



Competing Roles: Courts vs Regulators

- Courts have supervisory jurisdiction over the administration of justice and have the authority to remove a law firm from a file
- Disqualification may be required to:
 - Avoid improper use of confidential information
 - Avoid risk of impaired representation
 - Maintain the repute of administration of justice



Regulators' Role

- Courts develop fiduciary principles governing lawyer-client relationships
- Law societies govern the profession and establish regulations for lawyers, based on judicial precedent
- Rules ensure ethical conduct, protection of the public
- Regulators discipline lawyers who breach the rules.
- Law societies cannot compel a lawyer to withdraw from a file, but can discipline a lawyer who breaches conflict of interest rules.
- Courts are not bound by law society ethics codes: but they are 'important statements of public policy'



What is a Conflict of Interest?

Code of Conduct: Rule 3.4-1:

[1] A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duty to another client, a former client, or a third person....



Types of Conflicts

1. Former clients, lateral transfers
2. Non-clients or "near clients"
3. Current clients of the firm
4. Lawyer and own client

1. Former Client Conflicts

In *MacDonald Estate*, the Supreme Court reformulated the standards for conflicts of interest in the context of the lawyer's duty of confidentiality, adopting:

- A presumption of shared information;
- Possibility (not probability) of disclosure;
- Reasonable person/public perception; and
- Heavy burden of proof to discharge.

MacDonald Estate v Martin, [1990] 3 SCR 1235

Test for Disqualification

- Would a reasonably informed person be satisfied that no use of confidential information would occur?
- Two questions:
 - Did the lawyer receive confidential information attributed to the lawyer-client relationship?
 - Is there a risk that it will be used to the prejudice of the client?

Other Considerations

- Is there a “possibility” of mischief? The test is not whether it is “probable”
- Courts will infer that confidential information was shared with other firm members
...UNLESS the firm can establish the existence of timely ethical screens



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Competing Principles

Courts will balance three competing values:

- high standards of the legal profession, integrity of justice system
- litigants’ choice of counsel
- reasonable mobility of lawyers



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Other Duties to Former Clients

The duty to keep confidences is a fiduciary duty that survives termination of the retainer.

Other residual fiduciary duties:

- not to act against a former client on the subject matter of the prior retainer, or to undermine what was formerly done
- a duty of candour with respect to matters relevant to the prior retainer (eg. if you subsequently learn that advice was in error)
- not to improperly benefit from the fiduciary relationship.



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Scenario 1:

Ted, one of the partners in your firm, has invited his spouse, Cynthia, for lunch and you stop to talk to them in the hall as you all make your way out of the office.

Cynthia is leaving her employer to join a competitor and they ask for your advice about how best to handle the situation. You advise Cynthia on how she should manage situations with customers, what kind of notice she should give, and what sort of letter to write.



Scenario 1 – cont'd:

There was no follow up meeting, no discussion of payment, and no discussion or agreement that you would conduct research to provide a legal opinion. Cynthia has never retained you before. She has since been sued by her former employer but did not retain you to act.

Is Cynthia your “client”, such that you owe her a duty of confidentiality?



See *Cushing v Hood*, 2007 NSSC 97;
affirmed on appeal 2008 NSCA 47



Scenario 2:

Mr. B wanted new counsel in his matrimonial matter and had called a number of lawyers, including Ms. Peterson.

Ms. Peterson was in the process of leaving her firm, "HPD", but took the time to speak to Mr. B for up to 20 minutes about his case. She discussed opinions he had received from other lawyers, and provided him with her opinion on a variety of parenting, support and matrimonial property issues.

He ultimately decided to stay with his lawyer.



Scenario 2 – cont'd:

Mrs. B then retained the HPD firm, but retained someone other than Ms. Peterson. Ms. Peterson had left the firm two weeks after the call with Mr. B. She had taken some notes and placed them on a general file which she left at the firm.

A conflict check failed to identify Mr. B as a former client. Mr. B and his lawyer say that the HPD firm is in conflict and cannot act for Mrs. B. No one remaining at HPD ever spoke about the matter with Ms. Peterson, nor has anyone been able to locate her file.

Should the HPD firm be disqualified from acting for Mrs. B?



See *Babich v Babich*, 2016 SKQB 327



Prospective Clients

- Commentary to Rule 3.4-6:
 - Perform conflict search before meeting
 - No meeting or other disclosure if conflict is found
 - If you speak with the prospective client and are not retained, clarify in non-engagement letter
 - Firm may act opposite the prospective client only if other firm members are retained and the confidential information is not disclosed



Transferring Between Law Firms

- Transferring lawyers and non-legal staff can create conflicts
- Identify potential conflicts before hiring from another firm
- Timely ethical screens are essential



Beware of Transferring Support Staff

Contrast

Chem v Chem, 2006 ABCA 16 in which firm was disqualified and

FJN v JK, 2015 ABQB 660 in which the firm was not disqualified

Ensure that measures are put in place to screen incoming support staff who may have confidential information about an opposing party.



2. "Near" clients

- If you receive confidential information about a non-client in the course of representing your client, you may be prevented from acting against the non-client
- What duties do you owe to corporate officers within an organization who instruct you?
- What duties do you owe to opposing parties?

