

Conflicts of Interest

In-House Counsel Professionalism Conference Spring 2011

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AGENDA

1. **What is a Conflict of Interest?**
2. **Dual Obligation of In-House Counsel to Employers and to Profession**
3. **Who is Your Client?**
4. **Rules of Professional Conduct – Duties of Loyalty and Confidentiality**
5. **Legal Conflict v. Business Conflict**
6. **Consent**
7. **Joint Retainers**
8. **Ethical Walls**
9. **Challenge of Affiliates**
10. **Lawyer Mobility – Best Practices**

What is a Conflict of Interest?

What is a Conflict of Interest?

- **A conflict situation exists where a set of circumstances arises that is likely to adversely affect:**
 - A lawyer's judgment concerning a client or prospective client;
 - A lawyer's loyalty in respect of a client or prospective client; or
 - A lawyer's safeguarding of interests of a client or prospective client

Dual Obligation of In-House Counsel to Employers and to Profession

Dual Obligations

- **To the employer:**

- Rule 2.02(1.1) – *Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.*

- **To the profession**

- **These may conflict**

- Rules 2.02(5.1) and (5.2) – Whistle blowing

Who is Your Client?

Who is Your Client?

- **Your employer – Rule 2.02(1.1)**
- **Who has authority to instruct you?**
- **Can you provide advice to others in the company?**

Rules of Professional Conduct

Duty of Confidentiality

- **Protecting a client's confidential information**
- **Rule 2.04(5)** – *Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if:*
 - *The former client consents to the lawyer's partner or associate acting; or*
 - *The law firm/lawyer establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances.*

Duty of Loyalty

- **Protecting a client's interests**
- **Rule 2.04(2)** – *A lawyer shall not advise or represent more than one side of a dispute*
- **Rule 2.04(3)** – *A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents*

Legal Conflict v. Business Conflict

Legal Conflict v. Business Conflict

- **What is a legal conflict?**
- **What is a business conflict?**
- **Do the same rules apply to both?**

Consent

Consent

- **Rule 2.04(4)** – *A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter (a) in the same matter; (b) in any related matter; or (c) save as provided by subrule 5, in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.*
- **Must be “informed” consent**
- **Best practices when obtaining consent**

Joint Retainers

Joint Retainers

- **Rule 2.04(6)** – *Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the client 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 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*

Ethical Walls

Ethical Walls

- **What are they?**
- **When can they be used?**
- **What safeguards should you ensure are put in place?**

Challenge of Affiliates

Challenge of Affiliates

- Tend to think of corporate group as a group
- But, composed of entities with separate corporate personality
- “Group enterprise” concept has tended not be recognized in Canada
- Interests of affiliates may diverge

Lawyer Mobility – Best Practices

Lawyer Mobility

- Do you screen new hires for conflicts?
- How do you deal with any recognized conflicts?
- How are in-house counsel transferring to private practice viewed by the Courts? Same as inter-firm transfers?
 - See *CPR Co. v. Aikins, Macauley & Thorvaldson* (1998), 157 DLR (4th) 473 (Man. CA)

THANK YOU!