CHAPTER V

IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS

RULE

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Commentary

Guiding Principles

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client.\(^1\)

2. The reason for the Rule is self-evident. The client or the client's affairs may be seriously prejudiced unless the lawyer's judgement and freedom of action on the client's behalf are as free as possible from compromising influences.\(^2\)

3. 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 particular transaction or not, including the obligation to communicate information.\(^3\)

Disclosure of Conflicting Interest

4. The Rule requires adequate disclosure to enable the client to make an informed decision about whether to have the lawyer act despite the existence or possibility of a conflicting interest. As important as it is to the client that the lawyer's judgement and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead it may be only one of several factors that the client will weigh when deciding whether to give the consent referred to in the Rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer and the latter's unfamiliarity with the client and the client's affairs. In the result, the client's interests may sometimes be better served by not engaging another lawyer. An example of this

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sort of situation is when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

5. Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.\(^4\) If one of the clients is a person with whom the lawyer has a continuing relationship and for whom the lawyer acts regularly, this fact should be revealed to the other or others at the outset.\(^5\) If, following such disclosure, all parties are content that the lawyer act for them, the lawyer should obtain their consent, preferably in writing, or record their consent in a separate letter to each. If following such disclosure, a party raises an objection, the lawyer shall advise the party that the party is free to obtain independent representation. The lawyer should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.\(^6\)

6. If, after the clients involved have consented, an issue contentious between them or some of them arises, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers. 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.

Lawyer as Arbitrator
7. The Rule will not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are *sui juris* and who wish to submit the dispute to the lawyer.\(^7\)

Acting Against Former Client
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.8

9. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. It also includes the client of a lawyer who is associated with the lawyer in such a manner as to be perceived as practising in partnership or association with the first lawyer, even though in fact no such partnership or association exists.

Acting For More Than One Client

10. 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 Commentaries 4 and 5 of this Rule.

11. Notwithstanding any other provisions of The Code of Professional Conduct, a lawyer shall not act for both the builder or developer and the purchaser in a real estate transaction resulting from the construction of a new home, even if the parties consent.

12. It is improper for a lawyer to act on a mortgage foreclosure if the lawyer or his or her firm were involved in placing the original mortgage and advising the mortgagor.

This prohibition does not apply in the following cases:

1. Where foreclosure proceedings are based upon events subsequent and unrelated to the preparation, execution and registration of the mortgage;

2. Where the lawyer who is acting for the mortgagee attended on the mortgagor merely for the purposes of executing the mortgage documentation;

3. Where the mortgagor for whom the lawyer has acted has not been a party to the foreclosure proceedings;

4. Where the mortgagor has no beneficial interest in the mortgaged lands and no claim has been made against the mortgagor personally;

5. Where the mortgagor consents in writing.

In this commentary, mortgagor includes purchaser and mortgagee includes vendor under an agreement for sale.

[Commentaries 11 and 12 added June 8, 1995]

13. A lawyer who is employed or retained by an organization represents that organization acting through its duly authorized constituents. In dealing with the organization's directors,
officers, employees, members, shareholders or other constituents, the lawyer shall make clear that it is the organization that is the client when it becomes apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. The lawyer representing an organization may also represent any of the directors, officers, employees, members, shareholders or other constituents, subject to the provisions of this Rule dealing with conflicts of interests.

Burden of Proof

14. Generally speaking, in disciplinary proceedings arising from a breach of this Rule the lawyer has the burden of showing good faith and that adequate disclosure was made in the matter and the client's consent was obtained.

NOTES

1. Cf. CBA-COD 5; CBA 3(2), 3(7); Que. 3.05.04; Ont. 5; B.C. B-1, B-2, B-9(b); N.B. C-9; IBA B-7; ABA-MR 1.7, 1.8, 1.9; ABA DRs 5-101(A), 5-105; Orkin at pp. 98-101.

2. Cf. ABA EC 5-1.

3. "A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as it is relevant...What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has...", per Megarry, J. in Spector v. Ageda (1971), 3 All E.R. 417 at 430 (Ch. D.).

"Applying this [dictum of Cozens-Hardy, M.R. in Moody v. Cox et al. (1917), 2 Ch. D. 71] to a simple circumstance which arises in every conveyancing transaction, does a solicitor acting for both parties disclose the previous purchase price to the purchase...? If he does there may be a breach of duty... This example alone faces a solicitor with an unanswerable dilemma, which may only be resolved by his refusing to act for one...or...possibly stepping back from a situation in which both clients really need positive advise", article in (1970) Law Soc. Gazette 332; and see thirteen examples of difficulties there listed. In Cornell v. Jaeger (1968), 63 W.W.R. 747 (Man.) the non-disclosure by a solicitor of his personal interest in a property to the clear detriment of his client was held to amount to fraud.

4. This includes a situation where a lawyer proposes to represent both a lender and a borrower whether or not the loan is to be secured by a mortgage or security agreement.

5. This includes a situation where one of the parties is a commercial lender and the lawyer has previously represented that commercial lender. "Notwithstanding that [the solicitor] had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and R 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 writ was issued...acted for both defendants...I refer to Bowstead on Agency: 'It is the duty of a solicitor...(8) not to act for the opponent of his client, of or 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.”, per McRuer, C.J.H.C. in *Sinclair v. Ridout & Moran* (1955), 1 O.R. 167 at 182-83 (Ont. H.C.) (emphasis added). See Knepper, "Conflicts of Interest in Defending Insurance Cases" (1970), Defence L.J. 515, and "Guiding Principles", *ibid.*, pp. 540-44.

6. Cf. Ont. 5(5). Common "multiple client" situations where there is real danger of divergence of interest arising between clients include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants. See for examples *Orkin* at p. 100. [Leave to appeal granted] "...by reason of the same solicitor appearing for R and D, and it being apparent that there was a conflict of interest between R and D, each one blaming the other for the injuries of the children, he should not have acted for D after having acted for R.", *Regina v DePatie* (1971), 1 O.R. 698 at 699 (Ont. C.A.).

[Chapter V Footnote 6 Amended December 11, 1992]

7. Cf. Que. 55; ABA 5-20.

8. The Supreme Court of Canada in *MacDonald Estate v. Martin* [1991] 1 WWR 705; (1990) 77 DLR (4th) 249, set the standard which will be used by the courts in determining whether a lawyer ought to be disqualified as a result of a conflicting interest. In order for the lawyer to continue acting "a reasonably informed person" (must be) satisfied that no use of confidential information would incur". The Martin decision involved a lawyer moving from one firm to another and is dealt with in the following subchapter VA. There are other instances where concerns about acting against a former client's interest arise. "The appellant had for many years been the respondent's solicitor, and a quarrel...brought about a rupture...It was then...that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action... thus stirring up a litigation against the respondent.", per Taschereau, J. in *Sheppard v. Frind* (1941), S.C.R. 531 at 535 (S.C.C.). "The solicitor acting for the defendant...drew the mortgage and advised the said defendant on the effect thereof. Later the same solicitor acting for the mortgagee bank brought action against his former client based on a claim arising out of and related to that mortgage. Solicitors should not so conduct themselves even with the knowledge and consent of all parties...", *La Banque Provinciale v. Adjutor Levesque Roofing* (1968), 68 D.L.R. (2d) 340 at 345 (N.B.C.A.).

[Chapter V Footnote 8 Amended December 11, 1992 and April 27, 1995]