

Lawyers

For the convenience of readers interested only in issues relating to legal practice we provide this information about the duty and standard of care owed by lawyers. For info about the duty and standard of care to be met by professionals generally, including lawyers, click on "More" to the right or on the Professional Indemnity web page.

Professional Duty of Care

Lawyers occasionally give advice which is widely disseminated, and can face liability to a large number of potential claimants as a result. In such cases, the duty of care considerations for a lawyer will be similar to those of accountants. However, a lawyer typically provides advice specific to an individual client's circumstances. Furthermore, it is ordinarily expected that the client will keep the advice confidential. The duty of care issue is therefore usually not as great a concern to lawyers as to some other professions.

However, lawyers are sometimes unexpectedly found to owe a duty of care to someone other than a client. This someone can even be the opposing party in a transaction or dispute. If a lawyer agrees to provide a service or advice to an opposing party, even someone represented by their own counsel, then a duty to that person may arise. The existence of a duty will depend on the agreement to provide a service and the specific relationship created between that person and the lawyer. The question is whether, in the particular circumstances, the lawyer should have considered that his carelessness could harm the person. So, for example, a real estate lawyer was held liable to the opposite party for failure to register documents as he had agreed to do. In another case, a lawyer was liable to the opposing party in a loan transaction where the lawyer had incorrectly said that security documentation was binding on the debtor. A lawyer who fails to fulfil a formal undertaking given to the other side in a transaction can be liable as a result, particularly in a case where the lawyer has agreed to hold funds for a specific purpose. If the lawyer applies the funds for a purpose other than that agreed, the lawyer could be liable either to the opposing party who provided the funds or to a third party that was supposed to receive the funds.

As with most other professions, lawyers can owe a continuing duty of care to former clients to protect confidential information. In the case of lawyers though, a continuing duty may also exist relating to some activity completely unconnected to any previous involvement with the client. For example, a lawyer who goes into business with a former client or helps a former client with an investment can owe a professional duty of care regarding the new involvement. In one such case, a lawyer was found liable to a business partner for not telling him that he, the lawyer, was judgement-proof.

Lawyers can also owe a duty of care to someone whom the lawyer's client intends to benefit from the lawyer's advice or services. In one case a lawyer who drafted an agreement for a trust company, which intended to make the agreement available for use by its client, was found to owe a duty of care to that client. Generally, a professional

who gives advice will only owe a duty of care to someone who actually and reasonably relies on that advice. However, there are exceptions to this principle in the case of lawyers who were asked by their clients to do something for the benefit of someone else. A good example is the testator of a will who intends to provide a benefit to a beneficiary who may not know that a will exists. Even though the beneficiary did not rely on the lawyer who prepared the will, he or she may be able to claim against the lawyer if the will is not properly prepared or executed.

Professional Standard of Care

When a lawyer is retained by a client, misunderstandings often arise regarding the scope of the lawyer's involvement. It is therefore appropriate for the lawyer and client to discuss and decide upon the extent of the legal services to be provided and the degree of responsibility assumed. Even after these matters are determined at the outset of the retainer arrangement, the scope of the retainer may shrink or expand as the matter progresses. The variability of legal retainers has significant implications for the standard of care to be met by lawyers. Many negligence claims against lawyers relate not to the quality of the work performed, but rather to complaints about the lawyer's failure to complete tasks that the lawyer considered to be outside the scope of the engagement.

In assessing the standard of care to be met by a lawyer and the scope of the engagement, the court will be guided by the terms of a written retainer. If a written agreement clearly limits the scope of the retainer, then the lawyer will ordinarily not be liable for failing to undertake work beyond that scope. Where no written retainer exists, the courts will infer the nature of the retainer arrangement from the conduct of the parties. In the event of a disagreement, where there is no written retainer, the lawyer will be at a disadvantage in seeking to limit the scope of the retainer.

It is ordinarily expected that, when accepting a retainer, a lawyer assumes the following obligations:

1. to exercise reasonable skill, care and diligence;
2. to advise the client on all matters relevant to the retainer;
3. to protect the client's interests;
4. to carry out the client's instructions by all proper means;
5. to consult with the client regarding matters that are outside of the authority delegated to the lawyer to decide; and
6. to keep the client reasonably well informed.

With respect to the duty to advise, a lawyer is required, in particular, to warn client of risks associated with a proposed course of action. A lawyer's liability exposure for failure to provide an appropriate warning generally increases where the client is less sophisticated. If a client instructs his lawyer to proceed despite knowledge of a risk, the lawyer will usually not be liable in the event that outcome warned about actually occurs.

A lawyer will usually not be found negligent in the handling of a matter after complying with the prevailing practice of the profession regarding such matters, unless the practice is found to be unreasonable in the circumstances of the particular case. The practices and procedures that lawyers are required to follow in the conduct of individual engagements are defined with less specificity than that for many other professions. Lawyers perform a broad range of professional services. Some legal services are

capable of being evaluated against relatively precise and objective criteria for work competently performed. A simple real estate conveyancing transaction is an example of a service of this sort. However, much of the professional judgement that lawyers are called upon to exercise is not capable of being reduced to a detailed or comprehensive set of written standards. This observation is more true of advocates than solicitors, in part because the decisions made by an advocate regarding matters of tactics and presentation can be highly subjective. In the case of advocates, the courts have been reluctant to fault judgements made regarding the manner of presentation of a client's case, even where the court considers that another approach would clearly have been preferable. However, liability usually will follow from egregious errors of judgement, or from failure to comply with a strict procedural requirement, such as a limitation period.

While the specific practices and procedures to be followed by Canadian lawyers have not been precisely defined for general application, some basic principals have been set down. Of greatest significance in this regard are the codes of professional conduct established by the provincial law societies – the bodies empowered to exercise governance of the legal profession. These codes of conduct tend to address prohibited practices and proper ethical conduct, rather than imposing guidelines for the proper conduct of specific legal functions. However, to the extent that a lawyer's conduct is found not to comply with the applicable code of professional conduct, such non-compliance is sometimes considered to be strong evidence of failure to satisfy the minimum standard of care.

A lawyer qualified to practice in a Canadian province is permitted to undertake any engagement that a lawyer may properly undertake, without being required to obtain specialist training or qualifications. All lawyers are required to have knowledge of matters of fundamental importance and to conduct research necessary to inform themselves of the applicable law if the circumstances are such that a reasonably prudent solicitor would be alerted to the need for such research. Lawyers have been held liable for errors made as a consequence of lacking specialized knowledge required for a particular engagement undertaken. Some courts have held that a lawyer who specializes in a specific practice area may be held to a higher standard than a generalist undertaking an engagement in the same area. With the movement of some law societies towards certification of specialist qualifications to allow lawyers to market their specialities, the judicial recognition of a specialist standard of care may increase.

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