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### WHO ARE “CLIENTS”? (AND WHY IT MATTERS)

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*“A client is to me a mere unit, a factor in a problem”*

— Arthur Conan Doyle, Sr.

*Although the lawyer-client relationship is fundamental to the lawyer’s ethical and legal role, there has been little close attention paid to defining exactly who “clients” are. This article explores the shifting and multi-dimensional nature of the lawyer-client relationship. Consistent with the aspirational and pragmatic function of law and practice that underlies legal ethics and professional responsibility, the article argues there is no ideal taxonomy for categorizing “clients” and the obligations owed them. The identity of a client is neither fast nor fixed, and lawyers are subject to a spectrum of differing ethical duties and legal obligations that can vary in weight and effect with the context. The article explores the general duties and obligations lawyers have to members of society, notwithstanding any client-based relationship with an individual; identifies the circumstances in which people become “current clients” and the special legal and moral obligations that come into play; discusses the duties and obligations that continue when, and if, clients cease to have a formal and/or continuing relationship with their lawyers; and examines the particular complexities involved when lawyers deal with groups or organisations.*

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*Bien que la relation avocat-client soit au centre du rôle éthique et juridique d'un avocat, très peu d'attention à la définition exacte d'un « client » a été apportée. Cet article explore la nature changeante et multidimensionnelle de la relation avocat-client. En accord avec les aspirations et les fonctions pragmatiques du droit et de la pratique, qui sous-tendent la déontologie juridique et la responsabilité professionnelle, l'article maintient qu'il n'existe pas de taxonomie idéale pour catégoriser les « clients » et les responsabilités de leur avocat envers eux. L'identité d'un client n'est pas un concept rigide ou définitif et les avocats doivent jongler avec une multitude de responsabilités juridiques et de devoirs éthiques concurrents dont le poids et l'incidence varient selon le contexte. L'article explore les responsabilités et les obligations générales d'un avocat envers les citoyens, indépendamment de la relation avocat-client qu'il entretient avec une personne en particulier; dégage les circonstances dans lesquelles une personne devient un « client actuel » ainsi que les obligations légales et morales qui interviennent, commente les responsabilités et les obligations qui sont maintenues envers le client lorsque cesse la relation officielle ou continue avec l'avocat et examine la complexité particulière des interactions de l'avocat avec les groupes et les organisations.*

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In most discussions of legal ethics and professional responsibility, it is taken for granted that the main focus of critical attention is the relationship between lawyers and their clients. While lawyers do owe other duties to other people and institutions, it is the client to whom they have their greatest and most pressing obligations. As such, the lawyer-client relationship is at the dynamic heart of a lawyer's ethical and legal role. However, little close attention has been paid to exactly who "clients" are — when does a person or organisation assume that role and receive the benefits that are presumed to accrue from that identity? Of course, the answers to this question matter greatly. While it is essential to identify who is and who is not a client as the triggering event for most legal and ethical responsibilities, it is also important to emphasise that lawyers' legal and ethical obligations do not start and finish with clients; there are definite obligations to non-clients. Moreover, although the primary relationship is that between lawyers and their clients, the duties to which it gives rise are not absolute; they are foundational and fundamental, but they are not all-consuming.

There is a spectrum of differing ethical duties and legal obligations imposed on lawyers which will sometimes vary in weight and effect with the informing and practical context. As recent developments make clear, the identity of a client is far from fast or fixed. The landscape of professional responsibility has become populated by a variety of characters and caricatures, including current clients, former clients, quasi-clients, non-clients and organisational clients. It is a veritable *dramatis personae*

who morph in and out of their different identities and occasionally hold more than one personality at a time. Consequently, in thinking about legal ethics and responsibilities, it is prudent to treat the lawyer-client relationship as a shifting and multi-dimensional connection. If it were a light switch, it would be more of the dimmer variety than the traditional on/off kind.

It will be the burden of this short essay to explore and chart that complex and dynamic social drama. In doing so, my focus will be on the interactions between lawyers and others so as to demonstrate how the identity of others affects and shapes the particular duties that lawyers have towards them. As such, the analysis is intended to be more suggestive than exhaustive; reference to doctrine and rules will be topical and illustrative in nature, not comprehensive in scope. In the first part of the essay, I explore the general duties and obligations lawyers have to members of society, notwithstanding any client-based relationship with an individual. Next, I canvass the circumstances in which people become “current clients” and the special legal and moral obligations that then come into play between them. The third part looks to the duties and obligations that continue when, and if, clients cease to have a formal and/or continuing relationship with their lawyers. Finally, I examine the particular difficulties that can and do arise when lawyers deal with groups or organisations. Throughout the essay, I will cut across the various ethical duties and legal responsibilities placed upon lawyers. Indeed, it would be folly to suggest that there is some ideal taxonomic discipline that can be brought to bear on thinking about “clients” and the obligations owed them. To imagine otherwise is to misunderstand the aspirational and pragmatic function of the law and practice, which comprises legal ethics and professional responsibility.<sup>1</sup> Ethics as much as, and often more than, law will always be a vigorous site for contestation, development and improvement.

### *Professional Duties*

Rather than begin with a sketch of lawyers’ relationship with their clients and its attendant responsibilities, it is instructive to start with the general duties which are imposed on lawyers as one kind of professional in society. Indeed, taking such an approach immediately unearths and challenges a common, unspoken and false assumption in the literature and practice: that lawyers enter into relationships with their clients on a clean slate. The fact is that future clients are already owed a considerable range of duties as non-clients and these are simply added when people become clients. Although often overlooked and ignored, there are many duties which

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<sup>1</sup> See generally A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999) chs. 2 and 3.

lawyers have independent of their relationship with clients. Like all professionals, they owe a series of duties to the public at large, to individuals with whom they have contact, and to their professional communities and colleagues. These legal obligations and moral responsibilities provide a backdrop against which the central relationship between lawyers and clients can be better understood.

