

Fighting fraud: tips for lawyers

What can be done when fraudsters continue to refine their schemes? Obviously the financial institutions should be more diligent in researching and reviewing the proposed transactions before agreeing to lend money. But the lawyer acting for the financial institutions also has an important role to play.

Obtain photo identification

The examples listed on the previous pages emphasize the need for lawyers to obtain photo identification of borrowers to protect themselves from negligence claims.

In *Yamada v. Mock*, the court clearly said that lawyers cannot prevent fraud but can make it a little more difficult for the fraudster and should at least obtain identification from the borrower. This seems to be the current standard of care for lawyers. Failing to do so will no doubt bring a claim against the lawyer in a fraud or impostor case.

The proliferation of identity theft today means you must be on guard. Lawyers should ensure that they keep copies of the identification in the file and ensure that it is legible. It is critical to proving that you met the standard of care that you have the evidence in your file of your confirmation of the borrower's identity.

Keep the lender informed

If the vendor on the Agreement of Purchase and Sale is not the same as the person listed as the last registered owner on the search,

questions should be asked. If there is a flip involved, advise the financial institution of this information. If the price from one sale to the next has escalated significantly, the lawyer should also consider advising the financial institution, so that the final decision as to whether or not to proceed with the loan transaction is made on the basis of all relevant information.

Question unusual directions

As well, the lawyer should carefully scrutinize and critically assess any directions he/she receives to determine whether persons seemingly unrelated to the transaction (other than a recognized creditor) are to receive significant amounts from the mortgage proceeds. If a large percentage of the mortgage proceeds are to be paid out to the borrower themselves, or to parties other than a financial institution or recognized creditor, questions should be asked.

Consider title insurance.

Most title insurance policies insure against fraud. Discuss the title insurance option with your clients, so they fully understand the scope of coverage that title insurance provides. At the same time, appreciate the impact of these frauds on title insurers. Follow all of their procedures carefully to be certain that a policy is issued and coverage is available.

– Based on contributions from **S. Troister, R. Potts and M. Selznick**

What if you suspect a fraud?

The Law Society advises that lawyers become familiar with the indicators of fraud in real estate transactions to avoid becoming the tool or dupe of their clients.

Lawyers should also know that the Law Society can help answer questions about lawyers' ethical obligations should they be acting in a transaction where a client is or may be committing a fraud. For example, the Society's Practice Advisory department can give guidance to lawyers on their obligations regarding disclosure of confidential client information to third parties, obligations when acting on a joint retainer for both the lender and the borrower in a transaction, and withdrawal of their services.

The *Rules of Professional Conduct (Rules)* specifically prohibit lawyers from assisting in any dishonesty or fraud. Subrule 2.02(5)

provides that a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct or instruct the client on how to violate the law and avoid punishment. The commentary to the subrule warns lawyers to guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

Lawyers with questions about their ethical and regulatory responsibilities can access practice tips, the *Rules* and other resource materials on the Law Society's Web site at: www.lsuc.on.ca. The Practice Advisory department is also just a phone call away at 416-947-3315 or toll-free at 1-800-668-7380, ext. 3315.