



Office of the Executive Director

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CBA Task Force on Conflicts of Interest
Canadian Bar Association
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VIA FAX & MAIL

Attention: R. Scott Jolliffe

Re: Submission to CBA Task Force-Conflicts of Interest in Law Firms

The Legal Services Society ("LSS") welcomes the opportunity to provide input into the Canadian Bar Association's ("CBA") consultative process for developing conflict of interest guidelines. We believe our position in the legal service profession, our experience with developing our own approach to managing conflicts, and the knowledge we have gained from providing legal services to our clients will bring a unique perspective to this discussion.

We appreciate the opportunity to work with the CBA to develop these conflict of interest guidelines. We anticipate that this process will lead to the protection of our clients' interests and an improvement in the public's access to justice, while at the same time maintaining high standards for professional conduct.

Background

What the Legal Services Society Provides to the Public

The Legal Services Society of BC is a non-profit organization that offers legal aid services, which range from legal information to advice and representation.

Clients receive the type of service that is most likely to help them resolve their legal problems. Examples include:

- legal information (provided in person by legal information outreach workers, via printed materials, and through the Web);
- information, referrals, and advice from the LawLINE telephone service;
- duty counsel and advice counsel services;
- circuit court duty counsel services;
- the Brydges Line, a 24-hour telephone advice services for detainees;
- legal representation referrals to private bar lawyers (eligibility for which is assessed through an intake process that takes place in person or through our call centre);
- and
- legal representation referrals to staff lawyers.



Although LSS provides legal services to clients, like other legal aid providers, we are fundamentally different from a traditional law firm—both in the types of services we provide and in the limitations of those services. In BC, LSS occupies a unique position in the profession because:

- Our mandate is to help people resolve their legal problems and facilitate access to justice, with priority given to low-income British Columbians.
- We serve small communities throughout the province, where resources are limited.
- We often serve clients who are in crisis; many of them need immediate access to legal advice or representation.
- We serve a wide range of clients: some suffer from mental illnesses, addictions, or lack of education or life skills.
- We employ many service providers throughout the province.
- Many of our services are short term and of a limited nature.
- The extent of the services we provide is limited by the type of referral and the structure of the legal aid tariffs.
- We case-manage legal aid referrals and require counsel to seek authorization for certain types of work and disbursements.

How LSS Currently Manages Conflicts of Interest

While LSS does provide full legal representation in some situations, we have developed several models for short-term, limited-scope legal services such as family and criminal duty counsel, LawLINE legal advice, and dispute resolution services. LSS has established the following conflict of interest guidelines concerning their delivery.

According to our policies, each LSS office is treated as a distinct unit for the purpose of assessing conflicts of interest. Each office has a well established conflict checking system. LSS staff and contract lawyers must not represent clients who are opposed in interest. According to our policy, a person who is applying for legal aid or requesting legal information is not a client until he or she receives legal advice or representation from an LSS employee. For this reason, both parties to the same dispute can apply for legal aid or receive legal information from the same office. All communications between LSS and persons who approach LSS for any service are subject to solicitor client privilege.

If legal advice is given or legal representation is granted, the applicant is considered represented by LSS. As a result, the opposing party may only receive legal information from that same office. An eligible opposing party will receive a referral to another office or to the private bar if they require advice or representation.

Legal advice is given via telephone consultations and through duty counsel services. Specifically:

- LawLINE staff provide up to three hours of legal advice by telephone to eligible clients (in addition to providing legal information to anyone who calls). The service may extend to providing written opinions and advice, writing correspondence, assisting with documents, and contacting third parties. Conflict checks and eligibility



screening are both conducted when the staff member switches from providing information to providing advice.

- Family advice lawyers help eligible unrepresented clients prepare for their court appearance and follow up on the proceedings. They also assist parties who are going through the family justice centre mediation process to settle their separation or divorce matters.
- Duty counsel provide advice services to eligible clients, explaining law and court procedures and advising clients on their legal options. They also assist clients in filling out court forms and may provide representation in certain circumstances, such as refugee hearings, bail hearings, entering guilty pleas, simple family law hearings, case conferences, and assistance in Chambers on simple matters. The procedures they follow related to conflict checks are described in the next section.

Challenges Presented by Current Conflict of Interest Rules

Duty Counsel Services

Duty counsel lawyers often provide their services on the day of court with limited time and resources available. They seldom receive an advance list of clients, making a full law firm conflict check impractical to conduct. Requiring such a check would create a serious obstacle to the provision of legal aid services.

