LawPRO magazine

AUGUST 2012 VOL 11.3

Also:

- Limitations law updates
- Family law's top 10 cases
- Insulate against cost indemnification claims
- Vicarious liability for others' directorships?

Take the time to get it right

the checklist issue

Inside: Domestic matters toolkit & commercial documents checklist

upcoming events

August 12-14, 2012
CBA Canadian Legal Conference and Marketplace
TitlePLUS department exhibiting
Vancouver, BC

August 22, 2012
Ontario Bar Association's *Excelling at Articles 2012*
Lori Swartz presenting
London, ON

August 22, 2012
Ontario Bar Association's *Excelling at Articles 2012*
Tips for avoiding a malpractice claim
Yvonne Diedrick presenting
Toronto, ON

September 20, 2012
Law Society's *Ethical Red Flags for Real Estate Lawyers*
TitlePLUS department presenting
Lisa Weinstein speaking
Toronto, ON

September 25, 2012
Lincoln Law Association Luncheon
After practice insurance coverage for lawyers
Ray Leclair speaking
St. Catharines, ON

September 28, 2012
Law Society's *Opening Your Law Practice* webcast
Dan Pinnington presenting
Toronto, ON

September 28, 2012
1000 Island Legal Conference sponsored by the Frontenac Law Association
Ray Leclair presenting
Gananoque, ON

October 2, 2012
Lunch presentation at Blake, Cassels and Graydon LLP
Risk management and fraud prevention
Dan Pinnington presenting
Toronto, ON

October 11, 2012
Waterloo Law Association and Luncheon
Succession and disaster planning
Ray Leclair presenting
Kitchener, ON

November 21, 2012
6-Minute Real Estate Lawyer
Kathleen Waters presenting
Toronto, ON

November 22, 2012
Hamilton Law Association
Tech tools for commercial lawyers
Dan Pinnington presenting
Hamilton, ON

November 25-27, 2012
Canadian Association of Accredited Mortgage Professionals
TitlePLUS department exhibiting
Vancouver, BC

recent events

May 31, 2012
Law Society's Solo & Small Firm Conference and Expo
Dan Pinnington presenting
Toronto, ON

June 6, 2012
Law Society's *Annotated Agreement of Purchase and Sale for Residential Property*
TitlePLUS department sponsored
Toronto, ON

June 8, 2012
OTLA Spring Conference
E&O pitfalls for plaintiff practice
Dan Pinnington presented
Toronto, ON

June 20, 2012
WeirFoulds LLP
LawPRO policy and claims prevention
Dan Pinnington presented
Toronto, ON

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Volume 11
Issue 3
August 2012

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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)

Top 10 reasons we're in a $100 million world

That's a number you will be hearing and reading about frequently in the coming year.

It's a number we first introduced to you in the most recent issue of *LawPRO Magazine* – our annual review issue – because $100 million is the ballpark we expect to be in when all the dust has settled for total claims costs for 2011, including adjustments for our internal handling costs.

Moreover, at the mid point of 2012 we are seeing evidence that the number of claims reported is up again and that claims costs for the 2012 program (that is projected costs for resolving actual claims plus the cost of running LawPRO's claims units) will come in at the same $100 million level if not more.

This is sobering news that each and every lawyer needs to absorb – because ultimately it is the insured bar that needs to make changes in their practices to rein in claims numbers and costs. Remember as a rule of thumb, every $1 million increase in costs roughly translates into an additional $50 on the base insurance premium.

For our part at LawPRO, we have put our heads together to delve deeply into this disturbing reality.

Here are our claims counsels' top 10 explanations for why the Ontario mandatory E&O program's claims costs are in a $100 million world. The good news is that some of these issues are fixable by lawyers themselves.

1. Lawyers are reporting more claims and each claim is more costly:
   - 2,468 claims were reported in 2011 compared to 2,231 in 2010 and 1,846 a decade ago.
   - The average cost per claim has increased to just under $42,000 from $30,700 a decade ago.

2. We've said it before and will be reiterating this reality many times in the coming months: Communication problems – which lawyers can fix by changing their habits – are the main reason that clients sue their lawyers.
   - 42 per cent of real estate claims arise out of communication errors, accounting for $11 million annually in claims costs over the past five years (up from $6 million a year in the five years previous to that). The two main communications issues: failure to get client consent and failure to get or follow a client's instructions;
   - Similarly, 42 per cent of corporate/commercial claims are due to poor communication with the single biggest issue being a failure to get client consent;
   - 24 per cent of litigation claims arise out of poor client communication; again, failure to get client consent is the single most common issue driving up claims costs in this area of practice.

What can I say but: listen carefully, ask pertinent questions, do necessary research, formulate your advice thoughtfully, and throughout – document, document, document (both your instructions and your advice)! It may not be legally essential that you document certain things in writing, but it certainly can help to defend a claim successfully.

[1] Source: Canadian Real Estate Association

3. Inadequate investigation or discovery of facts is also an increasingly common error resulting in a claim. In real estate practice (which accounts for more than one-third of claims), inadequate investigation is the second most common reason cited for a claim and now accounts for $5 million in claims costs in 2011, up from $2 million in 2004. In 2011, 25 per cent of real estate claims arose out of this easy-to-remedy inadequate investigation issue.

4. A disproportionate number of claims reported to LawPRO are already in litigation. Further investigation seems to indicate that this trend springs from a change in the limitation period (from six to two years effective January 1, 2004, subject to various transition provisions).

5. Because more claims are already in litigation when reported to LawPRO (this is especially true for claims arising from real estate and litigation practice), our defence costs are being driven up. Cases need to be assessed, facts gathered, a strategy set, pre-trial pleadings and motions filed – and all of it quickly to contain costs if possible. Moreover, claims already in litigation often cannot be repaired.

6. Real estate values have increased more than 90 per cent between 2001 and 2009 – so when about one-third of LawPRO's primary program claim costs arise out of real estate claims, it is not surprising to see total costs climb.

7. Claims by self-represented/vexatious litigants are driving up both the number of claims reported and claims costs, accounting for $4.5 million in 2009, for example.

8. Class action costs and exposures (even if only one law firm is the target of the class action) inevitably drive up costs, as every single class action claim (to date) has hit the $1 million policy limit. There are often one or more excess insurers involved in these claims, so LawPRO is not the exclusive driver of the strategy and certainly not likely able to settle the claim within our policy limits.

9. We're seeing more clusters of claims – that is claims that have a common nexus such as a fraud scam that involves many lawyers, or a piece of (erroneous) advice that a lawyer provides to several clients or that several others relied on. Clusters can also involve a client suing a number of lawyers who, over time, genuinely tried to help the client, but no outcome would ever have been good enough. Clusters of claims now represent 10 per cent of our claims costs.

10. The implementation of the Harmonized Sales Tax (HST) in Ontario in mid-2010 means that our defence counsel costs (which were previously exempt from eight per cent provincial sales tax) for all unresolved claims (even those reported prior to 2010) jumped eight per cent automatically. LawPRO also now pays HST on rent, utilities and other consulting services. Total cost to the program: About $3.5 million annually.

There's not much we at LawPRO can do about many of these facts. But we are leaving no stone unturned in our drive to address the problems that we believe can be remedied. If we get our say, you'll see even more LawPRO risk management content in CPD programs in the future; we're investigating innovative ways to make tips and information more easily available to you and your law firm staff – through webinars, presentations, and publications that address their specific concerns. We're diving into the claims files in more detail to see what we can learn that we can share with lawyers – so you don't make the same mistake twice. We're slicing and dicing the numbers in more ways to see if we can get a better handle on the reasons for claims clusters and other trends; we're rethinking various internal processes to identify more opportunities to contain claims management costs.

But as I have said before, we at LawPRO can do only so much. The ball is in the court of our insureds – individually and collectively.

A bittersweet change at LawPRO

As of this release of *LawPRO Magazine*, we are saying farewell and happy retirement to its editor, Dagmar Kanzler. As Director of Communications for LawPRO, Dagmar has devoted every one of her working days since 1995 to meeting the needs of the Ontario bar – for risk management information, program renewals, LawPRO updates and many, many other areas too numerous to mention.

Over the years Dagmar has led countless projects and taken us from the paper-based world, to the web, to the explosion of social media. Her enthusiasm, commitment to getting it right and professionalism are legendary at LawPRO. She has graciously tolerated a company populated largely by lawyers who have no background in communications as a professional discipline (but naively think lawyer = communications expert) and taught us so much that we will never be the same.

We all wish Dagmar a wonderful retirement, with lots of great travel and sailing.

Kathleen A. Waters.
President & CEO

Consumer education efforts generate record media coverage in 2012

For the past six years, LAWPRO and the TitlePLUS program have supported a consumer education campaign aimed at helping members of the public understand how working with a lawyer protects a consumer's interests in various transactions. The focus largely has been on access to justice issues and supporting the real estate bar – although other topics, such as this spring's wills & powers of attorney campaign – also benefit other practice areas.

At the six-month mark in 2012, the coverage generated by these efforts exceeds coverage for any full previous year: Our media efforts reached more than 25 million Canadians, almost double the total media coverage obtained in 2011. The following is an update on LAWPRO's successful media outreach to date.

TitlePLUS wills & powers of attorney survey a hit with national media

In the 2011 Annual Review issue of *LAWPRO Magazine*, we referred to results of a TitlePLUS-commissioned poll that revealed that more than half (56 per cent) of Canadians do not have a will and 71 per cent do not have a power of attorney.

National media jumped on these results: Media outlets covering the results and comments from Ray Leclair, LAWPRO's vice-president of public affairs, included the National Post and Post Media print and web outlets across the country, the Globe and Mail, Calgary Herald, and Ottawa Citizen, among others. Twenty-five media outlets reaching almost 15 million readers/viewers carried articles based on this media campaign.

LAWPRO successfully delivers the message in recent articles

LAWPRO's TitlePLUS program also provides pre-written articles that explain the role of lawyers in protecting consumers' legal interests. This spring's campaign of mini-articles focused on three themes: the implications of buying a home in the United States, the complexity of home buying after a marriage ends, and what you need to know before purchasing a home alone.

The stories were picked up by national newspapers including The Sun group of newspapers and websites, and dozens of community newspapers, blogs and real estate websites. The stories were published 84 times and reached an audience of more than 10 million readers/viewers.

eBRIEFS

The following is a summary of electronic communications issued by LAWPRO this spring. To ensure that you receive timely information about deadlines, news, risk management tips and other program news, please make sure that you have whitelisted our email address, service@lawpro.ca, with your email service provider. The full content of these newsletters is available at practicepro.ca/enews

Alert

Real estate lawyers: This fraud is for you

June 13, 2012

A special message alerting lawyers to a hot fraud scam and the red flags to watch out for.

Insurance News

LAWPRO annual report available online

May 1, 2012

Summary of year-end LAWPRO results and a link to the annual report online; reminder of upcoming transaction levy filing deadlines.

Webzines

Family law news

May 24, 2012

An update on claims statistics for family law practitioners; a summary of family law case law on LAWPRO's radar; and an introduction to a new domestic matters toolkit that LAWPRO will launch later this summer.

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.

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Vicarious directors' liability?!?!

Everyone knows and accepts that legal partnerships are vicariously liable for the acts and omissions of their partners and employees in the course of the law firm's business. Most law firms carry on their practices on the basis that their business is the practice of law.

Some legal partnerships allow or even encourage their employees or partners to act as directors. Often, the corporation is the firm's client. Frequently, the director/partner is required to account to the partnership for his or her director's fees.

This course of conduct has just become more dangerous. In an endorsement released on June 18, 2012, styled *Allen v. Aspen Group Resources Corp.*[1], Justice Strathy declined to grant summary judgment for the defendants and paved the way for a trial on the issue of whether a law firm may be vicariously liable under s. 131 of the *Securities Act* for the actions of one of its partners in his capacity as director of Aspen Group Resources.

This class action arose out of the take-over of Endeavour Resources Inc. by Aspen Group Resources Corporation, pursuant to a take-over bid circular. The class plaintiff claimed damages on behalf of the shareholders as a result of alleged misrepresentations in the take-over bid circular. It is alleged that the circular contained misrepresentations and failed to disclose that insiders of Aspen had engaged in improper self-dealing. As a result, Endeavour shareholders received Aspen shares that were over-valued. The defendants have denied the allegations, and the directors (including the partner in the firm in question) – against whom there are no allegations of self-dealing – deny any knowledge of any improper behaviour.

The firm and the partner are also defendants. The partner was both a director of Aspen, and its corporate solicitor. He and the law firm are sued in both capacities. It is alleged that the partner is liable as a director under s. 131 of the *Securities Act*, because the information circular allegedly contained misleading information, that his alleged contravention of s. 131 is a "wrongful act or omission" within the meaning of s. 11 of the Ontario *Partnership Act,* and that his firm is therefore responsible for the partner's actions.

The firm brought a summary judgment motion to dismiss the claim against it, both on the basis that it owed the plaintiffs no duty of care at common law, and on the basis that it cannot be vicariously liable for the partner's actions as director.

Both aspects of the summary judgment motion were unsuccessful, although both defences may be raised at trial.

With respect to the law firm's vicarious liability, Justice Strathy indicated that the partner's activities as director fell within the ordinary course of the law firm's business. The firm expressly permitted its partner to act as director of Aspen, the firm's client, and took his director's fees as part of the firm's revenues.

From a public policy perspective, although the *Securities Act* is silent on the point, Justice Strathy felt that a case can be made that the purpose of the *Securities Act,*

> "can best be accomplished by holding partnerships and corporations accountable for the actions of those they select to sit on corporate boards. This way, partnerships and corporations can ensure that their employees and partners are competent to fulfill the responsibilities of a board member. They can put in place appropriate standards and controls to make sure that the director exercises due diligence in the discharge of his or her responsibilities. The partnership, or the corporation that employs the director, obtains the benefit of fees earned by the director, and fairness suggests that it should be required to stand behind the director in the event shareholders suffer loss as a result of the director's failure to exercise due diligence."[2]

As the above passage suggests, Justice Strathy leaves open the possibility that a partnership may also be vicariously liable where its employee serves as a director.

Is your legal partnership willing and able to "put in place appropriate standards and controls to make sure that the director exercises due diligence in the discharge of his or her responsibilities," insofar as your firm's partner/director is concerned?

If you are up to what some might see as a daunting task, consider paragraph 103 of Justice Strathy's endorsement:

> "[103] I do not, therefore, accept the submission of [the law firm] that this decision will deter lawyers from acting as directors. On the contrary, it would result in a sharing of the risk and responsibility between the lawyer and his or her law firm. This result accomplishes the goals of both the *Securities Act* and the *Partnership Act*. It provides greater protection for the public, results in higher standards and controls, and puts the risk on the party most able to control and insure it."

No LawPRO insurance for D&O work

On the subject of insurance, LawPRO does not and will not insure directors' liability,

[1] 2012 ONSC 3498
[2] at para 88

either on behalf of individual lawyer/directors, or on account of their firms' alleged vicarious liability. Therefore, if a member of your firm – partner or employee – acts as a director, you had better be certain that ample directors' and officers' (D&O) insurance is in place, preferably with the firm named as an additional insured under the D&O policy.

Justice Strathy's reasoning on these issues may or may not be affirmed or disapproved at some later date. In the meantime, be careful. ■

Debra Rolph is director of research at LawPRO.

More on liability insurance

for lawyer/directors of charities or non-profits

Serving as a director of a charitable or not-for-profit corporation can be a rewarding but potentially risky experience. As the article, "Vicarious directors' liability" demonstrates, a director can be held personally liable for his or her own actions or failures to act, as well as jointly and severally liable with the other members of the board of directors.

Directors with specialized knowledge and expertise, such as lawyers, are held to a higher standard of care. Moreover, a lawyer/director may be perceived to be a "deep pocket" by potential plaintiffs.

