

1 **Rule 1.8. Conflict of interest: current clients: specific rules.**

2 (a) A licensed paralegal practitioner shall not enter into a business transaction with a
3 client or knowingly acquire an ownership, possessory, security or other pecuniary interest
4 adverse to a client unless:

5 (a)(1) the transaction and terms on which the licensed paralegal practitioner acquires
6 the interest are fair and reasonable to the client and are fully disclosed and transmitted in
7 writing in a manner that can be reasonably understood by the client;

8 (a)(2) the client is advised in writing of the desirability of seeking and is given
9 a reasonable opportunity to seek the advice of independent legal counsel on the
10 transaction; and

11 (a)(3) the client gives informed consent, in a writing signed by the client, to the
12 essential terms of the transaction and the licensed paralegal practitioner's role in the
13 transaction, including whether the licensed paralegal practitioner is representing the client
14 in the transaction.

15 (b) A licensed paralegal practitioner shall not use information relating to
16 representation of a client to the disadvantage of the client unless the client gives informed
17 consent, except as permitted or required by these Rules.

18 (c) A licensed paralegal practitioner shall not solicit any substantial gift from a client,
19 including a testamentary gift.

20 (d) Prior to the conclusion of representation of a client, a licensed paralegal practitioner
21 shall not make or negotiate an agreement giving the licensed paralegal practitioner literary
22 or media rights to a portrayal or an account based in substantial part on information
23 relating to the representation.

24 (e) A licensed paralegal practitioner shall not provide financial assistance to a client in
25 connection with pending or contemplated litigation, except that:

26 (e)(1) a licensed paralegal practitioner may advance court costs and expenses of
27 litigation, the repayment of which may be contingent on the outcome of the matter; and

28 (e)(2) a licensed paralegal practitioner representing an indigent client may pay court
29 costs and expenses of litigation, and minor expenses reasonably connected to the litigation,
30 on behalf of the client.

31 (f) A licensed paralegal practitioner shall not accept compensation for
32 representing a client from one other than the client unless:

33 (f)(1) the client gives informed consent;

34 (f)(2) there is no interference with the licensed paralegal practitioner's independence
35 of professional judgment or with the licensed paralegal practitioner-client relationship; and

36 (f)(3) information relating to representation of a client is protected as required by Rule
37 1.6.

38 (g) A licensed paralegal practitioner who represents two or more clients shall not
39 participate in making an aggregate settlement of the claims of or against the clients unless
40 each client gives informed consent, in writing signed by the client. The licensed paralegal
41 practitioner's disclosure shall include the existence and nature of all the claims involved
42 and of the participation of each person in the settlement.

43 (h) A licensed paralegal practitioner shall not:

44 (h)(1) make an agreement prospectively limiting the licensed paralegal practitioner's
45 liability to a client for malpractice unless the client is independently represented in making
46 the agreement; or

47 (h)(2) settle a claim or potential claim for such liability with an unrepresented client or
48 former client unless that person is advised in writing of the desirability of seeking, and is
49 given a reasonable opportunity to seek, the advice of independent legal counsel in
50 connection therewith.

51 (i) A licensed paralegal practitioner shall not acquire a proprietary interest in the cause
52 of action or subject matter of litigation the licensed paralegal practitioner is providing
53 services on for a client.

54 (j) A licensed paralegal practitioner shall not engage in sexual relations with a client
55 that exploit the licensed paralegal practitioner-client relationship. For the purposes of this
56 Rule:

57 (j)(1) "sexual relations" means sexual intercourse or the touching of an intimate part of
58 another person for the purpose of sexual arousal, gratification, or abuse; and

59 (j)(2) except for a spousal relationship or a sexual relationship that existed at the
60 commencement of the licensed paralegal practitioner-client relationship, sexual relations
61 between the licensed paralegal practitioner and the client shall be presumed to be
62 exploitive. This presumption is rebuttable.

63 (k) While licensed paralegal practitioners are associated in a firm, a prohibition in the
64 foregoing paragraphs (a) through (i) that applies to any one of the firm shall apply to all
65 members of the firm.

