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LAWPRO

Inside:

delivering on the client service promise

Experience that matters

What is it draws you to Tim Horton's over Starbucks (or the other way around) for your morning coffee?

The java in your cup is only part of the story. Your morning coffee is also all about the fast and friendly service, the convenient hours, the location and, of course, the promise of consistency.

It's the total package – the "experience" – that has you coming back for more.

What does this have to do with you and your law practice?

You too are in the business of creating experiences.

Your legal expertise and knowledge are only a part of what makes for a successful lawyer-client relationship. Equally critical is your approach to client communication, and how you create a perception of value – whether this is your willingness to think outside the box when it comes to billing options or the effective use of technology in your law practice.

If you're not already thinking in these big picture terms about your law practice, now's the time to get started.

In today's increasingly competitive legal marketplace, rethinking the total client experience that your firm is providing is simply good for business: You need to be able to stand out from the crowd. You want the repeat business that a satisfied client ensures. And you want the referral business that comes from the great service you provided to an existing client.

Equally important from our perspective – as your insurer and risk management advocate – is the correlation between client service and claims: Communication issues, in their broadest sense, prompt close to 50 per cent of the claims made against lawyers each year. Clients often say that lawyers respond too slowly or not at all to their inquiries; they don't take the time to explain what is happening, why the matter seems to be stalled or going off the rails; they use voice mail to avoid talking to clients; they use snail mail where e-mail would have been preferred. They over-promise and under-deliver on the client experience – and sometimes pay the consequences.

For this issue of LawPRO Magazine, we have invited some leading experts to share their views on successful, client-focused law firms. Complementing these articles and inserted into the middle of this issue of our publication is the eighth in our series of practicePRO booklets: ***managing a better professional services firm***. It provides you with a wide range of practical information on how to implement a client-first focus in your law practice.

We hope that this magazine will give you a framework for looking at your practice with fresh eyes: So take a time out – with your favourite brew – and consider how you can rethink the client experience that you and your firm offer.

Michelle L.M. Strom
President and CEO

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Karen MacKay

Perfection in client service – from the ground up

The perfect client service law firm – is it possible?

Would it be like Field of Dreams[1]: "If you build it they will come?"

Would it be more like The Stepford Wives[2], where everything appears perfect but really isn't? Or would it be more like Lake Wobegon[3], "where all the women are strong, all the men are good looking and all the children are above average?"

If we could dream about the *art of the possible* – what shape would that dream take? What sort of leader would be in place? How would future leaders be developed and retained? How could we deliver service profitably in ways valued by clients? How would we use technology to collaborate and to anticipate clients' needs? What about culture – how could we create the desired culture and then build the components toward that desired end state? How would we differentiate this perfect firm from its competitors, in the eyes of both talent and clients, for whom we all compete?

Leadership

Leadership is influence – nothing more, nothing less. People don't want to be managed, they want to be led. Leadership is about having followers – whether you are in a firm of three or 300. Above all else, leaders must have integrity.

Organizations with superb client service are typically led by individuals who will tolerate nothing less. In the best-selling business book *Good to Great*, Jim Collins calls this Level 5 Leadership (see Figure 1). "A Level 5 Leader builds enduring greatness through a paradoxical blend of personal humility and professional will."[4]

These leaders attract and retain the next generation because they provide opportunities for future leaders to be *continually challenged* and to *grow professionally*. These leaders effectively communicate their vision and make the next generation feel that they are *part of a winning team*. These leaders *respect* their colleagues, as individuals, and respect their time while working hard and *leading by example*. These leaders attract and retain the next generation by *apportioning credit for success appropriately* and by setting them up for success.

When I asked a seasoned law firm managing partner what he would like if he had the opportunity to build a client service focused firm from scratch, he said, "I'd build a corporate model that would enable execution without worrying about cajoling, stroking or convincing partners to go along. Building consensus is incredibly time-consuming and gets in the way of implementation, given the speed necessary to anticipate client needs."

When I asked a senior associate who had worked in a number of very large firms, he said he would want to be led by partners who understand financial, marketing and people management, not just those who happened to become leaders solely because of their legal talents and billable contributions.

Figure 1: The Two Sides of Level 5 Leadership[5]

Professional Will	Personal Humility
Creates superb results, a clear catalyst in the transition from good to great.	**Demonstrates compelling modesty**, shunning public adulation; never boastful.
Demonstrates an unwavering resolve to do whatever must be done to produce the best long-term results, no matter how difficult.	Acts with **quiet, calm determination; relies principally on inspired standards**, not inspiring charisma, to motivate.
Sets the standard of building an enduring great company; will settle for nothing less.	Channels ambition into the company, not the self; **sets up successors for even greater success in the next generation**.
Looks in the mirror, not out the window, **to apportion responsibility for poor results**, never blaming other people, external factors, or bad luck.	**Looks out the window**, not in the mirror, **to apportion credit for success** of the company – to other people, external factors, and good luck.

The "connected" Rob Hyndman

"Plug into me."

For most lawyers, that would be offbeat opening pitch. But it's perfectly in character for Toronto business law lawyer – and self-professed technology geek – Rob Hyndman.

Rob's office is virtual, amorphous, portable: Equipped with a wireless enabled laptop, a thumbdrive, Blackberry and blog that helps spread the latest word on the technology front, he puts anything and everything at his client's fingertips – whether the meeting is in the client's boardroom, waiting room or favourite pub.

Need to look at a just-reported precedent-setting matter or the latest market knowledge that could affect a planned deal? Want to access the full client file and deep search all documents for a specific reference? Looking for a network of users who have experienced a similar e-commerce issue to yours? No matter what the need or request, Rob can likely plug you into the answer.

"Because of technology I can offer clients more today, as a sole practitioner, than I could when I worked in a corporate environment," says Rob. "I can be more thorough, faster, and more responsive. If a client e-mails me at 11 p.m. with a problem, I can have an answer in his in-box before he hits the pillow. Understand technology and what it can do for you, and you'll be able to service your clients in ways you never thought possible."

Technology and technology law are both his passion and the focus of his practice: "My mission is to help my clients create change with the transformative power of technology, and to provide personalized services to my clients without the distance, formality, and administrative pressures common to large law firms," reads his a posting on his website.

Rob makes it a point to walk that technology talk: In his office, paper is an anomaly. "I work only with electronic documents; everything is scanned, all my docketing and billing systems are automated. Everything is on my computer so that I can access anything anywhere and at any time" He's set up a VPN (Virtual Private Network) into his office, to secure the confidentiality of client communication; he uses voice recognition software and optical character recognition software to expedite document production.

Rob Hyndman

Right now he's looking at sourcing offshore legal expertise: "If I need a large amount of manpower for a short period of time, I can get it for about $60 per hour from very reputable services in India, for example; and I can have the results overnight. At minimal cost, I can replicate many of the benefits a large firm can offer a client." And he's exploring the potential of offering his clients an extranet on which he could post and update typical documents that a specific client would need regularly: "I'd be able to make available various precedent versions, for example, at minimal cost and with very little effort."

But it's his well-respected and widely quoted blog (www.robhyndman.com) that's both his best client service and marketing tool. Rob's recognized what the Globe and Mail recently wrote about: Blogs are quickly usurping resumes as a major source of information on people. "My blog lets others get to know me, how I think, and what I know," he explains. It also helps him connect with others in technology, law, business and other fields – and plug his clients into his networks, inside and outside the field of law.

Delivery of client service

In the perfect client service firm everything would be designed around the client.

Where possible, all dealings with clients would be at the client's place of business. Yes, **lawyers would go to the client rather than the client going to the lawyer**. The benefits of being at the client site are many.

- Strategy meetings with the client executive team would enable a full understanding of the business issues from all perspectives so legal counsel can be part of the solution.
- Records that need to be reviewed are at the client site and accessible.
- The lawyer's relationship with the organization would have multiple links rather than a single link where everything is fed to outside counsel through the general counsel or someone on the executive team charged with that responsibility.

Members of the firm would be **organized around industries** (client- focused) rather than areas of practice (internally focused).

- Lawyers would be hired based on legal training and experience, but also based on their knowledge, experience and passion for the industry. Undergraduate degrees would be part of the consideration rather than simply a right of passage to get to law school. Outside interests and passions would be valuable – e.g. a lawyer with a passion for the automotive industry would be valued not only for his legal skills but also for his knowledge of the industry. When work becomes fun because our passions are valued will people flourish? You bet.

The perfect firm of any size would **leverage technology** in very powerful ways that would enable lawyers and clients to collaborate, use knowledge and anticipate client needs. Leveraging technology enables small firms to have a much stronger "punch" than their size would normally permit.

- Harnessing technology solutions enables the legal team to work at the client site. All documents would be available through extranets or other collaborative tools. All lawyers and others on the team would have the technological tools needed and know-how to use them.

  There are still lawyers who believe that items such as notebook computers, Blackberries, Palm Pilots, cell phones, client relationship management applications and extranets are toys. They are simply tools in today's world – get them, understand them and use them.

- Technology would be used to anticipate client needs by monitoring competitive intelligence within the industries they serve so clients' needs can be anticipated. The entire client team would know about the client's current stock price, competitors, industry developments, and key contacts. Everyone on the team would be up-to-date on the latest communication. The mechanisms to do so are available and in place in many firms: We just can't get lawyers to contribute and collaborate.

The perfect firm would charge **flat fees** so that clients can budget and manage their costs. Hourly billing means that clients pay for law firm inefficiency – it's that simple. However, hourly billing is the driver of virtually all internal law firm measures including, but not limited to, personal compensation – it's that difficult. Flat fees require fee-based costing: That is you know what you are going to charge and you apply resources to the project in a way that generates appropriate profit.

The perfect firm would have a passion for **feedback**. We would have a link available on *every reporting letter, every invoice* and *every e-mail* where any client could log on and give us real time feedback. We would devour it, learn from it and act on it. We would not apportion blame but rather we would adjust our service model to meet client needs. We have two ears and one mouth for a reason – so we can listen twice as much as we speak. This is really, really tough but in our perfect firm we would do it.

In the perfect firm we would know what we are absolutely the best at and we would, with confidence, go after only that work and refer other work to colleagues across the street. Every file is not a good file, every client is not a good client but every referral sets up a *quid pro quo*. Our marketing material would not say that we regularly do this or that, when we don't. We would rather be the **pre-eminent firm in a few key areas** where we are worthy of our rates, than be mediocre and do many things where we profess proficiency. We would strive for domination in a few industries where we actually enjoy the people we are privileged to serve, doing work that we really enjoy. Life is too short to do otherwise.

Culture

Many lawyers describe the culture in their firm as collegial, while others describe their firm as toxic. In large firms the culture differs from practice group to practice group. In building the perfect client service firm could we actually define the culture and then design the firm to reach the desired end state? I believe the answer is yes. To do that, let's first take a look at a more meaningful definition of culture.

Striking the life/lawyer balance

Hamilton lawyer John Evans has a pretty simple formula for delivering excellent client service: Hire exceptional legal talent, give them room to grow and develop, and never forget that your A+ lawyers also have a life.

"Our challenge, as a firm, and my challenge as a senior member in this firm, is to find solutions and accommodations that allow the talented people we hire to contribute."

In the case of Liza Sheard, who had a young family when she started with the firm 12 years ago, it meant finding ways to accommodate to her schedule while helping build her career at the same time.

"To my surprise, clients thought it fantastic that the firm was flexible and let me work part time," says Liza. "Many of my clients could relate to my own reality – and respected how this firm was recognizing the need for lawyers to also have balance in their lives."

Developing legal talent at Evans Sweeny Bordin LLP also means taking a more holistic approach to clients and client files: Mentoring juniors, for example, is not a special program but a way of doing business at the firm.

John Evans, Liza Sheard

"I noticed early on that in this firm we did not compete over files. The attitude here is that it is in everyone's interests for everyone to get good experience and training. Work is allocated to enhance and develop each of our strengths. This generosity of distributing work has allowed each of us to be the best we can be," says Liza.

Similarly, remuneration is structured "so that it is in our individual interests to have the whole firm succeed," says John. "We don't 'eat what we kill' but rather share work so we can go out and find more work – it's this team building that gets rewarded."

Mentoring juniors, points out John, also means expecting more of them. "I expect them to explain to me what they are doing and how they are approaching an issue, so that I can ensure that all questions are getting asked, that the real issues are being addressed, that the junior lawyer is looking at how fees are charged and costs allocated. Our juniors benefit, because they get a wide range of experience. I benefit because I get to coach and get paid for it.

"Most importantly, clients benefit, not only because they're paying at lower rate, but also because a junior often has different ideas and new approaches. Our clients know that they're getting 'hotshot' young talent that is backed by seasoned professionals; it's a winning combination for the firm and for our clients."

A 40-year practitioner and now senior partner of the Hamilton-based law firm, John sees his job as balancing two interdependent mandates: "To ensure the firm consistently provides clients with first-class service. And to ensure that each of us lives a worthwhile life as a lawyer.

"I want people who will have dinner with their families. A lawyer is a better lawyer – and a better person – if she or he has a full and rich life."

