LawPRO™
A publication to help lawyers
Volume 2, Issue 1 March 2003

building for success

Helping lawyers manage practice finances

Ontario's new Limitations Act 2002

Using TitlePLUS online

Putting the "trust" in trust accounts

Of paths and planning

A promising student, recently asked my advice in helping her to set out a plan for her career. And, while I am a strong advocate of planning, I tried to dissuade her from setting a destination so early in the journey. On the other hand, it is easier to work with a plan than to take the alternate approach of working as hard as you can and let circumstances decide your options.

So the issues my student friend and I grappled with that day were: How do you define success; what are your goals? If you don't live a charmed life where everything unfolds as it should, and you can't have "it" all, what is most important to you? How would you rank your needs and wants: financial success, professional recognition, family, friends, lifestyle?

Chances are you've gone through much the same thought process at some point in your life. This issue of LawPRO magazine focuses on one aspect of planning: the need to turn your attention to financial management and planning – for the benefit of both your personal and professional life. Whether you're at the beginning of your career, considering partnership, or contemplating retirement, some measure of a financial roadmap is a must. By their own admission, lawyers are often poorly equipped to take on this challenge: Business basics, balance sheets and bottom lines are not mainstays of the legal curriculum. Yet understanding, planning and managing the financial aspects of your legal career are critical to your success and your enjoyment of what you do. Moreover, experience has shown us at LawPRO that financial management is also a factor in claims and risk management. Hence our interest in this topic. We trust the insights provided by lawyers who were interviewed and/or wrote on this subject in the following pages will provide food for thought. We hope that you find this material useful in keeping your options open as you plan your own path.

Michelle L.M. Strom
President

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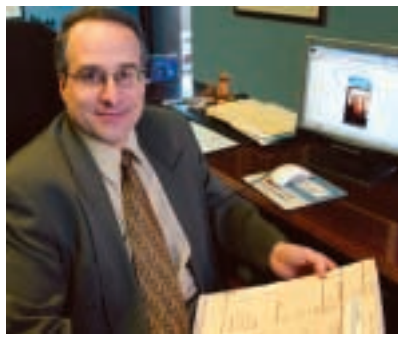

Dealing with the dollars

Why financial planning and management are as important as lawyering

Most lawyers know of at least one fellow practitioner who was so deeply indebted to the tax man that he lost his ability to focus on his law practice – and perhaps lost the practice itself.

We have also all read tales of lawyers who mishandle funds and misuse trust accounts.

The fact is: managing money is not every lawyer's strong suit. The Ontario Bar Assistance Program (OBAP) estimates that up to one half of the lawyers that come to it seeking help have money management issues that have escalated to the point where these problems adversely affect their practice and their personal lives.

Financial planning and management receive minimal attention during a lawyer's formal education and training. Yet they are also a critical factor in the success of any law practice – large or small. Financial stability lets you focus on what's really important: providing quality legal services and building a successful law practice. Conversely, poor financial management can and does lead to: an inability to focus on the job at hand; negligence; and even misconduct.

To assist lawyers with this critical but often overlooked aspect of law practice, LawPRO has prepared a booklet that walks you through some of the principal financial management needs associated with a law practice. A copy of *managing the finances of your practice* is included in this issue of LawPRO magazine.

As well, we have canvassed a number of lawyers in practices large and small who share their experiences and provide insight and advice from which others may benefit.

Make a plan

There's more to law practice than hanging out a shingle and opening the door, emphasize Fred Cameron and Graham Wilson, sole practitioners in the St. Catharines area. A line of credit, both say, is a must to help cover cash flow issues that can arise, especially at the start-up phase. To obtain that line of credit, you'll likely have to submit a detailed business plan – which they say is in itself an excellent reality check.

"Like so many others, when I first went into business with my father, I thought, 'well, I've gone to law school, I know all about this,'" says Wilson. "I learned the hard way that this is a business, and I have to keep an eye on all aspects of this business, my business, at all times. I must have a budget, and look at retainers and cash in and cash out on a regular basis."

An important benefit of a detailed and realistic business plan is that it forces you to plan for your tax and GST obligations, says Cameron, "so that you know how much you can realistically pay yourself. Understand these financial obligations right from the

outset so that you set realistic billing targets and have realistic numbers by which you can assess yourself regularly," he says. To ensure Revenue Canada doesn't spring any surprises on him, Cameron has set up a system of regular withdrawals for GST and tax obligations that come directly out of his line of credit on a monthly basis: "This way you don't bleed any less, just more slowly," he quips.

Check your overhead regularly as well, advises Cameron: "That $10 monthly subscription may not sound like much, but it all adds up. In the same vein, Windsor lawyer Dawn Melville, recommends you shop around for services: "I found out after the fact that I had been paying much more than I had to for process servers." Ask fellow lawyers who they are using in the way of couriers, bookkeepers, or other services; shop around for the best prices for equipment, supplies and the like.

Glenn Rumbell, who has just gone solo for the second time after a stint in the venture capital arena, adds, "To make money, you have to spend money." Try running a law practice alone and you'll get yourself into trouble: "You need a bookkeeper and good secretarial support as there are a myriad of issues from having to remit GST and taxes to tracking your levy obligations and regulatory matters that have to be tended to," points out the Toronto area lawyer. "But don't burn your savings to run your practice," he adds. A business line of credit helps keep things separate, simple and clean – and provides that extra measure of financial security you may need to help get on your feet.

Retainers rule

Even the most seasoned lawyers may balk at a discussion of retainers. Don't, advises Fred Cameron. "The reality is, many of us have trouble asking for money. But you quickly get over this after you've had to write off a few thousand dollars in bad debts. So the lesson is to pay attention to retainers. Get a retainer in writing – right from the outset."

Adds Rumbell: "When I first started out, I made the mistake of carrying a client through a transaction, even though my interim accounts weren't paid. As the receivable piled up, I couldn't afford to stop working on the file. I had too much time invested, and it ended up badly. Now, I'm careful not to let that happen. I insist on being paid on a regular basis."

In Graham Wilson's practice, his assistant gives new clients a heads up on the practice's policies on rates and retainers. "By the

Graham Wilson (left) and Fred Cameron (right)

Dawn Melville

time they get to me, they've been primed and I just fill in the details," says Wilson.

Dawn Melville of Windsor credits Robert Balance, a seasoned area practitioner with whom she now shares office space, with giving her some of the best advice a young lawyer could get: "I remember him saying that if your clients (largely family law clients) cannot afford this kind of retainer (typically $1,500 to $2,000), chances are there will be other financial issues with this client later on. So now I ensure that the retainer is sufficient to finance the initial work that is contemplated. Then I monitor the file, and try to ensure that I have a good handle on how much of the retainer I have used on a regular basis, so I can go back to the client and ask for more."

Cameron has made a habit of replenishing retainers as part of his reporting letter: "In my final line, I'll provide an accounting of where we are at, and ask to have the retainer replenished going forward."

Business building

If it's not enough to just hang out a shingle, says Cameron, it's also not enough to depend on your LLB designation to bring clients through the door. When he first went out on his own in the early 1990s, Cameron participated in a local business network that acted as a referral group: "We'd share information on leads we were looking for, pass around our cards and make a point of referring business to each other if we knew a client was looking for a particular service."

Wilson, who's been out on his own for only one year, sponsored a legal column in a local newspaper – a move that brought numerous clients in the door, he says. He's now marketing his business on many fronts, from participation in local clubs and organizations to providing local professionals, such as his dentist and doctor, with pens that advertise his law practice. A Web site and marketing brochure also are in the works, "but I still think the best advertising is a client referral," he says.

Influenced in part by the American media, Dawn Melville has tried television advertising, yellow pages and newspaper ads that focus on her services to build the business, which now, she says, depends largely on word of mouth.

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Avoiding financial difficulty

Business essentials for lawyers

"I owe, I owe, it's off to work I go"
– Anonymous

Are you among those who believe it necessary to purchase a new vehicle every two years, hold a golf membership, take two annual vacations, and send your kids to private school? The idea that a law degree automatically entitles one to an affluent lifestyle is an illusion that has landed more than one lawyer in financial hot water.

And even if you don't buy into the affluent lifestyle illusion, how prepared are you if an unforeseen financial problem arises?

It's deceptively easy to get into financial difficulties that make bankruptcy a potential solution. What happens, for example, if you miss a quarterly income tax payment? Penalties and interest mount, making it increasingly difficult to catch up. Or what if you are ill or incapacitated for a time? Even with disability insurance, your earnings can drop dramatically while your expenses continue. And if a key client can't pay your bill, even temporarily, what then? Suddenly, your own future is in jeopardy.

Anything, from changes to tax shelter laws, simple overspending, or low Legal Aid tariffs can have a devastating effect on your financial picture. To maintain your reputation and your clientele, it is critical that you avoid financial difficulties, or, if you're already facing problems, to deal with them immediately.

Almost a third of the people who seek my help when they are in financial difficulties are professionals – yes, even lawyers (and in the last legal aid crisis, that figure was even higher). To make sure that you're not one of the statistics, proper financial planning is essential.

Your first step, whether you are just starting out or have been in practice for a while, is to retain the services of a good accountant. He or she will help you develop a complete business plan, including monthly cash flow statements, business objectives and financial actions specific to your needs. This plan will ensure that instead of running around in circles, you'll have a clear idea of what you want to achieve, where you want to be financially, and how you'll get there.

With your accountant's help, review the finances for your practice. Are you financing your business with a bank loan or are you using a credit card? If you've opted for a credit card, remember that interest rates run between 11 and 22 percent per month, which may result in your ability to make only minimum monthly payments. This could, in turn, mean digging yourself ever more deeply into the debt hole. Find out what your alternatives are, and set your financing in order as soon as possible.

Budgeting for expenses is also vital. Be sure to consider all your expenses, including salaries, rent, Law Society dues, Errors and Omissions Insurance and your own draw. If you find that your practice income is less than your expenses, you'll need to fund the difference by borrowing, either from a bank, family or friends (but definitely not from your Trust Account – if you're at all tempted to take that route, the Law Society's strict approach will lead to disciplinary action and even disbarment).

In your budget, remember the expenses that must be dealt with monthly, quarterly, and yearly. For example, depending on your billings, as a GST registrant you must remit GST either monthly or yearly. This is not your money. It is trust monies that came from your clients and it belongs to the federal government. To be safe, and to avoid the temptation of spending it, put it in a special account so that when the GST must be paid, you're not scrambling to find the funds elsewhere.

The same thing holds true for source deductions. Again, this is not your money. It is trust monies and must be paid monthly to the Canadian government. Put it in a special account.

And, whether you want to or not, you are also required to remit quarterly instalments of your own income tax to the government. Failure to do so will not only result in interest charges on your late payments, it can also be disastrous at tax time. If you have to find $40-50,000 on April 30th and you haven't put the money away, you'll be stuck playing catch-up – or falling further and further behind. Calls and letters from the Canada Customs and Revenue Agency will make this a harrowing experience at best.

It is possible to rise above financial difficulties without damaging your reputation, but the key to avoiding problems in the first place is prevention. Recognize that, just like in every other profession, the lifestyle you want must be earned through hard work, effort, and responsible planning. Your practice is essentially a business like any other, so while you're taking care of other people's legal and business concerns, you also need to take care of your own.

Stanley J. Kershman (info@bankruptlaw.com) is the head of the Bankruptcy and Insolvency and Restructuring Department at the law firm of Perley-Robertson, Hill & McDougall LLP, as well as a speaker, author, and certified specialist in bankruptcy and insolvency law. His book "Credit Solutions: Kershman on Advising Secured and Unsecured Creditors" published by Carswell is in its second printing. He is also a Deputy Small Claims Court Judge.

