# Manage malpractice risk

## by recognizing cultural diversity

*Lorne Shelson*

In the social realm, cultural differences can be awkward for those on both sides; but in the context of legal services, cross-cultural misunderstandings and other culture-related factors can occasionally lead to malpractice claims against lawyers. The good news: claims with a cultural component are easily preventable as they tend to reflect certain recurring themes.

One category of claims arises where a lawyer is unfamiliar with the culture of his or her client or is not comfortable asking questions about culture, and so makes false assumptions or ill-advised communication "adjustments" that lead to misunderstandings and mistakes.

In a subset of this first category of claims, lawyers acting in commercial transactions based on the traditions of particular communities may be criticized for not communicating the extent to which such transactions are enforceable under Ontario law. Where the transactions

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involve parties outside the particular community, the lawyer must be on guard for the interests of all clients. Likewise, regardless of cultural norms related to agency, a lawyer practising in Canada will be held to the prevailing standard of care about from whom to take instructions, and will not be able to rely, as a defence, on the traditional practice of a particular community.

The second category of problems that we have seen occurs when some newcomers to Canada and lawyers from diverse communities inadvertently suffer marginalization due to cultural background, age or foreign legal training. These lawyers may have difficulty obtaining quality articles and proper mentorship, might not participate in mainstream CPD programs, and may end up as sole practitioners without adequate support from colleagues in the profession. Based on our experience, they are vulnerable to being preyed upon by fraudsters who seek to take advantage of and trade upon a common ethnic and/or religious background.

Lawyers who were trained in another country may also, in some cases, be less familiar with Canadian property rights concepts such as mortgages. Alternatively, they may be members of hierarchical cultures that require heightened deference to elders, causing them to be overly trusting of other lawyers based on seniority alone.

The following scenarios are loosely based on real claims we have seen at LawPRO.

## Scenario 1: Reliance on cultural norms leads lawyer to act without full instructions

A man retained a lawyer to commence a medical malpractice lawsuit. The man believed that his wife had died because she had been not properly diagnosed with a heart condition. The lawyer commenced an action on behalf of the man and his daughter against the doctor and hospital.

Unable to secure helpful expert reports to support his claim, the lawyer recommended to the man that the action be settled on the basis of a dismissal without costs. The lawyer took instructions from the father only, who was a member of a patriarchal community where fathers commonly spoke on behalf of female family members. In consideration of the clients' cultural background, the lawyer had not confirmed with the daughter that her father had her authority to provide instructions on her behalf. The daughter, who had not been consulted about the settlement, later refused to execute the settlement documentation. The doctor and hospital obtained an order enforcing the settlement.

The daughter made a claim against the lawyer for acting without her instructions.

## Scenario 2: Failure to properly balance cultural practices and Canadian commercial standards casts suspicion of fraud over lawyer

The lawyer belonged to a tight-knit community where loan transactions were rarely documented. Community members generally relied on the word of others with respect to repayment of loans. The community was also generally distrustful of financial institutions, and completed large transactions without involving banks.

It was also commonplace for one community member to support others by giving them money to assist in purchasing property. The money was typically repaid on the sale of the property, all without any written agreement. Consequently, undocumented funds would be paid from the lawyer's trust account on real estate transactions between community members. The lawyer, who was ultimately exonerated, fell under suspicion of being involved in value frauds because he had not obtained proof for the mortgagees that the deposits stipulated in various agreements of purchase and sale had in fact been obtained. The case illustrates the risk a lawyer faces in failing to balance the needs and traditions of a given cultural community with the expectations of local business enterprises. A less risky approach would be for a lawyer who is familiar with the particular financial practices of a community to make efforts to educate institutional clients about those practices. By doing so, the lawyer may be able to meet the needs of both the lawyer's community and local institutional lenders, in turn facilitating the community's ease of access to these lenders.

## Scenario 3: Failure to be on guard

A lawyer was both a member of a racialized community and first licensed as a lawyer in her late 50s. She had difficulty securing employment with a law firm, and so established herself as a sole practitioner offering real estate services. The lawyer, who had immigrated to Canada, assumed due to the openness of Canadian society, that people living in Canada were trustworthy. She further assumed that real estate law in Canada was the same as in her country of origin, where property rights were unrestricted and mortgage lenders extended funds at their own risk.

The lawyer approached a paralegal acquaintance who shared her cultural and religious background. The paralegal appeared to the lawyer to be a devout and caring person, and invited the lawyer to family gatherings. Because of their shared background and faith, the

lawyer unquestioningly trusted the paralegal and began working for her.

The paralegal provided the lawyer with an office and 'referred' real estate files to the lawyer. However, the paralegal and her staff processed all of the documentation, including effecting registrations using the lawyer's electronic land registration account and disk. The transactions turned out to be fraudulent. The lawyer was subjected to claims at the instance of the various mortgage lenders. She was ultimately compelled to resign as a licensee, having allowed herself to be duped by the paralegal.

## Scenario 4: Need to respect a client's cultural traditions

A lawyer appeared on behalf of a client on a criminal matter. During a break in the proceeding, the lawyer made a flippant comment related to the client's background in an ill-conceived attempt at humour. The client, on learning what his lawyer had said about him, lost faith in the lawyer's ability to represent him and discharged him. The comment was included in the official record of the proceeding. The client sued the lawyer for both negligence and defamation.

## Scenario 5: Failure to communicate barriers to enforcement of terms of preferred lending practice

A woman needed to refinance her home to raise funds for her business. Due to her religious beliefs, she wanted to finance the loan through the Islamic mortgage system rather than with an interest-based mortgage. The lawyer agreed to act for both the woman and lender on a Sharia-compliant loan transaction.

Unbeknownst to the lawyer, the woman had conspired with the mortgage company's representative to falsify her income to obtain approval for the loan. The mortgage went into default.

A dispute arose between the first and second mortgagee. For a mortgage to be Sharia compliant, no interest can be charged. Instead, the borrower makes periodic payments characterized as rent.

The second mortgagee took the position that by paying the principal balance owing under the mortgage, it had assumed the position of first mortgagee. The second mortgagee refused to pay the portion of the balance characterized as rent. Likewise, the borrower alleged that no "rent" was payable to the claimant as she did not "rent" anything other than the money under the mortgage.

The lender sued the lawyer alleging that although she instructed the lawyer to complete the legal work for a Sharia-compliant mortgage, she had always intended to make a return on her investment, and if the "rent" provisions of the mortgage were not enforceable under Ontario law, then the lawyer was negligent in structuring the mortgage transaction and in failing to warn the lender of an inherent risk. The lawyer disputed the lender's claim, noting that any such risk was well known to those providing Sharia-compliant loans. (The claim, which was founded primarily on other allegations, eventually settled.)

## Risk management lessons

When working with clients from cultures different from yours, it's important to treat the differences you encounter with sensitivity. However, protection of your clients' interests (and your own) means that you cannot use sensitivity as an excuse for not meeting your professional obligations by asking relevant and detailed questions about transactions, instructions and parties.

In cases involving culture-specific legal and finance practices, it is essential to communicate fully about Canadian legal and financial industry norms, and to review areas in which the client's expectations may not be enforceable under Canadian law. This is especially important where the parties come from different cultures.

Lawyers newly arrived in Canada need to be aware that LawPRO has seen newcomers expressly targeted by fraudsters, including individuals from their own culture who seek to take advantage of the newcomer's trust, or gaps in knowledge of Canadian law.

The bottom line? Learn about and be respectful of culture and cultural differences, and make sure that the services you deliver meet or exceed relevant standards of care and are consistent with Ontario and Canadian laws. ■

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