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A A R E B C

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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Go to www.clia.ca, and click on Loss Prevention to find a past issue.

■ **Bulletin # 176** **Recent Fraud Alerts**

The Law Society of Upper Canada recently issued an alert regarding a number of attempts to defraud law firms. The report alerts lawyers to the following common features of these scams:

- You are retained by someone you don't know but who appears credible and can produce documentation relating to the transaction in question
- You are retained to do something that turns out to be remarkably easy, such as collecting a debt or paying a deposit
- You receive a bank draft or certified cheque in a significant amount
- You are pressured to disburse the funds in a short time period, often offshore
- Attempts to validate the funds via the bank upon which they are drawn are professionally answered.

Some of the frauds reported have involved the use of counterfeit certified cheques in commercial loan transactions, where the lawyer (typically a solo or small firm practitioner) was retained to act for both lender and borrower to obtain appropriate security for the loan. The transactions appeared legitimate. The clients were new to the firm and in a hurry to complete the deal. The lawyer received the lender's certified cheque, deposited it into the firm trust account, and then drew cheques as per the borrower's directions. A few days later, the lawyer's own financial institution advised that the certified cheque received was counterfeit and in the result, there was a shortfall in the lawyer's trust account.

Another example reported involved a client unknown to the lawyer who requested assistance in collecting a debt. A demand letter was written and very shortly afterwards, a bank draft was sent to the law firm in payment of the debt. The client was advised of receipt and requested that funds be wired immediately. The law firm took the precaution of contacting the issuing bank, using the phone number on the bank draft, to confirm availability of funds. The call was professionally answered and the draft declared valid. The law firm took the further step of contacting the firm's financial institution for verification and found that the bank draft was a fake.

When the deal looks legitimate and there is no apparent reason to be suspicious of the transaction, it is difficult to protect yourself. But, if you are dealing with clients you don't know, take the precaution of contacting your financial institution to request verification that the cheque received is authentic and

has cleared before forwarding any funds from your firm account. Taking these steps may reduce the risk that you will expose your firm to loss if you are targeted by a fraudster.

Sources:

Law Society of Upper Canada: Fraud Alert, January 8, 2008 and Alert on Fraudulent Scams, May 21, 2008

■ **Bulletin # 177** **Cleaning out the Cobwebs**

When I was growing up, my mother would thoroughly clean our house twice each year, in spring and in fall. She would remove every item from the cupboards and closets and wipe clean every surface, both horizontal and vertical. She literally swept out the cobwebs and restored order to our home.

Today, television shows like *Clean Sweep* and magazines like *Real Simple* carry on the tradition of spring cleaning year-round, providing home owners with constant encouragement to sort their belongings into Keep, Trash and Give Away piles. Retailers have seized upon this trend, making available specialized containers and systems to store anything and everything.

Whether or not you buy into the hype, the practice of at least an annual clean-up is a good one for every office to adopt. In my office, we schedule periodic departmental "Clean-up Days" when everyone shows up in their jeans and pitches in to move the closed files out of the filing cabinets and into bankers boxes labeled for storage. Surplus paper is sorted and transferred into shredding and recycling boxes. Space is cleared in filing cabinets for new files and order is restored to storage areas. Of course, clean-up also takes place throughout the rest of the year on a less intensive basis.

A significant fringe benefit of making time for a periodic reorganization and cleaning of your office is that you may locate misfiled documents and files gone astray or forgotten, and be able to deal with them before limitation dates or deadlines are missed. You may also come across files ready to be billed out and closed, increasing your revenue stream for the months ahead while creating space for new client files. In the process, you can also ensure that your staff are complying with office filing and document management protocols. (You have those, don't you?)

