



TAB 3

**Report to Convocation
February 23, 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 and Information

**Prepared by the Policy Secretariat
(Margaret Drent 416 947-7613)**

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COMMITTEE PROCESS

1. The Committee met on November 10, 2016, January 11, 2017, and on February 8. Committee members present on November 10 were Michelle Haigh (Chair), Janis Criger (Vice-Chair), Cathy Corsetti (by telephone), Ross Earnshaw, Marian Lippa (by telephone), Susan McGrath, Barbara Murchie, Jan Richardson (by telephone), Baljit Sikand, and Anne Vespry. Malcolm Mercer also attended the meeting.
2. The following benchers attended the January 11 meeting: Michelle Haigh (Chair), Cathy Corsetti, Ross Earnshaw, Brian Lawrie, Marion Lippa, Susan McGrath, Barbara Murchie, Baljit Sikand (by telephone) and Anne Vespry. Malcolm Mercer also attended the meeting.
3. Committee members present at the February 8 meeting were Michelle Haigh (Chair), Janis Criger (Vice-Chair), Robert Burd, Cathy Corsetti, Ross Earnshaw, Brian Lawrie, Marion Lippa, Susan McGrath, Barbara Murchie, Jan Richardson (by telephone), Baljit Sikand (by telephone), and Anne Vespry. Malcolm Mercer also attended the meeting.
4. Staff in attendance on February 8 were Karen Manarin, Elliot Spears, Jennifer Khor, Juda Strawczynski, and Margaret Drent.

FOR DECISION

**AMENDMENTS TO THE PARALEGAL RULES OF CONDUCT
THREATENING PENAL OR REGULATORY PROCEEDINGS**

Motion

5. That Convocation approve the amendments to the Paralegal Rules of Conduct set out at [Tab 3.1.1](#).

Rationale

6. The proposed amendments, which are incorporated in English and French versions of the rule at [Tab 3.1.2](#), are intended to harmonize the Rules of Professional Conduct and the Paralegal Rules of Conduct in this area. The Paralegal Rules currently provide:

Threatening Criminal Proceedings

3.02(9) A paralegal shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

- (a) To initiate or proceed with a criminal or quasi-criminal charge; or
- (b) To make a complaint to a regulatory authority.

7. Rule 3.02(10) further provides that “subrule(9)(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled”.
8. The current Rule was adopted by Convocation in 2013, together with other amendments to the Paralegal Rules of Conduct to implement the Model Code of Professional Conduct of the Federation of Law Societies of Canada (Model Code). Prior to the coming into force of these amendments in 2014, Rule 4.01(5)(l) of the Paralegal Rules of Conduct provided as follows:

When acting as an advocate, the paralegal shall not attempt 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.

9. Prior to the implementation of the Model Code in Ontario, there was no reference to making a complaint to a regulatory authority in the Rules. The Model Code amendments in this area were intended to reflect the growth of regulatory offences, which are public welfare offences

that that do not necessarily involve a finding of fault, and may include charges or the issuance of an order, such as a clean-up order under environmental legislation.

10. Rule 3.02(10) of the Paralegal Rules mirrors Rule 3.2-5.1 which was drafted by the Professional Regulation Committee to explain the meaning of the phrase “regulatory authority” in Rule 3.2-5 of the lawyers’ Rules. Rule 3.2-5.1 of the Rules of Professional Conduct and Rule 3.02(10) in the Paralegal Rules of Conduct are unique to the Law Society of Upper Canada.

Proposed Amendments

11. The proposed amendments are intended to clarify the scope of the prohibition against threatening criminal proceedings, which has been expanded to include penal or regulatory proceedings. To this end, the Committee recommends the following:
 - (a) an amendment to the title of the Rule (which would now refer to “penal or regulatory proceedings”, rather than criminal proceedings);
 - (b) the replacement of the phrase “criminal or quasi-criminal charge” in Rule 3.02(9) to specifically refer to a charge for an offence under the *Criminal Code* or any other statute of Canada, a statute of a province or territory of Canada, or a municipal by-law;
 - (c) the deletion of Rule 3.02(10), consistent with the proposed changes to the Rules of Professional Conduct.

