2013: No. 3 • WINTER

INSURANCE ISSUES:

Risk Management

A publication of the Law Society of British Columbia

Lawyers Insurance Fund

Witnessing a signature? Stop. Read this first.

THERE ARE SOME legal services that seem very simple and straightforward – after all, how hard can it be to witness a signature (or two)? Unfortunately, these are potential minefields. Why? Because people signing legal documents often need legal advice. So if you are about to witness a signature on a real property transfer form, mortgage or discharge, power of attorney, co-ownership agreement, release of judgment or CPL, or any other document with legal consequences, read on.

The most frequent reports of claims and potential claims in this area arise from real property transactions involving family members. However, lawyers also report claims in relation to other transactions. The common thread is that the lawyer believes that the person understands the document and wants to sign. Unfortunately – and as the examples given from Lawyers Insurance Fund (LIF) claim files show – when matters later unravel, the lawyer may be targeted. Keep safe. Read and adopt the risk management tips that follow.

And if you're the lawyer who is retained to provide independent legal advice (ILA), stay tuned for LIF's risk management tips designed specifically for the ILA lawyer.

Risk management tips

1. Ask questions to satisfy yourself that your client understands the document and its legal effect.

Before signing a document, you should know that your client understands, for instance, that:

- a power of attorney given so that a friend can help with banking might also allow that friend to sell or mortgage real property;
- adding a son as a joint tenant might help avoid probate fees but also:
  - creates an interest that the son can mortgage without the parent's consent, and is subject to claims if he becomes bankrupt or separates from his spouse; and
  - results in a loss of a portion of the principal residence tax exemption;
- mortgaging the family home to finance a loan to a daughter or a spouse's interest in a business or investment, puts the entire property at risk of foreclosure; or
- giving a cottage to grandchildren means a potential loss of control during the grandparent's lifetime and that the gift, once given, cannot be taken back.

Digging into the reasons for the transaction, family dynamics and the characteristics of the parties involved may uncover critical information. Your client's answers will ensure that you give the proper legal advice and any appropriate warnings of risk. As one lawyer advised us, *"Better questioning at the start would have drawn out the additional detail I missed."*

2. Ask more questions to determine if the document actually achieves what your client wants.

You need to find out your client's intentions, as the document may not achieve that goal. This is particularly important if your client wants to transfer property as a gift. For instance, a client may hope to avoid probate fees by adding a son as a joint tenant. Given the law in relation to resulting trusts as established by *Pecore* v. *Pecore*, 2007 SCC 17, that gift may fail without a deed of gift or some other papering of intention. As an adult child will be presumed to hold the property in trust for your client, that child has the onus of proving that a gift was intended.

3. Caution your client about possible unintended consequences, and confirm it in writing.

Sometimes, a signature brings unintended results. A real property transfer may trigger unexpected income tax consequences, or an anticipated property transfer tax exemption may not apply. If there is a mortgage on title, a transfer may trigger default. A transfer or mortgage to assist a child may adversely affect an existing estate plan, including the provisions of a will, or result in unintended family law property consequences.

Be alert to the possibility that your client may need advice that you will not be providing. Recommend that your client obtain that advice, and make sure the limits on your retainer are clear. And put both in writing.

4. Fraudsters are out there. Know and meet your identification obligations.

You may be witnessing the signature of a fraudster. At a minimum:

- Know and follow the Law Society's client identification and verification rules.
- Get picture ID and keep a *legible* photocopy. Insist on picture identification (unless you are certain of the client's identity through your own *personal* knowledge). If there is more than one client, insist that each produce separate photo identification. Avoid making accommodations requested by the client that vary your standard procedure for checking identity. Keep a photocopy of any picture identification that you take in the file, and ensure that it is legible. Simply recording the driver's licence number is probably not sufficient to protect you.

Learn more about avoiding identity and other real estate frauds here.

5. If you are dealing with more than one party, be very, very careful.

You've likely had several people arrive at your office together, wanting you just to "help them paper" some agreement. They may want you to prepare a document or simply witness one (or more) signatures. This situation is rife with potential problems. As one lawyer cautioned, *"Be careful in dealing in a family transaction regardless of an apparently good relationship."*

To navigate these potentially troublesome waters, start by asking *"Who is my client?"* The answer to that question will help you determine your ethical duties, and how best to proceed.

If the answer is "everyone," you must ensure that you are not acting in a conflict. *BC Code* section 3.4 deals with conflicts of interest between clients, specifically defined as:

> … the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

Pursuant to rule 3.4-1, a lawyer must not

Real-life scenarios from our claim files

A longstanding client dropped by his lawyer's office to have his signature on a mortgage notarized. He explained that he knew he was signing a mortgage and needed no legal advice. In fact, he thought that he was simply guaranteeing the debt of friends, not putting his house at risk.

