

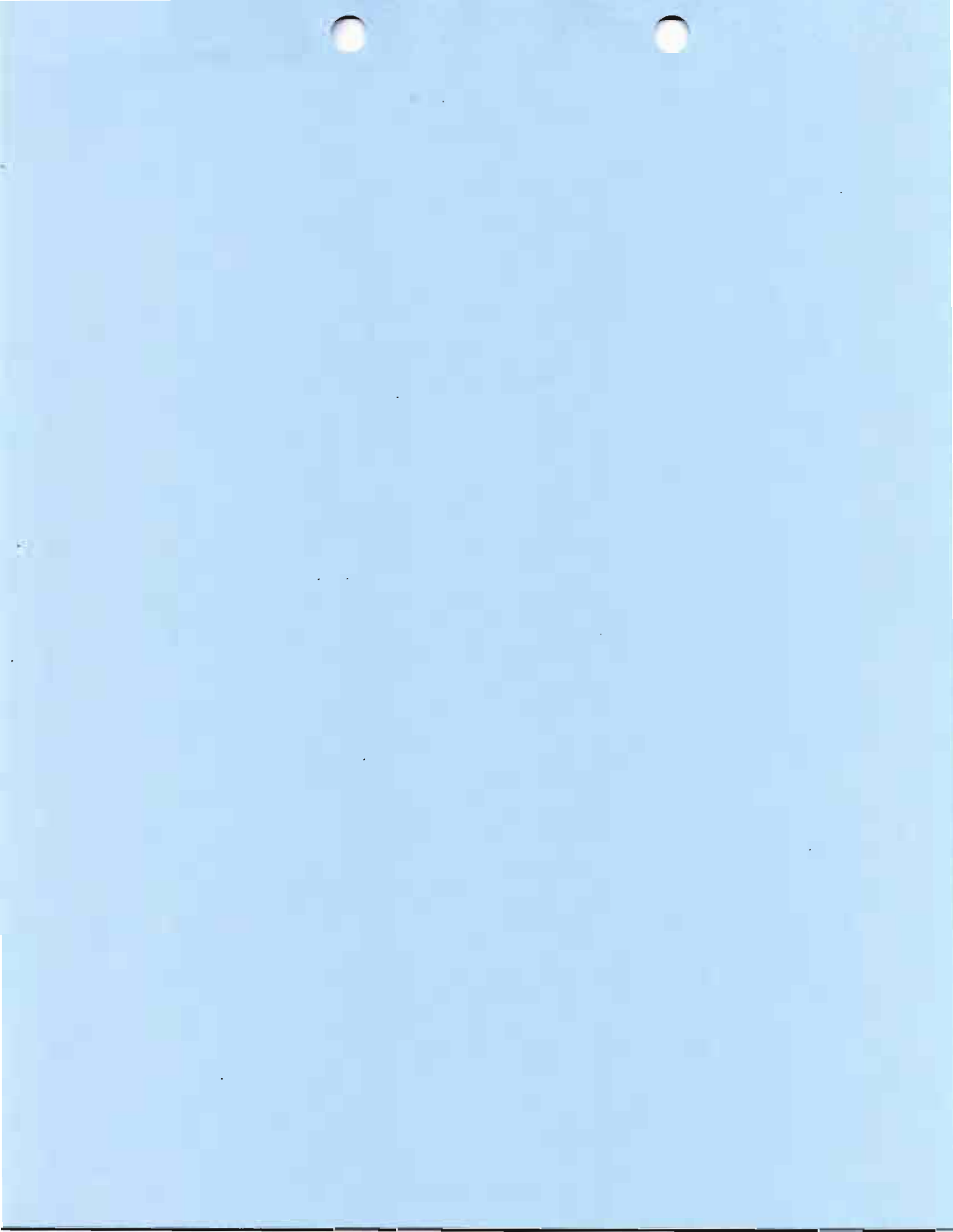


*Taman Inquiry*  
*into the investigation and prosecution of Derek Harvey-Zenk*  
Honourable Roger Salhany, Q.C., Commissioner

# **PROSECUTORIAL STANDARDS AND ETHICS**

**TAB 7**

**THE PROSECUTOR  
and CONFLICTS OF INTEREST**





*Taman Inquiry*  
*into the investigation and prosecution of Derek Harvey-Zenk*  
Honourable Roger Salhany, Q.C., Commissioner

