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A A R E B C

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LOSS PREVENTION BULLETIN

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■Bulletin #83

Conflict of interest extends to legal support staff

A Saskatchewan judge has found that, by employing a legal secretary who had worked for the plaintiff's counsel, a defence firm created a conflict of interest sufficient to disqualify the lawyer from representing the defendant. When the secretary worked for the plaintiff's counsel, she had full access to the plaintiff's file, which included privileged information and sensitive strategic litigation materials. The judge applied the test set out by Mr. Justice Sopinka in *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235: would a reasonably informed member of the public be satisfied that no use of confidential information would occur? The Law Society of Saskatchewan's Code of Professional Conduct imposes conflict of interest guidelines that apply to both lawyers and support staff, but in this case there was no evidence the guidelines were applied when the secretary transferred to the defendant's firm.

See *Ocelot Energy Inc*. v. *Jans* [1998] S.J. No. 287.

In a similar Texas case, the court held that a paralegal or legal assistant is conclusively presumed to have received confidential information during work on a case. This conclusive presumption is necessary to prevent the party seeking disqualification from being forced to reveal the very confidences it seeks to protect. Although the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that the information was shared with a new employer can be rebutted by showing that the paralegal was instructed not to work on any matter on which the paralegal worked during the prior employment.

See *In re American Home Products Corp.*, Tex., No. 97 - 0655, 5/8/98.

■Bulletin #84

Limit your exposure for tactical judgements

Usually, a lawyer is immune from liability for a good faith exercise of tactical judgement. But unhappy ex-clients *have* successfully argued that their lawyers acted below the standard of care in exercising tactical judgement. For example, if a lawyer decides not to use experts, a successful litigant will view that lawyer as a money-wise hero, while an unsuccessful litigant may confront the lawyer with a battery of experts attesting to the value of the case that could have been. To protect yourself, consider these steps:

1. Read: Make sure you have done the research needed to make well-founded tactical choices.

2. Document: Set out in writing the reasons for your tactical choices.

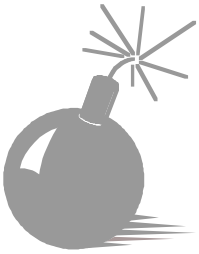
3. Communicate: Discuss the tactical options with your clients, and include your clients in the decision-making process. Document their acquiescence.

Make sure your file reflects reasoned choices among tactical options that your client helped evaluate.

See 'Bolstering the Indemnity Defense' by Kathleen Ewins in the LPL Advisory, a newsletter from the ABA Standing Committee on Lawyers' Professional Liability, vol. 2, no. 1, Spring 1998.

■Bulletin #85

Countdown to 2000



The countdown to the year 2000 and its associated computer problems continues. The year 2000 is only 15 months away, and safeguards must be in place well before then. To help you get ready, here are two additional internet resources, as recommended by G. Burgess Allison in a recent American Bar Association journal:

Patrick O'Beirne's Year 2000 page has excellent tutorials on the basic issues, covers detailed problems related to home-built spreadsheets and databases, has a column about embedded systems, and has a short 'frequently asked questions' file with worthwhile links.

http://homepages.iol.ie/~pobeirne/year2000.htm

The Year 2000 Support Centre — *Guide to Topics and Resources* has a solid list of some of the best articles in the field:

http://www.support2000.com/system.htm

Also, note that the Business Development Bank of Canada has a funding program to help small businesses cope with the Y2K problem. You can reach the Bank at 1-800-INFO-BDC or at http://www.BDC.ca.

■Bulletin #86

Software hits can eliminate deadline misses

Deadline management is a critical element in reducing risk. Aside from the obvious court, discovery, and statute dates, each case also brings with it a myriad of pre-litigation deadlines. These can become overwhelming, especially when you have a considerable caseload.

Fortunately, by automating your calendar and establishing consistent procedures you can significantly reduce the risk of missing important deadlines, even as your caseload increases.

