TAB 10

Keeping It Clean: Managing Conflicts in an Estates Practice

10

Hilary E. Laidlaw, C.S.
McCarthy Tétrault LLP

13th ***Annual*** **Estates and Trusts Summit**
Day One - November 17, 2010

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

KEEPING IT CLEAN:

MANAGING CONFLICTS IN AN ESTATES PRACTICE*

Hilary E. Laidlaw
McCarthy Tétrault LLP

TABLE OF CONTENTS

These appendices are taken from the *Canadian Bar Association Task Force on Conflicts of Interest – Toolkit*, 2008, available at: www.cba.org/CBA/groups/conflicts/toolkit.aspx, pp. 254 and 257-259, and are reproduced with the permission of the Canadian Bar Association.

***The research assistance of Peter Dueck, articling student, is gratefully acknowledged.**

INTRODUCTION

It is a fundamental tenet of trust law that trustees are subject to strict fiduciary obligations toward the beneficiaries. These include the duty to act exclusively for their benefit, putting personal interests aside.[1] Nowhere is this more clearly illustrated than with reference to the historical requirement that a trustee must act gratuitously unless the trust instrument specifically provides for remuneration.[2] While this rule has since been abolished, and the right to compensation is now statutorily codified[3], the duty to avoid any conflict of interest still governs all actions and decisions by a trustee. Simply stated, a trustee must steer clear of any conflict between his personal interests and his fiduciary duties, keeping in mind that the perception or appearance of conflict is as much a concern as the existence of an actual conflict of interest. As noted by Waters:

> The rule against conflicts exists in order to prohibit a fiduciary from being in a position where it will be systematically unclear whether or not he performed his fiduciary duty to act in what he perceived to be the best interests of the beneficiary.[4]

Consistent with these principles, there are a number of activities which, absent specific authorization, are prohibited for trustees. They include, but are not limited to, the following:

- purchasing trust property;
- selling or loaning his or her own assets to the trust;
- borrowing from the trust;
- purchasing from a beneficiary;
- acquiring a personal advantage from his or her office.[5]

While these are general propositions, and are thus subject to modification based on the specific context, including the terms of the trust, they serve to reinforce that the integrity of the trustee's office demands avoidance of any personal conflict of interest.

---

[1] Donovan W. M. Waters, ed., *Waters' Law of Trusts in Canada* 3rd ed. (Toronto: Thomson Canada Ltd., 2005) ("Waters") at 877.

[2] Waters, *infra* at 888.

[3] *Trustee Act*, R.S.O. 1990, c.T.23 s. 61(1).

[4] Waters, *supra* note 1 at 918.

[5] Waters, *supra* note 1 at 890-914.

The same is true for a solicitor, who is similarly subject to a wide variety of duties to a client. Key among these is the obligation to avoid any conflict of interest in the representation of the client. The following paper addresses this duty in the specific context of an estates practice, and discusses several instances in which the potential for conflict can – and often does – arise. A keen sensitivity to these issues is critical, particularly given the potentially overlapping areas of conflict when the solicitor is representing a trustee.

SOLICITOR'S CONFLICT OF INTEREST

General Principles

As members of a self-regulated profession, lawyers are expected to "exemplify the highest of personal and professional standards".[6] These include the need to recognize and appropriately deal with conflicts of interest. Avoiding conflict is essential to the fundamental integrity of the profession, as succinctly expressed in the following passage:

> Loyalty and trust are at the heart of [the solicitor-client] relationship and, if they are lacking, the significance of a momentary lapse can lead to fundamental issues about the integrity of the administration of justice and public confidence in the legal system.[7]

While any actual, or even potential, conflict is a matter to be determined based on the specific facts, there are nevertheless certain key principles which assist in the conflict analysis. As a starting point, the Law Society of Upper Canada, in its *Rules of Professional Conduct*, defines a conflict of interest as an interest:

> (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
>
> (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.[8]

Supreme Court of Canada Trilogy

There is a considerable body of case law addressing the issue of solicitor's conflicts. Most notably, the Supreme Court of Canada, in the following trilogy of decisions, articulated various principles which practitioners now look to for guidance in recognizing and avoiding conflicts.

---

[6] M. Deborah MacNair, *Conflicts of Interest: Principles for the Legal Profession* (Aurora, ON: Canada Law Book, 2010) ("MacNair") at 1-3.

[7] MacNair, *infra* at 1-2.

[8] Law Society of Upper Canada, *Rules of Professional Conduct*, effective November 1, 2000 with amendments current to April 22, 2010 (the "*Rules of Professional Conduct*") at 2.04(1).

