



It's easy to prevent communications breakdowns: So why is this consistently the #1 source of claims for LAWPRO?

No matter what the area of practice, the number one source of claims at LAWPRO is a breakdown in communication between the lawyer and client. And those numbers are increasing.

Between 2005 and 2010, more than 4,200 communications claims – an average of 711 a year – have been reported to LAWPRO. The total cost of these claims to date is about \$150 million – and likely to rise as more recent years' claims are resolved.

During that same period, the percentage of claims resulting from communication issues has also increased – to 35 per cent in 2010 from 32 per cent in 2005. More concerning is the increase in costs – to 45 per cent of all claims costs in 2010 from 32 per cent in 2005.

What's ironic about this discussion is that communications claims are potentially easy to prevent. This is a risk management message that

we have consistently sent to lawyers through past issues of *LAWPRO Magazine*, our *Managing* booklets and at every presentation on claims prevention.

And still the numbers creep up.

So rather than simply repeat the message that “lawyers need to communicate better,” we thought we’d take a different approach and look at how communications claims can arise in particular areas of law.

We asked LAWPRO claims counsel with expertise in the various areas of law to provide insights into the communications mistakes they see in their daily handling of claims files. We hope this approach makes it easier for you to implement risk management steps in your own practice.

Real estate

Real estate claims make up the largest share of communications claims. Busy, high-volume practices often lead to situations where the lawyer is not taking the time to communicate with the clients properly.

Mitchell Goldberg, unit director and counsel and Nadia Dalimonte, claims counsel, both in our Specialty Claims Department, provide some examples of the kinds of claims they see in this area of practice.

Meet the client – yourself – and ask questions

The common thread running through the examples that follow is that many real estate lawyers say they are too busy to communicate directly with clients. They rely on clerks, so the lawyers themselves become removed from the process. “It is always preferable for the lawyer to meet with the clients and review the important documentation in the file with the clients at that time. In the event of a claim, it’s not usually a strong defence for the lawyer to say to us ‘well, the clerk met with the client,’” says Dalimonte.

Some lawyers, she adds, take the position that their job is to carry out only the title conveyancing, when what they should have done is take the time to speak to the client to ensure they’ve gathered all the relevant information.

For example, although only one person may be registered on title, there could be a spousal interest in a matrimonial home. LAWPRO has seen a number of claims where the lawyer did not get the consent of the spouse to change the ownership status or encumber the property with a mortgage. Take the time to discuss important information such as the client’s marital status to determine whether the consent of a spouse – or any other person with an unregistered interest in the property – needs to be obtained, or whether the spouse needs to be sent for independent legal advice (depending on the nature of the transaction).

Another source of claims involves situations in which parents get involved in their children’s real estate dealings – such as the transfer of a parental property to a son or daughter, or the purchase of a home by the child with the parents guaranteeing the mortgage or taking title with the child and actually becoming mortgagors. The parents often later claim the lawyer did not properly communicate the potential consequences to them (e.g. if the children did not keep up the mortgage payments, the lender could come after them) or failed to send them for ILA.

There may be issues of capacity or language barriers preventing the clients from fully understanding the proceedings. Until you sit down and talk to the clients, these kinds of complicating factors might not be apparent.

Use title insurance wisely

Lawyers using title insurance also need to take the time to communicate directly with clients. Often the lawyer fails to ask clients about possible future uses of the property that the client might have in mind, and as a result fails to get a title insurance endorsement that would protect the clients (e.g., they planned to build a pool, but later discovered a subdivision agreement prevents it). Similarly, lawyers sometimes fail to discuss whether a client wants a survey or a particular search done.

“They just assume title insurance takes care of issues that could arise, so that the lawyer has no documentation in the file to demonstrate that the lawyer discussed what the client did or didn’t want,” says Goldberg. Failure to have that conversation may constitute negligence, and also may violate the commentary to the *Rules of Professional Conduct* that addresses informing clients about options to assure title.

Remember the lender client

Lawyers also need to remember that lending institutions are also their clients. We’ve seen claims in which lawyers have failed to communicate material information to the lender client so the lender can make an informed decision on whether to advance mortgage funds. Such details could include the correct purchase price, current ownership, or whether the purchaser is going to reside on the property.

