

A gold ring and a white ring are shown in a 3D perspective view, with the gold ring in the foreground and the white ring behind it. The rings are set against a white background with a subtle reflection.

# family law

Breakdown consultant:  
the new family law lawyer  
Managing clients and retainers  
View from the Bench  
Spousal support guidelines

**PLUS**

The future of real estate practice?  
Windows gone wild



# Food for thought this summer

In our last issue of LAWPRO Magazine, we examined the impact that technology is having on the way in which you practise. This issue of our publication focuses on the transformation that is taking place in family law and real estate law – the bread and butter areas of practice for many small firm/sole practitioner lawyers. Our next issue, which you'll find in your mailbox right after Labour Day, will introduce you to the new world of e-discoveries.

What all of these issues have in common is a message of change: The business of lawyering is changing, fundamentally and often significantly.

Although we focus in this issue on family law and real estate law, the issues raised by our lawyer panels are universal: Clients are more cost sensitive than ever – while also expecting more for their money; clients are more knowledgeable, more questioning, and often want to be more involved in resolving their matter; and increased competition from non-legal service suppliers is a growing threat to many areas of practice.

What's a lawyer to do? Our panels suggest that the options for the bar are two-fold: lawyers can either get out in front of the changes or risk being swept aside.

How can the bar be more proactive on its behalf? Listen to what your clients need and want; seize the

opportunities that changing technologies offer to streamline your practice; and take the initiative to explain to your clients what you're doing, why you're doing it and the value of your legal expertise to that matter or transaction. In other words, take the opportunity to educate your clients about your role as a lawyer – and how the involvement of a lawyer is vital in many circumstances.

And herein lies a major challenge: The idea that lawyers should be marketing themselves and their value to the public – both individually and collectively. The real estate bar is among the first to identify this need. The Law Society's small firm/sole practitioner task force also recommends an effort to "market" the benefits of working with a lawyer.

As your insurer, we're keenly interested in this issue of change, and how the bar responds to this challenge. There's lots of food for thought in this issue: Happy summer reading.

Michelle L.M. Strom  
*President and CEO*

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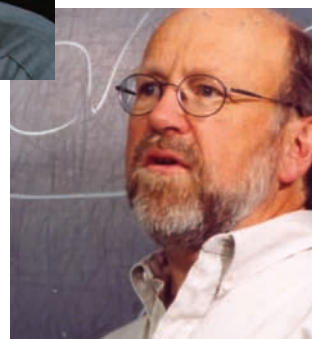
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Goodbye litigator:  
Hello "breakdown  
consultant"

# Meet the new family law lawyer

*The introduction this past January of new spousal support guidelines has put the spotlight on family law practice. To put the impact of the guidelines in context – and to better understand the pressures of family law practice today – LAWPRO Magazine this spring convened a panel of family law practitioners from across the province. We asked them to step back and look at the larger picture: What has changed in the practice of family law? What are the issues facing those doing family law today, and how have our panelists adapted to these evolving issues? And what lies ahead for the family law practitioner?*

*The insights and solutions offered transcend family law practice. Lawyers in all practice areas will find this discussion thought-provoking and eye-opening.*

**LAWPRO:** *In your view, has family law changed – and if so, has it changed for the better or worse since you started in practice?*

**Mary:** I don't think of it in terms of better or worse. Because change is constant, family law practice – like other areas of practice – is certainly different from what it was five, 10 or 20 years ago. Society, our clients and the environment in which we practise also have changed. All of the changes make us more accountable, which I think is a very good thing.

Our clients demand more of us – and rightfully so. They want everything better, quicker and cheaper. Therefore we cannot stay the same.

As well the world is not such a very big place anymore – thanks to technology. We can communicate 24/7. People are very mobile and everyone expects to reach everyone else at the touch of a button, by voicemail, fax or otherwise. This increases our obligations in a very significant way.

**Daniel:** What's better is that our practice is not the "same old, same old:." Our clients and their relationships are more complex, break-ups more difficult, and the issues are different than say 10 or 15 years ago. Today we have same-sex relationships, second marriages, children in combined families and so on. All of this makes the legal issues more challenging and more interesting.

Technology puts greater demands on us, but it also lets me interact with my clients at a much higher and more efficient level. E-mail certainly can be a scourge – but can also be a tremendous tool for saving clients money. Take for example, the preparation of financial statements: I almost never get a hand-written one anymore, they are almost always typed which leaves little or no room for error. So when these clients come in, I already have the pertinent details that I've had a chance to review in advance, and we have a very different kind of meeting. Certainly the lawyer and clerk still have to go through the paperwork – but e-mail and computers have helped reduce the "grunt" work at our end.



Heather McGee

# The panelists

**Kristen Bucci:** An associate with Buset & Partners LLP in Thunder Bay, Kristen has practised family and general litigation law since being called to the bar in 1993. She lectures and instructs in the local Bar Ads course, and facilitates CLE programs for area lawyers. She is past president of the Thunder Bay Law Association.

**Mary M.S. Fox:** An experienced trial lawyer and trained mediator, Mary is a partner with the Windsor law firm of Ducharme Fox LLP, where she practises primarily family law. She is also a frequent lecturer, instructor and panelist in CLE programs on family law, professional practice and civil justice reform, as well as serving on numerous professional and community boards and committees. Mary was called to the Ontario bar in 1978.

**Heather McGee:** The founding partner of McGee & Fryer, Heather has practised family and estates law in the Markham area since being called to the bar in 1991. She is also certified in collaborative law practice. As well as a guest speaker and writer in legal education and practice skills, Heather has volunteered on numerous committees and special projects for CDLPA, OBA and the Law Society. Heather is the incoming president of the OBA for 2005/2006.

**Daniel S. Melamed:** A partner at Torkin Manes Cohen Arbus LLP, Daniel focuses on family law and estates litigation. He

is certified by the Law Society as a Specialist in Family Law. He served as faculty member on National Family Law Conferences in Victoria, Ottawa, Whistler and St. John's, was an adjunct Professor at the University of Toronto Faculty of Law, and has lectured and instructed for the Law Society, the OBA, and other organizations. Daniel was called to the Ontario Bar in 1988.

**Lawrence S. Pascoe:** A sole practitioner lawyer, Lawrence has practised both family and wills and estates law in the Ottawa area since establishing his practice in the late 1970s. He is a frequent writer, lecturer and instructor on a wide variety of family law-related topics, and a regular contributor of articles on family law issues for local consumer publications. His firm's Web site – [www.thepascoedifference.com](http://www.thepascoedifference.com) – is frequently cited as an example of how lawyers can use technology to improve client relations and to market themselves more effectively. He was called to the Ontario bar in 1977.

## Moderator

**Dan Pinnington:** The director of LAWPRO's practicePRO risk management program, Dan moderated the family law panel discussion. After his call to the bar in 1993, Dan practised law, including family law, in southwestern Ontario. He joined LAWPRO in 2001.

Technology also lets me service clients more effectively around the world: I have clients in Eastern Siberia, Africa, France, England, even Australia. Where it once would take many days to turn around a document such as a separation agreement by courier, today I can send the clients a draft by e-mail, they can approve it overnight by e-mail, and the next day I can get it drawn up, send it to them by courier and two days later it is done.

What's worse? The greater expectations, some of which are unrealistic. Because of the Internet, clients think they have more legal knowledge: They'll send case law that they think applies to their situation. They ask more questions, challenge you more, are less willing to accept your judgment: While that makes practice challenging and interesting, it also means you spend a lot more time educating clients. You have to explain jurisdictional issues, why that case does not apply, or why that precedent is really a bad one to use in their situation.

One client contacted me the day after the (spousal support) guidelines came out asking why I didn't consider them when we were making a settlement. A very good question right? But a very difficult one to defend completely because you sound defensive. On the one hand, things are more difficult, but on the other people are informed and I prefer that.

**Heather:** Our role as lawyers has shifted to being one of "break-down consultants." We're having to improve our client relations and active listening skills. What we really want to be able to do, at an early stage, is separate the legal from the non-legal issues, and sort out where we can offer legal solutions and where we cannot, so we can better manage expectations.

Lawyers need to be realistic about what they can achieve, and should point the client in other directions for everything else, particularly services and counseling to promote emotional wellness.

It is essential that our clients are well enough to be making good decisions, and able to process the trauma of what is happening.

One of the things I do in my practice is encourage clients to put together their own "transition team," in effect a support system – friends, family, a good physician, a real estate agent, an accountant, a business or financial consultant – because issues on marriage breakdown can be diverse and overwhelming. My impression of a more traditional practice is that everything, including the non-legal issues, came to the lawyer's desk. Now, with more services in the community and awareness, you can have a notional partnership between the lawyer, the client and the client's team.

Frankly, this is not just a major improvement for the client, but also for the lawyer. When the client builds in other supports, less of the trauma is directed at the lawyer.

Many lawyers do burn out because we are constantly with people during a highly traumatic stage of life. All the grief, anger, shock, sadness is projected onto us, and we are left with this job to do. Without careful management, the lawyer can soon find herself being more responsible for the client's issues than the client is.

As family lawyers, we need to be more aware of the effect on us personally when we are working in this field, as well as help our clients understand that they are going through a process. This is a much more specialized approach: I am a good lawyer, but that's

all I am, I can help you with the legal issues, but on the non-legal issues the best I can do is point you in the right direction.

**Lawrence:** The over-aggressiveness of some lawyers is one issue that concerns me. Perhaps the cause is that there are more litigators doing family law because there is less personal injury and criminal work. I believe that these litigators forget that they are not representing banks, criminals and corporate clients and take pretty hard lines and positions. Unfortunately they sometimes succeed (though generally not) with these arguments, and so continue to practise in this aggressive way.

To address this problem we need to make family law more of an exact science. This has been done with the *Child Support Guidelines* and the new spousal support guidelines. More certainty will not only make our jobs easier, but will also cut down on the over-aggressiveness. It will also be fairer to all parties.

**Kristen:** I see change in four key areas: Others have already talked about improved technology and the fact that the issues facing the profession are different, because we're in an environment of continuous change.

As a result of these changes, the style of practice for some family law lawyers has changed. We're using alternative dispute resolution, collaborative law, mediation and other approaches. The new Family Law Rules are a testament to this new style – they emphasize case conferences as opposed to traditional adversarial litigation for example. In my view, some of these changes are positive.





Kristen Bucci

A fourth area of change is the growing emphasis on Continuing Legal Education that I trace to both changing client expectations as well as to ongoing legislative and regulatory changes, and to a lesser extent to the Law Society discussions surrounding the prospect of mandatory CLE. As a bar, I believe we are more committed to CLE and to staying on top of changes in the law and the need to better understand and meet client needs – especially in an environment in which fees are going up steadily.

**LAWPRO:** *One of the trends in family law practice is collaborative family law. Lawrence highlighted the over-aggressiveness of counsel on the other side and perhaps issues of civility. What's your view of the role of different practice models such as collaborative law, mediation and the like?*

**Heather:** Collaborative law has the potential to provide out-of-court, structured, and mainstream family law resolutions without the additional cost of arbitration. In a larger context, collaborative law is part of the development of family law as a highly skilled specialization.

And the truth is, not everyone can do it, and I say that with no disrespect to the traditional litigator or the generalist. Particularly in urban centres where there is a high concentration of family law cases, we can have a specialized bar, services for private resolutions, as well as a specialized Family Court. It's

remarkable how much higher the level of service is for clients in jurisdictions that have Family Law courts, collaborative law services and private resolution services such as arbitration and med/arb.

