# LIANSWERS

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LAWYERS' INSURANCE
ASSOCIATION OF NOVA SCOTIA

## DE-BUNDLING REAL ESTATE SERVICES

De-bundled services do not relieve solicitors from compliance with relevant legislation. Put another way, you cannot contract out of things you are required to do. That sounds pretty basic, but consider the following:

A client comes to you wanting to transfer title to a migrated parcel of land. You make it very clear that you are not offering any other legal advice (see "All I Want is a Deed" in LIANSwers November 2012).

The Land Registration Administration Regulations and the Professional Standards apply to all transfers of LR land, including ones without valuable consideration or ones at non-arm's length. Specifically:

1. The deed must match the registered owners (or the interest being transferred), as must the parcel description (exception: you can refer to an existing LR PID as the description); beware of just taking this information off paper documentation, or identification, given to you by the client. The parcel may have been subdivided (or even sold); the names on the Form 24 may be different or even reversed (John George Smith vs. George John Smith or even Jack Smith). You should examine the enabling instrument, which is part of the parcel register (LRA 13(3)).
2. You MUST judgment search transferror (either 20 years or since the last revision, depending on whether that last revision was before or after the 2005 regulations), and transferee (full 20 years), incorporate any judgments on revision, and file any applicable judgment declarations (LRAR 23(2), 26(5). You are also urged to discuss with the client any judgments against a transferee, prior to finalizing. It has happened with at least one claim where the parties allege "we wouldn't have done this if we had known the judgment would attach."
3. Compliance with the *Matrimonial Property Act* is required (Professional Standard 1.7) - if the grantor is a spouse, has the spouse consented to the transaction if it is or ever has been a matrimonial home? Remember that a quit claim from spouse to spouse does not necessarily mean that spouse has released his/her MPA interest (for example, they may have simply transferred it for financing or creditor-proofing reasons); look for evidence of a separation agreement, order or other indication that they have done so.
4. Even if you are not certifying to the client, you are certifying to the system that you have complied with all regulatory requirements. Your CLE is addressed to the system, regardless of the scope of your retainer. While the CLE states that, in your professional opinion, it is appropriate to make the changes on the given form (in the case of a deed, Form 24), you are certifying in effect that the "curtain comes forward" to the present time, including that your judgment search is up to date and that any interests which are to be modified by operation of law (e.g. death of a joint tenant, merger as a result of a transfer or foreclosure, disclaimer by a bankruptcy trustee if required, etc.) are reflected on the parcel register. In fact, the Form includes the statement: I have searched the judgment roll with respect to this revision of the registered interest and have determined that it is appropriate to add the following judgment(s) or judgment-related documents to the parcel register, in accordance with the *Land Registration Act* and Land Registration Administration Regulations.
5. You must comply with relevant ID regulations. In most instances, you will also be processing trust funds even if there is no transfer for value, if you are e-submitting the revision.
6. In some instances, you may be asked to provide a deed for registration by a third party. Examples include when a property is being resubdivided and transferred or when a person is going on or off title and then refinancing using a bank's title insurer to effect that transaction (the writer declines those engagements). In that instance (if you accept the engagement) you must make it clear that registration and certification is the responsibility of another lawyer, and that the parcel register is not changed until that is done. Accordingly, except for deeds which must accompany a plan to the relevant authority, lawyers should NOT sign a paper Form 24 for registration by another person at some indeterminate future point in time.

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## NOVA SCOTIA CIVIL LITIGATION CLAIMS

In the last five years in Nova Scotia, civil litigation claims have represented about 17 per cent of the total claims LIANS has seen, with on average $154,948 spent per year. Civil litigation-related files now account for one in five claims against North American lawyers. One in three reported claims in Ontario are litigation related, as certain automobile claims can still be the basis of a

lawsuit.
The leading cause of litigation-related lawsuits continues to involve missed limitations. These errors can be the result of:

- failing to properly use the limitation tickler system;
- clerical/data entry errors in the tickler system; and
- not allowing enough time to perform the required work before the limitation deadline.

