



Home → News → LIANSwers

Issue 49 | January 2018

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## "FEELING A DRAFT": AVOID EMAILER'S REMORSE



We've all done it – that cringey moment when you realize you've sent an email rife with typos and/or awkward phrasing, neglected to include an attachment, or left the subject line blank. Or worse, you've sent an email that gives private information to unauthorized parties. A simple way to avoid these mistakes involves working your way from bottom to top in your email drafting process. Follow this composition order:

1. Draft the body of your email **first**, and make any necessary edits before moving to step two.
2. Include any attachments.
3. Complete the subject line.
4. Add the recipient address(es). If relying on autocomplete, be sure to confirm that the addresses are correct (e.g., are you supposed to choose the "[asmith@yourclient.com](mailto:asmith@yourclient.com)" or the "[asmith@opposingcounsel.ca](mailto:asmith@opposingcounsel.ca)"?)

When you leave the recipient field blank until you have completed the email, you greatly reduce the risk that an incomplete, unedited, or otherwise unprofessional email will accidentally be sent.

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## **“DAMMIT JIM, I’M A LAWYER, NOT AN APPRAISER”: ADVISING THE MORTGAGEE**

*This article has been reprinted from our January 2013 issue of LIANSwers.*

As we enter 2018 and, in some regions, the low point in the property season, it pays dividends to refresh ourselves on a few “ten thousand foot” principles when representing a lender.

First, it is easy to lose sight of the fact that we DO generally have the lender as a client – even if we never speak to a live body or are able to send them a bill. Unless the lender is independently represented or it is confirmed that you are not representing them or protecting their interests, you will almost certainly be considered to have the lender as a client or deemed client. This means several things:

1. It sounds trite, but read your instructions. Not only is the day of “two-page mortgage instructions” and “four-page mortgages” a thing of the past, they frequently change. Access the most recent version online - not anything you've saved - and keep a printed copy in the file.
2. Even if you are not specifically told (most instructions now contain this), you have the ethical responsibilities that go with joint retainers. This includes the obligation to advise each client that no information received from one can be kept confidential from the other, and that you cannot take either side in a dispute (unless otherwise agreed by the parties in advance). In turn, this obliges



you to be wary of “unusual credits,” adjustments other than in the ordinary course or divergences from the stated and real price.

The *Bank Act* provides for “loan to value” measurement rather than “loan to purchase price” and institutions quite regularly accept legitimate credits and non-cookie-cutter financings; sometimes they even originate them with cashbacks and the like. However, I suggest there is at a minimum a dual obligation: any specific instructions to advise of “flag” matters and the obligation of disclosure to conjoint clients.

3. Pay attention to special conditions, such as an obligation to verify owner occupancy of the mortgaged property, payment of particular obligations (e.g., existing debts) or variations needed from general instructions (e.g., when the value of land makes up much of the value and the dwelling cannot be insured for the amount of the mortgage loan). The writer has had at least one instance in which a mortgagee “knew” a particular condition could not be met, but would not remove it. Confirmation with the requisition for funds that “an advance will constitute confirmation that you accept ...” paid off when the inevitable “where is ...” letter arrived post-closing. Finally, beware of certifying to the uncertifiable, such as “lawyer to confirm that buyer has no other debts.”

Second, beware the identity regulations. For the most part, the relief from the obligation to verify client identity is limited to public companies, credit unions, the Crown and similar (see [LPA Regulation 4.13.8](#)). Remember, unless there is a specific exemption, you must identify the client and, prior to processing any trust funds from that client, verify their identity. In the case of the

borrower, this obligation extends to due diligence that the person in front of you is or will be, in fact, the beneficial owner.