**Daniel:** Although I am not formally trained in it, I am doing a collaborative file right now and I am finding that it is a very interesting experience. Because it takes a unique kind of personality as well as determination on the part of the client, I also believe collaborative law will only reach a certain level of acceptance by both the bar and clients alike.

On the subject of mediation and arbitration – I do see more people doing mediation and arbitration, and am meeting people who are being mediated or arbitrated, because they believe that having that specialized knowledge results in a quicker, more efficient and fairer resolution of matters. But it's a trend among those who have the financial means to hire lawyers who are specialized, or can restrict themselves to those practice areas because we see their benefit.

What frightens me about this is that the courts are being left with more of the unrepresented and/or the dabblers. This is because the communities of people who are already like-minded figure out other ways to resolve things, either through negotiation or mediation/arbitration. The others don't. And then you get a

judgment that makes you ask: "Where did that come from?" You know the judge likely had to grapple with what facts need to be considered. This is a very different challenge facing family law today.

**Mary:** I believe a real challenge for us is that our ability to be advocates in the traditional sense of the word has eroded. Once we went to court when we chose to go to court; there was a beginning and an end. You represented your client in a traditional way that was understood. Today going to court is becoming a privilege, available for the rich or the poor.

That raises the challenge of the self-represented litigant. It is a challenge for the represented client because of the cost disproportionality. It is a challenge for us because we must take extra care in how we communicate with the self-represented. It is a challenge for the justice system because it puts an additional burden on the counter staff. It is a huge challenge for our judiciary to accommodate the self-represented who are at least notionally on the same footing as a represented client. But we all know that is never the case. I see the challenge in the self-represented litigant increasing and not decreasing in the practice of family law.

**LawPRO:** *What advice do you have for others when it comes to self-represented parties? How do you keep the matter moving along or help it move along more effectively?*

**Mary:** You have to keep everything documented. Whatever discussions you have, someone should be present so statements are not misconstrued. If there is a self-represented person on the other side, find a way to bring it to a close, quickly.

**Heather:** Some self-represented people are quite capable and reasonable. If you can set out expectations early, you can often get a resolution.

We have a policy to deal with unrepresented people only in writing. Also, we will set up a timetable up front for the negotiation process, failing which we then issue an application. Failing a quick resolution, we are more likely to go to court because with the court process there are imposed obligations and timelines. The whole process has to be much more structured and we have to make everything clear up front.

And we ask for an acknowledgement (we don't always get it) that the other party pays for half the cost of the larger documents to be drafted, even though we are not in any way representing them.

**Daniel:** I have an internal timetable and if people don't reach those benchmarks then we take the matter to litigation. At that point they are either overwhelmed by the process and hopefully retain counsel, or if they don't, we just bring it to an end as soon as possible.

I also try to negotiate the obvious things. If the other party is being unreasonable, I will just bring a motion: 80 per cent of the

time I know what the result should be, and that is generally what the result turns out to be. So I tell them that, I write them that and then we go forward. To do otherwise is simply not fair to your own client. You spend too much time and money trying to be nice and fair, and in the end you get nowhere because they are just being unreasonable.

The frustrating part, and I think we have all experienced this, is the degree to which the court must bend over backwards to ensure that this person understands what they are doing, and give them lots of opportunity to do what they need to do. This frustrates clients who have retained counsel to no end.

**Kristen:** My best piece of advice: Never give an unrepresented party legal advice – or what could be construed as legal advice. Although this appears to go without saying, it can be hard to do, especially if the unrepresented party is pleasant and you're close to resolution, and you realize there is only one thing that they don't understand. It's hard not to say, "OK, here's how it is," it's hard not to advise them on procedural issues or provide advice that keeps things moving forward. I almost always tell the unrepresented party to get their own lawyer because chances are they're making emotional decisions, not business decisions. We all know that emotional decisions will likely not satisfy that party in the long run.

**Lawrence:** Sometimes it is better having a self-represented client than some of the lawyers I have to deal with – I have had the experience where I felt that I was out-argued by the unrepresented client.

Because of some bad experiences, it is my policy that everything is in writing with the self-represented party. They have misinterpreted what I have said on the phone. In a couple of cases, they have later argued that they thought that I was representing them, when it was clear that I was not.

I find today that judges are not bending over backwards as often as they once did for the unrepresented client because the judges are also getting tired of doing their work for them.

**LawPRO:** *The issue of civility was raised earlier in the context of aggressive lawyers. Have you seen civility issues? Is it the newer or older members of the bar? What do you do if you're faced with an uncivil lawyer?*

**Lawrence:** My experience is that it is more often the younger lawyers who are more aggressive and less civil. Hopefully that is something that they will grow out of as they mature. I had a bad experience recently with an older lawyer, who was constantly quite derogatory about my client, and used some profanity in discussing my client. I wrote the lawyer a very strong letter to say that I was not going to tolerate this type of behaviour. I told him to stop bullying me and stop making disparaging remarks about my client. He then became quite civil with my client and me.

**Mary:** Somehow the notion of professional civility, of human decency, seems to have eroded if not utterly disappeared. I worry about some of the younger members coming out of our profession: They often have no ability to understand and appreciate what it means to be a lawyer, to behave in a professional manner towards colleagues, clients and the court.

There seems to be the notion: "If I disagree with everyone, if I am aggressive and challenge everyone and everything, that will make me a good lawyer." It is a problem that is not decreasing. This is a true challenge to our profession.

**Daniel:** What is happening to us is no different than what is happening in society. There is a general lack of civility. People in society are being more and more rude to one another, and that is reflected in all areas of practice. When it happens, I shut the bully down because bullying is what they are really trying to do. Say something that is effective and more embarrassing and does not add fuel to the fire and often it just goes away. That is my own experience.

**Kristen:** If the incivility is unwitting, it's prudent to discuss the issue with them. If it's purposeful and personal, take a deep breath and move on. Too often these parties confuse their notion of being good advocates with what in fact is unacceptable, uncivil behaviour. Here's where the need for more CLE comes into the picture.

**Heather:** On a positive note, although in a minority, I must say that there are a growing number of family lawyers who are genuinely trying to understand not only their clients' issues, but also the issues affecting the other side.

When I received my certification in collaborative law a couple of months ago, a light switch went on for me. The difference with collaborative law is that counsel and clients work as a team, with a commitment to find a solution that works for everyone. That kind of culture change encourages people to not only be more civil to the opposing counsel and client, but to also make the solution work for the other side. Quite often, your client doesn't even have to give anything up to make that happen. The cultural shift is that neither party is attacked and both parties have a deal they can live with.

**Mary:** Do we as counsel have an obligation to the bar to deal with this issue?

**Daniel:** Yes – and when faced with young, oppositional counsel I will take them aside, perhaps encourage them to take time to rethink their position or their approach, or to get more advice before they continue down the same road. Or I will take them out to lunch and try to mentor them.

**Heather:** We need to remind each other that we are colleagues, and that we share a desire to do good work, one file at a time.

**Mary:** We've all had situations where we have had to step up to the plate, take on motions or aspects of a file or even babysit another's children to give a colleague time off or time out.

**Lawrence:** Stress by osmosis is a reality for us: So each of us needs to have a conscious program of exercise, massage, vacations, whatever it takes to help keep life in balance.

**LawPRO:** *Let's talk about an issue that is very hot right now – the spousal support guidelines. What's their impact likely to be?*

**Mary:** We are seeing a variety of approaches in the extent to which counsel and the judiciary are relying on the guidelines. As counsel, we are using them as the litmus test. And what about judges in case conferences and on motions? Some expect to be educated as to why under the *Divorce Act* or the *Family Law Act*, they should apply or ignore the guidelines. Some expect to be provided with the calculations and at the same time need to be convinced that there are merits as to why the guidelines may be applied. Some are quite ready to jump on the bandwagon and say, "if it comes from a computer and it has numbers attached to it, it must be more right than if I am to exercise my own discretion in complicated circumstances."

**Daniel:** I use them or I produce them, I present them, I argue about them. Judges are interested in learning about them, as are my colleagues. For those of us who do most of our work at 393 University Avenue in Toronto, they are a most useful tool, because the numbers don't really change much if you use the old approach that they have been using for awhile now; it is really the termination aspects of the guidelines that provide a sharper focus for that part of the discussion.

**Kristen:** They're a useful tool when you're advising clients: If you're representing the payor, they can be a real eye-opener in terms of providing an objective idea of what the client may have to pay in the way of support. So you can say, "Here's the range, based on the guidelines and not just my opinion... and here are other factors that may also be taken into consideration." If you're representing the recipient, they can be a useful negotiating tool with opposing counsel.

**Heather:** The experience that I have had to date in arguing motions is that the justices have not delegated any of their discretion to the advisory guidelines. They are interested in what the guidelines say; but the standard of practice is not at the level where every lawyer is bringing the guidelines into the courtroom. I don't think it is a standard yet across the board. Duration has been the concept that has been churned by this



Daniel Melamed

and I hear more counsel now addressing duration, just like we did 10 or 15 years ago. But, other than that, I haven't found the spousal support guidelines to have the splash that I was expecting.

**Lawrence:** I think that they are fantastic. They really narrow the range of what the outcome will be, which as we all know in the past has been quite a wide range. Unfortunately, at the Law Society course on the spousal guidelines, the panel of judges indicated that they would look at them for motions and pre-trials, but were not going to use the guidelines for trials. I found those comments confusing. I think that the judges will realize how much easier it will make their job and will really start using these guidelines.

**LAWPRO: *Still another subject – support staff. How has the role of support staff changed over the years?***

**Mary:** Like us, our staff has to be more responsive and more responsible in dealing with our clients and how we provide information, in terms of quality, cost and speed. They have to function on a much higher level. As was said earlier, they become very much an integral part of a team approach to servicing our clients and assisting them in resolving their problems. CLE has also become mandatory for staff. Technology has played a large role in making ongoing training and development accessible and affordable.

**Heather:** Frankly, I am not sure how you run a sophisticated practice without the proper staff. Many of the younger lawyers run off laptops from their home, and I give them credit, it can't be easy. From my point of view, when you do have good staff and good communication, it just doesn't get any better.

I've discovered that the hardest part of practising law is the human resources job – developing consistent office policies, keeping good quality staff, and accommodating their goals. Staff today are more mobile than once was the case; and that means you cannot count on having a 20-year employee anymore. This has implications for file



Lawrence Pascoe

documentation. Mrs. Brown who witnessed the will 15 years ago may not work for you next year when the will goes to probate. You may not be able to rely on the institutional memory of your staff and they may not be around when the separation agreement comes up for variation. So document, document, document!

**Daniel:** Yes, we demand an awful lot more, especially in family law because of the narrow area of practice. Support staff can become more like junior lawyers; their level of expertise often exceeds that of the first, second or third-year lawyer on some of the technical aspects of family law. They are also really skilled at it – filling out financial statements, doing affidavits etc.

The emotional attention that support staff should get is paramount because they are so vital to your practice. Not only do they need to get paid well, but they need to know and hear that they are doing a good job. It helps to keep people around. They also need to know their ideas are being listened to. The way you run your practice makes a big difference to your support staff.

Family law practice is so emotionally based for our clients that it's critical for support staff to be warm and caring people. They also have to be totally on top of every file, so they can let me know about any change, any issue that could affect that file; they have to be able to deal with clients with integrity and compassion. These are things that don't change, no matter what else is happening.

