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"PRACTICE MANAGEMENT ISSUES IN COMMERCIAL LEASING"

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Practice Management Issues

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The purpose of this paper is to address some practice management issues in the context of a commercial leasing practice. Whether you represent a landlord or a tenant, and are involved in the negotiation of a single lease or a number of leases, the issues of quality control, the implementation of systems to seek instructions, the allocation of responsibility for ensuring that critical dates are not missed and the supervision of leasing clerks and other staff, are of universal concern.

Preliminary Matters

In the case of many lease negotiations, the offer to lease has already been signed by the parties, who have negotiated its terms with the assistance of real estate brokers, without the benefit of lawyer review. Upon receipt of the offer, the lawyer should ask the client to explain his or her understanding of what is being leased and bargained for, the nature of the property and the leased premises, any important rights which are critical to the deal (e.g., any easements, zoning compliance and compliance with any restrictive covenants existing in respect of the property) and any other material matters which will assist the lawyer in achieving what the client bargained for.

The client should advise the lawyer of the scope and depth of the lease review to be undertaken. The fact that a client does not wish to "spend a lot of money" on a lease negotiation does not absolve the lawyer from his or her duty of care to the client. Does the client wish an in-depth review of each lease provision, or does the client only wish you to suggest amendments to the critical or monetary provisions contained in the lease? The client's decision will have cost implications for it. A brief retainer letter outlining the scope of the services to be provided by the lawyer would be prudent, but failing that, any written correspondence (including by email) with the client outlining the services to be provided will be helpful in avoiding any

misunderstanding between the parties. The lawyer's file notes of conversations with the client regarding instructions (both initial and ongoing) are critical.

If you are acting for a tenant, it is important that the lawyer ask the client whether it wishes to have a subsearch of title conducted in respect of the property in order to confirm that the landlord named in the lease is the owner of the property (and if not, the relationship between the landlord and the owner). The subsearch will also reveal the existence of any construction liens, notices of power of sale or other worrisome registrations which may reveal financial weakness of the landlord and may adversely impact the landlord/tenant relationship. If your client has been granted a restrictive covenant or exclusive use in the property, the title search will reveal whether the legal description of the property contained in the lease is the same as the area your client understands is covered by its restrictive covenant. In *CSFY Inc. v. Creit Management Ltd., [2003] O.J. No. 3942 (S.C.J.)*, the shopping centre appeared to be operating as a single entity under one owner, but in fact two portions of the shopping centre (with differing legal descriptions) were owned by different, unrelated owners who granted each other the necessary easements for parking and common areas. The tenant's exclusive use provision for the operation of a "dollar store" was intended by the tenant to apply to the whole complex but in fact only applied to half of it, with resultant E&O issues arising.

If acting for a landlord (or a new tenant client), it is prudent to conduct a quick corporate name search in order to verify the exact name of the tenant. (A sample search website is www.cyberbahngroup.com). The name stated in the offer may only be a trade name, rather than a corporation, in which case the lease should be prepared in the name of an individual. The corporate name search will also reveal whether the corporation has been dissolved, in which case an alternate tenant entity should be sought. Articles of Incorporation may also be requested from the tenant.

In order to ensure that your client achieves its goals in this lease negotiation, have the client advise you of critical areas of concern. For example, if future share sales may occur among the shareholders of the company (thereby changing effective control of the company), or if estate planning objectives may need to be achieved through share sales, or if transfers to

facilitate income tax matters may need to occur, then special attention will need to be paid to the transfer provisions of the lease. Some clients have specific wording for amendments ("stepdowns") which they require be used in their lease negotiations and these should be reviewed and discussed.

The client should advise you whether all communication on the file should be through it or through a list of approved contacts at its organization. Your scope of authority must be discussed. Does the client wish you to deal directly with the opposing party or will you be advising your client who, in turn, will deal with the other side? If you are given the authority to negotiate directly with the opposing party or its lawyer, does your client wish to be copied on all correspondence? Does your client wish to approve all amendments before they are submitted to the opposing party? Will the client be expected to read everything it is copied on, or are copies only being provided for informational purposes? Clarifying these items in advance (and documenting them in writing to the client or in file notes) will avoid misunderstandings in the future.

If your leasing practice employs leasing clerks, your client should confirm that clerks may be utilized, under your supervision, for all or a portion of the work. Some clients prefer to use only lawyers in their lease negotiations and this request should be respected.