Apart from any specific contractual obligations that lawyers assume in their commercial dealings with others, there are several tortious and equitable duties that lawyers might owe people and organisations at large, as well as a number of moral responsibilities which lawyers assume as qualified legal professionals. As a general rule, lawyers can owe a duty to a third party (even if that party is represented), but there is understandable reluctance to impose such a duty if the third party is adverse in interest, as this may dilute and/or hamper the lawyers' duties to their own clients.<sup>2</sup> Nevertheless, the courts have been prepared to go as far as imposing a fiduciary duty on lawyers to non-clients in some situations. For example, in a real estate transaction, it was held that a purchaser's lawyer could owe a fiduciary duty to the vendors because they were unrepresented and the lawyer knew or ought to have known that the elderly and unrepresented vendors were or might be relying on him to protect their interests. Expressly stating that this decision was not based on the existence of an implied retainer, the judge stated, "though fiduciary responsibilities normally arise from an existing contractual relationship of solicitor and client, the contractual tie is not essential."<sup>3</sup> Again, a lender's solicitor will have a fiduciary duty to a borrower's spouse to ensure that he or she receives independent legal advice where that person is unrepresented and unfamiliar with legal matters.<sup>4</sup> Accordingly, while there are circumstances in which lawyers will be placed in a fiduciary relation with a non-client, this will usually only arise as corollary of an existing lawyer-client relationship with an associated other.

Nevertheless, it is the potential tortious duties of lawyers which loom largest in any discussions of legal responsibility to non-client others. While it is unlikely that lawyers will be in *Donoghue*-like situations where they will be at risk of causing personal injury or property damage to others, they will frequently be in situations where they might cause economic losses to others in performing their lawyering functions. As with other professionals, like accountants and financial advisers, lawyers have some

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<sup>2</sup> See *Nelles v. Ontario*, [1989] 2 S.C.R. 170, [1989] S.C.J. No. 86.

<sup>3</sup> *Tracy et al. v. Atkins* (1977), 83 D.L.R. (3d) 46 at para. 27, (B.C.S.C.), Rattan J. This decision was upheld on the narrow ground of negligence in *Tracy et al. v. Atkins* (1979), 195 D.L.R. (3d) 632 (B.C.C.A.).

<sup>4</sup> *Shoppers Trust Co. v. Dynamic Homes Ltd.* (1992), 96 D.L.R. (4th) 267 (O.C.J.).

vulnerability to non-client others as a result of offering negligent advice or misrepresentations. The general rules for negligent misstatements require, among other things (e.g., misleading representation, detrimental and reasonable reliance, etc.) that there exist a “special relationship” between the professional and the affected party. While this will obviously encompass clients, it can also extend to others: foreseeability and proximity are the standard requirements for imposing a duty of care on advice-givers. For instance, in *Hercules*, the Supreme Court of Canada had to decide whether and when accountants who perform an audit of a corporation’s financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements: the shareholders were not the clients of the accountants. Although it was held that there was no liability on the particular facts, as the actual use of the audit information was not reasonable, the Court was of the view that a “special relationship” can clearly exist between professionals acting for the corporations and its shareholders.<sup>5</sup>

In addition to liability for negligent misstatements, lawyers can also be considered to owe substantial duties of care in regard to the services they offer. This is most apparent in regard to wills and estates, but can also extend to other areas, such as contract. For instance, in *White*, it was held that the children of a testator could recover against their father’s lawyers because they negligently failed to act on his instructions to include the children in his will. While the court was at odds over the basis of this liability, there was no doubt that the lawyers did owe a duty of care to the disappointed beneficiaries, even though they had no formal or contractual relation. The extent of that liability to non-clients is far from settled, but the courts do not seem to have been hindered by lack of any particular reliance by the non-clients on the negligence.<sup>6</sup> Accordingly, lawyers cannot assume that, even where there is no knowledge of the possible future benefit, non-clients will have no claim against lawyers. Put more affirmatively, lawyers should be aware that their negligence might well have repercussions beyond the confined ambit of the lawyer-client relationship.

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<sup>5</sup> See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. See also *Queen v. Cognos*, [1993] 1 S.C.R. 87. In some provinces, the common law has now been extended by legislation in some securities-based situations. Lawyers can be held liable as “experts” for disclosing false or misleading information in secondary markets “without regard to whether the [investor] relied on the misrepresentation.” See, for example, *Securities Act*, R.S.O. 1990, c. S.5 at Part XXIII.1.

<sup>6</sup> See *White v. Jones*, [1995] 2 AC 207, [1995] 2 W.L.R. 187 and *Hill trading as RF Hill & Associates v. Van Erp* (1997), 188 C.L.R. 159, 142 ALR 687 (H.C.). On the Canadian position, see *Whittingham v. Crease & Co.* (1978), 88 D.L.R. (3d) 353 (B.C.S.C.).

As regards professional duties, lawyers can by no means be said to hold no particular ethical obligations to non-clients. Although the rules leave no doubt that lawyers' function is to be "openly and necessarily partisan" (IX, c.17), there is the general requirement that "the lawyer's conduct toward all persons with whom the lawyer comes into contact in practice should be characterized by courtesy and good faith" (XVI).<sup>7</sup> While the requirement of "good faith" cannot be said to impose a fiduciary duty to "all persons with whom the lawyer comes into contact," it does demand that lawyers do not treat non-clients "as if they were barbarians and enemies."<sup>8</sup> This is no longer, if it ever was, an acceptable or ethical way to proceed. A preferable approach is to note that, although a legal professional should exhibit "a special care for the interests of those accepted as clients, just as his friends, his family, and he himself have a very general claim to his special concern,"<sup>9</sup> a lawyer must still show a general care to and for others. Indeed, the professional rules state that a lawyer must, among other things, be "accurate, candid, and comprehensive" with unrepresented adversary (IX, c.17); not take advantage of "slips or oversights not going to the real merits" (IX, c.7); bring all legal authority "directly in point" to the court's attention (IX, c.2(h)); and not impose on other lawyers "impossible, impractical or manifestly unfair conditions of trust, including those with respect to time restraints and the payment of penalty interest" (XVI, c.4). All in all, it is incumbent on lawyers to deal with everyone with a genuine, if variable, sense of ethical integrity and professional regard.

