



**TAB 3**

**Report to Convocation  
April 27, 2017**

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**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  
Ekua Quansah 416 947 3425**

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## **COMMITTEE PROCESS**

1. The Committee met on April 5, 2017. Committee members present were: Michelle Haigh (Chair), Janis Criger (Vice-Chair), Robert Burd, Cathy Corsetti, Ross Earnshaw, Brian Lawrie, Marian Lippa, Susan McGrath, Barbara Murchie, Jan Richardson and Baljit Sikand. Bencher Malcolm Mercer also participated. Staff in attendance were: Karen Manarin, Diana Miles, Jim Varro, Margaret Drent, Ekua Quansah and Juda Strawczynski.

## FOR DECISION

PROPOSED AMENDMENTS TO THE *PARALEGAL RULES*  
REGARDING CONFLICTS OF INTEREST

## Motion

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

## Rationale

3. The Committee is proposing amendments to Rule 3.04 on Conflicts of Interest. The proposed amendments are intended to enhance guidance to paralegals on the obtaining of consent from a client where there is a conflict of interest by eliminating the distinction between express and implied consent. These amendments will ensure that the *Paralegal Rules of Conduct* are consistent with the lawyers' *Rules of Professional Conduct*. Convocation approved similar amendments to the lawyer's *Rules* regarding conflicts of interest in February 2016.

## Discussion

4. In February 2016, the Committee requested comment from paralegals on proposed changes to the *Paralegal Rules of Conduct* on a number of topics, including conflicts of interest. The proposed changes to the rules regarding conflicts of interest were developed as a result of changes to the Model Code of Professional Conduct of the Federation of Law Societies of Canada based on the *Canadian National Railway Co. v. McKercher LLP* decision.<sup>1</sup> The Committee is grateful to the respondents to the Call for Input for their interest.
5. The amendments to Rule 3.04 Conflicts of Interest - General can be found at [Tab 3.1.1](#). A clean version of the Rule is shown at [Tab 3.1.2](#). The corresponding Guidelines are provided to Convocation for information at [Tab 3.4](#).

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<sup>1</sup> Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39.

**Proposed Amendments to the *Paralegal Rules of Conduct* regarding conflict of interest –  
Redline version**

**3.04 CONFLICTS OF INTEREST – GENERAL**

**Avoidance of Conflicts of Interest**

3.04(1) A paralegal shall not act or continue to act for a client where there is a conflict of interest, except as permitted under this rule.

(2) A paralegal shall not ~~advise or~~ represent opposing parties in a dispute.

(3) A paralegal shall not represent a client in a matter when there is a conflict of interest unless

(a) there is ~~express or implied~~ consent which must be fully informed and voluntary after disclosure from all affected clients; and

(b) ~~it is reasonable for the paralegal to conclude~~ the paralegal reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

~~(4) — For the purpose of this rule:~~

~~(a) — Express consent must be fully informed and voluntary after disclosure.~~

~~(b) — Consent may be implied and need not be in writing where all of the following apply:~~

~~(i) — the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,~~

~~(ii) — the matters are unrelated,~~

~~(iii) — the paralegal has no relevant confidential information from one client that might reasonably affect the representation of the other client, and~~

~~(iv) — the client has commonly consented to lawyers acting for and against it in unrelated matters.~~

**Proposed Amendments to the *Paralegal Rules of Conduct* regarding conflict of interest –  
Clean version**

**3.04 CONFLICTS OF INTEREST – GENERAL**

**Avoidance of Conflicts of Interest**

3.04(1) A paralegal shall not act or continue to act for a client where there is a conflict of interest, except as permitted under this rule.

(2) A paralegal shall not represent opposing parties in a dispute.

(3) A paralegal shall not represent a client in a matter when there is a conflict of interest unless

(a) there is consent which must be fully informed and voluntary after disclosure from all affected clients; and

(b) the paralegal reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

**FOR DECISION**

**PROPOSED AMENDMENTS TO THE *PARALEGAL RULES*  
REGARDING COMMUNICATING WITH WITNESSES**

**Motion**

6. That Convocation approve the amendments to the *Paralegal Rules of Conduct* set out at [TAB 3.2.1](#).

**Rationale**

7. The Paralegal Standing Committee and the Professional Regulation Committee have been considering a number of proposed amendments to the *Rules* for lawyers and paralegals, arising from the work on the Federation of Law Societies' Standing Committee on the Model Code. The proposed amendments to paralegal Rule 4.02 – Interviewing Witnesses and Rule 4.03 – Witnesses Giving Testimony are prompted by changes to the *Model Code* in this area, which were adopted in March 2016.
8. The proposed changes for the lawyer *Rules* were considered in February 2017 and the proposed changes to the paralegal *Rules* were considered in April 2017. The corresponding changes to the lawyers' *Rules of Professional Conduct* are being recommended to Convocation by the Professional Regulation Committee.
9. This report addresses the paralegal *Rules* only – if the amendments are approved by Convocation, the Committee will then consider whether corresponding changes to the *Paralegal Guidelines* are necessary.