Finally, ask your client what your reporting requirements will be once the lease has been fully signed. Does the client want a reporting letter or a lease summary? If so, how detailed should the report or the lease summary be? If the intended purpose of the lease summary is lease administration, then greater detail will be required. Many clients choose to forego a reporting letter or lease summary, due to its additional cost, especially if they have been kept informed on issues throughout the course of the lease negotiations.

Supervision of Leasing Clerks

Knowledgeable, well-skilled leasing law clerks and paralegals are of great assistance in running a cost effective leasing practice. However, what to delegate, how to

supervise and the detail and frequency of work review are always top of mind. As with lawyers, all leasing clerks are not equally experienced and decisions pertaining to the nature and amount of delegation will depend upon the experiential level and reliability of the individual. Most importantly, delegation does not mean abdication.

The Law Society Rules of Professional Conduct (specifically, Rule 5.01) and Part 1 of By-Law 7.1 (copies of which are attached) govern the supervision of staff and assistants. Under Rule 5.01(2), the lawyer must assume complete professional responsibility for all business entrusted to him or her and must directly supervise all staff and assistants. In the context of working with leasing clerks, in accordance with By-Law 7.1(1)(4), the lawyer must: (1) maintain a direct relationship with the client, (2) assign to the leasing clerk only tasks and functions that she or he is competent to perform, (3) ensure that the leasing clerk does not act without the lawyer's instructions, (4) review the performance of the tasks and functions assigned to the leasing clerk at frequent intervals, (5) ensure that the tasks and functions assigned to the clerk are performed properly and in a timely manner, and (6) assume responsibility for all tasks and functions performed, including all documents prepared by the clerk.

Although clients understandably resist the duplication of legal fees, it is helpful to have the lawyer and the leasing clerk present to concurrently receive instructions from the client regarding positions to be taken with respect to lease amendments. All amendments drafted by the clerk should be reviewed by the lawyer before they are forwarded to the opposing party. This constant review on an "ongoing" basis is preferable to just one "final" review before the lease is sent for signature, as parties' positions are often changed based on the party's reliance upon amendments granted and received. Furthermore, By-Law 7.1 requires frequent review, undoubtedly to prevent small problems from becoming big ones.

Lawyers and clients sometimes differ on their characterization of a lease amendment as being of a business nature (and therefore, requiring the client's approval) or one which is of a legal boilerplate nature (and therefore, within the lawyer's discretion). A dialogue with the client is required on this issue. The client should be asked whether it wishes to pre-approve all drafts before they are sent out. In order to expedite matters, your client may also be

agreeable to you sending out the draft with the proviso that it is subject to any comments which your client may have. This takes the pressure off the client for instant review and enables the lawyer to "keep things moving." Subject to your client's agreement, the most efficient course of action is to send out the draft but copy your client on it.

Managing Documents

It is imperative that a system be implemented to document every meeting, conversation and telephone call (including telephone messages left and received) with respect to instructions and the progress of negotiations, by way of a dated note or memo to file. Another option is to keep detailed docket entries which, in addition to recording time spent on the file, serve as a narrative of the issues, discussions and general dealings in the file as they occurred.

Document retrieval may be a headache if the other side is unresponsive. A lawyer is not allowed to communicate directly with the opposing party, as all communication must be through the opposing party's lawyer. If the lawyer for the opposing party is tardy in responding to your comments or draft lease, put your client to work. Send him or her a copy of your latest correspondence to the opposing lawyer and ask your client to forward it to his or her business counterpart on the other side and advising of the inactivity. Lawyers dread receiving calls from their clients demanding why things are not moving faster.

Document status reports are appreciated by clients and serve an important function in keeping you organized in tracking documents and following up on their return. In its definition of a competent lawyer, Rule 2.01(1)(d) requires the lawyer to communicate "at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client." As a minimum, status reports should be prepared monthly, but bi-weekly reports may be more useful due to the quick turnaround time usually required in lease negotiations. Status reports should be kept in your computer's directory and your leasing clerk should be required to update the report each day as soon as a follow-up telephone call is made or a revised document is received or sent out. Status reports should kept current in order to avoid the last minute scramble and file hunt just before a status report is due. It is also possible to devise a system to allow your

client to access the status reports on-line through the use of a website and password, in which case up-to-the minute currency is important. An electronic document management system is recommended for a high volume leasing practice. A good status report may serve as an additional tickler system, but should not be a substitute for one. Spot-checking of status reports will also allow you to fulfill your staff supervisory obligations as required by the Law Society. Some offices also maintain the rule that all files not immediately in use must be filed away in cabinets in order to allow for file monitoring and speedy access in the event of absence of the person having carriage of the file.

