LAWPRO MAGAZINE

communication breakdown

page #17

Is anyone listening? How to avoid communication claims

Let's talk talking: Communication & client service

Casebook: Communication – a 2-way street

Also

Claims consequences of incivility

Practice tip: Rule 48

Fraud scams looking very real

upcoming events

September 14
University of Toronto Centre for the Legal Profession
Top 10 most common professionalism or ethics mistakes and how to avoid them
Dan Pinnington presenting
Toronto, ON

September 15
ABA LPL
Top tips, tools and trends for LPL litigators
Storms in the clouds: Internet-based technology
Dan Pinnington presenting
San Francisco, CA

September 20
Professionalism & LSUC
Practice Management for Real Estate Lawyers
Lori Swartz presenting
Toronto, ON

October 5
OBA webcast
What to do when a fraud investigator comes to your office
Dan Pinnington speaking

October 7
Law Society of British Columbia's Pacific Legal Technology Conference
60 tips in 60 minutes: Time management tips and tricks
Dan Pinnington speaking
Vancouver, BC

October 14
ABA LPM Fall Meetings
Every lawyer's goal: Avoiding malpractice
Dan Pinnington presenting
Cape Cod, MA

October 15
University of Windsor
Interviewing clients
Jordan Nichols presenting
Windsor, ON

October 19
Georgian Triangle Real Estate Board's Technology & Trade Show for Realtors
TitlePLUS Department exhibiting
Blue Mountain Conference Centre
Collingwood, ON

October 20
Thunder Bay Law Association Fall Conference
TitlePLUS Department exhibiting
Victoria Inn
Thunder Bay, ON

October 28 to 29
Chambre des notaires du Québec
TitlePLUS Department sponsoring
Montreal, QC

November 15
Heenan Blaikie
How to practice safely and avoid claims
Dan Pinnington presenting
Toronto, ON

recent events

August 4 to 6
National Conference of Bar Presidents
TitlePLUS sponsoring
Royal York Hotel
Toronto, ON

Aug 2 to 4
National Association of Bar Executives Annual Meeting
Apptastic: Apps that make the bar exec's job easier
BlackBerry users' circle
Dan Pinnington presenting
Toronto, ON

Aug 4 to 9
ABA Annual Meeting
Courting disaster: Tools to help you create a disaster plan now
BlackBerrys and the practice of law
Dan Pinnington presenting
Toronto, ON

Aug 4 to 9
Title insurance litigation in Canada
Mitch Goldberg presenting
Toronto, ON

Aug 4 to 9
Title insurance litigation committee reception and LPM section Sam Smith award reception
LawPRO hosting
Toronto, ON

August 14 to 16
CBA CLC and Expo
TitlePLUS Department exhibiting
World Trade & Convention Centre
Halifax, NS

August 24
OBA "Excelling at Articles" program
Tips for avoiding a malpractice claim
Yvonne Diedrick presenting
Toronto, ON

August 24
OBA "Excelling at Articles" program
Tips for avoiding a malpractice claim
Lisa Weinstein presenting
London, ON

Contents

Volume 10
Issue 2
Fall 2011

ERRORS & OMISSIONS | CASEBOOK | PRACTICE TIP | TECH TIP

communication breakdown

Feature

Departments

In practice

Publications Mail Agreement No. 40026252

Return undeliverable Canadian addresses to:
LawPRO
250 Yonge Street
Suite 3101, P.O. Box 3
Toronto, ON M5B 2L7

LawPRO® (Lawyers' Professional Indemnity Company)

A clean slate

Perhaps it's the crisp quality of the air at this time of year, the early evenings or the fact that vacation time is generally behind us.

Or perhaps it's a hold-over from the excitement we felt as we embarked on a new school year or a new course of study – or watch our offspring embark on new academic adventures of their own.

Whatever the cause, for many of us fall is associated with a clean slate. It's a time to start over, to re-energize the good intentions with which we started the year and often to change direction.

It's in this vein that we present this issue of *LawPRO Magazine*.

Over the summer months, we spent some time re-imagining the look and feel of the publication: You'll notice the new design and new way it is organized as soon as you turn the page.

And for the inaugural issue of our revamped publication, we also took a new approach to an old issue – the preponderance of communication-related claims reported to LawPRO.

We asked our claims counsel to share practical advice and insights into how to avoid communication claims, in each area of practice. You'll find that advice starting on page 17 ("Is anyone listening?").

We examined research on the subject of lawyers and communication – and discovered that this is an issue that transcends professions and jurisdictions.

We looked at the whole issue of communication in a different way – as an integral part of the client service experience. How many times have you been less than happy with the way you were treated as a customer? Now project that experience into your practice: Are you providing your clients with the best customer experience possible? Our "Let's talk talking" article canvasses practising lawyers and a client service expert at the Rotman School of Business for their views on communication and client service, starting on page 23 of this issue.

Communication-related issues account for 45 per cent of the claims reported to LawPRO annually. Yet, as is clear from the articles in this magazine, these are also often preventable claims. Take the time to absorb the ideas and insights we share on this important subject. Look at your practice habits, your procedures and the overall client experience you are providing. Is there a lesson or two in the following pages for you to apply to your practice? Can you make this fall the start of a new way of doing things?

Two regular columns – the E&O column that examines insurance program-related issues, and the Insurance Biz column that provides insights into how we manage ourselves as an insurance company and why we make the decisions we make – also get a facelift in this issue. The former is an in-depth examination of the subject of mandatory insurance worldwide, initially prepared as a research paper for a presentation by a member of our claims team. It has been 17 years since this subject was explored in depth (during the insurance crisis of the mid-1990s): Given the number of new lawyers who have come into practice since then and may have little, if any, understanding of this subject, we thought it appropriate to share this excellent research effort with you. You'll find this discussion starting on page 10.

Complementing this article is a thorough explanation of how LawPRO – as a mandatory insurer – determines new insurance program coverages each year. We hope you find this discussion of our mandate and how we exercise it useful as we head into the annual insurance renewal season, which is expected to start in early October after our presentation to Convocation of the Law Society in September – and represents yet another beginning.

Kathleen A. Waters
President & CEO

New appointments in LawPRO claims departments

This summer has been a season of significant change for the LawPRO claims departments.

After 22 years with the Law Society and later with LawPRO, Vice-President, Specialty Claims **Jerzy Adamowicz** has retired. Adamowicz began his legal studies in Israel and continued them in Canada, obtaining a doctoral degree in Insurance Law from Osgoode Hall Law School in 1999. Before joining the E&O department of the Law Society, Adamowicz worked as a claims adjuster for a national insurance company. When LawPRO was created in 1994, he was promoted to the position of claims supervisor, and held progressively more senior positions with the company until he was appointed vice-president, Specialty Claims, in 2010. Adamowicz looks forward to having more time to travel and to enjoy the company of his wife Sophie, his children and grandchildren. We wish him a wonderful retirement

LawPRO is pleased to announce that **Simon Bernstein** is appointed vice-president, Specialty Claims. Bernstein – who joined LawPRO in late April as assistant vice-president, underwriting – will be drawing on his extensive experience in claims management, loss control and risk management as AVP for St. Paul Travelers Insurance Company for his new role.

The Specialty Claims Department also saw the promotion of **Mitch Goldberg** to the role of unit director and counsel, and the appointment, on a contract basis, of **Victoria Margolin** and **Joseph Juda** to the positions of claims counsel. Both had articles with LawPRO. Finally, the department welcomes **Katie James**, previously of the firm of Purser Dooley Cockburn Smith LLP, as claims counsel.

In the Primary Professional Liability Claims Department, **Jennifer Ip** and **Cynthia Martin** are each taking on more senior assignments as unit director and counsel, heading the two PPL litigation units, and **Dale Herceg** is appointed senior claims counsel in the PPL new claims group, headed by Unit Director Domenic Bellacicco.

Ray Leclair

appointed acting vice-president, Public Affairs

On July 1, 2011, **Ray Leclair,** formerly vice-president, TitlePLUS began a one-year term as acting vice-president, Public Affairs for LawPRO. Leclair assumed this role to better support the company's executive in promoting the presence and effectiveness of LawPRO's interactions with third parties and government, especially at Queen's Park in advance of the upcoming provincial election. Leclair will rely on his considerable public relations expertise in working with critical stakeholder groups to achieve key company objectives.

While Leclair assumes his new role, responsibility for the administration of the TitlePLUS department will be shared between co-acting department heads **Lisa Weinstein**, director, national underwriting policy, and **Mark Farrish**, director, sales and marketing.

LawPRO eliminates mailed paper applications

We anticipate that renewal applications for the 2012 policy year will be accepted online starting October 3, 2011.

Please note that LawPRO will not be mailing out paper renewal applications for the 2012 policy year. If you do not wish to file online, pre-populated renewal application forms will be available for download from our website (www.lawpro.ca) on or about October 3, 2011.

LAWPRO MAGAZINE

President & CEO: Kathleen A. Waters

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

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

Editor: Dagmar Kanzler dagmar.kanzler@lawpro.ca

Contributing editors: Megan Haynes megan.haynes@lawpro.ca
Dan Pinnington dan.pinnington@lawpro.ca
Nora Rock nora.rock@lawpro.ca

Design & Production: Freeman Communications studio@freemancomm.com

Photography: Rick Chard rickchard@bmts.com
The Canadian Press cpimages.com

LawPRO advises Manitoba insurance council: Lawyers should not need insurance agent licences for title insurance

Following LawPRO's advocacy on their behalf, Manitoba lawyers who recommend title insurance to their real estate clients may avoid having to obtain insurance licences. Before receiving our written and oral arguments on the lawyers' behalf, the Insurance Council of Manitoba (ICM) had considered recommending this requirement – one that would have made the province's lawyers the only ones in Canada subject to regulation by two separate bodies for their conveyancing work.

The ICM was considering a system of restricted agency licences in a number of areas, including title insurance, and had law firms on the list of organizations being considered for regulation. Earlier this spring, after learning that the ICM had started its consultation process on this idea, LawPRO prepared a cogent written submission opposing the proposed requirement.

Representing LawPRO in an appearance before the ICM, Ray Leclair, acting vice-president, Public Affairs reinforced LawPRO's position that:

(1) there is no value to be gained by requiring law firms to obtain restricted agent licences for the sale of title insurance; in fact, there may be a detriment; and
(2) the involvement of a lawyer should be mandatory in the sale of title insurance, so there should be no incidental selling allowed by others on the proposed list of organizations. In other words, title insurance should be removed from the list of classes of insurance for which a restricted agent licence may be issued.

Leclair explained that we were unable to identify any benefits that would accrue from having an insurance regulator licensing law offices where lawyers assist clients in obtaining title insurance in the course of providing legal advice. Clearly the professional practice of law is already a well-supervised and regulated undertaking. Lawyers have their own rules of professional conduct administered by provincial governing bodies and are subject to fiduciary duties. They have mandatory professional liability insurance and must meet the education standards of their own regulator. Data on members of the profession and their office locations is kept by the provincial law society.

On the question of whether anyone other than lawyers should be given restricted licences to sell title insurance, LawPRO maintained its long-standing position that title insurance is a valuable complement to the Canadian real estate system but only when it is recommended and implemented by a lawyer (or notary in Quebec) in the context of his/her professional and fiduciary obligations to the client. By maintaining the centrality of legal advice for purchasers and lenders, from a fiduciary who is required to put their best interests first, owners and lenders can in fact have the best of both worlds: Excellent advice and legal services, and the comfort of insurance protection for the occasional times when a problem is identified after closing. Therefore, LawPRO recommended that the involvement of a lawyer should be mandatory in advising about title insurance.

Subsequent to our written and oral advocacy, we learned that the ICM has omitted lawyers and title insurance from its draft Regulatory Framework, which sets out a list of categories of professionals and businesses identified as requiring licensing for specified classes of insurance. If the current draft of the framework is adopted in the proposed licensing regulation (which may be in place as early as this fall), Manitoba lawyers will, thanks in part to LawPRO's submissions, be free to recommend title insurance for their clients without being required to seek a form of insurance agent licensing.

keyDATES

September 15, 2011

File your LawPRO CPD Declaration by this date to qualify for the $50 premium discount for each LawPRO-approved CPD program (to a maximum of $100) completed by this date. Go to www.lawpro.ca/cpddec to file your declaration. Please note that filing for LawPRO CPD credits is not the same as reporting CPD hours on the Law Society CPD portal.

On or about October 3, 2011

Online filing of Professional Liability Insurance applications for 2012 is expected to begin at www.lawpro.ca.

October 31, 2011

Real estate and civil litigation transaction levies and forms are due for the quarter ended September 30, 2011.

November 1, 2011

E-filing deadline: Applications filed online by November 1, qualify for a $25 per lawyer e-filing discount applied to the 2012 insurance premium.

November 8, 2011

Application filing deadline: 2012 LawPRO insurance applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium.

practicePRO® Reaches out to new lawyers

Did you know that the practicePRO website has a whole section devoted to lawyers new to the practice of law?

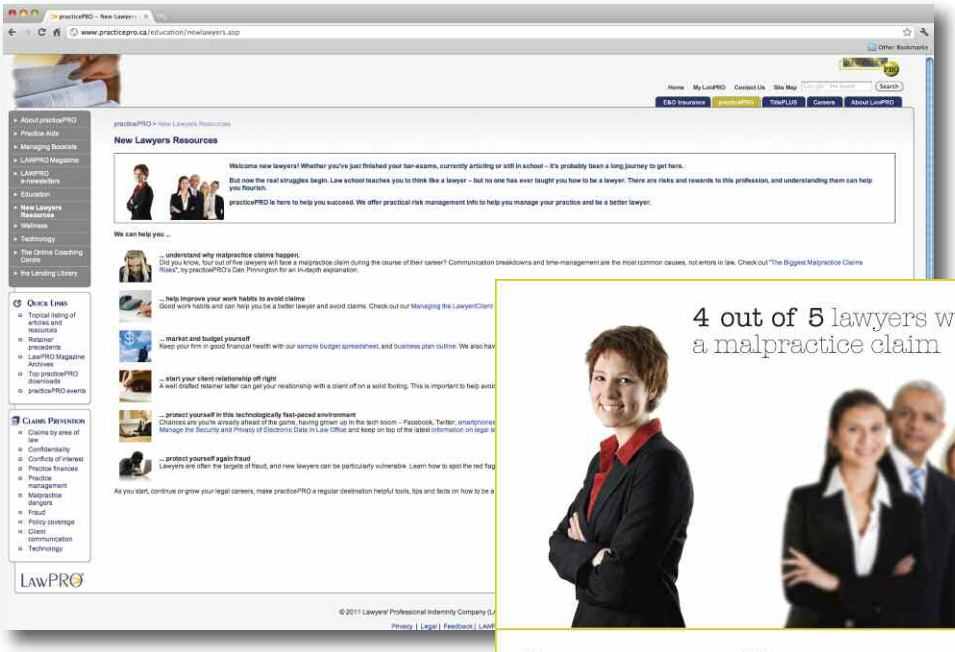
The section, accessible at www.practicepro.ca/newlawyers, has been developed not only for practising lawyers but also for students still at law school or in their articling period. Because professional malpractice is better avoided than remedied, it's important that new lawyers develop a good understanding, early on, of how practice problems develop and how to avoid them.

The section contains a wealth of links to practical resources to help lawyers develop good business and professional habits. Resources include:

- booklets on *Managing the Lawyer/Client Relationship* and *Building a Better Professional Services Firm*;
- guidance and precedents for creating a business plan and a budget spreadsheet; and
- retainer letter templates.

Lawyers will also find links to useful information about how to reduce their exposure to common practice risks. For example, we have resources about how to use Twitter for professional purposes, and how to ensure that use of social media and technology is consistent with the protection of privacy interests. Finally, lawyers can access frequently-updated information about scams and fraud attempts targeting the bar on the AvoidAClaim blog (avoidaclaim.com).

The website is part of a LawPRO program to reach out to future and new lawyers at law schools and other venues.



At right: Ad promoting practicePRO's resources for new lawyers that ran in several law school yearbooks this spring.

TitlePLUS website gets a facelift

Simple, intuitive and functional: Those were the benchmarks set for the new TitlePLUS website by its project manager Marcia Brokenshire, TitlePLUS marketing services manager.

"We wanted to make the site easy for lawyers, their staff and their clients to use – to put the information and the resources they might need at their fingertips," she explains.

The site, which goes live in mid-September, is built around a few principal sections:

- The **About Us** tab links to background information on the TitlePLUS program and LawPRO. Lawyers may find the legal services description page particularly useful, says Brokenshire: "It's written to make it easy for consumers to understand the legal services coverage and why that is so important and special."
- Under the **Products and Services** tab, subscribers and their staff will find links to many of the documents and information sheets they use regularly: The TitlePLUS Tools link, for example, provides easy access to Quick Facts, Pricing, and other information organized by region. Other important links take lawyers to TitlePLUS Hotsheets, the Confirmed Lenders List and more.
- A new **Policyholder Information** tab includes a sample TitlePLUS policy and links to a claims reporting form, two resources clients ask about the most.
- A **Publications** tab links to the many publications and information brochures produced by the TitlePLUS department to provide information to lawyers and their clients.
- A **Resources** tab, on the other hand, links to resources to help lawyers in their communication with clients, such as the *Working with a Lawyer When You Buy a Home* brochure.
- **Locate a Lawyer** lets consumers enter a postal code or city and source a list of TitlePLUS lawyers in that area.
- The **Real Simple Real Estate Guide**™ link contains an extensive list of consumer-oriented resources to help consumers better understand the intricacies of buying or mortgaging a property. It includes calculators to help consumers understand how much of a mortgage they can carry and how long it will take to pay it off, among other tools.

™ Trademark of Lawyers' Professional Indemnity Company

Get to know your local lenders:

TitlePLUS toolkit shows you how

Getting to know mortgage lenders in the community is vital if lawyers want their fair share of lenders' legal work. With that in mind, TitlePLUS consultants are stepping up efforts to help lawyers put the TitlePLUS toolkit – *Tools To Help You Get Legal Work From Local Lenders* – to work for them.

The toolkit is one of the many resources available to lawyers through the **Publications** tab of the new TitlePLUS website. It provides lawyers with eight simple steps to effectively promote themselves to local mortgage lenders. It also provides links to a sample contact list, an introductory letter and other resources that would help lawyers better promote their legal services and establish valuable contacts and business leads.

One important point the toolkit makes is that the TitlePLUS program is different. It is the only all-Canadian and Bar-Related® title insurer, and works to keep local real estate lawyers across Canada involved in real estate transactions. Unlike some other title insurers and/or their affiliates, the TitlePLUS program does not operate or send work to document processing centres; instead, it encourages consumers to work with lawyers so that they can receive valuable independent legal advice.

The toolkit can be found on the TitlePLUS website. More information is also available from Mark Farrish, Director of Sales & Marketing, TitlePLUS, at 416-598-5866.

