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LOSS PREVENTION BULLETIN

ISSUE NO. 23 DECEMBER, 1998

■Bulletin # 90

How far does a retainer reach?

Two Ontario lawyers, hit with large judgments for professional negligence, have discovered that a retainer can be far reaching indeed. In both cases, the lawyers assumed that their clients had taken over responsibility for specific tasks needed to complete a transaction, but both lawyers failed to confirm this transfer of responsibility in writing. The result: transactions that failed and lawsuits by clients who denied they assumed any responsibility.

Case A: Loan agreement A law firm represented a bank that was lending money to a lumber mill. According to the loan agreement, the lumber mill had to have business interruption insurance before the bank could advance the loan.

Because the lawyer for the bank didn't feel qualified to evaluate the size of the required insurance, he wrote the bank stating that he understood the mill was consulting an insurance broker to determine the appropriate level of coverage and that he understood the bank would consult an insurance agent about the adequacy of the coverage obtained by the lumber mill.

In fact, the bank did not consult an insurance agent, nor did it respond to the lawyer's letter. Neither the bank nor the lawyer followed up to determine if any insurance reviews were conducted.

The loan transaction closed and the bank's lawyer advanced the funds without evidence that the mill had obtained business interruption insurance. The lawyer did not draw this deficiency to the bank's attention. When the mill subsequently burned down, the bank successfully sued for its $450,000 loss.

The judge accepted the bank's position that it was the lawyer's responsibility to advise the bank if the mill had not produced evidence of business interruption insurance. The lawyer's letter did not absolve him of this responsibility; it merely indicated that further consultations about the sufficiency of the insurance coverage were needed.

Case B: Leasehold interest purchase Lawyers were retained to complete the purchase of a leasehold interest in a major office complex. The client was particularly interested in exercising all options to renew the lease because it planned to sublet the premises at a higher rate, thus generating a steady stream of income for itself. The lawyers understood that these renewals were crucial to the client and confirmed in writing that they were instructed to exercise all options to renew immediately after closing.

Although the purchase closed in December 1986, the client did not pay out the full purchase price until November 1987, at which point it was in a position to exercise the first renewal option. But the lawyers did not exercise this option to renew, nor did they advise the client to do it themselves.

The result: Because the option to renew was not exercised in a timely fashion, the lease terminated and the client sued the lawyers for damages. In their defense, the lawyers claimed that the instructions to renew the lease were "spent" by November 1987, because it had been impossible to exercise the renewal option immediately after closing. They claimed not to be responsible for exercising an option so far in the future. The client sued successfully for more than $9 million.

The judge said lawyers who accept instructions but later decide that they will not follow through on them must advise the client of their decision so the client can get other legal advice. The client needn't determine if the lawyers' duty had been done, and was entitled to rely on the lawyers to renew the lease in the absence of any advice to the contrary.

The insurer's advice: Put it in writing. If you plan to relieve yourself of some part of your original retainer, clearly confirm this with your client. Once a matter falls within a lawyer's retainer, any subsequent confusion about *who* is responsible for *what* will be decided against the lawyer.

Excerpted from Casebook *in lpic: news vol. 2 no. 2 with permission of the Lawyers' Professional Indemnity Company (LPIC).* Casebook *, a collection of articles about recent decisions and legal developments, can also be accessed from the practicePRO section of LPIC's website at www.lpic.ca. practicePRO is LPIC's risk management program for Ontario practitioners.*

■Bulletin #91

On keeping secrets from your clients

The lawyer-client relationship gives rise to a fiduciary relationship between the lawyer and client. Included in this relationship is the obligation to make known to the client any information the lawyer has that may be relevant to the representation.

A failure to make such information known turned out to be very costly for a lawyer and his firm. Substantial damages were awarded to the client in *Martin* v. *Goldfarb* [1997] O.J. No. 1918; appeal allowed as it related to damages [1998] O.J. No. 3403. The lawyer, acting jointly for Martin and for another client with whom Martin was doing business, chose not to tell Martin that the principal of the other client was a disbarred lawyer who had recent convictions and a jail sentence for activities similar to those in which they were jointly engaged. Martin was able to satisfy the court that he would not have continued joint activity had he known.

In a case of multiple representations like this one, the fiduciary obligation can be expressed in another way: a lawyer must be able to demonstrate after the fact that each client received representation equal to that which would have been rendered by independent counsel. A lawyer, acting only for Martin, having the knowledge that the lawyer had in this case, could not and would not have kept it from the client. To do so would have been a breach of fiduciary obligation leading to liability. The lawyer acting for both parties, where generally there are to be no confidences, cannot be in a better position.

Barry Vogel, Practice Advisor, Law Society of Alberta

■Bulletin #92

Communicate your client's instructions

A client, seeking an injunction to prevent harassment, specifically instructed her lawyer not to reveal her home address to the defendant. But the lawyer inadvertently revealed her address by exhibiting a medical report in an affidavit. The client suffered a mental breakdown following further harassment at home, which gave rise to a claim against the lawyer for distress. The lawyer had delegated preparation of the affidavit to an assistant without highlighting the need for confidentiality of the address. The affidavit was signed and served without either the lawyer or the client checking the exhibits.

See Law Society's Gazette, London, England, 95/11 10 March, 1998.

■Bulletin #93

Keep computer records as evidence

As lawyers increase their use of computers to create, store, and transmit information, computerized records feature more often in the discovery process. When it becomes apparent that litigation might require access to the parties' computerized records, put both your own client and all other parties on written notice of the possible evidentiary value of these records and demand that they be protected from alteration, deletion, or loss.

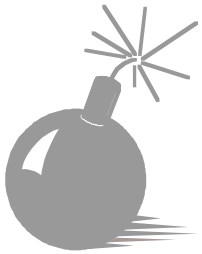
If you foresee the need to discover or disclose electronic data, instruct your client immediately to make a separate, complete, write-protected copy to be stored in a safe, off-premises location. This copy can then be restored as needed to show the data as it existed at a particular time. Consider whether to preserve earlier and subsequent backups as well, even if such preservation interferes with ordinary backup tape rotation or document retention schemes. Buying extra backup tapes is cheap insurance.

■Bulletin #94

Will others' Y2K problems 'bug' your practice?

Do your efforts to prepare for the Year 2000 extend beyond your office door? Even if you make sure your own house is in order, others on whom you regularly rely may have been less careful. Have you investigated whether there will be problems with these commonly-used third party services:

- court systems (computerized court dockets or other databases)?
- banks (business accounts, trust accounts)?
- service providers (couriers, court reporters, package delivery systems, etc.)?
- justice systems (incarceration records, offender histories, etc.)?
- legal research databases (EDGAR, Patent and Trademark databases, LEXIS & Westlaw, etc.)?



Now is the time to consider contacting service providers and vendors and asking your local bar association to meet with a representative of the local courts and jails to find out whether they have looked into Year 2000 issues.

■Bulletin #95

Be safe: look in your filing cabinets

A lawyer was given a list of files he was to take over from a colleague who was leaving practice. Unfortunately, the leaving lawyer omitted one file from the list, and the new lawyer only discovered the file was in his office after a limitation date had passed.

As part of your loss prevention routine, visually check your file cabinet regularly to see whether any files are being overlooked. And if you take over a group of files for another lawyer, have that lawyer walk you through the physical files in addition to giving you a list of file names.