

CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO ACT, 2017

DISCIPLINE COMMITTEE

IN THE MATTER OF: Allegations against **STEVE KOSTICH, CPA, CA**, under **Rule 206.1** of the CPA Ontario Code of Professional Conduct, and Allegations against **FELICE IORIO, CPA, CA**, under **Rules 202.1 and 206.1** of the CPA Ontario Code of Professional Conduct.

TO: Steve Kostich and Felice Iorio

AND TO: The Professional Conduct Committee

DECISION AND ORDER MADE NOVEMBER 25, 2024

DECISION AND ORDER

On November 6, 2024, the Professional Conduct Committee (“PCC”) requested a direction from the Panel allowing counsel for the PCC to communicate with their expert witness, Paul Rhodes (“Rhodes”), about matters introduced or touched on during the examination-in-chief between the completion of Rhodes’ examination in-chief by the PCC and the start of his cross-examination by counsel for Steve Kostich and Felice Iorio.

Having considered the parties’ oral and written submissions on November 22, 2024, the Panel denies the direction as sought by the PCC and orders:

1. The PCC’s external and in-house counsel are hereby directed to observe the requirements of Rule 5.4-2(a.2) of the *Rules of Professional Conduct* and are specifically not to discuss with Rhodes his evidence given in-chief or relating to any other matter introduced or touched on during his examination-in-chief in this proceeding;
2. The PCC’s external and in-house counsel may communicate with Rhodes with respect to any other matters that the PCC is involved in that do not relate to this matter or Rhodes’ evidence-in-chief; and
3. Should the parties choose to seek costs on this motion, the Panel defers the determination of costs to the end of the hearing.

DATED this 25th day of November, 2024



Bernard S. Schwartz, FCPA, FCA
Discipline Committee – Chair

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BETWEEN:

**Chartered Professional Accountants of Ontario
Professional Conduct Committee**

-and-

Steve Kostich and Felice Iorio

APPEARANCES:

For the Professional Conduct Committee: Lily Harmer and Hailey Bruckner,
Counsel

For Steve Kostich and Felice Iorio: Present
John Finnigan, James Hardy, and
Rebekah O'Hare, Counsel

Heard: November 6, 2024

Decision and Order effective: November 22, 2024

Release of written reasons: December 19, 2024

**REASONS FOR THE DECISION ON THE PROFESSIONAL CONDUCT COMMITTEE'S
MOTION FOR DIRECTIONS DATED NOVEMBER 6, 2024**

I. OVERVIEW

- [1] Counsel for the Professional Conduct Committee ("PCC") seek a direction from this Panel to allow them to communicate with the PCC's expert witness, Paul Rhodes ("Rhodes"), about matters introduced or touched on during examination-in-chief, between the completion of Rhodes' examination-in-chief and his cross-examination by counsel for Steve Kostich ("Kostich") and Felice Iorio ("Iorio") (together, "the Members"). PCC counsel seeks such a direction in light of the restrictions imposed on lawyers by Rule 5.4-2 (a.2) of the [Law Society of Ontario's Rules of Professional Conduct](#) which prohibits lawyers from communicating with

their own witness between the completion of examination-in-chief and the commencement of cross-examination.

- [2] Counsel for the Members oppose the direction sought by the PCC and request that the Panel direct PCC's external and internal counsel to observe the requirements of Rule 5.4-2 (a.2) and not be permitted to discuss with Rhodes his evidence given during examination-in-chief or relating to any matter introduced or touched on during his examination-in-chief.
- [3] For reasons set out below, we direct PCC external counsel in this matter, Lily Harmer ("Harmer") and Hailey Bruckner ("Bruckner"), as well as in-house counsel to observe the requirements of Rule 5.4-2 (a.2) and not discuss with Rhodes his evidence-in-chief or relating to any matter introduced or touched on during examination-in-chief in this proceeding.