Third, a non-institutional lender (and especially a private lender) may not only lack the sophistication of a Schedule I bank, but may be looking to you for additional protections – in the form of the security, the priority of the charge and even to the suitability of the investment. It is very important to clarify the scope of your retainer. I would personally urge confirmation in writing prior to any advance that as lawyers, we do not certify as to value, environmental matters, suitability of the investment, strength of the borrower, or costs of realizing on security. In any instance where the security is not a first charge, I would urge that this (and the associated complications of second or other subordinate security) be confirmed in writing as well. Despite the PPSA, we cannot certify title to chattels such as mobile homes, other than to say "we have found no other registrations in the PPRS system (by name or, if applicable, serial number).

Fourth, the "implied consent" rules for conjoint retainers contained in rule 3.4-13 of the [NSBS Code of Professional Conduct](#) only apply to banks and similar entities that lend in the ordinary course of business – not "Rich Uncle Bob" who is helping a relative start a business or purchase her first home.

The proliferation of non-traditional lenders, broker-oriented transactions and "creative financing" schemes have, in tandem with the economic gyrations of the last ten years, given rise both to increased foreclosures and claims against counsel under what might unscientifically be called "coulda shoulda woulda." As with all things, adhering to ethical first principles (including competence, practice standards, attention to instructions, and documentation) will stand you in good stead.

The author is indebted to guidance provided by an article by Nadia Dalimonte, LAWPRO's claims counsel, in November 20, 2012's issue of TitlePLUS Today, reprinted on November 21, 2012's practicePRO's "Avoid a Claim" Blog. Any errors or omissions in the above article are solely those of its author.

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Home → News → LIANSwers

Issue 49 | January 2018

# LIANSWERS

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## **AUTOMATED DECISIONS AND LEGISLATION UPDATES FROM CANLII**

An RSS feed sends current news and updates from various information and blog websites. It can also deliver images, audio or video messages, including podcasts, or recorded audio broadcasts that can be downloaded to your MP3 player or your computer.

**CanLII** (an open access database for Canadian legislation and case law) offers a comprehensive list of [RSS feeds for decisions and legislation](#) from federal and provincial courts and tribunals. Select the "RSS" link under the desired column to subscribe to that feed.

To receive current news and updates from an RSS application, locate and select this orange symbol which will prompt you to "Subscribe to this feed". Once completed, automatic updates will appear in your subscribed feeds folder.

Any questions on RSS feeds, contact Cynthia Nield [cnield@lians.ca](mailto:cnield@lians.ca).



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NEXT ▶

Back to LIANSwers: 49

CLIA

NSBS



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Home → News → LIANSwers

Issue 49 | January 2018

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## BECOME A MENTOR OR MENTEE WITH LIANS

Mentoring in the legal profession is a time honoured means of maintaining and enhancing professionalism and lawyering skills. It can help establish and improve relationships among lawyers, identify strategies to avoid complaints, increase skills and competencies, increase job satisfaction and help address issues of stress and isolation that lawyers sometimes face.

Mentors receive the satisfaction of helping someone grow and succeed in the practice of law while mentees benefit from the opportunity to receive regular encouragement and support, explore new ideas and alternatives, and develop new contacts and networking opportunities. To support this program, LIANS maintains a pool of members who have agreed to act as volunteer mentors and mentees.

In order to participate, fill out the [Mentorship Program Application Form](#) online, or download the fillable [PDF form](#) and save to your desktop and forward to [Cynthia Nield](#).

For more information, contact Cynthia Nield, LIANS' Database and Information Officer [cnield@lians.ca](mailto:cnield@lians.ca) or 902 423 1300 x346

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[◀ PREVIOUS](#)

[NEXT ▶](#)

[Back to LIANSwers: 49](#)

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## **CROSSING THE LINE: PRIVILEGED INFORMATION AT FOREIGN BORDERS**

Travel to foreign countries, be it personal or business, is a common occurrence. As has always been the case, prior to entry you can be subject to questions and a search. In today's world, a search extends to the ability of a border agent to examine any electronic device, be it a phone, tablet or a laptop, that a traveler may be carrying.

And in the case of personal travel, it is not uncommon to carry a work phone or computer.

For lawyers, this search is particularly problematic because of issues of privilege.

