What Should a Transportation Lawyer Do?

The Three C's: Competence, Confidentiality, and Conflicts




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A lawyer may experience difficult ethical dilemmas when asked to provide legal advice on cross-border transportation topics. This paper will provide practical tips for complying with the rules of professional conduct in different situations. We will focus our comparison on the American Bar Association's Model Rules of Professional Conduct ("ABA's Model Rules") and the current Law Society of Upper Canada's Rules of Professional Conduct ("LSUC Rules") in regards to *competence*, *confidentiality*, and *conflicts*.

It is important to note that the ABA's Model Rules serve as the model for the ethical rules of most states, but each state has its own set of rules of professional conduct. Also, similarly, the LSUC Rules are applicable only in the Province of Ontario because each province in Canada has its own governing body and set of rules of professional conduct. When dealing with matters within a specific state or province, a lawyer should consult the appropriate rules of professional conduct, as there may be essential differences.

A Comparison of the ABA's Model Rules and the LSUC Rules on Competence

A lawyer must be competent when providing legal advice to a client. Although this may seem obvious, the ABA's Model Rules and the LSUC Rules indicate specific qualities a lawyer must possess to meet the required standard of competency. The impact of an incompetent lawyer is serious; it could amount to a failure to properly serve the needs of the client and may even discredit the reputation of the lawyer, the lawyer's firm, and the justice system.

The ABA's Model Rules and the LSUC Rules contain specific provisions entitled "competence." The ABA's Model Rule 1.1 reads:

> ***Competence***
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[1]

The commentary to ABA's Model Rule 1.1 provides:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.[2]

The LSUC Rule 2.01(2) reads:

> ***Competence***
>
> (2) A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.[3]

The LSUC Rule 2.01(1) defines "competent lawyer" as:

> ***Definitions***
>
> 2.01 (1) In this rule "competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each

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matter undertaken on behalf of a client including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practices,

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including, (i) legal research, (ii) analysis, (iii) application of the law to the relevant facts, (iv) writing and drafting, (v) negotiation, (vi) alternative dispute resolution, (vii) advocacy, and (viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and in spirit with the Rules of Professional Conduct,

(h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

(i) managing one's practice effectively,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and

(k) adapting to changing professional requirements, standards, techniques, and practices.[4]

There is a slight difference in the wording of the ABA's Model Rule and the LSUC Rule, but the principle articulated is the same. Essentially, a lawyer is expected to meet a certain level of competence when performing services. The definition of "competent lawyer" in the LSUC Rules provides insight into the qualities a lawyer is expected to possess before undertaking a matter on behalf of a client.

A Discussion of the Competence Rules and their Meaning for a Transportation Lawyer on a Cross-Border Transaction

As a member of the legal profession, a lawyer is perceived by clients as being capable in the practice of law. A client is entitled to assume that the lawyer has the ability to deal with that client's legal matters.[5] The duty of competence means more than the "formal qualification to practice law"[6] and "involves more than an understanding of legal principles."[7] A lawyer who undertakes a particular matter for a client must be competent to handle the matter or must be "able to become competent without undue delay, risk or expense to the client."[8]

Consider the following example: a lawyer in the United States is retained by an insurance company to defend a negligence claim in Ontario against its insured; the lawyer is also asked to deal with the insured's motor vehicle administrative hearing and criminal prosecution, both of which are proceedings in Ontario.[9] Are there any ethical issues regarding competence to be resolved?

The pertinent part of the commentary of LSUC Rule 2.01 states:

> A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.
>
> A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.
>
> In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.[10]

Similarly, the commentary of ABA's Model Rule 1.1 state the following:

> Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.
>
> The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances,

> including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.[11]

After considering this commentary, it is advisable for a lawyer in any circumstance to identify one's limitations and if any are identified, to so advise one's client in writing. A lawyer may continue to act for the client if the lawyer determines she is capable of learning the information or she can consult a qualified person who has the requisite expertise.

