

# LAWPRO

magazine

JANUARY 2012 VOL 11.1



## making the right move

- Top talent: where to find it, how to keep it
- Interviews: Selling yourself
- Moving firms: conflicts checks; insurance issues

ALSO:  
Unbundling pitfalls  
Cost of self-represented litigants  
LinkedIn: Dos and Don'ts

# upcoming events

## February 2-3, 2012

CBA Saskatchewan mid-winter meeting  
TitlePLUS exhibiting  
Regina, SK

## February 7, 2012

The Law Society  
*Technology Tips for your Civil Litigation Practice*  
Dan Pinnington presenting  
Toronto, ON

## February 9-10, 2012

OBA Institute 2012  
practicePRO, TitlePLUS sponsoring and exhibiting  
Family Law Section – *20 Ways Technology Can Make You a Better Family Lawyer*  
OBA Entertainment Section – *Chasing Paper: Know Your Client Professional Responsibility Issues for External and In-House Counsel*  
OBA Solo/Small Firm Section – *The Ethics and Dangers of Using Social Media*  
Dan Pinnington presenting  
Toronto, ON

## February 16, 2012

MacMillan Binch LLP  
*Claims update; Fraud Prevention and Technology Tips*  
Dan Pinnington presenting  
Toronto, ON

## February 16, 2012

The Law Society webcast  
*Ethical red flags for real estate lawyers*  
Lisa Weinstein chairing  
Toronto, ON

## February 23, 2012

Fasken Martineau LLP  
*Practising Safely: How to Avoid a Malpractice Claim and Fraud Prevention*  
Dan Pinnington presenting  
Toronto, ON

## March 1, 2012

OREA Conference  
TitlePLUS exhibiting

## March 2, 2012

Algoma District Law Association  
*Succession and Continuity Planning and Fraud Prevention*  
Ray Leclair presenting  
Sault Ste Marie, ON

## March 7, 2012

Hamilton Law Association  
7<sup>th</sup> annual current issues in commercial litigation seminar  
*Update on claims and fraud prevention*  
Jordan Nichols presenting  
Hamilton, ON

## March 22, 2012

Realtors Association of Hamilton-Burlington – AGM Conference and Trade Show  
TitlePLUS exhibiting

## March 28-31, 2012

American Bar Association Techshow  
*Smartphone Shootout; Blackberry Apps; 60 Sites in 60 Minutes*  
Dan Pinnington presenting  
Chicago, IL

## March 30, 2012

Kenora Law Association  
*Succession and Continuity Planning and Fraud Prevention*  
Ray Leclair presenting  
Kenora, ON

## April 5, 2012

Nipissing Law Association Law Association  
*Succession and Continuity Planning and Fraud Prevention*  
Ray Leclair presenting  
North Bay, ON

## April 19, 2012

Oakville Milton District Real Estate Board Trade Show  
TitlePLUS exhibiting  
Oakville, ON

# recent events

## January 18, 2012

Osgoode professional development program: Pension and benefit entitlements upon marriage breakdown – the legal guide  
*Traps and Pitfalls When Dealing with Pension and Benefit Entitlements*  
Yvonne Bernstein presented  
Toronto, ON

## January 18-20, 2012

CBA Manitoba mid-winter meeting  
TitlePLUS exhibited  
Fort Garry, MB

## January 26-27, 2012

CBA Alberta Law Conference  
TitlePLUS exhibited  
Calgary, AB

## January 27, 2012

Ministry of the Attorney General E-government Group  
*60 Technology and Practice Tips in 60 Minutes*  
Dan Pinnington presented  
Toronto, ON

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Publications Mail Agreement No. 40026252

Return undeliverable Canadian addresses to:  
LAWPRO  
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Suite 3101, P.O. Box 3  
Toronto, ON M5B 2L7

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# How can we get your attention?



How should we at LAWPRO communicate fast-breaking, topical information that could help you avoid a claim?

This is not a rhetorical question. On the contrary, I would very much like to hear your suggestions – because we are concerned that many lawyers appear to be ignoring the information we make available.

A good example: On December 15, 2011, we sent a LAWPRO Alert – an email communication — detailing an audacious IP fraud scam to the 22,000 lawyers for whom we have an email address.

Within a week we heard from several lawyers who were taking steps to be retained or do work on the matter. One came within a hair's breadth of having been duped.

**At least three of these lawyers had not seen or read our LAWPRO Alert warning.** (Thank goodness they at least called before acting!)

This situation is not unusual. Unfortunately, our practicePRO (risk management) and claims teams are being kept busy responding to lawyers who are asking about the very issues we are trying to address in our email newsletters and our AvoidAClaim blog.

So what should we be doing differently? How can we encourage you to review the information we provide that warns you about frauds, alerts you to deadlines, or provides tips and resources to help you avoid claims in your law practice?

We all suffer from information overload, and we all get way too many emails. But email remains an essential communications tool for LAWPRO. It is cost-effective and – when

opened and read – a timely way for us to communicate with you.

But our statistics indicate that only one-third of lawyers open the emails we send. Fewer still – about 11 percent – click through to actually see (and we hope read) the content of those emails.

We do our best to minimize the number of email messages by sending focused and targeted messages. For example, we create practice-specific Webzines that go only to lawyers in a specific practice area. Reminders to file the insurance application or to remit transaction levies go only to those who have not filed. In all of 2011, we sent only nine emails to all 22,000 lawyers for whom we have an email address!

As well, we comply with the law regarding electronic communications, including appropriate notices and subscribe/unsubscribe options on our emails. For example, if you wish to receive only a paper or electronic copy of *LAWPRO Magazine*, you can unsubscribe to one or the other.

But the power of electronic communications is a major tool for LAWPRO in the fight against malpractice and fraud, and against the rising costs of doing business in general.

What can you do to help?

1. Make sure we have an email address for you – and that it is up-to-date. More than 1,300 insured lawyers still have not given us an email address that would allow us to communicate with them electronically.
2. Make sure your web server does not treat our email address – [service@lawpro.ca](mailto:service@lawpro.ca) – as junk or spam, thus preventing our

electronic communication from ever getting to you. Whitelist that email address and/or make sure your IT department (if you have one) does the same.

3. Take a minute to scan our email newsletters when they arrive in your inbox:
  - our *Insurance News* updates you on important deadlines and insurance program news,
  - *Webzine* brings you timely risk management information, and
  - *Alert* contains time-sensitive, critical information.
- All newsletters will always contain information that we believe you need to know about – now.
4. If your status or contact information changes, please let LAWPRO know by contacting our [service@lawpro.ca](mailto:service@lawpro.ca) or call Customer Service at 416-598-5899 or 1-800-410-1013. You must notify both LAWPRO and The Law Society separately of these changes. LAWPRO and The Law Society maintain completely separate information databases and, in keeping with our respective mandates, generally do not share information that lawyers may consider confidential or proprietary.
5. Finally – and most importantly – send me your best ideas for how we can improve the chances that you will read our electronic communication. We'll keep you posted on the best ideas that we can implement.

Kathleen A. Waters  
President & CEO

# Fraud resources

## Updated LAWPRO Fraud Fact Sheet now available

LAWPRO's popular Fraud Fact Sheet ([www.practicepro.ca/fraud](http://www.practicepro.ca/fraud)) – a four-page summary of the frauds being perpetrated against lawyers – has been updated and is now available on our website and in hard copy.

The fact sheet is a handy, skimmable resource that lists the common red flags for bad cheque and real estate frauds, provides tips on how to avoid being caught up in these frauds, tells you who to contact if you have a file that raises suspicions, and provides a heads-up on how to spot when the fraudster is an insider – an associate, a law clerk or other member of the firm staff.

Download the Fraud Fact Sheet at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud). To obtain hard copies for your lawyers or staff, please contact Tim Lemieux at [tim.lemieux@lawpro.ca](mailto:tim.lemieux@lawpro.ca)



## How to dig deeper if you suspect a fraud

Take these steps to cross-check and verify information provided to you by the client.

- Cross-check names, addresses, and phone numbers of the client and other people/entities involved in the matter on Google and other websites. While the real names of people or businesses may be used, contact information on fake documents will put you in touch with people in cahoots with the fraudsters.
- Do reverse searches on phone numbers.
- Look up addresses using Street View in Google Maps.
- Ask your bank or the issuing bank to confirm that the branch transit number and cheque are legitimate.
- Call the entity making the payment or loan and ask if they are aware of the transaction.
- Contact the company to confirm it is expecting the debtor's payment or business loan.
- Hold the funds until your bank confirms the funds are "good" by contacting the other bank, and have the bank confirm, in writing, that it is safe to withdraw.

## Fraudsters using names of celebrities to throw lawyers off guard

One sign of how audacious fraudsters are becoming is the recent use of the name of a famous Japanese baseball player – Hideki Matsui – in an attempt to quell suspicions about the legitimacy of the purported transaction. In this case, fraudsters used Matsui's

name (and a Toronto address) as part of a ploy to arrange for the purchase of property on a rush deal. Using the names of famous people is one way to attempt to bury any fraud-related web search results among the results related to the real person. For more

on this fraud and others, including examples of emails from fraudsters and copies of actual (fraudulent) cheques sent to lawyers, see the Confirmed Frauds page ([http://avoidclaim.com/?page\\_id=1479](http://avoidclaim.com/?page_id=1479)) on LAWPRO's AvoidAClaim blog.

# LAWPRO MAGAZINE

President & CEO: Kathleen A. Waters

LAWPRO Magazine is published by Lawyers' Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to potential claims.

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The Canadian Press [cpimages.com](http://cpimages.com)

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## LAWPRO receives A (Excellent) rating from A.M. Best Co.

LAWPRO was awarded a financial strength rating of A (Excellent) and an issuer credit rating of “a” from a leading rating agency – the 12<sup>th</sup> time that LAWPRO has received this positive rating from A.M. Best Co.

In addition, the rating agency gave LAWPRO a stable outlook – citing in part the company’s strong capitalization, commanding market profile, improved underwriting performance and access to capital sources held by the Law Society of Upper Canada for the benefit of the lawyers’ professional liability program.

In its January 13, 2012, rating announcement, A.M. Best Co. also commented on the unique nature of LAWPRO compared to other insurance companies. LAWPRO writes only two lines of business – lawyers’ malpractice and title insurance. As the dedicated insurer for the Law Society’s professional liability insurance program, it can count on 100 per cent coverage and retention of its base liability program, and earns 87 per cent of its premiums from this stable base. These factors contributed to the A (Excellent) rating and stable outlook, A.M. Best said.

At the same time, A.M. Best Co. commented that factors inherent in LAWPRO’s mandate could offset these positive rating factors. Cited were the goal of providing affordable insurance; continued exposure to fraud-related claims; and increased claims frequency and severity. These factors had contributed in the past to a “negative” outlook for LAWPRO – a caution about a possible change in a company’s financial strength rating that A.M. Best has now replaced with a stable outlook based on its re-evaluation of LAWPRO’s results and structure.

A.M. Best noted that LAWPRO’s ability to maintain its positive rating over the longer term would involve: maintaining its capital base; continuing to be the provider of the mandatory insurance program; and containing underwriting costs to budgeted levels using current risk management strategies.

“These positive results from A.M. Best Co. are an important corroboration of the strength and stability of our company and of the strategies we have in place that have contributed to sound financial and claims results,” said Kathleen A. Waters, president and CEO of LAWPRO. “We are also pleased that A.M. Best has recognized the unique mandate and nature of our insurance company in its evaluation of the factors driving our rating.”

## LAWPRO committed to accessible customer service

January 1, 2012, marked the coming-into-force of the Customer Service Standard established under the *Accessibility for Ontarians with Disabilities Act, 2005*. In preparation for meeting its compliance obligations under the standard, LAWPRO has conducted company-wide accessibility training and has adopted an “Accessible Customer Service Policies, Practices and Procedures” policy. This policy, points out Stephen Freedman, director, compliance risk & chief privacy officer at LAWPRO, describes how LAWPRO will meet its obligations to ensure those with disability receive services that respect their disabilities, and commits the company to train its employees appropriately. The new policy is available at [www.lawpro.ca](http://www.lawpro.ca) – see the Accessibility link at the bottom of every web page.

## keyDATES

### January 31, 2012

LAWPRO 2011 Fourth quarter real estate and civil litigation levy surcharge filings and applicable payments were due.

### February 7, 2012

LAWPRO lump sum payment discount deadline. Premium cheques had to be dated and received by this date to qualify for the \$50 discount on the 2012 LAWPRO insurance premium.

### April 30, 2012

LAWPRO 2012 real estate and civil litigation levy surcharge annual exemption form due.

### April 30, 2012

LAWPRO 2012 first quarter real estate and civil litigation levy surcharge filings and applicable payments due.

### July 31, 2012

LAWPRO 2012 Second quarter real estate and civil litigation levy surcharge filings and applicable payments due.

### September 15, 2012

LAWPRO CPD premium discount deadline: Complete the online declaration by this date to receive the CPD premium credit on your 2013 insurance premium.

### On or about October 1, 2012

LAWPRO Online filing of professional liability insurance applications for 2013 expected to begin.

### October 31, 2012

LAWPRO 2012 Third quarter real estate and civil litigation levy surcharge filings and applicable payments due.

### November 1, 2012

LAWPRO E-file deadline. LAWPRO renewal applications for 2013 professional liability insurance must be e-filed by this date to be eligible for the \$25 per lawyer e-filing discount.

### November 8, 2012

LAWPRO Final deadline to submit LAWPRO renewal application for 2013 professional liability insurance.

## New LAWPRO board members

The following were appointed to the LAWPRO board of directors in November 2011.

### Robert F. (Bob) Evans

A principal with Evans & Evans in Bradford, Evans is a Law Society bencher and former president of the York region law association. He is also an active member of his community, serving as a school board trustee, past president of the Bradford Rotary Club and is currently chair of the local community council.

### Clare Brunetta

A sole practitioner based in Fort Frances, Brunetta is a past chair of CDLPA and past co-chair of the Joint Working Group on Lawyers and Real Estate, and a deputy judge of the small claims court. He is also an active volunteer in his community and has served in many capacities in the education, health, sports and tourism sectors as well as with the aboriginal community.

