

MINUTES

COMMITTEE: Ethics Committee

DATE: April 12, 2012

1. CHAPTER 9: JOINT RETAINER - WILLS

At its meeting of May 12, 2011, the Committee considered the conflicts issues arising when a lawyer acts for a husband and wife in jointly preparing wills. The Committee was of the view that a lawyer should not act for one of the parties in drafting a new will unless the lawyer has knowledge that the will of the other party was no longer valid.

Since then a lawyer has questioned whether the Committee is of a different view if the retainer agreement with both parties expressly permits the lawyer at a date after the initial wills are signed to act for one party without seeking the consent of the other party.

The Committee noted that in the new BC Code of Conduct the Commentary to Subrule 2.04(7) [rule 3.4-5 in January 1, 2013 BC Code] would prohibit such a representation in the absence of consent by the other party. It provides:

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 subrule (7). 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:

- (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 Rule 2.03, 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.*

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

The Committee also noted that Subrule 2.04(5) of the BC Code [rule 3.4-10 in January 1, 2013 BC Code] expressly prohibits a lawyer acting against a former party in a related matter. It was the Committee's view that 2.04(5) is applicable here to prevent a lawyer from acting for one spouse to change a will after acting jointly for both spouses to prepare wills for each of them. Chapter 6, Rule 7 of the *Professional Conduct Handbook* contains a similar prohibition to Subrule 2.04(5).

Subrule 2.04(5) states:

2.04 (5) *Unless the former client consents, a lawyer must not act against a former client in:*

- (a) the same matter,*
- (b) any related matter, or*
- (c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.*

Chapter 6, Rule 7 of the *Professional Conduct Handbook* states:

- 7. *Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:*
 - (a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or*
 - (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.*

The Committee concluded that a lawyer may not act subsequently for one party in these circumstances, even if a provision in a retainer agreement expressly contemplates such a representation. The Committee declined to change its opinion of May 12, 2011.