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LOSS PREVENTION BULLETIN

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Your comments on this and the previous Bulletins are solicited, as well as your suggestions for items to be dealt with in future Bulletins.

Barry Vogel, Q.C., Editor
Chair, CLIA Loss Prevention Committee

BULLETIN #67

The following article is reprinted with the permission of Bruce Lee Schafer, taken from the 1991 Oregon State Bar CLE publication (plus 1994 supplement) entitled, The Oregon Ethical Lawyer.

FEE DISPUTES AND SUITS FOR FEES

Lawyers who sue their clients for fees run a great risk of being sued for legal malpractice in the same suit. Whether the retaliation suit or counterclaim is meritorious, the lawyer may very well regret having ever initiated the fee collection action against the client. Before suing a client for fees, the lawyer should consider the following questions:

(1) Is there any question whether the client has sufficient resources to pay the bill?

(2) Are there any grounds on which the client can credibly dispute the debt or part of it?

(3) Did the lawyer make any errors, large or small, in representing the client or handling the matter being billed?

(4) Is the amount of the debt too small to justify the time and expense of litigation and execution?

(5) Is there a risk of adverse publicity for the lawyer?

If the answer is yes to any one of the above, serious consideration should be given to not suing the client. A decision to sue a client is often an emotional response to the nonpayment of fees. That response needs to be tempered by consideration of the possible scenarios that might be played out and evaluation of the risks and the benefits of pursuing collection via litigation.

BULLETIN #68

AM I MY PARTNER'S KEEPER?

Item #6, in the very first issue of these Bulletins, cited Korz v. St. Pierre, (1987) 61 O.R. (2d) 609 (Ont. C.A.), in which a lawyer was found liable for the misdeeds of his partner in personal business dealings conducted through the office. Those dealings were found to be in the ordinary course of the partnership's business even though the innocent partner was not even aware of what was going on.

Lack of partners' awareness made no difference, either, in McDonic Estate v. Hetherington, (uncited at this time). In that case, the Ontario Court of Appeal found partners vicariously liable for the investments made for clients by another partner, without clients' approval and without protecting their interests.

It was acknowledged that it was the ordinary business of the firm to invest clients' money "in a proper and prudent" manner. The other partners argued that in not so doing, the errant partner's activities were set apart. However, the Court found that even if the errant lawyer's actions had not been within the ordinary course of the business, the partners would still be liable because he had "apparent authority" to act on behalf of the firm.

Supporting the decision were the following facts:

- the lawyer was a partner
- he worked out of the firm's premises
- he corresponded with the plaintiffs on firm letterhead
- the plaintiffs received cheques from the firm's trust account
- all records of their investments were kept by employees of the firm

Am I my partner's keeper? Yes! You must know what your partner is doing.

(Leave is being sought to appeal the case to the Supreme Court of Canada.)

BULLETIN #69

CLARIFYING INSTRUCTIONS

There have been a number of actions recently against lawyers based on an alleged failure of the lawyer to fulfill the terms of his/her retainer. These types of actions normally arise when a lawyer accepts instructions of a limited nature vis-a-vis the scope of work which would normally be performed on the given transaction. Upon the client's plans going awry, the client alleges the lawyer was to perform services beyond the limited retainer.

Members of the profession should be aware that the onus of proving the scope of the retainer falls upon the lawyer. As stated by the Ontario High Court in *ABN Amro Bank v. Gowling, Strathy and Henderson* (1994), 20 O.R. (3d) 779 (Gen. Div.):

> "Any attempt by a solicitor to limit his/her retainer to a scope less than that required of a reasonably competent and diligent solicitor should be done in simple, concise and precise language reduced to writing. Any ambiguity in any such communication, whether it be written or oral should be resolved against the solicitor. To do otherwise is to leave a client without the quality of legal services he/she would otherwise be entitled to as a matter of law and a freedom to retain and instruct another solicitor of choice if so advised."