Litigation files can all too often be neglected, which may result in a motion to dismiss the client's claim for delay in prosecution or in the potential loss of a client's favour overall. Regular communication with the client is key – it will not only keep them happy, but will ensure that their file (and therefore any upcoming limitations) are kept in check. Follow these tips when starting a litigation file:

- Carefully explain how the matter will proceed to ensure the client understands the steps that will take place as the matter proceeds.
- Give the client a realistic indication of how long the matter will take and identify any possible events that would delay the resolution of the matter.
- Provide the client with a full picture of all costs and disbursements that will or might incur, and be realistic – don't quote a lower cost to please them.
- Clearly explain to the client all possible outcomes or results, and avoid legal jargon to ensure your clients understand all possible outcomes.
- Answer all your clients' questions to their satisfaction, and listen carefully to address any elements they don't understand or that could be another relevant issue you'll need to advise upon. Obtain written confirmation of instructions and advice. Communication errors between lawyers and clients continue to be one of the areas that result in claims. Keep in mind that you have hundreds of files to remember but your client may have only one and it could be far more difficult for you recollect what was said than it would be for them.
- Immediately highlight for clients any unexpected changes that will change the process, timing, costs or outcome of a matter, to ensure the client is made aware of the change and why it took place. Confirm this advice in writing.

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## ADDING VALUE TO YOUR LAW WEBSITE

Websites are an incredibly valuable marketing tool for any business, including your law practice. To entice potential clients, your initial objective for your homepage is to provide a brief but informative description of your firm and what qualities set you apart from the competition (a short paragraph or better yet, a few lines).
How can you be sure that your website offers content that is both useful and visually appealing?

**Content accuracy** How often are edits made to your site? Contact information, staff listings, news and events, and legislation information are the four areas that most often show neglect on a poorly maintained website. Provide regular updates to these areas and the site overall, to ensure that the client's experience reflects your reputation of reliability and trust.
**Support your content with statistics** Use reputable sources for any facts, claims and estimates that you present on your site, and be sure to include references, citations or acknowledgements for any third-party data.
**Use real-life examples** Highlight your firm's best and most important work. Awards and recognition received by individual lawyers suggest the firm's overall success in all areas as much as publicizing major case wins or representing important organizations on a regular basis.
**Make effective use of images** Post profiles for all practising lawyers, with headshots and brief resumes. Profiles that appear both personal and professional inspire trust and interest in clients. You may choose to use the first-person voice in lawyer biographies, adding a familiar tone to the profile.
**Keep it simple** Don't overwhelm your clients with volume or complexity of text, or content overall. Be sure to promote your firm's successes but overall, keep the tone of your site welcoming, easy to navigate and professional, and let the clients come to you.

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## AVOIDING RULE 8 (DEFAULT JUDGMENT) CLAIMS

Claims related to Rule 8 of the *Nova Scotia Annotated Civil Procedure Rules* arise when it is alleged that the dismissal of a claim was due to the lawyer's negligence. While some Rule 8-related claims can be repaired by speaking with opposing counsel or court staff, in some instances repairs require a motion to set aside the dismissal and reinstate the action. Although these repairs often incur significant defence costs, they are not always successful.
Dismissal claims due to administrative errors are often preventable, and can become less likely if the following measures are taken:

1. Proper overall use and accurate data entry in your tickler system.

2. Have your tickler system produce inactivity to identify files that have become dormant. The court will continue to monitor the case, regardless of your clients' wishes to ignore the matter for the time being. An administrative-related dismissal may cause the client pursue an action against you.
3. Do not wait to take steps in an action while awaiting completion of medical reports, discoveries, or settlement negotiations, while relying on an opponent's waiver. Either meet litigation deadlines or obtain a signed agreement confirming the parties' decision to extend the deadline.
4. Ensure that staff and junior lawyers are able to recognize, prioritize and immediately deliver status notices to the counsel.
5. Learn to recognize signs of stress or being overworked in your staff, as they may be at risk of missing deadlines.
6. Develop a contingency plan in the event of an illness, injury or other emergency that could interrupt your practice (see no.4 above).

Contact LIANS for more information on avoiding a Default Judgment claim.

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## TIPS FOR IPHONES WITH IOS 7

**Increase text size in apps**
Go to Settings > General > Text Size and slide the bar to increase (or decrease) to the desired font size in Apple-supported apps.

**Universal search**
Find texts, emails, apps and more by manually swiping down anywhere on the home screen. A search "Spotlight" box will appear at the top of the page – simply enter your search term and it will automatically begin to scan your system.

**"Do Not Disturb"**
Get a better night's sleep – use the Do Not Disturb mode. Go to Settings > Do Not Disturb and then schedule a block of time wherein all calls and alerts will be silenced (e.g. midnight to 7am).
You will not miss emergency calls, however, as you can set the phone to allow calls from Favourites or repeated calls if someone is calling more than once in a three-minute window.

