Lawyers beware:

You can be fair game if your client is disappointed

LAWPRO has recently noticed a disturbing trend. Where a client – or even a non-client – achieves a disappointing result, and where it can be said with all the benefit of hindsight that a solicitor might have proceeded differently, the Courts have recently shown a tendency to hold the solicitor liable.

When the testator's capacity is at issue

One such example is *Hall v. Frederick* (2001), 40 E.T.R. (2d) 65 (Ont.S.C.). Solicitor Frederick received a telephone call from a social worker early one Saturday morning to attend at Kingston General Hospital to prepare a will for Bruce Bennett, who was expected to die imminently. Frederick arrived at about 10 a.m., and attended at Bennett's bedside, accompanied by the social worker and the nurse on duty (Swift).

All witnesses agreed that when Bennett was awake, he was lucid and communicated what directives he wished to communicate. There were frequent periods when Bennett drifted in and out of consciousness. To keep Bennett awake and alert through the conversation, it was necessary to elevate the head of his bed and turn on the fluorescent light. Frederick had to talk to Bennett in a very loud voice to rouse him and sometimes someone would have to grab his hand and give it a squeeze to keep his attention. It was Swift's evidence that Bennett appeared to be lucid in the directives that he was giving with regard to certain people. He wanted to leave his daughter $100. He wished to leave bequests to several other individuals as well. He wanted his store left to the plaintiff Hall.

Swift noted that Bennett was capable of making simple directives, but when it came to any complex thoughts in the nature of telling them his net assets, his debts, or the exact value of his property, he did not have the capacity to evaluate these things.

Bennett was unable to give instructions concerning his residuary estate. Frederick terminated the interview because Bennett seemed too tired to go on. Bennett was about to be medicated, and was obviously about to die. No plans were made for future re-attendance.

Frederick felt that he could not safely draw the will since Bennett could not maintain alertness long enough for it to be read and understood. He was also concerned that he could get no instructions from Bennett concerning the residue of Bennett's estate. Bennett died at 7 p.m. that evening.

When Hall learned that Bennett intended to leave him the store, but the will had not been drawn, Hall sued Frederick.

Despite the evidence of two expert witnesses – Brian Schnurr and Dr. Michael Silberfeld – that the defendant had met the requisite standard of care, Manton, J. held that Frederick was negligent in the circumstances.

Manton, J. held that Bennett did have testamentary capacity. The Court was of the view that Frederick should have prepared a will setting out the specific bequests. Nothing had to be said about the residue, except that his daughter and grandchildren should not receive it. Manton, J. criticized Frederick for spending "too much time worrying about Bennett giving him a list of assets and about what would be done with the residue of the estate." Manton, J. held that the defendant should have prepared a will and signed it in accordance with s. 4(1) of the *Succession Law Reform Act*, R.S.O. 1990, c.s.26. The Court could then decide on capacity if necessary at a later date.

This case is under appeal. Members of the profession who have reviewed this judgment have expressed concern. While a testator cannot be compelled to disclose the nature and extent of his property, how else is a solicitor to fulfil his obligation to ensure that the testator is aware of the nature and extent of his property? How could the Court have made a finding that the testator had mental capacity, if there was no certainty that the testator was aware of the "nature and extent of his property?" In view of these considerations, is it right to criticize the solicitor for "worrying about the list of assets and the residue of the estate…?" In what other area of law can a solicitor be held liable for refusing to proceed with a transaction, where the solicitor has concerns about the client's mental capacity? We hope the Court of Appeal agrees.

The dangers of joint retainers

We also obtained a disappointing result in *Foley v. Cook; Daniels* (T.P.), [2002] O.J. No. 2120. It illustrates the dangers of "joint" retainers, and assuming that one client speaks for the other. It also underlines the dangers of simply accepting a client's instructions, without discussing the matter with the client, and inquiring whether the transaction truly serves the client's purposes.

