



## ETHICALLY SPEAKING

## New Conflict of Interest Rules for Non-Profit Legal Services Provider

By Nancy Carruthers, Practice Advisor, Law Society of Alberta

A NEW CONFLICT of interest rule enhances access to justice by providing short term pro bono services.

At the June Benchers' meeting, a new conflict of interest rule was adopted and added to Chapter 6 of the Code of Professional Conduct. The new Rule 5.1 relaxes the application of the existing rules which govern conflicts of interest and a lawyer's duty of loyalty to an existing client, in limited circumstances.

The intent and effect of the proposed rule is to allow a lawyer in a non-profit or volunteer setting to represent a client for a limited or short-term purpose when that lawyer is not actually aware of a conflict, involving either the lawyer's firm clients or those of the non-profit service provider. The lawyer's firm or the clinic would not be in violation of any ethical rules in continuing to act for an opposing party, as long as the lawyer providing the short-term legal service main-

tains the client's confidentiality and appropriate screening measures are employed.

The new rule removes the "chilling effect" on volunteers who are concerned about potential negative consequences to their firm clients in the event of a conflict arising from services provided in a volunteer clinic. It also provides some comfort to Legal Aid and clinic staff counsel providing summary legal advice and duty counsel services in situations which may inadvertently give rise to a conflict of interest.

The majority of volunteers in Alberta's pro bono clinics come from private firms, though volunteer lawyers employed in-house or by the government are also affected. There are often issues of conflict which may arise when the volunteer lawyers are called upon to give advice which may be contrary to the interests of their firms' banking or property management clients in collections, foreclosures and tenancy matters.

Of concern to many volunteers in the Alberta clinics is the potential for an inadvertent conflict to arise which may have the unfortunate effect of requiring their firms to withdraw from a file. Though the clinics do attempt to identify potential conflicts, the circumstances in which services are offered make it difficult in many cases to systematically screen for conflicts. If a volunteer lawyer from a particular firm is aware that the opposing party is a long-standing firm client, the lawyer will typically advise the clinic and can take a different client. It is not always possible to do this, however, if the pro bono client cannot accurately identify the opposing party.

Legal Aid provides services through both roster counsel and staff lawyers, situated in a variety of offices. Legal Aid staff provides summary advice through the Law Line, and Legal Aid has a number of offices throughout the province, some of which provide service in specific areas of immigration and family law. Legal Aid also operates the Brydges counsel program, providing advice to those accused of criminal conduct, through either staff lawyers or members of the private practice bar.

Law Line callers are screened for conflicts

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### New Conflict of Interest Rules

The new rule provides as follows:

- R.5.1 (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:**
- (i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and
  - (ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.
- (b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.**

For the purposes of interpreting the new rule, the term "non-profit legal services provider" is defined in the commentary and refers to volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. The term "short-term legal services" includes advice or representation of a summary nature provided by a lawyer to a client under the auspices of a non-profit organization. While a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. ❖

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but this is difficult due to the volume of calls, and not all conflicts can be identified. In the Brydges counsel program, conflicts may arise involving a co-accused or complainants. Lawyers providing duty counsel services to family law clients have no way of performing conflict checks at the court house and the avoidance of a conflict often depends on the personal awareness of the duty counsel. Duty counsel are often asked by the judiciary to assist certain clients, again courting a potential risk of conflict if the duty counsel is unaware of a conflict and lacks the means to check for one. Staff counsel with Calgary Legal Guidance also appear as duty counsel in the Calgary courts and face the same concerns.

The summary nature of the short term legal services, contemplated by Rule 5.1, significantly reduces any real risk created by potential conflicts of interest with other matters being handled by the consulting lawyer's firm. If, however, the consulting lawyer providing the short term legal services fails to preserve the client's confidentiality, the lawyer's partners and associates in his or her firm will not be able to act for other clients where there is a conflict with the client who has obtained the benefit of the short-term legal services. Appropriate screening measures may be required within the firm to prevent disqualification arising from the provision of short term legal services in a volunteer clinic by one of the lawyers.

{ Law Line callers are screened for conflicts but this is difficult due to the volume of calls, and not all conflicts can be identified. }

Rule 5.1 still requires compliance with the usual rules which govern conflicts of interest if the consulting lawyer has actual knowledge that he or she is disqualified as the result of a relationship between an existing or former client and the consulting lawyer, the lawyer's firm or the non-profit legal services provider. In addition, if the lawyer intends to represent the client on an ongoing basis after commencing the short-term limited retainer, the standard conflict of interest rules will apply.

The Law Society of British Columbia has already adopted a similar rule, and the rule also exists in the American Bar Association's Model Code of Conduct. The new rule is an attempt to balance our current conflict of interest rules with the social benefit of encouraging lawyers to provide pro bono or non-profit legal services, thereby enhancing access to justice in Alberta. Members are welcome to contact the Practice Advisors to discuss the new rule in greater detail. ❖

## The Law Society's Regulatory Record: Timely, Transparent and Accountable

*By Don Thompson, QC, Executive Director, Law Society of Alberta*

THE RECORD OF the Law Society's regulatory work illustrates the role of the Counsel department in ensuring processes are entirely public, and are performed in a timely manner.

{ Our regulatory record indicates that in 2008, we held 48 hearings which resulted in 39 convictions, including 15 disbarments. }

The Law Society strives to be transparent and accountable. It provides public notices of conduct hearings in advance. Decisions are published promptly. The Law Society has public participation through non-lawyer public representatives (lay benchers) as members of

hearing committees.

Our regulatory record indicates that in 2008, we held 48 hearings which resulted in 39 convictions, including 15 disbarments.

The number of hearings and convictions can be placed in the context of the volume of complaints received and resolved. At the end of December 31, 2008, there were 487 open formal complaints and 273 open informal complaints. In 2008 the Law Society's Conduct department closed 379 formal complaints and 2,278 informal complaints.

The Counsel department has recently implemented benchmarks to ensure that notices and hearing reports regarding disciplinary actions, including suspensions, disbarments and resignations are posted on the LSA website on a timely basis. Hearing reports are also sent to Quicklaw and CanLII. ❖



## About the Counsel Department

*By Janet Dixon, QC, Senior Counsel, Law Society of Alberta*

THE LAW SOCIETY OF ALBERTA'S Counsel department combines an active litigation role with corporate counsel responsibilities.

With a team of four staff lawyers, three contract counsel, and four assistants, it actively supports the Law Society's mission to become a model regulator by protecting the public interest and preserving the fundamental principles of justice.

Counsel acts as professional advisors in the following areas:

- Works with knowledgeable professionals and paraprofessionals to provide legal and strate-

gic expertise to all Law Society departments, the Benchers and committees; and

- Provides advice on operational and public policy matters including assisting in the analysis, drafting and implementation of initiatives.

Counsel also represents the Law Society:

- for all types of internal hearings and appeals, including disciplinary, Assurance Fund, and credentialing hearings; and
- before all levels of court. ❖