

MINUTES

COMMITTEE: Ethics Committee

DATE: July 4, 2002

5. CHAPTER 6, RULE 4: WHETHER LAWYERS MAY ACT ON BOTH SIDES OF A TRANSACTION TO DOCUMENT AGREEMENT ALREADY CONCLUDED

The Discipline Committee asked for the Ethics Committee's opinion on the propriety of a lawyer acting on a joint retainer under Chapter 6, Rule 4 in a transaction for two clients that are adverse in interest. The April 4, 2002 Discipline Committee minute referring this matter to the Ethics Committee stated:

After considering an opinion from staff regarding the interpretation of Chapter 6 of the Professional Conduct Handbook, it was resolved that the question of whether or not a lawyer can act in a transaction for two parties, (where said parties are adverse in interest and the transaction is not a real property transaction), where all elements of the transaction have been agreed upon between the parties and the lawyer is asked to implement the agreement, be referred to the Ethics Committee for its consideration.

The Committee noted that the circumstances under which a lawyer may act for more than one party to a real property transaction are set out in Appendix 3 of the *Professional Conduct Handbook* and therefore the Committee's views with respect to this issue do not pertain to those matters.

With respect to non-real property matters, it was the Committee's opinion that a lawyer can never act jointly for two parties to a transaction where the interests of the parties are actually adverse. However, it was conceivable to the Committee that, in limited circumstances, two opposite parties to a transaction could be described as not "adverse in interest" such that a lawyer could act for them jointly. Those circumstances might include the following:

- where all issues with respect to the transaction have been agreed upon by the parties and the lawyer is asked only to prepare standard form documents to give effect to the transaction.
- where both parties have requested that the lawyer prepare documentation to evidence an agreement negotiated by the parties, on the understanding that the parties' own separate lawyers will use that documentation to conduct further negotiations, if necessary, and conclude an agreement.
- where lawyers for both parties retain a single lawyer to prepare documentation to give effect to an agreement the separate lawyers for the parties have negotiated and are free to negotiate further if they choose.

It was the Committee's view that in most circumstances other than the above, the interests of the clients conflict and it would not be proper for a lawyer to act for them jointly. In particular, it was the Committee's view that the preparation of documents to give effect to an agreement already reached by the parties is not proper. The preparation of documents, other than standard form documents, will require a lawyer to emphasize certain aspects of the bargain that favour one party at the expense of the other.

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