**TAB 7A**

**Lawyers and Conflicts Generally**

The Law Society of Manitoba  
La Société du Barreau du Manitoba

**CODE OF  
PROFESSIONAL CONDUCT**

**CODE DE  
DÉONTOLOGIE PROFESSIONNELLE**

Adopted by the Benchers of the  
Law Society of Manitoba on February 1st, 1992

Adopté par les conseillers de  
la Société du Barreau du Manitoba le 1<sup>er</sup> février 1992

**Chapter 5**

**IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN  
CLIENTS**

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**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.<sup>1</sup>
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.<sup>2</sup>
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.<sup>3</sup>

**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 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.

## Code of Professional Conduct

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. 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 with a recommendation that they obtain independent representation.<sup>4</sup> 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. 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.<sup>5</sup>

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.<sup>6</sup> This is to be distinguished from a lawyer who acts as a third party neutral mediator in accordance with the principles set forth in Chapter 22.

### **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.<sup>7, 8</sup>

## Code of Professional Conduct

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. In practice, there are many situations where even though no actual dispute exists between the parties their interests are in conflict. In cases where the lawyer is asked to act for more than one client in such a transaction, the lawyer should recommend that each party be separately represented.

11. 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.

12. 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 interest.

### Burden of Proof

13. 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 purchaser . . . ? 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 advice.", article in (1970) Law Soc. Gazette 332; and see thirteen

## Code of Professional Conduct

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. "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, or of 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 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.
5. 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.).
6. Cf. Que. 55; ABA 5-20.
7. "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.).
8. See the following cases relating to potential conflicts of interest that arise when a lawyer changes firms:  
  
*Bank of Nova Scotia v. Imperial Development (Canada) Ltd.*, [1989] 3 W.W.R. 21; 58 Man. R. (2d) 100 (Man. Q.B.).  
*Morton v. Asper* (1987), 45 D.L.R. (4th) 374 (Man. C.A.).  
*MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 (S.C.C.).



**CONFLICT OF INTEREST BETWEEN LAWYER AND CLIENT**

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**Rule**

(a) The lawyer should not enter into a business transaction with the client or knowingly give to or acquire from the client an ownership, security or other pecuniary interest unless :

- (i) the transaction is a fair and reasonable one and its terms are fully disclosed to the client in writing in a manner that is reasonably understood by the client;
- (ii) the lawyer has advised the client in writing to obtain independent legal advice about the transaction, the onus being on the lawyer to prove that the lawyer has so advised the client; and
- (iii) the client consents in writing to the transaction.

(b) The lawyer shall not enter into or continue a business transaction with the client if:

- (i) the client expects or might reasonably be assumed to expect that the lawyer is protecting the client's interests; and
- (ii) there is a significant risk that the interests of the lawyer and the client may differ.

(c) The lawyer shall not act for the client where the lawyer's duty to the client and the personal interests of the lawyer or an associate are in conflict.

(d) Unless the client is a family member of the lawyer or the lawyer's associate and there is no appearance of undue influence the lawyer shall not prepare or cause to be prepared an instrument giving the lawyer or an associate a substantial gift or benefit from the client, including a testamentary gift.

*Commentary*

**Guiding Principles**

1. The principles enunciated in the Rule relating to impartiality and conflict of interest between clients apply *mutatis mutandis* to this Rule.

## *Code of Professional Conduct*

2. A conflict of interest between lawyer and client exists in all cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. Such transactions are to be avoided. When they are contemplated, the prudent course is to insist that the client either be independently represented or have independent legal advice. Independent representation will not be required where the gift, purchase or testamentary disposition is insubstantial or of a minor nature having regard to all of the circumstances, including the size of the testator's estate.

3. This Rule applies also to situations involving associates of the lawyer. Associates of the lawyer within the meaning of the Rule include the lawyer's spouse, children, any relative of the lawyer (or of the lawyer's spouse) living under the same roof, any partner or associate of the lawyer in the practice of law, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or an associate owns or controls, directly or indirectly, a significant number of shares.<sup>1</sup>

### **Debtor-Creditor Relationship to be Avoided**

4. The lawyer should avoid lending money to the client, but where he or she does so, the lawyer must first advise the client in writing to obtain independent legal advice about the transaction, the onus being on the lawyer to prove that the lawyer has so advised the client.

The lawyer should avoid borrowing money either directly or indirectly from a client or former client who is not in the business of lending money.<sup>2</sup> Should the lawyer, the lawyer's family or a corporation controlled by any of them do so, then :

- (a) the lawyer must obtain from the client a certificate verifying that the client has received independent legal advice with respect to the borrowing transaction.

