



Guarding against real estate fraud

Catarina Galati and Jerry B. Udell

It's a war out there!

by Jerry B. Udell and Eli M. Udell

A quick look at the daily media confirms that transactional fraud has become a growing problem for real estate practitioners across Ontario. Although law firms across the country are tightening their policies and procedures in response to the increased frequency and severity of fraud, the fraudster – as we all have come to label the 'enemy' – has proven to be a formidable foe, capable of fooling even the most attentive lawyer.

This is a new battle to be waged against an old enemy. Using a clever technique of 'guerrilla warfare', the fraudsters usually lie low and out of sight: They study and test our complex regime of real property law, looking for each and every hole to exploit. The best fraudster is not a copycat – in most cases, the techniques are entirely original and well-disguised. We, in turn, can no longer rely on our old and outdated tools when we go into combat. If we do, we are doomed to fail.

In short, the fraudster is intent on staying ahead of the game. Conversely, lawyers want to prevent the advance

as best we can. We all have a duty to stay vigilant – not only to help protect our clients against being victimized by fraud, but also because it's in our best interests to do so. We are, after all, the gatekeepers to the transaction itself. By virtue of this role, we give the lending institutions and the government a valid, viable reason to involve us in the entire real estate process. If we absolve ourselves of the responsibility that comes with our role, then there will be no need for us at all.

© 2007 Lawyers' Professional Indemnity Company. This article originally appeared in LAWPRO Magazine "Aging Boomers," Winter 2007 (Vol. 6 no. 1). It is available at www.lawpro.ca/magazinearchives

A strategic approach: “The battle plan”

In the fight against real estate fraud, every lawyer can do his or her part by incorporating a number of simple mechanisms into his or her practice. This article outlines a layered strategy for fraud prevention at three separate levels:

- the **client intake**;
- the **deal phase**; and
- the **universal approach**

You should develop a routine with your team. At the very least, there should be a system of checks and balances in your office. Whether you choose to use all of the tools below, or only a few, just remember: This is a decision that may very well make the difference between catching the crook or being caught by one.

Client intake

CONFIRM YOUR CLIENT’S IDENTITY

When a new client comes through your door, a member of your staff should complete a reverse phone number search of that person on <http://www.canada411.ca>. This search is absolutely essential, unless you have dealt with the person or corporation in the past. Always insist that your client provide you with a land-based telephone number, because directory assistance does not yet support cellphones. This search should be conducted to ensure that the information your client has given you is valid.

CHECK YOUR DATABASE & FILES

Have a member of your staff crosscheck your firm’s roster of past and present clients to determine if you have done any work for the person or corporation in the past, and, if so, what type of work was done. Most importantly, this type of search usually rings a bell if there have been previous problems or issues with the client. This search is also an excellent preliminary tool for identifying a potential conflict of interest (should one exist).

Doing the “deal”

TAKE THE LEAD

- a) Be an active participant in every deal that comes across your desk. Most importantly, before executing any payouts to any of the parties, ensure that you personally review any and all trust statements that are associated with the deal and with your client.
- b) Consistently encourage the rest of your staff to ask you questions should someone become suspicious. Always stay in close contact with each member of your team about each file as you move towards the closing.
- c) Make it loud and clear – documentation matters. If something suspicious arises, it should be documented without delay. Ensure that every member of your staff can identify and recognize the overly anxious, nervous or restless client. E-mail is a powerful tool in this respect: It is essential that



Eli M. Udell

you foster a policy of immediate communication from the outset. If any member of your staff becomes apprehensive about a file, he or she should feel comfortable telling you about it right away.

IDENTIFICATION, TAKE TWO

- a) Prior to completing a mortgage deal on behalf of your client, instruct your staff to take a number of precautions. This cautious approach is necessary to confirm that the information your client has given you remains properly aligned with what any other parties to the transaction – such as a lender – may desire.
- b) Train your receptionist or front line person to request at least two pieces of government-issued identification when the client arrives. When your client makes an appointment, let him or her know that **two** pieces of identification are required. Not all lenders require the same form of identification. You are obligated to play by their rules and meet their requirements.
- c) Make sure that the client knows in advance what is expected of him or her, **before** he or she shows up at your doorstep.
- d) Have your receptionist or front line person electronically scan the client’s identification.

(cont’d on page 30)

Real estate fraud: Being creative & fighting back

Real estate fraud is a serious issue. Lawyers should consider implementing some of the following procedures within their firms to fight fraud.

ELECTRONIC REGISTRATION – PERSONAL SECURITY PACKAGE (PSP)

- Implement policies in your firm to safeguard all PSPs issued under your Teraview account.
- Train staff to ensure they understand the importance of not sharing PSPS.
- Take steps to cancel PSPs belonging to those no longer with your firm.
- Periodically review disbursements made through your Teraview account looking for any unusual disbursements or activity.

JOINT RETAINERS

If you are acting in a joint retainer, ensure that you act in the best interests of both clients throughout the retainer and that you do not prefer the interest of one client to the other.

If you are acting for both a borrower and a lender in a mortgage transaction, disclose to the lender all information that you know and that in your reasonable opinion may be material to the lender's decision to lend or not to lend. This information might include:

- the fact that there is a flip;
- the fact that there are amendments to the agreement of purchase and sale changing the terms of the agreement upon which the lender has based its mortgage transaction.