Quality Control

The ongoing education and training of leasing clerks and associates will not only make their jobs more meaningful, but will enable you to delegate work with confidence. In order to ensure consistency of product and quality control, develop a good precedent base of acceptable lease amendments or stepdowns and catalogue these in a computer directory for easy access and reference by the leasing clerks. When acting for a landlord, develop a catalogue of acceptable amendments which are referable to each section of the landlord's standard lease form. Any amendments which require the prior approval of the client before being granted should be noted. To the extent alternate options are available for amendments, these should be listed in descending order of desirability. If acting for a tenant, a catalogue of acceptable amendments may also be developed based on general subject categories, such as transfer rights, relocation rights, operating costs exclusions, and so on. A useful and easily accessible precedent base of lease amendments will increase efficiency by reducing the need for constant consultation between the lawyer and the leasing clerk on routine amendments and avoid the wear and tear on clients of repetitive questioning by the lawyers and law clerks.

In order to ensure consistency and quality of product for other lease-related documents, a similar, easily accessible electronic precedent database should be established containing acceptable forms of lease extension agreements, lease amending agreements (eg. expansions of space, reductions of space and relocation agreements), subleases, assignments of

lease, consents to sublease, consents to assignment of lease, consents to change of control, and so on.

In order to maintain quality control, all drafts and revised drafts of documents prepared by staff should be reviewed on an ongoing basis by the lawyer prior to submission to the client or the opposing party. This will not only keep you informed regarding the progress of negotiations, but will also enable you to flag major issues and catch errors before they become more serious or derail negotiations.

Allocation of Responsibilities between You and the Client

It is imperative that the lawyer and client determine and agree upon their respective responsibilities with respect to the monitoring of critical dates for fulfillment of conditions under the offer to lease, follow-ups regarding document retrieval, the obtaining of any zoning amendments and Planning Act consents, the pursuit of any non-disturbance agreements, the registration of any notices of lease against title to the property, the monitoring of the notice date for exercise of any renewal option, and other such matters. Most offers to lease are subject to a number of conditions (such as confirmation of the tenant's creditworthiness, review of environmental reports, receipt of waivers of rights of first refusal from other parties, etc.) and it is recommended that the client and its real estate broker be responsible for monitoring these. If an offer contains a condition related to lease review or lease finalization by a certain date, your client would expect you to monitor this condition date as well, as this pertains to your legal realm. Regardless of any casual attitude exhibited by the parties to the deal, conditions should not be treated lightly, and your tickler system must be utilized in order to ensure that conditional dates are not missed or failed to be extended.

The lawyer or leasing clerk is responsible for following up on the retrieval of leasing documents. If response is slow or if timelines are critical, the client's assistance may be enlisted in following up with his or her business counterpart (but not with the opposing party's lawyer.)

It is recommended that conditions related to ensuring that the proposed use of the property complies with zoning bylaws be monitored by your client, its real estate broker and any land use planning adviser which your client customarily deals with, unless the client specifically requires you to make this inquiry and you agree to do so. The obtaining of any Planning Act consent required for leases having a term (including renewals) in excess of twenty-one (21) years should also be left with your client and its land use planning advisers, unless the client specifically requires you to make this application and you agree to do so.

With respect to the obtaining of any non-disturbance agreements ("NDA") from existing mortgagees of the property, landlords often prefer to deal directly with their own lenders and will not enlist the services of their lawyer. If acting for a tenant, the tenant would understandably expect its lawyer to follow up with the landlord regarding receipt of the NDA.

If your client (usually a tenant) has confirmed to you that it wishes to proceed with registration of a notice of lease against title to the property, you will be responsible for doing so.

It is strongly recommended that the lawyer not accept responsibility for monitoring the date by which notice must be given by the tenant for exercise of any renewal right which it may have under the lease. This onerous responsibility should be left with your client, who hopefully has a tracking system equipped to flag these types of dates. From the lawyer's viewpoint, the ramification of missing this critical date is disastrous.