**Discussion**

10. As noted in materials provided by the Federation, the Model Code approach in this area is intended to be principles-based, recognizing that there are a range of practices in different jurisdictions governing communicating with witnesses, and this variation creates a challenge in amending the Code.
11. The Model Code amendments are intended to draw attention to a key principle underlying the Rules – prohibiting coaching of witnesses, and witness tampering.

12. A clean version of the proposed amendments can be found at [Tab 3.2.1](#). A redline version of the Rules showing the proposed changes can be found at [Tab 3.2.2](#). The proposed wording combines the Model Code approach and the Law Society's previous rules.
13. Federation Council approved the deletion of Rule 5.3-1, which is identical to current Paralegal Rule 4.02 and which provides
  - 4.02 (1) Subject to the rules on communication with a represented party at Rule 7.02, a paralegal may seek information from any potential witness, whether under subpoena or not, but shall disclose the paralegal's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.
14. The Committee has noted that the guidance in this Rule has been incorporated into proposed Rules 4.03(1) and Rules 4.03(2). Further guidance can be provided in the Guidelines. As a result, the Committee recommends the corresponding deletion of Rule 4.02 in the *Paralegal Rules of Conduct* to Convocation.
15. Consistent with the approach described above, proposed Rules 4.03(2) and 4.03(3) provide important guidance on key principles, emphasizing that the coaching of witnesses and witness tampering are inconsistent with the regulatory framework. The Committee recommends their adoption by Convocation.



## PROPOSED AMENDMENTS TO THE PARALEGAL RULES ON COMMUNICATING WITH WITNESSES

### 4.02 INTERVIEWING WITNESSES

#### **Interviewing Witnesses**

~~4.02 (1) Subject to the rules on communication with a represented party at Rule 7.02, a paralegal may seek information from any potential witness, whether under subpoena or not, but shall disclose the paralegal's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.~~

~~[Amended—October 2014]~~

### 4.03 COMMUNICATION WITH WITNESSES GIVING ~~TESTIMONY~~EVIDENCE

#### **Communication with Witness Giving Evidence**

~~4.03 (1) A paralegal may seek information from any potential witness, provided that~~

~~(a) before doing so, the paralegal discloses the paralegal's interest in the matter;~~

~~(b) the paralegal does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and~~

~~(c) the paralegal observes Rule 7.02 on communicating with represented parties.~~

#### **Conduct During Witness Preparation and Testimony**

~~(2) A paralegal shall not influence a witness or potential witness to give evidence that is false, misleading or evasive.~~

~~(3) A paralegal involved in a proceeding shall not obstruct an examination or cross-examination.~~

#### **Communication with Witnesses Giving Testimony**

~~4.03 (41)~~ Subject to the direction of the tribunal, a paralegal shall observe the following rules respecting communication with witnesses giving evidence:

(a) During examination-in-chief, the examining paralegal may discuss with the witness any matter that has not been covered in the examination up to that point.

(b) During examination-in-chief by another licensee of a witness who is unsympathetic to the paralegal's cause, the paralegal not conducting the examination-in-chief may discuss the evidence with the witness.

(c) Between completion of examination-in-chief and commencement of cross-examination of the paralegal's own witness, the paralegal ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.

(d) During cross-examination by an opposing licensee, the witness's own representative ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding.

(e) Between completion of cross-examination and commencement of a re-examination, a paralegal who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination.

(f) During cross-examination by the representative of a witness unsympathetic to the cross-examiner's cause, the paralegal may discuss the witness's evidence with the witness.

(g) During cross-examination by the representative of a witness who is sympathetic to that licensee's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness.

(h) During re-examination of a witness called by an opposing licensee, if the witness is sympathetic to the paralegal's cause, the paralegal ought not to discuss the evidence to be given by that witness during re-examination. The paralegal may, however, properly discuss the evidence with a witness who is adverse in interest.

(52) With the consent of the opposing licensee or with leave of the tribunal, a paralegal may enter into discussions with a witness that might otherwise raise a question under this rule as to the propriety of the discussions.

(63) This rule applies, with necessary modifications, to examinations out of court.

## **PROPOSED AMENDMENTS TO THE PARALEGAL RULES ON COMMUNICATING WITH WITNESSES**

### **4.03 COMMUNICATION WITH WITNESSES GIVING EVIDENCE**

#### **Communication with Witness Giving Evidence**

4.03 (1) A paralegal may seek information from any potential witness, provided that

- (a) before doing so, the paralegal discloses the paralegal's interest in the matter;
- (b) the paralegal does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and
- (c) the paralegal observes Rule 7.02 on communicating with represented parties.