In the transportation industry, in particular, where issues often cross borders, it is advisable for a lawyer to receive input from other counsel in order to understand the laws of other jurisdictions, since they differ significantly. For example, in the United States, the *Omnibus Transportation Employee Testing Act of 1991* requires transportation industry employers with employees in "safety-sensitive" positions, such as commercial drivers, to undertake both drug and alcohol testing.[12] Employer required drug and alcohol testing has been upheld by the United States Supreme Court.[13]

In contrast, in Canada, employers with drug testing policies have been successfully challenged by individuals using human rights legislation, employment standards legislation, privacy legislation, and the *Canadian Charter of Rights and Freedoms*.[14] The issue becomes particularly complicated for the transportation sector. The United States federal motor carrier safety regulations, which require a workplace drug and alcohol policy, have been extended to drivers of Canadian trucking companies who perform cross-border long haul carriage of goods; consequently, Canadian trucking companies conducting business in the United States must develop drug and alcohol testing policies which comply with both United States and Canadian laws and, correspondingly, a United States trucking company which has employees based in Canada may not be able extend its domestic policies to its international business.[15]

Therefore, it is important for a lawyer to recognize that while one may be competent to practice and provide advice in one's own jurisdiction, the cross border nature of the transaction may mean one is not competent to act on the entire transaction. It is essential for a transportation lawyer to establish a network of trusted relationships with counsel in other jurisdictions so that one can reach out for assistance when needed.

Another interesting consideration is the impact of technology on the duty of competence. The commentary for ABA's Model Rule 1.1 includes the language: "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...."[16] Although similar language is not found in the LSUC Rules, it raises an interesting question: does technology such as social media websites, the latest mobile devices and/or the "cloud" make it easier or more difficult to be a "competent lawyer"?[17] While a lawyer may utilize the latest technology to her benefit in performing legal services, this Rule also obliges lawyers to learn about new technology, to understand the risks related to the technology, and to implement appropriate protection measures. For example, this issue may arise when one considers how the latest technology may affect the confidentiality of a client's information. A lawyer must consider her ethical obligation to protect information that is stored on a smartphone or in the "cloud."[18] It is important that a lawyer remain competent by ensuring that she has the knowledge and skills required to meet her client's needs. This can be achieved through professional development courses or improved practice management.

We conclude this portion of the paper with ten tips for a practicing transportation lawyer when thinking about competence. A lawyer should:

1. Constantly evaluate the scope of one's legal knowledge and skills.
2. Be alert to recognize any lack of competence for a specific task.
3. Maintain open communication with one's client.
4. Manage the client's expectations.
5. Develop connections for referrals and/or advice.
6. Keep abreast of changes in the law and its practice, including technological changes.
7. Know the pitfalls of one's practice.
8. Ensure that one differentiates between the provision of legal and business advice.
9. Avoid bold or confident assurances to the client.
10. Obtain client instructions in writing.

A Comparison of the ABA's Model Rules and the LSUC Rules on Confidentiality

Confidentiality is a fundamental part of the lawyer-client relationship. For a lawyer to effectively serve a client, the lawyer must obtain all the information relevant to the client's matter. There must be "full and unreserved communication" between the lawyer and his or her client.[19]

The ABA's Model Rule 1.6(a) addresses confidentiality of information. It provides as follows:

> ***Confidentiality of Information***
>
> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).[20]

The LSUC Rule 2.03(1) reads:

> ***Confidential Information***
>
> 2.03 (1) A lawyer at all times shall hold in strict confidence

> all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.[21]

The wording of the provisions are slightly different but the elements are the same: (i) a lawyer must hold in confidence; (ii) any information; (iii) relating to the representation of a client.

The duty of confidentiality is not absolute. Under both the ABA's Model Rules and the LSUC Rules, a lawyer may reveal confidential information if the client explicitly authorizes the disclosure or if the client's authority to disclose the information is implied. However, it is prudent for a lawyer to always obtain a client's prior written consent to disclose confidential information for any purpose.

The ABA's Model Rule 1.6(b) sets out specific circumstances when a lawyer may disclose information about a client:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[22]

Similarly, the LSUC Rule 2.03(2) to (5) offers circumstances for the "justified or permitted" disclosure of confidential client information:

> ***Justified or Permitted Disclosure***
>
> (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.
>
> (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.
>
> (4) Where it is alleged that a lawyer or the lawyer's associates or employees are
>
> (a) guilty of a criminal offence involving a client's affairs,
>
> (b) civilly liable with respect to a matter involving a client's affairs, or
>
> (c) guilty of malpractice or misconduct,
>
> a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.
>
> (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.[23]

The ABA's Model Rule provides more grounds for disclosure of confidential client information than the LSUC Rule. In addition to the grounds provided by the LSUC Rule, the ABA's Model Rule allows for disclosure to prevent crime or fraud,[24] to secure legal advice about compliance with the Rules,[25] and to detect and resolve conflicts of interest.[26] The LSUC Rule contains one additional ground for disclosure and that is to establish or collect a lawyer's fee.[27]

It is noteworthy that the ABA's Model Rule 1.6(c) discusses "inadvertent" or "unauthorized" disclosure of confidential information:

> (c) A lawyer shall make reasonable efforts to prevent the

> inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[28]

This imposes the additional precaution that lawyers must make "reasonable efforts" to prevent accidental disclosure. There is no corresponding provision or commentary in the LSUC Rules.