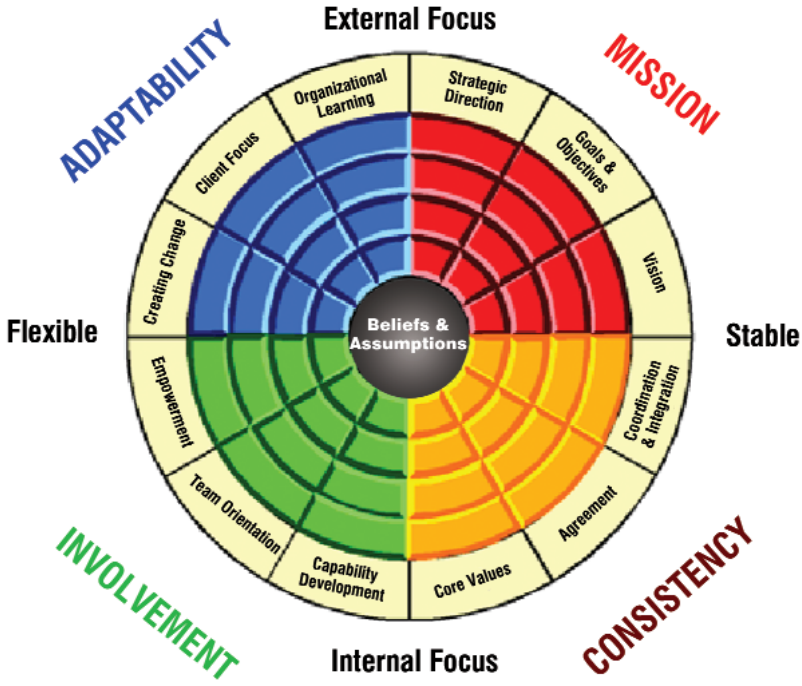
That's not to say the firm's lawyers don't work hard: "Our expectations and service standards are high; and when necessary, we'll put in that weekend or burn the midnight oil," says John.

Delivering on the client first mandate also means looking forward – preparing the firm for the next generation of owners. The corporate entity that was the original Evans law firm has been sold to a new partnership – a move that "encourages the new partners to bring their vision, plans and energy to work for the firm's future," says John.

"A firm is more than the reputation of one lawyer. We have set up things so that our people are establishing reputations of their own, and so that this firm is positioned, in the clients' eyes, to transcend the contribution and reputation of any one lawyer."

Figure 2: Components of Culture[6]

ADAPTABILITY	MISSION
•Creating Change •Client Focus •Organizational Learning	•Vision •Strategic Direction •Goals & Objectives
INVOLVEMENT	**CONSISTENCY**
•Empowerment •Team Orientation •Capability Development	•Core Values •Agreement •Coordination & Integration



In no workplace is culture more defined and more prized than in a law firm. In Figure 2 the components of culture are set out along with a 'circumplex' on which a law firm's culture can be mapped.

- *Involvement* measures how a firm deals with its people. Do they feel empowered? Is the orientation towards team or towards sole practitioners? Does the firm develop the capability of its people?
- *Consistency* measures how a firm's people deal with each other. Are core values defined, talked about and supported? Do people deal with conflict and come to agreement in a healthy way? Is there coordination and integration between individuals, groups and offices?
- *Adaptability* measures how a firm deals with the outside world. Does the firm react quickly to changes in the environment? Do clients influence the way the firm operates – does the firm seek out feedback and act on it? Does the firm learn from its mistakes?
- *Mission* measures the degree to which members of the firm understand and share a direction.

In building the perfect client service firm we could actually define our desired culture and monitor how we are doing, then identify what we need to adjust. We would define our core values, publish them and live them. We would reward the things that are important and we would have the courage to deal with people who might need to find their success elsewhere because they simply don't fit our perfect firm. We would be truly client-focused and we would adjust our firm to meet our clients' needs rather than adjust our client service to fit our needs.

People

In researching this article several conversations ensued with several lawyers, as well as with some of my colleagues including Gerry Riskin, Rob Millard, Michael Roch, Nick Jarrett-Kerr and Ed Wesemann. The lawyers currently in practice shall remain

Connecting with community

Greg Goulin, Bonnie Patrick

Volunteering is the way Bonnie Patrick and Greg Goulin give back to their community – and maintain a sense of balance and perspective.

The fact that donating their legal services also helps the Windsor lawyers build their practice is, in their minds, an unexpected bonus.

Bonnie, who focuses on estates work, admits that it's not unusual for her to spend as much as half her week on volunteer "work" – only to then spend much of the weekend addressing the needs of her paying clients. Partner Greg Goulin, a 30-year practitioner whose focus now is criminal law, has been an activist and volunteer since his high school days.

Together and individually, they've taken on dozens of local causes, from incorporating a homeless centre so that it could issue tax receipts and more easily raise funds[1] to helping create the North American Black Historical Museum (based in Windsor), to going to bat for a senior's right to keep her Beta fish in her condo. Greg's 25-year plus commitment to Scouting has earned him a Governor General's Award; Bonnie's gusto for social issues has put her on the front pages of the local newspaper.

They are, they admit, compelled to volunteer: "In our practice (Goulin & Patrick) we are up-close-and-personal with social injustices and the disadvantaged: Getting personally and professionally involved in these social issues is very rewarding, and relieves the frustrations of practice," says Greg. "At least you can go to bed at night and know that you tried to make a difference."

But volunteering has also paid off in very tangible ways – both to their practice's bottom line and to the kind of service they can offer their clients.

"We have never advertised, yet we're never short of clients," says Greg. "The many and meaningful contacts we make with community leaders (from cabinet ministers down), senior citizens, and others in the community become a constant source of referrals. So we can put our marketing dollars to better use through charitable donations – which is far more effective and rewarding."

"In our volunteer work we come into contact with people from many different backgrounds and in many different areas of work," says Bonnie. "Inevitably you learn something from each of these people; it's a bit like free continuing legal education, in fact.

"You also get to know who can do what – whether its investments, banking, dentistry, mechanical or medical issues. Having those contacts, being connected to those networks lets you better assist your clients, because you know who to send them to, who can best help them – and even what kind of help they might need. You spend less time helping a client, but in a more productive fashion."

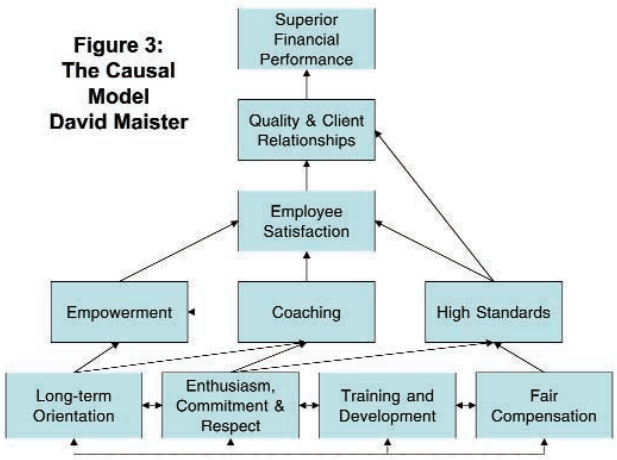
Their volunteer ethic has also earned Greg the respect of others in the legal arena: "As a criminal lawyer, having the respect of the crown, police, even sometimes members of juries, makes a difference. They know me in another context, they are often more predisposed to listen, and that often makes it easier for me as I try to make this justice system work for the people."

1 With the assistance of another Windsor area lawyer, Dawn Melville

nameless so as to protect their innocence. I asked everyone to provide me with their three wishes for the perfect firm if indeed they had an opportunity to build a firm from scratch.

Overwhelmingly the wishes were about how people would be treated in this perfect firm. *People* include lawyers, staff and clients. As one lawyer said, "My first wish is that people would come first and that profits will follow." Another wished for a coaching culture. It occurred to me that this had indeed been proven through the research of colleague David Maister in his book *Practice What You Preach* and as outlined in Figure 3 below.

Figure 3: The Causal Model, David Maister



In the perfect firm lawyers would travel seamlessly between client engagements and personal responsibilities for three reasons.

First, they have the technological tools to do so.

Second, they have moved beyond valuing face time to valuing contribution, no matter where or when that contribution is made, so long as the client is well served.

And third, they will have the confidence to negotiate proper time frames to enable predictability in their lives while still providing superior client service.

> *"I cannot think about a more important problem facing the profession, than how to maintain the life of a young lawyer that will lead to satisfaction in his or her career, that will produce time for a family, and that will produce time for some form of community service …It's like drinking from a fire hose. There is tremendous pressure on younger lawyers to produce 2000, 2200, 2400 billable hours. Well, that produces an unlivable kind of life."*

We would differentiate this perfect firm from its competitors by how people in all levels of the firm are treated, how they treat each other and how they treat our clients.

Conclusion

How many times have you thought about building the perfect firm from scratch? How many times have you talked with a colleague about how things *could be different*? We've all done it, though changing a law firm, particularly a large law firm, is a bit like turning an aircraft carrier – it takes time.

Sometimes lawyers make lateral moves in search of a better environment when indeed they could be part of the solution in their current firm. What can you do to turn your own practice, your own practice group or indeed your firm into an example of the perfect firm? What is the *art of the possible* in your firm?

Law firms compete for two things, talent and clients. Perhaps *Field of Dreams* is the best analogy. Perhaps if we did have the courage to build the perfect client service firm they would come.

Karen MacKay is a principal with Edge International Inc., (www.edge.ai) a global consultancy specializing in professional service firms, and founder of Phoenix Legal Inc. (www.phoenixlegal.com). She can be reached at mackay@edge.ai.

1 1989 movie directed by Phil Alden Robinson based on a book by W.P. Kinsella

2 2004 movie directed by Frank Oz, written by Paul Rudnick

3 A fictitious town in Minnesota, claimed to have been the boyhood home of Garrison Keillor, who reports the News from Lake Wobegon on the radio show A Prairie Home Companion, on Minnesota Public Radio.

4 *Good to Great*, Jim Collins, Harper Collins, 2001

5 *Good to Great*, Jim Collins, Harper Collins, 2001, Page 36

6 Components of the Edge International Cultural Inventory ® used in more than 300 law firms world-wide

How to walk the client – centric talk

Karen K.H. Bell

It's time to get serious about service!

If you haven't already added the term "client-centric" to your firm's vocabulary, it's time you did: Adopting a client-centered approach is what the future of our business is all about.

Simply put, we need to refocus from ourselves and what we need, to our clients and what they need. According to a myriad of client satisfaction surveys, our legal expertise and great work are not enough: What clients want is better service.

How do clients define better service? "Taking the time to understand our business, being proactive and offering advice outside the scope of the engagement that will help us anticipate issues or follow up on opportunities. Communicating with us, and being responsive to our needs."

This is your job as the lawyer working with the client. But, it is not the job of one. Each member of your firm must recognize the role he or she plays in delivering client service. Moreover, your firm's practices and procedures need to serve the interests of the client first. The only way to make all of this second nature is to embed a systematic, client-centric approach in the firm's business processes.

How do we make this happen?

The longer term answer is to develop and implement a Client Service Program that integrates policy commitment, practice management and business development.

But much can be accomplished in the short term. Whether you are a firm of one or one thousand, here are three key strategies that can support you and your firm in making the client the centre of your attention today.

I. Know your client

Re-orient your approach

Commit to a 'Know Your Client' (KYC) mindset. Proactively manage the relationship by knowing all there is to know about your client's business, the key players and what they do, the business climate in which the client operates, and the challenges and opportunities the client faces. Use the many free or fee-based business research resources available on the internet to gather this business intelligence.

Draw on this information in your next client meeting. Being able to put your legal services into the context of your client's business not only demonstrates interest, but also provides you with an opportunity to identify other legal services that the client may not realize he requires. You might even consider asking the client to share his business plan as further orientation for the legal services that you provide now or in the future.

Finally, you need to invest time thinking about all of this and how you can meet more of your client's needs.

Integrate a KYC approach into practices and procedures

To walk the KYC talk, your firm's infrastructure must promote and support the effort:

- Make the KYC investigation a required element of the pre-engagement and engagement processes. Foster the attitude that KYC is as important as doing a conflict check. Use an external contract resource or your library or marketing staff to continuously gather and analyze the business intelligence.
- Track this information using one or more of the many information technology systems already in place at the firm: accounting and docketing (PCLaw/CMS/Elite), case management (Time Matters/Amicus) or client relationship management (InterAction/Elite/Microsoft). Establish a process to integrate this information into a comprehensive client profile that can be used as a reference tool for building that relationship.
- Facilitate a KYC knowledge-sharing strategy within the firm so that all lawyers involved are better informed and more effective in meeting the client's needs.

II. Manage your client's expectations

Re-orient your approach

A satisfied client is one whose expectations you've been able to manage, meet or even exceed. The KYC approach positions you to better understand the client's expectations, and to lead him or her through the legal process and its anticipated outcomes and costs. Effective communication and responsiveness throughout the matter helps you then better manage these expectations.

