TRIAL ETHICS
TEACHING PROGRAMME
CANADIAN MANUAL

Approved by the Board of Regents
October 2005

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Preface

These materials were initially prepared by a subcommittee of the Legal Ethics Committee, composed of John Gianoulakis, Michael Loprete, Daniel Land, John McElhaney and Alan Radnor, using a template developed by a group of Canadian Fellows led by Earl Cherniak. It is intended for use by Fellows presenting litigation ethics issues to law students.

The Programme

The materials are presented as a guide, not a script. We expect that each presentation will be tailored to the presenter's experience, the audience, and the locale. We also hope that students will be encouraged to participate in a dialogue. Presenters will be representing the American College of Trial Lawyers, and we expect that their presentations will be faithful to the message expressed in these materials.

These materials can be used by one presenter. However, a group of Fellows, including judicial Fellows, would offer an ideal mix of experience and perspectives.

The full presentation will take many hours, but it can easily be broken down into shorter sessions by selecting materials from various areas. The problems, by topic, can be described as follows:

1. Delay - unfounded claims or defences
2. Taking the blame for another's crime
3. Prosecutor's duty to disclose new evidence
4. Solicitor-client privilege, criminal confession
5. Representing a more valuable client and firing the less valuable - conflict
6. Meeting with a current employee of defendant with evidence adverse to defendant
7. Class action - conflict between current client and potential class
8. Production of documents - duty to supplement
9. Document destruction - advice prior to lawsuit
10. Confidentiality agreements (priest cases in U.S.)
11. Defendant's confession to lawyer where another's life is endangered
12. Crime/fraud exception
13. Lawyer/insurance company loyalty

The order in which the problems are presented and discussed is unimportant. The presenter can group problems of interest together or select an example from a specific area, e.g., criminal law (Problems 2, 3, 4, 13), and focus upon only one problem in that area.

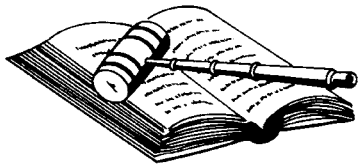
We have provided citations to the Canadian Bar Association Code of Conduct as amended August 15-17, 2004 and found at the website www.cba.org/cba/activities/code/default.asp and included as Appendix A, which form the basis of most provinces' ethical rules of professional conduct. Variations in each province's ethical rules should be examined. Citations are also provided to the American College of Trial Lawyers Canadian Code of Trial Conduct. These citations are noted as: CBA Code and ACTL Canadian Code of Trial Conduct.

Canadian users should consult rules of professional conduct in force in the appropriate province and any Code of Ethics approved by the individual Provincial Law Societies. The American College of Trial Lawyers Canadian Code of Trial Conduct should also be considered where relevant considerations differ between the USA and Canada.

One purpose of these materials is to familiarize students and lawyers with the American College of Trial Lawyers and its Code of Trial Conduct. Accordingly, we suggest that presenters distribute copies of the ACTL Canadian Code of Trial Conduct at each presentation.

Table of Contents

PROBLEMS



Problem 1

A significant client of the law firm of which you are senior partner, who is also a friend, is served with a claim in which the plaintiff seeks money owed and interim relief, including a writ of attachment on some of the client's assets. The client tells you he owes the money and has no defence to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall, to defeat the claim for interim relief, and to delay judgment until he can get his affairs in order.

Assume the same facts, except that you are a fifth year associate in the firm and will be reviewed for partnership in six months. A commercial partner who is on the firm's Management Committee relates the client's problems and instructs you to handle the matter.

In each case, what do you do?

Problem 2

You are consulted by two brothers, ages 23 and 24, who look very much alike. They were at a club recently and were repeatedly harassed by a drunken stranger. John, a third year law student with a provincial Court of Appeal clerkship pending, threw an empty beer bottle at the man just before closing. It struck him on the temple and caused him to fall against a chair. He died from his injuries five days later and the police charged John with manslaughter. The bar was dimly lit and identification of the person who threw the beer bottle will be an issue. John's brother Jim, who has bounced around from job to job, is currently unemployed. He has a record for a youthful indiscretion and wants to plead guilty to the crime so that the charge against his brother will be dismissed.

How do you advise the brothers? Can you represent either?

Problem 3

You are a junior Crown Prosecutor handling a sexual assault case against a teacher for conduct that occurred 15 years ago. Negotiations have been proceeding for several months toward a guilty plea that will satisfy the complainant and her family. You know from your discussions with defence counsel that the accused is very remorseful and willing to accept a sentence of the type under negotiation. Near the end of negotiations, but before any agreement for a joint submission has been made, you learn that the complainant, who is the only witness against the accused, suffered an injury that significantly affected her memory and ability to testify about the events in question.

