

Mobility within the Insurance Bar: Are Firewalls effective in Small Firms?

As insurance lawyers, we often see our client contacts enjoy a significant amount of freedom in moving from one insurance company to another, and we adjust our marketing efforts accordingly. Dissimilarly, as lawyers, our professional mobility is bound by a significant restriction: our enduring duties of loyalty and confidentiality owed to all of our clients, whether it be an insurer or an insured. However, a recent case out of British Columbia effectively affords greater mobility to lawyers practicing within the insurance bar, provided sufficient measures are taken to minimize the risk of inadvertent disclosure of confidential client information.

In *Robertson v. Slater Vecchio*, [2007] B.C.J. No. 1489 (B.C.S.C.) Terry Robertson Q.C. and Michael Thomas of Harper Grey LLP (the authors' firm) were retained by the Insurance Corporation of British Columbia ("ICBC") to apply on behalf of the petitioners for an order restraining and disqualifying the law firm of Slater Vecchio from acting as counsel for the plaintiffs in several motor vehicle insurance actions.

In October 2006 Patrick Gordon joined Slater Vecchio, a Vancouver firm of approximately nine lawyers specializing in plaintiffs' personal injury law, with many of its cases involving claims against ICBC. Gordon previously worked for the firm of Hartshorne Mehl and was actively involved in the defence of a number of motor vehicle insurance actions for ICBC, many of which involved Slater Vecchio as plaintiffs' counsel. Indeed, Gordon had met with two ICBC insured defendants - Robertson and Barrett - to prepare them for examinations for discovery by Slater Vecchio counsel the day before submitting his resignation at Hartshorne Mehl.

The petitioners argued that Slater Vecchio, as a firm, should be removed from the actions in which Gordon previously acted as insurance defence counsel, alleging Gordon either disclosed confidential information he had acquired in his previous employment or that his presence at Slater Vecchio created an unacceptable risk of disclosure. The petitioners argued this risk was even more pronounced in Slater Vecchio's small firm environment.

Justice Eric Rice first considered whether Gordon's meeting with two of the petitioners while he had received but not yet accepted the offer of employment with Slater Vecchio constituted a breach of his professional duty. While noting it would have been better for Gordon to postpone the meeting, Justice Rice declined to actually find a breach stating that "if there was a breach I do not regard it as a major breach bearing on the larger question of confidentiality."

The Court went on to consider the larger issue of the competence of the firewall system to safeguard against the disclosure of confidential information. Slater Vecchio's system included alerting staff to any potential conflict issues; establishing computer data file restrictions on the litigation software programs; labeling files, folders and subfolders with large labels indicating restrictions; filing those items in segregated cabinets and drawers, and dialoguing with all staff and lawyers to ensure that all applicable files underwent this process. However, this firewall was not fully in place by the date of Gordon's transfer.

While agreeing that ideally the firewall should have been completed by the time of the transfer, Justice Rice rejected ICBC's argument that it was egregious for Slater Vecchio to continue with the transfer without the firewall completely in place, noting that neither Slater Vecchio nor Gordon were in any way responsible for the delay and that the risk of disclosure during the delay period was not inappropriately high.

The Court then considered whether the small size of Slater Vecchio meant that the risk of disclosure by inadvertence was unavoidable. Justice Rice recognized that "...if Slater Vecchio were a large firm, Gordon could be tucked away on a floor separate from those working on the conflicting files and the files could be kept well away from him. And thus, something indiscrete that Gordon might say at the water cooler would be much less likely to cause harm." Despite Justice Rice's acknowledgement that the risk of harm could be greater in a smaller office space, he found that many other factors could compensate for a size disadvantage. For example, the configuration of the office space, the close supervision of staff, and the adequate training of staff could all help to alleviate any risk of disclosure. The Court also noted that much inter-office communication is now made via e-mail and telephone, and not by personal contact. Justice Rice ultimately dismissed ICBC's petition.

An application for leave to appeal is anticipated, but in the interim this ruling is particularly significant to jurisdictions with monopoly motor vehicle insurers, where there is a higher potential for conflicts when lawyers move between defense-based firms to smaller, plaintiff-based firms; this judgment essentially affirms the relative ease with which insurance lawyers can do so. As it stands, if a small firm implements the type of firewall described - even if it does not do so by the time the transferring lawyer arrives - the risk of disclosure of confidential client information will not be significant enough to warrant disqualification of the small firm from acting on insurance files where the transferring lawyer had previously acted as opposing counsel.

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