

Top 10 reasons we're in a \$100 million world



That's a number you will be hearing and reading about frequently in the coming year.

It's a number we first introduced to you in the most recent issue of *LAWPRO Magazine* – our annual review issue – because \$100 million is the ballpark we expect to be in when all the dust has settled for total claims costs for 2011, including adjustments for our internal handling costs.

Moreover, at the mid point of 2012 we are seeing evidence that the number of claims reported is up again and that claims costs for the 2012 program (that is projected costs for resolving actual claims plus the cost of running LAWPRO's claims units) will come in at the same \$100 million level if not more.

This is sobering news that each and every lawyer needs to absorb – because ultimately it is the insured bar that needs to make changes in their practices to rein in claims numbers and costs. Remember as a rule of thumb, every \$1 million increase in costs roughly translates into an additional \$50 on the base insurance premium.

For our part at LAWPRO, we have put our heads together to delve deeply into this disturbing reality.

Here are our claims counsels' top 10 explanations for why the Ontario mandatory E&O program's claims costs are in a \$100 million world. The good news is that some of these issues are fixable by lawyers themselves.

1. Lawyers are reporting more claims and each claim is more costly:
 - 2,468 claims were reported in 2011 compared to 2,231 in 2010 and 1,846 a decade ago.
 - The average cost per claim has increased to just under \$42,000 from \$30,700 a decade ago.
2. We've said it before and will be reiterating this reality many times in the coming months: Communication problems – which lawyers can fix by changing their habits – are the main reason that clients sue their lawyers.
 - 42 per cent of real estate claims arise out of communication errors, accounting

for \$11 million annually in claims costs over the past five years (up from \$6 million a year in the five years previous to that). The two main communications issues: failure to get client consent and failure to get or follow a client's instructions;

- Similarly, 42 per cent of corporate/commercial claims are due to poor communication with the single biggest issue being a failure to get client consent;
- 24 per cent of litigation claims arise out of poor client communication; again, failure to get client consent is the single most common issue driving up claims costs in this area of practice.

What can I say but: listen carefully, ask pertinent questions, do necessary research, formulate your advice thoughtfully, and throughout – document, document, document (both your instructions and your advice)! It may not be legally essential that you document certain things in writing, but it certainly can help to defend a claim successfully.

¹ Source: Canadian Real Estate Association

3. Inadequate investigation or discovery of facts is also an increasingly common error resulting in a claim. In real estate practice (which accounts for more than one-third of claims), inadequate investigation is the second most common reason cited for a claim and now accounts for \$5 million in claims costs in 2011, up from \$2 million in 2004. In 2011, 25 per cent of real estate claims arose out of this easy-to-remedy inadequate investigation issue.
4. A disproportionate number of claims reported to LAWPRO are already in litigation. Further investigation seems to indicate that this trend springs from a change in the limitation period (from six to two years effective January 1, 2004, subject to various transition provisions).
5. Because more claims are already in litigation when reported to LAWPRO (this is especially true for claims arising from real estate and litigation practice), our defence costs are being driven up. Cases need to be assessed, facts gathered, a strategy set, pre-trial pleadings and motions filed – and all of it quickly to contain costs if possible. Moreover, claims already in litigation often cannot be repaired.
6. Real estate values have increased more than 90 per cent between 2001 and 2009 – so when about one-third of LAWPRO’s primary program claim costs arise out of real estate claims, it is not surprising to see total costs climb.
7. Claims by self-represented/vexatious litigants are driving up both the number of claims reported and claims costs, accounting for \$4.5 million in 2009, for example.
8. Class action costs and exposures (even if only one law firm is the target of the

class action) inevitably drive up costs, as every single class action claim (to date) has hit the \$1 million policy limit. There are often one or more excess insurers involved in these claims, so LAWPRO is not the exclusive driver of the strategy and certainly not likely able to settle the claim within our policy limits.

9. We’re seeing more clusters of claims – that is claims that have a common nexus such as a fraud scam that involves many lawyers, or a piece of (erroneous) advice that a lawyer provides to several clients or that several others relied on. Clusters can also involve a client suing a number of lawyers who, over time, genuinely tried to help the client, but no outcome would ever have been good enough. Clusters of claims now represent 10 per cent of our claims costs.
10. The implementation of the Harmonized Sales Tax (HST) in Ontario in mid-2010 means that our defence counsel costs (which were previously exempt from eight per cent provincial sales tax) for all unresolved claims (even those reported prior to 2010) jumped eight per cent automatically. LAWPRO also now pays HST on rent, utilities and other consulting services. Total cost to the program: About \$3.5 million annually.

There’s not much we at LAWPRO can do about many of these facts. But we are leaving no stone unturned in our drive to address the problems that we believe can be remedied. If we get our say, you’ll see even more LAWPRO risk management content in CPD programs in the future; we’re investigating innovative ways to make tips and information more easily available to you and your law firm staff – through webinars, presentations, and publications that address their specific concerns. We’re diving into the claims files

in more detail to see what we can learn that we can share with lawyers – so you don’t make the same mistake twice. We’re slicing and dicing the numbers in more ways to see if we can get a better handle on the reasons for claims clusters and other trends; we’re rethinking various internal processes to identify more opportunities to contain claims management costs.

But as I have said before, we at LAWPRO can do only so much. The ball is in the court of our insureds – individually and collectively.

A bittersweet change at LAWPRO

As of this release of *LAWPRO Magazine*, we are saying farewell and happy retirement to its editor, Dagmar Kanzler. As Director of Communications for LAWPRO, Dagmar has devoted every one of her working days since 1995 to meeting the needs of the Ontario bar – for risk management information, program renewals, LAWPRO updates and many, many other areas too numerous to mention.

Over the years Dagmar has led countless projects and taken us from the paper-based world, to the web, to the explosion of social media. Her enthusiasm, commitment to getting it right and professionalism are legendary at LAWPRO. She has graciously tolerated a company populated largely by lawyers who have no background in communications as a professional discipline (but naively think lawyer = communications expert) and taught us so much that we will never be the same.

We all wish Dagmar a wonderful retirement, with lots of great travel and sailing.



Kathleen A. Waters.
President & CEO