals as officers of the court

¹² W. Wesley Prue, "In pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers", (1995) 33 Alta.L Rev 730. The quotation is from *Rondel v Worsely* [1967] 3 WLR 1666 H.L.

¹³ 1987 CanLII 5176 (NL SCTD), 56 CR (3d) 286 at 287 (1987).

¹⁴ 1987 CanLII 3977 (NL CA) at para 13.

would reinforce that as participants in the administration of justice, paralegals have duties to the courts and tribunals in which they are permitted to appear, and that these duties override their duties to clients, to the extent that they conflict. It would confirm their duties and obligations to these courts and tribunals, without conferring any benefit, other than whatever respect may be associated with being an officer of the court.

23. It is important to note that recognising paralegals as officers of the court would not impact on the right of the court to withhold its right of audience when necessary for the administration of justice.¹⁵ Nor would it change the paralegal scope of practice in any way, as this is a matter which is prescribed by Law Society By-Law 4. Recognizing paralegals as officers of the court would have no impact on the Law Society's ability to regulate paralegal licensees.

¹⁵ Not in my court you don't! The right of audience and the enforcement of ethical conduct *Ninth Colloquium on the Legal Profession: Legal Ethics in Action*, [Toronto, Ont.: Continuing Legal Education, Law Society of Upper Canada], 2007 at 4 and 8.

CASELAW PARALEGALS AND OFFICERS OF THE COURT

Before Law Society Regulation

1. In *R. v. Elguindy*¹, an unlicensed paralegal was convicted of attempting to obstruct justice after submitting a false document to the court. The Court stated that he was acting as an officer of the court at the time of the offence:

[7] I found that Mr. Elguindy had deliberately attempted to mislead the Provincial Court and to obstruct the course of justice, and that is a very, very serious matter indeed. Courts cannot operate with false information being presented to them. At the relevant time Mr. Elguindy was acting in the capacity of a paralegal and as an officer of the Court. (emphasis added)

2. In *R. v. Lemonides*², the defendant appealed his summary conviction for dangerous driving on the basis that his representation at trial by an agent was deficient and resulted in a miscarriage of justice, claiming that he was unaware that his agent was not a lawyer. The Court discussed the obligation on a trial judge to make inquiries and went on to set out the expectation of agents appearing before the court:

All agents should expect to be in a position to satisfy the Court that the defendant has been advised of the agent's status, and it should be clear on the record that the client waives their right to counsel and understands the significance of appearing without a lawyer. All agents should be aware that they will be expected by the Court to act as officers of the Court, that is, in an ethical and competent manner. (p. 18) (emphasis added)

3. In *R. v. Romanowicz*³, the defendant appealed his summary conviction for failing to stop and give his name and address following a traffic accident. He submitted that the trial judge erred in permitting an agent to appear in the absence of a proper assurance of the competency of the agent to defend the criminal charge. The Court dismissed the appeal, finding that there was no miscarriage of justice, and commented as follows:

[40] As noted elsewhere, unfortunately there is no prescribed training for paid non-lawyer agents nor standards, certification or accreditation guidelines. Such individuals are not officers of the court although they remain subject to the court's direction including the *in facie* contempt power. (emphasis added)

¹ [1993] O.J. No. 2869 (OCGD), appeal allowed on sentence only [1994] O.J. No. 3370 (OCA)

² 1997 CanLII 12291 (ON SC)

³ 1998 CanLII 14957 (ON SC), affirmed on appeal, [1999 CanLII 1315](#), 45 O.R. (3d) 506 (OCA)

4. In *R v. Wilson*,⁴ the Court reviewed the comments of the court in *Lemonides* concerning the requirement to inquire into the suitability of an agent to appear in a given criminal case and concluded:

[24] In interpreting the above passage, it is noted that an agent is not an officer of the Court, as is a judge or a barrister who has signed the Rolls. However Wein J. clearly expected that agents permitted to appear would have to demonstrably enjoy the same high ethical standards as a true officer of the Court. (emphasis added)

5. In *R v. Maleki*,⁵ the Court declined to order costs against a paralegal, distinguishing a prior decision on the basis that the paralegal was not an officer of the court, and suggested that this might be different once paralegals were regulated:

Unlike the defence counsel in *Dumont*, Mr. Lindsay is not an Officer of the Court subject to Codes of Professional Conduct. Once the regulation of paralegals becomes fully effective in this jurisdiction, the capacity of the court to control the conduct of agents appearing before this court will be enhanced, and I might be more inclined to consider the kind of order Mr. Gilman has sought in an appropriate case. (p. 3) (emphasis added)

6. These cases were all decided at a time when paralegals were not regulated, and the comments they contain about the absence of prescribed training, ethical standards and regulation are no longer true. However they illustrate that prior to regulation, there was significant doubt that paralegals were officers of the court.

After Law Society Regulation

7. In *R v. Lippa*,⁶ a licensed paralegal sought orders from the Superior Court, including orders compelling a Justice of the Peace to permit paralegals to sit past the gate of the bar and directing that the list be called on a first come first served basis, subject to common sense exceptions.
8. The Court dismissed the application, holding that it is within the jurisdiction of a judicial officer to decide where individuals sit in a courtroom, and how the list is called. The Court remarked:

[18] Further, s. 29 of the *Law Society Act* provides that every person who is licensed to practise law in Ontario as a barrister and solicitor is an officer of every court of record in Ontario. *Black's Law Dictionary*, 8th ed., defines "officer of the court" as "A person who is charged with upholding the law and administering the judicial system." Licensed paralegals are not included in s. 29.

⁴ [1998] O.J. No. 5190 (ONCJ)

⁵ 2007 ONCJ 430 (CanLII)

⁶ 2013 ONSC 4424 (CanLII)

9. While the Court did not expressly rule on whether licensed paralegals are officers of the court, the comments in the decision might reasonably be understood to express doubt that they have this status.
10. In *R. v Ezati*, the Court made the following remark on the record prior to allowing an appeal against conviction on the basis that a paralegal had acted without authority in entering a guilty plea against the defendant:

Yeah, but Mr. Chung as a licensed paralegal is an officer of the court, has a duty to come forward with an explanation because he presented himself in court as someone who had authority from Mr. Ezati to plead guilty to a serious offence under The Highway Traffic Act and be subjected to a thousand dollar fine, licence suspension and everything else.⁷ (emphasis added).

Law Society Good Character Decisions

11. In the context of Law Society of Upper Canada good character decisions, there are two statements that assume that paralegals are officers of the court.
12. In [*Tunney v. Law Society of Upper Canada*](#)⁸, a panel of the Hearing Division stated:

[35] The crux of our concern is about Mr. Tunney's judgment. Mature, sound and ethical judgment is required of all paralegals and lawyers. Officers of the court must be counted on to always respect and uphold the law. ... (emphasis added)

13. In [*Clarke v. Law Society of Upper Canada*](#),⁹ a panel of the Hearing Division stated:

[41] The conviction in February 2012, for failing to comply with the curfew terms of his recognizance in October 2010, raises concerns about the applicant's willingness to abide by the terms of judicial orders or undertakings or promises made to a legal authority. As a licensed paralegal he will be an officer of the court and will be under a higher ethical obligation to honour court orders, undertakings he gives and promises he makes. (emphasis added)

⁷ [2016] O.J. No. 2819 (ONCJ), at line 76

⁸ 2015 ONLSTH 202 (CanLII)

⁹ 2017 ONLSTH 31 (CanLII),