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A Conflict of Interests Refresher

*By Don Murray**

"CONFLICT OF INTEREST" has been in the forefront of ethical and professional liability concerns for most of the past decade. The types of conflicts of interest between clients are rarely new, though the factual contexts may be. Despite regular exposure to the issues, and considerable guidance in various Society publications about how to remain within the bounds of what is regarded as appropriate in modern practice, lawyers continue to find their judgments about this issue challenged successfully through litigation or the discipline process.

This article is concerned with conflicts among clients of the same lawyer or law firm. Drawing of the appropriate ethical boundaries may seem difficult in specific cases, but a great deal is clear. Multi-client representation in relation to the same matter is permissible in some circumstances. There are things that lawyers can do to protect the exercise of their professional judgment in choosing when to represent multiple parties in a matter. There are things that lawyers can do to protect their clients—and particularly their continuing clients—from unnecessary harm.

The Rule

The Nova Scotia Rule is stated simply in Chapter 6 of the *Legal Ethics and Professional Conduct (A Handbook for Lawyers in Nova Scotia):*

> A lawyer has a duty not to
>
> (a) advise or represent both sides of a dispute; or
>
> (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

The Few Certainties

A few things are clear. The rules about conflict of interest are to be interpreted strictly: the lawyer must act on the assumption that multiple clients will suffer a falling out at some point in the future, and the lawyer who is challenged will have the burden of satisfying a disciplinary body that he or she did not contravene the Rule.

The direction that conflict of interest rules are to be interpreted strictly has been part of accepted professional practise since at least *Sinclair v. Ridout*, [1955] O.R. 167, at p.182 - 183 (H.C.), where Justice McRuer said:

> Notwithstanding that he [the solicitor] had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and Ridout while they were negotiating the purchase...he divorced himself from his responsibilities...and acted for the defendants while they acquired the property...and, after the

continued on page 52

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Elementary Ethics

Delay

by R.S. Huestis.....page 51

continued from page 29

> writ was issued...acted for both defendants...I refer to Bowstead on Agency 11th ed. 1951, pp.101-2. 'It is the duty of a solicitor -...(8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage.' ***This is a principle of ethical standards which admits to no fine distinctions but should be applied in its broadest sense,*** and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter. [Emphasis added]

The Courts in Nova Scotia have spoken just as plainly about conflicts of interest, their effect, and the continuing vigour of the strict approach. Most recently, in *Gould v. Shirley et al.* (1998), 170 N.S.R.(2d) 360, at p.363 (N.S.C.A.), the Chief Justice expressed how the law was to be interpreted to avoid "even a perception of impropriety."

The Court felt that its approach must respect and respond to the fact that an informed public could perceive that a conflict "might occur." *G. (D.L.) v. Wood* (1995), 142 N.S.R.(2d) 127 (N.S.C.A.) also subscribed to this "appearance of possibility" of a conflict test.

This strict approach has much to recommend it, but the main reasons appear to be three:

> (1) A strict approach maintains the highest standards among the legal profession, and thus best protects the integrity of the administration of justice, and so maintains public confidence in the administration of justice;
>
> (2) A strict approach is the clearest to counsel who desire to properly and ethically manage their affairs; and
>
> (3) A strict approach gives a higher value to the lay client's sensitivities about continuing loyalty and trust, and a correspondingly lower value to complex and technical legal justifications by the lawyer about whether or not a conflict exists.

The foundation of the American approach to conflicts of interest among clients is just as strict. Storey J. observed in *Williams v. Reed*, 3 Mason 405, at p. 418, quoted in *Barristers and Solicitors in Practice*, Lundy, ed., Butterworths (1998; updated to Feb 2000), at 10.1:

> When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgement, or endanger his fidelity.