Solicitor Daniels was contacted by Gary Foley. Diane Cook and Foley had previously been involved in a common law relationship, but were in the process of "breaking up." Foley gave Daniels instructions to prepare a "Trust Agreement" wherein Cook agreed that Foley had a 50 per cent interest in a property to which Cook had registered title. It was agreed that "profits" would be split when Cook either sold the property, or died. Daniels had had prior dealings with Cook and Foley on other properties. He had prepared transfers from one to the other based on agreements of purchase and sale in which he took no part. Daniels believed that they acted as a "team."

Several months later, he placed a mortgage on the property on Cook's instructions, without consulting Foley. Several years later, he registered the "trust agreement" on title, pursuant to Foley's instructions.

When Foley learned about the mortgage, he sued Cook, claiming a 50 per cent interest in the property. Foley also sued Daniels, complaining that he assisted Cook to encumber the property without his consent. Cook also third partied Daniels. Cook paid Foley $25,000 to settle his claim. Cook incurred $30,000 in legal expenses in doing so. She then continued her third party claim against Daniels.

Pitt, J. accepted Cook's evidence that her objective was to satisfy what she considered the unreasonable demands of Foley by giving to him, at a time of her choice or her death, 50 per cent of the net proceeds of the sale of the property, after all expenses of every nature and kind made by her throughout her ownership of the property, were deducted. Instead, Foley got an undivided 50 per cent interest in the property forthwith. The agreement contained no specific restriction on Foley's right to seek partition, only an inferential limitation. The Trust Agreement did not accomplish this goal.

The Court accepted that there are clients to whom the question "why are you doing this?" would be quite inappropriate, and indeed, foolhardy, from the standpoint of maintaining an ongoing business relationship. But there was nothing about Daniels' relationship with Cook that would lead to the conclusion that he had no duty to communicate with Cook after having received instructions from Foley, to verify the basis on which those instructions were given.

For example, Daniels could have dropped Cook a note informing her that Foley had advised him that Foley had a half interest in the property registered in her name and that Foley had asked him to do a transfer to reflect that state of affairs. Daniels could have spoken with her on the telephone. Daniels could have drafted a brief Acknowledgment of Trust, and forwarded it to Cook, asking her to tell him whether the Acknowledgement truly represented the facts as she knew them to be, and suggesting independent legal advice, if she thought that was required. A solicitor must ensure that the clients understand the full nature and effect of the transaction in which they are engaging and are sensitive to the risks that are at stake.

The court accepted that the $25,000 settlement was reasonable, but allowed only $20,000 on account of the legal fees incurred in the litigation with Gary Foley. This judgment has not been appealed.

On dealing with an "unsophisticated" client

Turi v. Swanick [2002] O.J. No. 3595 (Ont.S.C.J.) holds that where a client is allegedly unsophisticated, it is not enough that a solicitor's advice be merely clear and correct. The solicitor must also explain the consequences of not following the advice, **and** confirm it in writing.

The plaintiff Turi retained the defendant solicitor Swanick to incorporate a new company for the purpose of operating a new men's clothing store. The plaintiff's express purpose in incorporating ITC Inc. was to avoid any personal liability for any liabilities that might be incurred in the operation of the store. Swanick prepared and registered a general security agreement to provide security for any money that the plaintiff advanced to ITC Inc. He also set up a family trust with the plaintiff, as the trustee, to hold the shares of ITC Inc. The store was not successful.

Teenflo Fashions (Teenflo) was one of the store's suppliers. Teenflo commenced an action against Turi for the price of certain goods that were allegedly sold and delivered to Mr. Turi personally. Turi defended the action claiming that, to the knowledge of Teenflo, all the purchases were made by ITC Inc. and that he was acting merely as a representative of the company. The "New Account" Application had been signed by Turi personally, as had the purchase orders in question. The Teenflo action proceeded to trial and judgment was granted against Turi in the amount of $22,427.37 together with prejudgment interest and costs.

