CONFLICT OF INTEREST AND THE FIDUCIARY RELATIONSHIP

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INTRODUCTION

It is said that, like obscenity, conflicts of interests are difficult to define but easy to recognise.

In dealing with this topic, it is important to remind ourselves of certain basic legal principles that affect the attorney-at-law and client relationship.

Firstly, it should be noted that under s. 5 (1)(c) of the Legal Profession Act of Jamaica, an attorney-at-law is subject to *all such liabilities* as attach by law to a *solicitor.*

[The terms "attorney" and "solicitor" are therefore used interchangeably in this article].

Secondly, under the retainer, the attorney *has a duty to exercise reasonable care and skill* in dealing with the client's matter and there is a *fiduciary* duty existing between himself and his client.

As a fiduciary, the attorney has certain special *contractual obligations* to his client —

(a) He has a duty to act with absolute fairness and openness towards his client. In his dealings with the client, he must act with *utmost good faith* and must make full and frank disclosures of all material facts known to him in the client's matter.

In *Spector* v. *Ageda* [1971] 3 All ER 417, Megarry J. said — "A solicitor must put at his client's disposal not only his skill but also his knowledge so far as is relevant and if he is unwilling to reveal his knowledge to his client he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any rele-vant knowledge that he has."

(b) He has a general duty to hold in *strict confidence* all information acquired in the course of the professional relationship concerning the affairs of his client. He must not therefore disclose any *confidential information* revealed to him in his professional capacity unless he is authorised by his client or authorised under some law to do so.

The purpose of this rule is to permit the client to confide in his lawyer secure in the knowledge that the information will be kept secret.

In *Rakusen* v. *Ellis, Munday and Clarke* [1912] 1 Ch 831, it was said that the duty not to disclose confidential in- formation will continue even after the relationship of solicitor and client has come to an end.

(c) He must not make a *secret profit* from the relationship. Any secret profit must be accounted for. (This includes any benefit he may receive.)

Because of the fiduciary relationship, the attorney is therefore forbidden from using confidential information for the benefit of himself or a third person or to the disadvantage of the client.

If an opportunity is presented to a fiduciary whilst he is acting on behalf of his client, his duty is to exploit the opportunity for his client rather than for himself. He will only be permitted to exploit the situation for his personal benefit if he makes a full disclosure of all material facts to his client and obtains an *informed consent* to his taking a personal interest.

Benefits obtained by a fiduciary from his position are to be held on constructive trust for the client. This is so even if the client did not have the resources to exploit the opportunity; even if the opportunity was offered to the fiduciary personally on the basis that those offering it were not prepared to contract with the client; and even further if the client had explicitly denied any interest in acquiring the opportunity — see *Boardman* v. *Phipps* [1967] 2AC 46.

In *Clark Boyce* v *Mouat* [1993] 4 All ER 268, the Privy Council said — "That a solicitor owes a fiduciary duty to a client is not in doubt."

Thirdly, under the retainer, the attorney is the *agent* of his client. As an agent, he has a loyalty to his principal, his client, and is duty-bound to protect the client's interests in the context of the retainer.

In *Groom* v. *Crocker* [1939] 1KB 194, Scott L.J. described the position in these terms —

> "The retainer, when given, puts into operation the normal terms of the contractual relationship including in particular the duty of a solicitor to protect the client's

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interests and carry out his instructions in the matter which the retainer relates by all proper means."

Fourthly, in equity, because of the fiduciary relationship, there is a presumption of *undue influence.* Any transaction entered into by the attorney with the client may be set aside if challenged by the client. Once the presumption of undue influence has been raised, the burden is on the attorney to prove that no undue influence or pressure was operating on the mind of the client at the time of the transaction. In other words, the attorney must show that the client exercised his free will when he entered the transaction. An important, though not conclusive, pointer towards free will is that the client was given *independent advice* before entering the transaction.