- At engagement, discuss fully the key aspects of the legal work to be done and how this might affect other aspects of the client's business. Define the role of client and other players, identify the objectives and course of action, communicate progress and take instructions, and establish and be prepared to reset timelines.
- As you proceed through the matter, timeliness and communication are priorities for the client. Ensure that you meet deadlines and communicate regularly whether there have been progress or setbacks or inaction. It is your client's matter so make her feel like she owns it by sharing the status. Consider providing guides or outlines to allow your client (and those to whom she accounts) to better understand the legal issues, legal processes or anticipated consequences. This makes it easier for your client to consider other options or constraints that inevitably arise during the course of the retainer. You must find ways to demonstrate your value and this is one way to do so.
- Use the billing process to reinforce the value that your services represent to the client. Few clients expect free services; all clients expect value for fees. Pay attention to the significance of the work to the client. Be aware of his cost constraints. Identify what represents a fair fee for the work done. Focus the discussion on how you were able to solve the client's problem or make an opportunity a reality.

Manage client expectations with systematic practices and procedures

Like it or not, a more systematic approach to managing client expectations means making procedures more disciplined.

- *The engagement process:* Create a procedure that standardizes the type of information to be reviewed with the client. It should require that a form of engagement letter be drawn. A written record benefits the client by bringing clarity and discipline to the process: Clarity because the written record is a reflective one that can be readily discussed and revisited; discipline because the procedure ensures that tough questions of outcomes, timelines and costs that are so key to clients are addressed. Make precedents of engagement letters readily available to lawyers in the firm.
- *The file management process:* Insufficient communication and procrastination are two common complaints made by clients against lawyers. Use case management and tickler systems to stay on top of the work and the relationship. Provide training to help lawyers work within these systems. As well, promote better organization, early delegation and teamwork. Set standards for communication which reflect the frequency, mode and content needed by the client. Consider monitoring compliance with these systems when evaluating performance and assessing compensation of the lawyers and their staff.
- *The billing process:* Build flexibility into billing systems: Consider a variety of hourly rates or tracking of fixed fees. Develop procedures to ensure accounts are sent frequently

(to avoid large accounts which most clients dislike); all accounts of substance should follow a certain format that includes a narrative that tells the story of the value provided, and include guidance on how to have an advance 'billing discussion' with the client.

III. Empower your client

Re-orient your approach

Now comes the ultimate badge of service – empowering your client through your relationship with them.

- Help make your client look good and more effective in her business role; find ways to help him build a more informed team, or avoid or better manage risk.
- Provide the client with value-added resources. Don't be afraid to give clients precedents, research analyses or other sample work product. Having a highly educated and empowered client does not mean you will not be needed. On the contrary, you will be seen as being vital to their success and worthy of remuneration.
- Enhance what you offer with connections to other lawyers in the firm or to other service providers that the client may need. In so doing, you become a highly valuable advisory resource to be called on for any kind of business challenge or opportunity.

Empower your client with systematic policies and procedures

We're quick to see speaking engagements or writing for publications as good profile-building opportunities – but we dismiss client-specific empowerment as a waste because it is non-billable time. The reality is that efforts specifically directed to clients will enhance the relationship immediately and generate more billable work. To systematically empower clients, consider the following:

- Sponsor the creation of tools that will help the client do his job better, such as education or awareness-building programs, master checklists, 'getting started' outlines, research analyses, FAQs and tip sheets, forms of documents and precedents as well as knowledge-sharing tools and professional development programs.
- Facilitate development of customized solutions for clients so that they can address their issues and also be educated on avoiding those issues in the future, all at a cost that reflects the value to them. Risk management services related to the services already provided are highly desired by clients and reflect a proactive approach.
- Promote cross-selling of services to clients to deepen the relationship. It is in the client's interest to know about other areas of expertise the firm has to offer. It is in the firm's interest to ensure that client needs are met with other areas of expertise.

Parting Words

We dismiss the call to refocus at our peril. Our clients say that a significant number of lawyers are not making the 'service' grade. In a profession where our very role is premised on serving the client, that reflects poorly on all of us. Clearly, the time has come to pause and refocus, and go back to some basic service principles. We must be proactive about understanding and meeting the needs of the client as perceived by the client. We must heed the fact that the client's perception is our reality. We must get serious and deliver on our 'service' promise.

Karen Bell, the principal of Karen Bell Consulting, advises law firms and legal departments on client relationship management, risk management, practice efficiency, and knowledge sharing – under the umbrella of managing business in the practice of law. She can be reached at karenbell@karenbellconsulting.com.

Client service policy

Formalizing the commitment to service

A policy will take shape by doing the following:

- Clarify for all members of the firm what client service means (meeting clients' needs) and how it is to be achieved (being responsive and proactive).
- Identify members' respective roles based on their touch points with clients, whether they handle accounting and finance, office services, word processing, technology or rendering of legal services (e.g. other lawyers, clerks, students).
- Commit to a set of standards or protocols that enhance the clients' experience in dealing with the firm.
- Include reference to the three strategies of 'Know Your Client', 'Manage Your Client's Expectations' and 'Empower Your Client.'
- Also include commitments to ongoing communication, offering 'best' solutions, ensuring timeliness and efficiency, promoting knowledge sharing, sponsoring innovation and acting on client feedback.

Once in place, firm management must champion the policy, and ensure that training about and adherence to it are active.


Liette Monat

Bring your Brand to life

by Liette Monat and Paule Marchand

The importance of branding

Every lawyer, every law firm wants – indeed needs – to stand out from the crowd. A good place to start is with three questions:

- *WHY should your clients resist your competitors' advances?*
- *WHY should interesting prospects change over to your firm?*

The answers to these will help you define your Brand. The third question then becomes:

- *How will you communicate your Brand to your clients and prospective clients?*

Your management team, in providing you with answers to these questions, must demonstrate marketing intelligence, the right attitude and skills.

And then all your partners and your professionals should apply your Brand in everything they do, live by your Brand and embody your Brand.

What is your Brand made of?

The Brand you market and sell is a combination of three elements:

- **Technical expertise:** This accounts for about 50 per cent of your firm's distinctive character; but this alone will not distinguish you or your firm, since, from a client's perspective, most legal firms are competent enough.
- **Relationship quality plus your value-added expertise:** These two elements account for the remaining 50 per cent and work together to make you and your partners stand out.

  First, the quality of the relationship you develop with your prospects and clients determines how your clients feel with you, about you and about your firm.

  - Do they feel that you respect and understand them?
  - Are they stimulated by your ideas?
  - Do you make them feel important?
  - Do they look forward to your calls and meetings with pleasure? Or do they find you competent – but abrupt, abrasive or condescending?

The second element is the **value of your contribution, your advice and your support**. The eye-openers you provide, the opportunities you spot, the obstacles you help them overcome, intellectual stimulation and business savvy you offer: These are all elements that create added value for each client and address a pivotal question. What does doing business with you give them, as opposed to doing business with your competitor?

Most professional firms manage their technical expertise very well. Unfortunately, very few manage the quality of the relationship they develop with their clients and prospects and the value of their contribution – the added value – for them.

Yet these are the only areas in which a firm can truly distinguish itself. The quality of the relationship and the value of your contribution are where your professionals make the difference. This is where your Brand takes root, takes form, comes to life. Moreover, there is no limit to improvement in these aspects.

Plan to make them say "WOW!"

Define a focused marketing strategy. Decide which clients you want to target and what you want them to say about you, your service and your firm.

For example, you might want to be branded as being:

- the top notch expert for difficult cases; or
- the creative, flexible business advisor who offers suggestions and finds solutions; or
- the hold-your-hand partner who understands your clients' specific issues and supports them in achieving their business objectives.

Your challenge is to get all your professionals to buy into this way of thinking, and to make sure that they have the skills to personify your chosen Brand. Do your people allow you to be who you claim to be? Can your people give more than lip service to your Brand? Can they embody your Brand?

Your clients are also key players on your team. Maintain an ongoing dialogue with them to realign your efforts. Ask them directly what could make the difference for them and grow with them. This will accomplish what surveys cannot – give you in-depth answers to your clients' needs and expectations.

Remember, you cannot be all things to all clients. You must establish your Brand astutely, as your choice will have important consequences in terms of infrastructure, operating costs, orienting your professionals' expertise, allocating budget, and so on. It also sets your business development in a specific direction, an orientation that is difficult to change mid-stream. Clients whose needs or expectations are not met by your Brand will be impervious to your courting. In other words, once you have chosen and begun to develop your Brand, it is costly and cumbrous to try to change it.

Some firms try to offer a full menu of services at the risk of diminishing their clients' confidence in what to expect from them. They even risk de-motivating their professionals through a lack of direction.

Far better to declare your Brand, one that will attract clients you can satisfy fully.

Give life to your Brand at each step of a business relationship

Now it is time to translate your decisions into action.

The networking stage:

This is where you invest resources (time, money and energy) in:

- getting your market to know about you and what distinguishes you and your firm;
- establishing interesting new contacts; and
- cultivating your existing clients, prospective clients and intermediaries.

Networking is time-consuming and requires big budgets. It needs to be closely managed for you to get the best return on your investments. The challenges here are to:

- invest your resources in the right places, in a coordinated and systematic manner; and
- perform well, at every opportunity, to create the desired strong impression.

For example: At a chamber of commerce lunch you find yourself seated next to a total stranger. To create the impression you want, your primary tool is your conversation – and so it is essential to manage it skillfully.

How? By:

- listening rather than dominating the conversation;
- not constantly turning the subject back to yourself, not trying to steal the show;
- reaching out, inviting the other person to express himself or herself; and
- allowing yourself to be impressed by the other.

In this short business conversation, you have given the other a first taste of what it would be like to work with you, a taste of the quality of the relationship you would develop and of the value of the contribution you would bring.

The courting stage:

Courting your contacts, following up after a first contact, helps you develop a meaningful relationship with them after that first contact. It's also an opportunity to earn the potential client's trust so that he or she considers switching to do business with you; and it gives a taste of the benefits he or she will reap from doing business with you.

To score points at the courting opportunity, you have to refrain from talking about yourself too soon and refrain from listing all your technical expertise and achievements.

Since you are not yet investing your energies in delivering service, you should invest in giving advice, in giving the prospect a taste of the relationship, and a taste of what it would feel like to be served by you.

You have to take the initiative and reach out to the prospect. The more you discover about the prospect during your initial conversation, the more possible avenues you will have for your follow-up.

At this stage a team effort is essential to surround the prospect. Don't fall into the trap of warning your professionals against giving free advice. Remember that this kind of advice is what will convert the prospect into a client, and a good part of your marketing budget should be used for exactly this.

Selling stage:

You reach the selling stage only when you have developed the relationship and acquired the understanding necessary to:

- translate your competencies into real benefits for the specific person to whom you are selling;

- deal with his or her questions and objections; and
- sell your fee.

Again, don't rush the sale or list your credentials.

Focus on your prospect, and show your potential client the benefits they will get from being served by you – again, the relationship and the contribution aspects.

Adapt your approach to each and every individual circumstance. It will change according to whether you are selling to an individual contact, making a sales pitch to a decision-making committee, writing a proposal or participating in a "beauty contest" to defend your proposal.

In all cases, talk to them, about them, for them – with interest, caring and determination.

Show your understanding of how the specific mandate fits into their global context and what they would gain from your presence in their affairs.

Create a target team with representatives from all your combined services. This approach not only helps you better understand the prospect's situation and needs, but also allows you to offer the prospect a full range of services.

Your challenge is to bring your client or prospect to the point where he says: "OK, they cost the earth, but they're worth it."

Therefore, avoid going on the defensive or lowering your fees. Sell your fees by giving more, by developing a relationship of quality and bringing contribution of value to your prospect, and eventually, to your client.

Service delivery:

At this stage that you get the opportunity to prove that your Brand is real, and to enchant your client to the extent that the news spreads by word of mouth.

The challenges are to:

- Avoid the trap of becoming totally absorbed in technical work and neglecting the relationship and the contribution aspects.

  Your own instincts and your personal marketing intelligence will tell you what will work for different clients, what matters to them, what they will perceive as added value, what will score points with them.
- Deal with challenging situations, such as client dissatisfaction, so positively that it actually enhances your relationship.

  Again, don't be defensive, and don't cut your fees. Instead, solicit, welcome and listen to complaints and requests with an open mind.

  If a demand is unrealistic, explain why.

  Use reasonable suggestions or complaints as an opportunity to work with the client to enhance your service, and, again, enter the relationship and the contribution aspects.

Consolidating and developing stages:

Here's where you have the opportunity to:

- maintain and build a true advisory relationship with the client in between mandates;
- spot new business opportunities; and
- make the client's network work for you.

This is where a good part of your marketing budget should be invested. But it means a lot more than entertaining. It means continuing to provide them with advice, to watch for opportunities for them, to warn them of potential pitfalls – in short, continuing to be their advisor.

When the next mandate comes up, you are not a voice from the past – you are an ongoing, valued presence.

Become more focused and strategic

Bringing your Brand to life does not demand more time and money. But it does require willpower, preparation, systematic coordination and follow-up. And it demands a different attitude and set of priorities.

For example, a Key Client Program is not an artifice – to succeed it needs:

- a fundamental change of attitude on the part of all partners and professionals;
- the development of their interpersonal and relationship abilities;
- the firm's alignment of its philosophy, vision, management and systems in order to encourage and provide support to its professionals as they breathe life into the brand.

Silo management; competition between your resources and practices; an evaluation process and remuneration structure that encourage individual performances instead of collective results: All these elements must be entirely realigned in order to support your branding.

