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DES JURISTES
CANADIENS



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A A R E B C

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All Loss Prevention Bulletins are on-line.

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

■ **Bulletin # 180**
Loss Prevention eBytes

If you've not recently had reason to visit the CLIA website (www.clia.ca) I hope you'll take some time to do so now. In the past year, we've given it a makeover. The design and overall appearance have been updated and we have been tweaking, editing and rearranging the content to make it both easier to understand and easier to find what you may be looking for.

You'll still find the loss prevention resources you know so well. The new Loss Prevention Page provides links to both the current and archived Loss Prevention Bulletins. A new search function has been added to assist you in finding what you may be looking for in past issues. You'll also still find Safe and Effective Practice available to read and download.

And just recently, we have added a new feature to our home page - *Loss Prevention eBytes* – a regularly updated feed that provides you with a dynamic source for current tips, links and commentary on loss prevention topics, sourced from CLIA subscribers and other law-focused service providers. You can access *Loss Prevention eBytes* in one of three ways (each in both official languages):

1. **By visiting our home page**
(www.clia.ca/en/ or www.clia.ca/fr/)
2. **By subscribing to receive periodic emailed updates:**
<http://www.clia.ca/documents/newsSubscribe.cfm>
3. **By RSS Feed:**
http://www.clia.ca/rssHeadlines/rssFeed_en.xml

If you are concerned about preventing and avoiding professional malpractice claims arising out of your legal practice (as every lawyer should be), check out Loss Prevention eBytes. It will only take a few minutes of your time and may ultimately save you a bundle (of time and money).

■ **Bulletin # 181**
Fraud Targeting Lawyers – Another Version

In an October 10, 2008 news item, the Law Society of Upper Canada reports that it has been the recipient of fraudulent changes of address information. The report describes the fraud as follows:

Impersonators or fraudsters are attempting to file changes of address and other contact information with The Law Society for certain lawyers. If successful, the fraudster can create a bogus office in

the name of a legitimate practitioner, and divert mail and phone calls intended for that member for an illicit purpose.

The Law Society of Upper Canada goes on in the release to assure its members that appropriate measures have been taken to protect and secure member information.

This release provides a reminder to lawyers of the need to remain vigilant in protecting personal and business information. Make sure that you have appropriate safeguards in place to keep confidential the information your clients provide to you as well as your own. The current environment of economic insecurity is one in which attempts at fraud will likely flourish.

Source:
<http://www.lsuc.on.ca/latestnews/b/archives/?i=14961>

■ **Bulletin # 182**
Looking at the Sources of Legal Malpractice Claims

The American Bar Association's Standing Committee on Lawyers' Professional Liability recently reported on statistics for legal malpractice claims across the United States and Canada for the period of 2004-2007. While the report is especially interesting to those in the legal insurance business, it contains a number of nuggets of information that should interest you, the practicing lawyer, as well.

Here are some of the most interesting bits:

• In Canada the top 4 areas of law in which malpractice claims are made are:

1. Real Estate;
2. Personal Injury-Plaintiff;
3. Corporate /Business Organization; and
4. Family Law.

Together, these accounted for more than 68% of all claims in the reporting period.

• Across the board, small and solo firms are most susceptible to malpractice claims. During the reporting period, some 70% of claims were made against firms with 5 or fewer lawyers.

• Errors made in the following types of activities by lawyers give rise to the most claims:

- o Preparation, filing, transmittal of documents
- o Commencement of action/proceeding
- o Advice
- o Pre-trial, pre-hearing
- o Settlement, negotiation

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- The most common kind of lawyer error giving rise to a claim is Failure to Know / Properly Apply the Law. Other common errors giving rise to claims include:
 - o Failure to File a Document – No Deadline
 - o Planning Error – Procedure Choice
 - o Inadequate Discovery/Investigation
 - o Failure to Calendar Properly

While the statistics can be thought-provoking, just knowing how other lawyers are making their mistakes will not help you to avoid the risks. Even if you're in a firm of more than 5 lawyers and are not practicing in one of the problem areas, you should not relax.