Martin v. Gray[9]

The facts of this case involved a lawyer who had made a lateral move from one firm to another. Both firms were on opposite sides of a particular matter and the new firm was eventually disqualified from acting. In making this determination, the Supreme Court of Canada emphasized the duty of confidentiality owed to the client, a duty that is critical to the solicitor/client relationship. In this regard, the Court stated as follows:

> Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated…. Loss of this confidence [with which clients bare their souls to lawyers] would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.[10]

At the time *Martin* was decided, cases in Canada tended to follow either the English "probability of mischief" test or, depending on the circumstances, the more stringent "possibility of mischief" test.[11] The majority, however, found this approach inadequate to protect the public, and insufficient to meet the high standards which the public expects from the legal profession. While the Court was not prepared to recognize an irrebuttable presumption that a lawyer with confidential information would infect (and thereby necessarily disqualify) all members of any firm to which he transferred, clearly, the duty of confidentiality was a critical factor in the majority decision. In fact, this very duty was held to be among the most fundamental and sacrosanct elements of the solicitor/client relationship.

Following *Martin*, new guidelines emerged among various provincial law societies and bar associations, resulting in amendments to rules of professional conduct. These, in turn, led many practitioners and law firms to enhance their internal screening procedures in order to identify and deal with conflicts at the outset.

---

[9] [1990] S.C.J. No. 41. ("*Martin*")

[10] *Martin*, *infra* at para. 15.

[11] *Martin, infra* at para. 19.

R. v. Neil[12]

While *Martin* focused on the duty of confidentiality in the context of an inter-firm transfer, *Neil*, decided in 2002, considered the lawyer's duty of loyalty as the basis for its analysis. Writing for the Court, Binnie, J., posed the following question:

> What are the proper limits of a lawyer's "duty of loyalty" to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the current client's interest?[13]

In response, the time-honoured importance of the duty of loyalty was emphasized in the Court's unanimous judgment:

> It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained. Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.[14]

Expanding on *Martin*, Binnie, J. then stated that:

> While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate*, *supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role.[15]

The *Martin* principles were therefore expanded to recognize a duty to avoid conflict of interest over and above that which might arise through the possible misuse of confidential information. In this regard, the Court concluded that the duty of loyalty engaged "more particularly three other dimensions: (i) the duty to avoid conflicting interests…; (ii) a duty of commitment to the client's cause (sometimes referred to as "zealous representation")…; and (iii) a duty of candour with the client on matters relevant to the retainer."[16]

---

[12] 2002 SCC 70. ("*Neil*")

[13] *Neil*, *infra* at para. 1.

[14] *Neil*, *infra* at para 12 (citations omitted).

[15] *Neil*, *infra* at para. 17.

[16] *Neil*, *infra* at para. 19.

In essence, the Court recognized that a solicitor cannot fully commit to the interests of a client and fulfil this duty of loyalty if his or her own interests, or those of another client, conflict.

Strother v. 3464920 Canada Inc.[17]

The duty of loyalty which featured so prominently in *Neil* was then further embellished in *Strother*, decided in 2007. On the facts of that case, a lawyer having a financial interest in one client was alleged to have breached his fiduciary duty by putting that interest ahead of his duty to a second client. At issue was whether the lawyer owed a fiduciary duty beyond the scope of the retainer agreement. The majority held that the solicitor's duties could extend beyond the terms of the agreement although Chief Justice McLachlin, in dissent, would have narrowed the duty to fulfillment of the terms of the retainer.

Thus, both *Neil* and *Strother* have taken the concept of conflicts beyond the original *Martin*-based focus on the (potential) misuse of confidential information. The area is a complex one, but in short, it would seem that even the potential for conflict raises concerns which must be addressed at the outset, as they may impact the solicitor's position *vis à vis* both existing and future clients. Like justice, which it is said must not only be done, but be seen to be done, a conflict - whether actual or potential – is still an issue either way. It is therefore an area which merits extra caution and vigilance.

Reference to the *Rules of Professional Conduct*

Fortunately, our *Rules of Professional Conduct* deal extensively with conflicts of interest, and thus offer valuable assistance in this area. While these Rules are obviously relevant to disciplinary proceedings, the Court will also consider professional codes of conduct in judicial hearings as well. In this regard, the Supreme Court of Canada in *Martin* noted that:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings.... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. The statement in Chapter V [of the Canadian Bar Association's *Code of Professional*

[17] 2007 SCC 24. ("*Strother*")

> *Conduct*] should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an appearance of impropriety should be avoided.[18]

Thus, in considering the possible conflict scenarios below, it is important to keep in mind both the case law and the *Rules of Professional Conduct*.