Being overloaded with work or not enjoying marketing activities are no excuse – they are the equivalent of putting one's head in the sand. All of the professionals in your firm must take some responsibility for providing their professional services with an eye to marketing. Waiting until business begins to fall off is waiting until it is too late. Lasting relationships and a stellar reputation take time to develop.

Your people make the difference!

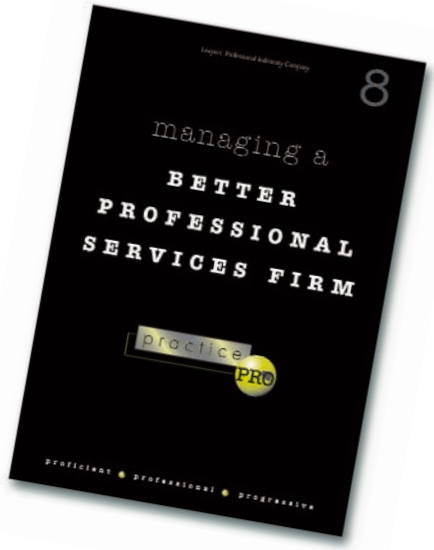
There are no new, improved marketing recipes, no magic formulae that will turn you into the "*Leader of the Pack.*"

You have to determine and manage the impact that you create – the impact that comes from the quality of the relationship that you develop with your clients and the contribution beyond expectations that you provide them. This is what will lead your clients to spread the word. And this can only come when your people bring your Brand to life.

Liette Monat and Paule Marchand are partners in Liette Monat Management Strategies Inc. For more information, e-mail your questions to: lmonat@lmonat.com

In this issue:

Managing a better professional services firm



The articles on marketing and yellow pages advertising are excerpted from **managing a better professional services firm**, the eighth in the **managing** series of booklets from practicePRO. These booklets provide practical tips to help lawyers better manage the risk in law practice, and adapt to the changing environment and capitalize on the opportunities that this change presents. A copy of this newest booklet from practicePRO is included with this issue of LawPRO Magazine.

Marketing plan ABCs[1]

Slow times, tough times, times when you really do have time on your hands: That's when the need for a sound marketing plan to promote your firm really hits home. But if you're waiting for just such a time to tackle your marketing project, think again.

Marketing yourself and your practice is a long-term proposition: Good marketing pays off over the long haul. It is critical that you spend some time marketing every month, especially when business is good. Good marketing efforts require a steady investment of your time.

Your individual marketing plan does not need to be lengthy or complex. You need to write down goals for yourself and your firm – benchmarks against which you can measure success. Set some target dates for completing various goals and projects. For most lawyers a six-month marketing plan might be as simple as:

Each week:

- I will take at least one person who has referred cases to me in the past, or one potential client, to lunch.
- I will send a letter of appreciation to every client whose file I close. I will include an outline of all my other practice areas and a client satisfaction survey.
- I will send a thank you note to someone who did something nice or beyond the call of duty for me.
- I will record on Friday all of my marketing efforts that week so I can see how I am doing.

Each month:

- I will attend at least one civic, church or community meeting.
- I will try to meet at least five new people.
- I will make a telephone call to an old friend whom I haven't talked to in a while and just chat.
- I will send someone that I know who received some good press, a copy of the newspaper article with a congratulatory note.
- I will attend my county bar monthly meeting and sit with some lawyers whom I do not know that well.

During the next four months:

- I will schedule a public speaking engagement or seminar. (I might even send the local newspaper a press release in advance).
- I will read a book on either marketing or law practice management.
- I will schedule time for myself to review my marketing efforts during the last four months.
- My spouse/partner and I will host a small dinner party for some people that we don't often see.
- I will spend some time touring a client's place of business at no charge to the client.
- I'll present a CLE program or do some other volunteer work for my local bar association.

At the end of six months:

- I will sit down and review everything I have done and recorded during the last six months on my marketing plan. I will note any areas of great success or failure, try to think of new ideas for marketing, and revise my old six-month marketing into a new plan for the next six months.

Make sure your plan reflects your individual strengths and your unique situation. If you feel that you are a great public speaker, then make speaking engagements. If most of your business comes from referrals from other lawyers, attend local bar meetings, serve on bar committees and attend bar social events can result in business. If your practice focuses in a narrow area, such as entertainment law, you need to be in places where people who may need those legal services congregate.

For an excellent outline of the steps necessary to create a detailed marketing plan for a firm, see *The Attorney's Guide to Marketing Your Practice, Second Edition*, edited by James A. Durham and Deborah McMurray and published in 2004 by the ABA Law Practice Management Section.

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

1 Portions of this section came from Marketing Magic for Lawyers, by Jim Calloway, originally published in the Oklahoma Bar Journal, Vol. 71, No. 26, September 9, 2000.

Effective Yellow Pages Ads

It's Not Just Size and Colour That Matter

Does your yellow pages ad jump off the page? Does it stand out from the crowd sufficiently to prompt a potential client to call you first? Chances are it does neither.

Most firms do not take the time to create yellow pages advertising that really works. With their eye on costs, they focus on the size of the ad, and/or whether or not to include colour elements.

Too often firms forget a unique characteristic of the yellow pages shopper: Unlike most situations, where the consumer tolerates the advertising, the yellow pages consumer is contemplating or has decided to made a purchase. S/he is now looking for direction on where to go to make that purchase.

To work, a yellow pages ad must be constructed specifically for the yellow pages. A well-constructed yellow pages ad not only attracts more clients, it can also help improve all of your marketing efforts as you must go through essentially the same process to create the marketing content and messaging for any other medium.

To create an ad that works, you need to spend more time understanding how best to construct your ad. To do this, you have to work to gain a better understanding of:

- who your potential customers are;
- who your competitors are;
- which content works most powerfully;
- how to speak effectively to your audience;
- how you can prevail by marketing over, under, and around your competitors; and
- how to transform readers into callers.

At its simplest, you are trying to get people to call you by offering them exactly what they are looking for. Keep in mind that you go through similar steps to create just about every marketing message.

Now get a copy of your current yellow pages ad and compare it to the six elements for creating high-performance ads that Kerry Randall lists in the *Effective Yellow Pages Advertising for Attorneys, A Complete Guide to Creating Winning Ads* published in 2005 by the ABA Law Practice Management Section:

1. Strong headlines that command attention and engage readers.
2. A laser sharp focus; a willingness to ignore most readers.
3. Arresting, eye-captivating illustrations or photographs.
4. Clearly identifiable differences (from competitive advertisers).
5. Relevant copy (text) that covers less than 50 percent of the ad space.
6. Professional looking, clutter-free layouts.

Arresting, eye-captivating illustrations or photographs help get the reader's attention, and distinguish you from other ads on the same or nearby pages. To stand out, you must do something different.

But also keep the ad simple: Relevant copy or text should cover less than 50 percent of the ad space, and the final product should be professional looking and clutter-free. Resist attempts by yellow pages salespeople to include more words, colour and graphics.

The right ad grabs and engages potential clients. It delivers a message to a core group of the best potential clients. Remember, you don't want to appeal to the broadest range of possible clients. For long-term practice development, you want to bring in the **best** potential clients.

Daniel E. Pinnington is the director of practicePRO, LawPRO's risk management and claims prevention program. He can be reached at dan.pinnington@lawpro.ca

The morning after mediation

Jack F. Fitch

Mediation is a powerful tool. When managed by a capable mediator, it can shine a bright light on a dispute, illuminating for all parties the strengths and the weaknesses of their respective positions.

The dynamic nature of mediation can also create unintended hazards.

This article is about "vendor's remorse," a concept familiar to the residential real estate profession, but equally of concern in civil litigation, and a potential hazard of mediation.

Vendor's remorse is the sickening feeling the morning after an intense negotiation when the vendor starts to think that the price agreed to the night before was too low. The same sickening feeling can, of course, affect the purchaser who believes the price is too high – often as a result of the same bargain. Vendor's remorse, whether experienced by vendor or purchaser, is a subjective reaction to the uncertainty of negotiating a deal when the price is determined, at least in part, by the will of the parties to the negotiation as opposed to objective criteria.

Settling a dispute is a form of sale.[1] The object of the sale is a release. A claim has been made. To satisfy the claim, the person against whom it has been brought will pay a price for a release to end the claim. The value of that release is frequently subjective, at least in part

both to the person who has brought the claim (the vendor), and to the person against whom it has been brought (the purchaser). The subjective value of a release may be affected by the parties' assessment of liability or damages or by intrinsic factors that may be known to one of the parties and not the others.

In any negotiation some give and take is anticipated. Normally none of the parties to a negotiated settlement feel that they have been completely successful, but all of the parties should feel that the settlement is an acceptable alternative to the dispute that it compromises.

If one or more of the parties subsequently has second thoughts about the settlement reached, that party may seek to put the settlement in jeopardy. Attacking settlements reached in good faith clearly is contrary to the interests of all parties, and society in general, as the purpose of the negotiated settlement was to resolve the dispute between the parties, and not to reformulate and continue it.

In the give-and-take of negotiation, of course, each party seeks to advance its position and undermine that of the parties adverse in interest to it. Poor preparation, mistake or error can enter into any negotiation and result in a relatively less advantageous outcome for one party.

The process of mediation makes this even more likely, as it brings intense focus to the dispute over a compressed time frame, and risks magnifying the adverse impact of poor preparation, mistake or error, and their potential impact on the outcome of the negotiation. A party represented by a lawyer at mediation who subsequently believes that he has given up too much or accepted too little in the resolution of the dispute is likely to seek to blame the lawyer for the outcome. A complaint to the Law Society of Upper Canada or a claim against the lawyer may result.

Lawyers, of course, act as agents on behalf of their clients and in doing so have ostensible authority to negotiate and settle disputes on clients' behalf. In any negotiation and settlement, the lawyer needs to have clear and unambiguous instructions from the client. These instructions should be in writing so the risk of miscommunication is minimized. In a claim by a client against a lawyer alleging that the lawyer acted in breach of the client's authority, there will be a practical onus on the lawyer to prove the client's instructions and authority or risk a finding against the lawyer.

Preparing against vendor's remorse

Because of the dynamic nature of mediation and its ability to achieve settlements even in cases where the parties are skeptical about the chances of settlement prior to the mediation, proper preparation for the mediation is an essential ingredient in protecting against vendor's remorse.

Proper preparation begins with the inception of the retainer and includes a thorough understanding of the file. It will be too late to investigate the factual basis of a claim or defence, to engage experts and research law once the mediation has been successful.

Proper preparation also includes properly preparing the client to participate in and understand the dynamics of the mediation.

Although many mediators begin mediations with an explanation of the process, clients often are too anxious at the start of mediation to absorb all of the information conveyed in the mediator's opening, or to understand its full implications. A lawyer preparing a client for mediation should take the time to explain the mediation process to the client; he should particularly prepare the client for the pressure to settle which may be exerted during the mediation.

Proper preparation includes a review of the strengths and weaknesses of the case with the client so that the client is prepared for arguments that may be advanced during the mediation and does not become intimidated by the other parties to the mediation or the mediator.[2] A realistic assessment of the case with the client is equally important.

Mediation should be approached tactically. A mediation plan should be considered and discussed with the client. Since the objective of mediation is normally negotiation, negotiation strategy should be part of the preparation. An analysis of the case, a mediation plan and a negotiation strategy should be reviewed with the client and reduced to writing. Realistic objectives should be established and agreed to and also reduced to writing prior to the mediation.

Properly done this preparation will prepare the client for mediation and more importantly provide a realistic assessment of the client's settlement position which, if understood and accepted by the client and adhered to, will minimize the risk of vendor's remorse following settlement.

It is important to recognize that the legal parties to an action are not necessarily the sole decision makers with respect to it.

More than one settlement achieved after a difficult day of mediation has been subsequently questioned by spouses, parents, siblings, friends, managers or employers. It is often difficult for those who were not involved in the negotiation of the settlement to understand why the case settled in the way that it did. However well-intended, the post-mediation analysis of other individuals may lead to vendor's remorse. Making sure that the appropriate people are present and participate in the mediation can be an important protection against vendor's remorse.

Even the best plans and strategies often need to be amended. Disclosure during a mediation, or the mediation plans or strategies of the other parties, can force re-evaluation during the course of a mediation. When re-evaluation is necessary, it should be shared with the client and amendments to the written plan made.

Ideally, the lawyer should know what the client seeks to achieve from the mediation before the mediation begins, although some clients are reluctant to share this information with their own lawyer let alone the other parties to the mediation. Encouraging the client's participation during preparation for the mediation and listening to the client during the mediation are critical to achieving the client's desired outcomes.

Slavish adherence to a mediation plan and negotiation strategy may have its own cost. Flexibility may increase the possibility of settlement, which should always be the desired outcome of a mediation or for that matter almost any dispute, although not at any cost. It is important to not lose a settlement opportunity even if deviation from the mediation plan and negotiation strategy are necessary to prevent the loss of the opportunity.

These changes should be carefully considered and fully reviewed with the client whose approval should be obtained in writing. This is easy to do. Most lawyers take notes during mediation negotiations. Review these notes with the client, and, where appropriate, have the client initial the note to signify his acceptance.