The above provision does not apply to clients who are connected by blood relationship, marriage or adoption to the lawyer, or to corporate clients whose shares are listed on a stock exchange, insurance corporations, and other corporations whose business in part is that of lending money to members of the public. [see Law Society Rule 5-56]

### **Joint Ventures**

5. The lawyer who has a personal interest in a joint business venture with others may represent or advise the business venture in legal matters between it and third parties, but should not represent or advise either the joint business venture or the joint venturers in respect of legal matters as between them unless the lawyer has advised the client in writing to obtain independent legal advice about the transaction, the onus being on the lawyer to prove that the lawyer has so advised the client.

## *Code of Professional Conduct*

### **When Person to be Considered a Client**

6. The question of whether a person is to be considered a client of the lawyer when such person is lending money to the lawyer, or buying, selling, making a loan to or investment in, or assuming an obligation in respect of a business, security or property in which the lawyer or an associate of the lawyer has an interest, or in respect of any other transaction, is to be determined having regard to all the circumstances. A person who is not otherwise a client may be deemed to be a client for purposes of this Rule if such person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer must consider such person to be a client and will be bound by the same fiduciary obligations that attach to a lawyer in dealings with a client. The onus shall be on the lawyer to establish that such a person was not in fact looking to the lawyer for guidance and advice.

### NOTES

1. Cf. ABA-COD 5. As to corporations, cf. ABA-MR 1.13; ABA EC 5-18: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests . . .".
2. Cf. Ont. 5; Alta. 34; and B.C. B-13: ". . . in a number of instances of professional misconduct . . . the borrowing of money by [the lawyers] in question has been a factor leading to the . . . misconduct. [A lawyer] should not borrow money from his clients save in exceptional circumstances, and in that case the onus of proving that the client's interests were fully protected by the nature of the case or by independent legal advice will rest upon [the lawyer] . . . [Attention is called to] the various transactions and dealings that the courts have held to be improper or reprehensible conduct in violation of these principles, and which, in addition to their consequences at law, constitute professional misconduct."  
Cf. ABA EC 5-8.



# DISCIPLINE CASE *DIGEST*

Case 97-12

**Member B**

## Particulars of Charges

### Professional Misconduct

- Use of confidential information to disadvantage of client
- Conflict of interest
- Failure to be frank and candid with the Court

## Date of Hearing

November 24 and December 1, 1997

## Date of Decision

January 19, 1998

## Panel

J.W. Hedley, (Chair)  
D. G. Douglas  
C. Wright

## Disposition

- Acquitted

## Counsel

J.R. Gallagher for The Law Society of Manitoba  
J.G. Dangerfield, Q.C. for the Member

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## Conflict of Interest

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### Facts

Member B was retained by a client who was charged with assault causing bodily harm. The complainant in the assault was a former client of Member B. At the trial on the assault matter, the complainant raised with the court that he had previously been represented by Member B and that the member possessed confidential information as to the business and affairs of the complainant which made the complainant uncomfortable in being cross-examined by the member. Member B advised the court that he had acted for the complainant in the past on unrelated matters. The court allowed Member B to cross-examine the complainant.

The complainant subsequently made a complaint to The Law Society about the conduct of the member, and in particular, that in cross-examining the complainant Member B had made use of

confidential information obtained previously while acting on behalf of the complainant on other matters. In responding to the concerns raised by the complainant, the member took the position that any work previously done on behalf of the complainant was unrelated to the criminal assault and that the cross-examination of the complainant was restricted to matters raised during the complainant's examination-in-chief.

### Decision and Comments

Following a hearing, the Discipline Committee decided that it was not satisfied on the evidence that the complainant had imparted any "relevant confidential information" to Member B. In the opinion of the Committee, this threshold test had to be met before the member could be convicted of any of the three charges contained in the Citation. Accordingly, the Committee found that the member was not guilty of professional misconduct and dismissed the charges.

**Relevant Passages from the Canadian Bar Association *Code of Professional Conduct* (2006) ch. VI, “Conflicts of Interest Between Lawyer and Client”**

**RULE**

...

3. The lawyer shall not act for the client where the lawyer’s duty to the client and the personal interests of the lawyer or an associate are in conflict.

...