ANALYZING CONFLICTS

The starting point for any analysis relating to conflict of interest is typically the presence or absence of a solicitor/client relationship, since it is this relationship which frames the duties of the lawyer to the client.[19] Based on *Neil* and *Strother*, however, the absence of a formal retainer would not necessarily protect a lawyer against an allegation of conflict. Consequently, it is critical, when analyzing potential conflicts, for a solicitor to consider the period before the retainer was formalized as well.

Estate Planning/Will Drafting

(a) Benefits to a Solicitor

In the specific context of an estate practice, conflicts can arise in an infinite variety of circumstances. Consider, for example, the case of a solicitor retained to draft a Will in which the testator wishes to include a gift to the solicitor personally. If the testator is a close family member, this may not be entirely unusual (although again, context will play a key role in determining the point). In any other instance, however, the solicitor should insist on independent legal advice for the testator.[20] Otherwise, however well-intentioned the gift may be, appearances suggest the possible operation of influence, which would be a clear violation of the conflict of interest rules. While independent legal advice is not strictly required, it is nevertheless a prudent practice.[21]

---

[18] *Martin, supra* note 9 at para 18. Citations omitted.

[19] MacNair, *supra* note 6 at 2-4.

[20] MacNair, *supra* note 6 at 7-24.

[21] Maurice C. Cullity, "Ethical Issues in an Estates Practice: A Personal View" in *Special Lectures of the Law Society of Upper Canada, 1996: Estates* (Toronto: Thomson Canada Ltd., 1996) 425 ("Cullity") at 437.

Less offensive – perhaps – is the inclusion of a clause in a Will in which the testator recommends that the estate trustee retain the services of the solicitor drafting the Will, or of his or her firm.[22] While such a statement is widely considered to be only precatory in nature, and not legally binding on the estate trustee[23], it nevertheless creates an appearance of conflict since the solicitor may be seen as having secured the advantage of a possible future retainer through the advice given in the Will retainer. Again, independent legal advice may be the ideal solution, but it will not always be the most practical one. Rather, it may be sufficient for the solicitor to point out the non-binding nature of the statement and ensure that it is appropriately framed in permissive, rather than mandatory, terms.

Along the same lines, a solicitor should think carefully when asked to act as the estate trustee of a client's estate. Again, while the request may be legitimately and independently initiated by the client, such an appointment nevertheless offers the solicitor the opportunity for profit (through an award of compensation) and for this reason, a strict application of the conflict rules might again lead a prudent solicitor to suggest that the client take independent legal advice on the matter. The client may choose not to do so (a completely understandable response, given the added cost), but the solicitor will at least have addressed the potential for conflict appropriately by making the

---

[22] According to the Court of Appeal for British Columbia in *Chalmers v. Uzelac*, 2004 BCCA 533 (CanLII) , such a clause is, in fact, every bit as offensive as an outright gift to the drafting solicitor. Among various issues considered on an appeal of the lower Court's decision upholding the validity of a Will, the Court of Appeal commented on the following clause contained in the Will:

> "Solicitors for the Estate
>
> (e) It is my wish to appoint Gary M. Cohen of Cohen Frost Buchan Edwards as the lawyer to assist my Trustee with all matters in relation to my Estate, provided that I am a resident of the Province of British Columbia at the date of my death. In the event that the aforesaid Gary M. Cohen predecease (sic) me, I wish to appoint any partner of Cohen Frost Buchan Edwards or any partner of the successor firm to Cohen Frost Buchan Edwards."

In her reasons, Madam Justice Southin made the following comments in obiter at paragraphs 8-11:

> "The legal import of sub-clause (e) is not before us. Whether, if this executor had chosen to retain another solicitor in the administration of the estate (he did not), Mr. Cohen could have insisted on the clause, I need not address.
>
> I make mention of the provision because, when I was a practising solicitor, I considered that to insert such a provision, unless the client expressly raised the question, was unethical as being dangerously close to a gift to oneself. There is nothing in Mr. Cohen's notes, as I read them, to indicate the testatrix specifically asked that he be solicitor for her estate.
>
> In making these comments, I am well aware that the ultimate guardians of the ethics of the legal profession are the benchers of the Law Society. Whether they have considered this point in the last 20 years, I am unable to say.
>
> But I will comment that the solicitors who are putting provisions in wills from which they benefit are well advised to read the judgment of the House of Lords in *Wintle v. Nye*, [1959] 1 All E.R. 552."

[23] MacNair, *supra* note 6 at 6-6 and Cullity, *supra* note 21 at 438.

recommendation. At the very least, the solicitor's notes should reflect such a discussion and, where appropriate, indicate that the client declined ILA.