When a settlement is achieved at mediation, the settlement should be put in writing and signed by the parties and their lawyers. Most mediation agreements provide that the mediator is not a compellable witness. A dispute concerning the terms of a settlement achieved at mediation may be as difficult to resolve as the dispute that gave rise to the mediation in the first place, and just as costly.

Even if it is late and the participants are tired, the additional time required to reduce the terms of the settlement to writing and, if possible, have settlement documents executed will generally be time well-spent.

The settlement documents should contain language that directs the parties' attention to the significance of what they have accomplished. The following may be appropriate in most cases: "I have read this document carefully and have had the significance of it explained to me to my satisfaction. I understand that by signing this document I am making a full and final settlement of all of my claims or the claims against me in this matter."

In some situations clients may question the result, no matter what documentation has or has not been completed at the end of the mediation: For example, if mediation was long and difficult; or if the result is acceptable but not all that the client hoped to accomplish; or if the mediation plan and negotiation strategy had to be changed; or if someone whose influence may have been appropriate did not attend the mediation, a lawyer can expect post-mediation questions. Make time for the client the next day or the day after when the questions are raised. A few minutes of patient support and explanation may prevent uncertainty, distress, distrust and, ultimately, a complaint or claim by the client.

Jack F. Fitch is a senior partner at Hughes Amys LLP and a certified specialist in civil litigation by the Law Society of Upper Canada. He has frequently appeared as counsel at mediations and has served as a mediator.

1 Wendell S. Wigle Q. C., one of my partners, wrote an article in the 1970s which articulated the commercial nature of litigation as the sale and purchase of a release. I have always been grateful to Wendell for this article, which I regret I no longer have a copy of, but which has significantly influenced my approach to the resolution of disputes throughout my career.

2 Mediators each have their own style. Some mediators are retained because of the enthusiasm and energy that they bring to the negotiation process and are expected by the parties to pursue settlement vigorously. Other mediators are more passive and preferred for that reason. The mediator's reputation and style and their suitability to the case at issue should be considered carefully when choosing a mediator and when preparing for mediation.

Carol Cochrane

Self-represented litigants:

a survival guide

Why do we all shudder on learning that our client's adversary is self-represented on a litigation file? So often we fail to appreciate opposing counsel – until we hear those dreaded words from our client: "You know, the other side won't be getting a lawyer." It is only then that we realize and appreciate the benefit of there being opposing counsel on a file.

On a litigation file, opposing counsel can serve a number of important functions that can make our own role so much easier. Without opposing counsel there is no one on the other side to:

- give good, solid advice as to what the law is and how it is or can be applied;
- recognize the critical importance of full, complete and timely disclosure;
- encourage a negotiated resolution;
- draft concise and legible pleadings, briefs and affidavits;
- screen, or serve as gatekeeper, to the irrelevancies and non-legal issues;
- facilitate compliance with Rule-directed or court-ordered obligations, such as the timely completion of an accurate affidavit of documents, the fulfillment of the requirements for mandatory mediation under Rule 24.1 of the *Rules of Civil Procedure*, the delivery of an updated financial statement or the prompt consideration of a draft order provided for approval;
- conduct a trial, properly focused on the issues at hand; and
- discourage protracted proceedings, mindful of the ever-increasing costs of contested litigation.

In earlier literature on this topic,[1] a distinction has been drawn between self-represented litigants and unrepresented litigants. The latter would like to be represented by counsel but are unable to qualify for representation under the Ontario Legal Aid Plan, and do not have the financial resources to retain counsel for what may prove to be a protracted proceeding.

Conversely, self-represented litigants feel that they are capable of representing themselves, and do not feel the need to pay someone else to do what they believe they can do themselves. (After all, if you've watched enough reruns of "L.A. Law" or "Street Legal," have high-speed internet and a library card, that is enough, isn't it?)

Whatever the reason or cause may be for the self-representation, it becomes your reality to address. Below you will find some general pointers as to how to best deal with the situation of an unrepresented or self-represented litigant (referred to collectively as "SRL") on the other side of your file.

Clearly spell out at the outset of your dealings that you will not give advice to the SRL.

Your first letter to the SRL must clearly indicate that you represent the adverse party and that you cannot, and will not, provide any advice to the SRL.

There is a very fine line between offering information and giving advice. Although it may be tempting to explain to a SRL what a document means or why something should be done a certain way, don't go there! Encourage the SRL to obtain independent legal advice. Offer the SRL the telephone number for the Lawyer Referral Service, or if the matter is a family law proceeding, suggest the SRL attend at the Family Law Information Centre. When you're asked questions, refer back to that initial letter of introduction and remind the SRL that he/she will have to obtain advice from someone other than you.[2]

Only allow communications between yourself and the SRL to be in writing.

Write to the SRL as soon as you are retained to indicate that you will be limiting your communications with him/her to writing. There will be no meetings; there will be no verbal negotiations; there will be no telephone calls. Although this may sound overly restrictive, it is the only way to avoid misunderstandings. All of your dealings with the SRL should be recorded in writing, either through your written communications or by your discussions being on record in the courtroom.

When you are writing to the SRL, use plain, simple language. This does not mean to insult the SRL's intelligence or to be condescending; simply avoid the "notwithstanding"' or "govern yourself accordingly" ' terminology that come too easily to us as lawyers.

If written communication is electronic, ensure that copies are printed and maintained on your file.

Always make sure that you respond promptly to communication you receive; if you cannot respond within a reasonable period of time, send a short note off to the SRL to acknowledge receipt of his/her correspondence and to advise that a considered response will follow shortly.

If communication cannot be in writing, limit your non-recorded dealings with the SRL, and if possible, have another person join you as witness, such as a junior or articling student. Follow up any oral communications with a letter of confirmation.

Never treat the SRL with anything less than the utmost of respect.

Ensure that your tone is consistently professional and respectful. Our *Rules of Professional Conduct* direct us to treat unrepresented litigants with respect, in the same way you would treat another lawyer. I suggest that you take that even one step further, as you can rest assured that one or more of your letters will find their way to a judge as an exhibit to an affidavit, in a settlement

conference brief, in a document brief at trial, or better yet, as the attachment to a complaint directed to the Law Society! With that foresight, be sure your written communications are written and edited in such a way that they cannot be interpreted as over-reaching, misleading, disrespectful, unreasonable or coercive.

Although you may be empathetic to the SRL's plight, (particularly those who are "unrepresented" versus those who are self-represented by choice), remain professional and respectful at all times. One thing I have tried to do to maintain that professional distance is to not address the SRL on a first name basis, but rather to refer to him/her at all times as Ms. X or Mr. Y.

Take charge of the fact finding and documentary disclosure that is required on the file.

The SRL may not know what information is required to allow the equalization issue to be resolved for instance, or may not be aware of what should be included in an affidavit of documents. Compile and organize early on all of the necessary corroborating documents that are required to allow you to outline in writing to the SRL what he or she must produce.

Remind your client that having a SRL on the other side often drives up the costs.

Negotiations with a SRL may not be helpful or results-oriented. Disclosure from a SRL may not be forthcoming. Your time may have to be spent reading numerous e-mails or letters, or you may be facing more case conferences or motions than if counsel were involved. You may have to recommend that court proceedings be initiated sooner than would otherwise have been the case in order to obtain some Rule-directed time lines, some judicial directives and/or genuine case management.

Open your eyes to the warning signs that your own or your client's security may be at risk.

Is the SRL's attitude towards you shifting (becoming suddenly charming or hostile)? Are the SRL's letters to you or to your client becoming blatantly or subtly threatening? Arrange for Court security to be available at any time you will be required to be with the SRL in that setting, and arrange to stay at the court house until the SRL is well on his/her way after the proceedings have concluded.

Limit the SRL's perceived power over the process.

Insist that the rules be followed – the *Rules of Civil Procedure* or the *Family Law Rules* with respect to pleadings, disclosure and time lines, for instance, as well as the rules of evidence.

Let the SRL know of your intention to seek an order of costs at each stage of the proceeding; if you successfully obtain such an order, pursue its enforcement. Limit the SRL from taking any fresh steps until such interim determinations are honoured [Rule 60.12 of the *Rules of Civil Procedure*; Rule 14(23) of the *Family Law Rules*].

Do not hesitate to rely on the provisions in the Rules that prevent a SRL from engaging in abusive or vexatious proceedings. Rule 37.16 of the *Rules of Civil Procedure* and Rule 14(21) of the *Family Law Rules* give the court the authority to limit a litigant's ability to bring further motions without leave being obtained in advance.

It is one thing for a presiding justice to de-mystify the court process to a SRL; it is not appropriate for the judge to over-accommodate to the prejudice of your client. In the courtroom, object where necessary if that line is crossed, and stress as strongly and respectfully as possible that the SRL is required to follow the rules, just like anyone else appearing in that courtroom.

C - O - N - T - R - O - L

If you combine the first letter of each of the "tips" outlined above, you'll see that what they spell: **CONTROL**. And it is just that, **control**, that you want to maintain when you deal with a self-represented litigant. Only through demonstrating the necessary degree of control will you keep your frustrations at a manageable level, minimize the risks to your client (in both time and costs) and reduce your own exposure to liability.

Carol Cochrane is a family law practitioner and partner with Low, Murchison LLP in Ottawa, Ontario. She prepared this paper, originally written with a focus on matrimonial litigation, for presentation at the Carleton County Law Association 25th Annual Civil Litigation Conference at Montebello, Quebec in November, 2005. Sarah Coristine, the newest addition to the firm, assisted in the research and preparation of this paper.

1 Thompson, D.A. Rollie "No Lawyer: Institutional Coping with Self Represented" 19 C.F.L.Q. 455; Thompson, D.A. Rollie and Reierson, Lynn "A Practicing Lawyer's Field Guide to the Unrepresented" 19 C.F.L.Q. 529

2 For a very clear indication of counsel's professional obligations when dealing with a SRL, see Rule 2.01 (14) of the *Rules of Professional Conduct*

The *Limitations Act 2002:* Two years and counting

More than two years have now passed since the *Limitations Act*, *2002*, came into effect. Because the Act marks a sharp break from traditional concepts of limitations law, Ontario lawyers need to be familiar with the Act: For example, many acts or omissions that took place before January 1, 2004, (the date on which the Act came into effect) will be governed by the *Limitations Act*, *2002*. As well, the clock is potentially ticking on many claims, as the new Act provides a basic two-year limitation period running from the day that the claim is discovered.

Third-party claims

Another reason that lawyers should familiarize themselves with the *Limitations Act*, *2002* involves third-party claims.

The *Limitations Act*, *2002*, has repealed Section 8 of the *Negligence Act*, R.S.O. 1990, c. N.1. Under that Act, defence counsel had until a year post judgment in the action to commence a third-party claim.

As a result of the enactment of Section 18 of the *Limitations Act*, *2002*, defence counsel now face a limitation period for contribution and indemnity of two years. The Act deems the running of the limitation period to commence when the defendant is served with the statement of claim in respect of which contribution and indemnity is sought.

Defence counsel would be wise to run a tickler system to alert counsel of the two-year period from service of the statement of claim, where service was effected after January 1, 2004.

The answer to the question of what limitation period applies to contribution claims arising of claims served before January 1, 2004 is not clear. Once again the best option is to refer to the transition chart.

Section 22 – No opting out

Another area of concern to Ontario lawyers is Section 22 of the *Limitations Act*, *2002*, which provides that a limitation period under the Act applies:

> "despite any agreement to vary or exclude it."

By way of example, a typical agreement for the purchase and sale of a business would contain representations and warranties by the vendor and would provide that claims for breach of those representations and warranties must be pursued within a specific period following closing. This negotiated time period may be inconsistent with the limitation period specified under the new law.

Section 22 affects business transactions under Ontario law and puts Ontario out of step with the common law provinces, the state of New York and other U.S. States and England.

The government under the leadership of Attorney General Michael Bryant has recognized the problem, and in response has introduced for first reading Bill 14/06, as of October 27, 2005.

Schedule D to the Bill provides as follows:

"2. Subsection 22(2) of the Act is repealed and the following substituted:

(2) Subsection (1) does not affect an agreement that was made before January 1, 2004.

Same

(3) Subsection (1) does not affect,

(a) an agreement made on or after the effective date by parties who are all acting for business purposes; or

(b) an agreement made on or after the effective date to suspend or extend a limitation period."

If enacted Bill 14 should allow parties to suspend or extend but not shorten a limitation period.

