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AAREBC

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LOSS PREVENTION BULLETIN

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All Loss Prevention Bulletins are on-line.

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

■ Bulletin #150

HOLIDAYS

Taking a well-deserved holiday - where you can both recharge your batteries and put your practice in perspective - is an important part of a safe and successful practice. Before you go, though, we highly recommend that you take precautions, so you won't have any nasty surprises waiting for you upon your return to the office.

When preparing to leave on vacation, it is important that you make certain arrangements:

- If you practice in a firm, ask a co-worker to read your mail, check your faxes and e-mails, and generally take care of your office. If you are practising on your own, make arrangements for a colleague to monitor your office and to be available as a support to your staff. Let them know where to reach you in an emergency.
- Try to anticipate which files will need attention while you are away and identify how far you have progressed on those files, so that your file monitor can easily find his or her way around.
- Inform counsel on the other side of active files that you will be away. Arrange to have letters sent in response to unanticipated correspondence received during your absence, advising that you are out of the office and giving your return date.
- Change your voice-mail or answering machine message (and don't promise to check for messages while you are away unless you really mean to). Arrange an automatic "out-of-office" response on your e-mail system or have someone reply that you are away.
- If trust funds must be disbursed during your absence and you are not practising in a firm, you should consult with your Law Society about the rules in your jurisdiction for signing authority on your trust account. **Do not, under any circumstances, sign trust cheques in blank.**
- Make arrangements for maintenance of trust records and reconciliations to be completed and kept up-to-date.

The peace of mind you take with you on vacation is well worth the effort of these basic steps.

■ Bulletin #151

COMMUNICATION

Failure to communicate effectively with clients is the common factor in a large percentage of errors or omissions claims and also in a huge number of complaints to the Law Society. Law Society discipline staff report that a significant number of the complaints they receive involve lawyers not returning phone calls or not advising the client about what is happening on the file. While failing to return a phone call may not be negligent or actionable *per se*, a client who feels neglected, uninformed, snubbed or ignored is far more likely to bring a claim than a client who has been consistently kept "in the loop" by his or her lawyer throughout the process.

Perhaps the simplest way to keep your client informed about what is happening on a file is to send copies of correspondence and pleadings. Some law firms make efficient use of what is essentially a form letter, generated by support staff, enclosing a copy of the most recent correspondence and inviting the client to call the lawyer if they have any questions. A low-tech but ingenious twist on that concept is the very effective use of a rubber stamp reading "*Forwarded to you by ABC Firm for your information*". A client who is kept informed and up-to-date by letter, email or phone call (even, or especially when the news is bad) is less likely to sue you or to write a letter of complaint to your governing body.

■ Bulletin #152

COSTS CONSEQUENCES

The dollar value of costs awards against unsuccessful litigants has risen dramatically in the last decade. Has your advice to litigation clients changed to reflect this trend?

Unsuccessful parties to litigation are upset enough to be "the loser" and be faced with either paying a judgment or losing any chance of recovering monies that they thought were properly due to them. It adds insult to injury when costs are awarded against them - and times have changed since costs awards were in the hundreds of dollars. It is no longer unheard of to see costs awards in the hundreds of thousands of dollars.

As far as we know, no Court has yet found a lawyer negligent solely for failing to warn of costs consequences or to accurately predict the magnitude of a costs award. Still, the prudent practitioner will adopt the habit of carefully explaining potential costs consequences to litigation clients.

A note to those who may be inclined to take on out-of-province litigation: costs consequences to the unsuccessful litigant can vary from province to province. In some provinces, making an offer in prescribed form and within a set time period under that jurisdiction's Court Rules can have a positive impact on the costs awarded against an unsuccessful litigant. Consult local counsel in the jurisdiction or do the research and advise your client accordingly.

