



Conflicts Part 2



LAW SOCIETY
of ALBERTA

Elizabeth Aspinall
Practice Advisor
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Today we will:



- Review conflicts basics
- Consider conflicts in criminal law context
- Consider conflicts in in-house context
- Consider conflicts giving rise to liability for lawyers

Conflict of Interest Defined

Substantial risk the lawyer's representation would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, former client, or a third person.

R v Neil, 2002 SCC 70

What *is* a conflict of interest?

Occurs whenever a lawyer is placed in a position where loyalty to the client is compromised.



Basic Principles

- Solicitor-Client relationship based on the highest of trust
- Lawyer's loyalty must be unquestioned and *unquestionable*
- Fiduciary relationship
- Underpins confidentiality



Removing Counsel Because of a Conflict

Court has jurisdiction to
remove counsel

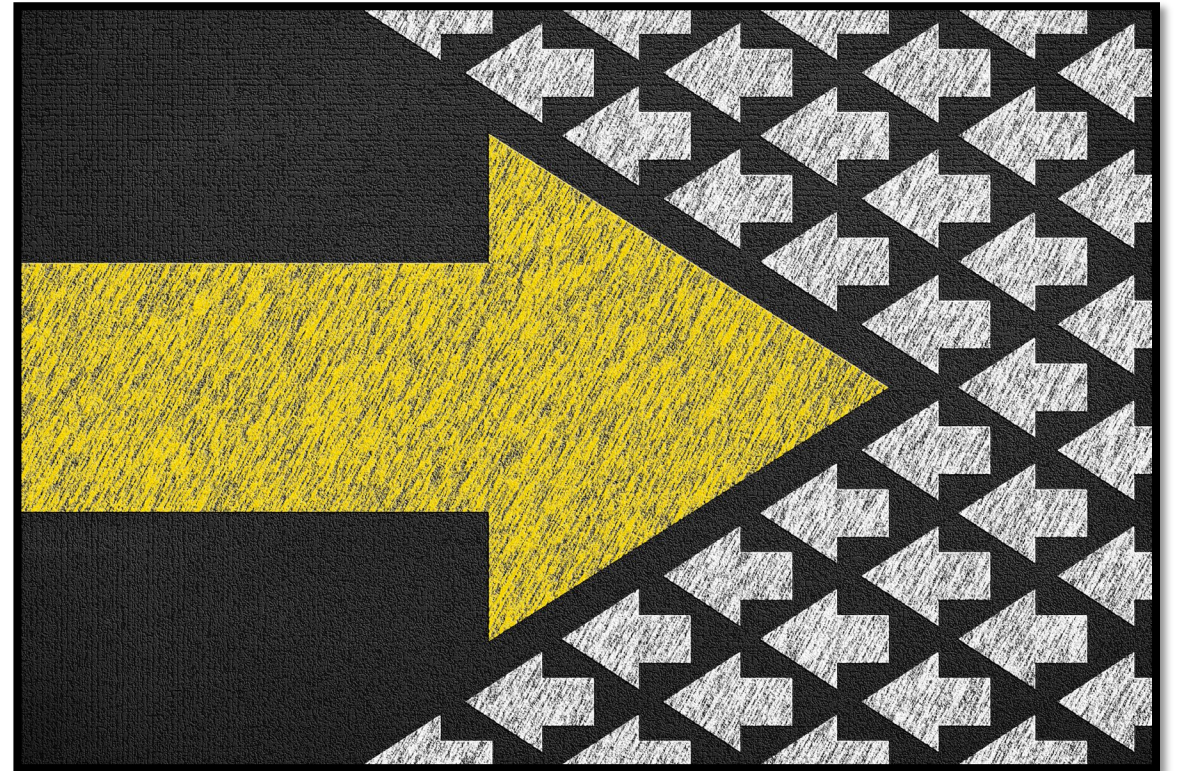
Law Society rules and
Code inform but do not
determine



Representation must be materially & adversely affected by the conflict

- Adverse effect measured against the quality of the representation, not the result
- Requires consideration of the retainer
- The importance the client ascribes to that element of the retainer is key

Third Restatement (American Law Institute), adopted in *R v Neil*



When will the representation be materially & adversely affected?