Clearly, specific written retainer agreements are, in most cases, the preferred route.

by J.B. Rooney, Q.C.,
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In the same vein as the foregoing is the decision in *120 Adelaide Leaseholds Inc. v. Thomson Rogers*, (1995) 43 R.P.R. (2d) Ontario Court, General Division. In that case the lawyer failed to exercise the client's lease renewal rights because she thought the instructions were "spent." As a result, the firm was found liable to the client. The lawyer that represented the firm at the trial stated that the decision demonstrated the importance of making notes if it is believed the client's instructions have changed. He added, "The lesson is that if a lawyer believes that a client has changed his instructions or...a lapse of time has caused the instructions previously given to be spent, the failure to record that belief in writing...puts the lawyer at his peril".

BULLETIN #70

SOME FAMILY LAW CONCERNS and TIPS

Claims made in the area of family law often involve a spouse who, after signing a settlement agreement, takes the position that she (it usually is the wife) should have received more. Where the agreement was in fact fair, careful memo-ing throughout the course of the file of discussions, advice and instructions, will stand the lawyer in good stead in responding to a claim. What about the situation where the spouse (again, usually the wife) wants to enter into an agreement, when counsel is of the view she is making a bad deal? **Patricia L. Blocksom of Dunphy Calvert in Calgary** offers the following comments:

In my experience there are many factors that may influence a wife to make what is basically a bad deal. Many women come out of marriages with very little self-esteem, financial acumen or business sophistication. Often they have not been in the work-force for some time and they are extremely naive about the ease within which they can re-enter the work-force, and their own ability to support themselves on the property settlement that they receive. In these situations, a client may have overly optimistic expectations about her ability to support herself and to obtain remunerative employment. Counsel should ensure that this type of client receives appropriate financial advice and counselling, so that she can understand the long term financial consequences in accepting the settlement. Many financial planners or accountants are able to provide, at a reasonable cost, a projection showing the depletion of capital given certain spending patterns. It is usually an eye-opener to see that if she accepts a certain settlement and assumes that she will continue to live in a certain lifestyle, her capital will be depleted within a few years.

Despite the advice that counsel may give, many of these clients insist on accepting less than favourable terms in the settlement. It is also my observation that in many marriages, particularly longer term marriages, the husband often is the spouse who controls the finances. This may be symptomatic of other control issues in the relationship. Often, the female spouses are reluctant to challenge their husbands and, indeed, have been advised by their husbands that if they "fight them" or "ask for too much" they will get nothing. The other comment that I frequently hear is that if the wife asks for too much, the husband threatens to go after custody of the children. This often motivates women to make bad deals.

What should counsel do with the client who wants to make a bad deal?

First, try to determine why the client is motivated to make a deal that is not recommended. If it is because the client is being pressured by the spouse or is not emotionally strong enough to deal with the situation, it is important to refer the client for counselling. In fact, it may be important to insist that the client has some counselling before she signs the deal. If the client chooses not to get counselling, then write a letter outlining the advice as to what the client should be accepting as a settlement, summarizing what she will be receiving under the proposed settlement and the recommendation against the settlement. If the client wishes to proceed with the settlement, then counsel should insist on receiving written instructions from the client. I often simply have the clients acknowledge that they have read the letter and understand that I am not recommending the settlement and sign-off the bottom of my letter to them. In extreme circumstances, you may want to insist on the client obtaining a second opinion.

Are there ever circumstances when counsel should not sign the Certificate of Independent Legal Advice?

There have been occasions where I have refused to sign a Certificate of Independent Legal Advice. Those circumstances have generally been fairly extreme, where I am concerned as to the stability of the client, or concerned that the client is being improperly pressured by her spouse to sign the agreement, i.e:, duress, or undue influence. When a client insists on signing an agreement that is so clearly not in her best interest that I feel uncomfortable about having my signature appear on it, I will refuse to provide independent legal advice. I will so advise the client in writing, and send the client to other counsel. In such instances, I think it is critical to provide an extensive memo to the file outlining the advice given to the client, the client's emotional condition, and the reason why you have refused to provide a Certificate of Independent Legal Advice.