■ **Bulletin #153**

FEDERAL PRIVACY LEGISLATION

While much of the talk about Federal Privacy Legislation has been about the previous commissioner's expense accounts, it is time for lawyers to start turning their minds to the substance of privacy legislation. On January 1, 2004, the *Personal Information Protection and Electronic Documents Act* (commonly known as PIPEDA) will apply to any organization that collects, uses or discloses personal information in the course of its commercial activities. Even if you are advising clients in a province that has similar displacing legislation acceptable to the Federal Government, this legislation will still have application to organizations which are federally regulated (for example, the telecommunications industry) or that transfer personal information for consideration across provincial boundaries.

PIPEDA will apply to your clients, and it will also apply to individual lawyers and law firms who must only collect, use and disclose personal information in compliance with this very complex and convoluted piece of legislation. As a practising lawyer, you must become familiar with PIPEDA in order to properly advise your clients who may be subject to its provisions and also to make sure that your own practice, law firm or organization has the appropriate privacy policies in place to deal with matters regulated by PIPEDA.

The website of the Privacy Commissioner of Canada (www.privcom.gc.ca) is an excellent resource about the requirements of the new legislation. Local continuing legal education seminars can also be a good way to acquaint yourself with PIPEDA.

■ **Bulletin #154**

TAXATION OF DISABILITY BENEFITS

The Federal Court of Appeal recently established a new approach for taxation of lump sums paid out under employer funded disability insurance plans for past and future disability benefits. If you are arguing or settling a claim where a lump sum settlement amount includes claims for past and future disability benefits, you should familiarize yourself with two recent cases. Previous Federal Court of Appeal cases had generally held that these types of lump sum payments were non-taxable. However, in *The Queen v. Tsiaprailis* (2003)

FCA 136, a lump sum settlement payment was found to be "payable on a periodic basis" and therefore taxable notwithstanding that the payments were paid in one lump sum, and paid late. The fact that the payment wasn't made when it was actually due and the employee had to make efforts to compel the payment, did not change the nature of the payment. That portion of the lump sum payment which was attributable to the accumulated arrears was included in the disabled employee's income and taxed.

The Queen v. Siftar (2003 FCA 137) considered a settlement agreement which did not break the lump sum payment down into accumulated arrears as opposed to future benefits. Whether a particular lump sum payment would include a component for accumulated arrears was found to be a question of fact. The intention of the parties would be one factor, but it is up to the recipient tax payer to determine what portion of a settlement should be included in income, with Canada Customs and Revenue Agency free to reassess the taxpayer if it does not agree that the taxpayer's declaration reflects the reality of the transaction.

Insurance litigators can no longer proceed on the basis that a lump sum payment under a disability policy is not taxable. Portions of a lump sum settlement attributable to accumulated arrears will be taxable under paragraph 6(1)(f) of *The Income Tax Act*. Leave to Appeal has been sought in *Tsiaprailis*. (With thanks to Richard Kirby of Felesky Flynn, Edmonton, Alberta for bringing these cases to our attention).

■ **Bulletin #155**

CLIENT SELECTION

In many professional liability insurance claims against lawyers, the defendant lawyer will confess that "I knew I shouldn't have taken this file" or "I had a bad feeling about this case". Before you take a file, you should think about whether you have the expertise, the experience, and the time to take on a matter in an area of law (or in an area of the country) which is unfamiliar to you. It's one thing to stretch yourself and rise to a challenge, it's another thing to take on matters which you're not quite competent to handle.

It's important to turn down cases when you don't have the required time or resources to devote to them. If a case is being offered to you on a contingency fee basis, carefully consider whether you have the financial resources to carry the case and its w.i.p. If it's clear that you can't adequately investigate and pursue a matter because of constraints on your time, send the potential client elsewhere as soon as possible.

Clients who have unrealistic expectations, or who talk about "just wanting to make their point" or "teaching someone a lesson" can be extremely difficult. Clients who see conspiracies everywhere are seldom easy to represent. And always proceed with caution where the client has had other lawyers before you. As Insurance Department staff at one Law Society are quick to warn: "never be the third lawyer on a file".
