



# PRAEVENTIO

« Crépuscule d'octobre », Claude Théberge

November 2008 | Volume 9 | n° 6

## TABLE OF CONTENTS

Regulation respecting the issuance of special permits	1
It's not what you say, it's what they hear ...	2
Do Your Files Contain This Document?	3

## REGULATION RESPECTING THE ISSUANCE OF SPECIAL PERMITS

### Amendments to the insurance policy

The *Regulation respecting the issuance of special permits*, which came into force on June 26, 2008, will impose additional risks on the Professional Liability Insurance Fund's operations as regards foreign-trained lawyers who continue to be members of their bar of origin.

After consideration and in light of the many uncertainties related to these new risks, at the meeting of the General Council of the Barreau held on September 25, 2008, the General Council, upon the recommendation of the board of directors of the Insurance Fund, adopted an amendment to the policy in order to limit coverage for holders of special permits strictly to the services authorized by the said permits and to one million dollars (\$1,000,000) per loss.

It is worth noting that there are three types of **special permits**, whose purpose is to facilitate the mobility of lawyers:

- a) The special Canadian legal advisor permit allows the holder thereof, subject to being entered on the Roll of the Order, to engage in the following activities on behalf of another person:
  - 1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he is legally authorized to practise law or involving matters under federal jurisdiction;
  - 2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;
  - 3) give legal advice and consultations on legal matters involving public international law; and
  - 4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.
- b) The special corporate legal advisor permit allows the holder thereof, subject to being entered on the Roll of the Order, to engage in the activities described

in subsection (1) of section 128 of the Act respecting the Barreau du Québec for the account of his employer or the employer's subsidiaries.

- c) The special foreign legal advisor permit allows the holder thereof, subject to being entered on the Roll of the Order, to engage in the following activities on behalf of another person:
  - 1) give legal advice and consultations on legal matters involving the law applicable in the State where he is legally authorized to practise law; and
  - 2) give legal advice and consultations on legal matters involving public international law.

The full amended text of the policy that came into effect on September 25, 2008 is available at: <http://www.assurance-barreau.com/en/pdf/police-barreau.pdf> 

## IT'S NOT WHAT YOU SAY, IT'S WHAT THEY HEAR ...

*“Between what I think, what I want to say, what I believe I’m saying, what I say, what you want to hear, what you believe you’re hearing, what you hear, what you want to understand, what you understand, there are ten possibilities we may have difficulty communicating. But let’s try anyway...”*

Bernard Werber, *Le père de nos pères* [TRANSLATION]

How do people feel when they are clients in a law firm? Regrettably, this is not a topic that is broached in law school. Certain lawyers give thought to this matter from time to time; others, caught in the frenetic pace of their legal practice, do not concern themselves with it.

Yet, it is essential to recognize that, most of the time, clients do not consult lawyers for the mere pleasure of doing so! They have a problem—one they feel is important. They need help (for example, they have been served with proceedings), or they have to deal with a major difficulty (for example, they have lost their job) or, perhaps, they are about to take a risk (for example, they are starting a business). As a result, they may be embarrassed, nervous or worried—perhaps even frightened. To add to the stress, their budget generally does not contemplate the expense of professional fees or disbursements.

Faced with an unfamiliar system, clients will generally then contact a law firm, armed with preconceived notions about lawyers and the judicial process and having set unrealistic expectations (*My neighbour will never need to work because of the alimony she gets; I want the same thing!*).

Once in the lawyer’s office, they are still on unfamiliar ground and are bombarded with information: procedures, deadlines, advice... in a language filled with jargon that, at times, is incomprehensible (injunction, *subpoena*, costs to follow suit, etc.). It’s not surprising, then, that they only remember part of what was said!

In short, all of these emotions, expectations and preconceived notions can create a multitude of obstacles to lawyer-client communications.

This can result in a marked difference between what you have told the client and what he has heard. When it comes to loss prevention in professional liability matters,

merely claiming that you said such and such a thing to a client is generally insufficient.

