STEWART McKELVEY
LAWYERS • AVOCATS

Conflicts of Interest for Estate Practitioners

CBA Nova Scotia Wills, Estates and Trusts Section
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Agenda

- Conflicts with clients – drafting
- The importance of ILA
- Joint retainers
- Acting in a fiduciary role for a client
- Lawyer as witness

Conflicts of Interest

- Lawyers may find themselves in conflicts of interest with their clients in any of the following situations:
  - Drafting wills for a client and acting as executor
  - Drafting powers of attorney for a client and being appointed as attorney
  - Drafting a trust for a client and acting as either settlor or trustee
- While this is not strictly prohibited under the Code, lawyers must be careful when wearing multiple hats

NS *Code of Professional Conduct* Provisions

- The “new” conflict of interest provisions were adopted under the NS *Code* in July 2012 (amended since).
- **Duty to Avoid Conflicts of Interest**

  3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

- Rule **3.4-2** provides an exception permitting a lawyer to act where there is express or implied consent from clients and the lawyer reasonably believes that he or she is able to represent each client without there being any material adverse effect upon either the representation of or the loyalty to the clients.

Retainers as Solicitor for the Estate

3.4-37 A lawyer must not include in a client's will a clause **directing** the executor to retain the lawyer's services in the administration of the client's estate.

- While drafting lawyers often expect to be retained by the executors to act on their behalf in administering the estate, including such a directive clause in the will is improper
- It may also cause future conflicts of interest: for example between duties to the executor and the beneficiaries. These conflicts could be compounded if the executor is also a beneficiary.

Testamentary Instruments and Gifts

3.4-28 A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client.

– **Note – does this include executor compensation?**

3.4-38 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a **gift or benefit** from the client, **including a testamentary gift**.

3.4-39 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice ("ILA") (see definition of ILA in **3.4-27**)

Drafting Wills

- “Benefit” is not defined within the Code and, depending on its interpretation, Rule 3.4-38 could preclude a lawyer from drafting a will in which he or she is appointed as executor.
- The Regulation Committee of the Law Society of Upper Canada stated that Rule 3.4-38 (almost identical to the NS rule) would **not** preclude the appointment of drafting lawyers as executors.

Drafting Wills (cont'd)

A portion of the meeting transcript reads:

"With respect to 3.4-38, the lawyer can't draft or cause to be drafted an instrument giving the lawyer or their associate a gift or benefit, including a testamentary gift. It's important that we not be doing the lawyering and be the beneficiaries of the gifts and benefits when we're doing the lawyering. That's contrary to the conflicts rule…

…[a]n executorship is not a gift or a benefit."

Exoneration clauses

- Similar concerns arise in respect of an exoneration clause added to a will which the lawyer drafts when the executor/trustee named in the will who could be exonerated is the drafting lawyer!
- Only an issue if the clause purports to exonerate everything but fraud and gross negligence?

Drafting a Trust and acting as Settlor

- Different issues arise when a drafting lawyer is named as settlor, as this requires them to transfer legal ownership of assets to the trustees.
- A relevant Code provision is :

  3.4-28 A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client.
- Is settling a trust a “transaction”?
- Is the settlement amount (whether nominal or more significant) really part of the fee for the work to draft the trust?
- If a legal fee for acting as settlor is charged but is nominal, then is there still an ethical issue grounded in the Code, and does that make the settlement voluntary?

Acting as Executor

- A disproportionate number of cases in which lawyers are disciplined for breaching the duty to serve clients conscientiously arise out of retainers to administer estates, particularly in cases where the lawyer serves also as executor of the estate, and the beneficiaries live far away or do not know that they have been left any interest in the testator's estate. [1]

1 G MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline,* 4th ed (Toronto: Thomson Carswell, 2006) at 18-9.

The Importance of Independent Legal Advice

Many examples of disciplinary proceedings arising out of a lawyer receiving testamentary gifts