Tab 3.1.1

Redline Showing Proposed Amendments to the Paralegal Rules of Conduct

Threatening ~~Criminal-Penal or Regulatory~~ Proceedings

3.02(9) A paralegal shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten without reasonable and lawful justification:

(a) to initiate or proceed with a charge for an offence, including an offence under

(i) the *Criminal Code* or any other statute of Canada;

(ii) a statute of a province or territory of Canada; or

(iii) a municipal by-law; ~~criminal or quasi-criminal charge~~; or

(b) to make a complaint to a regulatory authority.

~~(10) — Subrule (9)(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled.~~

Menace d'une poursuite ~~criminelle~~pénale ou réglementaire

3.02 (9) Un parajuriste ne doit pas, dans le but d'obtenir un avantage pour un client, menacer ou conseiller à son client de menacer-, sans justification raisonnable et légale :

a) d'intenter ou de continuer une poursuite-~~criminelle ou quasi criminelle~~ pour une infraction, notamment une infraction :

(i) au Code criminel ou à toute autre loi du Canada ;

(ii) à une loi d'une province ou d'un territoire du Canada ;

(iii) à un règlement municipal ;

b) de déposer une plainte à un organisme de réglementation.

~~(10) Le paragraphe (9) b) ne s'applique pas à une demande présentée de bonne foi à une autorité réglementaire pour un client qui y aurait légitimement droit.~~

Tab 3.1.2

“Clean” Version Showing Proposed Amendments to the Paralegal Rules of Conduct

Threatening Penal or Regulatory Proceedings

3.02(9) A paralegal shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten without reasonable and lawful justification:

- (a) to initiate or proceed with a charge for an offence, including an offence under
 - (i) the *Criminal Code* or any other statute of Canada;
 - (ii) a statute of a province or territory of Canada; or
 - (iii) a municipal by-law; or
- (b) to make a complaint to a regulatory authority.

Menace d'une poursuite pénale ou réglementaire

3.02 (9) Un parajuriste ne doit pas, dans le but d'obtenir un avantage pour un client, menacer ou conseiller à son client de menacer, sans justification raisonnable et légale :

- a) d'intenter ou de continuer une poursuite pour une infraction, notamment une infraction :
 - (i) au *Code criminel* ou à toute autre loi du Canada ;
 - (ii) à une loi d'une province ou d'un territoire du Canada ;
 - (iii) à un règlement municipal ;
- b) de déposer une plainte à un organisme de réglementation.

FOR INFORMATION

PROPOSED AMENDMENTS TO THE PARALEGAL GUIDELINES REGARDING INCRIMINATING PHYSICAL EVIDENCE

Issue

12. This report is being provided to Convocation for its information. The Committee has approved the amendment of the Paralegal Guidelines to address a paralegal's ethical obligations regarding incriminating physical evidence. The Guidelines are intended to be read with Rule 4.02(5.2) (The Paralegal as Advocate) which provides

(5.2) A paralegal shall not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the cause of justice.

13. The amendment referred to above was approved by Convocation in April 2016, and was developed following a similar amendment to the lawyers' Rules incorporating a new rule and commentary in this area. The new Rule was developed by the Standing Committee on the Model Code of the Federation of Law Societies of Canada.
14. Attached as [Tab 3.2.1](#) is document showing the amendments to the Paralegal Guidelines. A "clean" version is attached at [Tab 3.2.2](#).

GUIDELINE 12: ADVOCACY

Redline Showing Proposed Amendments re Incriminating Physical Evidence February 8, 2017

Definitions

Rule Reference: Rule 4

Rule 1.02 definition of “tribunal”

1. An **advocate** is someone who speaks and acts on behalf of others. Rule 4 outlines a paralegal’s duties when appearing as an advocate before a tribunal. Rule 4 applies to all appearances and all proceedings before all tribunals. A **tribunal** can be either an administrative board or a court of law. An **adjudicator** is any person who hears or considers any type of proceeding before a tribunal and renders a decision with respect to that proceeding.

General

Rule Reference: Rule 4

2. The paralegal has a duty to represent his or her client diligently and fearlessly. Generally, the paralegal has no obligation to assist an opposing party, or to advance matters harmful to the client’s case. However, these general principles do not mean that, when acting as advocate for a client before a tribunal, the paralegal can behave as he or she likes or, in some cases, as his or her client may instruct. Rule 4 describes the professional obligations that a paralegal owes to opposing parties, other paralegals and lawyers, the tribunal and the administration of justice. These obligations are paramount, and must be met by the paralegal in each and every tribunal proceeding in which the paralegal acts as advocate for a client.