## Former board members make news

In October 2011, **Harvey Strosberg**, chair of the LAWPRO board of directors from 1995 to 1996 and a partner at Sutts, Strosberg LLP in Windsor; was awarded the OBA Award of Excellence in Civil Litigation. Strosberg received the award in recognition of his outstanding service to the legal community and his contributions to and achievements in enhancing the practice of civil litigation.

**Gerry Swaye**, a LAWPRO board member from 2003 to 2006, recently received the Hamilton Law Association (HLA) Emilius Irving Award. The award is given to members of the Hamilton Law Association in recognition of their contributions to the HLA and the community in general. Swaye is principal at Gerald A. Swaye Associates PC in Hamilton.

Former LAWPRO board member **Randall Bocock** has been appointed to the Tax Court of Canada. A partner and practice head of corporate law at Evan, Philp LLP in Hamilton until his appointment in November, Bocock served on the LAWPRO board from 2010 to 2011.

**Constance Backhouse**, a member of the LAWPRO board from 2003 to 2011, was recently awarded the Gold Medal for Achievement in Research by the Social Sciences and Humanities Research Council (SSHRC), the Council's highest research honour. The award was presented to Professor Backhouse for her major body of work on feminist research. Backhouse is currently doing research on a biography of former Supreme Court of Canada justice Claire L'Heureux-Dubé.

## eBRIEFS

The following is a summary of the electronic communications you should have received from LAWPRO this fall. To ensure you receive timely information about deadlines, news and other insurance program developments, please make sure you have whitelisted [service@lawpro.ca](mailto:service@lawpro.ca) with your email service provider. The full content of these newsletters is available at [www.practicepro.ca/enews](http://www.practicepro.ca/enews).

### Alert



Avoid administrative dismissal; fraud alert

December 15, 2011

Reminder to lawyers to take a fresh step in litigation to comply with Rule 48; warning about new and sophisticated frauds.

## Insurance News



New programs approved for LAWPRO CPD credit:

File by Sept 15

September 7, 2011

A reminder of the CPD filing deadline; the launch of the *LAWPRO Magazine* summer edition; and four legal job postings open at LAWPRO.

### LAWPRO transaction filings overdue

September 15, 2011

Notice to lawyers who had not made their litigation or real estate transaction levy filings and/or payments by the July 30, 2011 deadline.

### Renew your LAWPRO exemption status for 2012:

File Online

September 28, 2011

A reminder to exempt lawyers to renew their exempt status for the 2012 policy year; information for exemption eligibility; and information for exempt lawyers planning to return to practice. Second renewal sent to those who had not yet filed on October 11, 2011.

### Renew your (your firm's) professional liability insurance for 2012

October 3, 2011

Separate notices to lawyers and firms that online filing for the 2012 insurance renewal is now open. Several reminders sent out in mid October and at the end of October to those who had not yet filed their insurance application, as well as final reminder of the November 8, 2011, filing deadline.



## Unbundled legal services:

# Pitfalls to avoid

At its September 2011 meeting, Convocation approved amendments to the Rules of Professional Conduct to give guidance to lawyers who provide legal services under limited scope retainers, also called “unbundled” legal services. LAWPRO is concerned that the more widespread provision of unbundled legal services in Ontario will increase malpractice claims. This article will help you understand some of the risks inherent in providing limited scope legal services, and how you can reduce your exposure to a claim when working for a client on an unbundled basis.

What are limited scope or “unbundled” legal services?

At its very simplest, the “unbundling” of legal services, also commonly called “limited scope representation” or “a limited scope retainer” (which now is a defined term under the Rules), is “the provision of legal services by a lawyer for part, but not all, of a client’s legal matter by agreement between the lawyer and the client.”

Limited scope legal services are already occurring in many areas of practice in Ontario. Practically speaking, LAWPRO

would see the provision of limited scope legal services as typically falling into one of three general categories:

- Consultation: Typically a short meeting or phone call with a lawyer to get advice and direction on a legal matter or issue;
- Document preparation: Sometimes referred to as “ghostwriting”, which typically involves a getting a lawyer’s assistance as to form and content of a contract, court pleading or other legal document; and
- Limited representation in court, an administrative hearing, at a mediation, etc.: Typically where a lawyer provides assistance with a single appearance in court or at a hearing, or for work and appearances for a particular stage of a matter.

### The biggest claims risks

LAWPRO’s concern that unbundling could lead to more claims stems from the fact that the biggest causes of claims against lawyers – communication issues and inadequate investigation or discovery of facts – are at least equally, if not more likely, to occur during the provision of unbundled legal services.

For lawyers at all sizes of firms, communication/relationship issues between the lawyer and client are the biggest cause of LAWPRO claims – representing more than one-third of LAWPRO’s claims and costs in most areas of practice over the last 10 years. The three most common communication-related errors are:

- a failure to follow the client’s instructions;
- a failure to obtain the client’s consent or to inform the client; and
- poor communications with a client.

Another major source of claims is inadequate investigation or discovery of facts representing about 15 per cent of all LAWPRO’s claims over the last 10 years. This error goes to the very core of what lawyers are supposed to do for their clients – give legal advice tailored to the client’s specific circumstances – and

basically involves the lawyer not taking a bit of extra time or thought to dig deeper and ask appropriate questions on the matter.

### Risks that arise when legal services are unbundled

When a lawyer is working for a client on a limited scope retainer, the exact scope of that retainer becomes even more important in terms of the client’s expectations as to the work the lawyer is to do and not do on the matter. Given this increased opportunity for confusion, it is critical that lawyer/client communications are clear and unambiguous.

A lawyer who is interviewing a client with an eye toward limiting the scope of the representation must interview the prospective client as carefully as that lawyer would a client who can afford full representation.

Moreover, limiting the interview of a client simply because other legal issues are not going to be pursued by the lawyer could place that lawyer at risk of failing to advise the client to seek other counsel, or of an impending deadline or statute of limitations issue, which in turn may open the lawyer to a malpractice claim.

One of LAWPRO’s biggest concerns is that lawyers who limit the scope of their representation may nonetheless be held accountable for failing to warn the client of material legal issues or claims, even though they were not part of the limited scope representation agreement. Courts in the U.S. have held lawyers liable for malpractice in this circumstance.

### Failure to explain the risks of limited scope retainers

Further to an amendment to the commentary under the definition of “competent lawyer” in the Rules, an extra obligation imposed on the lawyer providing unbundled legal services to a client is the need to obtain the client’s understanding and consent to the limited scope of the representation.

That consent must be an “informed consent” and should include disclosure by the lawyer of the risks and disadvantages of limiting the scope of the representation.<sup>1</sup> The type and extent of information needed to satisfy that the “consultation” requirement was met will vary with each client and the client’s ability to understand. If a client has not regularly used a lawyer, extra care should be taken to ensure that the client truly understands the limits of the representation and consequent risks.

Experience in the U.S. indicates that there will be post-matter disputes as to the scope of the lawyer’s representation on limited scope retainers. Court decisions in the U.S. show that dissatisfied clients will challenge purported limitations by refusing to pay fees, filing malpractice suits or bringing ethics complaints. Common allegations include: that the lawyer was not authorized to undertake certain aspects of the representation; that the fees were unreasonable given the nature or scope of a limited representation; that the litigation result or settlement should have been more favourable; or that the lawyer did not handle an aspect of the matter properly.

In the case where something was not done that allegedly should have been done (and the client will frequently judge this with the uncompromising and impossible standard of 20:20 hindsight), clients frequently argue that the lawyer should have completed the step in question and that the client never agreed that the lawyer would not be responsible for doing it.

### How to reduce your exposure to a claim

Here are several steps you can take to reduce your exposure to a claim when providing legal services on a limited scope basis:

**Limited scope representation does not mean less competent or lower quality legal services:** The commentary to Rule 2.01 “Competence” specifies that a lawyer considering whether to provide legal services under a limited scope retainer must carefully assess in each case whether, under the

<sup>1</sup> 669283 Ontario Ltd. v. Reilly, [1996] O.J. 273 (Gen. Div.)



circumstances, it is possible to render those services in a competent manner. And further, new Rule 2.02(6.1) provides that: “Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.”

Thus, under the Rules, a lawyer and client can limit the scope of representation and agree on the means used to achieve the client’s goals or objectives. However, while the Rules afford the lawyer and client great latitude to limit the time spent or costs of the representation, the limitation must be reasonable under the circumstances. Limitations will not be considered reasonable if the time allotted is not sufficient to yield advice upon which the client can rely. Lawyers providing unbundled legal services owe the same duties of competence, diligence, loyalty and confidentiality to limited-scope clients that they owe to full-service clients. Don’t be tempted to fall below the required standard of care just because you are handling a matter on a limited scope basis.

**Identify the discrete collection of tasks that can be undertaken on a competent basis:**

Take the time to understand the specific tasks and/or legal issues on which the client is seeking assistance. Make sure there are discrete tasks that you can undertake on a competent basis, and consider how ethics and court rules apply to the tasks you choose to handle.

**Confirm the scope of the limited retainer in writing:**

As amended, new Rule 2.02(6.2) directs that “When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.” Put in writing the discussions and agreement with the client about the limited scope retainer; doing so will both assist the client in understanding the limitations of the service to be provided and document the extent of the retainer in case it is questioned at a later point in time. Rule 2.02(6.3) specifies some limited exceptions to the limited scope retainer writing requirement.

**Clearly document work and communications:**

At every step of the matter, take steps to ensure it is clear to the client what tasks you are or are not responsible for, and keep a record of all communications (information and instructions provided by the client, advice given by the lawyer). Lawyers can significantly reduce their exposure to a 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 that documents communications, and confirming what work was done on a matter at each step along the way.

**Be careful with communications when opposing counsel is acting on an unbundled basis:**

The commentary under Rule 2.02(6.2) provides that: “A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed.” This recognizes that in the unbundled context a lawyer will deal with opposing counsel on the matters within the scope of a limited retainer and directly with a client on matters outside the scope of the retainer. The new Rule 6.03(7.1) provides some

specific directions on how and when to communicate with opposing counsel and client in the unbundled context. Note that court rules and procedures have yet to be amended to specifically address some of the issues raised in the unbundling context (e.g., communicating with counsel who is only handling some issues on a matter; dealing with a client under a disability; going on or off the record; or the ghost-writing of pleadings).

**Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems:**

Further to new commentary under Rule 2.02(6), limited scope representation will generally not be appropriate if a client’s ability to make adequately considered decisions in connection with the matter or representation is impaired due to minority, mental disability or for other reasons. That commentary states: “A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.” Lawyers should take care when they are providing unbundled services to clients who are or might be under a disability.

**Be careful providing further assistance to a client after a limited scope retainer is terminated:**

In many cases, a matter handled on a limited scope retainer basis will have started before the lawyer became involved and/or will continue on after the work the lawyer agreed to do was completed. If the client comes back for further assistance, the lawyer should make sure a new full or limited scope retainer is in place.

## Conclusion

Unbundled legal services are one solution to the complex issue of access to justice and are likely to become more commonplace. Being aware of the risks of unbundled legal services and prepared to take the steps outlined in this article will help you reduce your exposure to a malpractice claim. ■

Dan Pinnington is director of practicePRO, LawPRO’s risk management and claims prevention program. He can be reached at [dan.pinnington@lawpro.ca](mailto:dan.pinnington@lawpro.ca).

# MCT + IFRS

## More than the sum of its parts

In the post-Enron/post-Lehman world, the framework within which financial institutions and insurance companies (including LAWPRO) operate is increasingly regulated and prescribed – perhaps more so than in most industries. Knowing, understanding and complying with this steady stream of consultation, regulation and compliance regimes of course creates extra work, requires additional infrastructure (at a cost) and presents bottom-line challenges that were not even on the radar a few years ago.

We've discussed this new world order in previous Insurance Biz columns in which we explained two acronyms that are on everyone's tongues (at least in the insurance industry) these days: The Minimum Capital Test (MCT),<sup>1</sup> a benchmark requirement of our regulator, and International Financial Reporting Standards (IFRS).<sup>2</sup>

In those articles, we explained the need for LAWPRO to meet prescribed financial solvency tests (via the MCT calculation) and

the likely impact that a new financial reporting regime (IFRS) being adopted worldwide will have on the insurance industry.

What's become clear over the past year is that the inter-relationship between IFRS and MCT may well have even more impact than originally expected.

First the MCT – probably the single most important test that Canadian regulators use to assess the capital adequacy of an insurer such as LAWPRO.

As described in our earlier article on this subject, the MCT is a ratio calculation that compares the capital available (our net assets) to the capital we need to meet our financial obligations – i.e., claims costs. Our regulator, the Financial Services Commission of Ontario, has stringent requirements that apply to both sides of the MCT equation.

(These in turn are based on requirements of the national regulator for the financial services industry, the Office of the Superintendent of Financial Institutions – OSFI). For example, the MCT calculation must include prescribed additional capital or margins that vary depending on the assets and liabilities on the insurer’s balance sheet.

At mid year, LAWPRO’s MCT stood at 220 per cent – below the 260+ per cent average of all Canadian insurers. But the LAWPRO Board believes that an MCT of between 220 and 230 per cent is appropriate as it allows us the room to weather unexpected losses or poorer-than-expected investment returns and still ensure the regulator that we are stable and secure. LAWPRO’s ability to set premiums and raise capital – which is different from many other insurers which often must rely on fickle capital markets – makes a lower than average MCT feasible and reasonable.

To maintain an MCT in the desired range, we need to make a profit of about \$5 million a year. With the premium increases of 2010 and 2011 we achieved that goal while also ensuring we have the funds to pay claims which now hover in the \$80-\$90 million mark per year of operating the primary professional liability program.

But changes are coming to the way in which the MCT ratio is calculated. According to OSFI’s own published modelling, that change is expected to see insurers’ MCT drop an average of 14 per cent – **without the insurer having made any change in its underlying operations.**

It will take a concerted effort on the cost side – that is on the capital required side of the MCT equation – to ensure LAWPRO continues to maintain an MCT result in the 220 to 230 per cent range.