■ Bulletin # 178

There Are No Guarantees

Adapted with permission from the article Trust Accounts - Objects of Desire! by Marie-Josée Belhumeur, published in Praeventio October 2007, Volume 8, No. 4, Fonds d'assurance responsabilité professionnelle du Barreau du Québec

Lawyers, from time to time, are targeted by investment promoters who want to use the lawyer's trust account. The promoter's scheme may look something like this: an investment promoter markets an investment opportunity with guaranteed returns. Interested 3rd party investors (usually not previously known by the lawyer) provide their cheques to the lawyer in trust. The lawyer deposits the cheque into the firm's pooled trust account, as required by law society regulations and some time later, with the consent of the client, disburses the funds in accordance with the instructions received from the investment promoter. After some time, both the money invested and the promoters disappear. The innocent third party investors learn they will not receive the "guaranteed" returns on the investments, nor any return of the capital. Cheated by the now-absent promoter, they look to the lawyer and law firm for recovery.

The courts in Ontario recently considered whether lawyers' professional liability insurance under the LawPro policy provides coverage in this scenario. In *Cassels Brock & Blackwell LLP v. LawPro*, 2006 CanLII 15138 (ON S.C.), the court of first instance found that the law firm agents of the investment promoter in that case were not providing "professional services" as defined by the insurance policy. The court went on to find that there was no duty on the insurer to defend in the circumstances, stating that:

While the mere possibility that a claim within the policy may succeed is enough to impose a duty to defend upon the insurer and it is recognized that the policy be given a liberal purposive interpretation as to coverage, it would seem to me that there should not be an unnatural forced stretching of the words of the policy beyond justifiable reason so as to require coverage....Rather what is required is what is/are the reasonable interpretations of the policy and of the claim in the Statement of Claim. I do not see that this interpretation which I have come to would defeat the purpose of the LawPro insurance which is mandatory for LSUC lawyers – the coverage is there for lawyers/law firms as to their activities qua lawyers and in that respect with regard to legal advice and activities (plus matters of a non legal nature but which are ancillary to that in the sense of being a direct consequence of the legal work that investment advice and/or services is provided), but not with respect to investment advice and activities (or other entrepreneurial advice and activities). A person who is a lawyer may wear more than one hat, but just because at most times that person wears the hat of a lawyer does not mean that he always acts qua lawyer.

The Ontario Court of Appeal dismissed the law firm's appeal from the lower court decision finding that:

While use of a trust account can constitute professional services, based on the claim as pleaded, we see no basis for concluding that the use of the trust account in this case was anything other than an investment service. As noted, the trust account was merely a vehicle for receipt and distribution of the funds to be invested. In our view, the fact that a law firm's trust account is used as an investment vehicle does not of itself amount to the performance of Professional Services; nor does it make misuse of the investment vehicle a "direct consequence of the performance of Professional Services".
(2007 ONCA 122 (CanLII))

If an opportunity arises for you to become involved in this kind of investment scheme, you need to be mindful that if the "sure thing" goes sour, a claim will likely be made against both you and your firm. As the decisions from Ontario plainly illustrate, professional liability insurance coverage may not be available to you in circumstances where you are not providing professional services as defined by the contract of insurance.

Take a close look at the coverage provisions of your professional liability insurance policy. The CLIA policy describes the primary obligation of the insurer this way:

*The Insurer will pay on behalf of each Insured the Damages that that Insured becomes legally obligated to pay arising out of an **Occurrence**.*

The policy defines the term **Occurrence** as "...an error in the rendering of **Professional Services** to others...." **Professional Services** are defined to include:

- (a) services normally provided or supervised by a lawyer within the scope of a usual lawyer client relationship;
- (b) services rendered in alternative dispute resolution as an arbitrator or a mediator or in an equivalent role; and
- (c) Incidental Services that are substantially related to services described in paragraph (a), but does not include Ancillary Activities

...Incidental Services means services that are connected with and incidental to the practice of law, including services as an executor, administrator, trustee, personal representative, committee, guardian, or patent or trademark agent

...Ancillary Activities means activities of a quasi-legal or non-legal nature (including, without limiting the generality of the foregoing, financial, investment and accounting services, brokerage services, and real estate development and appraisal) that are ancillary to or independent of the practice of law and are provided by an Insured for compensation or personal benefit referable specifically to those activities

In light of the policy wording and the decision in the Cassels Brock case, proceed with great caution if you or a colleague are approached by someone who wants to use your firm's trust account in promoting an investment opportunity. Ask yourself why you are being retained - is it for your legal expertise or for your trust account?