Conflicts of Interest: Where are we since R. v. Neil?

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INTRODUCTION

Conflict of interest is one of the most common ethical challenges facing lawyers today. It can be vague and ambiguous, or stark and obvious. It is essential that lawyers have the tools and ability to recognize a real or potential conflict before a client's rights are affected. Conflicts can arise prior to, during and after a retainer: this is often because lawyers find themselves caught up in a complex web of relationships, both professional and personal, during the course of a solicitor-client relationship.

In the course of a file, a lawyer may be involved in relationships withcurrent and former clients; partners, associates and other lawyers; opposing or collaborating parties; witnesses; judges; adjudicators; family members; and volunteer organizations. Any and all of these relationships can give rise to the potential for conflict of interest. For example, conflicts can arise where:

- there is deliberate or inadvertent disclosure of confidential information by a lawyer to different clients
- the lawyer has divided loyalties between clients, or between a client and another party
- the lawyer is unable to engage in resolute advocacy for one client due to a conflicting interest with another client
- a lawyer becomes involved in a business transaction with a client

One simplistic solution is to return to first principles:

> *A solicitor is in a fiduciary relationship with his client and must avoid situations where he has, or potentially may develop a conflict of interest... a solicitor must be able to provide his client with complete an undivided loyalty, dedication and full disclosure, and good faith.* [Ramrakha v. Zinner (1994) 157 A.R. 279]

The *Nova Scotia Legal Ethics Handbook* attempts but does not clearly articulate the foundational principle of absolute loyalty, rather, it is dealt with piecemeal, throughout Chapters 6, 6A, 7 and 8.

With the decision in *Neil*, however, the tide is turning and lawyers must be fully aware of their current duties and obligations under the common law.

THE DUTY OF LOYALTY AND *R. V. NEIL*

What difference has the decision in *R. v. Neil* made, if any? *Neil* involved circumstances where a firm breached their duty to a client by accepting a retainer that required the firm to put before the divorce court judge evidence of illegal conduct of their client, at the time when they knew he was facing other criminal charges related to the client's paralegal practice, in which the firm had had a long standing involvement. The Court held in essence that a law firm cannot serve

two masters at one time, and in this case there was a breach of the duty of loyalty.

However, there have been a large number of cases since *Neil* which have adopted two fairly distinct interpretations: There are those (referred to as 'conventionalists') who believe that the *Neil* decision simply reiterates conventional ethics wisdom, while there are others (referred to as 'revisionists') who believe that this decision represents a significant shift in our ethical norms. How disparate are these views? And what should lawyers draw from the various common law interpretations of the duty of loyalty?

The conventionalists argue that *Neil* should be narrowly applied given the unique circumstances of the case, and the particular importance of the role of the criminal defense lawyer. The revisionists respond that *Neil* represents a unanimous decision of the Supreme Court of Canada and that its tone is to send a very clear message of professionalism to lawyers. The core proposition is that there is a general prohibition against representing a client against a *current* client of the firm, even in fresh and independent matters wholly unrelated to any matter to which is has no relevant confidential information. The only exceptions to this being where a) both client have given informed consent, and b) the lawyer reasonably believes that he or she is able to represent each client without adversely affected the other.

Justice Binnie emphasizes that loyalty has three components beyond the traditional duty of confidentiality: the duty to avoid conflicting interests; the duty of commitment to a client's cause; and the duty of candour. All of these principles fall under the main rule that "one cannot serve two masters". Justice Binnie also introduces the notion that a business conflict can now be a legal conflict; i.e. "...loyalty includes putting the client's business ahead of the lawyer's business..." meaning that retainers may have to be declined because of business conflicts. He goes on to say that "Business development strategies have to adapt to legal principles rather than the other way around.... It is the firm, not just the individual lawyer that owes a fiduciary duty to its client, and a bright line is required."

"The 'bright line' is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client - *even if the two matters are unrelated* - unless both clients consent after receiving full disclosure (and preferably independent legal advice) and the lawyer reasonably believes he or she is able to represent each client without adversely affected the other."