A Discussion of the Confidentiality Rules and their Meaning for a Transportation Lawyer on a Cross-Border Transaction

Confidentiality versus Privilege

A lawyer's ethical duty of confidentiality is often confused with the client's legal right of privilege; however, they are distinct. Privilege is the right of one's client and "an evidentiary rule of law that refers to the legal right of an individual to withhold information from an opposing party, a court, a tribunal, and investigation, including law enforcement officials."[29] A lawyer has a duty to protect a client's right to privilege, but one must remember that the privilege is the right of the client, and it applies to defined information and evidence. The duty of confidentiality, however, is an ethical obligation of the lawyer, and it is much broader than the client's right of privilege.[30] It covers all information obtained by a lawyer either directly from the client or from some other source, and it applies to all information in relation to the scope of the retainer.[31] It also applies regardless of whether others share the knowledge.[32] Confidential information must remain confidential throughout the representation and afterwards; it is perpetual.[33] Privilege, on the other hand, can be waived by a client.

Consider the following example: a United States parent company has a Canadian subsidiary operating in Ontario. The Canadian subsidiary company has been sued and a lawyer from Ontario has been retained to act on its behalf. The lawyer in Ontario has an on-going relationship with in-house counsel to the parent company, located in the United States. If the in-house U.S. counsel calls the lawyer in Ontario directly to discuss the subsidiary's litigation and to provide instructions regarding the conduct of the litigation, can the lawyer in Ontario discuss this file without breaching her confidentiality obligation to the Canadian subsidiary? Is the information of the U.S. parent privileged or confidential and different from that of the Canadian subsidiary? Who has privilege: the United States parent company, or the Canadian subsidiary, or both?

These are difficult questions: It is fundamental that the lawyer in Ontario understands who her client is – is it a joint engagement or does she only represent the Canadian subsidiary? What is the nature of the "ongoing relationship" with the parent company? Further, the Ontario lawyer needs to understand who has authority to issue instructions. The issue is probably best dealt with through an engagement letter which should clearly state who is the client(s) and who will be instructing the lawyer. If no such engagement letter exists, the lawyer should clarify, in writing, the identity of the client, and who the client has designated to instruct the lawyer, as well as who the lawyer may communicate with and yet still maintain attorney-client privilege. All of these issues should be clearly delineated by the lawyer at the beginning of the lawyer-client relationship.

Deemed Undertaking Rule and Confidentiality Orders

Because confidential information often has significant commercial value to clients, a transportation lawyer handling a cross-border matter must not only fulfill one's ethical duty to keep the information confidential, but must take steps to protect confidentiality of evidence, such as business records, and deposition testimony. In Ontario the 'deemed undertaking rule' applies which prevents parties and their lawyers from using evidence obtained on discovery (deposition) "for any purposes other than those of the proceeding in which the evidence was obtained."[34] There is not a corresponding rule in the United States.

In fact, in the United States, the rule is the opposite. A party is allowed to use documents obtained in discovery unless the party being discovered obtains an order prohibiting such use. Such an order is difficult to obtain in Canada because Canadian courts embrace the principle of a public courtroom and generally rule it "unnecessary and unsatisfactory" to issue protective or confidentiality orders covering discovery documents, since such protection already exists.[35] This is an important difference that lawyers advising on cross-border matters in Canada and the United States must know as part of their ethical obligations to protect a client's confidential information. An Ontario lawyer representing a client who may have evidence relevant to a claim in the United States must understand how the client's evidence may be used outside of the court process, and a United States lawyer needs to understand the restrictions placed on any documents and evidence obtained through the litigation process in Canada.

