

LIANSWERS

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This newsletter includes information to help lawyers reduce the likelihood of being sued for malpractice. The material presented is not intended to establish, report, or create the standard of care for lawyers. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate legal research.

LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

"ALL I WANT IS A DEED"

How many times have we all received this call? A client wants to add a family member to a title, or transfer a piece of property. Simple, right? It's all part of people living longer, staying in their homes longer, and the pig-and-python of ageing baby boomers embarking on the largest intergenerational wealth transfer in history.

Not so fast! A few pre-considerations that could land you in hot water:

- Most transfers are, for tax purposes, deemed dispositions. If it's for inadequate consideration there's a double-whammy: the transferee's cost base is the low amount, but the vendor is considered to have disposed of it for fair market value. Double taxation can result. If it's a gift, there is generally a deemed disposition and acquisition at fair market value. Does your client even have decent records of their capital cost? Did they make a capital gains election as of February 22, 1994?
- While some seniors (in particular) may not mind triggering a gain, it can affect income-based entitlements such as Old Age Security or the Guaranteed Income Supplement.
- Is the transferor competent? Under any apparent duress or undue influence? Acting hastily or in spite? Have you acted for any (other) family member before? There are perfectly legitimate – and illegitimate – motives at play and we are often the very last to know, after the fact. Interview the transferor alone. Determine, and make clear to all parties, who is and, just as importantly, who is not the client.
- What is the property? In the case of a principal residence of the transferor, normally any gain would be exempt to the transferor. But what if the transferee is not living in it? Any gain post-transfer would be taxable during the time it was not so occupied by the transferee as a principal residence. One may be avoiding (for example) probate taxes but at a higher ultimate cost.
- How solvent is the transferee and how stable is their domestic status? Their interest could be caught by judgments, bankruptcy, divorce proceedings ... probably not what grandpa had in mind.
- I would suggest always checking for judgments against both grantor and grantee prior to transfer, even if it is a gift of a whole or partial interest without consideration (so as to avoid a potential 'attachment' as noted above); in the case of a migrated property, it is mandatory that the parcel register be brought up to date to reflect any outstanding judgments.
- Does the transferor want to retain control over the property? What if they want to mortgage it later for cash flow, renovations, or to buy a cottage, or simply to sell it?
- Is the transferee a non-resident of Canada, so that any subsequent transfer requires CRA clearance? Even if the transferee is prepared to assume the liability under s. 116 of the *Income Tax Act*, an appraisal to establish value at the time of transfer (whether a gift, less-than-market sale, or fair sale) is desirable.
- If the prime motivation is estate planning, are there other alternatives, such as alter ego or discretionary family trusts, corporate structures with estate freezes, deeds in escrow or a donatio mortis causa, etc.? The writer is not a big fan of getting either complicated or cute, but professional accounting and specialized tax advice may be in order.
- Sometimes a transferor will wish to retain a life estate. Many of the same considerations above continue to apply, with added specialized twists for the tax treatment of what is disposed of, and retained. The remainderman, not the life interest holder, will generally be deemed to obtain any post-change capital gains that accrue (especially relevant if all remaindermen are not occupying the property as a principal residence). There are some exceptions for farm property. See [IT268R4](#) (*Inter vivos* transfer of farm property to child), s. 43.1 of the *Income Tax Act* (Canada) and [DePedrina v. The Queen](#), 2005 TCC 590 (CanLII).

In short, the "just a deed" call should be treated in much the same way as the "just a simple will" or "just a form for the bank [that turns out to be ILA]" call – rarely routine, never to be taken on lightly, and always to be papered with advice taken and, perhaps more importantly, not taken. Lastly, we are unlikely to be considered "word processors" if it later hits the family or fiscal fan – don't be afraid to charge accordingly.

[The author expresses appreciation to Garth Gordon QC for his resource material on life interests and remainders. Errors and omissions are those of the author alone.]

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SNOWBIRDS, WORK-LIFE BALANCE AND YOUR PROFESSIONAL LIABILITY INSURANCE POLICY

The LIANS Professional Liability Insurance Group Policy was rewritten in 1997, just about the same time that electronic mail and the worldwide web were arising in the world of law firms. Back in 1997, when you took a vacation, you left your office behind. If you were a worrier, you called your assistant once or twice long distance on a landline, just to see how things were doing. In extreme circumstances, your assistant might fax a document to the business centre in your hotel or send documents by courier but otherwise, when you were away from the office, you were away.