OBAP lends a helping hand

The Ontario Bar Assistance Program *lawyers helping lawyers* receives many calls from lawyers, law students and their families who are struggling with financial issues. The problems range from unexpected expenses, overspending and credit mismanagement, to bankruptcy and problem gambling.

The reasons lawyers face financial hardships are many:

- Young lawyers entering the profession are often burdened with a high debt load from student loans;
- Professional and start-up fees are often beyond the young lawyer's financial means;
- Lawyers may spend above their means to maintain an appearance of success;
- Because many lawyers do not have health benefit plans, health problems that affect the lawyer's earning power can be devastating financially;
- Financial problems can be an indicator of other personal or professional problems.

Whatever the reasons, when financial problems arise it is important to deal with them as soon as possible. OBAP helps lawyers in financial trouble by assessing any underlying cause of problems, and assisting with budgeting and planning; they also provide the support of someone who has been there, and referral to services for help with specifics and planning. Their goal is to put the resources at your disposal, and help you return to financial health.

Information and help are available from:

- LINK (the Lawyers Assistance Program), English: 1-866-261-6704; French: 1-866-261-6718. For more information visit the Ontario Bar Association Web site at http://www.oba.org/en/admin/affiliated_en/link.asp
- Ontario Association of Credit Counseling Services offers many publications and a variety of assistance and information from budgeting to creditor communication to bankruptcy. Credit Counseling Service of Toronto 416-228-3328 or http//www.creditcanada.com
- OBAP volunteers have experience dealing with financial issues and can offer tips from their experience as well as support. Contact John Starzynski, Volunteer Executive Director 1-877-584-6227or Leota Embleton Program Manager 1-877-576-6227 or visit www.obap.ca

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Administer and assess

Once the practice is up and running, it's vital that you continue to focus regularly on the administrative aspects of the business, says Rumbell. "Don't let lawyering get in the way of running your practice."

Technology, in the form of law office accounting software such as PCLaw, is indispensable. "It helps me keep my fingers on the pulse of the practice," says Cameron. "I can tell what our obligations are at any point in time; I can print out client ledgers, and pull off detailed reports because this software lets me add a great level of detail to each of my client files."

That higher level of detail makes it easy for Melville to meet the growing expectations of her client base. "Because today's clients are more knowledgeable, we as lawyers have to be more specific, more detailed, more forthcoming in the advice we provide and the details we offer," she says. "PCLaw is really my lifeline, because it lets me keep very detailed records, and makes it easy to manage and account for my time and for monies in trust accounts."

In Graham Wilson's practice, technology also is the foundation for a rigorous assessment process. He enters all dockets into PCLaw daily, and runs a report to determine if he met docket and billing targets. Weekly, he and his assistant assess all docketed time and the status of trust accounts, issue interim billings to maintain required cash flow, and "determine what I have to do next week to stay on target." Monthly, they examine overall trends, billings, receivables, receipts and retainers, and periodically meet with their accountant to ensure everything is on track.

Part and parcel of the assessment process, points out Melville, is examining your client base. Like many new practitioners, she initially took on many legal aid clients as one way to generate cash flow. "It's a groundbreaker, but does very little to help with your overhead," she explains. "Legal aid files take time, the clients are very demanding and rates are not great." A decision to focus on clients who provide better return for the practice has paid off: "Not only do I have more time and better clients, but my message pile went from two inches to less than one-half inch, almost overnight!"

Leaving private practice

"Think ahead." That's the succinct advice that Kingston lawyer Tom Troughton has for every lawyer in practice. Because sooner or later, every lawyer will cease to practise law.

Maximizing registered retirement savings plan (RRSP) contributions, which all those interviewed for this article recommend, is just the beginning.

Leaving private practice also requires you to make numerous decisions, some of which need to be addressed as much as five or 10 years before the actual retirement date, points out Troughton, who himself is now practising on his own for only two to three days a week as an interim step towards retirement.

For example, those in partnership with other lawyers may want to revisit their partnership agreement. "Tax, liability and other issues are very different today than they were 15 or 25 years ago, when you first became a partner," points out Troughton. Similarly, older lawyers may want to rethink their ongoing liability for issues such as leases and other contractual obligations affecting the firm and its partners. "It may make sense for you to renegotiate your arrangements with the firm and become an associate, or counsel to the firm rather than continue in partnership right to retirement," says Troughton. "It may be better in the long run for you to limit your liability on matters affecting the firm by leaving the partnership."

Solo and small practice lawyers will also want to examine all contractual matters, he adds. "If you own a building, you should, at about 50 years of age, start thinking about how you will get your equity out of that building. If you're leasing, look seriously at shorter term leases that leave you the flexibility to make decisions on a one- or two-year basis once you are in your 60s. It can cost you plenty to get out of a five-year lease, two years into the term."

Income planning

Although the conventional retirement age is 65, you can apply for your Canada Pension Plan (on a reduced basis) as early as age 60, provided your income has decreased below the level of the maximum CPP monthly benefit, says Troughton. Working part time and drawing on that pension provides some measure of income security, while also allowing you to disengage slowly from practice, says Troughton. Those with RRSPs or other retirement incomes should also look at all the options available to them as part of an overall retirement income plan, he adds.

Client files

What to do with client files, how much to store and where are perennial (and potentially costly) problems for lawyers, exacerbated by plans to leave practice. Troughton's advice: purge often and purge thoroughly. "Leaving the process of cleaning up your files until your last year in practice will consume a huge amount of billable hours just at the time when you need those billable hours the most," he says.

His advice – which he takes: When you close a file, be ruthless about what you keep. Return to clients any and all of their documents; documents that can be accessed in a court file are trashed: "If the client wants them at a later date, he can pay to get copies," reasons Troughton. Items that have to be stored indefinitely to comply with Revenue Canada regulations are either returned to the client (minute books, corporate records etc) or put into long term storage; clients (or other lawyers) who subsequently request these documents are charged a retrieval fee, says Troughton.


Glenn Rumbell

Troughton also took the same reasoned approach when advising clients of his pending semi-retirement. "Think in advance of the matters you are taking on and the time horizons involved," he says. "If you know that you are not interested in that file, advise the client that you may have to move the file to another lawyer, or refer the client to another lawyer from the outset." Troughton also became more pragmatic in his approach to files he would accept: "No legal aid, no family matters where there is no money, no litigation, except specific matters within estate practice," he says. Juggling that reality against the need to keep business coming in the door can be tricky admits Troughton. "You don't want to lose business but you need to ensure your practice pays – so you really have to deal with this on a client-by-client basis."

If all of this sounds like a lot of work, it is, admits Graham Wilson. "Managing finances, both practice and personal, is work and worry. But it's worth the effort – because when I'm in the know, I am in control. I can make things happen – they don't happen to me."

Common pitfalls & best practices for starting and leaving practice

The following are highlights from an article prepared by Margaret Dickie of Deloitte & Touche to help guide lawyers through the critical tax and income planning steps they need to take when going into and leaving private practice. For the full text of the article, please go to www.practicepro.ca/financesbooklet

Starting a practice

Registering your practice

From Canada Customs and Revenue Agency (CCRA – formerly known as Revenue Canada), you will need to obtain:

- a business number;
- a GST number (which must appear on all invoices issued to clients); and
- a payroll number, if you are going to have any employees. You will also need to register with Ontario so that you can make Employer Health Tax remittances.

Planning for required filings

Partnership returns:

- Partnership returns (for partnerships of six or more lawyers) are due by March 31.
- Returns include financial statements, T5013 slips (a partner's equivalent of a T4) plus some additional information.
- Partnerships of less than 6 lawyers: each partner files a copy of the partnership financial statements with their personal returns. A partner receiving a T5013 only needs to file that form.

Tax instalments:

- As a self-employed lawyer not subject to employee payroll deductions, you have to pay income tax in quarterly instalments, due March 15, June 15, September 15 and December 15 annually.
- CCRA charges penalty interest if instalments are seriously deficient; current rates are 3.5% to the extent instalments paid are less than 75% of the required amount.
- The contra interest rule lets you avoid interest charges as follows: if you pay your June 15 instalment on June 30, i.e. 15 days late, you can avoid an interest charge by paying your September 15 instalment on August 31, i.e. 15 days early.
- Taxes must be paid in full by April 30 even though the filing deadline for self-employed individuals is June 15.
- As a rule of thumb, set aside 40 to 45 per cent of your income for taxes: Set in place procedures to keep yourself disciplined and not use tax monies for personal use.

Banking arrangements

- Set up a separate bank account for the business: Make sure all business receipts and expenses flow through this account.
- Maintain appropriate records and reports if you draw funds from the business or pay business expenses personally and then reimburse yourself.

Borrowing

- When you borrow to invest in a business, the interest expense is deductible for tax purposes. Interest expense on funds used to acquire personal assets is not.
- Use available cash to fund the personal acquisitions; use borrowed funds to put into your practice.
- Keep a clear paper trail showing the borrowed funds going into the business in case you are challenged by the CCRA.
- Pay down your personal debt first with your income from the practice. If the practice needs more capital don't leave your income in the practice. Take it out to pay the personal debt and get another loan to put in the business.

Leaving Practice

- Plan ahead for the possible tax implications of leaving practice.
- Because partnerships can defer tax to a future period, this can mean partners are allocated deferred income – and required to pay tax – in a year after that income has actually been received and spent. Partners who do not plan for this can be caught short of cash when the deferral ends.
- Lawyers carrying a 1995 reserve who leave law practice may lose their entitlement to claim the reserve. The balance of the reserve is then included in income earlier than expected, requiring taxes to be paid on income for which there is no current cash distribution.
- Partners who leave a practice will at some point be deemed to have a disposition of their partnership interest, triggering either a capital gain or a capital loss. If the partnership did not engage in any unusual tax transactions, it will likely be a capital loss. The leaving partner should ensure that he knows what this loss is as it can be used to offset capital gains in either the year of disposition or any future year. Many partners are not aware that this disposition even takes place.

Law Society tools

To enhance competence and reduce risk

"Having one's financial house in order is key to maintaining a viable and competent practice and essential to managing risk," says Diana Miles, Director of Professional Development and Competence for the Law Society of Upper Canada. "It's also mandatory."

"Whether you're starting up your practice or winding it down, it is critical to keep and maintain adequate books and records. Ontario lawyers are required to do so under By-laws 18 and 19 of the *Law Society Act*."

"That is why we are here to help," explains Miles. "Our objective is to support members in fulfilling their statutory obligations. Recognizing that small firms and sole practitioners do not always have the resources easily available to assist them in their practice, we want to work with all members to help prevent them from running into problems."

For example, poor financial management can lead to revenue loss, as well as complaints. Statistics demonstrate that almost 40% of all complaints received by the Law Society in 2001 that resulted in investigations, related to records and financial issues.

According to Miles, the Law Society has a number of resources available to assist lawyers in the management and maintenance of a financially viable and competent practice, to manage risk and to avoid the errors commonly seen in the Society's discipline stream.

Practice Management Guidelines

The *Practice Management Guidelines* provide a general framework for conducting various aspects of legal work. They focus on eight practice management issues: Client Service and Communication, File Management, Financial Management, Personal Management, Professional Management, Time Management, Technology, and Closing Down Your Practice.

The Financial Management Guideline is a practical checklist for setting up, or checking up on a firm's accounting system to ensure compliance with Law Society directives. The Guideline sets out Law Society requirements, offers suggestions on a variety of billing practices and provides links to other sources of billing information for lawyers. It is a practical resource with tools such as a template for the development of a comprehensive firm billing policy, a checklist of terms to incorporate in a 'fees and disbursements letter' to clients, as well as links to sample fee and retainer letters.