**Set your own text message responses to phone calls**
Go to Settings > Phone > Respond with Text, and create your own default responses (e.g. "Can't talk right now ... in a meeting; in my car, etc.).

**Return to top of screen**
When browsing the internet or scanning through a lengthy app page, return to the top of the page by simply tapping the time display at the top of the screen.

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## CLIENT SATISFACTION

Many of the claims that we see at LIANS could be avoided. One of the top reasons for a claim is an unhappy client. Sometimes the client is unhappy with a lawyer's account; sometimes the client is unhappy with the result; sometimes the client is unhappy with the lawyer's service; and sometimes the client is just plain unhappy.

When a client is satisfied with your professional service and is convinced that you have done your best and given your full attention, that client is less likely to complain about the quality of your service or the outcome of the case.

This isn't new, but it is easy to forget when we are busy and caught up in heat of the transaction or the lawsuit. What follows are a few suggestions to help you avoid that unhappy client:

**Arrive at meetings on time**. You know how frustrated you were the last time you had to wait ... at a doctor's office, for a delayed flight, for a child to arrive home ... so don't make your clients wait. Respect their time and show them that you value them.

**Return phone calls promptly**. Establish a call return policy, tell your clients what it is and then stick to it. If you cannot return a call, have your assistant return the call to let your client know when you will be in touch (or if the matter needs to be referred out because it cannot wait for you).

**Clearly explain the nature of your services as well as the financial terms**. You wouldn't retain an expert without knowing the cost. Remember that this is how your client sees you.

**Provide written confirmation of what you have been retained to do (and not do) and then provide written confirmation of the instructions given to you along the way**. Communication with your client continues throughout your retainer and written confirmation can avoid frustration, mistrust and mistakes.

Avoid legal jargon. When you notify your client in writing about strategic decisions, about deadlines, and about advice, make sure that it is clear and understandable. Keep in mind the level of experience and sophistication of your client, and tailor your communication accordingly.

**Tell your clients the bad news**. If they have a weakness in their case, make sure they know about it so they are in a position to make informed decisions and will not be surprised if the outcome of their case is not favourable. If there is an objection to title, make sure they know before the day of closing when they have the moving van packed. If there are tax consequences to a transaction, make sure they have engaged their accountant.

**Be honest**. Be realistic about what you can accomplish and the time you need. You cannot guarantee success in litigation. You cannot control the other side of a transaction.

None of these steps are difficult, but sometimes our busy practices get in the way of our best intentions. Taking the time to keep your clients happy will pay off in the long run. Consider it an investment in your practice in addition to an effective risk management technique.

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## FACILITATING RESILIENCE IN THE WORKPLACE

Read the following newsletter from Homewood Human Solutions™, your health and wellness provider:

Facilitating Resilience in the Workplace

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## ETHICS IN REAL ESTATE TRANSACTIONS

A minority of issues cause a majority of claims. Often this is not from a lack of substantive knowledge, but the attention (or lack of attention) paid to the matter. Some issues in real estate:

**1. I gave my password to _____.**

Property Online issues two passwords: general and private. The general one is available to your office and can be used for searching, submitting PDCAs (and amendments) and draft AFRs. The private one is used for final AFRs, and electronic submissions.

Whenever someone with access to your general password leaves your employ (or if they cease to be involved in property transactions) change it. Unless you do so, they still have access.

Your private password is just that and must not be divulged to ANYONE, including other lawyers. It is the system's way of knowing that a specific lawyer is certifying to a particular matter. Lawyers have been disciplined for divulging their private passwords. This obligation is contained both in the POL Authorized User Agreement and in the "new" Code of Professional Conduct (6.1-5, 6.1-6)

**2. I didn't meet with the client(s) (or, I didn't sign up the clients).**

There are many good reasons for individuals other than the responsible lawyer – for example, law clerks or other office staff – to handle aspects of a client's matter. However, the ultimate responsibility for the work remains with the supervising lawyer, and he or she is required to obtain and review instructions from the client.

Claims may occasionally arise out of circumstances where there was a misunderstanding in instructions or a lapse in supervision. But if the lawyer doesn't meet with the client, it puts the lawyer in a more challenging position if the client later alleges certain instructions or information were provided orally to someone other than the lawyer, and now a claim related to the relevant issue is in the offing. As well, the lawyer is in a poor position to defend a "he said – she said" discrepancy, including allegations that something was not explained, or adequately explained (How many times have all of us heard, "I don't have a mortgage" only to find there is a secured line of credit recorded against a parcel?)