In 2012, it seems you can never really get away. Your office is only as far away as your cell phone or your laptop, even when you are out of the country. So what happens to coverage for lawyers who work remotely from their Nova Scotia offices while vacationing elsewhere?

Exclusion 3.1 of the Policy of Insurance states *"that insurance coverage given by this policy does not apply to a claim arising out of or from professional services from an office located outside of Canada."*

The policy defines "office" as *"a place of business established by or for the benefit or use of an insured or that person's law firm and from which services are provided or are intended to be provided to the public on an on-going, but not necessarily or regular or full-time basis."*

This policy wording raised some questions that would not have arisen in 1997 including, "Are you excluded from coverage when you are on your BlackBerry all weekend at a casino in Vegas? Are you excluded when you work poolside every morning on a month-long holiday in Florida?"

After some interesting discussion, LIANS' national insurer, the Canadian Lawyers Insurance Association (CLIA) has determined that coverage will be provided to lawyers practising "remotely" while on vacation from a location anywhere in the world, as long as they have a bricks and mortar office in Nova Scotia.

So, if you are planning a winter holiday that will take you out of the country, the work you do while tethered to your "real office" by your smartphone or computer from outside of Canada will not be excluded from coverage by this provision of the policy. However, you might want to ask yourself whether a holiday constantly connected to your office is really a holiday, and whether you are giving your work the attention it deserves if you're busy shooting craps. But those are risk management questions and altogether a different matter.

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TOP TEN THINGS YOU CAN DO TO PROTECT YOUR DATA TODAY

Reprinted with permission of Lawyers Mutual and Pegeen Turner, President of Turner IT Solutions, a North Carolina based legal technology firm. Celebrating its 35th anniversary, Lawyers Mutual NC was the first insurance company in the United States formed by lawyers for lawyers. For more information, visit www.lawyersmutualnc.com or www.turneritsolutions.com.

Anyone who has lost data in the past is much more aware of protecting data today. Data loss can be as simple as losing a document (that you worked on for hours), or as catastrophic as losing all of your data due to a hard drive or server crash. Any type of loss can be devastating for your practice, your firm or your wallet.

In an ode to David Letterman's Top Ten, I am providing a short, efficient list to help protect your data today. These are not things that your IT person needs to do, but things that you or your firm can do today:

1. **Maintain Physical Security** – The easiest way to protect your data is to physically secure it. Lock your server room door, and lock your server doors (yes, they have locks). Secure your laptops to the desk or (at least) to the docking station, and be sure to keep printers and fax machines out of high traffic areas where office visitors can easily take paperwork that is waiting for someone to pick it up. And don't let your guard down when you leave the office; make sure you lock your car if you keep your laptop, iPad or phone inside.
2. **Use Virtual Security** – The next best thing to a physical lock is a virtual lock. Screen protect your smart phone and iPad now. It is easy and simple to do and you will be thankful for it when your iPhone ends up in a taxi cab's back seat in New York or Atlanta. Also be sure to enable the Find My iPad/iPhone app so that you can find where you left it. Invest in encryption software for an extra layer of protection. (See instructions for password protecting your iDevice [here](#).)
3. **Use Strong Passwords** - I mean really strong passwords with 12-15 characters. It doesn't have to be hard to remember. Use a song phrase – Dude looks like a lady – and your password becomes "Dude I00ks like @ lady!" Change passwords regularly but especially if an employee leaves.
4. **Back It Up** - Back up your data, and then test your backups regularly. Make sure that your email is backed up as well. Keep your backed-up data in multiple secure locations. If backups are stored on USB or thumb drives, make sure to password protect them.