### IFRS – a complicating factor

Compounding this situation are the known and unknown changes coming via IFRS.

You’ll start to see the first impact of these changes this year: Financial statements for

2011 must be IFRS compliant – meaning we will see a new form of balance sheet and significantly more information in the Notes section of our annual report, to be released in April 2012.

Of particular interest to LAWPRO are how investments are going to be treated under IFRS and the impact that IFRS could have on the fundamental concepts used in insurance company accounting – especially the costing of claims which may undergo a profound change that sees us revert to a previous model.

First – the issue of investments.

A few years ago, the financial reporting world moved to a fair-value accounting model which introduced the concept of comprehensive income.

This allowed companies to account for unrealized gains and losses in their investment portfolios through the comprehensive income portion of their financial statements and separate them from the bottom line. LAWPRO took this option for its surplus investment portfolio – that is, for those investments that are surplus to the capital needed to fund our claim portfolio (these investments are referred to as our matched portfolio). For the latter, LAWPRO opted to have gains (or losses) in the matched portfolio flow through our income statement – that is, show up on the bottom line.

Proposed IFRS rules that will come into effect in the next two to four years may see us partially revert to the pre-2007 days.

If implemented as drafted, new IFRS rules would greatly diminish the use of other comprehensive income; in fact, in our case, the OCI line on our financial statements could disappear. That’s because the proposed changes would see unrealized gains in our surplus portfolio removed from the other comprehensive income line, and the unrealized gains/losses on the bond portion of the surplus portfolio drop off LAWPRO’s balance sheet entirely (until that investment is actually sold).

The impact of this proposition is two-fold: Shareholders’ equity (the value of the investment that the bar has in LAWPRO) would diminish. And – unless our regulator makes subsequent modifications to the way in which MCT is to be calculated – our MCT would fall. For example, if we applied the new rules to our June 30 financial results, we’d take a four per cent haircut off the MCT. So IFRS could create a new source of pressure when it comes to meeting our regulator’s solvency tests.

Another source of concern is IFRS 4 – Phase 2, expected to come into effect in 2014-2015. Of specific concern to us is a possible change in the treatment of the time value of money (the discount rate).

The discount rate is the assumed future interest rate that we use to determine how much money we need TODAY to pay claims in the FUTURE. There’s talk in accounting circles of implementing a **risk-free** discount rate.

What that means we’re not quite sure. Does it mean the bank rate set by the Bank of Canada or federal government bond yields? Will it have a two-year or 30-year horizon? We won’t know those details for a while yet.

But one thing we do know: Its impact can only be unfavourable. For example, a 50 basis point drop in the discount rate results in a \$5 million hit to the LAWPRO bottom line. So rethinking the discount rate affects not only our bottom line – in that we have to raise reserves – but also our MCT in that it increases the capital required side of the MCT equation. And for LAWPRO, the major way to increase capital is through premium revenue.

No matter how we look at it, maintaining a healthy insurance company in this new world is going to be our focus in the foreseeable future. ■

<sup>1</sup> “Why profit is not always a bad word”: *LAWPRO Magazine* September 2010 Vol. 9 no 2; pages 14-15; <http://www.google.com/url?q=http://www.practicepro.ca/LAWPROMag/InsuranceBizProfit>

<sup>2</sup> “Gearing up for IFRS at LAWPRO”: *LAWPRO Magazine* December 2010 Vol. 9 no. 4; page 13; [http://www.google.com/url?q=http://www.practicepro.ca/LAWPROMag/IFRS\\_LAWPRO](http://www.google.com/url?q=http://www.practicepro.ca/LAWPROMag/IFRS_LAWPRO)



# & Finders keepers:



## Recruiting & retaining top talent

Attracting the best possible lateral associates is critical to a law firm's ability to maintain its competitive edge, financial leverage, internal succession and future success.



*Cleo Kirkland*

When candidates approach our firm about a lateral move, they all tend to ask a variation of the following questions: Which firm is the best for me? Which will make the greatest difference in my career? Which offers me the greatest opportunity for success? For the best candidates, the task almost always lies in narrowing down all possible opportunities to the one or two that can offer them the best career path.

Recently, loyalty to law firms is being redefined, and the relationship between associates and their firms continues to change. Partnership is no longer the goal of many associates, and many are less inclined to stay with the same firm for their entire career.

Added to this dynamic is an increasing number of mergers and layoffs which, along with a choppy economy, have left many associates somewhat leery of their firms and far less likely to believe that what is best for their firm is necessarily best for them and their careers.

In this market, loyalty is short-lived and a strategic approach to attracting top lateral talent is critical to a firm's success. This strategy invariably includes a firm both honing its recruiting processes and becoming a preferred employer in its market.

## Recruiting smarter

A common mistake firms make is to identify needs only when they become crises, i.e., when there is an immediate and pressing position that needs to be filled. Instead of this reactive approach, firms should forecast forward and identify their needs over the next several years in order to ensure a constant flow of the right people. Knowing who might be favourably inclined to join your firm and when and how to initiate contact with them is one of the best ways a focused recruiting process can deliver value to a firm. A strategic recruitment plan will infinitely increase your firm's chances of hiring and keeping the best.

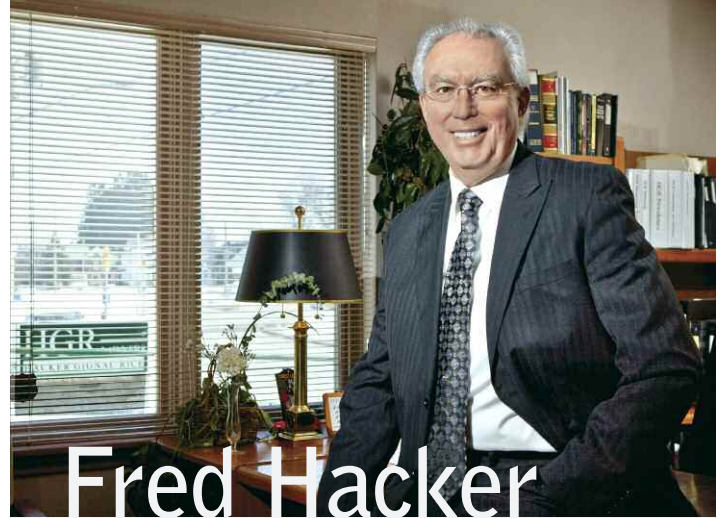
Simply placing an ad in the Ontario Reports (or an equivalent publication) typically results in nothing more than a large number of unsuitable candidates. No doubt some firms have had great luck in catching a top associate who has gone on to become a leader in his or her field. But the chance of coming across the right candidate at just the right time, persuading her to join your firm and finding that she is a good fit is rare and the cost of getting it wrong is high.

Targeted brochures and website pages, a designated recruitment/professional development director and a formal employee referral program can all be strong components of a firm's overall recruitment strategy. Use your firm and other legal recruitment websites to post openings. Encourage partners and associates to actively network at conferences and industry events that are likely to be frequented by top performers. Cultivate relationships with law school career offices and legal recruiters. Develop a 'story' about your firm that delivers a consistent message to the marketplace about who you are and where you are going, and spread the word!

## How to be a choice law firm

Becoming a law firm of choice requires both a clear understanding of exactly what associates want and a strategy to provide them with the platform through which they can achieve their professional goals. Assessing what superstars are seeking and figuring out how your firm is best positioned to respond is crucial to any recruitment and retention strategy.

A law firm is an employer of choice when its lawyers believe they are working at a great firm and tell people as much. The best associates



Fred Hacker  
Managing Partner – HGR Graham Partners LLP  
Midland

## On recruitment

In assessing talent for recruitment to our firm, the first quality we look for is character. We're looking for team players whose personal values are consistent with our culture. You can teach someone the fundamentals of practising law. You can't teach integrity.

## On retention

To retain top talent, it's essential to communicate. And communication must be two-way. There must be consistent communication of the plans and prospects of the firm and the importance of the role of the individual in those plans. There must also be constant interaction to understand the state of mind, goals, frustrations, challenges and worries of the individual so those issues can be addressed before they become insurmountable.

do their due diligence and ask the lawyers employed at the firm what it is like to work there. They also ask trusted friends and advisors (including legal recruiters) about the reputation of the firm and the likelihood that it will deliver on the career opportunities promised. Stars will ask the difficult questions about work platform, career trajectory and fit.

Strong indicators that a firm is an employer of choice include:

- it has positive name recognition on the street;
- prospective candidates and clients tend to choose the firm over others;



# Stephanie Willson

Chief Professional Resources Officer – McCarthy Tétrault LLP  
Toronto

## On recruitment

Whether we're hiring a law student – which is the primary source of new lawyers for firms such as ours – or an associate or a new partner, we look at what we call “buckets” of skills that help us determine if that individual will be a successful lawyer with McCarthy Tétrault. Depending on the level we're recruiting for, what we look for in each of those buckets will differ.

For example, with law students, who often have less work and life experience than candidates at other levels, our focus is on those qualities that you cannot train for: So we have a bucket of skills that fall into the “legal acumen” category: evidence of sound judgment, strong analytical skills, a demonstrated genuine interest in the areas in which our firm practises.

Similarly, we're keenly aware that we are in the business of serving clients, so we have another bucket of skills around “service orientation” – such as demonstrated good interpersonal skills, the ability to work as part of a team, good communication skills and the like.

These skills I have mentioned for the most part are hard to teach, so we need to focus on them in evaluating candidates before we hire them!

When we recruit at the associate level, we'll focus more on the individual's legal skill set and ambitions for their career. Client skills are also essential: can they speak to examples of excellent client service? Can they provide examples of how to build good client relationships? Of course personal qualities such as integrity, honesty and being a team player are also very important.

## On retention

A large firm such as ours needs a focused, deliberate talent management strategy that responds to the fact that we have different people with very different needs. We've built a framework for helping us retain top talent that we've trademarked: McCarthy Tétrault Advance. It's a platform for talent development that has eight components such as coaching, work and opportunity allocation, compensation and recognition, and capability development. At any time, we have various initiatives underway nationally in each area.

- there is a low turnover rate of top performers;
- lawyers at the firm deliver a consistent message on why the firm is a great place to work;
- there is a record of ‘recruiting back’ former associates and partners to the firm;
- the firm appears in the “best” lists of legal publications such as Lexpert; and,
- legal recruiters speak positively of the firm.

Law firms of choice consistently have the most effective recruiting and retention programs. Those programs may vary from firm to firm, but what all of them have in common is that they recognize associates financially, create an exceptional working environment and have a clear understanding of what their associates want (and why some of them leave).

## Money and other things

Although people work for a variety of reasons (professional fulfilment, personal challenge, desire to serve the community, meaningful work, contributing to society), the principal reason most people work is to get paid.

Even those for whom money ranks farther down the list of reasons for working are not interested in being unfairly compensated. Fair compensation is the first and most critical component of a successful recruitment and retention program. Only once this initial hurdle is cleared can a firm and its associates focus on issues of productivity and practice development.

That said, fair compensation does not always equate to top-of-market compensation. If your firm expects its lawyers to docket more than 2,000 billable hours every year, then it can and should pay top dollar. But many of today's associates are focused on more than just compensation. They are seeking responsibility and recognition for their efforts, the chance to learn from and work with skilled practitioners, professional growth and

Claude Lacroix & Andree Maryse Lacroix



## Claude Lacroix

Partner – Lacroix Forest LLP  
Sudbury

### On recruitment

Brains. Passion. Integrity. It's not one but the complete package.

**Brains** because the practice of law is not what it used to be. Clients are sophisticated and expect the same high standard no matter what the task. There is no room for cutting corners or substandard work product. That means you need to be able to understand what's expected of you – and deliver. Just because you had the best marks in law school doesn't mean you have what it takes to be a great lawyer. Client satisfaction is the ultimate litmus test.

**Passion** because the legal profession is now more than ever a very stressful and unforgiving calling that has lost many of the professional perks that would otherwise temper the bad days. The reality is if you don't love what you do the drudgery will eventually bury you and you will end up resenting the profession and us.

**Integrity** because trust and civility are more important today than ever in law practice. We try to take a team approach on many matters. Trusting those who take carriage of a file when you are away is essential. We need to know that each of us is representing the firm with complete integrity, honesty, and civility. We are very fortunate in the north that the local bar has always and continues to share this view.

### On retention

For a firm such as ours – a smaller, more local firm that is located outside a large major centre – though you sometimes fall upon a star looking to relocate, the reality is that we have to develop top talent internally. So we try to find bright young lawyers who are a good fit and work with them. We take our juniors and incorporate them into files right from the start: they share in the responsibilities, but also in the learning, the rewards and the credit. That willingness to share and work as a team has proven to be very effective and has developed their talents early and kept them engaged. We see students and new associates as the freshest legal minds we have... we are excited to work with and learn from them and draw on their energy and creativity.

We also encourage every member of our firm to be involved in some community activity or group – not because we see that as a way to get work but because our experience has been that it has helped them better understand and appreciate our community. Once they can appreciate a community and what it has to offer, new associates are much more inclined to set down roots and make it their home. Fully immersed and engaged citizens are better able to serve their community.

development, some measure of control over their personal and professional lives, an opportunity to have a hand in the firm's evolution, and to receive timely and thoughtful feedback.

The old law firm maxim that "no news is good news" simply does not work anymore and is, in fact, a fail-safe way of having associates walk out the door "out of the blue."

On the question of bonuses, many firms offer their associates plans that are intended to reinforce and reward the principles valued by the firm. If your firm only cares about financial profitability, then bonuses on billable hours alone will suffice. Too many firms claim they want their associates to contribute in ways beyond the billable hour but only reward those who are exceptionally profitable. Inconsistent recognition programs are a guaranteed path to high associate turnover.

## How to create a superior working environment

The single most valuable tool in associate retention is effective communication.

All too often, lawyers in management positions fail to communicate critical information about the firm and where it is going to its associates. These managers become absorbed in and distracted by in the day-to-day practice of law or firm management and mistakenly assume that the associates at the firm know what is taking place 'at the top'.