(b) Conflict Between Clients

The solicitor should also be aware, at the drafting stage, of the potential for conflict between clients. As a simple example, this could arise "where the instructions for a will are inconsistent with discussions with respect to a shareholders' agreement in which the solicitor is acting for all the parties."[24] In such a case, assuming no change to the instructions, it might be necessary for the solicitor to withdraw representation from both clients in order to maintain confidentiality as between them, and also to ensure no conflict of duty.

(c) Spousal Joint Retainer

As noted, while Will drafting generally can present considerable potential for conflict, there are also specific situations in which a conflict is inherent in the very nature of the retainer. The most common example of this is the situation in which the solicitor prepares Wills for spouses.

Where both spouses have retained a lawyer, they will typically have done so on the basis of a shared understanding of their mutual intentions. As such, they will usually be *ad idem* on their respective instructions. However, since each spouse may have a very different approach or agenda, the potential for genuine conflict exists and must therefore be appropriately addressed.

With respect to joint retainers generally, the *Rules of Professional Conduct* specify in Rule 2.04 as follows:

> (6) Except as provided in subrule (8.2) [joint retainer for mortgages or loans], where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
>
> > (a) the lawyer has been asked to act for both or all of them,
> >
> > (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

[24] Cullity, *supra* note 21 at 435.

> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.[25]

Thus, open communication is the default rule and the parties must understand that no information from one can be treated as confidential against the other. They must also understand that if a conflict should arise, the solicitor may be unable to act for both of them. This mandate must therefore be followed in the case of a joint retainer to prepare Wills for spouses. In fact, the commentary to the *Rules of Professional Conduct* deals specifically with this scenario as follows:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, [26] 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:
>
> > (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
> >
> > (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
> >
> > (c) the lawyer would have a duty to decline the new retainer, unless;
> >
> > > (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended

---

[25] *Rules of Professional Conduct*, *supra* note 8 at 2.04(6).

[26] "partner" means,

(a) Repealed.

(b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives;

"spouse" means a person,

(a) to whom the person is married, or

(b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.

> their close personal relationship, as the case may be;
>
> (ii) the other spouse or partner had died; or
>
> (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).[27]

Given these guidelines, it seems that the prudent course of action for any solicitor in the context of such a retainer is to ensure that the clients understand and accept the parameters of their relationship at the outset. In particular, it is essential for them to appreciate that in the event of a conflict, the lawyer may have to withdraw altogether. That said, it is not uncommon for the solicitor to have had a long-term relationship with one of the spouses, out of which the joint Will retainer may have arisen. In that event, the parties may agree that should a conflict develop, the lawyer will continue to act for the spouse who is already the existing client, but not the other. Both spouses may be content with these arrangements although admittedly, they do already sketch an outline of conflict in suggesting that one client's interests will be preferred over the other's. In such a case, it would therefore also be appropriate to refer to Rule 2.04(7) of the *Rules of Professional Conduct*, which provides as follows:

> Except as provided in subrule (8.2) [mortgages or loans], 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 shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

This may seem an unnecessarily complicated process simply to secure the retainer, but it is clear from the Supreme Court of Canada trilogy how fundamental these issues are to the very nature of our role as solicitors.

---

[27] Commentary to Rule 2.04(6) of the *Rules of Professional Conduct*, *supra* note 8.

(d) Family Retainer

The same considerations described in a joint spousal retainer would also apply in the context of an estate planning retainer for multiple family members. This scenario could arise, for instance, in an estate freeze in which multiple generations are involved, where the freezor parent insists on all the children having Wills. As with any joint representation, it is the solicitor's responsibility to advise each potential client, prior to accepting the retainer, of the implications of the joint retainer. The family members could not, for example, expect the solicitor to maintain confidentiality with respect to information conveyed by one of them, as against any other. Additionally, whether this is a joint retainer, or a separate retainer for each child, none of the clients could instruct the solicitor to act contrary to the interests of any of the others. Since it can often happen that brother A, for instance, will want to know what sister B has decided with respect to a particular issue, the solicitor in a joint retainer must ensure that all parties are comfortable with their instructions being communicated to the others. This way, to the extent any family member's Will instructions conflict with or could be detrimental to, any of the others, each of them will know about it, and either accept it – or not – in which case the retainer may come to an end. Alternatively, if there are separate retainers, the lawyer could not disclose such confidential communications, but nor could he or she act where the instructions of one client would create conflict for another.