Turi commenced an action against Swanick for damages in the amount of $40,125.23, being comprised of the amount of the judgment, interest, and costs that he was ordered to pay in the Teenflo action, and the costs of defending that action.

The Court found that Swanick's advice to Turi about the proper use of the corporate name must have occupied only a very small part of the forty minute meeting between them in which a number of quite complicated topics were covered. In these circumstances, and given that the consequences were not mentioned, it was likely that the advice did not register on the consciousness of the plaintiff. It likely "went in one ear and out the other." This finding was made notwithstanding Turi's evidence that he understood everything that Swanick told him. It was clear to the Court that he did not. For example, it was obvious that he did not understand the concept of the family trust, which he referred to in his evidence as "the trust company."

The Court was satisfied on the balance of probabilities that Swanick did advise the plaintiff about the proper use of the corporate name, but did not advise him about the consequences. Mr. Wayne Gray, Turi's expert witness, expressed the view that with respect to such high-risk clients, a reasonably prudent solicitor should take steps to avoid or minimize this risk to the client. These steps might consist of:

(a) advising the client on the distinction between the corporate and business names, in particular that dropping the word "Inc.", "Ltd.", or " Corp." from the corporate name is an improper use of the corporate name because it does not drive home to the opposite contracting party that it is dealing with a corporation;

(b) advising the client on the proper use of corporate names, including the need to saturate the name on all business dealings (e.g. on signage, cheques, business cards, letterhead, fax cover pages, Web site, e-mail, purchase orders, business contracts and other external communications) in order to minimize the chance that the opposite contracting party will not be aware that it is dealing with a corporation;

(c) warn the client of the risk of personal liability for failure to properly use corporate and business names.

Mr. Gray expressed the opinion that the best practice is to give the advice to the client in writing. However, none of his own sample letters to clients had any written advice concerning the consequences of failing to use the corporate name. Mr. Gray conceded that a failure to put the advice in writing does not, in and of itself, constitute a breach of the solicitor's duty. He stressed that it did not really matter how the information was communicated as long as the client "gets it and understands it." He conceded that it might be more effective to bring home the information to the client in a personal meeting than in a reporting letter.

Spiegel, J. found that the plaintiff was a high-risk client, and that the defendant regarded him as such, not only because he was in the high-risk retail business, but because he was an unsophisticated businessman. In the defendant's words, he was "a coat-pocket businessman" who could be sloppy in his record-keeping, and wasn't always going to do what the defendant told him. The standard of care owed to an unsophisticated client is different than that owed to a sophisticated client.

Swanick recognized there was a real risk that Turi would, despite the oral advice that he had been given, expose himself to the very type of liability which he was seeking to avoid by retaining the services of the defendant. Having foreseen this risk, Swanick owed Turi a duty to take reasonable steps to avoid or minimize that risk. Swanick could easily and conveniently have satisfied this duty by sending Turi a short written memorandum setting out the advice concerning the proper use of the corporate name and the consequences, which would not have taken much more time or effort than writing a memorandum to file. Swanick's failure to do so, on the particular facts of this case, constituted a breach of the standard of care. LawPRO has filed a notice of appeal on this case.

Conclusions

These three cases, all of which involved sole practitioners, illustrate the Court's tendency to sympathize with clients, even where expert evidence is adduced that the solicitor met the standard of care, or where the plaintiff's expert did not follow the steps which the Court found the defendant solicitor should have adopted.

Where a client leaves his will to the very last hours of his life, and is barely able to give instructions, the solicitor is nevertheless responsible if a proposed beneficiary is disappointed.

Where a solicitor is given firm instructions by two knowledgeable clients, the solicitor must nevertheless question the client to determine if the instructions are "really" what the client wants.

Where a solicitor gives clear and correct advice – the solicitor must nevertheless explain the advice, without being asked to do so, and must also record it in writing, lest it go "in one ear and out the other."

The conclusion: Solicitors beware. As these cases point out, you can be "fair game."

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