Fifthly, when looking at the powers of the Disciplinary Committee under the canons to control the conduct of attorneys-at-law in conflict situations, the common law principles must be taken into consideration — [see Appendix for powers of disciplinary committee].

With regard to the common law position, in *Nocton* v. *Lord Ashburton* [1914] AC 932, the House of Lords held that failure to fulfil his contractual obligations under the retainer renders the solicitor liable for *damages* for breach of his fiduciary duty to his client. The court can also restrain the solicitor by *injunction* — See e.g. *re a Firm of Solicitors* [1992] 2 WLR 809 CA and *Rakusen* v. *Ellis, Munday and Clarke* [1912] 1 Ch 831 CA.

CONFLICTING INTERESTS

An attorney who is retained in a matter must take steps to ensure that there is no conflict of interests and he should avoid situations in which a conflict of interests is likely to develop.

A conflicting interest is one which is likely to affect adversely the judgment of the attorney or his loyalty when acting on behalf of his client or one which the attorney might be prompted to prefer to the interests of his client.

When a client retains an attorney, he has a right to presume, if the attorney is silent on the point, that the attorney has no engagements which would interfere, in any degree, with his exclusive devotion to the cause confided in him by the client and that he has no interest which may betray his judgement or endanger his loyalty to the client.

In *re a Solicitor* (1987) 131 SJ 1063, it was said that when considering what constitutes a "conflict of interests", one has to enquire what duties an attorney owes his client in order to determine whether they are likely to come into conflict.

The fairest thing an attorney should do, whenever a conflict of interests arises or is likely to arise, is to cease to act and apprise the client or clients. To act further without *his or their consent* is opening the attorney to liability for a breach of his duty to a client. He is also opening himself to criticism which may not be good for the profession and makes him liable for disciplinary action to be taken against him.

TYPES OF CONFLICTS

Conflicting interests may occur under different situations.

(a) Personal Interest

One of the most obvious circumstances in which the attorney may be unable to fulfil his duties to his client fully is where he has a *personal interest* which conflicts with that of his client.

In *Spector* v. *Ageda* [1971] 3 ALL ER 417, Megarry J. commented at length on the dangers of a conflict between the personal interests of the solicitor and those of his client. He said —

> "The solicitor must be remarkable indeed if he can feel assured of holding the scales evenly between himself and his client. Even if in fact he can and does, to demonstrate to conviction that he has done so will usually be beyond possibility in a case where anything to his client's detriment has occurred. Not only must his duty be discharged, but it must manifestly and undoubtedly be seen to have been discharged."

In the *Spector* v. *Ageda* case, a solicitor agreed to lend her client money to pay off a loan from an unlicensed moneylender. The loan was illegal and unenforceable. The solicitor was held to be in breach of her duty to the client in failing to advise that the loan from the moneylender might not be repaid. It was held that the solicitor had a personal interest in the matter in that her loan to the client was to be repaid at an interest and the money lender was a close relative of hers.

Recently in *Clark Boyce* v *Mouat* [1993] 4 All ER 268, the Privy Council stated —

> "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 favourable it may be to the client, may be set aside...."

(b) Purchases and Sales to Client

A likely area of conflict is where the attorney sells property to his client or purchases the client's property. The position is that the attorney may purchase from or sell property to his client but he must show that the trans-

action is as good as any that could have been obtained by the client from another person other than the solicitor. He must show that he gave the client all reasonable advice so that the client was fully informed of the transaction and that the price involved was fair in the circumstances. In the absence of these requisites the court will set aside the transaction, and moreso if the client was in financial difficulties at the time — *Demerara Bauxite Co.* v. *Hubbard* [1923] A C 673. It must be recalled that there is a presumption of undue influence and, in order to rebut this presumption, the court would look to see if the client was separately advised. In fact, the solicitor should insist that the client be separately advised — *Nocton* v. *Lord Ashburton* [1914] AC 932.

The courts have said that where the attorney obtains a substantial benefit from his client, other than his proper remuneration, they would look at the transaction with suspicion and jealousy.

