LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Risk video bites

Risk video bites – Conflicts

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Practitioners who act for multiple parties are often caught unaware by conflicts, which can be difficult to anticipate and arise before the danger becomes apparent. This leaves the practitioners exposed to allegations of breach of duty and the conduct rules, and preferring the interests of one client over another. In acting for more than one party, you create a minefield for yourself.

You need to be especially vigilant when instructed by all parties to just document a structure or deal they have already agreed. Although the parties appear in heated agreement, their interests can be very different. Examples include intra-family transfers of property for no consideration, co-guarantors putting assets of different value at risk, and even mirror wills.

Another common example is acting for both sides in the sale of a business or real estate. In one claim, a practitioner acted for a vendor on the sale of a house. The practitioner drafted special conditions requiring the purchaser to effectively indemnify the vendor for the condition of the property and compliance with requirements of the responsible authorities. After the contract of sale was signed, the practitioner agreed to also act for the purchaser.

Four years after settlement the council issued the purchaser with a show cause notice because part of the premises had been built without a permit. The purchaser claimed the practitioner failed to properly advise her on the effect of the special conditions, and failed to advise her to obtain a building inspection report while the contract was still conditional.

The practitioner had sent her 'standard' letter of advice to the purchaser, but it did not address the effect of the special conditions. If such advice had been provided, she arguably would have breached her duty to her vendor client.

You also need to recognise potential conflicts when representing multiple parties in litigation. Their interests may appear to be the same, but those interests can diverge as the matter progresses. A seemingly clear pathway can then become a minefield. We saw a practitioner acting for a married couple who owned a business. They were sued by a man who claimed he performed work and paid money to them on the basis of certain misrepresentations that he would acquire a half-share of the business. The matter eventually settled, with the husband and wife jointly liable to pay an amount to the plaintiff.

However, the case against the wife had been weaker as the plaintiff's evidence had only been about alleged oral representations by the husband. The clients failed to pay the settlement amount, and the wife sued the practitioner arguing first that she had not been

advised about the possibility of making a strike-out application and secondly that she should not have been advised to sign the terms of settlement.

Even if you think the risk of acting for multiple parties in a matter is low, protect yourself by:

- considering and explaining to your clients where their respective interests may diverge
- obtaining your clients' informed consent, remembering that it will not protect you if you act for them in the event of an actual conflict
- clearly defining the scope of your retainer in writing
- if advice to one or more parties is excluded in your retainer, strongly recommending they obtain independent advice about the risks and
- by remaining alert to a potential conflict developing throughout the course of the matter.