66

67 Comment

68 Business Transactions Between Client and Licensed Paralegal Practitioner

69 [1] A licensed paralegal practitioner's legal skill and training, together with the
70 relationship of trust and confidence between licensed paralegal practitioner and client,

71 create the possibility of overreaching when the licensed paralegal practitioner participates
72 in a business, property or financial transaction with a client, for example, a loan or sales
73 transaction or a licensed paralegal practitioner investment on behalf of a client. The
74 requirements of paragraph (a) must be met even when the transaction is not closely
75 related to the subject matter of the representation, as when a licensed paralegal
76 practitioner drafting a will for a client learns that the client needs money for unrelated
77 expenses and offers to make a loan to the client. The Rule applies to licensed paralegal
78 practitioners engaged in the sale of goods or services related to the practice of law, for
79 example, the sale of title insurance or investment services to existing clients of the licensed
80 paralegal practitioner's legal practice. It does not apply to ordinary fee arrangements
81 between client and licensed paralegal practitioner, which are governed by Rule 1.5,
82 although its requirements must be met when the licensed paralegal practitioner accepts an
83 interest in the client's business or other nonmonetary property as payment of all or part of
84 a fee. In addition, the Rule does not apply to standard commercial transactions between the
85 licensed paralegal practitioner and the client for products or services that the client
86 generally markets to others, for example, banking or brokerage services, medical services,
87 products manufactured or distributed by the client, and utilities' services. In such
88 transactions, the licensed paralegal practitioner has no advantage in dealing with the client,
89 and the restrictions in paragraph (a) are unnecessary and impracticable.

90 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its
91 essential terms be communicated to the client, in writing, in a manner that can be
92 reasonably understood. Paragraph (a)(2) requires that the client also be advised, in
93 writing, of the desirability of seeking the advice of independent legal counsel. It also
94 requires that the client be given a reasonable opportunity to obtain such advice. Paragraph
95 (a)(3) requires that the licensed paralegal practitioner obtain the client's informed consent,
96 in a writing signed by the client, both to the essential terms of the transaction and to the
97 licensed paralegal practitioner's role. When necessary, the licensed paralegal practitioner
98 should discuss both the material risks of the proposed transaction, including any risk
99 presented by the licensed paralegal practitioner's involvement, and the existence of
100 reasonably available alternatives and should explain why the advice of independent legal
101 counsel is desirable. See Rule 1.0(f) (definition of informed consent).

102 [3] The risk to a client is greatest when the client expects the licensed paralegal
103 practitioner to represent the client in the transaction itself or when the licensed paralegal
104 practitioner's financial interest otherwise poses a significant risk that the licensed
105 paralegal practitioner's representation of the client will be materially limited by the

106 licensed paralegal practitioner's financial interest in the transaction. Here the licensed
107 paralegal practitioner's role requires that the licensed paralegal practitioner must comply,
108 not only with the requirements of paragraph (a), but also with the requirements of Rule
109 1.7. Under that Rule, the licensed paralegal practitioner must disclose the risks associated
110 with the licensed paralegal practitioner's dual role as both legal adviser and participant in
111 the transaction, such as the risk that the licensed paralegal practitioner will structure the
112 transaction or give legal advice in a way that favors the licensed paralegal practitioner's
113 interests at the expense of the client. Moreover, the licensed paralegal practitioner must
114 obtain the client's informed consent. In some cases, the licensed paralegal practitioner's
115 interest may be such that Rule 1.7 will preclude the licensed paralegal practitioner from
116 seeking the client's consent to the transaction.

117 [4] If the client is independently represented in the transaction, paragraph (a)(2) of this
118 Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied
119 either by a written disclosure by the licensed paralegal practitioner involved in the
120 transaction or by the client's independent counsel. The fact that the client was
121 independently represented in the transaction is relevant in determining whether the
122 agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

123 Use of Information Related to Representation

124 [5] Use of information relating to the representation to the disadvantage of the client
125 violates the licensed paralegal practitioner's duty of loyalty. Paragraph (b) applies when
126 the information is used to benefit either the licensed paralegal practitioner or a third
127 person, such as another client or business associate of the licensed paralegal practitioner.
128 For example, if a licensed paralegal practitioner learns that a client intends to purchase and
129 develop several parcels of land, the licensed paralegal practitioner may not use that
130 information to purchase one of the parcels in competition with the client or to recommend
131 that another client make such a purchase. The rule does not prohibit uses that do not
132 disadvantage the client. Paragraph (b) prohibits disadvantageous use of client information
133 unless the client gives informed consent, except as permitted or required by these Rules.
134 See Rules 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

135 Gifts to Licensed Paralegal Practitioners

136 [6] A licensed paralegal practitioner may accept a gift from a client, if the transaction
137 meets general standards of fairness. For example, a simple gift such as a present given at a
138 holiday or as a token of appreciation is permitted. If a client offers the licensed paralegal
139 practitioner a more substantial gift, paragraph (c) does not prohibit the licensed paralegal
140 practitioner from accepting it, although such a gift may be voidable by the client under the

141 doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any
142 event, due to concerns about overreaching and imposition on clients, a licensed paralegal
143 practitioner may not suggest that a substantial gift be made to the licensed paralegal
144 practitioner or for the licensed paralegal practitioner's benefit.