To assist lawyers in managing risk, the Guideline offers suggested internal control strategies that are inexpensive and easy to implement, such as staffing policies, computer controls and procedures to manage the issuance of cheques.

Lawyers are encouraged to consult the other seven Guidelines in conjunction with the Financial Management Guideline. The Guidelines are available at http://www.lsuc.on.ca/services/pmg_summary.jsp.

Professional Development and Competence Online Resource Centre

Available on the Law Society's Web site, the resource centre provides centralized access to a selection of articles, practice tips and frequently asked questions on a range of current practice management issues. Some of the financial topics covered include:

- Fees & Billings
- Credit Cards in the Legal Practice
- Flat Fee Disbursement Billings
- Law Office Accounting Systems and the GST
- Improving Profitability
- Books and Records

There are links to these articles from the *Practice Management Guidelines*, which can act as a gateway to further information on financial management. The resource centre is available at http://www.lsuc.on.ca/services_en.jsp.

Spot Audits

The Spot Audit program supports and promotes high quality law firm record keeping practices that comply with Law Society By-laws. Designed as a proactive compliance measurement and problem detection tool, the program:

- provides on-site and ongoing guidance and recommendations;
- addresses members' questions and concerns;
- shares information, knowledge, and best practices with members; and
- provides members with resources to assist in understanding and complying with By-laws 18 and 19.

Spot auditors take a remedial approach by providing on-site guidance to members, aimed at helping law firms correct minor deficiencies with record-keeping practices before they lead to serious non-compliance or misconduct issues.

For questions on the maintenance and preparation of law firm financial records, or interpretation of By-laws 18 and 19, e-mail lawsociety@lsuc.on.ca or call 416-947-3300 or toll free at 1-800-668-7380.

Continuing Legal Education – Publications

The Law Society produces a number of Continuing Legal Education (CLE) publications for purchase to help lawyers enhance their knowledge and skills, including effective financial management. Related topics include 'Practice Essentials' and 'Buying and Selling a Law Practice.' The full list of offerings can be found in the CLE publications catalogue, available at http://www.lsuc.on.ca/services/services_cle_en.jsp.

Simon Chester (left) and Keith Cassidy (right)

Business basics on the menu at "Binch Camp"

McMillan Binch LLP wastes little time ensuring its new lawyers get an inside view of the firm. At "Binch Camp," as its orientation program is known, Executive Director Keith Cassidy and other managers provide a solid grounding in business fundamentals: basics on the firm and its history, the type of information it captures and shares, its productivity expectations, firm expenses, and other salient financial information. "Binch Camp" is then supplemented by additional practice-specific information sessions that deal with business development, client relationship management, billing targets and the correlation between billings and collections.

"We see associates as the future of our firm," explains law firm partner Simon Chester. "The more they understand what is happening at the firm, the more motivated they will be to contribute and perform." To that end, the firm provides regular financial updates to its associates, "we aim for quarterly."

Partners are updated monthly, or more frequently if necessary, on the overall status of the firm, with a focus on the financial health of their practice areas. Productivity, receivables, budget targets and more all are on the table at these sessions. Those in transition from associate to partner, have access to a multi-faceted professional development program aimed at upgrading their knowledge of business, economic and client relationship issues, and financial administration through in-house programs, and external seminars and conferences.

Although it takes a more hands-off approach to personal financial management needs, McMillan Binch does facilitate access to these types of services. As well as being able to work with the personal financial advisory services offered by the firm's bank, firm members have access to an Employee Assistance Plan which, among other services, provides some financial counseling. As well, the firm subtly encourages sound financial management: "Distributions are arranged to encourage lawyers to make tax instalment dates," says Chester, "and at bonus time we take a lead in encouraging firm members to invest in RRSPs and other retirement savings opportunities."

"As a major law firm, we feel it is incumbent on us, and the profession, to be doing these things," explains Cassidy. We believe new young lawyers need to have a solid grounding in all business issues, including human resources management, business development, financial management …and we believe our clients expect us to be doing these things. They want to know that we are running the business well, from a business point of view."

TitlePLUS goes online

TitlePLUS has just taken another major step toward providing lawyers with a fully automated, totally integrated, online real estate practice: In mid-January 2003, it moved its core title insurance application – which enables real estate lawyers to secure TitlePLUS coverage for most of their residential transactions – to the Web.

The new Web-based application makes securing title insurance coverage as easy as "point and click": Select a common title-related defect (for example, easements) and the appropriate wording pre-populates the required boxes, eliminating the need to type in substantial amounts of information. Definitions, descriptions, useful hints and help guides are all online, and act as a double-check, reducing opportunities for mistakes. The application is dynamic at every step of the way, with fields and questions changing to reflect the information entered by the lawyer.

As well, the online application builds a dynamic action checklist that reflects the specifics of each individual transaction, and reminds lawyers of the due diligence items they need to review prior to issuing the TitlePLUS policy. For example, the searches required and itemized checklist will vary, depending on the characteristics of each specific property.

Because it is Web-based, the online TitlePLUS application is available around the clock. Information from online searches can be exported from Teraview® into the Web-based TitlePLUS application, further reducing the amount of data entry that has to be done by the law office.

LawPRO also automatically debits the law firm's bank account or credit card, depending on pre-determined arrangements, thus eliminating the need to send cheques or monitor account balances. And because the site has been designed as an "intelligent" site that interfaces with pre-set TitlePLUS underwriting criteria,

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Diane M. England Law
Oshawa

"After using the desktop-based TitlePLUS software for several years, my input time for an application was approximately 10 minutes. The Web-based application is definitely faster. It's a lot more streamlined and very user-friendly. There's a lot less key entry, so that saves me time. All the statements I need are there, so all I have to do is point and click and the appropriate fields are pre-populated. If I have a question, the TitlePLUS staff at the end of the 1-800 number are very helpful and friendly. Another benefit is that we are no longer tied into software that resides on one desktop. So if I am busy, someone else can access an application and get information or issue the policy, which streamlines the whole process. The bottom line is that it takes 5 to 10 minutes at the most to go through an application from start to finish, and that's good news in a busy real estate practice."

Patricia McCarthy
Law Clerk
Merovitz Potechin LLP
Ottawa

"I had become so familiar with the desktop application that I find that I don't save all that much time with the Web-based service – but I do really like the fact that it takes the guesswork out of the process of applying for TitlePLUS coverage. I like the prompts and the fact that all of your options, explanations, and even action lists are right there, on your screen. Anything that makes my job easier is a good idea, and this online service definitely does make our work as law clerks easier.

"I also think that someone who is not totally familiar with TitlePLUS would find it quite easy to apply for TitlePLUS coverage using the Web application, because all the information you could possibly need is right at your fingertips. And I have always been impressed with the people who answer the phone at TitlePLUS …they are extremely knowledgeable and very friendly, and I know when I call that I will get an answer right away."

approval for most TitlePLUS applications is instant. All documents related to the TitlePLUS application are created automatically, and reflect the details of that individual transaction.

The online application also eliminates the need for law firms wishing to order TitlePLUS to maintain desktop software. The entire application process, and the data related to the individual applications, resides with TitlePLUS. Lawyers have fingertip access to any of their completed, partially completed, or pending applications; because nothing resides on their desktops, they no longer have to worry about losing data if their systems crash.

Lee Fitzsimmons
Law Clerk
Frank Anzil Law
Sudbury

"This new process is very impressive …it's so much faster, easier to use and puts all the information you need right at your fingertips. There's really no comparison with the old, desktop-based TitlePLUS application. The standard wording for things like easement options is all there; all the supplementary material from the manual is online, so if you have a question the answer is only a click away. At 10 minutes per application, it's cut my application time by at least 50 per cent.

"But the most wonderful aspect is that it's accessible 24/7. So I can go home and work on this after hours, get my applications done in a fraction of the time it would take at the office, and be on top of things when I am back at work."

The Web-based TitlePLUS application also has been designed to reflect the common conventions and protocols used on the Internet. Virtually any lawyer (who has signed a subscription agreement with TitlePLUS), can go online and use the Web-based application without needing software training. In fact, many of those who helped TitlePLUS test the new Web site commented on how intuitive and logical the site is, literally guiding the lawyer through the entire application – in minutes.

The introduction of a Web-based TitlePLUS application represents a turning point for TitlePLUS: As of May 31, 2003, all TitlePLUS Ontario programs will be accessible **only** via the Web. Lawyers will no longer access TitlePLUS through the Teranet-owned Teraview® channel, but rather will interact with TitlePLUS directly.

This decision, says TitlePLUS Vice President Kathleen Waters, reflects lawyers' increased reliance on technology as an integral part of their working environment.

"In real estate especially, where electronic search and registration are fast becoming pivotal to any transaction, computers and being Web-savvy are a must. We're building on that knowledge base and moving into a new arena where the 'software' you use as part of your practice is not on your desktop but resides with the application

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® Teraview is a registered trademark of Teranet Inc.

Howard Dyment
Sole practitioner
Howard S. Dyment LL.B
Toronto

"I have used TitlePLUS since it was released in 1997, not only because of its tremendous benefits to my clients but for the cost and time savings it has brought to my real estate practice. TitlePLUS took very little time to learn and even less to use. Its real benefit to my practice is the 'checklist' approach it takes. I know when I use it, everything related to that transaction has been carried out. Nothing has been forgotten.

"Moving TitlePLUS to the Web has made this even better, easier and quicker, reducing the application time to mere minutes with no learning curve: Now I carry out my title search through Teraview®, export the search as a text file and then – on the TitlePLUS Web site – click 'import' and it is all there. The legal descriptions, the PIN number etc. are all automatically imported into the correct fields of my online TitlePLUS application. My fastest time using the old desktop application was about nine minutes, but now, with a high-speed Internet connection (which I think is a must), I've got it down to four minutes, start to finish.

"Another advantage of the TitlePLUS Web application is the fact that nothing resides on my desktop. TitlePLUS holds all the information, so if my system crashes, I know I won't lose a single piece of information. As this is a Web application, TitlePLUS now never 'closes' and I do not have to confine my application time to business hours, but can file applications 24 hours a day, 7 days a week. The entire product is …phenomenal."

service provider. Our goal is to provide lawyers with Web-based access to a real estate practice management and document production system that coordinates various aspects of their real estate transaction – including TitlePLUS title insurance applications – online." TitlePLUS has been moving in this direction for the past two years, rolling out a number of Web-based products targeted at specific types of real estate transactions *(see sidebar and the October 2002 issue of LawPRO magazine).*

The move to the Web also opens the door to a continued introduction of TitlePLUS across Canada, adds Waters: In addition to Ontario, TitlePLUS is now available in Atlantic Canada, Manitoba and Alberta.*

TitlePLUS will be available at titleplus.lawyerdonedeal.com through the LawyerDoneDeal.com portal. LawyerDoneDeal.com is owned by LawyerDoneDeal Corp. (LDD), which is affiliated with CAKE*soft* Inc.

Other Web-based services from TitlePLUS

Over the last 18 months, TitlePLUS has launched several new Web-based initiatives designed to make it fast, easy and economical for lawyers to use TitlePLUS and the Web as mainstays of their real estate practices:

- **LawyerMortgage** enables lawyers to apply for title insurance coverage for most mortgage/refinance transactions;
- **GoodMortgage** provides online access to title insurance and document production for mortgage transactions involving specific financial institutions; and
- **NewHome** is a title insurance Web site for lawyers associated with qualifying projects in the new home/condominium markets.

*In Alberta, TitlePLUS is available from Phoenix Insurance Group Edmonton Inc., at 780-482-6936 or 1-800-563-5325.

