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Confidentiality and Context: Lawyers' obligations of confidentiality and loyalty when acting in both lawyer and non-lawyer roles for a client

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Cases Considered:

Kent v. Martin, 2011 ABQB 298

Introduction

Lawyers owe clients a duty of confidentiality, and also a fiduciary obligation to act in furtherance of their clients' legal interests. The duty of confidentiality and the duty of loyalty are related. Breach of a client's confidences without the client's consent obviously has the potential to undermine accomplishment of the client's legal objectives. The ability of a client to repose confidence in her lawyer has been identified by the Supreme Court as important to permit the lawyer to provide "sound legal advice" to that client (*Smith v. Jones* [1999] S.C.J. No. 15 at para. 46).

The specific obligations arising from lawyer duties of confidentiality and loyalty can be complex, however, particularly when a lawyer acts in more than one capacity for a client, and where the client's interests may be both legal and non-legal. A recent Alberta case highlights these issues.

In *Kent v. Martin*, 2011 ABQB 298, the Court decided an issue related to the ability of a party to an action, Arthur Kent, to use information obtained in examinations for discovery to join his former attorney and Electoral Agent as a defendant in that action, and also to report her to the Law Society of Alberta. The case deals mostly with the scope of the implied undertaking rule, which prohibits the use of discovery testimony for a collateral purpose, and that aspect of the judgment will be discussed here. My main emphasis will be, however, on the risks that lawyers face when they both represent a client as counsel and provide services to the client in some other capacity, such as agent for the client or election campaign volunteer. In such circumstances, to what does the lawyer's duty of loyalty attach? Only to the client's specific legal goals, or to the broader matter on which the lawyer is acting, in both a legal and non-legal capacity? What information obtained by the lawyer is subject to the duty of confidentiality, and what is not? What information is privileged?

Using a hypothetical example inspired by the case (since the case does not itself provide us with any certain information about what happened), I will provide some tentative answers to these questions. My main contention will be that when a lawyer acts for a client in a legal capacity, then as a general rule the totality of the lawyer's relationship with the client will be governed by the lawyer's legal and ethical duties, even if some aspects of that relationship do not relate to the role of the lawyer *qua* lawyer. This general rule will not extend to every duty a lawyer owes to a

client – a lawyer is likely to be able to withdraw from a non-lawyer role, e.g. – and not every duty will apply to its full extent to the non-lawyer role. Any definitive conclusion on the lawyer's duties will depend on the particular facts and circumstances of the dealings between the lawyer and client. On the key duties of confidentiality and loyalty, however, this general rule will normally apply. When a lawyer-client relationship exists, a lawyer should not disclose any information learned from that client, and should not act contrary to the client's interests, even if the information was provided outside of the lawyer-client relationship, or even if the client interests relate more to the non-legal than to the legal aspect of the relationship.

Summary of the Decision

In the winter of 2008 Arthur Kent ran as a Progressive Conservative candidate in the Alberta election. His official Agent under the *Election Act*, R.S.A. 200, c. E-1, and his legal counsel, was Kristine Robidoux Q.C., a Calgary lawyer. On February 13, 2008, during the election campaign, Don Martin published a column in the Calgary Herald and National Post that was critical of Mr. Kent and cited anonymous sources from Mr. Kent's campaign team. Those sources were reported in the article as having made critical comments about Mr. Kent's character, his attitude to the campaign, and his conduct of the campaign. Mr. Kent was unsuccessful in the election, and in July 2008 sued Don Martin for defamation. During his examination for discovery in that action Mr. Martin "voluntarily disclosed one of his journalist sources for the impugned article: Kristine Robidoux, Q.C." (*Kent v. Martin*, 2011 ABQB 298 at para. 7).

On learning that the source of Mr. Martin's comments was apparently his own counsel and official Agent, Mr. Kent filed an action against Ms. Robidoux. That action was dismissed since its prosecution would put Mr. Kent in violation of the implied undertaking rule (*Kent v. Martin*, 2010 ABQB 479). The implied undertaking rule, as outlined by the Supreme Court in *Juman v. Doucette*, 2008 SCC 8, requires that a party to litigation only use information learned in that litigation for the litigation itself. The party cannot use the information for any other purpose "unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges" (para. 10, citing *Juman v. Doucette* at para. 4). The Court of Queen's Bench declined to vary the scope of the undertaking so as to allow Mr. Kent's lawsuit against Ms. Robidoux to proceed.