Given this exposure to the risk of liability, if you intend to serve as a director of a charity or non-profit, you should ensure that adequate directors' and officers' (D&O) liability insurance coverage is in place.

LawPRO standard policy

LawPRO's standard professional liability insurance policy covers you only for the "professional services" that you provide as a lawyer. It does not provide coverage for liability arising as a result of your activity as a director.

Part 1, A of the standard policy states that in consideration of payment of the premium, LawPRO agrees "to pay all sums which the insured shall become legally obligated to pay as damages arising out of a claim" that results from the insured's "error, omission or negligent act in the performance of or the failure to perform professional services for others."

The policy defines professional services as follows:

> Professional services means the practice of the law of Canada, its provinces and territories, and specifically, those services performed... by... an insured *in such insured's capacity as a lawyer*... and shall include... those services for which the insured *is responsible as a lawyer* arising out of the insured's activity as a trustee, administrator, executor, arbitrator, mediator, patent or trademark agent. [*Emphasis added*]

Services arising out of the insured's activity as a director are not included.

LawPRO excess policy

Like the standard policy, LawPRO's optional excess professional liability insurance policy covers only professional services that you provide as a lawyer. It does not cover liability arising from your activity as a director, or in other words, it does not provide incidental D&O coverage. LawPRO's excess policy incorporates by reference the definition of "professional services" in the underlying standard policy to ensure uniformity in the scope of coverage in the underlying and excess policies.

Generally speaking, most excess professional liability insurance policies do not cover lawyers for their activities as directors or officers. But some excess insurance policies may offer some incidental D&O coverage. You will need to refer to the specific policy wording and consult with your insurance broker or excess insurer to find out whether your excess policy does so. If it does, you should also ascertain whether it "drops down" to afford primary coverage, since the LawPRO standard policy does not afford such coverage. ■

Other useful practicePRO resources on acting as a director

E&O insurance

A more detailed discussion of directors' and officers' (D&O) insurance from which this article was excerpted is available at: www.practicepro.ca/information/nonprofits.asp

Risk of acting as director

1) A summary of risk issues for lawyers acting as directors for client corporations appears at: www.practicepro.ca/information/actingdirector.asp

2) "Lawyers on boards: Assessing the risks, limiting the liability" is a detailed review of the liability risks associated with acting as a director and how to avoid them. This article from *LawPRO Magazine* is available at: www.practicepro.ca/LawPROmag/LawyersOnBoards.pdf

3) "Lawyers on client boards: Handle with care!" also reviews the risks of lawyers acting as directors and appeared in the January 2012 issue of a special Webzine (electronic newsletter) that LawPRO prepared for lawyers in corporate/commercial practice. It is available at: www.practicepro.ca/information/doc/Lawyers-on-client-boards-handle-with-care.pdf

"Sitting on a non-profit board: A risk management checklist" Questions to ask before saying yes: www.practicepro.ca/practice/riskmanchecklist.asp

insurance matters

Leaving your current law firm

Lawyers who change firms, contact information, or practice status should notify both LawPRO and the Law Society separately of these changes because LawPRO and the Law Society maintain separate information databases.

Joining a new firm

- Send an email to LawPRO Customer Service (service@lawpro.ca) and include your new contact information and the effective date of the change.
- It may be necessary to amend your practice options to match the other lawyers in your new firm if you are joining a partnership or law corporation (not sole).

Becoming a sole practitioner

- Send an email to LawPRO Customer Service and include your new contact information and the effective date of the change.
- You may wish to review the coverage options you had as a member of your former firm and determine if you would like any changes to your coverage.
- As a former member of a law firm, your current policy includes Innocent Party coverage. As a sole practitioner, this coverage is no longer mandatory, and in fact is something for which you must apply separately to maintain. Please visit the LawPRO website (www.lawpro.ca) for further details regarding Innocent Party coverage.
- As a former member of a law firm, your real estate and civil litigation transaction levy filings may have been filed on your behalf. As a sole practitioner, you will be required to either file quarterly transaction levy forms and remit any applicable payment, or file annual exemption form(s), as applicable.

Leaving the private practice of law

- Lawyers who leave the private practice of law may be eligible to apply for exemption from paying insurance premiums.
- Please review the "Rules for Exemption Eligibility" to choose the correct category of exemption .
- Your professional liability insurance coverage will not be cancelled until we receive your completed application for exemption. If your current policy includes the Real Estate Practice coverage option, your application cannot be backdated and can only be processed as of the date of receipt of your exemption.

How to apply for exemption or optional Innocent Party coverage

- You can easily and quickly complete your application for exemption or Innocent Party coverage online at the secure section of the LawPRO website (www.lawpro.ca). Go to MY LawPRO to sign in using your Law Society number and confidential password. ■

insurance matters

Retiring from private practice

Lawyers who are fully retired from the practice of law, estate trustees, emeritus lawyers, judges and others no longer practising law may be eligible to apply for exemption from paying insurance premiums.

Depending on your specific circumstances, the appropriate exemption category is exemption (a) *lawyer not engaged in the practice of law in Ontario* OR exemption (h) *lawyer acting as estate trustee, trustee for inter vivos trust, attorney for property*.

Please review the "Rules for Exemption Eligibility" for detailed exemption criteria.

Standard Run-off coverage

- While claiming exemption (a), standard Run-off coverage provides you with coverage of $250,000 per claim in the aggregate, is a one-time limit and is not reinstated annually.
- **There is no premium associated with the standard Run-off coverage.**
- Run-off coverage does NOT provide coverage for claims arising out of professional services that you provide while claiming exemption (some exceptions apply).
- This coverage only applies to claims arising out of services provided while in private practice.
- Run-off coverage is subject to a $5,000 claim deductible. The limit and deductible are both applicable to claim expenses, indemnity payments and/or costs of repairs together.

Option to increase Run-off coverage

- Run-off coverage can be increased to limits of $500,000 per claim/in the aggregate OR $1 million per claim/ $2 million in the aggregate, for terms of 2 to 5 years.
- The premium for the increase in run-off protection is individually underwritten and is based on several factors.
- If you'd like an estimate for increased Run-off coverage, complete an application to increase Run-off coverage and we will send you a no-obligation estimate.
- **If you decide to apply for increased Run-off coverage you should apply 60 days prior to your intended exemption date to avoid any gap in coverage.**

How to apply

- You can easily and quickly complete your exemption filing or application to increase your Run-off coverage online at the secure section of the LawPRO website (www.lawpro.ca). Go to MY LawPRO to sign in using your Law Society number and confidential password. ■

Still have questions?

Speak to a LawPRO Customer Service Representative at 416-598-5899 or 1-800-410-1013 or send an email to service@lawpro.ca

Why we read the fine print from FSCO and OSFI

FSCO's announcement that it wants to get out of the P&C business may mean a new regulator for LawPRO.

Every insurance company operating in Canada today is regulated for solvency purposes at either the provincial or federal level.

As a company that is inextricably tied to the Ontario bar (and in fact is, through the Law Society's ownership, indirectly controlled by Ontario lawyers), it makes sense for LawPRO to be licensed and regulated provincially for all purposes, through the Financial Services Commission of Ontario (FSCO).

LawPRO said as much in its response to a FSCO consultation paper in which FSCO announced publicly that it is considering giving up the solvency (or financial) regulation of P&C (property & casualty) insurance companies such as LawPRO.

The reason? To meet the (much more prescribed and rigorous) requirements of the International Association of Insurance Supervisors (IAIS) would entail FSCO implementing a new form of regulatory regime – and with only seven Ontario-incorporated P&C companies left, the Ontario government may not be inclined to spend the money to implement its own program of IAIS compliance. However, staying in solvency regulation and failing to move in that direction may make Ontario appear as a weaker jurisdiction for insurance company compliance than some of its Canadian regulatory neighbours. No one wants the citizens of Ontario to suffer in the long term.

What would it mean for LawPRO to transfer from FSCO to the jurisdiction of the federal regulator, the Office of the Superintendent of Financial Institutions (OSFI) and IAIS compliance?

More layers of scrutiny and reporting, with related needs for more formalized controls, processes, monitoring and even additional functional areas. For example, we may have to create a more traditional internal audit function (not an inexpensive proposition) in addition to our normal reporting on internal controls to our board audit committee and paying for external auditors as we now do.

That's not to say that we are not now well regulated and supervised for our results and financial reporting by our present solvency regulator, FSCO, as well as our auditors and our board.

On the contrary, FSCO's current solvency and reporting requirements are rigorous. Taken together with new international financial reporting standards (IFRS), they already mean more controls, accountability and rigorous benchmarks than had been the case a decade ago.

Moving to OSFI – and even more extensive and rigorous IAIS compliance – would put added pressure on our overhead costs as we would likely have to expand the size of our organization and the skill sets needed to comply with OSFI requirements. Stay tuned: There's much more to come on this regulatory front.

New OSFI guidelines on mortgage underwriting by banks are music to our ears!

At the end of June, OSFI issued a new set of guidelines that set out its expectations for "prudent residential mortgage underwriting" among Canada's lending institutions. If you follow us on Twitter or LinkedIn, you'll know that we gave these guidelines – and OSFI's tighter control of lenders' mortgage lending practices – a solid thumbs up.

That's because we believe these new guidelines address the very issues that the legal community has been struggling with – and on which lawyers (and LawPRO) have often been left holding the ball.

Any one of the new measures described below could easily trip up someone looking to score a quick payout by stealing an owner's identity, or filing false income information, or trying to secure a mortgage using proceeds from another scam as the ostensible down payment on a purchase. Taken together, they will – we hope – make it very difficult for many fraud scams we've seen in both our E&O and TitlePLUS insurance portfolios to succeed.

Of the five principles for prudent mortgage underwriting and/or acquisition set out in the guidelines, we're particularly pleased with the principles related to verifying the

identity of the borrower and the appraisal process used by lending institutions.

Knowing the borrower

One of the messages we've been sending out to real estate practitioners is the need to verify the identity of the person walking in your door and asking you to act for him or her on a transaction. Gone are the days when you could assume the driver's license was sufficient proof of the borrower's identity. Rule 2 of the Rules of Professional Conduct sets out that expectation of lawyers very clearly. It was this expectation that lawyers would verify the client's identity that the lending institutions often depended on when a mortgage transaction went sour.

Now, with the new OSFI guidelines, lenders themselves will be required to do their own due diligence. Principle 2 sets out that:

> [Institutions] *"should perform reasonable due diligence to record and assess the borrower's identity, background and demonstrated willingness to service his/her debt obligations on a timely basis."*

Specifically, lenders will need to ensure that they have made "reasonable enquiry into the background, credit history, and borrowing behaviour of a prospective residential mortgage loan borrower as a means to establish an assessment of the borrower's reliability to repay a mortgage loan." Lenders will be expected to verify the borrower's employment status, document credit checks, and have on hand documentation that verifies the source of the down payment.

Principle 3 goes on to require lenders to "adequately assess the borrower's capacity to service his/her debt obligations on a timely basis," again pointing to the need to verify employment status and the borrower's income history, and to take into account that individual's assets, other debt obligations and living expenses – all pieces of information that a scammer trying to create a false identity on the fly would have difficulty assembling.

Appraisals come in for extra attention

On this subject, the new guidelines are very clear. Principle 4 requires lenders to have "sound collateral management and appraisal processes for the underlying mortgage properties."

Specifically, lenders will be expected to use a risk-based approach and consider a variety of tools and appraisal processes that address value, including conducting on-site inspections of the property being mortgaged. As real estate lawyers have always known, these kinds of site inspections have many benefits beyond the valuation of the property: "… an on-site property inspection is beneficial in the process of validating the occupancy, condition and, ultimately, the existence of the property." If automated valuation tools are used, lenders will have to have in place processes that ensure these tools reflect the current market value of the specific property.

Gone, one hopes, are the days in which drive-by appraisals or appraisals based on computerized models or neighbourhood average values (that did not reflect that the mortgage being requested was on the one house on the block that had not been renovated and was a fixer-upper) were considered adequate by themselves.

The 17-page Guidelines document makes for interesting reading, especially for real estate practitioners who should familiarize themselves with the kind of information they may be able to expect lenders to possess going forward to be able to provide (or at least to know what information the borrowers need to provide to the lenders, so that lawyers in turn can also request the same information from their clients where helpful).

Beyond that, it reflects the new reality that all of us in the financial industry are dealing with: Heightened expectations and scrutiny by our regulators that in turn generate more rigorous and time-consuming work processes. ■

Understanding LawPRO's regulatory filings:
It's all about context

Previously in this column, LawPRO has reported on some of the changes being imposed on insurance companies. Regulators around the world want to ensure that insurance companies (and other financial institutions) are prudent in how they handle the funds in their care and cautious in making assumptions that affect their operations and planning.

One of these new rules requires a change in how we report LawPRO's claims reserves. As of January 1, 2012, we are required to give more details on how we allocate certain estimated costs. Those costs include adjustments based on the discount rate (that is, the rising or sinking of our interest rate adjustments to reflect the time value of money), the estimate of future claims handling costs for policies already sold, and the provision for adverse deviation (that is, the cushion in case our actuarial estimates are off).

While we have always made the necessary adjustments to total claims reserves, the way they are presented on the regulator's forms has changed. For example, in our March 31st LawPRO filings, the TitlePLUS claims reserve number includes adjustments that have accumulated since that program started. This makes it appear higher and out of proportion to the premium amount reported for the first quarter. It is important to understand the context of the reported numbers given this one-time catch-up adjustment. This is an example of how insurance regulatory reporting doesn't always exactly compare apples to apples. However, the regulators will understand the data presented on their form, and going forward the goal of enhanced precision will be achieved.

We are in changing times and expect that proposals from the International Association of Insurance Supervisors will bring even more changes to how we operate and report our numbers in future years.

Inadequate investigation/discovery now

#1 cause of claims

The message?

Ask more. Dig deeper. Consider checklists.

The devil – as they say – is in the details.

And it's the details that appear to be creating issues for lawyers when it comes to the principal underlying cause of claims.

Back in 1998, "inadequate discovery of fact or inadequate investigation" was the fifth most common cause of a claim when we looked at the top five reasons a claim was made against a lawyer. (See graph 1)

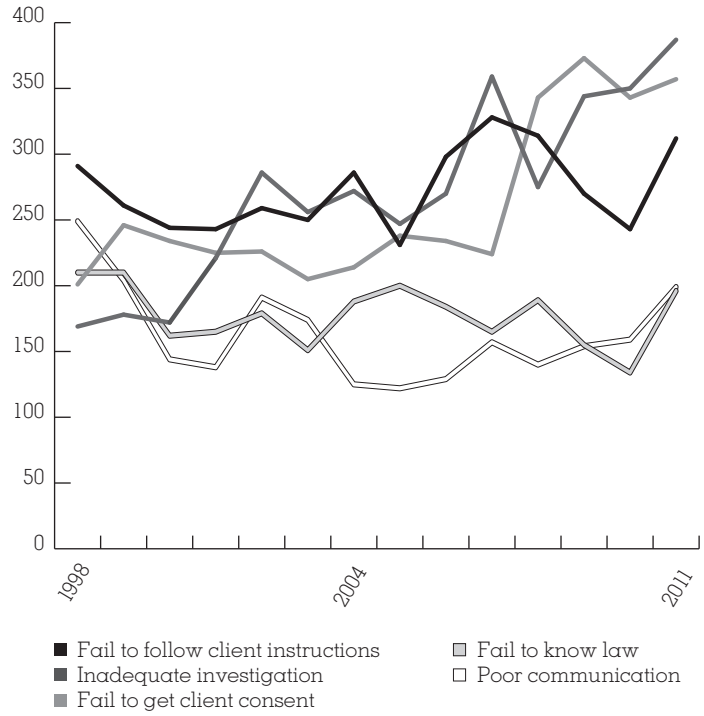
Since then the claims cause of "inadequate investigation" has climbed steadily upwards to the number one spot: By 2011, this category of errors had more than doubled in frequency. Moreover, claims resulting from inadequate investigation or discovery of facts also increased proportionately in terms of all LawPRO claims, rising to 15 per cent of errors reported from eight per cent.

