

A man in a dark suit, white shirt, and patterned tie is walking down a set of concrete steps. He is carrying a black briefcase in his right hand and a folder or book in his left. The background shows a large, multi-story building with arched windows and a brick facade, partially obscured by green trees. The overall scene is outdoors during the day.

# The biggest malpractice claim risks

*Most lawyers are surprised to learn that failures to know or apply substantive law account for a relatively small portion of LAWPRO claims. Over the last eleven years, by both count and cost, law-related errors were only the fourth most common cause of claims.*

*In most areas of the law, lawyer/client communication problems are the number one cause of claims, followed by basic deadline and time management issues. The pie chart on the next page illustrates the relative proportion of claims by area of law for 1997-2007.*

## **Communications-related errors #1 claims concern**

Lawyer/client communication-related errors are the biggest cause of malpractice claims. Over the last eleven years, by cost and count, more than one-third of LAWPRO claims involved this type of error – almost \$22 million or close to 7,200 claims.

It is interesting to note that for sole, small, medium and large firms alike, one-third of claims were communications-related. This is a profession-wide issue.

There are three types of communication-related errors. The most common is a failure to follow the client's instructions. Often these claims arise because the lawyer and client disagree on what was said or done – or not said or done. These claims tend to come down to credibility, and in handling claims LAWPRO finds these matters are difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.



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

These deadline and time management errors are easily preventable with better time management skills and the proper use of tickler systems. Practice management software programs such as Amicus Attorney and Time Matters are excellent tools for helping lawyers manage deadlines and tasks, and for helping them better manage client communications and relationships. Not waiting to the last minute by building in a one-day or two-day cushion can also help prevent this type of error when there are unexpected problems that prevent you from meeting a deadline for a filing (e.g. ice storm or taxi in accident on way to court house on last day to file).

## Digging a bit deeper

Inadequate investigation or discovery of facts is the third most common error at firms of all sizes (except firms of more than 75 lawyers, where it was the fourth most common error) and over the last eleven years accounted for 3,202 claims (15.6 per cent) and \$9.8 million (15.9 per cent) of LawPRO's claims costs.

This error has been on the rise for the last several years in many areas of law. Perhaps it is a symptom of "BlackBerry legal advice": quick questions and answers without context exchanged between people in a rush. It goes to the very core of what lawyers are supposed to do for their clients – give legal advice – and basically involves the lawyer not taking extra time or thought to dig deeper and ask appropriate questions on the matter.

On a real estate deal this type of claim might involve not delving into the client's long-term plans for the property, and then failing to follow up on appropriate zoning or bylaw searches to ensure the client can use the property as intended. On a family law or will or estates planning matter it might involve not digging into more detail about the status of past marital relationships, other children or step-children, or the amounts of assets or liabilities. On a merger and acquisition matter this error would arise where shortcuts are taken in due diligence work.

To avoid these claims, take the time to read between the lines so you can identify all appropriate issues and concerns. Ask yourself: What does the client really want? Does everything add up? Are there any issues or concerns that should be highlighted for the client? If something doesn't add up – dig deeper.

## Law

Over the last eleven years failures to know or apply the law accounted for approximately 2,703 claims (13.1 per cent) and \$9.1 million in costs (14.8 per cent).

A failure to know or apply the law arises when a lawyer does not have sufficient or current knowledge of the relevant law on the matter on which he or she is working. Over the past few decades, the law has become far more complicated. There are fewer general practitioners as more lawyers tend to specialize in a given area of law. Legislation has become more complex, there are increasingly more regulations, and new case law is coming out of the courts at an increasingly rapid rate. For these reasons it is important that lawyers participate in CLE programs to maintain a current knowledge of the law.

Extensive federal and provincial legislation, as well as voluminous case law, help make failure to know or apply law the most common error for family law lawyers, representing more than 21 per cent of family law claims in the last eleven years.

"Dabblers," or lawyers acting outside of their usual practice area, are far more likely to commit this error. Lawyers who are asked to handle a legal matter for a family member seem to feel obliged to help and often find themselves dabbling in an area of law they don't know. Dabbling is dangerous – don't do it.

