



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Report to Convocation January 27, 2011

Paralegal Standing Committee

Committee Members
Cathy Corsetti, Chair
William Simpson, Vice-Chair
Marion Boyd
Robert Burd
James R. Caskey
Paul Dray
Seymour Epstein
Michelle Haigh
Glenn Hainey
Douglas Lewis
Susan McGrath
Kenneth Mitchell
Baljit Sikand

Purpose of Report: Decision and Information

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COMMITTEE PROCESS

1. The Committee met on January 13th, 2011. Committee members present were Cathy Corsetti (Chair), William Simpson (Vice-Chair), Marion Boyd, Robert Burd, James Caskey, Michelle Haigh, Susan McGrath and Kenneth Mitchell. Staff members in attendance were Diana Miles, Roy Thomas, Terry Knott, Jim Varro, Elliot Spears, Naomi Bussin, Sheena Weir, Sophie Galipeau and Julia Bass.

FOR DECISION

AMENDMENT TO RULE 4.04 OF THE PARALEGAL RULES

Motion

2. That Convocation approve the amendment to Rule 4.04 of the *Paralegal Rules of Conduct* shown below, to reflect the wording of the lawyers' *Rules of Professional Conduct*, on the subject of a licensee acting as both advocate and witness.

Issue

3. The Law Society has received representations to the effect that the rules for paralegals should be more closely aligned with the rules for lawyers, regarding the question of a licensee acting as both advocate and witness in the same matter.

Background

4. It is a generally recognized principle that legal advocates should not argue the law and give evidence in the same case. This principle is recognized in both the *Paralegal Rules of Conduct* and the lawyers' *Rules of Professional Conduct* - in Rule 4.04 of the *Paralegal Rules* and Rule 4.02 of the lawyers' *Rules*.
5. However, the wording in the *Paralegal Rules* differs slightly from that in the lawyers' *Rules*. The *Paralegal Rule* is as follows:

The Paralegal as Witness

- 4.04 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, the paralegal who appears as an advocate shall not submit his or her own affidavit to the tribunal.
- (2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, a paralegal who appears as an advocate shall not testify before the tribunal unless permitted to do so by the rules of the court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.
- (3) A paralegal who is to testify before a tribunal shall entrust the conduct of the case to another licensee.
- (4) A paralegal shall not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge.

6. The relevant part of the Paralegal Guidelines is as follows:

The Paralegal as Witness

Rule Reference: Rule 4.04

16. As an advocate, the paralegal's role is to further the client's case within the limits of the law. The role of a witness is to give evidence of facts that may or may not assist in furthering the case of any of the parties to a proceeding. Because these roles are different, a person may not be able to carry out the functions of both advocate and witness at the same time.

17. When acting as an advocate for his or her client before a tribunal, the paralegal should not appear to be giving unsworn testimony. This is improper and may put the paralegal's own credibility in issue. A paralegal who has appeared as a witness on a matter should not act as an advocate or legal representative in any appeal of that matter.

7. The lawyers' *Rule* and accompanying *Commentary* are as follows:

4.02 THE LAWYER AS WITNESS

Submission of Affidavit

4.02 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

Submission of Testimony

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

8. The main difference arises from the fact that some of the wording of the lawyers' *Commentary* was incorporated into the *Paralegal Rules* – this involved replacing the word “should” with the more directive word “shall.” Rule 4.04 (3) requires a paralegal who testifies before a tribunal to entrust the case to another licensee, while Rule 4.04 (4) prohibits a paralegal acting as advocate in a matter from expressing personal opinions or beliefs or asserting as a fact anything that is properly subject to legal proof, cross-

examination or challenge. In the lawyers' rules, these two provisions are set out in the *Commentary*.

9. At the time the *Paralegal Rules* were drafted, the Law Society had met with representatives from a number of tribunals before whom paralegals regularly appear. On the basis of those discussions, the Law Society was concerned to highlight to paralegals the general principle that one should not act as both advocate and witness. It appeared that the legal principles behind the commentary to the lawyer rules were better known to lawyers than to paralegals. For emphasis, these were made the subject of a rule rather than commentary.
10. However, paralegals often appear at tribunals where speed and efficiency are key considerations. The Law Society has received communication from two such tribunals, arguing that for the sake of efficiency, they find it acceptable for advocates to also act as witnesses in the same proceeding, within the tribunals' rules of procedure. The current wording of the paralegal rule is causing difficulty for these agencies who wish greater flexibility in their processes.
11. The Landlord and Tenant Board advises that many of their hearings involve a landlord's paralegal representative giving evidence of arrears of rent and making submissions regarding the relief claimed. The Board is of the view that it is not practical for such representatives to entrust the conduct of a matter to a third party in every case where the representative is giving evidence.
12. The Assessment Review Board ('ARB') has also previously contacted the Law Society. The Board has implemented its own rules of practice and procedure, which expressly permit a representative to act as both advocate and witness in certain circumstances. An excerpt from the ARB Rules is attached at **Appendix 1**.