The respective responsibilities of the lawyer and the client regarding the matters referred to above should be clearly set out in writing in order to avoid miscommunication and misunderstanding between the lawyer and client. Those items or responsibility allocated to the lawyer should be tracked utilizing a reliable tickler system. Special care must be taken by the lawyer with respect to those responsibilities which are characterized as "post-lease signing" in nature (eg. non-disturbance agreements, notices of lease, Planning Act consents), as it is easy to forget that the file is not finished once the lease has been signed.

As always, the goal is to avoid having matters "fall through the cracks" by having the lawyer and client clearly document in writing their respective responsibilities for the matters set out above.

Conclusion

Running a successful leasing practice requires attention to detail, excellent organizational skills, an ability to appropriately delegate to knowledgeable staff, an ability to track and report the progress of files to completion, and maintain quality control. Communication with the client with respect to expectations, instructions and allocation of responsibilities between the parties cannot be overemphasized. An excellent document tracking system, a good precedent base, and a good tickler system are minimal requirements for success. In addition, databanks of key information for individual clients regarding critical dates, contact details for the client's decision-makers, any special requirements the client may have, and so on, will not only increase the efficiency of your practice, but will also instill confidence in your client.

BY-LAW 7.1

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OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES

PART I

SUPERVISION OF ASSIGNED TASKS AND FUNCTIONS

Interpretation

1. (1) In this Part,

"non-licensee" means an individual who,

(a) in the case of the assignment of tasks and functions by a person licensed to practise law in Ontario as a barrister and solicitor, is not a person licensed to practise law in Ontario as a barrister and solicitor and, in the case of the assignment of tasks and functions by a person licensed to provide legal services in Ontario, is not a licensee,

(b) is engaged by a licensee to provide her or his services to the licensee, and

(c) expressly agrees with the licensee that the licensee shall have effective control over the individual's provision of services to the licensee;

"catastrophic impairment" means a catastrophic impairment within the meaning of the *Statutory Accident Benefits Schedule*;

"claim" means a claim for statutory accident benefits within the meaning of the *Insurance Act*;

"impairment" means an impairment within the meaning of the *Statutory Accident Benefits Schedule*;

"law firm" means a law firm within the meaning of section 29 of By-Law 4 [Licensing], except the reference to clause 61.0.1 (a) in that definition shall be read as a reference to clauses 61.0.1 (a) and (c);

"*Statutory Accident Benefits Schedule*" means the *Statutory Accident Benefits Schedule* within the meaning of the *Insurance Act*.

Interpretation: "effective control"

(2) For the purposes of subsection (1), a licensee has effective control over an individual's provision of services to the licensee when the licensee may, without the agreement of the individual, take any action necessary to ensure that the licensee complies with the *Law Society Act*, the by-laws, the Society's rules of professional conduct and the Society's policies and guidelines.

Application: provision of legal services by student

2. (1) This Part does not apply to the provision of legal services by a student under the supervision of a licensee pursuant to subsection 34 (1) of By-Law 4.

Application: provision of legal services by law student

(2) This Part, subject to necessary modifications, does apply to the provision of legal services by a law student under the supervision of a licensee pursuant to subsection 34 (2) or (3) of By-Law 4.

Assignment of tasks, functions: general

3. (1) Subject to subsection (2), a licensee may, in accordance with this Part, assign to a non-licensee tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client.

Assignment of tasks, functions: affiliation

(2) A licensee who is affiliated with an entity under By-Law 7 may, in accordance with this Part, assign to the entity or its staff, tasks and functions in connection with the licensee's practice of law or provision of legal services in relation to the affairs of the licensee's client only if the client consents to the licensee doing so.

Assignment of tasks, function: direct supervision required

4. (1) A licensee shall assume complete professional responsibility for her or his practice of law or provision of legal services in relation to the affairs of the licensee's clients and shall directly supervise any non-licensee to whom are assigned particular tasks and functions in

connection with the licensee's practice of law or provision of legal services in relation to the affairs of each client.

(2) Without limiting the generality of subsection (1),

(a) the licensee shall not permit a non-licensee to accept a client on the licensee's behalf;

(b) the licensee shall maintain a direct relationship with each client throughout the licensee's retainer;

(c) the licensee shall assign to a non-licensee only tasks and functions that the non-licensee is competent to perform;

(d) the licensee shall ensure that a non-licensee does not act without the licensee's instruction;

(e) the licensee shall review a non-licensee's performance of the tasks and functions assigned to her or him at frequent intervals;

(f) the licensee shall ensure that the tasks and functions assigned to a non-licensee are performed properly and in a timely manner;

(g) the licensee shall assume responsibility for all tasks and functions performed by a non-licensee, including all documents prepared by the non-licensee; and

(h) the licensee shall ensure that a non-licensee does not, at any time, act finally in respect of the affairs of the licensee's client.