Mark Farrish (left), TitlePLUS Marketing Manager and Chris March (right), TitlePLUS National Sales Consultant

Building a national profile for TitlePLUS

Since joining TitlePLUS in the fall of 2002, **Chris March**, National Sales Consultant for TitlePLUS, has maintained a hectic schedule of training and visiting lawyers throughout Atlantic and western Canada. He brings to TitlePLUS extensive background in the financial services sector, including sales, marketing, training and branch management – experience he will draw on as he works his way across Canada as part of his mandate to help build the TitlePLUS business nationally.

Chris is traversing Canada to meet area real estate lawyers, reinforce with them the many benefits of TitlePLUS title insurance coverage over that offered by competitors, and establish a link between TitlePLUS and the practising bar.

"One of the important messages that I drive home is that using TitlePLUS is really like bulletproofing your law practice; I find that many lawyers really do not fully comprehend our legal services coverage and the comprehensive protection that this aspect of our program provides."

As well, members of the bar respond favourably to the "made in Canada" aspect of TitlePLUS, says Chris.

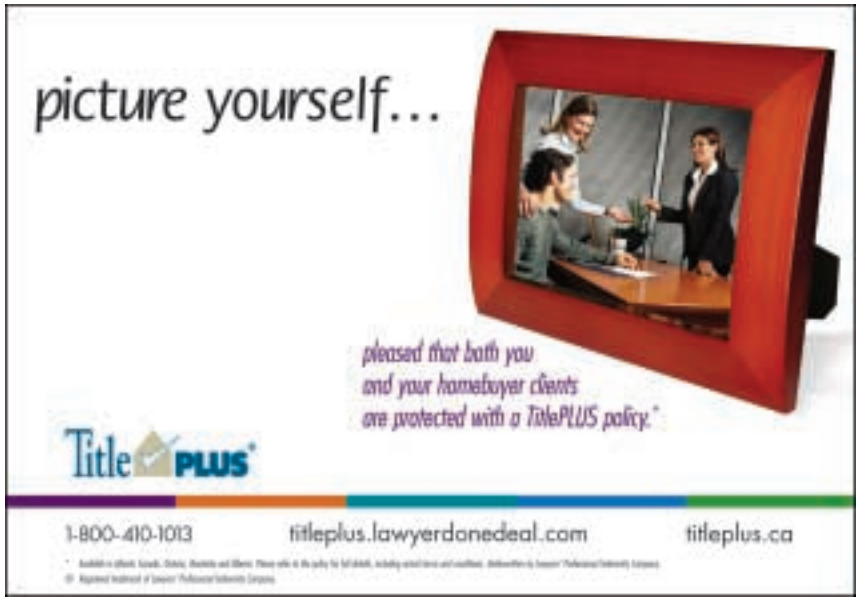
"Lawyers like the fact that we're Canadian owned, that we're set up by lawyers and therefore more accountable than our competitors," he explains. "And they really like that TitlePLUS keeps the work in the community. I am often asked, 'Who does your TitlePLUS work?' When I reply, 'You do, that's the whole point of TitlePLUS,' interest in using TitlePLUS really increases.

"My goal is to be a primary conduit between TitlePLUS and the real estate bar," he says. "As well as raise awareness and understanding of TitlePLUS, I am there to help solve problems lawyers may have, and to help them use TitlePLUS in their practice."

You can contact Chris by e-mail: chris.march@lawpro.ca; or by telephone: 1-800-410-1013.

New ad campaign

This spring, TitlePLUS will unveil a new series of ads for the lawyer, lender, realtor and homebuyer markets. The ads build on the brand visibility and recognition that TitlePLUS has achieved over the past few years, and focus on the many benefits that the various audiences realize from using TitlePLUS. The first "picture yourself" ads for lawyers will appear in March/April legal publications.



TitlePLUS expands into western Canada

TitlePLUS has announced the next step in a national rollout of its title insurance products: As of February 2003, lawyers in Manitoba and Alberta could secure TitlePLUS title insurance coverage for purchase and refinance/mortgage transactions. TitlePLUS is already available in Ontario and Atlantic Canada.

Lawyers in Manitoba can apply for TitlePLUS coverage through the TitlePLUS hotline (1-800-410-1013) or by completing and faxing an application form for TitlePLUS coverage; forms are available from the TitlePLUS Web site (www.titleplus.ca) or from TitlePLUS directly.

In Alberta, TitlePLUS has partnered with Phoenix Insurance Group Edmonton Inc., a risk management and insurance brokerage firm, to bring the TitlePLUS title insurance product to the Alberta real estate marketplace. Any lawyer in good standing in Alberta will be able to secure TitlePLUS title insurance coverage by contacting Phoenix Group at 780-482-6936 or 1-800-563-5325.

The Phoenix Group is one of the largest private insurance brokerage firms in western Canada, with offices in Edmonton, Grande Prairie, Red Deer, Hinton and Drayton Valley. The company, which was founded in 1983, places more than $40 million in premiums annually, covering commercial, employee benefits, life, personal and surety products. In addition to purchasing insurance, the company provides claims facilitation, risk management services and training to clients in all major industry sectors. Phoenix Group is known for its innovative ownership-based structure, strong customer focus and cutting edge service and products.

New look to titleplus.ca

The TitlePLUS Web site has been revamped from the ground up, with a new look, new content and easier navigation. The site complements the new printed promotional materials developed for each of its key audiences: lawyers, lenders, realtors and homebuyers. Different colour-coded sections of the new titleplus.ca Web site provide detailed information on the benefits of TitlePLUS for lenders, realtors and homebuyers, including the popular "locate a lawyer" link which enables Web site users in Ontario to locate a TitlePLUS lawyer in their neighbourhood. The lawyer portion of the site includes a password-protected area that features a variety of tools and resources used by TitlePLUS lawyers. Check it out at titleplus.ca.

Rosanne Manson, Claims Examiner

Best practices & title insurance: Lessons learned from managing claims

There is little doubt in the real estate bar today that title insurance is both widely accepted – and here to stay.

It is estimated that more than 50 per cent of residential real estate purchases in Ontario are now title insured – up from an estimated 30-plus per cent last year. This growth is being driven in part by the new home/condominium market where at least 50 per cent of purchasers buy title insurance.

As well, an estimated 80 to 90 per cent of refinance transactions are now title insured, prompted largely by lenders who want the added protection a title insurance policy can provide.

With increased use of title insurance comes an increase in claims. Industry-wide statistics on the overall incidence and costs of title insurance claims are hard to come by. At TitlePLUS, less than one half of one per cent of our policies have reported claims; most of these claims have a value of less than $1,000. This solid performance can be attributed to both an efficient claims handling system, and to stringent underwriting criteria: TitlePLUS will not insure any transaction that "walks in the door." While striving to be competitive in the title insurance industry, we also are mindful of risk.

But from the claims we receive and resolve, we can draw some conclusions on what precipitated the claim – and can advise you on some simple "best practices" to help lawyers avoid the stress and client dissatisfaction that comes when the home buyer discovers all is not as it appeared. As well, because of our experience with professional liability claims, we have firsthand experience with claims that have been denied by other title insurers, resulting in home buyers then suing their lawyer under the lawyer's professional liability insurance policy.

Understand and explain the title insurance coverage to your client

Chances are your clients are interested in title insurance because it can save them money: Survey coverage, if available, can save them hundreds of dollars. The savings that come from not having to conduct various off-title inquiries are also selling points. And in most instances, using title insurance is an excellent option for the lawyer and home buyer client alike.

A typical example of the benefits of title insurance is as follows: A home buyer opted for title insurance in place of an up-to-date survey back in May 2000, when he purchased a home with three expansive decks. The vendor provided a statutory declaration attesting to the legality of the decks and the insurer provided survey coverage. Recently, the buyer decided to sell the property in question. The new purchaser's lawyer advised the policyholder that no permits had ever been obtained for the decks, and requested that permits be issued, any infractions rectified and final inspections completed prior to closing – which was only one week away. The sale closed on time, with the insurer (TitlePLUS) providing assurances that it would rectify the outstanding permit issues after closing.

But while you're explaining the many benefits of title insurance, make sure you also fully explain what title insurance does and does not cover. Your clients should understand what you will **NOT** be doing as a result of getting title insurance, unless instructed by the client to do otherwise. In the course of explaining title insurance coverage, you may learn about particular issues or concerns the client has regarding the property in question – issues that may make certain searches advisable even if they are not expressly required by the title insurer. For example, your client may be buying a property because of an addition that does not appear on an existing survey, and might prefer you to check on the addition's compliance with building and zoning requirements rather than potentially having to make a claim under her title insurance policy after closing or when she is selling the property. Remember too that the insurer has a number of options for resolving a claim – and the client may not be happy with the insurer's decision to, for example, simply remove the non-compliant structure and pay the diminution in the value of the property (if any).

Explain the benefits of fraud coverage

The growing incidence of real estate fraud has reinforced the benefit of title insurance, especially for mortgagee clients. Title insurance is, in our view, the best protection for post-closing fraud that a client can obtain. Your opinion – which is backed by your professional liability coverage if your client does not opt for title insurance – cannot match this protection.

Understand and explain title vs. legal services coverage

Most policies in the marketplace today do not provide coverage for the legal services provided by the lawyer in the transaction. Instead, they cover only specific title, compliance and related property interest risks.

Understand too that a waiver of subrogation from a title insurer is NOT the same as an indemnity, and it certainly is NOT legal services coverage. Most title insurance policies do not provide express coverage for errors or omissions of the lawyer acting in the transaction, leaving open the door to potential lawsuits against lawyers if the error or omission gives rise to a type of loss not covered by the policy.

In practice, other title insurers often waive subrogation; depending on the circumstances, other title insurers will indemnify lawyers for their defence costs, in situations where the title insurer has denied coverage and the client has responded by suing the lawyer and/or the title insurance company. You should remember, however, that this type of indemnity is NOT a matter of contract, and is not an automatic right. Remember too that a waiver of subrogation does not prevent your insured clients from suing you and the title insurer.

Unlike other title insurers, TitlePLUS **does** provide coverage for the legal services of the lawyer in the transaction; in other words, the errors or omissions a lawyer may make in the course of the transaction are covered when a lawyer uses TitlePLUS title insurance in a transaction.

Typical is the example of a lawyer who acted for a private lender on a second mortgage transaction. The lawyer purchased a TitlePLUS mortage lender-only policy for his lender client. Prior to closing, the lawyer received oral instructions to proceed with the transaction, even though a statement from the first mortgagee (a financial institution) was not available. The client instructed him to obtain the statement immediately after closing. The transaction proceeded, the mortgage went into default immediately after closing. The mortgage statement received from the first mortgagee after closing revealed that the first mortgage had been in arrears at the time the second mortgage funds were advanced. The TitlePLUS insured took the position that she had instructed the lawyer NOT to proceed without a statement from the first mortgagee. The lawyer's recollection of his instructions, as noted above, conflicted with those of his client. The property was sold by the first mortgagee, and no funds were available to go toward the second mortgage. The losses in this example are not strictly related to title, and would not have been covered by other title insurers. Because of TitlePLUS legal services coverage, however, the claim was resolved without a professional liability insurance claim being made against the lawyer.

Cross the "t-s" and dot the "i-s" in your title insurance application

Securing title insurance is no excuse for not taking the time to get it right. An error in your application could lead to a denial or reduction of coverage, with the potential for a claim to your liability insurance. If you have identified a specific title issue for which you want title insurance, communicate clearly to the insurer's representative that you want coverage for this problem; if the insurer agrees to "insure over" the issue, it should be identified in the coverage provided under the policy or added as affirmative coverage in an endorsement. If you do not specifically request an "insure over" for the problem, you may find that the problem has been made an exception to coverage. Similarly, you must disclose all material information to the title insurer when applying for a policy, or risk denial of coverage later when a claim is made.