Are you under an obligation to disclose this change in circumstances?

Problem 4

You are defending a client on a murder charge and he is released on bail. He tells you that he has, in fact, murdered several children and that he fears he may kill again.

What is your obligation with respect to revealing any part of this information?

Problem 5

The driver of a motor vehicle is involved in an accident and asks you to file a claim for injuries. You accept the representation and estimate that her damage claim is in the range of $50,000. Later, the driver informs you that a passenger in her vehicle, who sustained permanent paralysis, also intends to consult you. There is no doubt that the passenger's claim will exhaust the defendant's $1 million coverage limit. Although the defendant clearly appears to be liable and your client had the right of way, she was traveling at an excessive rate of speed.

1) Can you represent the passenger?

2) Can you withdraw from the representation of the driver in order to represent the passenger?

Problem 6

You represent the plaintiffs in an action for property damage after a fire destroyed their mobile home. They claim the fire was caused by a water heater that was installed negligently by employees of the defendant. You learn that the employees who installed the water heater are ordinary workers, not management employees, and that they believe they made a mistake involving an electrical connection and caused the fire.

Can you interview and obtain statements from these employees of defendant without the knowledge and consent of counsel for defendant? Would the answer be different if the employees were no longer employed by the corporate defendant?

Problem 7

You are retained by a client in a product liability matter involving a relatively new product. You think the case has potential merit and could lead to many other consumers retaining you or even become a significant class action. You conduct a confidential investigation and learn things that lead you to believe the product is defective and the case has significant merit. Before you actually file the action for the client or do anything toward making it a class action, the manufacturer hears about your investigation and offers a very substantial sum to settle with your client, with a generous cost component, if you take no further action against the manufacturer, destroy your investigative file, and communicate to no one about it. The client is pleased with the settlement offer and is willing to accept the money.

Can you accept the manufacturer's offer?

Problem 8

You represent the defendant in a very contentious commercial dispute in which there have been numerous discovery motions and production of documents. Settlement negotiations have been proceeding and there is every reason to think that settlement can be achieved at a sum that your client is willing to pay.

While these negotiations are going on, your client gives you a new box of documents which appear to be adverse to your client's case and could therefore affect the plaintiff's position on settlement. The client is adamant that you complete the settlement before plaintiffs make a specific request on discovery that requires their production.

Can you complete the settlement without producing these documents?

Problem 9

Your firm has represented a manufacturer of a common consumer product for many years. After it markets a new variation of the product, its general counsel tells you that the Director of Research and Development informed the Vice President of Sales about a potential risk in the new product that has come to light. The general counsel shows you documents that demonstrate the existence of this risk, although there have been no reports of accidents or injuries caused by the product and no claims have been made against the company. The Vice President of Sales and the Director of Research and Development asked general counsel if they can destroy all copies of these documents. They plan to recall the product from the market without explanation.

What is your advice?

Problem 10

You have just concluded a favourable settlement on behalf of the plaintiff in a case that attracted considerable media attention. The defendant required a confidentiality provision in the settlement agreement, and your client agreed to the provision because she does not want anyone to know how much money she received. The media call you for a statement about the settlement, and you know that news reports of your involvement in the case and the favourable settlement would be helpful to your practice and public image.

What can you say to the media?

Problem 11

Joe and Jenny Advocate are married criminal defence lawyers who practice together. Young, ambitious, and eager to make a name for themselves, they are thrilled when Joe gets a call from Frank Outlaw.

Frank has just been arrested in a notorious kidnapping case. The young son of the town's wealthy media owner was kidnapped a week earlier and is being held for ransom. Frank Outlaw was arrested after a struggle when he picked up a bag containing the second and final installment of the one million dollar ransom. He has been in custody for a few days, and has refused to say anything to the police other than to claim he is innocent. He is contacting local lawyers looking for representation.

The child's whereabouts are still unknown.

After meeting with Joe, Frank says he wants Joe to represent him. Joe explains that his wife and law partner, Jenny, will share the workload and Frank can contact Jenny and deal with her just as if he were talking to Joe.

Frank tells Joe in confidence that the child was kidnapped by Ralph Scumbag and that Frank was not involved until later. Ralph hid the child and picked up the first half of the ransom, but he never intended to pick up the second half. He believed the police would not interfere with the first delivery, and that he would have time to get away while they waited for the second delivery. Ralph never told Frank this, but Frank figured it out after his arrest.