#### **Conduct During Witness Preparation and Testimony**

- (2) A paralegal shall not influence a witness or potential witness to give evidence that is false, misleading or evasive.
- (3) A paralegal involved in a proceeding shall not obstruct an examination or cross-examination.

#### **Communication with Witnesses Giving Testimony**

- (4) Subject to the direction of the tribunal, a paralegal shall observe the following rules respecting communication with witnesses giving evidence:
  - (a) During examination-in-chief, the examining paralegal may discuss with the witness any matter that has not been covered in the examination up to that point.
  - (b) During examination-in-chief by another licensee of a witness who is unsympathetic to the paralegal's cause, the paralegal not conducting the examination-in-chief may discuss the evidence with the witness.
  - (c) Between completion of examination-in-chief and commencement of cross-examination of the paralegal's own witness, the paralegal ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.
  - (d) During cross-examination by an opposing licensee, the witness's own representative ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding.
  - (e) Between completion of cross-examination and commencement of a re-examination, a paralegal who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination.
  - (f) During cross-examination by the representative of a witness unsympathetic to the cross-examiner's cause, the paralegal may discuss the witness's evidence with the witness.

(g) During cross-examination by the representative of a witness who is sympathetic to that licensee's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness.

(h) During re-examination of a witness called by an opposing licensee, if the witness is sympathetic to the paralegal's cause, the paralegal ought not to discuss the evidence to be given by that witness during re-examination. The paralegal may, however, properly discuss the evidence with a witness who is adverse in interest.

(5) With the consent of the opposing licensee or with leave of the tribunal, a paralegal may enter into discussions with a witness that might otherwise raise a question under this rule as to the propriety of the discussions.

(6) This rule applies, with necessary modifications, to examinations out of court.

**FOR INFORMATION**

**ELECTION OF THE PARALEGAL STANDING COMMITTEE  
CHAIR**

16. Sections 130.1 to 130.13 of By-law 3 provide for the annual election of the Chair of the Paralegal Standing Committee. The By-Law requires the election of the Chair to be the first item of business at the meeting one year from the last Committee Chair election, or, in a year in which the paralegal members of the Committee are elected, the first meeting of the Committee following that election.
17. Since the last election of the Committee Chair was in April 2016, election of the Chair was required to be the first item of business at the meeting in April 2017.
18. In accordance with section 130.4 of the by-law, the Director, Office of the CEO and Corporate Secretary, Jim Varro, was appointed Elections Officer by the CEO, Robert Lapper. Mr Varro attended the meeting and administered the election.
19. The By-law further requires that the person elected be appointed Chair.
20. Since there was only one nomination for the position, Ms Michelle Haigh, Ms Haigh was declared elected and was appointed Chair of the Committee for a further one year term.

**FOR INFORMATION**

**AMENDMENTS TO THE PARALEGAL GUIDELINES  
REGARDING CONFLICTS OF INTEREST**

21. 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 conflicts of interest. The Guidelines are intended to be read with Rule 3.04 – Conflicts of Interest – General.
22. The amendments to Rule 3.04 are provided at [Tab 3.1](#). The new Rule was developed by the Standing Committee on the Model Code of the Federation of Law Societies of Canada.
23. Attached at [Tab 3.4.1](#) is a document showing the amendments to the Paralegal Guidelines. A clean version is attached at [Tab 3.4.2](#).

## GUIDELINE 9: CONFLICTS OF INTEREST

### GENERAL

#### Definition

#### Examples of Conflicts of Interest

#### Rule Reference: Rule 1.02

1. Conflicts of interest are defined in Rule 1.02.

~~2. Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a paralegal to take particular care to determine whether a conflict of interest exists:~~

~~(a) A paralegal acts as an advocate in one matter against a person when the paralegal represents that person on some other matter.~~

~~(b) A paralegal, an associate, a partner or a family member has a personal financial interest in a client's affairs or in a matter in which the paralegal is requested to act for a client.~~

~~(c) A paralegal has a sexual or close personal relationship with a client.~~

~~(d) A paralegal or the paralegal's firm acts for a public or private corporation and the paralegal serves as a director of the corporation. These two roles may result in a conflict of interest or other problems.~~

### DUTY TO AVOID CONFLICTS OF INTEREST

#### The Duty

#### Rule Reference: Rule 3.04 (1) & (2)

~~3. 2. The duty to avoid conflicts of interest is found in Rule 3.04 (1) and (2).~~

#### To Whom is the Duty Owed – Current Clients and Prospective Clients

#### Rule Reference: Rule 1.02 definition

Rule 3.04(1) ~~& (3), & (4)~~

3. A conflict of interest exists when there is a substantial risk that a paralegal's loyalty to or representation of a client would be materially and adversely affected by the paralegal's own interest or the paralegal's duties to another client, a former client, or a third person. A "substantial risk" is one that is significant and plausible, even if it is not certain or even probable that it will occur. There must be more than a mere possibility that impairment will occur.

