



October 1993 Vol. 3 No. 1

OHIP subrogation in personal injury claims

The Law Society is dealing with a significant number of complaints and errors and omission claims as a result of lawyers failing to take OHIP payments into account when initiating or settling personal injury claims on behalf of clients.

In cases other than motor vehicle accidents, lawyers acting for an injured client who has received insured medical treatment must take OHIP's subrogated rights into account throughout the action.

By virtue of Sections 30 and 31 of the *Health Insurance Act*, and Section 39(2) of Regulation 552 under the Act, the solicitor of an insured person is required to inform the General Manager of OHIP of the com-

mencement of an action **and** to act as solicitor for the Ministry of Health in that action.

Notice to OHIP must be made in writing and should include the client's name, OHIP number, date of accident, nature of injury/treatment, and a medical report, if available. The lawyer may also include a liability opinion. Notice should be sent to:

Ministry of Health

Subrogation Unit

Box 48

Kingston, Ontario K7L 5J3

Fax: (613) 548-6514

It takes approximately six months for the Ministry to process a summary of its

In this issue:

- *Solicitor-client privilege*
- *Efficient computer use*
- *Firm names*
- *GST audits*
- *Annual filings*
- *Unauthorized practice*

Independent legal advice essential when fees secured by client mortgage

Lawyers accepting a mortgage as security for payment of legal fees should ensure that the client receives independent legal advice about the mortgage transaction.

Lawyers who fail to do so may find themselves facing one or both of the following scenarios:

- the client may seek to have the mortgage set aside on the basis that the lawyer did not properly explain the mortgage security/fee arrangement and that he or she did not understand the implications of such an arrangement
- the client may file a complaint with the Law Society asserting that the lawyer's interest was in conflict with the client's interest and that the lawyer acted to the detriment of the client.

The lawyer's ongoing fiduciary duty to the client requires that the lawyer be able to respond to an allegation of conflict of interest or undue influence by indicating that the client received independent legal advice.

portion of the claim. Lawyers who have not received a summary before negotiating a settlement for the injured client should contact the Ministry.

Section 39(3) of the Regulation states that where the insured person and the Ministry cannot agree as to any offer of settlement or where the solicitor receives conflicting instructions from OHIP and the insured person, the solicitor may inform OHIP and then cease to act for the Ministry. OHIP is then responsible for appointing another lawyer to handle its portion of the claim.

? You asked us...

The lawyer was acting separately for two clients, A and B. Both A and B were charged with criminal offences arising from different incidents. The two clients did not know each other and their only connection was that they happened to retain the same lawyer.

Client B advised the lawyer he had thrown a weapon in spot X. Police subsequently found a weapon in spot X and attributed it to client A's crime. Client A denied ownership or any knowledge of the weapon. The lawyer was aware that the weapon found by police was in fact the one client B had spoken about.

Can the lawyer advise the police of this knowledge?

No. Advising the police in this situation would constitute a breach of solicitor-client privilege. In using information from one file for another, the lawyer would be acting contrary to the interests of one client and in fact preferring one client over another.

The only safe option for the lawyer in this type of situation is to not reveal any information that can harm either client.

"You asked us" questions are based on inquiries received by the Law Society's Practice Advisory department, a confidential service available to members during business hours. It responds to virtually any question that can arise in the practice of law. Telephone (416) 947-3369.

Efficient computer use

After a marathon session with a computer, an impressive amount of work can be accomplished: case research is done on-line, memos and notes are drafted, time dockets are entered and calendars and tickler systems are brought up-to-date. Before computers, completing this work would have taken considerably more time.

Law Office Technology

But as some lawyers reach for the computer's off switch at the end of the day, the ache in their eyes, wrists and backs reminds them that efficiency can have a price.

As more lawyers and other professionals become computer users, they are also becoming increasingly susceptible to the physical ailments related to computer use.

Paying attention to how the computer workstation is designed and how work is done can help ensure that time gained from computer efficiency isn't lost to sick days and visits to the doctor.

The Hamilton-based Canadian Centre for Occupational Health and Safety offers a number of recommendations for computer users:

- **chair:** should swivel, have adjustable backrest and be adjusted so that feet rest flat on the floor
- **lighting:** reflections, glare and shadows cause eyestrain and fatigue; lighting must be balanced so that it is bright enough to read documents but not so bright that it makes it difficult to read from the screen
- **screen:** brightness and contrast should be adjusted and the screen should be tilted slightly backwards; the top of the screen should be about eye level and viewing distance between 12 and 24 inches; clean frequently
- **keyboard:** should be detached and moveable and placed directly in front of user; during use, the forearm and the upper arm form an angle of approximately 90 with the upper arm almost vertical; wrists should be relaxed and not bent
- **workflow:** vary work tasks by doing non-computer work, 10-15 minutes for every hour at the computer; take regular rest breaks, using the time to stretch and relax muscles; look away from the screen occasionally and focus on a distant object to rest the eyes.

The New Practitioner

What's in a firm name

Many lawyers establishing a new practice spend a fair amount of time and effort in deciding upon a name for their firm. While this effort is often devoted to deciding which lawyer's name will come first, some practitioners would like a catchy firm name to use for marketing or advertising purposes.