### *Current Affairs*

A pivotal event in the imposition of ethical obligations and professional responsibility is the occasion on which a person moves into the status of a "client." When the relation between lawyer and others assumes the professional imprimatur of lawyer-client, it establishes a whole set of obligations upon the lawyer toward the client. The primary duties are that lawyers must be zealous partisans on behalf of their clients, they must act with undivided loyalty and avoid conflicts of interest, they must be entirely candid with their clients,

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<sup>7</sup> References in the text are to the Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) as adopted by Council, August 2004 and February 2006, online: <<http://www.cba.org/CBA/activities/code>>.

<sup>8</sup> Charles P. Curtis, "The Ethics of Advocacy" (1951) 4 *Stan. L. Rev.* 3.

<sup>9</sup> Charles Fried, "Lawyer As Friend: The Moral Foundations of The Lawyer-Client Relation" (1976) 85 *Yale L. J.* 1060. While Fried's general friendship analogy is sound, Fried's understanding of what it means to be a friend is disturbing because it more resembles prostitution than anything else: continuing friendship is conditional on the receipt of money and implies that friends are those who do whatever is asked of them without comment or question.

and they must give the highest confidentiality to their clients' communications.<sup>10</sup> Because of this crucial shift from general duties to specific professional obligations, it is particularly important to be able to recognise and establish the circumstances and conditions under which such a relationship crystallises. In exploring this process of crystallisation, it is vital that lawyers and commentators appreciate that what counts as a "client" is about language as well as reality. It is not that the label "client" describes some independent reality, but that it brings in to play a whole collection of commitments and values, which shape as much as they are shaped by the world. The status of "clients," therefore, is not fixed or objective, but depends on the objectives and outcomes which the law and its regulators seek to achieve; these normative ambitions will change as a result of the deeper forces and interests at work in sculpting a legal and ethical regime which best matches the conditions, demands and expectations of modern lawyering.<sup>11</sup>

It is generally assumed that the lawyer-client relationship is tied to the existence of a written retainer. Indeed, the retainer will often stipulate the formal and special terms that are to govern the working relationship between lawyers and their clients. However, while the existence of a retainer will be proof positive that a lawyer-client relationship exists, the absence of such an agreement does not mean that the lawyer-client relationship has not come into existence. In other words, lawyers can owe a host of special responsibilities to persons even when they have not obtained the elevated and singular status of "client." Whether this pre-retainer phase is or is not part of the formal lawyer-client relationship is not the main point. While lawyers will not necessarily have assumed in regard to such persons all the composite duties owed to the client with whom they share a retainer, they will have taken over certain obligations which are not owed to the public at large. This crepuscular and shifting zone offers one of the keenest challenges in mapping the terrain of lawyers' professional duties: the status of "client" is much less settled and uncontroversial than many lawyers and commentators assume.

The preface to the CBA Code defines a client as "a person on whose behalf a lawyer renders or undertakes to render professional services." It is far from clear what "undertakes" might mean, but it should not be treated as only synonymous with a formal acknowledgement by means of a written retainer. In particular, it would surely be imprudent for a lawyer

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<sup>10</sup> See generally Hutchinson, *supra* note 1 at 89-105. Of course, there are limits and exceptions to these general duties.

<sup>11</sup> For more on this taxonomic tendency in legal thought and doctrine, see A. Hutchinson, *It's All In The Game: A Non-Foundationalist Account of Law and Adjudication* (Durham: Duke University Press, 2000) at 65-77.

who meets with a prospective client, but determines not to undertake to act as that person's lawyer for a variety of reasons, to consider that they owe no duties to that person over and above what they owe to everyone else with whom they come in contact. By agreeing to meet with persons, they must be considered to have impliedly assumed certain duties of confidentiality towards them and to "render professional services." While the Code states that "the lawyer owes a duty of secrecy to every client without exception, regardless of whether it is a continuing or casual client" (IV, c.5), this duty should be considered to extend to the "might-be client." Moreover, while this might-be client relationship would certainly occur if the meeting or conversation took place in the lawyer's office, I would suggest that this obligation can arise even in settings which are far less formal or official. The lawyer who chats (unadvisedly) to people about legal matters when those persons know that they are chatting with a lawyer is surely under a duty to keep any information or communication confidential whether that conversation takes place at a party, in public or anywhere else. Of course, the more informal or "casual" the situation is, the easier it will be for lawyers to insist upon and rely on a general disclaimer of liability.<sup>12</sup> In some situations, the duty of confidentiality might extend to keeping the identity of the client confidential. This will only arise in special circumstances where the client goes to the lawyer in order to preserve their anonymity. For example, where a person has committed a criminal offence and wants to seek advice before turning themselves over to the authorities, the lawyer would be under an obligation not to reveal the identity or whereabouts of the person, unless there is a possibility that the client is likely to commit further offences.<sup>13</sup>

An important corollary to this question of when a person becomes a client is that any positive answer will have implications for the lawyer's law firm as well as the lawyer personally. It is generally accepted that all members of the law office will be treated as being in a professional relationship with the client and, therefore, will owe them the full range of appropriate professional obligations; office staff will be obliged to respect the clients' claims to confidentiality and the supervising lawyer will be

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<sup>12</sup> For a waiver to be valid, several conditions must be met — full disclosure by the lawyer to the clients; signed and detailed waivers, preferably after independent legal advice; and a considered decision by the lawyers that they reasonably believe that they are able to represent each client without adversely affecting the other. Accordingly, informal and general waivers are not acceptable; waivers based on incomplete knowledge are not acceptable; and, even if a valid waiver exists, lawyers must be prepared to defend their decision to accept or continue the retainer as circumstances change. Knowledge, no matter how well-informed, is not tantamount to consent. See *Goldberg v. Goldberg* (1982), 141 D.L.R. (3d) 133 (Ont. Div. Ct.) and *Chiefs of Ontario v. Ontario* (2003), 63 O.R. (3d) 335 (Sup. Ct).

