Informal legal advice: just say No

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Requests for informal legal advice or services are fraught with danger, and should be avoided.

How often have you been asked to do a simple legal job for a family member, a friend or acquaintance? You know how it goes – someone says “You’re a lawyer – can you just have a look at this for me [or Uncle Fred or whoever]? It’s not a big deal – shouldn’t take you long...” A 2013 NSW case shows that despite the fact that the job might not seem particularly onerous, you should make it a rule to always politely say “No” to any such requests.

In Zakka v Elias [2013] NSWCA 119 Mr Zakka sued Mr Elias and Ms Rahe, both lawyers, for losses he suffered in respect of his entry into a loan transaction. Mr Elias was the proprietor of Cadmus Lawyers and employed Ms Rahe, a lawyer on a restricted practising certificate. Mr Zakka was unemployed and on a disability pension but owned his own home. Mr Rahe (Ms Rahe’s brother) persuaded Mr Zakka to borrow $50,000 from Permanent Trustees Limited (“Permanent”) secured by a mortgage over his home and on-lend the $50,000 to him (Mr Rahe). Mr Rahe told Mr Zakka that his sister was a solicitor and suggested that he see her to help him with the documents for the Permanent loan. In turn, Mr Rahe asked his sister to help Mr Zakka with the loan. She did so, using Cadmus Lawyers letterhead for correspondence but without opening a file and without Mr Elias having knowledge of any such transaction. Ms Rahe did not, however, learn that the money was to be paid to her brother until she received the directions for payment on settlement of the loan. The loan to Mr Rahe was unsecured and not documented. Mr Rahe did not repay the loan and Mr Zakka was forced to sue.

Mr Elias was unaware of the assistance that Ms Rahe had provided to Mr Zakka until the proceedings were issued. This was because Ms Rahe took active steps to conceal from Mr Elias what was going on, for example, she kept the documents relating to Mr Zakka’s loan in a folder which she did not keep at the office and used a computer to

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1 The case also concerned another loan transaction which is beyond the scope of this Article.
which Mr Elias did not have access to create relevant documents. Ms Rahe’s evidence was that she was providing assistance to Mr Zakka as a favour to him and was doing so at no cost.

Unsurprisingly, the Court found that as soon as Ms Rahe became aware that her brother was the intended recipient of the loan funds she should have realised that there was a serious possibility of a conflict of interest, declined to assist Mr Zakka any further and strongly advised him to obtain independent legal advice. Further, and in any event, she should have pointed out “in the strongest possible terms” to Mr Zakka that making an unsecured and undocumented loan was risky and he should not make the loan without security and documentation which made appropriate provision for repayment.

Mr Zakka’s claim against Mr Elias was based on authorities to the effect that a retainer between a client and an employed solicitor is a retainer with that solicitor’s employer. Mr Zakka submitted that, as far as vicarious liability was concerned, it was irrelevant as to whether or not Mr Elias knew of him or the work done for him. The Court examined the authorities concerning vicarious liability, in particular State of NSW v Lepore [2003] HCA 41 (2003) 21 CLR 511, and concluded that Mr Elias was not vicariously liable for Ms Rahe’s actions. Mr Zakka was therefore entitled to judgment only against Ms Rahe and, of course, her brother.

The conduct of Ms Rahe was not within the scope of her employment because (and the fact that she held a restricted practising certificate was relevant in this regard) she was only employed to assist Mr Elias on matters for his clients where he would supervise her work. The Court concluded that Ms Rahe was “engaged in a frolic of her own or at her own whim” and that there was no sufficient connection between her conduct and her employment so as to bring it within the scope of vicarious liability.

So, a happy ending for Mr Elias (and his Professional Indemnity Insurer) but not so happy for Ms Rahe. It is unlikely that Ms Rahe would have been indemnified by her Professional Indemnity Insurer and she would therefore have been personally liable for the judgment and costs. If a claim arose on these facts in South Australia it is difficult to see how Ms Rahe could be entitled to indemnity. This is because the Professional Indemnity Scheme covers the liability of “legal practices” (i.e. in this instance Cadmus lawyers – Mr Elias’ practice) not individual practitioners. The finding that Ms Rahe was “on a frolic of her own” and not acting as an employee of Mr Elias’ legal practice would mean that she would be unindemnified.

The clear conclusion is to politely but firmly say “No” to requests for informal legal advice or services – otherwise you may be on your own.

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