If an associate is not performing, firm managers often assume that the associate knows he or she is underperforming and needs to pick up his or her game. Perhaps even worse, many firms do not communicate to star associates that they are doing a good job, meeting or exceeding expectations, and are valued for their contributions to the success of the firm. As a result, the law firm misses a considerable opportunity to recognize and reward the efforts of its stars in a meaningful way.



left to right, Gerry Dust, Phil Grandmaître, Brad Evans, José Virgo and Marc Ouimet-McPherson.

## Gerry Dust

Partner - Dust Evans Grandmaître  
Ottawa (Orleans)

## On recruitment

In my 34 years at the bar I have managed everything from a sole proprietorship to a 25-lawyer firm, and I have done a lot of interviews. Right at the top of my list of "must haves" is people skills. Without them, there will be problems working with staff, colleagues, other players and clients. Next on the list would be something I would describe as "street smarts." It encapsulates a lot of essential attributes. I have interviewed many people who, while very intelligent and sporting excellent CVs, just did not get "it." You have to be able to put all the pieces together and know how the world works.

## On retention

That boils down to paying them well, giving them interesting work and never taking them for granted.

Beyond sharing information to retain lawyers, there is another and more important aspect of good communication and that is the need to listen. Law firms are typically chock-full of great talkers, with great listeners a considerably scarcer resource. To retain people, especially star

associates, firms must become good at listening. One of the most valuable tools a law firm has is the ability to receive and provide regular feedback. This can be achieved in any number of ways, including formal orientation programs, an internal mentoring program, written procedures



Sean Dewart & Tim Gleason

## Sean Dewart

Partner – Dewart Gleason LLP  
Toronto

### On recruitment

It is hard to put my finger on the single most important attribute we look for when we hire. There are a handful of “must haves,” such as a good legal mind, a strong work ethic and a personality that facilitates effective communications with clients, opposing counsel, witnesses and judges. To be a good litigation lawyer, you must be able to read people, and make it easy for them to read you. You must also be willing to learn, which means being highly inquisitive, if not perversely curious. The most effective advocates make the fewest assumptions and ask the most questions. There is nothing more irritating than a know-it-all who jumps to conclusions and sees every file as a chance to show off his or her abilities.

If I had to pick out the most important criteria we look for when we hire, they would be integrity and fearlessness. The most important thing our clients buy from us is our reputation. If opposing counsel and judges can't be certain that they can trust us, we are useless to our clients. We need to be certain that any lawyer we hire will not compromise the firm's reputation in this regard. Fearlessness is the other side of the same coin and no less important.

### On retention

Retaining good lawyers has not proven to be as much of a challenge as finding them in the first place. The key is to make their practices stimulating. We try to find a balance between training, and handing off as much responsibility as possible. It's far more interesting for lawyers to work on a file, or some part of a file, where they have primary responsibility and feel that they are answerable to the client and the court.

manuals for new lawyers, a designated professional development director, and regular reward and recognition programs.

### If it didn't work, what went wrong?

When an associate announces his or her impending departure, many firms respond by feeling rejected and sticking their heads in the sand. Unfortunately, not asking why the associate is leaving and what the firm could have done to better meet the associate's needs prevents us from understanding what changes can be made to keep the remaining associate ranks happy, motivated and 'in their seats'.

As recruiters, we hear from unhappy associates every day. We know why they come to us. And if one associate is unhappy, in all likelihood there are a number of associates who are unhappy. It is therefore critical that there be no confusion about what a firm's associates are seeking and whether they are finding it at their present firm. The best time to find that out is before they are crying on the shoulder of a recruiter. But, at the very least, conducting meaningful exit interviews with departing associates will allow the firm to adjust its practices to avoid similar departures in the future.

A great firm is not something that can be haphazardly assembled by chance. It requires partners, associates and management to be working together towards a set of common and clearly defined goals. ■

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**Glen McCann**

Partner – Sullivan Mahoney LLP  
St. Catharines

## On recruitment

As a firm located outside a major centre, we find there is no better indicator as to whether a lawyer will prove to be a good fit for the long term than his or her ties to the community. Toronto and Ottawa have obvious attractions to a variety of people from across the province. While we believe that there are many good lifestyle reasons for someone to want to practise in Niagara, we find that people who come and stay tend to be those who have a history here. Obviously there are exceptions but that is our general observation.

## On retention

Make them a part of the team. Involve them in interesting work and make sure they understand their value (to the firm). Help them to take the long view. We sometimes forget that life as a young associate trying to build a practice is challenging; they need to understand the rewards that are there in the long term. It is always a little dispiriting to see someone pursue an option for a quicker buck when you feel they are making a mistake. Make sure that they feel that they belong and that belonging is a good thing.

# Top 10 tips for top talent

1. Forecast forward over several years to identify your needs.
2. Incorporate brochures, websites, employee referral programs and a skilled recruitment person or PD director into your strategy.
3. Cultivate relationships with trusted legal recruiters.
4. Develop a 'story' about your firm and spread the word.
5. Have a clear understanding of what top associates want from their firms.
6. Associate pay should be competitive and reflect what is expected of them.
7. Use bonuses to reward behaviour you value and want more of.
8. Provide associates with regular updates on the firm and its direction.
9. Provide the means for associates to deliver feedback to the firm in an unthreatening way.
10. Conduct thoughtful exit interviews and adjust firm practices to prevent similar departures.

# Is this the job you want?



How to find the right fit – and then sell yourself in the interview



**On the face of it, interviewing should not be all that difficult – particularly for lawyers. As members of a profession who primarily make their living either writing or speaking, the idea that having a conversation about your interests and abilities in your own profession sounds both logical and easy.**

But throw the words “job interview” into the mix and a whole new paradigm emerges. With seemingly so much at stake, job interviews take on a new meaning for people who ordinarily would not shy away from talking about the field they have chosen and the background that they bring.

At the same time, it also seems that candidates often appear at interviews unprepared for a conversation in which they have voluntarily decided to participate.

Here are some thoughts about making the most of a difficult process, and in the end making good decisions about where you want to work.

## Preparation is key

Although you are, hopefully, going to be doing most of the talking in the interview, it pays to know as much as you can about the firm with whom you are interviewing, and the people who will be interviewing you. When you schedule the interview make sure to ask lots of questions. Whom will you be meeting with, how long will the interview last, and will the interview be a series of one-on-one conversations or a group meeting? There is a huge difference between those two kinds of interviews, and you want to be prepared for the one that you are going to have.

While most law firm interviews feature relatively standard questions, corporations now often employ what are called “behavioural” or “situational” interviews. These rely on the premise that past behaviour predicts future performance. To that end, candidates are queried at length in a series of statements that start with, “tell me about a time when,” followed by a series of situations that range from your best moments to your worst.

You may not believe that this is the best way to learn how you will perform in the new position – but not being prepared to deal with this format can be fatal. And coming up with your best answers to these situational questions on the way home in the car is not going to do you any good.

The best way to prepare is to know the content of your resume completely, and to be able to talk, in specifics, about how you have approached work situations in the past. Whether or not you find yourself in an interview of this type, it helps significantly to prepare the stories that you want to talk about in advance. Your interviewers are likely to forget about your past titles and dates: But you do not want them to forget your stories. Whatever you do, resist the temptation to “wing it” when it comes to preparing your answers to questions about your past experience.

## The SAO formula

There is an easy formula to employ when talking about what you have done – SAO – or Situation, Action, Outcome.

You want to describe succinctly the situation in which you found yourself, remembering that the listener may not know anything about the topic you are describing; include the actions that you took, and what happened as a result of your action.

Remember that in addition to winning circumstances, you are likely to be asked about times when you did not finish a project, meet expectations, or win a case. You may also be asked about difficult relationships with co-workers or supervisors. Having something prepared in advance is likely to prevent you from leading with an inappropriate story, or one that leaves the listener with a less than positive impression. While it is fine that you made mistakes in the past, you want the interviewer to know that whatever lesson was to be learned, you have done so and you will never make the same mistakes again.

Knowing who you are going to be meeting with gives you the opportunity to be well versed in their background prior to the interview. In addition to any posted firm or company biography, make sure that you look at their LinkedIn profile, any appropriate lawyer directories, court filings, and of course, the grapevine. The more you know about the temperaments and background of those interviewing you, the greater the likelihood that you will hit the right tone during the interview process.

## Questions to ask and when

There are two sides to the interview process, and it is an important distinction to keep in focus. If during the interview you believe that the hiring entity has all of the power in the process, you may subtly signal a lack of confidence in your own value. However, you must understand that the early stages of the interview process are all about what you are bringing to the table. It is not until the other side begins to signal an interest in your candidacy that you can begin to ask questions about the ways in which this employer might be a good place for you to apply your skills.

Most interviewers will ask if you have any questions – which of course you do. But there are some questions that should be asked no sooner than when a job offer has been tendered. It is then and only then that you have leverage in the interview process.

Questions you ask during the interview process should relate specifically to the job: the kinds of things that you would be doing, the experience the interviewer is looking for, and what would make someone successful in the job. If you can get a description of a successful candidate, you can go on to reiterate to the interviewer why you would be just such a candidate.

Questions about the culture of the firm, the reasons the position is available, working hours and conditions, and possible advancement should be left until after a job offer. So should any discussion of salary and benefits. Many potential employers will ask you for salary requirements; but answering those questions short of a job offer is likely to short circuit your ability to negotiate on your own behalf when an offer is made. When asked – and you will be – politely tell the interviewer that you will be more than happy to discuss salary at the time of a job offer. If you get pushback, and it is possible that you will, reiterate your willingness to talk about the issue after an offer,

and that you are at present primarily interested in learning more about the job and how you would be an asset to the organization.

If you are asked to complete a written application that includes salary history, write something narrative like: “within range for experience,” or “market rate.” If you have to include numbers, try to fill in the blank with zeros.

## Benefits & working conditions

When an offer has been made, refrain from discussing salary until you have received full disclosure of the benefits package. Without that information you will not be able to know what you want to negotiate in the employment package.

If at all possible, have the salary conversation in person. If a number is delivered to you over the phone, set up a meeting to talk about the offer in person. Understand that you must be clear about the salary you are willing to accept. Remember as well that this is a negotiation on behalf of your first client – yourself. As an attorney, negotiation is likely to be part of your job requirements, so you should demonstrate that ability now.

There are a number of other things that you may want to discuss prior to talking about remuneration. Now is the time to talk about working conditions, billable hour numbers and rates if they are applicable, opportunities for advancement, partner track, marketing support, fee-splits, and firm culture, just to name a few.

This would also be a time when you want to meet more of your potential future colleagues, and see the physical office space you would occupy if you haven't already. While taking any job has its risks, you are at this point trying to eliminate as many future surprises as possible.

So borrow a page out of the prospective employer's interview guide. The firm doing the hiring will probably want references from you to ensure that you are who you say you are. Now's the time for you to gather some of the same kind of information from the firm by meeting and talking with more people. Just as you have been asked about your weaknesses or shortcomings, now you may also want to ask the firm about issues they are working on to improve.

Remember as well that no job (and no candidate) looks better than the day before you start. If you see red flags now, you may want to consider whether or not this is the best fit. Just because you have successfully made a case for yourself in the interview doesn't necessarily mean this is the job you want to own.

Due diligence on both parts of the interview is likely to create a better chance of a good fit – for you and the hiring firm. ■

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# A checklist for avoiding conflicts on



# lateral lawyer transfers\*

Lateral hiring of partners or associates occurs at firms of every size, and is becoming far more common. The other articles in this issue of *LAWPRO Magazine* address the topic of finding someone who has the right credentials and is a good fit, from both the point of view of the firm and the transferring lawyer.

However, in addition to reviewing the transferring lawyer's credentials and suitability, the transferring lawyer and firm will need to identify and deal with potential conflicts of interest that may arise with respect to clients at the transferring lawyer's previous firm, and in particular, clients for whom the transferring lawyer worked.

This critical task is not as easy as it might seem on first thought. The hiring firm must have sufficient information to complete an internal conflicts check, while at the same time making sure that no confidential client information is disclosed by either the transferring lawyer or the hiring firm.

Here are some steps you may want to take to identify potential conflicts of interest when dealing with a lateral hire:

- Ask for a current curriculum vitae so that you can review the background of the transferring lawyer. You will want to look back at least five years, or to the time of articling if this was less than five years ago.
- Check with the lawyers in your firm, or search within your conflicts system if it has the data to identify any matters on which the transferring lawyer's previous firm was on the other side.
- Ask the transferring lawyer for a list of major clients and the matters he or she worked on (but not any confidential information, including the identity of clients if that is confidential) and have your firm's conflicts person run these names through your firm's conflicts database.
- In an interview (not in writing) ask the transferring lawyer if he or she is aware of any potential conflicts due to work done while at his or her previous firm.

- Ask the transferring lawyer if he or she sat on any boards, and if so, have your firm's conflicts person run this information through your firm's conflicts database, including, ideally, the name of the entity, the directors and officers.

It is critical that both the firm and the transferring lawyer take an honest and critical look at any potential conflicts situations. Unfortunately, the serious assessment of conflicts often does not occur until the very final stages of the transfer when the lawyer and firm are committed to making the transfer happen. A strong desire to hire a transferring lawyer should not lessen the need to identify and fully assess potential conflicts, and to take appropriate steps to deal with them if necessary. This may include erecting confidentiality screens or seeking client consents. In some cases, it may mean that the transferring lawyer cannot be hired or that the hiring firm may have to send existing clients to another firm.

Informing all lawyers and staff about the transfer once the transferring lawyer starts at the new firm will help identify potential conflicts that were not identified in the pre-transfer screening, and will ensure that appropriate confidentiality screens are put in place. The CBA Conflicts of Interest Task Force's Toolkit ([www.cba.org/conflicts](http://www.cba.org/conflicts)) has an excellent model of a Lateral Hire Memorandum.