(c) Conflicting Interest between Multiple Clients

In practice, the major problems result not from the personal interests of the attorney but from situations where the attorney is retained by *different clients* whose *interests conflict.*

As a general rule, an attorney should not accept instructions to act for clients whose interests *are* or *are likely* to *conflict.* If he does so he acts at his own peril. He may find himself in breach of his duty to one client or the other for he will be unable to act fully in the interests of one without failing to do so for the other. The burden is on him to show that the conflicting interests did not prevent him from doing his duty to the clients.

> In *Fullwood* v. *Hurtley* [1928] IKB 498 CA, Scrutton L J said —"No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal, unless he makes the fullest disclosure to each principal of his interest and obtains the consent of each principal to the double employment."

In *Moody* v. *Cox and Hatt* [1917] 2 Ch 71 CA, a case in which a solicitor acted for both sides in a transaction, Scrutton L J described the duty in the following words:

> "...they must not only tell the truth, but they must tell the whole truth so far as it is material, and they must not only not misrepresent by words, but they must not misrepresent by silence if they know of something that is material."

The attorney who accepts retainers from different persons with different interests in *respect of the same subject matter* places himself in a position where he runs a serious risk of being in breach of his fiduciary obligations to at least one of his clients. It will be difficult for him to devote his skill and judgement to the interest of one client without making use of the confidences and knowledge of the other client's affairs.

In particular, this can be seen in conveyancing transactions where the attorney is acting for the vendor, the purchaser and the mortgagor. The risks involved are illustrated in the case of *Goody* v. *Baring* [1956] 2 All ER II, where a solicitor was retained by both the vendor and the purchaser of property. The solicitor failed to check information supplied by the vendor in breach of his duty to the purchaser. Dankwerts J had this to say —

> "It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both vendor and purchaser."

Despite this warning the practice for acting for different parties has continued. In doing so there are grave risks as was observed by Megarry J in *Spector* v. *Ageda* when he said —

> "...doubtless in the vast majority of cases (the solicitor) does discharge his duty of acting impartially in the interests of each of his clients. But there remains a risk that in the case of real conflict he will be unable to do so.".

In *Moody* v. *Cox & Hatt* [1917] 2 Ch. 71 at 91 CA — Scrutton L J said —

> "It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other whatever he does....It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them."

In *Smith* v. *Mansi* [1962] 3 All ER 857, 860, it was said that the practice of one attorney acting for both parties *invites disaster;* and in *Wills* v. *Wood* [1984]) Times CA 24/3/84, Sir John Donaldson M R made the observation that the Law Society might well wish to give consideration to the propriety of solicitors acting for both *lenders and borrowers.*

The rule in such case is that where an attorney is acting for both sides and conflict arises, the attorney must cease to act for both clients. The rule is based on the general principle that —

> "Justice should not only be done but should manifestly and undoubtedly be seen to be done."

On the basis of this principle, the attorney must decline or cease to act not only where the interests of his

client are prejudiced, if the attorney continues to act for the other client, but also where that client's interests might *appear* to be prejudiced.

In a case of multiple clients, an attorney may, with propriety, choose one of the clients and continue to represent him but he can only do so if the other client agrees after *full disclosure*. In any event, if the attorney would be embarrassed in representing one of the clients then he should cease to act for *both* of them.

In *Farrington* v. *Rowe, McBride & Partners* [1985] INZLR 83 CA, a case from New Zealand, it was stated that where a conflict of interests arose between *two* clients, a solicitor could not properly discharge his duties unless he has fully disclosed all material facts to both clients and obtained their *informed consent* before taking any further action.