It is, of course, always open to the solicitor, rather than accepting the joint retainer, to instead recommend independent advice for each of the family members so as to avoid any potential for conflict whatsoever. Indeed, in many instances, this may be the simplest option. Even in such cases, though, conflict can arise. The solicitor must take care, for example, not to assume that, say, the freezor parent's presence at any meeting with the testator child, implies a blanket consent to disclose future instructions and communications to the parent. While there is often an expectation on the part of the parent to this effect, confidentiality still prevails.[28]

Estate Administration

Turning from the planning stage to the area of estate administration, it is clear that here, too, real potential for conflict exists.

First, a solicitor should be cautious about any confusion the trustee may have regarding his or her role. A solicitor acting in an estate administration represents the trustee in his or her fiduciary

[28] See "Practice Tips" published in Ontario Reports, October 15, 2010 at 1xviii - 1xix.

capacity, not in a personal capacity. The distinction may become relevant, for example, in any dispute regarding trustee compensation.

(a) Conflict Over Compensation

Although a trustee is entitled to compensation, and may legitimately expend estate funds in a passing of accounts in order to quantify it, there may come a point when the trustee's motivation becomes personal, driven more by his or her own interests than the best interests of the beneficiaries. If such a shift is evident, it may not fall within the limits of the professional retainer to pursue the trustee's personal interests.

As previously noted, the historical prohibition against a trustee receiving compensation recognized this inherent conflict, but that restriction has long since been abolished in favour of a statutory right to compensation. This is typically calculated with reference to accepted percentages, which are then tempered, as appropriate, by the so-called "five factors" set out in the case of *Re Toronto General Trusts Corp. v. Central Ontario Railway Co.*, these require the Court to consider:

> (1) the magnitude of the trust;
>
> (2) the care and responsibility springing therefrom;
>
> (3) the time occupied in performing [the trust] duties;
>
> (4) the skill and ability displayed; and
>
> (5) the success which has attended its administration.[29]

The calculation of compensation is not an exact science, particularly given the Court's discretion to modify the usual percentages by reference to the five factors. Thus, in cases where a trustee claims more than what might be awarded based on this approach, or where a beneficiary challenges compensation when accounts are passed, the solicitor for the trustees must consider how this might impact the professional obligations owed to the client as representative of the estate. Specifically, when the sole issue on a passing of accounts is compensation, the solicitor must be prepared to critically assess whether or not the client's claim is self-serving. In this regard, the Court in *Re Parkin Estate* noted as follows:

> The question arises whether it is fair and proper that the estate should pay and be burdened with the legal costs of the executors for a claim (being some $140,000.00) which they advanced against the

[29] *Toronto General Trusts Corp. and Central Ontario Railway Co.*, (1905) 6 O.W.R. 350 (Ont. H.C.) at 354.

> estate for their own interest and which was determined against them. In my view they should not. They were advancing a claim in their own interest and not in the interest of the estate. When such a claim is disallowed the risk of advancing such claim is not to be borne by the estate but rather by the executors. Aliter where the claim is allowed; for in such case the estate has put the executors to the expense to which the court by allowing the claim has determined that they should not have been put. To use the vernacular the executors should not be given, and there is no basis to give executors, "a free ride" with respect to a claim by them against the estate for their own interest and which has been determined against them.[30]

In each instance, a solicitor will have to assess the merits and determine whether it is appropriate to pursue the claim and continue to act on behalf of the client.[31]

This raises a related issue that deserves mention, although a detailed discussion of the point is beyond the scope of this paper. Briefly, it is also relevant for the solicitor to consider how a potential conflict in the area of compensation might impact the payment of his or her fees. The jurisprudence suggests that a trustee, acting properly, and in the best interests of the beneficiaries, is entitled to indemnification for all costs, including legal costs, reasonably incurred.[32] Whether a trustee acts reasonably or unreasonably (including acting for his or her own benefit) will be a matter of degree in any given circumstance, but if a solicitor considers a trustee to be acting for personal gain, concerns arise over both the obvious conflict of interest this presents, and also the status of the legal retainer. If conflict exists, the solicitor may be at risk in recovering legal fees incurred, if these are disallowed by a Court, as they were in *Parkin*. Having said that, it is true that although a trustee acts in a representative capacity, the retainer with the solicitor is entered into by the trustee personally. Hence, the obligation for payment to the solicitor ought, in the first instance, be that of the trustee, who may then recover from the estate, relying on the trustee's right of indemnification for reasonable costs.[33] However, while the obligation to pay may technically fall on the trustee, if his or her right of indemnity is compromised, then it is likely that the lawyer will still be at risk if the estate is precluded from paying, and the trustee cannot or will not do so.

(b) Disagreement Among Trustees

---

[30] *Re Parkin Estate*, 44 A.C.W.S. (3d) 1178 ("*Parkin*") at para. 15.

[31] Cullity, *supra* note 21 at 444.