Transition provisions

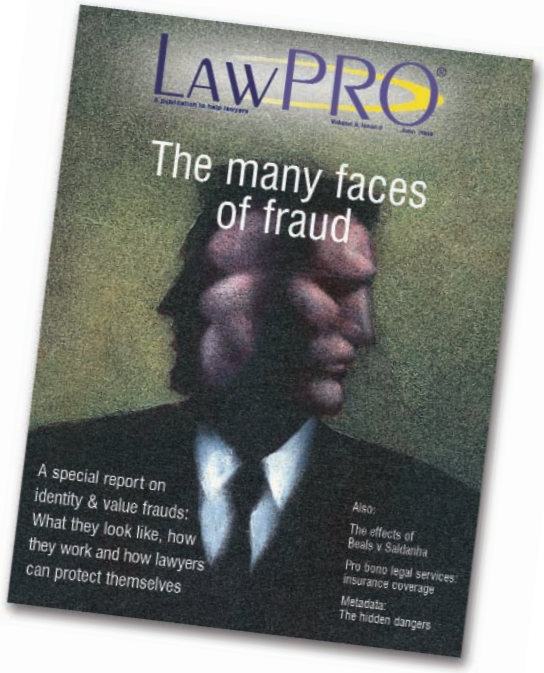
The LawPRO website provides a number of tools that will assist lawyers in understanding the implications of the changes that the new Act has brought to the limitations area. Available at www.practicepro.ca/limitations are a transition provision chart, as well as a summary and detailed limitation periods tables. These items are among the top 10 most frequently downloaded items on this website.

Conclusion

It is still early days for the implementation of the *Limitations Act*, *2002*. Watch for cases that will interpret the new Act. Ensure you are working with the correct limitations period. Above all obtain the transition chart and tables mentioned earlier.

Tim Bates is a partner with Borden Ladner Gervais LLP in Toronto.

Fraud-proof your practice



Sophisticated (and not so sophisticated) criminal schemes to defraud mortgage lenders and registered owners of their money and real property interest are becoming more prevalent. Real estate lawyers are traditionally used to looking for title problems, survey issues, zoning concerns and other possible glitches in legitimate deals.

But what about fraud? What can lawyers do to immunize themselves and their clients?

Awareness is the key. Real estate lawyers today need to know what kinds of fraud are out there, learn the warning signs, and use the tools that are available to protect against them. Complete prevention is impossible, because criminals will always come up with new methods as their old ones become outdated. But with the proper tools in hand, real estate lawyers can spot many intended frauds before they happen.

First, know the two common types of fraud:

- **Identity fraud.** In this scenario, the fraudster impersonates the registered owner of real property, and transfers it either to him/herself, a person who is complicit in the fraud, or an imaginary person. The same thing can occur when fraudsters impersonate the directors, officers or shareholders of a corporation that owns real property.

  The fraudster mortgages the property, forges a discharge, and re-mortgages it to another lender, each time retaining the proceeds of the mortgages. This cycle can occur several times with the same property before the fraud is discovered. By that time, the fraudster and the mortgage money are long gone.

- **Value fraud.** A property is "flipped" one or more times, at ever-increasing prices, to imaginary purchasers, or persons complicit in the fraud. The final Agreement of Purchase and Sale is at a price much higher than the real value of the property. This Agreement is presented to a lender, which relies on the price to grant a large mortgage on the property. The mortgage typically goes into default soon after closing. In these cases, the lender receives a valid mortgage, but cannot sell the property for enough to recover its investment. The mortgage covenant is typically worthless.

Sophisticated fraudsters combine these two methods, with results disastrous to *bona fide* owners and mortgage lenders.

Warning signs

Lawyers and their staff need to be on the lookout for several "danger signals" which may indicate that the transaction is not as it appears. Some of the most common are:

- A new client, who seems to be involved in many real estate transactions, and promises more business if this deal is closed quickly;
- A client who cannot produce utility bills, tax bills, a survey, or any other documents relating to the property, except the transfer to herself, but will not allow you to contact the lawyer who acted when she acquired the property;
- Municipality or utility companies with no record of your client as the owner of the property.
- A client who is not concerned about higher than normal legal or brokerage fees, or the interest rate of the mortgage;

- An Agreement of Purchase and Sale with no agent, or the name of an agent who never contacts you about the deal;
- An Agreement of Purchase and Sale with no handwritten amendments;
- A direction to pay funds from your trust account to a third party who has no apparent relation to the transaction;
- A small deposit, or a deposit paid directly to the vendor instead of a real estate agent or lawyer;
- Large credits to the vendor on the Statement of Adjustments, for "renovations" or other alleged improvements to the property;
- Instructions received from a "mastermind" who appears to control the transaction, although he/she is not a party to it; and
- The use of counter cheques for post-dated mortgage payments, pre-authorized debits, or otherwise in connection with the transaction.

Although not exhaustive, this list does highlight some of the most common characteristics of fraudulent deals.

Where any of these warning signs appear, obtain more information before closing. If the deals are legitimate, clients should not object to providing this information. In a world where you can't rent a DVD or get a library card without elaborate precautions, clients will see the sense in doing this when hundreds of thousands of dollars are at stake.

Law firm staff can be valuable tools in identifying possibly fraudulent deals. Often, they receive the Agreement, open the file, and review the search before you do. If they know the warning signs and look for them, they will be able to draw your attention to possible problems early in the deal.

Title insurance: fraud protection

Most title insurance policies, including those offered by TitlePLUS®[1], First Canadian, and Stewart Title, provide coverage for pre- and post-closing fraud.[2] Each has underwriting requirements that are designed to detect and prevent fraud. These may include, for example:

1. Obtaining, reviewing and copying photo identification for clients not personally known to you. This applies to mortgage and purchase transactions, including purchases for "cash" (with no mortgage);
2. Advising the title insurer of the date and price of any arm's length transfer of the property within a specified time period; and
3. Requiring a search of automated titles for deleted instruments, and advising the title insurer of all instruments registered within a specified period before the closing date.

Many lenders also have anti-fraud requirements, which must be complied with before they will advance funds.

"Existing owner" policies

Often, homeowners who did not buy title insurance (or bought their houses before residential title insurance was generally available) hear "horror stories" about real estate fraud, and want to protect their properties. Although the likelihood of fraud affecting a particular property is probably small, title insurance is an inexpensive way to put owners' minds at rest. A variety of title insurers now offer these policies[3].

Fraud is a serious risk in real estate transactions, and all indications are that it will remain so in the future. Stay up to date on the most recent fraud stratagems and warning signs as they develop, and train your staff about them. Numerous resources are available for this purpose, including continuing legal education programs for lawyers and staff, legal publications, and websites such as www.lawpro.ca/magazinearchives.

With lawyers and their staff alert to the warning signs of fraud, and how to protect their clients against it, the bar can hope for a future when more potential fraudsters are deterred from attempting real estate fraud.

Lisa Weinstein is underwriting manager with LawPRO's TitlePLUS program.

1 TitlePLUS is the registered trade mark of Lawyers' Professional Indemnity Company.

2 See the policies for details of coverages and exclusions.

3 Title insurers may have different underwriting requirements for these policies. For details, contact them.

Prompt claims reporting:

A key ingredient in the risk management mix

How can you defuse the potential anxiety – or even stress – that comes with discovering you may have made an error – or worse still, are about to be sued?

Report the matter, without delay, to LawPRO.

Prompt reporting of a claim, or potential claim, is a requirement under the LawPRO insurance policy. And failure to do so could result in a denial of coverage if the delay has prejudiced our position as your insurer.

But prompt reporting is also an important risk management tool that not only relieves you of that burden of worry, but also can lead to a more successful resolution than you had imagined possible. Prompt reporting gives you access to the expertise and experience of our claims counsel and examiners and, in many cases, defence counsel. In some cases, repairs are possible and the claim can be avoided altogether; many potential claims situations are resolved with no costs. In virtually all situations, you are better served working with the claims team to resolve the matter, than if you try to go it alone.

Consider these examples from our claims files:

Several years after Lawyer A had successfully acted on the purchase of his property, a client returned to ask the lawyer to now act on the sale of that same property. Lawyer B, acting for the new purchaser, sent a letter of requisitions, and indicated that there was a problem with title to the property. Lawyer B alleged that the vendor did not have proper title because the transfer violated the sub-division control provisions of the Planning Act.

Had Lawyer A immediately notified LawPRO of a potential claim, he would have learned from us that there was an easy fix to the issue: There was a statutory or case law exception to this issue, and the case could have been resolved without delay.

Lawyer A however opted to negotiate an extension of the closing date, and undertook a severance consent application. Fortunately, for him, this application was successful. But had he reported the matter to LawPRO, the closing could have proceeded without delay and the additional costs associated with the application could have been avoided.

Another recent example involves a lawyer who opted not to report a matter involving a missed limitation period. He undertook a repair motion on his own, as is often done in civil litigation matters when a time limit has been missed, but made the mistake of anticipating that the motion would be unopposed. He prepared the materials in a perfunctory way, the matter was opposed at the last minute and the motion for relief was not granted because the materials were inadequate. A claim resulted.

The issue for the lawyer then is further complicated because the issue of prejudice arises. If the matter had been reported, our claims counsel and/or defence counsel would have had an opportunity to ensure that the motion materials were better drafted, and the claim might have been avoided. Afterall, four eyes are better than two.

Clearly, promptly notifying LawPRO about a claim – or a situation in which you have made an error or are alleged to have made an error – is in your best interests (as well as an obligation under the insurance policy).

What specifically are your obligations to report under the LawPRO policy?

As soon as you become aware of a claim, or a circumstance of an error, omission or negligent act that could result in a claim, you must report this claim or potential claim to LawPRO. The policy also requires that you provide LawPRO with all information on the claim that is in your possession or that you know of, and that you immediately forward to LawPRO every demand or originating process that you receive or have received. The Law Society *Rules of Professional Conduct* have corresponding requirements in respect of reporting to LawPRO (Rule 6.09[2] and [3].

How does one report a claim?

Claims must be reported in writing – by e-mail, fax, ordinary letter correspondence or by using our online claims reporting form at www.lawpro.ca.

You'll need to provide the following information:

- your name, the name of your firm, full mailing address, fax number and e-mail address;

- name of your client;
- brief description of your retainer stating when you were retained, why you were retained and the nature of the claim;
- the manner and date on which you became aware of the potential claim;
- any relevant documentation, such as a demand or notice letter, or a copy of the Statement of Claim if litigation has been commenced. One way to include this is by including a PDF attachment to an e-mail;
- the amount of potential damages; and
- a chronology of events.

As your insurer, we accept claim reports only from you or from your appointed representatives (such as counsel, partners or associates, executors or personal representatives, or trustees in bankruptcy). As well, we accept reports of claims from the Law Society where it has been appointed trustee of an insured's practice by court order, or from the Law Society itself, in its capacity as Named Insured under the LawPRO policy, where that discretion has been duly exercised. We do not accept claim reports from third parties or their representatives.

What happens after the claim is received by LawPRO?

Our new claims coordinator records all new claims reports, noting the relevant date of error, date on which you received notice of the claim, and when you gave notice to LawPRO. A claims file is opened and the claim is assigned to a claims counsel who will contact you to discuss the matter further.

Depending on the circumstances, we may allow you or someone in your firm to handle the repair under our supervision, or we may retain outside counsel to do it. It is often best to retain external counsel because it can be quite awkward for you to have to appear before a judge to seek relief arising out of your own error.

If an allegation of negligence has been made against you that we believe is either unfounded or has not caused any damages, we can help you draft a denial letter or, if appropriate, send a denial letter ourselves.

Our philosophy is to make a reasoned assessment of liability and damages. If it is clear that you are liable for a matter that cannot be repaired, and if the amount of damages is proven and is causally connected to the error, we will try to negotiate a settlement at an early stage. But if, in our view, there is no liability and/or no damages, then we will not offer to make any indemnity payment. We do not make economic settlements.

What are the risks of not reporting a claim?

Ignoring a claim will not make it go away. It may come back to haunt you months or years later. Depending on the facts, coverage might be denied if the delay in reporting has prejudiced our position. You do not want to run that risk.

Handling it yourself, either by denying liability or trying to negotiate a nominal settlement, also comes with its own risks: If your attempts are unsuccessful and you then report to us, again, depending upon the facts, coverage might be denied if LawPRO's position has been prejudiced. For example, you might have inadvertently admitted liability, contrary to the terms of your policy. That's another risk that you do not want to run.

You may think that the amount of the claim is so small that it is within or close to your deductible, and so you can deal with it yourself. Consider that both your insurance policy and the *Rules of Professional Conduct* obligate lawyers to report any claim to the insurer. You do not want to risk running afoul of the Law Society.

Lawyers often say they do not want to report a claim for fear that it will trigger their deductible. Rest assured that the mere reporting of a claim does not trigger the deductible.

If you opted for a deductible applicable to both defence and indemnity, 50 per cent of the deductible is triggered by filing a Statement of Defence, and the other 50 per cent by examinations for discovery. If a claim does not reach those stages, an indemnity payment or costs incurred to effect a repair will trigger the deductible.

Should one report as a precaution?

When in doubt, the safe course is to report a claim even if it is on a precautionary basis. It costs you nothing to report a claim to LawPRO – deductibles and Claims History Levy Surcharges are not triggered by the mere reporting of a potential claim. As well, close to 50 per cent of claims reported to LawPRO close without any impact to the insured lawyer.

Moreover, you'll sleep better at night: More than one lawyer has discovered, after reporting a potential claim to us, that no error was made, that the matter was easily repaired or that there were no damages.

This article was prepared with contributions from various members of the LawPRO claims department.

Real estate wins

bode well for lawyers

LawPRO successfully defended several real estate solicitors in 2005. These successes are wins which keep on giving. The courts' reasons for judgment will be helpful in defending other solicitors in the future.

Breach of fiduciary duty claims fail

Breach of fiduciary duty claims have long been a *bête noire* for real estate and commercial lawyers. Defending them is difficult, but not necessarily impossible, as the next two cases show.