Resist any temptation to overlook or ignore any real or potential conflicts that arise when a lawyer transfers from one firm to another. A failure to deal appropriately with these conflicts only delays the inevitable. In all likelihood the firm will have to refer any clients with a conflict to another firm, and it may even face a malpractice claim as a result of a conflict. ■

\* Portions of this article were adapted from the *Checklist for interviewing transferring lawyer* which appeared in the CBA Conflicts of Interest Task Force's Toolkit ([www.cba.org/conflicts](http://www.cba.org/conflicts)).

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# Here today, gone tomorrow:



## Insurance implications of lawyer transfers & practice structures

Lawyer mobility is now taken for granted: The days of spending one's whole career in a single practice setting are long gone. Consider these scenarios:

*Scenario one: A lawyer previously in practice elsewhere joins a new firm. A claim is made based on work completed at the previous firm, but received only after the lawyer has joined the new firm. Does the new firm have any responsibility for the claim?*

*Scenario two: A firm is notified of a claim related to the work of a lawyer who once worked at the firm but whose whereabouts are unknown. What is the liability of the firm and its individual partners if the lawyer was a partner? What if the lawyer was an associate?*

These scenarios raise several questions:

- When a lawyer departs from or arrives at a firm, do his or her claims exposures follow in lockstep?
- Could former – or new – partners or employers be exposed?
- What happens when a claim is based on the error (or wrongdoing) of a lawyer, and liability exceeds the limit of his or her coverage?
- Are the firm assets exposed to this excess liability?
- And to what extent are other partners in the firm exposed?

The answer to all of these questions is, “it depends.”

### Scenario one

In scenario one, a relevant issue is the nature of the LAWPRO policy: claims-made-and-reported (for more on this topic see page 23). This means that coverage will be sought under the insured's current-year policy, unless the lawyer had knowledge of the circumstances potentially giving rise to the claim prior to his/her joining the new firm. In this latter case, the claim will engage a previous policy. It's also important to remember that LAWPRO's policy (issued under the Law Society of Upper Canada's insurance program) provides coverage to lawyers on an individual, not a firm, basis.

Either way, if the claim is covered and the amount falls within the amount of coverage available to the subject lawyer under his/her policy, neither the new nor old firm should be directly affected (subject to any arrangements of either firm with the lawyer related to payment of deductibles and claims history levy surcharges). Of course, indirect effects could include having to report the fact of the claim the next time excess insurance is being purchased (typically done on a firm-wide basis), but that is a topic for another day.

But if the claim amount exceeds the policy limits, it is a different story for at least one of the two firms. In this case, liability based on supervision, vicarious liability or agency law will be determined by reference to the working relationships of the lawyer at the time the legal services were performed, which means that the lawyer's current employer – or partners – should not be exposed. (For example, the

outcome would be different if the new firm assumed in some way the liabilities of the prior firm).

As for excess insurance – if any – in this scenario (acknowledging there is no standard form of excess insurance policy and assuming the lawyer’s former and new firms are unrelated), it would generally be expected that the current excess insurance policy of the prior firm, if one exists, would be triggered. The second firm’s current excess insurance policy – if the firm has one – would generally not apply because the services giving rise to the claim were not performed for/on behalf of that firm.

## Does an LLP avoid liability concerns?

The “shield” provided by an LLP firm structure is an imperfect one. The Ontario *Partnerships Act* (R.S.O. 1990, c. P.5) provides:

10(3) Subsection (2) [the provision establishing the limited liability of LLPs] does not relieve a partner in a limited liability partnership from liability for,

- (a) the partner’s own negligent or wrongful act or omission;
- (b) the negligent or wrongful act or omission of a person under the partner’s direct supervision; or
- (c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner’s direct supervision, if,
  - (i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or
  - (ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it.

In other words, where one partner supervised another in doing the work that gave rise to a claim, or knew of the circumstances that led to the claim without acting to prevent the claim, that partner will be liable as though the partnership were a traditional one.

Lawyers practising in an LLP, therefore, are required to carry innocent party coverage. Finally, because the firm assets are not protected from claims (regardless of firm structure), an excess insurance policy is a wise investment.

## Scenario two

In scenario two (the lawyer who has moved on and cannot be located), the responding coverage at first instance would be the current policy coverage in place for the departed lawyer. Depending on the circumstances, that may be the full practice policy coverage (that is, if the lawyer has kept his or her standard policy in force) or run-off coverage only. The latter is \$250,000 of coverage for all future claims in total, unless the lawyer arranges to buy a higher level of coverage. In the case where a lawyer’s policy is “in run-off”, the supervising partner’s policy would generally become engaged if the damages exceeded the limits of the run-off policy coverage.

The liability of the firm or partners **does not depend** on whether the departed lawyer was a partner or an associate. It depends on the firm’s structure. If the firm is a traditional general partnership, the firm and its partners are responsible for all activities of other partners, employees or agents. In other words, there is joint and several liability for claims, regardless of whether the claim flows from negligence or from an excluded act (see below regarding lawyer conduct). This is so regardless of whether the “innocent” partners supervised the lawyer whose work gave rise to a claim, and regardless of whether they had knowledge of the facts.

For that reason, lawyers working in traditional partnerships are strongly encouraged to apply to buy-up their innocent party coverage (as described on page 23) to the maximum level, and to purchase an excess insurance policy for the firm. In fact, some firms will arrange to pay for additional run-off coverage for lawyers leaving practice, when negotiating that lawyer’s exit from the firm, just to avoid the type of problem highlighted by scenario two.

If the firm is an LLP, the firm itself will be liable for the acts or omissions of all its members. Individual partners’ status is different. (See Sidebar, “Does an LLP avoid liability concerns?”)

Partners in an LLP are fully liable for their own acts or omissions and for those of others under their direct supervision, regardless of the latter being partners or employees. Partners in an LLP are not liable for errors and omissions of other partners or employees, unless those errors or omissions were criminal or constituted fraud, or they knew or ought to have known of the errors and omissions and did not take reasonable steps to prevent them. However, as the partnership itself remains fully liable, the limited liability partners’ assets in the firm will be at risk.

## What type of lawyer conduct often leads to law firm exposure?

As a lawyer vetting a prospective partner or employee, what should your main concern be in terms of exposure for the activities of the newcomer? Is it the quality of their legal knowledge, the excellence of their practice systems, or is it something else?

The “something else” alluded to is the possibility of dishonest or criminal conduct.

A key determinant both of coverage provided by the LAWPRO policy under the Law Society’s insurance program, and of whether liability could spread beyond the individual lawyer-policyholder, is the nature of the error or omission giving rise to a claim.

An LLP business structure may shelter partners from each others’ negligent errors or omissions, but not from each others’ criminal or fraudulent acts.

What’s more, LAWPRO’s policy excludes from coverage “... any CLAIM in any way relating to or arising out of any dishonest, fraudulent, criminal or malicious act or omission of an INSURED”(Part III (a) of the LAWPRO policy).

So, dishonesty and/or criminal conduct clearly pose a higher risk for the firm as a whole than do negligent errors or omissions.

All lawyers who practise in association or partnership with other lawyers (in other words, all lawyers other than true sole practitioners)

are required to purchase innocent party coverage as described in LAWPRO’s Endorsement No.5. to the policy, which has the effect of limiting the impact of the Part III (a) exclusion.

The innocent party endorsement serves to extend coverage to certain otherwise excluded acts. The coverage does this by treating a “dishonest, fraudulent, criminal or malicious” act of either the insured or of others for whose actions the insured might be liable (for example, under the doctrine of vicarious liability) as an “error, omission or negligent act” as described in the policy.

However, the extent of coverage provided under Endorsement No. 5 is subject to a sublimit (a special limit within, and counting towards, the general limit of liability) of \$250,000 per claim and in the aggregate. Considering the quantum of modern fraud schemes, it is easy to imagine a situation in which a claim would exceed this sublimit.

As a result, in addition to the firm vetting carefully any prospective practitioners, LAWPRO invariably recommends that lawyers working in association or partnership with others apply to buy-up their innocent party coverage to the maximum permitted, and purchase excess insurance coverage on top of that.

## What is a claims-made-and-reported policy?

Not all insurance policies work the same way. One factor that differs is how a policy that is renewed annually “matches” claims to policy years.

A policy that matches claims to the policy in force when the facts giving rise to the claim occurred is sometimes called an “occurrence” based policy.

LAWPRO’s standard policy, by contrast, is a “claims-made-and-reported” policy.

A claims-made-and-reported policy provides coverage under the present policy for claims that arise out of past and present services. With this type of policy, two developments together trigger coverage:

1. a claim is made against an insured; AND
2. the insured reports the matter to the insurer (LAWPRO) as a claim.

The focus is on when the claim is made and reported, not the year in which services are provided and the alleged error or omission is said to have occurred. If a claim is made against an insured this year for services provided in 2008, the policy that responds is this year’s policy. If the insured had similar coverage in 2008 as he or she has in 2012, it may not make much difference from a coverage perspective.

However, it is possible to have quite different coverage in different years:

- The insured may have retired since 2008 and now have only basic run-off insurance that provides coverage of \$250,000 per claim and in the aggregate;
- The insured may have been practising real estate law in 2008, and would have had specialized coverage under the Real Estate Practice Coverage Option at the time, but discontinued the practice of real estate between 2008 and 2012;
- The insured may have been practising in a firm in 2008 and have had the benefit of innocent party coverage and excess insurance coverage, but is now a sole practitioner without either (or vice versa – the insured may have moved from sole practice in 2008 to a firm in 2012); or
- There may be general changes to the policy provisions, terms and conditions, and the scope of coverage expanded or reduced between the time the services were provided and the time a claim is made and received.

Clearly, changes in coverage between the year in which the error was made (and when factors leading to the possible liability of other parties are relevant) and the year in which the claim is made and reported can have significant coverage implications. The LAWPRO policy is available at [www.lawpro.ca/standardpolicies](http://www.lawpro.ca/standardpolicies).



# Lawyers and paralegals: Working productively (and safely) together



Cathy Corsetti

The paralegal profession is in the midst of a significant evolution. In May 2007, the Law Society of Upper Canada undertook the regulation of Ontario independent paralegals. With that mandate came standards for the accreditation of paralegal education programs, a code of professional conduct for the profession, and changes to the permitted scope of paralegal practice.

Even before paralegal regulation, some Ontario lawyers maintained ongoing working relationships with paralegals. In some cases, paralegals worked in-house (whether in law firms or other organizations) and as such were not the “independent paralegals” now regulated by the Law Society. But in other cases, lawyers maintained referral-style relationships with independent paralegals. A good example of these are the relationships that continue to exist between paralegals who represent clients in provincial court on highway traffic matters and the lawyers to whom they refer those cases that exceed their jurisdiction (for example, certain impaired driving charges).

Cathy Corsetti, an independent paralegal and chair of the Law Society’s Paralegal Standing Committee, explains that although she rarely refers individuals to lawyers, she does receive some referral business flowing in the other direction, typically from real estate lawyers, or lawyers who work with property management companies.

Corsetti believes that the future of legal services will include more – not less – collaboration between the two professions, pointing out she has worked with one lawyer for 33 years.

“We won’t necessarily be working side-by-side,” she says. But she does expect that each profession will develop an increased respect for the other’s areas of expertise, and will view each other as support, rather than competition. Self-regulation, she believes, can only assist in fostering

this relationship: “Lawyers now realize that we can’t do whatever we want: we have essentially the same rules of professional conduct that they do, we have to carry insurance... we have to stand behind the work we’re doing, and we have to protect our reputation.”

Collaboration between lawyers and paralegals – even on a referral basis – has the potential to engage the agency or vicarious liability issues raised in other articles in this magazine. While the lawyer/paralegal pair may view their relationship as referral-based and not collaborative, the public may not have so clear an understanding. This is especially true in cases where there are indicia between the parties that have been associated with “holding out” a more collaborative association. A common practice that might be interpreted as holding-out is sharing office space or resources (for example, a waiting room, reception services, or equipment) with a paralegal.

Another example: is the lawyer listed on the paralegal firm website (or vice versa)? There are a few examples on the Internet of lawyer websites containing banner advertisements for paralegal firms. Although a lawyer may see a clear distinction between listing a paralegal in a banner ad at the top of a webpage and listing that paralegal’s name in the firm letterhead, this distinction may be lost on unsophisticated clients.

There is little case law to predict the consequences of a claim in the context of a finding that a lawyer and paralegal have held themselves out as working in association (for comments about holding out as between lawyers, see page 25). However, it would be prudent practice to take steps to avoid such a finding. While independent paralegals are required to carry malpractice insurance, the limits of coverage are substantially lower than the standard LAWPRO coverage for lawyers.

The bottom line: paralegal regulation is likely to both enhance and increase relations between lawyers and paralegals. It should also stimulate consideration of the liability and insurance implications of these relationships.

## Structuring relationships with lawyer-colleagues: What are the claims exposure implications?

Understanding that there may be times when a firm will be exposed for claims beyond the limits of the individual lawyer's policy, what are the differences arising from different relationships? Should a firm consider this when planning an addition to its professional resources?

1. *Lawyer employee of a law firm:* The simplest scenario from the perspective of assessing excess liability is that of employer/employee. Regardless of the nature of the firm structure (whether traditional partnership or LLP), both the firm itself and any partner who directly supervises or controls the work of the employee likely will be liable in the event a claim against the employee exceeds the limits of the employee's coverage. For this reason, law firms that employ associates must purchase innocent party coverage (to ensure coverage for Part III(a) excluded acts), and are encouraged to buy-up that coverage to the maximum limit and to purchase excess insurance coverage as well.
2. *Referrals:* Some lawyers regularly refer work to professionals outside the firm (that is, sending work out instead of bringing that lawyer into the firm). For example, a family lawyer may refer an existing client to a criminal lawyer, who is given complete carriage of a criminal matter outside the family lawyer's area of practice. Other lawyers may refer matters to paralegals.

While pure referrals involve no supervision or control of one professional by another, certain working relationships can muddy the waters. Consider, for example, arrangements through which sole practitioners share office space and other resources; or where lawyers not in partnership with others identify with those others (whether they be lawyers or paralegals) on their letterhead, on websites, or signage, or elsewhere.

