



**TAB 8**

**Report to Convocation  
December 4, 2015**

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**Paralegal Standing Committee**

**Committee Members**  
**Michelle Haigh, Chair**  
**Susan McGrath, Vice-Chair**  
**Marion Boyd**  
**Robert Burd**  
**Cathy Corsetti**  
**Janis Criger**  
**Brian Lawrie**  
**Marian Lippa**  
**Malcolm M. Mercer**  
**Barbara Murchie**  
**Baljit Sikand**  
**Catherine Strosberg**  
**Anne Vespry**

**Purpose of Report: Information**

**Prepared by the Policy Secretariat  
Julia Bass 416 947 5228**

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## COMMITTEE PROCESS

1. The Committee met on November 11<sup>th</sup>, 2015. Committee members present were: Michelle Haigh (Chair), Susan McGrath (Vice-Chair), Marion Boyd, Robert Burd, Cathy Corsetti, Janis Criger, Brian Lawrie, Marian Lippa, Malcolm Mercer, Barbara Murchie, Catherine Strosberg (by telephone) and Anne Vespry. For the discussion of the Tribunal Three Year Review, the Committee was joined by Raj Anand.
2. Staff in attendance were: Lesley Cameron, Naomi Bussin, Sophia Sperdakos and Julia Bass.

FOR INFORMATION

**PARALEGAL GUIDELINES: TRANSFERRING PARALEGAL**

3. In September 2015, Convocation approved amendments to the *Paralegal Rules of Conduct* governing the potential conflicts of interest that may arise when paralegals move from one firm to another. The amended rules approved by Convocation are shown at [TAB 8.1.1](#).
4. The necessary accompanying amendments to the *Paralegal Guidelines* have now been prepared and are shown in redline at [TAB 8.1.2](#) and in clean copy at [TAB 8.1.3](#).
5. The wording of the draft Guidelines has been based on the wording of the Commentary to the Lawyers' rules. The guidelines do not require the approval of Convocation.

## AMENDED RULES AS APPROVED BY CONVOCATION IN SEPTEMBER 2015

### 3.03 CONFIDENTIALITY

#### Justified or Permitted Disclosure

(10) a paralegal may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from:

- (a) the paralegal's change of employment or
- (b) changes in the composition or ownership of a paralegal firm,

but only if the information disclosed does not compromise client confidentiality or otherwise prejudice the client.

### 3.05 CONFLICTS OF INTEREST - TRANSFERS

#### Interpretation and Application of Rule

In rule 3.05,

- (0.1) "matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government paralegal, providing policy advice unless the advice relates to a particular client representation.

#### Application of Rule

3.05 (1) Rules 3.05 (2) to 3.05 (7) apply when a paralegal transfers from one paralegal firm ("former firm") to another ("new firm"), and

- (a) the transferring paralegal or the new firm is aware at the time of the transfer or later discovers it is reasonable to believe the transferring paralegal has confidential information relevant to the new firm's matter for its client; or
- (b) the transferring paralegal or the new firm is aware at the time of the transfer or later discovers that
  - (i) the new paralegal firm represents a client in a matter that is the same as or related to a matter in which the former paralegal firm represents or represented its client ("former client");
  - (ii) the interests of those clients in that matter conflict; and
  - (iii) the transferring paralegal actually possesses relevant information respecting that matter.

**3.05 (1.1)** Rules 3.05 (2) to 3.05 (7) do not apply to a paralegal employed by the federal, a provincial or territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

### **Paralegal Firm Disqualification**

(2) If the transferring paralegal actually possesses confidential information relevant to a matter respecting a former client that may prejudice the former client if disclosed to a members of the new firm, the new I firm shall cease its representation of its client in that matter unless

- (a) the former client consents to the new firm's continued representation of its client; or
- (b) the new I firm has
  - (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring paralegal to any member of the new firm; and
  - (ii) advised the paralegal's former client, if requested by the client, of the measures taken.

### **Transferring Paralegal Disqualification**

(3) Unless the former client consents, a transferring paralegal described in subrule (2) or (4) shall not,

- (a) participate in any manner in the new paralegal firm's representation of its client in that matter; or
- (b) disclose any confidential information respecting the former client.

(4) Unless the former client consents, members of the new firm shall not , discuss the new firm's representation of its current client or the former firm's representation of the former client in that matter with a transferring paralegal described in subrules (2) or (4) except as permitted by rule 3.03. .

(5) Anyone who has an interest in, or who represents a party in, a matter referred to in this rule may apply to a tribunal of competent jurisdiction for a determination of any aspect of this rule.