**LawPRO:** *What about what's ahead for family law practice. What or where are the challenges?*

**Kristen:** I think we have real access to justice issues. The cutoff to qualify for legal aid is so low that very few people actually qualify. At the same time, because of the rising costs of litigation, fewer people can afford to go to court. Fewer people can afford to hire a lawyer – and too often they're turning to paralegals. I'm often consulted on separation agreements or divorce papers that have been drafted by paralegals because that's what the client thought was all she or he could afford. There's this huge group of people who fall in the middle and have great difficulty getting access to legal counsel.

At the same time, the new Family Law Rules have not necessarily reduced the cost of litigation, especially in areas such as Thunder Bay where we have a collegial bar. In the past, we've been able to negotiate settlements quite effectively without case conferences and often more quickly than under the Rules. We have to fine tune these Rules to make them more effective.

**Mary:** We have to continue to become more effective problem solvers. Our skill levels, our knowledge base, and the manner in which we practise will all continue to change. Gone are the days when, as a litigator, you needed one skill. Today, being advocates in a courtroom and understanding procedure and evidence are critical skills. But we also need to be able to know when to negotiate and how, or when to arbitrate and how. We have the ability to specialize, if we choose.

Doors have opened for us. At the same time, one of the doors that is closing is our accessibility to the courts. Few clients can afford to be in a courtroom from beginning to end. The real challenge for us as lawyers is to be effective in understanding the nature of the problem of our clients. We need to be up front about what is or is not doable and not be simply processors. We have to recognize that we can be effective in many different ways. Sometimes we're delivering the service, and sometimes a part of our service is to refer the client elsewhere. For example, I don't practise collaborative law. If I thought my client would benefit from this approach, I would not hesitate to make a referral. My obligation is to advise my client in these circumstances that he or she may benefit from another service such as mediation, collaboration, arbitration, counseling, among others.

Similarly, if I don't see a role for myself in the early stages of the case, I will recommend a different course of action. The challenge, however, is that there is more and more complexity to all of this. And the question is: How do we maintain that level of information and skill to be able to direct people in the right way.

**Daniel:** Managing the communications aspect of our business, whether it's cellphones or e-mails or other technologies – especially in our "go-go" society – is a major challenge. There's a temptation to feel that every communication must be responded to instantly: That only leads to burnout. Don't be afraid to say that I am not going to respond for three days if you think a client's request does not require immediate response.

In terms of the practice, I think the spousal support guidelines and the *Child Support Guidelines* represent the beginning of the automation of a large swath of our clientele. For the majority of cases, they take away issues of discretion and make many decisions pretty straightforward. This is going to free us up to spend more time thinking about the more complex issues in our practices – for example to reflect on the tax implications of a very complicated property settlement.

Finally, a major challenge for us is to get more justices interested in the area of family law, in developing the expertise and providing the kind of guidance that we will need on a regular basis in the future. We have some excellent, really interested justices, but we also have some who have no specific interest in family law, which is quite complex, and that is very, very frustrating.

**Lawrence:** I'd like to build on what Daniel said about communications, because I think we have to better manage the whole process. Communication with the client is one aspect, our relationship with the client, working with them is another aspect, good reporting and written material, and even time management are other aspects. The process is very important to the client. As well, files are so complex that we have to be better managers.

We have to continue to move towards taking a lot of discretion out of family law which is what both guidelines have done, so there is more certainty and less cost. We have to push the legislature to be more precise on some of these issues so that figuring out support should be like figuring out your taxes. Remove the discretionary areas. Provide more definitive answers... be more precise, in both the legislature and in the courts.

**Heather:** A major challenge, as I see it, is the importance of recognizing family law as its own profession. Family law is now the bread and butter of most small firm practices. It is the place (outside of real estate) where most people are most likely to need a lawyer. So, as a profession, we need to invest in ourselves and make use of our volunteer organizations to learn and connect with each other.

I fear the issue of the specialized Family Court has become too political. The bar needs to address this. We have to recognize the critical role of dedicated and specialized family law justices. The public needs it.

We also need legislative reform. The Working Group in family law, comprising of the Ontario Bar Association, the County and District Law Presidents Association and The Advocate's Society, has been working with the Attorney General's Office on critical amendments to the *Family Law Act* – the first since 1986. We hope to see these reforms proceed.

When you look at the statistics on spousal relationship breakdowns, it is surprising that family law reforms are not front-page news. So I think that one of our roles, as family law lawyers, is to raise public awareness of the importance of good transitions on marriage breakdowns, and of the need for comprehensive legal and community resources.

# Tips on managing clients from the get-go

**Ed note:** *As well as discussing the changing nature of family law practice, our family law panel provided practical tips on retainers and other aspects of practice.*

**LAWPRO:** *On a more practical level, can you tell us how you deal with client expectations, and how you use retainers in your practice?*

**Mary:** I do have a one-page written retainer letter that sets out hourly rates and what the client can expect in terms of accounts and the types of charges that are involved. As part of the initial assessment of the problem, I discuss the cost of getting the job done. I do ask for a financial retainer. I'll explain what the client might be expected to spend if any one of a number of different scenarios unfold. I reserve the right to review or change the manner in which I deal with cases. I ensure the client gets copies of virtually everything.

I tend to be a straight shooter, and I expect the same from my clients. If there is a problem, we talk about it. The best way to deal with a problem is to resolve it when it arises. If there are concerns or questions, I like to be the first person to know not the last person.

It's also important to manage expectations, and help the client understand what may be financially manageable or not manageable. The client has a right to know that in some instances it is not financially feasible to pursue certain aspects of their case. If the client believes in principles and wants to fight on principles, the client needs to know that principles have a cost.

**Daniel:** Our retainer is almost one and a half pages of 8.5 x 14. Reviewing it is the first thing that we do in our first client meeting because it is important to set that stage. We've also implemented a system – a form that clients sign – that lets us take retainers from their credit card account on an ongoing basis. We call to let them know we are going to debit their credit card

account, and to let us know if they have a problem with that. We also have instituted a policy of billing monthly on every file because then there is none of that “oh boy, it has been three months and now there is a \$10,000 bill going through my account” which will raise all sorts of issues.

We provide clients with a retainer agreement, at our first meeting, and then we do a standard “file opening” letter which reflects what happened in the meeting. The third thing is an administrative memo that talks about how we operate as a law firm within the family law group. It deals with topics such as law clerks and their roles and costs, as they are on the retainer; it outlines who to contact with questions. It's quite a useful document because it ensures that the client understands how and why certain charges were billed. For example, if the client talked to the secretary for half an hour, it's important to know that they will receive a bill for the secretary's time.

**Heather:** I am very proud of our intake system, which I helped develop when I was with York Region Mediation. I also had a psychologist help us fine-tune the process, so it is built on a lot of insights. One of these is that people don't mind paying for legal services; what they don't like is the sense that you have some sort of leverage over them because you can give them a bill at any time and for any amount. So, having detailed dockets, regular accounts and work approved in advance can be very important.

As a result, we have changed our retainer. It is about five or six pages. It sets out who works here, what they do and what their hourly rate is; it explains the office

mission statement, the approach that we take, our communications policy, it provides tips on how to minimize your legal fees, there is a section for limitation periods, the need to do a new will, and an acknowledgement and signature section.

In terms of client meetings: I treat the first meeting as a legal information session, so it is booked for an hour and a half and charged at a reduced rate. I have mixed feelings on this approach because I find those first meetings very draining and much harder than regular file work.

I encourage people to bring their support people or a scribe with them, and I try to provide an overview of general information, some specifics as are appropriate, what concerns have to be prioritized and process choices. In this way, the client gets all the pieces they need to start considering their options. Sometimes, it is two or three years before the person retains us because they need to organize parts of their life, or they want to try to make the marriage work. Other times, they are at the front counter the next morning, signed retainer in hand.

I discourage on-the-spot retainers because I want them to go home, read through the package which now contains a copy of *Divorce Magazine* (which is just a fabulous resource for clients), a matrimonial information sheet, a blank financial statement and an outline on how to fill it out, a list of community resources, and of course the retainer. People get the information they need to reduce the uncertainty, and hopefully make a good decision. They can decide if they have a comfort level with us, and frankly, we get to decide if this is someone we wish to work for.

Once the client decides to move forward, we have a retainer meeting, where we review the terms of the retainer again, identify goals and actually put the money on the table. The list of goals goes in the back of the file and we bring them out every couple of months to take a look at it and check on our progress.

**Lawrence:** My initial retainer is only one page because I give clients a manual from the beginning. In the manual there are articles about how to keep their fees down, how to read an account, which is not that easy at times, and how we set fees. After that first meeting, I like to provide an initial letter to confirm what I have advised them, what they have to do, and what I will be doing; in that letter you can also provide more detail on some issues that you may have glossed over when speaking to them, such as their house and joint tenancy, beneficiaries and their will, and change of designations.

Because there is so much information that gets gathered over the course of a file, I provide clients with a binder. The manual and everything else goes into the binder. If we go into litigation, the client is provided with Volume II of the manual, which includes

articles on the different stages including case conferencing, information such as how to prepare, what to wear, what to expect, and so on. I three-hole punch all my letters to clients, so that they can go in the binder under “letters from me” in tab 1 and “letters from the other lawyer” in tab 2 and so on.

This is how my communication with the client is based, by providing them with copies of everything and a system with which they can organize this information. Giving the client written material is also helpful because when you are talking to them, some of what you have to say goes in one ear and out the other. There are so many things to deal with that if you don't write it down or provide them with some written information, it will be forgotten. My Web site ([www.thepascoedifference.com](http://www.thepascoedifference.com)) also has a lot of information for clients.

I have found that if you provide clients with a package, you can keep your costs down; they read documents that I have provided before they ask me any questions. I also try to limit the length of printed materials to one or two pages, otherwise they will not read them all.

**Kristen:** Our package is similar to what's been described by others. As well as outlining billing procedures and requiring a written retainer, I provide two memos that are an overview of separation and divorce, and explain the importance of financial disclosure in family matters. These memos help clients better understand the process – because inevitably they are emotional at that first meeting and unlikely to remember everything that was said. I also provide a simple questionnaire for them to complete which asks basic information and is usually easier for them to complete than providing a financial statement. In other words, I get the same information but in a format that is less overwhelming.

Finally I explain what kind of lawyer I am, that I can be adversarial if need be but that I've found the results are more satisfying for my clients if we can achieve a negotiated settlement.

As well, I make the client a larger part of the process. I want them to understand the law and how it applies in their situation, and the process involved. As lawyers we are so accustomed to the system that we often forget that a divorce or separation may be the client's first contact with the judicial system, and it's incumbent on us to explain the process to them so they know what to expect.

**For sample retainer precedents,  
see [www.practicepro.ca/retainers](http://www.practicepro.ca/retainers).**

# Family law

by The Honourable Mr. Justice D. Roger Timms  
Ontario Superior Court of Justice (Family Court Branch)

## A view from the Bench

*Family law files, by their very nature involve emotional, if not “difficult” people and situations.<sup>1</sup> On occasion, we judges can be difficult as well. Too frequently we see matters where counsel have taken shortcuts, or even skipped some basic and fundamental steps.*

*In this article, I highlight some basic “dos and don’ts” that should help guide you through the maze of case management, while also reducing judicial ire.*

### File conference briefs and confirmations on time

This seems so basic that I hesitate to mention it. However, it would be a very rare day indeed without at least one case where either there is no 14C and either no brief or no up-to-date brief. Cases that are not confirmed are removed from the list by the trial coordinator. Subject to the discretion of the presiding judge, the case will not be restored. Clients will be rightly annoyed! As of last July, the whole province has been subject to the Family Law Rules. I believe that one year is more than enough time for counsel to familiarize themselves with the requirements of those rules – even for Toronto counsel!