5. Protect Against Viruses - Virus/malware protection is effective, but only if your computer is scanned regularly for these threats and your virus/malware patterns are up to date; but updated virus/malware programs are only half the job. Be sure to set up your software so that it automatically checks for new virus/malware updates daily, and runs a regular (weekly) scan of your computer. Also, since some malware poses as virus scanning software, know the name of your virus software. If another program is asking to scan your computer for viruses, just say no.
6. Update Your Software – Install updates for Windows, Adobe, Java and other software programs in a timely fashion. The updates help with bug fixes as well as security issues. However, software updates are not without risk. A bad update can wreak havoc on your computer, so update with care, but regularly.
7. Know Your Cloud Provider - If you use the cloud for anything from email to documents, read and understand the Terms of Service. Understand who has access to your data, who owns your data and what happens to your data if the cloud provider goes out of business or gets bought or merges with another company.
8. Encrypt Your Dropbox Account - If you have any client data stored in Dropbox, be sure to have some type of encryption program like SecretSync running alongside Dropbox.
9. Don't Trust Your Email - Email is a great way to receive and transfer information as well as malware. If an email looks suspicious, it probably is not safe to open and if an email looks too good to be true, it probably is. (Is your niece really in England without her wallet? Did everyone just get the same message from Intuit about your taxes being late?). Better yet, use a spam filtering program like AppRiver so they do not get to your inbox in the first place.
10. Google Yourself Regularly - Just do it. You never know when someone might be using your picture or content on a valid or not so valid site. You need to be aware of comments on yelp.com and ratings on avvo.com.

While this is not a complete list by any means, it serves as a brief introduction to the [Data Security Policy](#) developed by Lawyers Mutual. This comprehensive article explains many of these topics in depth and provides an example Data Security Policy that your firm can use today. I encourage you to create, update and maintain a Data Security Policy. You can make it part of your employee manual and have employees read and sign it as a condition of employment. Maybe not today, or tomorrow or even next year, but someday, you'll be glad you did.

Pegeen Turner is the President of Turner IT Solutions, a Raleigh-based legal technology firm. Pegeen works with small and medium-sized law firms as they start-up as well as firms that need help maintaining and integrating legal technology into their practice. In addition, she helps firms understand the risks of cloud computing and how to incorporate cloud computing into their practice. pegeen@turneritsolutions.com; www.turneritsolutions.com; [@pegeenturner](https://twitter.com/pegeenturner)

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USING TECHNOLOGY FOR GOOD AND EVIL: SUPPORTING DOCUMENTS ARE EASILY FORGED

You may recognize the following request for representation, recently received by lawyers across North America and in Nova Scotia:

*From: Bella Kyung [mailto:lovebellak@gmail.com]
Sent: Tuesday, October 23, 2012 1:38 AM
To: Reception
Subject: Inquiry...*

Dear Counsel,

I wish to know if your firm handle case related to Child Support, Spousal Support, Equitable distribution and Medical support. Please advise if you handle such case.

Bella

For many of the lawyers who responded to this request, they then received an email with further details on support payment amounts, location (South Korea), etc., as well as “supporting documents” purporting to be her driver’s licence, marriage certificate, separation agreement and divorce decree. Following a simple Google Image search for “korean drivers licence”, a young man who had spent time in South Korea had proudly posted a picture of his newly obtained driver’s licence. The identification numbers on the driver’s licence provided by “Bella Kyung” exactly matched those featured on this man’s licence, although the two id photos had of course been pasted over.



Please keep in mind that in this era of advanced yet easily used technology, print documents as well as colour IDs and passports are easily manipulated, and electronic versions that are sent to you should not always be taken at face value.

Remember that you must always confirm a prospective client's identification in accordance with the [Client ID Regulations](#) of the Nova Scotia Barristers' Society. Be sure to Google any potential clients you are unable to meet in person, do not deposit cheques in advance of a deal being signed and do not release funds until you verify with your bank that the cheque has cleared.

If you do decide to proceed with a transaction, be sure to go to the bank website to verify branch transit number, address and phone number on the cheque. Wait until the bank confirms that the funds are legitimate and are safe to withdraw from the deposit. Where possible, use the [Large Value Transfer System](#) (LVTS), an electronic funds transfer system that allows large payments to be exchanged securely and immediately.

For tips to avoid being victimized, read a list of "Red Flags" and visit the [Fraud](#) section at [lians.ca](#). To report or seek advice on dealing with fraud and scam attempts, contact Cynthia Nield at cnield@lians.ca or 902 423 1300 x346.