® BAR-RELATED is a registered Mark of North American Bar Related Title Insurers used by LawPRO under License.

Fraud update: Real-looking scams

require lawyers to be warier than ever

Don't be a dupe: That's the advice from those who were fooled.

In the months of July and August alone, hundreds of lawyers have provided LawPRO with emails seeking to retain them on bad cheque frauds. The most common scenarios are loan or debt collections and spousal support payments. (If you get obviously fraudulent emails, please forward them to fraudinfo@lawpro.ca.)

Dozens more have called looking for help in determining whether a matter they were handling was a legitimate one. In many cases we have recognized the name of the fraudster, the scenario and/or the text of the email. And where we don't recognize the fraud, the members of the LawPRO fraud team can use the collective experience of having seen many frauds to determine if a matter may be fraudulent. On a few occasions, we have seen matters that were highly suspicious, but still may have been legitimate retainers.

Clearly Ontario lawyers are more aware that they are the targets of fraud, and they are becoming more adept at recognizing frauds. That is good. But we see some complacency, too. We frequently hear comments such as "I would never be fooled," or "How would anyone fall for one of these frauds?"

But some are falling for these frauds, acting through at least the initial stages of collecting information, sending a demand letter and communicating with the debtor – who just happens to call up wanting to pay immediately after getting the demand letter. And there are some lawyers who go all the way and are successfully duped into disbursing funds from their trust accounts. This happens more often at solo and small firms, but the biggest firms are not immune either.

One lawyer said to us: "I was suspicious at the start, but the client called several times, provided me with an Ontario driver's license as ID and a bunch of documentation. He led me along and I got fooled. I feel stupid that I fell for it."

Some of those who were duped were saved when the teller or the bank detected that the cheque was counterfeit. But don't rely exclusively on the banks to protect you: They get fooled too. These counterfeits are really good. They will be in colour, on decent paper, and have holographs and watermarks.

In one recent case, a lawyer faxed to the bank a copy of a cheque drawn on the account of a major Canadian retailer. The bank replied that the signatures on the cheque matched what was on file and that the cheque looked good. The lawyer was told "out of an overabundance of caution you may want to contact the company to verify that the cheque is good." The lawyer did so and it was confirmed that the cheque was bad. The fraud was one we had reported on the AvoidAClaim blog (avoidaclaim.com).

Frauds getting ever better

The fraudsters are changing it up to make fraudulent matters appear more legitimate.

We are seeing more phone calls or personalized emails as the initial contact (not generic BCC blasts to many people). We are also seeing new fake client names more frequently. In the sidebar to the right we list the new and most common names we've seen at LawPRO in the last two months. But just because a name does not appear on this list does not mean you can stop worrying. New names are being used by fraudsters daily.

While in the past the fraudsters would sign retainer agreements and promise retainer cheques, they are now providing actual retainer cheques (which are fake of course), typically on a U.S. account. Banks will accept these for deposit, but will put a hold on them. Of course, a payment on the debt collection matter magically shows up from the debtor a day or two later, before the bogus retainer cheque bounces.

What to do if you are suspicious

If you have even the slightest suspicion that the matter you are handling isn't legitimate, ask questions and dig deeper, especially if

Names in fraud scams

The following are some of the most common names that crop up in fraud scams. Click on the Confirmed Frauds button at the AvoidAClaim.com blog to see a full listing of confirmed frauds.

Commercial debt collection fraud:
Steven Bessant
Tom Paplia
Mark Branson

Business loan fraud:
George Graham
Larry Mason
Christine Gilbert

Real estate bad cheque fraud:
Shiukmoda Joji
Jyoung Chung Tu

Divorce settlement & collaborative family law agreement fraud:
Beverley Kawashima
Elizabeth Nakamura
Zaira Hoshiko

Employee injury settlement fraud:
Graham Jackie Lynn
Sullivan Terry

the facts don't add up or are inconsistent. Click on the confirmed frauds button at the AvoidAClaim.com blog to see a full listing of confirmed frauds. (avoidaclaim.com/?pageid=1479). Search the client's name on Google. Cross-check names, addresses and phone numbers.

If you still aren't sure, call LawPRO for some direction. We will walk you through the common fraud scenarios we are seeing and help you spot red flags that may indicate you are being duped. This will help you ask appropriate questions of your client to determine if the matter is legitimate or not. If the matter you are acting on turns out to be a fraud and there is a potential claim, we will work with you to prevent the fraud if possible, and minimize potential claims costs.

If you have been successfully duped, please immediately notify LawPRO as there may be a claim against you.

For more immediate updates on fraud and claims prevention, subscribe to the email or RSS feed updates from LawPRO's AvoidAClaim blog.

Fraud Fact Sheet

More fraud prevention information and resources are available on the practicePRO Fraud page (www.practicepro.ca/fraud), including the Fraud Fact Sheet, a handy reference for lawyers and law firm staff that describes the common frauds and the red flags that can help identify them.

Ultimately, if you are not completely sure a matter is legitimate, terminate the retainer. Don't be sucked in by your emotions or a strong desire to help. Don't let the lure of a generous fee cause you to ignore your concerns as to the legitimacy of a matter. If it looks too easy or sounds too good to be true, it probably is.

Two new members
appointed to LawPRO board of directors

The following have been appointed to the LawPRO Board of Directors.

Susan T. McGrath

A sole practitioner from the northeastern Ontario community of Iroquois Falls, Law Society Bencher, Susan McGrath is well-known for being a dedicated advocate for sole practitioners, small firms, and lawyers working in remote areas, and for their access to quality continuing legal education and peer support.

Since graduating from Osgoode Hall, McGrath has been an active member of her local legal community as well as contributing at the national level. She has served on her local Legal Aid Area Committee, including a stint as deputy area director, has acted as a deputy judge for the Temiskaming Small Claims Court, and has served on the Personal Rights Panel of the Office of the Children's Lawyer.

She has served as president of the Cochrane Law Association (1983-1984), the Ontario Bar Association (1999-2000), and the Canadian Bar Association (2004-2005). As well, she has served in many capacities on committees of these and other legal associations.

Barbara Murchie

An interest in intellectual property issues that she dealt with as a producer/director for major television networks prompted Law Society Bencher Barbara Murchie to embark on a legal career in the late 1980s – and remains the central focus of her litigation practice as a partner and trademark agent with the firm Bennett Jones LLP today. She has also provided advice in the areas of professional and municipal liability, product liability, and construction law while working at both small and large Ontario firms.

During her 25-year legal career, Ms. Murchie has held leadership and teaching/training roles with many organizations, including The Advocates Society, of which she was a director from 2002 to 2005, and Osgoode Hall Law School. Her commitment to lawyer education and advocacy training extends to her firm where she is co-director of the in-house advocacy training program.

She is a member of a wide array of lawyers' associations, including the Intellectual Property Institute of Canada, OBA, CBA, Toronto Lawyers Association and the Women's Law Association of Ontario. In recent years, she has extended her advocacy beyond the legal sphere through her roles as chair and director of the Casey House Foundation (1996-1999) and chair and director of Ovarian Cancer Canada (1999-2010).

eBRIEFS

Here's a summary of some of the electronic communications you may have received from LawPRO this spring and summer.

To ensure you receive our Alerts, Insurance News bulletins and Webzines, please whitelist service@lawpro.ca.

You can access the full content of any e-newsletters at www.practicepro.ca/enews.

Webzines


LawPRO Webzine

April 26, 2011 Send this to a friend

This special LAWPRO Webzine has been created exclusively for lawyers practising family law. The articles offer practice specific advice, cases making waves before the courts, and helpful tools just for you.

Family law: still a risky business
Family law malpractice claims are rising. With a rapidly evolving legal landscape, family lawyers must adopt best practices to avoid future problems. more

Waiver of survivor pension rights: Getting the release right
Leading family lawyer, Phil Epstein, partner with Toronto firm Epstein Cole LLP, offers an examination of the implications of **King v. King** and pension reform legislation. more

Independant legal advice checklist
Check out Phil Epstein's easy-to-use sample ILA checklist. more

Beware the dangers of representing family and friends
An analysis of LAWPRO claims files tell us there is a greater likelihood of a fraud or conflicts of interest issue when clients are

Key Dates

April 30: Transaction levies and forms due.
July 31: Transaction levies and forms due.
Sept. 15: CPD credit filing deadline.
Oct. 31: Transaction levies and forms due.
Nov. 1: E-Filing renewal application discount deadline.
Nov. 8: Renewal insurance coverage filing deadline.

Quick Links

File online
Address changes
Report a claim
Order materials

Wills and Estates Law Webzine
August 23, 2011

Tips on how to avoid common will-drafting pitfalls; raising awareness of family law issues with an impact on wills; and a summary of recent cases in this area.

2010 in review; twitter for lawyers, administrative dismissals
June 13, 2011

Announcing our most recent issue of the magazine; providing "do's and don'ts" for Twitter users; and Part 2 of our focus on administrative dismissals.

LawPRO annual report now available online
May 12, 2011

Highlights of and links to our annual report.

Insurance News


LawPRO Insurance News

March 14, 2011 Send this to a friend

2010 Transaction Levy Filings Overdue

An audit of our records indicate that we have not yet received all your 2010 transaction levy filings.

We ask that you please review your files to ensure that all of your 2010 transaction levy filings are up to date, and to remit any outstanding levy filings and associated payments to LAWPRO as soon as possible.

If your records indicate that you have filed all your 2010 transaction levy forms and remitted any associated payment(s) and you receive this email in error, we apologize, but ask that you contact our Customer Service Department so that we may verify our receipt of your filing, as we may have received your filing(s) after this email was generated.

As a suggestion, you may wish to make a note in your calendar of the 2011 key dates as noted below:

2011 Key Dates

January 31
Transaction levies and forms are due for the quarter ended

Hot Topics

Avoid A Claim Blog
Follow LAWPRO on Twitter
Fraud Prevention

Quick Links

File online
Address changes
Report a claim
Order materials

One month left to file your CPD credit with LawPRO
August 16, 2011

Reminder of September 15 deadline for filing declaration to receive credit of up to $100 on 2012 premium invoice for LawPRO-approved CPD courses taken between September 16, 2010, and September 15, 2011. Plus reminders of second quarter transaction levy filings and the fact that this year applications for insurance coverage will have to be submitted electronically as no paper applications will be available.

Transaction Levy Filings Overdue
August 9, 2011

Notice to lawyers who had not made their litigation or real estate transaction levy filings and/or payments by the April 30, 2011, deadline.

Alerts


LawPRO Alert

ATTENTION

July 27, 2011 Send this to a friend

New frauds different & daring: Know what to watch for
July is shaping up to be LAWPRO's busiest month ever when it comes to new frauds being reported to us: We've heard from more than 200 lawyers and have seen 29 daring frauds using new scenarios or new names. And the frauds are becoming more sophisticated. The fraudsters will contact you directly (via email, phone calls and firm website intake forms); the address and contact information they provide will make it appear that one of the parties on the matter is local to your area.

Be extra vigilant as we approach the Simcoe Day weekend! Not only is there increased fraud activity right now, but from experience we know that fraudsters are more active just before long weekends and holidays.

Read this Alert and visit the AvoidAClaim.com blog for more information on the types of frauds LAWPRO is seeing, the red flags of fraud, and what to do if you suspect you're being targeted or have been duped. more

Quick links

AvoidAClaim
Fraud Fact Sheet
Report A Claim
Follow us on Twitter

Subscribe | Unsubscribe | Contact us

About LAWPRO Alert:

Resources for Lawyers of Goderich
August 22, 2011

We sent out an alert to lawyers in the Goderich area offering resources and support to those affected by the tornado.

Fraud Activity at Record Levels
July 27, 2011

A warning that July 2011 was shaping up to be an all-time high in fraud reports, with more than 200 fraud attempts reported, and advice on how to avoid becoming the victim of a fraud.

Canada Day Fraud Warning
June 29, 2011

A reminder that fraud and scam attempts have been on the increase this summer and frequently spike just before weekends and holidays.

Keeping in touch if Canada Post strikes
June 2, 2011

Instructions on how to reach us in the event of a postal strike.

Mandatory professional indemnity insurance & a mandatory insurer:

A global perspective

The recent lawyers' malpractice insurance crisis in the United Kingdom offers a stark reminder of the value of Ontario's scheme of universal access to professional liability insurance.

Crisis in the UK

In the spring of 2010, UK bar associations warned members that the fall insurance renewal deadline was expected to be "difficult."[1] As many lawyers already knew from their dealings with insurers over the previous year, this warning would turn out to be a colossal understatement. Lack of access to affordable professional indemnity insurance for the 2009/2010 and 2010/2011 insurance years has since forced dozens of law firms in England, Ireland and Wales to shut their doors.

Like Ontario lawyers, UK lawyers are required, as a condition of remaining licensed, to obtain a malpractice insurance policy with set minimum terms. Coverage limits are prescribed for UK firms as a whole, not for individual lawyers: a firm that is not a corporation must have coverage of at least £2,000,000 (almost $3.3 million CAD) per claim; and an LLC must have £3,000,000 (more than $4.8 million CAD) coverage per claim. Defence costs must also be covered, and no aggregate limit is permitted.[2] Unlike their Ontario counterparts, UK lawyers must look to the open insurance market (actually, to a list of approved providers) to obtain this coverage.

The UK mandatory insurance requirement dates to 1975. Between 1975 and 1986, UK lawyers purchased insurance from commercial providers through a specialized broker. By 1984, only one provider was offering

coverage. In 1987, to ensure access to insurance for the profession, the open-market system was replaced by the Solicitors Indemnity Fund (SIF). The SIF was the exclusive provider of insurance to the profession until 2000, but it struggled, running up a potential £450 million (roughly $720 million CAD) shortfall by 1997, and imposing an expensive seven-year top-up to stabilize itself. Disillusioned with the fund, members of the profession voted in 2000 to decide its fate: A 70 per cent majority supported a return to buying insurance in the open insurance market.[3]

That market proved volatile. In the wake of the recent global recession, property values plunged, and there was a spike in mortgage fraud and money laundering activity. The insurance market responded by hardening dramatically. Estimates were delayed; the window of time for accepting insurance offers contracted; and premiums swelled, in some cases to over 400 per cent of 2007 levels.

Leading up to the fall 2009 mandatory insurance renewal deadlines, it became clear that a large number of UK firms – especially small and mid-sized – would be forced to shut their doors even if permitted to join the national Assigned Risks Pools (ARPs) – facilities offering punitively-priced coverage for the hard-to-insure. And then the Irish ARP folded.

While the English ARP continued coverage for existing clients for the 2009/2010 insurance year, it capped contracts at 12 months and closed the door to new applicants. The English ARP will be discontinued in time for the 2013 renewal. When the dust finally settles, it is likely that the loss of ARP coverage in Ireland and England will have dealt a fatal blow to at least two hundred firms.[4] The rest of the profession and the commercial insurance market will share responsibility for the claims orphaned by the loss of the ARPs, with insured lawyers on the hook for the first £10 million in aggregated claims. Going forward, when firms that would have been destined for the ARP are forced to cease operations due to lack of access to coverage, each defunct firm's last insurer will be required to provide tail coverage for six years.[5]

For the firms that have managed to weather the storm, survival has come at a high price. In a September 2009 article in the English *Law Gazette*, a London lawyer working in a two-partner firm reported that he would be closing his practice after receiving a quoted premium of £110,000 (nearly $200,000 CAD, and equivalent to 25 per cent of the firm's annual turnover).[6] Premium increases were triggered in part by the need to subsidize the ailing ARPs, and were especially galling in the face of reductions in the scope of coverage. Insurers have also become less generous in their acceptance of claims, refusing coverage in situations where lawyers other than the insured (but working in the same firm) have been dishonest. In the September 2010 edition of its newsletter, English insurance law firm Legal Risk LLP took a bleak view of the developments, lamenting that "the small high street firm may be all but gone forever."[7]

Lessons for Canada

Could a similar fate ever threaten Canadian firms?

It's easy to point out that if it were not for the UK's mandatory insurance scheme, some of the defunct firms could have foregone unaffordable insurance and soldiered on. This suggestion, however, ignores the reality that the insurance crisis was not fabricated, but rather was triggered by a recession-driven spike in fraud, falling real estate values and associated claims. A more rigorous post-mortem analysis makes it clear that problems with access to coverage – and not the coverage mandate itself – led to the calamity in the UK. Without the compulsory coverage, many of the same firms would likely have collapsed under the weight of claims, leaving the public unprotected and a spreading stain on the reputation of the surviving bar.

It would be irresponsible not to view the UK situation as a reminder to reflect on our choices here in Canada and more particularly, in Ontario. Should lawyers here be required to carry professional indemnity insurance? And if so, what kind of professional indemnity insurance arrangement should be in place to accommodate legal practitioners? These are questions considered around the world by regulators and law associations.

In most common law jurisdictions, professional indemnity insurance for lawyers is made mandatory by law or by law society or bar association regulation.[8] Besides requiring that practising lawyers have liability insurance, these law societies typically prescribe and/or implement various types of insurance arrangements to help lawyers comply. This article provides a global perspective on the benefits of a mandatory professional indemnity insurance program and a mandatory insurer regime for lawyers.

Mandatory professional indemnity insurance: background

A review of approaches elsewhere shows that requiring practising lawyers to buy professional indemnity insurance with minimum terms is popular among many jurisdictions. Some of the reasons that have prompted regulators in different jurisdictions to implement the compulsory insurance programs include:

Protecting the public interest

Many law associations have faced the challenge of balancing their duties to the public and to the legal profession. In doing so, many noticed that some lawyers were either not purchasing errors and omissions insurance, or were under-insured, resulting in clients being unable to collect on losses they suffered as a result of successful lawsuits against lawyers.

Legal regulatory leaders have also expressed concern about the varied policy terms available in a voluntary insurance market. Even where lawyers obtain insurance on their own initiative, differences among policies can expose some lawyers and their clients to potentially dangerous gaps in coverage.

Mandating that lawyers hold professional indemnity insurance that incorporates a minimum set of terms has been promoted as one way to provide some protection to the public. In offering this protection,

mandatory insurance helps maintain public confidence in the legal profession.

Mandatory insurance also helps redress certain inequities in the insurance status of lawyers practising in the same jurisdiction. Critics have suggested that those lawyers who might otherwise remain uninsured but for the requirement that they carry professional indemnity insurance would "free-ride" on the profession's reputation and liability standards.

When "caught" with a claim that these lawyers could not satisfy, these "free-riders" could negatively affect the reputation of the profession. Scandinavian regulators, for example, cited this as a problem for the profession, offering it as one reason for requiring that members be insured.[9]

Protecting lawyers' financial interests

Of course, protection of lawyers' financial interests is another important benefit of compulsory insurance. It is important to provide some protection against forcing a lawyer into bankruptcy, either due to the financial burden of judgments or settlements or from the cost of defending meritless claims. In a litigious environment and with an increasing number of self-represented claimants, this is of particular importance to lawyers. Fostering a financially healthy and diverse bar is also promoting – indirectly – access to justice.