The second clear thing about conflicts of interest is that when a lawyer attempts to simultaneously represent multiple interests, he should assume from the start that he will be unsuccessful in maintaining contentment among all of the clients. As Justice Nathanson observed in *Higgins v. Naugler et al.* (1994), 133 N.S.R.(2d) 167, at p.180 (N.S.S.C.), appeal dismissed (1995), 142 N.S.R.(2d) 104 (N.S.C.A.), where a lawyer attempted to represent two friends who ventured into a videostore business together:

> [The lawyer] purported to justify his actions on the basis that his client and another person (who was also his client) were friends. It may be that he should have advised one or the other of them to obtain independent legal advice. In any event, he failed to appreciate that solicitors must proceed on the basis that friends will fall out and that services of solicitors are often required in anticipation of such falling out, a not infrequent occurrence.

Prudent counsel should assume that matters will go awry, should assume that after the fact a conflict will be perceived by at least one of the parties, and should prepare accordingly.

The Discipline Committee recently had occasion to re-affirm this requirement of prudence. Client A sold shares in a company to B, for which she was to receive a deposit from C. Client A claimed that a dispute arose between herself and C. Client A and C were represented by the same law firm, though not the same lawyer. Upon being informed of the dual representation, Client A apparently determined that it was not necessary to retain other counsel. Still, the discipline complaint got made. A's lawyer insisted that throughout the transaction he was representing Client A only and had no conflict of interest to consider. However, the Discipline Committee counselled the lawyer that:

> . . . it is the lawyer's obligation to examine whether there ***is or might be*** a contentious issue, and that the member should have recognized that in the circumstances such as those in this case, it was ***likely*** a contentious issue ***could*** arise. [Emphasis added]

Discipline Digest, Issue No. 24 (October 1999), No. 134. The lawyer must show foresight and anticipation under Rule 6 - not delay acting until a problem or an open dispute among clients forces an assessment of the conflict of interest issue.

The third fundamental point about conflicts of interests among clients is that the lawyer carries the burden of proof in an ethical or professional conduct complaint under the Nova Scotia Rules. The *Handbook* provides in Commentary 6.8 that:

> 6.8 In disciplinary proceedings arising from a breach of this Rule, the lawyer has the burden of showing his or her good faith, that adequate disclosure was made to the parties for whom the lawyer was acting and that the client's informed consent was obtained.

Note should be made of the three part proof requirement of this Commentary: (1) good faith on the part of the lawyer, (2) adequate disclosure to the parties, and (3) informed consent from the clients.

What is a Conflicting Interest?

Guiding Principle 1 of Chapter 6 of the *Handbook* suggests that a "conflicting interest" is more inchoate than an actual conflicting right or entitlement. Clients do not need to be in open warfare before a conflict exists. It is defined in the Rule as an interest:

> . . . that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the transaction or not, including the obligation to communicate information.

A conflicting interest is therefore an interest which impairs the advice or level of service which the lawyer is able to provide to a client. *The Annotated Model Rules of Professional Conduct*, 3rd ed. (1996), American Bar Association, at pp.93 - 94 [hereafter referred to as ABA], comments helpfully in relation to their version of the conflict rule as follows:

> Loyalty to a client is also impaired when the lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

It is worthwhile pausing again to note the three practical professional functions which a conflicting interest may impair: (a) consideration, (b) recommendation, or (c) carrying out an appropriate course of action.

Perhaps the most common conflicting interest is an interest which impinges upon the ability of the lawyer to maintain client confidentiality. Confidentiality allows a lawyer to protect the interests of one client against knowledge of that client's problems or vulnerabilities by another client: see *Miller v. Dartmouth Dodge Chrysler* (1991) Inc. (1999), 177 N.S.R.(2d) 117 (N.S.S.C.); and *Lasch v. Annapolis (County)* (1992), 118 N.S.R.(2d) 418 (N.S. Co. Ct.).