145 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a
146 will or conveyance, the client should have the detached advice that another licensed
147 paralegal practitioner or a lawyer can provide.

148 [8] This Rule does not prohibit a licensed paralegal practitioner from seeking to have
149 the licensed paralegal practitioner or a partner or associate of the licensed paralegal
150 practitioner named as executor of the client's estate or to another potentially lucrative
151 fiduciary position. Nevertheless, such appointments will be subject to the general conflict of
152 interest provision in Rule 1.7. In obtaining the client's informed consent to the conflict, the
153 licensed paralegal practitioner should advise the client concerning the nature and extent of
154 the licensed paralegal practitioner's financial interest in the appointment, as well as the
155 availability of alternative candidates for the position.

156 Literary Rights

157 [9] An agreement by which a licensed paralegal practitioner acquires literary or media
158 rights concerning the conduct of the representation creates a conflict between the interests
159 of the client and the personal interests of the licensed paralegal practitioner. Measures
160 suitable in the representation of the client may detract from the publication value of an
161 account of the representation.

162 Financial Assistance

163 [10] Licensed paralegal practitioners may not subsidize lawsuits brought on behalf of
164 their clients, including making or guaranteeing loans to their clients for living expenses,
165 because to do so would encourage clients to pursue lawsuits that might not otherwise be
166 brought and because such assistance gives licensed paralegal practitioners too great a
167 financial stake in the litigation. These dangers do not warrant a prohibition on a licensed
168 paralegal practitioner lending a client court costs and litigation expenses.

169 Person Paying for a Licensed Paralegal Practitioner's Services

170 [11] Licensed paralegal practitioners are frequently asked to represent a client under
171 circumstances in which a third person will compensate the licensed paralegal practitioner,
172 in whole or in part. The third person might be a relative or friend. Because third-party
173 payers frequently have interests that differ from those of the client, including interests in
174 minimizing the amount spent on the representation and in learning how the representation
175 is progressing, licensed paralegal practitioners are prohibited from accepting or continuing

176 such representations unless the licensed paralegal practitioner determines that there will
177 be no interference with the licensed paralegal practitioner's independent professional
178 judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting
179 interference with a licensed paralegal practitioner's professional judgment by one who
180 recommends, employs or pays the licensed paralegal practitioner to render legal services
181 for another).

182 [12] Sometimes, it will be sufficient for the licensed paralegal practitioner to obtain the
183 client's informed consent regarding the fact of the payment and the identity of the third-
184 party payer. If, however, the fee arrangement creates a conflict of interest for the licensed
185 paralegal practitioner, then the licensed paralegal practitioner must comply with Rule. 1.7.
186 The licensed paralegal practitioner must also conform to the requirements of Rule 1.6
187 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is
188 significant risk that the licensed paralegal practitioner's representation of the client will be
189 materially limited by the licensed paralegal practitioner's own interest in the fee
190 arrangement or by the licensed paralegal practitioner's responsibilities to the third-party
191 payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the
192 licensed paralegal practitioner may accept or continue the representation with the
193 informed consent of each affected client, unless the conflict is nonconsentable under that
194 paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

195 Aggregate Settlements

196 [13] Differences in willingness to make or accept an offer of settlement are among the
197 risks of common representation of multiple clients by a single licensed paralegal
198 practitioner. Under Rule 1.7, this is one of the risks that should be discussed before
199 undertaking the representation, as part of the process of obtaining the clients' informed
200 consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding
201 whether to accept or reject an offer of settlement.

202 Limiting Liability and Settling Malpractice Claims

203 [14] Agreements prospectively limiting a licensed paralegal practitioner's liability for
204 malpractice are prohibited unless the client is independently represented in making the
205 agreement because they are likely to undermine competent and diligent representation.
206 Also, many clients are unable to evaluate the desirability of making such an agreement
207 before a dispute has arisen, particularly if they are then represented by the licensed
208 paralegal practitioner seeking the agreement. This paragraph does not, however, prohibit a
209 licensed paralegal practitioner from entering into an agreement with the client to arbitrate
210 legal malpractice claims, provided such agreements are enforceable and the client is fully

211 informed of the scope and effect of the agreement. Nor does this paragraph limit the ability
212 of licensed paralegal practitioners to practice in the form of a limited-liability entity, where
213 permitted by law, provided that each licensed paralegal practitioner remains personally
214 liable to the client for his or her own conduct and the firm complies with any conditions
215 required by law, such as provisions requiring client notification or maintenance of
216 adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2
217 that defines the scope of the representation, although a definition of scope that makes the
218 obligations of representation illusory will amount to an attempt to limit liability.