Legal profession as group risk

In deciding to introduce compulsory insurance, the Malaysian law society explained that mandatory insurance allowed Malaysian lawyers to view themselves as a cohesive profession, and not as stand-alone risks. The Law Society of Malaysia found that before malpractice insurance became compulsory, insurers offering this form of insurance favoured the larger firms – a problem because, in 2010, 66 per cent of the lawyers in the country practised either as sole practitioners or in two-lawyer firms. In addition, lawyers practising in high-risk areas such as conveyancing would have difficulty obtaining and sustaining professional indemnity insurance if it were not made mandatory.[10]

Even playing field regardless of firm size

The Malaysian bar has also asserted that mandatory insurance helps level the playing field as it helps sustain a range of firm sizes, giving clients more choice in the marketplace.[11] There is a suggestion that before the mandatory insurance requirement, clients were more likely to gravitate toward larger, more established, and more often insured firms, resulting in small-firm lawyers having difficulty competing for business.

Even playing field regardless of jurisdiction

The Hong Kong and Singapore bars both view compulsory professional indemnity insurance for their lawyers as essential to maintaining competitiveness in financial, trade and commercial services, and to being on equal footing with firms in other mandatory insurance jurisdictions. Since most common law jurisdictions require mandatory insurance for lawyers, clients will expect the same level of protection for inter-jurisdictional trade and commerce.[12]

The U.S. experience

Calls for the introduction of mandatory malpractice insurance for lawyers arise regularly in jurisdictions without the requirement, including in many areas of the United States. Opinions about the issue are typically divided, with critics warning that compulsory insurance would drive fees higher, and that other programs (for example, funds to compensate the victims of lawyers' criminal acts) provide adequate protection.

For example, in an article in the *Connecticut Law Tribune*, lawyer and blogger Susan Cartier-Liebel, a business consultant for solo and small firms, warned that malpractice insurance is designed to protect the assets of the (lawyer) policyholder as much as it is for the protection of the public, and that having insurance will not curb the insured's criminal behaviour: "[i]f you have a criminal mind, you have a criminal mind." In Cartier-Liebel's view, especially where a lawyer has few assets to protect, making an independent decision about the purchase of insurance is "the right and privilege of each attorney and business owner based upon their own risk-tolerance."[13]

However, when Cartier-Liebel posted her article to her blog, visitors countered that client claims are often based not on a lawyer's criminal acts, but rather on innocent errors. (Many professional indemnity insurance policies exclude coverage for losses caused by a lawyer's dishonest or fraudulent acts anyway.) While the Connecticut bar has a fund in place to compensate victims of lawyer dishonesty, clients with claims based on innocent error are unprotected. When clients find themselves unable to collect in these cases, the reputation of the entire bar suffers.

Just as controversial in the U.S. is the question of insurance status disclosure requirements. Many states have passed legislation requiring uninsured lawyers to disclose, in writing, that they do not have insurance coverage.[14] Critics of this requirement argue that the rule draws unwelcome attention to insured lawyers' coverage, which these critics suggest is tantamount to inviting the client to sue in negligence any time a legal action is unsuccessful. However, there is scant evidence, either in the U.S. or in any other jurisdiction, that this threat has actually materialized in the form of an increase in frivolous claims.

American bar associations will likely continue to grapple with the issue of mandatory insurance. However, the trend toward requiring disclosure of lack of insurance (disclosure is now required by law, either at the outset of the retainer or in response to client inquiry, in approximately 50 per cent of states) suggests that interest in mandatory insurance is growing in the U.S.

While only the state of Oregon has so far made insurance coverage mandatory, other states are looking seriously at the issue, including New Jersey, where certain kinds of legal service providers – professional corporations, limited liability companies, and limited liability partnerships – must carry a minimum of $100,000 worth of coverage for each member. In an article in the *New Jersey Law Journal*,[15] legal analysts Bennett

J. Wasserman and Krishna J. Shah urged that the New Jersey mandatory insurance provisions be extended to all lawyers, not only for the protection of the public, but to make malpractice insurance more affordable: "[M]ore lawyers covered by insurance would mean more premium dollars to the insurance industry and thus lower premiums overall. If ever there were a 'win-win' situation, this is it." The typical range for U.S. legal malpractice premiums in many states is currently $5,000 to $10,000 per year.

With mandatory insurance, who will be the insurer?

In compulsory insurance jurisdictions, regulators generally designate, endorse or establish an insurance scheme to achieve the objectives of the program. Law societies in many common law jurisdictions have moved toward self-insurance schemes for the primary compulsory layer. The structure and the operating procedures for these programs vary depending on the circumstances of each jurisdiction and the terms of the governing legislation under which the lawyers and the law societies operate.

The mandatory captive insurer regime

Some jurisdictions have implemented mandatory captive insurer regimes.

Australia

In New South Wales, Australia, all lawyers obtain insurance through LawCover Pty Limited, a wholly owned subsidiary of the Law Society of New South Wales.[16] In Queensland, Lexon Insurance Pte Ltd is a wholly owned subsidiary of the Queensland Law Society, and is the captive insurer providing professional indemnity insurance to members of the Queensland legal profession.[17] In Victoria, lawyers are required to maintain professional indemnity insurance with the Legal Practitioners' Liability Committee.[18]

United States

Oregon is currently the only state that requires lawyers to carry liability insurance. Oregon lawyers must purchase their primary insurance through the Oregon bar's Professional Liability Fund.[19] In an article for *Law Practice TODAY,* the newsletter of the Law Practice Management section of the American Bar Association, law practice management expert, Ed Poll praised the Oregon program for its affordable premiums and universal coverage, noting that the premiums paid by Oregon lawyers "are much less than the nationwide average [voluntary] payment for malpractice insurance," and that universal coverage in Oregon means that "[t]he playing field between large and small firms is at least manageable. And the public is truly protected."[20] Jeff Crawford of the Oregon bar's Professional Liability Fund confirmed that the base premium for the current insurance year is $3,500 (for coverage of $300,000 per claim and $300,000 in the aggregate, plus a defence costs allowance of $50,000), a premium amount that, he notes, "if you consider inflation, has remained quite stable over the past several years."

Canada

In British Columbia, a practising lawyer must purchase compulsory insurance through the LSBC Captive Insurance Company Ltd., a wholly owned subsidiary of the Law Society of British Columbia.[21]

In Quebec, the Professional Liability Insurance Fund of the Barreau du Quebec was established to provide insurance for the bar.[22] LawPRO is the mandatory insurer for practising lawyers in Ontario and is a subsidiary of the Law Society of Upper Canada.

Lawyers in all other Canadian jurisdictions effectively insure each other by participating in a reciprocal inter-insurance exchange called the Canadian Lawyers' Insurance Association (CLIA).

Benefits of a single mandatory insurer

The advantages of requiring all practising lawyers in a jurisdiction to acquire errors and omissions insurance from a single mandatory insurer are significant.

Robert Andrew Scott, past president of the Law Institute of Victoria, Australia, once observed that if lawyers were forced to find insurance on the open market, commercial insurers would likely insure only those lawyers they considered worth the risk. Even where lawyers found coverage, small mistakes leading to a large claim might, he predicted, impact a solicitor's premiums so substantially that he or she would no longer be able to practise law. Commercial insurers, he concluded, would *de facto* decide who may or may not practise law.[23]

As explained at the beginning of this article, Scott's warning has proven prophetic with respect to the UK insurance market. When factors such as the collapse of the housing market caused the professional indemnity market in Europe to harden,[24] many lawyers were forced out of practice when they became unable to obtain or afford coverage.

This result would likely have been avoided had the UK chosen instead to designate or create a single mandatory insurer. Reliance on

a captive insurer can protect the profession from adverse economic conditions and the vagaries of the cyclical insurance market. While captive insurers may be permitted to refuse insurance to a small percentage of lawyers with very poor claims histories, these programs generally are not at liberty to turn away lawyers considered higher-than-average risk from an underwriting standpoint.

In a mandatory insurance jurisdiction, being the insurance provider for all lawyers allows a captive insurer to rely on a predictable pool of clients. If the captive insurer is well-managed, that predictability, along with access to a critical mass of clients, can make it easier for the insurer to determine adequate funding levels, which helps to stabilize premiums.

Commercial insurers, on the other hand, focus on maximizing profit and will charge their premiums accordingly.[25] The Queensland Law Society prides itself on its insurance scheme that has protected its lawyers from increases in professional indemnity premiums of up to 1,000 per cent, as seen in other professions.[26]

Perhaps the greatest benefit of a captive insurer, however, is that its management focus targets the needs of a specific profession within a particular jurisdiction. In serving all insurance clients in a jurisdiction, the captive professional liability insurer can have at its disposal a complete picture of the different types of claims experience in a particular jurisdiction and in all areas of law. This focus promotes accurate identification and analysis of claim trends. Data analyzed in this manner is invaluable in support of the development of carefully-tailored risk management strategies that can be communicated to the profession through education initiatives.[27] Implementing risk management strategies helps to reduce claims costs and to keep premiums relatively stable.

Successful profession-specific insurers do not focus only on historical claims trends, but also take a prospective view of future changes and challenges likely to affect the profession. Because their mandate is to make insurance accessible to all lawyers regardless of market conditions, captive insurers must show leadership and foresight if they expect to live up to their commitment to protect lawyers and their clients throughout the insurance cycle. Focused research and analysis allows these insurers to plan accurately and early for contingencies, to adapt quickly to developing problems, and to tailor products and services to client needs within a specific jurisdiction.

Mandatory insurance program and a mandatory insurer: Ontario lawyers, we've got you covered. ■

Jennifer Ip is unit director and counsel (Litigation) at LawPRO; Nora Rock is a corporate/policy writer at LawPRO.

1 The Law Society (of England and Wales); "Practice Note: Professional Indemnity Insurance"; June 8, 2010; available at: http://www.lawsociety.org.uk/productsandservices/practicenotes/piinsurance/4527.article

2 Solicitors Indemnity Insurance Rules 2010 (established by the Solicitors Regulation Authority; last updated October 2010); Appendix 1: Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors and Registered European Lawyers in England and Wales; available online at http://www.sra.org.uk/solicitors/code-of-conduct/professional-indemnity/indemnity-insurance-rules.page#appendix-1

3 See "History of Solicitors' Professional Indemnity Insurance" prepared by Lawyers Defence Group, available at: http://www.lawyersdefencegroup.org.uk/solicitors-professional-indemnity-insurance/

4 According to *Legal Futures*, a UK website and blog dedicated to educating lawyers about regulatory compliance and other issues, 138 English and Welsh firms closed after joining the English ARP between 2009 and 2011, and several other firms are considered to be at risk. An additional cohort of firms have failed in Ireland, where the ARP closed in 2009. See: http://www.legalfutures.co.uk/latest-news/138-law-firms-in-the-arp-close-down-as-solicitors-face-bankruptcy-action

5 See explanation of arrangements after ARP closure in Lockton Solicitors' Blog at: http://solicitors-blog.co.uk/tag/arp/

6 Dean, James "Firms shut down ahead of PII renewal", The *Law Gazette*, September 16, 2009

7 In "The Renewal" in *Risk Update*, September 2010 edition, a publication of Legal Risk LLP. *Risk Update* is available at: www.legalrisk.co.uk

8 Refer to Table 1:"Professional Indemnity Insurance Requirements Around the World" at www.lawpro.ca/magazinearchives

9 G. Skogh, "Professional Liability Insurance in Scandinavia: The Liability of Accountants, Barristers and Estate Agents" in *The Geneva Papers on Risk and Insurance*, 14 (No. 53, 1989), 360 at 364, online: http://www.genevaassociation.org/PDF/Geneva_papers_on_Risk_and_Insurance/GA1989_GP14(53)_Skogh.pdf

10 R.Kesevan "Malaysian Bar PII: A Mandatory Scheme" (The Malaysian Bar, 2010), online: http://www.malaysianbar.org.my/professional_indemnity_insurance/malaysian_bar_pii_a_mandatory_scheme.html

11 R. Kesevan, "The Malaysian Experience: The Way Forward" (Address to the 1st Malaysian Professional Indemnity Insurance Workshop, 17 and 18 November 2005) [unpublished], online: (http://www.jltinteractive.com/ecCover/Attachment/Malaysian%20Experience%20-%20The%20Way%20Forward.pdf

12 "Hong Kong Solicitors Indemnity Scheme Review of Insurance Arrangements Review Report" (28 November 03), LC Paper No. CB(1)730/03-04(04), online: The Legislative Council of Hong Kong, http://www.legco.gov.hk/yr03-04/English/panels/ajls/papers/aj0129cb2-1092-1e-scan.pdf.at 121

13 Cartier-Liebel, Susan, "Mandatory Malpractice Insurance Only Hurts Law-Abiding Lawyers", The Connecticut Law Tribune, February 12, 2007

14 See, for example, the January 4, 2010 press release titled "Legal Professional Liability Insurance Disclosure Required in Many States" from the Brunswick family of insurance companies, available at: http://www.brunswickcompanies.com/pr-pl-legal-malpractice-insurance-disclosure-20100104.html

15 Wasserman, Bennett J. and Krishna J. Shah, "Mandatory Legal Malpractice Insurance: The Time Has Come", *New Jersey Law Journal*, Vol CXCIX No.2 Index 58, January 14, 2010

16 online: http://www.lawcover.com.au/topup/default.asp?ContentItemID=85

17 online: http://www.lexoninsurance.com.au/content/lwp/wcm/connect/Lexon/About+Lexon/

18 online: http://www.lplc.com.au/policies_and_premium/about_your_insurance/

19 R. Acello, "Climate Change" ABA Journal (1 Nov 2009); online: http://www.abajournal.com/magazine/article/climate_change/

20 Poll, Ed ""Risky Business – Some Thoughts on Legal Malpractice Insurance", *Law Practice TODAY*, a publication of the American Bar Association, February 2007 edition

21 online: http://www.lawsociety.bc.ca/licensing_membership/membership/status_changes/insurance.html

22 online: http://www.assurance-barreau.com/en/index.html

23 A. Scott, "Playing the ball not the man" (Law Institute of Victoria, President's LIJ Column, Jun 1998), online: http://www.liv.asn.au/About-LIV/Media-Centre/President-s-Page/Playing-the-ball-not-the-man

24 Law Society of England and Wales, Practice Note (June 8, 2010); Online: http://www.lawsociety.org.uk/productsandservices/practicenotes/piinsurance/4527.article

25 Law Council of Australia, Law Council Submission to the Potts Review, "Review of Regulation of Discretionary Mutual Funds and Direct Offshore Foregin Insurers"(2006) at 9, online: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C755089-1C23-CACD-22CC-8316BEC40307&siteName=lca

26 online: http://www.qls.com.au/content/lwp/wcm/connect/QLS/Your+Legal+Career/Practice+Support/Professional+Indemnity+Insurance/

27 M. Gill, "Lawyers' Professional Indemnity: New South Wales", (Address to the 1st Malaysian Professional Indemnity Insurance Workshop, 17 and 18 November 2005) [unpublished], online: http://www.jltinteractive.com/ecCover/Attachment/New%20South%20Wales%20-%20Lawyers%20Professional%20Indemnity.pdf; see Law Council of Australia, supra note 14 at 9; see Scott, supra note 12; A. Flandrin, G. Durange, L. Halper, t. al., "Professional Indemnity for Lawyers - A Worldwide Review and Comment" (2005) PartnerRe at 6, online: http://www.partnerre.com/App_Assets/Public/4dd14bd9-48a6-4e32-820a-200c9bdb6c98/PIforLawyers.pdf

insurancebiz

Balancing risk & fairness: How LawPRO considers new insurance program coverages

When was the last time you stepped back and examined the specific risks you are exposed to in relation to your law practice and the insurance you have in place to address those many – and often disparate – risks?

It's that time again.

Autumn is risk assessment time for Ontario lawyers who are renewing their primary professional liability coverage with LawPRO and (hopefully) considering what other coverages they may need given their own risk assessment. Watch for details on the 2012 insurance program in early October.

Similarly, LawPRO undertakes its own regular risk assessment as it considers the components of the primary insurance program for the coming year. Included in that "prep work" are a detailed review of the program's results (claims experience), an analysis of where costs (and risks) are headed based on actuarial models and, when appropriate, discussions with members of the profession about evolving practice issues and potential related insurance program changes.

This detailed review – which starts in the spring and extends into late summer – culminates in our annual offer for the coming year's insurance program at the Law Society of Upper Canada's September convocation.

The insurance program requires the Law Society's approval because the program – and indirectly LawPRO itself, as insurer – exist by virtue of the power given to the Law Society to operate the program in ss. 5(4) of the *Law Society Act*.[1]

LawPRO CEO Kathleen Waters notes that when the Law Society Insurance Task Force first introduced the LawPRO errors and omissions program, the task force members concluded that a continued program of mandatory insurance for lawyers was desirable because "…a program with broad coverage [i]s in the best interests of the public and in the best interests of the members of the profession."[2]

The task force also recommended, however, that the coverage be provided not by the Law Society directly, but by an insurance company managed according to generally accepted insurance principles. This recommendation led to the creation of LawPRO (or LPIC as it was then known) as an independent, fully operational insurance company with its own management structure and board of directors. The majority of LawPRO's directors are neither benchers nor Law Society employees.

The LawPRO mandate

While LawPRO is indeed an insurance company and not simply a bar-annexed indemnity fund, the Law Society is its principal shareholder and LawPRO strives to operate in a manner consistent with the Law Society's mandate as set out in the Act.

This means that LawPRO has a focus and philosophy quite different from that of most commercial insurers. Whereas commercial insurers' obligation to shareholders requires that their claims management and scope of coverage decisions focus on the financial bottom line, LawPRO commonly approaches a claim by considering how coverage can be found, as opposed to denied.

Our mandate is clear: subject to the terms of the annual policy, we defend and indemnify lawyers against the risk that they – in the process of providing professional services (as defined under the policy) to a client – commit an error, omission or negligent act that results in a loss to the client, and which in turn leads to a claim for compensation for damages by the client.

This unique focus does not, however, release us from the obligation to observe generally-accepted insurance principles. Among the mandate and principles of operation derived from the task force report are that LawPRO be operated in a commercially reasonable manner, and that LawPRO move to a system where the cost of insurance reflects the risks of claims. Moreover, as a regulated insurer LawPRO is required to provide proof of its ability to meet our financial obligations and satisfy solvency tests. And balanced against all of these obligations is the expectation of members of the bar that LawPRO will make every reasonable effort to control premiums.

The Task Force Report clearly recognized that this would not be a "no fault" system of compensation for clients, that some coverages would be limited or eliminated, and that coverage might be denied in appropriate circumstances.