<sup>13</sup> See *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312 (B.C.S.C.).



liable for any breaches by such employees. This rule has particular and wide-reaching implications for the lawyer's professional colleagues. One lawyer's client is considered to be the client of all the firm's lawyers and, therefore, will be entitled to the same duties and obligations as the circumstances allow: "it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients."<sup>14</sup> For instance, clients in a Vancouver office have claims to professional obligation against lawyers in Toronto whom they will never meet and who might not even know of their existence, let alone have any details or information about the clients' business. As such, it is incumbent on law firms to have in place a process and system whereby they can monitor the client base of the firm, and all reasonable steps are taken to ensure that conflicts do not inadvertently arise and that appropriate measures are taken to protect confidential information.<sup>15</sup>

Nevertheless, it will not always be sufficient for law firms to have such screening processes in place. In determining who is to count as a current client and what ethical responsibilities are owed to them, the recent decision of the Supreme Court of Canada in *Neil* has set off alarm bells in large law firms.<sup>16</sup> While this was a criminal case, it has definite and genuine implications for the lawyer-client relationship generally. Indeed, *Neil* is accepted by the legal community to have re-ignited the flame of debate, and many now think that it has converted what were previously thought to be "business conflicts" into "legal conflicts." If the force of the *Neil* decision is fully appreciated and followed, law firms would be exposed to greater civil liability for conflicts. Moreover, the *Neil* decision confirms that, while there are several policy factors at work in this area of law, those of client autonomy and the ethical integrity of the legal profession and system are much more important than lawyers' choice and mobility: the latter is only a cautionary limit to the former.

Neil was charged with fabricating divorce documents and defrauding a trust company in his capacity as a paralegal. A firm had a lawyer-client relationship (offering legal advice, not defending him) with Neil. At the same time, it was representing persons who were adverse in interest to Neil, namely a co-accused and one of the parties to the impugned divorce transactions. Neil sought to have his ultimate conviction set aside on the basis of the conflict of interest by the law firm. The Supreme Court of Canada held that the law firm was in conflict and that Neil could proceed

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<sup>14</sup> *R. v. Neil*, [2002] 3 SCR 631 at para. 29, Binnie J.

<sup>15</sup> See *Ford Motor Co. of Canada v. Osler, Hoskin & Harcourt* (1996), 24 B.L.R. (2d) 217 (O.C.J.) [*Ford*], and *Chapters Inc. v. Davies, Ward & Beck LLP*, [2000] O.J. No. 4973, 10 B.L.R. (3d) 91 (O.S.C.) [*Chapters*].

<sup>16</sup> *Supra* note 14.

against them civilly or through the Law Society. However, it held on the particular facts that there was no abuse of process sufficient to quash Neil's trial and order a re-trial. In his judgement for the Supreme Court, Justice Binnie explored the question of "what are the proper limits of lawyer's duty of loyalty to a current client when there is no issue of confidential information involved?" He was unequivocal that the duty of loyalty is much broader than duty of confidentiality. However, he conceded that an appropriate balance among competing interests is required because "an unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation."<sup>17</sup>

Justice Binnie (a former Bay Street lawyer) held that there should be no room for doubt about counsel's loyalty and dedication to the client's case. In particular, he cast doubt on whether "ethical screens" will be sufficient in regard to the affairs of current clients by including the aside that "whether this belief [in the efficacy of "ethical screens"] is justified in the absence of informed consent from the clients concerned is an issue for another day." He emphasised that there is a fiduciary relationship between lawyer and client and that, approving of Lord Millett's statement in *Bolkiah*, "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position — without the consent of both clients, [a firm] cannot act for one client while his partner is acting for another in the opposite interests."<sup>18</sup> Although Justice Binnie stated that "in exceptional cases, consent of the client may be inferred" (e.g., banks and small unrelated briefs against the bank), he was clear about the basic force of a lawyer's duty of loyalty:

The general prohibition is undoubtedly a major inconvenience to large law partnerships and especially to national firms with their proliferating offices in major centres across Canada. Conflict searches in the firm's records may belatedly turn up files in another office a lawyer may not have been aware of. Indeed, he or she may not even be acquainted with the partner on the other side of the country who is in charge of the file. Conflict search procedures are often inefficient. Nevertheless, it is the firm not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.<sup>19</sup>

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<sup>17</sup> *Ibid.* at para. 15.

<sup>18</sup> *Ibid.* at para. 27. See *Bolkiah (Prince Jefri) v. KPMG (A Firm)*, [1999] 2 A.C. 222 at para. 37, Lord Millett.

<sup>19</sup> *Supra* note 14 at para. 29.

