

SLEEPING WITH THE ENEMY

Let me say at the outset – the title of this article is a bit tongue in cheek. I don't consider insurers to be the enemy... in fact some of my best friends are insurance claims officers and solicitors. But when you're in the middle of bloody-minded settlement negotiations, it can sometimes feel as though you are in a fight to the death.

Which brings me to a recent dilemma. A claims officer from an insurance company against which I have a number of cases, asked me if I could represent her in relation to a compensation claim she was making. I was a little surprised by her request, as I tend to spend a great deal of time telling this particular claims officer that she should be doing a whole lot more than she is doing. But apparently that 'tough' demeanour was exactly what she liked about me. Flattering... I guess...

Her request troubled me. Not because I minded acting for her; in fact I would have loved to take her case on. But I was concerned that

acting for her might create a conflict of interest in relation to the other clients for whom I am acting whose cases are being handled by this particular claims officer. Those clients rely on me to represent them without fear or favour, to pick up the phone and blast the living daylights out of the insurer if required and to be there, on their side, no matter what. I could see how they might feel that my ability to represent them properly would be compromised if I was also acting for their claims officer – I would hardly be likely to blast my own client, now, would I?

In the end, I decided that the only way I could act for this claims officer would be to disclose this to all my other clients whose claims cases she was handling. And given that I was pretty sure that they would (understandably) not be thrilled about it, I decided that it was better not to act for this claims officer at all. I politely explained to her my concerns in relation to the conflict of interest and suggested that she might be better represented by another solicitor in my firm who doesn't have active cases against her.

The more you think about it, the more this issue of conflict of interest, and what should be disclosed to a client, becomes quite complex. For me it was pretty clear that I would have to disclose a solicitor/client relationship with an insurance claims officer to my clients. But there are all sorts of other relationships that I am not so sure about. For instance, one of my very close friends is a solicitor who represents insurance companies. If she is against me in one of my cases, do I need to disclose to my client that we are good friends? Would there be a suggestion that I may not fight quite as hard in a case against her (even on a subconscious level) because of our friendship?

And perhaps even more troubling are romantic relationships. If a solicitor strikes up a romantic relationship with a barrister who is then briefed to appear against her (or him) in a case, do they have to disclose their relationship to their respective clients? And what about doctors and other experts whom we engage to provide opinions in relation to our cases? If there is a relationship between a solicitor and an expert, is there an obligation for either of them to disclose it? Does it give rise to an apprehension of bias, or can we assume that experts will rigorously adhere to their obligation to be impartial?

In a relatively small legal profession, and an even smaller section of specialty, it is unrealistic to think that it will be possible to have no prior relationships with the legal practitioners and experts that you come across in a case. But is there a distinction, in terms of duty to disclose, between a casual friendship or acquaintance, and a close friendship or romantic relationship and, if so, where on the spectrum do you draw that line?

So many questions... I don't know the answers. It certainly makes you think. ■

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