Scope of coverage considerations

Individual lawyers can be endlessly creative in the services they provide and in the activities in which they engage; however, we must consider carefully each year, when preparing the offer for the next year's program, whether our terms of coverage should expand to cover the risks associated with new services and activities.

When faced with a request to expand our scope of coverage on a go-forward basis, some of the questions we ask ourselves are:

- Does the activity undertaken by the lawyer occur within a lawyer-client relationship? In other words, is there a client to be protected?

- Did the activity involve the provision of legal advice or other legal services that fall within the scope of a lawyer's practice as defined by ss. 1(5)-(7) of the *Law Society Act*?

Some examples may help to demonstrate the type of analysis LawPRO undertakes when a lawyer contacts us to say, "Why doesn't your policy cover…? Can you change that for next year?"

Example No. 1: Lawyer online activities

One of the contexts in which we have considered these questions lately is with respect to lawyer adoption of the Internet for various purposes. In some instances, the answers are quite clear. Where a lawyer writes a blog for a law firm website as part of its marketing program and is sued for defamation over the blog's contents by a non-client, it can be expected that the claim arises outside any lawyer-client relationship and is therefore not covered by the insurance policy. And there is no imperative on the part of LawPRO to amend the policy for future years to cover lawyer marketing activity in itself: There is no client who has been accepted by the firm and receiving legal services to be protected in a purely marketing setting. As a result, some firms have talked to their insurance brokers about media coverage, which is quite different from a lawyer's professional liability coverage as provided by LawPRO.

What about lawyers who choose to use their legal knowledge to design products and sell them on the web, for example, "do-it-yourself" documents? A small number of firms offer access to forms or precedents for use by random website visitors who never obtain advice or enter into a traditional lawyer-client relationship with any of the firm's lawyers. To the extent that these forms or precedents could be viewed as "products" of the firm, the lawyers offering them are at potential risk of product-liability style claims by an unlimited number of end users who may feel that they used the "products" to their detriment.

For LawPRO, a duty to indemnify lawyers under these circumstances goes beyond the contemplation of the mandatory policy as it is currently conceived and funded. The distribution of self-service "products" to a wide (in fact, unlimited) audience is fundamentally different, in terms of risk exposure, from the delivery of professional services to a limited number of known clients.

Hypothetically speaking, if an amendment to coverage was proposed to take on these kinds of claims, LawPRO would likely be forced to increase policy funding – an expense borne by the entire profession in the form of an increase in premiums. In deciding whether or not to create coverage for these kinds of claims in future policy years, we would need to consider whether lawyers who do not engage in or benefit from these kinds of business activities would be willing, if asked, to pay to protect those who do, especially where there is no client who has received legal advice, or entered a solicitor-client relationship, to bring forward a claim.

Also, product liability insurance is available in the commercial marketplace; it is underwritten and priced quite differently from professional liability insurance for legal practitioners.

Example No. 2: Lawyer activities beyond Canadian law practised in Ontario

Another key issue when thinking about scope of coverage relates to jurisdiction. The Law Society regulates Ontario lawyers for the protection of the public. Given that the *Law Society Act* is a statute of the Ontario government, one assumes that the legislature had the interests of the Ontario public top of mind.

We at LawPRO, in thinking about the future, are mindful of the risks associated with extending the primary program into other jurisdictions (especially outside Canada) where it may be more logical and appropriate for other providers to bear the risks, or where we have little control over how legal services are delivered.

For this reason, while we facilitate access to justice through reciprocal agreements with other Canadian jurisdictions, we do not cover Ontario lawyers who practise foreign law, or who conduct much of their practice of Canadian law in a foreign jurisdiction. To provide affordable and sustainable E&O protection to Ontario lawyers – while also generally supporting the broader public protection mandate of the Law Society – LawPRO must put some limitations on coverage.

This jurisdictional restriction means some Ontario practitioners must look elsewhere for coverage for their activities relating to foreign jurisdictions. The commercial insurance markets operating in the other jurisdictions, or internationally, have specialist underwriters to address these risks.

A standard policy that seeks broad-based fairness

Like the lawyers in the Internet services example, lawyers who practise foreign law may argue that the full range of their commercial activity is not covered under the program policy. It's important to remember, however, that we are talking here about a mandatory policy for which the cost is spread across the entire private practice bar. As LawPRO Executive Vice-President Duncan Gosnell explains, when designing the mandatory coverage we must focus on providing "a standard policy that works for – and is fair to – the bar as a whole."

Most lawyers would agree that, in the interests of affordability and sustainability, a mandatory policy should be a standard, base level policy that is well-suited to most Ontario law practices. The focus is on indemnifying lawyers for claims from clients for professional services. The policy does NOT protect lawyers against the full range of possible claims that might arise from all forms of business activity, or business risks, that those lawyers might undertake.

If you provide services or engage in activities that fall outside the practice of law as defined by the *Law Society Act* and the protection provided by the LawPRO program, you may want to take the time to assess both your risk exposure and the adequacy of the coverage provided under all of your insurance policies. Many other interesting and potentially helpful insurance products exist that LawPRO encourages lawyers to review with their insurance brokers on a regular basis. ■

Nora Rock is corporate writer/policy analyst at LawPRO.

[1] Subsection 5(4) of the *Law Society Act* states, "The Society may own shares of or hold a membership interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to licensees and to persons qualified to practise law outside Ontario in Canada"

[2] *Report to Convocation of the Insurance Task Force and the Insurance Committee*, October 28, 1994 (amended November 15, 1994), para. 16

It's easy to prevent communications breakdowns: So why is this consistently the #1 source of claims for LawPRO?

No matter what the area of practice, the number one source of claims at LawPRO is a breakdown in communication between the lawyer and client. And those numbers are increasing.

Between 2005 and 2010, more than 4,200 communications claims – an average of 711 a year – have been reported to LawPRO. The total cost of these claims to date is about $150 million – and likely to rise as more recent years' claims are resolved.

During that same period, the percentage of claims resulting from communication issues has also increased – to 35 per cent in 2010 from 32 per cent in 2005. More concerning is the increase in costs – to 45 per cent of all claims costs in 2010 from 32 per cent in 2005.

What's ironic about this discussion is that communications claims are potentially easy to prevent. This is a risk management message that we have consistently sent to lawyers through past issues of *LawPRO Magazine*, our *Managing* booklets and at every presentation on claims prevention.

And still the numbers creep up.

So rather than simply repeat the message that "lawyers need to communicate better," we thought we'd take a different approach and look at how communications claims can arise in particular areas of law.

We asked LawPRO claims counsel with expertise in the various areas of law to provide insights into the communications mistakes they see in their daily handling of claims files. We hope this approach makes it easier for you to implement risk management steps in your own practice.

Real estate

Real estate claims make up the largest share of communications claims. Busy, high-volume practices often lead to situations where the lawyer is not taking the time to communicate with the clients properly. Mitchell Goldberg, unit director and counsel and Nadia Dalimonte, claims counsel, both in our Specialty Claims Department, provide some examples of the kinds of claims they see in this area of practice.

Meet the client – yourself – and ask questions

The common thread running through the examples that follow is that many real estate lawyers say they are too busy to communicate directly with clients. They rely on clerks, so the lawyers themselves become removed from the process. "It is always preferable for the lawyer to meet with the clients and review the important documentation in the file with the clients at that time. In the event of a claim, it's not usually a strong defence for the lawyer to say to us 'well, the clerk met with the client,'" says Dalimonte.

Some lawyers, she adds, take the position that their job is to carry out only the title conveyancing, when what they should have done is take the time to speak to the client to ensure they've gathered all the relevant information.

For example, although only one person may be registered on title, there could be a spousal interest in a matrimonial home. LawPRO has seen a number of claims where the lawyer did not get the consent of the spouse to change the ownership status or encumber the property with a mortgage. Take the time to discuss important information such as the client's marital status to determine whether the consent of a spouse – or any other person with an unregistered interest in the property – needs to be obtained, or whether the spouse needs to be sent for independent legal advice (depending on the nature of the transaction).

Another source of claims involves situations in which parents get involved in their children's real estate dealings – such as the transfer of a parental property to a son or daughter, or the purchase of a home by the child with the parents guaranteeing the mortgage or taking title with the child and actually becoming mortgagors. The parents often later claim the lawyer did not properly communicate the potential consequences to them (e.g. if the children did not keep up the mortgage payments, the lender could come after them) or failed to send them for ILA.

There may be issues of capacity or language barriers preventing the clients from fully understanding the proceedings. Until you sit down and talk to the clients, these kinds of complicating factors might not be apparent.

Use title insurance wisely

Lawyers using title insurance also need to take the time to communicate directly with clients. Often the lawyer fails to ask clients about possible future uses of the property that the client might have in mind, and as a result fails to get a title insurance endorsement that would protect the clients (e.g., they planned to build a pool, but later discovered a subdivision agreement prevents it). Similarly, lawyers sometimes fail to discuss whether a client wants a survey or a particular search done.

"They just assume title insurance takes care of issues that could arise, so that the lawyer has no documentation in the file to demonstrate that the lawyer discussed what the client did or didn't want," says Goldberg. Failure to have that conversation may constitute negligence, and also may violate the commentary to the *Rules of Professional Conduct* that addresses informing clients about options to assure title.

Remember the lender client

Lawyers also need to remember that lending institutions are also their clients. We've seen claims in which lawyers have failed to communicate material information to the lender client so the lender can make an informed decision on whether to advance mortgage funds. Such details could include the correct purchase price, current ownership, or whether the purchaser is going to reside on the property.

Litigation

Jennifer Ip, unit director and counsel (Primary Professional Liability Claims Department) and Yvonne Diedrick, claims counsel (PPL) provide some insights into how breakdowns in communication with the client can derail litigation or leave the client dissatisfied with the outcome.

Put it in writing

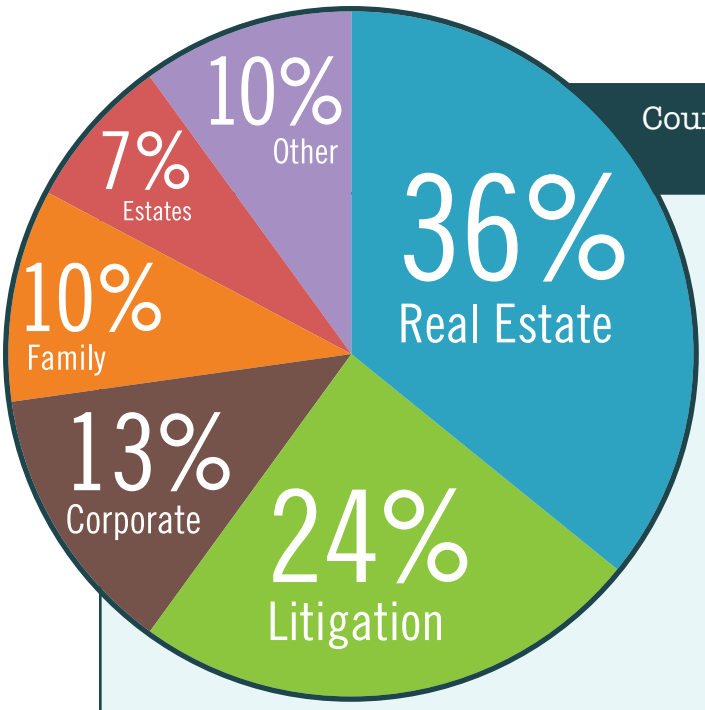
One of the biggest issues in the litigation claims LawPRO sees is a failure on the part of the lawyer to properly document instructions. Clients may later say they asked the lawyer to do X and it wasn't done; or the lawyer may have done Y and the client claims he didn't authorize this course of action. If there is no documentation of the lawyer client/conversations, the claim then turns on credibility, and the experience has been that courts are more likely to believe the client's recollections (the case is top of mind for the client, but only one of several for the lawyer).

The same failure to document discussions can be seen when advising clients on the terms of settlements and what the client can expect. Clients can be left thinking they will receive more money out of the

settlement than they in fact get. "They may try to claim they were not aware that a portion of the award would flow back to the lawyer in fees," says Ip.

When it comes to motor vehicle cases, some lawyers will handle only the tort action or only the accident benefits claim, not both, but they fail to put this limited retainer into writing. The client then comes back and says the lawyer failed to follow instructions – but by then the limitation period has expired – and now the lawyer faces the prospect of a claim. Even if you have put the limited retainer into writing, make sure the client understands what this means.

Many communication errors result in accusations of an improvident settlement. For instance, the defendant in an action may offer to



Count of Communication claims (2005-2010)

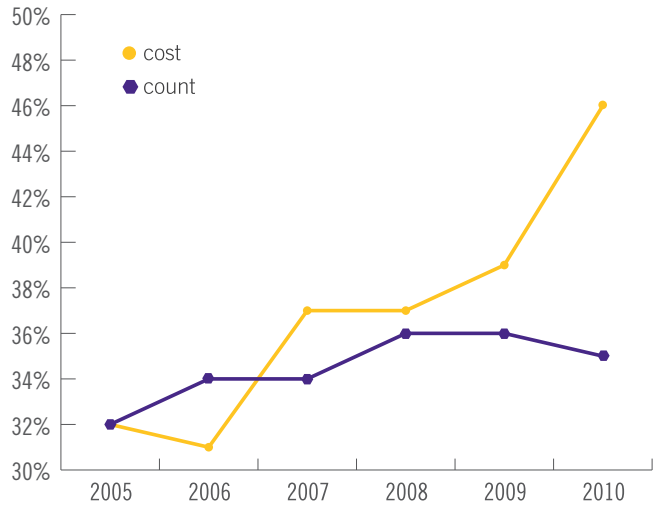
Communication breakdowns – broken down

Failure to obtain client's consent: 41 per cent of communication claims by count (36 per cent by cost) involve the lawyer doing work or taking steps without informing the client or getting the client's consent, or else not making sure the client was fully informed about what he or she was consenting to.

Failure to follow client's instructions: 39 per cent of communications claims (45 per cent by cost) are essentially a disagreement over what instructions the client did or didn't give and what the lawyer did or didn't do. These claims often come down to credibility, and without proper documentation by the lawyer they are difficult to defend.

Poor communication with client: The remaining 20 per cent of communication errors (18 per cent by cost) result from a failure by the lawyer to properly explain various aspects of the case (e.g., timing, fees, outcome) or confusion over whether the lawyer or client was responsible for doing something during or after the matter.

Communications claims as a % of all LawPRO claims



settle for a lower amount than is really justified by the facts of the case and the lawyer is obliged to present this offer to the client. The client may want to settle, but if the lawyer doesn't recommend the settlement, this advice should be clearly documented and communicated. Otherwise the client may come back later, perhaps when the money runs out, and accuse the lawyer of not properly explaining the situation or not making clear that the settlement might have been greater had the matter been pursued further.

Take the time to explain – and document

During a trial, things can happen quickly. LawPRO has seen claims in which an offer was communicated verbally mid-trial. The lawyer then quickly explains (or says she explained) the offer to the client. The client rejects the offer and the lawyer's recommendation to accept it, and goes on to lose the case. The client then sues the lawyer saying, "had I properly understood the offer, I would have accepted it."

On the flip side, it may be the client who chooses to accept an offer to settle for a lower amount – despite the lawyer's advice to the contrary. No matter how rushed you are or how convincing (and happy) your client appears, take the time to make notes of your conversations with the client and make sure your client fully understands the implications of the decision he or she is making.

Similarly, lawyers should communicate (and document that they have done so) the prospects of winning or losing a case. This is especially so in cases where the client insists on pursuing the case "on principle." When the client loses, it's suddenly no longer about the principle. "If the lawyer is of the opinion that the client has a weak case, the client needs to be told so and instructions to proceed to trial, despite the lawyer's recommendation not to proceed, should be written down," says Ip.

Communicate clearly – face-to-face if possible

As in all areas of law, lawyers are using email to communicate – resulting in increased misunderstandings. Clients or lawyers read things into emails that aren't there, miss the meaning of what was said, or read between the lines and make assumptions, says Diedrick. "You can't replace face-to-face communication. If geographic distance makes that difficult, pick up the telephone and later document the call in a follow-up letter or email."

This is particularly important in litigation matters, which can go on for long periods of time and involve strong emotions. There isn't necessarily the same tradition of a pivotal lawyer-client meeting as often occurs before the closing of a transaction in other areas of the law. Consider at what point in a long piece of litigation you should meet with the client, and be sure to document your discussions.

Corporate law

Anna Reggio, claims counsel (PPL), says corporate communication claims often arise from confusion over the breadth of the insured's retainer and who is representing the interest of whom in an environment of fast-paced, and sometimes large-dollar, transactions where the niceties of communicating may get overlooked.

Know who your client is – and communicate this clearly

A question which frequently arises is the question of who the lawyer is acting for and whether it is the corporation or one or more of the shareholders. The interest of the corporate entity may be different from that of one or more of the shareholders and therefore, the corporate entity should be separately represented.

Certainly, in any given proposed transaction or agreement, each shareholder's interest may vary from that of one or more of the other shareholders. Therefore, in fact, the corporate entity and each of the shareholders should really be represented by a separate lawyer.

Often, in closely held corporations, the lawyer will meet with all of the directors, officers and shareholders to discuss the terms of a transaction to be entered into by the corporation or the terms of a transaction or agreement amongst the shareholders. A shareholders' agreement, for example, is one of the more common agreements under discussion.

In many cases, the parties are of the view that it is not financially expedient for the corporate entity and each of the shareholders to be separately represented. In other cases, the transaction may be clipping along and the parties are too focused on their negotiations to care about the lawyer's oral caution that they should obtain independent legal advice or independent representation.

Later, a disgruntled party may allege that he or she relied on the lawyer and may accuse the lawyer of having been in a conflict of interest, preferring the interest of one party over another (particularly where the lawyer has represented the other party or parties in the past) or failing to consider and advise that party of the implications arising from the particular transaction or agreement. The lawyer may well respond by saying that he or she was not acting for the complaining party, but rather acting for the corporate entity or, possibly, for another shareholder. But if this was never clearly communicated, in writing, the lawyer is faced with a credibility dispute.

The lawyer should write to all principals to clarify and confirm whom he or she is acting for. The lawyer should confirm that the

other parties will not be provided with any advice and that they should not be relying on the lawyer for that purpose.

Further, the lawyer should tell the other parties or entities to retain independent counsel or obtain independent legal advice, preferably as evidenced by way of a Certificate of ILA, depending upon the circumstances. Otherwise, the lawyer must obtain a signed, written acknowledgement of this advice together with a waiver of independent counsel or ILA.

"There is no shortcut for this," says Reggio. "The lawyer needs to get written, signed acknowledgements to protect him or herself." If the lawyer chooses to proceed to act for more than one party, the lawyer faces the inherent risks of failing to meet the onerous burden of providing the best possible advice to all of the clients in the circumstances. Also, depending on the deductible chosen, the lawyer may also face the obligation of a double deductible under the LawPRO policy if he or she is subsequently sued, even if a written acknowledgement and waiver was obtained.