Ralph told Frank about the kidnapping after the first delivery and said that the second ransom note should come from a different "writer," but Frank realizes in hindsight Ralph wanted him to do this so Ralph could get away.

Frank wants Joe to tell the prosecutor that Frank will help the police get Ralph in exchange for immunity or a plea to some minor charge for Frank. He also tells Joe there is a map in Ralph's handwriting showing where the child is being held. The child's health and life are in danger if he is not found within 72 hours. Frank offers to tell Joe where the map can be found and authorizes Joe to use the map to make the deal Frank wants, but he also instructs Joe that he must keep the note for use at trial if no agreement is reached because Ralph may be arrested and claim Frank was the instigator. The map in Ralph's handwriting would be crucial evidence to show Ralph's responsibility.

Joe leaves Frank and wanders the streets for a few hours thinking about the case. In the meantime, Frank calls Joe from the jail and reaches Jenny. Frank tells her there is something important that he has not told anyone and that he needs to meet with his lawyer immediately. Jenny rushes down to see Frank at the jail.

Frank gives Jenny a brief overview of what he told Joe earlier but adds that he left something out: Ralph trusted Frank with knowledge of his crime because Ralph knew that Frank had been involved in kidnappings and murders before, although he did not know the details. Frank suddenly tells Jenny the location of the bodies of three of his previous victims.

Jenny leaves the jail stunned. She does not know whether to believe Frank, but she realizes the location he gave her is only a one hour drive away and gets in her car to go there. Her worst fears are confirmed when she finds what appear to be human remains in the location Frank described. She touches nothing and returns home just as Joe arrives from his walk.

What should Joe and Jenny say to each other? What should they say to others'?

Problem 12

An existing client contacts a law firm to inquire about provincial incorporation requirements. The firm previously advised him regarding a real estate transaction, the creation of a will, and income tax issues. He says that he now needs help incorporating a telemarketing business which will contract with local newspapers to sell newspaper subscriptions.

The firm assists the client in incorporating his telemarketing business. Six months later, the firm learns that the client and his business have been sued by several individuals who claim to have been defrauded. The plaintiffs learn about the firm's previous association with the client, and they request access to privileged documents. They also seek to examine for discovery one partner regarding the legal advice provided to the client by the law firm.

You are hired to represent the law firm at the partner's examination and any subsequent court hearings. What advice do you give to the firm? May you ethically refuse to furnish the requested information? May you ethically disclose the information?

Problem 13

You have been hired by a law firm to represent it in the defence of a legal malpractice claim. Your employment has been approved by the Monarch Insurance Company, the law firm's malpractice insurance carrier. You have represented Monarch's insured in the past and have enjoyed a good relationship with Monarch's staff.

The law firm has $20 million in insurance coverage, and its exposure in this case is $50 million. Unfortunately, the malpractice case involves transactional malpractice in the negligent preparation of a contract, and legal liability is extremely likely. An arbitration panel has already rejected your interpretation of the contract, and the only defence may be that the other contracting party would have refused to execute the agreement if it had been drafted differently. It is unlikely that a court would find in favour of your client on this issue, but it may be possible to reduce the damages below $50 million because plaintiff's calculation of lost profits over a 30-year period may be too speculative.

Shortly after the lawsuit is filed and before there has been any discovery, you receive a demand from the plaintiff to settle the case for the $20 million policy limits. The offer will be withdrawn unless the money is paid within two weeks.

Should you write a letter to Monarch Insurance Company recommending settlement at the policy limits and suggesting that refusal to do so would constitute bad faith?

If Monarch declines to settle, may you represent your law firm client in a subsequent dispute with Monarch about whether it has engaged in a bad faith refusal to settle the case within the policy limits?

Would your obligations change if Monarch were paying the legal fees?

ANSWERS

Answer to Problem 1

The Partner.

Section 1 of the ACTL Canadian Code of Trial Conduct provides:

l. EMPLOYMENT IN CIVIL CASES

> It is the right of a lawyer to accept employment in any civil case unless such employment is likely to result in violation of the rules of professional conduct or other law. The lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which the lawyer or the lawyer's firm or associates have conflicting interests. Otherwise it is the lawyer's right and duty to take all proper action and steps to preserve and protect the legal merits of the client's position and claims and he or she should not decline employment in any case because of the unpopularity of the client's cause or position.

In short, the lawyer cannot simply delay proceedings for the sake of delay.

