



Consultants' Conundrum

by Michael Sandor

(As usual the references to the principles of conduct are to the Draft Hong Kong Solicitors Guide of Professional Conduct)

Lawyers as consultants to multiple firms

1. The Guidance Committee has been asked whether solicitors may work for more than one firm. Some solicitors work as 'consultants', with no particular affiliation. Some are employed by, or are partners in, a firm and also act as consultants for other firms. Some firms share principals. The Guidance Committee told the enquirers that there was no absolute objection to the practice under Rule 5C of the *Solicitors Practice Rules*. However, consultant-solicitors have to take care to ensure that no conflict of interest arises.

Discussion — conflict of interest

2. We will assume that the consultant-solicitor (Sol) is registered as a full-time employee with Firm A and will be asked to do a task for Firm B. Sol's an expert in international trade law. Firm A has clients who are international traders.
3. Task 1: Sol is asked by Firm B to advise on a question of law, expressed as a hypothetical issue.
4. Task 2: Sol is asked to advise on the effectiveness of and possible improvements to a proposed international contract; no names. In order to respond adequately he asks for and receives information about the business objectives of the firm's client. No names. But Sol deduces who the client is and the nature of the commercial interest at stake.
5. Task 3. Sol is asked to advise on a matter and Firm B's client is revealed in the papers.
6. Assume that in every case Sol binds himself to keep confidential all the information received from Firm B.
7. Consider two situations. First, at the time of the tasks Sol is quite unaware that a client of Firm A would benefit from the work done or information obtained from Firm B. Second, he becomes aware during or after the task that a client of Firm A would be very interested in the information.
8. For Task 1 there is no difficulty. His duty to disclose to Firm A's client does not conflict with a duty to keep confidential 'information' received from Firm B. Sol has simply learned from a task; expanded his expertise and thereby enhanced his quality as adviser to Firm A without causing harm to Firm B's client or breaching confidentiality.
9. Task 2. If Sol has no clue and was given none about the identity of Firm B's client, again there would be no conflict. But difficulties arise if he realises the identity of Firm B's client and sees that a client of Firm A would be extremely interested (for purely commercial reasons) to know about the moves of a competitor.
10. If, during the task, he comes to this realisation, does he have a duty to Firm B to inform it of a 'conflict'? If he says something, he will probably alert Firm B to a prospective problem which may cause difficulties for firm A's client in the event of any future dispute between that client and Firm B's client.
11. Conversely, if he says nothing to Firm B, does he still have a duty to his client at Firm A to inform him? If he passes the information to his own client, that will conflict with his promise to Firm B to keep confidential all the information he has acquired.
12. The ethical guidelines are:

8.03: A solicitor is under a duty to pass onto his client and use all information which is material to the subject matter of the retainer regardless of the source of that information. There are, however, exceptional circumstances where such a duty does not apply.
13. The "exceptional circumstances" relate to information harmful to the mental or physical condition of the client and receipt from another party of privileged documents disclosed by mistake.
14. So the strict, narrow solution to the problem ought to be that Sol terminates his relationship with his "own" client if and when there is a retainer with the client that is relevant. Until then, Sol can keep silent to both Firm B and his own client — with a time-bomb ticking away. However, even if Sol's retainer with his own client is not "relevant" there will be an obvious temptation to pass the information on.
15. Reader, what do you think Sol ought to do? ❖