In *Tiago v. Meisels*, 2011 ONSC 5914, a client of one lawyer named three other lawyers as defendants in a negligence-based suit on the basis that, by having the four lawyers' names appear together on business cards, letterhead and a sign, the lawyers, who were sole practitioners sharing space, were holding themselves out as partners. The plaintiffs alleged that this holding-out created the erroneous view that the lawyers were "a firm of some depth."

Stinson J. was not swayed by the defendants' reliance on the words "practising in association" on the firm letterhead, because he was not convinced that the clients understood this to mean the lawyers were not partners. The defendants lost their motion for summary judgment.

The bottom line: Not having a certain lawyer join your firm may seem to be an effective way to limit risk. But when making referrals, lawyers should transfer carriage of the entire matter, and ensure that this is done with the client's knowledge and approval and that the client understands that the referring lawyer and referee are not collaborating. Also, be careful to avoid sharing resources or referrals in any way that might be interpreted as holding-out a partnership that doesn't exist.

3. *Partner:* Where the insured whose work gives rise to a claim is a partner, the potential for exposure to excess liability for his or her partners will depend on two additional analyses (as discussed above):

- What is the firm structure – traditional partnership or LLP?
- If the firm is an LLP, were there any factors present that would cause the limits on liability to be lost? For more on LLPs, see page 22.

## Another scenario: Working with paralegals

*Scenario three: A lawyer hears of a claim related to the work of a paralegal with whom the lawyer has worked. Might the lawyer be exposed to liability in excess of the paralegal's own coverage?*

Not only lawyers move around: Paralegals do, too. They also can have similar insurance issues, in terms of which policy responds, the scope of coverage, the amount of coverage, and so forth.

The answer to the question in this scenario depends on the nature of the working relationship between the two parties. If the paralegal was an employee of the firm, the firm (and likely the supervising lawyer) will be directly or vicariously liable. If the paralegal provided services to the firm on a contract basis, the firm and at least the supervising lawyer will likely be liable on the basis of agency law, possibly with a right of contribution/indemnity from the paralegal.

If the work that gave rise to the claim was referred completely to an independent paralegal (not an employee or working in association with the law firm) to be performed without the lawyer's ongoing supervision, with the client's knowledge and approval and with no indicia that might lead the client to believe that the paralegal and the lawyer were partners or employer/employee, liability for the claim would likely be the paralegal's alone.

## The lesson in all of this?

The potential for personal liability beyond the available coverage, for the errors of present, past, or future colleagues, is highly unpredictable. A lawyer's best defence? A review, at least annually, of the full spectrum of risks facing the firm and the lawyers practising within it, and of the adequacy of coverage in place to address those risks. Also consider a special review whenever an addition to the firm or new working structure is being considered.

Need help with this analysis? Contact LAWPRO's Customer Service Department at [service@lawpro.ca](mailto:service@lawpro.ca), 1-800-410-1013 or 416-598-5899 to discuss your evolving insurance needs. For more on coverage under the LAWPRO policy see our FAQs page ([www.lawpro.ca/insurance/faqs/faqs.asp](http://www.lawpro.ca/insurance/faqs/faqs.asp)). ■

Nora Rock is corporate writer/policy analyst at LAWPRO.

# The changing face of

## “of counsel” arrangements



Traditionally, the term “of counsel” was used when a firm wanted to list a distinguished lawyer who was acting as an advisor to the firm on its letterhead.

As times change the term has expanded to include a number of roles that may appeal to lawyers looking to alter the way they practise.

Some lawyers may wish to practise on a part-time basis. The lawyer benefits from having a relationship with a firm and being able to access its support and infrastructure, while the firm benefits from the lawyer’s expertise. This arrangement may appeal to senior lawyers as an alternative to retirement, or to a young lawyer wishing to be affiliated with a firm while practising from home. Others may have non-practising backgrounds (having worked in business, academia, or public office) and want to explore a new career with a law firm. In other arrangements, the term “of counsel” may designate a probationary partner-to-be, or a lawyer who desires a senior role but is not interested in becoming a full partner.

With the term “of counsel” being so flexible, and the arrangements that fall under it so varied, it’s difficult to provide definitive risk or practice management guidelines that support lawyers entering into such an arrangement. LAWPRO suggests that lawyers and firms consider their exposure to potential claims arising out of the practices of lawyers they are affiliated with (which includes “of counsel” lawyers) when determining how much insurance coverage is appropriate.

Although LAWPRO has not yet seen any significant claims trends relating to “of counsel” work specifically, there have been interesting developments and cases in the U.S. relating to conflicts of interest and issues of client consent and vicarious liability. Questions that have been dealt with by the courts include:

- Is the “of counsel” lawyer an employee of a firm or an “independent contractor”?
- Is there any contractual relationship between a client and an “of counsel” engaged by the retained firm without the client’s consent?
- Can a client who didn’t retain or meet with an “of counsel” lawyer seek compensation from that lawyer’s liability insurance?
- What are the standards to be met when determining if an “of counsel” lawyer is in a conflict and he, she, or the firm must be disqualified? Is merely being ‘affiliated’ with a firm in conflict enough to also disqualify the “of counsel” lawyer?

Answers to these types of questions often come down to the specific facts of a particular case. For lawyers wishing to explore these matters in more detail, we recommend *The Of Counsel Agreement: A Guide for Law Firm and Practitioner* by Harold G. Wren and Beverly J. Glascock. This is an American Bar Association publication that is available in the practicePRO Lending Library. It explores the many permutations of “of counsel” working arrangements and suggests important issues to consider in each, as well as offering guidance in drafting agreements that will clearly define the lawyer’s role and protect both the lawyer and the firm in terms of liability and conflicts. ■

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## UNBUNDLING AND FAMILY LAW:

# A cautionary tale

The Law Society of Upper Canada recently released its protocols on “unbundling” legal services.<sup>1</sup> *Webb v. Birkett*<sup>2</sup> is a cautionary tale about the dangers of unbundling in the context of collaborative family law.

Marguerite Webb retained Lucille Birkett, an experienced collaborative family law (CFL) lawyer, to represent her in her divorce proceeding. The plaintiff indicated she wished to use the collaborative process in negotiating resolutions to the various outstanding property and support issues.

After a series of meetings between the plaintiff, her husband, their solicitors, and various accountants and financial advisers, the parties reached a divorce settlement. However, this settlement was reached before all disclosure, appraisals and exchange of tax information were completed.

Three years later, the plaintiff sued her counsel.

The trial judge dismissed the plaintiff’s action. He relied on an expert in CFL, who described CFL as a process in which the role of the lawyers is to develop the process, and the role of the parties is to take ownership of the process, gather their own information, and actively and fully participate in assessing the quality of that information.

The expert testified that a competent matrimonial lawyer would have ensured that the plaintiff understood that disclosure of information to her satisfaction was available, and that in order to prepare a

complete matrimonial property statement of the parties’ assets and liabilities, further information was required. The lawyer must confirm that the client was willing to resolve this matter without such disclosure, and that she was aware of the risks of settlement without completing that process. Since the lawyer had done this, she met the standard of care.

The Court of Appeal found that counsel failed to meet the required standard of care, most notably in failing to demand production of the financial statements of the husband’s businesses.

The Court of Appeal held that CFL practitioners must meet the same standard of care required of other family law practitioners – including taking appropriate steps to get the financial information needed to properly advise the client. A lawyer must obtain sufficient reliable information to be able to ascertain what the client would likely receive, or be required to pay, for spousal support, child support and matrimonial property division, should the matter be resolved at trial, and so advise the client. A lawyer should tell a client who wishes to settle without having received full information from the other side that they may be accepting less, or paying more, than what the law requires.



The lawyer should provide estimates of the value of what might be lost, or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing.

Fortunately for the lawyer, the Court of Appeal agreed with the trial judge that the plaintiff had failed to establish damages. She failed to prove that had she had the missing information, she would have obtained a better settlement or would have proceeded to trial and obtained more than the settlement provided to her.

### The lesson:

Do not “unbundle” tasks to clients without strict oversight and detailed explanations and warnings, confirmed in writing. Indeed, carefully consider the extent to which unbundling is appropriate at all. ■

Debra Rolph is director of research at LawPRO.

- 1 See Professional Regulation, Report to Convocation, September 22, 2011, available on the Law Society’s website
- 2 2011 ABCA 13 (CanLII), dismissing appeal from 2009 ABQB 239 (CanLII)

# Self-represented claimants and vexatious litigants

It is common knowledge that the number of self-represented litigants has increased sharply. LAWPRO records show that it has received 964 claims by self-represented litigants, 90 per cent of which have been made since 2000. LAWPRO has incurred close to \$30 million in claims costs, which include both claims payments and defence costs.

Some self-represented claimants have legitimate claims and are simply unable or unwilling to get legal representation. Certainly self-represented claimants are often unfamiliar with the *Rules of Civil Procedure*, making it more time-consuming and therefore expensive for LAWPRO counsel to deal with them.

However, actions brought by self-represented claimants who are in fact vexatious litigants are inordinately and disproportionately expensive to defend. The following are three recent examples.

It started with a lease<sup>1</sup>

LAWPRO spent more than \$80,000 defending four actions which a plaintiff brought against two solicitors arising from damages allegedly suffered by his company in the early 1990s.

He initially sued the solicitor who had negotiated the company's lease with the landlord. That claim was dismissed as statute barred. He then sued a second solicitor, for failing to advise him to sue his first counsel at an earlier date. That action was summarily dismissed.

The plaintiff then sued his first counsel again, on the same facts. Justice Turnbull dismissed that action as *res judicata*. Next

he commenced a second action against his second solicitor, on the same basis as the earlier suit, except that "fraud" was substituted for "negligence." This fourth action was dismissed by Wood, J. as *res judicata* and an abuse of process.

Following the criteria set out in Lang *Michener Lash Johnston v. Fabian*<sup>2</sup>, Wood, J. found the plaintiff to be a vexatious litigant. The court also referred to the Court of Appeal's recent judgment, *Bishop v. Bishop*,<sup>3</sup> where the court considered the plaintiff's "non-judicial proceedings" in determining whether the plaintiff was a vexatious litigant.

Following the analysis in *Bishop*, Wood, J. commented on the fact that the plaintiff had made complaints about a judge involved in one of the actions to two chief judges, the Justice Ministry, and the Judicial Council. The plaintiff also wished to cross-examine the defendant solicitor's own counsel in the pending action.

Wood, J. found that the plaintiff's relentless pursuit of two solicitors, the counsel for one

<sup>1</sup> 2011 ONSC 5408, Cv11-77-00, September 15, 2011. PDF copy available from [debra.rolph@lawpro.ca](mailto:debra.rolph@lawpro.ca)

<sup>2</sup> (1987), 59 O.R. (2d) 358

<sup>3</sup> 2011 ONCA 211, 2011 CarswellOnt 5050, para 9

of the solicitors, and a judge, amply demonstrated that he was someone unreasonably obsessed with a cause and likely to pursue vexatious court proceedings indefinitely unless stopped. It was therefore appropriate that the plaintiff be found to be a vexatious litigant, and prohibited under s. 140 of the *Courts of Justice Act* from commencing or continuing any proceedings without leave of a judge of the Superior Court.

#### It started with an estate<sup>4</sup>

LAWPRO has spent more than \$125,000 defending claims brought against three lawyers by another vexatious litigant.

The plaintiff sued the estate of her late husband, as well as her late husband's solicitor (solicitor B), the solicitor for her husband's estate (solicitor S), and solicitor M, who had at one time represented the plaintiff.

Justice Templeton dismissed that action against all three solicitors. Justice Templeton ordered that the plaintiff was precluded from commencing any litigation against the solicitors without leave of the court.<sup>5</sup> Plaintiff's appeal to the Court of Appeal was dismissed.

She then brought an application to set aside Templeton, J.'s order. Little, J. dismissed it.

The plaintiff then sought to have solicitor B added as a party defendant to an earlier, pending action against her husband's estate. Conway, J. dismissed the application. Karakatsanis, J. denied the plaintiff's motion to review Conway, J.'s order.

The plaintiff then moved before Rady, J. for an order setting aside the order of Templeton, J., and to commence a new action against solicitor B. Rady, J. dismissed both motions, and found the plaintiff to be in contempt of court. Rady, J. was not prepared to incarcerate her on that date, but warned the plaintiff that the prospect of imprisonment was quite real.

Unfortunately, the plaintiff was not deterred. She issued a small claims court action against a LAWPRO defence counsel who had appeared before Rady, J.

Counsel appeared before Little, J. on October 21, 2011. The court was not prepared to incarcerate the plaintiff, but it did make a "super" vexatious litigant order against her. She is now precluded from instituting any new action of any nature or court proceeding of any nature in any court in Ontario, including small claims court, and she is precluded from bringing any further or fresh step in any existing action without the consent of a Superior Court judge, which consent will only be granted after the plaintiff makes an application for it, and provides proof that she has paid \$40,000 of the more than \$50,000 in cost orders that have been made against her to date.

#### The Crown and LAWPRO both apply for orders<sup>6</sup>

Van Rensburg, J. granted applications by Her Majesty the Queen and LAWPRO for an order under s. 140 of the *Courts of Justice Act*, declaring a particularly determined plaintiff to be a vexatious litigant and prohibiting him from instituting or continuing any proceeding, except with leave of a judge of the Superior Court.

The court found that the plaintiff had persistently and without reasonable grounds instituted proceedings in the courts of Ontario, and had conducted such proceedings in a vexatious manner.

Since 2006, he had commenced two judicial review proceedings and four civil actions. In those proceedings, at last count, 28 orders were made against him, including outstanding costs orders exceeding \$135,000.

A repeated failure to pay costs alone does not justify a s. 140 order, especially in the case of an impecunious litigant. However, costs awards are an important indicator of the resources that have been expended by opposing counsel in responding to unsuccessful proceedings. An award of costs against a party should act as a disincentive to fruitless litigation. The substantial costs orders against the plaintiff did not dissuade him from pursuing meritless appeals and motions.

His own emails disclosed that his litigation was commenced for purposes other than the

legitimate pursuit of legal remedies, and made it clear that he intended to continue such conduct in the future.