3.4. Rule 3.04 protects the duties owed by paralegals to their clients and the paralegal-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the paralegal's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest. A paralegal owes the duty of avoiding conflicts of interest to all clients, including prospective clients. A paralegal should identify potential conflicts of interest at the first contact with a prospective client. A **prospective client** can be described as one who has consulted with a paralegal or paralegal firm to see if the firm will take on his or her matter or to see if he or she would like to hire the paralegal or firm.

4.5. Conflicts of interest may arise at any time. A paralegal should use a conflicts checking system to assist in managing conflicts of interest. The paralegal should examine whether a conflict of interest exists not only at the outset, but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

6. At the time that a paralegal becomes aware of a conflict, or potential conflict, the paralegal should consider whether to accept the retainer, or to continue to act. This applies even where the client consents or where the retainer would not, in the paralegal's opinion, breach the *Rules*. The paralegal should consider the delay, expense and inconvenience that would arise for the client and/or the paralegal, should the paralegal be required to withdraw from the matter at a later stage in the proceedings.

5.7. In addition to the duties of representation arising from a retainer, the law imposes other duties on the paralegal, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. The rule protects all of these duties from impairment by a conflicting duty or interest.

## Examples of Conflicts of Interest

### Rule Reference: Rule 3.04 (1)

8. Examples of conflicts of interest include: personal interest conflicts, current client conflicts, former client conflicts and conflicts arising from duties to other persons.

### Personal Interest Conflicts

9. A paralegal's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a paralegal is asked to represent a client in respect of a matter in which the paralegal, the paralegal's partner or



associate or a family member has a material direct or indirect financial interest. Another example of a personal interest conflict is a close personal relationship, sexual or otherwise, with a client.

### **Current Client Conflicts**

10. Duties owed to another current client may also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict.
11. A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. Subject to certain limited exceptions, the bright line rule holds that a paralegal cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent. Paralegals should assume that matters undertaken against a current client are directly adverse to the immediate legal interests of that current client and that the bright line rule ordinarily applies because of the nature of paralegal practice.

### **Former Client Conflicts**

12. Duties owed to a former client can impair client representation and loyalty.

### **Conflicts Arising From Duties to Other Persons**

13. Duties owed to other persons can impair client representation and loyalty. Paralegals should carefully consider the propriety, and the wisdom, of wearing "more than one hat" at the same time.

### **Other Issues to Consider**

14. A paralegal should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation can give rise to new conflicts of interest that must be addressed.

## **To Whom is the Duty Owed – the Firm's Clients**

### **Rule Reference: Rule 1.02 definition of "client"**

- 7-15. Since every client of a paralegal firm is also the client of every other paralegal employed at the firm, if one paralegal in the firm has a conflict of interest in a matter, then all paralegals in the firm have a conflict in that matter.

As a result, when checking for conflicts, the paralegal should review the names of all current and former clients of the firm and not just the clients personally served by the individual paralegal.

## DEALING WITH A CONFLICT OF INTEREST

### Disclosing All Information

#### Rule Reference: Rule 3.04(3) & ~~(4)~~

16. Disclosure is an essential element to obtaining a client's consent and arises from the duty of candour owed to the client. The client needs to know of anything that may influence the paralegal's judgment or loyalty. Once the paralegal has provided the client with all the details, the paralegal must allow the client time to consider them or to ask for further clarification.

~~8.~~

9-17. There may be situations where it is impossible for a paralegal to give a client or prospective client all necessary information. This may happen when the details about the conflict involve another client or a former client. Since a paralegal cannot reveal confidential information regarding another client, the paralegal may only say that there is a conflict and that he or she cannot continue with or accept the retainer.

### Obtaining Consent

#### Rule Reference: Rule 1.02 definition of "consent"

#### Rule 3.04(3) & ~~(4)~~

6-18. The client may only consent after being given all information required to make an informed decision. This is called ***informed consent***. Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure of the confidentiality of the information of another client, a paralegal should decline to act.

19. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The paralegal should therefore inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the paralegal's relation to the parties and any interest in and connection with the matter.