In the CBA Code, the most applicable commentary is found in Ch. IX, commentary 7:

> The lawyer should never waive or abandon the client's legal rights (for example an available defence under a statute of limitations) without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or **tactics that will merely delay** or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute. [emphasis added]

The primary rule is that a subordinate lawyer has personal responsibility to observe the rules of professional conduct.

Although some deference is given to subordinate lawyers who are acting at the direction of a supervising lawyer, subordinate lawyers do not automatically avoid personal responsibility if they blindly follow the instructions of supervising lawyers in committing an ethical violation. However, the subordinate may act in accord with a reasonable resolution of an arguable question of professional responsibility.

If the facts and circumstances of a given case indicate that the supervising lawyer is clearly wrong, it is the duty of the subordinate lawyer to refrain from proceeding with the improper course of conduct Section 8(b) of the ACTL Canadian Code of Trial Conduct. While not specifically addressed to a partner/subordinate situation, is broad enough to cover this situation. It provides:

> (b) When lawyers jointly associated in a cause cannot agree as to any matter vital to the interests of a client, the conflict of opinion should be frankly stated to the client for final determination. The client's decision should be accepted unless the nature of the difference makes it impracticable or inappropriate for the lawyer whose judgment has been overruled to cooperate effectively; in this event it is the lawyer's duty to ask to be relieved.

Answer to Problem 2

A lawyer must not mislead the court.

The first issue to be addressed is that of conflict of interest. The CBA Code's new Chapter V: Impartiality and Conflict of Interest Between Clients and several commentaries to Chapter V are applicable here. The Rule states:

The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Ch. V, commentary 1 states:

> A conflicting interest is one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client.

The CBA Code Ch. V, commentary 6, prevents a lawyer from acting for both parties where it is reasonably obvious that a contentious issue may arise. This commentary states:

> Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them with respect to the matter and may have to withdraw completely. Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the other client obtain independent legal advice about the joint retainer. If, following such disclosure, all parties are content that the lawyer act for them, the lawyer should obtain their consent, preferably in writing, or record their consent in a separate letter to each. **The lawyer should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that a contentious issue may arise between them or that their interests, rights or obligations will diverge as the matter progresses.** [emphasis added]

Because one brother has a law degree and the other appears to be uneducated, Ch. V, commentary 7 should also be taken into consideration:

> Although commentary 6 does not require that, before accepting a joint retainer, a lawyer advise each client to obtain independent legal advice about the joint retainer, **in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend doing so to ensure that the less sophisticated or more vulnerable client's consent to the joint retainer is informed, genuine, and uncoerced** [emphasis added].

Finally, Ch. V, commentary 14 states:

> In practice, there are many situations where persons have a conflicting interest even though no actual dispute exists between them. A common example in a conveyancing practice is where the lawyer is asked to represent both vendor and

> purchaser. In cases where the lawyer is asked to act for more than one party in such a transaction, the lawyer should recommend that each party be separately represented. In all such transactions the lawyer must observe the rules prescribed by the governing body.

Rule 1 of the new Chapter IV of the CBA Code prevents a lawyer from disclosing confidential information without the client's consent.

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information except as expressly or impliedly authorized by the client, required by law or otherwise required by this Code.

A number of provisions in the CBA Code prohibit a lawyer from knowingly assisting any sort of dishonesty or fraud. Rule IX states:

> When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.

Certain specific conduct is prohibited in Ch. IX, commentary 2:

The lawyer must not, for example:

> (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;
>
> (e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
>
> (j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another.

Ch. IX, commentary 11 states:

> Admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but **must not suggest that some other person committed the offence, or call any evidence that, by reason of the admissions, the lawyer believes to be false.** Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done, or in fact had not done, the act. Such admissions will also impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that

> the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that. [emphasis added]

Ch. IX, commentary 4 of the CBA Code states:

> If the client wishes to adopt a course that would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a course the lawyer should, subject to the Rule relating to withdrawal, withdraw or seek leave of the court to do so.

By extension, this commentary would also permit a lawyer to decline to act for prospective client or clients who suggested such a course of conduct.

Ch. III, commentary 7 of the CBA Code states:

> When advising the client the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client.
>
> The lawyer must be both honest and candid when advising clients.

Ch. III, commentary 1 is also applicable:

> The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results.

If John does not testify, can his lawyer fully and aggressively build a defence which suggests the possibility that Jim, whom he knows to be innocent, is guilty as long as that argument is consistent with the facts and the lawyer does not present false evidence? The ACTL Canadian Code of Trial Conduct Rule 5(b) provides that "[t]he crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt."