Mr. Kent then sought to add Ms. Robidoux to his action against Don Martin and also applied for an exemption to the implied undertaking rule so as to allow him to report Ms. Robidoux to the Law Society of Alberta. He was permitted to do so. Mr. Justice D.K. Miller noted that the implied undertaking rule is not absolute, although it "should only be set aside in exceptional circumstances" (2011 ABQB 298 at para. 15). He noted that in this case there are competing values. Don Martin chose not to protect his journalist source. If the allegations are true then Mr. Kent's "own lawyer appears to have breached solicitor-client privilege" which would deny her protection as a journalist "source" (para. 22). Here Mr. Kent is no longer using the information "for an extraneous purpose but rather to advance his original claim in which the discovery took place" (para. 23). On these facts, the implied undertaking should be set aside. The public interest outweighs those that the implied undertaking serves, the information is being used in the same action, and there is "no prejudice to the original examinee" (para. 25).

With respect to the Law Society, Ms. Robidoux did not oppose the disclosure of the information to the Law Society. Counsel for Mr. Kent argued that disclosure to the Law Society was necessary to ensure that lawyers do not receive immunity simply because breach of confidentiality is revealed in an undertaking. Justice Miller held that the public interest in

reporting outweighed the public interest in maintaining the implied undertaking. There is a public interest in lawyer regulation and no prejudice to the original defendants. In conclusion he noted that "Robidoux may very well face some sanction for her actions, but so does every lawyer if they are found to breach solicitor-client privilege" (para. 31).

Analysis

Implied Undertaking

In the Supreme Court's decision in *Juman v. Doucette*, 2008 SCC 8, the Court refused to allow the police and the Attorney General to access discovery transcripts that might indicate a crime. The Court held that a party to an action may be permitted to apply to the court for permission to provide the information to the police, or that the police may obtain a search warrant for transcripts, but that the implied undertaking rule prohibited information from being disclosed outside of the context of the litigation without a prior court order.

Justice Miller's judgment properly applies *Juman*. He weighs the appropriate interests and determines that, in the circumstances, disclosure is justified. Notably the information was not disclosed by Ms. Robidoux herself, so some of the interests against self-incrimination and in favour of ensuring a party's willingness to disclose, simply did not apply to these circumstances.

Further, the public interest in not fettering law society regulation of lawyer misconduct was properly recognized by Justice Miller. In a 2008 decision of the Saskatchewan Court of Appeal, *Law Society of Saskatchewan v. Merchant*, 2008 SKCA 128, the Court held that solicitor-client privilege could be breached in a disciplinary proceeding, even without the privilege holder's consent. Justice Miller's decision seems consistent with the weight given to the integrity of lawyer regulation in that Saskatchewan judgment.

Lawyer obligations

At this point in time what Ms. Robidoux did or did not disclose is not yet established, and nor has the accuracy of Mr. Martin's statements been tested in court. The facts provided in the judgment are minimal, and provide no information about, for example, the work that Ms. Robidoux did for Mr. Kent. Therefore, while I am interested in considering the questions about lawyer obligations that the case seems to raise, I do not want to engage in unwarranted speculation about Ms. Robidoux's conduct. To avoid that result but to allow meaningful discussion I am going to construct a related hypothetical on which I can base the rest of my analysis:

> Lawyer AB agrees to act as an electoral Agent and lawyer for CD. She signs CD's papers permitting him to run, and provides him with advice as to other requirements he must fulfill as a candidate for election. The legal circumstances are relatively uncomplicated, and much of AB's time is spent on election matters similar to those engaging any other campaign volunteer – how to maximize CD's chances of getting elected. The campaign goes poorly. CD seems too focused on his personal circumstances, insensitive to party dynamics and unwilling to focus on the matters likely to get him elected. Out of frustration and to protect the interests of the party, with which she is also concerned, AB has a conversation with a journalist. In it she reveals that she views CD as self-centered, that he is frustrating his campaign team and that he

has insisted on talking about issues that the electorate doesn't care about, such as foreign affairs.