Accordingly, it is clear that, after *Neil*, there are now two legal regimes for conflicts — one to cover “current clients” of the law firm and one to cover “former clients.” While that governing the former is much more exacting than that controlling the latter, there is still a strong case to be made that the fiduciary relationships between lawyers and clients and the corollary duty of loyalty prevent lawyers from accepting or continuing retainers where there are conflicts between the interests of the client and other current and former clients. Indeed, after *Neil*, it appears clear that lawyers should only agree to represent two clients where and when those clients’ interests are not directly adverse to each other. This is the case even if the two mandates are unrelated. There is little guidance as to what amounts to “directly adverse.” If the jurisprudence on conflicts generally is a guide, it will be sufficient if there is a possibility, not a probability of there being an adversity of interests.<sup>20</sup> However, it is very likely that the burden will be on lawyers to demonstrate that their clients’ interests are not directly adverse because the lawyers are the ones who will be in the best position to know all the relevant factors. As Lord Upjohn in an earlier case put it, this means that “the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.”<sup>21</sup>

In most situations, it is possible for lawyers to represent concurrent clients, even if conflicts exist, provided that there is a valid waiver from the client. For a waiver to be valid, several conditions must be met — full disclosure by the lawyer to the clients; signed and detailed waivers, preferably after independent legal advice; and a considered decision by the lawyers that they reasonably believe that they are able to represent each client without adversely affecting the other.<sup>22</sup> Accordingly, while lawyers can waive a variety of conflicts, it cannot be done by informal and general waivers (i.e., agreements which waive all future conflicts in all situations) and by waivers based on the provision of incomplete knowledge to the clients. Moreover, even if there is a formally valid waiver, lawyers must be prepared to defend their decision to accept or continue the retainer as meeting a reasonable standard of professional judgement. As regards so-called business conflicts between a current client and a former conflict, the law and professional rules are much less clear. Nevertheless, it seems that

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<sup>20</sup> See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41.

<sup>21</sup> *Boardman v. Phipps*, [1967] A.C. 46 at 124, [1966] 3 All E.R. 721 [*Boardman* cited to A.C.].

<sup>22</sup> See *Moffat v. Wetstein* (1996), 135 D.L.R. (4<sup>th</sup>) 298 (Ont. Gen. Div.), (*sub nom. Moffat et al. v. Wetstein et al.*), and *Chiefs of Ontario v. Ontario*, *supra* note 12.

the reasonable lawyer or law firm should inform clients of any potential business conflicts before the retainer is concluded or after any potential conflict comes to light as the representation progresses. This disclosure should be sufficient to place clients in the best position possible to evaluate whether they wish to retain or continue with the lawyer or law firm. In such circumstances, it is the general fiduciary duty rather than any particular conflicts doctrine that will be in play; it is unlikely that a formal waiver, following independent legal advice, will be required.

*Gone, But Not Forgotten?*

That persons are no longer “current clients” does not mean that lawyers have no obligations towards them. Lawyers have a number of continuing and general duties that persist after the lawyer-client relationship has ended. For instance, it is axiomatic that the duty of confidentiality “continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them” (IV, c.5) and may bind even after the client has died.<sup>23</sup> However, more contested issues of legal ethics arise in regard to conflicts of interest. For instance, almost all the cases dealing with conflicts involving former clients are concerned with claims by the former client to prevent lawyers acting against them in future transactions or litigation. While clients simply want to have the lawyer disqualified, the claim is framed in terms of confidentiality; it is contended that lawyers should not be permitted to use confidential information and knowledge obtained while the former client was a client in order to benefit a new and present client for whom the lawyer is now acting. If lawyers act against former clients in “related matters,” two rebuttable presumptions are considered to be in play — that confidential and relevant information was passed between the lawyer and the former client, and that lawyers in the same firm do share information which might prejudice former clients unless there is “clear and convincing evidence that all reasonable measures were taken to ensure no disclosure will occur.”<sup>24</sup> In most circumstances, it will be sufficient for lawyers to demonstrate that the law firm has in place “ethical screens” in order to rebut these presumptions. Of course, these devices must be sophisticated, well-monitored and effective.<sup>25</sup>

While there is now general consensus on the appropriate scope of lawyers’ duties towards former clients, there remains very real debate about the circumstances in which persons or organisations cross the ethical rubicon separating current clients from former clients. There is little

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<sup>23</sup> See *Guay v. Societe Franco-Manitobaine* (1985), 37 Man. R. (2d) 16 (Q.B.).

<sup>24</sup> See *supra* note 20.

<sup>25</sup> See *Ford and Chapters*, *supra* note 15.

established doctrinal guidance as to when this occurs. However, it will not necessarily be determined by reference to whether a particular transaction or retainer has come to an end. This is especially the case with large corporate or institutional clients who might not have any particular set of files in an active state, but who have a number of law firms working for them and who have not yet given any definitive or final indication of whether they have permanently shifted their business to another law firm. Consequently, even if a law firm is no longer actively doing work for or billing a person or institution, the court might still consider them a current client for the purposes of the professional rules. Of course, as so much hangs on whether a particular client is considered “current” or not, it will be important to establish some instructive guidelines on when that shift in status occurs. Indeed, lawyers would be well-advised to treat clients as current clients unless they have clear and compelling evidence to the contrary.

The recent case of *Strother* is a cautionary tale for all lawyers who might consider relying on technicalities and playing fast and loose with the idea of who their clients are and the extent of their duties to them. The plaintiff corporation carried on business in tax-assisted production services financing (TAPSF) for the film industry and retained Strother to act as a tax shelter advisor; there was a written retainer agreements for consecutive one-year terms in 1996 and 1997 which gave Strother a special fee arrangement in return for his exclusive services. In 1998, legislative amendments brought an end to TAPSF tax shelters. In response to enquiries from the corporation, Strother advised it that no remedies were available and that tax sheltered financing was at an end. A short time after the expiry of the written retainer agreements, but while Strother and his law firm were still engaged in the performance of legal work for the corporation, Strother and a former employee of the corporation obtained a favourable advance tax ruling on a potential exception to amendments to the Act which would permit resumption of some forms of TAPSF. They secretly proceeded to exploit that exception and generate substantial profits. The corporation brought an action for damages, accounting and disgorgement of profits for breach of Strother’s fiduciary duty and duty of confidentiality to it. Although the claim was dismissed at trial, the Court of Appeal ordered Strother to disgorge all profits to the corporation, even though this was substantially more than the corporation itself would have made if it had utilised the available tax exception for itself.<sup>26</sup>

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<sup>26</sup> 3464920 *Canada Inc. v. Strother*, 2005 BCCA 35, [2005] B.C.J. No. 80, [2005] 5 W.W.R. 108 (on appeal to S.C.C.). The Court of Appeal went on to hold that Strother’s law firm was required to pay back any fees paid by Monarch after the retainer expired as there was a direct conflict of interest, but it was not jointly and severally liable.

