COMMITTEE: Ethics Committee

DATE: February 26, 2009

3. CHAPTER 6: WHETHER IMPLIED UNDERTAKING PREVENTS LAWYER FROM ACTING

Lawyer 1 acts for Company A which is wholly owned by Mr. S in an action against Mr. B ("action 1"). The action alleges Mr. B did work for Company A's customers for cash and pocketed the cash without accounting to the company for the money. Company A claims the right to trace the proceeds of that alleged embezzlement into the house which is owned by Mr. B and his wife.

Mr. B and his wife are represented by Lawyer 2.

In a family proceeding Mr. S's wife, Ms. M, is claiming a division of assets. Ms. M has named as respondents, not only Mr. S, but also Company A and another company, Company B, owned and controlled by Mr. S ("action 2"). Lawyer 2 represents Ms. M in this action. Mr. S is represented by Lawyer 3.

Lawyer 1 argues that Lawyer 2 is in a conflict because of his representation of both Mr. B and Ms. M and asked the Ethics Committee for its opinion. The Committee considered the possibility that a conflict might arise in one of two ways in these circumstances: because of a conflict created by an implied undertaking, or because Lawyer 2's conduct of one action may affect the amount of funds available for resolution of the other.

Conflict Created by Implied Undertaking

The Committee noted the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers obtained on discovery for any purpose other than securing justice in the civil proceedings in which the answers were compelled: *Juman v. Doucette* S.C.C. 2008. The argument Lawyer 1 makes is that to the extent that Lawyer 2 has such information from Ms. M in action 2, or from any other source, he is bound by his duty to his client, Mr. B, in action 1 to use that information to Mr. B's benefit. Since he cannot do so because of the implied undertaking, there is a conflict between his duty not to disclose information, derived from the implied undertaking, and his duty to share that information with his client. He must therefore withdraw.

The Committee noted a number of decisions and opinions where a lawyer may continue to act for a client but, nevertheless, is unable to disclose certain information to that client that the lawyer has in his or her possession. In *R. v. Fisk* (1996) 108 C.C.C. (3d) and *R. v. Guess* 2000 BCCA 547 courts contemplated that in certain circumstances counsel might, by court order or client agreement, have access to information that would not be available to counsel's client. The Committee recognized that in the *Fisk* and *Guess* situations counsel were prevented from communicating information to the client by court order while, in the circumstances before the Committee, the information could not be communicated because of an implied undertaking to the court. Nevertheless, the decisions contemplate situations where a lawyer may continue to act where the lawyer must withhold relevant confidential information from the client.

In an opinion of December 2003 the Ethics Committee concluded that it was proper for a lawyer, in some circumstances, to withhold certain information from a joint client where section 148 of the *Securities Act* prevents the lawyer from sharing relevant information of one joint client with another joint client. In a

September 1999 opinion the Ethics Committee considered whether a lawyer whose client was bound by a confidentiality agreement not to disclose certain information could act for another client with a similar issue against the same defendant. In the Committee's opinion, the knowledge the lawyer gained from his representation of the first client is simply "know how" that comes from acting in a particular matter and against a particular client. Although a lawyer is under a duty to decline to disclose confidential information concerning the first representation to a subsequent client, the lawyer is not prevented from using all the skill and knowledge gained during that representation for the benefit of a subsequent client.

In *Merck & Co. v. Interpharm Inc.* [1992] 3 F.C. 774 (F.C.T.D.) affirmed [1993] F.C.J. No. 26 (F.C.T.D.) the court rejected an assertion that an implied undertaking not to disclose evidence obtained on discovery could operate to prevent a lawyer from acting in a subsequent matter.

It was the Committee's view that as long as Lawyer 2 complies with the undertakings of confidentiality which protect the information disclosed in each discovery process, it is not improper for him to continue to act in both matters.

<u>Conduct of one action may affect the amount of funds available for resolution of the other</u>

The argument for disqualification of Lawyer 2 with respect to this issue is that to the extent that Lawyer 2 does a good job of defending the action commenced by Company A in action 1, there may be fewer assets available for Ms. M to obtain the relief she seeks in action 2. Arguably that places Lawyer 2 in a conflict.

Although the Committee was of the opinion that this situation on its face seems to place Lawyer 2 in a conflict, he may be in receipt of instructions from his clients that make it acceptable for him to act. Those instructions are privileged and not known to the Committee and for that reason the Committee declined to give an opinion on this issue.

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