On this example, what has AB done wrong? She can argue, contrary to the suggestion of Justice Miller, that she has not violated solicitor-client privilege, nor her duties of confidentiality and loyalty. In order to be privileged, information must be given to a lawyer for the purpose of obtaining legal advice (*R. v. Campbell*, [1999] 1 S.C.R. 565). It cannot be simply something which a lawyer observes – e.g., if a lawyer witnesses a client having a car accident what the lawyer sees is not privileged (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18). And it cannot be information given to the lawyer in a non-lawyer capacity. In *Nova Scotia Real Estate Commission v. Lorway*, [2009] N.S.J. No. 527 (N.S.C.C.), for example, the Nova Scotia Supreme Court held that information held by lawyers acting as real estate agents was not privileged. AB might even argue that she has not violated confidentiality, since information provided to a lawyer who is not acting in a legal capacity – e.g., where the lawyer is consulted "off the cuff" for his "two cents worth" – may also not be subject to any duty of confidentiality (*Cushing v. Hood*, 2008 NSCA 47). Finally, she may argue that while her comments were almost certainly detrimental to CD's chances of being elected, they do not diminish the *legal* interests which she was retained to protect – i.e., his satisfaction of the legal prerequisites to be met by an electoral candidate. What she has done is akin to the lawyer for Chrysler driving a Ford; it may not be good for the company, but it does not injure any interests that the lawyer was retained to protect.

The arguments with respect to privilege appear sound. In part because the protection given to solicitor-client privilege is so strong, courts have been somewhat restrictive about the circumstances that will give rise to a claim of privilege. As suggested in outlining AB's argument, the information must be provided in the context of a lawyer-client relationship for the purpose of obtaining legal advice. Third parties normally cannot know the information or that the client gave the information to the lawyer. The information given to the journalist by AB would seem to fall outside the scope of the privilege and in disclosing the information AB would not, therefore, be violating solicitor-client privilege.

The arguments on confidentiality and on loyalty are wrong, however, although they do require some response. Information given to a lawyer who is not acting *qua* lawyer may not be confidential, but once the lawyer *is* acting as a lawyer then the Alberta Code of Professional Conduct provides that *all* information obtained by the lawyer in the course of the representation will be confidential, whether or not in the public domain, regardless of where it came from, and whether or not it relates "directly to the client's matter" (Code of Professional Conduct, Chapter 7, Rule 1, Commentary 1). This means that when a lawyer acts as a lawyer for a client, but also acts for the client in some other but related capacity, the lawyer cannot simply assume that information that does not relate directly to the retainer is not confidential. In fact, the operating presumption is that the information *is* confidential, and that the lawyer may not disclose it without the client's consent. In this case, even if one can argue that information about how CD conducts the campaign, his self-regard or his insistence on talking about foreign affairs do not directly relate to AB's ensuring that CD has met the legal requirements for candidacy, her knowledge about them relates sufficiently to her role as legal counsel that she must treat them as confidential. In choosing to play other roles in CD's campaign AB cannot alter the breadth and scope of the duty of confidentiality that applies to the lawyer-client relationship.

With respect to loyalty, the first point to emphasize is that it is not only lawyers who are fiduciaries charged with acting in the best interests of others. Agents – including electoral agents

– have like duties, and a lawyer who acts as both lawyer and agent is as charged with a duty of loyalty in one role as in the other. The second point, though, is that even if AB's agency did not also impose a duty of loyalty, the fact of her legal representation of CD imposes a duty of loyalty on her broad enough to cover not only CD's compliance with electoral laws, but also his goal to be elected. The lawyer's duty of loyalty is not a duty in the air, and does not attach to every legal and economic interest a client may have, however unrelated to the representation. A lawyer who represents Chrysler may indeed drive a Ford without compunction. But the duty of loyalty must not be unduly parsed and narrowed. A lawyer who represents a corporation in obtaining bank financing for a takeover could not, for example, act to help the target resist the takeover on the grounds that the first retainer dealt only with financing questions. Similarly, here, the compliance with electoral laws and the management of the campaign are related features of the same general activity, and the lawyer's duty of loyalty will attach to the totality of the enterprise, not just to one aspect of it.

One can understand why a lawyer like AB might not appreciate that she was acting as a lawyer. Her motivations were almost certainly political, she was probably not being paid, and in volunteering for CD's campaign she probably agreed to be his lawyer simply because it was a very obvious way for her to make herself useful to the campaign. She was a campaign volunteer first and a lawyer second. That understanding does not, though, obscure the serious nature of AB's violation of her professional obligations. As soon as AB agrees to be CD's counsel, however technical and minor the legal services provided, she must recognize that she is bound to act as his counsel, keeping his information secret and helping him to achieve his goals. If she fails to do so then there is no defence that arises from the fact that the representation was minor, voluntary or part of a broader campaign. Whoever else in his campaign might feel morally justified in cutting CD off at the knees, AB was legally and ethically obligated to have no part in it.