Be clear about the services you are providing

Lawyers should also communicate clearly and in writing to confirm that they are not providing business advice and they are not reviewing financial statements or providing any tax advice, where applicable. Lawyers should specifically advise the client in writing to get advice from tax specialists, accountants or other experts where necessary and applicable.

Family law

Yvonne Bernstein, litigation director and counsel (PPL) with extensive experience in family law claims, talks about the potential for misunderstandings and communication breakdowns in family law.

Email communication must be very clear

The increased use of emails to replace face-to-face meetings has significant implications in family law where emotions (and tensions) often are high; clients can be difficult, emotional and prone to misunderstanding (and for these reasons some lawyers find the lack of face-to-face contact a good thing).

While email is a faster form of communication, the in-person conversation provides visual cues and the discussion is more interactive. The lawyer can judge reactions, and make sure everyone understands. Email promotes a more stilted, incomplete communication, says Bernstein.

In a recent claim a client was informed by email about what was being negotiated, and agreed to the settlement; but the client had not been given enough information on a certain part of the settlement. He later sued the lawyer on the grounds that if he'd known how valuable this concession was, he never would have agreed. "The client could have asked," says Bernstein, "but the on the other hand the lawyer should have been clearer."

Take the time to explain implications of legal processes

Often, clients don't understand that a settlement is a final settlement. They may have thought maybe they could settle today and re-open the agreement later.

Misunderstandings such as this can stem from the fact that lawyers operate within a framework where certain concepts or rules are understood: "We all know that when you sign a release, that's it," says Bernstein. "Lawyers don't always appreciate that clients don't have that same frame of reference." When a claim arises, it is then found that there is no letter from the lawyer to the client confirming the things they discussed, such as the fact that the settlement was final.

Limited retainers and possible unbundling of legal services will bring more challenges for lawyers to communicate as clearly as possible about what they are retained to do and not retained to do, as well as the potential consequences of what they're not being retained to do.

"There will be more of a burden on lawyers to hone their communication skills if they want to accept limited scope retainers and hope to get out of that process unscathed," says Bernstein. "This risk is not confined to family law, but family law has a high proportion of litigants who are self-represented and only want to retain a lawyer to do X, but not Y and Z."

Another way in which clients feel they can save money is by negotiating with the other side themselves. At the same time, the lawyers for each side are in communication as well. In these situations, things can get overlooked, or a lawyer can be left out of the loop.

Wills and estates

Cynthia Martin, unit director and counsel (PPL), Deborah Petch, claims counsel (PPL), and Pauline Sheps, claims counsel specialist (PPL) review the kinds of communication errors we see in wills, estates and trusts practice.

Ask questions – many questions

The biggest communication issues take place at the time the will is being drafted. The claim may result from drafting errors, but often it was poor communication that led to the drafting error.

Too many lawyers, says Martin, are not truly listening to the client's instructions and not probing and questioning the client to uncover facts that may cause problems later.

"It's not so much the client not providing the information as the lawyer failing to communicate what the lawyer needs to know," says Martin. "For instance, the client says: 'I want to leave everything to my son.' Fine, but does she have any other children? What did the prior will say?"

Are the beneficiaries identified correctly? (e.g., there is more than one St. John's Church in the city.) Did the lawyer ask about gift-overs in the event that a beneficiary is not alive at the time the testator dies? When the will drafting is complete, lawyers should do a reporting letter to the client so that there will not be confusion in the future about why changes were made, which beneficiaries added or removed, and so forth.

LawPRO has seen in an increase in claims resulting from lawyers failing to ask about client assets when drafting wills. Too many lawyers don't ask the simple question: "What assets to do you have?" (Given how many people in Ontario now come from other jurisdictions, lawyers should be asking about assets on a worldwide basis.)

It's equally important to discuss how these assets will be distributed. This issue often arises in the case of second marriages. The clients want to leave everything to their respective children, but often what happens goes something like this: after the husband dies, the wife says that she didn't understand that the assets would go to his children and not her; or conversely, all the assets are in joint names and – despite the will – at the end nothing is left to go to the children.

"Ask what the assets are, and ask how they are registered," says Sheps. "Some lawyers tell us they don't ask 'because the client will have different assets when they die.' That's not a good enough reason not to ask."

Get clarification given complexity of family structures and dynamics

Lawyers are increasingly likely to be dealing with a variety of family structures other than the traditional nuclear family. When the client uses words such as "married" or "my daughter," those words may not necessarily mean what the lawyer thinks. The marriage could be common-law, and the daughter could be a step-daughter.

To be absolutely sure of the nature of the relationships, ask questions and get clarification.

Talk to your client to understand family dynamics. You may discover information that could improve the advice you provide the client. If you know, for example, that two siblings don't get along, it may not be wise to appoint them as joint powers of attorney or estate trustees.

"A dysfunctional family can lead to a dysfunctional estate," says Sheps, who also recommends not agreeing to be an attorney or trustee if you know the family is fighting. "If they are not satisfied with the management of the estate, they will all blame you."

State who is doing what

Miscommunication regarding pensions often results in claims. The client may have made designations for inheritance purposes on a pension, life insurance, RRSP, etc., but a will can revoke those designations. There is often not enough discussion with clients about these designations, and what effect a will can have on them. The clients themselves may not be certain how the designations are arranged, and it may not be clear who was supposed to find out (client or lawyer) and what the consequences are for not making certain.

When dealing with powers of attorney, it is important to communicate to the attorney the roles and obligations involved. Template letters and a checklist are very good tools for this. They protect the lawyer from future accusations that "the lawyer didn't tell me I couldn't spend the money this way."

The administration of an estate also requires clear communication. Keep records of who is responsible for what, in terms of what the lawyer is doing and what trustee is doing. If roles are divided, the work and responsibilities should be spelled out.

"If the lawyer is taking on work normally done by the estate trustee, there has to be a letter setting out clearly who is doing what," says Petch, who recommends communicating to your trustee client what you'll charge in legal fees for this work.

"We get a lot of complaints about the mishmash of the lawyer's fees and executor's fees. This is particularly true where the lawyer is a co-trustee." ■

Tim Lemieux is practicePRO coordinator at LawPRO.

Humans communicate from the time they are infants until the day they die.

At its heart, communication is all about the same thing – whether we speak, write, gesture, sign, listen, or tweet. It's a way of telling someone something.

So why, if lawyers have been communicating for as long as they have, are the majority of LawPRO claims related to communication issues? In 2010, for example, the broad category of communications accounted for about 35 per cent of claims reported and 45 per cent of claims costs.

LawPRO breaks that broad category of communication claims into three categories of errors: failure to obtain consent or inform (often a lack of two-way conversation), failure to follow a client's instructions (often this is a disagreement over what was agreed upon), and poor communication (for example, unreturned phone calls).

Ontario lawyers aren't the only ones facing these communication challenges. Insurance companies and law associations in the United States, Australia, and Great Britain have noticed the issue as well.

According to a 1994 survey done in Australia, the majority of malpractice claims in that jurisdiction are caused by lawyers not listening to the client, not asking appropriate questions or not explaining relevant material.[1] LawCover, the professional indemnity program for lawyers in the New South Wales, found 51 per cent of clients were dissatisfied by information provided by the lawyer, 67 per cent felt they had no control over the outcome, and 80 per cent wanted more participation in the legal process.

A different study, done in Great Britain, found that communication problems were an "important source of client dissatisfaction."[2] The


Dilip Soman

study found that bad communication on the part of lawyers wasn't just a matter of sloppy practices or unreturned phone calls. The study emphasized the importance to clients of understanding and being understood.

Is it that lawyers can't communicate?

It isn't that simple an issue. In fact many excel at certain forms of communication. Lawyers are often applauded by their peers and the judiciary for their excellent advocacy skills.

So if lawyers are highly effective communicators, why are there so many communication-related claims? And why does this seem to be an issue among lawyers, irrespective of jurisdiction?

To answer that question, LawPRO canvassed a number of people – inside and outside the profession – who are known and respected for their communication skills and expertise. We also examined research studies on the broad topic of client engagement and communication.

What we learned is that communication is an issue for any service provider. Moreover, the problem may lie in the *way* lawyers communicate with their clients – that is, in the customer service experience. To the extent that the overall experience is positive, the communication that is integral to that experience is also seen as successful; but a bad customer experience often defaults into an allegation of communication failure.

The client service experience

It's been said before but it's worth repeating: The world has changed from the days when there was blind, unflinching faith in professionals such as doctors and lawyers. Clients today are more likely to be educated, and want to be involved and understand the process. They also have access to the Internet – so inevitably are more questioning if not more knowledgeable about a subject. And they have higher expectations – of the information they will get, the service they will receive, and the overall customer experience.

Eighty-four per cent of Canadians believe a single experience can make or break a relationship with a service provider, according to a survey done by TD Bank in 2008. What makes a positive relationship? According to the same survey, 64 per cent of Canadians want friendly, helpful staff, convenient hours, and quick service, regardless of whether they are visiting their lawyer or doctor or a retail store or bank.[3]

Moreover, people need to feel engaged in the process, says Dilip Soman, an expert in client satisfaction. A professor of marketing and communication strategy at the Rotman School of Business, Soman has focused extensively on the field of behavioural economics, the application of human behaviour to business and marketing models, and the effect of emotions and memories and how they influence experiences with service providers.

According to Soman, engaging a service provider can either be rational – for example, it fulfills a functional need such as pipes being replaced – or emotional – for example, a service based on calming anxiety or fulfilling a desire, such as a wedding or divorce, a new home or the sale of a business.

When customers and clients are dealing with a purely rational need, they can easily hand over the reins to the professional. They do not need to feel involved or engaged in the process, says Soman.

When the issue is emotional people feel like they need to have some control over the outcome of the issue. People want to control their own destiny.

If something goes wrong, the response from the customer or client isn't necessarily rational. Emotional issues tend to produce emotional responses. Anger, frustration, anxiety, low self-worth, and defensiveness can be common reactions when an emotional situation goes awry.

The numbers say what?

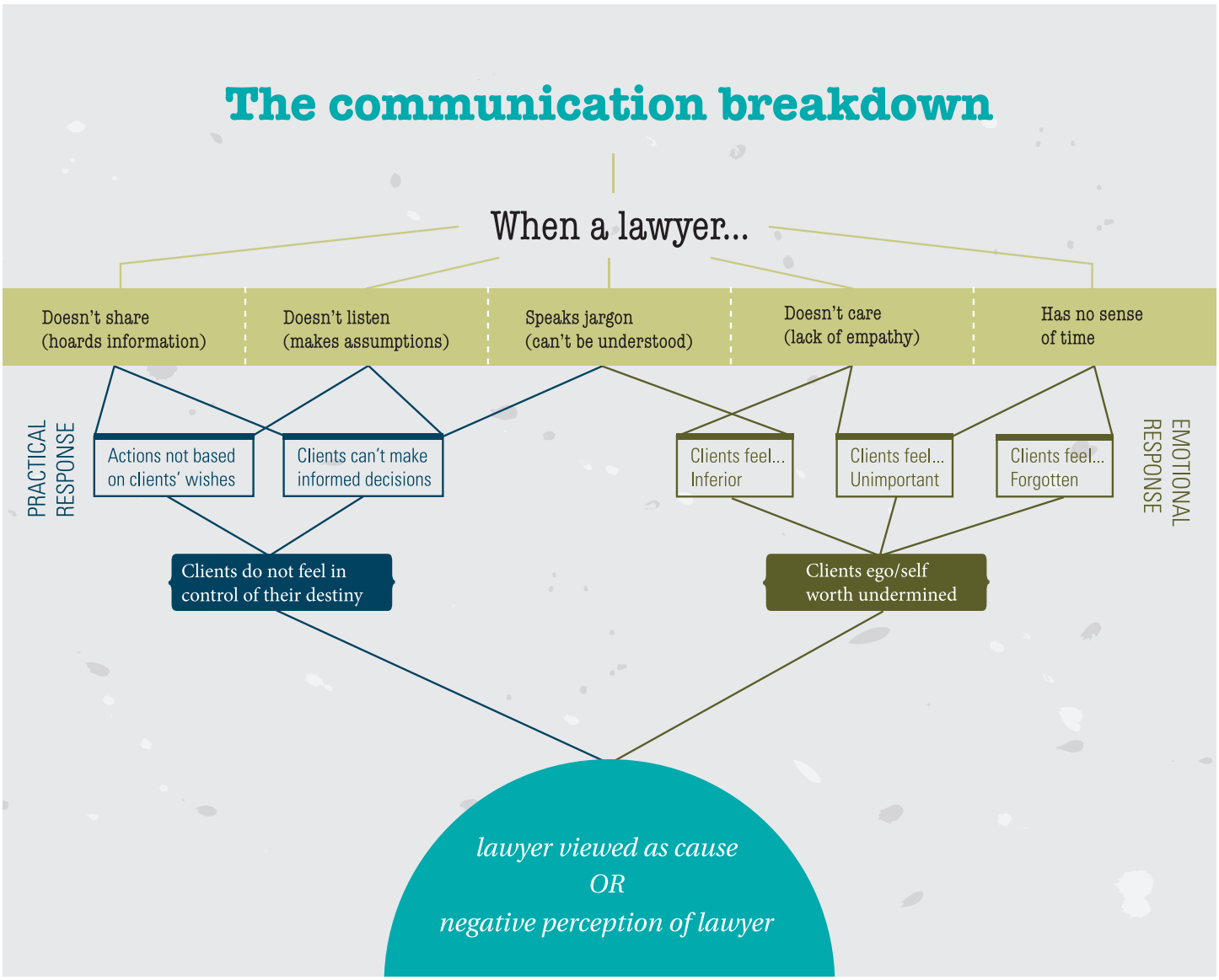
The following statistics are from a study done by the Australian insurer LawCover on the issue of communication claims:

51 per cent of claims in New South Wales were based on a client's dissatisfaction with the information provided by the lawyer.

67 per cent of these same clients did not feel they had control over the outcome.

64 per cent of these clients thought the system was unfair.

80 per cent wanted more participation.[1]



This is a graphic representation prepared by LawPRO of the typical points at which communication breakdowns occur in a lawyer-client relationship based on the points made in the accompanying article.

In essence, good customer service *is* good communication with the customer, and the type of service a person is looking for will determine how much communication and engagement is necessary.

Soman argues that almost everything lawyers deal with has some emotional component to it; Therefore clients are generally more vested in the outcome of the entire process.

Engaging the client and showing empathy becomes even more important for lawyers, Soman says, as a breakdown in either will increase a person's dissatisfaction with the situation. Lawyers should take note because generally speaking, happy clients don't sue their lawyers. They are also more likely to promote a lawyer to family and friends and retain the lawyer's services longer.

A lack of empathy, or the appearance that a lawyer is not listening and providing information in an understandable and timely fashion, are the main ways communication can break down, says Soman. This can lead to very emotional responses (a feeling of inferiority, for example) or very practical responses (an inability to make decisions because of a lack of information). The result: Further breakdown in the relationship with the client.

To best understand the communication breakdown, put yourself in the client's shoes to think about customer service and communication from your perspective as a customer as the lawyers on the following pages have done. With their help, we break down the communication breakdown.

Breaking down communication breakdowns

When a lawyer... doesn't care

Appearance matters: Empathy is important

How can lawyers understand what clients truly want if they don't listen? And how can lawyers listen if they are distracted by other files or aren't accessible to their client in the first place?

Not caring and appearing to not care are the same things in customers' eyes. In other words, it's all about perception. Being unreachable and distracted gives the appearance of disinterest, says Soman.

"If it is easy to access my service provider, I feel that provider is more in tune with my needs," he says. "For example, I received an email from my car dealership the other day saying 'it's time to service your car,' and I emailed them back and I got a message saying this 'email address isn't functional, you have to call us.' If I get an email I expect to be able to email back."

This type of breakdown can give the perception that the service provider doesn't really want to hear from the client at all. And people pick up on it when the service provider doesn't *really* want to be helping with a problem, says Soman.

"You *know* that they don't want you there. You can sense they wish you didn't exist, but because they're a customer service agent they have to be there," he says.

The lawyer may be dealing with more than 100 files of varying importance, but as far as the client is concerned, there's only one file that matters – and it's that of the client.

Early in his career, Stephen Pike, now firm managing partner, external, at Gowling Lafleur Henderson LLP, had a client pull him aside and say "I know I'm not your only client, but can you treat me like I am."

"I never forgot that," he says. Now he makes sure clients know they are the most important part of the business, which Gowlings holds as a vital value in its client services model.

Nobody likes to be put on hold or made to feel ignored or unimportant, so the solution is relatively straightforward.

"Needless to say there should be no interruptions during a consultation. This means turning off email and the phone, and asking staff not to interrupt unless it is an emergency," says family, wills and estates lawyer, Lawrence Pascoe of Mirksy Pascoe LLP in Ottawa. "If you are expecting an interruption, then you should warn your client beforehand that you may be interrupted."

LawPRO Executive Vice-President Duncan Gosnell adds: "Ultimately if the advocate doesn't seem to care, what confidence should the client have in the advocate?"

When a lawyer... doesn't listen

Effective communication requires attentive listening skills

A study for the Law Society of England and Wales by Hilary Sommerlad, quoted in "What Clients Want" by Clark Cunningham, found that 50 per cent of clients polled had worked with lawyers they did not like.

The study concluded it was, more often than not, the way lawyers interacted with clients that was the issue. Indeed, the paper describes a true situation "where a specialist lawyer with a 'big reputation' had interrupted the client because she believed she had heard enough to 'get the picture.'"

This had the unintended consequence of leaving the client too frightened to speak up in future meetings, and resulted in the lawyer not fully understanding the situation and what the client wanted.

"Listening is not something we as lawyers do particularly well," says Judith Huddart, collaborative family lawyer at Dranoff and Huddart, Barristers and Solicitors.

When lawyers don't listen or make assumptions of what the problem is without letting the client finish his or her side of the story, they run the risk of ignoring what the client really wants.


Judith Huddart

The England and Wales study showed effective communication also involves actively listening, which in turn boosts rapport, trust and mutual respect between the lawyer and client.

The study participants had more positive responses when they felt their lawyer listened to them. It allowed the lawyer to better understand the needs of the client and address them accordingly.

Stephen Pike points to a recent bike-buying excursion with his wife to illustrate the point. They had done the research beforehand and had walked into the store convinced they knew what they wanted. The salesperson began asking them questions about how they planned to use the bike. After some extensive questions and answers – and attentive listening – the salesperson suggested a less expensive bike more tailored to the Pikes' needs.

"It turned out to be perfect," Pike says. "It was exactly the right bike."

When the lawyer... doesn't share

Be transparent and generous with information to your clients


Dale Orlando

After getting some work done on his cottage, Dale Orlando, partner at McLeish, Orlando LLP in Toronto, had a dispute with the contractor over fees.

