

Family law: increasingly a risky business

In both count and cost, family law-related malpractice claims are on the increase. By area of law, family law is LAWPRO's fourth most common area of claims: Only litigation, real estate, and corporate/commercial/bankruptcy rank higher.

Over the last five years, family law claims averaged about eight per cent of our claims by count (143 claims per year) and about six per cent of claims costs (\$2.8 million per year).

This article examines the reality behind the numbers: It highlights the most common errors, and the steps that you can take to reduce the likelihood of a claim.

The top three

It is striking that, year after year, the top three errors on family law matters are consistently the same. Also striking is that collectively these three errors account for the majority of family law claims reported (56 per cent) and costs associated with resolving these claims (60 per cent).

The three most common errors are:

Error	% of family law claims reported	% of family law claims costs
Failure to know or properly apply the law	23.0	23.4
Failure to follow client instructions	17.2	20.7
Failure to obtain client consent or inform client	5.9	15.7

Failure to know or properly apply the law

Family law is one of the most complex practice areas. It involves dozens of different federal and provincial statutes, and voluminous case law. Our claims statistics indicate that a failure to know or apply the law is almost three times more likely to occur in family law than in other areas of practice.

The most common law-related mistakes we see are the following:

- The *Child Support Guidelines* are not complied with when arrangements are made for child support, and in particular, when pre-guideline agreements or orders are varied, or when there is an attempt to include "special provisions" that vary from or attempt to opt out of the application of the guidelines;
- Errors as to entitlement, amount or duration of spousal support;
- When giving advice on a separation agreement, it is not made clear to the client that even after transferring the matrimonial home, they will still be liable on the covenant on a mortgage. Similarly, even if the client gets an indemnification under the terms of the separation agreement from their former spouse on the line of credit, the client needs to be advised that if the former spouse goes bankrupt, the financial institution will still look to the client to repay monies owed on the line of credit.
- Unanticipated and unintended tax obligations are also very common, in particular when deemed dispositions are triggered when shares or assets are simply transferred instead of being

properly rolled over, or when RRSP transfers are not completed properly. Cole & Partners annually publish a booklet entitled *The Tax Principles of Family Law*, which is an excellent and free reference on various family law related tax issues. Contact Cole & Partners at 416-364-9700 or go to www.coleandpartners.com.

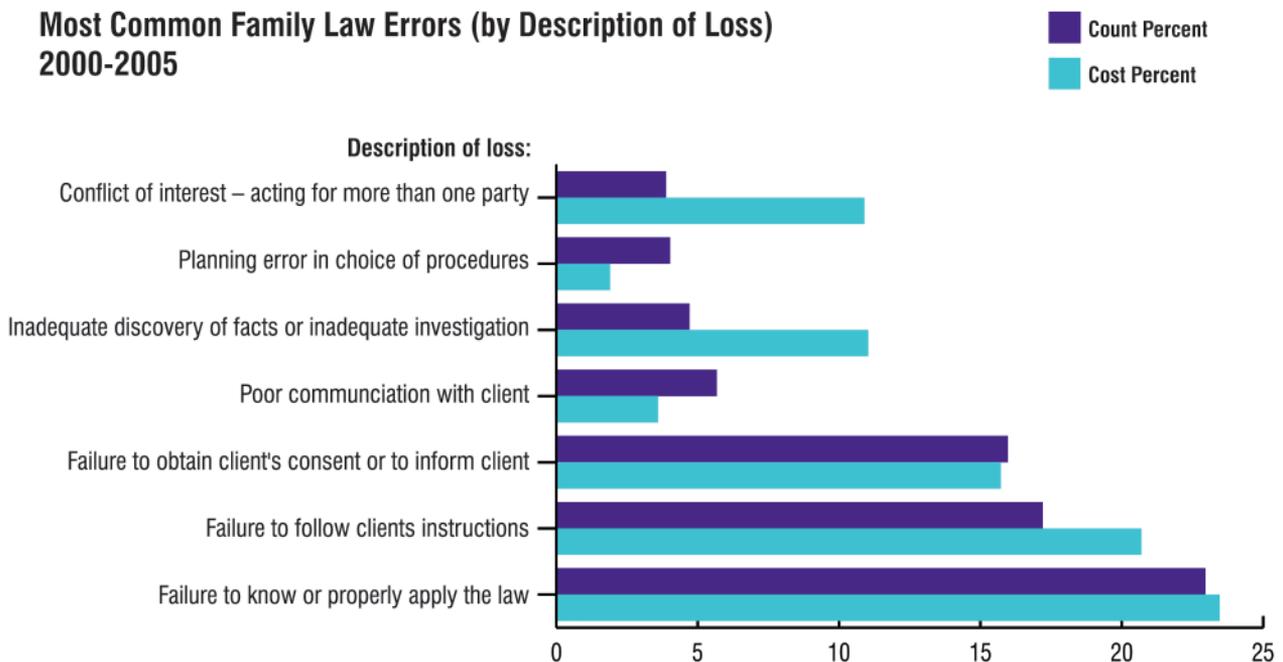
Given the complexity of the law in the family law area, and the fact that legislation and case law is always changing, the importance of Continuing Legal Education (CLE) can't be overstated. All family law lawyers should actively and regularly participate in CLE programs.