However, even failures to properly inform clients as to how to most effectively exploit a legally common pool of information are disappointingly common: e.g., *Barrett v. Reynolds et al.* (1997), 163 N.S.R.(2d) 127 (N.S.S.C.); *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 133 D.L.R. (3d) 647 (Ont. C.A.); *Re A.M.* (NSBS Formal Hearing Decision, April 13, 1995), *Re G.S.* (NSBS Formal Hearing Decision, August 31, 1995). The New Brunswick Court of Appeal has expressed the view that it is nearly impossible to properly represent purchaser and seller in a commercial transaction for this very reason: *Bertrand v. Roussel* (1996), 183 N.B.R. (2d) 81 (N.B.C.A.).

There may be professional liability consequences as well as the disciplinary issues arising from multi client representation in relation to information sharing issues: e.g., *Ramrakha v. Zimmer* (1994), 24 Alta. L.R. (3d) 240 (C.A.); *Martin v. Goldfarb*, [1997] O.J. 1918 (Ont. Gen. Div.). *The Loss Prevention Bulletin*, circulated by the Society commencing in May 1991, shows that the problem of multi-client representation has been referred to on more than 10 occasions in this context: e.g., *Loss Prevention Bulletin* #8, 10, 12, 29, 34, 48, 49, 65, 72, 73, 79, 83, 91, and 97. Indeed, *Loss Prevention Bulletin* #73 in Issue No.19 (November 1997) provided an 'Independent Legal Advice Checklist'.

A conflict of interest may arise where there is a group with common legal interests but who arrive at the legal situation in significantly different factual circumstances. Where several parties sign as guarantors of a financial transaction, for example, the most financially able may in fact be shouldering a disproportionate amount of any risk and may require independent representation. See, for example, *Loss Prevention Bulletin*, Issue 4, Bulletin #29, "Looking after Mr/Mrs Deeppockets" (August, 1992). See also *Loss Prevention Bulletin*, Issue No.9, Bulletin #49, Item 1 (July 1994). Other conflicts of interest involving the financial interests of clients have been considered and reported regularly in the discipline context: e.g., *Discipline Digest*, Issue No. 15 (December 1996), No. 72; *Discipline Digest*, Issue

No. 11 (May 1995), No. 42; *Discipline Digest*, Issue No. 6 (September 1993), No.12.

A factual connection between legal matters is not required for a conflict of interest to arise in a litigation: *Canada Trustco v. Corkum* (1991), 105 N.S.R.(2d) 230 (N.S.S.C., T.D.), though obviously there can be such a disqualifying connection: e.g., *Discipline Digest*, Issue No. 22 (February 1999), reported Consent to Reprimand. See also: *Bow Valley Energy Inc. v. San Diego Gas & Electric Co.* (1996), 38 Alta. L.R. (3d) 116 (C.A.), aff'g. (1995), 36 Alta. L.R. (3d) 269 (Q.B.). The wording of the Canadian Bar Rule is more explicit in this respect than the Nova Scotia Rule. The *Canadian Code of Professional Conduct*, Chapter VI includes the following Guiding Principle:

> 8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) ***in the same or any related matter***, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter ***wholly unrelated to any*** work the lawyer has previously done for that person. [Emphasis added].

A conflict or appearance of conflict can arise between existing clients where one has a special, undisclosed relationship with the lawyer: e.g., *Discipline Digest*, Issue No. 6 (September 1993), No.12, or even just an ability to improperly influence or instruct the lawyer: e.g., *Discipline Digest*, Issue No. 6 (September 1993), No.7; *Discipline Digest*, Issue No. 22 (February 1999), No. 110.

Commentary 6.11 to the Nova Scotia Rule suggests that where counsel for an organization ventures to provide advice to corporate officers in relation to the personal interests of those officers, that may legitimately impair the lawyer's later ability to act on behalf of the company in asserting the interests of the company. An American example demonstrates the point. *National Texture Corp. v. Hymes*, 282 N.W. 2d 890 (Minn. Sup. Ct. 1979) involved a lawyer giving advice to a company officer about a personal patent application, and then litigation initiated by the company against the officer in relation to ownership of that patent. The lawyer was prevented from acting on behalf of the company against the interests of the officer.

