

Legal malpractice risks change in tough times (But the best risk management strategies don't)

When times are good, bumps in the road won't always cause problems. Clients are upbeat and they want the deal to close, their problem resolved or the litigation matter to proceed. Happy clients are far less likely to sue their lawyers for malpractice.

However, in tough times, clients squeezed by money problems can become unhappy and they will be more likely to look for ways to allege that their lawyers made a mistake. In a similar fashion, lawyers squeezed by financial problems can also find themselves more likely to engage in risky behaviour. Unhappy clients and risky lawyer behaviour translate into more LawPRO claims.

In good times and bad, avoiding a legal malpractice claim requires that you understand where the risks are so that you can respond to them by proactively taking steps to reduce your exposure to a claim. As you will see, the risk management strategies you should employ in good times and bad are essentially the same. And, as clients are likely to hold you to a higher standard when money is tight, being proactive with risk management becomes even more important in tough times.

The most common malpractice claims

As has been highlighted in more detail in past issues of LawPRO Magazine,¹ in good times and bad, in most areas of the law, lawyer/client communication problems are the number one cause of claims. Deadline and time management issues are the second most common type of error, followed by claims that arise because the lawyer didn't dig deep enough into what the client wanted or needed, substantive law errors, conflicts of interest and then clerical/supervision errors.

Malpractice errors made at solo, small, medium and large firms are virtually identical in proportion and type². People make mistakes and systems don't work properly in similar ways, regardless of firm size.

Tough times make clients more demanding

A client squeezed by financial problems may behave in a less reasonable or rational way. A financially desperate client may act in a totally irrational way. A client's financial health can take a turn for the worse very quickly and unexpectedly. Don't underestimate the impact that financial pressures or changed circumstances can have on an individual, or on the relationships

between family members or business partners. People who were all previously marching in the same direction can all of a sudden want very different things (e.g., a sale of business or a buy-out of an individual interest). If the matter or amount of money at issue is significant, even long-standing and loyal clients can turn on you. They can see a malpractice claim as a potential solution to their financial difficulties.

In response to financial pressures or changed circumstances, clients may want to back out of business deals or delay litigation matters that would have otherwise proceeded in a good economy. To this end, they will look for ways to allege that their lawyers made a mistake. You will be held to a higher standard. Minor questions or issues that would have warranted little or no attention in good times can become deal breakers in bad times. When making an allegation of malpractice, unhappy clients will look to exploit (with or without merit) one or more of the following: retainers with a vague scope; poor lawyer/client communication; missed deadlines or delay; ambiguous language in documents; unanticipated scenarios or circumstances; unexpected results or outcomes; and immaterial conflicts of interest.

Five key risk management strategies

These five risk management strategies will help you reduce the risk of a claim when you are dealing with demanding clients:

1. **Start out on the right foot with a written retainer:** The retainer letter or agreement is your terms of engagement. It should clearly identify who the client is and what you are retained to do. A written retainer can protect you if there are unexpected changes in the scope of the engagement as the matter progresses.
2. **Control client expectations at all times:** Clearly and accurately communicate to your clients the available courses of action and possible outcomes; all the implications of any decisions; how long things will take; and the expected fees and disbursements. This strategy, coupled with the next one, is your best protection from a malpractice claim in good times and bad.
3. **Document everything (almost):** It is just not practical to document everything on every matter, but you should document as much as you can in some contemporaneous manner. Letters are fine, but emails, detailed time entries and marginal notes on documents can be equally effective. In particular, you want

¹ *The Biggest Malpractice Risks* by Dan Pinnington at page 17 of LawPRO Magazine: **practicePRO: Helping Lawyers for 10 Years** (Volume 7, Issue 2, Summer 2008).

² See *Solo, Small And Big Firms Make Same Errors* at page 25 of LawPRO Magazine: **Work and Wellness** (Volume 5, Issue 4, Summer 2006).

to record advice or instructions that involve significant issues or outcomes, and major client instructions or decisions. Documenting things is especially important when you are dealing with clients who are difficult or emotional due to financial stresses. Documented communications help confirm what was said or done for the client in the event you ever need or want to look back to explain why or what work was done, to justify an account, or to defend yourself on a malpractice claim.

4. **Meet or beat deadlines:** Set realistic deadlines when it comes to completing tasks and/or delivering things to clients. Underpromising and over-delivering (i.e., earlier than promised) on work for clients will make them very happy. Don't leave things to the very last minute, as unexpected events beyond your control (blackouts, snow storms, taxi got lost on way to file documents) may prevent things from happening as required. Giving yourself an extra day or two by setting your deadline before the real deadline can be a lifesaver.
5. **Send interim and final reporting letters:** They should confirm what work was done and the successes obtained for the client, outline future steps, and confirm that the retainer is terminated. This helps keep the client fully informed, and can be critical when it comes to defending a malpractice claim if circumstances unexpectedly change as you work on a matter for a client or after your retainer is terminated.

Risky lawyer behaviour to avoid

Lawyers under economic and financial pressures can also find themselves more likely to engage in a variety of risky behaviours. These are discussed in more detail in the following paragraphs.

Don't dabble in areas of law outside your expertise: When you are not busy and have extra capacity to do work, it is just so tempting to take any client who walks through the door, even if you have limited expertise in the area of law in which they require help. The pressure to do work outside your usual practice area

for an existing client, family or friends can be even greater. Lawyers who hoard work because they are under pressure to increase their billable hours or billings also have a tendency to dabble. Don't do it! Resist the temptation and pressure. As a "dabbler" you will be less efficient and effective – and far more prone to a malpractice claim. LAWPRO's claims tell us that dabblers make more than their fair share of mistakes when it comes to knowing and applying substantive law.