Depends on:

- Context
- Retainer
- Work done

Risk must be:

- Significant
- Not certain or probable
- More than a mere possibility

Code of Conduct 3.4-1, Commentary 1

Law Society of Upper Canada v DeMerchant, [2015] LSDD No. 32 at para. 119

Key Principles:

- A conflict arises where a lawyer's interests or duties create a substantial risk of material or adverse effect on the representation
- A substantial risk requires a genuine and serious risk to the representation
- There does not need to have been an actual effect on the lawyer's representation of the client
- Determining whether there is a conflict requires assessment of actual duties owed to client
- Conflict may not involve risk to confidential information

Scenario #1

- G and Z charged with conspiracy to smuggle people into the US.
- L represented Z in previous immigration prosecution, acted again at judicial interim release proceedings, and before, during and after the preliminary inquiry on smuggling charges.
- L's partner, F, also acted for Z from time to time during the preliminary inquiry but communications were limited. F crossed witnesses on Z's behalf.
- F retained by G on the conspiracy matter





- Is this a conflict?

a) Yes

b) No

R v Chen, 53 OR (3d) 264, [2001] OJ No 589 (SCJ)

Crown's application to remove F for conflict granted

Z client of L and F

Z and G had significantly different positions and interests

Duty of loyalty shared by all firm members

Counsel could not cross witnesses effectively because evidence in favour of one client could harm the other

Conflicts and Loyalty in Criminal Justice System



- Importance of lawyer's loyalty key in adversarial criminal justice system
- Resolute advocacy
- Public's confidence in the system
- Client's constitutional rights to effective counsel & counsel of choice

Effective Assistance

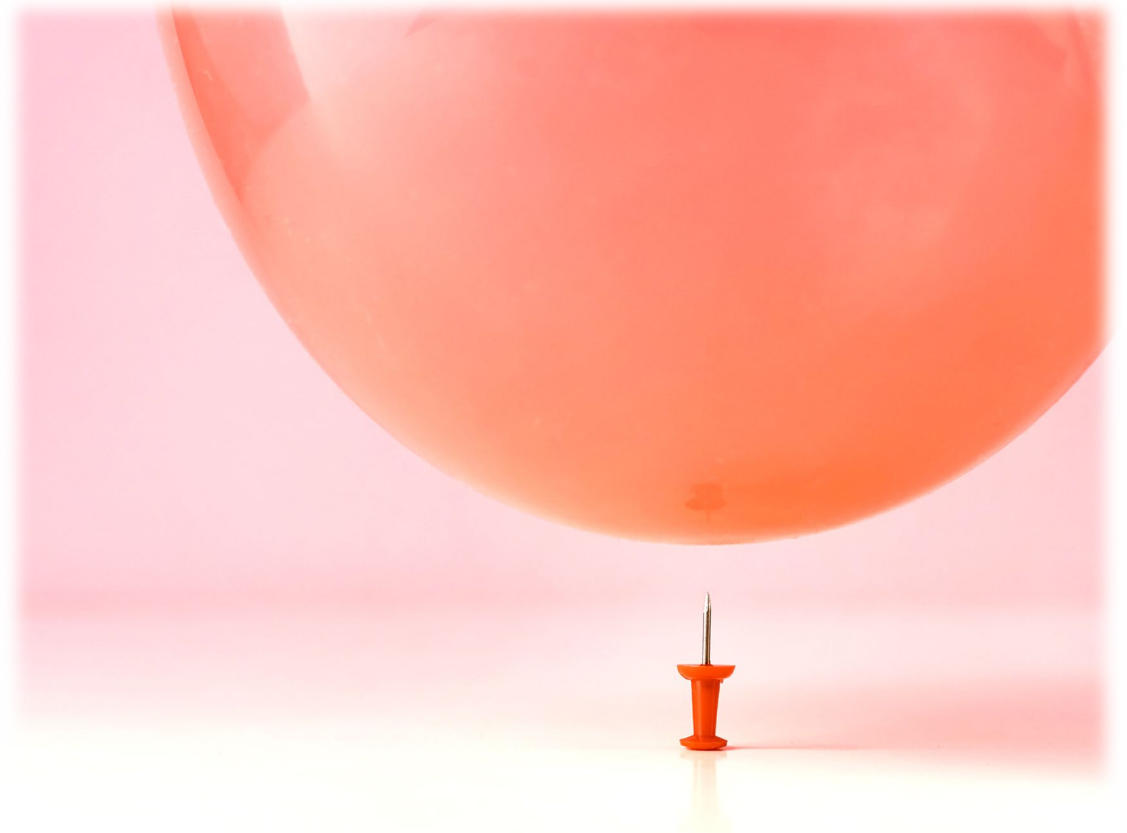
A lawyer can render effective assistance only when that lawyer gives the accused's cause the undivided loyalty which is a prerequisite to proper legal representation. Within the limits imposed by legal and ethical constraints, the lawyer must champion the accused's cause *without regard to counsel's personal interests or the interests of anyone else.*

G.A. Martin, "The Role and Responsibility of the Defence Advocate" (1970), 12 Crim. L.Q. 376 at pp. 383-8 in [Regina v Widdifield et al \[Indexed as: R v Widdifield\], 25 OR \(3d\) 161, \[1995\] OJ No 2383, 1995 CanLII 3505](#)

When is the risk of a material and adverse effect substantial?

