



ERRORS & OMISSIONS

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SOLVING THE LAWYER'S DILEMMA

When considering the fiduciary duties of a solicitor, it is not sufficient to simply consider your clients' interests. It is necessary to consider as well those parties who will be affected by your work and your duty of care to third parties.

In the field of estate planning, solicitors frequently consider themselves to be the "family" solicitor. This means that not only are the interests of mothers and fathers involved in estate planning matters but the interests of children, grandchildren and other relatives must also be considered.

In many cases, this resembles a forest of family representation involving diverse interests which are not easily recognizable and which interests change from time to time.

Matters become more complicated when prior marriages and children born from such marriages are involved.

Not infrequently, one of the spouses, after having the estate plan included in a will or trust, will consult the solicitor and request a change which the spouse insists that the solicitor not disclose to the other spouse.

It is also not unusual for a child to give the "family solicitor" instructions to prepare a will for his parent giving a greater benefit to that child than other siblings or children of a prior marriage.

How about this. "My father will qualify for increased social benefits if you will prepare a deed of his farm to me which he wants me to have."

In such circumstances, the solicitor must recognize the problem and conflicts that exist and consider how he will deal with the problems they create when they eventually arise.

Surely, a thorough discussion with the testator or grantor is the least one could expect.

While elaborate retainers or engagement letters are not usually warranted, where potential conflicts exist, it would seem that a satisfactory answer would be to include in a reporting letter paragraphs along the following lines:

“You have jointly requested me to prepare your wills in the form enclosed after a full consideration of your respective assets and wishes.

At the time of taking instructions for these wills, I advised each of you together that as between both of you, any confidences which you have reposed in me relating to either or both of your wishes are held by me on the understanding that if any conflict of interest is disclosed to me respecting either of your interests I am bound to disclose that conflict to the other of you.

In other words, there are no secrets between the three of us affecting either of you respecting these wills and the dispositions in connection with your estate and I am bound to discuss with each of you any subsequent changes either of you may wish to make.”

In considering whether you can act for both the husband and wife, you should ask yourself the following questions:

1. Did the husband and wife come to you jointly and ask you to prepare their estate plans?
2. Did one of the parties come to you and say, “I would like you to prepare wills and trusts for me and my spouse?”
3. Have you already represented either the husband or wife in another capacity? Is there any relationship between your firm and one of the spouses which might affect your ability to treat the spouses equally?
4. Is either the husband or wife a relative of another client of yours whose interest may be affected?
5. Did either of the spouses tell you that it is not necessary for you to talk to his or her spouse as to what he or she wants?
6. Have you considered any fiduciary duty of yours which may arise with respect to some third party to whom you owe a duty either of care or disclosure?

By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way a solicitor can avoid becoming a target for a claim arising out of breach of fiduciary duty.

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