Rule 12(7) of the Rules of Professional Conduct limits the name of a law firm to the names of all or some of the lawyers who constitute it. The limitations on the naming of a firm are for the benefit of the public in that they establish certainty and consistency as to whom the client is dealing with.

There are certain exceptions to Rule 12; however none of them permit a law firm to be called anything other than by the names of persons who are, or were, entitled to practise law. The exceptions are as follows:

- the names of deceased or retired members may be used unless the retired member has been elevated to the Bench or has moved to an occupation incompatible with the practice of law
- when a firm practises in more than one province, the name may consist of or include lawyers who are entitled to practise in another province
- if the firm has been purchased from a deceased or retired member, that firm name may continue to be used for a reasonable period of time. The words "successor to—" may be used in small print if a new name is established.

The words "and Associates," "and Company," and "and Partners" must be used strictly in accordance with the number of lawyers involved. For example, "Joan Smith and Associates" means there are at least three lawyers in the firm.

GST audits and real estate disbursements

Recent audits of lawyers' practices by the Excise Branch of Revenue Canada have highlighted some issues about how members should deal with the GST when acting on real estate matters.

Simply stated, the problem is a lack of certainty as to when the lawyer is required to collect and remit GST on disbursements incurred on behalf of the client.

The Law Society has retained counsel to provide an opinion to guide members as to the proper treatment of disbursements. Members will be advised once the opinion is available.

Guidelines for annual filing forms

Members will have received the annual filing forms for the current year with this general mailing.

Lawyers in the following groups must file **Form 2** on or before November 30, 1993:

- those who are not engaged in the private practice of law, including those whose rights and privileges have been suspended for whatever reason
- those who have practised exclusively as an employee of a government agency, corporation or other entity that is a non-member of the Law Society
- those who have practised exclusively as an employee of a sole practitioner or a law firm.

Members engaged in the private practice of law in Ontario must file **Forms 1, 2 and 3** within six months of the law firm's fiscal year end.

Members who are 65 years of age or over *and* who have permanently retired from practice are exempt from filing.

Members who have not received their forms or who have any questions about their filing should contact the Law Society's Administration Department at (416) 947-3393.

Members have role in monitoring unauthorized practice

Legal services in Ontario are to be provided only by qualified barristers and solicitors of the provincial bar. However, the increased visibility of untrained and unsupervised paralegals has created some confusion among both the public and lawyers as to what legal tasks can be properly performed by independent paralegals.

While provincial statutes allow for the use of "agents" in specified areas, some people wrongly assume that anyone who does such work has the appropriate education and training and is accountable to a regulatory body.

As stated by the Court of Appeal in *R. v. Lawrie and Pointts Ltd.* (1987), 50 O.R. (2d) 161 at 169 :

"[T]here must be concern about the absence of any control over the education, qualification, competence, and probity of all agents. They deal with serious matters because penalties of up to six months imprisonment apply to some offences un-

der the *Highway Traffic Act*. No provision exists for disciplining or supervising agents and protecting the public from financial loss arising from the improper performance of their responsibilities by way of an insurance scheme like that of the law society."

The Law Society and its members are partners in ensuring that the public interest in this area is safeguarded. When lawyers encounter situations in which they believe an individual is engaged in the unauthorized practice of law, they have a duty to bring it to the attention of the Law Society. Practitioners are encouraged to review Rule 19 of the Rules of Professional Conduct.

While it is not possible to be exhaustive, paralegals are not allowed to offer services in the

following areas:

- acting for vendor or purchaser in a real estate transaction
- incorporations
- wills and estates
- divorces and separation agreements
- criminal proceedings, other than summary conviction matters ("hybrid" offences are deemed to be indictable offences unless and until the Crown elects to proceed summarily)
- proceedings in the Ontario Court (General Division).

Section 50 of the *Law Society Act* contemplates four modes of unauthorized practice: "acting," "practising," "holding out" and "representing".

Where an agent prepares documents intended to have a legal effect that commit the consumer to the facts stated in the documents, the courts have held that this amounts to "acting" as a barrister

and solicitor. Continued activity of this kind would amount to "practising". "Holding out" involves representing or indicating a willingness to do legal work, and it is not essential to prove that services were actually provided. "Representing" covers the case where an agent has presented himself or herself as a lawyer in the context of delivering legal services.

When a complaint of unauthorized practice is received by the Law Society, it is investigated and then reviewed by Convocation's committee on Unauthorized Practice before prosecution is authorized. Because of financial restraints, the policy of the Unauthorized Practice Committee is to carefully select matters for prosecution. Damage or harm suffered by victims due to breaches of Section 50 is a primary consideration in authorizing prosecutions.

In the year ending June 30, 1993, a total of 56 new matters were investigated by the Unauthorized Practice Department. Five charges were laid and five convictions were obtained. Two prior convictions are under appeal to the Court of Appeal.

Members who would like more information about unauthorized practice or who want to report a matter in this area may contact the department at (416) 947-5252.

The Law Society and its members are partners in ensuring that the public interest in this area is safeguarded.

The Law Society
of Upper Canada



Le Barreau
du Haut-Canada

The Adviser

is published four times annually by
The Law Society of Upper Canada
Communications Department
Osgoode Hall,
130 Queen Street West
Toronto, Ontario M5H 2N6
Tel: (416) 947-3465
Fax: (416) 947-3991



Printed on
paper containing
recycled material