[32] See *Geffen v. Goodman Estate*, [1991] S.C.J. No. 53, [1991] 2 S.C.R. 353 at para. 74.

[33] See Hilary E. Laidlaw "A Trustee's Right to Indemnification", presented at Ontario Bar Association conference A Badge of Honour? Trustees' Duties, Liabilities and Obligations, Toronto: April 7, 2003.

As a general rule, "[t]rustees must act together"[34] In *Gibb v. McMahon*, for example, MacLennan J.A. stated unequivocally that "[n]othing is better settled than that where there are several trustees all must act."[35] This requirement for unanimity, however, sets the stage for yet another area of conflict where there is more than one trustee and no mechanism for dispute resolution exists.

> Unless there is some conflict-resolving mechanism in the will (such as a majority rule clause), the solicitor must take instructions from the estate trustees acting in concert and not any sub-group of the estate trustees. Therefore, if such a conflict arises and cannot be resolved through discussion and negotiation, then the solicitor must advise the parties that the only recourse is to apply to the court for directions or the possible removal of the trustees.[36]

While an application for advice and direction may indeed be appropriate in such circumstances, it is not necessarily clear who may act on behalf of the estate trustees in bringing such an application. Although technically, estate trustees are required to maintain a position of neutrality when seeking advice and direction, in the scenario posited, each of the individual trustees would be taking a different position. Accordingly, the original solicitor may have no role to play given the clear conflict between the existing clients. Accordingly, it may be necessary for both estate trustees to seek independent legal advice.

This presents an interesting dilemma: while it may be advisable in a perfect world to withdraw from the retainer at the first sign of conflict, this will not always be practical or financially feasible. There may, however, be some relief provided by the *Rules of Professional Conduct*, in particular, Rules 2.04(9) and (10) which provide as follows:

> (9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall
>
> (a) not advise them on the contentious issue, and
>
> (b) refer the clients to other lawyers, unless
>
> (i) no legal advice is required, and
>
> (ii) the clients are sophisticated,

[34] Waters, *supra* note 1 at 864.

[35] Quoted in Waters, *supra* note 1 at 864.

[36] Brian Schnurr, *Estate Litigation* 2nd ed. looseleaf (Toronto: Thomson Reuters Canada, 1994) at 21-14.

> in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.
>
> (10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.[37]

This would appear to allow some flexibility, under the circumstances described, for the solicitor to attempt to assist the clients in resolving the conflict. Indeed the commentary to the Rules notes that:

> [t]he rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

Failing successful resolution, however, withdrawal may then become necessary.

(c) Powers of Attorney

An increasingly common area of conflict arises with respect to Powers of Attorney. There is no question that having prepared a Power of Attorney for a client, and provided relevant advice on its nature and effect, it is the grantor of the power who is the client and to whom the solicitor owes a duty. However, once the power has been invoked and is being exercised by the named attorney, issues can arise which make it difficult to understand exactly how that duty of loyalty is to be satisfied.

In a typical example, the attorney may contact the lawyer seeking information about the client's files and personal affairs. Unless the lawyer has personal knowledge of the grantor's current circumstances and is satisfied of the grantor's incapacity, the first step in fulfilling the duty of loyalty to the client is to contact[38] him or her to advise of the request and verify instructions to comply. But this is not necessarily an easy step since the grantor's status may be far from simple to determine. Capacity is a fluid and multi-layered concept and the solicitor must make a reasoned assessment of the grantor's status based on available information and circumstances. This is not only necessary

---

[37] *Rules of Professional Conduct*, *supra* note 8 at 2.04(9)-(10).

[38] Canadian Estate Administration Guide, ¶29,960, "Continuing powers of attorney for property".

as part of the duty of loyalty owed by the solicitor to that client, but is appropriate given the fact that the mere invocation of a Power of Attorney does not strip the grantor of his or her own authority to continue dealing with property management.

Assuming the circumstances support the lawyer's responding to the attorney, the *Substitute Decisions Act, 1992*[39] provides some guidance in terms of how and to what extent the solicitor may do so. In particular, section 33.2 provides that:

> (1) A person who has custody or control of property belonging to an incapable person shall,
>
> > (a) provide the incapable person's guardian of property with any information requested by the guardian that concerns the property and that is known to the person who has custody or control of the property; and
> >
> > (b) deliver the property to the incapable person's guardian of property when required by the guardian.
>
> (2) For the purposes of subsection (1), the property belonging to a person includes the person's will.

The limits of this provision have not yet been tested. Accordingly, it would be prudent for the solicitor to take a narrow interpretation of subparagraph (a) and limit any required disclosure to information about the incapable person's "property", maintaining the confidentiality of other personal information.

