

Conflicts of Interest:

The third most common and second most costly malpractice error

A review of LAWPRO claims data for the last 20 years shows that the third most common error relates to conflicts of interest situations. Almost nine per cent of the claims we have handled since mid-1982 involved this error. The costs associated with resolving claims that involve this type of error are even more significant. It is the second most costly error, representing 16.7 per cent of estimated and incurred costs for all claims over this period of time.

What is a conflict of interest? It is a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a client. A conflict of interest can adversely affect a lawyer's judgment, loyalty, and ability to safeguard the interests of a client or prospective client.

What is it about a conflict of interest that is so bad? The answer is quite simple. Loyalty and independence of judgment are essential to the effective representation of a client. They are also fundamental to the health of the lawyer/client relationship. A conflict of interest may make it impossible to exercise loyal and independent judgment. The following passage from the judgment of Wilson, J.A. in *Davey v. Woolley, Hames, Dale & Dingwall* (1982) 35 O.R. (2d) 599 (Ont.C.A.) is worth remembering:

"...In any event, the lawyer unquestionably assumes a dual role at his own risk, the onus being on him in any lawsuit that ensures to establish that the client has had 'the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded'..." (at p. 602).

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Therefore, identifying and checking for a conflict of interest needs to be a routine part of every lawyer's practice. In fact, every time you have a new client or start a new matter for an existing client, you should consider if a real or potential conflict of interest situation exists on that matter. As a matter proceeds, you should continually assess whether any new circumstances give rise to a conflict of interest.

LAWPRO's data makes it clear that law firms are not catching or recognizing conflict situations. Even in small firms, not to mention much larger firms with offices in separate cities, it is impossible to properly check for conflicts of interest without some kind of electronic database. Most law office accounting and case management software products now include the ability to quickly search for possible conflicts within the software's database. To help ensure all possible conflicts are caught, this database should include more than just client data. On litigation matters, witnesses, experts and other involved parties may have to be included in the

database. On corporate matters, officers, directors, shareholders and others, including related corporate entities, may have to be included.

The most claims-prone conflicts arise when lawyers act for more than one person or entity on a single matter, and when lawyers act for a client on a matter where the lawyer has a personal interest other than reasonable professional fees. This personal interest is frequently a direct financial stake in a matter, or a client who is a family member or personal friend.

When a conflict of interest situation arises, it is critical that a lawyer handle the matter properly by immediately informing the client, and either withdrawing, or proceeding with the client's consent. Taking appropriate steps to handle a conflict of interest situation is also critical in terms of avoiding a malpractice claim.

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To assist you in reducing your risk of a malpractice claim, practicePRO created the *managing conflict of interest situations* booklet. It is one in a series of booklets to help lawyers manage the risks associated with the practice of law. It is available at www.practicepro.ca/practice/conflicts.asp or you can call Customer Service at 416-598-5899 or 1-800-410-1013 or e-mail service@lawpro.ca to request a copy.