Note: The broad category of communication-related claims, which encompasses poor communication, failure to get client consent and failure to follow client instructions still outpaced all other error types. But when claims causes are broken down individually, inadequate investigation topped all others.

Why this significant increase in this type of error? Perhaps it is a symptom of "BlackBerry legal advice:" Quick questions, and answers without context exchanged between people in a rush. These claims go to the very core of what lawyers are supposed to do for their

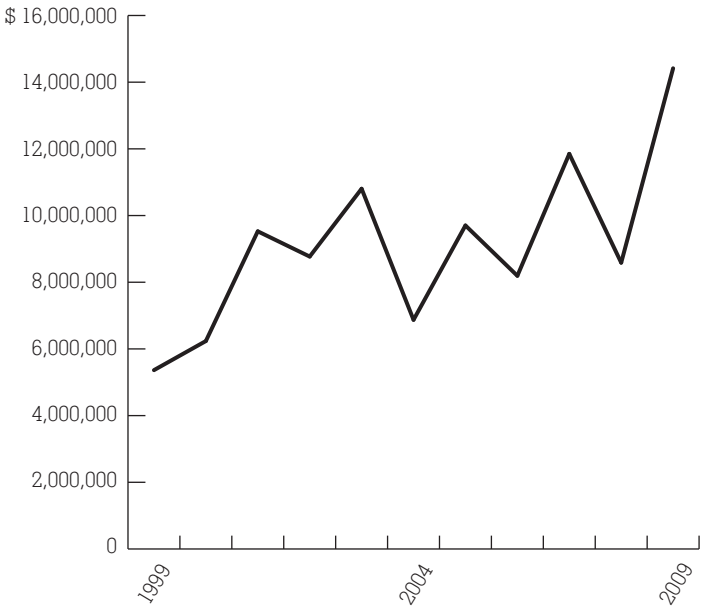
Graph 1

Top 5 causes of claims by count



Graph 2

Cost of inadequate investigation claims



clients – give legal advice – and basically involve the lawyer not taking extra time or thought to dig deeper and ask appropriate questions on the matter.

Claims arising out of the failure of a lawyer to properly investigate the facts also cost much more to defend and investigate. In fact, the cost of these claims has nearly tripled to just under $15 million in 2009 from just over $5 million in 1999. (See graph 2)

And while it's true that all claims costs have increased over that time, errors resulting from inadequate investigation have increased disproportionately when all LawPRO claims are analyzed. Between 1999 and 2009, the proportion of claims costs attributable to inadequate investigation increased to 15 per cent of all LawPRO claims costs in 2009 from about 10 per cent of claims costs in 1999.

Areas of law in which inadequate investigation claims predominate

LawPRO has seen an increase in claims resulting from inadequate investigation of the facts in three particular areas of law: real estate, plaintiff litigation and wills & estates. (see graph 3)

Real estate

The economic realities of real estate practice – the pressure to reduce fees in the face of increased competition – may be one factor prompting real estate lawyers to take on more files and spend less time on each file. Examples of failing to do adequate investigation in a real estate deal include:

- not delving into the client's long-term plans for the property, and then failing to follow up on appropriate zoning or bylaw searches to ensure the client can use the property as intended;
- not ensuring that the client has capacity or is not under undue influence when transferring property;
- misreading a survey, search or reference plan;
- failing to review a condo status certificate and bring deficiencies to the client's attention;
- on a condominium purchase, failing to ensure that the parking space and locker specified in the agreement of purchase and sale are actually for sale and that the legal description of both units is correct;

- not doing a title search on a commercial lease; and
- giving an undertaking to discharge a mortgage as vendor's solicitor, but failing to carefully review and ensure the accurate scope of the discharge statement – in particular, failing to ensure that the statement reflects all sources or types of indebtedness owing by the vendor to the lender that are secured by the mortgage.

Plaintiff litigation

In plaintiff litigation claims, we see the following kinds of inadequate investigation claims:

- failing to show due diligence and reasonable efforts to discover all the parties to a lawsuit within the limitation period – for instance, not ordering a police report in a motor vehicle collision case;
- failing to identify and sue the correct defendant in an occupier's liability case;
- when acting for the plaintiffs, failing to name all potential plaintiffs, using their correct corporate names, (e.g., both a principal shareholder and his/her corporation, where both have a cause of action); and
- failing to note and comply with an order requiring that a truly independent other lawyer is present when an Anton Piller order is executed.

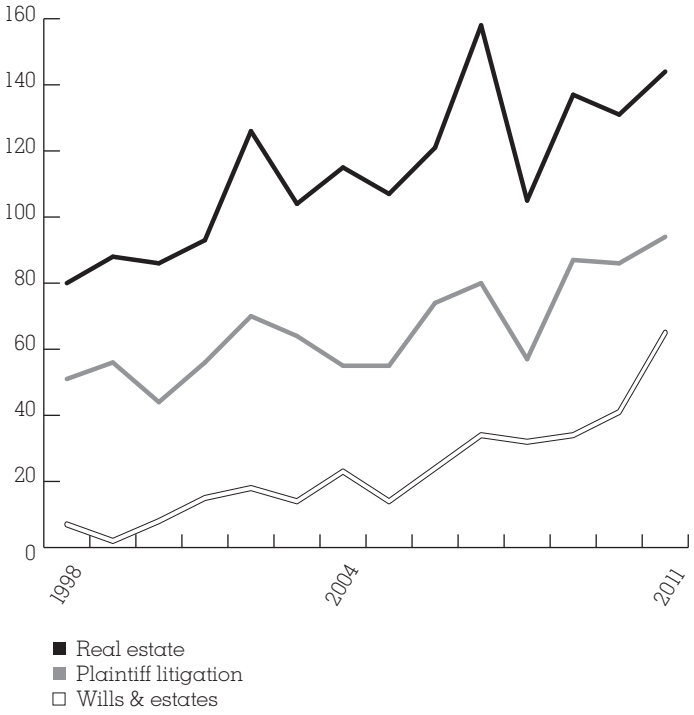
Wills and estates

On a will or estates planning matter an inadequate investigation claim might involve:

- not asking the testator what their assets are;
- not asking about the existence of a prior will;
- not asking about dependents, including disabled children;
- not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse;
- not enquiring about beneficiaries named in RRSPs, life insurance policies and pension plans;
- when an elderly client wants to make major changes to his/her will, not taking steps to ensure testamentary capacity and that the client is not under undue influence;

Graph 3

Inadequate investigation claims by area of law



- not doing due diligence to verify that the information a client provides about his/her assets or liabilities is accurate. It may not be the lawyer's job to confirm all the details, but if disputes break out among unhappy beneficiaries they could attempt to blame the lawyer; and
- not taking the time to search out the existence of all blood relatives in the event that a person dies intestate.

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

Tim Lemieux is practicePRO coordinator at LawPRO.

before expanding your practice, expand your competence!

Think you have the confidence to bluff your way through a file that's outside your normal scope of practice?

It might work if you were playing a lawyer on TV… but that's only because your opponent (and the judge, if it's a litigation file) would be actors, too. In the real world, trying to "fake it to make it" in an unfamiliar area of law is unfair to the client, dangerous to the lawyer's reputation, and risks a potential legal malpractice claim.

In a challenging economy, many lawyers scramble to maintain a steady stream of work in their established areas of practice. Faced with pressure to keep fees stable, these lawyers sometimes decide that the only way to boost billable hours is to take on new clients with legal needs in areas in which they haven't previously practiced, or to offer new categories of legal services to existing clients.

For example, a lawyer who normally practises only family and estates law may be asked to set up a charitable corporation for a family law client. She might be tempted not only because it's new business, but also because it would be rewarding to contribute to the establishment of the charity, and she knows she has her client's trust. What could go wrong?

"Plenty," explains W. Grant Buchan-Terrell, an Oakville sole practitioner who practises exclusively business law. Over the course of his career, Buchan-Terrell has noticed that lawyers seem more willing to dabble in business law (especially vendor-side) than in other areas with a more significant courtroom component.

"There's this mythology of general practice – that a standard legal education equips you to practise in any area you want. But the law has become so much more complex. That's just not realistic anymore."

Errors that flow from dabbling in practice areas outside a lawyer's scope of competence can have significant financial consequences for clients. Those consequences can prompt a client to complain to the Law Society, to sue the lawyer in negligence, or both.

While judges and discipline committee members tend to show a certain level of restraint when commenting on lawyers' competence, it is clear from the wording of certain decisions that dabbling without an appropriate foundation of knowledge or experience underlies many findings of incompetence. One of the clearest condemnations, in the discipline context, of a lawyer's dabbling

can be found in the Law Society's reasons in *Re Cosway*, (1995 CanLII 1765). Recommending a one-month suspension for incompetence, the discipline committee offered the following pointed advice:

> "Get out of areas of practice about which you know little or nothing. You cannot cope with the complexity and difficulty those cases cause you. If there are any further difficulties, a further suspension is really quite unlikely. To be disbarred at your age would be a great tragedy."

At the time of his hearing, the lawyer had been in practice for 30 years; the one-month suspension was the fifth discipline order made against him between 1986 and 1993.

Dabbling also appears to have been a factor in a 2002 discipline decision. In that case (*Re Wilson*, 2002 CanLII 42273), the committee cited "extreme inertia" when describing the lawyer's record in responding to clients. In recommending a reprimand and that the lawyer be restricted to practising under supervision and taking on new client matters only with a supervisor's approval, the committee found that the lawyer was competent in his own area – commercial litigation – but noted that he "ran into trouble when he exercised poor judgment and took on cases outside his area of practice." Those areas included employment law and personal injury litigation.

So does this mean you are stuck taking on the exact same range of file types for the rest of your career? Of course not. The following tips can help ensure that your practice expands in lockstep with your competence:

1. Expand purposefully

If you decide to expand your scope of practice, make sure that the decision to do so is conscious and considered. Resist the temptation to end a business drought by taking any case that walks in the door. A change in practice requires planning. Above all, avoid taking on a case in an unfamiliar practice area on an emergency basis, or at the request of a valued client. Why risk providing novice-level service to a valued client?

2. Choose carefully

Make sure that the practice area in which you'd like to expand is compatible with the work you already do, and that it plays to your strengths. If your background is in commercial litigation you might not adjust easily to, for example, real estate practice. Consider your strongest skills. Are you detail-oriented, logical and a good writer, but have trouble "thinking on your feet?" You might do best to branch into wills and estates, rather than into an area that requires lots of negotiation over the phone.

3. Hit the books

Or perhaps, more productively, the CPD circuit. Don't assume that you can rely on your distant memories of law school classes. The law changes quickly. You will need to familiarize yourself with not only the substantive law in your target area, but also the procedures, forms, deadlines, software, technology and other tools unique to the new area. Remember – your opponents already know this stuff inside and out.

Do this general learning on your own time, and don't bill clients for it. If you need reinforcement of this point, read the reasons in *LSUC v. Ravinder Pal Sawhney* (2012 ONLSHP 13).

4. Find a mentor

There is no better way to familiarize yourself with the demands of a new area of practice than to observe a successful and seasoned expert. Find a mentor in your new area. If you're lucky, you might identify someone who has more work than he or she can handle, and who can refer some simple files your way. On the other hand, if competition is stiff in your local area, you may find that an expert in another city is more receptive to sharing knowledge with you. If you've referred matters to other practitioners in this area of practice before deciding to expand into it, the recipients of those referrals might be willing to mentor you. Do what you can to keep the lines of communication open with your chosen mentor (including the setting of ground rules for your new relationship). Observe him or her in court, ask about where to find the best resources, and get in touch any time you have a question.

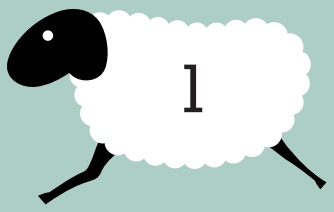
5. Invest in the right tools

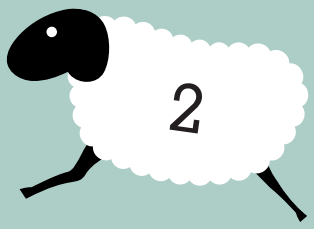
As mentioned above, there are forms, resources, software and technologies specific to every practice area. You can't level the playing field between yourself and your opponents unless you invest in these. Also, don't overlook a *personnel* investment: a law clerk or paralegal with considerable experience in your new area can give you an instant leg-up on routines and conventions you would otherwise have to figure out for yourself. Consider hiring such a person even on a short-term or part-time basis.

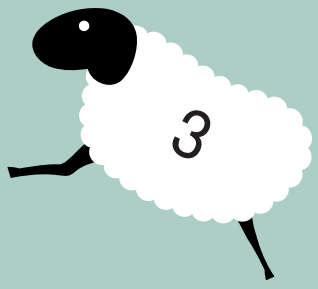
6. Expand by increments

To the extent that you can, build your expertise in your new practice area beginning with the simplest matters first and working up to more challenging files. An effective way to do this is to spread the word that you are looking for referrals of a specific type. Restricting your practice at the beginning and growing it by increments of difficulty will help ensure that you expand your competence in tandem with the scope of the work you do. ■

Nora Rock is corporate writer at LawPRO.







What keeps you up at night?

Ontario family lawyers answer our question

Like many areas of practice, family law is going through a period of change. Both clients and their lawyers are questioning traditional modes of practice. Economic woes both cause legal problems, and leave clients with limited resources with which to resolve them. Stress – for both families in crisis and for their lawyers – is a constant reality. Still, within this challenging climate, family lawyers are expected to work diligently and professionally in the service of their clients' interests.

On page 25 of this issue of the magazine, you'll find an extract from practicePRO's new Domestic Matters Toolkit. The full kit aims to help family lawyers ensure that they are covering the necessary bases when drafting a domestic contract, and will be released later this summer. Self-review tools such as this can help safeguard against the oversights that can occur in a busy, demanding and increasingly complex area of practice.

Also, to understand how the bar is coping with the demands of modern family law practice, we invited a sampling of lawyers from across the province to answer the question "What keeps you up at night?" Their comments start on page 17.

As well, on page 33 we provide a summary of the top 10 cases that all family law lawyers should have on their radar. Our thanks to Epstein Cole LLP for this contribution.

Two perspectives
on self-represented parties

Helene Desormeau and Christopher Giggey are partners in a Cornwall family law practice. Each identified self-represented family litigants as an issue of particular concern. Ms. Desormeau's comments focus on access to justice, particularly for victims of family violence; Mr. Giggey talks about the challenges of representing a family law client where the opponent lacks representation.

Helene Desormeau
Christopher Giggey

Helene Desormeau

The problem

I'm concerned when I encounter victims of domestic violence who earn under $19,000 annually or who are in receipt of public assistance, but who are refused traditional legal aid because the violence was "not serious enough." I have also encountered people who have to go to court because they are afraid that the ex-partner will attend to kidnap the children, but who don't qualify for legal aid because the ex-partner lives 200 kilometres away; or men or women forced to bring motions to vary support after a drastic change in financial circumstances (such as losing their employment) who must attend court without legal counsel. Although the situations described above are serious from my perspective, they do not qualify for legal aid.

What helps

I've served as family court duty counsel, and I've assisted in the local Family Law Information Centre. Also, I often accept clients funded under special domestic violence duty counsel certificates. These certificates – often issued by shelters – entitle the recipient to two hours of legal assistance. Two hours is usually not enough time to meaningfully help someone in dealing with the breakdown of the relationship, to provide advice about legal rights and possible remedies, or to assist these people in cutting through the cobwebs of the legal issues they face. In many cases, all I can do is draft pleadings for these clients so that they at least have a good first step into the family court world.