- A contingent threat of harm to the duty of loyalty can disqualify a lawyer
- Can be a low threshold
- Lower than proof in the civil standard

R v WW (1995), 100 CCC (3d) 225;
Strother v 3464920 Canada Inc, 2007
SCC 24



Joint Retainers in Criminal Law Context



- Clients have inconsistent defences
- Clients implicated to different degrees in the charges
- Clients' adversity of interest

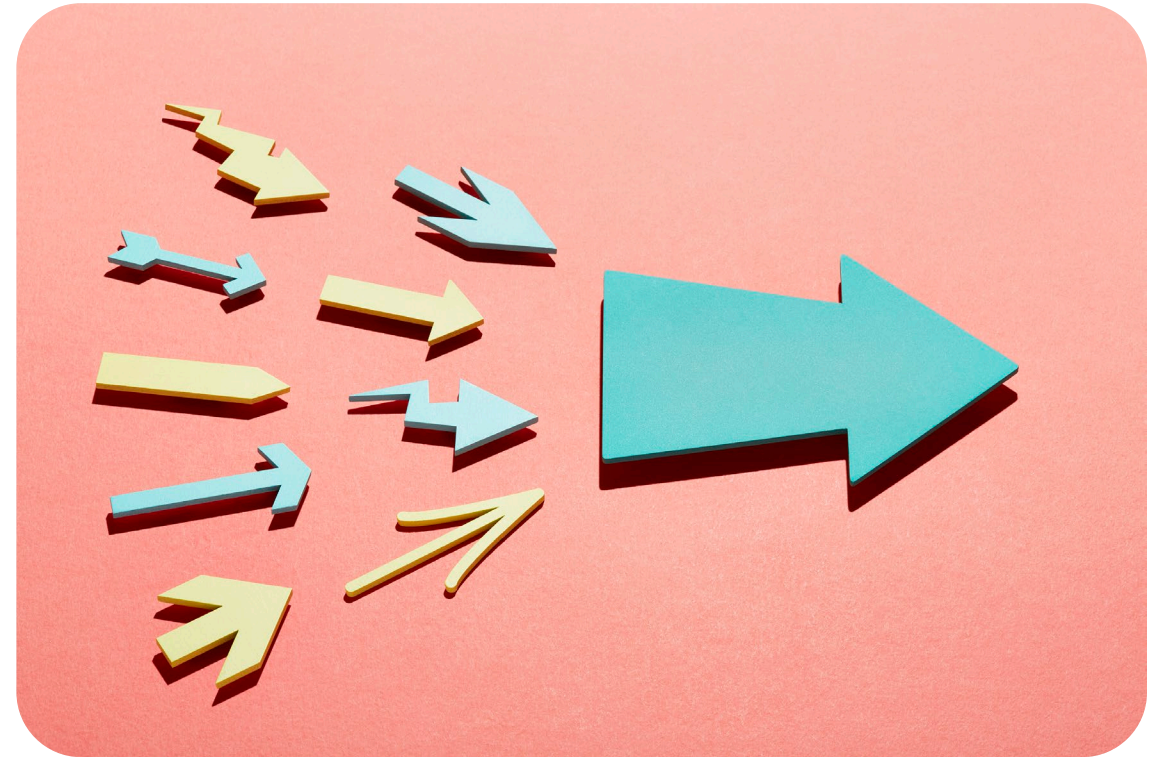
Joint Retainers in Non-Criminal Context

- Lawyers may act for clients who have *conflicting interests* or have a *potential conflict*
- Two separate clients with seemingly compatible interests
- Client having multiple roles with a single matter



Clients with Multiple Roles

- Lawyer acting on a matter where client has multiple roles
- Essentially joint representation
- Alignment of interests between the roles may develop into a conflict or dispute



Scenario #2:



- Share purchase
- Lawyer acting for Purchaser
- Agreement required P to pay in installments
- Vendor asked L to act

- 
- Can the Lawyer act?

