

JOINT RETAINERS - PLANNING FOR POTENTIAL CONFLICTS

New BC Code of Professional Conduct Diminishes Access to Justice

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Litigation lawyers are often approached by multiple prospective clients to represent their similar interests. Such prospects may include multiple investors who purchased the same instrument; multiple creditors of a common debtor; multiple owners of land; multiple beneficiaries of an estate; or multiple passengers in the same motor vehicle.

On occasion, there develops a falling out among such clients during the currency of the retainer for reasons which may or may not be reasonably foreseeable. There are a myriad of reasons for which a conflict may later develop. These may include: strained personal relationships; disagreement over the course of action to take in litigation; a reluctance to share otherwise confidential information; differences of opinion on a potential settlement; an inability of some clients to pay continuing costs – just to mention a few possibilities.

This author has been approached many times by multiple prospective clients seeking redress in regard to an unsuccessful investment, land or business dispute. Such disputes often take years to litigate. They are often complex. They involve all kinds of business structures and investment vehicles. Usually, there is no clear litigation path at the outset of the retainer. Rarely in these cases is a class action appropriate or a contingent fee agreement feasible.

In such cases, it is critical for the co-investors be in a position to pool their resources to retain counsel with confidence that their efforts will be sustainable under circumstances that are difficult to foresee.

In this author's respectful view, the Code of Professional Conduct for BC (the "New BC Code") which came into force in British Columbia on January 1, 2013, and in particular, the Commentary under rule 3.4-9, limits access to justice by making the obtaining of legal representation, and the long-term sustainability of legal proceedings, more tenuous for such clients.

I will first consider a number of attributes common to cases involving joint retainers, using a case from the 1990s as an example.

From the Provisions of the former Annotated Professional Conduct Handbook, Chapter 6¹ (the "Former Handbook"), I will illustrate how those provisions provided multiple clients with practical options to ensure the protection of both their interests and their access to justice in the event of a conflict arising.

I will then review relevant changes to the New BC Code and submit that the Commentary under rule 3.4-9 be either deleted or redrafted to allow clients to plan efficiently for potential conflicts in an orderly and predictable manner at the outset of a joint retainer.

¹ <http://www.lawsociety.bc.ca/page.cfm?cid=383>

A Case in Point

In the 1990's this author represented some 39 investors who had purchased shares of two closely-held British Columbia companies². Each company had a subsidiary which owned and managed a hotel in Texas. The 39 investors had collectively invested the majority of the equity capital used by the subsidiaries to purchase the hotels.

This case had a number of attributes which I have found common to investment cases where multiple clients seek a joint retainer:

1. The investors were members of the same ethnic group. Most of them attended the same temple.
2. All or almost all of the investors were friends, family members or close business associates.
3. The defendants who received the investors' funds were also members of that group and were related to some of the investors.
4. The investors had contributed radically different amounts, from \$25,000 to \$550,000, to the ventures. They also had radically different risk tolerance and ability to fund the litigation.
5. It was highly uncertain at the start what courses of action would be taken, and what the prospects were of success and, ultimately, of collection.

The case was complex and continued for four years. The 39 plaintiffs appointed a committee of three investors to oversee the litigation, provide instructions to counsel and report back periodically. The case involved oppression proceedings in B.C., the appointment of a professional Receiver-Manager, sequestration and insolvency proceedings in Texas and, with them, the appointment of U.S. counsel by several parties.

The reality of this case, as this author has found with other such files, is that the efforts and expense involved would not have been possible without the pooled resources of multiple clients. The situation was akin to that alluded to by the Law Society's Ethics Committee in its opinion of Apr. 3, 2008³:

A lawyer is proposing to represent approximately 100 clients in an action against a number of defendants arising out of an investment scheme that caused the plaintiffs to collectively lose about 6 to 7 million dollars. The losses for any one plaintiff are not sufficient to outweigh the costs of litigation but if the plaintiffs undertake a joint litigation, the costs of proceeding measured against the potential return may be economical.

Moreover, the complexity of a case and of the dynamics among clients can make it virtually impossible to predict the future course of litigation or the conflicts which might later arise amongst the investors.

²Virani v. Virani, Vancouver Registry No. A942491

³ [http://www.lawsociety.bc.ca/docs/publications/handbook/ec/08-04\(4\).pdf](http://www.lawsociety.bc.ca/docs/publications/handbook/ec/08-04(4).pdf)

In the midst of this author's case, the single-largest investor-plaintiff, wooed by the defence, terminated my firm's retainer, had himself switched to a defendant and, almost immediately thereafter, instructed his new counsel to apply to discharge me for conflict of interest. I have no doubt that the defendants thereby intended to strike a fatal blow to the plaintiffs' ability to continue the case. They knew well that the remaining plaintiffs could not afford to discharge their existing financial obligations and find money to retain new counsel. Fortunately, Macdonald J., was also alive to the defendants' tactics. Counsel was permitted to continue to act for the remaining investors and, after four years of litigation and many court appearances, the case was resolved.

