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■ Bulletin # 202
Put it in Writing!

The effectiveness of clear written communications as a loss or malpractice claim prevention technique can hardly be overstated. While at a recent conference focused on legal malpractice claims, I was repeatedly struck by the realization that many of the claims described might have been avoided, in whole or in part, had the lawyers just followed this most basic malpractice prevention advice.

We've said it here before, but it bears repeating. At minimum, make it your practice to put it in writing when you are:

- Confirming that you are not acting as a person's lawyer
- Setting out the limits/scope of the work you are doing (or not doing)
- Outlining opinions you provided and advice you gave
- Confirming your client's instructions
- Documenting the completion of a retainer
- Outlining fee arrangements

■ Bulletin # 203
Keeping Your Client's Information Secure

This past winter we co-sponsored the webinar Safeguarding your Client's Confidential Information – Tips and Traps with the Lawyers Professional Assistance Conference (LPAC) and the Canadian Bar Association.

For those who weren't among the 200+ Canadian lawyers participating in that webinar, we put together this synopsis of some of the issues discussed by panellists Dominic Jaar, KPMG and David Fraser, McInnes Cooper.

Lawyers have a professional obligation to keep all client information confidential. This includes, but is not limited to information that is covered under the umbrella of solicitor-client privilege. Applicable privacy legislation creates further obligations on lawyers to safeguard and protect personal information obtained from their clients.

The panellists described the obligation to protect a client's confidential information as requiring a "cradle-to-grave" strategy and emphasized that:

- Anything that can record information and that may have stored client information should never just be thrown out.
- Discarded paper should be shredded (cross-cut), ideally onsite.
- Recycling bins should be emptied into locked shredding bins.
- Unused or obsolete equipment should be destroyed – memories, drives and disks should be destroyed or wiped. Remember that copiers and fax machines have memories, too.
- Written contracts with trustworthy cleaning and disposal contractors are recommended.

The further duty of lawyer to keep competent includes an obligation to keep up with and use appropriate technological tools if these become the accepted standard for a particular kind of practice. And in using those tools, you should always keep an eye on how to safeguard any client information stored on or accessed via that tool. This requires a significant level of vigilance.

This same level of vigilance is required in using social media tools, whether tweeting or updating your Facebook page.

Further concerns may arise when lawyers travel, particularly where national borders are crossed. The panellists took the view that the best approach is not to cross the border with any client materials and to wipe all electronic devices before traveling. Then, use secure remote access tools to access your files while traveling. But, if you must travel with client materials, you should take the following steps:

- Mark files as privileged.
- Use encryption.
- Assert privilege.

Finally, here are a few more information protection tips from the webinar:

- Be sure to change the default user names and passwords for your devices, including your router, computer, cell phone and Bluetooth devices
- Use complex and unique passwords for each device, and change them frequently
- Always make certain that your information is securely backed up

■ Bulletin # 204
Engagement Letters, Revisited

In response to Bulletin No. 200, Best Practices: Engagement Letters, a reader wrote with a

thoughtful question (though with tongue in cheek) which we are including below in edited form (with permission), together with the response provided.

I am responding to your bulletin No. 200 relative to "Engagement Letters." I am now in my 60th year of practice. Most of my clients are of long standing and with some degree of personal relationship. As use of engagement letters was not the practice in bygone years, I find the practice somewhat difficult to establish at this late date.

Having given thought to the idea…I would take it that it is anticipated that the client would either sign or endorse or acknowledge the receipt of the engagement letter, which is in effect the setting out the terms of the contract between the solicitor and the client. Such being the case, because of the possibility of conflict, the client should be sent to another solicitor in order to obtain independent legal advice, which again should involve an engagement letter limited to that scope of the responsibility.

This though sets up another contractual relationship for which that client should again obtain independent legal advice…and so on and so on.

Facetious as the above may seem, I would appreciate your comment as to the necessity of obtaining independent legal advice in the first instance.

And here is the response provided:

…It is not essential in every case to have the client sign or acknowledge the engagement letter. One of the purposes of such a letter is to confirm to the client in clear, written form what has presumably already been discussed and agreed upon by the lawyer and the client in establishing the retainer. In other words, the letter exists to confirm the terms of an agreement already in place. This is consistent with the comments of the Supreme Court in Strother v. 3464920 Canada Inc., 2007 SCC 24, [2007] 2 SCR 177 where it stated that:

> *When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement.*

But, there are circumstances in which it would be prudent to have the client sign or acknowledge the engagement letter so as to ensure that there is no ambiguity as to the terms of the agreement. An obvious example is where the letter confirms the client's consent to a waiver of a conflict or potential future conflict of interest. This circumstance was considered in Chiefs of Ontario v. Ontario, 2003 CanLII 32351 (ON SC), in which the Court suggested that any ambiguity in the consent to waiver of a conflict would be determined in favour of the client, and at the expense of the law firm.

While an engagement letter sets out the contractual terms of the retainer, a lawyer's fiduciary duties overlay the contractual arrangement. The Court in Strother went on to say that:

> *The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:*
>
> > *The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency. [para. 95]*
>
> *Not every breach of the contract of retainer is a breach of a fiduciary duty. On the other hand, fiduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for…. Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest….*

It is the fiduciary duty of loyalty which makes it unnecessary for a lawyer to advise a prospective client to obtain independent legal advice upon entering into a retainer agreement.

But where a retainer agreement purports to limit or alter the scope of this duty, the lawyer should refer the client for independent legal advice. This was made clear in the decision of the Supreme Court in the R. v. Neil, 2002 SCC 70, [2002] 3 SCR 631 where the Court set out the "Bright Line" rule:

> *The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — even if the two mandates are unrelated — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.*

Thus, in the normal course, a lawyer would not be expected to refer a prospective client for independent legal advice before being retained by that client, but where a retainer is contemplated in circumstances that give or could give rise to a conflict of interest, a lawyer should at minimum recommend that the client obtain independent legal advice before consenting to waive conflict.

For further reading on these topics, I recommend the Final Report of the Canadian Bar Association's Task Force on Conflicts of Interest, available online at: http://www.cba.org/CBA/groups/pdf/conflicts_finalreport.pdf