The basis of the lawyer's defence was that the retainer agreement to provide advice to the corporation concerning TAPSF had ended before his personal initiative to obtain and act upon the favourable tax ruling. In rejecting this claim, the court insisted on the strictness and persistence of the lawyer's fiduciary duty, especially in regard to conflict of interest. Emphasising that the lawyer-client relationship can continue after a retainer agreement has expired and that fiduciary duties "are implied by law and are unlikely to be validly excluded or diminished by contract," Newbury JA concluded:

the duty of a solicitor, like any other fiduciary, to advise his client of the existence of a conflict of interest ... may continue even after the solicitor's retainer has terminated. In *Allison v. Clayhills* (1907), 97 LTR 709, [1904-07] All E.R. Rep. 500 (Eng. Ch. Div.), for example, Parker J. held that a solicitor's fiduciary duty will last as long as his 'ascendancy' over the client can operate, and thus may require full and proper disclosure of his interest in any transaction between himself and his client 'long after the relationship of solicitor and client in its stricter sense had ceased to exist.' (at 502.) This principle was approved by the Privy Council in *McMaster v. Byrne*, [1952] 1 All E.R. 1362 (Ont. P.C.), a case on appeal from Canada, and was applied in *Korz v. St. Pierre* (1987), 43 D.L.R. (4th) 528 (Ont. C.A.), at 637-38.<sup>27</sup>

The upshot of *Strother* is that, while lawyers are not prevented from working for competitors in all circumstances and that clients will at some point move from "current clients" to "former clients," the fiduciary duties owed by lawyers will linger for some time after a retainer has formally come to a close. On the facts of *Strother*, it would seem that there was a clear breach of loyalty as the lawyer took active steps to deceive the client and to actively hide his machinations from it. Nevertheless, the gist of the decision is that the courts' refusal to draw hard and fast lines around the process by which a client moves from "current" to "former" should put lawyers on guard against treating clients too hastily as "former clients" and, therefore, having reduced responsibilities towards them. Accordingly, although the duty of loyalty is limited to current clients, the definition of who counts as a "current client" is expansive and protean. Again, the growing tendency of courts and regulators to move from an exclusively formal analysis of professional obligations to a more substantive inquiry of lawyers' ethical duties represents an important change in attitude.

### *Organisational Clients*

As the character of transactions and litigation becomes less individual and

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for profits secretly made by Strothers. See *3464920 Canada Inc. v. Strother*, 2005 BCCA 35, [2005] B.C.J. No. 80, [2005] 11 W.W.R. 399.

<sup>27</sup> *Ibid.* at paras. 23-24.

more institutional, the question of who it is that counts as the lawyer's "client" is also potentially more problematic — From whom does the lawyer take instructions? To whom is a duty of confidentiality owed? What is to be done if the group members disagree? Whose interests count in determining conflicts? These questions receive short shrift in the professional rules. The most that is stated is that lawyers represent "that organisation acting through its duly authorized constituents" and must make it clear to all such constituents that the interests of the organisation are paramount to those of any constituents who become "adverse" in interest (V, c.16). This rule is based on the notion that lawyers do not represent the interests of the people involved, but the artificial entity of the organisation they form, whether it is a corporation or a loose association. The problems with this notion are many. In particular, there are two important implications that warrant comment. First, this brief reference reflects the law and lawyers' concentration on individual autonomy; even when there are group interests at stake, they are treated either as reducible to one individual-like conglomerate interest or they are simply treated as separate interests whose combination does not change the nature of the interests represented. Secondly, there is an assumption that the client group will remain constant when, in fact, it might begin to change as a result of what the lawyer does or suggests. There are three general situations of representation in which these difficulties arise in terms of client identity — corporations, unincorporated associations, and class proceedings.

As regards corporations, while it is clear and undisputed that the corporation itself is the client for the purposes of the lawyer's ethical obligations, it remains less settled as to how this relationship is operationalised and what the impact on different individuals of this professional relationship between lawyer and corporation is. Indeed, mindful of the number of corporate clients served by modern lawyers, being able to negotiating the thicket of potential problems that can arise in such corporate situations is a matter of some importance and controversy for lawyers. As a general matter, it can be stated that lawyers' paramount obligation of allegiance is to the corporation itself and not to any of its officers, shareholders, employees or other connected person (V, c.16). Corporate lawyers are well advised to obtain express clarification in their retainers about which individuals have authority to instruct them on the corporate client's behalf. While they may assume duties to the corporation's agents, their duties to the corporation are paramount and, if there is a conflict, the duty to the corporation must prevail. Moreover, lawyers should inform agents of the corporation that, in the event of a conflict of interests, they will be representing the corporation as a whole and that individual agents should seek independent representation (V, c.5 – c.8).

