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A A R E B C

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LOSS PREVENTION BULLETIN

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■ Bulletin #113

Claims against wills and estate lawyers may increase

Claims made against wills and estates lawyers tend to be for large sums since they relate to the property a client has accumulated over a lifetime plus life insurance policy pay-outs. So it's not surprising that lawyers' insurers are concerned about a possible upward trend in these claims as baby boomers increase their use of estate planning and administration services over the next two decades. If your practice includes wills and estates, you should be aware of common sources of claims in this area.

Procrastination is one stumbling block, and one with which courts now have little patience. For example, in *White v. Jones* [1995] 1 All E.R. 691, the House of Lords found a lawyer liable to his client's daughters, the would-be beneficiaries under a new will, which the lawyer had not completed drafting when the client died two months after giving instructions for the will.

Simple drafting oversights can cause claims, things like omitting a clause or including a precedent clause that doesn't reflect the testator's wishes. These oversights go together with failure to communicate with the client so that the error goes undetected. An example is failing to ascertain the nature of real estate or business interests.

Lawyers should also be alert for estates that are too complicated to allow a simple, 'loss leader' will. In particular, the tax implications of a testator's instructions must be fully discussed.

Certain estate administration practices also give rise to claims. Some examples:

- delaying realization of assets that leads to loss in asset value
- distributing the estate before all estate liabilities are known
- failing to insure assets or to notify insurers that property is unoccupied
- advising both the executor and the beneficiaries, a practice that can lead to conflicts of interest
- allowing retired lawyers to continue to do trustee work on their old files that might involve practicing law, thereby exposing the firm to vicarious liability

■ Bulletin #114

Will your on-line communications lead to claims against you?

Do you have an on-line presence to promote your practice? If so, a few precautions will help lower the associated risk of malpractice claims:

- Make clear that anything on your web site relates only to the law of the jurisdiction where you are admitted to practice.
- Be sure the site's contents comply with all ethical requirements of your jurisdiction.
- Eliminate any language that could be interpreted as a solicitation.
- Refrain from giving specific legal advice to non-clients on the internet. Avoid answering particular questions even in a general way.
- Use the same screening mechanisms on-line as you would use if giving legal advice to someone on the phone.
- Don't discuss the particulars of an individual's situation through publicly posted messages. And note that responding privately may in itself be taken to set up a solicitor-client relationship.
- Beware of conflicts. Do you really know the identity of the person on-line?

If you use e-mail, take extra care in addressing your correspondence. Especially when you address e-mail from an on-line directory, it's simple to click the wrong recipient's address or to send a confidential message intended for one individual to a whole group.

Before corresponding with a client by e-mail, ask whether the client checks his or her e-mail regularly and whether anyone else has access to the client's e-mail. Consider having clients sign a statement authorizing you to use e-mail communication and stating whether encryption should be used. Send a test e-mail to the client before sending any other information to identify addressing errors.

Evaluate on a case-by-case basis whether information should be sent by e-mail, considering available security measures and the sensitivity of the message itself. As a general rule, if you wouldn't send it by fax, don't send it by e-mail.

■ Bulletin #115

No backup system? Get one today.

Because a loss through theft or fire of the client information, forms, and legal research on your computer can cost you time, money, and reputation, a good computer backup system is important insurance. Whether you choose tapes, removable hard drives, Jaz or Zip drives, or uploading files to a Web storage site, keep these points in mind:

- backups should be automated and done during non-working hours
- data should be backed up daily and your whole system weekly or monthly
- at least two people should be responsible for backing up
- they should test the backup system monthly by restoring some data to your hard drive

■ Bulletin #116

Growth in condominiums presents opportunities and risks for lawyers

The past few years have seen substantial growth in common interest ownership, including condominium homes, hotels, garages, and other commercial buildings, as well as timeshares in resort complexes. This increased number of condominium associations has given rise to a growing number of legal issues and created a growing practice area for lawyers. Condominiums often involve inexperienced owners with large investments and inexperienced boards with large budgets and powers, so condominium lawyers can become targets when something goes wrong. Before moving into this expanding practice area, ask yourself whether you are suited to it.

To practice in this area you need to be part litigator, part corporate counsel, and part real estate lawyer. You should also be a conciliator and a teacher, since emotions often run high among owners who have little understanding of the communal nature of their property investment.

If your clients are first-time condominium purchasers, ensure that they understand what they will own, what obligations they will assume toward other owners, and what property restrictions they'll face or might face if the condominium rules change. Ask if they have read the condo bylaws. Explain that the condo association can increase monthly fees and what can happen if these fees are not paid. It would be useful to locate available checklists or develop your own for yourself and your client.

If your clients are owners in dispute with the condo association, carefully assess your chances of prevailing in a legal battle before plunging in. The bylaws may provide that the prevailing party will recover lawyers' fees.

If your client is the condo board, be prepared to spend many evenings attending board meetings run by volunteer directors, and note that you will need expertise in a number of areas. You may be called on to deal with a delinquent assessment foreclosure

action, an injunction against a visitor to a private community, an owner's allegation of racial discrimination by the board, a construction defect case, or even complaints about water damage caused by an owner's failure to repair a toilet seal.

If you choose to practice in this area, be prepared for a steep learning curve and practice defensively.

For more on condominiums, see the American Bar Association Journal, October 1999, page 54.

■ Bulletin #117

Severe penalties for misrepresentations on tax matters

Lawyers involved in tax-related transactions should watch out for new legislation, section 163.2 of the *Income Tax Act*, which provides a severe penalty that could catch them or their clients. Instead of an earlier 'gross negligence' test, the Department of Finance has proposed a 'culpable conduct' test to determine whether penalties should apply. The culpable conduct test refers to conduct that is:

- tantamount to intentional conduct;
- shows an indifference as to whether the *Income Tax Act* is complied with; or
- shows a wilful, reckless, or wanton disregard of the law.

So, for example, a mis-statement as to the value of a property or service will amount to culpable conduct unless the stated value is within a prescribed percentage of the fair market value. If not, the penalty will apply unless the person establishes that the stated value was:

- reasonable in the circumstances, and
- provided in good faith.

Consider a lawyer involved in an estate freeze. Relying on the accountant's valuation of the assets transferred as consideration for the freeze shares, the lawyer prepares a resolution that confirms the redemption/retraction amount of the shares. By preparing documents that confirm an overly-deflated value, the lawyer can be deemed to have acted in circumstances amounting to culpable conduct and so be exposed to penalty.

This legislation has a broad reach, and lawyers may need to warn clients that it applies not only to professionals but also to supervisors and other business people who turn a blind eye to false tax statements.

The penalty involved is the greater of \$1,000 and 50% of the tax in question, plus interest. The penalty need not bear any relationship to an illicit financial gain by the individual in question, and since there is no assessment limitation period, the threat of the penalty can follow individuals into retirement. Professional liability insurance coverage would not likely apply, due to exclusion clauses for fines or penalties.

See Tax Topics, a publication of CCH Canada Ltd., September 23 and 30, 1999.