- a) Yes
- b) No

Code 3.4-5

Before a lawyer acts for more than one client in the same matter, the lawyer ***must***:

- a) disclose advantages and disadvantages of a joint retainer
- b) obtain client consent
- c) ensure the joint retainer is in clients' best interests;
- d) advise each that no confidentiality between them;
- e) advise each that if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Joint Retainer in Clients' Best Interest?



- complexity of the matter
- terms yet to be negotiated, complexity and contentiousness of those terms
- whether considerable extra cost, delay, hostility or inconvenience would result from using more than one lawyer
- availability of another lawyer of comparable skill
- degree to which the lawyer is familiar with the parties' affairs
- probability that the conflict or potential conflict will ripen into a dispute due to the respective positions or personalities of the parties, the history of their relationship or other factors
- likely effect of a dispute on the parties
- whether it may be inferred from the relative positions or circumstances of the parties (such as a long-standing previous relationship of one party with the lawyer) that the lawyer would be motivated to favour the interests of one party over another
- the ability of the parties to make informed, independent decisions.

Scenario #2 – Part 2

- No written retainer agreement
- L did not collect first installment payment from Purchaser on closing because parties advised they would arrange it themselves
- P does not pay
- Parties renegotiated without L's involvement
- P discovered defects with shares, seeks to renegotiate purchase price. Parties unable to agree
- Purchase never completed

Scenario #2 – Part 2

- What should the lawyer do?
 - a) Withdraw
 - b) Act for one of the parties
 - c) Act for both parties

Scenario #3



- Joint venture to purchase and renovate homes for resale
- Joint venturers secured interest by caveat on title
- Agreement reached before L retained in joint retainer
- B claims it entered loan agreements and profit on loans were to have priority registration
- L represented that loans were secured by registration and had priority
- B's interests not secured, JV bankrupt

Third Party Payment of Fees



- Code 3.2-6, Commentary 4-6
- Lawyer must be satisfied that payor understands they are not the client and the significance of that, including that they have no right to receive confidential information
- Fee Payment by Third Party - Lawyer | Law Society of Ontario (lso.ca)

Law Society Rule 119.21



- If a third party pays funds to be held in trust for a client
- Lawyer *must* obtain agreement from the third party and client
- Setting out conditions upon which money is held in trust
- Setting out when funds can be disbursed
- What happens to unused funds or at termination of retainer

Lawyer's Own Interest Creating Conflict

Code 3.4-12, and Commentary

IF:

- lawyer's own interests
 - substantial risk
 - lawyer's representation materially and adversely affected

THEN:

- lawyer may not act unless
 - client provides informed consent *and*
 - lawyer independently determines they can represent the client ethically despite the conflict

Brogan v Bank of Montreal, 2013 NSSC 76: Not all familial or personal relationships will disqualify a lawyer

- Nature of the relationship?
- Will it interfere with duty to provide objective, disinterested advice?
- Lawyer has personal involvement or interest in the proceeding?



Scenario #4



- Lawyer's colleague states to them that they engaged in conduct that may be criminal
- Soon thereafter, colleague put on leave and charged
- Lawyer speaks to their supervisor about providing statement to police but told not to, that they have no duty to, and that doing so will have negative repercussions for Lawyer and the whole office.



- What should the lawyer do?

- a) Ignore their supervisor
- b) Stay silent
- c) Go over their supervisor

Private Practice:

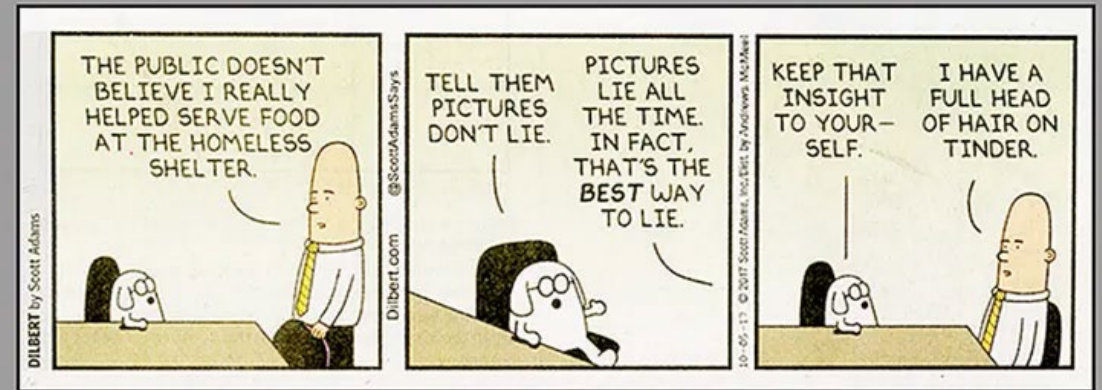
- Stay silent.
- May depend on what is reported to you.
- Implied retainer? Possible but unlikely.

