



Law Society
of Ontario

Barreau
de l'Ontario

Tab 2.1

Paralegal Standing Committee

Ending Licensing Exemption for Injured Workers' Groups

February 27, 2020

Committee Members:

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Megan Shortreed (Vice-Chair)
Joseph Chiumminto
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Motion

That Convocation approve amendments to By-Law 4, as detailed in the motion attached at [Tab 2.1.1](#), and summarized as follows:

1. Subsection 31 (1) of the English version of the By-Law is amended by deleting “ ‘injured workers’ group’ means a not-for-profit organization that is funded by the Workplace Safety and Insurance Board to provide specified legal services to workers;”.
2. Subsection 31 (1) of the French version of the By-Law is amended by deleting “ ‘groupe de travailleurs blessés’ S’entend d’un organisme à but non lucratif financé par la Commission de la sécurité professionnelle et de l’assurance contre les accidents du travail pour fournir des services juridiques précis aux travailleurs. ”
3. The By-Law is further amended by revoking subsection 31 (4).

Executive Summary

This motion proposes to amend By-Law 4 to revoke the exemption from licensure for persons who volunteer in injured workers’ groups funded by the Workplace Safety and Insurance Board (“WSIB”), thereby effecting a decision made by Convocation *in camera* in September 2015 to end that exemption following a sunset period.

The Injured Worker Outreach Services (“IWOS”) program was the sole program operating pursuant to this exemption, through multiple offices in Ontario. In September 2015, Convocation agreed that this exemption should be ended effective September 30, 2017, in order to provide sufficient time for members of each IWOS office to become licensed as paralegals by the Law Society and for these offices to phase out the provision of legal services by unlicensed volunteer members. The sunset period has now passed, IWOS offices no longer provide legal representation services by unlicensed volunteer members, and the only remaining step to complete this process is to amend By-Law 4 accordingly.

Background

A. Context

Since the outset of paralegal regulation in 2007, the *Law Society Act* has authorized the Law Society to make by-laws permitting certain persons in certain circumstances to provide legal services without a licence. Exemptions from the requirement to become licensed in order to provide certain legal services have been established in the Law Society's By-Law 4.



Convocation has since the outset adopted a policy of seeking to eliminate the number of exemptions over time where appropriate, and thereby reducing the number of unregulated legal services providers. This policy was also recommended by the Attorney General for Ontario's external reviewer, David Morris, in his "Report of Appointee's Five-Year Review of Paralegal Regulation in Ontario, published in 2012. Since 2007, four exemption categories have been eliminated, and several others have been narrowed or clarified.

The IWOS program is funded by the WSIB to provide free information, advice and education to injured workers and their families who have been impacted by a work-related injury or illness. There is a network of IWOS offices across the province, which operate independently. Most of the work of IWOS volunteers (known as "peer helpers") was limited to information-sharing about WSIB policies and procedures, as well as peer support; however, the IWOS offices had also developed a practice of providing free assistance to injured workers through advice about their claims and representation at hearings. The WSIB provided education and training to IWOS volunteers.

In 2007, an exemption was created for these IWOS offices so that they could continue to deliver these services without the immediate need for all peer helpers involved in this work to become licensed as paralegals and obtain professional liability insurance. Specifically, the exemption covered individuals who volunteer in IWOS offices and allowed them to advise workers on their legal interests, rights or responsibilities under the *Workplace Safety and Insurance Act, 1997*, and to act on behalf of workers in connection with matters and proceedings before the WSIB or the Workplace Safety and Insurance Appeals Tribunal, or related proceedings.

B. Previous Decisions

In the years since the creation of this exemption, the Law Society engaged in extensive discussions with IWOS offices and the WSIB, with a view to creating a plan to sunset the exemption that was sensitive to their needs. In September 2015, resulting from those discussions, Convocation approved *in camera* a plan to end the exemption for the IWOS volunteers effective September 30, 2017. This allowed sufficient time for active members of each IWOS office to become licensed as paralegals by the Law Society (as some IWOS volunteers did over the course of the exemption) and for these offices to phase out the provision of legal services by unlicensed volunteers.

This decision was communicated to the WSIB and to the IWOS offices. The Law Society understands that they were all in a position to comply by September 30, 2017, and that the provision of legal services by unlicensed volunteers is no longer part of the suite of peer support services offered by IWOS offices.

By-Law 4 must now be amended to reflect that this exemption has ended. The Law Society has communicated to the WSIB its intention to bring this motion to Convocation.



Implementation

A. Proposed Amendments

The motion attached at **Tab 2.1.1** proposes to make the following three amendments to By-Law 4, which collectively will eliminate the exemption for injured workers' groups:

1. Subsection 31 (1) of the English version of the By-Law is amended by deleting “ ‘injured workers’ group’ means a not-for-profit organization that is funded by the Workplace Safety and Insurance Board to provide specified legal services to workers;”.
2. Subsection 31 (1) of the French version of the By-Law is amended by deleting “ ‘groupe de travailleurs blessés’ S’entend d’un organisme à but non lucratif financé par la Commission de la sécurité professionnelle et de l’assurance contre les accidents du travail pour fournir des services juridiques précis aux travailleurs. ”
3. The By-Law is further amended by revoking subsection 31 (4).