219 [15] Agreements settling a claim or a potential claim for malpractice are not prohibited
220 by this Rule. Nevertheless, in view of the danger that a licensed paralegal practitioner will
221 take unfair advantage of an unrepresented client or former client, the licensed paralegal
222 practitioner must first advise such a person in writing of the appropriateness of
223 independent representation in connection with such a settlement. In addition, the licensed
224 paralegal practitioner must give the client or former client a reasonable opportunity to find
225 and consult independent counsel.

226 Acquiring Proprietary Interest in Litigation

227 [16] Paragraph (i) states the traditional general rule that licensed paralegal
228 practitioners are prohibited from acquiring a proprietary interest in litigation. Like
229 paragraph (e), the general rule has its basis in common law champerty and maintenance
230 and is designed to avoid giving the licensed paralegal practitioner too great an interest in
231 the representation. In addition, when the licensed paralegal practitioner acquires an
232 ownership interest in the subject of the representation, it will be more difficult for a client
233 to discharge the licensed paralegal practitioner if the client so desires. The rule is subject to
234 specific exceptions developed in decisional law and continued in these Rules. The exception
235 for certain advances of the costs of litigation is set forth in paragraph (e). In addition,
236 paragraph (i) sets forth exceptions for liens authorized by law to secure the licensed
237 paralegal practitioner's fees or expenses and contracts for reasonable contingent fees. The
238 law of each jurisdiction determines which liens are authorized by law. These may include
239 liens granted by statute, liens originating in common law and liens acquired by contract
240 with the client. When a licensed paralegal practitioner acquires by contract a security
241 interest in property other than that recovered through the licensed paralegal practitioner's
242 efforts in the litigation, such an acquisition is a business or financial transaction with a
243 client and is governed by the requirements of paragraph (a). Contracts for contingent fees
244 in civil cases are prohibited by Rule 1.5.

245 Client-Licensed Paralegal Practitioner Sexual Relationships

246 [17] The relationship between licensed paralegal practitioner and client is a fiduciary
247 one in which the licensed paralegal practitioner occupies the highest position of trust and
248 confidence. The relationship is almost always unequal; thus, a sexual relationship between
249 licensed paralegal practitioner and client can involve unfair exploitation of the licensed
250 paralegal practitioner's fiduciary role, in violation of the licensed paralegal practitioner's
251 basic ethical obligation not to use the trust of the client to the client's disadvantage. In
252 addition, such a relationship presents a significant danger that, because of the licensed
253 paralegal practitioner's emotional involvement, the licensed paralegal practitioner will be
254 unable to represent the client without impairment of the exercise of independent
255 professional judgment. Because of the significant danger of harm to client interests and
256 because the client's own emotional involvement renders it unlikely that the client could
257 give adequate informed consent, this Rule creates a rebuttable prohibition on the licensed
258 paralegal practitioner's having sexual relations with a client regardless of whether the
259 relationship is consensual and regardless of the absence of prejudice to the client.

260 [18] Spousal relationships and sexual relationships that predate the licensed paralegal
261 practitioner-client relationship are not prohibited. Issues relating to the exploitation of the
262 fiduciary relationship and client dependency are diminished when the sexual relationship
263 existed prior to the commencement of the licensed paralegal practitioner-client
264 relationship. However, before proceeding with the representation in these circumstances,
265 the licensed paralegal practitioner should consider whether the licensed paralegal
266 practitioner's ability to represent the client will be materially limited by the relationship.
267 See Rule 1.7(a)(2).

268 ~~[19] Reserved. When the client is an organization, paragraph (j) of this Rule prohibits a~~
269 ~~licensed paralegal practitioner for the organization from having a sexual relationship with~~
270 ~~a constituent of the organization who supervises, directs or regularly consults with that~~
271 ~~licensed paralegal practitioner concerning the organization's legal matters.~~

272 Imputation of Prohibitions

273 [20] Under paragraph (k), a prohibition on conduct by an individual licensed paralegal
274 practitioner in paragraphs (a) through (i) also applies to all licensed paralegal practitioners
275 associated in a firm with the personally prohibited licensed paralegal practitioner. For
276 example, one licensed paralegal practitioner in a firm may not enter into a business
277 transaction with a client of another member of the firm without complying with paragraph
278 (a), even if the first licensed paralegal practitioner is not personally involved in the
279 representation of the client. The prohibition set forth in paragraph (j) is personal and is not
280 applied to associated licensed paralegal practitioners.

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