Crown or In-House:

- Prosecutors have additional obligations.
- Rule 5.1-4: have to act for the public and administration of justice resolutely.
- Was the conversation “when engaged as a prosecutor”?
- Who is the client? Was the conversation with an employee? Is the corporate client implicated?
- Up the ladder reporting – go over the supervisor and consider whether that necessitates report of supervisor to Law Society under Rule 3.2-14.

Implied Retainers and Near Clients

- A person can be a client without a formal retainer
- A client can be any person who reasonably concludes that the lawyer has agreed to render legal services on their behalf.



Scenario #5



- Lawyer knew opposing party or key witness as a child
- No recent contact

Can they act?

What should the lawyer do?

Private Practice

1. Enough time has passed, they can act
2. Don't act
3. Take on the retainer and withdraw later if it seems to be a problem

Crown or Defence Counsel

1. Enough time has passed, they can act
2. Don't act
3. Take on the retainer and withdraw later if it seems to be a problem

Can the lawyer's own actions give rise to a conflict?

- Lawyer makes a mistake on a file
- Client accepts Lawyer's recommendation, it goes badly, client blames Lawyer
- Do gifts from other lawyers create a conflict?
- Can a Crown recommend a charity with which they are involved for restitution payment?



Doing business with a client

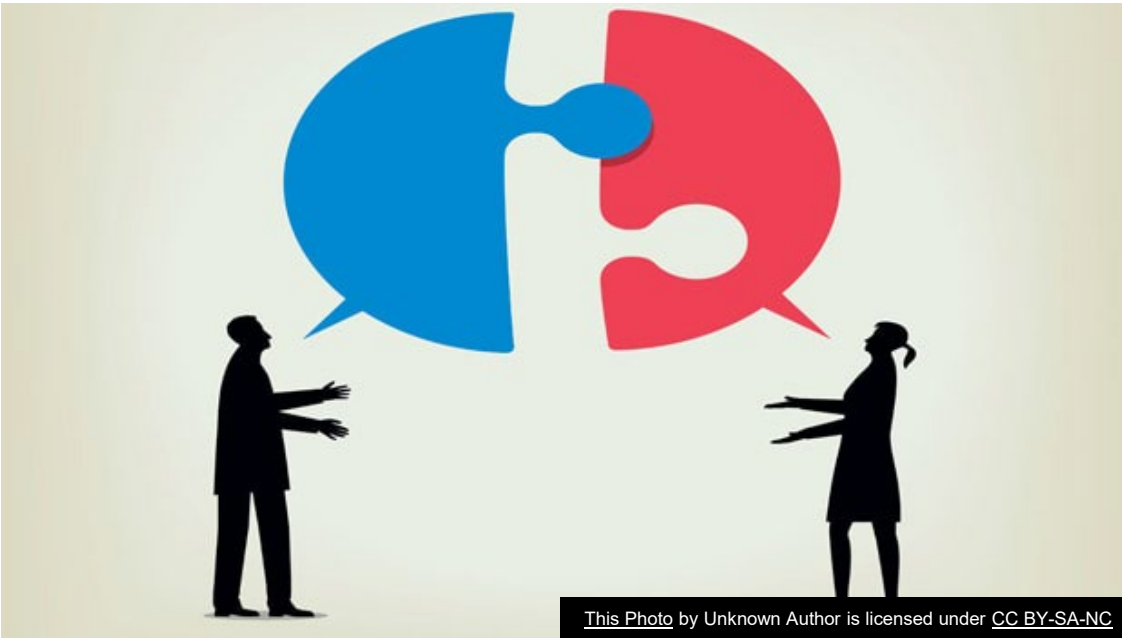
Lawyer must show:

- business relationship was advantageous to the client,
- Client clearly understood the conflict and consented to it

Code of Conduct 3.4-13

Biggs v London Loan, [1933] SCR 257

Galambos v Perez, [2009] 3 SCR 247



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Practice Advisors - Law Society of Alberta

Toll free: 1.866.440.4640

Calgary: 587.390.8462

Beth Aspinall: 403.229.4784

Elizabeth.aspinall@lawsociety.ab.ca