



# ERRORS & OMISSIONS

*A periodic update from the  
Lawyer's Professional Indemnity Company*

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## **Beware of the Phantom Client!**

Of all of the hazards of practising law in the late 20th century, none is more bone chilling than the phantom client who drifts into your office like an apparition, speaks to you briefly and then disappears into the mists of time. The phantom reappears only when forgotten, to haunt you and point a bony finger at you. You are powerless in the face of moans and accusations about the phantom's sufferings. When you realize that it is the phantom client calling to you in that piteous voice, it is too late to help yourself. The phantom client, though appearing transparent to you, is viewed by others as a victim of your shameful neglect and you are made to atone for the suffering.

A phantom client is almost always the victim of a loss by house fire, car crash, slander or anything else involving a limitation period. The apparition will always appear before the limitation period has expired. The first meeting is usually a short introductory session when the client explains the problem, asks the questions and in the course of the conversation you may mention the limitation period as a means of demonstrating your grasp of the subject. The client is impressed but when the meeting is over, there remains uncertainty. Perhaps the client is going to try to raise the retainer or get a copy of the insurance policy. The client may want to discuss your advice with others before getting tied up in litigation. You may be given a phone

number or even an address. Often the client will set up an appointment to show you the policy and give you the retainer. The appointment is missed. Occasionally another one will be scheduled but then the client disappears.

You may write to the client to set up another meeting or you may phone when the client is out of town. As the weeks pass the phantom client becomes a fading memory - the client who did not come back.

When the phantom client reappears to ask how the case is going you cannot recall the client's name. There is no case at all and the limitation period has passed.

A lawyer in this position faces an uphill battle. In the first place, the lawyer has little or no recollection of the meeting. Notes of the meeting, if there are any, are very brief. If they contain the words "limitation period", the lawyer is sunk because the notes show knowledge of the limitation period but action to protect the client. If they do not include these words, the lawyer is sunk because the client was not even warned about the limitation period. A faded memory and sketchy notes are little help. An even greater difficulty facing the lawyer is the presumption that in these cases the word of the client is to be preferred over the word of the lawyer. In very rare cases, it may be possible to prove

that there was no retainer or there was a termination of the retainer. The lawyer may even be able to show that there were no instructions to sue in exceptional cases.

The only way to avoid this type of claim is at the time when the client is in your office or has just failed to show up for a follow-up appointment. After that it will be too late. The way to avoid this type of claim is simple. Write to the potential client (or better yet, have the client sign a form in your office) saying that you will not be retained until you receive written instructions or a monetary retainer. At the same time, advise the client that if

you are not retained another lawyer should be consulted immediately because of the limitation period involved.

Following these simple steps will protect you from the return of the phantom client and the plaintive calls for help. It helps you and it helps the "client" who may have thought you had been retained and instructed when you thought otherwise - thereby protecting the client from the horrors of life after the death of a limitation period and protecting you from the accusing finger of the phantom client.

- William S. O'Hara

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## Tips

The firm of Oatley, Purser has a system whereby every employee of the firm uses the same phone call memo form. It is to be used without fail for all phone calls in and out of the office by everyone in the office. Each member of the staff makes a contemporaneous written record of each and every attendance, event or conversation during the life of the file. It is an absolute rule never to be broken that no one in the office has a phone conversation or meeting that is not reduced to some form of writing. The use of a pad which is kept at everyone's desk makes this rule one that is easily obeyed.

You may have a procedure in your office which you have found very helpful in avoiding claims and/or assisting in communication within your firm or between your firm and your clients. Please share that with us.

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