A conflict or appearance of conflict could also arise between current and past clients as a result of confidences imparted over the course of a long relationship with the past client and which would be available to be used by the solicitor against the affected individual: e.g., *Montreal Trust Co. of Canada v. Basinview Village Ltd. et al.* (1995), 142 N.S.R.(2d) 337, at p.342 (N.S.C.A.); *Re Robinson* (1992), 114 N.S.R.(2d) 73 (N.S.S.C., T.D.); *Gainers Inc. v. Pocklington* (1995), 29 Alta. L.R. (3d) 323 (C.A.). This is at the murky edge of a disqualifying conflict of interest, and the possibility of conflict could likely be effectively managed through the methods provided by the Rule.

Getting Informed Consent

As seen earlier, a lawyer undertaking a joint representation of clients has to prepare for the day when the common enterprise among those clients will come undone. If the common enterprise does not fall apart, there will not be a problem. If the relationship does break down, the clients deserve that the lawyer will have arranged matters so that the breakdown is at least orderly and, if possible, without surprises. This is a particularly important expectation for clients who have been and wish to remain continuing clients of the particular lawyer or firm which originally undertook the multi-client representation. It is just as important for clients who believe that they want to save the expense of independent representation.

The Nova Scotia Rules permit lawyers to represent clients with conflicting interests by allowing clients to choose to have less independent representation than they could get from a lawyer of their own. A lawyer of the client's own could maintain confidences and aggressively press the client's advantage, while a lawyer with multiple clients with conflicting interests can do neither. That having been said, there are situations where the need to maintain confidentiality, or to assert a position to protect a client is so important, that it is not possible, even with informed consent, to provide competent legal services to more than one client. In those situations the lawyer has a duty to refer clients or potential clients away to other counsel.

Some of the client values associated with joint representation, and which should be considered in relation to whether to seek informed consent to joint representation, are described in Commentaries 6.6 and 6.7 of the Nova Scotia Rule:

> 6.6 The client's interests may be better served by not engaging another lawyer. Such may be the case when the client and another party to a commercial transaction are continuing clients of the same firm but are regularly represented by different lawyers in that firm.
>
> This situation does not eliminate the need for informed consent.

> 6.7 There are also many situations where more than one person may wish to retain the lawyer to handle a transaction and, although their interests appear to coincide, in fact a potential conflict of interest exists. Examples are co-purchasers of real property and persons forming a partnership or corporation. ***Such cases will be governed by the requirement of this Rule for informed consent.*** [Emphasis added].

Several steps or strategies must be taken in order to obtain "informed consent." To start, there must be more than the communication to each client that the lawyer also represents a second client. Even broaching the issue of joint or concurrent representations probably requires consultation with the clients or potential clients in advance for permission to discuss confidential client information which will provide the context for the full, affirmative disclosure required.

The concept of "informed consent" is described in Guiding Principle 2 as involving communication by the lawyer to each client or prospective client of five issues of concern. Informed consent also requires a response from each client or prospective client, after receiving the advice, that s/he consents to the lawyer acting. Both ends of that communication are "preferably" to be documented in writing—and perhaps most preferably for the lawyer who will at some future time carry the burden of proving that fully informed consent was given.

The five items of knowledge which the consenting clients or prospective clients must have in order to give informed consent are:

> 1. that the lawyer intends to act in the matter not only for that client or prospective client but also for one or more other clients or prospective clients;
>
> 2. that no information received from one client respecting the matter may be treated as confidential with respect to any of the others;
>
> 3. that if a dispute develops in the matter that cannot be resolved, the lawyer cannot continue to act for any of the clients and has a duty to withdraw from the matter;
>
> 4. whether or not the lawyer has a continuing relationship with one of the clients and acts regularly for that client; and
>
> 5. that the client or prospective client obtain independent legal advice where the lawyer has a continuing relationship with one or more of those for whom the lawyer intends to act.