This author has found that joint retainers, including the one noted above, typically involve these stark realities:

- A contingency fee agreement is unavailable due to the uncertainties of the case. A class action is also either unavailable or impractical.
- The ability of many clients to commence proceedings, and to see them through to the end, is contingent upon the involvement of others.
- For personal and practical reasons, clients in joint retainers often agree to bear costs in percentages which are disproportionate to the amounts invested.
- The vast uncertainties of the case make it difficult to predict, or to even imagine, the circumstances which might later give rise to a conflict among clients.

The Strong and the Weak

In this author's experience, clients in joint retainers fall on a vulnerability continuum. At one end of the spectrum are the "driving-force" clients who have the most money at stake, the greatest wherewithal to fund litigation, the most experience with the legal system and the strongest command of business and language. I call these "Stronger Clients".

At the other end of the continuum, Weaker Clients are inherently more vulnerable. Although they may have invested less money, they may have lost a disproportionate amount of their life savings. They rarely have the ability to pursue their claims individually or in small groups. They typically have little understanding of the legal system or how to navigate it. They often face linguistic and cultural barriers to pursuing complex litigation.

The ability to control the process creates synergies for all prospective clients. Stronger Clients are encouraged to bring along Weaker Clients who would otherwise lack the ability to seek redress. The inclusion of Weaker Clients strengthens both numbers and resources. It can also create efficiencies by lessening the disorder which can arise when multiple splinter groups each have their own counsel. On the other hand, Stronger Clients want the assurance of knowing that a single participant cannot sabotage their efforts; otherwise, they will be less likely to include Weaker Clients at the outset.

For reasons discussed below, as the New BC Code stands it will no longer be possible for lawyers to take instructions on a joint retainer that, in the event a conflict arises in future, certain clients will remain with the firm and others will be required to seek their own counsel.

In the author's view, prospective clients who are vulnerable to losing their representation will be more reluctant to allow others to participate in their litigation.

Restricting the orderly planning of clients' affairs in the event of a conflict will also make it easier for a single client with a difference of opinion to sabotage the efforts of the entire group by forcing all parties to seek new counsel in the midst of what may be a protracted and complex legal process. The result could be such a great roadblock as to effectively negate the proceedings for all participants.

The Old Handbook, Chapter 6

Under the Rules of Professional Conduct in effect prior to 2013, the Law Society required lawyers intending to jointly represent multiple clients to inform each of them of the rules of the road of which we are all familiar: the duty of undivided loyalty⁴ and the fact that confidential information must be shared among them⁵.

The Handbook then required the joint clients to select between two options in the event the lawyer may in future come across information relevant to the retainer while acting for one of the clients in a separate engagement, namely, that either the information would be shared and the joint retainer would continue, or alternatively, that the information would be maintained as confidential and the joint retainer would cease.⁶ Although covered off in all joint retainers, to the best of the writer's recollection this dilemma has never arisen in over 20 years of practice.

The Handbook then made provision for what would occur in the event of a future falling-out. It provided in Chapter 6, Rule 4(d) that the lawyer wishing to jointly represent two or more clients must, at the outset secure "the informed consent of each client (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them." The Handbook went on, in Rule 5, to set out the two courses of action which are available:

5. If a lawyer jointly represents two or more clients, and a conflict arises between any of them, the lawyer must cease representing all the clients, unless all of the clients:
 - (a) consented, under paragraph 4(d), to the lawyer continuing to represent one of them or a group of clients that have an identity of interest, or
 - (b) gave informed consent to the lawyer assisting all of them to resolve the conflict.

Otherwise put and notwithstanding the duty of undivided loyalty, Rules 4(d) and 5 permitted a lawyer, with informed consent, to act for more than one party in circumstances that *might* in the future give rise to divided loyalties⁷, providing them with options as to the orderly conduct of the file in the event such an event should arise.

⁴ Former Handbook, chapter 6, Rule 4(a)

⁵ Ibid, Rule 4(b)

⁶ Ibid, Rule 4(c)

⁷ Davies v. Pedersen 2002 BCSC 1245

Finally, Rule 6 permitted the lawyer who ceased joint representation under Rule 5 or who continued to represent one or more clients under paragraph 5(a), with the informed consent of all the clients, to resume representation of all of them after the conflict has been resolved.

The New BC Code

Rule 3.4 of the Code itself leaves open a variation of the options which existed under the Old BC Handbook:

3.4-5 Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of 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 client can be treated as confidential so far as any of the others are concerned; and
- (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.