II. RELEVANT BACKGROUND AND FACTS

- [4] Rhodes is the only witness called to date by the PCC. On May 6, 2024, the first day of the hearing, Rhodes was qualified as an expert witness. He began testifying in chief on May 7, 2024. The majority of Rhodes' evidence has related to the observations and findings set out in his reports dated February 17, 2021 (found in the Joint Document Brief of the Parties, Exhibit 1, Tab A for Iorio and Tab C for Kostich) and the supporting Document Brief to the report (found in the Joint Document Brief of the Parties, Exhibit 1, Tab B for Iorio and Tab D for Kostich). Rhodes has referred to his report and the supporting documents extensively throughout his examination-in-chief.
- [5] As of the end of the latest hearing date of November 6, 2024, Rhodes has been on the stand for a total of 10 days. The next day set by the parties for the continuation of the hearing is January 29, 2025. Thereafter, the hearing is to continue on January 30, February 20, 21 and 27, and March 3, 6 and 10, 2025.
- [6] During the course of the hearing on November 6, 2024, Counsel for the Members alerted the Panel to a disagreement between the parties regarding whether Counsel for the PCC would be permitted to speak to Rhodes following the completion of his examination-in-chief and the commencement of cross examination. Counsel for the PCC advised that they anticipated completing the examination-in-chief of Rhodes in "a couple of hours" when the hearing reconvenes on January 29, 2025, after which cross examination would commence that same day.
- [7] Counsel for the Members proposed the parties find a few more hours before the end of year so that Counsel for the PCC could complete Rhodes' examination-in-chief. The Panel offered eleven dates in December of 2024 for a further half day hearing in order that the examination-in-chief of Rhodes could be completed. Counsel for the Members were available on six of the days offered, while Counsel for the PCC advised that neither they nor their witness were available on any of the dates Counsel for the Members were available.
- [8] PCC Counsel requested that the Panel be canvassed as to their availability in the month of January 2025. The Panel could not offer any dates in the month of January prior to the January 29, 2025 continuation date. As such, the hearing is set to resume on January 29, 2025.

III. ISSUES ON MOTION

Position of the PCC

- [9] Counsel for the PCC wish to speak to Rhodes following the completion of his examination-in-chief and prior to the commencement of cross-examination. Because Rule 5.4-2 (a.2) provides that a lawyer ought not to speak to their witness between the completion of examination-in-chief and cross-examination, the PCC is seeking a direction from the Panel to allow communications with their witness about matters introduced or touched upon during Rhodes' examination-in-chief.
- [10] The PCC submits that there are extraordinary circumstances in this case that merit an exemption to the direction limiting communications with a witness between examination-in-chief and cross-examination found in Rule 5.4-2 (a.2).
- [11] The PCC notes that Rhodes has been in the witness box since the commencement of the hearing on May 6, 2024. There have been 10 hearing days over the past six months. By the time cross-examination is expected to begin in late January 2025, nine months will have passed during which time PCC counsel will only have had restricted conversations with Rhodes. Following the commencement of cross-examination, counsel for the PCC will then be restricted from speaking to Rhodes until the completion of his cross-examination and any re-examination by PCC counsel.
- [12] PCC counsel submits that Rhodes' evidence "is at significant risk of '*being lost in the mists of time*' in the circumstances of this case." While not seeking to discuss specific evidence provided to date or to provide transcripts of the witness' testimony to date, the PCC argues that it cannot adequately prepare Rhodes for cross-examination unless allowed to discuss matters introduced or touched on during his examination-in-chief with counsel for the PCC.
- [13] The PCC argues that Rhodes is the only witness who will not be adequately prepared for cross-examination due to the limits placed on counsel for the PCC by Rule 5.4-2 (a.2). No other witness is expected to testify over a similar span of time.
- [14] The PCC further argues that they will be unable to seek clarification or input on written and oral submissions from their witness until well into February 2025. The PCC submits that the Members have an unfair advantage as they are not encumbered by such restrictions and can consult with counsel as they will not be testifying. The PCC argues that the Members have failed to explain how they would be prejudiced if counsel for the PCC were permitted to speak to Rhodes as requested, except to allege that the PCC would coach Rhodes if permitted to speak to him.

Position of the Members

- [15] The Members argue the direction sought by the PCC to allow communication with their witness, Rhodes, between the completion of examination-in-chief and cross-examination, should not be granted. It is their position that to allow communication during this period of time would create "a serious risk to the integrity of [Rhodes'] evidence and the fairness of the proceeding."

