



Fraud: The problem that won't go away

by Caron Wishart

Lawyers' ability to hold money in trust and transfer it from one entity to another is a unique professional responsibility. It makes the lawyer's role essential to real estate and commercial transactions - and lawyers an attractive target for fraudsters.

Five years ago, homebuyers and owners would not dream that their home could be stolen out from under them. Today, fraud is a frequent topic in both the legal and consumer media. Consumers are increasingly better informed about how fraud

works. In legal arenas, fraud has become the subject of presentations, articles, publications and Continuing Legal Education programs. Despite this increased awareness, the cost of these frauds to the lawyers' insurance program has not decreased.

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The number of ways that fraud can be committed by those who interact with lawyers is complex. Previously LAWPRO tracked two types of fraud – fraud by the lawyer or fraud by someone else.

The “someone else” category has expanded quite dramatically. We now track:

- Fraud by client
- Fraud by insured
- Fraud by partner
- Fraud by lawyer employee or associate
- Fraud by non-lawyer employee
- Fraud by real estate agent/mortgage broker
- Fraud by non-client party to transaction
- Fraud by other

Lawyers are vulnerable to all of these types of fraud. Here are some examples:

Fraud by non-lawyer employee

Funds in the amount of more than \$50,000 were certified and stolen from a lawyer’s trust account. This lawyer had left signed trust account cheques available for the convenience of the staff. One short-term employee used this convenience to steal money from the trust account. In other situations, staff employees have created false mortgages.

Fraud by client

This is the most prevalent type of fraud and the schemes involving identity theft and value fraud are widely publicized. Clients tender false identity documents and register fraudulent mortgages.

Fraud by insured, associate or partner

In some unfortunate cases, lawyers are complicit in the fraud and participate in the fraudulent mortgage transactions. Other situations start off more innocently. The lawyer enters a lawyer-client relationship in the normal course and is involved in a series of real estate transactions. The promise of ongoing work is enticing. However, the catch is that some of these transactions do not make commercial sense. Funds are paid to third parties who are not involved in the transaction. Multiple transactions are completed, and in many cases, the person whom the lawyer meets with and considers to be his client, is not the one who is actually purchasing, selling and signing mortgages. The lawyer turns a blind eye. The lawyer may initially be a dupe, but at some point he or she knows that the transactions are fraudulent. Yet he continues to act.

Fraud by non-client party to transaction

The lawyer acts for a lender only, but does not follow instructions concerning photo ID, searching title and commenting on purchase

price. The borrower successfully completes a fraudulent transaction.

The price of fraud

At the end of the day somebody will pay for these fraudulent transactions. The financial institutions, the title insurers, Canada Mortgage and Housing Corporation and other mortgage insurers, the Law Society Fund for Client Compensation, the Land Titles Assurance Fund, LAWPRO or the victim all stand to lose. Rarely, of course, does the perpetrator of the fraud pay.

Needless to say, when a fraud is committed by any member of a firm or association, there are many other costs to the partnership and the lawyer that are not financial. The emotional toll on those left to pick up the pieces can be huge. They will have lost the trust of the clients; they will be involved in time-consuming investigations and explanations; everyone in the firm will be affected.

The cost to LAWPRO

Fraud-related claims are not disappearing. In 2003, we had in our claims portfolio 33 fraud-related files with a value of \$500,000 at six months into the fund year. Three and a half years later, the 2003 fund year claims have increased to 111 with a value of \$4.4 million. In 2006, we had 108 fraud claims with a value of \$6.7 million.

Coverage provided by the LAWPRO policy

Under the LAWPRO policy, fraud and dishonest acts by the insured lawyer are excluded from coverage. Except for sole practitioners, lawyers generally must secure minimum Innocent Party insurance coverage at a premium cost of \$250 for \$250,000 of coverage.

Many firms pay another \$249 per lawyer to ensure that they have Innocent Party coverage up to \$1 million. Therefore, if an employee or a partner commits a fraud, firm lawyers are covered and the client will receive compensation. This coverage is available on an optional basis to sole practitioners as well, as long as they qualify. Subject to underwriting, a lawyer with a good claims record usually can purchase this coverage.

What can you do?

The best you can do is to make efforts to protect yourself, your firm and your clients from fraud. Be vigilant. Educate your staff. Create processes and procedures that help identify suspicious transactions and adhere to them.

The articles that follow provide some practical advice that you may want to incorporate into your law practice.

Caron Wishart is vice-president, claims at LAWPRO. This article is based on a presentation on fraud at the OBA’s A Viper in the House: Real Estate Fraud and You conference in November 2006.