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LOSS PREVENTION BULLETIN

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Bulletin #118

When a lawyer leaves, does every file still have a home?

"I thought you took on all his files." "But, didn't he take some files with him?" "No, no. I'm sure he left that file with you."

Office chaos and lack of communication can lead to a dialogue like this on any file left behind by a lawyer who has left the firm. When the conversation happens *after* a firm receives a notice of motion to dismiss an action for want of prosecution, it can be costly.

A case in point: Pat started to handle a file, but assigned it to John in 1991, who assigned it to Bruce in 1993, who assigned it to Tim in 1994. Tim stopped practice in 1998 and transferred his files back to Pat. Pat says he transferred this file to Bruce, but Bruce denies he ever received or accepted the file back from Pat. When Bruce left the firm in 1999, Pat assumed that he took this file with him. In fact, it sat in the office without any lawyer assuming responsibility for it.

No notice was sent to the client when the lawyers left the firm, and no notice of ceasing to act or change of solicitors was filed at the law courts. Since Pat's firm was still counsel of record, it was served with the notice of motion to dismiss the action in January, 2000.

Does your firm have a proper system in place for the transfer of files from departing lawyers and the proper notification of their clients? Do you follow up to ensure that every file has a home?

Bulletin #119

Who is using your letterhead?

"I need to settle this issue on the cheap. Could I just use your letterhead to write one letter?"

Most often this request is made on a debt collection. But firms should not provide their letterhead to anyone for unsupervised use no matter what the practice area. Your firm won't want to be responsible for the legal conclusions or litigation threats made by a non-lawyer. As well, the use of your letterhead by a non-lawyer can be seen as the unauthorized practice of law.

Bulletin #120

Mid-career lawyers at greater risk of malpractice?

"I've practiced law for 25 years and never had a malpractice claim; I'm not likely to have one now."

Statistics from the American Bar Association show that the above statement contains a false assumption. In fact, mid-career lawyers have a greater risk of making an error that results in a malpractice claim, and claims against experienced lawyers are likely to be more expensive.

A combination of factors put the mid-career lawyer at greater risk:

- One common thread in malpractice claims is unmet expectations. Clients—and lawyers themselves—expect a higher level of performance from lawyers with more years of service.
- Long-term clients may ask their lawyer to handle new legal matters in an unfamiliar area of practice. More claims occur, and more claim dollars are spent, in areas where lawyers spend the least amount of time in practice.
- Clients and peers expect a faster response time than in the past, increasing the pressure on lawyers accustomed to having thinking time.
- The mid-career lawyer is at full stride both professionally and personally. Being overextended makes a lawyer more likely to take shortcuts and less likely to use checklists or other practice aids.
- An experienced lawyer may neglect to explain the legal process to a client, particularly to a long-term client whom the lawyer perceives to be knowledgeable.
- Senior lawyers may delegate parts of a file to associates who never see the whole picture and so are apt to make mistakes. The lawyer who delegates the work is still responsible for the quality of the finished product.
- More experienced lawyers tend to handle legal matters with higher value. The higher the value of the underlying work product, the more worthwhile it is for the client to sue and the more costly the malpractice claim.

From 'Mutually Speaking,' a newsletter of Wisconsin Lawyers Mutual Insurance Company, Summer 1995

Bulletin #121

Environmental orders and actions affecting real estate: practitioners be warned

A recent decision of the British Columbia Supreme Court should interest lawyers who deal with commercial and real estate transactions. In *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw (1999) Vancouver C918006 (BCSC),* a land developer sued its lawyer in negligence when its subdivision project was delayed for nearly two years and cost an additional $2.6 million dollars. The property in question had been landfilled with hogfuel, a lumber byproduct that can leach contamination.

The client said its lawyer was negligent by failing to:

1. search the Ministry of Environment, Lands and Parks, and discover a pollution abatement order on the lands the client was purchasing
2. include appropriate representations and warranties in the contract of purchase

The court found that the defendant lawyer fell below the required standard of care by failing to search for and discover the pollution abatement order, given that:

- the lawyer held himself out as a specialist in complex commercial real estate transactions
- he was aware of the *Waste Management Act* and its impact on developers
- he saw a 'preliminary layout approval' for the subdivision, which suggested contacting the Ministry of Environment, Lands and Parks, and he knew that the clients were relying on him to conduct due diligence
- his law firm had up-to-date course materials about environmental liability, had published an alert to clients on the subject, and was updating environmental clauses in its precedent system

On the second cause of action, the court said the lawyer's due diligence failure made it all the more crucial that representations and warranties be included in the contract.

In the end, the court found that the lawyer's negligence didn't cause the plaintiff's damages, since the plaintiff would have completed the purchase even if it had known about the pollution abatement order. But this case indicates that real estate lawyers must learn about the various environmental orders that can be issued against land, a company, or an individual. Does your jurisdiction have an organization that helps with environmental due diligence searches, such as the Environmental Law Centre in Alberta?

Excerpted from an article originally published in Alberta's Environmental Law Centre News Brief 14:4 (1999) 1.

Bulletin #122

Common law, common mistakes, common claims

Joint tenancy and tenancy in common: different concepts with different consequences that are frequently either overlooked by solicitors or not explained to clients.

Gordon paid the deposit when Gordon and Phillip bought a house. Phillip made no cash contribution but was jointly liable for repayment of the mortgage. The relationship broke down. The house was sold. Gordon was not pleased with the outcome—he lost half his original deposit to his former partner when it turned out they held the property as joint tenants and were entitled to half the sale proceeds each. Their solicitor had not advised them about the options of holding title to the property and had decided, without taking instructions, they should be joint tenants.

Mary and Ted, both widowed got married. They put their respective savings into a new home. Neither had a good relationship with the other's children. They made wills leaving their shares in the home to their respective children. When Mary died, her interest in the property passed by survivorship to Ted—they were joint tenants.

Mary's children were not pleased with the outcome. They received no benefit under their mother's will despite the clause in their favour. As disappointed beneficiaries, they claimed against their mother's solicitor, who should have severed the joint tenancy to ensure the gift was valid. Had Ted died first, his children could have made a similar claim.

John and Fiona separated. She moved out of the matrimonial home and instructed solicitors about a divorce. She was buying an apartment with financial help from her parents. Her solicitor, acting for both her and her parents, drafted a loan agreement. Fiona was to repay the loan out of her share of the sale proceeds of the matrimonial home. Unexpectedly, Fiona died. Her interest in the matrimonial home passed to her husband by survivorship—they were joint tenants. Fiona's parents were not pleased with the outcome. They were unable to recover their loan and claimed against their solicitor, who should have investigated the title to Fiona's former matrimonial home and severed the joint tenancy to give effect to the repayment clause in the loan agreement.

When two or more people are involved in property ownership, always:

- ask about how title to the property is held
- advise as to how title can be held
- act to give effect to clients' instructions

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