A lawyer witnessed his borrower clients' signatures to a mortgage prepared by the lender's lawyer. The mortgage was an inter alia mortgage over two properties. The clients later said that they agreed to mortgage only one.

As part of a settlement of a bond claim, a supplier to a building site signed a release of both past and future debts. The lawyer witnessed the release, unaware that her client was continuing to supply materials to the site. In a subsequent builder's lien claim, the owner/contractor raised the release as a defence.

A lawyer acted for a client who put title to his properties in joint tenancy with his daughters to avoid probate fees. When one daughter proceeded to use her interest for her own purposes, the client threatened to sue the lawyer for failing to advise him of the legal effects of joint tenancy.

A lawyer witnessed signatures on transfers for an elderly client putting property titles into joint tenancy with two of her three children. One of the children later alleged that the transaction documentation was not proper, and an anticipated tax exemption unavailable.

act or continue to act for a client where there is a conflict of interest except as permitted under the Code. Lawyers caught in a conflict from the outset, or as the matter develops, may well face claims. For instance, information received from one client may have prejudiced another, or one client may not have received advice about the potential negative effects of the transaction. Separate from any liability exposure, a lawyer's breach of the Code may also result in the Law Society taking disciplinary action.

If you are ethically able – and choose – to act for everyone, remember the Code requires a joint retainer letter, even for members of the same family (rules 3.4-5 to 3.4-9). Remember to include any limits on the scope of your retainer (see Tip 3). A sample letter is available on the Law Society's website. Of course, even if you are ethically able to act for all, the prudent course may still be to choose to act for just one.

What about the unrepresented party? At a minimum, you will need to follow rule 7.2-9. That rule provides that, when a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

If you are prepared to witness the unrepresented person's signature, the suggestions in Tip 8, adapted as needed, will help protect you. If it is a real property transaction, you will need to follow Appendix C, paragraphs 7 through 9 of the Code.

Recognize, however, that the only safe course may be to insist the other party receive independent legal advice and resist pressure to witness any signature other than your client's. Protect your client, and yourself. The other party will have much more difficulty challenging a transaction if they received independent legal advice.

Two further words of advice:

- Appreciate that, even if your client's signature isn't required on a document, many of these tips will still be relevant. For instance, parents who lend money to an adult child and take a mortgage against that child's property as security may need to know how time limitations could affect enforceability.
- Think carefully before you include a non-client in any client meeting. Inclusion may erode privilege. You also run the risk of the non-client shifting allegiances and "going public" about the meeting, unfettered by any confidentiality obligations.

6. If a party is elderly or vulnerable, be careful about capacity and undue influence.

Be wary of any transaction involving an elderly or vulnerable person.

If that party is not your client, do not take their signature. Insist that they receive independent legal advice as there may be issues of competency or undue influence. If they refuse, explain to your client that proceeding in these circumstances may mean less ability to enforce their position in the face of a challenge. If your client still decides to proceed, confirm that advice in writing. And if you aren't comfortable continuing, stop before you witness even your client's signature.

If the elderly or vulnerable party is your client, take appropriate care to satisfy yourself that they understand the nature and consequences of what they are signing. Remember your ethical obligations regarding clients with diminished capacity (rule 3.2-9). Even a mentally capable client may be vulnerable to undue influence by a relative, friend, caregiver, acquaintance, church member, accountant or other person. The BC Law Institute's (BCLI) *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide* has application beyond wills. It can help you ensure that powers of attorney, property transfers or other common transactions, including gifts, loans and guarantees among family members and acquaintances, represent the genuine independent wishes of your clients and can withstand

More real-life scenarios

A lawyer witnessed the signatures of spouses mortgaging their home to raise money for a property development project in which the husband was involved. The lawyer offered legal advice but the husband advised that none was needed. The economy turned, the development failed and the bank started foreclosure proceedings. The spouses turned on the lawyer for failing to advise them that both were liable under the mortgage.

A wife wanted to transfer her interest in recreational property to her husband, the lawyer's client. She refused independent legal advice, and the lawyer agreed to witness her signature. The wife's personal representative later tried to set the transfer aside on the basis of undue influence and lack of capacity, and the husband alleged that the lawyer failed to protect his interests by not insisting that his wife receive separate representation.