An exception to the third requirement of referring a contentious matter away is contained in Guiding Principle 5, which provides that:

> However, if the issue is one that involves little or no legal advice, for example a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, they may be permitted to settle the issue by direct negotiation in which the lawyer does not participate. Alternatively, the lawyer may refer one client to another lawyer and continue to advise the other ***if it was agreed at the outset that this course would be followed in the event of a conflict arising.*** [Emphasis added].

These matters were neatly summarized by Kenneth Kipnis in a helpful article titled "Conflict of Interest and Conflict of Obligation," in *Ethics and the Legal Profession*, Davis and Elliston, eds., 1986, Prometheus (New York), where he said at p.289:

> At the very minimum - and this may not be enough - the attorney should tell clients precisely what he or she will do in the event that a conflict of obligations arises and should secure from each client a consent that is informed by adequate knowledge of the consequences. What is suggested here is not so much a rule as a set of strategies. To be sure, there will be many occasions in which a conscientious attorney, committed to doing the best for clients, can do nothing better than decline simultaneous representation. But it is often possible for an ethically competent lawyer to fashion a framework for cooperation that will serve all of the clients well.

In short, when a lawyer wishes to act for differing interests, affirmative full disclosure which provides the clients with sufficient information to evaluate the potential conflict, followed by client consent, is required.

Guiding Principle 3 of the Rule makes it clear that even "informed consent" should not be accepted by the lawyer where "it is reasonably obvious that an issue contentious between them [the clients] may arise or that their interests, rights or obligations will diverge as the matter progresses." Guiding Principle 4 indicates that even with informed consent, a lawyer is precluded by the conflict of interest rule from even attempting to advise on the contentious issue. On that issue the lawyer is under a "duty to refer the clients to other lawyers," though s/he may continue to advise on any non-contentious issues.

For example, in *Discipline Digest*, Issue No. 15 (December 1996),

No. 72, it was reported that multiple clients retained the lawyer to incorporate Company A to purchase the assets of Company B. The lawyer also represented Company B. The purchase arrangement was very complicated. Many required specifics were not dealt with in the agreement, nor were any of the clients counselled to obtain independent advice. The lawyer persisted in acting even when there existed ongoing disputes between the parties since the vendor and purchaser had originally agreed to retain him. This was a situation where the lawyer was counselled that he should not have acted even with informed consent.

In *Discipline Digest*, Issue No. 11 (May 1995), No. 42, A was selling her business to B. The lawyer was to handle both ends of the transaction. A asked the lawyer to obtain additional security for the purchase price beyond a promissory note, and remained under the impression that her instructions had been followed. While the lawyer did discuss additional security with B, B was unwilling to provide additional security. Informed consent was not given even though the parties had signed a retention agreement. It was decided that:

> ...when the issue of additional security arose in this matter it should have been reasonably obvious to the member that this was a contentious issue between the parties, and that he should have withdrawn at that point.

Counselling was again the disposition chosen by the Discipline Committee.

In *Discipline Digest*, Issue No. 11 (May 1995), No. 54, the lawyer represented both vendor and purchaser in a property transaction. Septic, and then legal, problems arose. The Report details the several concerns of the Discipline Committee which reviewed the matter:

> In cautioning the member, the Committee expressed concern that the purchasers were not fully informed with respect to the Agreement of Purchase and Sale. In particular, the Committee felt that when the vendor asked for a warranty clause on the septic system, the lawyer should have realized his obligation to advise the purchasers to obtain independent legal advice, at least on the Agreement. The Committee was also concerned that the purchasers did not fully understand the lawyer's position in representing both parties in the transaction. It was evident that the lawyer did not obtain the purchasers' informed written consent before proceeding and that they did not fully understand that the lawyer would have to withdraw if a dispute developed.