Much more troubling, however, are instances where our investigation of a claim reveals that a lawyer's name and trust account are simply being used (with his or her knowledge and consent) in a practice that is effectively being conducted by a non-lawyer. This, of course, is problematic under the Rules, a very high-risk way to do business, and depending on the details, potentially outside the scope of LIANS' policy coverage.

All of this is quite aside from the obligation to verify the identity of the client, both under the *Legal Profession Act* regulations, and under most mortgage instructions.

**3. I would never have even considered doing that – that's not the standard of practice.**

Also known as "we've always done it this way."

When a claimant complains that a lawyer failed to take a particular step, investigate a detail or deliver a warning – or committed some other alleged oversight – the lawyer often defends him or herself by asserting that the "omission" was not part of the standard of practice. The lawyer's expectation is that the standard of practice will define the standard of care in the subject circumstances.

Every time we work with the system, we certify compliance with the Professional Standards. They are, however, a floor – not a ceiling. They do not detract from the obligation to comply with instructions, obtain informed instruction, and exercise professional skill and judgment competently. Deviations from the standard must be explained, instructed and **documented**.

In other words, thinking critically about the standard is part of the standard.

**4. The property value isn't my responsibility – that's the lender's job.**

True enough. We are not guarantors of lending decisions, or the value of the security. That is a different issue from being diligent against fraudulent transactions.

Red flags that should prompt additional enquiries include:

- irregularities on the parcel page;
- unusual terms for the deal (for example, unexplained credits); or
- evidence of multiple recent transactions (a.k.a. "flip fraud")

(For a longer list of red flags in a real estate deal, see Ontario LAWPRO's Fraud Fact Sheet)

When an aspect of the deal provokes suspicion, the lawyer has a duty to communicate his or her concerns to the lender client. The lender may or may not choose to act on the information; however, by documenting the communication, the lawyer can protect him or herself from a potential claim.

**5. I just dealt with the _____ (mortgage broker, property manager, real estate agent, client's son or daughter, etc.) – it's easier that way.**

While a lawyer may need to gather information relevant to the deal from a variety of sources, he or she must always be able to answer "yes" to the question: "Do I have instructions to do this work from the person or entity who really has value at risk in this transaction, and (where applicable) have they clearly instructed me to take orders from the intermediary, and in all circumstances?"

If the lawyer cannot answer yes to this question, the lawyer should consider him or herself vulnerable to a claim. Where something goes wrong in a deal arranged with the help of an intermediary, the result is often a dispute about informed consent. Regardless of how thoroughly the lawyer may have communicated relevant issues to the intermediary, he or she will not always be able to prove having communicated them to the client.

**6. I wasn't negligent; I just had to do whatever the client wanted.**

There are two general themes to this explanation.

In the first, the lawyer typically protests that the client was resistant to, or impatient with, the lawyer's efforts to inform him or her about the pitfalls of a particular approach, and insisted on proceeding in a particular way, or just couldn't be bothered. LIANS is aware of one incident in which a client told the lawyer, "Yeah, I got your letter and I couldn't be bothered reading it." At that point, at least arguably, the lawyer is on notice that the client is not in a position to give informed instruction. A less extreme example is the client who is "in a rush and just wants to sign where they're told," and "wouldn't listen anyway." In these cases, clients may argue later that the lawyer did not obtain their full and informed consent to the steps taken – an argument that may frustrate the lawyer, but that is a direct product of the lawyer's insufficient efforts to draw clients' attention to the potential consequences of a particular course of action.

The second version of the "I had to" theme is rooted less in poor communication, and more in greed and imbalance of power: the lawyer has effectively abandoned the ethical underpinnings of his or her practice and has become a cipher of (usually one) powerful client – allowing personal financial interest to trump professionalism. For a good example of this, and its financial and ethical consequences, see *Nova Scotia Barristers' Society v. Michael Hayes, 2011 NSBS 1* (CanLii)

**Conclusion**
All six of these scenarios ultimately boil down to a lawyer's abandonment of his or her professional responsibility. This abandonment may occur with the client's knowledge and blessing in the name of "efficient service"; but when something goes wrong, the lawyer very quickly becomes the potential focus of the blame.

When lawyers sacrifice their ethical standards, they cease to provide independent advice and no longer add value to the transaction for the client. Nobody wins.

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