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AAREBC

Editor: Karen L. Dyck,
Loss Prevention Coordinator

219 Kennedy Street
Winnipeg, Manitoba, Canada
R3C 1S8
(204) 926-2043
Email: kdyck@lawsociety.mb.ca

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All Loss Prevention Bulletins are on-line.
Go to www.clia.ca, and click on Documents to find a past issue.

■ Bulletin # 170

The Screen Door Slamming

As I write this bulletin, it is finally summer on the prairies. I am savouring long, sunny days, lush, green lawns and thunderclouds on the horizon at dusk, but my paradise is not free from troubles. There are pests in my world - ants, flies, wasps, mosquitoes and more – and I find myself becoming irritated by their incessant buzzing and humming, until I hear the distinct *whack* of a screen door slamming. The sound immediately reminds me that my summertime serenity is secure. The simple screen allows the fresh morning breezes and cool night air to pass freely through my home, all the while, effectively keeping the pests at bay.

Screens can be equally effective in your legal practice. Good screening techniques will help you to select clients who provide clear instructions, pay their bills ungrudgingly, and value the services that you provide them. Absent a good screen, you may find yourself swarmed by clients who don't appreciate your expertise and won't pay their accounts. Not coincidentally, these are often the same clients who later allege malpractice and/or complain to your law society about the quality of your services.

One of the most effective client-screening techniques you can employ is to watch for the red flags that may signal problems down the road. These include clients (or potential clients) who:

- Have retained previous lawyers on the same matter;
- Are unrealistic in their expectations about the strength of their case or speed of resolution;
- Give instructions that include statements about proceeding "on principle;"
- Require last minute emergency work;
- Express bad attitudes about the legal system in general, or lawyers in particular;
- Hesitate to discuss fees or are excessively concerned with the cost of proceeding; and/or
- Behave irrationally.

When you notice these red flags, heed your instincts (and this bulletin!) and think twice before taking on or continuing to represent this client. Consider that the fees you might otherwise bill may not be worth the aggravation you'll experience and time you will spend in defending a malpractice claim or complaint made to your governing body.

By using a good screen, you'll be able to invite the good clients into your practice, while preventing some of the more "difficult" clients from finding their way through the door.

■ Bulletin # 171

Courage!

We all know that the area of lawyer-client communication is rife with opportunity for misunderstanding, misapprehension and mistake. For example, clients under stress in difficult circumstances may find it nearly impossible to absorb and process the advice given by their counsel, while other clients may have such unrealistic expectations of their lawyer or their legal position that they simply will not hear a contradictory viewpoint.

These challenges can be exacerbated when lawyers fail to provide their clients with clear and candid advice about the facts of their case and the applicable legal issues. Inevitably, this is a road that leads to dissatisfied and disgruntled clients.

Chapter 3 of the Canadian Bar Association's *Code of Professional Conduct* directs that lawyers "…must be both honest and candid when advising clients." This principle is expanded upon in the Commentary which explains that:

> The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion

> based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results.

In his book, *The Successful Lawyer*, Gerry Riskin makes essentially the same point, although he frames it somewhat differently. He says:

> "In order to have a successful practice, **we need to muster some courage.** That courage manifests itself in our willingness to be straight with our clients, and to counsel them the way we think we should. It is important and appropriate that we have the courage to tell our clients at times even those things that they do not want to hear."

A healthy dose of courage may indeed be required to meet the obligation to be absolutely candid with clients when providing an unfavourable opinion. Some clients will not accept such advice and will seek to end the retainer; however, most will appreciate that their lawyer is not setting them up for disappointment or urging them to pursue positions with little likelihood of success.

When faced with a situation where you have to deliver an unfavourable opinion to your client, resist the temptation to temper it or tone it down so that the advice will be more palatable to your client. Clients are paying for your professional advice and the relationship of trust between you and your clients requires that you give that advice openly and without reservation. Failing to do so could result in a malpractice claim or a complaint of professional misconduct against you.

(Sources: *Code of Professional Conduct,* Canadian Bar Association, 2006; *The Successful Lawyer: Powerful Strategies for Transforming Your Practice*, Gerald A. Riskin, American Bar Association, 2005.)

■ Bulletin # 172

Discovering eDiscovery

The recent release of the *Sedona Canada Principles Addressing Electronic Document Production* for public comment in February 2007 (English version) confirms that e-discovery is an issue that should be on every Canadian lawyer's radar.

Electronic discovery and the use of electronic evidence is an important loss prevention topic because the technology that enables it is constantly changing and the jurisprudence in the area is rapidly developing. One by-product of all this change and development is the increased opportunity for lawyers to mishandle electronic evidence or to fail to adequately discover evidence in electronic formats. In some circumstances, the result may be that courts order penalties and costs against parties responsible for spoliation of electronic evidence or who have failed to comply with directions for discovery. In other words, there is significant potential for legal malpractice issues to be raised as a result of failed or flawed efforts at electronic discovery.

Even if this issue hasn't yet reared its head in your practice, you need to be aware of the terminology and general principles that have developed regarding use and discovery of electronic evidence. There are volumes of resources on the topic, both from Canada and especially, from the United States. The links below will assist you in getting started in your "discovery" of this subject area. Make it a priority to learn more before you and your clients find out the hard way that you didn't know enough.

e-Discovery Resources:

- The Sedona Canada Principles: http://www.thesedonaconference.org/content/miscFiles/2_07WG7pubcomment.pdf
- LawPro magazine's eDiscovery issue & supplemental materials: www.practicepro.ca/ediscovery
- CBA PracticeLink eDiscovery page: http://www.cba.org/cba/PracticeLink/national/ediscovery.aspx
- Ontario Bar Association's eDiscovery Case Digests: http://www.oba.org/en/main/ediscovery_en/digest.aspx
- American Bar Association Litigation Section's Electronic Discovery Issues and Analysis: http://www.abanet.org/litigation/issuecenter/issue_ediscovery.html
- E-Discovery Presentations and Downloads: http://www.ediscoverycanada.com/downloads/e-discovery-presentations-and-files/