In smaller, more remote rural communities, duty counsel services fill a particularly important void. In these areas, a person's access to counsel is already restricted by distance, cost, and the lack of available lawyers. However, the presence of strict conflict of interest rules serves to further impede the public's access to counsel in three important ways.

To begin with, very remote communities are served only by circuit courts and by the duty counsel that work with them. In these cases, resources and time are at a premium, making conflict checks very impractical to conduct.

Secondly, strict rules discourage the few available lawyers in these areas from serving as duty counsel. The current rules forbid a firm from representing someone when another member of the firm has represented the opposing party. In many remote areas, there might only be one law firm. Lawyers who serve as duty counsel often do so on a contract basis and rely on paying clients for the bulk of their income. So to serve as duty counsel under the current rules could cut off potential future sources of income. In practice, this usually ends up adversely impacting the party with fewer resources, because that person is seen as the less desirable client.

Thirdly, the presumption that information within a law firm is shared, and the consequent ban on two lawyers from the same firm representing clients opposed in interest, can limit access to representation for people who live in very remote areas. For anyone in these



areas, but particularly for clients with limited means (the bulk of legal aid clients), travel to another locality for the purpose of securing representation or advice is just not feasible.

Limited-scope services

Although clients have traditionally retained lawyers for full-service representation, there is a growing demand for “unbundling”—that is, limited-scope services that fall short of full representation, usually aimed at assisting self-represented clients. These LSS services are referred to as dispute resolution referrals. At LSS, such referrals may include advice on case strategy, coaching to help the client self-represent in court, assistance in drafting documents, appearances at case conferences, and preparation and representation at mediation. These referrals do not include representation at trial.

There are many factors contributing to the rise in legal self-representation, but it is widely acknowledged that the high cost of litigation is a major barrier to many people in their search for legal remedies to disputes. Limited-scope services go a long way to closing this divide. However, LSS is concerned that existing conflict of interest rules may impede access to justice by discouraging lawyers who wish to offer limited-scope services, in ways that are similar to the impediments felt by potential duty counsel service providers.

While the legal community at large is coming to terms with the demand for limited-scope services, LSS and other non-profit and court-annexed service providers have been delivering these sorts of services for many years. This has been particularly true since budget cuts in 2002 necessitated the reduction of services from previous levels.

Given these trends in service demands, it is imperative that ethical and procedural guidelines are developed to enable the legal profession to provide limited-scope and duty counsel services within the parameters of ethical lawyer/client principles of confidentiality and loyalty. The goal is to enhance, not hinder, access to justice. Other jurisdictions provide us with an excellent model on which to base such an approach.

The American Experience

Many other jurisdictions have amended their conflict of interest rules to allow for unbundled legal services, relaxing their guidelines to assist lawyers who are providing legal services through non-profit and court-annexed legal advice programs. For example, the American Bar Association’s Model Rule 6.5 excuses a lawyer who is participating in a non-profit or court-based legal program offering limited services from the obligation to check for conflicts of interest prior to providing the service. However, it is important to note that Rule 6.5 does not excuse lawyers who have actual knowledge of a conflict. In such a situation, the general rules apply and the lawyer must not provide services or must terminate services upon learning of a conflict.

The Americans conclude that relaxing the rule will cause no harm to the client because the relationship ends at the moment the lawyer is aware of a conflict.



Model Rule 6.5 has been adopted by many states. Washington's Rule 6.5 reads as follows:

- (a) A lawyer, who under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for services provided:
 - (1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;
 - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and
 - (3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:
 - (i) the program lawyers representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;
 - (ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; and
 - (iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.
- (b) Except as provided in paragraph (a) (2), Rule 1.10 is inapplicable to a representation governed by this Rule.

The Washington rule allows lawyers who work at non-profit or court-annexed legal service providers (or who volunteer their time) to give limited-term legal advice to clients without performing the standard conflict of interest check. A lawyer must undertake a conflict check only if s/he *knows* the service presents a conflict for the lawyer or the firm. If the lawyer decides to represent the client on an ongoing basis, the lawyer will be required to undertake the regular, more stringent conflict rules check.

In addition, if the lawyer knows of conflict, he or she is still allowed to provide limited services sufficient to determine eligibility under the program and to refer the client to another lawyer.