~~20. Following the required disclosure, the client can decide whether to give consent. Factors to be taken into consideration may include the availability of another paralegal of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another paralegal, and the latter's unfamiliarity with the client and the client's affairs.~~

~~10.13. A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. The bright line rule holds that a paralegal cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent.~~

14.21. A paralegal may be able to request that a client consent in advance to conflicts that might arise in the future. The effectiveness of such consent is generally determined by the extent to which the client understands the material risks involved. A paralegal may wish to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent should be recorded in writing.

~~12. The Rules permit consent to be implied in some circumstances.~~

## Independent Legal Advice/Legal Representation

**Rule Reference: Rules 3.04 (87), 3.06(2)(b) and 3.06(4)(b), 3.06(6)(c)**

7.22. There are situations where the client's informed and written consent is not enough to allow the paralegal to accept or continue with a matter. In some circumstances, the client must receive advice from an independent legal advisor regarding the matter or transaction before the paralegal may take any further steps in the client's matter.

23. An independent legal advisor is another paralegal or lawyer, who can provide the client with **independent legal advice**. This advisor is unrelated to the client's matter, associated parties or the paralegal. He or she is unbiased and objective and does not have a conflict of interest.

15.

8.24. In circumstances where the paralegal is prohibited from acting for a client or prospective client, the paralegal must suggest that the individual obtain his or her own independent legal representation. **Independent legal representation** means that the individual has retained a legal representative, either a paralegal or lawyer, to act as his or her own representative in the matter. This retained

representative is objective and does not have any conflicting interest with regards to the matter.

## **Refusal to Act, Withdrawal of Services**

### **Rule Reference: Rules 3.04(1) and 3.08**

~~46.25.~~ In some cases, the only way to deal with the conflict is to refuse to act. The paralegal may have to decline the retainer at the outset or may have to terminate the retainer and withdraw from representing the client at a later time. A paralegal may need to take this step even where the client wants the paralegal to accept the retainer, or to continue to act.

\*NOTE: References to subsections of Rule 3.04 in the Paralegal Guidelines will have to be adjusted to reflect the new number resulting from the deletion of what is currently subsection 4.\*

## **GUIDELINE 9: CONFLICTS OF INTEREST**

### **GENERAL**

#### **Definition**

#### **Examples of Conflicts of Interest**

#### **Rule Reference: Rule 1.02**

1. Conflicts of interest are defined in Rule 1.02.

### **DUTY TO AVOID CONFLICTS OF INTEREST**

#### **The Duty**

#### **Rule Reference: Rule 3.04 (1) & (2)**

2. The duty to avoid conflicts of interest is found in Rule 3.04 (1) and (2).

#### **To Whom is the Duty Owed – Current Clients and Prospective Clients**

#### **Rule Reference: Rule 1.02 definition**

#### **Rule 3.04(1) & (3)**

3. A conflict of interest exists when there is a substantial risk that a paralegal's loyalty to or representation of a client would be materially and adversely affected by the paralegal's own interest or the paralegal's duties to another client, a former client, or a third person. A "substantial risk" is one that is significant and plausible, even if it is not certain or even probable that it will occur. There must be more than a mere possibility that impairment will occur.
4. Rule 3.04 protects the duties owed by paralegals to their clients and the paralegal-client relationship from impairment as a result of a conflicting duty or interest. A client's interests may be seriously prejudiced unless the paralegal's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest. A paralegal owes the duty of avoiding conflicts of interest to all clients, including prospective clients. A paralegal should identify potential conflicts of interest at the first contact with a prospective client. A ***prospective client*** can be described as one who has consulted with a paralegal

or paralegal firm to see if the firm will take on his or her matter or to see if he or she would like to hire the paralegal or firm.

5. Conflicts of interest may arise at any time. A paralegal should use a conflicts checking system to assist in managing conflicts of interest. The paralegal should examine whether a conflict of interest exists not only at the outset, but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.
6. At the time that a paralegal becomes aware of a conflict, or potential conflict, the paralegal should consider whether to accept the retainer, or to continue to act. This applies even where the client consents or where the retainer would not, in the paralegal's opinion, breach the *Rules*. The paralegal should consider the delay, expense and inconvenience that would arise for the client and/or the paralegal, should the paralegal be required to withdraw from the matter at a later stage in the proceedings.
7. In addition to the duties of representation arising from a retainer, the law imposes other duties on the paralegal, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty. The rule protects all of these duties from impairment by a conflicting duty or interest.

## **Examples of Conflicts of Interest**

### **Rule Reference: Rule 3.04 (1)**

8. Examples of conflicts of interest include: personal interest conflicts, current client conflicts, former client conflicts and conflicts arising from duties to other persons.

### **Personal Interest Conflicts**

9. A paralegal's own interests can impair client representation and loyalty. This can be reasonably obvious, for example, where a paralegal is asked to represent a client in respect of a matter in which the paralegal, the paralegal's partner or associate or a family member has a material direct or indirect financial interest. Another example of a personal interest conflict is a close personal relationship, sexual or otherwise, with a client.