Litigation

Jennifer Ip, unit director and counsel (Primary Professional Liability Claims Department) and Yvonne Diedrick, claims counsel (PPL) provide some insights into how breakdowns in communication with the client can derail litigation or leave the client dissatisfied with the outcome.



Put it in writing

One of the biggest issues in the litigation claims LAWPRO sees is a failure on the part of the lawyer to properly document instructions. Clients may later say they asked the lawyer to do X and it wasn’t done; or the lawyer may have done Y and the client claims he didn’t authorize this course of action. If there is no documentation of the lawyer client/conversations, the claim then turns on credibility, and the experience has been that courts are more likely to believe the client’s recollections (the case is top of mind for the client, but only one of several for the lawyer).

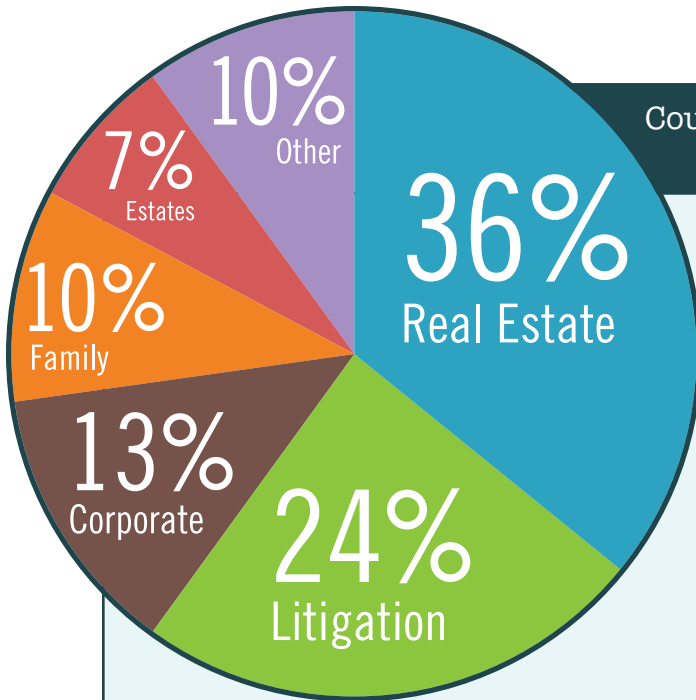
The same failure to document discussions can be seen when advising clients on the terms of settlements and what the client can expect. Clients can be left thinking they will receive more money out of the

settlement than they in fact get. “They may try to claim they were not aware that a portion of the award would flow back to the lawyer in fees,” says Ip.

When it comes to motor vehicle cases, some lawyers will handle only the tort action or only the accident benefits claim, not both, but they

fail to put this limited retainer into writing. The client then comes back and says the lawyer failed to follow instructions – but by then the limitation period has expired – and now the lawyer faces the prospect of a claim. Even if you have put the limited retainer into writing, make sure the client understands what this means.

Many communication errors result in accusations of an improvident settlement. For instance, the defendant in an action may offer to



Count of Communication claims (2005-2010)