While there are many software programs available that offer a calendar, only those designed for the rigorous requirements of a law firm environment should be considered. The investment in a quality system and thorough procedures can have exponential paybacks if only one malpractice case is avoided.

Here are some things to look for:

Countdown reminders - Look for a software system that can be pre-programmed to provide an early warning of upcoming deadlines. For example, inputting a statute date can automatically trigger reminders 1, 30, 60 and 90 days in advance.

Deadline history - Don't settle for a system that allows deadlines to 'drop off' once the deadline date has passed. Items should display until they have been completed. We use a status indicator to denote that items are finished, cancelled, or rescheduled. This serves as a great ongoing checklist of what has been completed.

Accountability - Just as you create audit trails for your trust account, you should make sure to identify who has made changes to the system based on a password or operator log-in. If a statute or court date mysteriously disappears, it is comforting to know that you can restore the data and pinpoint who needs further training.

Reporting capabilities - A calendar program will be ineffective without the ability to provide meaningful reports. Look for programs with reports that can be sorted by date, case, status and reminder type (appointment or deadline). Don't forget to consider the needs of those who do not have PCs. Make sure you can print reports to give to individuals without computer access. Equip lawyers with hard copy reports to take to the courthouse and on trips.

Program integration and support - Before investing in a new calendar program, you will want to consider how well the system integrates with existing software your firm uses. Also, most case management programs offer their own calendar systems. The fully integrated programs tend to be more efficient in the long term, as you will save considerable data entry time. As with any new program, look into the technical support and training that the software company provides before making your final decision.

Written by Linda Chadwick, a consultant with ADC Legal Systems Inc., (407) 843-8992 http://www.adclegal.com.

■Bulletin #87

Unintended severance of joint tenancy

When negotiating a property division, family lawyers should remember that mutual offers to buy out the other party's interest might inadvertently sever a joint tenancy. An old case determined that a joint tenancy can be severed if the parties embark on 'a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.' See *Williams* v. *Hensman* (1861), 1 J&H 546, 70 E.R. 862.

More recent caselaw applies the same principle. An exchange of 'without prejudice' letters by the joint tenants' lawyers was sufficient to inadvertently sever a joint tenancy in *Robichaud* v. *Watson* (1983), 147 D.L.R. (3d) 626. In another case, a wife asked that the property be sold and the proceeds shared equally. In response, the husband proposed that she transfer her interest to him or to their son. Since both parties were treating the property as tenants-in-common, the court found they had severed the joint tenancy. See *Ginn* v. *Armstrong* (1969), 3 D.L.R. (3d) 285.

■Bulletin #88

Cash that cheque!

Tom instructed solicitors to collect on a series of outstanding debts owed to him. One debtor agreed to pay by post-dated cheques. A cheque post-dated to 30 November 1997 was handed to Tom's solicitors on November 1. The solicitors didn't present it for payment until 7 January 1998. It didn't clear then, or on two further attempts, because the debtor company had gone into liquidation. A forensic accountant's report disclosed that had the cheque been presented on the due date, it would have cleared. So Tom was able to recover the money owed from his solicitors instead of from the original debtor. Tom's solicitors clearly had no effective diary or file review system. They also failed to clarify responsibility for presentation of the cheque as part of the firm's internal office procedures.

■Bulletin #89

Merge all causes of action arising from one accident in one suit

Bulletin #81 warned lawyers to claim all damages arising from one accident in one suit. Unfortunately, some lawyers are still failing to do so, as illustrated by the following two examples. On behalf of an insurer, a law firm settled a small, subrogated claim for damage to a vehicle without considering that that settlement would prevent the insured from making a much larger claim for her personal injuries. Another firm advised an insured party to sue in provincial court for damage to his vehicle without considering that this would foreclose the subrogated claim of the Workers Compensation Board. Remember that all the causes of action from one accident will merge into the first judgement obtained. Claim all damages arising from an accident in one suit.