Another case from New Zealand which came before the Privy Council raised the question of the circumstances in which a solicitor ought to refuse to act for both parties in a transaction where there is likely to be conflict of interest. The case is *Clark Boyce* v. *Mouat* [1993] 4 All ER 268 P.C., where a mother agreed to mortgage her house as security for a loan to their son. Solicitors acted for both mother and son. They advised the mother to obtain independent advice before entering into the transaction. She declined to do so and signed an authority to that effect. The nature of the transaction was explained to her and she was told that she would be the principal debtor and could lose her house if the son failed to keep up the mortgage payments.

The son's business subsequently failed and he became bankrupt. The mother was left with the liability of repaying the mortgage. She sued the solicitors, alleging negligence in failing to ensure that she received independent advice. The Privy Council held that there was *no general rule of law that a solicitor should never act for both parties in a transaction where their interests might conflict.*

Lord Jauncy at p. 273 said —

> "Rather is the position that he may act provided that he has obtained the *informed consent* of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interest of the other. If the parties are content to proceed upon this basis, the solicitor may properly act...In determining whether a solicitor has obtained informed consent to acting for parties with conflicting interests it is essential to determine precisely what services are required of him by the parties."

On the facts, their Lordships were satisfied that the mother required of the solicitors nothing more than that they should carry out the conveyancing transaction on her behalf and explain to her the legal implications. The solicitors were held to be not liable.

Lord Jauncy said —

> "When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."

(d) Contentious Matters

In *Rakusen* v. *Ellis, Munday and Clarke* [1912] 1 Ch. 831 the Court of Appeal held that there was no general rule that a solicitor who had acted for some person either *before or after litigation* began could in no case act for the *opposite side*. Before the court will interfere there must be *some degree of likelihood of mischief or real prejudice*, that is to say, of the confidential information imparted by the former client being used for the benefit of the new client.

The Rakusen's case was unusual. It was a two-man firm in which two solicitors conducted apparently completely separate practices without communicating with each other. The Court of Appeal came to the conclusion from the facts and the assurances given that there had not been demonstrated any real risk of prejudice by one of the partners (who had known nothing at all of the transaction with the other partner) continuing to act for the other party in the dispute.

(e) Partnerships

Generally, in a partnership, a partner is the agent of all the partners and of the partnership. The knowledge of one partner will be presumed to be the knowledge of the other partners. Where different solicitors of the same partnership are acting for different clients with conflicting interests, the question of the propriety of their acting will arise.

The question to ask is whether there is in place a "Chinese wall" which eliminates any real risk of prejudice to the clients, ie, "was there an information barrier set up to prevent leakage of information between the solicitors"? The "Chinese wall" in the Rakusen's case, although not then so called, was on the basis of the undertakings given by Mr. Clarke, one of

the solicitors, coupled with the retainer being not of the firm but that of Mr. Clarke, *personally.* This was held to be an impregnable barrier against leakage or misuse of information to the other so that the court could allow Mr. Clarke to act.

In the *Supasave Retail Ltd.* v. *Coward Chance* [1991] I All ER 668, the arrangements there proposed to prevent leakage did not eliminate the risk which arose. The same was the case in a *Re a Solicitor [1992]* 2 WLLLR 809. (For these two cases, see below.)

(f) Merged Firms

In *Supasave Retail Ltd.* v. *Coward Chance [1991]* I All ER 668 Ch D, the question was: what is the position where one part of a newly merged firm acts in litigation for clients who wished to keep their services and another part of the same firm acts or formerly acted for the defendants.

It was held that where firms of solicitors had merged there was no absolute bar against the newly merged firm continuing to act for one party in litigation even though a partner in that firm had formerly represented the other party in the same litigation, unless the circumstances of the particular case were such that the continued representation of the client against the former client of the newly merged firm *could be rightly anticipated to cause mischief or real prejudice* to the former client, in which case the court would intervene to prevent the firm continuing to represent the client.

Browne-Wilkinson V C said —

> "The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in *Rakusen* v *Ellis, Munday and Clarke* [1912] 1 Ch 831, [1911 — 13] All ER Rep. 813. The law as laid down there is that there is no absolute bar on a solicitor in a case where one partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client...."