Special difficulties arise in dealing with confidentiality in the context of corporate lawyers' professional responsibilities. Canadian courts have tended to give the lawyer-client privilege a broad ambit of operation. For instance, in *Mutual Life*, it was decided that the company's lawyer was not obligated to hand over to Revenue Canada at its request on an audit most documents that were in the lawyer's possession.<sup>28</sup> As well as granting privilege to all legal communications between the lawyer and the management and employees of the company, the court extended confidentiality to all legal communications between the lawyer and employees of a wholly-owned subsidiary as the management of the two companies was very closely connected. Privilege also extended to communications about law in foreign jurisdictions and to documents exchanged between other employees that commented on privileged legal communications. However, in line with the traditional doctrine, communications between the lawyer and management or other employees about business matters were not privileged nor were documents simply received and filed by the lawyer if they were not directly related to legal matters. Accordingly, corporate lawyers must make it clear when they are giving legal as opposed to non-legal advice.<sup>29</sup>

Nevertheless, there are circumstances in which lawyers might owe duties directly to those persons who instruct them on behalf of the corporation. In *Gainers Inc.*, a law firm acted for a corporation, which was controlled by one person. There was close contact between that person and a particular lawyer of the law firm that represented the corporation. Subsequently, that person ceased to control the corporation that brought an action against him. The corporation then rehired the law firm to act for it. Because the individual claimed he was a former client, he moved for an order disqualifying the firm as being in a conflict. The Alberta Court of Appeal held that there was no simple rule to govern cases of this sort. The risk of undue harm to the former controller must be assessed in the circumstances of each case. However, if there is the real possibility of harm to that person and he or she had a reasonable expectation of confidentiality, some minimal ethical obligations towards the corporation's instructing person would have crystallised even if there was no strict lawyer-client relationship.<sup>30</sup> The line between clients and non-clients was significantly

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<sup>28</sup> See *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney-General)*, [1988] O.J. No. 1090, 28 C.P.C. (2d) 101.

<sup>29</sup> *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Custom and Excise (No.2)*, [1972] 2 All E.R. 353 (UK CA).

<sup>30</sup> *Gainers Inc. v. Pocklington* (1995), 125 D.L.R. (4th) 50 (Alta. C.A.). It was held that, in view of the close contact between the lawyer and instructing individual, it would be improper for that person to be personally cross-examined by the lawyer with whom he had special contact. In *Rosman v. Shapiro* (1987), 653 F. Supp. 1441 (S.D.N.Y.), a lawyer was prevented from representing a corporation when one of only two shareholders takes over



and justifiably smudged in such corporate situations; substantive justice was placed ahead of technical categorisation. Accordingly, corporate lawyers must be assiduous in ensuring that all persons involved are not only advised of their likely future rights, but also that certain non-clients are afforded basic ethical and professional respect.

If the control of the corporation shifts, it will be the new controllers who will determine what is in the corporation's best interests; the right to waive earlier privileged communications lies with the new controllers, not the earlier ones. However, the lawyer's duties are to the corporation generally and not only to any incumbent control group. The duty of corporate lawyers to shareholders will depend on the size of the company and the number of shareholders. For example, in derivative proceedings, shareholders may bring an action on behalf of the corporation against the alleged misconduct of those controlling directors and officers who normally instruct the corporation's lawyer.<sup>31</sup> While such derivative proceedings do not automatically require separate representation, lawyers should advise all interested parties to the conflict of the risks and remind everyone that the lawyers' primary responsibility is to the corporation. Directors and officers not named in the allegations of impropriety can retain and instruct counsel on behalf of the corporation. If this is not feasible, the court can assign independent counsel to represent the interest of the corporation.

The terrain becomes even more murky when the situation of unincorporated associations or organisations is considered. The scope for confusion is exacerbated by the fact that there is no separate legal entity to be served as in the case of corporations, and there is no fixed or established set of interests to be promoted or protected. The law tends to characterize these organizations as unitary “entities” or “legal persons” and to suggest that lawyers' duties to such clients are analogous to their duties to individual clients. In fact, however, these organizations consist of multiple individuals with potentially differing interests, and hence they are prone to internal conflicts that do not arise in individual representation.<sup>32</sup> For instance, lawyers who represent tenants' groups or environmental action committees must be careful to ensure that members are aware of their respective rights and responsibilities as between the group and the lawyer. While the professional rules simply state that lawyers acting for such organizations can represent their constituents, as long as they are in

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the corporation and the other sues.

<sup>31</sup> See *Vadeko International Inc. v. Philosophe (Gen. Div.)* (1990), 1 O.R. (3d) 87 (G.D.), [1990] O.J. No. 2010.

<sup>32</sup> William H. Simon, “Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intra-Client Conflict” (2003) 91 Cal. L. Rev. 57.

accordance with the rules and commentaries concerning conflicts of interest (V, c.16), they must be assiduous to avoid a variety of “intra-client” disputes in regard to what interests are to be zealously advocated, what conflicts of interests might occur, and the zone of confidentiality which applies. This is potentially treacherous territory for the ethical lawyer and, again, lawyers would be prudent to take a very generous and flexible definition of who counts as a “client.”

Finally, there are freshly-minted challenges of class action litigation. As class proceedings begin to accelerate in size and reach, the ethical responsibilities of class counsel have come under closer scrutiny. It will come as no surprise that how traditional legal ethics rules and guidelines are to be modified and applied to class action litigation is far from settled or straightforward. Indeed, even at first glance, it is clear that conventional assumptions and expectations from the lawyer-client context cannot simply be transplanted to class proceedings. The central difference in class actions as opposed to traditional litigation is the potential and often genuine antagonism between class members and representative plaintiffs. While it is obvious that the representative plaintiff is clearly a client of counsel, it is the relationship between class counsel and the class which has begun to raise problems. Also, this relationship will have implications for the ethical dealings between the representative plaintiff and class counsel. The rules of professional conduct are almost silent on how ethical challenges, like confidentiality and conflicts, are to be dealt with in the context of class actions. As Deborah Rhode sums up the situation, “asymmetries between class interests and preferences will often force counsel to function more as a Burkean trustee than instructed delegate.”<sup>33</sup> Nevertheless, although rather tentative and delayed, the courts are beginning to make some headway in clarifying the ethical issues in play and proposing some possible guidance to class counsel’s dilemma of how to balance the competing claims on their fiduciary attention.