Ensure too that you describe fully the client's property and attendant interests in the legal description that you provide in the application process. We recently handled one case where a title insurer denied coverage because the lawyer had failed to include in the description of the property the parking and storage units of a condominium purchase; as these units were separately deeded and were not described in the application, the insurer took the position that they were not covered by the title insurance policy for that unit.

Assist and inform your clients when they make a claim

Your client may well ask you for help in making a claim and dealing with the insurance company's adjuster or examiner. Review the policy provisions again, to ensure your clients understand their coverage and the insurer's responsibilities; as well, review the provisions for making a claim, as failure to comply with the policy could lead to a reduction or denial of coverage.

If you are retained to help make a claim, obtain the Proof of Loss or Claims Notice forms, and help your clients complete them and return them promptly. As well, do not attempt to repair or compromise a claim without the authorization of the insurer. A claim for expenses incurred without authorization may be denied by the title insurer. Remember too that the insurer has various options for resolving a claim, and that a settlement you negotiate may not reflect the insurer's views of the appropriate resolution to a claim, leading to a reduction in the claim payment or even a denial to fund the settlement based on the fact that your actions have prejudiced the insurer.

Conclusions

Title insurance is, without a doubt, a valuable practice tool for the real estate bar. It enables lawyers to conduct real estate transactions more efficiently and effectively, saving clients time and money. But it is not a magic bullet. It does not absolve you of the need to provide the legal advice, expertise and services that your clients sought in the first place. Used with care and understanding, title insurance can and does enhance the transaction for all parties. Used carelessly, title insurance can come back to haunt you.

Rosanne Manson is a Claims Examiner at LawPRO, with responsibility for TitlePLUS claims.

Ontario's new Limitations Act, 2002:

An overview

On December 9, 2002, the Ontario legislature passed Bill 213 – the Justice Statute Law Amendment Act *– by unanimous consent, without debate. Wrapped up in a single bill were three pieces of legislation, one of which will become known as the* Limitations Act, 2002.

The following are highlights of the new Act and its implications for Ontario lawyers. A more detailed discussion of the Act, as well as a table of the commonly found limitation and notice periods still in effect, can be found on the practicePRO Web site at http://www.practicepro.ca/practice/limitation.asp

The *Limitations Act, 2002*, will come into force on a date to be proclaimed, most likely later this year or the beginning of 2004. It represents a huge reform of the existing law of limitations, except for the provisions of the current Act concerning real property, which are preserved. It is by no means perfect, but nevertheless represents a substantial improvement, which will hopefully make the law of limitations more intelligible to lawyers and clients alike. Other benefits, which are anticipated, are a reduced drain on court and judicial resources of limitation-related motions, and fewer negligence claims against lawyers resulting from missed limitation periods.

Basic limitation period of two years

A basic limitation period of two years is introduced running from the day the "claim" is discovered. "Claim" is defined as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission." The basic limitation period replaces the general limitation periods found in the present *Limitations Act*, as well as many of the numerous special limitation periods found in other statutes.

Some special limitation periods remain

A schedule to the new Act contains a list of special limitation periods contained in other statutes, which will remain in force. If a limitation period set out in or under another act is not listed in the schedule, it is of no effect. Many of the special limitation periods that have been the bane of advocates' existence are expressly repealed. Gone are old favourites such as:

- section 7 of the *Public Authorities Protection Act* (actions against public authorities), sections 44(7) and 84 of the *Municipal Act* and section 33(5) of the *Public Transportation and Highway Improvement Act* (highway repair claims);
- section 31 of the *Public Hospitals Act* (claims against public hospitals);
- section 89 of Schedule 2 to the *Regulated Health Professions Act* (claims against healthcare professionals); and
- section 46 of the *Professional Engineers Act* (claims against engineers).

Ultimate limitation period

The concept of an ultimate limitation period is introduced by section 15, subsection 2, of which provides that no proceeding shall be commenced in respect of any claim more than 15 years after the day on which the act or omission on which the claim is based took place. Accordingly, even if a claim has not been discovered within 15 years of the occurrence which gave rise to the claim, an action commenced after the 15th anniversary of that occurrence will be statute barred. Section 15(6) provides a definition of the day of occurrence where there is a continuous act or omission or a series of acts or omissions. In the case of a default in performing a demand obligation, the ultimate limitation period runs from the date of default. Special considerations apply to "incapable" parties and situations where the existence of a cause of action is concealed from a claimant.

No limitation period

It has always been the case that if a limitation period is not provided for there is either no limitation period at all or, if the claim is one for equitable relief, the doctrine of laches applies. Under the new Act, a claim will only be subject to no limitation period at all if that is expressly provided for in the *Limitations Act*. (For details see http://www.practicepro.ca/practice/limitation.asp)

Transition provisions

There are transition provisions for claims based on acts or omissions that took place before the coming into force of the new Act (the "effective date") where no proceeding has been commenced before the effective date.

If the limitation period applicable before the new Act comes into force (the "former limitation period") has expired before the effective date, the new Act will not, except in certain cases involving assault or sexual assault, revive the claim.

If the former limitation period has not yet expired on the effective date then:

- if the claim is one that, if it was based on an act or omission that took place after the effective date would not be subject to any limitation period under the new Act, there is no limitation period;
- if a limitation period under the new Act would apply if the claim was based on an act or omission that took place after the effective date, (a) if the claim was not discovered before the effective date, the new Act applies as if the act or omission had taken place on the effective date; and (b) if the claim was discovered before the effective date, the former limitation period applies.

If there was no former limitation period but, under the new Act a limitation period would apply if the claim was based on an act or omission that took place after the effective date, then:

- if the claim was not discovered before the effective date, the new Act applies as if the act or omission had taken place on the effective date;
- if the claim was discovered before the effective date, there is no limitation period.

If claims are based on an assault or sexual assault, even if the former limitation period has expired before the effective date, the provisions of the new Act will effectively apply to most, if not all, such claims.

*This article has been condensed from a detailed discussion of the new **Limitations Act, 2002**, prepared by Graeme Mew of Gowling Lafleur Henderson LLP for The Advocates' Society and LawPRO. The full article by Mr. Mew is available on the practicePRO Web site at http://www.practicepro.ca/practice/limitation.asp and is reproduced with the permission of The Advocates' Society.*

Respecting the "trust" in trust account

It may be because of difficult economic circumstances …or the need to keep a client happy …or simply a lack of understanding of what a trust account is and how it should be used.

Whatever the underlying reason, the end result is the same: An increasing number of lawyers are facing claims related to inappropriate use of their trust accounts. In some instances, lawyers are being duped into activities involving subsequent allegations of fraud or money laundering. More commonly, they are merely letting clients use their trust accounts as bank accounts, or acting purely as escrow agents. Often, there is some question as to whether or not the lawyer provided any legal services in connection with the monies that flowed in and out of their trust account – leaving open the door to a potential denial of coverage under the LawPRO insurance policy, and leaving the lawyer potentially exposed to the full costs of the claim being made.

Why are lawyers' trust accounts such an attractive option for their clients? Because lawyers are in a unique position of trust.

A lawyer's professionalism is held in the highest esteem, so their services automatically are imbued with an aura of respectability and confidence. Their activities on behalf of their clients are protected by solicitor/client privilege (subject to requirements of new federal anti-money laundering legislation). For those who prefer not to leave a paper trail, lawyers' trust accounts are an attractive alternative to traditional financial institutions. Among the most vulnerable is the sole practitioner who – perhaps of economic necessity – closes his eyes to the improper ways in which he is being asked to use his trust account, or simply does not understand that his trust account is being used for purposes that have nothing to do with his legal expertise, and everything to do with moving money in inappropriate, and sometimes illegal, ways.

The following are summaries of typical claims that LawPRO has seen in the last few months involving improper use of trust accounts.

The construction project front

A small, but sophisticated, developer decided to be his own general contractor on Project A through companies he owned.

He retained his lawyer to help him. The lawyer also acted for the bank that was funding the construction. Advances from the bank loan were paid to the lawyer in trust. Rather than immediately paying out these funds to the client, the lawyer left the money in his trust account. Over the next few months, he took instructions from the developer about whom to pay and how much. As it turns out, many of the payments paid debts on other projects, the developer's overhead, and other items not connected with Project A. Subcontractors for Project A have now sued the developer and the lawyer directly for breach of trust under the *Construction Lien Act*.

While this points out the need for the lawyer to have understood the *Construction Lien Act*, it also highlights the problems that can arise when a lawyer allows the client to use her trust account indiscriminately. The lawyer has created an opportunity for strangers to make claims against him. Regardless of the outcome, she faces the financial and other costs of dealing with a claim.

Letting clients use trust accounts as bank accounts

On some claims involving trust accounts, lawyers let their clients use trust accounts as bank accounts: They will accept and deposit cheques from clients and then make payments on their trust accounts on client instructions – without providing any legal services related to the transactions.

We have examples where lawyers have consented to requests from clients to run dozens, even hundreds of transactions through their trust accounts, even though they have no knowledge of the source or payee; in some instances, the transactions did not relate to any file or matter that the firm knew about. Subsequent inappropriate activity on the part of the client in situations such as these inevitably leads to disputes that involve the lawyer – and raises the issue of liability insurance coverage if the lawyer cannot prove that he or she provided legal services related to the transaction under dispute.

In another example, a client asked the lawyer to let him use the lawyer's trust account to facilitate the process of lending money to a relative who was purchasing property. The lawyer did not act for either party in the real estate transaction, but did deposit into his trust account a handwritten, certified cheque from the client, and subsequently wrote cheques on that trust account to various parties, as directed by the client. It turned out the certified cheque had been altered, and had been certified for only a few hundred dollars and not hundreds of thousands of dollars. A claim was the inevitable result.

Lessons learned

What lessons can lawyers learn from these examples?

Firstly, your trust account should be under your control. No matter how benign the transaction looks or how much confidence you have in the client, if you are being asked to use your trust account in ways that are not appropriate, and not consistent with the Rules of Professional Conduct and related guidelines (see sidebar on page 23), you do have the option to say NO.

Second, be mindful of the role you are being asked to fulfill in the transaction, your potential liability and the possibility that you may not be covered for this "service" under your professional liability insurance policy. If you are **not** providing legal services related to the transaction involving your trust account (or any other type of transaction, for that matter), you may be denied coverage if a subsequent dispute arises.

The issue of coverage: Is there or is there not?

Everyone knows that in real estate transactions, purchasers' solicitors receive purchase funds into their trust accounts. The source of these funds are the purchasers themselves, or the purchase mortgagees. Purchasers' solicitors then pay the money over to the vendors' solicitors, who deposit the money into their trust accounts, and then pay the proceeds to the vendors. Defendants' solicitors receive settlement funds from their clients, deposit them into their trust accounts, then pay the money to the plaintiffs' solicitors, who deposit the money into their trust accounts for payment out to the plaintiffs. We could multiply examples.

The point is, these solicitors receive money into their trust accounts in connection with some transaction which forms part of their legal practice. Solicitors do not operate as bankers, simply receiving money and paying it out again, as their "depositors" demand.

Several English cases make the point that it is not the practice of law to simply receive money into a solicitors' trust account, and pay it out again, without any underlying transaction in which the solicitor provides legal services.