In *Re a firm of Solicitors* [1992] 2 WLR 809 at p. 817, Parker L J said —

> "Some help is, in my view, to be gained from Buckley C J's test in *Rakusen's* case...of whether there may reasonably be anticipated to exist a danger of breach of the duty not to communicate confidential information. This appears to me to suggest that the proper approach is to consider whether a *reasonable man informed of the facts might reasonably anticipate such a danger.*"

He continued —

> "If a reasonable man with knowledge of the facts would say if I were in the position of the objector, I would be concerned that, however unwittingly or innocently, information gained while the solicitor was acting for me might be used against me, the court in my judgement can and should intervene. Were it not to do so the court would be permitting to exist a situation of apparent unfairness and injustice."

The facts in *Re a Firm of Solicitors* were that a firm of solicitors while acting for ASM, received confidential information from A & A, a company closely associated with ASM. Subsequently A & A brought an action against D who instructed the firm of solicitors to act for him in the matter. A & A applied for an injunction to restrain the firm from acting for D on the ground that the firm had acquired confidential information from A & A when acting for ASM and there was a conflict of interest. The injunction was granted. On appeal, *held* —

(i) that the firm owed A & A a duty in relation to the confidential information;

(ii) that the court would intervene to prevent the firm from acting if a risk of a breach of the duty not to communicate confidential information could *reasonably be anticipated;*

(iii) that despite the arrangements made by the firm to prevent any leakage of the information the risk of such leakage could not be eliminated. The injunction was properly granted.

Note, however, the case of *Taylor* v. *Black & Others* [1993]) 19 CLB (No. 2) 653 (a New Zealand Case), where it was stated, after a long and detailed analysis of the common law authorities, that the test in the *Rakusen* case of the "real probability of mischief" should no longer be followed and that, in New Zealand, the test should be similar to the Canadian test, which is that "where there was a previous relationship sufficiently related to the new retainer the court should infer that confidential information was imparted unless the solicitor satisfies the court otherwise."

Note also the case of *Wan* v. *McDonald* [1992] 105 ALR 473 where the Federal Court of Australia declared —

(i) that it could only be in a rare and very special case that a solicitor could properly be permitted to act against a

former client, whether or not any real question of the use of confidential information could arise. Even among fiduciaries, solicitors stand in a special position;

(ii) that the effect of a solicitor having confidential information did not depend on the source of that information; and

(iii) that an attorney who has acted for a client cannot thereafter assume a position hostile to the client concerning the *same matter.*

In *Cardinale Country Club Estate Property Ltd.* v. *Astill and Others* [1993] 115 ALR 112, reported in Vol. 19 C L B (No. 4) at p. 1539, the Federal Court of Australia, in granting an injunction, held —

"(i) that a solicitor was liable to be restrained from acting for a new client against a former client if a reasonable observer, aware of the relevant facts, would think that there was a real, as opposed to a theoretical, possibility that confidential information given to the solicitor by the former client might be used by the solicitor to advance the interests of a new client to the detriment of the former client;

(ii) that a solicitor's duty of loyalty did not end with the termination of the retainer and the law favoured a strong policy of ensuring that solicitors do not have actual or apparent conflicts of interests in order to maintain public confidence in the administration of justice;

(iii) that it would be inconsistent for the law to encourage the client to repose confidential information in a solicitor by making those confidences privileged from disclosure without the client's consent, if the law on the other hand were to readily allow the solicitor to act for a new client in a matter adverse to the interests of the old client;

(iv) that a solicitor who has been given confidential information would in general only be able to avoid being enjoined if it was clear that the confidential information in question relates only to matters which were remote from the matters relevant to the discharge by the solicitor of his retainer for his new client;

(v) that testimony of the client that the former solicitor was in receipt of confidential information was not conclusive of the case for disqualifying the solicitor from acting;

(vi) that it was a basic requirement that before material will be recognised as confidential information, the information in question had to be identified with precision even though it may necessitate the disclosure to the court of the very information which it was sought to preserve from disclosure."