Tab 2.1.1

LAW SOCIETY OF ONTARIO
BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE LAW SOCIETY ACT

BY-LAW 4
[LICENSING]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 27, 2020

MOVED BY

SECONDED BY

THAT By-Law 4 [Licensing], in force immediately before this motion is moved, be amended as follows:

1. **Subsection 31 (1) of the English version of the By-Law is amended by deleting “ ‘injured workers’ group’ means a not-for-profit organization that is funded by the Workplace Safety and Insurance Board to provide specified legal services to workers;”.**
2. **Subsection 31 (1) of the French version of the By-Law is amended by deleting “ ‘groupe de travailleurs blessés’ S’entend d’un organisme à but non lucratif financé par la Commission de la sécurité professionnelle et de l’assurance contre les accidents du travail pour fournir des services juridiques précis aux travailleurs. ”**
3. **The By-Law is further amended by revoking subsection 31 (4).**



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Tab 2.2

Paralegal Standing Committee

Amendments to the Conflict of Interest Rules – Pro Bono and Other Short-Term Legal Services

February 27, 2020

Committee Members:

Robert Burd (Chair)
Megan Shortreed (Vice-Chair)
Joseph Chiumminto
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Motion

That Convocation approve the amendments to Rule 3.04(18)-(22) of the *Paralegal Rules of Conduct* that are attached at [Tabs 2.2.1 \(English\)](#), [2.2.2 \(English, redlined\)](#), [2.2.3 \(French\)](#), and [2.2.4 \(French, redlined\)](#) of this report, updating the rules regarding conflicts of interest in the provision of *pro bono* and other short-term legal services.

Executive Summary

Since 2010, both the *Rules of Professional Conduct* (the “Lawyer Rules”) and the *Paralegal Rules of Conduct* (the “Paralegal Rules”) have included rules regarding conflicts of interest in the provision of *pro bono* and other short-term legal services (the “Short-term Rules”). The Short-term Rules provide a modified standard for screening and addressing conflicts of interest in circumstances where legal services are being provided through certain non-profit organizations on a short-term basis, and where adherence to standard conflicts screening requirements could impede access to justice for vulnerable people.

In October 2019, Convocation approved amendments to the Short-term Rules within the Lawyer Rules. These amendments addressed a request initiated by Legal Aid Ontario (“LAO”) to apply the Short-term Rules more flexibly and inclusively, specifically in similar circumstances to those that were already permitted. This motion now asks Convocation to approve analogous amendments in the Paralegal Rules, so as to once again harmonize the two sets of Short-term Rules. The rationales for making these amendments to the Paralegal Rules are the same as they were for the Lawyer Rules.

Subject to Convocation’s approval of this motion, the Paralegal Standing Committee (“PSC”) has also approved in principle amendments to the *Paralegal Professional Conduct Guidelines* (the “Paralegal Guidelines”) that would provide paralegals with interpretive assistance around the Short-term Rules.

Background

A. Context

In 2010, Convocation approved rules regarding conflicts of interest in the provision of *pro bono* and other short-term legal services (the “Short-term Rules”) in both the Lawyer Rules and the Paralegal Rules. The Short-term Rules provide a modified standard for screening and addressing conflicts of interest in circumstances where legal services are being provided through certain non-profit organizations on a short-term basis, and where adherence to standard conflicts screening requirements could impede access to justice for vulnerable people.

The Short-term Rules were developed in consultation with Pro Bono Law Ontario (now “PBO”). Short-term legal services, such as duty counsel or summary advice services, are usually provided in circumstances in which it is difficult to systematically screen for conflicts of interest. Adherence to standard conflicts screening requirements could result in delays or the outright denial of services.

The Short-term Rules attempt to address this problem by permitting licensees to provide short-term legal services in certain circumstances without having to take steps to determine whether conflicts of interest arise. They also provide steps that must be taken where a licensee becomes aware of a conflict of interest involving duties owed to current or former clients. The Short-term Rules serve to promote access to justice for vulnerable members of the public. PBO submits that these rules have been a “resounding success” and that the public has “benefitted enormously.”

B. LAO Request and Other Stakeholder Feedback

More recently, LAO requested that the modified conflict of interest standards in the Short-term Rules be extended to LAO lawyers who provide short-term legal services. Although many LAO lawyers provide short-term legal services in almost identical circumstances to the lawyers who volunteer for PBO, these LAO lawyers did not fall within the existing Short-term Rules because they are remunerated and do not provide the legal services under the auspices of a Pro Bono Ontario program.

According to LAO, conflicts are a regular occurrence in summary advice lawyer and duty counsel offices across the province, and clients had been denied service due to a conflict issue two or three times in a typical week. Often, the underlying conflict is the result of another brief service that occurred years prior with a client that the lawyer no longer recalls. LAO submitted that the conflict of interest rules impeded access to justice for low-income Ontarians in these circumstances, and also imposed delays and burdens on courts when clients were denied services due to a conflict.

In 2019, having considered LAO’s request and approved amendments in principle, the Professional Regulation Committee (“PRC”) sought comment from stakeholders about the Short-term Rules and the possible extension of them to other not-for-profit legal services providers. Most participants supported extending the modified conflict standard to LAO lawyers who provide short-term legal services, and most also supported extending it to similarly situated organizations. One individual recommended mirroring any lawyer-related amendments for paralegals as well, because some organizations that provide short-term legal services also employ paralegals. Finally, some stakeholders also raised concerns that including LAO’s remunerated lawyers within the existing definition of a “*pro bono* lawyer” risked diluting the understanding of *pro bono* work as unpaid volunteer work.



C. Convocation Decision Regarding the Lawyer Rules

In October 2019, after careful consideration of LAO's request and the additional stakeholder feedback, PRC recommended the amendments to the Short-term Rules within the Lawyer Rules that were approved by Convocation. A copy of the October 2019 report to Convocation is attached at [Tab 2.2.5](#).