## **Relevant Passages from the Canadian Bar Association *Code of Professional Conduct* (2006) ch. V, “Impartiality and Conflict of Interest Between Clients”**

### **RULE**

The lawyer shall not advise or represent both sides of a dispute and, except 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 judgment on behalf of, advice to, or loyalty to a client or prospective client.
2. The reason for the Rule is self-evident. The 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 compromising influences.
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 another client, whether involved in the particular matter or not, including the obligation to communicate information.

...

#### Disclosure of Conflicting Interest

5. 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 judgment 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 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.

...

#### Acting Against Former Client

12. A lawyer who has acted for a client in a matter should not thereafter, in the same or any related matter, act against the client (or against a person who was involved in or associated with the client in that 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.

...

# Relevant Passages from the Canadian Bar Association *Code of Professional Conduct* (2006) ch. XIX, “Avoiding Questionable Conduct”

## RULE

The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.

### *Commentary*

#### Guiding Principles

1. Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.
2. Our justice system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute.

#### Duty after Leaving Public Employment

3. After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving because to do so would give the appearance of impropriety even if none existed. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed. As to confidential government information acquired when the lawyer was a public officer or employee, see commentary 14 of the Rule relating to confidential information.

...

#### Standard of Conduct

10. The lawyer should try at all times to observe a standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence, respect and trust of both clients and the community.



ESSENTIALS OF  
CANADIAN LAW

# ETHICS AND CANADIAN CRIMINAL LAW

HON. MICHEL PROULX

Quebec Court of Appeal

DAVID LAYTON

of the Ontario Bar



A Quicklaw Company

ETHICS AND CANADIAN CRIMINAL LAW  
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Published in 2001 by  
Irwin Law  
Suite 930, Box 235  
One First Canadian Place  
Toronto, Ontario  
M5X 1X8

ISBN: 1-55221-044-8

**National Library of Canada Cataloguing in Publication Data**

Proulx, Michel  
Ethics and Canadian criminal law

(Essentials of Canadian Law)  
Includes bibliographical references and index.  
ISBN 1-55221-044-8

1. Criminal procedure—Moral and ethical aspects—Canada.  
I. Layton, David II. Title. III. Series.

KE339.P76 2001      174.3      C2001-901531-3

Printed and bound in Canada

1 2 3 4 5      05 04 03 02 01

# CONFLICT OF INTEREST

## A. INTRODUCTION

A conflict of interest occurs whenever a lawyer is placed in a position where loyalty to a client is compromised. There are an inexhaustible number of situations in which a conflict problem can arise. The conflicting interests may involve current, former, or prospective clients, or sometimes even third parties with whom a client-lawyer relationship was never established or contemplated. A lawyer's loyalty may also be compromised by his or her own interest or the interest of an affiliated lawyer. Categorizing scenarios according to the type of conflict raised is a helpful way to address the ethical and legal obligations of criminal counsel in this area. A discussion of any particular scenario, however, is incomplete without examining the principles that make conflict avoidance so important, as well as the professional-conduct standards, common law rules, and constitutional guarantees that are derived from and reflect these principles.

## B. BASIC PRINCIPLES

The client-lawyer relationship is based on the highest of trusts, where the lawyer's loyalty is unquestioned.<sup>1</sup> The duty to be loyal, born of the fiduciary relationship between counsel and client, must guide and inform every aspect of the lawyer's dealing with a client, and it leads to

important component duties such as the duty of confidentiality. As we shall see, the duty of confidentiality is particularly important in the realm of conflict of interest. Yet a threat to confidentiality is not a *sine qua non* to the existence of a conflict problem. The leitmotif of conflict of interest is the broader duty of loyalty. Where the lawyer's duty of loyalty is compromised by a competing interest, a conflict of interest will exist even where there is no possibility that confidential information will be misused.<sup>2</sup>

The importance of loyalty to the lawyer-client relationship is underlined by the adversarial nature of the criminal justice system. An adversarial system gives litigants the responsibility and right to present their own cases and to challenge the evidence and arguments of their opponents. As agents for the litigants, lawyers operate within this adversarial setting, making loyalty towards the client absolutely essential. Failure to provide loyal service may harm the client's ability to exercise important constitutional rights and can also operate to undermine the reliability of the system. Consequently, the duties that are necessary for the existence of a healthy client-lawyer relationship are, by extension, important parts of the entire administration of justice. Given that the client-lawyer relationship is central to the operation of our justice system, the protection and promotion of the relationship by members of the profession and the courts not only advances the interests of each individual client but also bolsters the integrity of the entire system.