In *Re A Firm of Solicitors, The Times,* May 9, 1995, three plaintiff companies applied for an injunction to stop a former partner of a solicitor's firm acting for an opponent in patent proceedings in the U.K. and abroad. His former firm had acted for one of the plaintiffs in the proceedings and when he moved to his new firm, one of the defendants wanted him to act as their solicitor. He had not been involved in the litigation in his former firm but he did work in the intellectual property department. The former partner claimed that he possessed no confidential information on the case and therefore there was no risk of prejudice. The plaintiffs contended that he might not recall that he had heard relevant information but that, once he started work on the case, he might recall such information. They claimed that they only had to show that there was a risk that such information had been received by the former partner.

Held, refusing the injunction, that it was for the former partner to show that there was no real risk that he was in possession of confidential information in the instant case, and that had been done to the court's satisfaction. The plaintiff had only established that there was a possibility of information being communicated to the former partner and after hearing his evidence the court was satisfied that there was no real risk of prejudice.

In *Re Manville Canada Inc. and Ladner Downs* [1993] 100 DLR (4th) 321, the respondent law firm was retained to represent a number of plaintiffs in asbestos-related litigation against the appellants. The respondent was one of three domestic firms affiliated to an international partnership, another member of which had previously been retained by the appellants. Although the affiliated firms expressly agreed to continue as separate, independent and competing practices in Canada, the appellants contended that where firms represented themselves as affiliated they must be treated as one firm for the purposes of the confidentiality rule. Accordingly, the appellants unsuccessfully sought an order that the respondent was ineligible to act against them because of a conflict of interest. On appeal, *held,* the court had to consider whether a reasonably informed person would be satisfied that no confidential information concerning the appellant had been, or would be, passed to the respondent. The stringent arrangements to maintain the independence of the domestic firms ensured that interaction between the partners of the affiliated firms was minimal. A reasonably informed person would

thus conclude that any appearance of conflict was not well founded and that there was no appearance of impropriety. Accordingly, the appeal would be dismissed.

(g) Criminal Matters

In *Saminadhen* v. *Khan* [1992] 1 All ER 963 CA, Lord Donaldson MR observed that there are no circumstances in which it would be proper for a solicitor who has acted for a defendant in criminal proceedings, the retainer having been terminated, to then act for a co-defendant where there is a cut-throat defence between the two defendants.

APPENDIX

POWERS OF DISCIPLINARY COMMITTEE

AN ATTORNEY SHALL ACT IN THE BEST INTEREST OF HIS CLIENT AND REPRESENT HIM HONESTLY, COMPETENTLY AND ZEALOUSLY WITHIN THE BOUNDS OF THE LAW. HE SHALL PRESERVE THE CONFIDENCE OF HIS CLIENT AND AVOID CONFLICTS OF INTEREST.

. . . . . .

(c) An Attorney shall exercise *independent judgement* within the bounds of the law and the ethics of the profession for the benefit of his client.

. . . . . .

*(j) Except with the specific approval of his client given after *full disclosure*, an Attorney shall not act in any manner in which his professional duties and his *personal interests* conflict or are *likely* to conflict.

(k) Subject to the provisions of Canon IV (1), an Attorney shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if the independent professional judgement of the Attorney is likely to be impaired.

(l) Notwithstanding the provisions of Canon IV (k), an Attorney may represent *multiple clients* if he can adequately represent the interests of each and if each consent to such representation after full disclosure of the possible effects of such multiple representation. (Consent here is "informed consent" as stated in *Clarke Boyce* v. *Mouat* [1993] 4 All ER 268 PC).

(m) In all situations where a possible conflict of interest arises, an Attorney shall resolve all doubts against the propriety of multiple representation.

. . . . . .