Assignment of tasks, functions: prior express instruction and authorization required

5. (1) A licensee shall give a non-licensee express instruction and authorization prior to permitting the non-licensee,

(a) to give or accept an undertaking on behalf of the licensee;

(b) to act on behalf of the licensee in respect of a scheduling or other related routine administrative matter before an adjudicative body; or

(c) to take instructions from the licensee's client.

Assignment of tasks, functions: prior consent and approval

(2) A licensee shall obtain a client's consent to permit a non-licensee to conduct routine negotiations with third parties in relation to the affairs of the licensee's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

Assignment of tasks, functions: mediation of ancillary issues relating to catastrophic impairment claims

5.1 (1) Despite clause 6 (1) (c), a licensee who holds a Class L1 licence may permit a non-licensee who holds a Class P1 licence to participate in mediation of ancillary issues relating to a claim of an individual who has or appears to have a catastrophic impairment, but only if the non-licensee is employed by the licensee or by the law firm of which the licensee is a member.

(2) For the purposes of subsection (1), ancillary issues do not include issues relating to the determination of whether an impairment is a catastrophic impairment.

Tasks and functions that may not be assigned: general

6. (1) A licensee shall not permit a non-licensee,

(a) to give the licensee's client legal advice;

(b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the non-licensee is authorized under the *Law Society Act* to do so;

(c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);

(d) to sign correspondence, other than correspondence of a routine administrative nature; or

(e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

Tasks and functions that may not be assigned by Class L1 licensee

(2) A licensee who holds a Class L1 licence shall not permit a non-licensee to use the licensee's personalized specially encrypted diskette in order to access the system for the electronic registration of title documents.

Collection letters

7. A licensee shall not permit a collection letter to be sent to any person unless,

(a) the letter is in relation to the affairs of the licensee's client;

(b) the letter is prepared by the licensee or by a non-licensee under the direct supervision of the licensee;

(c) if the letter is prepared by a non-licensee under the direct supervision of the licensee, the letter is reviewed and approved by the licensee prior to it being sent;

(d) the letter is on the licensee's business letterhead; and

(e) the letter is signed by the licensee.

Rule 5 Relationship to Students, Employees, and Others

5.01 SUPERVISION

Application

5.01 (1) In this rule, a non-lawyer does not include an articled student.

Direct Supervision required

(2) A lawyer shall in accordance with the By-Laws

(a) assume complete professional responsibility for his or her practice of law, and

(b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

Commentary

By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.

Real Estate – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

In real estate transactions using the system for the electronic registration of title documents ("e-reg" TM), only a lawyer may sign for completeness of any document that requires compliance with law statements.

Corporate and Commercial – A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Wills, Trusts and Estates – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors' accounts and statements of account, and to attend to filings.

[New- November 2007]

Electronic Registration of Title Documents

(3) When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents ("e-reg" TM), the lawyer

(a) shall not permit others, including a non-lawyer employee, to use the lawyer's diskette, and

(b) shall not disclose his or her personalized e-reg TM pass phrase to others.

(4) When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

(a) does not permit others to use the diskette, and

(b) does not disclose his or her personalized e-reg TM pass phrase to others.

Commentary

The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-reg ™ system must have a personalized specially encrypted diskette and personalized e-reg ™ pass phrase. The integrity and security of the system is achieved, in part, by it's maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

In real estate transactions using the e-reg ™ system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

[Amended – November 2007]

Title Insurance

(5) A lawyer shall not permit a non-lawyer to

(a) provide advice to the client concerning any insurance, including title insurance, without supervision,

(b) present insurance options or information regarding premiums to the client without supervision,

(c) recommend one insurance product over another without supervision, and

(d) give legal opinions regarding the insurance coverage obtained.

[New - March 31, 2008]

Signing E-Reg™ Documents

(6) A lawyer who electronically signs a document using the system for the electronic registration of title documents – e-reg™ – assumes complete professional responsibility for the document.

