



## Duties of care to non-clients

All solicitors know that they not only owe duties of care to their clients but can often owe them to parties who are not their clients. This newsletter highlights the importance of identifying non-clients to whom a duty of care might be owed and what steps need to be taken in relation to them.

In our experience a lot of the professional negligence claims made by non-clients against solicitors are made in conveyancing transactions or other property-related matters such as loans. Many of those claims arise where a solicitor has acted for one or more members of a family; for example, where property has been transferred within the family or where a parent is providing funds to enable one of his or her children to buy property and this newsletter considers the problem of the non-client in such transactions.

There are several reasons why solicitors have to establish the identity of their clients. They need to know who will be responsible for their fees. Also, a solicitor acting in a conveyance, to give an illustration, clearly needs to have information regarding the client so that the necessary documents can be prepared.

However, these reasons do not force solicitors to think, in the same way, about non-clients to whom duties of care may be owed. Considering who will or may fall into that category is as important as establishing the identity of the client. Thinking about possible duties of care to non-clients at the start of a file is necessary so that a solicitor can decide, in advance, what needs to be done to avoid claims from such parties. One benefit of this approach is that it is likely to lead to less claims from non-clients or, where claims do arise, give solicitors better defences to those claims.

In transactions involving members of a family the instructions to the solicitor often come from just one person who is clearly a client; for example, the family member acquiring the property. But there may be other people, who are not represented by the solicitor or by any other firm, whose interests and rights are going to be affected by the transaction. A typical example would be the family member parting with the property or providing the funds for the purchase. These people, if not clients as well, may be able to argue that they are owed a duty of care by the solicitor acting on the transaction who is aware or ought to be aware of them.

Problems arise where family members do not benefit, or discover that they will not benefit, from a transaction in the way that they expected. This occurs, for instance, where a relative of a client expects, to have a right of occupation in a property owned by a client or to have some other interest, such as an entitlement to proceeds of sale, which the solicitor conducting the transaction has not, in fact, provided for. When the property comes to be sold or the client dies and the property passes under a will it is then that the non-client, who previously assumed that his or her interests were being taken into account, realises that they were not and then criticises the solicitor.

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The problem with identifying duties of care and knowing what needs to be done to discharge them is that this is a constantly evolving area of the law. Defining exactly when duties of care to non-clients exist is not easy but recognising situations that could give rise to duties should be possible.

In the claims that we receive, claimants often complain that they were simply not considered by the solicitor even though it was known or should have been realised that they were unrepresented. They allege that their role in a transaction, or its effect on them, was simply not thought of at all.

We recommend that at the start of a transaction, all family members are contacted direct to establish if they are to be clients of the solicitor. This is better than simply leaving one of the family members to tell the solicitor who else he or she thinks are clients of the solicitor. Any family member who does not ask the solicitor to act for them, should be told:

- that the solicitor will not have a duty to them to protect their interest or to ensure that they obtain a benefit from the transaction which they are expecting
- that they must take independent legal advice to safeguard their position in the transaction generally.

As the transaction progresses, especially if there are any changes in the solicitor's instructions, the position of non-clients needs to be carefully reviewed at regular intervals.

As an extra precaution, the solicitor should also ensure that the parties that are identified as his client or clients should be aware of all discussions and correspondence with other family members who have chosen not to instruct the solicitor to act for them.

These principles can be applied to other similar situations, such as transactions involving friends or small businesses or any other transaction where the parties may not be dealing at arms length or in a formal commercial context.

It is a well known professional conduct requirement of the Law Society that all solicitors should be aware of the potential conflicts of interest between clients. Watching out for potential duties of care to non-clients is a similar issue which should be approached in the same way.

This is one area of a solicitor's practice where it is essential that instructions received and advice given must be in writing or subsequently confirmed in writing.

These points are all signs of quality service from a solicitor. They are also good risk management measures.

## Practical Summary

- In any transaction there will be parties who are easily identified as the client or clients.
- Check with all family members whether they require you to act for them.
- Those that do not must be told the consequences.
- Always recommend that non-clients take independent legal advice.
- Always confirm instructions and advice in writing.

Our specialist in-house claims advisors are always available to answer questions which arise out of this newsletter and are able to advise on any other professional liability issues arising in the course of insureds' practises.



Please note that this information is not intended to constitute advice or a complete statement of relevant law.

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