In *United Bank of Kuwait Ltd. v. Hammoud and others* [1988] 3 All E.R. 418, the English Court of Appeal held at pp. 427 – 428:

> "The evidence establishes that two requirements must be fulfilled before an undertaking is held to be within a solicitor's ordinary authority.
>
> "First, in the case of an undertaking to pay money, a fund to draw on must be in the hands of, or under the control of, the firm; or at any rate there must be a reasonable expectation that it will come into the firm's hands. Solicitors are not in the business of pledging their own credit on behalf of clients unless they are fairly confident that money will be available so they can reimburse themselves.
>
> **"Second, the actual or expected funds must come into their hands in the course of some ulterior transaction which is itself the sort of work that solicitors undertake. It is not the ordinary business of solicitors to receive money or a promise from their client, in order that without more they can give an undertaking to a third party. Some other service must be involved."**

The *United Bank of Kuwait* case was followed in *Hirst v. Etherington* [1999] Lloyd's Rep P.N. 938 (Eng.C.A.). An English solicitor, Mr. Etherington, acted for a Mr. Wilkinson. He also represented Wilkinson's companies. The plaintiff Hirst agreed to loan £30,000 for a period of six months to a firm controlled by Wilkinson. Etherington gave Hirst's solicitor, Miss Hedges, an unconditional undertaking to pay £36,000 to Hirst at the end of six months. Hirst's solicitor knew that Etherington had a partner, Miss Bassett. Miss Hedges asked Etherington whether the undertaking was given in the ordinary course of the firm's business. Etherington assured her that it was.

The money was never repaid. Etherington became bankrupt. Hirst sued Miss Bassett on Etherington's undertaking. The trial judge gave judgment to the plaintiff.

The Court of Appeal allowed Miss Bassett's appeal. The undertaking in question was in reality nothing more than a guarantee of the client's indebtedness. Such undertakings are not within the ordinary course of a law partnership's business. **It is within the scope of a solicitor's business to undertake to apply funds received from an underlying transaction in a certain way**. Miss Hedges was not justified in simply accepting Etherington's assurances that the undertaking was given within the ordinary course of the firm's business. **She should have inquired concerning the "underlying transaction."** There was in fact none.

While *United Bank of Kuwait* and *Hirst* are "undertaking" cases, the same logic applies to "deposit and pay out" transactions. Simply taking in money and paying it out again is bankers' work, not solicitors' work.

Withdrawal of money from trust accounts

By-Laws 18 and 19 of the Law Society's Rules of Professional Conduct provide lawyers with some specific guidelines on how to use a trust account.

Money that may be withdrawn

Lawyers shall only withdraw the following from a trust account:

- money properly required for payment to a client or to a person on behalf of a client;
- money to reimburse the lawyer for money properly expended, or incurred on behalf of a client;
- money required for, or toward, payment of fees for services performed for which a billing has been delivered;
- money directly transferred into another trust account and held on behalf of a client;
- money that should not have been paid into a trust account but was inadvertently paid into a trust account;
- other money if authorized to do so by The Law Society of Upper Canada.

Manner of withdrawal of certain money

When transferring trust monies properly due from their clients, lawyers shall only:

- withdraw money from a trust account by cheque drawn in favour of the lawyer;
- transfer to a bank account that is kept in the name of the lawyer and is not a trust account;
- electronically transfer according to the procedure set out in By-Law 19, s.7.

Withdrawal by cheque

Lawyers shall ensure that cheques drawn on a trust account shall not be:

- made payable to either cash or bearer;
- signed by a person who is not a lawyer, except in exceptional circumstances and if conditions exist as set out in By-Law 19.

Withdrawal by electronic transfer

Lawyers shall only withdraw money from a trust account by electronic transfer if the conditions in By-Law 19 are met. Conditions to be met include:

- electronic system requirements;
- timely production of confirmation of certain information relating to the electronic transfer;
- use of electronic transfer requisition, Form 19A.

Adobe Acrobat and PDF files:

an essential part of your legal technology arsenal

Today, it is impossible to spend even a few minutes on the Web without coming across a PDF document. This file format is the universal standard for sharing documents, and is already used by many lawyers. In the future, PDF documents are going to become even more widely used in the legal profession. This article will help you understand what PDF files are, and how you can use them in your practice.

What is a PDF file

The PDF file started out as the simple solution to a common problem. Undoubtedly, you have experienced the frustration of not being able to access a computer file someone else created because you didn't have on your computer the same program they used to create it in the first place. Or perhaps, a program on your computer could access the file, but some of the formatting was lost, or it would not print properly. This remains a common problem today, and was an almost universal problem in the waning days of DOS in the early 90s.

In 1993, Adobe developed a solution to this problem: the Portable Document Format, or what is more commonly known as the PDF file. These files are easily recognizable as the last three letters of the file name are always PDF (e.g. letter.pdf).

Adobe's timing could not have been better. In 1993, the Internet was just starting to take off, and the world was starving for a solution to the problem of exchanging documents. PDF documents worked well with Netscape, the new and soon-to-be very popular Web browser that made the Internet easily accessible to everyone. As a result, the PDF format has become the universal standard for exchanging documents.

What is a PDF document? It is really nothing more than a frozen version of the original document you created on your computer. If you have the proper software, you can create a PDF file from a document in virtually any program and save it, text, fonts, graphics, layout and all, in a format that anyone can read, even people using the Mac, UNIX, LINUX or Palm operating systems. The key is that a PDF document will look, and print, exactly as it appeared on your computer for everyone who views it. This is the case, even if viewers do not have the original program you used to create the document on their computer.

To view and print a PDF file, all you need is Acrobat Reader. This free program is available as a download from Adobe's Web site (www.adobe.com). It works seamlessly with Windows and your Web browser. When you access a PDF file on your hard drive or the Web, the Reader automatically starts and opens the file so you can view it on the screen. Posting a PDF document on the Web assures that almost anyone can access it, as the Adobe Reader is installed on several hundred million computers world-wide, including, most likely, yours.

You can't create PDF files with the free Acrobat Reader. Adobe has a separate program for creating PDF files, the latest version of which is called Adobe Acrobat 5.0. It costs about $375. Installing it gives you the ability to easily create a PDF file from just about any program you use.

How can lawyers use PDF files

As PDF files are universally accessible, PDF is the only format you should consider for posting documents on your firm's Web site.

The Internet and e-mail have come together to make it common practice for lawyers and clients to exchange final or draft documents electronically as attachments to e-mail messages. Although

sending documents by e-mail is far more convenient than using a fax machine or regular mail, it is something that should be done with care, and in some circumstances, ideally with a PDF file.

In some situations you will want the other person to be able to easily edit the document you are sending them. Perhaps you are sharing a draft document with a client or co-counsel, and you want them to be able to make changes to that document. If this is the case, sending them a document they can edit, say a Word or WordPerfect document, is appropriate.

However, there are circumstances where you will want to send a document that can't be easily changed or edited. Perhaps you don't want to give a difficult client a draft they can change, or you want to send opposing counsel a final document that cannot be altered. In this case sending it in PDF format is the answer. It will retain all original formatting, and the contents will be frozen and unalterable.

If you have the ability to create PDF documents, and your recipient has an e-mail account and the Adobe Reader, you should seriously consider e-mailing PDF documents instead of using a fax machine. E-mailing a PDF will be faster than faxing, and it will be cheaper (especially if you have to send the fax long distance). The quality of the document will be virtually identical to the one you printed, unlike faxes, which can be difficult to read. Lastly, e-mailing multiple parties is much easier than sending a fax to multiple parties.

PDF security, integrity and safety

You can change and set various security options on a PDF document to accomplish a number of different things. Access to a document can be prevented and controlled with passwords. You can prevent people from changing a document, printing it, or even copying the text it contains. For document integrity and identity purposes, you can digitally sign a PDF document. With proper security settings, PDF files are as tamperproof as originals.

Providing the file hasn't been secured, you can easily extract text or images from a PDF file, something Adobe calls re-purposing.

PDF documents are safe – they cannot carry a virus. This is great comfort for anyone receiving a PDF document as an e-mail attachment. Keep in mind that many people will not open a Word document or other attachments fearing that they will contain a virus. In some companies and law firms, security settings are set to only allow attachments that are PDF documents; all others are automatically stripped out of a message.

More advanced PDF document features

Adobe Acrobat has many other features and abilities that make it potentially useful for lawyers. These include:

- inserting annotations or comments in a document, which can be used by you or others;
- creating interactive court pleadings that include internal and external links;
- creating interactive forms for a Web site;
- the ability to facilitate online collaboration by allowing content on a Web site to be accessed by others.

Some small firms are using Adobe Acrobat as the foundation of a paperless office. All documents are scanned into PDF format and placed on a network. This gives everyone at the firm access to all the documents on the matter. There is a program that allows you to OCR (Optical Character Recognition) a scanned document to convert it to text. This gives you the ability to search for text within PDF documents.

Acrobat can be used by litigators for document production. A program called StampPDF (www.appligent.com) allows you to automatically Bates Stamp all documents in a PDF file. It can stamp thousands of documents in a matter of seconds, a fraction of the time it takes to do it manually.

As a result of its abilities, the PDF format has been designated as the required standard e-filing format in almost every jurisdiction that has implemented e-filing, whether for courts, tribunals or other government agencies.

Take steps to learn to use PDF documents

The PDF document is already the universal cross-platform format for document exchange. It ensures that every document you create can be shared with anyone in an easy-to-use format. As more people become comfortable with PDF documents, and learn to use the more advanced PDF document features, this document format will become even more common. Take steps to learn how you can use PDF documents in your practice. They will help you work more efficiently and effectively.

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practice PRO

Search and file writs of execution online...

without going to the Registry Office

Searching for writs of execution is a necessary part of all real estate and most business transactions. Filing an execution is often a key part of enforcing a judgment. In the not-too-distant past, one had to personally attend at an Enforcement or Registry Office to file or search for an execution. This is a thing of the past, thanks to two online services provided by BAR-eX Communications Inc. through its Web site/portal www.bar-ex.com.

OWL™ – Ontario Writs Locator – is an exclusive service providing comprehensive writ searching capabilities. OWL's most powerful feature is the ability to simultaneously search all 49 enforcement offices in Ontario for writs of execution in a single query. Until OWL was available, searching for writs in even a few offices was generally prohibitive given the time, cost and effort required to attend each jurisdiction of interest.

If you are working late you don't have to worry if your local Enforcement or Registry Office is closed. OWL is available 7 a.m. to 10 p.m., seven days a week. Results of a search are normally electronically delivered by e-mail within three hours. The cost is $39.95 per name searched.

In addition to OWL, BAR-eX also provides online issuing and filing of writs of execution through **WritFiling™**. Using it can reduce your risk of creditors liquidating assets before a writ of execution can be manually filed. WritFiling allows lawyers to securely issue and file writs of execution online in any of the 49 enforcement offices – seven days a week from 7 a.m. to 10 p.m. WritFiling requests will normally be processed and filed by the next business day. This means that you can file an execution much faster than you can manually, as electronically filed executions can be in place much more quickly. Once electronically filed, an execution can also be withdrawn, re-filed, revised, renewed or updated (change solicitor of record, advise Enforcement Office of payment(s) received) online.

To use WritFiling you will need a Personal Security Licence. But if you are an existing Teraview® user, you simply need to contact BAR-eX to add WritFiling to your security licence. Log into www.bar-ex.com for more information.

Keep these BAR-eX services in mind next time you need to file or search for an execution. Now you can complete either of these tasks without leaving your desk.

® Teraview is a registered trademark of Teranet Inc.

™ Owl and WritFiling are trademarks of Teranet Inc.

The Online COACHING CENTRE

Workshop: *business development*
Module: *#20 – Developing business by… fishing for whales*

Coaching

Most lawyers use marketing simply to obtain more clients. There are other reasons to market once a practice is busy and lucrative.

"Busy" isn't necessarily optimum. Especially if busy means working many hours for low margin clients or if busy means working with clients whose work or personality isn't desirable.