Remember that family and friends can be the most demanding of clients because they can, and will, call at all hours of the day or night. They also tend to not pay their fees on time, if at all. Given the relationship, it can also be difficult or awkward for the lawyer to give a family member or friend independent legal advice. Lawyers should steer clear of representing family members. The best solution is to refer them to someone else in the firm, or, ideally, to send them to another firm with expertise in the area of law.

Lawyers should also tread carefully when giving advice or working on matters relating to U.S. or other foreign law. The LawPRO policy does not cover lawyers for advice involving U.S. or other foreign law.

## Conflicts of interest

Over the last eleven years, conflicts of interest claims ranked fifth by count (1,322 claims) and cost (\$6.0 million), accounting for 6.4 per cent of claims reported and 9.7 per cent of costs, respectively. Conflicts claims are proportionally more costly to defend and indemnify as they tend to be complex and involve multiple parties.

There are two types of conflicts claims: The first arises when conflicts occur between multiple current or past clients represented by the same lawyer or firm. The second is a conflict that arises when a lawyer has a personal interest in the matter.

Multi-client conflicts claims have been on a general downwards trend for most of the last 10 years. During the same period, lawyer self-interest conflicts claims have occurred at the same rate. However, since the Supreme Court of Canada's decisions in *R. v. Neil* and *Strother v. 3464920 Canada Inc.*, there is clearly

increased sensitivity to the duties of loyalty and confidentiality that lawyers owe their clients.

As they regularly act for multiple clients and/or entities, real estate and corporate commercial lawyers experience more conflicts claims than other areas of law, while litigators have a relatively low rate of conflicts claims.

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

Often, firm conflicts-checking systems do catch real or potential conflicts. Unfortunately, decisions are made to overlook these conflicts, either to please the client (often to keep fees down) and/or keep the matter at the firm for the fees it will generate. In the end these decisions come back to haunt firms.

LAWPRO is also seeing more conflicts arise with the lateral hiring of partners and associates. In a desire to bring on the new person, real or potential conflicts are also ignored or overlooked.

## Clerical and delegation errors

Clerical and delegation-related errors are the sixth most common type of error by count and cost (1,093 claims and \$1.6 million in costs, 5.3 per cent and 2.7 per cent, respectively).

Delegation errors include things such as simple clerical errors, errors in mathematical calculations, work delegated to an employee or outsider that is not checked, and failures to file document where no deadline is involved.

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

## Fraud claims

As is detailed in the articles on pages two to eight, fraud-related claims are on the rise and of significant concern to LAWPRO. Although real estate fraud has been a concern for several years, counterfeit cheques now are being used to target litigators (on collection matters) and commercial lawyers (on financing deals), as we are seeing more frauds by firm lawyers and staff.

Regardless of firm size, it is important that every firm implement appropriate internal controls to ensure that funds in trust accounts are handled properly and that all transactions involving client monies are properly documented.

## Firms have different claims “personalities”

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

For example, firms that do a poor job of managing tasks and deadlines have more time management and missed deadline-related claims. To reduce claims risks, firms should proactively identify and address shortcomings in their operations practices and procedures. One large Toronto firm seems to have kept conflicts claims very low by having excellent conflicts checking procedures and an increased sensitivity to conflicts claims through an annual conflicts education program that is mandatory for all lawyers and staff.

## Avoiding a claim: your marching orders

Over the last eleven years LAWPRO has averaged 1,846 new claims each year. Over this time period LAWPRO successfully defended 86 per cent of these claims (of all claims closed during this 11-year period, 39 per cent were closed with only defence costs incurred, and 47 per cent with neither defence costs nor indemnity payments). But, while only 14 per cent of these claims ultimately involved an indemnity payment, it still makes sense to do everything you can to avoid the stress, time and cost of dealing with a malpractice claim.

The six most common malpractice errors detailed in this article represent more than 92 per cent of the malpractice claims handled by LAWPRO in the last eleven years. The biggest claims risks, and the biggest opportunity to reduce claims exposure, lie in basic lawyer/client communications, and in time and deadline management – accounting for more than 50 per cent of the claims. Taking some proactive steps to address these types of claims is your best opportunity to reduce your claims exposure. See the practicePRO resources centerfold for tools and resources that you can use to reduce your claims exposure.

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