Confidential Information and Privacy Legislation

In Canada, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") is a federal statute which governs how consumer information is to be used, collected, and disclosed in commercial activities. PIPEDA does not apply if an organization is covered by provincial privacy schemes which are deemed substantially similar to PIPEDA.[36] However, it is significant that the Canadian federal and provincial laws do not prohibit a Canadian private sector enterprise from transferring personal information across borders, including into the United States, where certain obligations have been met.[37]

An important concern for companies in Canada is that authorities in the United States could use the *Patriot Act*, or other similar legislation, to obtain personal information of Canadians that is located in or accessible from the United States.[38] Consider the following example: a Canadian subsidiary company has a parent company in the United States and that parent is the target of investigation by authorities in the United States. Any confidential personal information stored on a mutual server located in the United States, which would be protected by PIPEDA in Canada, is not accorded such protection in the United States. There is conflicting legislation: in Canada, there is an obligation *not* to disclose personal information under PIPEDA, but in the United States, there is an obligation to disclose the personal information under the *Patriot Act*.

It is noteworthy that privacy regulators in Canada do require companies to notify affected individuals if they will be transferring individuals' personal information to a service provider outside of Canada; however, this is typically done through implied consent in the form of a statement in a corporate privacy policy.[39]

We conclude this portion of the paper with ten tips for a practicing transportation lawyer when thinking about confidentiality. A lawyer should:

1. At the commencement of any work, identify the client clearly: i.e. parent and/or subsidiary?
2. Establish in writing the method by which the client will instruct the lawyer.
3. Ensure that all emails contain the appropriate language to protect the contents therein if inadvertently disclosed.
4. Establish in writing the appropriate reporting method to be followed by the lawyer to protect privilege.
5. Ensure there is full and unreserved communication with the client.
6. Ensure any information provided by the client is protected as being confidential.
7. Only disclose confidential client information with the client's explicit written consent, unless a specific exemption applies.
8. Understand the difference between confidentiality and privilege.
9. Understand the difference between the effects of the deemed undertaking rule (Ontario, Canada) and confidentiality/protective orders (the United States).
10. Discuss with corporate clients the implications and short-comings of applicable privacy legislation.

A Comparison of the ABA's Model Rules and the LSUC Rules on Conflicts of Interest

A conflict of interest is an incompatibility that may have a damaging effect on the lawyer's ability to fulfill his/her obligations to the client. The LSUC Rule 2.04(1) defines conflict of interest as follows:

> ***Definition***
>
> 2.04 (1) In this rule a "conflict of interest" or a "conflicting interest" means an interest
>
> (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
>
> (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.[40]

Although there is no corresponding definition in the ABA's Model Rules, the commentary for the Rules provide guidance as to what qualifies as a conflict of interest. For instance, the commentary for ABA's Model Rule 1.7 says that for a lawyer, the competing interest that causes the conflict may come from a variety of sources including another client's interest, a lawyer's own interest, the court's interest, and so on.[41]

It is difficult to directly compare the ABA's Model Rules and the LSUC Rules regarding conflicts of interest because the concepts are organized differently in each set of rules. The ABA's Model Rules divide conflicts of interest into two categories: current clients and former clients. The LSUC Rules are divided into three categories: avoidance of conflicts of interest, acting against the client, and joint engagements.

The LSUC Rule 2.04(2) to (3) provides that a lawyer has a general duty to avoid becoming involved in a conflict of interest. It reads:

> ***Avoidance of Conflicts of Interest***
>
> (2) A lawyer shall not advise or represent more than one side of a dispute.
>
> (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.[42]

The equivalent provision in the ABA's Model Rules is Rule 1.7 which reads:

> ***Conflict of Interest: Current Clients***
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict

of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.[43]

We point out the common feature in both the ABA's Model Rule and the LSUC Rule that a lawyer can, in many instances, continue to act for a client or prospective client, despite a conflict of interest, with the affected clients' informed consent. This will be discussed in further detail below.

There is further parallel between the LSUC Rule 2.04(4) to (5) and the ABA's Model Rule 1.9. They both prohibit a lawyer from acting against clients in the same matter or a related matter. The LSUC Rule 2.04(4) to (5) reads:

Acting Against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

unless the client and those involved in or associated with the client consent.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.[44]

In comparison, the ABA's Model Rule 1.9 provides that:

Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[45]

The general principles from the above Rules suggest that a lawyer must recognize a conflict of interest, take steps to avoid the conflict of interest, try to resolve the conflict of interest if one arises, and if unavoidable, take appropriate steps.