The Committee's Deliberations

13. The Committee is of the view that the general principle that there are difficulties with a 'dual role' is valid. While acknowledging that there are risks with the practice, where

tribunals can only effectively manage their case load by selectively permitting its use, the Committee recognizes that it is up to the tribunal member hearing the case to manage the hearing fairly.

14. Since it has been generally accepted that the rules for paralegals should closely parallel those for lawyers, it is recommended that Rule 4.04 and the relevant guidelines be amended to be consistent with Rule 4.02 of the lawyers' *Rules of Professional Conduct*.

15. The following are the proposed changes to the *Paralegal Rules of Conduct*:

4.04 THE PARALEGAL AS WITNESS

The Paralegal as Witness

4.04 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, the paralegal who appears as an advocate shall not submit his or her own affidavit to the tribunal.

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a paralegal is appearing, a paralegal who appears as an advocate shall not testify before the tribunal unless permitted to do so by the rules of the court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

~~(3) — A paralegal who is to testify before a tribunal shall entrust the conduct of the case to another licensee.~~

~~(4) — A paralegal shall not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross examination or challenge.~~

Proposed Changes

16. The following are the proposed changes to the Paralegal Guidelines:

GUIDELINE 12: ADVOCACY ...

The Paralegal as Witness

Rule Reference: Rule 4.04

16. As an advocate, the paralegal's role is to further the client's case within the limits of the law. The role of a witness is to give evidence of facts that may or may not assist in furthering the case of any of the parties to a proceeding. Because these roles are different, a person may not be able to carry out the functions of both advocate and witness at the same time.

17. Unless permitted by the tribunal, when acting as an advocate for his or her client before a tribunal, the paralegal should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge, or otherwise appear to be giving unsworn testimony. This is improper and may put the paralegal's own credibility in issue. A paralegal who has appeared as a witness on a matter should not act as an advocate or legal representative in any appeal of that matter.

17.1 Unless permitted by the tribunal, the paralegal who is a necessary witness should testify and entrust the conduct of the case to another licensee. A paralegal who has appeared as a witness on a matter should not act as an advocate or legal representative in any appeal of that matter.

17.2 There are no restrictions on the advocate's right to cross-examine another licensee, however, and the paralegal who does appear as a witness should not expect to receive special treatment because of professional status.

The Committee's Deliberations

17. The Committee considered the proposed wording and recommends that it be adopted.

Assessment Review Board

RULES OF PRACTICE AND PROCEDURE

(made under section 25.1 of the *Statutory Powers Procedure Act*)

Effective April 1, 2009

[EXCERPT]

REPRESENTATIVES

11. Appearance in Person or by Authorized Representative

A party may attend a proceeding in person or by a representative. Representatives who are not licenced by the Law Society of Upper Canada must obtain written authorization and may be asked to provide this authorization to the Board at any time. If representation changes, the party and the representative shall immediately notify the Board and the other parties.

12. Notices of Proceedings Provided to Representatives

Any notice given to a representative is deemed to have been given to the party for whom the representative acts.

13. Witness and/or Advocate

Unless the Board orders otherwise, at any hearing event, in the direct hearing stream a party and/or a representative excluding a lawyer appearing as counsel may be both an advocate and witness. In the case managed stream no representative may be both advocate and witness unless the Board orders otherwise and the representative is not a lawyer appearing as counsel. If a representative (except a lawyer appearing as counsel) is applying to be both a witness and an advocate notice in writing must be given to the other parties at least 21 days prior to the hearing event in the case managed stream.

FOR INFORMATION

GUIDELINES RE LAW OFFICE SEARCHES

18. The Committee considered the proposed Guidelines on Law Office Searches that the Professional Regulation Committee has been considering, based on the Protocol developed by the Federation of Law Societies of Canada. (The protocol was developed to address the difficult issues that arise where the need for a full criminal investigation, including the search for evidence, conflicts with the principle of solicitor/client privilege).

19. While the law on the privileged status of paralegal/client communications is not yet as well developed, the same issues arise in principle. The Committee was satisfied with the draft presented.