That is not to say you should never consider doing more work in or switching to a "growth" area of law. But, if you do so, take steps to become competent by attending CLE programs, working with other lawyers who already know the area or seeking help from a mentor.

Poor client selection: Shortages of work or money pressures can also cause lawyers to engage in another type of risky behaviour: poor client selection. Poor client selection manifests itself in a variety of ways. It can be working for a client that is unwilling or unable to pay an initial retainer or ongoing fees. It could also be acting for a very difficult client or one who has unrealistic expectations about the strength of his case, the cost of proceeding with it, and/or the likelihood of success. With these types of clients, collecting and replenishing retainers is critical to avoid fee disputes. And carefully setting and controlling their expectations by documenting communications is key to avoiding disputes.

Taking shortcuts: Clients under financial stress are going to want lower legal fees. To please a client with a faster turnaround time and/or lower fees, lawyers may find themselves tempted to take shortcuts. Taking shortcuts means a lawyer will do less work than she might otherwise have done on a matter. This could be skipping searches on a real estate deal, taking less care in reviewing or drafting a document, skipping discoveries or not ordering transcripts, not completing enough due diligence or not updating research.

In some cases taking shortcuts will be fine, provided the client fully understands and accepts the risk. But never let the client's

practicePRO claims prevention tools and resources

Numerous tools and resources that can help you reduce the risk of a malpractice claim are available at www.practicepro.ca. These include:

- **LawPRO Magazine Archive:** Articles from all past issues of the magazine (www.practicepro.ca/LawproMag/LawproMagArchive.asp)
- **LawPRO Resources Topical List page:** Articles and resources sorted by topic (www.practicepro.ca/information/default.asp)
- **Retainer precedents** for several of areas of law and matter types (www.practicepro.ca/practice/financesbookletprecedents.asp)
- **Dealing with difficult clients** paper and client file opening information memo precedent (www.practicepro.ca/practice/DifficultClients.asp)
- **Limitation periods charts** (www.practicepro.ca/practice/limitation.asp)
- **ILA checklist** (www.practicepro.ca/practice/checklist.asp)
- **Sample law firm business plan and budget** (www.practicepro.ca/practice/financesbookletprecedents.asp)
- **practicePRO Lending Library:** Books on law practice management issues that Ontario lawyers can borrow for free (www.practicepro.ca/practice/library.asp)
- **practicePRO Wellness and Balance Page:** Tools and resources to help you manage stress (www.practicepro.ca/wellness/default.asp)

financial distress expose you to a malpractice claim because you didn't take all of the necessary and appropriate steps to handle the matter in a competent way. If your client instructs you to take shortcuts, carefully document your advice to her on the risks of doing so.

Don't sue for fees: Tough times mean there will be more clients who are unwilling or unable to pay their legal fees. This will lead to more lawyer/client fee disputes, and in turn, more lawyers suing their clients for fees. Think twice before you sue for fees. A suit for fees almost guarantees a counter-claim alleging negligence.

The better solution: get the money up front so you avoid fee disputes altogether. At the time you are retained, get a retainer that is sufficient to cover all initial work that needs to be done on the matter. Replenish retainer funds *before* they are exhausted (set up your accounting system to monitor and remind you when the amount in trust is getting low). Stop working on the file if the retainer is not replenished – working on credit greatly increases the likelihood you will not get paid for your work, especially in tough times.

Lawyers or staff dipping into trust funds: Financial problems caused by tough times or personal difficulties can be the motive for even the most long-serving and trusted staff or lawyers to commit fraud. Weak internal controls coupled with the knowledge of firm systems and how to get around them create the opportunity for them to get away with it. Internal law firm fraud has been very

costly for the insurance program. See *When The Unthinkable Happens: What To Do When Partners, Associates Or Staff Commit Fraud*³ for information on recognizing when internal fraud may have occurred, and how you should respond.

Watch for conflicts of interest on lateral hires: Lateral hires of partners or associates frequently occur in bad times. A strong desire to hire a transferring lawyer should not lessen the need to identify and honestly assess potential conflicts, and to take appropriate steps to deal with them if necessary (e.g., confidentiality screens or client waivers). A failure to deal appropriately with these conflicts only delays the inevitable: in all likelihood the firm will have to refer any clients with a conflict to another firm.

Conclusion

When times are tough, clients in financial distress are far more likely to sue their lawyers for legal malpractice, and financially-pressed lawyers may be tempted to engage in risky behaviour. In these circumstances, risk management is more important than ever. Use the knowledge you have gained from this article and the tools and resources mentioned in the sidebar on the previous page to reduce your exposure to a malpractice claim.

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

3 LAWPRO Magazine **Surviving The Slide: Dealing With The Tough Economy** (Volume 7, Issue 4, Winter 2008-2009) at page 16.



LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO®)

President & CEO: Kathleen A. Waters

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

Editor: Dagmar Kanzler
dagmar.kanzler@lawpro.ca

Contributing editors:
Gary Edgar
gary.edgar@lawpro.ca

Dan Pinnington
dan.pinnington@lawpro.ca

Design & Production: Freeman Communications

Tel: (416) 598-5800 or 1-800-410-1013
Fax: (416) 599-8341 or 1-800-286-7639
www.lawpro.ca

Disclaimer:

This publication includes techniques which are designed to minimize the likelihood of being sued for professional liability. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.