



## AN OUNCE OF PREVENTION...

By Ken Fitz, Partner



The Commercial Litigation Practice Group at McLennan Ross typically acts in litigation matters on behalf of a client once two parties (or sometimes more) have reached an impasse. Unfortunately, by the time a matter reaches the hands of litigation counsel, the opposing positions are often quite deeply entrenched. As a result, formal litigation is seemingly inevitable or has often already commenced. Once that happens, the parties will move from a previously entrenched position only after the time-consuming and expensive exchange of pleadings, document production, Examinations for Discovery (now known as Questioning) and the resultant realization of the cost of full-out commercial litigation.

In addition to the polarized positions noted above, a litigator's position is further complicated by the inadvertent "damage" that a client may have created before the file was turned over to counsel. The unguarded correspondence, e-mails, voicemails, etc. that a client has exchanged when attempting to resolve problems often do nothing to enhance their position. The fact is that in most lawsuits, only a handful of documents typically contribute to a liability determination. More often than not, at least one of these key documents will be an ill-founded communication forwarded by one party to the other.

It is infrequent that clients ask a litigator to review communications and contracts *before* a dispute becomes entrenched and litigation is inevitable. But having a litigator review the backdrop to a potential dispute might well provide a balanced perspective to a problem and possibly minimize the prospect of litigation. Or, if litigation is inevitable, a legal review and response can cast the client's issues in the best possible light. In the very least, the exchange of communications between the parties will hopefully not contain a "smoking gun" that comes back to haunt the client when the key documents are later identified.

By way of illustration, one of our litigation lawyers was recently asked to review a multi-million dollar contractual matter for a client who anticipated future litigation. After reviewing the contract documents and communications, the recommended response to the dispute was utterly opposed to the approach that the client was contemplating before counsel's involvement. The different approach was adopted, and months have now elapsed and litigation has not resulted. While the approach taken may have avoided litigation, if it does eventually occur, the issues will be cast properly and in a significantly different light than might otherwise have been the case.

The foregoing is not to suggest that a commercial client needs to involve a litigator every time there is a commercial dispute. Clients are often well-equipped to address disputes with a business party without legal intervention. However, if a problem is destined for dispute and possibly formal litigation, the client should ask itself whether having a litigator review the problem before positions have become fully entrenched and before an exchange of improvident communications best serves the client's interests. Litigation may not ultimately be avoided, but the potential for self-inflicted damage may be minimized and hopefully there is room for a more expeditious resolution. As for the



litigator, the opportunity to be involved with a client well before formal litigation is commenced is welcome.