There are those who predict that this decision will cause firms to shrink and increase the number of boutique firms; others predict that law firms will have to develop more rigorous systems for both opening and closing files, and conflict search systems. *Neil* therefore highlights, for example, the importance of disengagement letters, for example, and the value of 'closing' a file securely with a client.

APPLICATION OF *NEIL*

There are at least 18 cases that have engaged in a substantive discussion of *Neil*. Some (i.e. the revisionists) give a broad interpretation of *Neil*, while others (i.e. the conventionalists) read it more narrowly. A number of courts have emphasized that not only must there be loyalty, there must be 'harm' attributed to any alleged breach. [*River Colony, Philips v. Goldson, West Fork Ranch*]. However, others have put increasing emphasis on the duty to respond candidly and completely, especially where the lawyer's own economic interests have a potential to come into play. [*Shamray, Strother*] The Quebec Criminal Court in *Angers* acknowledged the competing values of a) preserving the integrity of the legal system, b) a client's right to choice of counsel, and c) mobility of the legal profession, and emphasized that not only a real conflict of interest, but also a perceived/potential conflict of interest might put the duty of loyalty at risk, and result in disqualification of the lawyer.

In *Toddglen*, the Court pointed out that a firm cannot avoid the 'duty of loyalty' to an existing client by terminating one retainer when another more lucrative one comes along. This principle was applied by the Society's discipline committee in 2002 when a member was cautioned for terminating services for a plaintiff in a personal injury action against Company A well after the conflict of interest had been identified, where the firm was concurrently representing Company A in an unrelated matter, and the Company instructed the firm not to act against it on any matters. The Committee found that the member owed a duty of loyalty to the plaintiff and as soon as the conflict of interest arose, the firm should have withdrawn so as to minimize further hardship and cost to the plaintiff.

MODEL RULE ON CONFLICTS

In 2004, a national committee was struck by the Federation of Law Societies to consider development of a model code of conduct for the country. Given the ambiguity created by the common law since *Neil*, and the fact that lawyer mobility has increased the need for greater consistency between provinces in this area, this committee quickly agreed that a rule on conflicts needed to be addressed as a matter of priority. The proposed draft model rule coming forth adopts the 'revisionist' interpretation of *Neil*.

The Rule and its Commentaries note that a solicitor and client relationship is often established without formality; i.e. an express retainer or remuneration is not required for a solicitor-client relationship to arise. The duty of confidentiality arises regardless of whether a potential client ultimately retains the lawyer, and a lawyer may have a disqualifying conflict if he or she were to later act against the prospective client. It is therefore imperative for the lawyer to carefully manage the establishment and termination of the solicitor-client relationship.

The Rule goes on to provide that a client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest. A lawyer must examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer as new circumstances or information may establish or reveal a conflict.

The foundation of the proposed rule is that a lawyer must not act against a current client without the client's consent, which consent may be express or implied. With respect to former clients, the proposed rule states that it is not improper 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 and where previously obtained confidential information is irrelevant to that matter. This raises the bar, so to speak, from requiring that the matter be wholly unrelated to previous work, to including situations where previously obtained confidential information is also irrelevant.

CONCLUSION

The tension between the business model of the law firm and the professional model is likely to intensify as a result of *Neil*. This case reaffirms the ideal duty of client loyalty, but there are large structural economic forces at play that complicate the conventional model: the emergence of specialized legal services, the globalization of commerce, the dramatic growth in the size of law firms, a significant increase in mobility within the legal profession, and increasingly competitive legal markets. [Janine Baker-Griffiths, Serving Two Masters:Conflicts of Interest in the Modern Law Firm (Oxford:Hart Publishing, 2002]

What is critical is that lawyers not lose sight of their fundamental ethical duties and principles of practice when responding to these changing dynamics of practice. Although *Neil* and its progeny do not endorse a principle of absolute loyalty, these decisions recognize the overarching principle of maintaining the integrity of the administration of justice, and emphasize that it is an 'unassailable and defining principle'.