The bigger challenge

Duty counsel and advice lawyers from the Family Law Information Centre are generally extremely knowledgeable and exceptionally helpful and patient. However, they often lack the time to follow a matter through, especially when both sides tend to be self-represented. And they cannot shelter victims of violence by sending correspondence on their behalf, or by ensuring that the aggressor does not have their personal contact information. When unrepresented, the victims of domestic violence may continue to be victimized by the aggressor by having to communicate directly with that person, often when they are at their weakest. Legal aid budgets and services continue to shrink; if this trend continues, the only people likely to have legal counsel in family court are those who earn substantially over $50,000 annually, and can afford to privately retain a lawyer.

Helene Desormeau is in her eighth year of practice, and is a partner at the law firm of Desormeau & Giggey LLP in Cornwall. Her main areas of practice are family law and criminal law. She is also a children's lawyer.

Christopher Giggey

The problem

The ever-increasing proportion of self-represented litigants in family court means the proceedings often become protracted and more time intensive, due in part to the fact that the other side does not have the benefit of ongoing legal representation. This can translate into increased legal fees for represented clients, because additional time must often be spent in dealing directly with opponents who have a limited understanding of the law and of legal procedure.

What helps

In my initial correspondence to the self-represented litigant, I set out my obligations under rule 2.04(14) of the *Rules of Professional Conduct*. (See the sidebar on page 18 for Giggey's specific wording.) Notwithstanding this, I have found that the self-represented litigant will attempt to obtain direction – and sometimes legal advice – from me. As a result, it often becomes necessary to remind the other party of my role and my obligations throughout the proceeding.

Sometimes a self-represented opponent sends an unmanageable volume of email; when this happens, I have followed the suggestion

of other lawyers, and have asked that all future correspondence be via mailed letter. I also take the time to explain to my client, at the outset of the retainer, that courts may provide a self-represented party with some leeway in presenting their case and complying with deadlines. Hopefully, this assists in managing their expectations down the road, when procedures are relaxed somewhat to account for a party being self-represented.

Advice for new lawyers

Establish contacts with more senior lawyers in your area of practice. Senior counsel are usually more than willing to pass on their knowledge and experience. There will come a time when you need to rely on this support network, and therefore, you should ensure that it is in place at the outset.

Christopher Giggey is in his eighth year of practice, and is a partner at the law firm of Desormeau & Giggey LLP in Cornwall. His main areas of practice are family law and civil litigation.

High conflict cases

require empathy, professionalism, civility

Rachel E. Baron

The problem

High conflict cases can cause a lawyer to lose sleep. In a family law crisis, clients are often overwhelmed with emotional and financial issues. Unreasonable and difficult counsel can also cause further conflict, increasing stress on the lawyer and costs for the clients.

What helps

It is important to refer clients to the appropriate resources so that they can obtain the emotional help that they require due to their situations. It is critical for the lawyer to remain objective and professional. However, one must also be aware of the client's social problems and deal with clients effectively and with empathy at an extremely difficult time in their lives – all without losing one's objectivity.

A trusting relationship between opposing lawyers can help the parties work towards a resolution. When other lawyers see you as cooperative, it is easier to create an environment in which constructive solutions are possible, even in circumstances where the clients cannot solve the problem themselves.

Help self-represented litigants understand your role

Self-represented litigants sometimes fall into a pattern of relying on the other party's lawyer for information and even advice about the legal process. It's important to prevent or correct this pattern early so that the self-represented party doesn't develop unreasonable expectations.

In his first written communication with a self-represented opponent, Cornwall lawyer Christopher Giggey includes the following plain-language explanation of his obligations under the *Rules of Professional Conduct*:

As you are not represented by legal counsel at present, I am under a professional obligation to:

1. *urge you to obtain independent legal representation;*
2. *ensure that you are not proceeding under the impression that your interests will be protected by me; and*
3. *confirm and clarify that I am acting exclusively in the interests of xxxx and accordingly my comments may be partisan.*

Some parties may not understand this message the first time, or may lose sight of the role of the other party's lawyer as the matter unfolds. Where requests for assistance from the opponent persist, this message should be repeated to protect the interests of both parties and of the lawyer.

For more insights on how to deal with self-represented litigants, see "Self-represented litigants: A survival guide" in the Winter 2006 issue of *LawPRO Magazine* (www.practicepro.ca/LawPROMag/SurvivingSRLS.pdf)

The broader challenge

I believe the most significant practical challenge for the family bar in the next decade is the diversity of our population and cultural differences in Canada. Language barriers and cultural issues and differences will become more prevalent. It will be critical that lawyers understand and communicate effectively with their clients.

Advice for new lawyers

Learn to negotiate amicably with other counsel and deal with matters with honesty and integrity. The lawyer must be cooperative and respectful of other counsel and clients, and must remain organized, conscientious, meticulous and diligent in meeting all deadlines.

Rachel E. Baron is a sole practitioner in Toronto, practising family law with particular emphasis on marriage contracts and cohabitation agreements, custody, support and property disputes.

Rachel E. Baron

Providing relevant, high-quality service while managing expectations

Mary M.S. Fox

The problem

What keeps me up at night is ensuring that I remain an effective problem-solver given factual, legal and procedural challenges in the complex area of family law. The nightmares occur when I envision complaints to the Law Society, assessment of accounts or a requirement to defend a statement of claim.

What helps

I try to remain current on the law and procedure, to manage client expectations, and to be considerate, courteous and a good listener. The real challenge is to do so in a timely and cost-effective manner given the complexities of today's families and our duties and responsibilities. Navigating the long and winding road and minimizing professional risk and liability force me to stay focused, work hard, be realistic and find effective ways of dealing with stress while maintaining a balance in life.

The broader challenge

The most significant practical challenge the family law bar faces is maintaining its relevancy. The expectations of our clients, our roles as lawyers and the skills required to remain effective problem-solvers are changing at a rapid pace. The well-off are buying "private justice" with mediation and arbitration. Others are supported by the taxpayer: legal aid, self-represented and unrepresented. Our courthouses are akin to hospital emergency rooms: expected to serve all who enter.

Mary M.S. Fox

The obligations on lawyers mean that the cost of legal services is prohibitive for most people. How do we deliver a quality service at an affordable price when client expectations, no matter how well managed, often remain unrealistic? When a client does not like the result, his or her first step is to complain about everyone involved, including the lawyer. Lawyers must nevertheless rise to the occasion, tackle the challenges and justify how we bring real value to the way in which we resolve complex family problems.

Advice for new lawyers

Speak to those who have done it successfully. Establish a network of individuals known for modelling best practices, and seek their guidance and advice. Most lawyers are willing to help if asked. Do not assume you can do this alone if you intend to do it well.

Mary M.S. Fox is a partner in the Windsor firm of Ducharme, Fox LLP. She practises family law with emphasis on financial issues involving business owners and professionals.

Manage your stress

so you can deal with clients in crisis

Erinn A. Fitzpatrick:

The problem

Like most other family law lawyers, I often work with clients who are in crisis. Clients often attend my office immediately after being blindsided by a sudden separation, or after months of careful planning to leave an abusive relationship. The fear, pain, and anger they express is very real, and my office is sometimes the first place they have had an opportunity to disclose their extremely personal problems. These accounts at times quite literally keep me up, especially when I receive multiple panicked email messages on my mobile phone from clients requesting instantaneous advice at all hours of the night.

Working with clients in crisis is rewarding, but stressful. Although our job as lawyers is to provide meaningful legal advice and not therapy, it is impossible not to be affected by the depressing and sometimes horrific narratives of our clients.

As many family law lawyers have not been formally trained in dealing with crisis or trauma, I fear that we are not always able to recognize the symptoms of burnout before it is too late. I have witnessed family law lawyers become overly cynical, disengaged, frustrated, and exhausted by the difficult work that they do every day. Some suffer even more serious consequences, including depression and substance abuse.

What helps

The first step is simply to recognize that family law is very stressful, and to take precautions against burnout. Lawyers are notoriously guilty of working long hours and having poor work/life balance. Taking adequate time to spend with friends and family, to engage in favourite activities, to get enough exercise, to rest, and to eat right are all ways of ensuring wellness and preventing burnout. While these

Erinn A. Fitzpatrick

suggestions might seem self-evident, they are often surprisingly difficult to incorporate into our busy days.

Lawyers must also set appropriate boundaries between their work and private lives. Sometimes I go as far as to lock my mobile phone in my vehicle for the evening to feel completely unplugged from my office.

Advice for new lawyers

New lawyers can easily become overwhelmed by the stress of working with family law clients. It helps to keep in mind that while it is important to be patient and compassionate, it is equally important to remain professional and to avoid becoming personally engrossed in a family law client's situation. ■

Erinn A. Fitzpatrick is an associate lawyer at Valin Partners LLP in North Bay. She practises in the areas of family law, real estate, and wills and estates.

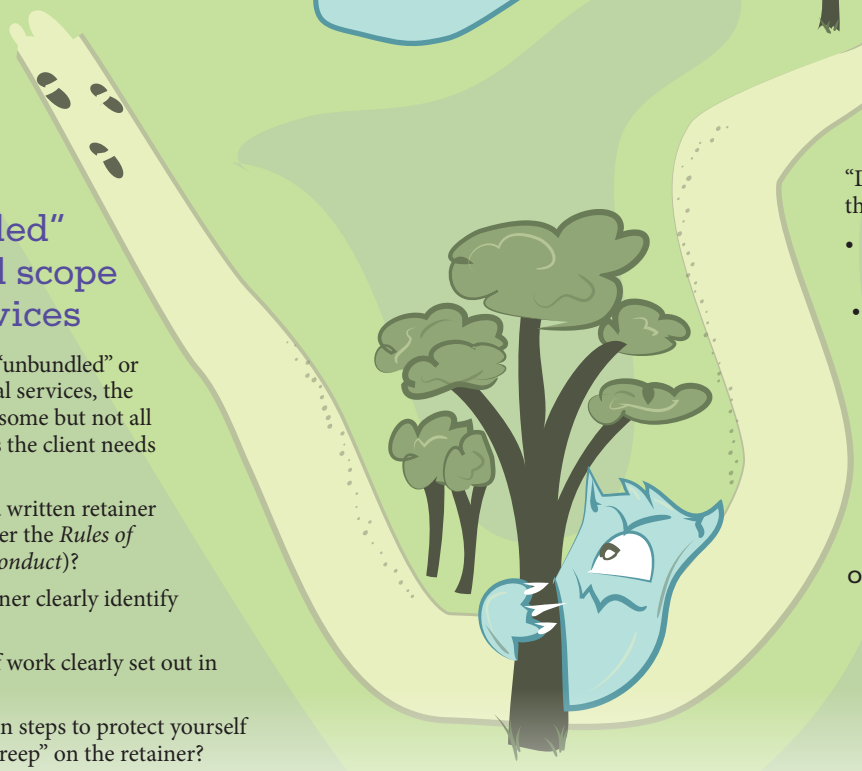
Avoiding claims when serving clients on a budget

In today's difficult economic environment, it's not unusual for lawyers to find themselves dealing with requests for representation from clients of limited means, or clients who want to keep their legal fees at a minimum. The economic issues these types of requests raise is but one consideration: Access to justice – which has become a prominent issue in Ontario lately – also figures in the equation. For its part, LawPRO is committed to helping lawyers understand how they can serve different types of clients' legal needs while also avoiding claims.

Instead of turning away clients with limited budgets, lawyers often consider ways of providing limited scope or non-traditional legal services. From a malpractice exposure perspective, lawyers should appreciate that providing limited services can create a set of risks different from those that arise in a matter handled without limitations on fees, and may present an increased risk for claims. Some alternative approaches fall completely outside the coverage provided by the LawPRO policy.

The map on the next page gives an overview of the options lawyers might consider, highlights potential claims risks, and introduces some strategies and resources lawyers can use to protect themselves.

Can you lead your client through the woods without falling into a malpractice trap?



1. "Unbundled" or limited scope legal services

When providing "unbundled" or limited scope legal services, the lawyer works on some but not all of the legal issues the client needs help with.

- Do you have a written retainer (required under the *Rules of Professional Conduct*)?
- Does the retainer clearly identify the client?
- Is the scope of work clearly set out in the retainer?
- Have you taken steps to protect yourself from "scope-creep" on the retainer?
- Are you protected from a post-matter allegation that you were to do something for the client you didn't?

See articles "Unbundled legal services: Pitfalls to avoid" at www.practicepro.ca/unbundled

2. Beware the dangers of dabbling

"Dabbling" in unfamiliar areas increases the risk of a claim.

- Do you ever do work in an area of law where you are uncomfortable?
- Have you caved into client pressure to handle a matter outside your usual area of practice?

To learn more about the risks of dabbling, see "Diversify without dabbling: Don't expand your practice without expanding your competence!" on page 14 of this issue.

3. Legal coaching/ghostwriting pleadings

Some lawyers assist clients by coaching them in advance of a self-represented appearance or by drafting pleadings without providing any related legal services.

- Have you considered whether undisclosed assistance violates the *Rules of Professional Conduct*?
- Have you documented the work and advice you provided to the client?
- Could you defend yourself if the client later alleged your advice prejudiced their case?

4. Independent legal advice (ILA)

Do you always send clients out for ILA where appropriate, even when they do not want to incur the extra expense? When you do ILA, do you:

- Get all appropriate background information?
- Engage the client in a full and frank discussion?
- Fully explain to the client the nature and consequences of the document(s) they are signing?
- Ever decline to give ILA based on lack of disclosure?
- Carefully document your advice when you advise a client not to sign?

Use our ILA checklist at www.practicepro.ca/ILAchecklist to ensure you address all necessary issues on an ILA consultation.

5. Could your online communications create a lawyer/client relationship?

Information provided online (or elsewhere) outside the context of a traditional lawyer-client relationship may be interpreted by the recipient as legal advice, and may lead to a claim.

- When you post information online, is it legal information or legal advice?
- Do you engage in conversations with people by answering questions, posting comments or chatting?
- Do you have a disclaimer? Even if you do, it may not protect you.

See "Danger signs: Five activities generally not covered by your LawPRO policy" at www.practicepro.ca/notcovered

6. DIY documents/ products – Outside LawPRO coverage?

The LawPRO policy does not cover claims related to a lawyer's sale, marketing or distribution of products, which includes the sale of "do it yourself" wills, contracts or other documents outside a lawyer/client relationship.

- Does your firm sell or market DIY legal services?
- Do you have product liability insurance to cover those services?

See "Danger signs: Five activities generally not covered by your LawPRO policy" at www.practicepro.ca/notcovered

Domestic Contract Matter Toolkit

Between 2007 and 2011, 830 family law claims were reported to LawPRO. These claims are costly. Resolving them will cost LawPRO approximately $21 million. Some of these claims arose due to real (or alleged) problems with domestic contract matters. That is the bad news.

Domestic contracts are complex documents that deal with complicated issues involving emotional clients. The dangers are real and there are many places that errors can occur. The good news is that the risks involved in handling domestic contract matters can be greatly reduced. This toolkit is designed to help Ontario lawyers proactively take steps to reduce their exposure to claims when they are working on domestic contract matters.

Like most other areas of law, lawyer/client communications issues can play a significant role in domestic contract claims. The complexity of the subject matter makes it easy for clients to allege there were communication problems or errors. They will say that provisions were not explained to them, that they didn't understand them or that they created unexpected or unintended consequences. Sometimes there is a real communications mistake and a legitimate claim due to an incomplete or improperly drafted domestic contract or other mistake by the lawyer.

Beyond the communications issues, getting the final document right requires diligent management of the file, a thorough investigation into the client's circumstances, a consideration of relevant law, and the careful drafting of the provisions of the agreement. Lawyers may also find themselves pressured into taking shortcuts due to tight time constraints or clients who want to keep legal fees as low as possible.