The Washington rule goes further than the ABA's Model Rule 6.5 because it also provides a mechanism for a court-based or non-profit program to assign two lawyers from the same program to represent opposing parties. This is possible if the program has an effective barrier in place to maintain the respective clients' confidences and ensure the individual lawyers' loyalties to their clients.

Summary

To recap, as a publicly funded legal aid provider, LSS finds that:

- It is difficult to find lawyers willing to provide legal aid services.
- The current rules act as a barrier to lawyers' willingness to participate in programs that offer short-term, unbundled legal services, such as duty counsel, advice services, or limited-scope referrals.
- Often, it is not feasible for a lawyer providing legal aid services to systematically conduct a conflict check.
- The ability for lawyers from the same firm to represent opposing parties—if effective barriers are put into place—will increase the number of lawyers available to provide legal aid services.
- Relaxing the rules for legal aid services will bring the rules more in line with the actual practice on the ground where in some instances complete conflict checks are not conducted.
- Because neither the client nor the lawyer expects that the services will be provided on an ongoing basis, the client would be adequately protected by a standard that required actual knowledge of a conflict.

In general, the Legal Services Society would like the Canadian Bar Association to consider relaxed conflict of interest rules when lawyers provide short-term legal services through court-annexed or non-profit legal assistance programs. LSS supports the following principles:

- The best practice is to conduct a conflict of interest check before giving legal advice.
- A lawyer who provides short-term, limited services through a court-annexed or non-profit organization should be governed by modified conflict of interest guidelines.
- An appropriate retainer letter should be used and reviewed with the client, explaining the nature and scope of the limited-scope services and how conflicts will be handled if they arise. (LSS has developed model retainer letters for some family law services.)



- If the lawyer is aware of a conflict of interest, the lawyer may not provide legal advice, but may assess the person's eligibility for services and refer him or her to another lawyer or program.
- The lawyer is not required to check for a conflict of interest before or after the summary advice is provided, but the lawyer must cease to act if he or she subsequently becomes aware that a conflict exists.
- The usual rules of client confidentiality apply to lawyers who provide full representation services.
- If the lawyer has continuing contact with the client outside of the legal advice program, the lawyer must undertake a conflict search before entering into a new retainer.
- If the lawyer is subsequently assigned to the client again in the legal advice program, he or she may provide summary advice but must perform a conflict check upon returning to his or her office.
- If the lawyer discovers a conflict of interest with his or her law firm, the lawyer must maintain client confidentiality and cannot act against the client. The conflict of interest will not be imputed to the lawyer's firm and the firm can continue to act for its existing clients.

The Legal Service Society's recommendations for conflict of interest guidelines

Recommendation #1

That conflict of interest rules be developed that recognize that one rule regarding conflicts may not fit all situations.

Recommendation #2

That new conflict of interest rules look at the nature of different services and recognize the unique role played by legal aid providers in terms of offering their duty counsel and limited-scope services. The standard for checking for conflicts ought to be proportional to the context and type of service the client is receiving.

Recommendation #3

That legal aid service providers be permitted to provide duty counsel, limited-scope, and advice services to clients whose opposing party has retained the lawyer's firm on an unrelated matter.

Recommendation #4

That the duty of loyalty be limited to the individual with whom an individual lawyer has a direct solicitor/client relationship.

**Recommendation #5**

That the presumption that information within a firm is shared be rebutted if the lawyers providing legal aid services are permitted to establish information barriers within law firms. This would permit two lawyers in the same firm to represent clients opposed in interest if the firm takes necessary steps to prevent the actual disclosure of confidential information.

Recommendation #6

That lawyers be required to use retainer letters that clearly outline the scope and limitations to the legal services provided.

Recommendation # 7

That a conflict of interest rule be adopted that is based on the American model of a reduced duty of loyalty for limited-scope services and pro bono advice services. We recommend a rule similar to the Washington rule referred to above.

Conclusion

We believe that adopting the above recommendations will lead to conflict of interest rules that:

- are practical;
- recognize the public's need for duty counsel, summary advice, and limited-scope legal services;
- enhance access to justice by increasing the number of lawyers providing legal aid and pro bono services;
- promote a high standard of professional responsibility in the solicitor/client relationship;
- address the need for flexibility in applying the conflict of interest rules;
- provide clarity in the solicitor/client relationship; and
- recognize the unique programs and services provided by organizations like LSS.



We urge the Canadian Bar Association to adopt rules that are consistent with the above recommendations. By doing so, we believe that a greater segment of the Canadian population will have increased access to legal services.

Yours truly,

Mark Benton
Executive Director