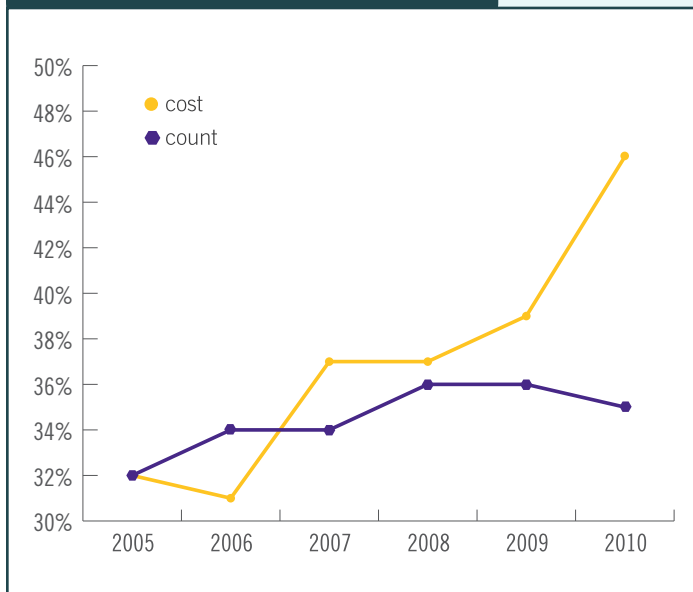
Communication breakdowns – broken down

Failure to obtain client’s consent: 41 per cent of communication claims by count (36 per cent by cost) involve the lawyer doing work or taking steps without informing the client or getting the client’s consent, or else not making sure the client was fully informed about what he or she was consenting to.

Failure to follow client’s instructions: 39 per cent of communications claims (45 per cent by cost) are essentially a disagreement over what instructions the client did or didn’t give and what the lawyer did or didn’t do. These claims often come down to credibility, and without proper documentation by the lawyer they are difficult to defend.

Poor communication with client: The remaining 20 per cent of communication errors (18 per cent by cost) result from a failure by the lawyer to properly explain various aspects of the case (e.g., timing, fees, outcome) or confusion over whether the lawyer or client was responsible for doing something during or after the matter.

Communications claims as a % of all LAWPRO claims



settle for a lower amount than is really justified by the facts of the case and the lawyer is obliged to present this offer to the client. The client may want to settle, but if the lawyer doesn't recommend the settlement, this advice should be clearly documented and communicated. Otherwise the client may come back later, perhaps when the money runs out, and accuse the lawyer of not properly explaining the situation or not making clear that the settlement might have been greater had the matter been pursued further.

Take the time to explain – and document

During a trial, things can happen quickly. LAWPRO has seen claims in which an offer was communicated verbally mid-trial. The lawyer then quickly explains (or says she explained) the offer to the client. The client rejects the offer and the lawyer's recommendation to accept it, and goes on to lose the case. The client then sues the lawyer saying, "had I properly understood the offer, I would have accepted it."

On the flip side, it may be the client who chooses to accept an offer to settle for a lower amount – despite the lawyer's advice to the contrary. No matter how rushed you are or how convincing (and happy) your client appears, take the time to make notes of your conversations with the client and make sure your client fully understands the implications of the decision he or she is making.

Similarly, lawyers should communicate (and document that they have done so) the prospects of winning or losing a case. This is especially so in cases where the client insists on pursuing the case "on principle." When the client loses, it's suddenly no longer about the principle. "If the lawyer is of the opinion that the client has a weak case, the client needs to be told so and instructions to proceed to trial, despite the lawyer's recommendation not to proceed, should be written down," says Ip.

Communicate clearly – face-to-face if possible

As in all areas of law, lawyers are using email to communicate – resulting in increased misunderstandings. Clients or lawyers read things into emails that aren't there, miss the meaning of what was said, or read between the lines and make assumptions, says Diedrick. "You can't replace face-to-face communication. If geographic distance makes that difficult, pick up the telephone and later document the call in a follow-up letter or email."

This is particularly important in litigation matters, which can go on for long periods of time and involve strong emotions. There isn't necessarily the same tradition of a pivotal lawyer-client meeting as often occurs before the closing of a transaction in other areas of the law. Consider at what point in a long piece of litigation you should meet with the client, and be sure to document your discussions.

Corporate law

Anna Reggio, claims counsel (PPL), says corporate communication claims often arise from confusion over the breadth of the insured's retainer and who is representing the interest of whom in an environment of fast-paced, and sometimes large-dollar, transactions where the niceties of communicating may get overlooked.



Know who your client is – and communicate this clearly

A question which frequently arises is the question of who the lawyer is acting for and whether it is the corporation or one or more of the shareholders. The interest of the corporate entity may be different from that of one or more of the shareholders and therefore, the corporate entity should be separately represented.

Certainly, in any given proposed transaction or agreement, each shareholder's interest may vary from that of one or more of the other shareholders. Therefore, in fact, the corporate entity and each of the shareholders should really be represented by a separate lawyer.