The checklists and forms in this toolkit contain points and questions lawyers should systematically consider as they conduct the initial interview on a domestic contract matter and when they meet with the client to review and sign the document.

Following the steps listed in the checklists and forms will make sure nothing is missed, and just as importantly, that there is a paper trail documenting the work that was done and the communications that occurred at the two most critical stages of a domestic contract matter: the initial intake meeting and the review and signing of the agreement. That paper trail can be invaluable in the event a client sues you for malpractice.

There are four documents in the toolkit:

1. Domestic Contract Matter Intake Form: This form systematically walks you through all the information you need to gather to prepare a domestic contract.
2. Domestic Contract Matter Intake Checklist: This checklist lists the steps and issues that need to be considered at the intake stage.
3. Post-Meeting Client Assignment Sheet: This sheet gives the client a list of the information that they will need to collect after the initial meeting.
4. Domestic Contract Execution Meeting Checklist: This checklist lists the steps and issues that need to be considered when a client comes in to review and sign a domestic contract.

Use these documents to help reduce your risk of a claim and keep your LawPRO premiums low. ■

Acknowledgement: LawPRO acknowledges the assistance of Dawn Melville of Ballance & Melville in Windsor, Ontario, for her assistance with the creation of the documents in this toolkit.

Domestic Contract Matter Intake Form

All intake interviews should be conducted in person and in the presence of the lawyer.

Date: Start time: End time:

Our File No.: Type of Legal Proceedings:

Client

Name (full legal name):

Address:

Identity verification

Copy of identification obtained on:
(Copy kept in file)

Identification obtained and verified by photo identification:
Passport:

Driver's License DL:

Citizenship Card:

Background

Phone: Home: Cell: Work:

Email: (❑ Confirmed with client is confidential)

Date of birth: Age: Place:

Employer:

Employer address:

Position:

Length of employ: Annual gross income:

Employment history:

Social insurance number: Pension plans:

Opposing Side

❑ Husband ❑ Wife ❑ Statutory Common Law Partner ❑ Parent of Child of Relationship

Name of individual:

Address: Telephone:

cont'd on next page

Date of birth: Age: Place:

Employer:

Employer address:

Position:

Length of employ: Annual gross income:

Employment history:

Social insurance number: Pension plans:

Matrimonial Home

Location: Approximate value:

Ownership: ❑ Joint ❑ Sole Mortgagee:

Address of mortgagee:

Value of mortgage: Discharge/Renewal date:

Separation Details

Date of separation: Place of separation:

Details of marriage

Date of marriage: Location: Cohabitation before marriage:

Current living arrangements: ❑ Living in same home ❑ Living separate and apart

Information of Wife

Surname at birth: Name at time of marriage:

Marital status at time of marriage:

If previously married name of former spouse:

Date of divorce from former spouse: Place of divorce:

Information of Husband

Surname at birth: Name at time of marriage:

Marital status at time of marriage:

If previously married name of former spouse:

Date of divorce from former spouse: Place of divorce:

cont'd on next page

Children of the Marriage

Name: Date of birth:

School attended: Grade level:

Child's residence: Length of time child resident:

Where are the children living and when do they see the other parent?

Current custody arrangement sought: ❑ Sole ❑ Joint

(Visit www.practicepro.ca to download a sheet to list additional Children of the Marriage, if needed.)

Existing Support Arrangements

Spousal frequency: Amount of payment:

Child support frequency: Amount of payment:

Other

Any previous court actions: ❑ No ❑ Yes If yes, explain:

Domestic contract: ❑ No ❑ Yes If yes, explain:

Income

Gross weekly pay: Regular wage: Overtime pay:

C.P.P.: U.I.C.: Union dues:

Disability: Automatic deductions: Pension:

Other:

Assets

Vehicles: (1) (2)

Works of art: Jewellery:

Contents of home:

Bank accounts: Securities/RRSPs:

Life insurance: Other:

Debts

(1)

(2)

(3)

cont'd on next page

Deadlines

Applicable limitation periods: Other crucial deadlines:

Parenting Affidavit Information

1. Other names used during lifetime:

2. The child(ren) in this case is/are:

   Child's full legal name:

   Birthdate (d/m/y): Age:

   Full name of parents (if different from intake information):

   Name(s) of all people the child lives with now (include addresses if the child does not live with you):

   My relationship to the child (specify if parent, grandparent, family friend, etc.):

3. I am also the parent of or have acted as a parent (for example, as a step-parent, legal guardian etc.) to the following child(ren): (include the full legal names and birthdates of any child(ren) not already listed in paragraph 2)

4. I am or have been a party in the following court case(s) involving custody of or access to any child: (Including the child(ren) in this case or any other child(ren). Do not include cases involving a children's aid society in this section. Attach a copy of any custody or access court order(s) or endorsement(s) you have.)

   Court location:

   Names of people involved in the case:

   Names of children:

   Court orders made (include dates of orders):

5. I have been a party or person responsible for the care of a child in the following child protection court case(s): (attach a copy of any relevant court order(s) or endorsement(s) you have)

   Court location:

   Names of people involved in the case:

   Name of Children's Aid Society:

   Court orders made (include dates of orders):

6. I have been found guilty of the following criminal offence(s) for which I have not received a pardon:

   Charge:

   Approximate date of finding of guilt:

   Sentence received:

cont'd on next page

7. I am now charged with the following criminal offence(s):

   Charge: _____

   Date of next court appearance: _____

   Terms of release while waiting for trial: (attach copy of bail or other release conditions, if any) _____

   _____

8. To the best of my knowledge, since birth, the child(ren) in this case has/have lived with the following caregiver(s):

   _____

9. ❑ The child(ren) does not/do not have any special medical, educational, mental health or developmental needs.
   ❑ The child or one or more of the children has/have the following special needs and will receive support and services for those needs as follows: (if a child does not have special needs, you do not have to include information about that child below)

   Medical: _____

   Educational: _____

   Mental Health: _____

   Developmental: _____

   Other: _____

Other toolkits and checklists to help minimize risk

LawPRO resources

ILA Checklist: When providing independent legal advice, this checklist provides you with a handy tool to ensure that you are covering all the bases when discussing the underlying transaction and your client's relationship to that transaction: www.practicepro.ca/ILAchecklist

Non-profit Board Risk Management Checklist: Here are some questions you should ask yourself before serving as a director on the board of a charity or not-for-profit organization: www.practicepro.ca/nonprofit

Vulnerabilities Assessment Chart: Use this chart to help identify and assess your firm's vulnerabilities: www.practicepro.ca/disastercoverage

Employee Departure Checklist: A list of security-related steps you should take when an employee leaves your firm: www.practicepro.ca/EmployeeDeparture

LawPRO's practicePRO website also has links to numerous resources to help lawyers address a wide variety of practice issues – including sample retainers, a limitations period summary chart and sample generic policies that you can adapt on topics such as law firm privacy. Check them out on the practicePRO practice aids page at www.practicepro.ca/practice/default.asp

TitlePLUS resources

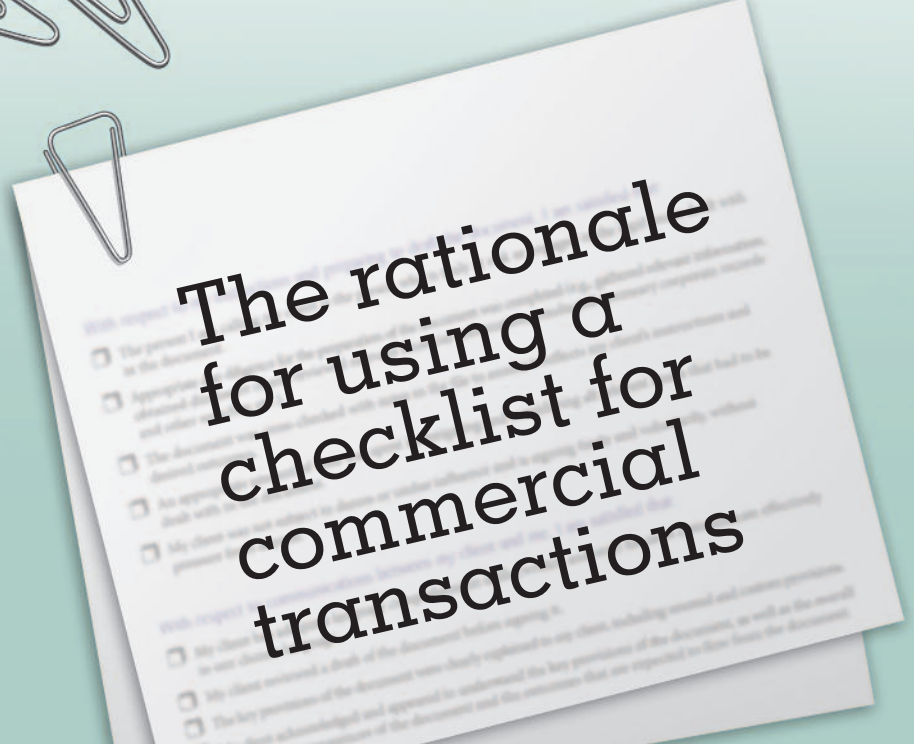
The TitlePLUS website provides lawyers with a number of sample documents (retainer agreements, reporting letters) that can be easily adapted for specific transactions. Check them out at www.titleplus.ca/resources

Other checklists

CBA Conflicts of Interest Toolkit: A great resource of conflicts related checklists and precedents: www.cba.org/CBA/groups/conflicts/toolkit.aspx

Law Society Lawyer Basic Management Checklist: A practice analysis tool which assists in identifying possible deficiencies in your practice: rc.lsuc.on.ca/jsp/pmg/executiveSummary.jsp

Getting the final document correct:



Many commercial matters involve the preparation of one or more documents. These documents are drafted based on communications between the parties to the document and/or their respective lawyers, the specific circumstances of the matter and applicable substantive law.

While the majority of commercial deals in Ontario are concluded without difficulties, all too often LawPRO sees claims arising due to various real – or alleged – problems with the documents that lawyers have prepared for clients on commercial matters. These problems frequently arise due to communications problems between the lawyer and client.

In fact, lawyer/client communication issues are the most common cause of claims in the commercial area. The communications problems that lead to claims in this area involve failures by the lawyer to: follow the client's instructions; obtain the client's consent; inform the client of the implications of decisions/actions to be taken; or clearly communicate with the client.

Of the 3,085 claims arising out of commercial law practice (including bankruptcy, securities and tax) reported to LawPRO between 2000 and 2010, 1,205 – or close to 40 per cent – involved communications issues.

The cost of resolving communications-related claims will be approximately $57 million ($169 million for all commercial claims). The oldest communications-related commercial claim LawPRO has ever seen was reported 24 years after the work was done (the oldest commercial claim was reported 44 years after the work was done) – proof positive that in this area of law it can take a long time for past events to catch up with the lawyer involved.

Sometimes there is a real communications mistake and a legitimate claim due to an incomplete or improperly drafted document or other mistake by the lawyer. For example, a mistake is made as to the specific details of the matter and what is to be included in contracts or other agreements.

However, on many communication-related claims the lawyer and client will have a very different recollection about what was said and done or not said and not done. Communications can be incomplete (perhaps due to a language barrier or because the matter was rushed), or there's confusion about who is to look after tasks before or after the matter is concluded. Credibility plays a large part in resolving these claims and LawPRO finds these matters difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.

Practically speaking, you can't document every communication and every step taken on every matter. You also can't anticipate and address every possible outcome, especially for things that may come up after the retainer is over.

But equipped with an understanding of where the most common communication errors occur, you can take steps to significantly reduce your risk of a malpractice claim. These steps can also put you in a much better position to successfully defend yourself in the event an allegation of negligence is made.

The checklist on the next page contains a series of questions lawyers should ask themselves to help ensure that the commercial documents they are drafting correctly reflect the client's instructions and expected results. By following the steps in this checklist, you will be taking steps to proactively manage your file and address the areas where communication problems most commonly occur. You will also be creating a paper trail that could be invaluable in the event your client sues you for negligence.

Most lawyers will want to avoid a claim at all costs. Dealing with an allegation of negligence where there was none can be just as distressing as dealing with a claim where you made a mistake. To stay out of trouble consider reviewing this checklist next time you are drafting a document for a client. ■

Checklist

Getting the final document correct

FILE NUMBER: DATE CHECKLIST COMPLETED:

CLIENT/MATTER NAME:

This checklist assumes there is a single client, with a few exceptions. If there are multiple clients, each of the items in the checklist should be read as applying to all clients.

With respect to my instructions and preparing to draft the document, I am satisfied that:

- ❒ The person I am calling my client is the person who is truly at risk or engaged in the legal issues dealt with in the document.
- ❒ Appropriate due diligence for the preparation of the document was completed (e.g., gathered relevant information; obtained disclosure of and reviewed relevant financial information; conducted necessary corporate records and other searches; etc.).
- ❒ The document was cross-checked with notes in the file to ensure it reflects my client's instructions and desired outcomes.
- ❒ An appropriate amount of time was spent investigating and considering all relevant issues that had to be dealt with in the document.
- ❒ My client was not subject to duress or undue influence and is signing freely and voluntarily, without pressure from anyone.

With respect to communications between my client and me, I am satisfied that:

- ❒ My client has adequate language comprehension skills (written and oral) for us to communicate effectively in our chosen language.
- ❒ My client reviewed a draft of the document before signing it.
- ❒ The key provisions of the document were clearly explained to my client, including unusual and custom provisions.
- ❒ My client acknowledged and appeared to understand the key provisions of the document, as well as the overall nature and consequences of the document and the outcomes that are expected to flow from the document.
- ❒ I explained the possible negative outcomes that could flow from the document, if any.
- ❒ My client understands the final and legally binding nature of the obligations being undertaken and that there are no (or limited) opportunities to withdraw after signing.
- ❒ I have told the client about areas where I am not able to give advice and the client should consider retaining another appropriate expert (e.g., accountant, business advisor, etc.).
- ❒ I answered all questions that my client asked to my client's satisfaction.
- ❒ The client clearly confirmed that the document reflects and is consistent with his/her instructions.
- ❒ All required follow-up steps to be undertaken by my client are noted in the document and/or a reporting letter.

Download a copy of this and other helpful checklists at www.practicepro.ca

cont'd on next page

With respect to the drafting of the document and the use of precedents, I am satisfied that:

- ❒ The document is sufficiently well-drafted to accomplish my client's objectives.
- ❒ All required clauses are in the document, including all required standard boilerplate clauses.
- ❒ There are no ambiguities or inconsistencies as between the clauses in the document.
- ❒ The terms of the agreement are both certain and enforceable.

With respect to real and potential conflicts of interest, I am satisfied that:

- ❒ My work for this client will not impair the duties of performance that I and other lawyers at my firm have to our other clients.
- ❒ My work for this client will not affect the relationships that I and other lawyers at my firm have with our other clients.
- ❒ Neither my personal interests nor the interests of my firm will affect my handling of this matter.
- ❒ There is no risk of me having and disclosing the confidential information of one client to another, and if necessary, confidentiality screens have been put in place.
- ❒ Where there are multiple clients, there are no conflicts of interest as between the various clients I am acting for on this matter.
- ❒ ILA was not required on this matter or my client required and received appropriate ILA.
- ❒ There are no conflicts of interest as between my client and past clients I have had.
- ❒ Where there are real or potential conflicts, appropriate waivers have been obtained from the affected clients.

With respect to legal issues relating to matters dealt with in the document, I am satisfied that:

- ❒ I have sufficient knowledge of the relevant areas of substantive law necessary for the preparation of this document.
- ❒ All relevant substantive law issues have been considered and appropriately dealt with in the document.
- ❒ There are no tax issues raised by the document or all appropriate tax issues have been properly considered and addressed, with (if necessary) the help of expert tax advice.