If the solicitor can establish the *bona fides* of the attorney's request and the necessity for action under the Power of Attorney, it often happens that the attorney will seek representation in that capacity by the same solicitor who prepared the document. This requires the solicitor to assess whether accepting the retainer would or might create any conflict with the duty of loyalty owed to the grantor. Given that an attorney is bound by both statute and common law to act only in the best interests of the grantor[40], on a simple analysis, the representation of the attorney should not be in conflict with the original client's interests – since these are the very interests the attorney must also protect. If, however, the solicitor has or develops concerns about the attorney's actions, decisions or motivations, he or she should decline the retainer. In that instance, it may also be necessary to

---

[39] S.O. 1992, c. 30. (*"SDA"*)

[40] See, for example, section 32(1) of the *SDA infra,* which provides that "a guardian for property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit".

consider how best to then safeguard the interests of the original client and, indeed, whether the terms of the original retainer, and the related duty of loyalty, even extend that far. The nuances and endless variations that can present in this context make it impossible to provide any hard and fast guidelines. It is well to remember, however, that as a last resort, it may be necessary for the solicitor to involve the Office of the Public Guardian and Trustee, but even then, one must be extremely cautious about the disclosure of information to that office so as not to violate the solicitor/client confidentiality that still applies.

The previous examples assume a prior relationship with the grantor. However, it is equally common for a solicitor to be contacted for the first time by an attorney purporting to act under a Power of Attorney. Where a retainer is then established, the client is the attorney, but like an estate trustee, the legal representation of the attorney applies in his or her fiduciary capacity. Because the primary obligation of the attorney is to act in the best interests of the incapable person, there is undoubtedly a need for the solicitor also to keep the incapable person's best interests in mind and to ensure that the attorney's actions are consistent with those interests at all times. Where they are not, withdrawal may be necessary as a final measure.

Quite aside from matters of withdrawal, however, it is critical for the solicitor to ensure, before accepting the retainer, that the attorney's authority is valid. Accordingly, some preliminary inquiry is in order to determine that the Power of Attorney was properly executed, is otherwise valid (i.e., was entered into at a time when the grantor was capable of giving such a power) and has not been revoked. Notwithstanding that the *SDA* permits a third party to rely on a Power of Attorney, and the attorney's authority thereunder, where there is no information suggesting that it has been revoked[41], the extent of the power is so great, and the possible consequences of misuse so severe, that it would likely not be considered fulfillment of the solicitor's duties of loyalty to accept at face value a document which he or she has not prepared without some reasonable inquiry as to its origin and validity. One might well question to whom this duty is owed if the grantor was not originally a client, but since the grantor's interests are paramount, it follows that the solicitor should take such steps to ensure no abuse of the power is intended or being perpetrated.

CONCLUSIONS

These are but a few examples of the kinds of conflicts that estate practitioners often face. The fiduciary nature of the executor's or attorney's office, coupled with the solicitor's own duties and

[41] *SDA*, *supra* note 39, s. 13.

obligations, increase the potential for conflict on many different levels. Add to this the fact that estate matters often involve multiple parties, each with their own conflicting agenda and interests, and the risk of conflict is significantly increased. Accordingly, a prudent solicitor will undertake a regular and critical assessment of the circumstances governing any retainer so as to avoid conflict or, where unavoidable, to ensure that steps are taken to address it as quickly and effectively as possible. To this end, frequent reference to our *Rules of Professional Conduct* is recommended[42], as is open discussion with the client or clients at the outset.

[42] Another excellent reference in dealing with conflicts is the Canadian Bar Association Tax Force on Conflict of Interest Toolkit, available at www.cba.org/CBA/groups/conflicts/toolkit.aspx.

Guidelines to Identify Conflicts Involving Lawyer's Personal Interest

Lawyers who act for clients in any situation where there is a personal interest,.financial (other than fees) or otherwise, are in a conflict of interest. The exposure to a malpractice claim is inevitable if the client becomes unhappy about any aspect of the transaction. Even with a written waiver from the client in hand, the burden of proof regarding adequacy of disclosure and demonstrating exercise of good judgment will be most challenging.

Therefore, in situations where there is a real or likely personal conflict of interest, you should not act! If in doubt, consult with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline.

Questions to help you identify whether you have a personal interest conflict:

- What is the client's interest?
- What is your interest?
- Will maximizing your interest negatively affect the client's interest? If so, you should not act.
- Will you always be able to place the interests of your client first? If not, you should not act.
- Is there potential for a falling out between the client and you in connection with the matter? If so, you should not act.