Often, in closely held corporations, the lawyer will meet with all of the directors, officers and shareholders to discuss the terms of a transaction to be entered into by the corporation or the terms of a transaction or agreement amongst the shareholders. A shareholders' agreement, for example, is one of the more common agreements under discussion.

In many cases, the parties are of the view that it is not financially expedient for the corporate entity and each of the shareholders to be separately represented. In other cases, the transaction may be clipping along and the parties are too focused on their negotiations to care about the lawyer's oral caution that they should obtain independent legal advice or independent representation.

Later, a disgruntled party may allege that he or she relied on the lawyer and may accuse the lawyer of having been in a conflict of interest, preferring the interest of one party over another (particularly where the lawyer has represented the other party or parties in the past) or failing to consider and advise that party of the implications arising from the particular transaction or agreement. The lawyer may well respond by saying that he or she was not acting for the complaining party, but rather acting for the corporate entity or, possibly, for another shareholder. But if this was never clearly communicated, in writing, the lawyer is faced with a credibility dispute.

The lawyer should write to all principals to clarify and confirm whom he or she is acting for. The lawyer should confirm that the

other parties will not be provided with any advice and that they should not be relying on the lawyer for that purpose.

Further, the lawyer should tell the other parties or entities to retain independent counsel or obtain independent legal advice, preferably as evidenced by way of a Certificate of ILA, depending upon the circumstances. Otherwise, the lawyer must obtain a signed, written acknowledgement of this advice together with a waiver of independent counsel or ILA.

“There is no shortcut for this,” says Reggio. “The lawyer needs to get written, signed acknowledgements to protect him or herself.” If the lawyer chooses to proceed to act for more than one party, the lawyer faces the inherent risks of failing to meet the onerous burden of providing the best possible advice to all of the clients in the circumstances. Also, depending on the deductible chosen, the lawyer may also face the obligation of a double deductible under the LAWPRO policy if he or she is subsequently sued, even if a written acknowledgement and waiver was obtained.

Be clear about the services you are providing

Lawyers should also communicate clearly and in writing to confirm that they are not providing business advice and they are not reviewing financial statements or providing any tax advice, where applicable. Lawyers should specifically advise the client in writing to get advice from tax specialists, accountants or other experts where necessary and applicable.

Family law

Yvonne Bernstein, litigation director and counsel (PPL) with extensive experience in family law claims, talks about the potential for misunderstandings and communication breakdowns in family law.



Email communication must be very clear

The increased use of emails to replace face-to-face meetings has significant implications in family law where emotions (and tensions) often are high; clients can be difficult, emotional and prone to misunderstanding (and for these reasons some lawyers find the lack of face-to-face contact a good thing).

While email is a faster form of communication, the in-person conversation provides visual cues and the discussion is more interactive. The lawyer can judge reactions, and make sure everyone understands. Email promotes a more stilted, incomplete communication, says Bernstein.

In a recent claim a client was informed by email about what was being negotiated, and agreed to the settlement; but the client had not been given enough information on a certain part of the settlement. He later sued the lawyer on the grounds that if he'd known how valuable this concession was, he never would have agreed. “The client could have asked,” says Bernstein, “but the on the other hand the lawyer should have been clearer.”

Take the time to explain implications of legal processes

Often, clients don't understand that a settlement is a final settlement. They may have thought maybe they could settle today and re-open the agreement later.

Misunderstandings such as this can stem from the fact that lawyers operate within a framework where certain concepts or rules are understood: “We all know that when you sign a release, that's it,” says Bernstein. “Lawyers don't always appreciate that clients don't have that same frame of reference.” When a claim arises, it is then found that there is no letter from the lawyer to the client confirming the things they discussed, such as the fact that the settlement was final.

Limited retainers and possible unbundling of legal services will bring more challenges for lawyers to communicate as clearly as possible about what they are retained to do and not retained to do, as well as the potential consequences of what they're not being retained to do.

“There will be more of a burden on lawyers to hone their communication skills if they want to accept limited scope retainers and hope to get out of that process unscathed,” says Bernstein. “This risk is not confined to family law, but family law has a high proportion of litigants who are self-represented and only want to retain a lawyer to do X, but not Y and Z.”