With respect to file management steps taken on this matter:

- ❒ I opened a file.
- ❒ I completed a conflicts check for all clients and others connected with the matter.
- ❒ I took notes of my meeting(s) with my client and retained these in the file.
- ❒ I docketed the time spent in the initial and subsequent meetings and phone calls with my client on this matter.
- ❒ I docketed the time spent drafting the document.
- ❒ I docketed the time spent reviewing the document with the client when it was signed.
- ❒ I placed this form, various draft versions of the document and a copy of the final version in the file.
- ❒ I sent a reporting letter outlining the terms of the document, resulting outcomes and obligations assumed together with my final account.

Download a copy of this and other helpful checklists at www.practicepro.ca

Top ten family law developments to have on your radar

Anna Rolbin

Aaron Franks

In the past 18 months, we have seen significant developments in jurisprudence on a variety of family law issues. In addition, a number of cases have come out that, while not strictly related to family law, should be kept in mind. The following are the top ten noteworthy cases that every family law lawyer should know about.

Bread and butter cases

1 *Kerr v. Baranow and Vanesse v. Seguin*[1] (2011, S.C.C.) – Joint family venture

A must read (and re-read), this is one of the most important family law decisions to be released in the past several years. First, *Kerr* signifies the unquestionable end of the common intention resulting trust in Canada. Second, *Kerr* introduces the concept of "joint family venture" and a new remedial framework for spouses who successfully prove a cause of action in unjust enrichment.

Prior to *Kerr*, only two remedies were commonly thought available: a monetary award based on *quantum meruit* (or "value received"), or a proprietary award of constructive trust (based on "value survived").

In *Kerr*, the S.C.C. recognized that this remedial dichotomy did not accurately reflect the realities of many domestic partners, and introduced a "value survived" monetary award to be used in instances where the parties' relationship can be characterized as a "joint family venture." Whether the family functioned as a "joint venture" is a question of fact. Courts are to consider four non-exhaustive factors:

(1) mutual efforts: Whether and to what extent there was a pooling of efforts and teamwork by the parties to achieve common goals;

(2) economic integration: Whether and to what extent parties pooled resources to pay for all or part of their common expenses;

(3) the intent of the parties: The court will look at the parties' actual intentions, which may be inferred from the parties' actions; and

(4) priority of the family: Is there good evidence to show that the parties gave priority in decision-making to the family unit as opposed to their individual interests?

Where a joint family venture is found, but the claimant is unable to meet the threshold for a proprietary constructive trust, the quantum of the monetary award should equal the share of the accumulated wealth that is proportionate to the claimant's contributions to the joint family venture. The claimant need not show a contribution to any one particular asset to receive credit for the growth in the asset.

Although some provincial legislatures across Canada (Ontario included) continue to deny property rights to unmarried spouses, the introduction of a value survived monetary award in *Kerr* brings unmarried spouses far closer to an equitable property regime. Since there is no presumption of equal sharing, it will be interesting to see whether, in the right circumstances, the courts will allow a claimant spouse to receive more than 50 per cent of the growth in the family's wealth, such that a common law spouse may actually receive a greater proprietary entitlement than a married spouse (a hitherto unheard of result).

2 *Schreyer v. Schreyer*[2] (2011, S.C.C.) – Effect of discharge from bankruptcy on property claims

In this appeal, the Supreme Court of Canada addresses the interaction, and sometimes "clash," between the *Bankruptcy and Insolvency Act*[3] (BIA) and provincial legislation dealing with property division on marriage breakdown.

The parties separated after a 19-year marriage. The wife sought (among other things) equal division of marital property. While matrimonial litigation was ongoing, the husband made an assignment in bankruptcy without notice to the wife. The husband did not list the potential equalization payment as a debt, nor did he list the wife as a creditor. Prior to the resolution of the wife's property claims, the husband was discharged from bankruptcy. The wife did not even find out that the husband filed for bankruptcy until some time after he was discharged. The court of first instance ordered the husband to pay an equalization payment. The Manitoba Court of Appeal reversed the decision, finding that the wife's personal claim for equalization was provable in bankruptcy and the husband was released from his obligation to pay it when he was discharged. The S.C.C. agreed.

In *Schreyer*, the S.C.C. confirmed that an equalization regime, as found in Manitoba (and Ontario), creates only a "debtor-creditor relationship" between spouses and does not confer proprietary or beneficial interests. The S.C.C. found that an equalization payment is a debt, not a proprietary interest, and as such it is to be treated like any other unsecured claim under the BIA. The equalization payment was therefore "swept into the bankruptcy" and the husband was released from his obligation to pay it upon his discharge.

While the BIA creates exemptions for maintenance or support, it does not create an exemption for an equalization payment. The S.C.C. in *Schreyer* warns that, until changes are made to provincial legislation, creditor spouses should "be alive… to the pitfalls of the BIA." Counsel should heed this warning. If one is acting on a case where bankruptcy is a real possibility, counsel must advise the client about the possible impact of bankruptcy on the equalization payment. If necessary, counsel should move quickly to secure the client's equalization claim and rights, perhaps by moving before discharge to continue the claim against bankruptcy-exempt assets.

3 *Thibodeau v. Thibodeau*[4] (2011, Ont. C.A.) – Impact of bankruptcy on equalization payment

In *Thibodeau* the Ontario Court of Appeal addressed the legal impact of bankruptcy on a spouse's entitlement to receive an equalization payment. An arbitrator awarded the wife an equalization payment to be paid from the husband's share of the proceeds of sale of the matrimonial home. The wife brought a motion to incorporate the award into a court order. Before that motion was heard, the husband

[1] 93 R.F.L. (6th) 1, 2011 CarswellBC 240 (S.C.C.)

[2] 2011 SCC 35, 2011 CarswellMan 334 (S.C.C.)

[3] R.S.C., 1985, c. B-3 (hereinafter "BIA")

[4] 104 O.R. (3d) 161, 2011 CarswellOnt 686 (Ont. C.A.)

filed for bankruptcy. The wife immediately moved to add the trustee in bankruptcy as a party to the pre-existing court proceeding and asked the court to transfer the husband's RRSPs to her in partial satisfaction of the arbitration award.

The court below found that, because the arbitrator had directed the equalization payment to be paid from the husband's share of the proceeds of sale, the award created an equitable trust in favour of the wife over the husband's share of the net proceeds of sale, in priority to other creditors. The court below also ordered that the husband transfer to the wife his bankruptcy-protected RRSPs. The Court of Appeal disagreed on both counts.

The Court of Appeal emphasized that the *Family Law Act*[5] (FLA) does **not** provide for the division of property and that the arbitrator had done no more than award an equalization payment. Therefore, the award was nothing more than a money judgment – and the wife was simply another unsecured creditor. The Court noted that it (or an arbitrator) *may*, under s. 9(1) of the *FLA*, impose a legal relationship between the spouses other than a debtor-creditor relationship. However, as orders under s. 9(1) of the *FLA* can affect the rights of unknown and unrepresented third parties, such remedies should not be imposed "indiscriminately" or "routinely" and should only be used if the record justifies such "exceptional and intrusive action." In any event, the arbitrator in this case did not make an award under s. 9(1).

Ultimately, the Court of Appeal concluded that resort to the "proprietary rights" powers of s. 9(1) in cases of *pending or actual* bankruptcy should not be a regular occurrence. Interestingly, in *Schreyer v. Schreyer* (above), the S.C.C. suggested (albeit in *obiter*) that a payee spouse prejudiced by a bankruptcy might do exactly that which was eschewed by the Ontario Court of Appeal in *Thibodeau*. Having cited *Thibodeau* in *Schreyer*, perhaps the S.C.C. is signalling that, pending law reform, lower courts should, in proper cases, be more willing to resort to proprietary enforcement remedies in the face of bankruptcy than suggested by the Ontario Court of Appeal.

Notables

4 *Hansen Estate* v. *Hansen*[6] (2012, Ont. C.A.) – Severing joint tenancy by conduct

It is accepted in the jurisprudence that there are three ways to sever a joint tenancy: (1) by unilaterally acting on one's own share, such as selling or encumbering it; (2) through a mutual agreement between the co-owners to sever the joint tenancy; or (3) through any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

In *Hansen*, the Ontario Court of Appeal addressed what conduct constitutes a "*course of dealing*" sufficient to establish that a joint tenancy has been severed, such that the co-owners now hold the property as tenants in common. The Court stated that:

> *"It is not essential that the party requesting a severance establish that the co-owners' conduct falls into a formulation found to have had the effect of severing a joint tenancy in other cases. The court's inquiry cannot be limited to matching fact patterns to those in prior cases. Rather, the court must look to the co-owners' entire course of conduct – in other words the totality of evidence – in order to determine if they intended that their interests were mutually treated as constituting a tenancy in common. This evidence may manifest itself in different ways. Each case is idiosyncratic and will turn on its own facts."*

In *Hansen*, the parties were separated and were negotiating a settlement of the outstanding issues between them, including property division and equalization. Both parties, through correspondence by counsel, took the position the matrimonial home would be equally divided in a separation agreement. The respondent moved out of the home and took steps to value her half interest in the home, and the applicant made a will that was inconsistent with the right of survivorship. Looking at the totality of the parties' conduct, the Court of Appeal concluded that the course of dealing of the parties resulted in a severance of the joint tenancy.

Hansen appears to lower the threshold found in prior jurisprudence for a finding of severance of joint tenancy through a course of dealing. Based on the facts of this case, it would appear that in most family law cases where division and equalization of joint property is addressed in a meaningful way, the conduct of the parties will point to a severance of joint tenancy. Nonetheless, counsel would be wise to continue following LawPRO's advice and canvass the issues of severance with their clients at the earliest opportunity in order to minimize the risk of negligence claims against them.

5 *V. (B.) v. V. (P.)*[7] (2012, Ont. C.A.) – Access

This was an appeal by a father from a trial decision regarding custody, access, and spousal support. It is most notable for the Court of Appeal's comments on what constitutes an appropriate access schedule. The trial judge found that the mother assumed primary responsibility for the care of the child during the marriage, that the child had specific educational and social needs, and that the father displayed some controlling and disrespectful behaviour toward the mother. The trial judge awarded access to the father on alternating

[5] RSO 1990, c F.3 (hereinafter "FLA")

[6] 9 R.F.L. (7th) 251, 2012 CarswellOnt 2051 (Ont. C.A.)

[7] 2012 ONCA 262, 2012 CaswellOnt 4738 (Ont. C.A.)

weekends (from Friday after school to Monday morning), every Wednesday overnight, and three weeks in the summer.

The Court of Appeal found that the access schedule ordered by the trial judge was "minimal" and that the terms of access failed to respect the "maximum contact principle" set out in section 16(10) of the *Divorce Act*[8]. The Court found that, as a result of the father's behaviour toward the mother, equally shared physical custody was not appropriate, but that generous access was in the child's best interests. The Court ultimately ordered the parties to agree on the details of an access schedule whereby the father would have the child in his care for 35 per cent of the time.

It should be noted that, based on the trial judge's access schedule, the child was in the care of the father for five out of every 14 overnights, or 35.7 per cent of the time. It is therefore unclear how, exactly, the schedule should have changed. In any event, this case is yet another indicator that, while equally shared physical custody is not a presumption, the courts continue to award ever more generous access to non-resident parents.

6 *Pollitt v. Pollitt, et al*[9] (2011 N.S.S.C. and 2011 Ont. S.C.J) – Costs and the deductibility of legal fees

These five cases from the Ontario Superior Court of Justice and the Nova Scotia Supreme Court stand for the proposition that the tax deductibility of legal fees should be a factor in fixing costs. The relationship between the deductibility of legal fees and the quantum of costs has not been specifically addressed prior to these recent cases, therefore all family lawyers are encouraged to read and familiarize themselves with these decisions.

Pursuant to s. 18 of the *Income Tax Act*,[10] a party who is pursuing a claim for support may deduct the portion of legal fees attributable to pursuing those claims (but a party who is defending a support claim is not able to deduct her legal fees in the same way). In *Pollitt*, Justice Czutrin noted that if a claimant is able to deduct legal fees from his total income, the deduction will lead to overall tax savings. Justice Czutrin concluded that if the deducting party is entitled to costs, the tax savings resulting from the deduction should be taken into account in setting the quantum of costs payable. Justice Czutrin found that tax savings resulting from the deduction of legal fees provide a partial indemnification of a party's costs (even if minimal), and this indemnification is beyond the cost award that a court orders. If the tax position of the cost recipient party is ignored, the cost recipient may receive more costs than he or she actually spent, thus resulting in a windfall.

Counsel who wish to argue that a cost award against their client should consider the deductibility of legal fees by the recipient will bear the onus to set out for the judge what the impact of the deduction will be. To do so, counsel will need to establish, through evidence: (a) what portion of the legal fees relating to the cost award are tax deductible, and (b) the impact the deduction will have on the recipient.

7 *Ruffedeen-Coutts v. Coutts*[11] (2012, Ont. C.A.) – Appeals from consent orders

This is an important case about appeals from consent orders that should serve as a reminder to counsel of the importance of carefully considering all the consequences of entering into such orders, including the very limited rights of appeal.

In this case, in what was characterized as a consent judgment, a trial judge removed a child from the custody of the mother and awarded joint custody to both parents. The mother brought a motion for leave to appeal. There was some concern expressed by Justice Feldman, in dissent, that the mother was pressured by the trial judge into consenting to the change of custody, given the trial judge's remarks that, if she did not consent to joint custody, sole custody would be awarded to the father. The majority did not make a similar finding.

The majority found that in leave applications to appeal consent orders involving children, the court must take into account three factors:

(1) even though consent orders are not ordinarily accompanied by reasons, a trial judge's determination should attract deference;

(2) finality has been recognized as being in the best interests of the child; and

(3) in light of the prevalence of consent orders in family proceedings, allowing consent orders to be more easily appealed if children are the subject matter of the order may open the floodgates to appeals on other substantive issues.

Ultimately, the majority decided that leave to appeal consent orders in family cases involving children should not be granted unless the record demonstrates an arguable case that, at the time it was made, the order was not in the child(ren)'s best interests.

[8] R.S.C. 1985, c. 3 (2nd Supp.)

[9] 2011 CarswellOnt 5873 (Ont. S.C.J.); *Burchill v. Savoie*, 2011 CarswellNS 501 (N.S.S.C.); *Peraud v. Peraud*, 2011 NSSC 80 (N.S.S.C.); *Brandon v. Brandon*, 2011 CarswellNS 202 (N.S.S.C.); *Lockerby v. Lockerby*, 2011 CarswellNS 153 (N.S.S.C.)

[10] R.S.C. 1985, c. 1 (5th Supp.)

[11] 2012 ONCA 65, 2012 CarswellOnt 1184 (Ont. C.A.)

Good to know

8 *Jones v. Tsige*[12] (2012, Ont. C.A.) – Tort of intrusion upon seclusion

In *Tsige*, the Ontario Court of Appeal recognized a new cause of action for invasion of privacy in the form of a new tort named "Intrusion Upon Seclusion." To make out a case for intrusion upon seclusion, a claimant must show: (1) an unauthorized intrusion; (2) that the intrusion was highly offensive to the reasonable person; (3) that the matter intruded upon was private; and (4) the intrusion caused anguish and suffering. The tort does not require proof of any economic loss or harm to an economic interest. Where intrusion upon seclusion is found, damages can be awarded up to $20,000, absent aggravated or punitive damages.

Family law practitioners routinely receive information about the "other side" from clients who get their hands on keys to cabinets and/or electronic passwords, or find other ways to retrieve the other spouse's personal information. Counsel would be wise to advise their family clients of this new tort early on. And, of course, counsel should always be leery of recommending to clients to "have a look around and see what you can find," lest you wish to potentially become well acquainted with LawPRO.

