

COMMITTEE: **Ethics Committee**

DATE: **April 6, 2006**

## **5. CHAPTER 6: WHETHER LAWYER ENTERING INTO AGREEMENT WITH ICBC MAY BE PLACED IN A CONFLICT**

ICBC requires counsel acting for it in defending injury claims to enter into a “strategic alliance” agreement (“SAA”) with it. Under that agreement counsel agree to decline to act against ICBC in some kinds of actions, although it does not prevent them from acting for plaintiffs against ICBC in other matters.

The Trial Lawyers Association asked the Ethics Committee whether certain aspects of the strategic alliance agreement place lawyers in a conflict or create other kinds of ethical dilemmas for them. It points specifically to the following clauses in the SAA:

Article 6.2(a)(vi): wherein ICBC at its sole discretion may impose penalties or restrictions, including termination of the SAA, where “The Firm or any member of the Legal Team, in the performance of the Legal Services, fails to act in the best interests of ICBC or ICBC’s insureds...”;

Article 6.2(b)(i): wherein the same penalties or restrictions can be imposed where “the Firm or any member of the legal team was or is engaged in any activity that was, is or may be contrary to ICBC’s strategic business or financial direction or initiatives, or the interest of ICBC’s insured”;

Article 9.4: “Members of the Firm’s Legal Team will not directly or indirectly:

- commence or participate in claims or actions, or
- counsel or assist others in bringing claims or actions against ICBC which include:
  - allegations of bad faith, or
  - claims for punitive, aggravated or exemplary damages.”

The Trial Lawyers Association states:

TLABC’s concern is that the above clauses not only limit counsel’s ability to have conduct of certain types of actions but also limit counsel’s ability to properly advise clients in accordance with their ethical obligations, including their obligations to fully advise clients of the merits of their claims and the remedies available to them, or to refer clients for independent legal advice with respect to such matters. Being prevented from pursuing certain remedies on behalf of clients creates the further complicating issue of the potential of counsel having to withdraw from a case at some point. This in turn may result in the client having to retain another lawyer to properly represent them, which would add to the cost of legal services, create confusion in the mind of the public and contribute further to the negative stereotypes the public may have of lawyers.

The Ethics Committee looked at similar issues in June 1999 in an ICBC request for proposals from law firms and gave an opinion which states, in part:

**6. CHAPTER 6: INSURANCE CORPORATION OF B.C. REQUEST FOR PROPOSALS**

The Insurance Corporation of British Columbia has circulated a Request for Proposals (the “RFP”) inviting lawyers in British Columbia to bid on legal work for the Corporation. The work on which bids are sought is primarily the defence of claims arising out of motor vehicle accidents and the prosecution of fraudulent claims.

The RFP states that ICBC will require that lawyers retained to act as part of a legal team for ICBC decline to act against it in bringing actions which include allegations of bad faith or claims for punitive, aggravated or exemplary damages. ICBC also requires that counsel who have agreed to act for ICBC in the prosecution of actions alleging fraud decline to defend any such actions. The precise provisions in the RFP state:

“f) It is not acceptable for a member of a legal team to commence actions (or to counsel or assist others in bringing actions) against ICBC which include allegations of bad faith or claims for punitive, aggravated or exemplary damages. Such allegations and claims are not consistent with a strategic alliance relationship;

g) Further, it is not acceptable for the Selected Firms to assume the conduct of the defence of actions brought by ICBC against alleged fraudulent claimants, if the firm has agreed to act in the prosecution of such actions. These actions involve issues of significance to ICBC’s fight against fraud involved in the development of sensitive and highly confidential information;”

The Committee was asked whether it is proper for lawyers to act for clients adverse in interest to ICBC after agreeing to the restrictions required by ICBC and, if it is proper for them to act, what advice they must give to such clients regarding the restrictions placed on them.

It was the Committee’s view that a lawyer who accepts the conditions required by ICBC may properly act against ICBC for clients whose cases do not fall within the restrictions the lawyer has accepted. However, a lawyer acting in these circumstances must advise the client of the lawyer’s relationship with ICBC, the restrictions the lawyer is under in acting for parties adverse in interest to ICBC and the implications of those restrictions.