In *Upper Valley Dodge Chryster Ltd. v. Huckabone and Cronier*[1], the Court of Appeal affirmed the judgment of Maranger, J.[2] Justice Maranger held that a firm of solicitors did NOT breach its fiduciary duty, although it acted on both sides of a loan transaction. While it would have been preferable had the wife, Mrs. Cronier, been sent out for independent legal advice, there was no obligation to insist on such advice in this case.

The wife granted a mortgage of the family home to the plaintiff Upper Valley Dodge Chrysler as security for a loan to the Cronier family business. Mrs. Cronier understood the transaction, and it was beneficial to her. Although Mrs. Cronier did not own the family business, it provided a livelihood for the family. The purpose of the $160,000 loan was to consolidate other outstanding loans owed by the business, $90,000 of which was owed to the plaintiff, and to provide money to seek a federal work contract. It was not a case of someone putting up their house for someone else's clearly foolhardy loan. This was a case where the individual in question had a vested interest in obtaining the loan to consolidate and potentially reduce an overwhelming debt load. Mrs. Cronier could not rely on *non est factum*, unconscionability, duress, undue influence, or lack of independent legal advice.

The Court of Appeal wrote at para. 24:

> "Although it obviously would have been better had Jacqueline Cronier obtained independent legal advice before signing the mortgage, on the basis of the trial judge's findings of fact and the record before us, we are persuaded that even if she did obtain independent legal advice she would have nonetheless signed the mortgage so her husband and his company could obtain the loan. Thus this argument must fail, as did Upper Valley's principal argument on the issue of causation."

The Court rejected Upper Valley Dodge's contention that its solicitor was in breach of his fiduciary duty to it, since the law firm acted on both sides of the transaction. The transaction was a simple one. There was no room for negotiation once the transaction arrived at the law firm. Upper Valley was adamant that Mrs. Cronier provide a mortgage on her home. The Cronier business needed the loan. The plaintiff lender was eager to proceed with the loan because the borrowers already owed it money, and under the terms of the loan the plaintiff would get security on the house. The solicitor suggested that Mrs. Cronier be sent out for independent legal advice, but Upper Valley refused, suggesting that "it would take its chances in Court."

The Court wrote at para 12:

> "Lawyers and law firms must, of course, be wary of acting on both sides of a transaction. The law reports contain many cases where acting on both sides gives rise to a disqualifying conflict of interest. However, we think that on the record before him, it was open to the trial judge to find that no conflict arose requiring separate representation. We therefore decline to interfere with it."

Hendry v. Strike[3] is another unsuccessful breach of fiduciary duty claim against a solicitor.

The plaintiffs were partners in a land development partnership. When the land development failed, they sued solicitor Strike for breach of fiduciary duty in his capacity as managing partner and solicitor for the partnership.

The action against Strike was dismissed. He acted in the best interest of the partnership at all times, and got instructions from it. He had no "unilateral discretion" with respect to the plaintiffs' interests, nor were they "at his mercy." The fact that he was managing partner, and had occasionally acted as the plaintiffs' solicitors on unrelated matters, did not enhance his obligation to the plaintiffs to provide investment advice with respect to unrelated transactions. There was no "general retainer." These unrelated transactions were mostly arranged without Strike's involvement in any event. The plaintiffs called no evidence concerning the standard of care of a solicitor acting as a managing partner of a real estate partnership. The appropriate standard of care was not within the knowledge of the court.

The plaintiffs were financially ruined by the failure of the partnership due to the real estate recession, the freeze on waterfront development, and the freeze on residential developments outside of municipal boundaries. The plaintiffs also purchased and over-mortgaged properties in order to support a lifestyle beyond their means. These factors were not Strike's fault.

Attempt to expand solicitor's responsibility fails

A developer's attempt to substantially expand its solicitor's responsibility failed in *Accurate Fasteners Ltd. v. Gray.*[4]

Justice Molloy held that a solicitor for a purchaser of raw land has no responsibility for seeing to the satisfaction of conditions in the agreement of purchase and sale relating to business, structural, electrical or construction issues. Verifying satisfaction of these conditions falls to the client. A lawyer ought not to take on responsibility for matters outside his area of legal expertise. The solicitor has responsibility for conditions relating to zoning and environmental soil reports. The plaintiff took "short cuts" in its due diligence concerning the costs of grading and construction. The solicitor cannot be responsible for the client's lack of due diligence.

The court rejected evidence from the plaintiff's expert that a solicitor must review the client's due diligence on these issues. The defence's expert evidence to the contrary was accepted.

Molloy, J. found that it would have been preferable had solicitor Gray confirmed in writing with his client precisely what tasks Gray had undertaken, and which were the responsibility of the client. However, a failure to confirm in writing does not constitute a breach of the duty of care.

The client was informed of and understood the extent of what his solicitor would be doing. There was no requirement that the solicitor reduce the understanding to writing.

The plaintiff also failed to prove any damages. The plaintiff incurred $216,000 in grading and landfill costs, which he had not expected to incur. The court declined to award these damages because:

1) this work was required because of the characteristics of the soil, not because of any error or omission on Gray's part;

2) there was no evidence that the vendor would have allowed any abatement had the grading issue been raised prior to the conditions having been waived. All evidence was to the contrary.

The plaintiff led no evidence as to the market value of the property at the time of its purchase. Diminution in value is the preferred approach to damages in cases such as this one. The evidence that did exist suggested that the property was worth the price that the plaintiff in fact paid.

The plaintiff's action was therefore dismissed.

Solicitor not liable for failing to detect purchaser's alleged mental incompetence

Plaintiffs are ingenious in their attempts to hold solicitors responsible for their real estate losses.

In *Smith v. George, Murray & Shipley*,[5] the defendant solicitor was sued for allegedly failing to recognize that the plaintiff was mentally incompetent to enter into three real estate transactions.

The action was dismissed. The evidence did not establish that the plaintiff was incapable of managing his financial affairs. Even if he were, the evidence did not establish that the defendant knew or ought to have known that the plaintiff was mentally incompetent.

Compelling evidence is required to override the presumption of capacity found in s. 2(2) of the *Substitute Decisions Act*.

The court also rejected the contentions that the defendant should have advised concerning the purchase price of the property, or the appropriate down payment.

Claims by non-clients dismissed

LawPRO generally has been successful in defending claims against solicitors by non-clients.

Rapoport and Wine v. Polsinelli, Draiman et al.[6] was no exception. G. Speigel, J., confirmed that solicitors acting for vendors and purchasers owe no duty to subsequent encumbrancers to register information on title that a work order has been issued by the Ministry of the Environment.

Nor can the solicitors' failure to do so constitute a "conspiracy," since their decision not to do so was legal, and there was no intent to cause harm to the plaintiffs, a subsequent second mortgagee. If the plaintiffs' solicitors had done the appropriate searches with the Ministry of the Environment, they would have learned of the work order.

A mortgagor's solicitor who gives a mortgagee an opinion with respect to the mortgagor's corporate status owes no duty to the mortgagee above and beyond the contents of that opinion. There is no duty to volunteer information or advice about other matters.

The *ex turpi causa* defence is alive and well

In *Stoneman v. Gladman and Monteleone et al.*[7], the plaintiffs' claim for return of

1 [2005] O.J. No. 5097 (C.A)

2 [2004] O.J. No. 2260 (S.C.J.)

3 Unreported judgment of Ferguson, J.E., released September 7, 2005, Whitby Court file no. 21352/03

4 [2005] O.J. No. 4175 (S.C.J.); (2005) 35 R.P.R. (4th) 9.

5 Unreported judgment of Abbey, J., released orally on March 23, 2005 and in writing June 20, 200, Sarnia Court file 756/99 (S.C.J).

6 [2005] O.J. No. 2089 (S.C.J.)

7 Unreported judgment of Perell, J., released July 22, 2005, Toronto Court file no. 01-CV-221646 CM (S.C.J.)

property which they transferred to two of the defendants prior to their bankruptcy was dismissed.

First, any cause of action for return of their property vested in their trustee in bankruptcy, not in the plaintiffs personally. The fact that the trustee did not pursue this claim did not confer status on the plaintiffs. Second, their action was barred by *ex turpi causa*. Their scheme to keep property out of the hands of their trustee was dishonourable and illegal. The court would not assist them to get this property back. The action against the defendant solicitor, who allegedly advised them concerning this scheme, was dismissed as well.

To read more about these judgments

Three of the judgments featured above are reported; three are not. If you wish to read the unreported judgments, go to LawPRO 's website: www.practicepro.ca/magazinearchives.

Select the current issue of LawPRO Magazine, and scroll down to supplementary materials listed under this Casebook.

Debra Rolph is director of research at LawPRO .

casebook #2

IP Lawyers Beware

Fallout from Dutch Industries Decision and new Section 78.6 of *Patent Act*

Patent lawyers may want to circle February 1, 2007, in red on their calendars: "Top-up" fee payments must be made prior to that date to ensure the validity of a patent or patent application for which payments had been incorrectly made at the small entity rate.

In the *Dutch Industries Ltd. v. Canada* (Commissioner of Patents) 2003 FCA 121 (CanLII) decision, the Federal Court of Appeal held that any fee paid to the Canadian Intellectual Property Office (CIPO) in connection with a patent (or patent application) on a small entity basis, where small entity status could not validly be claimed, would result in the patent or patent application being declared invalid (or abandoned) after exhaustion of the statutory 12-month grace period for late payment of fees (reinstatement).

The court also held to be improper the earlier established practice of CIPO to accept "top-up" payments for the difference between the small and large entity fees, at any time during the life of an application or patent, if a payment was found to have been incorrectly paid at small entity rate.

This decision created confusion in the intellectual property (IP) bar, and raised the spectre of potential LawPRO claims.

To rectify the fallout from this court decision, a new section of the *Patent Act*, Section 78.6, was enacted. It came into force on February 1, 2006.

Section 78.6 legitimizes any previously made corrective "top up" payments, and removes the possibility of an invalidity declaration of the basis of such payments.

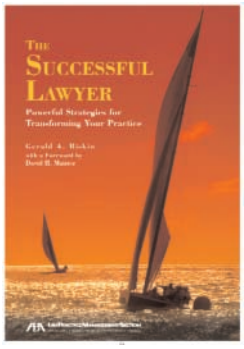
Most importantly, Section 78.6 provides a once only twelve-month window of time, commencing February 1, 2006, during which any fee payments previously made incorrectly at the small entity rate, may be corrected by payment of the difference between the small and large entity rates for the relevant fee at the relevant time.

Any corrective payment being made during that twelve month period will need to be accompanied by information with respect to the day on which the underpaid fee was submitted, the service or proceeding in respect of which the fee was paid, and the patent or application in respect of which the fee was paid.

To help lawyers determine if corrective payments need to be made, relevant fee schedules and a fee payment history with respect to specific patent applications or patents are available online in the Canadian Patents Database.

After February 1, 2007, any application or patent in connection with which corrective payment has not been made will be susceptible to an invalidity attack.

LawPRO encourages all lawyers who may have matters where top-up fees are required to conduct a careful review of their files, and take appropriate steps to deal with the issue and ensure that all top-up fees are paid well before the February 1, 2007, deadline.



The Successful Lawyer:

Powerful Strategies for Transforming Your Practice

Gerald A. Riskin, ABA Law Practice Management Section
Publication Date: July 2005, ISBN: 1590315340

Gerry Riskin is a Canadian lawyer and business school graduate with a global reputation as a pioneer in the field of professional firm economics and marketing. He is also a leading expert on managing professional service firms.

He speaks with in-the-trenches experience. A practitioner since 1973, he has worked as a partner and managing partner at Canadian law firms. In 1983, he co-founded The Edge Group with another well-known law firm consultant and author, Patrick McKenna. Edge Group has evolved into Edge International, a global firm with clients in over 30 countries. Through Edge International, Gerry has become a popular facilitator, teacher, retreat speaker and trusted advisor to many of the world's largest and most prominent law firms.

Don't let Gerry's big firm credentials scare you away – this book is not just for big firm lawyers. It provides practical and helpful advice for lawyers at any size of firm and any stage of practice.

In the book Gerry distills his knowledge on practice management and client development into a well-organized, practical and readable format. You'll learn how to re-plan your future and build skills in a wide arena, including areas such as: active listening, managing client relationships, building client rapport and long-term relationships, handling heavy workloads, effective delegation, dealing with complaints, running effective meetings, business development, firm management and leadership.

The book gives you new insights into delivering client value in an efficient and profitable manner. You'll also learn how to develop the more entrepreneurial approach that delivery of legal services in a competitive global economy demands.

The book resonates with common sense. But common sense is not always so obvious or common, especially when you are running at breakneck speed on the treadmill of a busy practice. Through his comments and personal anecdotes, Gerry will get you to reflect on and critically analyze your firm, your practice, and what you want out of the practice of law. On top of learning the skills that you need to build a successful, personally rewarding and profitable practice, many will find the motivation and inspiration to increase their passion for what they are doing.

This publication is available as a 256-page book (US$84.95), a 330-minute audio program on audio tapes or CDs (US$149.95), or as a combination package of the audio CDs and the book together (US$209.95). ABA LPM section members get a discount on these prices.