Examples include:

- changes in the purchase price;
- extra deposits payable;
- renovation or other credits;
- changing the parties to the transaction.
- the fact that the mortgage documentation is to be executed under power of attorney, where this fact is not apparently known to the lender;
- information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the lender's ultimate decision to advance funds. Examples include:
 - the actual proceeds of sale expected by the vendor;

- the use of counter cheques;
- identification irregularities;
- information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment. Examples include:
 - changes in the mortgagor's economic circumstances, employment or marital status,
 - evidence of inaccurate appraisals.

BE ON GUARD AGAINST BECOMING THE TOOL OR DUPE OF AN UNSCRUPULOUS CLIENT

If you have suspicions or doubts that you might be assisting a client in dishonesty, fraud or illegal conduct:

- make reasonable inquiries about the client;
- make reasonable inquiries about the subject matter and purpose of the retainer;
- make notes of the results of these inquiries;
- disclose your concerns to all of the clients in the retainer;
- if appropriate withdraw from representing the client(s).

Verify that the person retaining you and/or signing documents under your supervision has reasonable identification to substantiate that he or she is the named client/party and retain details or information in the file about the identification obtained.

CLOSING TRANSACTIONS AND DUE DILIGENCE

- Develop and use checklists of red flag indicators to assist you and your staff to identify transactions that could involve real estate fraud.
- Review instructions from the lender carefully as soon as possible upon receipt and develop a list of requirements. If you are unable to meet the requirements immediately notify the clients.
- Prior to registering electronic documents, obtain and retain in your file the client's written authorization.
- Develop a policy that whenever possible only a lawyer in your firm will sign for completeness documents that require electronic registration.
- Carefully review documents before they are signed.

Catarina Galati is senior competence counsel, Law Society of Upper Canada.

(cont'd from page 28)

- e) Use this scanned copy to confirm that the documents provided by the client will satisfy the requirements of any lender(s) involved.
- f) Double-check your scanned document and scanned license against any instructions received vis-à-vis the transaction itself. If any of the listed names differ, draft a formal affidavit for your client to sign, confirming that he is who he claims to be.
- g) A common form of identification provided by most clients is their Ontario Driver's Licence. For as little as \$200 you can purchase a magnetic strip reader and software that reads the magnetized strip on the back of their licence. It can then be stored with the scanned copy of the other identification provided in your database. For a small fee you can also access the Ministry of Transportation website and confirm whether or not the licence is valid or if there are any fines.

OTHER INDICIA

Other unusual items may give you signals or flags that a fraud is at hand. These items are:

- a) there are substantial Cash Net Proceeds from the sale;
- b) the closing is rushed;
- c) sale proceeds are not payable to the registered owner;
- d) the property is vacant;
- e) the property is mortgage free; or
- f) the client offers only a cellphone number for contact purposes.

If any of these flags are raised, you should instruct your staff to take the necessary steps to ensure that you are not unwittingly being dragged into a fraud scheme.

The universal approach

Beyond intakes and retainers, what can your office do, on a continuing basis, to identify the enemy and prevent the harmful occurrence of fraud?

TRAIN YOUR TROOPS

Each year, make sure that you send at least one member of your staff to the Law Society of Upper Canada's annual seminar for law clerks. These seminars regularly discuss the evolution of the guerrilla warfare we have discussed – and its attendees are always shown new techniques that have developed over the past year, what to look out for, and how to pre-empt their use. When your staff member returns from the meeting, designate him or her as the team leader for fraud prevention in your office. Schedule an information-sharing session – led by your team leader – with the rest of your current staff. When a new person comes onboard, have your team leader meet with him or her immediately to discuss the importance of fraud prevention.

Mobilizing your “battle plan”: Discovering an anomaly or fraud

IT'S ALL IN A NAME

It is not unusual for the name on the instruction document to be different from the actual client name. The name “Sean” or “Jean” may be recorded on a birth certificate, yet on the driver's licence the same person may use the name “John.” Some people use their second name as their name of choice; others, for valid reasons, use nicknames or pseudonyms.

In these situations, it is not good enough simply to ask your client about the discrepancy. Get it in writing. Ask the client to sign an Affidavit confirming the change of name **and** call the lending institution to confirm that it is aware of the change or difference. Paper the file to confirm that all parties know about the situation, and ask the lender for a fax confirming that you are safe to proceed.

WHO'S YOUR CLIENT?

Not everyone has a driver's licence or other forms of identification which the lending institution has mandated you to obtain in the ordinary course. If your client has no acceptable form of identification, you **must** confirm with the lender – by telephone, fax or e-mail – that the lender is aware of the discrepancy or issue. Paper the file to confirm that the lender knows about the situation, and ask the lender for a fax confirming that you are safe to proceed.

GOTCHA!

What if you catch a fraudster? Today, with mortgage brokers and other independent individuals involved in many aspects of your transaction, you can assume nothing. At the outset, if you have a problem, you should immediately request instructions in writing from both parties. If the client declines, resign from the file.

Overall, unless you are certain that a fraud is being committed, tread carefully. However, if you are certain that things are askew, you must act quickly to protect the integrity of your practice. Here are a few helpful hints for getting started:

1. Resign in writing from the file;
2. If possible, get written confirmation from the client that he or she has received a notice of your resignation;
3. Call the Law Society of Upper Canada; and
4. Document everything.

Jerry Udell is a partner with McTague Law Firm LLP in Windsor. Eli Udell is a law student. The authors thank Steven Shub, Ray Leclair, and Sally Burks for their comments and suggestions on dealing with fraud in daily practice.

Ed note: This article is a précis of a paper presented at the OBA seminar, “A Viper in the House: Real Estate Fraud & You” in November 2006. The full text is available at www.practicepro.ca/elderlaw.