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Know Thy Client

The Court of Appeal recently released a decision that serves as a reminder to all counsel: never lose sight of who you act for.

In *Mallory v. Werkmann Estate*, 2015 ONCA 71, Ontario's Chief Justice Strathy removed counsel after finding that he had neglected his duties to his client by advancing the interests of the client's insurer, the entity who appointed counsel.

The dynamics at play in *Mallory* are not uncommon in the insurance context. An insurer was called upon to defend an action in relation to an accident that led to the plaintiff's injuries and the deaths of two people. The accident occurred as a result of a high-speed motorcycle race between three motorcyclists, including the appellant, Mihali. Another motorcyclist lost control and crashed into the plaintiff's car, killing the car's passenger and the motorcyclist. Mallory sued the motorcyclists (including the estate of the deceased). He also sued his insurer to guard against the possibility of any of the defendants being uninsured or under-insured, a possibility since racing was a basis to significantly limit coverage. In Mihali's case, if it was determined that the motorcyclists were racing or engaged in a "speed test" his $1 million policy would be reduced to $200,000.

Rather than deny full coverage outright, Mihali's insurer Royal & Sun Alliance ("RSA") reserved its rights, and appointed counsel to defend Mihali. The trouble arose when findings from trial invited a conflict of interest between the client and the insurer.

At trial, Mihali was found partially liable and the claim against the Mallory's insurer was dismissed on the basis that Mihali had coverage. RSA balked at the finding, and attempted to raise the issue with the judge. It was rebuffed by the judge's secretary, and was advised to raise the issue through the proper channels. Rather than do so, Mihali's counsel (who was appointed and paid by RSA) raised the issue as a ground for appeal.

However, the ground appealed was clearly irrelevant to the appellant's case. After all, the issue related to plaintiff's claim against his own insurer. More troublesome was the fact that the issue of coverage was adverse to the appellant's interests. The finding of coverage was clearly favourable to Mihali. Yet his lawyer, under his notice of appeal, sought to challenge the finding. From this, Justice Strathy came to the "inescapable conclusion that defence counsel was acting on the instruction of the insurer to advance a ground of appeal contrary to the

interests of the insured."

Apparently the client was not bothered by this fact, and would have liked counsel to continue to act. Justice Strathy considered this, but ultimately concluded counsel had to be removed to protect the integrity of the administration of justice and avoid the appearance of impropriety.

Though it is not always easy to navigate competing interests at stake, the interests of the client must be kept paramount, irrespective of who pays the bills.