[New - March 31, 2008]

As a lawyer, you are responsible for ensuring that your employees abide by the Rules of Professional Conduct *and the By-Laws under the* Law Society Act. *Lawyers must assume complete professional responsibility for all business entrusted to them and must directly supervise all staff to whom they delegate particular tasks and functions pursuant to Part I of By-law 7.1 and subrule 5.01(2) of the* Rules of Professional Conduct. *Making supervision a priority is also a good way to reduce the use of claims.*

Supervision of employees

The buck stops with you

When it comes to supervision, lawyers should think beyond just the people who are physically in their offices. In many law offices, there are various people working externally who do different types of work as employees or in other capacities. Examples include title searchers, private investigators, bookkeepers and technology support people. These people could be around the block, or on the other side of the world, and lawyers are obliged to properly supervise the work that they do as well.

What can't be delegated?

Section 6 of Bylaw 7.1 directs that a lawyer shall not permit a non-lawyer:

- to give the licensee's client legal advice;
- to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the lawyer in accordance with subsection 5(1) of the Rules, unless the non-lawyer is authorized under the *Law Society Act* to do so;
- to conduct negotiations with third parties, other than in accordance with subsection 5(2) of the Rules;
- to sign correspondence, other than correspondence of a routine administrative nature (see the paragraph below for details on what staff can sign);
- to forward to the lawyer's client any document, other than a routine document, that has not been previously reviewed by the lawyer.

As well, non-lawyers cannot:

- use the lawyer's Teranet PSP or be given the lawyer's password (Rule 5.01(3)); or
- provide advice, information or opinions to a client concerning any insurance, including title insurance, without supervision (Rule 5.01(5).

What can a lawyer delegate?

After noting the requirement of direct supervision in subsection 4(1), subsection 4(2) of Part 1 of By-law 7.1 gives some direction on what a lawyer can delegate and the extent to which work by a non-lawyer should be supervised. It provides that:

- a lawyer shall not permit a non-lawyer to accept a client on the lawyer's behalf;

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- the lawyer shall maintain a direct relationship with each client throughout the lawyer's retainer;
- the lawyer shall assign only tasks and functions that the non-lawyer is competent to perform;
- the lawyer shall ensure that a non-lawyer does not act without the lawyer's instruction;
- the lawyer shall review a non-lawyer's performance of the tasks and functions assigned to her or him at frequent intervals;
- the lawyer shall ensure that the tasks and functions assigned to a non-lawyer are performed properly and in a timely manner;
- the lawyer shall assume responsibility for all tasks and functions performed by a non-lawyer, including all documents prepared by the non-lawyer; and
- the lawyer shall ensure that a non-lawyer does not, at any time, act finally in respect of the affairs of the lawyer's client.

Express instruction & authorization required

Section 5(1) of Part 1 of By-law 7.1 directs that a lawyer shall give a non-lawyer express instruction and authorization prior to permitting the non-lawyer to do the following things:

- give or accept an undertaking on behalf of the lawyer;
- act on behalf of the lawyer in respect of a scheduling or other related routine administrative matter before an adjudicative body; or
- take instructions from the lawyer's client.

Further, Section 5(5) directs that a lawyer shall obtain a client's consent to permit a non-lawyer to conduct routine negotiations with third parties in relation to the affairs of the lawyer's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

Signing correspondence

Do you have to sign every piece of correspondence that leaves your office? No, but certain limits apply. Section 6(1)(d) of By-Law 7.1 provides that correspondence of a routine or administrative nature may be signed by non-lawyer employees. However, the lawyer should specifically direct the employee to sign and should ensure that the correspondence discloses that the person signing is not a lawyer and in what capacity the employee is signing the document. Only lawyers, within their permitted scope of practice, are permitted to sign correspondence containing legal opinions.

Collection letters

Section 7 of By-Law 7.1 has specific direction on collections letters. It provides that lawyers shall not permit a collection letter to be sent to any person unless:

- the letter is in relation to the affairs of the lawyer's client;
- the letter is prepared by the lawyer or by a non-lawyer under the direct supervision of the lawyer;
- if the letter is prepared by a non-lawyer under the direct supervision of the lawyer, the letter is reviewed and approved by the lawyer prior to it being sent;
- the letter is on the lawyer's business letterhead; and
- the letter is signed by the lawyer.

Supervision of articling and law students

See subsection 34 (1) of By-Law 4 for information on the requirements for supervising articling students and law students.