A Discussion of the Conflict of Interest Rules and their Meaning for a Transportation Lawyer on a Cross-Border Transaction

Recent Supreme Court of Canada Decision on Conflicts of Interest

The Supreme Court of Canada recently released its decision in *Canadian National Railway Co v.*

McKercher; it discusses a lawyer's duties of loyalty to one's client, which includes a lawyer's duty to avoid conflicting interests, a duty of commitment to the client's cause, and a duty of candour. In this case, the Canadian National Railway Company ("CNR") was an existing client of McKercher LLP which was acting for CNR on a variety of matters. McKercher LLP accepted an engagement to act against CNR in a $1.75 billion class action without advising CNR. Immediately following acceptance of the engagement for the class action, McKercher LLP terminated its engagement with CNR. CNR applied for an order removing McKercher LLP as solicitor of record in the class action lawsuit.[46]

The Supreme Court of Canada upheld its general "bright line" rule that: "a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent – regardless of whether the client matters are related or unrelated."[47] If the "bright line" rule is not applicable, then the applicable question is: "whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would materially and adversely affect by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."[48] The Supreme Court of Canada concluded that McKercher LLP's concurrent representation of CNR and the class action fell within the scope of the bright line rule and thus there was a conflict of interest.[49]

Consider the following example: A transportation lawyer wants to act for a major trucking company, A-Corp, in a new matter. B-Corp, a current client of the lawyer's firm, is involved in that matter. The lawyer's firm is *not* acting for B-Corp on that new matter, but does act for B-Corp on other unrelated matters. Can the transportation lawyer accept an engagement with the trucking company, A-Corp? What if A-Corp and B-Corp are direct competitors? In the *Canadian National Railway Co v. McKercher LLP* case, the matters were unrelated and yet the Supreme Court held that the "bright line" test applied. The lawyer in our example could obtain consent of both the clients to act on the new unrelated matter. Alternatively, the lawyer could act on the new unrelated matter without consent if two questions are satisfied:

1. Are A and B's immediate legal interests directly adverse in the new matter?[50]
2. Is it nevertheless unreasonable for B to expect the lawyer's firm to not act against it?[51]

Upon accepting a new client and/or new matter, a lawyer must be extremely cautious to ensure there are no conflicting interests, including potential business interests.

Dealing with a Conflict of Interest

As already mentioned, the ABA's Model Rules and the LSUC Rules outline circumstances where, even though there is a conflict of interest, a lawyer is permitted to obtain "informed consent" of the client to act or continue to act in a matter. The ABA's Model Rule 1.0 defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of the reasonably available alternatives to the proposed course of conduct."[52] In other words, to obtain informed consent, a lawyer must disclose all pertinent information regarding the conflict of interest to the client or prospective client and then must obtain their consent to act in the matter.[53] A situation may arise where it is impossible for a lawyer to make full disclosure without revealing information that is confidential. In this circumstance, the lawyer must advise the client that there is a conflict of interest and refuse to accept the retainer.

Moreover, we should point out that part of the commentary for the LSUC Rules suggests that even with a client's consent, a lawyer should be wary of potential conflicts:

> Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.[54]

A lawyer should be cautious if there is a potential or actual conflict of interest, even with both client's "informed consent."

In the ABA's Model Rules and the LSUC Rules, there are circumstances where the client's informed consent is insufficient and the client must receive advice from an independent legal advisor regarding the matter or transaction before the lawyer may proceed. For example, the ABA's Model Rule 1.8(a)(2) provides a lawyer must not enter into a business transaction with a client unless the client seeks independent legal advice; the ABA's Model Rules 1.8(h)(1) and (2) provide that a lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client has received independent legal advice.[55] The LSUC commentary states that:

> While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.[56]

The independent legal advisor is to have no connection to the client's matter or the lawyer. He or she should be objective and unbiased.

If the conflict of interest is unavoidable, the lawyer must either refuse to act at the outset or terminate

the engagement and withdraw from representing the client. It would be advisable for the lawyer to refer the client to another lawyer capable in the area related to the matter.