### File complete and up-to-date financial statements

A significant number of incomplete financial statements are filed in the first instance. The problem mainly lies in relation to Parts 5 and 6 (Other Income Information and Other Income Earners in the Home). In particular, very few tax returns and notices of assessment actually get attached and almost no one files proof of current income. Instead, we get the direction to the CCRA. That is of no help at the conference.

On subsequent appearances, the filing of up-to-date and corrected financial statements appears to be a problem. The provisions found in Rule 13(12) through 13(15) are quite clear and not that onerous.

### File meaningful conference briefs and confirmations

It is relatively easy for counsel to file a 14C that tells the judge to “read all of the file.” It is relatively easy to simply tick off the boxes in the forms required under Rule 17. It is also relatively useless.

Case management lists are significant. Each file requires at least ten minutes reading by the judge to properly prepare. We do not have the time to read the whole file. If the brief is comprehensive, it should suffice. By “comprehensive” I mean that every section has been filled in, and that particular attention has been paid to section 11 in a case conference brief or to section 8<sup>2</sup> in a settlement conference brief. Expand these to several pages, with headings and subheadings. If appropriate, attach ancillary documents such as net family property statements or DIVORCEmate calculations. Trial management conference briefs **must** have an opening statement for the trial attached.

Case conference briefs and settlement conference briefs are not part of the continuing record and are required to be returned or destroyed at the end of the conference.<sup>3</sup> However, if the conference is adjourned, the briefs should be up-dated for the continued conference, either with a whole new brief or by way of an addendum.

### Proofread all documents

In this era of spell check, we all need to carefully proof read our final work. Relying on “quick correct” or the abilities of those who type the document can lead to hilarious or just plain confusing results. Judges are old-fashioned enough that we expect counsel to properly employ the basic rules of grammar.

### Be on time and attend when a conference is scheduled

In fact, come early so that you don’t have to say to the judge “could we please hold this case down your honour, we have just begun settlement discussions.” Confirm the date with your client and make sure that she or he comes, unless already excused by the court. Remember that the first listed purpose of all conferences is to “explore the chances of settling the case.”<sup>4</sup>

That is very difficult without both clients in attendance.

The concept that counsel of record is required to appear, unless excused by the court, until formally removed from the record, seems to have fallen by the wayside. Far too often, lawyers just fail to show up. Sometimes they tell their clients beforehand, and sometimes they do not.

Beyond a scolding on the next appearance, there is a risk of possible long term and irreparable damage to reputation. There is a risk of being made to appear just to explain one's dereliction. There is a risk of costs being assessed personally against the lawyer.<sup>5</sup> Unfortunately, I have had to do this several times over the past few years. It is painful for everyone. The lawyer has to be given notice and the opportunity to explain his/her absence/lateness.<sup>6</sup> That can entail retaining counsel. A hearing may result. It diverts everyone from the litigation itself. It costs everyone's time. If the order for costs against the lawyer personally becomes final, it is almost always with the condition that the costs not be passed on to the client and that the client not be billed for any of the time spent determining the issue. Clearly the effective hourly rate goes way down! And the client will probably say goodbye and then go and badmouth the lawyer in his/her own community.

## Anticipate questions from the judge

The judge presiding at a conference is likely to pose questions. Prepare yourself and your client. The more formulaic in nature the pleadings, the more pointed those questions are likely to be.

- If you have claimed extraordinary child support expenses, do you have receipts?
- Exactly what facts would support a claim for undue hardship?
- Is the claimed deduction for date of marriage assets ever going to be provable?
- Is there any substantial factual basis for an unequal equalization or a constructive trust claim?
- Does your self-employed client have appropriate records for all of his claimed business expenses?
- If your client is relying upon her inability to work due to medical reasons, can you get a doctor's report? When?

- If the separation was two years ago, and there is nothing preventing a party's return to the work force, what has she/he done to find reasonable employment?
- If the disability insurance has ended, why is she/he not working?

These and other questions are easily anticipated.

## Make offers

Do submit a reasonable offer under Rule 18 of the Family Rules and do so at all stages. I see an extraordinary number of cases where no offer at all has been made. A failure to submit a considered, reasonable offer can have disastrous consequences as a result of Subrule 18(14).

Did you explain that to the client before attending at the conference? Did you explain that "unreasonable behaviour" could deprive a successful party of costs? Did you explain that an unprepared party might well have a costs award made against him or her? Did you explain that "bad faith"<sup>7</sup> will likely result in costs on a full recovery basis?

## Be civil

Unfortunately, notwithstanding recent attempts to promote greater civility in litigation, some counsel seem determined to act otherwise. A theatrical, fractious, belligerent attitude or a gross exaggeration of facts, serves no one's interests. A calm, prepared, stick-to-the-facts, an I-am-here-to-settle-this-case, approach serves everyone's interests.

## Mediation and other FLIC services

Remember that all Unified Family Court sites have both Family Law Information Centres and mediation services available. Mediation may be available immediately on site. Take advantage of that. Could your clients benefit from attending a parent information session? Send them to the FLIC.

In conclusion, case management can be a relatively pleasant and productive experience for all of us who "toil in the vineyards of matrimonial discord."<sup>8</sup> How pleasant and productive it is will depend largely upon how prepared are counsel.

<sup>1</sup> See the well written article, *Dealing with difficult clients*, by Carole Curtis, family law practitioner and benchler, in the Spring 2004 Edition of LawPRO ([www.practicepro.ca/difficultclients](http://www.practicepro.ca/difficultclients)).

<sup>2</sup> These two respective sections are the "issues for the conference" sections.

<sup>3</sup> See Rules 17 (22) and (22.2).

<sup>4</sup> See Rules 17 (4)(a), (5)(a) and (6)(a).

<sup>5</sup> See Rule 24(9) of the Family Rules.

<sup>6</sup> See *Fekete v. 415585 Ontario Ltd.* [1998] O.J. No. 222

<sup>7</sup> See the various provisions dealing with reasonableness, preparation and bad faith found in Rule 24.

<sup>8</sup> A favourite and well-known phrase of Justice George Walsh, now retired.

# Spousal Support Advisory Guidelines –

## A brave new world for practitioners?

On May 1, 1997, the family law landscape changed dramatically with the introduction of the *Federal Child Support Guidelines*. On January 27, 2005, the landscape changed once again when the Department of Justice Canada released the Spousal Support Advisory Guidelines: A Draft Proposal.

However, the spousal support advisory guidelines (SSAG) differ dramatically from the *Child Support Guidelines*. Most notably, while the *Child Support Guidelines* were enacted as regulations pursuant to the *Divorce Act*, R.S.C. 1995, c.3 (2<sup>nd</sup> Supp.), the SSAG are informal guidelines, intended to operate on an advisory basis only within the existing legislative framework.

The *Child Support Guidelines* introduced the concept of table amounts of support tied to the payor's level of income. Once income is determined, identifying the appropriate quantum of support is, in the majority of cases, a simple matter of looking up the table amount. The SSAG, on the other hand, set out a different approach. Instead of tables, the SSAG contain two distinct formulas which provide ranges for both quantum and duration of spousal support. While the formula for determining ranges in situations where there are no dependent children of the relationship is straightforward, the formula for cases where there are dependent children is complex and requires the use of specialized software to generate the calculations. One of the challenges lawyers will face is understanding the conceptual framework behind the SSAG and the application of the formulas. Like the *Child Support Guidelines*, the SSAG emphasize determining income. To the extent there are issues with respect to determining income under the *Child Support Guidelines*, the same issues will arise under the SSAG.

What are some of the limitations lawyers should be aware of? First, the issue of entitlement is not dealt with under the SSAG. Entitlement remains a threshold issue to be determined before the guidelines will be applicable.

Secondly, the guidelines do not deal with the effect of a prior agreement on spousal support. This issue, like entitlement, is

outside the scope of the guidelines given their informal nature. The primary application of the guidelines is to initial determinations of spousal support upon separation or divorce. Accordingly, the third limitation is with respect to subsequent reviews and variations. While the guidelines can be applied in certain situations, such as increases in the recipient's income and decreases in the payor's income, they do not deal with more complex situations such as re-partnering and second families.

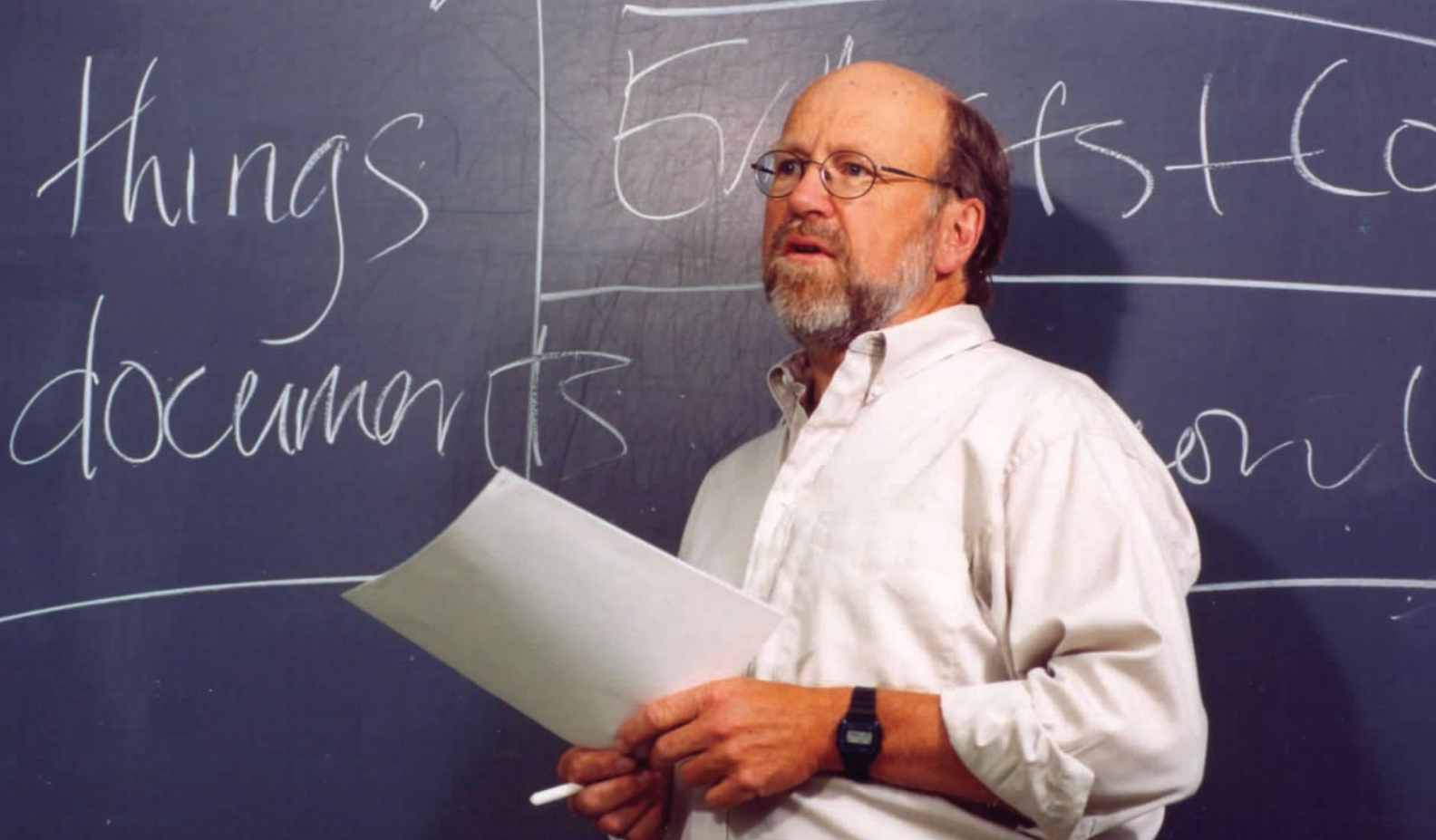
Since the SSAG produce ranges for both quantum and duration of spousal support, there is considerable scope for tailoring the outcome to the unique circumstances of each particular case. The draft proposal also promotes the use of re-structuring by trading off quantum against duration in order to produce solutions that most appropriately meet the needs of individual clients. Accordingly, lawyers will need to be creative in advocating on behalf of their clients and identifying, together with their clients, the solution that best fits each case.