9 *Van Breda v. Village Resorts Ltd.*[13] (2012, S.C.C.) – Conflict of laws: Real and substantial connection

Van Breda is the new leading authority on the test for *jurisdiction simpliciter* based on "real and substantial connection." After examining at some length the evolution of private international law, the Supreme Court of Canada accepted the Ontario Court of Appeal's "*Van Breda* Approach" to the real and substantial test (a reformulation of the test previously set out in the seminal case *Muscutt v. Courcelles*[14]). The S.C.C. identified four presumptive factors that, if found to exist in a tort case, will create a rebuttable presumption that there was real and substantial connection to the jurisdiction. The presumptive factors are: (1) the defendant is domiciled or resident in the province; (2) the defendant carries on business in the province; (3) the tort was committed in the province; and (4) a contract connected with the dispute was made in the province.

Although this is not a family law case, it provides an updated framework for cases involving jurisdiction issues. The Court's discussion regarding real and substantial connection and *forum non conveniens* are both applicable in family law cases involving any type of jurisdictional issues.

10 *Harte-Eichmanis v. Fernandes*[15] (Ont. C.A.) – Jurisdiction of the divisional court

Although not a family case, this case provides a useful summary of the jurisdiction of the divisional court in appeals of financial matters. Section 6(1) of the *Courts of Justice Act* which confers jurisdiction on the divisional court when:

(a) there is an award for a single payment of not more than $50,000, exclusive of costs;

(b) there is an award for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) an order dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) an order dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

The Court of Appeal noted that, when deciding whether the divisional court has jurisdiction, it must look at the four subparagraphs disjunctively and apply the following principles:

(1) where an amount is ordered to be paid, it is the amount of payment ordered (not the amount claimed) that is determinative;

(2) where an amount is ordered paid, a court is to look at each subsection individually to determine if the amount of the judgment claim is under or over $50,000;

(3) where a claim is dismissed, the divisional court has jurisdiction if the amount of the claim is not determined or is assessed at less than $50,000; and

(4) all of the claims within each subparagraph are to be added together and cannot exceed $50,000.

Counsel should keep this case in mind for clients who seek to appeal final orders where a single payment from a spouse, i.e., an equalization payment is not more than $50,000 or the periodic payments awarded do not amount to more than $50,000 (exclusive of costs) in the 12 months commencing on the date of the first payment. ■

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[12] 6 R.F.L. (7th) 247, 2012 CarswellOnt 274 (Ont. C.A.)

[13] 10 R.F.L. (7th) 1, 2012 CarswellOnt 4268 (S.C.C.)

[14] 213 D.L.R. (4th) 577, 2002 CarswellOnt 1756 (Ont. C.A.)

[15] 2012 ONCA 266, 2012 CarswellOnt 4925 (Ont. C.A.)

Liability for client costs: Protect yourself

Lawyers breathe a sigh of relief after decision in *Attis*

by David Gadsden

A recent Court of Appeal decision, *Attis v. Ontario*[1], has provided clarity on the issue of when counsel will be held personally responsible for legal costs ordered against a client. Although *Attis* deals with this issue in the context of a class proceeding, the decision underscores the importance of certain "best practices" that can be applied universally by litigation counsel to insulate against a client's claim for costs indemnification.

Background and the motion

Attis involved a proposed class action in which government defendants were alleged to have failed or refused to properly regulate the use of breast implants manufactured, distributed, imported and sold in Canada. The plaintiffs' motion to certify the action as a class proceeding was dismissed by Winkler J. (as he then was) on May 3, 2007. Costs were awarded against the plaintiffs in favour of the attorney general for Canada (AG) in the amount of $125,000. The plaintiffs appealed to the Court of Appeal which, on September 30, 2008, dismissed the appeal and awarded further costs of $40,000 against the plaintiffs. An application for leave to appeal to the Supreme Court of Canada was dismissed on April 23, 2009, with costs of $1,086.10 ordered in favour of the AG.

In June 2009, the AG learned that the plaintiffs were impecunious. The AG then brought a motion before Cullity J. seeking to reopen the issue of costs and requesting that the costs awarded to the AG throughout become the responsibility of plaintiffs' counsel.

The evidence of plaintiffs' counsel before Cullity J. was that the plaintiffs were advised of their potential personal liability for the costs of the defendants. Not surprisingly, the evidence of the plaintiffs was that they had not been advised of potential adverse

[1] 2011 ONCA 675

costs consequences. Although notes were taken during the client intake meeting, the notes produced as evidence at the motion made no reference to the plaintiffs' potential exposure to costs. Similarly, a letter confirming the plaintiffs' costs exposure that was believed to have been sent to the plaintiffs by counsel was not able to be located or produced. Cullity J. also noted that the retainer agreement was silent as to the possible liability for the costs of the defendants if the proposed class action was unsuccessful.

On September 10, 2010, Cullity J. ordered plaintiffs' counsel to indemnify the plaintiffs for the costs awarded previously against the plaintiffs in favour of the AG. The basis of the decision was that the plaintiffs had not given their counsel authority to bring the action as counsel had not properly advised the plaintiffs of their potential exposure to costs.

In short, Cullity J. found that:

(i) the plaintiffs had not been properly advised of their potential exposure to costs in the event of the dismissal of the class proceeding;

(ii) as such, their consent to proceed with the action was uninformed, and therefore not consent at all; and

(iii) when a solicitor commences an action without consent or authority from a client, the solicitor should be personally liable for costs. In arriving at his conclusion, Cullity J. relied on, *inter alia*, Rules 15.02(4) and 57.07(1)(c) of the *Rules of Civil Procedure*.

Plaintiffs' counsel appealed Cullity J.'s decision. In allowing the appeal and setting aside the order of the motions judge, a unanimous Court of Appeal panel accepted the appellant's argument that Rule 15.02(4), a rule designed to terminate proceedings where a named plaintiff has not authorized commencement, had no application. The Court held that a defendant, in this case the AG, has no right to inquire into the legal advice given to the plaintiff by the plaintiff's lawyer – this is purely a matter between solicitor and client. The Court reasoned that if a question arises concerning the legal advice a client received prior to conferring authority to commence a proceeding, it is for the aggrieved client to take steps, not a defendant. In fact, one of the plaintiffs in *Attis* took such steps by commencing an action (prior to the motion underlying the appeal) in negligence against plaintiffs' counsel for damages of $250,000 – a factor that was considered by the Court in allowing the appeal.

The Court of Appeal also determined that Rule 57.07(1)(c), which deals with costs unnecessarily incurred as a result of a lawyer's conduct, did not apply as that rule is to be used only in exceptional circumstances and the conduct of plaintiffs' counsel in the case at bar was without reproach.

Finally, the Court of Appeal held that breach of warranty of authority could not be deployed in the circumstances as, even if such a breach existed, it could not have provided the AG with recoverable damages as the plaintiffs were impecunious. To award the AG costs would put the AG in a better position than if the action had proceeded with authority and failed.

Implications of the Court of Appeal decision in *Attis*

Attis represents important appellate Court guidance for the class action bar as, prior to *Attis*, certain decisions, most notably *Poulin v. Ford Motor Co. of Canada*[2], earmarked class counsel as a potential payment source for defendants in situations where the plaintiffs were unwilling or unable to cover costs ordered against them. *Poulin* could also be interpreted as forming a low-threshold for clients, in class actions or otherwise, seeking indemnification from their counsel for costs ordered against them. *Attis* affirms that counsel will only be personally liable for costs in exceptional cases, and that disgruntled defendants do not have standing to challenge the legal advice provided to plaintiffs in the context of conferring authority to commence a proceeding.

Although *Attis* limits a client's ability to seek 'after-the-fact' indemnification from counsel for an adverse costs award, the decision does not preclude such recourse altogether. In fact, *Attis* acknowledges that clients have the ability to pursue claims against their counsel relating to legal advice provided prior to a client's instructions to commence a proceeding. Those claims are properly resolved through an action framed in solicitor negligence, not by way of a motion brought under Rule 15.02(4) or 57.07(1)(c).

Lessons learned

With the above in mind, *Attis* serves as a useful reminder of certain 'best practices' that can be employed in an effort to avoid litigation of this nature altogether. *Attis* underscores the importance for counsel to take detailed notes relating to client intake matters and retainer terms. Any oral discussions relating to retainer terms, expectations and possible adverse consequences of litigation, including potential costs awards, should be thoroughly documented and confirmed, preferably as terms in an executed retainer agreement, so it is clear that the client understood and consented to the specific terms of the retainer. Equally critical is the practice of retaining notes, confirmatory letters and retainer agreements in an orderly filing system such that they can be easily located and produced if necessary at a later time. In *Attis*, had plaintiffs' counsel been able to produce the notes and confirmatory letter that were believed to exist, the plaintiffs' ability to argue uninformed consent would have been limited considerably. ■

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[2] 2007 CanLII 56490 (ON S.C.)

Lessons learned: The *Limitations Act, 2002*

Recent case law applying the *Limitations Act, 2002* contains essential lessons and warnings for the profession. This article is a summary of these matters and what they mean for the practising bar.

It really is a catch-all statute...

Don't forget that subject to certain expressly stated exceptions, the *Limitations Act, 2002* is a broadly worded, catch-all statute. Don't assume that because a cause of action was not caught by the "old" *Limitations Act*, it is NOT caught by the *Limitations Act, 2002*.

Toronto Standard Condominium 1703 v. 1 King St. W.[1]
Section 4 of the *Limitations Act, 2002* is a "catch-all" provision that applies generally to all claims not otherwise provided for in the *Limitations Act, 2002*, or in some other statute. The old *Limitations Act*, R.S.O. 1990, had no such basket provision. It governed only causes of action which expressly fell within it.

Therefore, under the "old" limitations regime, there was no limitation period for an action to set aside a fraudulent conveyance. But now, where such a claim was discovered on or after January 1, 2004, it is subject to the two-year limitation period in the *Limitations Act, 2002*.

...including actions in equity

Be especially aware that actions in equity, which were NOT subject to limitation periods under the "old" regime, now fall under the *Limitations Act, 2002*.

Boyce v. Toronto Police Services Board[2]
Under the *Limitations Act, 2002*, claims for breach of fiduciary duty are caught by the phrase "claims pursued in court" in s. 2(1). These claims do not fall within any of the exceptions to that section. A two-year limitation period therefore applies.

Portuguese Canadian C.U. v. Pires[3]
The applicable limitation period for alleged fraud, breach of fiduciary duty, and misrepresentation under the *Limitations Act, 2002* is two years.

Fracassi v. Cascio[4]
Claims for breach of fiduciary duty and a claim for oppression are subject to the two year limitation under s. 4 of the *Limitations Act, 2002*.

Syndicate Number 963 (Crowe) v. Acuret Underwriter[5]
It was accepted that the two-year limitation period under the *Limitations Act, 2002* applied to an action arising out of a failure to account for trust funds.

Estate of Blanca Esther Robinson (Re)[6]
It was accepted by the parties and the Court that a claim for rectification is subject to s. 4 of the *Limitations Act, 2002*. Under the "old" regime, claims for rectification were not governed by the *Limitations Act*, although they could be barred by laches.[7]

The Act assumes claims facts known by all from day one

Don't forget that s. 5(2) of the *Limitations Act, 2002* imposes a presumption that plaintiffs are aware of the facts giving rise to their claims on the day the act or omission took place, unless the contrary is proved.

Muirhead v. Coulas[8]
The plaintiff's action arising from a trip and fall was summarily dismissed as statute

1 2010 ONSC 2129 (Div.Ct.), dismissing appeal from 2009 CanLII 55330
2 2012 ONCA 230
3 2012 ONCA 335, affirming 2011 ONSC 7448
4 2011 ONSC 178
5 [2009] O.J. No. 4002
6 2010 ONSC 3484; pdf available from debra.rolph@lawpro.ca
7 *Menary v. Welsh*, (1973) 1 O.R. (2d) 393 (C.A.)
8 2011 ONSC 6281

barred. The accident occurred in July, 2005. The plaintiff hurt her knee. She underwent surgery a few days later, and was unable to walk for two months. After a second accident led to further injury, she received medical reports in 2009 indicating that the first trip and fall was a contributing cause of her ongoing severe disability. The action was commenced in January, 2010.

The defendants led evidence that the plaintiff knew of her injury; that it was serious enough to require surgery; that she could not walk for some two months thereafter; that she still had pain and restrictions in her movement six months after the fall and had not been able to return to work by then. She knew who the defendants were and where to locate them. Section 5(2) of the *Limitations Act, 2002* sets out a presumption that a plaintiff has the requisite knowledge as of the day the act took place, "unless the contrary is proved." The plaintiff knew she had a claim against the defendants within the limitation period. She knew her injury was significant and she decided not to sue the defendants because of friendship and her own hope for recovery. (See also *Liu v. Silver*[9].)

When does the limitation period start to run?

Several cases point to the fact that, under the Act, one should not assume that a limitation period only begins to run when related litigation is resolved.

Isailovic v. Vojvodic[10]
The plaintiff, after making an allegedly improvident settlement, sued a solicitor who had represented him in the period immediately preceding the settlement (the retainer was terminated prior to the settlement). The settlement took place in April, 2006. The plaintiff brought a motion to set aside the settlement, which Justice Herman dismissed in 2008. The Court of Appeal dismissed the plaintiff's appeal in December, 2008. The plaintiff sued his former solicitor in December 2010, one day before the two-year anniversary of the Court of Appeal's judgment.

Justice Lauwer declined to make a finding of negligence against the solicitor, ruling instead that the plaintiff 's action was statute barred. The entire cause of action upon which the plaintiff sought to rely crystallized when the plaintiff entered into the settlement; he suffered damage at that time. The effort to set aside the settlement was an attempt to reverse the damage. The failure of that attempt did not revive the negligence action. (See also *Ferrara v. Lorenzetti Wolfe Barristers & Solicitors*[11] and *Lipson v. Cassels Brock*.[12])

Nor should you assume that the limitation period begins to run only when an expert opinion is received.

Lawless v. Anderson[13]
The Court of Appeal held that the plaintiff's medical malpractice claim was statute barred. Where a patient has knowledge of the material facts giving rise to the claim, the claim is "discovered," whether or not the patient has obtained medical records or an expert opinion.

The surgeon performed breast augmentation surgery on the plaintiff on July 3, 2003. Shortly thereafter, the plaintiff expressed concern. She met with another cosmetic surgeon, on November 20, 2003. He was critical of the first surgeon's work.

The plaintiff met with a solicitor on December 4, 2003, who explained that the CMPA "fights all malpractice cases extremely hard." The solicitor advised the plaintiff to obtain a complete copy of her medical charts as well as an expert opinion on the standard of care.

The clinic's charts were produced pursuant to a court order in May, 2004. These were sent to the second surgeon, who responded by email on July 22, 2004, stating, "...I don't believe that the consent was informed and the result was below acceptable medical standards. My full report is to follow."

The solicitor did not consider that this e-mail was sufficient to found litigation because it was not a written report admissible under the *Evidence Act* and *Rules of Civil Procedure*.

The second surgeon ultimately declined to provide an expert report and suggested that someone with greater experience with this type of procedure be retained. On June 6, 2005, a third doctor provided a report stating that the first surgeon had fallen below the standard of care. A statement of claim was issued on June 24, 2005.

The first surgeon then brought a motion for summary judgment on the basis that the plaintiff discovered her claim prior to January 1, 2004, and as a result, the one-year limitation period established in s. 89(1) of the *Health Professions Procedural Code*, S.O. 1991 applied.

The plaintiff argued that the claim was not discovered until she received the written opinion from the third doctor. The motion judge concluded that the plaintiff had knowledge of all of the material facts necessary to discover her claim prior to January 1, 2004. Because the claim was issued over a year later, he dismissed the claim.

