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AAREBC

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

ISSUE NO. 33 MARCH 2002

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■ Bulletin #142

Business Advice – a risky business

Is a lawyer at risk of being successfully sued by a client for having, as part of the services to the client, given business advice which turned out to be bad? If there was any doubt, the decision of the Ontario Court of Appeal in *Wong v. 407527 Ontario Ltd, (1999) 179 D.L.R. (4th) 38* removes it.

In that case the lawyer acted for the purchaser of rental property under an agreement wherein the vendor warranted that the rental income would be at certain amount after a year. When that wasn't achieved, the purchaser sued the vendor for, among other things, damages under the warranty. He also sued his lawyer for negligence in failing to protect his client's interests, mainly by failing to obtain security for the warranty.

The lawyer's defence was that he had no duty to negotiate security for the warranty because that was a business matter, not part of a lawyer's retainer.

Fortunately for the lawyer, the purchaser/client had concluded the agreement before coming to the lawyer. The agreement did not entitle him to security for the warranty.

Laskin, J.A. relied on that fact in finding that in this case the lawyer had no duty to try to negotiate something for which the client had no legal entitlement.

However, he did not accept the submission that a business matter was not part of a lawyer's retainer. He stated that ordinarily clients do retain lawyers for legal advice, not business advice, but added:

> …on some transactions the two are intermingled and no clear dividing line can be drawn. Thus, a lawyer may well have a duty to give advice on the financial or business aspects of a transaction, depending on the client's instructions and sophistication, and on whether the client is relying on the lawyer for that kind of advice.
>
> As I have said, had the respondents consulted (the lawyer) before signing the agreement, they could reasonably have looked to him for advice on the risk of relying on an unsecured warranty by a numbered company, be it characterized as business advice or legal advice or a mixture of the two.

It is frequently very difficult to characterize whether the advice being given is legal, business, financial, personal or otherwise. If distinctions can be made, it would be a good idea to do so with the client at the outset so as to avoid future misunderstanding. However, the best rule for staying out of trouble is:

> always know what you are talking about no matter what kind of advice you are giving.

■ Bulletin #143

Are You Witnessing, Notarizing or Lawyering?

Lawyers are frequently asked to witness signatures, and to act as a commissioner for oaths or a notary public in respect of the completion of documents by others. This frequently flows from the representation of and the giving of legal advice to clients. Often, however, it is a "stand-alone" service, provided to people who are not clients, or to people who are or have been clients, but on the particular occasion are requiring only the specific witnessing, commissioning or notarizing function. In other words, the usual lawyer/client relationship is not intended to arise in the situation.

If that is so, it is a good practice to keep it that way. If you start answering questions about the documentation you may very well create the relationship that will expose you to a claim for lawyer's negligence if something later goes off the rails for the person you were helping. It may be appropriate that you do provide additional service such as legal advice, in which case you will deal with the person/client accordingly. Where the service is confined to the administrative function, future misunderstandings and problems may be avoided if at the time of signing you note or affix with a stamp near your signature, the phrase "no legal advice sought or given" or appropriate words with a similar effect.

■ Bulletin #144

Are Your Employees Honest?

A lawyer's real estate assistant was involved in scheme with a rogue client who sold properties and diverted the proceeds instead of paying out and discharging mortgages. The assistant, who had been intercepting calls and correspondence, missed a letter from the bank confirming instructions to pay mortgage proceeds to the client account instead of being used to discharge mortgages. The lawyer discovered the problem only when he saw that letter from the bank and checked in the file where he found that the letter of instructions to the bank had not been done by him and that his signature was forged. That led to discovery of other undertakings which were not being fulfilled because of the assistant's activity.

Another lawyer found trust account discrepancies and discovered that his secretary was stealing retainer funds. His office insurance policy had some employee dishonesty coverage, but not nearly enough to recoup his losses.

While the lawyer's insurer did provide coverage in the example in the first paragraph of this bulletin, losses caused by dishonest employees which may not always be covered by insurance or law society managed defalcation/assurance funds. Do you make careful reference checks when you hire? Do you have internal audit procedures? Do you have adequate employee dishonesty insurance?

But most important of all:

are you delegating too much?

are the times when the employee is to be checking with you and confirming with you clearly understood? Are there check-lists or other written guidelines for your employees?

In other words, are you properly supervising your staff?

■ Bulletin #145

It Goes Without Saying…

There are many things that "go without saying" that from time to time should be said. The following are in that category.

1. One of the CLIA jurisdiction insurance programs recently paid out big money because a lawyer who deposited a cheque to his trust account, wrote his own trust cheque on the strength of it before being satisfied that the original deposit had cleared. The deposit cheque was payable to the firm in trust and appeared to have been issued by a major Canadian corporation. It turned out that the client was a rogue who had fabricated the form of cheque and forged the corporation president's signature. It goes without saying that you should always be sure the money is in your account before writing cheques on it. You can never be too careful.
2. It is Principal and Agent Law 101 and Contract Law 101. If you make an offer on behalf of your client which is accepted, or if you accept an offer on behalf of your client, your client is bound. If your client didn't authorize you to so act they will still be bound to the other party but will have a claim against you. It goes without saying, therefore, that before offering or accepting, you have your client's authority to do so. It goes without saying that it is always best to have that authority clearly set out in writing. When it is not in writing and the client says he didn't give authority or didn't fully understand the terms of the offer in question, you know who is going to get the benefit of the doubt.

There is another problem that arises in the same area. From time to time a lawyer will tell the lawyer on the other side that she will recommend that her client offer or accept a specific sum. Be sure the other lawyer knows that a positive response from his client will be subject to her client's agreeing with the recommendation. In other words, the positive response is the offer, not an acceptance. It goes without saying that this kind of communication should be clearly set out or confirmed in writing.