At that time, PRC also recommended that PSC consider whether the Short-term Rules within the Paralegal Rules should also be amended in the same fashion as the Lawyer Rules.

There were four key overarching amendments to the Lawyer Rules as approved by Convocation.

First, the modified conflict of interest standard in Rules 3.4-16.2 to 3.4-16.6 of the Lawyer Rules now applies to LAO lawyers providing short-term legal services. These lawyers are similarly situated to the *pro bono* licensees to whom the Short-term Rules already applied. This modification has allowed lawyers to provide short-term legal services under the auspices of an LAO program or clinic without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer's firm or of the short-term provider.

Second, this modified conflict of interest standard now also applies to lawyers who provide short-term legal services through a clinical education course or program. During the consultation, a clinical education program at the University of Ottawa requested that the Short-term Rules apply to its volunteer and co-teaching lawyers, who assign tasks to law students and assume responsibility for supervising those tasks, including responsibility for ensuring that professional obligations associated with conflicts of interest are met. PRC found that this amendment would be appropriate both in this specific clinic's circumstance and generally for similar clinical education courses or programs.

Third, the terminology used in the Short-term Rules has been changed to make clear that they apply to both *pro bono* and remunerated lawyers who are providing short-term legal services. Several stakeholders supported clarifying the distinction between *pro bono* work – which is performed without the expectation of payment – and other not-for-profit work in which licensees are remunerated for their services.

Fourth, lawyers in private practice who provide short-term legal services under the auspices of a short-term provider have been advised that it is a best practice to screen for conflicts involving their private clients, by way of a new Commentary paragraph added to the Short-term Rules in the Lawyer Rules.



Analysis

A. Rationales for Harmonization of the Paralegal Rules

Further to its October 2019 decision regarding the Lawyer Rules, Convocation is asked to make equivalent amendments to the Paralegal Rules so that they remain harmonized in this area.

Currently, the Paralegal Rules contain a modified conflict of interest standard for pro bono and other short-term legal services that is equivalent to the Lawyer Rules prior to October 2019. The only amendments needed for the Paralegal Rules are the same ones that were made to the Lawyer Rules in October 2019. Without these amendments, the two regimes would be out of sync.

The rationales for making these amendments to the Paralegal Rules are the same as they were for the Lawyer Rules. There are paralegals who currently provide short-term legal services in the circumstances captured by the Short-term Rules, and there are no unique aspects of lawyer or paralegal work in this area that would support maintaining different professional obligations. Continued harmonization of the two sets of Rules in this area, besides being consistent with the Law Society's longstanding commitment to move towards harmonization wherever appropriate, will also allow paralegals to continue to adapt to changing industry circumstances and to take up emerging opportunities to provide services to low-income clients through the kinds of organizations captured by the Short-term Rules.

B. Paralegal Professional Conduct Guidelines

The October 2019 amendments to the Lawyer Rules included a new Commentary paragraph regarding the importance of conflicts-checking systems and minimizing conflict risks. The Lawyer Rules now contain a total of nine Commentary paragraphs related to the Short-term Rules.

The Paralegal Guidelines are intended to assist paralegals with the interpretation and application of the Paralegal Rules. They perform a similar function to Commentary in the Lawyer Rules, and because the Paralegal Rules do not include any Commentary paragraphs, changes to Commentary in the Lawyer Rules are typically mirrored by changes to the Paralegal Guidelines in situations like this one, where identical rules apply to both professions.

With respect to the Short-term Rules, although the rules themselves have been harmonized as between lawyers and paralegals up until October 2019, the Paralegal Guidelines have not contained any guidance about them. The information that is provided in the nine Commentary paragraphs within the Lawyer Rules is not currently provided to paralegals in any format. Paralegals would benefit from the same interpretive guidance to the Short-term Rules that lawyers currently receive.



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Amendments to the Conflict of Interest Rules – Pro Bono and Other Short-Term Legal Services

To address this issue, PSC has approved in principle importing those nine Commentary paragraphs (with necessary terminology changes) to the Paralegal Guidelines, as indicated in the amendments attached at [Tab 2.2.6 \(English\)](#) and [Tab 2.2.7 \(French\)](#). PSC's approval in principle is subject to Convocation's approval of the motion within this report, and will become effective at the same time as that approval.

Implementation

If approved by Convocation, the amendments detailed in this report would be adopted into the *Paralegal Rules of Conduct*. The amendments approved in principle by PSC would also be adopted into the *Paralegal Professional Conduct Guidelines*.

Tab 2.2.1

Pro Bono and Other Short-term Legal Services

3.04 (18) In this rule,

"short-term client" means a client to whom a paralegal provides short-term legal services;

"paralegal's firm" means the paralegal firm at which the paralegal provides legal services as a partner, associate, employee, or otherwise;

"short-term provider" means a *pro bono* or not-for-profit legal service provider that makes paralegals available to provide advice or representation to clients;

"paralegal" means (i) a volunteer paralegal who provides short-term legal services to clients under the auspices of a short-term provider; (ii) a paralegal providing services under the auspices of a Pro Bono Ontario program; (iii) a paralegal providing short-term legal services under the auspices of a Legal Aid Ontario program or clinic; or (iv) a paralegal providing short-term legal services under the auspices of a clinical education course or program;

"clinical education course or program" means a course, program, placement or partnership that is organized or accepted by an Ontario law school and that provides Ontario law students with an opportunity to gain practical and applied legal experience;

"short-term legal services" means short-term legal services or representation to a short-term client under the auspices of a short-term provider with the expectation by the paralegal and the client that the paralegal will not provide continuing legal services or representation in the matter.