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LAWYERS HELPING LAWYERS: TOP 10 CONSIDERATIONS WHEN REFERRING SOMEONE TO HELP

Written by Marian V. De Souza, LL.B., Executive Director, Alberta Lawyers' Assistance Society. First posted September 19, 2012 at [Slaw.ca](http://www.slw.ca): <http://www.slw.ca/2012/09/19/lawyers-helping-lawyers-top-10-considerations-when-referring-someone-to-help/>

I worked for several years as in-house counsel helping develop title insurance in western Canada. When I joined Assist (Alberta Lawyers' Assistance Society), an organization whose purpose is to help lawyers with personal problems, a colleague commented, (tongue-in-cheek) that I would still be providing lawyers something they think they don't need. As Executive Director of Assist, it has been my experience that lawyers are increasingly aware of the importance of seeking help for personal problems and before problems turn into crisis.

Assist has been focussed on increasing awareness in the hope every lawyer knows that there are free, professional and confidential services available to those in need of help for personal and professional issues.

The ongoing work involves ensuring that we are doing everything possible to help remove stigma associated with physical and mental health issues.

What distinguishes Assist from other employee assistance programs is that we are lawyers helping lawyers. In addition to professional counselling, lawyer assistance programs across Canada provide peer support: the ability to offer a lawyer seeking help support from a lawyer who has a particular understanding of the person or situation at hand.

Time and time again, I have seen the power of peer support help with a mental condition, a medical diagnosis, dealing with a career transition, relationship or family conflict, addiction, or adapting to pressures of home and work. Peer support eliminates isolation and provides an individual with hope and encouragement. Within a non-judgmental, collegial relationship, the person seeking help is empowered to develop skills and access resources to deal with the problem at hand.

Often, I am asked whether lawyers, compared to other professions are a) more stressed, b) have more career challenges, or c) have particular idiosyncrasies leading to more personal problems. Research shows that all of these factors can lead to more incidents of problems for the lawyer population. A possible compounding factor is the need to maintain a professional image of competence, while meeting challenging responsibilities as lawyers.

It is important that we do everything we can to ensure the culture of our legal profession is amenable to lawyers seeking help for personal problems, when needed. Lawyer assistance programs across Canada, along with the national Legal Profession Assistance Conference of the Canadian Bar Association are taking important steps to raise awareness of the importance of health and wellness for lawyers and of the programs and services available. Engagement events, communication and education initiatives are designed to bring the profession together to help talk about issues relating personal wellness. I encourage you and your firm to support these initiatives.

More importantly, as lawyers helping lawyers, we can each play a significant role, by encouraging a lawyer to seek help, if needed. Whether it is an initial referral to support or ongoing peer support, here are suggestions to consider when offering support to a lawyer in distress:

1. For lawyers or articling students, the legal profession's Code of Conduct may bear upon the situation. Familiarize yourself with responsibilities under your Code of Conduct. While reporting obligations are limited (especially when you are trying to help another lawyer seek help), if concerns about ethical obligations under the Code, cause you to hesitate to reach out to a colleague, make a confidential call to Assist to work it through.
2. Consider the distressed person may be:

- Scared
 - Embarrassed
 - Ashamed
 - Denying or ignoring the issue
 - Feeling isolated
 - Unaware of changes in their own behavior
 - Confused and not knowing what to do or who to talk to
3. You are not alone when reaching out to help someone else. Call Assist and receive advice and coaching on dealing with a distressed friend, colleague, or family member.
 4. Assess how you are feeling. It may not be the time to reach out to help someone else if you are in the middle of a work or personal crisis yourself.
 5. Free yourself of any judgments, assessments, or diagnoses you may have and enter the interaction as a compassionate observer.
 6. Be clear about the goals of your conversation: Is it about expressing concern and encouraging the person to seek help?
 7. Be clear about your role. Typically, you will want to be there to express concern and be a catalyst. You are not a medical professional and are not there to “save” someone.
 8. If initial prompting to seek help has been unsuccessful and an individual is in severe distress, a planned intervention involving professional help, colleagues, peers, family members, or others may be warranted. The professionals at Assist can help you and other concerned parties make that determination.
 9. If an individual is threatening harm to themselves or others, call 911.
 10. Keep brochures or information about assistance programs on hand. If you are part of management in the firm, consider including references to the lawyer assistance program in your employee orientation manuals.