The plaintiff's appeal was dismissed. Rouleau J.A. held that a medical opinion "simply would serve as evidence in support of her claim, not as the disclosure of necessary facts to ascertain whether she had a claim against Dr. Anderson. A medical opinion was not required given the plaintiff's knowledge of the material facts. (See also *Liu v. Silver.*)

Don't assume that damages must be fully crystallized before the limitation period begins to run.

Hamilton (City) v. Metcalfe & Mansfield Capital Corp[15]
The plaintiff suffered damage on the day he purchased credit default swaps (CDS) on the advice of the defendants, his financial advisers. It was enough that the CDSs were not worth what the plaintiff had paid for them, on the day he bought them. The plaintiff discovered his claim as soon as he

[9] (2010) 101 O.R. (3d) 702, 2010 ONSC 2218, aff'd 2010 ONCA 731
[10] 2011 ONSC 5854
[11] 2012 ONSC 151
[12] 2011 ONSC 6724 (under appeal)
[13] 2011 ONCA 202, dismissing appeal from 2010 ONSC (D.M. Brown, J.)
[14] (2010) 101 O.R. (3d) 702, 2010 ONSC 2218, aff'd 2010 ONCA 731
[15] 2012 ONCA 156, dismissing appeal from 2010 ONSC 7184

Updated October 2012

learned that the CDS market had crashed, and a loss was almost a certainty, NOT on the date that the debtor actually defaulted.

Mansoori v. Laing[16]
The plaintiff's claim against the defendant's solicitor and real estate agent was dismissed as statute barred. His action was commenced more than two years after he learned that he did not have the first mortgage to which he claimed to be entitled, and that there would be a shortfall on the sale of the property. It was not necessary to await the sale of the property to ascertain the exact dollar amount of the loss, before the limitation period began to run.

Lipson v. Cassels Brock & Blackwell LLP[17]
The plaintiffs' action against the solicitors was dismissed as statute barred. The plaintiffs invested in a charity tax credit scheme between 2000 and 2003. The defendants opined that the Canada Revenue Agency (CRA) would not likely dispute the scheme.

In 2004, the CRA did so. The plaintiffs spent the next four years negotiating and litigating with the CRA. A settlement was reached in 2008, but the plaintiffs were assessed interest, and penalties for the tax credits were disallowed. Justice Perell held that the plaintiffs knew or ought to have known all of the elements of their cause of action in 2004. They had also suffered damages by that date.

Plaintiffs must prove action commenced promptly

Under the Act, when a limitation period is pleaded, the onus is on the plaintiff to satisfy the court that the action was commenced in time.

Ferrara v. Lorenzetti Wolfe Barristers & Solicitors[18]
An action against a solicitor was dismissed as statute barred. The statement of adjustments prepared by the defendant solicitor on behalf of the plaintiff was questioned and attacked by the opposite party in a real estate transaction.

The "other" party successfully litigated the issue. The plaintiff then sued the solicitor. The court found that the solicitor's error was discoverable when the statement of adjustments was first questioned. The burden is on the plaintiff under s. 5(2) to rebut the presumption that he knew he had a claim on the day of the incident. The plaintiff has the evidentiary burden to prove the claim was issued within the limitation period: *Findlay v. Holmes*[19] and *McSween v. Louis*[20].

The onus is on you

Don't assume that you are entitled to wait for other parties to provide information to you.

Lockett v. Boutin[21]
The plaintiffs moved to add Enbridge Gas as a defendant in an action arising from an explosion in their water heater. Lalonde, J. dismissed the motion on the basis that the plaintiffs failed to exercise due diligence in ascertaining Enbridge's involvement. Waiting for a companion action brought by Boutin against Enbridge, or waiting for information to be supplied by others, did not satisfy the due diligence requirements.

The plaintiffs' appeal was dismissed. There was no evidence of any effort by the plaintiff, prior to the expiry of the limitation period, to determine the identity and potential liability of the persons who owned, supplied, installed or maintained the water heater. The motion judge was entitled to conclude that the plaintiffs had failed to demonstrate due diligence.

Add third parties promptly

Even after a claim has been issued, be alert to the possibility that it may be necessary to add additional parties or causes of action. Investigate such possibilities promptly. Don't assume that it is sufficient to wait until discoveries to explore the matter. On a motion to add additional parties or additional causes of action, thoroughly set out your due diligence efforts.

Sloan v. Ultramar[22]
An oil spill took place in February, 2004. The action was commenced two years later. Ultramar delivered its defence on August 9, 2006, clearly indicating that an independent contractor delivered the fuel.

Counsel for the plaintiff failed to act on this information until eight months later at Ultramar's discovery. On discovery, the name of the independent contractor was provided – a name that turned out to be erroneous. The undertakings given on this discovery, several of which related to the independent contractor and the truck driver, remained outstanding until April 30, 2009. The motion to add the truck driver and the independent contractor was brought on November 13, 2009.

The Court of Appeal held that the plaintiff's application to add these parties was properly dismissed. The only step the plaintiff took to pursue this potential claim was to question Ultramar on discovery. The plaintiff failed to explain why the proposed defendants were not identified and named prior to the expiry of the *Limitations Act, 2002*.

Marcovitch v. Kurtes[23]
Justice Stinson refused to allow Sunnybrook Hospital University of Toronto Clinic to be added as a defendant, because the claim against it was statute barred.

The medical procedure giving rise to the action occurred on April 15, 2004. The action was commenced on May 8, 2006. The initial defendants were Dr. Kurtes and the Sunnybrook and Women's College Health Sciences Centre (the hospital). The hospital's defence pleaded that the plaintiff's surgery was performed at an unnamed private clinic. That defence was delivered on February 27, 2007.

[16] Unreported Judgment, Court file No.: CV-08-11132 CM (Windsor), released June 2, 2011; pdf available from debra.rolph@lawpro.ca

[17] Supra note 15 (under appeal.)

[18] 2012 ONSC 151 (under appeal)

[19] 1998 CanLII 5488 ,[1998] O.J. No. 2796 (Ont.C.A.)

[20] 2000 CanLII 5744, [2000] O.J. No. 2076 (Ont.C.A.)

[21] 2011 ONCA 809, affirming 2011 ONSC 2011

[22] 2011 ONCA 91

[23] 2012 ONSC 1496

The plaintiff moved in November, 2009, to add the clinic as a defendant. Master Hawkins allowed the motion.

Justice Stinson allowed the clinic's appeal. He applied the reasoning in *Sloan v. Ultramar*[24]. The pleading clearly stated that the surgery was performed in a private clinic, and the hospital had no legal responsibility. The delivery of this pleading was a "triggering event" that put the plaintiff on notice of the existence of a potential claim against another legal entity.

Plaintiff's solicitor made no effort to determine the name of the clinic until August 2008 – more than 18 months after delivery of the pleading. When information was finally sought and provided in September, 2008, no further steps were taken until discoveries were conducted in January, 2009.

By mid-January 2009, the plaintiff's lawyer was fully aware of the private clinic's name. This was prior to the two-year anniversary of the delivery of the hospital's defence. Even so, the plaintiff's lawyer did not initiate the motion to amend until October 27, 2009. No reason was given for this delay. The plaintiff failed to discharge the onus on her to demonstrate that the clinic's name was not discoverable within two years of the triggering event (the delivery of the hospital's defence). The lawyer's affidavit contained little information about the efforts made, and instead confirmed a lack of meaningful effort to pursue the information that was available.

Special status of some statutes

Don't forget that the *Limitations Act, 2002* abolished "special circumstances" for the purpose of adding new parties to an action after the limitation period has expired: See *Joseph v. Paramount Canada's Wonderland*[25].

However, this may NOT be true for claims brought under the *Trustee Act*, or other statutes listed in the Schedule to the *Limitations Act, 2002* – see *Bikur Cholim Jewish Volunteer Services v. Penna Estate*[26]. In that case, the court analyzed the interplay between s.38(3) of the *Trustee Act* and the provisions of the *Limitations Act, 2002* and found that cases covered by s. 38(3) (in general, cases involving fraud) are exempt from the limitation. (However, as there was no fraud alleged against the Penna estate, no such exemption was available in this case.)

The benefits of "misnomer"

Don't forget that "misnomer" may be helpful in some circumstances.

Livingston v. Williamson[27]
The plaintiff was allegedly injured when the bus on which she was a passenger braked suddenly to avoid a collision with an unidentified driver. She sued the Toronto Transit Commission (TTC) in its capacity as owner of the bus, employer of the driver, and provider of uninsured motorist coverage.

In fact, the TTC was not the insurer. The plaintiff was unaware that TTC Insurance was a separate company. The plaintiff brought a motion to correct the name of the insurer by adding TTC Insurance as a defendant. TTC Insurance argued that this was not a misnomer motion, but rather a motion to add a party after the limitation period had expired.

Master Hawkins allowed the motion. Both the TTC legal department and TTC Insurance operated from the same building, had identical postal codes and were represented by the same lawyer on the motion. A representative of TTC Insurance, upon receiving a copy of the statement of claim, would have known immediately that insofar as unidentified motorist coverage was concerned, TTC Insurance was intended. Neither TTC nor TTC Insurance suffered any actual prejudice. (See also *Streamline Foods Ltd. v. Jantz Canada Corporation*[28]; *Cappello v. Quantum Limousine Service Inc*[29]; *Ortisi v. Doe*[30]; *McCormick v. Tsai*[31]; *Stekel v. Toyota Canada*[32] and *Pufal v. Richards*[33].)

Cases involving wrongful criminal convictions

In cases which arise from wrongful criminal convictions, resolution of the criminal charges in a manner favourable to the plaintiff may be required before a cause of action can arise.

For example, in *Chimienti v. Windsor (City)*[34], the plaintiff was arrested and charged with assault on March 30, 2000, despite a lack of good evidence of his role in a multi-party brawl. On January 3, 2003, the charges against him were dropped. On July 31, 2003, he issued a statement of claim against the city of Windsor for wrongful detention. The city brought a successful motion to dismiss the action as out of time, arguing that Chimienti was aware of the facts supporting his claim on the day of his arrest. Chimienti appealed. The Court of Appeal allowed the appeal, citing *Hill v. Hamilton Wentworth Police Services Board*[35] for the principle that a plaintiff suing for wrongful conviction (or in this case, wrongful detention) cannot be held to have discovered the facts in support of his or her claim until there is a formal ruling or finding confirming the wrongful conviction (or detention).

See also: *Harris v. Levine*[36]; *Beuthling v. Hayes*[37]; and *Baltrusaitis v. Ontario*[38].

DO IT NOW

Finally, you can save yourself grief by issuing the claim within two years of the date of the occurrence which gave rise to the claim, unless there is some very good reason for not doing so. ■

Debra Rolph is director of research at LawPRO.

[24] (2008) 90 O.R. (3d) 401, 2008 ONCA 469, allowing appeal from 87 O.R. (3d) 473
[25] (2009) 94 O.R. (3d) 410 (C.A.)
[26] (2011) 107 O.R. (3d) 75; 2011 ONSC 3849
[27] 2012 ONCA 174, dismissing appeal from 2011 ONSC 1630, dismissing appeal from 2010 ONSC 6393
[28] 2012 ONSC 2507
[29] 2011 ONSC 5354
[30] 2011 ONSC 2057
[31] 2011 ONSC 6507, dismissing appeal from 2011 ONSC 2211
[32] 2012 ONSC 1969
[33] 2011 ONCA 16, dismissing appeal from 2010 ONSC 1699
[34] 2007 SCC 41 (CanLII), [2007] 3 S.C.R.129
[35] 2011 ONCA 530
[36] 2011 ONSC 1203
[37] 2011 ONSC 532
[38] 2011 ONCA 608

bookreview

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Cloud Computing For Lawyers

By Nicole Black, published in 2012, 222 pages

"Cloud computing" has become the hot technology topic lately, and many lawyers are looking for information and guidance to help them both better understand the concept and integrate it into their firms. Nicole Black, founder of a company that educates lawyers on emerging legal technologies, has set out to explain the risks and benefits of computing in the "cloud," and provide lawyers with advice on the software and services currently out there.

The first point the author makes is that while the term "cloud" is new, the functionality isn't. Any service accessed online that isn't hosted in the lawyer's office is already in the cloud (e.g., Gmail, Google Docs, Netflix, Facebook, etc.). The question really is: Are lawyers ready to have their law practice software and client information managed in the same way? There are many potential benefits in terms of cost and convenience (for both staff and clients), but the technologies are also fairly new and there is much that lawyers need to think through.

This book contains chapters on both ethical and security matters lawyers need to keep in mind. Ethical questions to consider when storing data remotely and creating a greater online presence include the nature of the lawyer-client relationship when contact is done online, the security of client information, and electronic discovery requirements for remotely stored information. (This section deals with ABA Rules, but similar questions are faced by Ontario lawyers.) As many of these are recent issues, regulations and case law have not always kept pace.

The security questions can be equally complex. Where will the stored data be located (of particular interest to Canadian lawyers who may not want their client data to fall under the *Patriot Act*)? How will it be backed up? What happens in the event of a system failure that leaves it temporarily inaccessible? These can seem like daunting questions, but the author points out that in terms of security, online cloud storage may in many cases be safer than outdated or jerry-rigged computer setups many lawyers currently have in their offices. In some cases the cloud may be the better security option.

For lawyers who have made the decision to move parts of their practice software into the cloud, the remainder of the book looks at how best to do this. A lot depends on how established a firm's practice management software already is. New lawyers just starting out have the most flexibility in choosing which functions to move online. Firms that have already invested heavily in in-house storage and software may be more constrained. For most it will be a matter of choosing which software services can best complement or replace their existing systems.

Some applications are free, and some come at a cost, but there are high quality programs in both categories. Google's Apps for Business, for example, is free (certain extra functions can be paid for), but offers high quality email, word-processing, spreadsheet and calendaring systems. However, lawyers are more likely to be interested in software designed to be run in a law office, and these are generally not free. The author reviews popular programs such as Clio, Rocket Matters, LexisNexis Firm Manager and Total Attorneys Practice Management System.

Lawyers exploring the benefits of running aspects of their practice in the "cloud" have a lot to consider. This book provides a good introduction to the technical concepts, ethical issues and currently available software, and will be welcomed by lawyers who have been searching for guidance on this topic. ■

Tim Lemieux is practicePRO coordinator at LawPRO.

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We welcome your views, ideas, comments

In the last two issues of *LawPRO Magazine*, we have invited you, our readers, to provide us with feedback on any number of topics: What kind of information would you like to see in the publication? How can we help lawyers understand the implications of claims costs that are in the $100 million ballpark? Do you have ideas for how we can get lawyers to act on some critical messages that too often seem to go unheeded – messages about fraud scams targeting virtually every practice area, or about the need to safeguard and not share PSPs, or about the need to document more rather than less?

Here are some of the comments we are hearing:

This note was from the Real Estate Council of Ontario which had requested extra copies of the *LawPRO Magazine* for educational purposes:

My manager… thought the magazine was put together nicely, especially the piece regarding fraud. Not only was fraud described very well, it is relevant to what we do.

On our corporate social responsibility efforts:

I was delighted to see, in the latest LawPRO report, the efforts you are taking to reduce LawPRO's environmental footprint. Thank you, and congratulations.

Also, I want to let you know that I think your materials are very clear and very well presented. Your case studies are an excellent reminder of the importance of standing up to clients…

Glad to see that you are keeping up the great work, for all of our sakes.

Dianne Saxe
Toronto, ON

An idea for the future:

One lawyer suggested that lawyers would be more inclined to read the magazine if it was available through an "app" that can be downloaded on a smartphone. The magazine is currently available in PDF format from our website but as PDFs are difficult (if not impossible) to read on many smartphones, having it available in an app that lawyers can access at their leisure might influence readership, according to this lawyer.

This is one option that we are considering as part of a larger revamp of the website and the way in which information is presented on our site. We're also looking at posting content in html format and providing mobile presentation options. Watch for more news on this front later in 2012.

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