

**Mortgage Fraud: Some Ethical Issues** (from May 2009 Advisory)

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The Law Society of Alberta has been concerned with mortgage fraud in this province for a number of years. It seemed to flourish during the time of our hot economy, but now that the housing market has cooled, we are seeing the fallout.

Recently, the Calgary Herald published an article in which a member of Calgary's police force suggested that mortgage fraud would not be so prevalent without the involvement of dirty bankers, realtors and lawyers. Most lawyers might take exception to this comment.

In many cases, lawyers are unwittingly involved in mortgage fraud. Fraudsters are not anxious to reveal their scheme to the conveyancing lawyer and will try to conceal it. The Practice Advisors' office receives regular calls from lawyers who suspect that the deal in which they are acting involves a potential fraud, or who have discovered that a fraud may have taken place on a matter which has long been closed. Following are some common questions and answers:

1. ***May I continue to act for the purchaser client if I discover that the purchaser is attempting to commit a fraud on the mortgagee?*** The Code of Professional Conduct prohibits lawyers from knowingly assisting a client in a crime or fraud, and requires withdrawal if the client persists in instructions that the lawyer knows will result in a crime or fraud. Knowledge will be attributed to a lawyer when a reasonable argument cannot be made for any other interpretation of the available facts. When a lawyer suspects a client may be engaged in fraud, the lawyer should discuss these concerns with the client and otherwise exercise due diligence. If the client's explanation is not satisfactory, withdrawal must be considered.
2. ***I have withdrawn from representing my client, as I discovered he is committing a real estate fraud. Should I tell anyone? Can I?*** Chapter 7 of the Code of Professional Conduct requires a lawyer to keep confidential all information concerning the business and affairs of the client, acquired during the course of the professional relationship. Disclosure of certain information may, however, be allowed under the Code.

Lawyers must disclose confidential information to the Law Society when required, and must disclose such information when required by law. Disclosure is also required to prevent a crime likely to result in death or bodily harm.

Lawyers *may* disclose confidential information when necessary to prevent any other type of prospective crime. When disclosure is discretionary, the lawyer must evaluate the risk to the safety or property of others. In any case in which disclosure is considered, the lawyer should assess the information to be disclosed, and disclose only the minimum amount of information required to give effect to his or her ethical obligations. Secondly, the client should be given an opportunity to either make the

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disclosure directly or persuade the lawyer that the apparent need for disclosure is based on incorrect information. This will ensure that confidential information is not disclosed by a lawyer in haste, or when inappropriate.

3. ***I act for the borrower/purchaser and lender, and have just discovered that the borrower has misrepresented the purchase price of the property to the lender. What do I do now?***

Lawyers acting in a joint retainer have a duty to act in the best interests of all clients in the retainer. Information received from one client in connection with the matter cannot be treated as confidential, and must be shared with the other clients in the retainer. The information about the purchase price is obviously material to the lender's decision to advance funds and must be disclosed. If the disclosure creates a conflict, the lawyer cannot continue to act. Further, if one client in a joint retainer instructs the lawyer to take steps which are not consistent with the lawyer's obligations to other clients, the lawyer may have to withdraw. The obligation to advise the lender of the purchaser's misrepresentation extends past the date of closing.

4. ***I previously acted for a purchaser/borrower and lender. The lender is now requesting my conveyancing file. Can I provide it?***

Pursuant to Chapters 6 and 7 of the Code of Professional Conduct, a lawyer engaged in a multiple representation or joint retainer cannot withhold material information from one client, or treat it as confidential in respect of the others. Consent of the parties to allow the lawyer to act for them in a multiple retainer is required, and in obtaining that consent the lawyer must advise the clients that no material information can be withheld and any information provided to the lawyer must be disclosed to the other parties. Even if the lawyer fails to inform the clients of this obligation, the duty to share confidential information obtained during a joint retainer still exists.

The lawyer is entitled to release the file information to the lender without getting the borrower's consent. The lawyer's duty to maintain an even hand as between the clients also suggests that it would be prudent for a lawyer to advise the borrower of the lender's request and to make the information available to the borrower as well. It may be best for the lawyer to maintain the original file and give both clients copies. If original documents are to be provided, the lawyer should do so with a written direction from both parties authorizing the release of the originals to one party, pursuant to appropriate terms or trust conditions. Alternatively, the parties may seek a court order authorizing the release of the originals.

5. ***I acted for the vendor, purchaser and lender in a real estate transaction. The lender wants the vendor's file material as well. How should I respond?***

This is an area of some difficulty, as the issue of whether a joint retainer existed for a common matter may be a question of fact which must be determined in each case. There is authority for the principle that privilege is not waived with respect to communications and information acquired from one of two clients, either before or after the period in which the joint retainer exists (*Bank of Nova Scotia v. Lennie*, [1996] A.J. No 106). There is also authority for the proposition that two clients may be represented by the same firm, even on related matters, and one client may exert a claim of privilege

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against the other if the clients do not have a joint interest in the subject matter of the communication (*Chersinoff v. Allstate Insurance Co.*, [1969] B.C.J. No. 405).

Courts have found joint retainers to exist in situations where a lawyer or firm was managing a file in which two parties, although technically having conflicting interests, were engaged in a transaction intended to benefit both their interests (*Gulutzen v. Wilford*, [2005] O.J. No. 2423, involved a vendor and purchaser of real estate; also see *Divinsky v. Bethania Mennonite Personal Care Home Inc.*, [2002] M.J. No. 508). It may be the case that the parties do not turn their minds to the issue of whether there is a joint retainer at the outset of the file, such that the parties and the lawyers take different positions about the nature of the retainer and the obligation to share information which may otherwise be considered to be confidential or privileged. Parties are well-advised, in the event of uncertainty, to submit the matter to a court for an independent determination of whether privilege exists or whether there was, in fact, a joint retainer.

Lawyers should clearly address the issue with the clients at the outset of the retainer and, if acting for vendor, purchaser and lender, open a separate file for the vendor's matter. Lawyers must also be alert to conflicts if they become aware of something during the course of acting for the vendor, which materially affects the interests of the purchaser or lender but which the vendor may not wish to disclose.

**6. *I act for the vendor. It appears to me that the purchaser's lawyer may be engaged in a file involving a real estate fraud. What are my obligations?***

It is possible that the other lawyer is being duped. It merits a call to the purchaser's lawyer to advise them of your observations and concerns. The other lawyer must then consider the circumstances of the file and his or her potential withdrawal. If the lawyer's involvement in the fraud appears to be deliberate, it must be reported. You have a positive duty to report conduct which raises a serious question about the competence, honesty or trustworthiness of another lawyer, or which is likely to harm another person. Even trivial ethical breaches may be reportable if there is a pattern of conduct which suggests that a more serious situation exists or is developing.

The [Practice Advisors](#) are available to assist Alberta lawyers with confidential inquiries involving mortgage fraud and lawyers' ethical obligations.