About the OCC

The Online COACHING CENTRE (OCC) is LAWPRO's innovative online education tool. It lets you quickly and easily enhance a variety of "soft skills" that not only help you survive and thrive, but also help reduce malpractice claims.

The OCC is entirely Web-based, allowing lawyers across Ontario to use it at a time and place convenient to them. It is organized into six workshops, each of which contains approximately 25 learning modules, such as the one profiled on this page. Modules encourage self-teaching and self-evaluation; answers you provide when working in the modules should be saved for review at a later time.

To access the OCC, go to www.practicepro.ca/occ

Marketing therefore can be used to obtain new clients:

- who are more lucrative per hour of effort;
- who offer a more desirable kind of work; or
- who are simply more pleasant to work with.

The idea of marketing for a new kind of client can be described as fishing for whales (rather than minnows). The idea is that a big fish will give you more of what you want, than a small one. What you want can be both money and professional satisfaction.

Mentoring

The following chart will help you analyze your practice toward choosing a more desirable target audience.

The column on the left asks you to identify clients who you would say are ideal because of the combination of revenue, projects and personality.

The middle column asks you to identify clients who are worth letting go of because they fail the revenue, projects, personality test.

The third column asks you to identify prospects you should seek to cultivate further, because they would offer you more of what you want and prospects you should let go of, because you really don't want their business.

One trait of successful lawyers is that they do a regular housecleaning of unsatisfactory clients. They "let go" of, i.e. do not encourage, clients they don't really want, in order to have more time to cultivate clients and prospects they really do want to do business with.

Current Ideal Clients	Current Unsatisfactory Clients	Best Prospects to Cultivate
•	•	•
•	•	•
•	•	•
•	•	•
•	•	Prospects not to Cultivate
•	•	•
•	•	•
•	•	•
•	•	•

practicePRO

Conflicts of Interest:

The third most common and second most costly malpractice error

A review of LawPRO claims data for the last 20 years shows that the third most common error relates to conflicts of interest situations. Almost nine per cent of the claims we have handled since mid-1982 involved this error. The costs associated with resolving claims that involve this type of error are even more significant. It is the second most costly error, representing 16.7 per cent of estimated and incurred costs for all claims over this period of time.

What is a conflict of interest? It is a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a client. A conflict of interest can adversely affect a lawyer's judgment, loyalty, and ability to safeguard the interests of a client or prospective client.

What is it about a conflict of interest that is so bad? The answer is quite simple. Loyalty and independence of judgment are essential to the effective representation of a client. They are also fundamental to the health of the lawyer/client relationship. A conflict of interest may make it impossible to exercise loyal and independent judgment. The following passage from the judgment of Wilson, J.A. in Davey v. Woolley, Hames, Dale & Dingwall (1982) 35 O.R. (2d) 599 (Ont.C.A.) is worth remembering:

> "…In any event, the lawyer unquestionably assumes a dual role at his own risk, the onus being on him in any lawsuit that ensures to establish that the client has had 'the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded'…" (at p. 602).

Therefore, identifying and checking for a conflict of interest needs to be a routine part of every lawyer's practice. In fact, every time you have a new client or start a new matter for an existing client, you should consider if a real or potential conflict of interest situation exists on that matter. As a matter proceeds, you should continually assess whether any new circumstances give rise to a conflict of interest.

LawPRO's data makes it clear that law firms are not catching or recognizing conflict situations. Even in small firms, not to mention much larger firms with offices in separate cities, it is impossible to properly check for conflicts of interest without some kind of electronic database. Most law office accounting and case management software products now include the ability to quickly search for possible conflicts within the software's database. To help ensure all possible conflicts are caught, this database should include more than just client data. On litigation matters, witnesses, experts and other involved parties may have to be included in the database. On corporate matters, officers, directors, shareholders and others, including related corporate entities, may have to be included.

The most claims-prone conflicts arise when lawyers act for more than one person or entity on a single matter, and when lawyers act for a client on a matter where the lawyer has a personal interest other than reasonable professional fees. This personal interest is frequently a direct financial stake in a matter, or a client who is a family member or personal friend.

When a conflict of interest situation arises, it is critical that a lawyer handle the matter properly by immediately informing the client, and either withdrawing, or proceeding with the client's consent. Taking appropriate steps to handle a conflict of interest situation is also critical in terms of avoiding a malpractice claim.

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To assist you in reducing your risk of a malpractice claim, practicePRO created the *managing conflict of interest situations* booklet. It is one in a series of booklets to help lawyers manage the risks associated with the practice of law. It is available at www.practicepro.ca/practice/conflicts.asp or you can call Customer Service at 416-598-5899 or 1-800-410-1013 or e-mail service@lawpro.ca to request a copy.

Lawyers beware:

You can be fair game if your client is disappointed

LawPRO has recently noticed a disturbing trend. Where a client – or even a non-client – achieves a disappointing result, and where it can be said with all the benefit of hindsight that a solicitor might have proceeded differently, the Courts have recently shown a tendency to hold the solicitor liable.

When the testator's capacity is at issue

One such example is *Hall v. Frederick* (2001), 40 E.T.R. (2d) 65 (Ont.S.C.). Solicitor Frederick received a telephone call from a social worker early one Saturday morning to attend at Kingston General Hospital to prepare a will for Bruce Bennett, who was expected to die imminently. Frederick arrived at about 10 a.m., and attended at Bennett's bedside, accompanied by the social worker and the nurse on duty (Swift).

All witnesses agreed that when Bennett was awake, he was lucid and communicated what directives he wished to communicate. There were frequent periods when Bennett drifted in and out of consciousness. To keep Bennett awake and alert through the conversation, it was necessary to elevate the head of his bed and turn on the fluorescent light. Frederick had to talk to Bennett in a very loud voice to rouse him and sometimes someone would have to grab his hand and give it a squeeze to keep his attention. It was Swift's evidence that Bennett appeared to be lucid in the directives that he was giving with regard to certain people. He wanted to leave his daughter $100. He wished to leave bequests to several other individuals as well. He wanted his store left to the plaintiff Hall.

Swift noted that Bennett was capable of making simple directives, but when it came to any complex thoughts in the nature of telling them his net assets, his debts, or the exact value of his property, he did not have the capacity to evaluate these things.

Bennett was unable to give instructions concerning his residuary estate. Frederick terminated the interview because Bennett seemed too tired to go on. Bennett was about to be medicated, and was obviously about to die. No plans were made for future re-attendance.

Frederick felt that he could not safely draw the will since Bennett could not maintain alertness long enough for it to be read and understood. He was also concerned that he could get no instructions from Bennett concerning the residue of Bennett's estate. Bennett died at 7 p.m. that evening.

When Hall learned that Bennett intended to leave him the store, but the will had not been drawn, Hall sued Frederick.

Despite the evidence of two expert witnesses – Brian Schnurr and Dr. Michael Silberfeld – that the defendant had met the requisite standard of care, Manton, J. held that Frederick was negligent in the circumstances.

Manton, J. held that Bennett did have testamentary capacity. The Court was of the view that Frederick should have prepared a will setting out the specific bequests. Nothing had to be said about the residue, except that his daughter and grandchildren should not receive it. Manton, J. criticized Frederick for spending "too much time worrying about Bennett giving him a list of assets and about what would be done with the residue of the estate." Manton, J. held that the defendant should have prepared a will and signed it in accordance with s. 4(1) of the *Succession Law Reform Act*, R.S.O. 1990, c.s.26. The Court could then decide on capacity if necessary at a later date.

This case is under appeal. Members of the profession who have reviewed this judgment have expressed concern. While a testator cannot be compelled to disclose the nature and extent of his property, how else is a solicitor to fulfil his obligation to ensure that the testator is aware of the nature and extent of his property? How could the Court have made a finding that the testator had mental capacity, if there was no certainty that the testator was aware of the "nature and extent of his property?" In view of these considerations, is it right to criticize the solicitor for "worrying about the list of assets and the residue of the estate…?" In what other area of law can a solicitor be held liable for refusing to proceed with a transaction, where the solicitor has concerns about the client's mental capacity? We hope the Court of Appeal agrees.

The dangers of joint retainers

We also obtained a disappointing result in *Foley v. Cook; Daniels* (T.P.), [2002] O.J. No. 2120. It illustrates the dangers of "joint" retainers, and assuming that one client speaks for the other. It also underlines the dangers of simply accepting a client's instructions, without discussing the matter with the client, and inquiring whether the transaction truly serves the client's purposes.

Solicitor Daniels was contacted by Gary Foley. Diane Cook and Foley had previously been involved in a common law relationship, but were in the process of "breaking up." Foley gave Daniels instructions to prepare a "Trust Agreement" wherein Cook agreed that Foley had a 50 per cent interest in a property to which Cook had registered title. It was agreed that "profits" would be split when Cook either sold the property, or died. Daniels had had prior dealings with Cook and Foley on other properties. He had prepared transfers from one to the other based on agreements of purchase and sale in which he took no part. Daniels believed that they acted as a "team."

Several months later, he placed a mortgage on the property on Cook's instructions, without consulting Foley. Several years later, he registered the "trust agreement" on title, pursuant to Foley's instructions.

When Foley learned about the mortgage, he sued Cook, claiming a 50 per cent interest in the property. Foley also sued Daniels, complaining that he assisted Cook to encumber the property without his consent. Cook also third partied Daniels. Cook paid Foley $25,000 to settle his claim. Cook incurred $30,000 in legal expenses in doing so. She then continued her third party claim against Daniels.

Pitt, J. accepted Cook's evidence that her objective was to satisfy what she considered the unreasonable demands of Foley by giving to him, at a time of her choice or her death, 50 per cent of the net proceeds of the sale of the property, after all expenses of every nature and kind made by her throughout her ownership of the property, were deducted. Instead, Foley got an undivided 50 per cent interest in the property forthwith. The agreement contained no specific restriction on Foley's right to seek partition, only an inferential limitation. The Trust Agreement did not accomplish this goal.

The Court accepted that there are clients to whom the question "why are you doing this?" would be quite inappropriate, and indeed, foolhardy, from the standpoint of maintaining an ongoing business relationship. But there was nothing about Daniels' relationship with Cook that would lead to the conclusion that he had no duty to communicate with Cook after having received instructions from Foley, to verify the basis on which those instructions were given.

For example, Daniels could have dropped Cook a note informing her that Foley had advised him that Foley had a half interest in the property registered in her name and that Foley had asked him to do a transfer to reflect that state of affairs. Daniels could have spoken with her on the telephone. Daniels could have drafted a brief Acknowledgment of Trust, and forwarded it to Cook, asking her to tell him whether the Acknowledgement truly represented the facts as she knew them to be, and suggesting independent legal advice, if she thought that was required. A solicitor must ensure that the clients understand the full nature and effect of the transaction in which they are engaging and are sensitive to the risks that are at stake.

The court accepted that the $25,000 settlement was reasonable, but allowed only $20,000 on account of the legal fees incurred in the litigation with Gary Foley. This judgment has not been appealed.

On dealing with an "unsophisticated" client

Turi v. Swanick [2002] O.J. No. 3595 (Ont.S.C.J.) holds that where a client is allegedly unsophisticated, it is not enough that a solicitor's advice be merely clear and correct. The solicitor must also explain the consequences of not following the advice, **and** confirm it in writing.

The plaintiff Turi retained the defendant solicitor Swanick to incorporate a new company for the purpose of operating a new men's clothing store. The plaintiff's express purpose in incorporating ITC Inc. was to avoid any personal liability for any liabilities that might be incurred in the operation of the store. Swanick prepared and registered a general security agreement to provide security for any money that the plaintiff advanced to ITC Inc. He also set up a family trust with the plaintiff, as the trustee, to hold the shares of ITC Inc. The store was not successful.