Family law practitioners should also recognize the limitations in their legal knowledge and expertise. They should seek advice from more specialized counsel or third-party experts where appropriate. For example, they may want to engage another lawyer who has expertise in estate planning or tax issues; an accountant or actuary may be needed to help with a pension or business valuations, stocks or stock options, bonds; or an appraiser to deal with assets such as antiques.

Failure to follow client instructions

The second most common error in the family law area is a "failure to follow client instructions." This can be a simple failure to follow a client's specific instruction. However, more often than not, this

Most Common Family Law Errors (by Description of Loss) 2000-2005



type of claim involves the lawyer recalling that one thing was said or done, or not said or not done, and a client who recalls something different. All too often clients allege that the lawyer did not explain the terms of a separation agreement or minutes of settlement, or that they did not understand them, or that the lawyer did not review a net family property calculation with them.

This type of claim is very hard for LAWPRO to defend successfully. At the end of the day it essentially comes down to a question of credibility. The client's very specific recollection on what transpired usually wins out over the lawyer's much more general and often vague recollection. Unfortunately, we frequently find very little documentation in the lawyer's file to back up the lawyer's version of what occurred. All too frequently we see files with no reporting letters whatsoever.

Fortunately this error is one of the easiest to prevent. You can significantly reduce your claims exposure by documenting your work. Confirm the information your client provided to you, your advice to the client, the client's instructions to you, and what steps were taken on those instructions. This should be done in your notes, and in a reporting letter, or even in an e-mail. Document the time spent reviewing the terms of a separation agreement, including what issues were discussed.

Take the time to make detailed dockets. "Telephone conference with client re access problems on the weekend" is much better than just "telephone conference with client." Document everything! A paper trail in correspondence and/or dockets can help refresh your memory as to the work that was done on a matter. This can be of great assistance if a file must be re-opened, if you must appear before an assessment officer, or have to defend a malpractice claim.

Failure to obtain client consent or to inform client

The third most common error is a "*failure to obtain client consent or to inform client.*" It is similar to what is actually the fourth most common error: "*poor communication with the client.*" Without a doubt, family law clients can be among the most difficult to deal with, given the stress and emotions involved in a marital breakdown. This emotional overlay often makes it more difficult to communicate with the client, to make sure he or she understands the legal issues on the matter, and the options and implications of the various decisions being made.

We actually see claims where lawyers decide not to contact a client on a relatively minor decision as to the conduct of a matter, simply to avoid a conversation with the client. Later on, when circumstances change and the client ends up in a difficult or awkward position because of that decision, a claim can arise.

Many family law clients have unrealistic expectations as to the process, timing, costs, and potential outcomes of their matters.

From the moment of the initial contact and retainer, lawyers need to proactively direct and control client expectations to keep them reasonable. As a supplement to her article "Dealing with Difficult Clients," which appeared in the Spring 2004 issue of LAWPRO Magazine, Carole Curtis provided the financial and administrative information documents that she gives to her clients. They set out in great detail for a client how all aspects of a family law matter are handled by her office. These precedents are available at www.practicepro.ca/difficultclients. Some general retainer precedents are available at www.practicepro.ca/retainers.