Promoting consistency, simplifying the process, reducing conflict and encouraging settlement are worthwhile objectives. It is too soon to tell whether the SSAG will achieve these objectives. Since they are truly advisory, their use is intended to be voluntary rather than mandatory. This begs the question: will the SSAG promote consistency or encourage even greater inconsistency from region to region and province to province? How much reliance will lawyers be able to place on the SSAG in advising their clients?

The SSAG are, in a sense, the first iteration of an attempt to formulate another approach to spousal support which shifts the focus away from conventional means of assessing support based on budgets. The SSAG do not, unlike the *Child Support Guidelines*, have the force of law. For now, they are another tool in the lawyer's arsenal.

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*Yvonne Bernstein is a claims manager with LAWPRO.*



## SPOUSAL SUPPORT ADVISORY GUIDELINES:

# New help for lawyers

By Rollie Thompson  
Dalhousie Law School

Spousal support cases are amongst the hardest we deal with in family law, right up there with parental mobility cases. The law of spousal support is confused, inconsistent and unpredictable. Both the *Divorce Act* and the leading Supreme Court cases like *Moge* and *Bracklow* speak only to broad principles, with little direction about the hard questions of amount and duration. Appeal courts have only provided limited guidance on these issues, in those few cases where a trial judge has gone beyond the outer limits of appellate review of discretionary decisions. Since the *Bracklow* decision in 1999, the law has become even more unpredictable.

So lawyers are left to prepare statements of income and expenses and budget deficits in individual cases, supplemented by DIVORCEmate calculations for differing levels of proposed spousal support. But what's a reasonable claim? A reasonable offer? You can start at zero from the payor's perspective or, from the recipient's

perspective, 50 per cent of the payor's income. Whether you are constructing a position for negotiations or you're preparing an argument for court, you are left pretty much to your "gut feel" in formulating an amount or duration for spousal support. In turn, this makes it hard to explain the law to clients, and even harder to advise clients on reasonable positions and outcomes.

Help on these issues can now be found in the spousal support advisory guidelines, released on January 27, 2005, in the form of a Draft Proposal. The formulas in the advisory guidelines generate ranges for the amount and duration of spousal support in a wide range of typical cases. These ranges reflect the dominant ranges of support now found in Canadian case law, as well as emerging trends in some specific areas. The guidelines are not a reform project, but an attempt to bring more consistency and predictability to the existing law.

Work on the advisory guidelines began back in late 2001, funded by the federal Department of Justice. Professor Carol Rogerson of the University of Toronto and I are the co-authors of the Draft Proposal. In our work, we drew on our own research and also on the invaluable advice and assistance of the federal Advisory Working Group on Family Law, which consists of 13 specialised judges, lawyers and mediators from across the country. The Executive Summary and complete Draft Proposal are available online from the federal Justice Web site [www.justice.gc.ca/en/dept/pub/spousal/project/index.html](http://www.justice.gc.ca/en/dept/pub/spousal/project/index.html).

The guidelines are called “advisory guidelines,” to distinguish them from the federal *Child Support Guidelines*, which are really “child support rules.” These spousal support guidelines are not legislated, but are voluntary and advisory. Spousal support is much more complicated than child support, demanding greater flexibility in the form of these “true guidelines.” The current Draft Proposal has been released, for lawyers, judges and mediators to use now. In 2006, we expect that we will make revisions and improvements, based upon the feedback we receive, a process that has already begun.

## Formulas require before and after work

The basics of the advisory guidelines are set out in the executive summary. Most lawyers will immediately hone in on the two formulas, the *without child support* formula and the *with child support* formula. These are the formulas that generate the numbers for amount and duration. But it is important to note that there are critical steps before and after the formulas.

*Before* you get to the formulas, you must first address these preliminary issues:

- (1) do the guidelines apply;
- (2) is there an entitlement to support; and
- (3) what are the incomes of the spouses.

It is important to emphasize the issue of entitlement: Only *after* entitlement has been found, can these guidelines be used to determine amount and duration. The formulas can generate “numbers” for even small income disparities, but the law is clear that a disparity in incomes at separation does not of itself generate entitlement.

*After* the formulaic ranges have been calculated come another series of steps:

- (1) does the payor’s gross income exceed the “ceiling” of \$350,000 or fall below the income “floor”;
- (2) what factors should be considered in locating an amount or duration within the range;
- (3) can the amount and duration of support be “restructured”;
- and
- (4) does the case fall within one of the “exceptions.”

In short, the advisory guidelines still require the exercise of skill and judgment by lawyers, both before and after the formula

calculations. **It’s not just a matter of plugging in some numbers and out come “the answers.”** What the guidelines do is narrow the range of outcomes, based upon formulas that incorporate the dominant ranges and trends in the law. The precise result will be the product of negotiation, mediation or adjudication on the facts of the particular case.

The first formula – the *without child support* formula – uses gross incomes and length of marriage, in a straightforward formula that can be calculated on the back of an envelope. This formula generates limited support obligations for short, childless marriages, but produces substantial sharing of income in long marriages of 20 years or more.

The second formula – the *with child support* formula – requires computer software to make the calculations, as it employs individual net incomes, after the deduction of each spouse’s child support obligations, and incorporates the necessary tax and benefit considerations. This second formula *is not* arithmetic, but requires software to “iterate,” by transferring differing amounts of support until the requisite proportion of individual net disposable income is left in the hands of the recipient spouse.

Lawyers are already using these advisory guidelines in negotiations around Ontario. Lawyers are also presenting the guidelines’ ranges as part of their arguments in court. Judges will sometimes ask lawyers what the “status” of these guidelines are. Obviously, they are not binding “law” that must be applied. They are not “evidence” or “expert evidence” either. The guidelines can best be described as part of reasoning and argument, akin to the familiar DIVORCEmate income calculations, but one step beyond, since the ranges incorporate the existing case law on amount and duration. In a written brief or argument, I would suggest that lawyers refer to the leading appellate authorities on spousal support, cite some relevant and similar cases, make the usual case-specific arguments, and then provide the guidelines ranges for the information of the court. Some judges will openly refer to these numbers in court, but others will prefer not to do so (although most will still want to know if they are “in the ballpark”).

The best way to get a sense of how these guidelines work is to use them in actual files. I encourage lawyers to use them in developing a principled claim or offer, or in putting forward a reasoned argument in court. At first, use them as a check or litmus test for your usual methods. Over time, you may find that you start with the ranges and then tweak your proposals, using actual housing, debt and other “hard” expenses as well as the factors and steps identified above.

At the present time, Prof. Rogerson and I are traveling around the country, speaking to groups of lawyers and judges about the advisory guidelines. In the fall, as lawyers and judges gain practical experience with the guidelines, we are hoping to receive helpful feedback for revisions and improvements.

## Revisions in the works

Already we can identify a couple of areas that will be revised. First, cases of post-secondary students where s. 3(2)(b) of the *Child Support Guidelines* applies and the individual budget method is used, either because the student attends studies away from home or the student makes a sizeable contribution to his or her expenses. In these cases, child support does not resemble the “table-plus-section-7-expenses” approach that underpins the “with child support” formula. Hence, we suggest that the “without child support” formula be used, with the respective amounts of parental child support “grossed up” and deducted from each

parent’s gross income. Second, cases of shared custody. We are waiting for the Supreme Court of Canada’s decision in the *Contino* appeal, the Ontario case involving how to calculate child support under s. 9 of the *Child Support Guidelines*. Once that decision is handed down, there will likely have to be some changes made to the application of the with child support formula in such cases.

Try out the guidelines. Read the full Draft Proposal. We think they should help lawyers in this difficult area of family law, as another practical tool in spousal support cases.

# Calculation software IS ESSENTIAL TO ACCURATELY FOLLOW SSAG FORMULAS

The formulas for calculating spousal support in the new spousal support advisory guidelines (“SSAG”) are so complex that it takes specialized software to ensure you’re getting it right. In fact, in the SSAG themselves, the authors repeatedly recommend lawyers use software to perform the calculations.

The guidelines use two main formulas: one to calculate spousal support without dependent children and one to calculate spousal support with dependent children. While the formula for spousal support without dependent children is supposedly simple enough that it can be calculated using pen and paper, it can still be problematic: In one of the first reported cases of a judge using this formula, the results arrived at were incorrect.

The “with child support” formula’s complexity lies in the calculation of the parties’ respective Individual Net Disposable Incomes (“INDI”), which excludes spousal support for the payor, and which includes spousal support for the recipient, all the while searching for the appropriate spousal support amount! As the spousal support amount changes, so do the other factors used in the calculation of INDI – the special expenses’ component of child support (if any), the taxes and deductions and the government benefits and credits. This spousal support range can only be determined by numerous, complex, cyclical mathematical calculations, known as ‘iterations’.

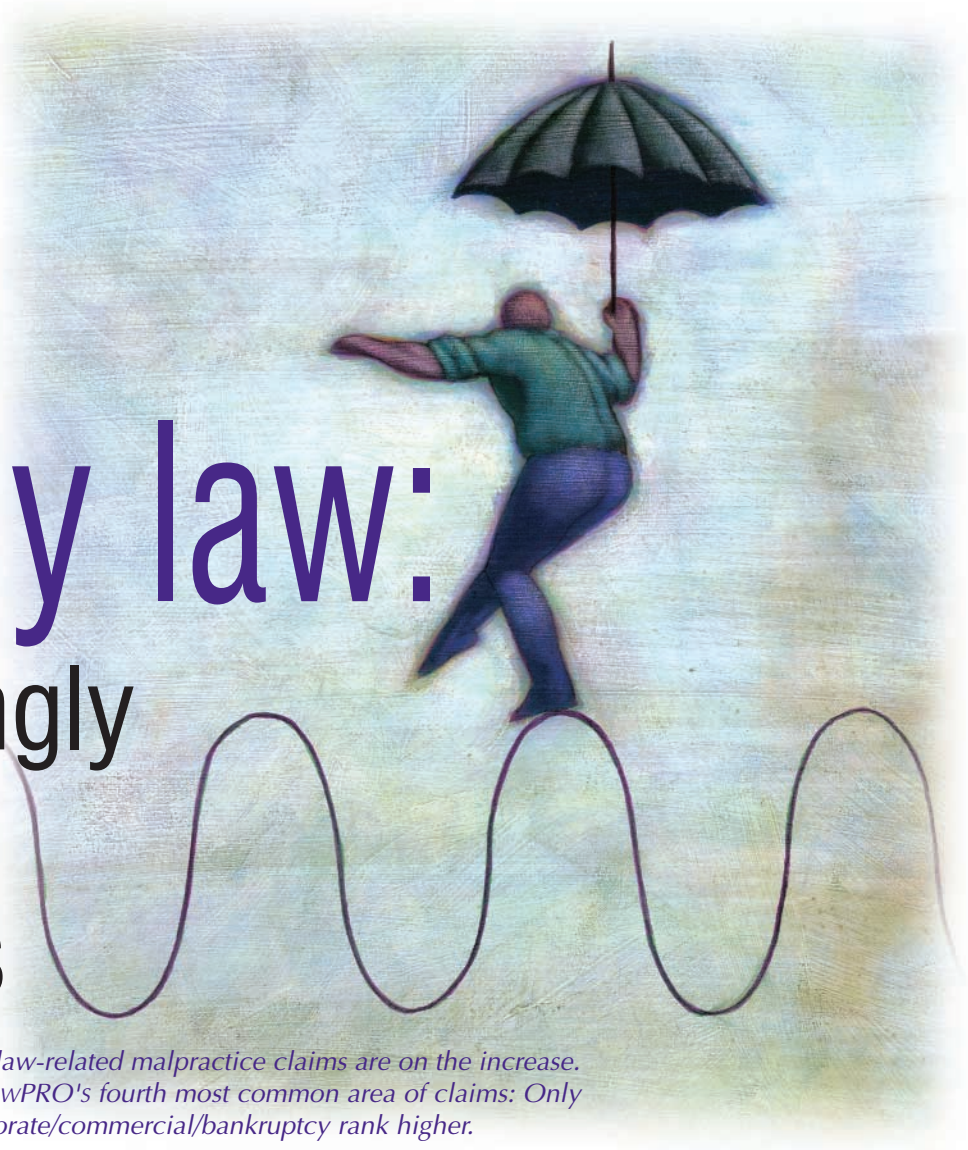
In Ontario, the most popular software available is the CHEQUEmate Spousal Guidelines Calculator (CHEQUEmate),

