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A A R E B C

Editor: Barry Vogel, Q.C.

600, 919 - 11th Avenue S.W.
Calgary, Alberta, Canada
T2R 1P3
Tel: (403) 229-4714
Fax: (403) 228-1728

LOSS PREVENTION BULLETIN

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All Loss Prevention Bulletins are on line.

Go to www.clia.ca, click on "Site Map". You'll find the Bulletins under "Documents".

This issue consists of random pointers that originated with Jean Côté, now of the Alberta Court of Appeal, when he was in practice. Justice Côté is the author of the highly regarded "Safe and Effective Practice" handbook, published and distributed by CLIA/CBELA.

■ Bulletin #133

What Will It Cost To Get Out Of The deal?

The economic roller-coaster impels many clients to think about getting out of contracts or leases. Often your clients ask you what would have to be paid if they just repudiated the deal.

Be very wary of giving offhand advice of that sort. The law of damages can be difficult, the cases are not all consistent, and what you think you know of the law is probably outdated unless you have researched the area recently. Contractual terms vary. Lease law is especially complicated. Worst of all, the plaintiff might allege some very large loss of profit flowed from the breach.

■ Bulletin #134

Are You Unful-filed?

Unfiled papers are a menace: they may be misplaced, and the file may be totally misleading because of their absence. Do you keep papers off the file until all possible tasks are completed? Are your files therefore incomplete? Do you waste a lot of time looking for missing papers? Does your assistant give filing low priority? Is that your idea or have you just let it happen? Is your filing behind at the moment? Do you know? Why not discuss it with your assistant and agree on a proper priority and method? And while on the subject, make sure the paper gets on to the right file. A misfiled document may be lost forever.

■ Bulletin #135

Postponing The Inevitable

Clients will often postpone an interest in land in favour of someone else's encumbrance. Even if such a postponement is necessary, it might be possible to ensure that the encumbrance is only used for the right purpose. If it is a new mortgage, will it be used to pay out other encumbrances or to improve the land? Or will the mortgagor just pocket the proceeds and disappear? If your client is in such a situation, you should not only warn of the risks, but also make sure that instructions to you are completely clear.

■ Bulletin #136

Some Taxing Problems

Many transactions are done purely for income tax purposes. Often, your client's accountant handles the tax end of it, and you just prepare some simple company or conveyancing papers. But:

1. Did the accountant give you the right numbers?
2. Did you check them with your client to see whether they were willing to accept them?
3. Can you prove they came from the accountant and that you were supposed to rely on him or her and not make your own investigation?
4. Do election or other forms have to be filed with the District Taxation Office?
5. When?
6. Who is supposed to do that?

■ Bulletin #137

Do You Check, Mate?

When you do serious work, does anyone check it? Do you check anyone else's?

If your firm sends out an important opinion, or an important contract, or an important pleading or argument, is it a one-person job? Does a second lawyer read it over? Do you mail letters dictated in the heat of indignation without review by any other lawyer? Do you discuss problems and difficulties with other lawyers?

Your clients and the courts see your firm's name on everything which leaves the office. But is the work really a firm product, or is the chain as weak as its weakest link?

■ Bulletin #138

Limitations - Again

Some jurisdictions have shorter limitation periods than others. If there is any possibility that you cannot sue or personally serve a defendant in your jurisdiction, consult a lawyer in the appropriate jurisdiction about local limitation periods. Don't guess at them or try to puzzle them out yourself.

■ Bulletin #139

There Still Is A Corporate Veil

Some clients treat assets of their private companies cavalierly. They feel free to intercept or spend company funds. That can be breach of trust or theft even if the client owns all the shares. Even if no shareholder or director ever complains, guarantors or other creditors may complain. Indeed they may sue everyone who participated in the breach of trust or theft. So don't treat your clients and their companies as the same thing, even if they do. Get the authority of the directors before you pay funds to someone else other than the company.

■ Bulletin #140

Misplaced Trust?

Be careful when executors or administrators or trustees mortgage or sell property. Do they have power to do so? Are they doing so for proper purposes, or for private purposes not benefitting the estate? Are the proceeds going to the estate? If you act for either side of a questionable trust transaction, you may be sued. The beneficiaries will claim the transaction is invalid or that they should have got the proceeds, or both.

■ Bulletin #141

Something More To Think About

The fact that you are acting for a client does not exempt you from tort liability to third parties or even criminal liability. At best, it might give you a questionable cause of action against your client for indemnity.

Some of the torts which you might commit in the course of obeying your client's instructions are:

- (1) defamation
- (2) interference with contractual relations, conspiracy, or similar economic torts
- (3) slander of title or wrongful filing of a caveat or a builder lien
- (4) breach of copyright
- (5) contempt of court
- (6) conversion of chattels
- (7) conspiracy to commit almost any other tort
- (8) negligent misrepresentation, especially as you do not know to whom your client is going to show your letters (even those just addressed to your client).

Think about the legal result of your actions should the facts that your client gave you prove to be incorrect. If you suspect that version of the facts, have them checked independently, or else make sure that your client is (1) known to you, and (2) undoubtedly solvent.

If these conditions are not met, think twice about what you are doing. Alternatively, merely give your client legal advice and let them take the active steps such as writing letters or filing documents.