It is your duty to see to it that your clients hear (and understand) what you have told them. Here are a few suggestions to ensure this happens:

- It is important to establish a good rapport with the client from the very start. Make sure the client is at ease. Be attentive, courteous, relatively sympathetic and receptive to his needs. Listen actively: repeat certain words or phrases so the client knows that you have understood what he has told you. Once the client is confident that you are listening to him, he will be able to take in the information you provide.

- Opt for face to face meetings with the client when possible so that you can confirm that he has grasped what you have told him. Such meetings enable better communication and demystify the aura surrounding lawyers and the judicial process.

- Devote sufficient time and attention to the client to ensure you understand his questions and he understands your answers.

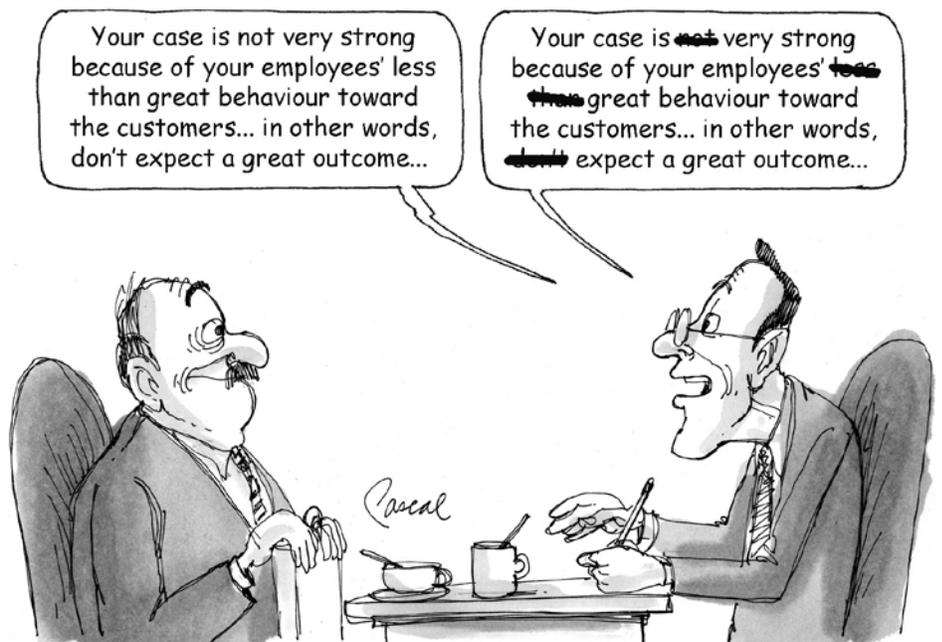
- Just because two people have similar legal problems does not mean they have the same communication needs. Don’t treat all your clients exactly the same way! Differences in a client’s mother tongue, culture, age, education and experience may affect what he understands.

### WHAT YOU SAID TO YOUR CLIENT :

Your case is not very strong because of your employees' less than great behaviour toward the customers... in other words, don't expect a great outcome...

### WHAT HE THINKS HE HEARD :

Your case is ~~not~~ very strong because of your employees' ~~less~~ ~~than~~ great behaviour toward the customers... in other words, ~~don't~~ expect a great outcome...



You should adjust the way you communicate based on these factors; don't rely on the client to do so, because he may assume that you will ask relevant questions or he may be too embarrassed to speak up.

- Dispel the client's preconceived notions by addressing them at the very first meeting and discuss all doubts and concerns.
- Each time you communicate with the client, explain specifically, explicitly and in plain language what you are going to do, why you are going to do it, within what timeframe and how much time it will take. Be frank and direct. Resist the temptation to hold back information or to soften the impact of bad news or the negative aspects of a case. Be careful not to promise an unlikely or impossible outcome. You must tread very cautiously, because people often remember only what they want to hear about foreseeable or expected results.