which is a spousal support calculator developed as part of DIVORCEmate Software Inc.’s Tools+ product group. CHEQUEmate calculates the SSAG ranges for both the amount and duration of spousal support. The software incorporates the substantive content with a help feature that provides assistance with the inputting of information as well as in-depth information to help family law practitioners understand the rationale behind the calculations.

Mark Harris, President of DIVORCEmate, says that CHEQUEmate was designed in direct consultation with Carol Rogerson and Rollie Thompson, the authors of the SSAG, as well as a team of family law practitioners, accountants familiar with family law, and experienced programmers. While CHEQUEmate easily handles the mathematical formulas, Harris cautions that lawyers must understand and be able to apply the SSAG in order to properly serve their clients: “Our products are the ‘power tools’ of the trade, but they are not a substitute for knowing the law. I encourage lawyers to take the time to read the draft paper.”

How judges will use the SSAG remains to be seen: Harris notes, “Judges appear to be using the SSAG in case conferences and settlement conferences; they provide a starting point for discussion.”

Information on CHEQUEmate software is available from DIVORCEmate at 416-718-3461 or 1-800-653-0925 x440, or by e-mail at [markharris@divorcemate.com](mailto:markharris@divorcemate.com).



# Family law: increasingly a risky business

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

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

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

## The top three

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

The three most common errors are:

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

## Failure to know or properly apply the law

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

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

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

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

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

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

## Failure to follow client instructions

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

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



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

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

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

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

## Failure to obtain client consent or to inform client

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

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

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

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

## Inadequate discovery of facts or inadequate investigation

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

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

## Conflicts of interest

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

## Procrastination

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

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

## Independent legal advice

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

## Learn to say no

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

Some of the warning signs of a problem client include:

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

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

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

## Your marching orders

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

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# Is your LAWPRO coverage adequate?

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

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

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

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



Bob Aaron, Kathleen Yeoman, Ian Kirby, Ray Leclair

# The Future of Real Estate Practice?

*Residential real estate practice has changed over the past decade with the introduction of title insurance, the creation of the TitlePLUS program, mortgage outsourcing initiatives and competition from non-lawyers. At TitlePLUS conferences across Ontario, and in follow up interviews, we asked panels of regional real estate practitioners their views on the changing role of lawyers in residential real estate transactions. Following is a selection of their comments.*

***Lender outsourcing became a major issue in 2003 when a number of outsourcing companies, working with major financial institutions, piloted mortgage processing programs in selected areas in Ontario. Among the concerns these programs raised were: potential conflict of interest issues; liability issues surrounding trust accounts; less emphasis on the role of the lawyer; putting third party intermediaries between the lender and the lawyer; and the fact that additional costs were being carried by the consumer without corresponding benefit. A joint OBA-CDLPA-ORELA working group was formed to raise awareness of the issue among lawyers, and to advocate on lawyers' behalf with the lenders and title insurers. At the same time, the County of Carleton Law Association mobilized lawyers in the Ottawa Valley against a local mortgage outsourcing initiative.***

***While these groups were successful in stopping these pilot programs from expanding, the real estate bar has not been completely successful at getting lenders to understand the value of lawyers in conveyancing. Why not?***

**Brenda Bell:** When you read Justice (Peter) Cory's Report, you realize it's a slippery slope between when they let non-lawyers into real estate work, and when title insurers start introducing closing centres. My concern is that if we don't promote ourselves in the deal, people don't realize our value. I think it's very important to market ourselves not just to the general public, but to others involved in real estate: agents and the banks, the people who are the first ones on the scene. If the banks promote a cheaper solution, such as paralegals, we'll be out of the deal entirely. We need to let them

know how important we are. We have to band together and work with TitlePLUS and move beyond not just the online product, but the VIP program and RealtiPLUSWeb product. This gets the banks involved and gets us all on the same team again.

**Jerry Udell:** More and more lenders are using TitlePLUS instead of U.S. title insurance companies. They (commercial title insurers) are making many mistakes that lawyers generally don't make: I've heard of discharged mortgages that should have been assigned and mortgages put under wrong names or wrong properties. Lenders are starting to realize what lawyers do; the dotting the i's and crossing the t's is time consuming. We clear their desks so they can do what they do best: selling products to clients. What other title insurers have done with these low-cost arrangements is download work onto the desk of the lender. The cost is their time and delays, and to everybody, time is money. As word filters up to those in administration and they realize that lawyers can do the work at or close to the same cost, they realize the value. Their bottom line is being met.

**Ray Leclair:** We've forgotten to maintain the communication with clients, in particular, our biggest clients: the banks. We must ensure the communication is flowing to and from banks to maintain our role in the transaction. We shouldn't be waiting to hear

from them on new initiatives, we should be proactive in going to them with new ideas.

***Traditionally, bar-related organizations work toward specific purposes that are often not shared goals: At times they can even work at cross-purposes to each other. Does the real estate bar need one voice to represent it, and if so, how can that be accomplished?***

**Ray:** Our success in fighting mortgage outsourcing demonstrates the strength of our profession when we work together as a group. ORELA, the OBA and CDLPA worked together, their lobbying shut down what the other title insurers were trying to do, and we're continuing to push on lender outsourcing. Other initiatives are the Seminar in a Box program (see story on page 29) to promote ourselves to the community, and we're working together on ideas for standards and a suggested fee schedule to be presented to the Law Society for consideration.

We're beyond the point where we spin our wheels – we now have a real focus on what needs to be done for the real estate bar, and we're working together to make change happen. We have to market with one voice for the real estate lawyer in Ontario, and the Working Group on Lawyers and Real Estate (which is an extension

## Selected panelists

### Moderator:

**Maurizio Romanin** is the president of LawyerDoneDeal Corp. After being called to the bar in 1987, he joined the firm of DelZotto, Zorzi. Maurizio is on the OBA Real Property Executive and is co-chair of the OBA Condominium Committee and Joint OBA/LSUC Joint Committee on Electronic Registrations. Maurizio moderated panel discussions at all 2005 TitlePLUS conferences.

### Panelists:

**Bob Aaron** (Orillia panel): Bob is a sole practitioner in Toronto practising in the areas of real estate, estates, and corporate/commercial law. He is a bencher of the Law Society. In 1993, he founded the Ontario Real Estate Lawyers Association. Bob writes the Title Page column in the Toronto Star.

**Brenda Bell** (Thunder Bay panel): Brenda started a successful practice in Marathon, with offices in Terrace Bay and Manitouwadge, and now practises with McAuley & Partners in Dryden.

**Ian Kirby** (Orillia panel): Current president of the Ontario Bar Association, he has served the OBA in numerous roles since 1989. Ian practises exclusively in the area of civil litigation.

**Ray Leclair** (Kingston & Orillia panels): General Counsel for Kanata Research Park Corporation, Ray is also VP – Ontario Real Estate Lawyers Association and co-chair of the Working Group on Lawyers and Real Estate.

**Bob Tchegus** (Kingston panel): Bob is the partner responsible for the real estate group at Cunningham, Swan, Carty, Little & Bonham LLP in Kingston. He is a certified instructor for the OREA Real Property Law Course and is a special lecturer in Residential Real Estate for the Bar Admission Course. He is designated as a Certified Specialist (Real Estate Law) by the Law Society of Upper Canada.

**Jerry Udell** (Windsor panel): A partner with the McTague Law Firm in Windsor, Jerry is counsel to a number of financial institutions and is on the Working Group on Lawyers and Real Estate. He has been designated a Certified Real Estate Specialist by the Law Society, and has been appointed to the Board which oversees the Certified Real Estate Specialist program.

**Kathleen Yeoman** (Orillia panel): After working with the Department of Justice and the Institute of Chartered Accountants, Kathleen returned to private practice in Mississauga in 1987, practising primarily in residential real estate.

of our collaborative efforts to fight mortgage outsourcing) is one voice, and we've been making inroads.

**Bob Aaron:** I just want to see the interests of lawyers represented: We need to deal with issues on a case-by-case basis and forget about politics and mergers.

**Brenda:** People who think we should have one voice are talking about legal organizations that don't necessarily see eye to eye. Regardless of whether it's one voice, or a band of common voices, it doesn't matter. On this issue, we've all got the same point of view we want to get across, we can team up.

**Jerry:** The problem is that each group has its own agenda. I think OBA has taken positive steps to put more practitioners on its council. To be able to contribute in a significant way to any of those groups, you have to make the sacrifice of not being in your office: that's really part of the issue. We all get involved in our own lives and don't see the bigger picture. The voice of the bar outside of Toronto has to be heard, so you have to subsidize the cost. Then it becomes a matter of conscience. Everyone has to make concessions to benefit the bar and public. Everyone would benefit from a merger. Ultimately, the OBA, CDLPA and Law Society have to come to the conclusion that without the real estate bar, the whole bar is in trouble.

***In real estate transactions, the work of lawyers is often time consuming and highly specialized. While the fees that real estate agents collect have increased exponentially in the last years, lawyers' fees have not witnessed corresponding increases. What can lawyers do to ensure they receive a reasonable fee necessary for a viable real estate practice? How can we ensure that standards are met? With the amount of competition and reported undercutting of fees in the real estate***

***bar in jurisdictions across Ontario, are lawyers their own worst enemies?***

**Ian Kirby:** It's wrong that consumers are willing to pay much more to their real estate agent than to their lawyer. We need to be able to charge reasonable fees so others are drawn to our profession. In 1950, the real estate agent got a six percent commission on a listing, – Today, it's still six per cent, but look at selling prices today – it works out to 4,000 per cent or more increase in fees for agents – while lawyers are working for less and less.