- In ***Nova Scotia Barristers' Society v. Muttart***, 2009 NSBS 4, the drafting lawyer was found guilty of professional misconduct for preparing a will in which he received the substantial testamentary gift in lieu of commission and the client did not have independent legal advice regarding the disposition.
- Received a reprimand and had to pay costs

Independent Legal Advice (cont'd)

- In ***Nova Scotia Barristers' Society v. Romney***, 2004 NSBS 7, the Hearing panel found that in accepting "gifts" from elderly clients of cash, property and other assets, including joint ownership of an investment account, without independent legal advice, the lawyer was in a conflict of interest, even in the face of evidence that the cash and assets were given to the lawyer from the clients voluntarily.
- The Panel also noted that the then rules required that independent legal advice be obtained, even if the clients expressed no interest in doing so.

Independent Legal Advice (cont'd)

- Ethics committees have stressed on many occasions that the interests of, and loyalty to, the client must be **paramount.**
- If it is believed a lawyer's actions are being driven by personal interests, and not the client's, the lawyer should withdraw
  - (NS Legal Ethics Committee Minutes (13 November 1997)).
- If the client is advised to obtain ILA and waives it, that should be documented.

Joint Retainers: NS *Code of Professional Conduct*

Rule 3.4 Duty to Avoid Conflicts of Interest

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) 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.

Commentary

- **[1]** Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.
- **[2] A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:**

Commentary (Cont'd)

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with section 3.3, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- **(c) the lawyer would have a duty to decline the new retainer, unless:**
  - **(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;**
  - **(ii) the other spouse or partner had died; or**
  - **(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.**

Commentary (Cont'd)

- **[3]** After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-9.

Joint Retainers (cont'd)

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

- (a) refer the clients to other lawyers; or
- (b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate provided:
  - (i) no legal advice is required; and
  - (ii) the clients are sophisticated

Joint Retainers (cont'd)

- **3.4-8A** If the contentious issues referred to in rule 3.4-10 are not resolved, the lawyer must withdraw from the joint representation.

Commentary

- **[1]** This rule does 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 not under any legal disability and who wish to submit the dispute to the lawyer.
- **[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non- contentious matters.**

Joint Retainers (cont'd)

3.4-9 Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Considerations for Joint Retainers

- Arise frequently in estates practice for drafting matters.
- Consider if better **not** to act for both spouses in a blended family scenario.
- If act, note separation ends joint retainer.
- Also watch out for generational advice – is there such a thing as the “family lawyer”?
- If acting for mother/father, you are not acting for the children.

The “Family” Lawyer

- Lawyer acts for multiple family members/generations for a corporate estate freeze transaction.
- Problems arose ..
  - In ***Roth Estate v. Juschka, ONCA 92 (Ont. C.A.)***,
    - “In this case, the respondent acted for all parties on what turned out to be a share sale transaction. He did so without ever considering whether there was a conflict of interest or a potential conflict because he believed that the effect of the transaction was essentially a gift by ... [the father] of this 51% interest in ..[the HoldCo] ... To the [daughter and son-in-law]. Having perceived no potential conflict, he did not undertake the most basic obligations of a lawyer to his client: to raise the problem of acting for both sides, to explain the potential conflict, to obtain consent to act for both sides or to recommend independent legal advice ...”.
- Lawyer (or insurer!) paid the bill.

Acting as Trustee or Attorney

- Lawyer-client conflicts arise when a lawyer takes possession of client assets when acting as trustee or attorney.
- When lawyers maintain client trust accounts or property, they are placed under significant fiduciary obligations to take special care of their client's money and property and to account for it appropriately – the law societies have reporting and audit powers to ensure compliance.
- It is important that clients can place a high degree of confidence in their lawyers.
- It is therefore not surprising that lawyers who abuse their client's trust by misappropriating trust monies for their personal use are dealt with harshly by law societies and the courts!

NS Trust Account Regulations When Acting in a Representative Capacity

10.1.2 A lawyer is acting in a representative capacity if the lawyer is

(a) the **personal representative**, executor or administrator, or one of the personal representatives, executors or administrators, **of the estate of a deceased person**;

(b) **a trustee**, or one of the trustees, of a trust under an appointment made pursuant to a trust instrument creating the trust;

(c) a trustee, or one of the trustees, of the property of another person under an appointment by a court;

(d) a de facto trustee; or

(e) an **attorney**, or one of the attorneys, of a person **under a power of attorney**, whether general or special, enduring or otherwise.