He re-litigated procedural and substantive issues that were already determined against him. He rolled forward grounds and issues from one proceeding into subsequent actions and has made claims against lawyers who have acted for or against him in earlier proceedings. He failed to pay any of the costs awarded against him. He persistently took unsuccessful appeals from judicial decisions.

Numerous judges explained to the plaintiff why certain claims he has persisted in advancing could not succeed. Instead of accepting such guidance, he responded with allegations of misconduct.

In response to adverse decisions, he alleged conspiracies, conflicts of interest, incompetence, fraud and other improprieties on the part of judges, court staff and counsel.

The court was satisfied that that an order was required under s. 140 of the *Courts of Justice Act* to prevent the plaintiff's further abuse of the courts' processes through the commencement and continuation of vexatious litigation.

As one would expect, he unsuccessfully appealed van Rensburg, J.'s order.

LAWPRO has so far spent more than \$250,000 defending claims brought by this plaintiff.

#### In short:

Claims brought by vexatious litigants are seemingly endless and tortuous beyond belief.

These three vexatious litigants alone have cost LAWPRO more than \$450,000. There is no guarantee that we have seen the last of them. ■

**Debra Rolph is director of research at LAWPRO. Karen Granofsky is senior claims counsel in LAWPRO's Primary Professional Liability Claims Department.**

<sup>4</sup> 2011 ONSC 4430, Court File No. 4091-11, July 20, 2011

<sup>5</sup> 2010 ONSC 3372, Court File No. 217/09 – June 9, 2010 PDF copy available from [debra.rolph@lawpro.ca](mailto:debra.rolph@lawpro.ca)

<sup>6</sup> 2011 ONSC 858 (CanLII)

# Tendering correctly: Preserve your client's rights (and avoid a claim!)

Tendering, in real estate practice, is a strategy real estate lawyers can use to demonstrate a client's willingness and readiness to close a transaction in circumstances where there may be doubts about the other party's ability or willingness to close on time. Done properly, tendering can help to preserve a client's rights in the event of a breach. Done wrong, it can backfire.

The following is an adaptation of a longer article written by Sidney Troister, LSM. The full article, "The Reality of Tendering: Why Real Estate Lawyers Give Fuel For Litigators To Sue Them", includes summaries of the relevant cases in the area and is available at [www.practicepro.ca/tendering](http://www.practicepro.ca/tendering).

Tendering is all about proving, in the event of a failure to close, who as between the parties was in breach and who was not in breach of the agreement. Much has been written on the mechanics of the perfect tender.

## Safeguarding the transaction: the new school rules (sort of)

Thirty or forty years ago, courts favoured strict contract compliance. More recently, courts have looked beyond the technical and have examined what was really occurring in the deal – including motives, good faith, and intention – and have begun looking at tenders not as proof positive of ability to close but as evidence of intention. While the mechanics of tendering have become less important when the big picture is reviewed, it is always better to be perfect and beyond reproach than to have to rely on any law that excuses imperfection.

Tendering has become a bit more complicated with the electronic system. Lawyers cannot be as hands-off with an electronic closing and the couriering of cheques and keys as with a deal that closes in the traditional way. To demonstrate that you have the cheque, keys, or the executed discharge or acknowledgement and direction to register (when you have no intention of letting go

of them) you must attend in person to meet the other side. Telling someone that the money is in your trust account is an invitation to criticism.

The traditional practice of bringing a witness to a tender has become somewhat of an anachronism. Witnesses were once used because the tendering lawyer would also likely be the litigator, making it improper for him or her to be counsel and a witness in the same case. Practice specialization (except in remote areas) has made this conflict increasingly unlikely.

The lawyer tendering without a witness must take notes of what was delivered, what was said and what was exchanged. Use a closing checklist and note deficiencies in any documents at the time. Identify to the other side what is asked for and not delivered.

## Safeguarding the transaction: the unspoken side issue

When the circumstances and details of a tender become the subject of litigation, there is often a sidebar issue of solicitor negligence. An opponent may allege a defective tender, or failure by the opposing lawyer to either insist on performance or successfully avoid it.

In other cases, a buyer client wanting out of the deal may fall back on a lawyer's inability to show readiness to close; or a seller may accuse his or her lawyer of letting the defaulting buyer off the hook, either by failing to have a mortgage discharge (or some other document) available, or by taking some step that prejudices the client.

## Safeguarding yourself when things are going south

**Rule 1:** Communicate carefully with opponents and avoid posturing. Beware the implications of declaring an anticipatory breach: if you're wrong, you may put your own client in breach. Know that by insisting on strict compliance with the agreement, you will also be required to strictly comply.

In *Kwon v. Cooper*, [1996] O.J. No. 181, the purchaser advised the vendor's lawyer that he had no money. The vendor's lawyer communicated an intention to stand on the strict terms of the agreement, and required closing on the original date, threatening to sue for damages if the deal did not close. On the closing date, the vendor did not have a discharge of the mortgage. Having insisted on strict compliance, the vendor was precluded from appointing a new day for closing after the

defective tender. The purchaser who could not close got his deposit back.

**Rule 2:** Know when trouble is coming: the overly technical requisition letter; last minute requests for unreasonable things; cleaning debris; rumours of environmental hazards and therefore environmental clearances; corporate minutes; declarations; etc.

**Rule 3:** Communicate with your client when you sense trouble is coming. Explain what is being asked of your side, explain what will be needed to tender properly (funds, signed

documents, discharges, cleanup, etc.) and explain the potential consequences of not satisfying the other side's requests.

If there is a private mortgage requiring discharge, explain that you cannot guarantee the cooperation of the private lender to provide an escrowed discharge. Explain that the deal may not close regardless of what you do to appease the other side. Never tell your client that he is assured of either keeping the deposit or getting the deposit back, or that he is entitled to damages for the other party's breach. Recommend bridge financing if a new purchase is at stake.

**Rule 4:** Never advise a client that the failure of the parties to tender terminates the agreement; it does not. Avoid any step that could lead to an unintended breach and repudiation after the closing date.

**Rule 5:** If in doubt about strategy, get help and get it early: consult seasoned real estate lawyers and real estate litigators.

*Adapted from an article by Sidney Troister*

Sidney Troister, LSM is a senior partner in the commercial real estate group at Toronto's **Torkin Manes LLP**.

## titleplus

# TitlePLUS poll catches media attention:

Canadians use homes as collateral – but know little about fine print in home equity lines of credit

Media across the country jumped on the results of a TitlePLUS-commissioned poll that shows consumers know very little about home equity lines of credit – but use them extensively for a variety of reasons.

The poll and related media campaign are part of a TitlePLUS program to educate consumers about the legal implications of many commonplace transactions, and to encourage them to seek legal advice.

Coverage for the poll results was extensive, reaching an estimated four million Canadians coast to coast. All national newspapers, as well as several radio and television stations across the country conducted interviews with spokesman Ray Leclair, LAWPRO's vice president (acting), Public Affairs as part of their coverage.

According to the Leger poll, more than one third of respondents (36 per cent) have a home equity line of credit (HELOC) and close to 60 per cent think they know all

about HELOCs. However, those polled correctly responded to only 38 per cent of the questions that tested their understanding of this financing mechanism. Moreover, only 12 per cent consulted with a lawyer before signing the agreement. One-in-ten (11 per cent) admitted to not reviewing any documents or seeking advice before signing.

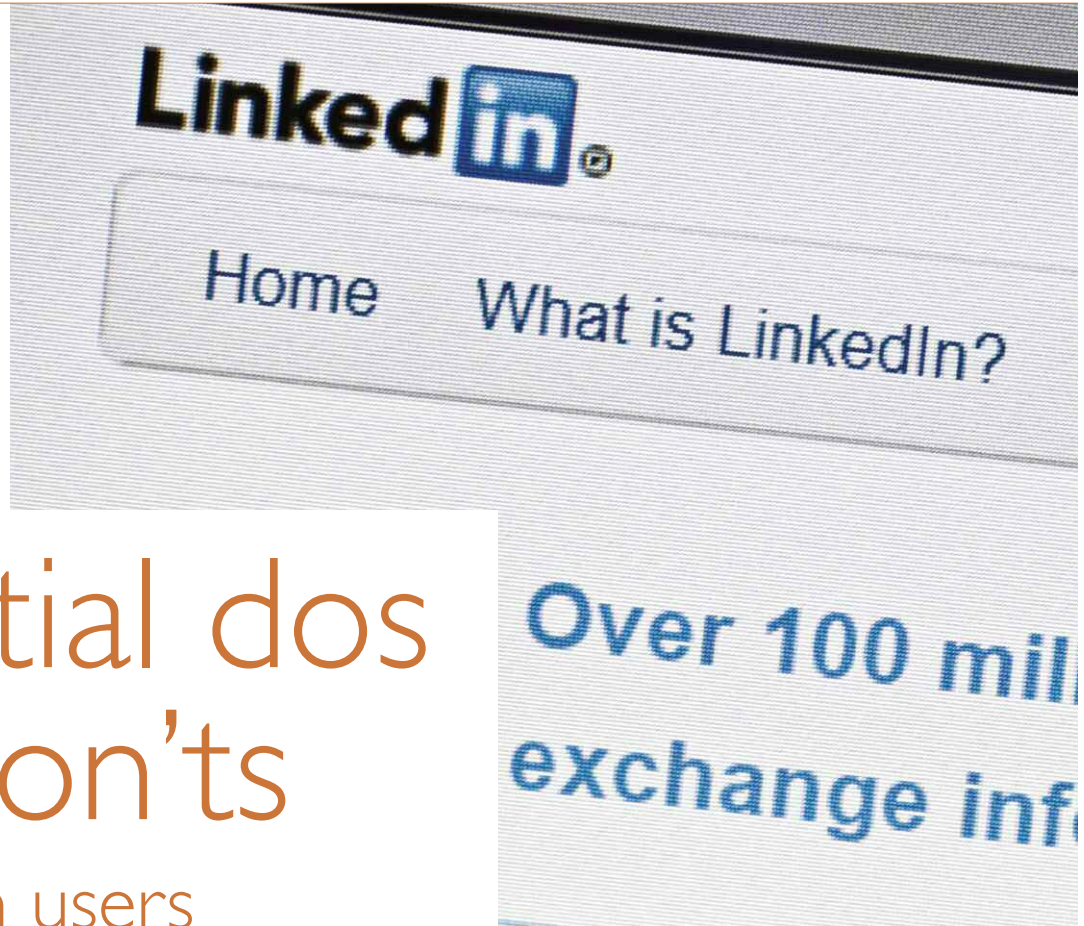
Despite Canadians' confidence in their knowledge about how a secured line of credit works, the majority seemed fuzzy on the details. For example, of those who said they did have a home equity line of credit:

- 57 per cent did not know that when you take out a HELOC the financial institution lending the money puts a mortgage on the borrower's home;
- 58 per cent did not know that taking out a HELOC when they already have a mortgage on their home means that the lending institution places a second mortgage on the home, or modifies the original mortgage to capture all the equity in the home;

- Nearly seven-in-ten (69 per cent) did not know that having a HELOC could negatively affect their credit rating or future loan applications.

Among the many points made by Leclair in interviews following release of the poll results was that consumers – to protect themselves – should seek legal advice before signing on the HELOC dotted line. “Canadians would not buy or sell a home without first consulting a real estate lawyer. Borrowing against it is just as important because a HELOC is a mortgage with similar implications; and in some cases, depending on the fine print, a home equity line of credit can affect a consumer's credit rating, their ability to borrow for other needs, and even their ability to use a credit card going forward,” said Leclair.

For the full text of the media release on this poll, see [www.lawpro.ca/news](http://www.lawpro.ca/news).



# Essential dos and don'ts for LinkedIn users


With more than 120 million users in more than 200 countries (including at least a million lawyers) and web traffic that ranks it as the 13th most visited site on the planet, LinkedIn is the social networking tool of choice for professionals. It is far more than a glorified way for job hunters to put their CV online. LinkedIn profiles are optimized to perform well in search engines, specifically when someone looks for you by name. In fact, it's not uncommon for a LinkedIn profile to rank above your firm's website!


If you aren't on LinkedIn, you should take the plunge. It is very easy to create and maintain a presence on LinkedIn. When one considers ethics obligations and other practical dangers, it is among the safest social media tools for lawyers to use.

This article covers the basic dos and don'ts of creating and building a presence on LinkedIn (LI).


## Creating a profile


Your profile is the foundation of your LinkedIn presence. Here are some tips for creating an impressive LI profile:


 **Don't list every job you ever had:** Some of you were lucky enough to have really interesting, exciting or unusual summer jobs. Good for you, but will it really impress a potential client? In most cases, probably not. Include a reasonable level of detail about your professional work and industry experience post law school. Anything before that is probably irrelevant.

 **Do list other relevant or interesting background:** You should include other relevant background information in your profile. The LI profile page outlines what you should include. Give details about your college or university degrees; affiliations, articles or books you have written; awards you have

won; books you are reading and so on. Note that you can change the order of the sections on the profiles page – put the sections that highlight your strengths at the top of your profile.


 **Don't use formal and dry CV-speak:** Inject a little personality. Craft something that is client focused. Ask yourself what prospective clients really want to learn about you. Make an educated guess as to the words prospective clients might search to find you and sprinkle these keywords through your profile.


 **Do make your profile public:** While your LI contacts will always see your full profile, LI allows you to selectively hide details of your profile from other LI users on the Edit Public Profile page. This defeats the purpose of being on LI. Most of you should share all or most of your profile with everyone.


 **Do create a LI vanity URL:** By default, your LI URL will be alpha-numeric gibberish. A LI URL that includes your name is far more friendly. You can personalize your LI URL by clicking “Settings,” then “Public Profile” under “Profile Settings.” I suggest you use the following: [www.linkedin.com/in/FirstNameLastName](http://www.linkedin.com/in/FirstNameLastName)


### Collecting contacts

Collecting a network of contacts is the very essence of LI. Here are some tips for building a good collection of LI contacts.