(19) A paralegal may provide short-term legal services without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the paralegal's firm or of the short-term provider;

(20) A paralegal shall take reasonable measures to ensure that no disclosure of the short-term client's confidential information is made to another paralegal in the paralegal's firm;

(21) A paralegal shall not provide or shall cease providing short-term legal services to a short-term client where the paralegal knows or becomes aware of a conflict of interest;

(22) A paralegal who is unable to provide short-term legal services to a client because there is a conflict of interest shall cease to provide such services as soon as the paralegal actually becomes aware of the conflict of interest and the paralegal shall not seek the short-term client's waiver of the conflict.

Pro Bono and Other Short-term Legal Services

3.04 (18) In this rule,

"short-term client" means a client to whom a paralegal provides short-term legal services;

"paralegal's firm" means the paralegal firm at which the ~~pro bono~~-paralegal provides legal services as a partner, associate, employee, or otherwise;

"~~pro bono~~short-term provider" means a *pro bono* or not-for-profit legal service provider that makes ~~pro bono~~-paralegals available to provide advice or representation to clients;

"~~pro bono~~-paralegal" means (i) a volunteer paralegal who provides short-term ~~pro bono~~legal services to clients under the auspices of a ~~pro bono~~short-term provider; ~~or~~ (ii) a paralegal providing services under the auspices of a Pro Bono Ontario program; ~~(iii) a paralegal providing short-term legal services under the auspices of a Legal Aid Ontario program or clinic; or (iv) a paralegal providing short-term legal services under the auspices of a clinical education course or program;~~

"clinical education course or program" means a course, program, placement or partnership that is organized or accepted by an Ontario law school and that provides Ontario law students with an opportunity to gain practical and applied legal experience;

"short-term ~~pro bono~~legal services" means ~~pro bono~~short-term legal services or representation to a short-term client under the auspices of a ~~pro bono~~short-term provider with the expectation by the ~~pro bono~~-paralegal and the client that the ~~pro bono~~-paralegal will not provide continuing legal services or representation in the matter.

(19) A ~~pro bono~~-paralegal may provide short-term ~~pro bono~~legal services without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the paralegal's firm or of the ~~pro bono~~short-term provider;

(20) A ~~pro bono~~-paralegal shall take reasonable measures to ensure that no disclosure of the short-term client's confidential information is made to another paralegal in the paralegal's firm;

(21) A ~~pro bono~~-paralegal shall not provide or shall cease providing short-term ~~pro bono~~legal services to a short-term client where the ~~pro bono~~-paralegal knows or becomes aware of a conflict of interest;

(22) A ~~pro bono~~-paralegal who is unable to provide short-term ~~pro bono~~legal services to a client because there is a conflict of interest shall cease to provide such services as soon as the paralegal actually becomes aware of the conflict of interest and the paralegal shall not seek the ~~pro bono~~short-term client's waiver of the conflict.

Tab 2.2.3

Services juridiques pro bono et autres services juridiques de courte durée

3.04 (18) Les définitions qui suivent s'appliquent à la présente règle :

« cabinet de parajuriste » s'entend d'un cabinet parajuridique où le parajuriste offre des services juridiques comme associé, professionnel salarié, employé ou autre ; (« *paralegal's firm* »)

« client de courte durée » Client auquel un parajuriste fournit des services juridiques de courte durée ; (« *short-term client* »)

« cours ou programme de formation pratique » S'entend d'un cours, d'un programme, d'un stage ou d'un partenariat organisé ou accepté par une faculté de droit de l'Ontario et qui fournit aux étudiants en droit de l'Ontario des occasions d'acquérir une expérience juridique pratique et appliquée ; (« *clinical education course or program* »)

« fournisseur de courte durée » S'entend d'un fournisseur de services juridiques pro bono ou sans but lucratif qui met des parajuristes à la disposition de clients pour leur donner des conseils ou les représenter ; (« *short-term provider* ») ;

« parajuriste » S'entend (i) d'un parajuriste bénévole qui fournit des services juridiques de courte durée aux clients sous les auspices d'un fournisseur de courte durée ; (ii) d'un parajuriste qui fournit des services sous les auspices d'un programme des services juridiques pro bono de l'Ontario ; (iii) d'un parajuriste qui fournit des services juridiques de courte durée sous les auspices d'un programme ou d'une clinique d'Aide juridique Ontario ; ou (iv) d'un parajuriste qui fournit des services juridiques de courte durée sous les auspices d'un cours ou d'un programme de formation pratique ; (« *paralegal* »)

« services juridiques de courte durée » Services juridiques ou représentation de courte durée fournis à un client sous les auspices d'un fournisseur de courte durée, étant entendu, tant par le parajuriste que par le client, que le parajuriste ne fournira pas de services juridiques ou de représentation de façon permanente dans l'affaire en cause. (« *short-term legal services* »).

(19) Un parajuriste peut fournir des services juridiques de courte durée sans prendre de mesures pour déterminer si un conflit d'intérêts découle des devoirs envers des clients actuels ou anciens du cabinet du parajuriste ou du fournisseur de courte durée.

(20) Un parajuriste prend des mesures raisonnables pour s'assurer qu'aucun renseignement confidentiel du client de courte durée n'est divulgué à un autre parajuriste dans le cabinet.

(21) Un parajuriste ne fournit pas de services juridiques de courte durée à un client de courte durée, ou cesse d'en fournir, s'il sait ou se rend compte qu'il y a un conflit d'intérêts ;

(22) Un parajuriste qui ne peut pas fournir de services juridiques de courte durée à un client en raison d'un conflit d'intérêts cesse de fournir ces services dès qu'il se rend compte du conflit d'intérêts, et le parajuriste ne sollicite pas la renonciation du conflit par le client de courte durée.