"He was doing work that needed to be done but without clearing it with me first," Orlando says. As a result the project went over budget. "I should have been communicated with before the work was done, not afterwards."

Imagine going for surgery without the doctor telling you where they will be cutting. That would be unthinkable. Similarly, why should the client allow the lawyer to proceed without knowing what was being done?

Clients need information so they can make decisions that work for them. Not knowing what is happening in a file can cause people stress and anxiety, Soman says.

"I've had clients come in from other lawyers and say 'I have no idea what's happening with my file, I don't understand a thing about it,'" says Huddart. "And I say 'Bring your documents,' and I look at it and say 'You know you have to be in court next week,' and they say 'Well nobody told me that.'"

With the Internet making information readily available, people have come to expect the same level of information availability from their lawyers, says Soman. Simply sharing information throughout the case can help a person feel engaged in the process.

People who feel involved in the decision-making process are more likely to take ownership of the outcome, be it positive or negative.

When that sense of ownership is taken away, there is a feeling of helplessness and a lack of control over one's own destiny. And should the matter take a negative turn or end unfavourably for the client, the client is more likely to blame the lawyer for the actions taken, since it was the lawyer's "decision," not the client's, that resulted in the unfavourable result.

Take the example of a lawyer's fee structure, says Soman. Lawyers should lay out exactly how they plan to bill a client: Does a meeting with the senior counsel on the case cost X, but with the junior associate cost half that? Is an email response equivalent to 15 minutes of docketed time, but a phone call is docketed by the minute?

"Information gives [clients] more control," says Soman. "Once I have control, it is my choices that affect how much I pay. It's my choices that affect what I get. Whereas if I don't know, it's the lawyer's choices that affect what I get and what I pay."

That is not to say lawyers should allow clients to take the reins on their files: lawyers still have a responsibility to reasonably manage a client's expectations. But sharing information also includes ensuring the client has realistic goals and expectations, and understands what can and can't be done, and how long things will likely take. This gives clients choices.

"As a client, I want the good with the bad," says Huddart. "Trust me enough to tell me the bad news."

When a lawyer... has no sense of time

Their time is as important as yours. Give clients a sense of control over timelines


Stephen Pike

A few years ago, Huddart had to visit the doctor. She checked in, provided her health card and settled in with a book. Patients who came in after her came and went.

"I suddenly realized there was no one left in the waiting room. An hour had gone by and I was still sitting there. When I got up and looked around – which I probably should have done earlier – I realized there was no one around at all," she says. The doctor had left and when she asked what happened, she was told she should have spoken up, and that she "got missed." The experience left its mark.

"I felt like I was nothing," she says. "I had no value, I wasn't important. It was just 'oh well, too bad for you, I have no sympathy for you.' And I've never forgotten that."

Waiting is inevitable in law. It may be months before a court date is set. Weeks can fly by before a discovery. Lawyers may understand this, but clients, who rarely have dealings with the legal system, may have no way to gauge timelines.

However, lawyers may want to remember the old FedEx slogan: "Waiting is frustrating, demoralizing, agonizing, aggravating, annoying, time-consuming and incredibly expensive."

Some ways to make the waiting period less agonizing that Soman suggests:

1) letting clients know a file has been received and is scheduled for appropriate action; and

2) providing an idea of how long – roughly – the whole process will take and what steps to expect.

The goal, he says, is to find a way to soothe the client's inevitable anxiety.

He points to a recent study he conducted at a Canadian hospital of wait times to see an oncologist. There is a standard time lag of five to six weeks for someone with non-life threatening cancer to get a first appointment with a specialist. Soman and his team looked at ways hospitals can calm patients and make waiting a more pleasant experience.

"People felt anxious because they didn't know if anyone had seen the files; in their eyes, this was a life-threatening event but the doctor's office didn't seem to think that was the case."

The solution: have a nurse call patients as soon as the referral is received and the appointment date set, a step that used to take place a week before the appointment. As well as taking basic information (age, weight, height, etc.), the nurse now asks the patient if he or she has any questions. This is followed up with reminders about the upcoming appointment. By moving this call up in the process, the hospital gives the appearance that the patient is "in the system," says Soman.

There's a lesson in this for lawyers, says Soman. As a matter of good practice, clients should get prompt acknowledgement their file was being handled and then a timeline or estimation of how long a file would take to resolve. The reasoning behind the latter is simple, Soman says: "Anticipated waits are more bearable."

People who have a sense of how long they will have to wait for their appointment will consistently rank their experience as more positive than those who aren't told how long the wait will be.

"I recently worked with my lawyers on a real estate transaction," Soman says. "They gave me a timeline and set out expectations – I got a flowchart. I loved it!"

Not all timelines are easy to predict, but even acknowledging it is difficult to determine the waiting time has a soothing effect on anxiety and dissatisfaction, Soman says. However, when timelines can't be predicted, lawyers should check in regularly with clients, to let the client know the status of the matter or next steps (even if next steps are on hold because of delays or a pending event).

Gosnell adds that clients are able to plan their own lives better too: They do not need to keep the calendar open for possible unanticipated court dates.

When a lawyer… uses jargon

Speak in a language clients understand: Drop the legalese

"We're [McLeish , Orlando LLP] in the process of retaining an ad agency for some of our marketing," says Orlando. "And it's really frustrating when they use acronyms we don't understand. You don't want to ask because it seems like everybody else in the room knows what that means, so maybe I should.

"One agency came in to talk about a service agreement, and they were trying to explain to us the services they were going to provide. After listening for 30 minutes I still had no clue what they were going to be doing." Needless to say, Orlando did not retain that agency.

Speaking in code is an easy trap to fall into. It is the language lawyers use daily with their peers, so to talk in legal terms with a client seems totally natural.

This can create two problems. First of all, when clients don't understand what is going on, they aren't in a position to make informed decisions.

"I like it when a doctor explains things on my layman's level as I am not a doctor. We forget our clients are not lawyers," says Pascoe. "I like it when my doctor makes it even simpler by drawing a diagram to explain my medical problem." It may seem rudimentary, but it works. Understanding *why* something is the way it is makes it easier to accept and rationalize rather than just being *told* that's the way it is.


Lawrence Pascoe

The second problem, Soman says, is emotional: When someone speaks 'above' a customer's understanding, it makes the client feel inferior.

"It puts the lawyer on a pedestal," he says.

No one wants to be talked down to or made to feel stupid, but when they don't understand, it isn't always easy to ask for an explanation. As Orlando said, there is a perception that everyone else at the table "gets it," so those who don't are not as smart as the others.

"We tell our new staff that good communication isn't based on what the communicator says but what the listener understands," says Gowlings' Pike. "Talk in the language the client understands."

Ditch the jargon and speak plainly. Make things as concise as possible and ask questions to make sure the client understands.

The final word

Solid, two-way communication involves actively listening to clients and clearly explaining issues at hand. It doesn't require new technologies or serious investment, Soman says.

"It's the small things that matter," he adds. Little, positive experiences will have a much longer-lasting effect on the entire process. Think of the last trip you took: Did you have a good time? Was it raining or sunny the entire time? Was the staff friendly or rude? The entire trip may be coloured by a single positive or negative event.

Creating a positive experience for your clients can result in client loyalty, brand recognition, free marketing as clients tell their friends and family, and a deeper relationship based on trust and respect.

The benefits of great communication outweigh the cost. In fact, Soman says, communication is probably one of the easiest processes to fix because the solutions to "bad communication" don't cost much (if anything) at all.

"Making people aware of what is going to happen is the single biggest and easiest solution to avoid a communication breakdown." ■

Megan Haynes is communication coordinator at LawPRO.

1 As referenced by, Cunningham, Clark: "What clients want," Aug 3 2006 http://law.gsu.edu/ccunningham/PR/WhatClientsWant.pdf
2 *Ibid*
3 TD Media Room; "Show me good service- most Canadians want companies to thank them with good service." http://td.mediaroom.com/index.php?s=43&item=75
4 *Supra Note 1*

TitlePLUS lawyer service goals:
An old idea whose time has come (again)

Innovation has always been one of the strengths of the TitlePLUS title insurance program.

More than a decade ago, the then-new TitlePLUS program published a set of service commitments to which TitlePLUS lawyers were encouraged to commit.

The 12 pledges that comprise the "I will endeavour" commitments – which found their way onto a plaque which TitlePLUS subscribers could display in their law offices – are as (if not more) relevant today as back in 2000. Nor do they apply only to real estate lawyers: Given the consistently high proportion of claims that arise out of communication issues, the following may be food for thought for any practitioner.

I will endeavour for all my real estate clients:

To be committed to the care and understanding of your needs;
To develop long-term relationships and build confidence while providing excellence in legal services;
To discharge all my duties with loyalty, dedication, honesty and good faith;
To bring care, skills and knowledge to the performance of the professional services which I have undertaken;
To keep confidential all information about you and your business that I acquire through our professional relationship;
To explain legal issues and procedures in understandable terms;
To discuss fees before starting any work;
To obtain instructions from you on all material issues and to follow them, so that I do not act without your authority;
To keep you informed about the progress of your file;
To have your phone calls returned expeditiously;
To report to you promptly after completion of your file;
To appreciate your feedback on our service and to make your satisfaction my goal.

Chatting with the pros

Here are some tips from Huddart, Pike, Orlando and Pascoe on how they make communication work for them:

1) **Give your clients some homework:**
Give them a checklist of things they will need to do and should want to do to help keep the case moving forward.

2) **Give them a "manual":**
This doesn't have to be as thick as a car manual, but it could offer basic information about the type of law you will be helping them with, a breakdown of the processes involved and, when possible, timelines or estimated timelines.

3) **Treat each client as if she is your only client and your business depends on her:**
This doesn't mean worshipping the ground she walks on. It means turning off your phone, not checking your email and putting all your attention on the file before you – not the file sitting on your desk upstairs.

4) **Remember the little details:**
Take a minute to familiarize yourself with the file or documents before you meet with the client. Try to remember some more personal details about the client as well – his family details, hobbies, or job. Try connecting on a personal level.

5) **Practice the art of (partial) silence:**
When a client first comes in to discuss a matter, let the client do the talking, at least at first. Ask appropriate questions to get to the heart of the matter. What exactly does the client need you to do and why?

6) **Don't assume the client understands:**
When you are explaining something, ask the client if she understands what you are talking about. Take it a step further and have her explain it back to you.

7) **Be up-front about costs:**
To the best of your ability, lay out how the client will be charged. Is he going to be charged a flat rate? Will you charge by the hour? Do follow-up phone calls "count" towards that hour? How much is the retainer and how will it be replenished? Be open.

8) **Find out the best way to communicate with the client:**
Rather than force the client to call you on your schedule, find out if email is a better way of keeping in touch with the client.

9) **Spell out your return correspondence policy:**
Let clients know you will always get back to them in a certain time frame, even if it is just to say – "a tad busy now, but will get back to you tomorrow."

10) **Provide regular updates:**
Keep the client informed with what is going on in his file. This is especially important when the file has a long shelf life and there may be long periods of inactivity.

11) **Acknowledge when you receive new information from the client:**
Your client needs to know you have that new document in your system and it hasn't been lost in the mail.

lawyer incivility

How clients – and the bar – pay the consequences

The perception that the legal profession is becoming less civil has attracted widespread comment – from the judiciary to legal associations to regulatory bodies. The common concern: the potentially damaging consequences of a lack of civility on the individual matter, on the lawyer-client relationship (and on the quality of the service that the lawyer provides the client) and, ultimately, on the reputation of the bar as a whole.

In 2000, The Advocates' Society shouldered some of the responsibility for turning the tide by creating a set of Principles of Civility. Despite lacking the force of law, the widely-praised principles have been cited not only by Canadian judges, but also in judicial systems internationally.

Much has been written about the impact of incivility on the administration of justice and on the public image of the profession. But as Mark Lerner, president of the The Advocates' Society explained during a recent interview, incivility "ultimately comes back to the client" who must live with the consequences of a lawyer's conduct, both in court and at other stages of legal proceedings.

LawPRO: Some lawyers suggest that clients are partly to blame for lawyer incivility. Do clients urge lawyers to be aggressive or uncivil?

Mark Lerner: Sometimes clients may be behind it: Some clients, particularly in matrimonial law, want lawyers to be "gunslingers." But lawyers need to be able to withstand that kind of pressure. Lawyers need to manage client expectations; and by expectations, I mean not only expectations about results, but also expectations about the lawyer's style.

LP: What can lawyers do to manage client expectations?

Lerner: I tell my clients: "my role is to resolve a dispute." A lawyer should not be a puppet to the client's wishes. The lawyer is a professional adviser.


Mark Lerner

Sometimes a client may suggest that a lawyer is not being difficult enough. But if you're pushing back just to push back – or just to irritate the other side – it's going to have a negative impact. I said to one client [who had requested a more aggressive stance in his employment law matter] "you're still working without restrictions. If you want to be difficult, these are the possible consequences: You may lose your job." If the client wants a scorched-earth policy, the lawyer needs to explain that there are consequences that will flow from that.

LP: What are some of the potential consequences of a lawyer's uncivil conduct?

Lerner: It affects the way lawyers are viewed by opposing counsel, and the way they're dealt with by judges. Lawyers talk. Judges talk. That kind of reputation gets around.

Nobody has ever been successful just by being a bully. Some lawyers come in all guns blazing: I've seen it myself, and I've never understood it. I don't know whether it's a lack of self-esteem, or whether it's a lack of mentoring in the early years of practice, or whether they just think that that's the way lawyers should act based on television. But there are levels of professionalism and civility that need to be maintained. You can be firm, but also be fair.

LP: Can mentors help lawyers learn to be civil?

Lerner: It depends on what the mentor is like. Lawyers who aren't exposed to good mentors or who don't observe senior counsel demonstrating an appropriate tone of civility don't always learn appropriate conduct. Mentors can make a difference.

LP: Does lawyer incivility tend to prolong litigation or negotiations?

Lerner: Absolutely. I think that being inflexible, not being accommodating, bringing unnecessary motions, taking unreasonable positions without appropriate grounds, just for spite – it all ultimately comes back to hurt the client.

LP: Why is discovery such a common context for civility problems?

Lerner: There is no judge or referee present. You've got your client sitting right beside you, watching you perform. If the other lawyer is being aggressive, you may feel like you have to rise to the bait, because the client is right there, measuring your performance. But you can't "pick up every nugget on the road."

LP: What do you mean?

Lerner: If you don't pick your battles, you're not doing your job. Experience, temperament, personality – and more importantly, judgment – should remind you where to draw the line.

LP: If you could give one piece of advice to lawyers about how to avoid pitfalls in relationships with clients, what would it be?

Lerner: If lawyers start to develop a relationship of confidence and trust with their clients right from the first minute that the lawyer is retained, it will go a very long way toward eliminating complaints to the Law Society or lawsuits against the lawyer.

It's very difficult, if not impossible, to begin to work on the lawyer-client relationship halfway through the litigation. Ultimately, the lawyer is going to want to make a recommendation to a client, or take instructions from the client; but if the client doesn't have any confidence in, or respect for, the lawyer, it's very difficult to develop that later on. Confidence and trust are absolutely fundamental. First impressions really do count.

Ed. note: The Principles of Civility are available on The Advocates' Society website at: www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf. practicePRO's *Managing a Mentoring Relationship* booklet is available at www.practicepro.ca/mentoringbooklet. ■

The claims consequences

At LawPRO, we've seen a growing proportion of incivility allegations cropping up in claims. For example, lawyers may find themselves personally liable to pay a party's costs under Rule 57.07 (*Rules of Civil Procedure*) where the court has found that the lawyer's actions contributed to running up the bill.

Incivility can also lead to other consequences. The client's case may be prejudiced because the lawyer is unfavourably viewed by a jury; or a prospect of settlement may evaporate in the face of a lawyer's rigid posturing. Finally, a court may make an order designed to rectify an abuse of process: For example, an order terminating discoveries, or dismissing motions deemed excessive. It's not difficult to understand that these consequences of uncivil behaviour often culminate in a claim against the lawyer.

Here are some consequences of incivility that LawPRO has noted:

Self-represented lawyer must still behave like a lawyer

While representing himself in a defamation action against a publisher, a lawyer made "intemperate" statements about the defendant organization in his pleadings, including accusing it of "evil profiling." In correspondence with the defendant's counsel, he accused them of sharp practice, and suggested that they were personally motivated to ruin or embarrass him. The court found that the lawyer's statements violated Rule 6.03 of the *Rules of Professional Conduct*, and ran contrary to Principle 27 of the Principles of Civility published by The Advocates' Society, which provide that a lawyer should not: "…attribute bad motives or improper conduct to opposing Counsel, except when relevant to the issues of the case and well-founded."

In dismissing the litigation due to the plaintiff's non-compliance with certain court orders, the court ordered that the plaintiff pay costs on a substantial indemnity scale, but only for the motion in which the inappropriate comments were made.

The lawyer protested that he was appearing not as counsel, but as a self-represented litigant, and so should not be subject to punitive cost awards designed to curb lawyer misbehaviour. The court disagreed, holding that "…a lawyer who is representing himself is still acting as a lawyer (as well as a litigant) and is bound by the rules that apply to lawyers."

Civility to clients is at least as important as civility to members of the justice system

In another case, the discipline committee of the Law Society of Upper Canada considered seven separate allegations of professional misconduct made against a lawyer.

Three of the five allegations related to the lawyer's relationship with clients. The first two centered on the tone of a letter sent to the client in an attempt to collect fees. In the letter, the lawyer made a racist remark about the client and threatened criminal proceedings if the client failed to pay the lawyer's bill.

The final allegation described the lawyer's refusal, after being removed as the solicitor of record, to transfer the client's file to the successor lawyer. The Law Society found that all of these actions constituted professional misconduct. In addition to the penalty imposed by the Law Society, a successful claim was made against the lawyer's malpractice insurance.

In our experience, incivility to clients is an important trigger for claims. Even though the claim may ultimately be framed in negligence, it is not uncommon for the claim to be filed in reaction to an incident of incivility. As noted by Mark Lerner, establishing a relationship of mutual respect and trust at the outset of the lawyer-client relationship can prevent much misery further down the road.

Rule 57.07 intended not to punish, but to compensate

An important message about the purpose of Rule 57.07 (costs against a lawyer) was reinforced in the judge's reasons in a case that ended up in an insurance claim.