Candour, Fairness, Courtesy and Respect

Rule Reference: Rule 4.01(1), 4.01(4)(d)

Rule 4.01(5)(o)

Rule 7.01(3)

3. A paralegal should not engage in rude and disruptive behaviour before a tribunal, or uncivil correspondence, language or behaviour towards opposing parties or their advocates.

Malicious Proceedings

Rule Reference: Rule 4.01(5)(a)

TAB 3.2.1

4. A paralegal should not help a client to bring proceedings that have no merit. Claims that have no merit waste the time of the tribunal and its officers, and do not further the cause of justice.

Misleading the Tribunal

Rule Reference: Rule 4.01(5)(c), (d), (f), (i), (j), (k)

5. A paralegal must ensure that neither the paralegal nor his or her client(s) misleads the tribunal. For a tribunal to decide a matter effectively and appropriately, the tribunal must have access to everything that is relevant to the issues to be decided.

Improperly Influencing the Tribunal

Rule Reference: Rule 4.01(5)(e) & (h)

6. For the public to have respect for the administration of justice, tribunals must be fair, objective, independent and neutral. There should be no personal connection between an adjudicator and any of the parties to a proceeding or their advocates.
7. The only appropriate way to influence the tribunal's decision is through open persuasion as an advocate. This is done by making submissions based on legal principles and offering appropriate evidence before the tribunal in the presence of, or on notice to, all parties to the proceeding, or as otherwise permitted or required by the tribunal's rules of procedure. A paralegal should not communicate directly with the adjudicator in the absence of the other parties, unless permitted to do so by the tribunal's rules of procedure.

Dishonest Conduct

Rule Reference: Rule 4.01(5)(b), (c) & (f)

8. Acting with integrity before a tribunal means being honest and acting with high ethical principles.

Admissions by the Client

Rule Reference: Rule 4.01(5)(b), (c) & (f)

9. When defending an accused person, a paralegal's duty is to protect the client from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, a paralegal may properly rely on any evidence or defences, including "technicalities", as long as they are not known to be false or fraudulent.
10. However, admissions made by a client to a paralegal may impose strict limitations on the paralegal's conduct of the client's defence. The client should be made aware of this by the paralegal. Where the client has admitted to the paralegal any or all of the elements of the offence with which the client is charged, a paralegal must not do or say anything before the tribunal, including calling any evidence that would contradict the facts admitted by the client to the paralegal. This would be misleading the court.

TAB 3.2.1

11. Where the client has admitted to the paralegal all the elements of the offence, and the paralegal is convinced that the admissions are true and voluntary, the paralegal may properly take objection to the jurisdiction of the tribunal, or to the form, admissibility or sufficiency of the evidence. The paralegal could not suggest that someone else committed the offence, try to establish an alibi or call any evidence which, by reason of the admissions, the paralegal believes to be false. Admission by the client to the paralegal of all of the elements of the offence with which the paralegal is charged also limits the extent to which the paralegal may attack the evidence for the prosecution. The paralegal may test the evidence given by each witness for the prosecution and may argue that the evidence, as a whole, is not enough to prove the client guilty. The paralegal should go no further than that.

Incriminating Physical Evidence

Rule Reference: 4.01(5.2)

12. A paralegal is not ordinarily required to take or keep possession of incriminating physical evidence or to disclose its existence. Possession of illegal things could constitute an offence. A paralegal should immediately consult an experienced criminal lawyer regarding their professional obligations. The paralegal should carefully consider his or her options, which may include, as soon as reasonably possible:

(a) considering whether to retain independent legal counsel to provide advice about the paralegal's obligations. If retained, the paralegal and independent legal counsel should consider

(i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing paralegal to law enforcement authorities or to the prosecution, and

(ii) whether independent legal counsel should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

(I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or

(II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(d) disclosing the existence of the evidence to the prosecution.

TAB 3.2.1

13. A paralegal should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a paralegal discloses or delivers incriminating physical evidence to law enforcement authorities or to the prosecution, the paralegal has a duty to protect client confidentiality, including the client's identity.