Inadequate discovery of facts or inadequate investigation

Over the last five years we have seen a rise in the fifth most common error: "*inadequate discovery of facts or inadequate investigation.*" Examples of this type of error include failing to take sufficient steps to properly identify all assets and liabilities for the purposes of preparing financial statements and making net family property calculations, or failing to explore the full facts and circumstances of the client's marriage so as to appreciate the issues that need to be dealt with in a separation agreement or litigation. Lawyers should clearly advise a client that lack of disclosure can result in an agreement or order being set aside, and can damage a client's credibility in the event they must appear in court. Don't take shortcuts – they can and will come back to haunt you.

Lack of attention to details often arises when there are time pressures created by lawyers, clients or the courts. The most common scenario here involves minutes of settlement or separation agreements that are prepared in a rush – and details get missed or drafting errors occur. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day.

Conflicts of interest

Family law is not immune to conflicts of interest claims. As elsewhere, these claims tend to be every expensive to resolve. They can arise when a lawyer who has done extensive work for many members of a family, often in the context of doing work for a family business, attempts to act for one of the family members on a matrimonial file. We also see conflict of interests arise where the lawyer ends up with a stake in the outcome of the matter after taking an interest in the matrimonial home to secure payment of fees.

Procrastination

We are still seeing errors involving "*procrastination in the performance of services or lack of follow up.*" One example of this involves circumstances where a claim for spousal support is not

made for a lengthy period of time, and ultimately an amount of support is lost because the court will not make a retroactive order.

Independent legal advice

The provision of ILA is fraught with danger, especially if it is done in a cursory fashion. Remember that a quick and dirty \$150 fee potentially exposes you to a \$5,000 deductible and a \$1 million claim. An ILA checklist precedent is available at www.practicepro.ca/ILAChecklist.

Learn to say no

Unreasonable clients will have unreasonable expectations which no lawyer can ever satisfy. If your instincts tell you that a potential client is going to be difficult, stop and pay attention. Too often we hear lawyers say: "I knew this client was going to be trouble the first time I met him."

Some of the warning signs of a problem client include:

- The client has changed lawyers more than two or three times;
- The client owes money to his or her previous lawyers;
- The client expresses dissatisfaction with all of his or her previous lawyers;
- The client has unreasonable and unrealistic expectations about his or her case;

- The client places unreasonable demands on you and your staff;
- Every aspect of the client's case is urgent and requires instant attention;
- The client either will not or cannot provide proper financial disclosure; and
- The client instructs you to advance positions which you believe to be without merit.

If you see some of these warning signs when dealing with a new client, ask yourself if you should accept the retainer. Sometimes it is best to just say "no."

Your marching orders

The practice of family law will continue to evolve and change at breakneck speed. You can't totally eliminate the risk of a malpractice claim. However, you can substantially reduce your risk of a claim by documenting your work, and improving your lawyer/client communications. Set aside time to integrate the various risk management strategies outlined above into your practice.

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Is your LAWPRO coverage adequate?

If one of your bigger files took a turn for the worse, ask yourself if your standard LAWPRO policy would adequately protect you? As a result of a healthy economy and increasing real estate values, many clients have substantial assets. In some cases these assets, coupled with the high costs of defending a complex malpractice claim, can exceed the one million dollars per claim coverage limit under the standard LAWPRO policy. If you have potential exposure to claims that might exceed the policy limit, you should review the options for excess coverage, whether it is from LAWPRO or another insurance carrier.

If you are planning on leaving private practice, you need to consider your potential claims exposure relative to the standard run-off coverage. Upon leaving practice you become eligible

to exempt yourself from the requirement to purchase ongoing LAWPRO practice coverage. By exempting yourself, you bring the standard Run-off Insurance coverage into force. It provides coverage of only \$250,000 per claim and in the aggregate for all claims made against you while you remain exempt, in respect of your past insured practice. You can increase your run-off coverage limits with Run-off Buy-Up Coverage.

For more information on excess or run-off buy-up insurance options, visit the LAWPRO Web site at: www.lawpro.ca/insurance/ or contact Customer Service at 416-598-5899 or 1-800-410-1013 or e-mail: service@lawpro.ca.