



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Real Estate Fraud Being Creative and Fighting Back

Real estate fraud is a serious issue. Lawyers should consider implementing procedures within their firms to fight fraud. The following is a list of steps that a lawyer can take to fight fraud. This list is not exhaustive nor is it intended to replace the lawyer's professional judgment. With the exception of those steps that a lawyer must take in order to comply with legal or regulatory requirements (Rules of Professional Conduct or By-Laws), a lawyer should take steps and implement procedures to fight fraud best suited to the lawyer's practice and the circumstances of the individual client file.

Consider taking some of these steps to fight fraud.

Hiring Practices

- ❑ Verify past employment.
- ❑ If there are gaps in the employment history, obtain explanations for those gaps.
- ❑ Check the details of the resume and call the references.
- ❑ In appropriate circumstances, do background checks.

Accounting Controls

Cheques

- ❑ Never sign a blank cheque.
- ❑ Never sign a cheque with no payee or no amount stated.
- ❑ Carefully review cheques before signing.
- ❑ Develop a policy where requests for cheques are accompanied by a signed cheque requisition evidencing approval.
- ❑ Establish a policy to always issue receipts for all cash and cheques received.
- ❑ Keep cheques in a secure location and allow access only to authorized staff.

- ❑ Stamp incoming cheques “for deposit only” and whenever possible deposit cheques the same day that the cheque is received.
- ❑ Stamp original copies of invoices “paid” to prevent a person from using the invoice more than once to obtain payment.
- ❑ Number cheques in order and check the sequence.
- ❑ Number receipts in order and check the sequence.

Bookkeeping

- ❑ Regularly review your books and records including source documents such as deposit books and cancelled cheques.
- ❑ Do not let accounting records fall into arrears.
- ❑ Reconcile your accounts within the required time period (by the 15th day of the month following) and look at all original bank statements, cheques including cheque numbers, deposit books, computer print outs or ledger sheets as part of the process.
- ❑ Periodically check the clients’ trust ledger looking for unusual or incorrect items.
- ❑ Ensure that you have adequate documentation in the file for trust transfers - for example, written instructions from the client authorizing the transfer of funds to another client.

Segregation of Duties and Handling of Money

- ❑ If possible when assigning duties separate the duties of staff so that one person does not have complete control of the process. For example, assign the task of opening the mail and receiving deliveries to one person and the duty to make deposits to another person.
- ❑ If possible separate the tasks of creating and posting cheques and reconciling cheques and receipts.
- ❑ If practicable, have two signing authorities for cheques over a certain amount of money.

Supervision of Staff

- ❑ Set an example by acting ethically.
- ❑ Periodically conduct spot reviews of files.
- ❑ Have a policy of keeping a copy of cheques relating to a matter in the file so that multiple staff sees the cheques.

- ❑ Have bank statements delivered to you unopened.

Electronic Registration – Personal Security Package (PSP)

- ❑ Implement policies in your firm to safeguard your PSP(diskette and pass phrase used to access the electronic registration system) and all PSPs issued under your Teraview account.
- ❑ Train staff to ensure they understand the importance of not sharing PSPs and safeguarding their PSPs.
- ❑ Review disbursements made through your Teraview account.
- ❑ Develop policies requiring staff to report to you any misuse of PSPs by anyone who has a PSP under your account.
- ❑ Take steps to cancel PSPs belonging to persons 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 property is being re-sold the same day or within a short period of time at a higher price)
- ❑ the fact that there are amendments to the agreement of purchase and sale, either formal or otherwise, changing the terms of the agreement upon which the lender has based its mortgage transaction. Examples include:

- ❑ purchase price reductions
 - ❑ extra deposits payable
 - ❑ renovation or other credits
 - ❑ cash-backs or other credits to the purchaser
 - ❑ changing the parties to the transaction
 - ❑ changing the purchase price
 - ❑ adding subsequent mortgages
 - ❑ adding a vendor take back mortgage
 - ❑ changing the amount payable on closing and
 - ❑ changing the manner of taking title

- ❑ 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 vendor named in the agreement of purchase and sale is not the registered owner of the property at the time of the agreement of purchase and sale
 - ❑ the actual deposit being paid
 - ❑ the actual date of closing
 - ❑ 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
 - ❑ changes in the mortgagor's employment
 - ❑ changes in the mortgagor's marital status and
 - ❑ evidence of inaccurate appraisals
- ❑ mortgage surpluses - the fact that the mortgage advance exceeds the balance due or actually paid on closing
- ❑ the direct payment of the deposit or down-payment to the vendor.

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).
- ❑ Clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear and make notes to the file.
- ❑ Make efforts to know your client.

- ❑ Make it a practice whenever possible or practicable for you to meet personally with the client and attend to the signing of the closing documents.
- ❑ Undertake steps to 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.
- ❑ If you are acting for a corporation or an organization, ensure that the person giving instructions for the organization or corporation is acting within that person's actual or ostensible authority.
- ❑ If you are acting for a corporation, request and review the original minute books of the corporation.
- ❑ If you are concerned about the identity of a lawyer acting in a transaction, verify that the address and phone number of that lawyer match the information on file with the Law Society.

Closing Transactions and Due Diligence

- ❑ Develop and use checklists of red flag indicators to assist you 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.

- Review when doing a title search:
 - all documents on title affecting the client's interest in the property and retain notes on the search of title with respect to every real estate file
 - the values revealed by arms-length transfers in the recent past, to determine if there have been any suspicious changes in value
 - the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges.

- Report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to the purchaser/borrower if you are acting for the purchaser/borrower, the lender if you are acting for the lender and the title insurer.

- 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.

- Develop checklists of red flag indicators of real estate fraud for use by staff so that files containing certain indicators are brought to your attention immediately.
- Train staff to look for indicators of real estate fraud in real estate files and to bring those files to your immediate attention.
- Discuss title insurance options with your clients including coverage for fraud so that they fully understand the scope of the coverage available and if the client decides not to obtain title insurance, obtain a written waiver from the client.
- Where title insurance is being obtained, issue the title insurance policy as soon as possible after closing to insure that an issued policy exists should the client need to make a claim.
- Where title insurance has been obtained, compare the issued policy carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

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- i. Some of the practice tips included in this article have been adapted from an article entitled “*Is there a crook in the firm?*” written by Susan Elliott for the Law Society Program, *Fighting Real Estate Fraud* presented on October 19, 2004, and from the LAWPRO publication, “*The Many Faces of Fraud*”, published June, 2004.

This information is not a substitute for the member’s own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.