

## **LEGAL Vs ETHICAL**

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*“It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation.”*

Lord Chief Justice Coleridge, in *R v Instan* [1893]

As Dinker in his Legal Ethics observes, “A lawyer will be constantly confronted with conflicting loyalties which he may have to reconcile. He is answerable not only to his client whose interests it is his primary duty to serve and promote, but also to the Court of which he is an officer and further to his colleagues at the Bar and to the traditions of the Profession.”

### **INTRODUCTION**

A relationship exists between law and ethics. In some instances, law and ethics overlap and what is perceived as unethical is also illegal. In other situations, they do not overlap. In some cases, what is perceived as unethical is still legal, and in others, what is illegal is perceived as ethical. A behavior may be perceived as ethical to one person or group but might not be perceived as ethical by another. Further complicating this dichotomy of behavior, laws may have been legislated, effectively stating the government’s position, and presumably the majority opinion, on the behavior. As a result, in today’s diverse business environment, one must consider that law and ethics are not necessarily the same thing.

Ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties. In some cases, the law mandates ethical conduct. Examples of the application of law or policy to ethics include employment law, federal regulations, and codes of ethics. Though law often embodies ethical principles, law and ethics are far from co-extensive. The law does not prohibit many acts that would be widely condemned as unethical. And the contrary is true as well. The law also prohibits acts that some groups would perceive as ethical. For example lying or betraying the confidence of a friend is not illegal, but most people would consider it unethical. Yet, speeding is illegal, but many people do not have an

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ethical conflict with exceeding the speed limit. Law is more than simply codifying ethical norms.

### **SCOPE OF CONFLICT**

*"Conflict is the gadfly of thought. It stirs us to observation and memory. It instigates to invention. Conflict shocks us out of sheep like passivity, and sets us at noting and contriving . . . It is the sine qua non of reflection and ingenuity."*

Whenever interest and duty come into conflict, duty ought to prevail. In the life of an advocate difficult situations do frequently arise; for instance, fill in his adversary in a subsequent suit, the client may not engage you but his opponent must be willing to do so with motives good or bad. The opponent may try to get information from you relating to previous case, which an advocate ought not to do. All the communications made, between client and his lawyer is privileged and such privilege is perpetual. The adversary of your previous client may offer you engagement in a second and third case against a third party and may try to create intimacy with you. In such situations one will rarely err if he "keeps in his mind a high sense of honour and conscientious desire to follow right."

Quoting from *In re Jans*, Justice Tongue wrote that a cardinal rule of legal ethics says *"It is never proper for a lawyer to represent clients with conflicting interest no matter how carefully and thoroughly the lawyer discloses the possible effects and obtains consents."*

A lawyer should not appear before any authority of which he is a member in a case against it. A lawyer should not accept a brief in which he has acted in a judicial or quasi-judicial character, e.g., as an Arbitrator. An advocate should not appear in case in which he has given a testimony. This is not on account of conflict between interest and duty, but is based on a different principle; namely, *"it might tend to throw suspicion on the advocate character which may entail loss of respect for the profession as a whole and diminish public confidence in the purity of administration of justice."*

Our Constitution enshrines that the right to consult and to be defended by a lawyer of one's choice is a fundamental right of a person accused of an offence; and so, it is duty of a lawyer to defend such person. Because of this constitutional injunction, there is absolutely no conflict between interest and duty in criminal cases. However, some difficult may arise in

case where the accused confesses his guilt to the lawyer. The answer may be elucidated in the following words:

*“He had expressed in England and South African lawyers were consciously or unconsciously let into untruth for the sake of their clients. He vehemently opposed an English lawyer when he advocated that the duty of the lawyer was to defend a client even if he knew that he was guilty. Gandhi on the other hand was emphatic that the duty of a lawyer was to place correct facts before the judge and to help him to arrive at the truth, and not to prove the guilty as innocent.”*

Lord Cozens-Hardy MR in *Moody v. Cox* said that:

'A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client *"I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side."* The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say-which would be much better-*"I cannot accept this business."* I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform.'

The thrust of this passage is that if a solicitor puts himself in a position of having two irreconcilable duties it is his own fault. If he has a personal financial interest which conflicts with his duty, he is even more obviously at fault. It was later on quoted in *Hilton v. Barker*

Further the interest of the parties is to seek a favourable decision and their duty is limited to complying with the rules of the court, giving truthful testimony and refraining from taking positive steps to deceive the court but the interest and duty of the advocate is much more complex, because it involves divided loyalties.

## **POTENTIAL FOR CONFLICT**

It was held in the case of *Abse and others v. Smith* and another that

“A lawyer wishes to promote his client's interests and it is his duty to do so by all legitimate means. But he also has an interest in the proper administration of justice to which his profession is dedicated and he owes a duty to the court to assist in ensuring that this is achieved. The potential for conflict between these interests and duties is very considerable yet the public interest in the administration of justice requires that they be resolved in accordance with established professional rules and conventions and that the judges shall be in a position to assume that they are being so resolved. There is thus an overriding public interest in the maintenance amongst advocates not only of a general standard of probity, but of a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved.”

Dubin J.A. remarked *in re Regina and Speid*, “We would have thought it axiomatic that no client has a right to retain counsel if that counsel, by accepting the brief, puts himself in a position of having a conflict of interest between his new client and a former one.”

## **A WORD OF CAUTION**

What if a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other "ethical" relief using “the integrity of the administration of justice” or “conflict of interest” merely as a flag of convenience? Will the fairness of the process be undermined?

