

MINUTES

COMMITTEE: Ethics Committee

DATE: September 4, 2003

8. CHAPTER 6, RULE 7: WHETHER LAWYER ACTING IN A CONFLICT WHERE ASSOCIATE FORMERLY ACTED FOR PARTY ON THE OTHER SIDE

Lawyer K of Lawfirm 1 asked the Ethics Committee for an opinion on whether he is acting in a conflict of interest in an action where B, the plaintiff, seeks relief against SCS Ltd. and P, the defendants, including specific performance of an alleged agreement B made on June 25, 1998 with the defendants. Lawyer K advises that the primary issue in the litigation is whether there was such an agreement. Lawyer W acts for Mr. B.

The defendants were originally represented by Lawyer T. Lawyer K began acting in January 2003 with Lawyer T continuing to act as defence counsel as well.

Sometime in the middle of 2000, when he worked at Lawfirm 2, Lawyer X represented B in respect of negotiations with the defendants involving the implementation of the alleged agreement of June 25, 1998. His involvement was concluded in 2000. Lawyer X became associate counsel with Lawyer K's firm, Lawfirm 1, on August 1, 2002. He remains an independent practitioner. He keeps separate financial statements and simply remits to Lawfirm 1 a fixed amount each month representing an appropriate charge for overhead costs.

Regarding his representation of B in 2000 Lawyer X says in his affidavit of August 12, 2003 that he acted for B with respect to matters referred to in paragraph 19(e) of the Statement of Claim. Paragraph 19(e) states:

In February and through the summer and fall of 2000, Mr. B, Mr. P and Ms. P worked to finalize the details of a consolidated arrangement by which Mr. B would obtain the shares in SCS Ltd with no adverse tax consequences to the Ps, and Ms. P would receive, *inter alia*, control of the survey business. But despite Mr. P's assurances that the deal was going forward, no documents were ever finalized or signed.

Lawyer X's affidavit states:

7. My involvement with Mr. B was not an extensive one. My recollection is that Mr. B was referred to me by an accountant who indicated that there had been problems in having the principals of SCS Ltd. complete an arrangement with Mr. B whereby he was to acquire equity in the company. My recollection is that the company was owned by two individuals, a husband and wife.

8. Following an initial meeting and review of the file, my recollection is that I either prepared or communicated with C & D who were the lawyers for SCS Ltd. and the Ps about preparing documents to implement the arrangement.

9. I have no direct recollection of the exact details, but I do remember that letters were exchanged by C & D and me setting out certain terms and conditions but agreement was never reached on those terms and conditions.

10. I do not believe I possess any confidential information which is relevant to the allegation, made in the Statement of Claim, that an agreement was made on June 25, 1998.

11. I believe I ceased representation of Mr. B at some point in 2000 after it became clear that agreement was not going to be reached.

The Committee noted that Lawyer X is listed on the letterhead of Lawfirm 1 as “associate counsel.” Given this listing, it was the Committee’s view that Lawyer K and Lawyer X are operating in an apparent partnership or association. Under Chapter 13, Rule 6 of the *Professional Conduct Handbook* they are deemed to have the same professional obligations to the general public, other lawyers and the Law Society as they would have if they were practising in a partnership. Those obligations generally require the conflict of one lawyer in a firm to be imputed to all other lawyers in the firm. Here, it was the Committee’s view that it would be improper for Lawyer K to act against B in the matter if Lawyer X was precluded from acting by Chapter 6, Rule 7 of the *Professional Conduct Handbook*.

The Committee observed that, absent consent of the former client, Chapter 6, Rule 7 prevents a lawyer from acting against a former client unless the new and former matters are substantially unrelated and the lawyer has no confidential information from the former matter that is relevant to the new one. A central issue in the litigation is whether an agreement was concluded between the parties on June 25, 1998. Whether an agreement was ultimately concluded, Lawyer X worked on matters that were relevant to completion of whatever arrangement or tentative agreement was reached between the parties on that date. In the Committee’s view, the connection between the arrangement of June 25, 1998 and Lawyer’s X’s work is sufficiently close that it cannot be said that the matters are substantially unrelated. For that reason, it was the Committee’s opinion that Lawyer K is acting in a conflict in his representation of SCS Ltd.

JO/
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