More delegation

Delegation involves getting the job done through others. A governing tenet in every firm should be to push work down to the lowest capable level. You are wasting your time and the client's money if you or others at your firm are consistently doing tasks that lawyers with a lower hourly rate or staff can complete. Lawyers typically fail to delegate for any number of reasons, none of which stand up to scrutiny.

- **They don't want to give up control of the matter or client:** This is a bad behaviour often driven by a compensation system that rewards bad behaviours.
- **They think they can complete it better themselves:** With proper training, someone else can likely do the job just as well.
- **They think they can complete it faster themselves:** With proper training, someone else can likely do the job just as fast.
- **There is not enough time to properly train someone else to do the task:** This excuse is often cited in conjunction with the previous point – and it may make sense in the rush to get an individual matter done. However, this ignores the longer-term

benefits that once that person is trained, the task can be done much more quickly every time it is required in the future.

- **The work was not done properly the last time it was delegated:** This was likely because there was insufficient training or instructions.

Better delegation

Carefully review your common tasks and make an effort to identify which ones could be delegated. Then apply the following tenets of effective delegation:

- **Pick the right person for the task:** Often the right person can do the work without training. However, don't overlook an opportunity to challenge and engage someone who is willing and interested, and could do the task with training.
- **Don't talk down to the delegatee:** Treat staff members with respect and as equal members of the team.
- **Give clear instructions and all required information:** Highlight specific issues of concern, but also paint the bigger picture so that staff members understand the reasons behind the work that they are doing.
- **Explain any special parameters:** Are there resources to use or not to use, a sensitivity to high fees by the client, etc.?
- **Make deadlines realistic:** An unrealistic deadline is unfair and frustrating to the person being assigned the task.
- **Establish the reporting mechanism:** Do you expect the delegatee to simply return the completed work, or is the staff member to check in or provide updates as he or she works through the task?
- **Confirm instructions were understood:** Ask the delegatee to reiterate the task requested.
- **Always provide feedback when the work is done:** Don't just complain when there are mistakes or problems. Say thank you every time, compliment and reward good work, and make sure any criticism is constructive criticism.

The commentary to subrule 5.01(2) of the Rules further provides that the "lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion." Extra care may be warranted if there is something different or unusual in the matter at hand. Consider if special training or courses could help increase the skills of staff, allowing them to take on more complex tasks.

Hiring reliable staff

As you are ultimately responsible for their work, it is important to hire reliable and trustworthy employees for your firm. When interviewing potential employees, ask hard questions. Inquire about the candidate's past performance. Confirm details on a candidate's resumé, consult references and verify previous employment experience. Look for any red flags and be very cautious if someone appears to be withholding information or has false or misleading information on a resumé. If the position involves handling money, ask for the applicant's consent to check his or her criminal record and credit reports. Ensure that you comply with privacy legislation and refer to subrule 5.04(3) of the lawyers' Rules for questions that can and cannot be asked of an applicant.

Internal controls

Ideally, your office should have clearly established internal controls for handling and documenting all types of financial transactions. These internal controls are really just policies and procedures that direct what steps should be taken when various financial transactions occur – indirectly they act to "supervise" these transactions. Although a lack of internal controls does not necessarily constitute a breach of the Rules of Professional Conduct or By-laws, you may consider implementing internal controls to assist your efforts to comply.

The Managing the Finances of Your Practice booklet (www.practicepro.ca/financesbooklet) has sample law office internal controls for several things including:

- cheque requisitions
- cheque signing policies
- trust records
- handling clients' valuable property
- staffing policies and procedures
- segregation of staff duties, and
- use and operation of trust accounts.

Internal fraud

The cost of fraud claims, including claims due to the frauds of law office staff, are a significant cost of the LawPRO insurance program. Proper supervision and internal controls can help to prevent fraud by staff members. For more information on how to recognize and respond to internal fraud, review the article What to do when partners, associates or staff commit fraud by David Debenham which appeared in the Surviving the Slide, Winter 2008/2009 (Vol. 7 no. 4) issue of LawPRO Magazine.

Conclusion

It is a big responsibility to assume complete professional responsibility for all business entrusted to you, including any tasks done by your staff or third parties. Take steps to meet these obligations by properly supervising all tasks and functions that are delegated in your office. For additional information regarding education and training for non-lawyers and the supervision of staff and assistants, see the Law Society's Professional Management Guideline, and the Commentaries on the Rules.

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