Answer to Problem 3

Chapter IX, commentary 9 of the CBA Code states:

> **When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits.** The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure t**o the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.** [emphasis added]

Resolution 04-01-A adds to this commentary:

> There is a clear distinction between prosecutorial discretion and professional conduct. Only the latter can be regulated by a law society. A law society has jurisdiction to investigate any alleged breach of its ethical standards, even those committed by crown prosecutors in connection with their prosecutorial discretion.

Counsel is prohibited from making false statements.

Ch. IX, commentary 2:

> The lawyer must not, for example:
>
> (e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
>
> (j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another.

Answer to Problem 4

ACTL Canadian Code of Trial Conduct, Rule 6, recognizes the duty of confidentiality lawyers owe their clients but also recognizes that a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime that "is likely to result in imminent death or substantial bodily harm."

In considering situations in which it is appropriate to reveal a client's confidences, see the CBA Code under the new Chapter IV: Confidential Information. Rule 2 creates a public safety exception to Rule 1 (which requires a lawyer to keep all client information in strict confidence):

> Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person, or group, of death or serious bodily harm, including serious psychological harm that would substantially interfere with health or well-being, the lawyer shall disclose confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Ch. IV, commentary 11 is also relevant:

> When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should be careful not to divulge more than is required. Legislation in certain jurisdictions imposes a duty on persons to report sexual or physical abuse in specified circumstances. Careful consideration of the wording of such legislation is necessary to determine whether, in such circumstances, communications that are subject to solicitor-client privilege must be disclosed.

If the lawyer in this problem believes his/her client is operating under a disability, Resolution 93-15-A amending the CBA Code includes a rule about Representation of Clients Under Disability after Chapter III:

> A. When a lawyer reasonably believes that a client's capacity to make adequately considered decisions in connection with representation of that client is limited, whether because of minority, mental disability or for some other reason, the lawyer shall maintain, as far as reasonably possible, a routine client-lawyer relationship.
>
> B. A lawyer shall refuse to take instructions from a client if the lawyer reasonably believes that the client cannot adequately instruct the lawyer to act in the client's own interests. Should the lawyer form such a belief in the course of providing legal services in which further instructions will be required, the lawyer shall secure the appointment of a substitute decision-maker for the client.
>
> C. Nothing in this Rule prevents a lawyer from representing a client who is apparently incapable of instructing a lawyer,
>
> > (a) if the lawyer is appointed by a court or tribunal or by operation of statute; or
> >
> > (b) in a proceeding in which some aspect of the client's mental capacity is in issue.

Answer to Problem 5

In order to decide whether to accept both cases, you must assess and appropriately respond to the conflict of interest created by (a) the evidence of the driver's fault and potential liability exposure to the passenger, and (b) the competition between them for the limited insurance proceeds.

Conflict of interest situations are covered by many of the same rules and commentaries applied under problem 2. The Rule in Chapter V of the CBA Code states:

> The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Ch. V, commentary 1 states:

> A conflicting interest is one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client.

In this case, you cannot represent both the driver and the passenger for two reasons. First, in order to fully protect the passenger's rights, the driver's liability to the passenger must be vetted. You can not take both sides of this issue and attempt to represent the driver and the passenger. Furthermore, you cannot request or accept their consensual waiver of this conflict because it would be unreasonable to believe that joint representation would not impose limitations on your representation of one or the other client.

It might be suggested that you could represent both driver and passenger if a separate lawyer is engaged to represent the driver as a defendant. This is at best an awkward arrangement which does not eliminate the differing and inconsistent interests which will adversely affect counsel's judgment. ACTL Canadian Code of Trial Conduct § 7 makes this point.

Of course, even if counsel is satisfied that the driver has no liability for the passenger's damages, a conflict of interest remains because the limited insurance proceeds create a competition between them. For example, the driver and passenger may disagree about whether to accept a settlement offer. However, because this competition would exist even if they had separate counsel, counsel could seek their consensual waivers of the conflict if both clients consent after a full explanation, and if both agree (a) that they will attempt to resolve any conflict that arises with respect to the insurance proceeds, and (b) that if those efforts (which may include elements of mediation or arbitration) fail, counsel will be entitled to withdraw from both representations, with counsel's fee protected in accordance with the retention agreements. In other words, counsel could go forward, but the situation could very well become difficult.