Conflicts Arising From Representing Institutional Clients

A conflict of interest may also arise when representing a corporation and related parties. Although a corporation is a distinct legal entity, it cannot act except through its shareholders, directors, officers, or employees.[57] Thus, a lawyer must be careful to determine the identity of her client and who is to provide instructions. The ABA's Model Rule 1.13 sets out the ethical obligations of a lawyer when a client is an organization and reads in part:

> ***Organization as Client***
>
> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

The equivalent LSUC Rule is Rule 2.02(1.1) which reads:

> ***When Client an Organization***
>
> (1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Conflicts in relation to corporations typically arise when the lawyer acts jointly for the corporation and its immediate constituency, or when the lawyer becomes aware of criminal activity or fraud committed by the corporation.

Consider the following example: a lawyer in the United States is acting for a parent company that has a subsidiary in Ontario. The parent company has just purchased the Canadian subsidiary and has found out that it has been conducting business in Cuba. The lawyer often does legal work for the subsidiary either himself or by instructing local counsel, through the instructions of the parent company. The parent company seeks instructions from the lawyer on how to stop its subsidiary's business operations in Cuba. The United States' *Cuban Assets Control Regulations* specifically prohibit foreign entities that are owned and controlled by a United States person from doing business with Cuba (i.e. a Canadian subsidiary).[58] However, this creates a conflict of interests, because the laws governing the subsidiary in Canada are different.

In Canada, the *Foreign Extraterritorial Measures (United States) Order, 1992* requires Canadian corporations and their directors/officers to give notice to the Attorney General of Canada of any "directive instruction, intimation of policy or other communication relating to an extra-territorial measure of the United State in respect of trade or commerce between Canada and Cuba..."[59] There is also an explicit prohibition that says "No Canadian corporation and no director, officer, manager or employee in a position of authority of a Canadian corporation shall, in respect of any trade or commerce between Canada and Cuba, comply with an extraterritorial measure of the United States...."[60]

How is the lawyer to proceed? The parent company and subsidiary company are required to abide by conflicting laws, and thus, the lawyer should not be advising both companies and cannot properly instruct local counsel. Consider whether the lawyer can continue to act on behalf of the parent company with respect to this issue or must he or she withdraw from acting for both parties on the matter.

We conclude this portion of the paper with ten tips for a practicing transportation lawyer when thinking about conflicts of interest. A lawyer should:

1. Identify any potential or existing conflicts of interest.
2. Perform extensive and thorough conflict checks and/or conflict screens prior to accepting a retainer.
3. Always obtain a clear engagement which sets out the work to be completed and the clear identity of the client.
4. Close matters and clearly identify the end of the engagement as soon as appropriate.
5. Notify an existing client of any conflict of interest and, if

necessary, obtain the client's written and informed consent to act for another party and to continue acting for the existing client.

6. Refuse to act or withdraw, if there is an uncontestable conflict of interest.
7. Be particularly cautious when representing a corporation and its shareholders or directors.
8. When a potential conflict is identified; determine the nature of the retainer, and ascertain the identities of the persons to whom the potential conflict may apply.
9. When dealing with a Conflicts Committee, ensure the presentation of the information is precise, and clear.
10. Accept a conflict once identified and avoid creative efforts to circumvent the conflict of interest guidelines and rules.

The ethical considerations facing transportation lawyers are extensive and complex. We have focused our discussion on three key rules: competence, confidentiality and conflicts. However, there are many other ethical issues that may face a transportation lawyer with a cross-border transaction. We have examined the American Bar Association's Model Rules of Professional Conduct and the Law Society of Upper Canada's Rules of Professional Conduct, as well as suggested practical ways of handling different situations as they arise.