Tab 2.2.4

Services juridiques pro bono et autres services juridiques de courte durée ~~Services juridiques pro bono à court terme~~

3.04 (18) Les définitions qui suivent s'appliquent à la présente règle :

« cabinet de parajuriste » S'entend d'un cabinet parajuridique où le parajuriste offre des services juridiques ~~pro bono~~ comme associé, professionnel salarié, employé ou autre ; (« *paralegal's firm* »)

« client de courte durée » Client auquel un parajuriste fournit des services juridiques de courte durée ; (« *short-term client* »)

« cours ou programme de formation pratique » S'entend d'un cours, d'un programme, d'un stage ou d'un partenariat organisé ou accepté par une faculté de droit de l'Ontario et qui fournit aux étudiants en droit de l'Ontario des occasions d'acquérir une expérience juridique pratique et appliquée ; (« *clinical education course or program* »)

« fournisseur de courte durée~~pro bono~~ » S'entend d'un fournisseur de services juridiques pro bono ou sans but lucratif qui met des parajuristes ~~pro bono~~ à la disposition de clients pour leur donner des conseils ou les représenter ; (« *pro-short-term bono-provider* »)

« ~~pro bono~~parajuriste » S'entend (i) d'un parajuriste bénévole qui fournit des services juridiques pro bono de courte durée à court terme aux clients sous les auspices d'un fournisseur ~~pro bono~~de courte durée ; ou (ii) d'un parajuriste qui fournit des services sous les auspices d'un programme des services juridiques pro bono de l'Ontario ; (iii) d'un parajuriste qui fournit des services juridiques de courte durée sous les auspices d'un programme ou d'une clinique d'Aide juridique Ontario ; ou (iv) d'un parajuriste qui fournit des services juridiques de courte durée sous les auspices d'un cours ou d'un programme de formation pratique « ~~pro bono~~*paralegal* »)

« services juridiques pro bono à court termede courte durée » Services juridiques ou de représentation ~~pro bono de courte durée~~ fournis à un client sous les auspices d'un fournisseur de courte durée~~pro bono~~, étant entendu, tant par le parajuriste que par le client, que le parajuriste ne fournira pas de services juridiques ou de représentation de façon permanente dans l'affaire en cause. (« *short-term pro bono-legal services* »).

(19) Un parajuriste ~~pro bono~~ peut fournir des services juridiques de courte durée ~~pro bono à court terme~~ sans prendre de mesures pour déterminer si un conflit d'intérêts découle des devoirs envers des clients actuels ou anciens du cabinet du parajuriste ou du fournisseur de courte durée~~pro bono~~ ;

(20) Un parajuriste ~~pro bono~~ prend des mesures raisonnables pour s'assurer qu'aucun renseignement confidentiel du client de courte durée n'est divulgué à un autre parajuriste dans le cabinet ;

(21) Un parajuriste ~~pro bono~~ ne fournit pas de services juridiques de courte durée ~~pro bono à court terme~~ à un client de courte durée, ou cesse d'en fournir, s'il sait ou se rend compte qu'il y a un conflit d'intérêts ;

(22) Un parajuriste ~~pro-bono~~ qui ne peut pas fournir de services juridiques de courte durée pro-bono à court terme à un client en raison de d'un conflit d'intérêts cesse de fournir ces services dès qu'il se rend compte du conflit d'intérêts, et le parajuriste ne sollicite pas la renonciation du conflit par le client de courte durée pro-bono.



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Tab 4.2

Professional Regulation Committee

Amendments to the Conflict of Interest Rules – Pro Bono and Other Short-term Legal Services

October 24, 2019

Committee Members:

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Motion

That Convocation approve the amendments to Rules 3.4-16 – 3.4-16.6 at Tabs 4.2.1 (English), 4.2.2 (English, redlined), 4.2.3 (French) and 4.2.4 (French, redlined), as detailed in this report and summarized as follows:

1. That the current title for Rules 3.4-16.2 – 3.4-16.6, Short-term *Pro Bono* Legal Services, be amended to “Pro Bono and Other Short-term Legal Services”;
2. That in Rules 3.4-16.2 – 3.4-16.6:
 - a. the phrase “*pro bono* client” be replaced with “short-term client”;
 - b. the phrase “*pro bono* provider” be replaced with “short-term provider”;
 - and
 - c. the phrase “short-term *pro bono* services” be replaced with “short-term legal services”;
3. That the definition of “*pro bono* lawyer” be amended to define “lawyer” so that the Short-term Rules are applicable to:
 - a. A volunteer lawyer who provides short-term legal services to clients under the auspices of a short-term legal services provider;
 - b. A lawyer providing short-term legal services under the auspices of a Pro Bono Ontario program;
 - c. A lawyer providing short-term legal services under the auspices of a Legal Aid Ontario program or clinic; or
 - d. A lawyer providing short-term legal services under the auspices of a clinical education course or program.
4. That the definition of “clinical education course or program” in By-Law 7.1 be added to Rule 3.4-16.2 to clarify the application of the proposed amendment above.
5. That the Commentary to the Short-term Rules be amended to include the following:

[6] Information obtained by a lawyer representing short-term clients may result in a conflict for the lawyer with an existing client that could require the lawyer to cease representation of that existing client. This risk can be minimized by the establishment of a system to search for conflicts of interest of the lawyer’s law firm prior to representing short-term clients.

Executive Summary

In January, 2010, after discussions with what was then Pro Bono Law Ontario (now Pro Bono Ontario) Convocation enacted Rules 3.4-16.2 – 3.4-16.6, the *Short-term Pro Bono Rules* (the “Short-term Rules”).