- Never assume that information has been properly understood or that something is obvious and need not be explained.
- Clients may be ashamed to show their ignorance and will sometimes nod their head and tell you they understand, even though they have no idea what you have said. Avoid complaints such as "*My lawyer never explained this to me!*" by checking the client's comprehension with open-ended questions. Thus, instead of saying: "Do you understand what I said?", "Is that okay?" or "Do you follow what I'm saying?", ask: "What do you think about ...?".
- Encourage people to ask you questions by saying: "*I'm sure you have a lot of questions for me*", before ending a meeting.
- Finally, in the time it takes a client to leave your office and walk to his car, he may feel he no longer understands what you told him. Be available and tell your clients not to hesitate to contact you in such circumstances.

- Clients usually have to manage a number of emotions at the same time, while taking in information and concepts that are sometimes hard to grasp. In order to ensure that the client does not forget what has been said, it is crucial to communicate the information to him in writing and document the advice given.

Misunderstandings between lawyers and clients are the principal source of malpractice claims. Poor management of a client's expectations and poor communication by the lawyer can generate a perception in the client's mind that his case has not received all the required attention and that the lawyer has committed an error. Given that the possibility of a misunderstanding can arise at any stage of a mandate, you must continuously ensure that these possibilities are kept to a minimum. To do so, you must constantly strive to ensure that what you have said and what the client has understood are one and the same thing. ☂

## DO YOUR FILES CONTAIN THIS DOCUMENT?

One of the most important things a lawyer can do is properly document his clients' files.

As stated many times in the Prevention Bulletin, the letters sent to a client confirming the type of mandate, the advice provided, the decisions that have an impact on the client's expectations as well as the strategic decisions that have been made constitute a fundamental loss prevention measure.

Obviously, a letter need not be sent to a client for every single action involving his case. Nonetheless, you should keep track of such actions.

Thus, between the beginning of a mandate and the completion of the mandate, every communication, meeting, telephone conversation and telephone message received or left should ideally be recorded in a note to the file.

You should not rely on your memory or on the fact that you have confidence in the client. After all, legal proceedings are not necessarily instituted the very next day following an alleged "fault" (since the prescription period for professional liability is 3 years). Furthermore, it is highly possible that even an informed client will swear, without being dishonest, that he does not remember a given conversation, that he did not understand the conversation or that he remembers something completely different from what the lawyer remembers regarding the conduct of the case.

For the sake of the client and that of the lawyer, the file should therefore provide a complete picture of what took place.

It is possible that the lawyer will not be the only one to work on the case. Clear and precise notes will allow someone else to continue to work on the case, even in the lawyer's absence, the whole in the best interests of the client.

Written notes regarding oral communications will also generally help reduce misunderstandings.

In short, organized files make it possible to provide better service to clients.

Obviously, in the event of a complaint, the lawyer will be in a position to defend himself with certainty and conviction.

A note to the file can therefore have a major impact on a claim or on malpractice proceedings.

### Here are a few suggestions:

- The note should be dated (including the year) and indicate its author;
- The note should be legible. To the extent possible, it should be typed;
- The note should be comprehensible to others. Make a note to file that will be understood in 3, 4, 5, 6, 7 or more years;

# PRÆVENTIO

- The note should indicate the duration of the meeting/conversation and the presence of other persons, if any;
- The note should state the material facts, the advice given and/or what must be done and within what deadline;
- If the conversation relates to a document, such as a draft consent, the note should refer to it and the document should be clearly identified;
- To the extent possible, use a standard form in a distinct colour so that the notes are easy to find (avoid notes written on other documents, such as old letters, invoices, the back of timesheets, and the like!);
- Make sure that all your staff (receptionists, assistants, junior lawyers, articling students, and so on) document the file in the same way;

The number of claims that are essentially based on a question of credibility regarding what was allegedly said is really quite surprising. Developing the necessary discipline to properly document your files will make it possible for you to avoid being the subject of claims. From a professional liability point of view, it is therefore a crucial practice. ☂

Use the following example as a starting point:

## NOTE TO FILE

File no.:	
Lawyer or other staff member:	
Date:	
Meeting/telephone conversation with:	
Duration:	
Subject:	
Advice:	
Actions to be taken:	
Deadlines:	

Note: Model adapted from "Memo the file !", CLIA, Issue No. 10, Bulletin No. 52.

