



# ERRORS & OMISSIONS

A periodic update from the  
Lawyer's Professional Indemnity Company

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## Practising law in...the Twilight Zone

It started out as a regular deal. A long-time client was purchasing a gas station—it seemed like a good business and the price was a steal. I had closed a hundred deals like it and I had no worries at all. As I read the file late one night in my office an eerie calm settled over me. The lights were dim and the phone was silent. Everything looked fine at first. The papers were in order but something seemed out of place. A few numbers didn't add up. The deal seemed rushed and it made my skin crawl. I knew I was approaching...the Twilight Zone.

The first thing I noticed was the insurance my client had arranged. There wasn't enough insurance and all the wrong things were insured. A strong wind rattled the windows. Then I noticed the address of the gas station on Main Street and I knew that there would be no turning back. I knew the gas station well. It was a loser and always had been. There were never any customers at the place. I had heard rumours that the gas tanks on the site were filled with holes and the ground was drenched in gasoline. Worst of all, the mayor had told me that the whole of Main Street was being considered for a pedestrian mall. I was entering...the Twilight Zone.

I reached for the phone to call my client but then dropped it. My hand hovered over the receiver, unable to make the call and I thought about what I had to do. My instructions were simple. Buy the gas station and

make sure the title is clear. Should I stick my neck out by advising my client on other issues? If my advice is incomplete or inadequate I could be liable to my client. Or should I follow my strict instructions and risk liability for not telling my client what I thought about the deal? I grabbed the phone again. I let it go. A heavy rain began to fall. There was no way out for me. I had entered...the Twilight Zone.

Somewhere between day and night falls the twilight. In practising law there is a nebulous area in the outer reaches of retainer where the duties owed to a client dissipate into no duties at all. A lawyer acting for the purchaser of a gas station has a clear obligation to ensure a valid title to the property, but no obligation to arrange a moving van. At some point in between falls the Twilight Zone where the lawyer may or may not have obligations to a client depending on the nature of the transaction, past dealings between the lawyer and the client, the standard prac-

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### *Video rebate reminder*

Members are reminded to return the allowance form that was included with the loss prevention video. Forms need to be received by the E&O office by October 31, 1993, for the \$25 rebate to be applied to the 1994 levy.

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tice of lawyers, the nature of the risks involved, the sophistication of the client and, above all, the retainer letter—if there is one.

Trying to guess which side of the line the lawyer is on is difficult enough, but the real danger is when the lawyer unknowingly shifts the line and the scope of the retainer in a well-intentioned effort to assist the client. No matter how clearly defined the terms of the retainer are, a lawyer who strays beyond the bounds of the retainer by giving advice on business, accounting, insurance, politics, or unrelated legal matters extends the scope of the retainer into those areas and may be liable to the client if the advice or legal work is lacking. The added risk is that liability for advice on non-legal matters may not be covered under the lawyer's professional liability policy. On the other hand, a lawyer who fails to advise a client regarding non-legal matters or unrelated legal matters risks liability to the client if there was a duty to advise the client on those matters.

Damned if you do and damned if you don't? Not quite. The best way to avoid practising law in the Twi-

light Zone is to specify the scope of the retainer at the outset and stick to the understanding. Clarify the scope of the retainer if the need arises. This will enable you and your client to understand your respective obligations. If you find yourself slipping into the Twilight Zone the best way out is to advise your client that there may be a problem in a non-legal area or an unrelated legal area and advise your client to get whatever professional advice is required.

Whatever steps you take to clarify the scope of your retainer with your client make sure they are properly documented. In the immortal words of Lord Denning:

If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences. (*Griffiths v. Evans*, [1953] 2 All E.R. 1364 (C.A.), at page 1369)

Among the consequences of being at variance with your client on the scope of the retainer is the disturbing prospect of practising law in...the Twilight Zone.

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