The problem is that real estate groups have not been effective in advancing their cause. Groups that represent real estate agents have been more effective than lawyers. A good example is the *Mortgage Brokers Act*: The proposed amendments would restrict activities lawyers can engage in. The OBA view is that rather than limit the range of activities, we need to have lawyers more involved in more aspects of real estate, so we're making a submission to ensure lawyers' practice is protected and expanded. The CBA also has been advertising on behalf of the profession.

We're all afraid of the word 'tariff' – but we should be taking our cue from litigation lawyers who have set up a cost grid based on the types of work they do.

**Bob Tchegus:** What we've done at our firm is to work on a percentage, just like the real estate agent: 0.5 per cent on a purchase and 0.4 per cent on a sale (with minimum fees between \$650-750). Since the average real estate lawyers' fees are \$650 to \$750, it works out for houses in the \$150,000 market and, heaven forbid, we actually can make some money on the higher-end properties. We've probably lost a lot of price-sensitive shoppers, but they're the ones we don't want. The people who are most cost-sensitive

are often ironically the most demanding. The lawyers who cater to them are perhaps more likely to get sued. You can't just bang these deals out without applying any kind of effort to them, and yet a low fee doesn't justify any effort!

Set percentages work for the real estate agents. I don't understand where the fear comes from at the bar. Perhaps a standard fee across the board would be appropriate, but the problem is one of enforcement. Even if you could get the real estate bar in unison, you're always going to have the general practitioner who dabbles in real estate or the criminal lawyer who does so when times are tough.

**Brenda:** Some lawyers feel it won't be easily received, but I think the fee schedule is a good idea; it can calm people's fears that we're charging too much. It works for realtors because everyone knows they get six per cent. If it's just acknowledged this is how much lawyers charge, it will make us all work to the same standard. If the fees are the same, you have to provide good service to stay in business.



Maurizio Romanin



Ray Leclair, Ian Kirby

**Jerry:** When you get into a jurisdiction such as Windsor, the majority of clients are CAW (Canadian Auto Workers Union) members: they set the fee, you have to try to match it. When you talk to the CAW people setting the fees, they say, "lawyers are willing to do it for this price, so why not?" Technology has allowed us to remain competitive: We can do more for less expense, but then your exposure is high. The TitlePLUS program has been our saving grace; it has really allowed us to remain competitive.

We are all suspicious that there are people out there who are bait-and-switch lawyers. They mislead the public by advertising their quoted fees as lower, and then later add on a bunch of extras. Some call it smart marketing; I call it deception. Not enough has been done to get rid of the people who are misrepresenting themselves, and the public ultimately suffers; the public at large has become the sacrificial lambs. But until there are a number of complaints, tremendous damage is done.

**Kathleen Yeoman:** We are our own worst enemies. It's harder than ever to do business because the issues in closing are often more complex, clients are more difficult to deal with, more litigious – yet we have lawyers willing to undercut each other, we're competitive, litigious and argumentative – it's crazy.

**Ray:** The Law Society standards are basically the Rules, and there are very few practice-specific Rules. We're trying to establish standards that may or may not create new Rules that we'll be able to monitor. That's why we'll be asking the bar: How do you want to see this happen? Rules? Certification with audits? Or something else? We haven't come to resolution on that.

The Law Society has now created a working group on real estate issues; on a related note there's been some pressure on the Law Society to come out with new rules for fraud. We're working in

combination to produce one package, so that we can go out with the message of professionalism, and explain the long-term view for the public and the short-term view for practitioners. If fees keep going down, the lawyer gets put to the side, and the public suffers. We're elevating that message to countrywide via the Canadian Bar Association. We're finding banks want national, not province-wide solutions.

***As consumers shop for the lowest quote they can get on legal fees, it becomes clear that the real estate bar has not done enough to make clear the value they bring to real estate transactions. How can real estate lawyers change public perception?***

**Ray:** We need to keep educating – both lawyer and consumer – about the value the lawyer adds to a real estate transaction. We say we quarterback – when in reality we're only involved at the tail end. We need to get out in front of the transaction. Can we expand where we're involved? We have to. We are professionals and we cannot forget that: We have to maintain a certain level of professionalism.

**Bob Aaron:** We need to reinforce that if a lawyer is not involved, there is no one there to protect the public – that's where the interests of the Law Society dovetail with ours, as their mandate is to protect the public.

**Ray:** At this point the best marketing the individual lawyer can do is to make sure the day-to-day business is continuing to be done. They should make sure the client knows all the work they're doing, and they should organize Seminar in a Box presentations.

**Kathleen:** It's up to us to demonstrate value, and we can all do it with our own clients. When you hear that someone is offering a \$999 "all in" package to close a purchase you need to explain



what that lawyer is likely **not doing**, all the searches he/she won't be doing if the fees are going to be capped. We also need to work together; we need the help of others in the real estate arena to come up with the money to help make education efforts successful.

**Bob Tchegus:** The only marketing out there for lawyers at this time is for TitlePLUS. Real estate lawyers aren't really out there marketing themselves. Wherever I go, it's title insurers who are spending the money. It's all marketing: The lawyers have to have a presence, and that's how to do it. The ironic thing is that it is the lawyer who really takes pride in his/her work, compared to all the other parties involved. What lawyers have to do is stop selling themselves short and get their confidence and measure of self-value back. Real estate lawyers have knowledge that people want, and they tend to forget that and sell it too cheaply, if not give it away.

You have independents fighting the cause. With more dollars, you're going to get a bigger bang for the buck. Politics have to be put aside. We need a one-shot effort with the money to do the advertising and take on the commercial title insurers. They haven't won yet. We need the resources to get people sitting down with the banks and selling lawyers and what we do in the real estate transaction/market.

**Brenda:** Lawyers really aren't good at marketing; for a long time we weren't able to advertise. Meanwhile, realtors are on every channel telling people how important they are. Every time someone's rights are trampled on or he is being taken advantage of, he calls a lawyer. In real estate practice, we're preventing people from getting into trouble in the first place. We have an

important role in society and real estate. We should be putting up more of a fight to make others realize that importance.

**Jerry:** We can do better. As a member of the working group, we've tried to lay out the tools, such as the Seminar in a Box program. Most people don't take advantage of these tools. A lot of time and effort has gone into making these tools available; we have to learn to be better marketers. If we can't take care of ourselves we can't expect others to do it for us.

***With all the upheaval that the real estate bar has faced in the last decade, what trends are of major concern? What can lawyers do to ensure they remain an essential component of real estate conveyancing?***

**Bob Tchegus:** I recall in 1997, attending a seminar on title insurance and being told we have to tell people about title insurance. Back then, if the other title insurers had made a deal right off the bat to use Ontario solicitors, it wouldn't have been necessary to create the TitlePLUS program.

**Bob Aaron:** I have to give credit to the Law Society for creating TitlePLUS – because the closing centres were out to put us out of business. The Law Society realized there would be a wholesale dislocation of lawyers, as there was with the closing centres in the States, so they created TitlePLUS.

**Bob Tchegus:** The American title insurers are flooding the market with low premiums; eventually they won't need lawyers. They are insulting us by asking us to work as brokers. I know of a number of major builders with closing centres that refuse to execute the Planning Act statements. That's the first step in our losing control. We need to demand that there be law statements

on all instruments. The one thing that everyone has to realize is that TitlePLUS is LawPRO – TitlePLUS is us. I believe all lawyers should be buying TitlePLUS. It's self-insuring. Other title insurers have told us of their policy of not suing lawyers, but I believe that this policy will change. But TitlePLUS is the only company where that it is just common sense to not sue lawyers.

**Ray:** Is there a future? Yes, very much so. We need to seize the role. We've been letting it slide. We need to be a little more proactive in maintaining our role, educating the public, the lenders, the broker, the agents. We've been lax on doing that. The Working Group is working on those issues, and on a major marketing effort to the public. People don't think about all of the legal steps and the transactions we do in their deal. People don't hear about problems, because of all the good work we've done in past. We're going to see a lot more of people getting the short end of the stick.

We shouldn't go to a U.S. model where the lawyer isn't involved. In Canada, we try to identify the issues and make sure the purchaser gets what she bargained for. We need a marketing strategy. The Law Society's report on small firms and sole practitioners is a starting point: The Law Society wants feedback from the practising bar on the recommendation pertaining to marketing. We want to go back to them and say we want to partner all the groups together and do a joint marketing campaign.

**Ian:** Real estate is the only butter left in the sandwich for many lawyers. Legislation has made motor vehicle negligence into work that no one wants to touch; provincial criminal work is being usurped by paralegals – all that's left is real estate.

This has major implications for small communities where lawyers are active in local politics and often the pillars of the community. If they leave because they can't practise real estate law and they can't support a family, it creates major access to justice issues for these communities.

**Brenda:** If we keep selling ourselves short, we're only going to get stuck with the more complicated deals as non-lawyers take over the more straightforward transactions. We'll only get involved when things get messy, which means fees will go up. Society in general will be left with lawyers they can't afford.

We're moving towards better promoting ourselves. Everyone on the panel is on fast forward. It's time to get out there and show how important we are. The U.S. title insurers are a major force; most of us don't realize how huge they are. We have to put up a fight: It's time to band together as lawyers.

**Bob Tchegus:** In all honesty, I think lawyers are running hard because of the economy. We know it's cyclical and we're wondering what's going on? No one wants a recession, but there will be a slowdown and that's when things will get tough. Now is the time for planning and marketing, so when things tighten up, we'll be prepared.

**Jerry:** Ten years ago I thought we'd be out of real estate practice by now. Fortunately the TitlePLUS program and the Law Society have made the playing field more level. The ability to computerize, openness to adapting to new technology and integrating it into your practice are essential: Without them you're a dinosaur.

## Seminar in a Box

Critical to the future of the real estate bar is the need to educate the public on the value that lawyers add to the transaction. To that end, the Working Group on Lawyers and Real Estate has created Seminar in a Box – a complete presentation and information package for lawyers to use in a public presentation on the work they do in a residential real estate deal.

The package – **available at no cost to lawyers** – includes: a PowerPoint presentation, key messages, task checklists (For example, book a room, confirm a date, arrange audio/visual equipment), ideas for other speakers who could be invited to present (for example a banker or home inspector), a mission statement, a draft budget and correspondence templates for invitations, thank you notes and more.

Seminar in a Box was developed over the winter, and was tested by volunteers during the past few months. According to Ray Leclair and Clare Brunetta, co-chairs of the Working Group, audience reaction has been positive: "By putting the lawyer in charge, we're making sure our message gets out in the way we want and need it to," says Leclair. He's quick

to add that the program will evolve as additional materials and ideas from lawyers are incorporated into the package.

Leclair encourages anyone in real estate practice to request a package, get out into the community and make sure the public understands the importance of having a lawyer involved in their real estate transactions. Brunetta explains that the program "is designed as a user friendly tool that we as lawyers can use to raise consumer awareness about the critical role that we play."

He believes lawyers need to take an active part in explaining the importance of legal services to the public: "People need to be aware that real estate conveyancing is much more than just document processing. If we as lawyers don't deliver that message, then nobody else will do it for us. Seminar in a Box gives us the ability to do just that."

Interested lawyers can request information or the Seminar in a Box by contacting one of the co-chairs of the Working Group, Ray Leclair at: [ray.leclair@krpc.net](mailto:ray.leclair@krpc.net) or Clare Brunetta at [cbrunetta@nwonet.net](mailto:cbrunetta@nwonet.net).

# The Online COACHING CENTRE

**Workshop:** *getting stress hardy*  
**Module:** *#11 – Achieving work life balance by  
 ...understanding the components of your life*

## Coaching

People who balance their life well are active in various components of their life.

