

## MINUTES

**COMMITTEE:** Ethics Committee

**DATE:** September 30, 2004

### 6. CHAPTER 6: WHETHER LAWYER ACTING IN A CONFLICT

Lawyer A represents a client who is charged with sexual assault of his two step sisters, T and W. Their father, R, is the accused's stepfather and is paying for his defence.

Mr. R brought his two daughters, the complainants T and W, to Lawyer A's office and was present while Lawyer A questioned them. Lawyer A says that during the interview the complainants made statements that are inconsistent with his client's guilt. At least one of the complainants now says that during the interview Lawyer A induced her to lie about the events in question.

Lawyer A formerly acted for the complainants' mother, F, in a family matter before the complainants were born. He has suggested that he has information from that representation that may assist his client.

The Crown has retained Lawyer B with respect to the issue of Lawyer A acting as counsel and Lawyer B has taken the position that Lawyer A would be acting in a conflict if he continues to act for the accused. She says that the interview Lawyer A conducted with the complainants makes it inevitable that he will be a witness. Moreover, she says that it appears that Lawyer A intends to use confidential information he obtained from the complainants' dead mother in his defence of the accused.

Lawyer A argues that the presence of the complainants' father in the interview makes it unnecessary for him to be a witness in his client's defence. He says, as well, that the only information regarding the complainants' mother that he would use is information that is a matter of public record.

#### *The former representation*

With respect to the issue concerning Lawyer A's former representation of F, the Committee noted that the rules require that a lawyer not disclose to one client confidential information concerning another client in a different matter, and decline employment or withdraw from a retainer that might require such disclosure. It was the Committee's view that if Lawyer A has information from his representation of F that is relevant to this matter that he has a duty to use that information to his current client's advantage. At the same time, he owes a continuing duty of confidentiality to his former client, F, and it is not relevant to his obligations to her that the information he has was made part of the public record or that she is now deceased. With respect to this issue, those dual obligations would place the lawyer in a conflict and require his withdrawal.

#### *The lawyer as a potential witness*

With respect to the question of the lawyer as a potential witness, it was the Committee's opinion that, in these circumstances, the prudent course would have been for Lawyer A to have had the interview with T and W conducted by other counsel or an investigator without Lawyer A being present.

The Committee noted that Chapter 8, Rule 9 of the *Professional Conduct Handbook* does not require a lawyer who has given evidence to withdraw from a representation until that evidence is concluded. However, it was the Committee's view that the chances Lawyer A will be obliged to give evidence if the matter proceeds to trial are sufficiently great that it would be improper for him to continue as counsel unless other counsel is ready to assume conduct of the matter without interruption if Lawyer A's evidence is required. The prudent course would be for Lawyer A to withdraw as counsel now.

JO/  
September 30, 2004