### **Paralegal Due Diligence for non-licensee staff**

**3.05 (6)** A transferring paralegal and the members of the new firm shall exercise due diligence in ensuring that each member and employee of the paralegal's firm, and all other persons whose services the paralegal or the firm has retained

- (a) comply with Rule 3.05; and
- (b) do not disclose confidential information of
  - (i) clients of the firm, or
  - (ii) any other paralegal firm in which the person has worked.

**REDLINE BASED ON COMMENTARY APPROVED BY CONVOCATION****GUIDELINES RE CONFIDENTIALITY****Disclosure without Client Authority to Detect Conflict****Rule Reference: Rule 3.03 (10)**

16.1. Rule 3.03 provides that a paralegal may disclose information to the extent reasonably necessary to detect and resolve conflicts of interest arising from a paralegal's change of employment, or from changes in the composition or ownership of a paralegal firm, but only if the information disclosed does not compromise client confidentiality or otherwise prejudice a client.

16.2. In these situations, the rule permits paralegals and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred. This exchange of information needs to be done in a manner consistent with the obligation to protect client confidentiality and avoid prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

16.3. The disclosure should be made to as few persons at the new firm as possible, ideally to only one person. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

16.4. Since the disclosure would be solely for the purpose of checking for conflicts, the disclosure should be coupled with an undertaking by the new firm to the former firm that it will:

- (a) limit access to the disclosed information;
- (b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

16.5. The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the paralegal and client. In some circumstances, however, because of the nature of the retainer, the transferring paralegal and the new firm may be required to obtain the consent of clients to such disclosure or to the disclosure of any further information about the clients. This is especially the case where disclosure would prejudice the client, such as where a person has consulted a paralegal about a criminal investigation that has not led to a public charge.

## PARALEGAL GUIDELINES RE TRANSFERS

### PARALEGAL TRANSFER BETWEEN FIRMS

#### General

**Rule Reference: Rule 3.05**

#### Paralegal Changing Firms

**Rule Reference: Rule 3.05**

1. Problems concerning confidential information may arise when a paralegal changes firms and the firms act for opposing clients in the same or a related matter. The potential risk is that confidential information about the client from the paralegal's former office may be revealed to the members of the new firm and used against that client. A paralegal should carefully review the *Rules* when transferring to a new office or when a new paralegal is about to join the paralegal firm.

## Actual Knowledge

### Rule Reference: Rule 3.05

2. The purpose of the rule is to deal with what a paralegal actually knows, not what a paralegal might be assumed to know. Paralegals working together in the same firm are assumed to share confidences on the matters on which they are working, with the result that actual knowledge may be presumed. However, that presumption of actual knowledge can be rebutted by clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the transferring paralegal to the member or members of the firm who are engaged against a former client.
  
3. The duties imposed by this rule concerning confidential information are in addition to the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.
  
4. Firms with multiple offices - This rule treats as one “firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments and an inter-jurisdictional legal firm.

## How to Determine If a Conflict Exists Before a Paralegal Changes Firms

### Rule Reference: Rule 3.05

5. When a firm considers hiring a paralegal from another firm, the transferring paralegal and the new firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring paralegal is leaving and with respect to clients of a firm in which the transferring paralegal worked at some earlier time.

6. After completing the interview process and before hiring the transferring paralegal, the new firm should determine whether any conflicts exist. In determining whether the transferring paralegal actually possesses relevant confidential information, both the transferring paralegal and the new firm must be very careful, during any interview of a potential transferring paralegal, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.03, which provides that a paralegal may disclose confidential information to the extent the paralegal reasonably believes necessary to detect and resolve conflicts of interest where paralegals transfer between firms.

7. A paralegal's duty to the firm may also govern a paralegal's conduct when exploring a professional opportunity with another firm and is beyond the scope of these Rules.

**WORDING BASED ON COMMENTARY APPROVED BY CONVOCATION**

**GUIDELINES RE CONFIDENTIALITY**

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**FOR INFORMATION**

**RULES UNDER THE *PROVINCIAL OFFENCES ACT***

6. The Ministry of the Attorney General notified the Law Society of a proposed change to the manner in which rules for proceedings under the *Provincial Offences Act* (POA) are developed. Instead of the current Rules Committee, the Minister would make rules by means of regulations, subject to approval from the affected level of court. The Rules Committee would no longer exist, but the Ministry would continue to consult stakeholders, including the Law Society, as appropriate. This is based on the recommendations of the August 2011 Report of the Law Commission of Ontario entitled *Modernization of the POA*. The Committee regarded the change in process as beneficial, provided stakeholders are appropriately consulted.