### **Current Client Conflicts**

10. Duties owed to another current client may also impair client representation and loyalty. Representing opposing parties in a dispute provides a particularly stark example of a current client conflict.

11. A bright line rule has been developed by the courts to protect the representation of and loyalty to current clients. Subject to certain limited exceptions, the bright line rule holds that a paralegal cannot act directly adverse to the immediate legal interests of a current client, without the clients' consent. Paralegals should assume that matters undertaken against a current client are directly adverse to the immediate legal interests of that current client and that the bright line rule ordinarily applies because of the nature of paralegal practice.

### **Former Client Conflicts**

12. Duties owed to a former client can impair client representation and loyalty.

### **Conflicts Arising From Duties to Other Persons**

13. Duties owed to other persons can impair client representation and loyalty. Paralegals should carefully consider the propriety, and the wisdom, of wearing "more than one hat" at the same time.

### **Other Issues to Consider**

14. A paralegal should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. For example, the addition of new parties in litigation can give rise to new conflicts of interest that must be addressed.

### **To Whom is the Duty Owed – the Firm's Clients**

#### **Rule Reference: Rule 1.02 definition of "client"**

15. Since every client of a paralegal firm is also the client of every other paralegal employed at the firm, if one paralegal in the firm has a conflict of interest in a matter, then all paralegals in the firm have a conflict in that matter. As a result, when checking for conflicts, the paralegal should review the names of all current and former clients of the firm and not just the clients personally served by the individual paralegal.

## **DEALING WITH A CONFLICT OF INTEREST**

### **Disclosing All Information**

#### **Rule Reference: Rule 3.04(3)**

16. Disclosure is an essential element to obtaining a client's consent and arises from the duty of candour owed to the client. The client needs to know of anything that may influence the paralegal's judgment or loyalty. Once the paralegal has

provided the client with all the details, the paralegal must allow the client time to consider them or to ask for further clarification.

17. There may be situations where it is impossible for a paralegal to give a client or prospective client all necessary information. This may happen when the details about the conflict involve another client or a former client. Since a paralegal cannot reveal confidential information regarding another client, the paralegal may only say that there is a conflict and that he or she cannot continue with or accept the retainer.

## **Obtaining Consent**

### **Rule Reference: Rule 1.02 definition of “consent”**

#### **Rule 3.04(3)**

18. The client may only consent after being given all information required to make an informed decision. This is called ***informed consent***. Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure of the confidentiality of the information of another client, a paralegal should decline to act.
19. Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The paralegal should therefore inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the paralegal's relation to the parties and any interest in and connection with the matter.
20. Following the required disclosure, the client can decide whether to give consent. Factors to be taken into consideration may include the availability of another paralegal of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another paralegal, and the latter's unfamiliarity with the client and the client's affairs.
21. A paralegal may be able to request that a client consent in advance to conflicts that might arise in the future. The effectiveness of such consent is generally determined by the extent to which the client understands the material risks involved. A paralegal may wish to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent should be recorded in writing.



## Independent Legal Advice/Legal Representation

### Rule Reference: Rules 3.04 (7), 3.06(2)(b) and 3.06(4)(b), 3.06(6)(c)

22. There are situations where the client's informed and written consent is not enough to allow the paralegal to accept or continue with a matter. In some circumstances, the client must receive advice from an independent legal advisor regarding the matter or transaction before the paralegal may take any further steps in the client's matter.
23. An independent legal advisor is another paralegal or lawyer, who can provide the client with ***independent legal advice***. This advisor is unrelated to the client's matter, associated parties or the paralegal. He or she is unbiased and objective and does not have a conflict of interest.
24. In circumstances where the paralegal is prohibited from acting for a client or prospective client, the paralegal must suggest that the individual obtain his or her own independent legal representation. ***Independent legal representation*** means that the individual has retained a legal representative, either a paralegal or lawyer, to act as his or her own representative in the matter. This retained representative is objective and does not have any conflicting interest with regards to the matter.

## Refusal to Act, Withdrawal of Services

### Rule Reference: Rules 3.04(1) and 3.08

25. In some cases, the only way to deal with the conflict is to refuse to act. The paralegal may have to decline the retainer at the outset or may have to terminate the retainer and withdraw from representing the client at a later time. A paralegal may need to take this step even where the client wants the paralegal to accept the retainer, or to continue to act.

