

Simultaneously acting for members of same family is more risky

Many lawyers assume that simultaneously acting for members of the same family and their business or corporate entities is relatively safe from fraud and conflicts issues. After all, the parties all know each other and everyone is on good terms.

Unfortunately, this is just not the case. An analysis of LAWPRO claims files tell us that there is actually a greater likelihood of a fraud or conflicts of interest issue when clients are related to or know each other.

Understanding when and why malpractice claims arise when work is done for related clients can help you avoid a claim.

When do these types of claims arise?

In the estate and real estate contexts, problems often result when there are dealings with a property that is owned by a parent and child, or by siblings.

On a will matter, allegations of undue influence or lack of ILA are often made when one family member appears to receive more than others under the will, or where it is unclear whether there was a gift or pre-taking when property is received before death.

In a real estate transaction, problems can arise after a mortgage is placed on a property and it is alleged that one sibling has received preferential treatment. Mortgage transactions involving spouses commonly lead to claims where one spouse is giving security but not receiving the benefit of the mortgage advance. Typically the lawyer is acting for both spouses and the mortgagee; when the mortgage goes into default a *non est factum* or undue influence defence is thrown up, and the mortgagee adds the lawyer into the action. It is vital in this scenario that the spouses be separately represented.

On the real estate fraud front, we have seen several high profile cases in Ontario in which a family member was the first true victim of the fraud, often because a

power of attorney was fabricated or used incorrectly by another family member. Spousal impersonation has also been a problem for many years. Further complications arise because it can be challenging to establish the good faith of the alleged victim once a family member, now outside the jurisdiction, obtained significant proceeds from a real estate fraud.

In the business or corporate context, claims often arise when lawyers do work for both a corporation and its individual shareholders, or for multiple members of a partnership. As long as everyone involved is getting along, headed in the same direction and making money, all is fine. But circumstances change, often in unexpected ways. There can be unanticipated costs or even financial losses, marriages breakup, people lose interest and decide they want to cash-out or sell their interest, and so on. When changes such as these occur, clients who once all wanted the same thing now want very different things. As a result, duties of confidentiality and loyalty can become very complicated, and even irreconcilable. Defending conflicts of interest claims is complicated and tends to be more costly than other the types of claims LAWPRO handles.

LAWPRO is also seeing more "fail to warn" claims. These occur when a lawyer doing work for multiple people and/or entities makes a seemingly innocuous comment to one of the clients. Due to changed or unexpected circumstances, that comment ends up giving that one client an advantage, and the clients that didn't get the benefit of that comment allege a "fail to warn." When you are acting for multiple people or entities, take care to make sure all communications and advice reach all clients.

Indeed, when it comes to avoiding conflicts, the best defense is a good offence. Be extra vigilant in looking for potential conflicts when you are doing work for related individuals or entities,

both at the start of the matter and as it proceeds.

Don't let your guard down

When handling a file for clients who are family members or know each other, lawyers seem to let their guard down and miss or do not followup on things that are slightly out of the ordinary. The situation can become even worse when the lawyer has become an acquaintance or close friend with one or more of the clients.

In this situation, it also seems lawyers are more likely to take shortcuts at various stages in a matter, including:

- not following formal file opening process, and, in particular, not doing a proper and full conflicts of interest check;
- not opening a file and doing "off-the-books" work;
- not documenting the file or keeping time dockets;
- skipping appropriate or necessary searches;
- not following up or completing tasks to be done by client or lawyer; or
- not sending interim or final accounts and reporting letters

When shortcuts are taken, things will be missed, mistakes will be made, and malpractice claims will result. For the reasons stated above, when clients know each other it is even more critical that you jump through all the procedural and legal hoops.

Most lawyers are surprised that they are more likely to get a claim where clients are related or know each other. Please be aware of your greater exposure in this circumstance, and don't let your guard down.

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