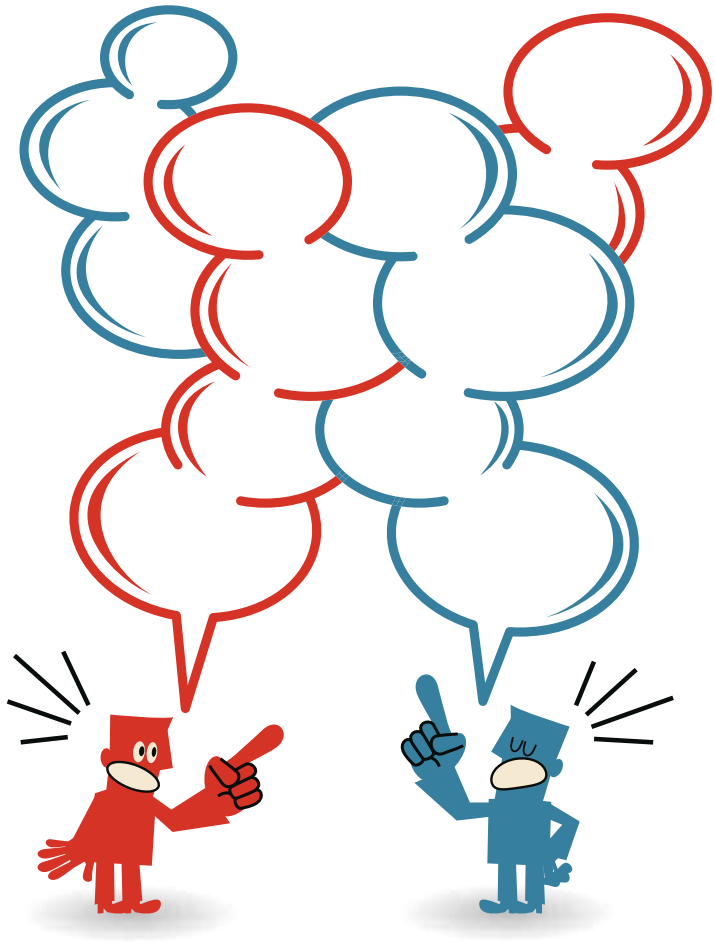
In this case, the court found that while the lawyer's deportment was quite civil (with one minor exception), the lawyer was ill-prepared for the litigation. His weak grasp of evidence law and the *Rules of Civil Procedure* led to considerable time and effort spent by opposing counsel to address matters (for example, the testimony of "experts" that the court ultimately refused to qualify as experts) that never amounted to anything. In characterizing the lawyer's case as "a moving target," the court found that the lawyer's lack of preparation increased the costs for the other side, justifying a Rule 57.07 order. The court made it clear that, as established in *Walsh v. 1124660 Ontario Ltd.* ([2007] O.J. No. 639, Lane J.), Rule 57.07 is designed not to discipline lawyers, but to compensate aggrieved parties for wasted costs.

Whether or not it flows from incivility, fighting a Rule 57.07 order often means the lawyer must make an insurance claim to cover not only the costs ordered in the litigation, but also the lawyer's own defence costs.

The bottom line here: Being professional means not only being civil, but also being prepared – a duty lawyers owe not only to their clients, but also to opponents and to the court. ■

Nora Rock is corporate writer/policy analyst at LawPRO.

Communication is a two-way street



How lawyers can help clients become better communicators – and vice-versa

Some solicitors may think that the responsibility for maintaining appropriate solicitor/client communications lies solely with them. It is true that solicitors who fail to adequately communicate with their clients risk losing those clients – or even facing a malpractice claim.

But it is also true that clients have reciprocal obligations to disclose relevant facts, to communicate their need for additional explanation, and in certain cases, to review legal documents sent by the solicitor and communicate their concerns and instructions with respect to them.

Clients' communication obligations

Can you coach your clients so they can better help you to help them? Setting out your expectations in terms of client communication at the start of the retainer can be a powerful tool in achieving a successful outcome for the client. Consider the following case law in deciding how to frame your client communication requirements.

Clients should disclose relevant facts, ask for further explanation

Justice Denis Power's decision in *Michiels v. Kinnear and Vadala*[1] holds that clients must disclose relevant facts to their solicitors and ask for additional explanation if there is something that the client does not understand.

The lawyer acted for the plaintiff and her late husband in making a gift of their home to the husband's niece. The plaintiff later regretted making the gift and sued the solicitor as well as the niece and the niece's husband.

The court held that the solicitor did not cause the plaintiff's loss, because she and her late husband were determined to make the gift. There was no advice that any solicitor could have given which would have dissuaded them from doing so.[2]

The following year, the plaintiff released the life interest which she had retained at the time of the conveyance to her niece, so that the niece could obtain a mortgage to renovate the property.

The plaintiff claimed that she was functionally illiterate and did not understand what she was signing on either occasion.

Power, J. held that if the plaintiff was functionally illiterate, she clearly had an obligation to point this out to both lawyers who had advised her. Most people assume that, unless there is some indication to the contrary, the person with whom they are dealing is literate. Both lawyers explained the documents to the plaintiff. They reasonably assumed that if she had any difficulty understanding them, she would have said so.

Power, J. referred to *Dawe (c.o.b. Dawe and Dawe Fisheries) v. Brown*,[3] where Schwartz J., at para. 44, stated:

> **44**… It is incumbent on the client to explain the problem fully, provide all facts pertaining to the matter including anything which might be detrimental to the possibility of a successful claim, and to give the lawyer instructions on proceeding after being fully advised. It is only then that a solicitor can act properly on behalf of the client.

In Justice Power's opinion, it is incumbent on clients who do not understand what they are being asked to sign to ask for a better explanation, just as an illiterate client must point out to the lawyer that he or she is illiterate.[4]

If the first lawyer's negligence had caused loss to the plaintiff, Power, J. would have reduced the plaintiff's damages by 50 per cent to account for her contributory negligence in failing to disclose her alleged illiteracy and lack of understanding of the documents she signed.[5]

Clients should review legal documents sent by the lawyer

The courts have long accepted that clients, especially experienced business clients, should read the legal documents sent to them by their solicitors for review and comment.

In *Duncan v. Cuelenaere, Beaubier, Walters, Kendall & Fisher*,[6] the plaintiff's crops were damaged by hail. The plaintiff gave his lawyer the wrong date of loss, which caused the statement of claim to be issued outside the limitation period. The plaintiff had the opportunity to read the statement of claim before the limitation period expired.

The court stated:

> … (the lawyer) was entitled to assume that an experienced business person would take care in giving instructions to his counsel and that the dates and descriptions of the lands affected would be accurate. He was also entitled to assume that a client would care enough to review important legal documents sent to him. The plaintiff failed to take the most basic steps to ensure that his instructions were being discharged. He knew better than anyone the facts prevailing and could be expected to detect any errors immediately.[7]

Duncan v. Cuelenaere was followed in *Hallmark Financial v. Fraser & Beatty*.[8] In *Hallmark*, the court held that the solicitors were entitled to assume that their clients, experienced business people, would review the purchase agreement to ensure that its business provisions reflected their understanding of the letter of intent. The clients reviewed the agreement and made no changes.

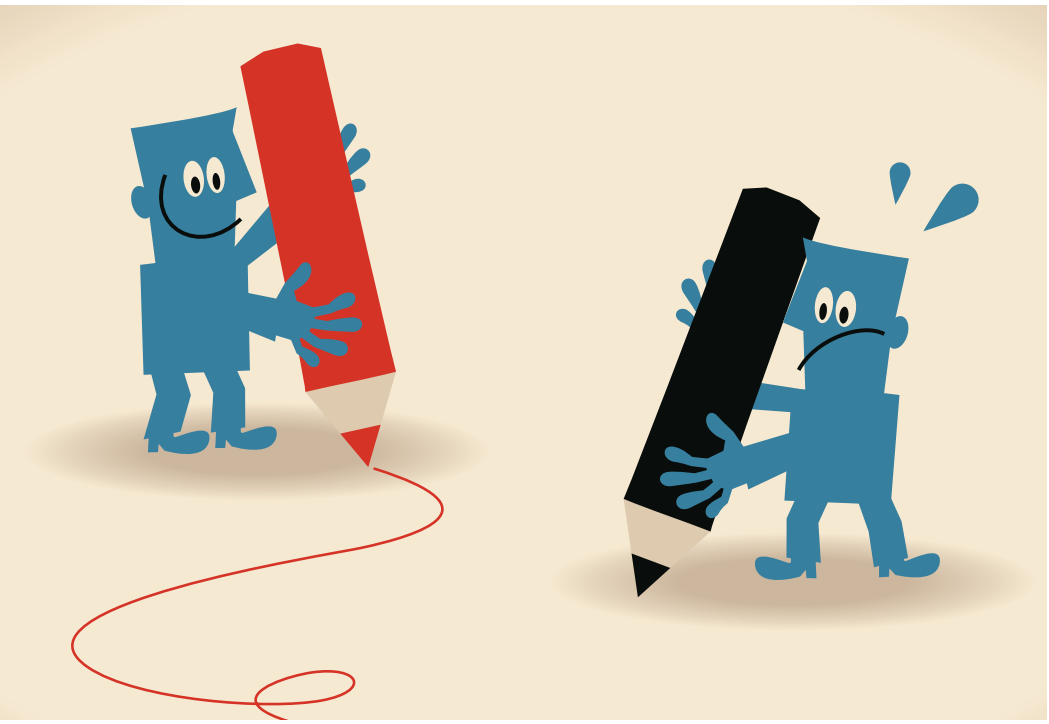
The approach taken in these cases was recently confirmed in *3557537 Canada Inc. v. Howard*,[9] an action by a sophisticated businessman against his solicitor. The lawyer and client had frequent conversations concerning the transaction and the documentation as the transaction evolved.

The court held that the client recognized the need to review and understand the documentation which was sent to him. He knew that if he did not understand a provision in the documentation he should say so. He knew that it was important to ensure that the documentation correctly reflected the business deal he had made. He knew that if he was uncertain whether or not it did so, he should say so. The solicitor was not responsible for the client's failure to do so.[10]

Lawyers' communication obligations

Articles published elsewhere in this magazine discuss the very real client dissatisfaction caused by solicitors' failure to discuss what the solicitor can reasonably accomplish on the client's behalf, failure to keep clients informed of the progress of their cases, failure to adequately discuss fees, and so forth. Below we discuss miscommunication which gives rise to malpractice claims.

A prime example of such miscommunication is failure to come to an understanding about



what the solicitor will or will not do for the client. The issue is complicated by the fact that, in some cases, the client needs the solicitor's guidance in defining what the solicitor's retainer should be.

Personal injury claims are the most obvious example. In other cases, the client is sophisticated, but something nevertheless "falls between the cracks." A third source of difficulty is the extent to which advice must be put in writing.

Defining the scope of the retainer

Jackson & Powell on Professional Liability – Sixth Edition, the leading British text on professional liability, contains the following warning at p. 659:

> **The need for writing**. Where the retainer is oral, the solicitor ought, for the benefit of both parties, to record the terms in a letter to his client at the outset. At the very least, the nature of the retainer should be recorded in an attendance note. If the solicitor neglects this precaution and later there is a dispute as to what he was instructed to do, the solicitor will begin at a disadvantage.
>
> If a solicitor considers that the services he is performing for a client are only limited, this should be put in writing to avoid misunderstanding. Similarly it is prudent for a solicitor to record in writing the advice that he gives during the retainer.

Limited retainers

Limited retainers have been a fruitful source of malpractice claims. Whether a solicitor can establish that his or her retainer was properly "limited" is extremely fact-driven and unpredictable.

The best known limited retainer case is *ABN Amro Bank Canada v. Gowling, Strathy & Henderson*.[11] The law firm acted for the lender client. It was the law firm's responsibility to obtain evidence that business interruption insurance was in place before the loan proceeds were advanced. The firm alleged that the lender had nevertheless agreed to undertake this responsibility. The lender, as plaintiff, denied this. The law firm was held liable. Any attempt to "limit" a solicitor's retainer to exclude a matter otherwise required should be done in simple, clear, concise language, reduced to writing. The law firm did not do so.

The outcome for the solicitor was happier in *Woodglen & Co. v. Owens*.[12] A sophisticated developer's action against the lawyer was dismissed. The developer asked the solicitor to carry out several specific but limited tasks, which he did. The developer retained overall control of the project, and had engaged other planners and solicitors to help with the work. The defendant solicitor did everything he was retained to do. The developer was responsible for the lack of co-ordination between himself, the solicitor and his other legal and planning advisors.

In *Outaouais Synergest Incorporated v. Keenan*,[13] the court found that responsibility for an important matter "fell between the cracks" as between solicitor and client, and the solicitors were responsible for this. The law firm acted for the plaintiff on the purchase of vacant commercial land near Ottawa. The purchaser and firm agreed that the purchaser would deal with the municipality of Ottawa in relation to zoning and development issues, with the law firm to attend to the legal issues.

After closing, the plaintiff learned that its property was subject to a 0.3 metre reserve around its perimeter in favour of Ottawa. The plaintiff could not get access to the property, unless the reserve was lifted. Ottawa had spent over $200,000 on road improvements, and the reserve was its way of ensuring repayment. The purchaser unwittingly took the property subject to this obligation, which was not registered.

James J. held that the plaintiff, in taking responsibility for development issues, never appreciated the access implications of the 0.3 metre reserve. The interplay between the development control aspect of the 0.3 metre reserve and its relationship with the legal issue of access was a "question of doubt" in the scope of the lawyer's retainer. The law firm failed to establish a "bright line" between its responsibilities and those of the client. Consequently, the due diligence obligation with respect to the 0.3 metre reserve was not effectively transferred to the client. This judgment is under appeal.

Distinguishing between a limited retainer and an ordinary retainer

Because any attempt to limit a solicitor's retainer must be done in simple, clear language (preferably reduced to writing), it is important to distinguish between what is or is not a limited retainer.

Broesky v. Lust[14] is helpful on this issue. The plaintiff client retained the lawyer to pursue her claim for disability benefits, which he did. The plaintiff alleged that she also retained the lawyer to pursue tort and SAB claims. Mackinnon, J. dismissed the plaintiff's action. The court found that the lawyer was retained only for the disability claim, even though the defendant never expressly stated in writing that he would NOT be handling the tort and SAB claims.

This case supports two useful principles:

- a limited retainer, as properly understood, refers to a solicitor undertaking a lesser level of service than a reasonably competent solicitor would provide in the circumstances. Examples of limited retainers include closing a real estate transaction without a title search or advising about a separation agreement without obtaining financial disclosure. Pursuing a disability claim on the client's instructions – but not a tort or SAB claim – is not a limited retainer; and
- it is not negligent for a solicitor to fail to confirm a non-retainer in writing, although it is prudent to do so. Such a letter is for the solicitor's protection. A non-retainer letter should be distinguished from a letter limiting a solicitor's retainer.

Other useful limited retainer cases include *Coughlin v. Comery*[15] and *Holomego v. Brady*.[16]

Failure to confirm with client that the retainer is spent

In *120 Adelaide Leaseholds Inc. v. Thomson, Rogers*,[17] the law firm acted on the purchase of a leasehold interest in a Toronto commercial building. It was instructed to exercise all options to renew immediately after closing. It proved impossible to do so. The solicitors considered that their instructions were "spent." This was not confirmed with the client. The solicitors were held liable when the option to renew was not exercised in a timely fashion.

A client is not obliged to follow up with his solicitor to inquire whether the solicitor has followed the client's instructions. A client is entitled to rely upon the solicitor to follow its instructions, in the absence of clear advice to the contrary.

Must oral advice be confirmed in writing?

In most cases, failing to put advice in writing is not negligence, so long as the advice was given clearly and the client understood it. It is a sensible precaution for solicitors to either give their advice in writing or to make an attendance note of all oral advice, but that is principally for their own protection.[18]

There are exceptions to every rule. *Turi v. Swanick*[19] illustrates that confirming advice in writing may be necessary to ensure that the client understands and remembers the advice.

The plaintiff client retained the solicitor to incorporate a company to operate his new store, in order to avoid personal liability for the store's debts. Nevertheless, the plaintiff was found liable to one of the store's creditors because he signed an account application and a purchase order in his personal capacity.

The plaintiff sued his lawyer to recover this amount. Spiegel, J. found that the plaintiff was an unsophisticated businessman, and that the lawyer's advice about the proper use of the corporate name must have "gone in one ear and out the other." The lawyer should have sent his client a short written memorandum setting out the advice concerning the proper use of the corporate name; his failure to do so, in this case, fell below the appropriate standard of care.

Conclusion

Communication is indeed a two-way street. A solicitor must clearly establish, from the beginning, the scope of his or her retainer. Any limits on the retainer should be confirmed in writing. Although clear oral advice is generally acceptable, some clients may require that the advice be confirmed in writing.

Clients, on the other hand, must make their solicitors aware of all relevant facts. If the client does not understand the solicitor's advice, the client should say so. Clients, especially business clients, should carefully read documents sent by the solicitor for their review and comment. Letting the clients know their role in good communication may help them avoid problems for themselves in the long term. ■

Debra Rolph is director of research at LawPRO.

1 2011 ONSC 3826 (S.C.J.)

2 *Ibid*., at para. 20

3 (1995), 130 Nfld. & P.E.I.R. 281 (S.C.)

4 *Michiels v. Kinnear, supra*, paras. 157, 158

5 *Ibid*, para. 174

6 [1987] 2 W.W.R. 379 (Sask.Q.B.)

7 *Ibid*., at p. 383

8 (1991), 1 O.R. (3d) 641 (Ont. Ct. Gen. Div.)

9 2011 ABQB 212. (Alta. Q.B.); pdf copy available from debra.rolph@lawpro.ca

10 *Ibid*, at para. 318

11 (1995), 20 O.R. (3D) 779 (Ont. Ct. Gen. Div.)

12 (1999), 27 R.P.R. (3d) 237 (Ont. C.A.), affirming (1997), 6 R.P.R. (3d) 259 (Ont. Ct. Gen. Div.)

13 2011 ONSC 637 (S.C.J.)

14 2011 ONSC 167 (S.C.J.)

15 [1998] O.J. No. 4066 (Ont. C.A.), dismissing appeal from [1996] O.J. No. 822 (Ont. Ct. Gen. Div.)

16 [2004] O.J. No. 5283 (S.C.J.)

17 (1995), 43 R.P.R. (2d) 68 (Ont. Ct. Gen. Div.)

18 *Harwood v. Taylor Vinters (A Firm)*, [2003] E.W.J. No. 3352; [2003] EWCA Civ. 907; see also *Kumar v. Atkinson*, [2004] O.J. No. 3151; *Accurate Fasteners v. Gray*, [2005] O.J. No. 4175; *Dinevski v. Snowdon*, 2010 ONSC 2715 (S.C.J.)

19 (2003), 61 O.R. (3d) 368 (S.C.J.)

practicetip

Beware the Ides of Rule 48

The following scenario is familiar to all plaintiffs' counsel. Consider it, for example, in the context of a slip and fall claim.

Upon being retained and after having reviewed the relevant factual background, counsel chooses, wisely, to explore the prospect of resolving the claim without the need for formal proceedings. The liability insurer is like-minded and appoints an adjuster to investigate and engage counsel in a settlement dialogue. As is often the case, the running of a limitation period outstrips the pace of negotiations and the expiry of the limitation looms.