The fact that you took the time to read this article means that you care about the profession and your colleagues. Supporting a peer is a simple act of human kindness. The reward is a stronger profession for everyone.

To obtain a guideline for a conversation with an individual in need of help, and other information, call Assist at 1 877 737 5508 or visit www.albertalawyersassist.ca.

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YOUR PROFESSIONAL LIABILITY INSURANCE AND CYBER COVERAGE

The LIANS Professional Liability Insurance Group Policy, which covers all insured lawyers in Nova Scotia, has what is generally referred to as a “cyber coverage” exclusion. Condition 3.9.1 of the Policy of Insurance excludes “*claims arising out of or from damage to or loss of use of tangible or intangible property, loss of data, disclosure of confidential information, or any other loss which is directly or indirectly connected with the receipt or transmission of a computer virus or other damaging program via the internet or in any other electronic manner, or through unauthorized interference with an internet connection, network, computer or telecommunication device.*”

LIANS, with its national insurer, the Canadian Lawyers Insurance Association (CLIA) has recently clarified what this policy exclusion means. Essentially there is no coverage for most cyber claims, including claims where the law firm itself suffers damage as a result of unauthorized interference from things like cyber attack, computer meltdown due to viruses, theft or hacking of electronic equipment or data. Further, there is no coverage where a client suffers damage as a result of the theft, cyber attack or hacking of your firm’s computers.

What does this mean for you? If you lose your smartphone, your laptop is stolen from your vehicle or computers or servers are taken from your office in a break-in, your professional liability coverage will not respond. Likewise, if you are a victim of “hacking” – like the recent well-publicized cyber attack on Bay Street firms involved in the unsuccessful Potash Corp sale – damage suffered by the firm or its clients would not be covered.

So, what should you do to protect yourself from exposure to claims arising from lost equipment or compromised data? You may find some coverage for theft or cyber attacks in your existing general office liability policy. Read that policy carefully and check on your coverage limits for lost or stolen devices and data interruption at the same time. There are also some commercially available cyber policies specifically designed to cover “hacker” and “cyber attacks”. Check those out with your insurance broker.

More importantly, do what you can to **prevent** cyber attacks, and consult with a computer security expert about firewalls, encryption, anti-virus software, secure passwords, intrusion detection systems and other ways to protect your equipment and your clients’ information. Protect your portable devices with secure passwords, keep them locked and stored in a safe place when you are not using them and try not to leave your laptop on the bus or ferry.

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IMPORTANT NOTICE CONCERNING JUDGMENT SEARCHES AND FORM 21

The Registrar General's Office wishes to remind title searchers and authorized lawyers that:

1. The only times that a parcel register is updated to list judgments affecting the parcel are at the time of initial registration of a property and when registered interests are changed using a Form 24. Judgments are not updated in the parcel register when registered interests are changed with a Form 21. Therefore, judgments searches must be carried out in the judgment roll, from the latest time that judgments were updated in the parcel register.
2. All enabling instruments listed in a parcel register, including those linked in the archive, must be reviewed in order to determine the appropriate judgment searches. If a surviving joint tenant is enabled by a deed showing a joint tenancy, then a judgment search must include the deceased joint tenant to determine whether any judgments may apply. Please refer to subsection 23(2) of the Land Registration Administration Regulations.

Form 21 (Code 127) - Death of a Joint Tenant- changes to Land Registry processing

Effective May 1, 2012, Land Registry staff have instituted a change in processing a Form 21 which is submitted to reflect the death of a joint tenant. The changes are to being made to highlight the need for a judgment search into a deceased joint tenant. The changes are as follows: The Form 21 will now be added as an additional enabling instrument in the registered interest section of the parcel register, to enable the interest of the surviving joint tenant(s). As a result, the surviving joint tenant(s) will show as registered owner(s) as enabled by the Form 21 in addition to the original enabling instruments in the registered interest section.

For example, Mr. Smith and Mrs. John Smith are each shown as fee simple owners (interest type) enabled by a deed (instrument type). A Form 21 is submitted to remove Mr. Smith as a deceased joint tenant. Mr. Smith's interest will be removed and put in the parcel archive, as removed by the Form 21. Mrs. Smith's fee simple interest will remain in the parcel register, enabled by the deed. In addition, there will be a subsequent entry showing Mrs. Smith's fee simple interest enabled by the instrument type "removal of deceased joint tenant".