Endnotes

1. American Bar Association, *Model Rules of Professional Conduct* (Chicago: American Bar Association, 2013) at Rule 1.1 ["ABA Model Rules"].
2. Ibid at Commentary for Rule 1.1.
3. Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2013) at Rule 2.01(2) ["LSUC Rules"].
4. Ibid at Rule 2.01(1).
5. Ibid at Commentary for Rule 2.01(1).
6. Canadian Bar Association, *Code of Professional Conduct* (Ottawa: the Canadian Bar Association, 2009) at Commentary for Chapter II ["CBA Code"].
7. Ibid at Commentary for Chapter II.
8. LSUC Rules, *supra* note 3 at Commentary for Rule 2.01(1).
9. Teresa A. Gruber and Noelle M. Natoli-Duffy, "Ethical Considerations Facing Transportation Attorneys" (2013 Transportation Seminar: The Harmonie Group, May 29, 2013), online: < https://www.harmonie.org/user_documents/Arkansas2013_FINAL.pdf>.
10. LSUC Rules, *supra* note 3 at Commentary for Rule 2.01(1).
11. ABA Model Rules, *supra* note 1 at Commentary for Rule 1.1.
12. 49 U.S.C. §31306; 49 CFR Part 40.
13. See *Skinner v. Railway Labour Executives' Association*, 489 US 602 (1989); see also *National Treasury Employees Union v. Von Raab*, 109 S Ct 1384 (1989).
14. Nancy Holmes, Karine Richer, Law and Government Division, "Drug Testing in the Workplace" (February 28, 2008), online: Parliament of Canada < http://www.parl.gc.ca/content/lop/researchpublications/prb0751-e.htm#endnote3>.
15. Ibid.
16. Ibid.
17. American Bar Association, "The Duty of Competence in the 21st Century" (December 2013), online: Your ABA < http://www.americanbar.org/newsletter/publications/youraba/201312article04.html>.
18. Ibid.
19. LSUC Rules, *supra* note 3 at Commentary for Rule 2.03(1).
20. ABA Model Rules, *supra* note 1 at Rule 1.6(a).
21. LSUC Rules, *supra* note 3 at Rule 2.03(1).
22. ABA Model Rules, *supra* note 1 at Rule 1.6(b).
23. LSUC Rules, *supra* note 3 at Rule 2.03(2)-(5).
24. ABA Model Rules, *supra* note 1 at Rule 1.6(b)(2)-(3).
25. Ibid at Rule 1.6(b)(4).
26. Ibid at Rule 1.6(b)(7).
27. LSUC Rules, *supra* note 3 at Rule 2.03(5).
28. ABA Model Rules, *supra* note 1 at Rule 1.6(c).
29. Law Society of Upper Canada, "Confidentiality versus Privilege," online: Practice Management Topics <http://www.lsuc.on.ca/ConfidentialityVsPriviledge/>; see also, Center for Professional Responsibility, "Confidentiality, Privilege: A Basic Value in Two Different Approaches" (May, 2007), online: American Bar Association <http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.pdf>.
30. Ibid.
31. Ibid.
32. Ibid.
33. Ibid.
34. *Rules of Civil Procedure,* RRO 1990, Reg 194 at Rule 30.1.01(3).
35. *Robinson v. Medtronic Inc*, 2011 ONSC 3663.
36. *Personal Information Protection and Electronic Documents Act*, SC 2000, c.5. Quebec, British Columbia, and Alberta have been determined to have similar legislation.

37. Gowling Lafleur Henderson LLP, "Doing Business in Canada – Privacy Law" (September 2013), online: Gowlings <http://www.gowlings.com/services/dbic/?p=15#4> ("Privacy Law").
38. *USA Patriot Act,* (U.S. H.R. 3162, Public Law 107-56), Sec. 215 and 505.
39. Privacy Law, *supra* note 37.
40. LSUC Rules, *supra* note 3 at Rule 2.04(1).
41. ABA Model Rules, *supra* note 1 at Commentary for Rule 1.7.
42. LSUC Rules, *supra* note 3 at Rule 2.04(2)-(3).
43. ABA Model Rules, *supra* note 1 at Rule 1.7.
44. LSUC Rules, *supra* note 3 at Rule 2.04(4)-(5).
45. ABA Model Rules, *supra* note 1 at Rule 1.9.
46. *Canadian National Railway Co v. McKercher LLP*, 2013 SCC 39 at paras 1-5.
47. Ibid at para 8.
48. Ibid.
49. Ibid at para 9.
50. Ibid at para 32.
51. Ibid at para 37.
52. ABA Model Rules, *supra* note 1 at Rule 1.1.
53. Law Society of Upper Canada, "Consent," online: Practice Management Topics <http://www.lsuc.on.ca/with.aspx?id=2147490121>.
54. LSUC Rules, *supra* note 3 at Commentary for Rule 2.04(7).
55. ABA Model Rules, *supra* note 1 at Rule 1.8(a) and (h).
56. LSUC Rules, *supra* note 3 at Rule 2.04(3).
57. ABA Model Rules, *supra* note 1 at Commentary for Rule 1.13; LSUC Rules, *supra* note 2 at Commentary for Rule 2.01(1.1).
58. *Cuban Assets Control Regulations*, 31 CFR 515.
59. *Foreign Extraterritorial Measures (United States) Order, 1992*, SOR/92-584 at section 3.
60. Ibid at section 5.