 **Do consider the quality, not the quantity, of your LI contacts:** We all want to be popular but ultimately, the quality of your contacts is more important than the quantity. Although a high number of LI contacts may look impressive at first, potential clients will dig deeper and judge you by the details in your profile and the quality of the people in your network.

 **Do make it easy for people to connect with you:** LI allows you to limit invitations to connect to people in a contact list or people who already know your email address (Settings > Email Preferences). Don't make it hard for people to connect with you. Configure LI so that anyone can send you an invitation to connect.


 **Don't accept LI connection requests from people you don't like or respect:** Politely say “no thanks” or just ignore the invite. This can be awkward, especially when people are pesky and keep extending invites to you. Protect your reputation by making sure you like and respect the people you connect with.


 **Do be careful about conflicts of interest:** If you are a litigator, be careful about connecting with the judges, experts or opposing counsel who might be involved with matters you are handling. While you may know them well, and may even be good friends with them, consider how having them listed as a LI


contact might look to your client or the party on the other side of a matter. Ethics opinions say it is not proper for lawyers to become friends with someone to dig up information about them for use in a litigation matter.


 **Do send personalized contact requests:** Generic connection requests are cold and impersonal.

Few things will make a stronger positive first impression than a personalized invitation to connect. This is especially helpful if the invitee may not be sure of or recall their connection to you.


 **Do use the People You May Know feature:** Look for this box in the top right of your LI homepage. Click “See more” to see a list of people LI thinks you might know. It generates this list by using keywords and by looking at the contacts of your contacts. It does a good job of finding people whom you will know.


 **Do right-click to open a new tab when extending LI connection invites:** After you extend an invite to a new contact, LI gives you a list of other people you may know (it is the “People You May Know” list). What's annoying is that clicking on “Connect” to add a new contact causes the list of suggested contacts to disappear or reset to the top. If you right-click on “Connect” and select “Open in new tab,” the invite will appear on a new tab and you still have the first tab with the list of suggested contacts you are working through.


 **Do mine the contacts lists of people you know:** Once you connect with someone in LI, you can see their list of contacts. As many of us work and socialize with the same smallish group of people, looking at the friends of your friends will help you find other people you know. The “Invite accepted” email is a great reminder to do this.

 **Do use lists of other groups of people you know:** Reviewing the list of names from organizations you already participate in is a great source of contacts. This works well, as many

LI users do not list the different groups they belong to or the activities they participate in.


 **Do use the Search feature to find other contacts:** Enter the names of companies, law associations or other entities where you know people to add people to your contacts list.


 **Do remember to invite people you are connecting with in other social media channels to LI:** While you will not want to add everyone you connect with in other social media tools, this will get you a few extra contacts.


 **Do cross-market your LI presence:** Let people know you are on LI by adding the LI logo or your LI URL to your business cards, email signature (make it a link), firm website (make it a link), promotional materials, article bylines, PowerPoints and anywhere else it will be visible to existing or potential clients.

### Posting updates


Most LI users are in a mad dash to collect contacts, and they are watching other LI users do the same thing. Unfortunately, they are missing out on one of the key benefits of LI: being visible to your contacts by sharing information with them.


 **Do post regular updates, but don't overdo it:** You must post regular updates. Do what is right and works for you. At the start that might be one update a week. Over time it might grow to a single daily update or even three daily updates. Get on a regular schedule and stick to it.


 **Do share interesting ideas, news, links or information:** Strive to post updates your contacts will feel are truly worthy of reading. Send information that is practical, helpful, interesting or informative. On occasion, even funny things are fine.


 **Don't blast all your updates out at once:** It's great to be efficient and work on your updates at one time (e.g., first thing in the


morning over your coffee), but remember that not everyone is online all the time. To give yourself greater visibility, use tools such as HootSuite or TweekDeck which allow you to schedule your LI updates for a later point in time.

 **Do be professional:** What goes around comes around, and it doesn't matter if it's in person, in print or online. Be professional all the time because everyone is connected to everyone on the web. When using LI you must comply with your ethics rules at all times.

 **Don't use LI messages for lawyer/client communications:** You can't assume messages sent through LI are private. Don't use it for lawyer/client communications.


 **Do inject some personal info, but not too much:** Social media connections are built on personal relationships. You need to share some personal information so your contacts can learn more about you. But always remember that LI is a professional network and most things that happen in Vegas, the bedroom or the kitchen are not appropriate for posting on LI.


 **Don't post updates that are spam:** We all get enough spam in our inboxes—updates that are a self-promotional commercial are a no-no. No doubt, there is an aspect of self-marketing in the very act of participating in LinkedIn, but impress with your knowledge and insights. A blatant and hollow sales pitch will just turn others off.


 **Don't automatically blast all your other social media updates to your LI contacts:** You can and should mention content that you post on your blog or in other social media channels, but don't bore us all by blasting everything through LI. As a filter, note that you can configure your LinkedIn account to display only tweets with the #in or #li hashtags.


## How to be more visible

As stated above, posting regular updates is a must if you want to get value from LI. But there are other simple things that you can do to give yourself greater visibility with your contacts.

 **Do comment on the updates your contacts post:** If you like, agree, or even disagree with something one of your contacts has posted, share your two cents by posting a comment on the original post. For reputation building, try to post comments on the updates of respected peers.


 **Do ask questions:** Web 2.0 is all about two-way communication and interactions. Asking a question in an update is a great way to engage your contacts in a discussion. And if you ask a question, make sure you read and comment on the answers!

 **Do tweak your profile:** By default, LI will automatically post an update every time you change your profile. You can turn this off, but I don't think you should. Make it a habit of tweaking your profile once or twice a month.


 **Do join a LI group:** LI has a groups feature. Groups help people who are interested in a particular topic, entity or event find each other. There are also groups for events, associations and other entities. No doubt there are groups on many topics relevant to your area of practice. Click on "Groups" and enter some keywords to search for groups that are of interest to you. But be warned: some groups have far too many consultants and vendors aggressively marketing themselves.


## Power user tips


Here are a few extra tips for those of you who want to take LI to a higher level:

 **Do give and ask for recommendations:** All of you will have asked for or given a

personal or professional recommendation at some point (e.g. "Do you know a good mechanic?" or "John is a good IP lawyer?"). A LI recommendation gives you or your contacts the ability to get or give a virtual recommendation that all your respective contacts can see. Just knowing someone is basic networking, but offering a recommendation takes it to a higher level. You should never give a LI recommendation unless you really feel good about someone and the work they do.

 **Do look at and tweak your LI settings:** Visit the LI Settings and Profile configuration pages and look at the various settings you can change. Most of you will want to go with the default settings, but you may find configuration options that will make LI operate in ways that are better suited to your personal preferences.

 **Do create a LI Group:** To show yourself as a thought leader, create your own group in an area that you want to build a profile in. You can draw positive attention to yourself by creating a group that will give you a profile in your area of expertise.

 **Do work on your corporate LI page:** If several people from the same law firm create LI profiles, LI will automatically create a corporate page for the firm. It aggregates the information from the individual profiles. The corporate LI page can be used to promote your firm and can be customized. Someone from your firm should be responsible for administering your firm's LI company page.

So there you have it. Some simple rules to govern your use of LinkedIn. And remember, LinkedIn won't bring thousands of new clients to your office door, but it will allow you to connect and share information with all sorts of interesting professionals. You can find new clients, speaking engagements, or even a new job if you happen to be looking for one. ■

Dan Pinnington is director of practicePRO, LawPRO's risk management and claims prevention program. He can be reached at dan.pinnington@lawpro.ca.

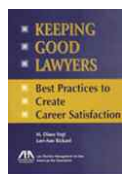
# bookreview

The practicePRO Lending Library has more than 100 practice management titles available to Ontario lawyers free of charge. Here are three titles that make for great additional reading for the topics covered in this issue of *LAWPRO Magazine*.



## Recruiting Lawyers: How to Hire the Best Talent

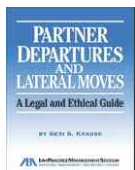
*Recruiting Lawyers: How to Hire the Best Talent* by Marcia Pennington Shannon and Susan G. March is the result of the authors' 30 years of research into law firm hiring practices. It is a solid guide for firms that perhaps don't have a lot of experience in hiring associates and are looking for practical recruiting strategies. The first few chapters will help firms assess their needs, learn how to write position descriptions, and decide where to focus their recruiting efforts. From there, readers will be guided through the interview and hiring stages. Included throughout are several worksheets and checklists to help make the whole process of bringing on a new lawyer simpler.



## Keeping Good Lawyers: Best Practices to Create Career Satisfaction

Once you've got the lawyers, you need to hang on to them. *Keeping Good Lawyers: Best Practices to Create Career Satisfaction* by M. Diane Vogt and Lori-Ann Rickard addresses the fact that while many firms go to great lengths to attract the best talent, they often don't put as much effort into keeping the lawyers they have and are often oblivious to job dissatisfaction in the firm. The authors interviewed lawyers and firm managers to try to understand what lawyers want to have greater career satisfaction, and developed a series of "best practices" firms can adopt to address these needs.

The book first examines the somewhat unique nature of a law firm workplace, in which each lawyer is a free agent who likely sees the work as a vocation more than just a job. As such their demands on themselves and their employer are higher. And younger lawyers expect more flexibility and work-life balance than did previous generations. The authors look at what firms can do to address the career needs of their lawyers in such areas as career guidance, mentoring, compensation, and workplace evaluation.



## Partner Departures & Lateral Moves

Inevitably though, people will leave a firm. *Partner Departures & Lateral Moves* by Geri S. Krauss acts a guide to a process that once was rare but is becoming more common: partners making lateral moves to new firms (and sometimes taking large clients with them). The risks and potential liabilities to both the old and new firm (and the lawyer making the move) can be huge; but as the author points out, there is little guidance out there as to how the process should happen. This book explores the fiduciary duties owed to partners and clients, due diligence regarding conflicts and obligations to the prior firm, what to do with files, and a look at claims and cases that have arisen (in the U.S.) from lateral moves. Too often the process of moving is already underway before lawyers seek advice on what to do – or not do – and errors may already have been made. This book aims to help partners contemplating a move get off on the right foot.

Tim Lemieux is practicePRO coordinator at LAWPRO.

### About the practicePRO Lending Library

The practicePRO Lending Library has more than 100 books on a wide variety of law practice management topics. Ontario lawyers can borrow books in person or via e-mail. A full catalogue of books is available online ([www.practicepro.ca/library](http://www.practicepro.ca/library)). Books can be borrowed for three weeks. LAWPRO ships loaned books to you at our expense, and you return books to us at your expense.

We have books on these topics:

- Billing & financial management
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- Marketing & client relations
- Law office technology
- Career issues
- Wellness & balance issues
- Solo and small firm issues

For full descriptions of these titles, including downloadable tables of contents, go to [practicepro.ca/library](http://practicepro.ca/library)

## Resources to help you find your footing

LAWPRO has learned through experience that the pressures that lawyers face in their jobs, and the related mental, emotional or physical problems, often lead to claims. The claim against the lawyer may be for “procrastination” or “poor communication,” but looking deeper we sometimes find lawyers overwhelmed by the stress of their jobs who have succumbed to addiction, depression, or just plain burn-out.

Adding to the problem is that lawyers often don’t want to reveal any “weakness,” so even if they know they have a problem they may not go to a colleague or pick up the phone and call the Ontario Lawyers’ Assistance Program (OLAP). For those lawyers who suspect they may have a problem but aren’t quite ready to confide in a peer, practicePRO’s Wellness page ([www.practicepro.ca/wellness](http://www.practicepro.ca/wellness)) has self-assessment tools, links and resources that are just a click away.

We’ve grouped our resources into three broad themes.

### Getting Stress-Hardy

This section is tied to the Online Coaching Centre stress-related modules. These are quick self-assessments that can be completed in minutes. Also featured are a series of case studies on the debilitating effects of stress, based broadly on real scenarios that LAWPRO and OLAP have seen involving alcoholism, depression, and thoughts of suicide.

### Staying Healthy

Staying in good physical health can help ward off the effects of the stress. Long hours at the desk and poor fast-food diets are too common among the legal profession. In this section lawyers will find links to Health Canada’s Physical Activity Readiness Questionnaire ([www.phac-aspc.gc.ca/sth-evs/english/parq.htm](http://www.phac-aspc.gc.ca/sth-evs/english/parq.htm)) and Physical Activity Guide ([www.phac-aspc.gc.ca/pau-uap/paguide](http://www.phac-aspc.gc.ca/pau-uap/paguide)), and the Dietitians of Canada assessment guide ([www.dietitians.ca/](http://www.dietitians.ca/)). All of these resources provide a good start to figuring out how to get more exercise and eat right.

And to improve your mental health, why not think about volunteering? Studies have shown that this can greatly improve self esteem and satisfaction with life. There are links here to such sites as Charity Village ([www.charityvillage.com/](http://www.charityvillage.com/)), which puts a volunteer in touch with an organization looking for one.

### Addictions

Being able to recognize that one has an addiction problem is the first step on the road to both personal recovery and protecting one’s professional life and practice from the damaging toll an addiction problem can take. Alcohol, drugs and gambling are the major addictions seen in lawyers. The Wellness page provides links to self-assessments, Bellwood Health Centre ([www.bellwood.ca/](http://www.bellwood.ca/)), Alcoholics Anonymous ([www.alcoholics-anonymous.org/](http://www.alcoholics-anonymous.org/)), Centre for Addiction and Mental Health ([www.camh.net/](http://www.camh.net/)), Gamblers Anonymous ([www.gamblersanonymous.org/qna.html](http://www.gamblersanonymous.org/qna.html)) and many more.

### Next steps:

If you’re a lawyer who is struggling with any of the problems mentioned above but don’t feel you’re able to openly speak about your issues to a professional or peer, please visit [www.practicepro.ca/wellness](http://www.practicepro.ca/wellness) to anonymously browse the many resources we’ve made available.

If on the other hand you are ready to work with a professional or willing to confide in a peer, contact OLAP at 1-877-576-6227 or visit OLAP’s website to learn more about the organization and its resources at [www.olap.ca](http://www.olap.ca).

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