The Law Society of Upper Canada

Le Barreau du Haut-Canada

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Real estate deals and the *Re/Max* case

A recent court ruling has added to the confusion about what lawyers acting in real estate transactions should do when client instructions conflict with the irrevocable direction clause in standard agreements of purchase and sale.

Real estate agents who have made complaints to the Law Society are of the view that *Re/Max Realty Garden Inc. v. 828294 Ontario Inc., Louras and Fleming* 8 O.R. (3d) 787, gives lawyers the authority to override the instructions of their clients and to pay real estate commissions from the proceeds of sale pursuant to the irrevocable direction.

Some lawyers have complied with vendor client instructions by disregarding the clause and have released money to the client which would otherwise be earmarked for payment of commission. Other lawyers have taken the position that there are competing claims and they are, therefore, mere stakeholders.

Is it proper for a lawyer to release monies to a client knowing that it is to be paid to an agent pursuant to the direction clause

In this issue:

Guidelines for second opinions

The Professional Conduct Committee recently adopted some guidelines for lawyers who are contacted to give a second opinion.

The committee agreed that the practice of seeking second opinions is fairly widespread and is generally a healthy exercise. The main issues to consider in these situations are how the lawyer is approached for the opinion and to whom the lawyer owes a duty.

Where lawyer A is asked by lawyer B to give a second opinion to assist a client, lawyer A should provide the opinion only to lawyer B and not to the client. If lawyer B requests that lawyer A should report directly to the client, lawyer A should also provide the report to lawyer B as well.

In cases where a lawyer is approached directly by the client for a second opinion, the lawyer is under a duty to provide the opinion only to the client. However, in these circumstances it is recommended the client be advised that the lawyer should be allowed to contact the first lawyer to ensure the second opinion is based on the same facts and accurate information.

If the client does not allow the lawyer to contact the first lawyer, the client should be sent a letter clearly indicating that: i) the opinion is based on facts and information supplied only by the client ii) the lawyer was not allowed access to the first lawyer's file.

and does failure to comply with the clause amount to improper conduct warranting sanction by the Law Society?

The case law appears to be unclear. In *Family Trust Corporation v. Morra* (1987) 44 RPR 250, it was concluded that because the lawyer was not a party to the agreement of purchase and sale, the lawyer could not be bound by the irrevocable direction clause in the absence of some consideration flowing to the lawyer.

It is suggested that lawyers who receive instructions from clients to ignore the irrevocable direction clause should hold the money in trust until it can be paid into court or the parties to the dispute resolve their differences.

Consumer and Commercial Relations update

Business Names Act

As mentioned in a previous issue of The Adviser, lawyers should be aware that the *Business Names Act* (R.S.O. 1990, B.17), which has been in force since 1991, requires a law firm to register its name with the Ministry of Consumer and Commercial Relations.

The Ministry is concerned that many lawyers and law firms are not complying with registration requirements.

In April 1993, the Companies Branch conducted a survey of law firms listed in the Toronto Yellow Pages and determined that 45 per cent of the firms had not registered their business names.

If law firms continue to be in breach of the legislation, the Ministry has indicated that it will consider laying charges under the Act.

Firms with unregistered names should therefore register as soon as possible. The current fee for each registration is $60.

Members can refer to the August 1991 issue of The Adviser for more information. Copies of the article are available by contacting the Practice Advi-

Lawyers Fund for Client Compensation

Members are reminded that if they are representing a client who lost money as a result of a lawyer's dishonesty, a claim to the Lawyers Fund for Client Compensation is a possibility.

During 1993, the Law Society awarded the largest amount in grants to clients of dishonest lawyers since the Fund's inception in 1953. The awards, which are limited to $100,000 per applicant, totalled $3.3 million and involved claims against 28 lawyers.

On a more positive note, the value of new claims received in 1993 dropped considerably from the previous year. The Fund received 189 claims totalling $12.6 million in 1993, compared to 354 claims with a value of of more than $33 million in 1992. As at June 30, 1993, outstanding claims amounted to $28.1 million ($16.1 million with limits applied).

Claims to the Fund must be based on losses directly related to a lawyer's dishonesty and must have arisen within Ontario in connection with the lawyer's law practice. A lawyer's incompetence or failure to take a certain action cannot be the basis of a claim to the Fund. Losses arising out of a business venture between a lawyer and client are not covered.

The Fund does not pay interest or for any damage that results from the client losing money. The dishonest lawyer's fees are not reimbursed by the Fund, but clients who hire a lawyer to represent their case to the Fund may receive some reimbursement for legal fees in connection with the hearing of the claim.

Clients must try to recover their lost money from other sources before a grant will be paid by the Fund.

Claims must be made in writing within six months from the time the financial loss was first discovered.

For more information or to obtain a claim form, contact the Lawyers Fund for Client Compensation at (416) 947-3327, fax (416) 947-3990.

sory Service at (416) 947-3369.

Non-profit incorporations

The Ministry advises that because more than 90 per cent of applications for Letters Patent or Supplementary Letters Patent are rejected for failing to comply with the requirements of the *Corporations Act* and Regulations, there are large backlogs in processing the applications.

