CONFLICT OF INTEREST

DUTY OF LOYALTY PART II

Some conflicts are obvious; for example, theobligation not to represent two sides in a dispute.

Other conflicts are more complex - Conflicts arise because lawyers find themselves caught in a complex web of relationships, both professional and personal. These include relationships with current clients, former clients, other lawyers, partners and associates, witnesses, adjudicators, and family members. A straightforward solution to these challenges is to go back to first principles:

First Principles

Lawyers are fiduciaries, clients are sovereign, justice should not only be done but manifestly and undoubtedly be seen to be done, hence a lawyer should avoid even the appearance of impropriety. In short, there is a principle of absolute loyalty. As Harradence J.A. has said in *Verma v. Zinner*:

> A solicitor is in a fiduciary relationship to his client and must avoid situations where he has, or potentially may develop a conflict of interests: … the logic behind this is cogent in that a solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.

MacDonald Estate v. Martin

In *Martin*, the Appellant's lawyer was assisted by a junior associate of his firm who was actively engaged in the case and was privy to confidential information. The junior associate later joined the law firm which represents respondent in this action. The Appellant applied for a declaration that the law firm was ineligible to continue to act as solicitors of record for respondent. The court granted the application and ordered the firm removed as solicitors of record. The Court of Appeal reversed that decision.

The Supreme Court was concerned with three competing values:

> 1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice;
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> 2) the value that a litigant should not be deprived of his or her choice of counsel without good cause; and
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> 3) the desirability of permitting reasonable mobility in the legal profession.

Ultimately, the primary concern of the Supreme Court is whether there might be an abuse of confidential information.

> The use of confidential information is a matter usually not susceptible of proof, and the test must therefore be such that a reasonably informed person would be satisfied that no use of confidential information would occur.

Two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

> In answering the first question… courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication.

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client.

Although there was consensus on the fact that the transferring lawyer is conflicted out, there was disagreement on whether existing members of the new law firm are also conflicted out.

> The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and

> is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it.

The court supported an inference that lawyers who work together share confidences, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.

In dissent, the Supreme Court found that, where a lawyer who has a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for an opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm. Such an irrebuttable presumption is essential to preserve public confidence in the administration of justice.

> Neither the merger of law firms nor the mobility of lawyers can be permitted to affect adversely the public's confidence in the judicial system… it is fundamentally important that justice not only be done, but appear to be done in the eyes of the public. While the necessity of selecting new counsel will certainly be inconvenient and worrisome to clients, and reasonable mobility may well be important to lawyers, the integrity of the judicial system is of such fundamental importance that it must be the predominant consideration. Our judicial system cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed. No matter what form of restrictions were sought to be imposed on individual lawyers and law firms involved, the public would, quite properly, remain skeptical of their efficacy since lawyers in the same firm meet frequently and have numerous opportunities for the private exchange of confidential information.

Stewart v. Canadian Broadcasting Corp.

This case arose out of Edward Greenspan’s participation as host and narrator on a C.B.C. television program called “The Scales of Justice”. He discussed at length a criminal negligence causing death case in which he had served as a defence lawyer for Mr. Stewart some thirteen years previously. After the program was aired, Stewart sued Greenspan (and the C.B.C.) for breach of contract and his fiduciary duties. The trial level judge made several very important points which emphasized the positive ideal of a duty of loyalty rather than the negative prohibition on conflicts of interest:

• Lawyers are in an intense fiduciary relationship with their clients, and the relationship exists beyond the duration of the retainer;

• The fiduciary relationship imposes a positive duty of loyalty;

• Loyalty is not dependent on confidentiality; it is a larger, freestanding obligation;

• Loyalty arises because of the vulnerability and dependency of clients vis-à-vis the lawyer;

• Loyalty is crucial because the legal profession is an important social institution, and the public needs to have faith and confidence in such institutions.

The case law on this matter created two specific bodies of thought:

The Conventionalists

A number of courts have emphasized that not only must there be loyalty, there must be a "harm" or "prejudice" attributed to any alleged breach. In *River Colony*, the court found that any breach of duty of loyalty must demonstrate a "loss." In *Phillips v. Goldson*, the Ontario Superior Court of Justice agreed that *Neil* expanded *Martin* but also pointed to paragraph 31 of *Neil* to argue that Binnie J. may have "smudged the bright line" by defining conflict to add two additional conditions: "there is a substantial risk that the new client's representation will be adversely affected and that it will be affected in a material way." Similarly, in *West Fork Ranch*, the British Columbia Supreme Court held that a breach of loyalty must have "caused or materially contributed to the Plaintiff's loss."

The Revisionists

Revisionists, however, can point to a series of other cases to argue that lower courts are developing an expansive interpretation. First, the vast majority of these recent cases are commercial/corporate law cases and, specifically, that corporate solicitors owe a manifest duty of loyalty. Second, appellate and trial level courts in British Columbia, Manitoba, Ontario, and Newfoundland and Labrador have reaffirmed that loyalty has a larger compass than confidentiality, "including the duty to avoid conflicting interests and the duty of commitment to the client's cause." Third, courts have begun to put increasing emphasis on the duty to respond candidly and completely, especially where the lawyer's own economic interests have potential to come into play.