**\*NOTE: References to subsections of Rule 3.04 in the Paralegal Guidelines will have to be adjusted to reflect the new number resulting from the deletion of what is currently subsection 4.\***

**FOR INFORMATION**

**AMENDMENTS TO THE PARALEGAL GUIDELINES  
REGARDING MAKING LEGAL SERVICES AVAILABLE AND  
MARKETING OF LEGAL SERVICES**

**Issue**

24. This report is being provided to Convocation for its information. At February 2017 Convocation, as part of the advertising and fee issues motion, Convocation approved amendments to the *Paralegal Rules of Conduct*, and requested that the Paralegal Standing Committee amend the related Guidelines. The Committee has approved the amendment of the Paralegal Guidelines to address a paralegal's ethical obligations regarding making legal services available and marketing of legal services. The Guidelines are intended to be read with Rule 8.02 – Making Legal Services Available and Rule 8.03 – Marketing of Legal Services.
25. Attached at [Tab 3.5.1](#) is a document showing the amendments to the Paralegal Guidelines. A clean version is attached at [Tab 3.5.2](#).

## **Redline Showing Amendments to the Paralegal Professional Conduct Guidelines**

# **GUIDELINE 19: MAKING LEGAL SERVICES AVAILABLE AND MARKETING OF LEGAL SERVICES**

## **Making Legal Services Available**

### **Rule References:**

#### **Rule 8.02**

#### **Rule 8.03**

1. Rule 8.02(1) describes the paralegal's obligation to make legal services available and the manner in which he or she must do so. A paralegal has a general right to decline a particular representation (except when assigned as representative by a tribunal), but it is a right that should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the paralegal should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the paralegal's private opinion about the guilt of the accused. A paralegal declining representation should assist in obtaining the services of a lawyer or another licensed paralegal qualified in the particular field and able to act.
2. A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a paralegal. A paralegal is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the paralegal for this purpose, and to offer assistance to a person with whom the paralegal has a close family or professional relationship. Rules 8.02 and 8.03 prohibit the paralegal from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

## **Marketing of Legal Services**

### **Rule References:**

#### **Rule 8.02**

#### **Rule 8.03**

3. In presenting and promoting a paralegal practice, a paralegal must comply with the *Rules* regarding the marketing of legal services.

## Redline Showing Proposed Amendments to the Paralegal Professional Conduct Guidelines

4. Rules 8.02 and 8.03 impose certain restrictions and obligations on a paralegal who wishes to market and/or advertise his or her legal services. The *Rules* help to ensure that a paralegal does not mislead clients or the public while still permitting the paralegal to differentiate himself or herself and his or her services from those of lawyers or other paralegals. A paralegal should ensure that his or her marketing and advertising does not suggest that the paralegal is a lawyer and should take steps to correct any misapprehension on the part of a client or prospective client in that respect.
5. Examples of marketing practices that may contravene Rule 8.03(1) include:
  - (a) ° Stating an amount of money that the paralegal has recovered for a client or refer to the paralegal's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases.
  - (b) ° Suggesting qualitative superiority to lawyers or other paralegals
  - (c) ° Raising expectations ~~unjustifiably~~;
  - (d) ° Suggesting or implying the paralegal is aggressive;
  - (e) ° Disparaging or demeaning other persons, groups, organizations or institutions;
  - (f) ° Using testimonials or endorsements which contain emotional appeals.

~~° Taking advantage of a vulnerable person or group.~~

### 6. Examples of marketing that do contravene Rule 8.03(1) include

- (a) marketing services that the paralegal is not currently able to perform to the standard of a competent paralegal;
- (b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;
- (c) marketing that fails to clearly and prominently disclose a practice that the paralegal has of referring clients for a fee, or other consideration, to other licensees;

## Redline Showing Proposed Amendments to the Paralegal Professional Conduct Guidelines

(d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both as the case may be;

(e) referring to awards, rankings and third party endorsements are not bona fide or are likely to be misleading, confusing, or deceptive; and

(f) taking advantage of a vulnerable person or group.

7. Rule 8.03(2) establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing including advertisements about the size, location and nature of the paralegal's practice and awards and endorsements from third parties.

8. Paragraphs 6(a-d) of these Guidelines are intended to ensure that marketing does not mislead by failing to make clear what services are actually available and are intended to be provided. Paragraph (d) is intended to better ensure that prospective clients are aware whether the marketed services are being offered will be performed by lawyers or paralegals.

9. Paragraph 6(e) of these Guidelines addresses marketing by reference to awards, rankings and third party endorsements. The terms "awards" and "rankings" are intended to be interpreted broadly and to include superlative titles such as "best", "super", "#1" and similar indications. Awards, rankings and third party endorsements which contravene this rule include awards or rankings that:

(a) do not genuinely reflect the performance of the paralegal and the quality of services provided by the paralegal but appear to do so;

(b) are not the result of a reasonable evaluative process;

(c) are conferred in part as a result of the payment of a fee or other consideration rather than as a result of a legitimate evaluation of the performance and quality of the paralegal; or

(d) the paralegal could not have demonstrated, at the time of reference, were compliant with this rule.