- [16] The Members seek an order directing that the PCC, including in-house counsel, observe the requirements of Rule 5.4-2 (a.2) and that they not discuss with Rhodes his evidence given in chief or relating to any matter introduced or touched on during examination-in-chief.
- [17] The Members do not seek to limit the ability of the PCC to speak to Rhodes regarding purely administrative matters. Nor do the Members seek to limit the PCC's ability to communicate with Rhodes regarding others matters that the PCC is involved in that do not relate to this proceeding or to Rhodes' evidence-in-chief.
- [18] The Members submit that Rule 5.4-2 seeks to prevent intentional or unintentional aiding or influencing of a witness while the witness is still testifying.
- [19] In support of their argument, the Members note that this is not a case in which Rhodes is relying upon his recollection of events. Throughout his testimony in chief, Rhodes has been able to refer to his expert report and the numerous documents and standards that are part of the record. Should it be necessary during cross-examination for Rhodes to refresh his memory of testimony given in chief, transcripts of his prior testimony in chief can be provided to him. The Members argue that the PCC had the opportunity to prepare Rhodes for cross-examination prior to the commencement of his examination-in-chief.
- [20] In response to the PCC's position that they would be prejudiced if unable to speak to Rhodes in order to prepare written or oral submissions, the Members raise concerns that the PCC requires the assistance of Rhodes to prepare their submissions when he is an expert witness and as such, is required to be non-partisan. The Members also point to other PCC staff, as well as to Ian Wintrip ("Wintrip") who assisted Rhodes in preparing the report from which Rhodes has been referring, as possible sources of assistance to counsel for the PCC when preparing submissions.
- [21] In response to the PCC's request that any direction restricting communications with Rhodes regarding his testimony in this matter should solely be limited to Harmer and Bruckner, the Members submit that the Panel's direction should also apply to PCC's external and in-house counsel as the *Rules of Professional Conduct* apply equally to all counsel to the PCC.

IV. ANALYSIS AND DECISION

The Law

- [22] Rule 5.4-2 (a.2) of the *Rules of Professional Conduct* of the Law Society of Ontario reads as follows:

Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

(a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief.

[23] The Commentary in support of this Rule provides:

If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[24] As Justice Pomerance observed in [R v. Veltman, 2023 ONSC 6108](#), para. 5, the purpose of Rule 5.4-2 restricting counsels' ability to speak to their witnesses throughout the course of a hearing is "not mysterious. The rules seek to preserve the integrity of a witness' evidence, by preventing coaxing, coaching, or the appearance of such conduct." In order to ensure the trust-seeking process of a trial is not undermined, even by the most well-intentioned participants, prohibiting communications between counsel and their witness will ensure that the lawyer does not "unwittingly alert the witness to the implications of a line of questioning or unintentionally influence the witness' recollection." (para. 8)

[25] In *Veltman*, the witness on the stand was the accused. The accused had testified in his own defence over the course of a number of days during the course of his trial in which he faced three counts of first-degree murder and one count of attempted murder. The accused/witness had also been cross-examined. Following the completion of cross-examination, the accused's counsel sought a direction from the Court to allow him to speak to his client before the commencement of re-examination. The Court observed that when the witness with whom counsel seeks to speak is their own client and the accused, there is a constitutional dimension to be considered, namely the right to a fair trial and the ability to make full answer and defence. The Court ultimately allowed the communication between counsel and his client following the completion of cross-examination and before the commencement of re-examination after considering a number of factors: 1) the gravity of the charges; 2) the issues to be determined by the jury; 3) the length of time the accused had testified; and 4) counsel's assertion that he needed to speak to his client in order to make full answer and defence.

[26] In [Scavuzzo v. The Queen, 2004 TCC 806](#), on a motion seeking a direction that new counsel for the appellant be permitted to speak with his client between the completion of the client's cross-examination and re-examination. The witness had been shown two volumes of previously undisclosed documents during cross-examination. As counsel newly on the matter, counsel needed to seek instructions from his client before proceeding with re-examination. In considering then Rule 4.04 of the *Rules of Professional Conduct*, the Court concluded that "(t)he Rule is a salutary one and should be observed in the vast majority of cases." (para. 15) The Court concluded that Scavuzzo's case was not ordinary, finding unique circumstances that justified allowing counsel to speak to their witness.

[27] In [Van der Steen v. R., 2016 TCC 205](#), the Court had to determine whether it should grant a direction to counsel regarding, amongst other issues, whether counsel for the Respondent could speak to their witness following the completion of the witness's examination-in-chief, and before cross-examination. After examination-in-chief of the witness had been completed, the matter was adjourned for seven and a half months. Counsel for the Respondent sought a direction from the Court to allow her to communicate with the witness during the course of the adjournment. Counsel for the Appellant objected, arguing that communications between the witness and counsel for the Respondent should be limited to administrative matters.

Counsel for the Respondent later conceded that they would not discuss with their witness the witness's evidence given in chief. The issue which then remained was whether counsel for the Respondent could discuss with the witness other appeals not related to the matter before the Court.

