

## Solo, small and large firms make same errors

Without even trying, most lawyers could come up with dozens of ways in which big law firms are different from their small and solo firm counterparts. But despite all these differences, the most common malpractice errors at large, small and solo firms are virtually identical.

The charts that accompany this article illustrate the eight most common types of errors for all malpractice claims handled by LAWPRO between 2000 and 2005. Statistics are divided into two categories: firms of 75 or more lawyers, and sole practitioners.

It is striking how similar the errors are in these two different types of firms. The six most common errors are the same in rank, and very similar in proportion. Surprisingly, in rank and proportion, the errors at firms of two to ten lawyers and 11 to 74 lawyers are virtually identical as well.

Most lawyers are surprised to learn a failure to know or apply substantive law is not the most common error that lawyers make. It is only the fourth most common error at firms of all sizes. The biggest claims risks, and the biggest opportunity to reduce claims exposure, lie in basic lawyer/client communications, and in time and deadline management.

### Communications-related errors #1 claims concern

Lawyer/client communication-related errors are the biggest cause of malpractice claims. For all types of firms, they represent roughly one-third of the claims LAWPRO handles.

There are three types of communication-related errors. For both large and small firms, the most common communications-related error is a failure to follow the client's instructions. Often these claims arise because the client says one thing about what was said or done, or not said or done, and the lawyer says another. These claims tend to come down to credibility, and in handling claims LAWPRO finds these matters are difficult to defend if the lawyer has not documented the instructions or not backed up with sufficient notes or other documentation in the file.

Poor communications with a client is the second most common communications error. These claims often involve a failure to explain to the client information about timing, fees and disbursements, options, implications of decisions and potential outcomes. The third most common communications error: a failure to obtain the client's consent or to inform the client.

On top of being the most common malpractice errors, communications-related claims are also among the easiest to prevent. You can significantly reduce your exposure to this type of claim by controlling client expectations from the very start of the matter, actively communicating with the client at all stages of the matter, creating a paper trail by carefully documenting instructions and advice, and confirming what work was done on a matter at each step along the way.

### Time management and deadlines

Missed deadlines and time management and related errors are the second biggest cause of LAWPRO claims at all sizes of firms.

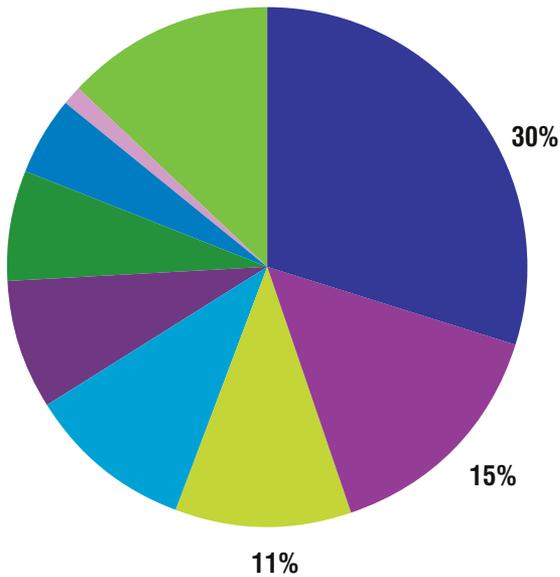
The most common time-related error is a failure to know or ascertain deadline – missing a limitation period because you didn't know it. The good news is that this type of error has decreased over the last several years. The bad news is that the other time- and deadline-related errors are holding stable or increasing. At this stage it is not clear if the new Limitations Act will result in fewer claims.

A failure to calendar is the second most common time-related error (a limitation period was known, but it was not properly entered in a calendar or tickler system). The fourth most common time-related error is the failure to react to calendar error (in other words, the limitation period was known and entered into a tickler system, but was missed due to a failure to use or respond to the tickler reminder).

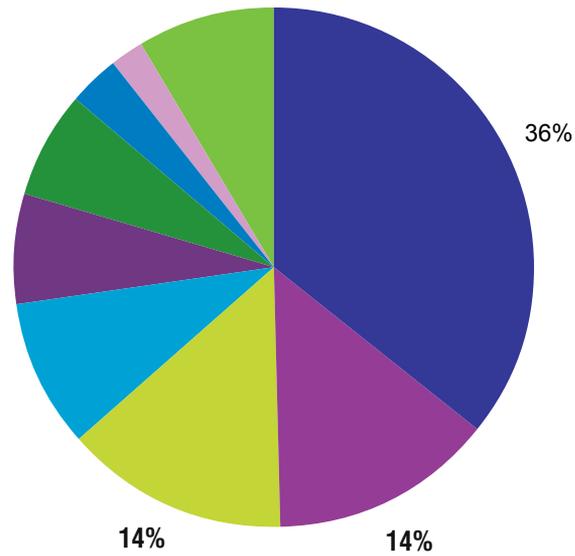
Lawyers at firms of all sizes seem to have a dusty file or two that sits on the corner of their desks for far too long, and makes procrastination-related errors the third most common time-related error.

These deadline and time management errors are also easily preventable with better time management skills and the proper use of tickler systems. Practice management software programs such as

**Firms over 75**



**Solo firms**



- Communication
- Time management
- Inadequate discovery
- Failure to know/apply law
- Clerical & delegation
- Conflict of interest
- Tax consequences
- Fraud
- Other

A full listing of the types of errors made by size of firm is available on the practicePRO website at [www.practicepro.ca/firmerrors.pdf](http://www.practicepro.ca/firmerrors.pdf).