NS Trust Account Regulations When Acting in a Representative Capacity

10.1.3 A lawyer is not required to deposit trust money or trust property received by a lawyer acting in a representative capacity into the lawyer's or law firm's trust account or record the trust money or trust property in the prescribed financial records of the lawyer's law firm if

(a) the lawyer maintains a record of all appointments or assumptions of a representative capacity and a list of the beneficiaries of the estate or trust together with their last known address;

(b) the books, records, accounts and documentation of the estate or trust are in a form sufficient to accommodate an examination, review, audit or investigation ordered by the Executive Director or Complaints Investigation Committee; and

(c) the lawyer or law firm cooperates with the Society's auditor or investigator in the conduct of any examination, review, audit or investigation so ordered.

Compensation Issues when a Solicitor is Named Executor or Trustee

- A lawyer–trustee/executor who seeks both professional fees and trustee's compensation has an obligation to satisfy the beneficiaries and the Court that the full consequences of the arrangement were explained to the testator/settlor.
  - See *Estate of Roman Krentz*, 2011 ONSC 1653
- Lawyers should fully explain to clients the manner in which trustees may claim compensation, and the potential for "double dipping" if the client names a lawyer as trustee.
- ILA is no longer expressly required but should be suggested regardless of manner of compensation (hourly rate, compensation agreement, fixed percentage etc.)
- A conflict letter outlining the manner of compensation should be sent to the client with the draft documents.

Re Rustig Estate, 2002 NSSC 210

- Lawyer named alternate executor of husband's will and started acting when wife died.
- Lawyer was sole executor of wife's will.
- Lawyer also acted as solicitor for both estates and had a professional charging clause in the wills which he drafted.

Re Rustig Estate (Cont‘d)

- **Para 23**: The Saskatchewan Court of Appeal confirmed the proposition that a solicitor acting as an executor cannot charge full professional fees for non-professional executor’s duties. In *Re McIntosh* (1964), 46 D.L.R. (2d) 416, Maguire, J. wrote at p. 418:

  “It has long been established that a professional man, be he solicitor, accountant or otherwise, will not be granted compensation on the basis of professional charges for services rendered in respect of those services not actually professional in nature, which an executor not being a solicitor, could perform without legal advice.”
- **Para 24**: Where an executor also acts as proctor under the authority of the will or with the full consent of co-executors, separate recording of the duties exercised and preferably in separate and distinct logs, one covering the time and services as executor and the other, the normal docket recording professional legal services.
- **Para 34** …the court in determining entitlement and the quantum of the commission should examine the extent to which the executor has, under the authority of the will, sought payment for services that were not necessarily legal but administrative on a professional legal fee basis.

CAUTION

- If are acting and breach fiduciary duty could be liable for punitive damages
- See ***Oskar v. Chee, 2012 ONSC 1545 (Ont. S.C.J.)***

The Lawyer as Witness

- Having a lawyer act as witness to a will or trust may not be best practice when that lawyer is also appointed under the document, as it can give rise to conflicts of interest in the future if there are issues arising later pertaining to the document.
- If the lawyer has taken on a role such as executor or trustee, they will also be a party to the proceeding if the document is challenged, resulting in further potential conflicts of interest should the lawyer's firm be acting as lawyers for the estate – see 5.2 of the Code re lawyer as witness in court.

Lawyer as Witness (Cont'd)

- A lawyer must always be aware of the ethical responsibilities to clients, such as maintaining impartiality, and it can appear that a lawyer was not impartial in a case where a lawyer is appointed as executor, settlor or trustee in a document they themselves drafted and/or witnessed.
- A triple play – drafted, named and witnessed!
- What if document challenged later? Lawyer cannot act as counsel and witness if it is a contentious issue.

Questions?

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Thank you!