Counsel cannot withdraw from the representation of the driver in order to accept the passenger's much larger claim. Not only would counsel become adverse to a former client, but the adversity would be in the same matter. The CBA Code addresses this in Ch. V, commentary 12:

> A lawyer who has acted for a client in a matter should not thereafter, in the same or any related matter, act against the client (or against persons who was involved in or associated with the client in that matter) or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.

Counsel would be disqualified from representing the passenger after withdrawing from the driver's representation. Counsel may represent only the driver.

Answer to Problem 6

ACTL Canadian Code of Trial Conduct, Rule 15(b) specifically prohibits plaintiffs' counsel from communicating "with persons employed by the [defendant corporation]" concerning the issues in this lawsuit without the knowledge and consent of defendant's counsel if the employees are managerial employees, or if their statements would constitute an admission on behalf of the corporation or their acts or omissions in connection with the matter would be imputed to it for purposes of civil liability. Although the workers who installed the water heater are not managerial employees, their acts or omissions would be imputed to the corporation for liability purposes. Therefore, plaintiffs' counsel may not interview these employees without the consent of defendant's counsel.

If one of the workers is no longer employed by defendant, the ACTL Canadian Code of Trial Conduct specifically allows communication without the knowledge or consent of defendant's counsel. However, plaintiffs' counsel must "be careful not to cause the former employee to violate the privilege attaching to attorney/client communications."

The CBA Code does not expressly distinguish between current and former employees. Chapter IX, commentary 6(b) (Resolution 04-01-A) states:

> A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer should not approach…
>
> > (b) an employee or agent of the corporation or organization whose acts or omissions in connection with the matter may have exposed it to civil or criminal liability, concerning that matter
>
> except to the extent that the lawyer representing the corporation or organization consents or as otherwise authorized or required by law.

Answer to Problem 7

The answer is "yes" and "no." The issues raised by the terms of the settlement offer implicate restrictions on the right to practice law. In addition, in certain circumstances, a conflict of interest is also extant. ACTL Canadian Code of Trial Conduct, § 7.

Few would disagree that counsel could properly accept purely monetary settlement of the client's claim at this stage. The fact that counsel was thinking about a class action does not make the case a class action or create any duty to potential, unnamed class members when no suit has been filed on their behalf.

Other terms of the proposed settlement are problematic. Lawyers should not agree to restrictions on their right to practice law. Such restrictions limit the lawyer's professional autonomy and the public's freedom to choose a lawyer. The latter is the paramount consideration.

Would an agreement to take no further action against the manufacturer for future or other claimants be an unprofessional "buy off" of counsel's practice of law? It would be in the U.S. under the ABA Model Rule 5.6.

Counsel may agree to treat the terms of a settlement as confidential information. However, an agreement to destroy the investigative file and never discuss this matter with anyone would ultimately restrict counsel's ability to represent other clients with similar claims.

The CBA Code in Ch. XII, commentary 10 (text), states that:

> The lawyer acting for several clients in a case or matter who ceases to act for one or more of them should cooperate with the successor lawyer or lawyers to the extent permitted by this Code.

This would preclude the destruction of the file and the undertaking not to communicate about it. However, this would likely not apply because the case is not yet a class action, thus, there is no duty to potential unnamed class members (see para. 2).

For rules relating to class action litigation, see the various provincial statutes and Rules of Civil Procedure.

Answer to Problem 8

Several provisions of the relevant Rules and Codes are applicable in this situation. The ACTL. Code of Conduct provides: "To opposing counsel, a lawyer owes a duty of courtesy, candour in the pursuit of the truth [and] cooperation in all respects not inconsistent with the client's interests..." (Preamble); "a lawyer should not...in pretrial procedure...fail to make diligent effort to comply with a legally proper discovery request by an opposing party" (at 18), "nor should any lawyer render any service or advice encouraging or inviting disrespect of the law..." (at 24).

The initial inquiry is whether the new documents come within any of the plaintiff's discovery requests. If so, there is a duty to disclose, and it would be improper to withhold these documents pending consummation of the settlement negotiations.

Irrespective of whether previous discovery demands encompass these documents, they are clearly relevant and appear to come within the obligation of voluntary disclosure.

Presumably the settlement discussions referred to, or even relied upon, documents that were previously produced and statements previously made by counsel that may now be inaccurate based upon the new documents. A lawyer has a clear duty to correct any previous statement made by the lawyer to the adversary when that statement is no longer truthful.

Failing to bring these documents to the attention of the adversary may not be fraudulent but it would, at the very least, constitute misrepresentation because settlement discussions proceeded on the basis that no such documents existed. A lawyer should play no part in misleading an adversary, notwithstanding a client's wishes. The client should be advised that the documents must be produced and that failure to do so would violate one or more of the foregoing codes and rules.