## NOTICE

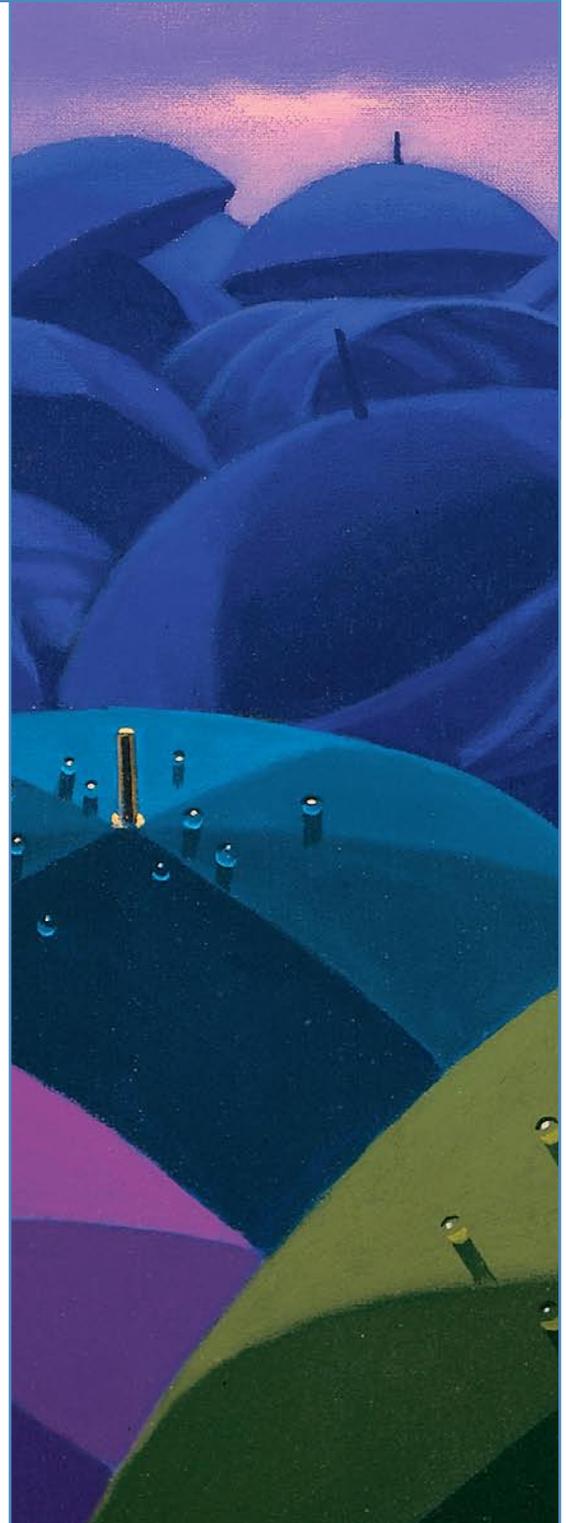
### Service de prévention

M<sup>e</sup> Isabelle Guiral, Coordinator  
Professional Liability Insurance Fund of the Barreau du Québec  
445 Saint-Laurent, Suite 300  
Montreal (Québec) H2Y 3T8  
Telephone: (514) 954-3452 or 1-800-361-8495, ext. 3285  
Fax: (514) 954-3454  
E-mail: [assuranceresponsabilite@barreau.qc.ca](mailto:assuranceresponsabilite@barreau.qc.ca)  
Visite our web site at: [www.assurance-barreau.com](http://www.assurance-barreau.com)

Assurance  
responsabilité  
professionnelle

**Barreau** 

Une version française est aussi disponible sur demande. / A French version is available upon request.  
All published Praeventio bulletins are available at the following address: [www.assurance-barreau.com/fr/bulletin.html](http://www.assurance-barreau.com/fr/bulletin.html)



This publication is an information tool which has been compiled for the purpose of minimizing the risks of legal claims for professional fault. Its content shall not be considered to be an exhaustive study of the topics covered, legal advice, nor as suggesting minimum standards of professional conduct.

This Loss Prevention Bulletin is published by the Professional Liability Insurance Fund of the Barreau du Québec.