Adults have three major areas to concentrate on; the **self, family and work**. At different times in our lives, some components or tasks dominate and we go out of balance. Each component involves a set of tasks. The key tasks in each component are:

### FAMILY AND SOCIAL COMPONENT

- establish a family unit with a shared mission
- care and nurture children
- care for parents

### CAREER COMPONENT

- learn job skills for advancement toward goals
- contribute to team or organizational success
- have challenges
- move towards job security

### PERSONAL COMPONENT

- develop a personal identity and values
- pursue opportunities for growth
- develop personal interests
- make a contribution to society and community
- build and maintain friends and social contacts

People should consciously complete at least one significant activity in all three areas everyday. So, for example, if your work and family responsibilities tend to dominate, it is wise to plan and consciously complete one personal activity everyday.

## Mentoring

In each of the three areas of your life identify three objectives and then choose one that is most important. Then identify one activity you can do each day towards meeting that objective.

Complete the Work Objective chart below. Using the chart as your guide, use the same format to create charts to identify and develop your Family Objectives and Personal Objectives.

### Three Work Objectives.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

*Most important work objective.*

- \_\_\_\_\_

*One activity you do can each day towards achieving your most important work objective.*

- \_\_\_\_\_

## 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](http://www.practicepro.ca/occ)

# Windows

## Gone Wild



*Everything you ever wanted to know about moving, opening, closing, and resizing windows*

Today the standard human-computer interface has become a computer screen partitioned into distinct “windows” of information. Most of us spend much of our day looking at these windows. Unfortunately, they aren’t always well behaved and appear in unwanted sizes and locations. This column discusses everything you ever wanted to know (and probably more) about manipulating and arranging the windows on your desktop.

### Switching between programs

Switching between open programs is one of the most frequent things we all do as we work on our computers. For this task most of us use a mouse to select a button on the task bar. There is a much faster way.

Pressing Alt+Tab will open a rectangular grey pop-up window in the centre of your screen. It will have an icon for each program that is running on your computer. Hold down the Alt key, and repeatedly press Tab to jump from one icon to the next. To help you find the window you want, the text from the title bar of each window appears in a box at the bottom of the pop-up. Simply release both keys when you get to the window you want.

In this pop-up window, the icons are presented, from left to right, in the order you last looked at their respective windows. This means that the window you were in previous to the current one is just one Alt+Tab away. This makes jumping back and forth between two programs easy and instant.

### Switching between documents

On occasion you will want to jump from one document to another within a single program. For example, switching between two or more letters within Word. Use Ctrl+F6 to do this. Hold down the Ctrl key, and repeatedly hit F6. Again, release both keys when you get to the document you want. This shortcut works on many, but not all Windows programs.

### Minimize, maximize, restore and close

On occasion you will want to look at two or more windows at the same time. Perhaps you want to compare text in different documents, or cut and paste parts of one document to another. So now we need to learn about moving and resizing windows.

Let's look at the Minimize, Maximize, Close and Restore caption buttons (and their equivalent keyboard shortcuts). These buttons appear in the top right corner of every window on your computer.

To make a window completely disappear by closing it, click on the Close button (✕), or press Alt+F4.

To make a window disappear from the screen by shrinking it to a button on your taskbar, click on the Minimize button (▢). To open a minimized window to its previous size, simply click its taskbar button.

The Maximize button (◻) expands a window to fill the entire desktop. To make a window appear in a size that is less

than a full desktop, click on the Restore button (🖥).

The title bar is the bar across the top of every window. You can double-click a window's title bar to change it back and forth between maximize and restore sizes. Drag and drop a non-maximized window's title bar to move it around your desktop.

### Windows vs. dialog boxes

You should be aware that there are two types of windows that can appear on your desktop. A program such as Word or WordPerfect opens in a fully functional window. Dialog boxes are primarily used to communicate with or configure a program. They have a Close caption button, and sometimes a Help caption button (it looks like a question mark). They never have a Minimize or Maximize button. The most commonly used dialog box is the Print dialog box. Dialog boxes don't appear on the task bar.

### Resizing windows

After selecting Restore, you have a window that fills only part of your screen. To change the height or width of a window, put your mouse pointer over one of the window's edges. When the pointer changes into a double-headed arrow, drag the border to make the window larger or smaller. To change the height and width simultaneously, go to any window corner, and when the pointer changes into a diagonal double-headed arrow, drag the corner in any direction. You can't resize a window when it is displayed in a full screen (maximized).

*continued on page 32*

# Free is good:

## Three fantastic and free Web resources

Sometimes the good content on the Web is a bit hard to find. This month's tip highlights three helpful Web site resources, all of which are free.

### LAWPRACTICETODAY.ORG

One of the best online collections of information on law practice management issues is the ABA Law Practice Management Section's Webzine — LawPracticeToday. You do not have to be a member of the ABA LPM section to access this content. Fifteen or more new articles are published online each month. They cover topics such as practice management and finances, technology, marketing, ethics and malpractice claims prevention. Over 300 hundred previously published articles are available in the archives.

You can subscribe to receive an e-mail each month that includes a listing of all newly published articles. Visit LawPracticeToday at [www.lawpractice.today.org](http://www.lawpractice.today.org).

### ONTARIO E-LAWS SITE

This Ontario government Web site contains current consolidated versions of most (but not all) of Ontario's public statutes and regulations. You can browse statutes and regulations by title, or do keyword searches to find what you are looking for. There is an advanced search feature. A consolidated annual snapshot of the law as of January 1 for each year since 2003 also is available. Note that there is a table of statutes and regulations that are not included on the site. These tend to be laws of limited application or effect. See e-laws at [www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)

### THE BEST FREE ON-LINE CLIP ART

Thousands of sites on the Internet offer free and pay clip art. While there is some good content in those sites, many force you to deal with advertising and pop-ups. Stop searching further — there is only one site you need to go to. The best source of free online clip art, photos,



animations and sounds is the Microsoft Office Online Clip Art and Media page. It has thousands of free images and media files, which you can very easily search by key words and topics.

The licensing agreement for the site allows you to freely reproduce the images as you wish, without having to worry about copyright or royalties. See this page at <http://office.microsoft.com/clipart/>.

*continued from page 31*

### Arranging all open windows

You can simultaneously arrange multiple windows in several ways.

To simultaneously minimize all open windows and dialog boxes, click the Show Desktop button (🗑️) on the taskbar. It is only available when the Quick Launch bar is displayed. If the Quick Launch bar is not displayed, right-click an empty area on the taskbar, point to Toolbars, and then click Quick Launch.

Pressing the Windows logo key (⊞) and M will also minimize all windows. **⊞+Shift+M** will restore windows to their pre-minimized sizes.

You can also reduce all open windows to taskbar buttons by right-clicking an empty area on the taskbar and selecting Minimize All Windows. To restore all the windows to their previous state, right-click an empty area on the taskbar, and then click Undo Minimize All.

### Cascading and tiling windows

If you right-click an empty area on the taskbar, you will be given three choices: Cascade Windows, Tile Windows Horizontally, or Tile Windows Vertically. The Cascade option stacks all windows in a diagonally stacked pile so that the title bar for each window is visible. The Tile option automatically resizes all non-

minimized windows so they appear like floor tiles.

When using the Cascade and Tile options, windows that have been reduced to taskbar buttons will not be displayed. This makes it easy to cascade or tile just a few selected windows, rather than a window for every program that is open on the computer. To restore your windows to their previous state, right-click an empty area on the taskbar, and then click Undo Cascade or Undo Tile.

*Go wild and have some fun with your windows.*

*Dan Pinnington is Director of practicePRO. He can be reached at [dan.pinnington@lawpro.ca](mailto:dan.pinnington@lawpro.ca)*

# Events calendar



## June 22

CIMBL Symposium & Trade Show –  
Halifax  
TitlePLUS exhibiting  
World Trade Centre, Halifax

## August 14-16

CBA Canadian Legal Conference and Expo  
*Technology Tips*  
Dan Pinnington, practicePRO  
TitlePLUS and practicePRO exhibiting  
Vancouver Convention & Exhibition  
Centre, Vancouver

## August 19

2005 NABRICO Annual Conference  
*Technology Tips*  
Dan Pinnington, practicePRO  
Montreal

## September 23

practicePRO Technology Breakfast  
*Living in a Paperless Office With Just  
One Filing Cabinet*  
Peter Henderson; Kramer Henderson  
LAWPRO, Toronto

## September 26

Canadian Association of Paralegals  
Annual Conference  
*Avoiding Malpractice and Liability Claims*  
Dan Pinnington, practicePRO  
Novotel Centre, Toronto

## September 29

OBA – Young Lawyer's Division Family  
Law Conference  
*Developing and Maintaining Positive  
Solicitor/Client Relationships*  
Yvonne Bernstein, Claims Manager,  
LAWPRO  
Ontario Bar Association, Toronto

## October 4

RAHB "Realtors Without Borders"  
Trade Show  
TitlePLUS exhibiting  
Hamilton Convention Centre, Hamilton

## October 13-15

IBAS Convention  
TitlePLUS exhibiting  
Radisson Hotel, Saskatoon

## October 19

HLA 19<sup>th</sup> Annual Joint Insurance  
Seminar  
*Emerging Ethical Issues and  
Malpractice Claims*  
Kim Carpenter-Gunn;  
Waxan, Carpenter-Gunn  
Sheraton Hotel, Hamilton

## October 19

Halton Symposium and Trade Show  
Oakville, Milton and District  
Real Estate Board Trade Show  
TitlePLUS exhibiting  
Oakville Conference Centre, Oakville

## October 20-21

Thunder Bay Law Association CLE  
TitlePLUS sponsoring  
Victoria Inn, Thunder Bay

For more information on practicePRO  
events, contact Susan Carter at 416-596-  
4623 or 1 800 410-1013, or e-mail  
[susan.carter@lawpro.ca](mailto:susan.carter@lawpro.ca).

For more information on TitlePLUS events,  
contact Marcia Brokenshire at 416-598-5882  
or e-mail [marcia.brokenshire@lawpro.ca](mailto:marcia.brokenshire@lawpro.ca).

## NEWS BRIEFS

### 2004 report marks 10th anniversary

Our 2004 annual report – the 10<sup>th</sup> since  
LAWPRO was relaunched as an independ-  
ent insurance company in 1995 – celebrates  
the power of 10.

We chronicle a decade of innovation in  
Underwriting and Customer Service; we  
explore the reasons behind the top rat-  
ings that lawyers consistently award our  
approach to claims management; we  
examine the benefits of our practicePRO  
risk/practice management program; and  
we celebrate the success of our  
TitlePLUS Canada initiative which has  
grown across the country.

The report is available in PDF format on  
our Web site at [www.lawpro.ca/  
annual\\_reports/default.asp](http://www.lawpro.ca/annual_reports/default.asp).

Copies of the 2004 annual report were  
distributed electronically to all lawyers  
this spring. Limited quantities of printed  
reports went to all law firms in early  
May. Additional copies are available  
from the Communications Department  
at 416-598-5844 or 1-800-410-1013; e-mail  
[dagmar.kanzler@lawpro.ca](mailto:dagmar.kanzler@lawpro.ca).

### Deadline reminders

Please note the following deadlines:  
Transaction filings:

- Real estate and civil litigation transac-  
tion levy surcharge payments for the  
second quarter of the year ending  
June 30, 2005, are due on July 31, 2005.
- Real estate and civil litigation transac-  
tion levy surcharge payments for the  
first quarter of the year ending March  
31, 2005, were due on April 30, 2005.



**LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO®)** 

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