

COMMITTEE: Ethics Committee

DATE: September 7, 2006

7. CHAPTER 6: WHETHER LAWYER IN CONFLICT AS A RESULT OF HIS REPRESENTATION OF A FORMER CLIENT

Lawyer A represents the plaintiff, Ms. E, and Lawyer B the defendant, Ms. S, in a lawsuit. Lawyer A alleges that because of his prior representation of the plaintiff Lawyer B is in a conflict of interest and must withdraw. Lawyer B denies he is acting in a conflict. Both counsel agreed to seek the opinion of the Ethics Committee to resolve their disagreement.

The plaintiff and defendant are sisters. Their mother, Ms. D, was the sole shareholder and director of a company ("the company"). The company owned a small farm which included a gravel pit. Gravel taken from the gravel pit has been used by a highway contractor ("the contractor"), since about 1954.

In 1998 Ms. D transferred her shares in the company to her three daughters, two of whom are plaintiff and defendant. Shortly thereafter the defendant purchased the shares from her two sisters, one of whom is the plaintiff. Prior to the purchase the defendant obtained an appraisal of the farm property, but the plaintiff alleges the appraisal did not factor in the anticipated revenue from the gravel pit. The plaintiff takes the position that she agreed to sell her shares for a price based on the representations of the defendant that the activities of the contractor would be winding down, so that the true value of the property would be based on its land value only, without any reference to expected revenues. The plaintiff says that those representations were untrue and seeks a remedy for unjust enrichment.

Ms. D died in 2002 leaving a will that named her three daughters as executors. Lawyer B, the lawyer for the defendant, acted for the three executors in probating Ms. D's estate.

Lawyer A takes the position that Lawyer B is acting in a conflict by continuing his current representation of the defendant. In his letter to Lawyer B of April 20, 2006 he says the following:

At one time or another, you have acted for all of the players which are central to this lawsuit. It would appear, that in some capacity, you acted for Ms. D. I note that the contract between Ms. D and the contractor was signed in 1996 and you are the witness to Ms. D's signature. There is no indication on the document that you did not give legal advice. You acted on behalf of all three daughters including my client, in the handling of Ms. D's Estate. Your involvement is something more significant than witnessing signatures on documents prepared outside of your office. It would appear, at least on the face of it, that the Probate Documents, affidavits, schedules etc. were prepared by you. In the course of handling the Estate you would have had to make inquiries as to the value of the assets in Ms. D's Estate, the debts of the Estate (including any sums owed by the daughters) and whether there was a possibility of a *Wills Variation Act* claim being pursued. You met with our client and conversations took place which may compromise her position if at some point she ends up being cross-examined by

you. In your letter of March 22, 2006 you point out that Ms. B (the third sister who is not a party to the action) perceives no wrong-doing on Ms. S's (the defendant's) part. Your knowledge of her perception may have been gained, at least in part, from your dealings with her during the course of handling her mother's Estate. I understand that you may have had dealings or at least conversations with the Ministry of Transportation and Highways in the early 1990's pertaining to the gravel pit.

My client is very much concerned that the information that you gathered when acting for her and her sisters on her mother's Estate, may be used against her in these proceedings. Whether or not those fears will materialize, there is at least a reasonable foundation for this belief. Our position would also be compromised if you possessed knowledge about the longevity of the gravel pit at the time the property was transferred to Ms. S (the defendant). Finally, I note that the property in question was registered in the name of Ms. D as bare trustee for the company Ltd., the beneficial owner thereof. One of the Class "A" Shares is held by your client in trust for the three daughters. I note that since 2000, you have been the registered and records office for the company and that you are the solicitor for the company. While her interests may be small, my client does have certain rights as a shareholder including access to corporate materials. Having all of these records in your office creates a further conflict.

In his letter of May 10, 2006 Lawyer B responded to Lawyer A's allegations by making the following points:

- The events giving rise to the dispute between the parties arose in 1998 when Ms. D obtained an appraisal of the farm property for the purpose of establishing a fair market value of the shares she planned to transfer inter vivos to her three daughters. The appraisal valued the property at \$225,000 and Ms. D transferred 1/3 of the shares to each of her daughters for a stated value of \$75,000. The plaintiff and her sister, Ms. B, then transferred their shares to the defendant for \$75,000 each. Lawyer B did not act for any of Ms. D, the plaintiff, the defendant or Ms. B with respect to these transfers.
- Since he did not act in any of the matters related to the transfer of shares in 1998, acting for Ms. D in 1996 with respect to the lease agreement with the contractor cannot place him in a conflict with respect to his representation of the defendant.
- Although he acted for the three sisters (plaintiff, defendant and Ms. B) in their capacities as executors of Ms. D's estate, there was nothing contentious about the estate, no hint of the difficulties that have resulted in the litigation and very little contact with the plaintiff and Ms. B. Most of the communication regarding the estate matters took place between Lawyer B and the defendant and all of his instructions came from the defendant. He says there is nothing in the probating of Ms. D's estate that bears even remotely on the subject matter of the lawsuit.

The Committee concluded that Lawyer B is not acting in a conflict in representing the defendant in the matter.

In the Committee's opinion, to the extent that Lawyer A argues that Lawyer B ought to be disqualified from acting for the defendant on the basis that he may be a witness to various events,

Lawyer A's contention is without merit. If Lawyer B is to be a witness to any matters in relation to the litigation, he would, of course, be bound to comply with the relevant rules. Chapter 8, Rule 9 states:

9. Unless the evidence relates to a purely formal or uncontested matter, a lawyer who gives *viva voce* or affidavit evidence in a proceeding shall not thereafter act as counsel in that proceeding unless it is necessary in the interests of justice.

However, Rule 9 does not become relevant until after counsel has given evidence.

The Committee did not consider that Lawyer B's position as solicitor and registered and records office for the company places him in a conflict. The company is not a party to the litigation and the lawyer owes no duty to refrain from acting against the plaintiff by virtue of her status as a shareholder in the company.

With respect to Lawyer B's past representation of the plaintiff as one of three executors of Ms. D's estate, it was the Committee's view that Lawyer A has failed to establish that Lawyer B's representation of the defendant is proscribed by Chapter 6, Rule 7 of the *Professional Conduct Handbook*. Rule 7 states:

Acting against a former client

7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against the interests of a former client of the lawyer unless:
 - (a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or
 - (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the representation of the former client that might reasonably affect the new representation.

The Committee noted that Lawyer B's representation of the defendant in the current matter and his representation of the plaintiff in her capacity as executor both deal with aspects of the property of Ms. D, the estate matter with her property, generally, the litigation matter with a dispute arising out of an *inter vivos* gift; and both have common actors. However, the two matters have no issues in common. For this reason, it was the Committee's view that Lawyer B's representation of the defendant is substantially unrelated to his former representation of the plaintiff.

With respect to the question whether Lawyer B has confidential information from his former representation of the plaintiff that might reasonably affect the new representation, it was the Committee's view that Lawyer B does not possess information that rises to that standard. Lawyer B had little contact with the plaintiff in her capacity as executor and, although he would have become aware of an aspect of her financial resources as a result of the former representation, the Committee was of the opinion that in these circumstances that information would be unlikely to influence Lawyer B's conduct of the new matter.

JO/
September 7, 2006.