To protect the client's interests and preserve the right to formally advance the claim, counsel commences an action. Mindful of the six-month deadline for service, counsel serves the statement of claim and an agreement is struck with the adjuster to hold the action in abeyance pending the outcome of settlement discussions. The outlook in this regard is favourable and counsel is justifiably optimistic. All is well, but for one thing… Rule 48.15.

The Rule provides as follows:

48.15 (1) Dismissal – The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than 180 days have passed since the date the originating process was issued.
2. None of the following has been filed:
   i. A statement of defence.
   ii. A notice of intent to defend.
   iii. A notice of motion in response to an action, other than a motion challenging the court's jurisdiction.
3. The action has not been disposed of by final order or judgment.

The action has not been set down for trial in our slip and fall scenario.

The registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned: O. Reg. 438/08, s. 46, O. Reg. 394/09, 21(1).

It does not matter that the parties are engaged in ongoing and perhaps vigorous negotiations, with a clear and unequivocal intent on the part of the plaintiff to proceed with the claim. The rule deems the action as "abandoned" in the absence of the specified filings. Ordinarily, the filing of these documents would be a routine measure if defence counsel were appointed. The problem arises where the defence representative is an adjuster.

Assume for a moment that the court office has delivered the required 45-day notice. Counsel then advises the adjuster of the deadline and asks that defence counsel be appointed to deal with the appropriate filing. Unfortunately, 45 days is often far too brief a span for the adjuster to communicate with his principals, have the insurer appoint counsel, and have that counsel respond in a timely manner so as to keep the action alive. Add a vacation to the mix, and the result is all too common: The action is dismissed.

While there is recourse by way of a motion to set aside the dismissal, time and money are better spent in some prudent planning so as to avoid the dire consequences of Rule 48.15.

Perhaps the simplest and safest course (instead of issuing the statement of claim) is a "tolling" or "standstill" agreement, whereby the parties agree to suspend the running of the limitation period while negotiations are ongoing. If a formal action becomes necessary, the agreement stipulates the time frame within which an action must be commenced, upon written notice from the defendant.

Perhaps the Rules committee may revisit this issue and see fit to extend the time frame within which an action is allowed to lay dormant. For the moment, it is up to the plaintiff's counsel to be mindful and watchful. ■

Dale Herceg is senior claims counsel at LawPRO.

techtip

Six technology tools for improving client communication

Technology is becoming an ever greater part of our lives, both personally and professionally. On a daily basis most of us use a cellphone or smartphone, a desktop computer and the Internet. Many of us will have an iPad or other tablet device and be posting updates on Facebook, Twitter or other social media tools.

Clients expect their lawyers to be technology literate – and there are always new and improved ways for communicating with clients. Here are some newer tools that you can consider using to better serve and communicate with your clients.

1 Help clients find your office

How often do you find yourself giving new clients directions to your office? Google Maps offers a great tool for creating a map that will show clients the location of your office. Go to maps.google.com and type your office address into the search box. Click on the link icon (look for an icon with three chain links at the top right corner of your screen). This will open a pop-up that will give you a URL link you can use to access that same map. Send that link to new clients via email and they can see the map. The pop-up also gives you the HTML code you can use to include the map on your website. Take it a step further by creating customized maps to show clients directions to other places that might be helpful for them (for example, the local court house).

2 Electronic intake forms

In many areas of practice, collecting background information is the main purpose of an initial meeting with a client. Wouldn't this be easier if the client came to your office with a standard intake form already completed? Adobe Acrobat (the Standard and Pro versions) makes this possible by giving you the ability to create an electronic PDF client intake form which you can email to your client. The client can print it to fill out a paper version or better still, can complete it onscreen and send it back to you electronically. The client just needs the free Adobe reader software.

And don't limit yourself to the intake process – consider converting other paper forms you have in your office. Acrobat has a form conversion tool that does a fantastic job of converting paper forms into electronic ones.

3 Virtual meetings

Virtual meeting tools let you collaborate across the web in ways that are just as effective as face-to-face meetings, while helping you significantly reduce time and travel costs.

These tools let you show the contents of your computer screen to multiple people via the Internet. You can create a document much more quickly when everyone can simultaneously view and comment on the draft as it evolves. In a single phone call you can draft and finalize a document that normally might take many emails and redrafts over days or weeks to create. These tools are easy to use and you can set up a virtual meeting on an *ad hoc* basis in the middle of a conference call in a matter of minutes.

GoToMeeting (www.gotomeeting.com), WebEx (www.webex.com) and Acrobat Connect (www.adobe.com/products/adobeconnect.html) are the most widely used virtual meeting tools. Pricing for the basic versions of these products is around $50 per month. Some of them have trial or limited-use versions that you can use for free. If you avoid just one in-person meeting a month, you are more than paying for them. I have GoToMeeting installed on my laptop, and it allows me to host a virtual meeting from anywhere I have an Internet connection.

4 Free long distance

Voice-over-IP or "VoIP" phone systems can save on long distance charges, but they are expensive to buy and set up. However, if you have a high-speed Internet connection and your computer has a soundcard and microphone, you can try VoIP for free with Skype (www.skype.com) or Google Talk (www.google.com/talk). You can use these tools to communicate with audio and video over the Internet. While not suitable for every area of practice (and you will on occasion experience poor voice or video quality and dropped calls), some lawyers are using Skype or Google Talk to avoid long-distance charges – both improving the bottom line for their office and making clients happy about avoiding long-distance charges for calls to their lawyer. While some social media tools offer similar functionality, it is probably safer not to use them for the sake of protecting client confidentiality.

5 Find time for a meeting

Trying to schedule a meeting with multiple people via email is inefficient and annoying – few things are better at filling your inbox with totally unnecessary messages. Next time you need to find the best time slot for a meeting, consider using online tools such as GatherGrid (www.gathergrid.com), WhenIsGood (www.whenisgood.net) or Doodle (www.doodle.com).

These tools vary slightly in how they present the options for the timing of a meeting (i.e., giving you full days of available time vs. offering specific time options), but they all work in more or less the same way. Go to one of these sites and create a meeting event. Then indicate potential times and dates for the meeting and provide the email address of each person who needs to come. Finally, initiate an email that goes out with a link that will give all invitees a calendar showing them the possibilities. Once invitees indicate whether they are available or not, the meeting organizer can go to the calendar to easily see the best time for the meeting. Some of these tools also let you send a meeting invitation that will automatically put an entry into an Outlook or other electronic calendar.

Use one of these tools next time you need to schedule a meeting: your client will really appreciate how quickly and easily you can tie down the date and time for that meeting.

6 I'm thinking of you

Marketing experts tell us we need to do things to stay top of mind with clients. The free Google Alerts service can help you do this. It allows you to monitor the web for interesting new content and it will send you an email listing of relevant Google results (news, website content, etc.) based on your choice of query or topic.

Some handy uses of Google Alerts include:

- being notified when your name or your firm name appears in the news or on the web;
- being notified when your client's name appears in the news or on the web;
- monitoring a developing news story; and
- keeping current on a competitor or industry.

To create an alert, go to the Google Alerts page (www.google.com/alerts) and enter a text string that contains the name of the person or topic that you want to monitor (for example, your name, your firm name, a client's name or industry). Google Alerts will send you an email alert listing Google news or web search results based on the terms that you specified. You can configure it to deliver the alerts to you instantly, daily or weekly. On the news side, it searches several thousand news sources that the Google News page indexes. On the web search side, it searches all the web pages that the Google search engine indexes.

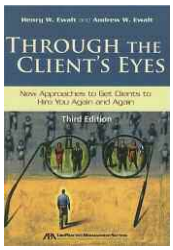
When you get an alert about something that would interest one of your clients, take a minute to send them a quick email with a link to the news item or webpage.

As the other articles in this issue highlight, regular communication with your clients is a cornerstone of a solid lawyer-client relationship. Consider how you can use the tools listed above to better serve and communicate with your clients. ■

Dan Pinnington is director of practicePRO at LawPRO.

bookreview

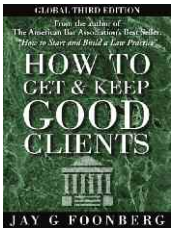
The practicePRO Lending Library has more than 100 practice management titles available to Ontario lawyers free of charge. Below are three books that will be of great help to lawyers looking to improve how they communicate with their clients. For a full list of the books available and details on how to borrow one, visit www.practicepro.ca/library.



Through the Client's Eyes

Through the Client's Eyes, by Henry W. Ewalt and Andrew W. Ewalt asks lawyers to think of their practices as client-centred businesses responsive to customer needs. Adapting firm practices to suit clients' needs isn't just a feel-good exercise; clients are increasingly willing to take their money elsewhere if they don't get good customer service.

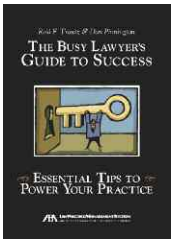
Lawyers should look at their firms through their clients' eyes. What is their experience when they first walk in the office? Does anyone take the time to learn more about them than the bare facts of their case? Are they kept informed about the progress of their case and how they are being billed? Are they asked for their feedback after the matter is closed? This book contains advice on how to do all of these things, which will not only ensure more satisfied clients but also make it more likely the firm will see repeat business from them. (A full review can be found at www.practicepro.ca/library).



How to Get and Keep Good Clients

How to Get and Keep Good Clients is by Jay G. Foonberg, who is well known for the American Bar Association's best-selling title ever: *How to Start and Build a Law Practice*. This book is a collection of practical tips, checklists and anecdotes on growing a client base and keeping existing clients satisfied.

Many of the chapters' names speak for themselves, such as "How to Handle People who Hate Lawyers or the Legal System," or "Cases Which Should Be Turned Down." A perennial favourite: "Foonberg's Favourite 51 Rules of Good Client Relations for the Busy Lawyer."



The Busy Lawyer's Guide to Success

The Busy Lawyer's Guide to Success is co-authored by practicePRO's Dan Pinnington and U.S. practice management advisor Reid Trautz. This book builds on practicePRO's main risk management message: communications breakdowns are the number one cause of malpractice claims against lawyers. In this book the authors have distilled their knowledge and experience of practice and risk management into a pocket guide of tips, checklists and ideas to help lawyers be more successful in their practices.

The first chapter is devoted to client service and includes tips on how lawyers can improve their client service during intake, a list of things that annoy clients most, how lawyers can make themselves more accessible (it's a good thing, honest!) and advice on telephone and business etiquette that will leave clients more satisfied with the service they receive. Subsequent chapters deal with marketing, technology, professionalism and better management of the firm.

Tim Lemieux is practicePRO coordinator at LawPRO.

More from the practicePRO Lending Library

The practicePRO Lending Library has many practice management titles to help firms guide their lawyers and staff.

- **Keeping Good Lawyers** is filled with easy-to-implement suggestions for training and retaining good lawyers and helping them maintain high levels of motivation and career satisfaction.
- **The Lawyer's Guide to Governing Your Firm** provides strategies for firms that want to change their culture, provide better client service and improve the working environment for lawyers and staff.
- **Strengthening Your Firm: Strategies for Success** provides insight and advice from a panel of experts on topics such as adapting to change, partnership challenges, dealing with financial problems, and improving leadership skills.

For full descriptions of these titles, including downloadable tables of contents, go to practicepro.ca/library

The fallout of incivility from the victim's perspective

A call came into the OLAP offices the other day. The lawyer caller had been subjected to a series of nasty, accusatory emails and telephone calls from an opposing lawyer and had "had it."

The immediate reason for the call to us was an email with a personal attack on his competence and a threat to contact the Law Society (with a "CC" to the Law Society on the bottom of the letter) that came the day before at 4:45 p.m.

He described that a relatively simple matter had become very litigious. He was astonished that the other lawyer then began to engage in a campaign of name calling, sarcasm, profanity and rude, offensive behaviour. The emails were a testament to the conflict, but the personal interaction was even worse. In front of both clients, at court appearances and discoveries, the other lawyer rolled his eyes, talked to him like a child or, alternatively, aggressively; and even shrugged his shoulders and waved his hands as if to shoo our caller away – showmanship with personal fallout for our caller.

As he talked, we explored how these actions were causing the emotional reaction of anger. He described what his anger and upset felt like.

When he got an email from the other lawyer, his heart would pound as he wondered: "What now?" On reading the projectile, he would breathe shallowly, tense his shoulders, his hands would shake and he felt that he would explode. To make matters worse (if that could be possible), another email usually came less than an hour later demanding an immediate reply to the previous email with the threat that a failure to respond would be used in subsequent court proceedings followed by the ubiquitous – "Kindly govern yourself accordingly!"

This is exactly what had happened the day before. The caller described what his day had been like after that. He was distracted from his other work. The situation obsessed him to the point that he kept going over the other lawyer's abusive actions in his mind and then reviewing and second-guessing his own position to determine whether he was, in fact, representing his own client competently.

The thinking threaded its way into everything he did that day from trying to work on other matters to eating dinner with his family. He would alternate from wanting to send a flaming email in response to an "I don't care" attitude. However, underlying all of these feelings were fantasies of revenge, putting the other lawyer in his place and coming out on top. When he went to bed, the events continued to worm in his brain and he had a very disturbed sleep. When he woke up in the morning, he was tired, confused and at the end of his rope. He did

the right thing by calling an OLAP case manager to talk to someone who would lend him a sympathetic, understanding ear and who could offer assistance.

The obvious essence of this scenario is anger. AngerManagementTips.com (www.angermanagementtips.com) tells us that anger is a natural emotion, nature's way of telling us that something in our lives has gone haywire. It is a defensive response to a perceived attack or threat to our well-being. These are the psychological changes we undergo.

There are physiological changes as well. Your adrenaline flows, your heart rate increases and your blood pressure escalates. Long-term anger has been linked to chronic headaches, sleep disorders, digestive problems, high blood pressure and even heart attacks.

Aristotle said: "Anybody can become angry – that is easy; but to become angry with the right person, and to the right degree, and at the right time, and for the right purpose, and in the right way – that is not within everybody's power and is not easy." Our caller truly displayed the truth of those words!

Tips to manage how you react

To try to manage your anger in the face of incivility, I offer a few tips. Not all of them are easy to put into practice. Some may seem trite.

However, when you are aware that you are **reacting** instead of **responding** to another lawyer's actions, maybe you can mine something from the following:

1 **Put your anger on hold** – Reacting with anger to anger merely escalates the situation. The other lawyer gets what he wants from you – an out-of-control reaction that may lead to your less-than-well-thought-out reply to his or her attacks. As Eugene Meehan, Q.C., past-president of the Canadian Bar Association, has written on numerous occasions: "Never wrestle with a pig – you'll only get dirty; AND the pig likes it!" See Eugene's article titled, "Civility as a Strategy in Litigation: Using it as a Tactical Tool" (www.eugenemeehan.com/default_e.asp?id=76).

So, pick your battle, the time to engage it, and do it deliberately with objective argument. Do not take the bait to fight right away. Take some time to reflect, put your emotions on hold, and then think of the right steps to properly and effectively represent your client's interests.

2 **Call a friend, colleague, mentor or peer support person** – Our caller did the right thing. After taking time, he needed more help so he called OLAP. If you have someone you trust, ask them to listen to you objectively, help you gain perspective and maybe even develop a strategy to handle your anger, call them to debrief. You will reap great rewards. This does not mean turning over the problem to someone else. It does mean you need to own your own emotions and deal with them. A practice mentor can share with you his or her own experiences in how he or she managed her anger and uncivil lawyers. If you feel you are not able to represent your client effectively, transfer the file to another lawyer – with a big red flag about the other lawyer's uncivil behaviour.

3 **Change your environment** – Physically do something to deal with the physiological fallout of your anger. Go for a walk, run or exercise. Eat a good meal, drink lots of water to refresh your body to help you deal with the stress.

Emotionally, take some quiet time with your private passion – reading, working with wood, spending time with family, sailing or whatever activity gives you balance. Try some "quiet time" with meditation, yoga or reading self-affirmations. Pray, if you do that. Consider saying the Serenity Prayer during stressful times: "God, grant me the serenity to accept the things I cannot change, courage to change the things I can, and the wisdom to know the difference."

If you are not the quiet type, crank up the stereo, play air guitar or put on your favourite movie and simply escape.

4 **Recognize the triggers to your anger** – The cause of your anger will be rooted in your beliefs. For lawyers, one belief may be that we are being accused of incompetence. This can lead to a series of negative thoughts: being sued, discipline, losing clients, losing your practice, losing your home, and so on. These are unproductive and damaging patterns that lead to increased anxiety that may result in the inability to perform.

Each one of us will have our own root cause or belief that causes us to get angry, defensive and react. However, the cause will be triggered by internal and external triggers.

Internal triggers can include: becoming overwhelmed by exceeding the level of frustration you can tolerate; unreasonable expectations from yourself, others or life in general; and, comparing or judging yourself and others.

External triggers can be: personal attacks against you verbally or in writing; your position being attacked, ridiculed or ignored; and physical or emotional states including fatigue, addictions or mental wellness issues.

The difference between appropriate and inappropriate reactions and responses to another lawyer acting in an uncivil manner towards you determines your resilience and professionalism. LawPRO will tell you that many claims are the result of a lack of communication between lawyers with clients or with other lawyers. To avoid a claim, try the tips above or whatever works for you.

Remember that free confidential help is available 24 hours a day, seven days a week with peer support and counselling through the Ontario Lawyers Assistance Program. The case managers are lawyers who understand the pressures of practising law and can refer you to appropriate sources for help.

OLAP's telephone number is 1-877-576-6227. The website has many other resources at www.olap.ca. ■

John Starzynski is the Volunteer Director, Peer Support and Liaison at the Ontario Lawyers Assistance Program.

4 out of 5 lawyers will face a malpractice claim

Improve your odds.

Check out these resources from practicePRO:

- **AvoidAClaim.com** blog to get the scoop on claims and how to avoid them
- **practicepro.ca/newcalls** for tips, tools and resources on how to succeed in the practice of law
- **lawpro.ca/newcalls** for information on insurance coverage you will need when you go into practice

practice PRO®

Risk management

LAWPRO®

Professional liability insurance

practicePRO® is the claims prevention program provided by LAWPRO® – the malpractice insurer for Ontario lawyers. LAWPRO also provides excess insurance and title insurance through its TitlePLUS® program.

LawPRO®

practice PRO®

Risk management
www.practicepro.ca

LawPRO eXcess Insurance

Additional professional liability insurance
www.lawpro.ca/excess

Title PLUS®

Title insurance
www.titleplus.ca

www.lawpro.ca

CANADA POST POSTES CANADA

Postage paid Port payé
Publications Mail
40026252

Return undeliverable Canadian addresses to:
LawPRO • 250 Yonge Street • Suite 3101, P.O. Box 3 • Toronto, Ontario M5B 2L7

< previous