44. 14. A paralegal has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. A paralegal who becomes aware of the existence of incriminating physical evidence or declines to take possession of it should not participate in its concealment, destruction or alteration.

Witnesses

Rule Reference: Rule 4.01(5) (g), (i), (j), (l), (m) & (n)

Rule 4.02

Rule 4.03

Rule 7.01(6)

42. 15. As an advocate, a paralegal may contact all possible witnesses for both sides of a matter (subject to Rule 7.02 regarding communications with a represented person, corporation, or organization), but the paralegal must be fair and honest when dealing with them. This includes the paralegal speaking to the opposing party or co-accused. The paralegal must make it clear to the witness who the paralegal's client(s) is/are and that the paralegal is acting only in the interests of his or her client(s). As part of this disclosure, the paralegal should give the witness his or her name and tell the witness that he or she is a paralegal, the name of the client(s) he or she represents in the matter, and his or her status in the proceeding. A paralegal should make an extra effort to be clear when the witness does not have legal representation. Note that, although a paralegal may ask to speak to a potential witness, the witness does not have to speak to the paralegal.

43. 16. During a hearing, a paralegal's ability to speak with a witness giving testimony is limited. This ensures that the paralegal does not influence the evidence the witness will give. A comment made by the paralegal to the paralegal's own witness during court recess, for example, may result in a breach of the *Rules*. The witness may return to the witness box and, as a result of the communication with the paralegal, offer evidence that is slanted to benefit the paralegal's client. Such evidence is no longer neutral and could mislead the tribunal.

Disclosure of Documents

Rule Reference: Rule 4.01(6)

44. 17. The rules of procedure of the tribunal may require parties to produce documents and information to the tribunal or to the other parties in the matter. Timely, complete and accurate disclosure helps settlement efforts and makes the hearing process more effective and fair.

TAB 3.2.1**Agreement on Guilty Pleas****Rule Reference: Rule 4.01(8) & (9)**

~~15.~~ 18. As an advocate for a person accused in a criminal or quasi-criminal matter, the paralegal should take steps reasonable in the circumstances to satisfy himself or herself that the client's instructions to enter into the agreement on a guilty plea are informed and voluntary. The paralegal should ensure the client's instructions to enter into an agreement on a guilty plea are in writing.

The Paralegal as Witness**Rule Reference: Rule 4.04**

~~16.~~ 19. 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.~~ 20. 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.

~~20.1~~ 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.

~~20.2~~ 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.

Dealing With Unrepresented Persons**Rule Reference: Rule 4.05**

~~18.~~ 21. The paralegal has a special duty when representing a client and an opposing party is not represented by a paralegal or a lawyer.

~~19.~~ 22. To avoid misunderstandings, it will be helpful for the paralegal to confirm in writing the steps he or she takes to fulfill the requirements of Rule 4.05.

Withdrawal and Disclosure Obligations**Rule Reference: Rule 4.01(7)**

TAB 3.2.1

Rule 3.08

| ~~20.~~ 23. If, after explanation and advice from the paralegal, the client persists in instructing the paralegal to engage in or continue a type of conduct prohibited by Rule 4, the paralegal must withdraw from representing the client in the matter. (See Guideline 11: Withdrawal of Representation.)

GUIDELINE 12: ADVOCACY

**“Clean” Version Showing Proposed Amendments re Incriminating Physical Evidence
February 8, 2017**

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Candour, Fairness, Courtesy and Respect

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Malicious Proceedings

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10. However, admissions made by a client to a paralegal may impose strict limitations on the paralegal's conduct of the client's defence. The client should be made aware of this by the paralegal. Where the client has admitted to the paralegal any or all of the elements of the offence with which the client is charged, a paralegal must not do or say anything before the tribunal, including calling any evidence that would contradict the facts admitted by the client to the paralegal. This would be misleading the court.

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Agreement on Guilty Pleas

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18. As an advocate for a person accused in a criminal or quasi-criminal matter, the paralegal should take steps reasonable in the circumstances to satisfy himself or herself that the client's instructions to enter into the agreement on a guilty plea are informed and voluntary. The paralegal should ensure the client's instructions to enter into an agreement on a guilty plea are in writing.

The Paralegal as Witness

Rule Reference: Rule 4.04

19. 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.

20. 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.

20.1 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.

20.2 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.

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Withdrawal and Disclosure Obligations

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