Amicus Attorney and Time Matters are excellent tools for helping lawyers manage deadlines and tasks, and for helping them better manage client communications and relationships.

### Digging a bit deeper

Inadequate discovery of facts or inadequate investigation is the third most common error at firms of all sizes. This error has been on the rise for the last several years in several areas of law. It goes to the very core of what lawyers are supposed to do for their clients – give legal advice – and basically involves the lawyer not taking a bit of extra time or thought to dig deeper and ask appropriate questions on the matter.

On a real estate deal this type of claim might involve not delving into the client's long-term plans for the property, and then failing to follow up on appropriate

zoning or bylaw searches to ensure the client can use the property as intended. On a family law or wills and estates planning matters, it might involve not digging into more details about the status of past marital relationships, other children or step-children, or assets.

To avoid these claims, take the time to read between the lines so you can identify all appropriate issues and concerns. Ask yourself: What does the client really want? Does everything add up? Are there any issues or concerns that should be highlighted for the client?

### Clerical and delegation errors

Clerical and delegation-related errors are the fifth most common type of error at large and solo firms, and rank sixth at firms of two to ten lawyers. These errors include things such as simple clerical errors, errors in mathematical calcula-

tions where work is delegated to an employee or outsider and is not checked, and a failure to file document where no deadline is involved.

Delegation of tasks to knowledgeable support staff is an essential part of the operation of every practice as it makes lawyers more efficient and effective. However, ultimately, the lawyer is responsible for delegated work, and steps should be taken to review delegated work were appropriate. Extra care is especially warranted if there is something different or unusual on the matter.

### Conflicts of interest

Conflicts of interest claims rank sixth for large and solo firms, and fifth for firms of two to ten lawyers. Conflicts-related claims have been on a general downwards trend for many years. However, since the Supreme Court of

Canada's decision in *R. vs. Neil*, there is clearly increased sensitivity to the duties of loyalty and confidentiality that lawyers owe their clients.

It is easier for litigators to steer clear of conflicts of interest because they are in an adversarial position. Real estate and corporate commercial lawyers may be pressured to act for multiple clients by the clients themselves.

To avoid conflicts of interest, make sure your firm has a procedure and system in place for checking conflicts at the earliest possible point in time. Ideally it should be an electronic system and include more than just client names. A system that includes individuals and entities related to the client, including corporations and affiliates, officers and directors, partners, and trade names etc. will catch more real and potential conflicts.

## Tax errors

A failure to understand or anticipate tax consequences is the seventh most common error at large firms, and occurs less frequently at solo and small firms. This shouldn't be a surprise as larger firms tend to do more work that involves tax issues. In some of these claims the tax issues just are not spotted. But even in cases where tax issues are identified, errors occur because advice from a tax partner or lawyer is not sought, or the tax partner or lawyer is given insufficient information to give proper advice. Be sensitive to possible tax issues, and seek advice from a lawyer with appropriate tax expertise if these issues arise.

## Fraud

While real estate fraud sometimes has a higher profile, fraud by firm lawyers and staff is also a concern, and fraud-related claims occur at both large and small firms. Regardless of firm size, it is important

that every firm implement appropriate internal controls to ensure that funds in trust accounts are handled properly and that all transaction involving client monies are properly documented.

## Firms have different claims "personalities"

It is interesting to note that on an aggregate basis, the malpractice error types and proportions can vary significantly from firm to firm. Sometimes this is a reflection of practising in a different area of law, but it can also very much reflect an individual firm's calendaring procedures and time management practices.

For example, firms that do a poor job of managing tasks and deadlines have more time management and missed deadlines related claims. One large Toronto firm seems to have kept conflicts claims very low by having excellent conflicts checking procedures and an increased sensitivity

to conflicts claims through an annual conflicts education program that is mandatory for all lawyers and staff.

## Your marching orders

The eight most common malpractice errors represent more than 90 per cent of the errors for all sizes of firms. In terms of risk management and claims prevention, taking some proactive steps to address these claims is your best opportunity to reduce your claims exposure. See the practicePRO resources sidebar below for tools that you can use to help you take proactive steps to reduce your claims exposure.

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# practicePRO resources

LAWPRO Magazine archives: [www.practicepro.ca/magazinearchives](http://www.practicepro.ca/magazinearchives)

Retainer Precedents: [www.practicepro.ca/financesbooklet](http://www.practicepro.ca/financesbooklet)

Managing booklets and other practice aids: [www.practicepro.ca/practice/default.asp](http://www.practicepro.ca/practice/default.asp)

Lawyer/Client Relationships booklet: [www.practicepro.ca/relationshipsbooklet](http://www.practicepro.ca/relationshipsbooklet)

Limitations charts: [www.practicepro.ca/limitations](http://www.practicepro.ca/limitations)

Topical Listing of LAWPRO & practicePRO resources: [www.practicepro.ca/topiclisting](http://www.practicepro.ca/topiclisting)

Dealing with difficult clients: [www.practicepro.ca/difficultclients](http://www.practicepro.ca/difficultclients)

LAWPRO Magazine Fraud issue: [www.lawpro.ca/fraudreport](http://www.lawpro.ca/fraudreport)

ILA Checklist: [www.practicepro.ca/ilachecklist](http://www.practicepro.ca/ilachecklist)