



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
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In Issue No. 16, Bulletin #65 (December 1996) James Rooney, Q.C. expressed views regarding the degree of inquiry a lawyer must make in giving independent legal advice. In Issue No. 18, Bulletin #71 (July 1997) William O'Hara suggested that the lawyer's obligation in giving independent legal advice is not as stringent as Mr. Rooney indicates. Mr. Rooney's comments on Mr. O'Hara's comments follow:

I have had an opportunity to review William S. O'Hara's commentary on independent legal advice. Mr. O'Hara and I evidently have a similar view of the legal trend, but differ on the height of the standard of care required of providers of independent legal advice.

The Courts continue to utilize the phrase "nature and effect of the transaction". My review of the cases suggests however, that in advising a party on the "nature and effect" of a document the Courts are demonstrating an increasing tendency to require that the signatory to the agreement proceeded with adequate knowledge of their underlying rights. That is, the trend appears to be to ensure that the signatory reach an informed judgment.

Mr. O'Hara referenced the Decision in *Bank Co. Exterior v. Thomas*, [1997] All E.R. 46 C.A. The case report indicates that the bank's duty was "to ensure that she knew what she was doing...".

It is my interpretation of the various cases that in order for a provider of independent legal advice to be satisfied that the signatory knows what they are doing, or is in a position to make an informed judgment, it is necessary that both the lawyer and the client are fully informed as to the nature of the transaction and the associated legal entitlements.

As indicated by the Alberta Court of Appeal in *Brosseau v. Brosseau* 100 A.R. 15, the lawyer must himself have all the relevant information in order to ensure that the client is aware of their underlying rights and entitlement.

I agree that lawyers need not question the wisdom of the transaction nor provide business advice. It appears from the cases however that in explaining the "nature and effect" of a document it is necessary that the lawyer and the client have sufficient information at hand to ensure that the client has adequate knowledge of all legal rights and entitlements to reach an informed judgment.

Notwithstanding differing views, independent legal advice is a potential minefield. That minefield will be more effectively navigated by use of the following checklist or your modification thereof.

INDEPENDENT LEGAL ADVICE CHECKLIST

Client's name	yr.	mo.	day	Start time	Finish time
Client's address					Telephone
Client's age	Spoken languages		Written languages		
Family status	Referred by		Reason for independent legal advice		
Client's net worth	Spouse's net worth		Security requested by lending institution		
\$	\$				
The client has limited facility with English, so I obtained an interpreter whose name was:				Also present during our meeting was:	

I reviewed the following documents:

PART A - I EXPLAINED THE FOLLOWING TO THE CLIENT

- The nature and consequences of a mortgage
- The nature and consequences of a guarantee
- The effect of power and sale/judicial sale and foreclosure
- The effect of an action on the covenant and the liability for any insufficiency
- The consequences of his or her spouse's default
- The possible consequences of failure to honour the financial obligations (loss of her or his house, business and all other property)
- The possibility of obtaining security for the financial obligations
- That an indemnity will be worthless if the spouse declares bankruptcy
- The risks to the client if there is a breakdown of the marriage

PART B - THE CLIENT

- I reviewed the current state of the client's marriage
- I reviewed the current state of the client's health
- I asked about domestic violence and was told _____
- The client said that the reason for his or her consent to this transaction or agreement was _____

- I satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily, without pressure from anyone
- I accepted payment from the client only, and not from anyone adverse in interest to the client

PART C-IF THE INDEPENDENT LEGAL ADVICE RELATES TO A DOMESTIC CONTRACT

- I obtained complete financial disclosure from both my client and the other side
- I determined that the document was sufficiently well-drafted to accomplish my client's objectives
- I ensured that the terms of the agreement were both certain and enforceable
- I ensured that, if the agreement is to be filed against property or as an order of the court, the statutory requirements for filing have been met
- I reviewed the risks and consequences of the agreement
- I discussed the effect of the agreement upon the client if her or his spouse dies first
- I carefully explained all the clauses of the agreement and the client indicated that he or she understood same

PART D - WHEN CLIENT SIGNS CONTRARY TO ADVICE

- I advised the client against signing the documents, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was _____
- The client signed an acknowledgement, in the presence of this witness, that she or he was signing the documents against my advice

PART E - FILE MANAGEMENT

- I opened a file
- I placed this form, a copy of the documents and my notes in the general independent legal advice file
- I took notes of my meeting(s) with the client and retained these
- I docketed the time spent advising the client
- I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account
- My advice was oral only and I sent no reporting letter

NOTES