Placing a lawyer in a position where he or she must simultaneously serve conflicting interests is thus not only inimical to the duty of loyalty demanded of every lawyer for the benefit of each client but also undermines the well-being of the justice system as a whole.<sup>3</sup> Accordingly, two related but distinct concerns lie at the heart of the general prohibition against conflict of interest: harm to the client and harm to the administration of justice. These concerns are reflected in the rules of professional conduct, common law precepts, and constitutional guarantees pertaining to conflict of interest.

- 
- 1 The principles articulated in this section have already been discussed elsewhere. For a fuller discussion, with case law citations, see section D, "The Rationale for Defending One Known to be Guilty," in chapter 1, and section B, "Rationale," in chapter 4.
  - 2 This point is expanded upon below in the discussions accompanying notes 40 & 72-77.
  - 3 See, for example, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1244 [*MacDonald Estate*]; *R. v. Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.) [*Robillard*].

### C. RELATED RULES OF PROFESSIONAL CONDUCT

A number of the rules of professional conduct emphasize the principles underlying the proscription of conflict of interest. In particular, all provincial governing bodies and the CBA have adopted a rule specifically concerning conflict of interest, which evinces a strong concern for the preservation of the client-lawyer relationship.<sup>4</sup> For instance, the CBA Code defines a conflicting interest as "one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client."<sup>5</sup> Included in the Code's definition are the financial and other interests of the lawyer and any partners or associates of the lawyer, as well as the duties and loyalties of the lawyer to any other client (such as the obligation to communicate information).<sup>6</sup> The CBA Code also states that the lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure and with the consent of the clients, should not act in a matter where there is likely to be a conflicting interest.<sup>7</sup> Furthermore, a lawyer is expressly prohibited from acting against a former client in the same or a related matter, and is likewise forbidden from taking a position where he or she might be tempted or appear to be tempted to breach the duty of confidentiality owed to a former client.<sup>8</sup>

Clearly, the rationale for rules of professional conduct that address conflict of interest is that the client's interests may be seriously impaired unless the lawyer's judgment and ability to act on the client's behalf are as free as possible from compromising influences.<sup>9</sup> However, these rules recognize that a conflict of interest is not always fatal from the client's point of view but rather may be subservient to other factors such as the availability of another lawyer of comparable expertise and experience, the extra cost, delay, and inconvenience involved in engaging another lawyer, and a new lawyer's unfamiliarity with the client

4 See, for example, CBA Code ch. V (conflict of interest between clients), and ch. VI (conflict involving the lawyer's own interest); Ont. r. 2.04; Alta. ch. 6; B.C. ch. 6-7; and Man. ch. 6-7.

5 CBA Code ch. V, comm. 1. Compare the more matter-of-fact statement of principle used in Alberta: "In each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences" (ch. 6).

6 See CBA Code ch. V, comm. 3, and ch. VI.

7 See CBA Code ch. V, Rule.

8 See CBA Code ch. V, comm. 8.

9 See CBA Code ch. V, comm. 2.

and the client's affairs.<sup>10</sup> Hence, where there is full disclosure of the conflicting interest, the lawyer may continue to act with the client's consent, though the lawyer should guard against acting for multiple clients where it is reasonably obvious that an issue contentious between them may arise or where their interests, rights, or obligations will diverge as the matter progresses.<sup>11</sup>

Numerous other rules of professional conduct reflect the concerns raised whenever a lawyer finds himself or herself in a conflict of interest.<sup>12</sup> For instance:

1. **Integrity:** Lawyers are required to discharge with integrity all duties owed to client, the court, the public, and other members of the profession, as stipulated by Chapter I of the CBA Code. Integrity is the fundamental quality of a lawyer,<sup>13</sup> representing a key element of each rule of professional conduct, and vis-à-vis the client finds expression in absolute trustworthiness.<sup>14</sup> Trustworthiness, or loyalty, is seen to be the essential element of the client-lawyer relationship.<sup>15</sup>
2. **Confidential information:** A lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship.<sup>16</sup> In particular, the information cannot be used for the benefit of the lawyer or a third party, or to the detriment of the client,<sup>17</sup> and this duty persists even after the demise of the professional relationship.<sup>18</sup>
3. **The lawyer as advocate:** When acting as advocate the lawyer must, *inter alia*, represent the client resolutely, honourably, and within the limits of the law. The duty to the client is to raise every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case, and to endeavour to obtain for the client the benefit of every remedy or defence available at law.<sup>19</sup>