As most Canadian travel is to the United States, the following link is to the current U.S. border policy on searching electronic devices:

<https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf>. Pursuant to the policy, you can be asked for your password to open your device. Though files generally cannot be downloaded during a search, documents on the device can be examined.

Because the risk of a search of an electronic device always exists, steps can be taken to reduce (though not eliminate) the risk of inadvertently giving access to privileged information. These steps include:



1. having the device(s) in airplane mode before you reach the border to prevent access to your firm's system and any cloud storage if the device is searched;
2. consider deleting client information from the device or transferring it to the cloud so that if the device is in airplane mode, the information cannot be accessed from the device. Perhaps law firms should arrange for a cell phone specifically for travelling lawyers that the lawyer can forward their calls to but has no files, or access to files, on it;
3. if you have to take files and documents, use paper or perhaps put what you need on a USB stick that is properly encrypted.

In the worst case scenario, you should be prepared to turn your device over if the border agent demands it. If such a demand is made, you have to consider the risk of refusing the request. In the case of travelling to the U.S., though U.S. citizens cannot be stopped from entering the U.S., a non-citizen can be turned away at the border if the agent so decides. If your device is detained, the detention period, without seeking further approval is up to five days which may be a problem if you are travelling for a one-day meeting.

Certainly none of these solutions can completely eliminate all risk of inadvertent disclosure of privileged information if a search of a device is made. As this is a developing issue, if it is necessary to take an electronic device that you use for business on your travels, attempts should be made to at least reduce the risk of disclosure.

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◀ PREVIOUS

NEXT ▶

Back to LIANSwers: 49

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[NSBS](#)

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[Privacy](#)

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Home → News → LIANSwers

Issue 49 | January 2018

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## EXCHANGE AND CONSULT ON LIANS' ONLINE PRACTICE FORUMS

LIANS' online forums “Small Talk, “The Family Room” and “Real Estate Assistants Forum” allow solo and small firm lawyers, family law lawyers, and real estate assistants to connect and share information.

Practitioners in these areas are able to chat in a secure social network system. They are designed as an opportunity to share collective professional knowledge and experience, provide a sounding board, and otherwise connect but are no substitute for professional judgment.

Discussion group participants determine the topics for discussion. Topic headers should be descriptive and new topics should result in a new discussion thread. The contents of the network are confidential to the participants in each forum. Be respectful.

LIANS is not responsible for the content of the forums, and does not moderate these discussions. If you practice Real Estate or Family law, or are a solo/small firm practitioner and would like access, please contact us at [info@lians.ca](mailto:info@lians.ca).

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◀ PREVIOUS

NEXT ▶

[Back to LIANSwers: 49](#)

[CLIA](#)

[NSBS](#)

[Disclaimer](#)

[Privacy](#)

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Home → News → LIANSwers

Issue 49 | January 2018

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## **FRAUD ALERT: NOVA SCOTIA FIRM FALLS VICTIM TO LARGE CONSTRUCTION MACHINE PURCHASE SCAM**

A Nova Scotia firm recently experienced a loss after falling victim to a large construction equipment scam, with scammers using actual names and details to masquerade as legitimate companies. In questioning the legitimacy of a client request, we've been contacted by dozens of Nova Scotia lawyers in recent months who've received an email similar to the following:

*I'd like your office to handle a PSA for an equipment we are about to sell. Our client is located in your area. you will find client details below for conflict check.*

*[redacted] Construction Company  
Bedford, NS B4A \*\*\*, Canada*

*Attached you will find details of the 2008 Grove GMK7550 Telescopic Mobile Crane Equipment for your digest. If you can handle this please advise on your fee and also send over a fee agreement for our review and signing. I will like to discuss this matter further with you over the phone of course that's after we must have reviewed your fee agreement . So please let me know available dates so i can make myself available.*

*Regards,  
[redacted]*

*Sales & Purchase Executive*  
*[redacted] Crane Rental Corporation*  
*[redacted]*  
*Michigan 48239, USA.*  
*Phone: +1(713) [redacted]*  
*Fax: 713 [redacted]*

These types of scam attempts are extremely common, and scammers will send out thousands of versions of their email using hundreds of registered company names and active lawyer or broker names (pulled from online directories) to give an air of legitimacy, and are sometimes accompanied by bogus electronic supporting documents, such as a Guarantor form and personal IDs. Although the details may reflect a legitimate company, the cheque ultimately sent to the lawyer will be bogus in the hopes that neither the lawyer nor their financial institution will be vigilant and perform the proper verification processes before the trust account is debited.