A similar situation arose in *R. v. Parsons*, where the accused was charged with the first degree murder of his mother. The Crown sought to remove defence counsel on the basis that he had previously acted for the father of the accused in an unrelated matrimonial matter, and might in future have to cross-examine the father at the son's trial for murder.

The accused and his father both obtained independent legal advice, after full disclosure of the relevant facts, and waived any conflict. The father also waived solicitor-client privilege. The court was satisfied there was no issue of confidential information. On these facts, the court concluded that "public confidence in the criminal justice system might well be undermined by interfering with the accuser's selection of the counsel of his choice".

### **MAKING RECKLESS AND FALSE ALLEGATIONS**

A counsel is to assist the Court in the administration of justice and is not a mere mouthpiece of his client. If a counsel makes reckless and false allegations against a Magistrate in the application for transfer on the instructions of his client without taking any steps to verify the truth of these allegations, he is unfit to enjoy the privileges conferred upon him by law and must be visited with punishment as was held in the case of *Ganwar v. Emperor*. Thus a conflict is created between the Preamble (which imposes a duty on a lawyer) and the interest of the client and the lawyer.

### **WHERE LAWYER HAS A PERSONAL INTEREST**

A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party who has such an interest.

The classic case where the duty arises is where a solicitor acts for a client in a matter in which he has a personal interest. In such a case there is an obligation on the solicitor to disclose his interest and, if he fails so to do, the transaction, however favorable it may be to the client, may be set aside at his instance as was held in the case of *Lewis v Hillman*.

### **THROWING AWAY INTERESTS**

Under the Legal Practitioners Act, Section 13 talked of throwing away interests of unimportant client in favour of important client is deserving of censure. In the case of *N*, a pleader, a pleader *N* had two cases to attend on the same day. On the next day however *N* presented himself in the former case and the latter case which was weak was conducted by another pleader and the accused was convicted.

The Court held that “*N* may also have been influenced by the probability that in one case the client had very little chance of acquittal and that the case could not be made any worse by his absence and could not be made any better by his presence but however that may be the more difficult the case the more important ...”

The court further held that “in these circumstances he certainly on his own account of the proceedings threw away the interests of an unimportant client in favour of the interests of an important client and in so doing he has committed an offence which is deserving of the most serious censure. But a censure in a case of this kind is an inadequate punishment and we feel

it our duty to mark our opinion of the gravity of the offence and also to protect the reputation of the profession itself. The reputation of the profession is liable to be gravely affected by conduct of this kind. We therefore order that N be suspended from practice for a period of two months from this date.”

### **SUGGESTION**

Bar Council of India Rules is devoid of any specific provision regarding Conflict between interest and duty. As I have made detailed analysis of the position regarding conflict in America, England, Canada, Philippines and the thought provoking that comes out is that why is such a provision lacking in India. In Canada, the rules even incorporate guiding principles as commentaries but as far as India is concerned the word “conflict” has no place in the rules. Thus considering the present scenario and complexity of the legal profession, it is recommended that there be a specific provision regarding Conflict between Interests and Duties of a Lawyer.

### **CONCLUSION**

Where a lawyer is guilty of a conflict of interest in representing a client he will have committed a breach of duty. That duty is usually expressed as a fiduciary obligation arising out of the relationship between solicitor and client. But there is similar duty owed by the lawyer to the court (as well as an ethical duty). The duty to the court arises from the court’s concern that it should have the assistance of independent legal representation for the litigating parties. The integrity of the adversarial system is dependent on lawyers acting with perfect good faith. This is central to the preservation of public confidence in the administration of justice.

The usual basis for restraining a lawyer from acting for a client on the ground of conflict of interest is that a conflict is perceived between the continuing duty of the lawyer (owed to his former client) not to disclose or use the latter’s prejudice that which he learned confidentially, and the interest he has in advancing the case of his new client.

Every counsel has a duty to his client fearlessly to raise every Issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court to the standards of his profession, and to the public which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not without authorities or documents which may tell against the clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

In an era of national firms and a rising turnover of lawyers, especially at the less senior levels, the imposition of exaggerated and unnecessary client loyalty demands, spread across many offices and lawyers who in fact have no knowledge whatsoever of the client or its particular affairs, may promote form at the expense of substance, and tactical advantage instead of legitimate protection. Lawyers are the servants of the system, however, and to the extent their mobility is inhibited by sensible and necessary rules imposed for client protection, it is a price paid for professionalism. Business development strategies have to adapt to legal principles rather than the other way around. Yet it is important to link the duty of loyalty to the policies it is intended to further. An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing and conflicting interests. He is not merely a mouthpiece of his client to say what he wants. He must disregard to most specific instructions of his client, if they conflict with his duty to the Court.

No better words can sum up this article than that of Gandhiji. He said the following: -  
*“... that the duty of a lawyer was to place correct facts before the judge and to help him to arrive at the truth, and not to prove the guilty as innocent.”*

#### **REFERENCES:**

- Lawyer's Duty to the Court - (1998)
- Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"? - Penn St. L.
- Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs - (2007).

- Unforeseeable Concurrent Client Conflicts: The Committee on Professional and Judicial Ethics - (2006)
- Principles of Administrative Law - M.P. Jain
- Solutions to the City Attorney's Charter - Imposed Conflict of Interest Problem - 1075.
- Advocates Practice (ILI).
- Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship
- P RamanathaAiyer; "Legal and Professional Ethics"; 3rd edition; 2003.