- [28] In considering the issues in *Van der Steen*, the Court concluded that Rule 5.4-2 (a.2) should be followed and that counsel for the Respondent should not communicate with their own witness regarding the witness' evidence given in chief following the completion of examination-in-chief and before cross-examination. The Court, however, concluded that counsel for the Respondent could discuss with the witness other appeals brought by taxpayers other than the Appellant.
- [29] In [Essar Steel Algoma Inc. and United Steelworkers, Local Union 2251, 2009 CanLI 41184 \(ON LA\)](#) ("Essar Steel"), during the course of a hearing relating to General Nature Grievances, the arbitrator had cautioned the Company's witness not to discuss his evidence with anyone as he was in the midst of cross-examination, with one exception which was originally agreed upon by the parties. The exception allowed the witness to discuss other cases with counsel for the Company.
- [30] While the Company's witness was testifying in another matter before a different arbitrator, an issue was raised about the witness being in the midst of cross-examination and under a caution in Essar Steel. The arbitrator chose to proceed, ruling the matter before him was different from the Essar Steel proceeding.
- [31] The issue was raised in the original arbitration, with the Union arguing that the witness's testimony should be struck from the record, alleging the direction had been breached. In considering whether there had been a breach, the arbitrator found that a direction or caution regarding communicating with a witness during their testimony "ensures that the evidence is not influenced by others" and that such directions and cautions seek to "eliminate any potential unfairness that may result from any influence by others." The arbitrator concluded that "directions preserving a witness' testimony and eliminating influence from others is a necessary safeguard required to provide a fair hearing."

Decision

- [32] The purpose of Rule 5.4-2 of the *Rules of Professional Conduct* is to ensure that the integrity of a witness' evidence is not compromised, intentionally or unintentionally by counsel during the course of a witness' testimony. As noted by the Court in *Scavuzzo v. The Queen*, the Rule should be observed in this vast majority of cases. Based on our review of the facts and submissions of counsel, we conclude that the Rule should be observed in this case.
- [33] In reviewing the cases presented by counsel for both parties, we note that this is not a case where the witness is an accused person who needs to consult with their counsel during the course of their evidence in order to make full answer and defence. This is not a situation in which new counsel has only recently been retained in the middle of a witness's evidence and needs to confer with their witness, who is also their client, in order to address new disclosure presented in the midst of an examination and to seek instructions.

- [34] In this case, we are dealing with an expert witness who has been testifying from a report and supporting documentation prepared over three years ago. This is not a matter where the witness's memory is being tested. Throughout examination-in-chief, the witness has repeatedly referred to his report and supporting documentation. If there are questions arising during cross-examination relating to testimony previously provided, transcripts of Rhodes' evidence can be provided to him to assist in the refreshing of his memory.
- [35] The witness is not an accused seeking to instruct counsel on issues that have unexpectedly arisen for the first time during the course of testimony.
- [36] If new issues arise during cross-examination, counsel for the PCC still has an opportunity to address those issues in re-examination.
- [37] Regarding the PCC's argument that they need to consult with Rhodes in order to prepare their final submissions, Rhodes is an expert witness, who, as pointed out by Counsel for the Members, has a non-partisan role in the proceedings. Wintrip, who co-authored the report, or other staff who have attended the hearing could offer assistance to counsel for the PCC should there be an issue when preparing written submissions.
- [38] The risk of even unintended influencing of the witness's testimony far outweighs any possible prejudice to the PCC's ability to conduct its case. We find there are no unique circumstances in this matter justifying an exception to Rule 5.4-2 (a.2).
- [39] We find there is no reason to prohibit PCC external or in-house counsel from speaking to Rhodes relating to other matters outside this proceeding.
- [40] As indicated above, we direct PCC external counsel in this matter, Harmer and Bruckner, as well as in-house counsel to observe the requirements of Rule 5.4-2 (a.2) and not discuss with Rhodes his evidence-in-chief or relating to any matter introduced or touched on during examination-in-chief in this proceeding.

V. COSTS

- [41] Should the parties choose to seek costs on this motion, the Panel defers the determination of costs to the end of the hearing.

VI. ORDER

- [42] The Panel denies the direction as sought by the PCC, and orders:
1. The PCC's external and in-house counsel are hereby directed to observe the requirements of Rule 5.4-2 (a.2) of the Law Society of Ontario's Rules of Professional Conduct and are specifically not to discuss with Rhodes his evidence given in chief or relating to any other matter introduced or touched on during his examination-in-chief in this proceeding; and
 2. The PCC's external and in-house counsel may communicate with Rhodes with respect to any other matters that the PCC is involved in that do not relate to this matter or Rhodes' evidence-in-chief.

DATED this 19th day of December, 2024

A handwritten signature in black ink, reading "Bernard S. Schwartz". The signature is written in a cursive, flowing style.

Bernard S. Schwartz, FCPA, FCA
Discipline Committee – Chair

Members of the Panel

Incheol (Charlie) Baek, CPA, CMA
Richa Khanna, CPA, CA, LPA
Marianne Park-Ruffin, Public Representative

Independent Legal Counsel

Nadia Liva, Barrister & Solicitor