Prior to the change in procedure, a Form 21 was used to remove the deceased joint tenant as an owner and was placed only in the parcel archive. As a result, using the above example, Mrs. Smith would show in the parcel register only as a fee simple owner enabled by the deed. A searcher would have to review the deed into the joint tenants and then review the parcel archive for the document removing the deceased joint tenant.

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I'VE DECIDED NEVER TO DO NEW CONSTRUCTION AGAIN WITHOUT TITLE INSURANCE!

A recent RELANS thread highlighted a new, and potentially expensive, practice on the part of taxation authorities with new construction. Apparently in some regions, new construction can receive a revised assessment during, and perhaps even after, the tax year and issuance of final tax bills (if the construction was in existence during the tax period). In one anecdote, the assessment was even retroactive.

This new practice appears to be the result of PVSC "catching up" to construction during a tax period, rather than the prior practice of newly assessing the construction in the following tax year.

If the new assessment is in place, one should adjust based on the new assessment and then-extant mil rate for the municipal unit.

So what to do? Even a tax holdback - on the unlikely assumption a seller would agree - may not deal with a retroactive reassessment. An undertaking to "readjust" is also not a full solution when trust funds have been disbursed.

One solution, at least when a final tax bill for the year has been issued, is to obtain a tax certificate, which is then binding on the municipal unit. Remember that verbal tax information is not binding.

A second is title insurance, which generally indemnifies against any taxes the buyer has not agreed to pay or assume. In the case of new construction, where there is no location certificate showing the dwelling, the cost-benefit is double.

In any case, be sure the client is aware that "next year's taxes will be higher" and obtain a written waiver and acknowledgement, particularly if the client does not wish to have either title insurance or a tax certificate. You may not have been negligent, but this apparent taxation practice is fraught with the potential for an unhappy client who is attempting to "save a dollar" on either of these items at closing, only to look to you when they receive a four-figure tax bill a few months after closing.

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FAILING TO DELIVER TITLE INSURANCE OPENS UP A NUMBER OF RISKS

This article by Kathleen Waters (President & CEO at LAWPRO) originally appeared in the October 5, 2012 issue of [The Lawyers Weekly](#) published by LexisNexis Canada Inc.

[**Please note:** This article is written from the Ontario perspective, but is an important reminder for Nova Scotia lawyers.]

Hundreds of real estate malpractice claims find their way to LAWPRO every year. Some involve complex and exotic fact situations, but many do not.

At the heart of most claims is the lawyer's failure to deliver something the client has requested or expected. Where the deliverable is at the heart of the deal – keys or money – the client will promptly draw the lawyer's attention to a failure to deliver. Deliverables that are less connected to the client's immediate needs, like a title insurance policy, are easier to overlook.

Failing to secure title insurance when instructed to do so is perhaps the easiest way to increase your risk when acting on a real estate deal. From the lawyer's (and LAWPRO's) perspective, it's also emerging as a dangerous exposure.

Why? When a lawyer is asked to secure title insurance and doesn't, he or she effectively becomes responsible for everything the policy would have covered, even if the range of insurance protection exceeds the normal standard of practice in the "opinion on title" world.

Consider a lawyer who makes a different kind of error — for example, assume we are in the "old days" and the lawyer forgets to search with the local municipality for building department work orders. The purchaser-client discovers post-closing that there is building non-compliance at the property, but no work order has been issued. In the Ontario conveyancing world pre-title insurance, that would likely have been the end of the matter in terms of the lawyer's exposure: From a causation perspective, the lawyer is off the hook because there is no way the lawyer could have uncovered the issue by making the standard search.

But many title insurance policies cover a purchaser (and lender) where the non-compliance existed at closing and a work order is issued at a later date. In today's world, where the lawyer is instructed but fails to secure title insurance, the alleged error becomes failure to obtain the title insurance and the non-existence of a work order as of closing becomes irrelevant.

How does title insurance get missed? Often in haste. One of the advantages of using title insurance to protect a deal is that it can permit shorter closing periods by eliminating some search-related delays. Rushing a transaction may mean that the title policy is applied for, but the deal is closed before the policy coverage is actually bound. If signs of a problem emerge after closing, the insurer may decline to proceed with the policy or insist on exclusions. After all, the insurer did not bind itself, in our example, to issue a policy.