10. Particular care should be taken in respect of awards and rankings referenced in mass advertising, such as in newspaper and internet advertising and advertising on television, billboards, taxis, buses and the like. In such contexts, references to awards, rankings and third party endorsements must be particularly clear and straightforward as there is little opportunity for reflection or appreciation on the part of the potential client or to provide context.

## Redline Showing Proposed Amendments to the Paralegal Professional Conduct Guidelines

11. References to awards and honours that are genuine reflections of the professional or civic service do not contravene this rule. For example, a potential client may consider it useful to know that a paralegal has been honoured for their service by the Canadian or the Ontario government, the Law Society or a professional organization. However, the paralegal should take care to ensure that such awards and honours reflect a genuine and responsible assessment in the public interest.

12. Rule 8.03(2) also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of paralegals, the legal professions and the administration of justice. The Law Society has acknowledged in the Rules the special role of the professions to recognize and protect the dignity of individuals and the diversity of the community in Ontario. Marketing practices must conform to the requirements of human rights laws in Ontario.

13. Examples of marketing practices which may be inconsistent with a high degree of professionalism would be images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other licensees, the legal professions or the administration of justice.

14. Rule 8.03(4) and Guideline 6(d) to Rule 8.03(1) foster public awareness that both lawyers and paralegals are licensed by the Law Society, and transparency as to who is offering to provide services.

15. Rule 8.03(5) prohibits the marketing of second opinion services. The provision of second opinions is a valuable service to clients. However, second opinion marketing is commonly with a view to obtaining the retainer, rather than providing a second opinion. Such “bait and switch” marketing is inappropriate. The marketing of second opinions is prohibited under this rule, whatever the intent of the marketing.

## **GUIDELINE 19: MAKING LEGAL SERVICES AVAILABLE AND MARKETING OF LEGAL SERVICES**

### **Making Legal Services Available**

#### **Rule References:**

##### **Rule 8.02**

##### **Rule 8.03**

1. Rule 8.02(1) describes the paralegal's obligation to make legal services available and the manner in which he or she must do so. A paralegal has a general right to decline a particular representation (except when assigned as representative by a tribunal), but it is a right that should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the paralegal should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the paralegal's private opinion about the guilt of the accused. A paralegal declining representation should assist in obtaining the services of a lawyer or another licensed paralegal qualified in the particular field and able to act.
2. A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a paralegal. A paralegal is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the paralegal for this purpose, and to offer assistance to a person with whom the paralegal has a close family or professional relationship. Rules 8.02 and 8.03 prohibit the paralegal from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

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to ensure that a paralegal does not mislead clients or the public while still permitting the paralegal to differentiate himself or herself and his or her services from those of lawyers or other paralegals. A paralegal should ensure that his or her marketing and advertising does not suggest that the paralegal is a lawyer and should take steps to correct any misapprehension on the part of a client or prospective client in that respect.

5. Examples of marketing practices that may contravene Rule 8.03(1) include:

(a) stating an amount of money that the paralegal has recovered for a client or refer to the paralegal's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to lawyers or other paralegals;

(c) raising expectations;

(d) suggesting or implying the paralegal is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) using testimonials or endorsements which contain emotional appeals.

6. Examples of marketing that do contravene Rule 8.03(1) include:

(a) marketing services that the paralegal is not currently able to perform to the standard of a competent paralegal;

(b) bait and switch marketing, that is marketing by which clients are attracted by offers of services, prices or terms different from those commonly provided to clients who respond to the marketing;

(c) marketing that fails to clearly and prominently disclose a practice that the paralegal has of referring clients for a fee, or other consideration, to other licensees;

(d) failing to expressly state that the marketed services will be provided by licensed lawyers, by licensed paralegals or both as the case may be;

(e) referring to awards, rankings and third party endorsements that are not bona fide or are likely to be misleading, confusing, or deceptive.



7. Rule 8.03(2) establishes, among other things, requirements for communication in the marketing of legal services. These requirements apply to different forms of marketing including advertisements about the size, location and nature of the paralegal's practice and awards and endorsements from third parties.
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  - (c) are conferred in part as a result of the payment of a fee or other consideration rather than as a result of a legitimate evaluation of the performance and quality of the paralegal; or
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12. Rule 8.03(2) also requires marketing to be consistent with a high standard of professionalism. Unprofessional marketing is not in the best interests of the public. It has a negative impact on the reputation of paralegals, the legal professions and the administration of justice. The Law Society has acknowledged in the Rules the special role of the professions to recognize and protect the

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