The CBA Code deals with failure to disclose material facts and the prevention of fraudulent acts by clients:

> The lawyer must not….knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonorable (Ch. IX, commentary 2(b)….A lawyer must not…knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit [such as an affidavit of records], suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct (Ch. IX, commentary 2(e) (text).

The CBA Code also specifically prohibits knowing assistance or encouragement of any dishonesty (Ch. III, commentary 7 (text).

The CBA Code obliges a lawyer to comply with the rules of a tribunal or other discovery methods:

> where the rules of a court or tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate, shall explain the necessity of making full disclosure of all documents relating to any matter in issue (Ch. IX, commentary 3).

Note: Full disclosure is required by various provincial Rules of Court.

Answer to Problem 9

A number of provisions may apply here. ACTL Code of Conduct provides at 24 that no lawyer shall "render any service or advice encouraging or inviting disrespect of the law...".

The CBA Code requires that:

> the lawyer must not…knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonorable (Ch. IX, commentary 2(b) (text).

The first inquiry is whether the proposed document destruction would be contrary to the client's document retention rules or guidelines, governmental document retention requirements (e.g., requirements of agencies for Food & Drug Administration or Consumer Product Safety, or any statute concerning destruction of evidence that is relevant to pending or reasonably foreseeable litigation. If so, the documents cannot be destroyed, and any contrary advice would violate the obligation of counsel not to "render any service or advice encouraging or inviting disrespect of the law." ACTL Code of Conduct, at 24.

If destruction of the documents would not violate client guidelines, government requirements, or state statutes, the client should be advised that destruction is legally permitted. However, the client should also be advised that the recall of this product from the market without explanation will, at the very least, engender inquiries, and that the Director of Research and Development will undoubtedly be deposed if any lawsuit is filed and if asked will have to disclose the destruction of the documents and describe their contents. This could place the client in a very unfavourable light and could cause the court to penalize it for destroying clearly relevant documents.

Under these circumstances, the lawyer should advise the client not to destroy the documents and fully disclose the risks of their destruction.

Answer to Problem 10

ACTL Canadian Code of Trial Conduct, Section 6, provides in pertinent part:

> (a) It is the duty of a lawyer to preserve his or her client's confidences and secrets and this duty outlasts the lawyer's employment...
>
> (b) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation...

The CBA Code, Ch. IV, Rule 1 (resolution 04-01-A) deals with client confidentiality:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information accept as expressly or impliedly authorized by the client required by law or otherwise required by this Code.

Also see commentary 5, which indicates that obligation continues even after the relationship with the client ends and commentary 10, which states that confidential information is not to be used for the benefit of the lawyer.

The duty of confidentiality is broad and definite. The obligation is fundamental to and inherent in lawyer-client relationship. Based on public policy, a lawyer's duty of confidentiality stands on its own and is not dependent upon other related concepts such as solicitor-client or work product privileges.

A lawyer's self-interest in obtaining favourable publicity is simply no justification for breaching fundamental duties of confidentiality and loyalty.

The lawyer may not respond to the inquiry.

Answer to Problem 11

Jenny and Joe both represent Frank and can discuss the case freely between themselves. Under ACTL Canadian Code of Trial Conduct, Rule 6(c), they have the discretion, but not the obligation, to disclose the location of the kidnapped child. Frank's instructions that Joe not reveal the map unless a deal is reached can be superseded by counsel in the exercise of the lawyer's judgment under ACTL Canadian Code of Trial Conduct, Rule 6(c), to save the child's life.

Under the CBA Code the lawyer is permitted to disclose the location of the kidnapped child but not to disclose the prior murder. The relevant rule is the public safety exception, which is Rule 2 of Chapter IV:

> Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious physiological harm that would substantially interfere with health or well being, the lawyer shall disclose confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Before making this disclosure, the lawyers should confer with their client, encourage him to reveal the information, and inform him that they may disclose it if he does not. The lawyers are not required to divulge the information and can attempt to obtain immunity for their client before doing so. It should be noted that Joe and Jenny as joint counsel may make different decisions about this. Either one of them may conclude that the information should be disclosed, and then disclose it. If they reach different conclusions, however, they should not continue to jointly represent their client. See generally ACTL Canadian Code of Trial Conduct, Section 8(b), which covers situations in which lawyers cannot agree on actions taken in the client's interest; in this problem, however, the disclosure would be adverse to the client's interest.