What these statistics reveal is that no lawyer is immune from a malpractice claim. Claims occur in all practice areas. Lawyers make mistakes at all stages of a matter, whether in a litigation proceeding or a commercial transaction. While errors may be easily avoided in many cases through dedicated calendaring and bring forward procedures, maintaining systems of checks and double-checks and careful and detailed preparation and planning, those precautions may not be sufficient to avoid a claim.

Is there any good news here? The study also revealed that more than 50% of claims are abandoned without any payment being made and that 14.6% of claims ended upon dismissal or judgment for the defendant lawyer. And ultimately, only 0.7% of claims were concluded with judgment in favour of the plaintiff. Given all we know about the levels of stress faced by lawyers who are the subjects of legal malpractice claims, this is hardly a silver lining. Any one who has been sued will likely agree that it is much better to avoid the claim altogether than to successfully defend it or see it abandoned.

■ Bulletin # 183 Crossing Borders with Client Information

When you are traveling to the United States with your laptop computer or other electronic device, you need to keep in mind that U.S. border security agents are authorized to access and search those devices. U.S. Customs and Border Protection Policy Regarding Border Search of Information, dated July 16, 2008 states that "...officers may examine documents, books, pamphlets, and other printed material, as well as computers, disks, hard drives, and other electronic or digital storage devices." While the policy recognizes that lawyer/client privilege may attach to some of the information searched, it does not provide an unqualified exemption from search for that information.

A lawyer's duty of confidentiality requires that "The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information except as expressly or impliedly authorized by the client, required by law or otherwise required by this Code." (CBA Code of Professional Conduct, Chapter 4, Rule 1). If you

travel across borders with confidential client information in your electronic tools, whether on a laptop, pda or flash drive, you place that data at risk.

One solution proposed by some is to ensure that all data is subject to password-protected encryption; however, Dana Bissoondatt, in his article *Electronic Devices and Borders - A Privacy-Free Zone?* points out that "...the U.S. Government maintains that it can compel disclosure of encryption passwords. Whether or not the authority to compel such disclosure exists, failing to provide the password to customs officials will most likely result in the seizure of the electronic device." Encryption may safeguard your data from loss due to theft, but will likely not provide sufficient protection from the scrutiny of border security agencies.

Instead, Dave Bilinsky, Practice Advisor to the Law Society of British Columbia, advised in his article, *Electronic devices - encryption and client confidentiality issues*, that lawyers traveling across borders "...carry a "clean" laptop — equipped with software to reach the office network remotely via a secure link, but containing no other information. The lawyer can link to the home office via the secure link as required, storing all work on the home office servers and saving nothing on the laptop." This is exactly the approach being taken by some Canadian law firms, as reported in *The Washington Post* on February 7, 2008.

Whether you are just taking your laptop home at the end of the day or taking it across a border, always make sure that your clients' confidential information is adequately protected. Your clients will thank you for it.

Sources:

U.S. Customs and Border Protection Policy Regarding Border Search of Information, July 16, 2008

How to Secure Your Laptop Before Crossing the Border, by Luigi Benetton published on CBA Practice Link, September 2008

Caution Travelers: Laptops May Be Subject to Suspicionless Searches at the Border, published on ABA Site-tation, April 25, 2008

Electronic devices - encryption and client confidentiality issues, by Dave Bilinsky, March 2008 issue of the Law Society of British Columbia's *Bencher Bulletin*

Laptops and Cross-Border Security by Simon Fodden, published February 7, 2008 on Slaw.ca

Electronic Devices and Borders – A Privacy-Free Zone? by Dana Bissoondatt, Fraser Milner Casgrain LLP's May 2008 Focus on Technology/IP

Clarity Sought on Electronics, by Ellen Nakashima, February 7, 2008, *The Washington Post*