Rules 3.4-16.2 – 3.4-16.6 apply to two groups:

- i. lawyers who provide short-term legal services under the auspices of a Pro Bono Ontario program; or
- ii. lawyers who provide short-term legal services as a volunteer under the auspices of a *pro bono* or not-for-profit legal services provider.

Under the Short-term Rules, short-term legal services, such as duty counsel or summary advice services, are defined as including legal advice or representation with the expectation by both the lawyer and the client that the lawyer will not provide continuing legal advice or representation in the matter.

Lawyers in circumstances to which these rules apply may provide short-term legal services without taking steps to determine whether a conflict of interest arises from duties owed to clients or former clients of the lawyer’s firm or of the *pro bono* provider. If the lawyer knows or becomes aware of a conflict of interest, the Short-term Rules require that the lawyer cease providing services and may not seek the client’s waiver of the conflict.

As noted in the Commentary to the rules, short-term legal services, such as duty counsel services, are usually provided in circumstances in which it is difficult to systematically screen for conflicts of interest, which may result in delays or the outright denial of services. These rules attempt to remedy this problem and serve to promote access to justice for vulnerable members of the public.

According to Pro Bono Ontario, the rules have been a “resounding success” and the public has “benefitted enormously”.¹

Legal Aid Ontario (“LAO”) has now requested that the modified conflict of interest standard in rules 3.4-16.2 – 3.4-16.6 be extended to LAO lawyers who provide short-term legal services, such as duty counsel and summary advice lawyers.

¹ See Pro Bono Ontario’s Submissions in response to the Law Society’s Call for Comment, which are available in the Professional Regulation Committee’s materials, “Responses to the Short-term Call for Comment”.

Although many LAO lawyers provide short-term services in almost identical circumstances to the lawyers to whom the Short-term Rules apply, the modified conflict of interest standard is not applicable to LAO's lawyers, since they are remunerated and are not providing legal services under the auspices of a Pro Bono Ontario program.

At its meeting in October 2019, the Professional Regulation Committee considered LAO's request as well as the feedback received in response to a Call for Comment. The Committee now recommends that Convocation approve amendments to the Short-term Rules to extend the modified conflict standard to LAO's lawyers who provide short-term legal services.

In particular, Convocation is asked to approve the amendments to Rules 3.4-16.2 – 3.4-16.6, detailed in Tabs 4.2.1 – 4.2.4, which:

1. Extend the modified conflict standard to LAO lawyers who provide short-term legal services through LAO and to lawyers who provide short-term legal services under the auspices of a clinical education course or program; and
2. Enhance the Commentary by reminding lawyers in the private bar that, when providing such short-term legal services, it remains a best practice to screen for conflicts of interest with their private clients.

Background

A. Context

Between November 2017 and October 2018, the LSO and LAO engaged in discussions about a request from LAO to exempt their lawyers from the conflict of interest rules, where those lawyers provide short-term legal services, such as duty counsel or summary advice. Discussions focused on the Short-term Rules, which are not applicable to LAO lawyers who are paid and are not providing legal services under a Pro Bono Ontario program.

B. LAO's Rationale for the Request

According to LAO, the Rules that address conflicts of interest impede access to justice for low-income Ontarians. LAO does not maintain statistics that detail the instances in which conflict issues have resulted in the denial of services. However, LAO's anecdotal evidence suggests that conflicts are a regular occurrence in advice lawyer and duty counsel offices across the province, and clients are denied service due to a conflict issue two or three times in a typical week. Often the underlying conflict is the result of another brief service that occurred years prior with a client that the lawyer no longer recalls.

LAO also indicates that clients will often receive brief service advice from multiple lawyers over the course of several visits spaced over days, weeks, or even months. Often this may simply be the result of circumstance. However, LAO speculates that some clients may deliberately use such visits to disqualify all available lawyers so as to disadvantage the opposing party.

LAO also contends that conflict issues cause court delays and create a burden for court staff and judges. According to LAO, where clients are denied services due to a conflict, judges and court staff are left to manage frustrated unrepresented clients who lack the experience to engage with the court system effectively.

C. Previous Decision

After considering LAO's request, this Committee approved amendments in principle to the Short-time Rules to:

1. Extend the modified conflict of interest standard to lawyers who provide short-term legal services while employed by LAO or through a LAO program or clinic; and
2. To include Commentary to highlight the obligation of LAO's *per diem* lawyers that they continue to conduct conflict screening with respect to their private, non-LAO clients.

In addition, the Committee decided to initiate a Call for Comment about these proposed changes and to specifically ask for requests from other legal services providers who want to be included in the exemption. Members of the professions and the public were asked to provide any input by May 31, 2019.

Analysis

A. Recommendations and Rationale

Based on previous discussions as well as the feedback received in the Call for Comment, a majority of the Committee recommends that Convocation approve amendments to the Short-term Rules according to the following principles:

1. The modified conflicts of interest standard in Rules 3.4-16.2 - 3.4-16.6 should apply to LAO lawyers

As detailed above, lawyer's providing short-term legal services under the auspices of a LAO program or clinic are similarly situated to the *pro bono* lawyers to whom these rules already apply. PBO has advised that these rules have enabled it to provide short-term legal services more efficiently and have expanded the number of clients to whom

their lawyers can provide short-term legal services. LAO has similarly advised that it expects that these changes will have similar impacts, expanding the pool of eligible clients and reducing burdens on court staff and the justice system.

In addition, the feedback received in response to the Law Society's Call for Comment overwhelmingly supported extending the modified conflict standard to LAO lawyers who provide short-term legal services.