Teenflo Fashions (Teenflo) was one of the store's suppliers. Teenflo commenced an action against Turi for the price of certain goods that were allegedly sold and delivered to Mr. Turi personally. Turi defended the action claiming that, to the knowledge of Teenflo, all the purchases were made by ITC Inc. and that he was acting merely as a representative of the company. The "New Account" Application had been signed by Turi personally, as had the purchase orders in question. The Teenflo action proceeded to trial and judgment was granted against Turi in the amount of $22,427.37 together with prejudgment interest and costs.

Turi commenced an action against Swanick for damages in the amount of $40,125.23, being comprised of the amount of the judgment, interest, and costs that he was ordered to pay in the Teenflo action, and the costs of defending that action.

The Court found that Swanick's advice to Turi about the proper use of the corporate name must have occupied only a very small part of the forty minute meeting between them in which a number of quite complicated topics were covered. In these circumstances, and given that the consequences were not mentioned, it was likely that the advice did not register on the consciousness of the plaintiff. It likely "went in one ear and out the other." This finding was made notwithstanding Turi's evidence that he understood everything that Swanick told him. It was clear to the Court that he did not. For example, it was obvious that he did not understand the concept of the family trust, which he referred to in his evidence as "the trust company."

The Court was satisfied on the balance of probabilities that Swanick did advise the plaintiff about the proper use of the corporate name, but did not advise him about the consequences. Mr. Wayne Gray, Turi's expert witness, expressed the view that with respect to such high-risk clients, a reasonably prudent solicitor should take steps to avoid or minimize this risk to the client. These steps might consist of:

(a) advising the client on the distinction between the corporate and business names, in particular that dropping the word "Inc.", "Ltd.", or " Corp." from the corporate name is an improper use of the corporate name because it does not drive home to the opposite contracting party that it is dealing with a corporation;

(b) advising the client on the proper use of corporate names, including the need to saturate the name on all business dealings (e.g. on signage, cheques, business cards, letterhead, fax cover pages, Web site, e-mail, purchase orders, business contracts and other external communications) in order to minimize the chance that the opposite contracting party will not be aware that it is dealing with a corporation;

(c) warn the client of the risk of personal liability for failure to properly use corporate and business names.

Mr. Gray expressed the opinion that the best practice is to give the advice to the client in writing. However, none of his own sample letters to clients had any written advice concerning the consequences of failing to use the corporate name. Mr. Gray conceded that a failure to put the advice in writing does not, in and of itself, constitute a breach of the solicitor's duty. He stressed that it did not really matter how the information was communicated as long as the client "gets it and understands it." He conceded that it might be more effective to bring home the information to the client in a personal meeting than in a reporting letter.

Spiegel, J. found that the plaintiff was a high-risk client, and that the defendant regarded him as such, not only because he was in the high-risk retail business, but because he was an unsophisticated businessman. In the defendant's words, he was "a coat-pocket businessman" who could be sloppy in his record-keeping, and wasn't always going to do what the defendant told him. The standard of care owed to an unsophisticated client is different than that owed to a sophisticated client.

Swanick recognized there was a real risk that Turi would, despite the oral advice that he had been given, expose himself to the very type of liability which he was seeking to avoid by retaining the services of the defendant. Having foreseen this risk, Swanick owed Turi a duty to take reasonable steps to avoid or minimize that risk. Swanick could easily and conveniently have satisfied this duty by sending Turi a short written memorandum setting out the advice concerning the proper use of the corporate name and the consequences, which would not have taken much more time or effort than writing a memorandum to file. Swanick's failure to do so, on the particular facts of this case, constituted a breach of the standard of care. LawPRO has filed a notice of appeal on this case.

Conclusions

These three cases, all of which involved sole practitioners, illustrate the Court's tendency to sympathize with clients, even where expert evidence is adduced that the solicitor met the standard of care, or where the plaintiff's expert did not follow the steps which the Court found the defendant solicitor should have adopted.

Where a client leaves his will to the very last hours of his life, and is barely able to give instructions, the solicitor is nevertheless responsible if a proposed beneficiary is disappointed.

Where a solicitor is given firm instructions by two knowledgeable clients, the solicitor must nevertheless question the client to determine if the instructions are "really" what the client wants.

Where a solicitor gives clear and correct advice – the solicitor must nevertheless explain the advice, without being asked to do so, and must also record it in writing, lest it go "in one ear and out the other."

The conclusion: Solicitors beware. As these cases point out, you can be "fair game."

Debra Rolph is LawPRO's Director of Research.

A successful year for LawPRO

Although results are not yet final and audited, it appears 2002 was another year of growth and financial strength for LawPRO:

- A.M. Best has just awarded LawPRO an A (Excellent) rating for the third consecutive year.
- Although the number of claims reported in 2002 was up slightly, the number of open claims files has fallen below the 3,000 mark, due in large part to a concerted commitment to expeditious claims handling by the claims team.
- TitlePLUS posted record results, increasing its volume of business by over 30 per cent over last year and launching a number of Web-based initiatives that make it simpler and more economical for lawyers to secure TitlePLUS coverage for a large variety of real estate transactions.

The 2002 LawPRO Annual Report, to be released in early April 2003, will provide a more detailed review of results and accomplishments in the past year.

Money laundering update

The final set of regulations on the cross-border movement of currency and monetary instruments under Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) took effect January 6, 2003. Under these regulations specified persons must report the import or export of amounts of $10,000 or more, in currency or monetary instruments in bearer form.

All lawyers should understand the circumstances when they or their client would be required to file a cross-border transaction report. However, practically speaking, very few lawyers will have occasion to engage in the types of cross-border transactions that are reportable under this legislation.

The Federation of Law Societies has sought and received clarification from the Attorney General for Canada on who is obligated to file reports on reportable cross-border transactions under s. 12 of the PCMLTFA. In most cases where a lawyer is involved in a reportable cross-border transaction on behalf of a client, it is the client who is obligated to report the transaction, not the lawyer [ss. 12(3)(b)-(e)]. Lawyers are obliged to file a report only if they act as the courier, that is, only if they physically carry funds or monetary instruments in bearer form across the border on behalf of a client [s. 12(3)(a)].

Note, under this legislation lawyers are not required to report cross-border transactions involving bank drafts or cheques or other negotiable instruments made payable to a named person, and which have not been endorsed. Lawyers are also not required to report cross-border electronic funds transfers they are involved with through banks (banks may report these EFT transactions).

Lawyers are reminded that they continue to be exempt from Part 1 of the PCMLTFA, including the reporting requirements respecting suspicious and large cash transactions, and the obligation to implement a compliance regime. This exemption will continue at least until the constitutional challenge taken by the Federation of Law Societies is heard.

3rd annual LegalTech a hit

The 3rd Annual LegalTech Toronto Conference, sponsored in part by LawPRO, was a stellar success. More than 500 registrants packed the Metro Toronto Convention Centre on November 13-14th, 2002, for this joint event by the Law Society of Upper Canada and the Ontario Bar Association.

The opening keynote remarks by Mark J. Freiman, Deputy Attorney General and Deputy Minister Responsible for Native Affairs for Ontario, focused on his personal view of how technology makes an impact on the Attorney General Ministry's work at four different levels, including: the law, the justice system, the government and society as a whole. The text of Mr. Frieman's speech is available at www.oba.org/en/pdf/legaltechfinal.pdf

Almost 150 registrants attended the comprehensive program of keynote speeches, exhibits and 26 sessions focusing on a variety of topics, including using technology in the courtroom, communicating more effectively with e-mail, moving to a "paperless" office, and how to better acquire, implement, use and manage technology in the practice of law. An additional 350 participants attended the vendor exhibition, which featured over 30 vendors of legal technology products and services.

A number of the sessions taped by BAR-eX Communications Inc. are available in video and written formats online at www.bar-ex.com. Individual one-hour sessions are $49.95 (plus tax) and include online access to the audio/video replay of the program for one year from the date of purchase. Copies of conference materials are available from the OBA for $125.

Upcoming filing deadline

Transaction levies: April 30

Real estate and civil litigation transaction levies and forms for the first quarter of 2003, ending on March 31, 2003, are due and payable on April 30, 2003. All real estate and civil litigation lawyers must file a transaction levy form indicating the number of civil or real estate transactions undertaken for the period from January 1 to March 31, 2003. A filing must be made even if there were no transactions to report for this period. Transaction levy filing forms are available on the LawPRO Web site at www.lawpro.ca. To complete your transaction filings electronically, click on **File Online**; to access blank forms in PDF format, click on **Insurance Forms**.

Events calendar

2003

The following is a listing of events at which LAWPRO representatives, including staff from TitlePLUS and practicePRO, have presented or will be presenting and/or participating.

March 20 – 22

OBA's 2003 Institute of Continuing Legal Education

TitlePLUS and practicePRO, sponsors & exhibitors

Metro Toronto Convention Centre, Toronto

March 26 – 28

Ontario Credit Union Trade Show

Mark Farrish, TitlePLUS
TitlePLUS exhibiting

Royal York Hotel, Toronto

March 28

practicePRO Technology Breakfast: *Adobe Acrobat 101*

Come to this session to learn the basics of using Adobe Acrobat to create PDF files, and what you can and should be doing with PDF files – Martin Felsky, Commonwealth Legal Inc.

LAWPRO, Toronto

April 3 – 5

ABA Tech Show

60 Tips in 60 Minutes and How Not to Commit Malpractice With Your Computer – Dan Pinnington, practicePRO

Chicago, Illinois

April 8

TitlePLUS Staff User Conference

Le Royal Meridien King Edward, Toronto

April 9

TREB (Toronto Real Estate Board) General Meeting and Realtor Expo

Tim Anningson, TitlePLUS
TitlePLUS exhibiting

Toronto Congress Centre, Toronto

April 25

practicePRO Technology Breakfast: *Using Technology to Communicate with Clients*

Come to this session to learn how you can better communicate with clients and market yourself through firm Web sites, e-mail, electronic newsletters and extranets – Milton Zwicker, Zwicker Evans Lewis LLP

LAWPRO, Toronto

May 2 – 3

CCLA 9th Annual Solicitors Conference

practicePRO exhibiting

Montebello, Quebec

May 7 – 10

ILCO (Institute of Law Clerks of Ontario) Annual Conference

Jonathan Hager, TitlePLUS
TitlePLUS exhibiting

The Westin, Ottawa

May 30

practicePRO Technology Breakfast: *The 7 Rules of E-Discovery*

This session will review seven practical rules for effectively handling e-mail and other electronic documents in the discovery process – Martin Felsky, Commonwealth Legal Inc.

LAWPRO, Toronto

June 20

practicePRO Technology Breakfast: *Surviving with a Macintosh in a PC World*

This session will review the ins and outs of using a Mac in the law environment, and include tips on how to transition from Mac and PC – Peter Cusinamo, Barrister and Solicitor

LAWPRO, Toronto

For more information on practicePRO events, contact Nanette O'Connor at 416-596-4623 or 1 800 410-1013, or by e-mail at nanette.oconnor@lawpro.ca

For more information on TitlePLUS events, contact Marcia Silverman at 416-598-5882 or e-mail marcia.silverman@lawpro.ca

About practicePRO technology breakfasts

These presentations focus on legal technology; some sessions feature product comparisons; others are practical discussions and demonstrations of specific products by actual users; others review practical technology skills at a basic level.

Written summaries and online versions of past breakfasts, including handouts if available, are available for download at www.practicepro.ca/techbreakfasts

Online versions of some breakfasts also are available for only $29.95 at the BAR-eX Communications Web site at www.bar-ex.com. These online versions provide screen captures and audio of the actual presentation.

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