10 See CBA Code ch. V, comm. 4.

11 See CBA Code ch. V, comms. 4 and 5.

12 See the discussion in P. Perell, *Conflict of Interest in the Legal Profession* (Toronto: Butterworths, 1995) at 2-4.

13 See CBA Code, ch. I, comm. 2.

14 See CBA Code, ch. I, comm. 1.

15 See CBA Code, ch. I, comm. 1.

16 See for example, CBA Code ch. IV, Rule.

17 See CBA Code ch. IV, Rule, comms. 5-7.

18 See CBA Code ch. IV, comm. 4.

19 See CBA Code, ch. IX, Rule, comms. 1, 10, & 15.

4. **The lawyer and the administration of justice:** The lawyer should encourage public respect for and try to improve the administration of justice. Judicial institutions will not function effectively unless they command the respect of the public, and constant efforts must be made to improve the administration of justice and thereby maintain its respect in the eyes of the public.<sup>20</sup>

Each of these rules integrally engages the lawyer's duty of loyalty to the client and is potentially jeopardized in cases where a conflict arises.

## D. COMMON LAW

The rules of professional conduct, while not constituting a statutory code, have been afforded close attention by the courts in determining the policy concerns and general principles that impact on conflict of interest.<sup>21</sup> It is thus not surprising that courts have recognized a common law prohibition against counsel acting while in a conflict of interest, as well as the jurisdiction to remove conflicted counsel from the record.<sup>22</sup>

**Observation:** While the rules of professional conduct will be given significant weight in the exercise of the court's inherent jurisdiction to disqualify counsel for a conflict of interest, compliance with such rules does not necessarily mean that no conflict exists.<sup>23</sup>

20 See CBA Code, ch. XIII, Rule & comm. 1.

21 See, for example, *MacDonald Estate*, above note 3 at 1244-46; *Gainers Inc. v. Pocklington* (1995), 125 D.L.R. (4th) 50 at 53 (Alta. C.A.), leave to appeal to S.C.C. refused 130 D.L.R. (4th) vii (note) (S.C.C.); and *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 at 107-08 & 115 (Ont. Gen. Div.) [Stewart].

22 See *MacDonald Estate*, above note 3 at 1245.

23 This observation is implicitly supported by *MacDonald Estate*, above note 3 at 1245-46. See also *R. v. Dix* (1998), 218 A.R. 18 at 25 (Q.B.) [Dix]; and *Stewart*, above note 21 at 115.

## Relevant Passages from *Côté v. Rancourt* (S.C.C., 2004), paras. 11-13

[2004] 3 S.C.R. 248 (Deschamps J.)

...  
11 In the case of the prohibition against conflicts of interest, we must analyse the nature of the conflict in order to characterize the violation. In some situations, the integrity of the judicial system is at stake, while in others the only interests in play are those of the parties (M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (2001), at p. 287). Thus when a lawyer simultaneously represents two co-accused who are facing related criminal charges and whose interests are adverse, he or she cannot provide both clients with the assistance to which they are constitutionally entitled. The reliability of the verdict takes on an importance that prevails over the private interests of the clients. Respect for the integrity of the criminal justice system derives, first and foremost, from the reliability of verdicts. The protection of the integrity of the justice system is necessarily a part of general public order. A contract that violates general public order is absolutely null (art. 1417 of the *Civil Code of Québec*, L.Q. 1991, c. 64 ("C.C.Q.)) and may not be confirmed (art. 1418 C.C.Q.).

12 However, not all conflicts of interest call higher interests into question. Some cases involve merely private interests, and some of those conflicts vitiate the contract and are matters of protective public order (art. 1419 C.C.Q.). While those contracts may be annulled, they may also be confirmed (art. 1420 C.C.Q.). Other conflicts arise during the performance of the contract. They instead raise a problem involving contractual liability.

13 In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, this Court developed rules allowing a firm of professionals to continue representing a client despite the existence of a conflict of interest. There is an infinite variety of possible conflicts. It will sometimes be possible to reconcile the various interests in play, including the right to retain counsel of one's choice. Mere disclosure, followed by waiver (s. 3.06.08 of the Code of ethics) or confirmation (art. 1423 C.C.Q.), may sometimes be sufficient when only the interests of the parties are at stake. Where the facts giving rise to the conflict have not been discussed and the case is one in which confirmation is possible, the judge must analyse the conflict in order to determine its nature and decide what remedy, if any, should be applied.

...