The Committee continues to accept the June 1999 conclusions as a correct statement of lawyers’ ethical obligations in these circumstances.

The Committee responded as follows to specific questions raised by the Trial Lawyers Association:

### **Question 1**

Would the lawyer subject to the SAA place oneself in a potential ethical dilemma and/or conflict of interest when acting for a Plaintiff in a personal injury claim where that claim was defended by ICBC or ICBC was a party to the action, particularly in circumstances where the evidence would support claims for bad faith and/or punitive, aggravated or exemplary damages against ICBC?

### **Answer**

A lawyer who has signed the SAA must not advise or act for clients where there is a reasonable basis for believing the evidence supports claims of this nature. Lawyers who are prevented from bringing claims by reason of their agreement with ICBC may properly refer them to other lawyers. A lawyer who has begun acting for a client and discovers the client has a reasonable basis for commencing a claim the lawyer is prevented from bringing must cease acting for that client.

### **Question 2**

Similarly, would a lawyer subject to the SAA place oneself in a potential ethical dilemma and/or conflict of interest when acting for a Plaintiff in a property damage claim where that claim was defended by ICBC or ICBC was a party to the action, particularly in circumstances where the evidence would support claims for bad faith and/or punitive, aggravated or exemplary damages against ICBC?

### **Answer**

A lawyer who has signed the SAA must not act for clients where there is a reasonable basis for believing the evidence supports claims of this nature

### **Question 3**

Would a lawyer subject to the SAA place oneself in a potential ethical dilemma and/or conflict of interest when acting for an ICBC-insured Defendant in a personal injury claim, and the Defendant faces the risk that the plaintiff's claim may exceed the defendant's ICBC policy limits, and thereby face personal exposure?

Factual Scenario: Lawyer represents a Defendant in a tort action at the request of ICBC. During the course of the retainer, it becomes clear to the lawyer that ICBC does not wish to settle a claim despite an offer by a Plaintiff to accept a settlement within the ICBC-insured Defendant's third party policy limits. It is apparent to the lawyer that there is a real risk that the claim could exceed the policy limits. Arguably the lawyer would be ethically obliged to advise the Defendant of this risk, or to recommend independent legal advice; however, if the lawyer does either of these things, it would likely amount to a breach of the SAA restrictions under Articles 6 and 9 above.

### **Answer**

The lawyer in this situation must advise the insured to seek independent legal advice. Articles 6.2(a)(vi) and 6.2(a)(vii) do not prevent the lawyer from doing this. On the contrary, they speak of the lawyer's obligation to "act in the best interests of ICBC and its insureds."

#### **Question 4**

Would the lawyer subject to the SAA place oneself in a potential ethical dilemma and/or conflict of interest when acting for a Plaintiff in a Part 7 action against ICBC, where the facts would support allegations of bad faith and/or claims for punitive, aggravated or exemplary damages against ICBC?

Factual Scenario: Lawyer is acting on behalf of a Plaintiff. There is clear medical evidence supporting the provision of Part 7 medical, rehabilitation or disability benefits, and appears to be no basis for ICBC to deny the payment of benefits.

#### **Answer**

A lawyer subject to the SAA must not act if the circumstances support a claim for punitive, aggravated or exemplary damages against ICBC.

#### **Question 5**

The wording of Article 9.4 of the SAA, which mandates that a firm or a member of the legal team may not “counsel or assist others in bringing claims or actions against ICBC which include: allegations of bad faith or claims for punitive, aggravated or exemplary damages”, is so broadly drafted that it may preclude a lawyer from recommending that a client obtain independent legal advice (for example, in the circumstances above).

#### **Answer**

It is proper for a lawyer in good faith to recommend that a person obtain independent legal advice and Article 9.4 need not be construed as preventing such a recommendation.

#### **Question 6**

With respect to Chapter 5 of the *Professional Conduct Handbook*, can a lawyer subject to the SAA breach his duty of confidentiality to ICBC as their client, by disclosing to plaintiff clients the restrictions which are contained in the terms of the SAA?

#### **Answer**

If ICBC refused to permit SAA lawyers to disclose the fact that they represent ICBC and cannot act in some kinds of matters because of their obligations to ICBC, the Ethics Committee would be prepared to consider this issue further.

JO/  
April 6, 2006.