

LAWPRO CEO: Six things I hate to read in a real estate claim file

Kathleen Waters, CEO of LAWPRO, reveals which protestations from claims-plagued real estate lawyers are the least musical to her ears.

When I talk about the disturbing escalation we have seen in claims costs in the past few years, I am often asked why real estate claims are so prominent, and what can be done to get these claims under control.

Besides the usual advice about careful review of transaction details, effective and regular lawyer-client communication, and good general practice management (you can find the details of these recommendations, and others, in the resources available at practicepro.ca), I recommend a measure of self-reflection.

When LAWPRO counsel work with lawyers to resolve claims, they ask questions about how the problem that led to the claim arose. The answers to those questions can be as varied as the claims themselves.

The following are the six “explanations” I most hate to read – whether in a payment request memo, a trial preparation memo, or any other part of a real estate claim file.

1. I gave my disc and password (for the electronic land registration system) to

_____.

Whose name fills in the blank? It could be a clerk, a summer intern, a disbarred lawyer – it doesn’t matter. Any time a lawyer starts a sentence this way, it’s a problem. Only the lawyer who received the electronic registration credentials provided by the Ministry of Government Services is entitled to use the lawyer disc and password to register an instrument on title using the electronic system. Permitting anyone else to pose as the authorized lawyer for the purpose of accessing the system is a breach of the *Rules of Professional Conduct* (hereafter *Rules*).

But sometimes the answer is problematic because it could be a lie. A lawyer may allege access by an unauthorized party, where in fact the authorized lawyer did log in personally using his or her own name and password... but then committed an act of fraud, and is now scrambling to deflect responsibility or avoid detection. Which is worse: Admitting to a breach of the *Rules* or to commit a fraud? Not much more I need say about *that*...

2. I didn’t meet with the client(s) (or, I didn’t sign up the clients).

There are many good reasons for individuals other than the responsible lawyer – for example, law clerks or other office staff – to handle aspects of a client’s matter. However, the ultimate responsibility for the work remains with the supervising lawyer, and he or she is required to obtain and review instructions from the client.

Claims may occasionally arise out of circumstances where there was a misunderstanding in instructions or a lapse in supervision. But if the lawyer doesn't meet with the client, it puts the lawyer in a more challenging position if the client later alleges certain instructions or information were provided orally to someone other than the lawyer, and now a claim related to the relevant issue is in the offing.

Much more troubling, however, are instances where our investigation of a claim reveals that a lawyer's name and trust account are simply being used (with his or her knowledge and consent) in a practice that is effectively being conducted by a non-lawyer. This, of course, is problematic under the *Rules*, a very high-risk way to do business, and depending on the details, potentially outside the scope of LAWPRO policy coverage.

3. I would never have even considered doing that – that's not the standard of practice.

When a claimant complains that a lawyer failed to take a particular step, investigate a detail, or deliver a warning – or committed some other alleged oversight – the lawyer often defends him or herself by asserting that the “omission” was not part of the standard of practice. The lawyer's expectation is that the standard of practice will define the standard of care in the subject circumstances.

We are familiar with this argument; we use it ourselves when warranted (and when it's supported by expert opinion – we obtain several of these each year). However, a policy of blind adherence to the bare standard of practice, regardless of circumstances, is not always enough. On occasion, a LAWPRO claims adjuster or junior claims counsel (in other words, not a real estate expert) reviews the file and immediately identifies a glaring risk that could have been avoided by a simple and reasonable extra step. The question then becomes whether that extra step, while not necessarily within the normal standard of practice, was sufficiently warranted under the circumstances that it would be seen by a judge as part of the standard of care.

Practitioners must be thoughtful as they go about the client's work, and must make reasoned choices about when to deviate from the standard of practice. For a reminder, see *Edward Wong Finance v. Johnson, Stokes* (1984, JCPC), which stands for the principle that a lawyer must, after establishing that the standard of practice has been met, consider the facts and ask him or herself: Is there a foreseeable risk in the standard, and could the risk reasonably have been avoided?

In other words, thinking critically about the standard is part of the standard.

4. The property value isn't my responsibility – that's the lender's job.

Lawyers are not well-placed to appraise the value of the properties they transfer, and so should not be expected to guarantee value. However, lawyers are occasionally in a position to spot certain red flags that might indicate that value is being misrepresented.

Red flags that should prompt additional enquiries include:

- irregularities on the parcel page;
- unusual terms for the deal (for example, unexplained credits); or
- evidence of multiple recent transactions.

(For a fuller list of red flags in a real estate deal, see LAWPRO's Fraud Fact Sheet, available at: <http://www.practicepro.ca/practice/pdf/FraudInfoSheet.pdf>.)

When an aspect of the deal provokes suspicion, the lawyer has a duty to communicate his or her concerns to the lender client. The lender may or may not choose to act on the information; however, by documenting the communication, the lawyer can protect him or herself from a potential claim.

5. I just dealt with the _____ (mortgage broker, property manager, real estate agent, client's son or daughter, etc.) – it's easier that way.

While a lawyer may need to gather information relevant to the deal from a variety of sources, he or she must always be able to answer "yes" to the question: "Do I have instructions to do this work from the person or entity who really has value at risk in this transaction, and (where applicable) have they clearly instructed me to take orders from the intermediary, and in all circumstances?"

If the lawyer cannot answer yes to this question, the lawyer should consider him or herself vulnerable to a claim. Where something goes wrong in a deal arranged with the help of an intermediary, the result is often a dispute about informed consent. Regardless of how thoroughly the lawyer may have communicated relevant issues to the intermediary, he or she will not always be able to prove having communicated them to the client.

6. I wasn't negligent; I just had to do whatever the client wanted.

There are two general themes to this explanation.

In the first, the lawyer typically protests that the client was resistant to, or impatient with, the lawyer's efforts to inform him or her about the pitfalls of a particular approach, and insisted on proceeding in a particular way. The lawyer may complain that the client "wouldn't listen anyway" to advice longer than the 140-character equivalent of a tweet, and that the lawyer could not get full (or reasonable) instructions. In these cases, clients have often argued later that the lawyer did not obtain their full and informed consent to the steps taken – an argument that may frustrate the lawyer, but that is a direct product of the lawyer's insufficient efforts to draw clients' attention to the potential consequences of a particular course of action.

The second version of the "I had to" theme is rooted less in poor communication, and more in greed and imbalance of power: The lawyer has effectively abandoned the ethical

underpinnings of his or her practice and has become a cipher of (usually one) powerful client – allowing personal financial interest to trump professionalism.

Conclusion

All six of these scenarios ultimately boil down to a lawyer's abandonment of his or her professional responsibility. This abandonment may occur with the client's knowledge and blessing in the name of "efficient service"; but when something goes wrong, the lawyer very quickly becomes the potential focus of the blame.

When lawyers sacrifice their ethical standards, they cease to provide independent advice and no longer add value to the transaction for the client. Most lawyers know this – 20 per cent of lawyers cause 80 per cent of claims. If the role of the lawyer as trusted advisor is to be preserved, the remaining 80 per cent must, through excellent practice and a commitment to independence and ethics, carry on fostering an environment in which careless and irresponsible practice (that can lead to higher premiums for everyone else) will not be tolerated.

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