Neither Jenny nor Joe may disclose Frank's confession to the three prior murders. This information is privileged because the crimes are completed and no additional serious injury from the crimes is possible.

Answer to Problem 12

Although it may seem initially that the documents and information about conversations with the client are protected, the crime-fraud exception to the solicitor-client privilege may apply and allow plaintiffs to obtain them.

Courts use a two-part test to determine if the crime-fraud exception applies: 1) whether there is probable cause to believe that a crime or fraud has been committed or attempted, and 2) whether the communications were in furtherance of that crime or fraud. The crime or fraud need not have occurred, as long as it was the objective of the client's communication. The exception applies if there was a reasonable basis for believing that the client's objective was criminal or fraudulent.

The knowledge or the intent of the lawyer is not determinative in these cases. It is the client's state of mind that is at issue. If the client initiated contact with a lawyer for the purpose of perpetrating a fraud, the client will not be able to invoke the solicitor-client privilege to shield their conversations from disclosure. However, if a client contacts a lawyer in order to comply with laws or regulations, and subsequently breaks the law or commits fraud, the solicitor-client communications will be protected.

Many courts have held that a mere allegation of fraud and assertion that the privileged communications may help prove the fraud will not suffice. There must be a specific showing that a particular conversation or document was made in furtherance of the client's fraudulent purpose. Courts will not sanction discovery "fishing trips."

The relevant provision of the CBA Code to deal with disclosure necessary to prevent a fraudulent act is commentary 11 of Ch. IV:

> When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should be careful not to divulge more than is required. Legislation in certain jurisdictions imposes a duty on persons to report sexual or physical abuse in specified circumstances. Careful consideration of the wording of such legislation is necessary to determine whether, in such circumstances, communications that are subject to solicitor/client privilege must be disclosed.

A lawyer may not knowingly help a client commit fraudulent acts, and may reveal significant facts to the extent the lawyer finds it reasonably necessary, but disclosure is not mandated. However, there are many cases in which courts have applied the crime-fraud exception and ordered disclosure of solicitor-client communications.

A lawyer may ethically refuse to disclose communications and documents that are protected by the solicitor-client privilege. However, the lawyer must comply with the final order of a court or other tribunal requiring the lawyer to give information about a client. If a court finds that the crime-fraud exception to the solicitor-client privilege applies, the court may order the production of communications or documents, and the lawyer may ethically comply.

Answer to Problem 13

Under the ACTL Canadian Code of Trial Conduct, Section 1, a lawyer has the "right and duty to take all proper action and steps to preserve and protect the legal merits of the client's position." Under Section 2, counsel has the further duty to "diligently pursue the matter to an expeditious conclusion." Under Section 7(b), a lawyer should not represent clients with differing, interests, defined as "every interest that will adversely affect the judgment or the loyalty of the lawyer to a client." Section 7(a).

When there is a conflict between an insured and the carrier, the defence lawyer's duty is to the insured. Monarch Insurance Company in the first scenario is not the lawyer's client. While one option could be to communicate the settlement offer to the client and to Monarch and recommend that it be rejected until some discovery has been done, if counsel believes the settlement value of this case will be at least $20 million irrespective of what counsel may learn during discovery, then counsel has an obligation to the client to recommend that the client and Monarch settle the claim at the policy limits. However, irrespective of how strongly counsel may recommend settlement, counsel should not tell Monarch that it would be bad faith to refuse to settle at the policy limits.

Counsel cannot become involved in any coverage dispute or any dispute about whether the carrier has engaged in bad faith by refusing to settle. The client must hire separate counsel from another law firm to represent it in connection with a dispute between the client and its insurance carrier.

If Monarch has retained counsel and is paying the defence costs, then the lawyer is acting for both the insured and the insurer. In this situation, upon receipt of the settlement offer at policy limits, the lawyer has a duty to disclose to both the law firm and the insurer the offer and his recommendation on the merits. If any question arises from either about the limits issue, both clients should be referred out to independent counsel in order that you, as counsel for both parties in conducting the action, can receive the appropriate instructions. If counsel cannot get instructions to settle, both parties will have had advice as to their exposure down the road.

COMMENTS

ACTL Trial Ethics Teaching Project

Comments

1. Date taught: _____

2. Place taught: _____

3. Fellows who participated: _____

4. Number of students/lawyers: _____

5. Problems taught: _____

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6. General comments (what worked well, what did not): _____

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Please e-mail (nationaloffice@actl.com) or fax (949-752-1674) to the College to be forwarded to the Legal Ethics Committee.

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