Another way in which clients feel they can save money is by negotiating with the other side themselves. At the same time, the lawyers for each side are in communication as well. In these situations, things can get overlooked, or a lawyer can be left out of the loop.

Wills and estates

Cynthia Martin, unit director and counsel (PPL), Deborah Petch, claims counsel (PPL), and Pauline Sheps, claims counsel specialist (PPL) review the kinds of communication errors we see in wills, estates and trusts practice.



Ask questions – many questions

The biggest communication issues take place at the time the will is being drafted. The claim may result from drafting errors, but often it was poor communication that led to the drafting error.

Too many lawyers, says Martin, are not truly listening to the client's instructions and not probing and questioning the client to uncover facts that may cause problems later.

"It's not so much the client not providing the information as the lawyer failing to communicate what the lawyer needs to know," says Martin. "For instance, the client says: 'I want to leave everything to my son.' Fine, but does she have any other children? What did the prior will say?"

Are the beneficiaries identified correctly? (e.g., there is more than one St. John's Church in the city.) Did the lawyer ask about gift-overs in the event that a beneficiary is not alive at the time the testator dies? When the will drafting is complete, lawyers should do a reporting letter to the client so that there will not be confusion in the future about why changes were made, which beneficiaries added or removed, and so forth.

LAWPRO has seen an increase in claims resulting from lawyers failing to ask about client assets when drafting wills. Too many lawyers don't ask the simple question: "What assets do you have?" (Given how many people in Ontario now come from other jurisdictions, lawyers should be asking about assets on a worldwide basis.)

It's equally important to discuss how these assets will be distributed. This issue often arises in the case of second marriages. The clients want to leave everything to their respective children, but often what happens goes something like this: after the husband dies, the wife says that she didn't understand that the assets would go to his children and not her; or conversely, all the assets are in joint names and – despite the will – at the end nothing is left to go to the children.

"Ask what the assets are, and ask how they are registered," says Sheps. "Some lawyers tell us they don't ask 'because the client will have different assets when they die.' That's not a good enough reason not to ask."

Get clarification given complexity of family structures and dynamics

Lawyers are increasingly likely to be dealing with a variety of family structures other than the traditional nuclear family. When the client uses words such as "married" or "my daughter," those words may not necessarily mean what the lawyer thinks. The marriage could be common-law, and the daughter could be a step-daughter.

To be absolutely sure of the nature of the relationships, ask questions and get clarification.

Talk to your client to understand family dynamics. You may discover information that could improve the advice you provide the client. If you know, for example, that two siblings don't get along, it may not be wise to appoint them as joint powers of attorney or estate trustees.

"A dysfunctional family can lead to a dysfunctional estate," says Sheps, who also recommends not agreeing to be an attorney or trustee if you know the family is fighting. "If they are not satisfied with the management of the estate, they will all blame you."

State who is doing what

Miscommunication regarding pensions often results in claims. The client may have made designations for inheritance purposes on a pension, life insurance, RRSP, etc., but a will can revoke those designations. There is often not enough discussion with clients about these designations, and what effect a will can have on them. The clients themselves may not be certain how the designations are arranged, and it may not be clear who was supposed to find out (client or lawyer) and what the consequences are for not making certain.

When dealing with powers of attorney, it is important to communicate to the attorney the roles and obligations involved. Template letters and a checklist are very good tools for this. They protect the lawyer from future accusations that "the lawyer didn't tell me I couldn't spend the money this way."

The administration of an estate also requires clear communication. Keep records of who is responsible for what, in terms of what the lawyer is doing and what trustee is doing. If roles are divided, the work and responsibilities should be spelled out.

"If the lawyer is taking on work normally done by the estate trustee, there has to be a letter setting out clearly who is doing what," says Petch, who recommends communicating to your trustee client what you'll charge in legal fees for this work.

"We get a lot of complaints about the mishmash of the lawyer's fees and executor's fees. This is particularly true where the lawyer is a co-trustee." ■

Tim Lemieux is practicePRO coordinator at LAWPRO.