Examples of personal interest situations to avoid at all costs:

- Participating in a business transaction with a client;
- Having a personal or business relationship with another party interested in the representation or transaction;
- Acquiring an ownership or other interest in a matter adverse to a client;
- Purchasing real estate from a client;
- Taking a financial interest in a client matter other than reasonable fees;
- Creating a legal document wherein the lawyer is entitled to a beneficial interest e.g. being a beneficiary under a client's will which you have drafted;
- Having a personal, social or political interest in a client matter; or
- Borrowing money from a client at the same time as providing legal advice and drafting documentation evidencing the loan and security therefrom.

Ongoing Assessment of Conflicts

Lawyers need to be aware that conflicts can develop during an engagement, and that they need to assess situations for conflicts throughout the representation. Because these conflicts are outside the initial screening process, they often appear unexpectedly. Some, however, are foreseeable at the outset of the retainer.

Unexpected Conflicts

Subsequent conflicts typically arise unexpectedly. Common triggers are the addition of a new party to a transaction or lawsuit, or a lateral hire who has acted for a party opposed in interest to the current client.

These types of conflicts should be managed in the same way as suggested for initial conflicts.

Previously Foreseeable Conflicts

In some instances, subsequent conflicts were foreseeable. Typically, this type of conflict was identified prior to the engagement but did not involve a contentious matter; the conflict was managed with documented disclosure to the clients and their written waiver based on informed consent. Later, the conflict materializes and requires further management. The typical situation involves previously aligned interests diverging, such as the individual interests of partners in a partnership.

Depending on just how contentious the matter has become, continued representation of some or all of the clients affected may or may not be possible. The Checklist for Managing a Subsequent and Previously Foreseeable Conflict may be helpful.

Checklist for Managing a Subsequent and Previously Foreseeable Conflict

The approach suggested for managing conflicts identified before the representation begins is equally appropriate for conflicts which arise unexpectedly and subsequent to the commencement of an engagement. However, when managing a previously foreseeable conflict consider these additional questions:

- Review the disclosure document and written consent which was prepared in light of the acknowledged potential for conflict; it may be that you already determined a plan of action that you will now implement.
- Consider whether the matter has become contentious, making representation impossible at least for some of the parties affected.
- Discuss with all clients and parties affected that the possible conflict previously identified has now materialized; review the nature, extent and implications of this conflict.
- If it is still appropriate to continue the representation, prepare a new consent in writing which outlines your disclosure and have it executed by all affected parties.
- If representation becomes limited to only one or two of the parties, prepare non-representation letters for those who are no longer being represented and direct them to obtain independent representation for the remaining portion of the matter.
- Suggest that the parties obtain independent legal advice with respect to the consent being executed.
- Be alert to future signs that the representation of one or all of the parties is no longer appropriate.
- Re-examine conflicts policies and procedures and incorporate any changes that might have become apparent as being necessary to avoid subsequent conflicts.

Action Plan to Manage a Conflicts Situation

The failure to identify and manage a conflict when it arises whether initially, prior to the start of the engagement, or subsequently, can result in a conflicts situation that must be addressed. These situations include:

- You find yourself representing more than one interest;
- At least some of the interests have or are about to become adverse and even contentious;
- At least one of the clients' interests is being preferred or is perceived as being preferred by another of the clients.

It can be even more of a problem when one (or more) of the clients is not aware of these circumstances. At this point it is likely too late to manage the conflict through the disclosure and consent approach.

If you find yourself in this situation, your reaction may be to try to fix it yourself, or alternatively, to simply ignore the problem. Stop – doing this will most likely create an even greater problem. Instead, follow these three steps:

- **Recognize it is not too late to react.** Recognize that although adverse effects may already be in play, you may be able to minimize them. The earlier you address the situation, the better.
- **Consult with someone.** Recognize that the independent objectivity of another lawyer is essential to understanding the circumstances you are in and the proper course of action to follow. Review the situation with a colleague, your firm management or conflicts person/committee, outside counsel or your Law Society's practice advice hotline. Carefully listen to, and follow, the advice you receive.
- **Do not continue to act.** Finally, recognize that you cannot continue to act. It is a huge mistake to try to deal with the conflict yourself. No matter how good your intentions or how objective you think you are, you will be challenged by the competing interests inherent in the conflict itself. Once people become adverse in interest, you will very quickly find yourself in a contentious and possibly acrimonious situation.

It is almost a certainty that at least one of the clients will blame his or her loss on your conflict of interest and an alleged failure to safeguard their interest. You should inform all of the affected clients of the conflict, that it may affect your ability to act in their interests, and that they each should seek their own independent counsel. By doing these things, the clients will get the independent advice and direction they need and you have done something to contain the damage.