A lawyer acted for a long-time friend and his co-worker on the purchase of a house. The friend advanced money to the co-worker for the purchase, but no agreement was prepared relating to the advance. Years later, after the friend lost mental capacity, his family asserted that the advance was a loan and not a gift, and asked the lawyer for his file and evidence to prove the same.

A lawyer acted for a joint tenant wanting to pay a mortgage registered against an elderly co-owner's interest in the property, in exchange for the co-owner's share. When the co-owner refused to obtain legal advice, the lawyer agreed to meet with him at his assisted living facility and witness his signature. The co-owner later alleged a lack of consent or understanding of the transfer.

challenges based on undue influence. The guide includes an excellent reference aid with a checklist, flow chart and list of red flags. Use the checklist and keep it in your file – your checkmark is evidence you dealt with an issue. Both the guide and reference aid are available on the Law Society's website (go to Lawyers > Practice Support and Resources). The Lawyers Insurance Fund has a limited supply of the reference aid in brochure form. If you would like one, please email us at insurance@lsbc.org and include your mailing address.

For a helpful resource on issues of capacity, see BCLI's *Report on Common-law Tests of Capacity*, available on the BCLI website (www.bcli.org).

7. Remember that you may be a witness down the road: keep notes and relevant documents, and protect your client's confidential and privileged information.

You may have acted entirely appropriately, including testing your client's understanding of the transaction and checking for capacity and undue influence, but how will you prove that years down the road? Remember that you may be a witness some day in a dispute about the transaction, and you will likely have no independent memory of the matter. Make notes, and keep them.

You may be the first person called if there's a dispute later. If it's not your client, remember your duties in relation to confidentiality and privilege. To whom can you speak, or give access to your file? Is the client still alive? What legal authority does a lawyer under a power of attorney or a court-appointed committee have to obtain information? If the client has died, is there a personal representative who has the authority of a grant of probate, or is there a dispute about the validity of the will? Call a Law Society Practice Advisor for assistance in determining to whom you may give information.

You will also need to decide how long to keep your file, including your notes. The Law Society offers minimum file retention guidelines, noting that other factors may require a longer retention period. Use your judgment. If the transaction might be questioned at some later date, your file will help give us any evidence we may need to defend you.

8. If you simply witness a signature and give no legal advice, protect yourself.

If you conclude that it is appropriate to simply witness a signature, use of the stamp "no legal advice sought or given" provides evidence of the limits on your retainer. Help keep that evidence unassailable:

- Ensure your actions are consistent with the stamp's message. Taking additional steps that belie the message, such as actually offering some advice despite the warning, may create additional duties. And if you intend to act for only one party but do more than witness another's signature, the Code's conflict and joint retainer requirements may be triggered (rule 7.2-9, commentary [1]).
- Consider having the client initial the stamped message to acknowledge that it was read and understood. This will help protect you from a client who later tries to advance a position that is inconsistent with the stamp's wording.
- Consider using a second stamp that clearly states the very limited nature of the services the lawyer provided (for example, "officer certification only").

If a stamp is unavailable, write the words yourself or make some contemporaneous note reflecting the limits of your retainer. If appropriate, consider a letter setting out what legal advice is needed and that the person has declined and just wants you to witness their signature. Keep your notes and copies of any documents that you witnessed in a general file that you use just for that purpose.

Remember as well your duties in relation to documents prepared by "Freemen" or "sovereign citizens." For more information, see The Freeman-on-the-Land movement in the Winter 2012 *Benchers' Bulletin*.

9. Know and meet your officer certification obligations.

Part 5 of the *Land Title Act* codifies a specific scheme of certification. Under Part 5, if you are certifying the execution of an instrument as an officer, you are certifying both the signature and identity of the signor. Specifically, you are certifying that the signature you witnessed on the document is the signature of the individual who appeared before you and acknowledged that he or she is the person named in the instrument as signor. You are not guaranteeing identity. As long as you took reasonable steps to confirm this independently – see Tip 4 – you are safe. As with any signature you witness, you must also satisfy yourself that the person appears to understand the contents of the document and to be acting of their own free will. And remember that properly witnessing the execution of an instrument is also an ethical obligation under Appendix A of the Code.

For more detailed information, see the *Land Title Practice Manual* – Volume 1, Land Title Act: Part 5 (ss. 41 to 50), Attestation and Proof of Execution of Instruments, published by the Continuing Legal Education Society of BC.

845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9
Telephone 604.669.2533 | Facsimile 604.669.5232
Toll-free within BC 1.800.903.5300 | TTY 604.443.5700

Lawyers Insurance Fund
Telephone 604.682.8911 | Facsimile 604.682.5842

lawsociety.bc.ca