The Ministry, with the assistance of the Office of the Public Trustee, has published a guide to incorporation which includes many precedents. The "Not-for-Profit Incorporation Handbook" is available at minimal cost from Publications Ontario, telephone (416) 326-5300 in Toronto area or 1-800-668-9938 outside Toronto.

Corporate Annual Returns

Amendments to the *Corporations Information Act,* which deal with annual information returns, are included in the *Expenditure Reduction and Non-Tax Revenues Statute Law Amendment Act, 1993,* and are expected to come into force this year. The legislation should ensure that corporations keep their records up to date, at least annually, and should bring Ontario's reporting requirements in line with those of other Canadian jurisdictions.

A second mailing of special filing notices began in the Fall of 1993. The Companies Branch is sending out pre-printed turnaround forms showing current information on file to all corporations which filed a Special Notice in 1992 or 1993.

Corporations which have not yet filed the first special notice will be mailed a blank form to complete. Administrative procedures for the dissolution of these non-filing corporations have also begun with this mailing. The list of corporations which have been given a notice of default in complying with the *Corporations Information Act* is available on computer diskette.

A copy of the diskette or further information about special filings and annual returns is available by calling the Ministry's Special Notice Help line at (416) 314-8880 in Toronto or 1-800-361-3223 outside Toronto.

? You asked us...

A lawyer is having difficulty with another lawyer who refuses to cooperate in the service of documents. The second lawyer shares office space but does not have a secretary and consequently it can take more than a week to have anything served. No one at the office space will accept service or give their name so that the process server can do an Affidavit of Service. The fax machine is often turned off. The first lawyer is growing increasingly frustrated at the time and expense involved in having the documents served.

It is suggested that the document could be served by fax, provided the second lawyer consents. A blank agreement from the second lawyer to accept service by fax would be necessary. However, if the fax is not on most of the day, this solution will not be particulary helpful.

Members are therefore reminded to review Rule 14 of the Rules of Professional Conduct which states generally that a lawyer's conduct towards other lawyers should be characterized by courtesy and good faith. Commentary 1 of the Rule suggests that matters entrusted to a lawyer be dealt with effectively and expeditiously, and that fair and courteous dealings on the part of each lawyer materially contributes to this end. Also remember that if you send by fax, you must be available to receive by fax.

"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.

The New Practitioner

Relativity Theory: the perils of acting for relatives and friends

Many recent graduates and other lawyers setting up a new practice are at some point approached by relatives and friends who need a lawyer. Some new practitioners also make family members and people in their social circle aware that they are available to provide legal services should the need arise.

There is usually nothing wrong with having family and friends as clients: it provides work and can be the seed of a good word-of-mouth reputation; in addition, these lawyers sometimes *can* do a better job for clients whose concerns, businesses and family situations are already familiar to them.

While the practitioner may feel an obligation or a genuine desire to help relatives and friends with their legal problems, it is important to be aware of some of the pitfalls associated with acting for these types of clients.

Problems in making it pay:

Relatives and friends may expect Cadillac service for a reduced fee. They may use up your office time chatting about family matters or other subjects unrelated to their legal problem. It is important to establish that you are not their psychiatrist, surrogate parent, or even friend (within the four walls of your office), but their professional adviser only. Reinforce this to yourself by treating the client like any other, and not relaxing your normal practice standards—e.g., properly opening the file, docketing, making use of memos to file, confirming correspondence, etc.

Problems in remaining objective:

Would you act for your live-in significant other in a matrimonial matter? On a traffic ticket? On a mortgage matter? Different lawyers have different comfort levels, but the first of these three scenarios is probably unwise, unless you enjoy unbroken composure to a degree normally associated with the figures on Mt. Rushmore. How about acting for an aunt on a hotly-contested estate dispute? (where you're not a potential beneficiary). What fee will justify the grief? And more importantly, can you discharge your obligations to your client, can you give detached professional advice in a detached professional manner, in what may be a very tense situation for you? The ancient adage, "Know thyself", is particularly applicable here.

Maintaining authority:

Particularly a problem where you're acting for an older relative: "I used to help your ma change your diapers, now you're treating me like some stranger". What about Dominant Dad (or husband), with whom your relationship has always been charged with resentment anyway? Here again, it may well be critical to say, "If I'm to act, our relationship here will be very different, it will be that of solicitor and client and that's it—if you'll treat me like a lawyer, I'll treat you like a client, it won't work otherwise". Again, try to maintain your normal practice standards.

Difficulties in obtaining proper instructions:

Can arise in phone calls from the friend or relative: "I've told you what I want, I can't believe you're going to make me come in and write it out for you. Don't you trust me?". Or, on a will: a lawyer makes the mistake of taking instructions in part or in whole, not from the testator, but from the testator's relative, who "knows" what the testator wants.

Conflict of interest or perceived conflict:

After acting on a mortgage transaction, the mortgage goes sour, and the mortgage broker or commercial lender claims that you gave precedence to the interests of the borrower, who happens to be a family member. Remember the importance of independent legal advice.

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