As regards class counsel’s ethical obligations towards the representative plaintiff, it can be safely reported that the basic duties of professional responsibility from the traditional lawyer-client situation can be relatively easily grafted onto the class counsel-representative plaintiff relationship. At least presumptively, there are the usual requirements of confidentiality, competence, etc. However, it is the limits of those obligations and the countervailing pressures from the client being a “representative” litigant that causes problems. While these will be lessened if the plaintiff is truly “representative,” it will be incumbent on class counsel to explain the dynamics of class actions to the plaintiff and to

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<sup>33</sup> Deborah L. Rhode, “Class Conflicts in Class Actions” (1982) 34 *Stan. L. Rev.* 1183 at 1258.

stress the extent to which the plaintiff exists in a representative as opposed to purely personal capacity. In particular, class counsel would be well advised to notify representative plaintiffs of their potential liability for costs in the event that the action fails. Also, there is the possibility of a conflict of interests between class counsel and the representative plaintiff when there is an early and perhaps premature settlement of the class action; class counsel should likely advise the representative plaintiff to obtain independent legal advice so as to ensure that the settlement is fair and not only to the financial advantage of class counsel.<sup>34</sup> However, it will be what the substantive nature of class counsel’s relationship with class members is considered to require which will most tellingly impact upon what the representative plaintiff can ethically expect and demand from class counsel.

The relationship between class counsel and class members is very much *sui generis* and, as such, warrants its own special rules; it is ill-suited to the black-and-white imperatives of the traditional lawyer-client relationship. Because the professional societies seem unwilling or unable to grasp the nettle, it has been left to courts to tackle this challenging situation. The response has tended to hinge upon the pre- and post-certification stage of class proceedings. As a general rule, it can be reported that judges expect class counsel to have very few ethical obligations to class members before class certification. As Nordheimer J. stated:

...it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of the class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all of the duties and obligations that arise under a solicitor and client relationship with respect to the class members, including the obligation to represent the class members ‘resolutely and honourably.’<sup>35</sup>

Nevertheless, this blunt conclusion must surely be qualified by at least two more subtle caveats. As regards the pre-certification stage, while class counsel does not stand in a formal lawyer-client relationship with class members and owes them no formal duties, it is reasonable to suggest that class counsel is not free to treat class members as only and entirely non-clients. It is better to consider them to be potential and/or quasi-clients such that there will be some minimal obligation to class members at least to ensure that they act competently and fairly towards the class, especially in reaching settlements, and that they respect the confidentiality of

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<sup>34</sup> See generally Michael Carabash, *Ethical Conduct for Class Counsel in Ontario* (April, 2006) (paper on file with author).

<sup>35</sup> *Ward-Price v. Mariners Haven Inc.*, 71 O.R. (3d) 664, [2004] O.J. No. 2308 at para. 7.

communications with the class. In short, it behoves class counsel to consider and act with integrity towards the interests of class members when dealing with the representative plaintiff; the full force of fiduciary duty will be reduced, but not abandoned completely.<sup>36</sup> Secondly, as regards the post-certification phase, it would seem that, while class counsel has assumed a fuller and more formal set of ethical obligations towards class members as clients, the primary force of their professional responsibility on a day-to-day basis is still to the representative plaintiff. Moreover, because class counsel have assumed a greater menu of ethical obligations towards class members, they must be aware of potential conflicts between members and, where appropriate, recommend that separate sub-classes be formed and separate counsel be appointed in some circumstances.

### *Conclusion*

Despite Arthur Conan Doyle, Sr.'s revered status, contemporary lawyers would do well to ignore his observation that "a client is a mere unit, a factor in a problem." This might be well and good for the sleuth or others. For lawyers, the ethical and legal ramifications which flow from the characterisation of persons or institutions as "clients" is much more fraught and freighted. Indeed, it seems incumbent on lawyers to treat their clients as moral entities who are worthy of respect for that reason alone. Clients may well be "units" and they might often be "problems," but lawyers should treat them with the moral respect and ethical integrity which their status as moral beings recommends; talk of clients as "units" or "problems" is antithetical to a rigorous legal ethic. Law may well be a business, but that does not necessarily entail an unethical or unprofessional approach to conducting that business. Moreover, and perhaps as importantly, lawyers should be prepared to accept a wider and less traditional view of who counts as a "client" or, at least, to recognise that ethical responsibilities do not begin and end with the client. As not only courts and professional bodies, but also society at large, begin to expect more of lawyers, it would be prudent for lawyers to take much more seriously the ethical responsibilities of their professional roles.

By developing a broad-ranging professional *modus vivendi* which was less determined by formal categorisations, lawyers might be able to move beyond the on/off world of lawyer-client relationship. While it is clear that lawyers must and should put their clients' interests first, this does not mean that they should not or need not take into account the interests of others.

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<sup>36</sup> This seems to be the dominant American position. See *City of San Jose v. Superior Court* (1974), 12 Cal. 3d 447, 525 P.2d 701, (*sub nom. City of San Jose, v. Superior Court of Santa Clara County; Lands Unlimited, et al., Real Parties in Interest*).

Nevertheless, even if the other party has little or no legal representation, lawyers are legally obliged and morally required to be more concerned with the interests of their clients. The duty to be a zealous partisan in the pursuit of clients' interests involves the prioritizing of clients' interests, not the obliteration of everyone else's. This is the very opposite of an appropriate and honourable ethic for professional lawyers. Other interests still count, but for less. For instance, there seems to be little or no reason for lawyers to facilitate their clients' efforts to harm deliberately another's interests, especially if such actions would not improve the situation of their clients. Lawyers' social responsibilities are not exhausted or fulfilled simply by advancing the interests of their clients. And, most importantly, acting in the best interests of clients should not be an excuse or pretext for acting unethically towards others. Lawyers have some duties that go beyond and above the welfare of their clients.