For more information on this book, and the other excellent ABA LPM Section publications go to www.abanet.org/lpm/catalog.

Reviewed by practicePRO director Dan Pinnington. You can reach Dan at dan.pinnington@lawpro.ca

Work that never goes missing

We have all experienced the upset and frustration of losing work due to an unexpected computer crash.

Thankfully, there is a very simple and easy way to prevent this from ever happening to you again.

In most Windows programs, pressing Ctrl+S will save your work. This key combination is the same as clicking on File, then Save, or clicking on the Save button (the floppy disc icon) on the toolbar.

In many e-mail programs Ctrl+S saves a copy of your message in the Drafts folder.

While it accomplishes the same thing, using Ctrl+S to save your work is much faster as you don't have to take your fingers off the keyboard and reach for the mouse.

Get into the habit of pressing Ctrl+S to save your document each time you finish a page or even a paragraph. If your computer crashes you will only lose the changes you made after you last saved the document.

Even lawyers

sometimes need help

It may be simply the stress and burnout that comes with managing a busy practice. It may have escalated to depression, or a dependency on drugs or alcohol. Whatever the issue, lawyers – like other professionals – sometimes need the very special type of peer support that the Ontario Bar Assistance Program (OBAP) makes available – completely confidentially – to legal professionals (lawyers, law students and judges), and their families.

Because stress and related issues are often contributing factors to claims, LAWPRO supports the work of OBAP in many ways, including this new column that will highlight the type of support OBAP provides to Ontario's legal community. The columns by OBAP staff Leota Embleton and John Starzynski will provide practical tips to help lawyers manage balance and wellness in law practice. They are based on Leota and John's first-hand experiences in responding to calls to OBAP's help line.

Striking a balance between client service and self care

Bob is a conscientious lawyer. He tries to take care of his clients and give them optimal service for his fees. His clients can reach him by office phone, cellphone, fax, e-mail and Blackerry. He spends great amounts of his everyday practice listening, consoling and advising. He finds that his evenings are quite busy with volunteering for a few boards of directors and going to his kids' activities – hockey, soccer and dance lessons. His wife is understanding, but Bob is getting tired.

Eventually, things start to go off the rails. The policy of returning calls the same day just cannot be met. His court schedule is so busy that he is missing lunches. He is working full-out all the time. Finally, he realizes that he needs help.

Bob calls the Ontario Bar Assistance Program and speaks to Leota, who listens to his dilemma. He is hooked up with another lawyer in a similar kind of practice who acts as a daily peer support to listen and brainstorm possible solutions to the problem. The theory of "two heads are better than one" helps Bob better cope with the isolation and frantic nature of the practice. He learns to better prioritize, to manage expectations, to set aside time for himself. Hearing a friendly voice every day gives Bob encouragement. And slowly, things pick up and Bob is back on an even keel.

If this scenario sounds familiar – or if you have other concerns that lead you to believe you may benefit from peer counselling and support – contact OBAP. Program Manager Leota Embleton can be reached at 1-877-576-6227 and Volunteer Executive Director John Starzynski is available at 1-877-584-6227.

New one-stop assistance program in the works

The Boards of Directors of OBAP and LINK – the Lawyers' Assistance Program – have agreed to merge the two organizations. The new organization will continue the work of OBAP and LINK – but will provide lawyers with one central contact point from which to access peer support and/or counselling services.

The new organization builds on the strength of its two predecessor organizations: OBAP's unique peer support services which link lawyers in distress or crisis with other lawyers who can listen, help them access appropriate resources, or even help them work through an issue; and LINK's access to professional counselling services, offered through an independent service provider.

Combining the two organizations eliminates the confusion created by having two services with overlapping mandates. A single call to one central intake number lets lawyers access assessment and referrals to peer support assistance or counseling or both. The result is a more streamlined, cost-effective organization that eliminates duplicate administration and can put more financial resources to work for lawyers in need.

More information on the merger and how to access services will be available later this spring.

Workshop: emotional intelligence

Module: #9 Taking initiative by … turning barriers into stepping stones

Coaching

Lawyers who are good at taking the initiative don't let barriers stand in their way. They recognize barriers and understand how to overcome them.

Can you identify what is standing between you and what you want? For example, the following are common barriers that people note when explaining why they haven't gotten started or taken the initiative:

- lack of know how
- lack of permission to…
- a negative attitude
- not enough time to…
- don't know right people
- a missing skill
- one good relationship
- an unresolved issue

Taking the initiative to overcome barriers can be accomplished using the following four-step process.

1. Identify the barrier that is in your way and its relevance to you.
   - For example, lack of time is a common barrier, and the personal relevance is that you don't have time to do the things you want (complete work, exercise, build relationships, etc.).
2. Rephrase the barrier in its positive context as a stepping stone (your desired situation).
   - For example, if your barrier and personal relevance is a lack of time to finish your work, the restatement in a positive context is "I have enough time to finish my work."
3. Imagine looking backwards in time from your desired positive situation (imagining the stepping stone as having been achieved).
   - The way to do this is to visualize that it is one year in the future and that the positive state (the stepping stone) is actually true.
4. With this positive outcome imagined and in mind, determine what steps were used to overcome the barrier.
   - This is creating a strategy by envisioning what was done to get to a desired outcome. It is easier to develop strategy when you look back from success, even if that success is just imagined.

It is very helpful to be looking backwards from success. The positive imagery helps develop more creative ideas.

Mentoring

Work through the examples below to give yourself some practice in using stepping stones to help you take the initiative and overcome barriers.

1) Barrier/Personal Relevance	I don't have enough time/to read fiction
Stepping Stone (Opposite of Barrier / Personal Relevance)	I have enough time to read fiction
Initiatives taken to achieve Stepping Stone	What I did was, 1. cleaned up my time messes 2. woke up earlier 3. scheduled more in advance
2) Barrier / Personal Relevance	I don't have enough time to get the work done
Stepping Stone (Opposite of Barrier/Personal Relevance)	The files are up to date
Initiatives taken to Stepping Stone (stated in past tense)	What I did was, 1. Identified type of lawyer I needed to help 2. Considered collaborating with another lawyer who was not as busy 3. Worked longer hours

Your own example

3) Barrier/Personal Relevance	
Stepping Stone (Opposite of Barrier / Personal Relevance)	
Initiatives taken to achieve Stepping Stone	

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

Sixth annual A+ rating for LawPRO

LawPRO's underwriting and operating strength, its skilled management team and excellent capitalization have earned it a sixth consecutive A+ financial strength rating from A.M. Best Co., a leading rating agency.

A.M. Best commented favourably on LawPRO's risk-based underwriting model, which it says provides greater control over matching risk factors to the cost of insurance. It also commented on LawPRO's ability to manage risks on its insurance program, pointing out that a combination of stop-loss reinsurance and self-insurance arrangements have mitigated potential exposure resulting from LawPRO's decision to forgo quota share reinsurance coverage for the insurance program since 2002. "Overall, A.M. Best believes that the company's disciplined management, strong results and excellent capital position will ensure its ability to assume the liability program without compromising its financial strength," A.M. Best said in its release.

Lawyers adopt online filings, reduce insurance premiums

Close to 90 per cent of lawyers eligible to file their insurance applications electronically opted to do so for the 2006 insurance year: Just under 18,000 of the 20,000 practising lawyers completed insurance applications online, via the LawPRO website, making them eligible for a $50 per lawyer e-file discount on the 2006 insurance premium.

As well, about 3,300 lawyers filed the required declaration to be eligible for a $50 per program premium credit (to a maximum of $100) for each CLE qualifying program they had completed by mid-September 2005. Programs eligible for the LawPRO CLE credit must include a risk management component that must be pre-approved by LawPRO.

TitlePLUS extends online application process to western Canada

Lawyers in Western Canada can now apply online, at titleplus.lawyerdonedeal.com, to secure TitlePLUS coverage for their purchase transactions.

Real estate practitioners in Manitoba, Saskatchewan, Alberta and British Columbia had been using the website to access TitlePLUS insurance for their mortgage-only/refinance transactions for the past year. For purchase transactions, lawyers in these provinces had been either completing a paper application (available for dowload from the TitlePLUS website) and/or accessing TitlePLUS title insurance directly by phone.

"We've had excellent response to TitlePLUS insurance from lawyers in all areas of Western Canada over the past year," said TitlePLUS Vice President Kathleen Waters. "Over the past year, we've been working hard to ensure that our online TitlePLUS application addresses the specific differences in approaches and practices in conveyancing in the different provinces, and are pleased to now offer this online facility to Western Canada lawyers. We expect that the ability to apply online will attract even more lawyers, and will translate into a significant increase in TitlePLUS business from Western Canada."

Deadline reminders

Please note the following transaction levy filing and payment deadlines:

- Real estate and civil litigation transaction levy surcharge filings and payments for the quarter ending March 31, 2006, are due on April 30, 2006.
- Real estate and civil litigation transaction levy surcharge filings and payments for the quarter ending June 30, 2006, are due on July 31, 2006.
- Annual levy exemption forms to exempt yourself from having to file quarterly real estate and/or civil litigation forms are due April 30, 2006.

2006 Insurance premium payment deadlines:

- The first two quarterly instalments by pre-authorized bank account withdrawal or credit card are processed on January 15, 2006, and April 15, 2006.
- Monthly instalments by pre-authorized bank account withdrawal or credit card are processed on the 15th of each month.
- Lump Sum payment discount: Payments dated and received by March 1, 2006, are eligible for a $150 per lawyer discount. Only payments made by cheque or pre-authorized bank account withdrawal are eligible for the lump sum payment discount.

Events calendar

March 1
practicePRO presentation
Risk Management and Claims Prevention
Dan Pinnington, practicePRO
Smith Valeriote LLP, Guelph

March 2
The Basics of Buying & Selling a Residential Condominium
Law Society CLE
TitlePLUS exhibiting
Law Society of Upper Canada, Toronto

March 7
practicePRO presentation
Electronic Discovery: Why Electronic Documents are Different
Dan Pinnington, practicePRO
Heenan Blaikie LLP, Toronto

March 23
Edmonton Real Estate Board Trade Show
TitlePLUS exhibiting
Mayfield Trade Centre, Edmonton

March 26
Canadian Real Estate Association (CREA) Leadership Conference
TitlePLUS exhibiting
Westin Hotel, Ottawa

March 30
practicePRO presentation
Electronic Discovery: Why Electronic Documents are Different
Dan Pinnington, practicePRO
Hughes Amys LLP, Toronto

April 3 – 4
Special Lectures 2006: Family Law
Law Society CLE
Risk Management and Claims Prevention
Yvonne Bernstein, LawPRO
InterContinental Toronto Centre, Toronto

April 5-6
3rd Annual Real Estate Summit
Law Society CLE
TitlePLUS sponsoring & exhibiting
University of Toronto Residence, Toronto

April 7
Independent Mortgage Brokers Association of Ontario (IMBA) 2006 Annual Conference
TitlePLUS exhibiting
Hilton Suites, Markham

April 20 – 22
ABA TECHSHOW 2006
The Weakest Link: Security in a Wired and Wireless World
Excel at Excel
Dan Pinnington, practicePRO; Program Vice-Chair
Sheraton Chicago Hotel & Towers, Chicago

April 20 – 21
HomeLife 2006 National Conference
TitlePLUS sponsoring & exhibiting
Niagara Fallsview Casino & Resort, Niagara Falls

April 25
CIMBL Symposium & Trade Show
TitlePLUS exhibiting
Sheraton Saskatoon, Saskatoon

April 27
CIMBL Symposium & Trade Show
TitlePLUS exhibiting
Fairmont Winnipeg, Winnipeg

May 12
1st Annual Solo and Small Firm Conference and Expo
Law Society CLE
Dan Pinnington, practicePRO; Program Co-Chair and presenter
Law Society, Toronto

May 12
Middlesex Family Law Conference
Risk Management and Claims Prevention
Yvonne Bernstein, LawPRO
Best Western Wellington, London

May 10 – 13
Institute of Law Clerks of Ontario (ILCO) Conference 2006
TitlePLUS sponsoring & exhibiting
Blue Mountain Resort, Collingwood

May 17
TitlePLUS 2006 Conference
Toronto

May 25 – 26
The Sedona Conference Working Group Addressing Electronic Discovery and Production in Canada
Dan Pinnington, practicePRO
Mont Tremblant, Quebec

June 12
CIMBL Symposium & Trade Show
TitlePLUS exhibiting
World Trade Centre, Halifax

June 15
Toronto Real Estate Board (TREB) Trade Show
TitlePLUS sponsoring & exhibiting
Toronto Congress Centre, Mississauga

For more information on practicePRO events, contact practicePRO at 416-598-5863 or 1-800-410-1013 or e-mail dan.pinnington@lawpro.ca

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

LAWPRO • One Dundas St. W. • Suite 2200, P.O. Box 75 • Toronto, Ontario M5G 1Z3

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO®)

President & CEO: Michelle Strom

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Editor: Dagmar Kanzler
dagmar.kanzler@lawpro.ca

Contributing editors: Stephanie Wei
stephanie.wei@lawpro.ca

Dan Pinnington
dan.pinninton@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