(emphasis added)

A lawyer **must** obtain “consent” from all clients where they, having advised the clients as provided under rules 3.4-5 and the parties are content that the lawyer act.

The New BC Code then allows clients to set out their agreement on one of the two options:

3.4-8 **Except as provided by rule 3.4-9**, if a contentious issue arises between clients who have consented to a joint retainer,

- (a) the lawyer must not advise them on the contentious issue and must:
 - (i) refer the clients to other lawyers; or
 - (ii) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
 - 1. no legal advice is required; and
 - 2. the clients are sophisticated;
- (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

3.4-9 Subject to this section, **if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.** (emphasis added)

There is additional protection in the case of joint retainers where some, but not all, of the clients have a pre-existing relationship with a lawyer, requiring that the new client(s) be advised of the continuing relationship and to seek independent legal advice.⁸

⁸ New BC Code, rule 3.4-6

Consent vs Agreement

It is important to note that, under the New BC Code, “consent” is a defined term but “agree” or “agreement” is not. This may have implications on how the New BC Code is to be applied to cases referred to in rule 3.4-10 and which are the subject of this article.

As noted above, that rule provides that the clients must “consent” to a joint retainer but they may “agree” that in the event a contentious issue arises the lawyer may continue to advise one (or presumably some) of them and must refer the others out.

Specifically, pursuant to rule 1.1-1 “consent” means “fully informed and voluntary consent after disclosure

- (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or
- (b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable.

In turn, “disclosure” is defined as “full and fair disclosure of all information relevant to a person’s decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed”.

The Commentary

The Commentary under rule 3.4-2 provides that disclosure is an essential requirement to obtaining a client’s consent:

Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

It then goes on to consider the prospect of obtaining consent in advance:

Consent in Advance

A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. **A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved.** If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

(emphasis added)

On the other hand, the Commentary does not similarly set out what is meant by the term “agree” as used in rule 3.4-10, and in particular, it is not caught by the requirement of “fully informed and voluntary consent after disclosure of all information relevant to a person’s decision”.

There is good reason for this distinction. By its very nature, a joint retainer will rarely involve an actual conflict. Rule 3.4-1 provides simply that a “lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code”. Rule 3.4-2 then prohibits a lawyer from representing “a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.” Whether these conditions can ever exist in the case of an actual conflict is beyond the scope of this article.

As noted in the Commentary under Rule 3.4-1, to exist as a conflict of interest there must be “a **substantial risk** that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client...” (emphasis added)

As a result of these provisions, when a client gives “consent” to a joint retainer under rule 3.4-7, the possibility of a conflict will be only conceptual. It cannot be reasonably expected that the prospective client will anticipate the myriad of circumstances under which a conflict *might* arise in the future.

On the other hand, under rule 3.4-9 the clients are not required to offer their “consent” but only their “agreement” that in the event a contentious issue arises the lawyer may continue to advise one (or presumably some) of them and must refer the others out. In this author’s view, it is precisely due to the *prospective* nature of any conflict that the client could not possibly give “informed consent following disclosure of all material facts”.

However, the Commentary under rule 3.4-9 states explicitly otherwise:

Commentary

- (1) This rule does not relieve the lawyer of the obligation, **when the contentious issue arises**, to obtain the consent of the clients if there is or is likely to be a conflicting interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.
- (2) When entering into a joint retainer, **the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer’s continuing to represent one of them.** Consent given before the fact **may be ineffective** since the party granting the consent will not at that time be in possession of all relevant information. (emphasis added)

In this author's respectful view, the Commentary under rule 3.4-9 ignores the aforementioned distinction in terminology between the client's "consent" to the joint retainer and his/her "agreement" as to whom counsel will represent in the event a conflict arises.

For the reasons discussed above, the Commentary under rule 3.4-9, if maintained, will limit access to justice for both prospective clients considering a joint retainer, and clients who are already in joint retainer situations.

Conclusion

The Old Handbook rules permit clients in multiple retainers to order their affairs in a way which facilitates access to the legal system and allows Stronger Clients to include Weaker Clients with the comfort that they will not be forced to change counsel in the event of a later disagreement. This author's clients have frequently adopted this option.

The Commentary under the New BC Code effectively negates this option by requiring the clients either to agree *after* the conflict arises or to anticipate the precise nature of the conflict in advance. The lack of predictability will discourage the inclusion of Weaker Clients and will allow clients to use the threat of ordering their affairs as they see fit. If clients do proceed to retain counsel together, the New BC Code will facilitate the use of blackmail by individual clients to the expense of all others.

There is no unfairness in allowing multiple clients to order their affairs in this way. If there is a concern over informed consent, it can be addressed by requiring counsel to advise all clients to obtain independent legal advice before accepting a joint retainer.