Wondering whether your practice structure could expose you to liability for other lawyers' work?

Lawyers working "in association" need to consider how they may be perceived by clients and the public, since those who hold themselves out as a law firm risk being treated as such by the courts and can expect to be held to the same conflict requirements as a law firm partnership.

That's according to a recent decision by Justice Stinson, in the Ontario Superior Court of Justice.[1]

The facts

The defendant brought a motion to remove the plaintiff's lawyer from the record on the basis that the lawyer worked in association with another lawyer with whom the defendant had communicated about the same matter. The plaintiff's lawyer and the lawyer with whom the defendant had spoken both practised as part of a group of lawyers under the same firm name, sharing the same business address and office premises and using the same telephone number (save for three digit extensions), fax number and email domain – but who were not partners, nor members of a law firm as traditionally defined.

At trial

The Master who heard the motion at first instance ruled in favour of the defendant, declining to remove the plaintiff's lawyer from the record. The defendant appealed.

Appeal reasons

In allowing the appeal, Stinson J. held that the conflicts rules applicable to law firms ought to be applied to lawyers working in association where the lawyers "hold themselves out to the public" as a firm. Referring to an association as a "group" rather than a firm or partnership is not enough, the court held, to overcome the public's reasonable assumptions about issues like confidentiality among the group's lawyers. This was found to be especially true where there was no statement on the firm's letterhead, signage, etc., making it clear that the group was not a law firm.

Although evidence was given that the lawyers "work in association" and "have completely separate practices" (including separate bank accounts and conflict systems), Stinson J. found that the common features and absence of any public disclaimer would lead a reasonably informed member of the public to believe that the arrangements would not provide adequate or sufficient assurance that confidential information imparted to the one lawyer would remain confidential to that particular lawyer.

[1] 2014 ONSC 3411 (CanLII)

Conspicuously absent in the case, in the view of Stinson J., was any evidence of precautions that would prevent any sharing – inadvertent or otherwise – of confidential information pertaining to the clients of any particular lawyer (e.g., instructions to support staff to take appropriate precautions regarding maintaining confidentiality, precautions dealing with faxes, mail or phone calls arriving through shared means, etc.)

Justice Stinson explained that allowing the plaintiff's lawyer to remain on the record was likely to promote an appearance of conflict regardless of the true nature of the (non-)firm. In the interest of promoting public confidence in the integrity of the profession and justice system, the defendant was entitled to have the plaintiff's counsel removed.

Balancing practice economics and the public interest

While Justice Stinson agreed with the Master that lawyers should be permitted to share resources for economic reasons, "…those arrangements must take into account the need to preserve public confidence in the administration of justice by implementing in advance measures that will protect client confidentiality..."

In Stinson J.'s view, lawyers who practise "in association" but who hold themselves out to the public as a law firm ought to maintain some form of common conflicts search system in order to avoid the very type of problem that arose in the present case.

Insurance implications

While it may make a lot of sense for some sole practitioners or professional corporations with only one lawyer to work together from a cost-sharing perspective or in order to promote referrals between each other, such an association can lead to more than just conflict of interest concerns. If the public might reasonably think that lawyers are working together as partners, then a claim against one lawyer may lead to vicarious exposure, as indicated under s. 15 of the *Partnerships Act*.

Since the "association" practice structure is not unusual among practising lawyers these days, many professional indemnity and excess insurers are keen to see that active steps have been taken to avoid the types of exposures discussed here. While lawyers sharing space and resources may practise independently from each other, courts may well find them liable for the work of each other where it is reasonable for the public to assume that they may collaborate or share information on client matters.

For this reason, under the Law Society insurance program, all lawyers who practise in association with other lawyers must purchase the basic innocent party coverage with a minimum $250,000 per claim/$250,000 in the aggregate sublimit (see Endorsement No. 5 of LAWPRO policy no. 2014-001).

Also, insurer concerns about a lawyer giving the impression — whether intentionally or unintentionally – of working in a law firm with others may result in the lawyer's application for excess insurance coverage being declined.

Alternatively, excess insurers may insist that a clear indication of the nature of the practice (e.g. "Practising in association, not in partnership" or "Acting as a sole practitioner, not in partnership") be included in reception greetings, on signage, business cards, letterhead, webpages, promotional materials, advertisements, etc., with a more fulsome explanation of the nature of the practice included in firm materials and on-line.

Wondering whether your practice structure could expose you to liability for other lawyers' mistakes, or render you ineligible for coverage? Read about the indicia of collaboration – and how to overcome them – in Ray Leclair's space-sharing presentation, delivered at the Law Society of Upper Canada's Solo and Small Firm Conference in June 2014.

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