If you do decide to proceed, remember that you must always confirm a prospective client's identification in accordance with the [Client ID Regulations](#) of the Nova Scotia Barristers' Society. Perform all searches as thoroughly as possible, be vigilant and take your time – and beware of any aggressive urgency on behalf of the other parties to complete the transaction. Be cautious with all cheques received, especially if they exceed an agreed upon amount. If you decide to proceed with a transaction, be sure to go to the bank website to verify branch transit number, address and phone number on the cheque. Wait until the bank confirms that the funds are legitimate and are safe to withdraw from the deposit. Where possible, use the [Large Value Transfer System \(LVTS\)](#), an electronic funds transfer system that allows large payments to be exchanged securely and immediately.

**For tips to avoid being victimized, visit the [Fraud](#) section on [lians.ca](#), and to report or seek advice on dealing with fraud and scam attempts, contact Cynthia Nield at [cnield@lians.ca](mailto:cnield@lians.ca) or 902 423 1300, x346.**

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◀ PREVIOUS

NEXT ▶

Back to LIANSwers: 49

CLIA

NSBS

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Home → News → LIANSwers

Issue 49 | January 2018

# LIANSWERS

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## HEALTH AND WELLNESS WITH NSLAP

Your well-being and happiness in your chosen profession, and the health of your practice, are important to us at LIANS and the Society. Accordingly, we would like to take a few minutes to remind you of the [Nova Scotia Lawyers Assistance Program](#) we have in place to provide you with assistance and guidance if issues arise.

The LAP has two parts. The first, and probably better known, is provided through Homewood Health and includes wellness programs, e-courses and other tools aimed at helping you maintain your health and well-being. This is a confidential service and includes short term counselling for members of the legal profession, their staff, and families who may have health or personal concerns.

The second part is the group of peer volunteers arranged through LIANS' standing LAP Committee. This is a group of your practicing peers who have volunteered to provide confidential assistance to any member who seeks peer support. For information on this program please contact LIANS' [Director of Insurance](#) or any member of LIANS' [LAP Committee](#).

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◀ PREVIOUS

NEXT ▶

[Back to LIANSwers: 49](#)

[CLIA](#)

[NSBS](#)

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[Privacy](#)

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Home → News → LIANSwers

Issue 49 | January 2018

# LIANSWERS

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## LIFE'S A BREACH: HAS YOUR DATA BEEN COMPROMISED?

If you've used LinkedIn, Gmail, DropBox, Hotmail, and/or Adobe in recent years, you've been made to change your passwords for these sites – and for good reason. Every time a site/server breach occurs, any personal information captured on that site (e.g. email or civic addresses, birthdate, etc.) can be released by hackers.

Companies are generally quick to recognize a breach, recapture that data, and instruct all of its users to change their passwords after they've re-secured their site. How can you determine whether your credentials have been compromised? Visit "Have I Been Pwned[sic]" (<https://haveibeenpwned.com/>) and type in your email. Created and maintained by a Microsoft Security Developer, this site will let you know if your account has been compromised in a data breach, and there is a need to change the password for the indicated website. Law firms and businesses can also do a domain search, to track which email addresses using a certain domain name have been seized in any of the known data breaches.

Users can also register to receive free email notifications for if (or when) their account is compromised.

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[◀ PREVIOUS](#)

[NEXT ▶](#)

[Back to LIANSwers: 49](#)

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