Scenario 3:

Mr. Lessing acts for Mr. S against Mrs. S. with regard to support and custody matters. He previously acted for Mrs. S's former husband, Mr. F., in a similar action with similar issues. During F's retainer the lawyer, Lessing, became aware of an expert report from a psychologist.

Mr. S and Mr. F have contacted each other directly and have shared information about their files. Mr. F is to be a witness for Mr. S at the upcoming trial.

Scenario 3- cont'd:

Mr. Lessing has never acted for Mrs. S.

Mrs. S seeks to have Mr. Lessing disqualified from acting as Mr. S's lawyer.

Should he be disqualified?

See *Svorinic v Svorinic*, [2012] BCJ No. 1143 (BCSC)

Compare and contrast with *McCain v Melanson*, 2016 ONSC 6350, leave to appeal denied 2017 ONSC 375

McCain v Melanson

- McCain sought to disqualify her husband's lawyer on the grounds the lawyer had acted against her and members of her family in other matrimonial matters, and that she had provided personal and confidential information to the opposing counsel
- The Court stated she was obliged to demonstrate that the previous retainer was sufficiently related to the current one, and that there was a possibility the opposite lawyer had relevant confidential information

McCain – cont'd:

- The Court declined to disqualify Melanson's counsel:
 - The two legal issues were unrelated, involving different parties, facts and legal issues
 - Information from a psychiatrist 11 years ago, about McCain's parenting capacity was not relevant to the current dispute
 - Information about McCain was communicated to others and had been properly shared with opposing counsel; she had not provided confidential information directly to him and was adverse to him throughout

3. Current Client Rule

3.4-3 A lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, even if the matters are unrelated, unless both clients consent.



R. v Neil

“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 mandates are unrelated** — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.”

(*R. v Neil*, 2002 SCC 70, para. 29)



Duty of Loyalty

- i. a duty of commitment to the client's cause,
- ii. the duty to avoid conflicting interests,
- iii. a duty of candour with the client on matters relevant to the retainer, and
- iv. a duty not to disclose, or abuse, confidential information.

(para. 19)



CNR v. McKercher LLP

- [33] ...the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting.
- [35] ...only when clients are **adverse in legal interest**.
- [36] Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. It is not a **tactical** strategy.
- [37] Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters.

[2013] 2 SCR 649


Scenario 4:

- The Harris law firm acted for D Corp on a number of employment matters between 2005 and 2015.
- In 2016, E Corp acquired/amalgamated with D Corp.
- The Harris firm had been acting for Mr. S. against E Corp in an employment matter since 2014.
- E Corp alleges the firm is in conflict and seeks to disqualify Harris from the matter involving Mr. S and E Corp.

Scenario 4 - cont'd

Should the Harris firm be disqualified?


See *Salager v Dye & Durham Corporation*,
2017 BCSC 470



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Other Simultaneous Representations

- Joint representations – two clients are represented in the same matter
- Concurrent representation – permitted for economic competitors, for example, separately represented by the firm in independent matters.




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Advance Waivers: *MTM v Statesman*

- Firm had worked for M for many years
- M entered joint venture with S to develop condo project
- Firm was engaged to work for the joint venture partners to defend them in a lien dispute
- Firm emailed S, to confirm with S that it would not object to the firm continuing to act for M in event of future disagreements

(2015 ABCA 142)



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Advance Waivers – cont'd:

- S ended retainer with the firm
- M started an oppression action against S
- S demanded the firm withdraw due to alleged conflict – Court of Appeal found no conflict
- The firm had clearly obtained advance consent to act against M in future disputes such as this
- No confidential information was at stake as lien and oppression matter were unrelated



4. Lawyer – Client Conflicts in the Code of Conduct

- Rule 3.4-12: Too closely connected to the client's cause, loss of objectivity
- Rule 3.4- 14: Opposing counsel is related to you
- Rule 5.2-1: Lawyer as witness
- Rule 3.4-13: Doing business with clients



Conflict Management Systems

- Establish a central system to identify and avoid conflicts
- Ensure no one receives confidential information from potential clients or opens a file until a conflict analysis is complete
- Record names of all potential clients, those you see on a one-time consultation, and those you reject



Conflict Management – cont'd

- Include sufficient information to allow you to identify potential conflicts, such as:
 - Names of all new, former and current clients
 - Aliases and spelling variations
 - Trade names, corporate names, affiliates, partners
 - Directors, officers, shareholders
 - Adverse parties, known now and during life of file
 - Known relatives, spouse
 - Opposing counsel
 - Subject matter of retainer

Conflict Management – cont'd:

- Withdrawal
- Informed Consent of Clients
- Ethical Screens
- Retainer / engagement letters

Q&A Section



More Conflicts Questions? Contact The Practice Advisors

- Website: www.lawsociety.ab.ca under "Lawyers & Students"
- By Phone: 1.866.440.4640
- Resources for Lawyers on Conflicts:
 - Learning Centre:
<https://learningcentre.lawsociety.ab.ca/>
 - Resource Centre:
<https://www.lawsociety.ab.ca/resource-centre/key-resources/>