2. The modified conflict of interest standard in Rules 3.4-16.2 – 3.4-16.6 should apply to lawyers who provide short-term legal services through a clinical education course or program.

A submission from a clinical education program at the University of Ottawa asked that the Short-term Rules explicitly apply to volunteer and co-teaching lawyers. The Committee recommends that this amendment be adopted as it appears to address both the specific need identified by this particular clinic, as well as a possible access to justice impediment at that clinic or other similar clinical education courses or programs.

Students at these clinics, and at other short-term providers, would be assigned tasks by their supervising lawyers in accordance with section 2.1 of By-law 7.1 and Rule 6.1-1 of the *Rules of Professional Conduct*. Under the By-Law and the *Rules*, the supervising lawyers are required to assume responsibility for their own practices, including obligations with respect to conflicts of interest.

3. The terminology used in Rules 3.4-16.2 – 3.4-16.6 should be changed so that the Short-term Rules are applicable to both *pro bono* and remunerated lawyers.

Some of the organizations responding to the Call for Comment expressed concerns about including LAO's remunerated lawyers under the definition of "*pro bono* lawyer". According to those respondents, *pro bono* denotes legal work that is performed without the expectation of payment and should not be used to refer to lawyers who are paid for their services.

4. Lawyers in private practice who provide short-term legal services under the auspices of a short-term provider should be advised that it is a best practice to screen for conflicts involving their private clients.

A lawyer who inadvertently receives information that results in a conflict of interest with respect to an existing client could be disqualified from representing that existing client. Therefore, LAO's policy appears to be a best practice for any lawyer who provides short-term legal services under the auspices of a pro bono or not-for-profit legal services provider, while maintaining their own private practice.

In order to implement these principles, Convocation is asked to approve the following amendments:

1. The current title for Rules 3.4-16.2 – 3.4-16.6, Short-term *Pro Bono* Legal Services, should be amended to “Pro Bono and Other Short-term Legal Services”;
2. In Rules 3.4-16.2 – 3.4-16.6:
 - a. the phrase “*pro bono* client” should be replaced with “short-term client”;
 - b. the phrase “*pro bono* provider” should be replaced with “short-term provider”;
 - and
 - c. the phrase “short-term *pro bono* services” should be replaced with “short-term legal services”;
3. The definition of “*pro bono* lawyer” should be amended to define “lawyer” so that the Short-term Rules are applicable:
 - a. A volunteer lawyer who provides short-term legal services to clients under the auspices of a short-term legal services provider;
 - b. A lawyer providing short-term legal services under the auspices of a Pro Bono Ontario program;
 - c. A lawyer providing short-term legal services under the auspices of a Legal Aid Ontario program or clinic; or
 - d. A lawyer providing short-term legal services under the auspices of a clinical education course or program.
4. The definition of “clinical education course or program” in By-Law 7.1 should be added to Rule 3.4-16.2 to clarify the application of the proposed amendment above.
5. The Commentary to the Short-term Rules should be amended to include the following:

[6] Information obtained by a lawyer representing short-term clients may result in a conflict for the lawyer with an existing client that could require the lawyer to cease representation of that existing client. This risk can be minimized by the establishment of a system to search for conflicts of interest of the lawyer’s law firm prior to representing short-term clients.

A redlined and clean copy of the proposed amendments in both English and French are attached at Tabs 4.2.1 – 4.2.4.

Implementation

B. Next Steps

If approved by Convocation, the amendments detailed in the report would be adopted into the *Rules of Professional Conduct*.

A copy of this report has been provided to the Paralegal Standing Committee so that it may consider whether the *Paralegal Rules of Conduct* should include rules respecting conflicts of interest and the provision of short-term legal services by paralegals.

PRO BONO AND OTHER SHORT-TERM LEGAL SERVICES

Conflicts of Interest Arising From Pro Bono and Other Short-term Legal Services

Rule Reference: Rule 3.04(18) – (22)

55. Short-term legal services, such as duty counsel programs, are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the short-term provider, the paralegal and the paralegal's firm. Performing a full conflicts screening in circumstances in which short-term legal services are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

56. The limited nature of short-term legal services significantly reduces the risk of conflicts of interest. Accordingly, the paralegal is disqualified from acting for a client receiving short-term legal services only if the paralegal has actual knowledge of a conflict of interest in the same or a related matter. For example, a conflict of interest of which the paralegal has no actual knowledge but which is imputed to the paralegal because of the paralegal's membership in or association or employment with a firm would not preclude the paralegal from representing the client seeking short-term legal services.

57. In the provision of short-term legal services, the paralegal's knowledge about conflicts is based on the paralegal's reasonable recollection and information provided by the client in the ordinary course of the consulting with the short-term provider regarding the short-term legal services.

58. The disqualification of a paralegal participating in a short-term legal services program does not create a conflict for the other paralegals participating in the program, as the conflict is not imputed to them.

59. Confidential information obtained by a paralegal representing a short-term client will not be imputed to the lawyers, paralegals and others at the paralegal's firm. As such, these people may continue to act for another client adverse in interest to the short-term client and may act in future for another client adverse in interest to the short-term client.

60. Information obtained by a paralegal representing short-term clients may result in a conflict for the paralegal with an existing client that could require the paralegal to cease representation of that existing client. This risk can be minimized by the establishment of a system to search for conflicts of interest of the paralegal's firm prior to representing short-term clients.

61. Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the short-term client to other persons at the paralegal's firm. Rule 3.04(20) extends, with necessary modifications, the rules and guidelines about conflicts arising from a paralegal transfer between paralegal firms (rule 3.05) to the situation of a paralegal firm acting against a current client of the firm in providing short-term legal services. Measures that the paralegal providing the short-term legal services should take to ensure the confidentiality the client's information include:

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the short-term client;

(b) identifying relevant files, if any, of the short-term client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

62. Rule 3.04(21) precludes a paralegal from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

63. Rules 3.04(19) and (20) are intended to permit the provision of short-term legal services by a paralegal without the client being considered to be a client of the paralegal's firm for conflicts and other purposes. However, it is open to the paralegal and the short-term client to agree that the resources of the paralegal's firm, including other paralegals, may be accessed for the benefit of the client, in which case the provisions of Rules 3.04(19) and (20) do not apply, the paralegal would be required to clear conflicts, and the short-term client would be considered a client of the paralegal's firm.

Tab 2.2.7

SERVICES JURIDIQUES PRO BONO ET AUTRES SERVICES JURIDIQUES DE COURTE DURÉE**Conflits d'intérêts découlant de services juridiques pro bono et autres services juridiques de courte durée****Règle 3.04 (18) – (22)**

55. Les programmes de services juridiques de courte durée, comme les programmes d'avocats de service, visent habituellement les cas où il est difficile, compte tenu des délais impartis, de vérifier systématiquement les conflits d'intérêts possibles, et ce, en dépit des efforts déployés et des méthodes mises en place par le fournisseur de services de courte durée, le parajuriste et le cabinet du parajuriste. L'examen exhaustif des conflits dans les cas de prestation des services juridiques de courte durée peut être très difficile à mener à bien compte tenu des délais, du volume des services et de la logistique de leur prestation. Le temps nécessaire pour vérifier les conflits possibles risque de priver les personnes admissibles à ces services juridiques de courte durée d'une représentation juridique.

56. La nature restreinte des services juridiques de courte durée réduit de façon marquée le risque que ces services créent des conflits d'intérêts. Ainsi, le parajuriste ne serait inhabile à agir pour le compte du client qui bénéficie de services juridiques de courte durée que s'il a une connaissance réelle de l'existence du conflit d'intérêts. Par exemple, tout conflit d'intérêts dont le parajuriste n'a aucune connaissance réelle, mais qui lui est imputé en raison de sa relation avec le cabinet – en tant que membre, associé ou employé – ne l'empêcherait pas de représenter le client qui a besoin de services juridiques de courte durée.

57. Lors de la prestation de services juridiques de courte durée, la connaissance des conflits par le parajuriste se fonde sur son souvenir raisonnable et sur les renseignements que le client fournit dans le cours normal de la consultation du fournisseur de courte durée à l'égard des services juridiques de courte durée.

58. L'inhabilité à agir qui frappe le parajuriste participant aux services juridiques de courte durée ne crée pas de conflit pour les autres parajuristes participant à ce même programme puisque le conflit ne leur est pas imputé.

59. La confidentialité des renseignements obtenus par le parajuriste qui représente un client de courte durée ne sera pas étendue aux avocats, parajuristes et autres personnes du cabinet du parajuriste. Ces personnes peuvent donc continuer d'agir pour le compte de clients ayant des intérêts opposés à ceux du client de courte durée, et même agir à l'avenir pour le compte d'autres clients qui ont des intérêts opposés à ceux de ce client de courte durée.

60. Les renseignements obtenus par un parajuriste qui représente des clients de courte durée peuvent entraîner un conflit pour l'avocat à l'égard d'un client existant et ce conflit pourrait l'obliger à cesser de représenter ce client existant. Il est possible de réduire au minimum ce risque en établissant un système pour déceler les conflits d'intérêts du cabinet du parajuriste avant de représenter des clients de courte durée.

61. Des mesures d'isolement convenables doivent être prises pour empêcher la divulgation de renseignements confidentiels sur le client de courte durée aux autres personnes du cabinet du

parajuriste. La règle 3.04 (20) étend, avec les adaptations nécessaires, les règles et les lignes directrices visant les conflits découlant d'un changement de cabinet (règle 3.05) au cas du cabinet qui agit contre un de ses clients actuels en fournissant des services juridiques de courte durée. Entre autres mesures que doit prendre le parajuriste qui fournit de tels services, citons :

- a) ne pas participer à la représentation d'un autre client dont les intérêts sont incompatibles avec ceux du client de courte durée ni aux discussions sur cet autre client avec toute autre personne du cabinet ;
- b) repérer les éventuels dossiers pertinents du client de courte durée et en réserver physiquement l'accès aux personnes qui travaillent à l'affaire ou qui doivent y avoir accès pour d'autres raisons précises et approuvées ;
- c) veiller à ce que le cabinet remette à tous les titulaires de permis, aux associés non titulaires de permis, aux professionnels salariés et au personnel une politique écrite qui explique les mesures d'isolement prises.

62. La règle 3.04 (21) interdit au parajuriste d'obtenir une renonciation du client en ce qui a trait aux conflits d'intérêts découlant de la prestation de services juridiques de courte durée.

63. Les dispositions des règles 3.04 (19) et (20) visent à permettre la prestation de services juridiques de courte durée par un parajuriste sans que le client soit considéré comme un client du cabinet du parajuriste aux fins de conflits et autres. Cependant, le parajuriste et le client de courte durée peuvent accepter l'accès possible aux ressources du cabinet du parajuriste, y compris aux autres parajuristes, au bénéfice du client, auquel cas, les dispositions des règles 3.04 (19) et (20) ne s'appliquent pas ; le parajuriste serait obligé de vérifier s'il y a conflit et le client de courte durée serait considéré comme un client du cabinet.