*(t) An Attorney shall not knowingly —

(i) reveal a confidence or secret of his client, or

(ii) use a confidence or secret of his client —

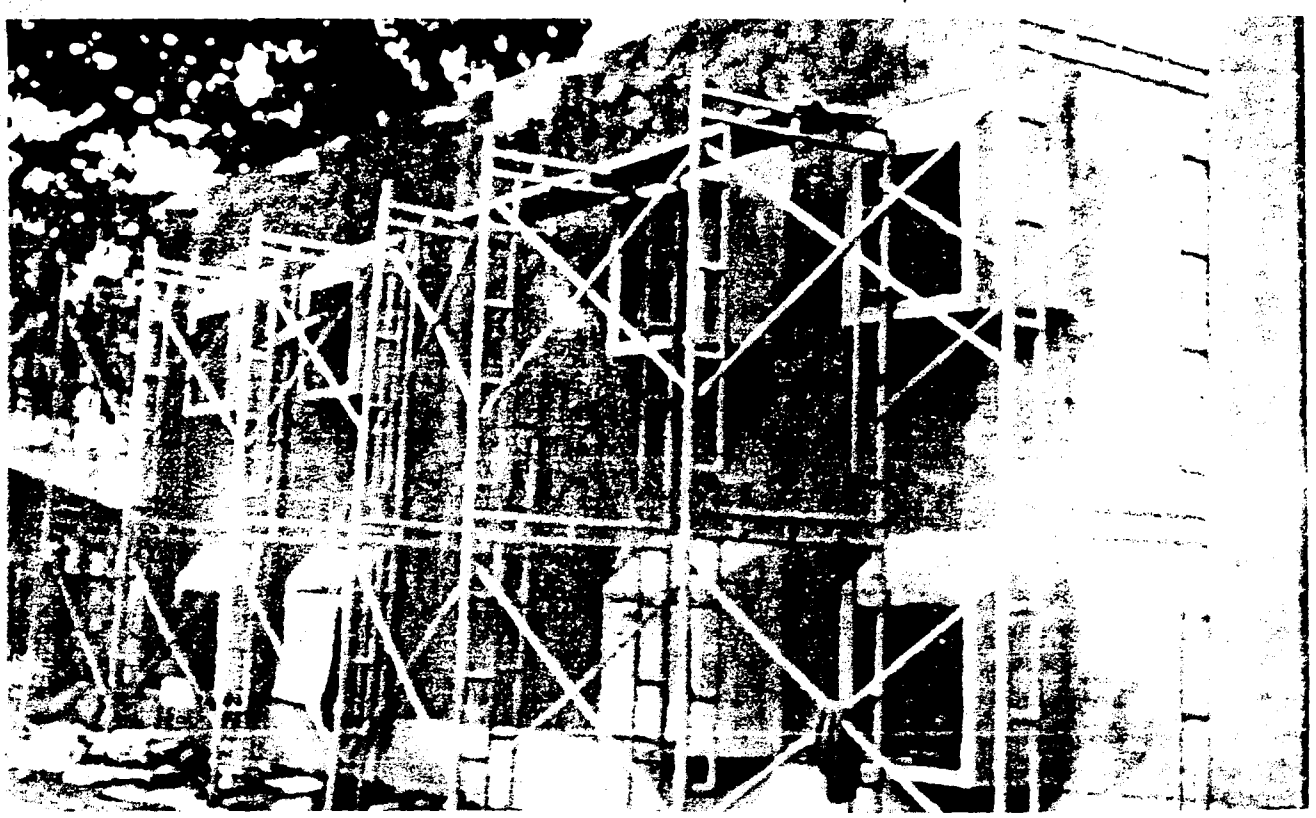
(1) to the client's disadvantage; or

(2) to his own advantage; or

(3) to the advantage of any other person unless in any case it is done with the consent of the client after full disclosure.

Provided, however, that an Attorney may reveal confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

This paper was presented at Continuing Legal Education Seminar on Ethics held at the Norman Manley Law School on February 3, 1996.



William Roper Wing under construction.

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