This "error" is more likely in situations where there is uncertainty about the legal effect of the insurer's response to the application. Title insurers vary in their procedures. An insurer may respond to certain applications for insurance by issuing the policy itself, such that it takes immediate effect on closing without the need for any other action on the insured's part. Some lawyers may, by their own actions, be authorized to bind the insurer, provided they stay within the terms of their firm's agreement with the insurer. In other cases, an insurer might issue a "binder" that provides temporary coverage pending finalization of the terms, disclosure of information, or satisfaction of conditions. An insurer may, for example, call this binding of coverage "pre-approval."

After the coverage is bound, it's common for insurers to require the insured (meaning, his/her lawyer) to take certain actions as a precondition to the negotiated coverage taking effect. For example, to secure TitlePLUS title insurance coverage, the insured is always required to submit the registration number for the transfer (or mortgage), so we know the deal was closed and registration occurred.

The dangerous claims mentioned above typically arise in situations where the client (whether the lender or the purchaser) has instructed the lawyer to obtain title insurance, the lawyer has taken the initial step of contacting the insurer about coverage, but then has failed to realize that the coverage has not been bound before closing. By "bound", I mean a contractual agreement that allows the insured to insist upon issuance of the policy, subject to payment of the premium and satisfaction of clearly defined pre-conditions to issuance (if any).

What kinds of loss can this problem apply to? Consider, for example, an instance of identity fraud: A lender requests title insurance as a condition of making a mortgage loan, the lawyer undertakes to obtain the insurance, the mortgage funds are advanced, and it later comes to light that the "owner" who obtained the mortgage was actually a fraudster, and the real owner of the property has no knowledge of the mortgage transaction.

Before the advent of title insurance, a lawyer who handled a transaction that turned out to be based on identity fraud would likely not be liable for the loss if he or she had taken reasonable steps to guard against fraud (for example, checking the mortgagor's identification). The essence of a good fraud has always been how hard it is to detect.

With the advent of title insurance, which provides coverage for fraud, the situation is markedly different: In instructing the lawyer to obtain title insurance, the lender is no longer relying on the lawyer's reasonable efforts to investigate the identity of the borrowers — it is purchasing protection against loss regardless of flaws in that process. The risk of identity theft is intended to be moved to the insurance company. The lawyer's failure to obtain the insurance is causally linked to the lender client's loss, if the mortgage proves to be unenforceable.

Sobering? We hope so. But the solution is conceptually straightforward, if time-consuming on occasion: Follow through fully on title insurance instructions; be sure you understand the legal effect of the insurer's response to the policy application, whichever insurance company you chose to deal with; consider before closing whether any conditions on the insurance binder or pre-approval are acceptable to you and your client, seeking instructions if necessary; comply with all conditions of coverage; and give the client prompt notice of issuance of the policy.

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15 TERRIFYING SOUNDS YOU HOPE YOU NEVER HEAR

Halloween is a time of rattling chains and things that go bump in the night. But nowhere will you hear creepier noises than in that "House of Horrors" known as the law office. Following are 15 scary sounds sure to send a chill up your spine:

From a client: This case is a slam dunk.

From your paralegal: Hey, look what I just found behind your desk.

From a prospective client: How about I pay you twenty dollars now and the rest after we go to court?

From a client: You got the year wrong in my complaint. My accident was in September 2009, not 2010.

From a judge: One more word and I'm holding you in contempt.

From your office runner: Bummer. I got stuck in traffic and didn't get to the courthouse before it closed.

From a client: This is not about the money.

From your secretary: I've got good news and bad news. The good news is I finally found the file that's been missing for six months. The bad news is the limitation period expired five months ago.

From a prospective client: Sure I've had three prior lawyers. But they were all idiots, unlike you.

From your legal assistant: You mean it had to be notarized?

From a client: Could you please give me the name and telephone number of your insurer?

From a client: I've already done all the legal research on the Internet. All you have to do is go in and give it to the judge.

From your new associate: What does dismissal with prejudice mean?

From a client: I'm here to pick up my file.

From a judge: That won't be necessary, counsellor. I've heard enough.

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