Another lawyer was counselled about these very same issues in a matter reported in the *Discipline Digest*, Issue No. 15 (December 1996), No. 70, where the lawyer had represented two distinct joint purchasers as well as the vendor in the transaction. See also *Discipline Digest*, Issue No. 16 (May 1997), No. 75; *Discipline Digest*, Issue No. 17 (August 1997), No. 80; and *Discipline Digest*, Issue No. 17 (August 1997), No. 81.

Conclusion

The point of all of these references to cases and digests in relation to multi-client conflicts of interest is that the Rule, and its scope for application, and methods for acting within the permissive scope of the Rule, have all been repeatedly communicated to the membership. From a professional conduct perspective, it seems fairly safe to conclude that counsel should be aware of the appropriate way to proceed in a multi client matter, and aware of the protections (financial and legal) which would flow to their clients as a result of complying fully and explicitly with the permissive elements of Rule 6, Guidelines 2 and 5. Acting in disregard of the Rules and practice guidance provided by the *Discipline Digest* reports invites the very problems, and complaints, which continue to afflict lawyers in relation to this Rule. Failing to take the precautions made possible by the Rule is careless, and costly for clients.

Getting informed consent is obviously not an absolute bar to complaints of alleged conflict of interests, nor is it ironclad protection against costly court removal motions. Lawyers, and clients, who opt for the efficiencies of joint representation ought to recognize that they are adopting a risky, delicate position. Not all lawyers may be up to the task, and not all clients may be ready to take the risks involved.

In *Re R.M.* (NSBS Formal Hearing Decision; March 21, 1985), a remedial penalty was imposed on a lawyer who had failed to get express consent to represent both vendors and purchasers in a real estate transaction, and had also failed to explain to both clients the implications of the conflict of interest. The Hearing Panel ordered, *inter alia*:

> (2) that the Solicitor undertake to not represent both sides in any matter until further order of the Committee;
> ...
> (4) that the Solicitor consult with the Practice Assistance Committee regarding conflicts of interest; ...

In other words, the lawyer was precluded under the terms of the Order from providing multi-client representation pursuant Guideline 5 of Rule 6. The lawyer had proven himself at least temporarily

unworthy of that permissive provision.

If a lawyer does choose to persist in representing two or more clients, it is will be important to keep the following cautions in mind. Geoffrey C. Hazard, Jr., in his article "Lawyer for the Situation," in *Ethics and the Legal Profession, supra,* posed the practical problem this way, at p.304:

> The role of lawyer for the situation therefore may be too prone to abuse to be explicitly sanctioned. A person may be entrusted with it only if he knows that in the event of miscarriage he will have no protection from the law...It can properly be undertaken only if it will not be questioned afterwards.

In *Barristers and Solicitors in Practice, supra,* at para.10.82, the same point was made:

> If a lawyer has accepted a joint retainer from two clients (with the necessary informed consent and restrictions upon the clients' ability to have individual representation), any fracturing of that common interest will be fatal to the joint representation. The lawyer may not necessarily be precluded from acting for the parties on non-contentious matters, though in practice this may be an impossible distinction to draw. But the rules are clear that the lawyer cannot advise both parties. Normally both clients should be referred to other lawyers. The two clients may be able to settle a business dispute (in which legal questions play no major role) by direct negotiation. However, the lawyer must stay out of the negotiations. If the parties agreed in advance that one client could continue to be represented by the lawyer, the rules permit the lawyer to refer one client to another lawyer and to continue acting. In practice, this scenario is rarely viable, and a court would be likely to disregard the purported agreement or waiver.

That pessimistic view is not entirely justified in Nova Scotia where lawyers are given the means to protect their continuing client relationships from the outset by getting informed consent. The unfortunate fact is that in the cases where complaints are made, few lawyers have attempted to bring themselves within the terms of Guiding Principle 5. If that is because the process of getting properly informed consent from clients might scare some clients off, or because the lawyer feels that making adequate "full disclosure" is too onerous, then the lawyer probably shouldn't be trying to undertake those conflicting representations in the first place.

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