LAWPRO magazine

JANUARY 2016 VOL 15.1

Serving Indigenous clients

PLUS:

Rule 48: The clock is ticking

Managing risk: Who pays for crime?

When the other party is unrepresented

upcoming events

January 20, 2016
Peterborough Law Association
Rule 48 changes: Take timely steps
Ian Hu presenting
Peterborough, ON

January 29, 2016
Advocates' Society
Tricks of the Trade 2016
Adverse cost insurance
Ian Hu presenting
Toronto, ON

February 2, 2016
Ontario Bar Association
OBA Insurance Law Section
Risk management for insurance litigators
Cynthia Miller presenting
Toronto, ON

February 4, 2016
Ontario Bar Association
OBA Real Property Program, Annual Institute
Now to the future: What does it hold for the real estate bar?
Kathleen Waters presenting

Managing disasters for the real estate lawyer or firm
Ray Leclair presenting
Toronto, ON

February 26, 2016
University of Toronto Faculty of Law
Internationally Trained Lawyers Program
Introduction to LawPRO
Ray Leclair presenting
Toronto, ON

recent events

November 18, 2015
Middlesex Law Association Annual Practice Management Seminar
Cybercrime and law firms: Avoiding cybercrime dangers
Ray Leclair presented
London, ON

November 18, 2015
Ontario Bar Association
When Construction Liens and Real Estate Collide CPD
Avoiding negligence claims (construction law)
Martine Morin presented
Toronto, ON

November 19, 2015
Ontario Bar Association
Managing Partner Roundtable Breakfast Series
Filling the role of managing partner
Dan Pinnington chaired
Toronto, ON

November 21, 2015
Carleton County Law Association
CCLA 35th Civil Litigation Updated Conference
Rule 48 changes: Take timely steps
Ian Hu presented
Mont Tremblant, QC

November 23, 2015
County of Lanark Law Association
Rule 48 changes: Take timely steps
Ian Hu presented
Perth, ON

November 24, 2015
Law Society of Upper Canada
The Six-Minute Real Estate Lawyer
Current real estate malpractice errors and how to avoid them
Lisa Weinstein presented
Toronto, ON

November 26, 2015
Roundtable of Diversity Associations Conference & Soiree
Diversity and malpractice claims
Ian Hu presented
Toronto, ON

December 2, 2015
University of Ottawa
Ottawa Law Practice Program
Assurance titres et la fraude
Ray Leclair presented
Ottawa, ON

December 3, 2015
Law Society of Upper Canada
Professional Conduct and Practice in Ontario
Your LawPRO policy
Michael Kortes presented
Toronto, ON

December 3, 2015
Waterloo Law Association
Professionalism CPD
Technology to help solos and smalls – risk, rewards and requirements
Ray Leclair presented
Waterloo, ON

December 8, 2015
Blaney McMurty LLP
Your LawPRO policy and claims prevention
Dan Pinnington presented
Toronto, ON

December 9, 2015
Law Society of Upper Canada
Real Estate Practice Basics
Fraud awareness
Ray Leclair presented

Introduction to title insurance
Lori Swartz presented
Toronto, ON

LawPRO and the practicePRO and TitlePLUS programs welcome invitations to speak about professional liability insurance, risk management, title insurance and other topics within our expertise. Interested in arranging for a speaker? Please contact us at practicepro@lawpro.ca, or call us at 416-596-4623.

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Serving Indigenous clients

Departments

In practice

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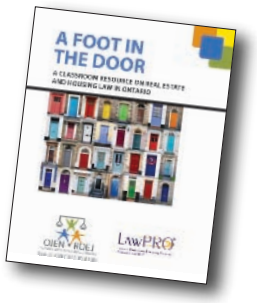

LawPRO, in collaboration with the Ontario Justice Education Network (OJEN), has created learning materials for Ontario secondary schools. Entitled *A Foot in the Door: A Classroom Resource on Real Estate and Housing Law in Ontario*, the lesson plans address two of the most important skills in life – knowledge of legal issues and financial literacy. Informed consumers ask the right questions when working with a lawyer and are better prepared to provide relevant information and understand the documents and issues involved. We hope that this program will help improve the financial and legal literacy of future consumers while also fostering the communication and understanding between real estate clients and their lawyers.

Key dates

January 31, 2016
Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ended December 31, 2015.

February 5, 2016
Last date to qualify for a $50 early payment discount on the 2016 policy premium (see page 13 of the 2016 Program Guide for details).

April 30, 2016
Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending March 31, 2016.

April 30, 2016
Annual exemption forms are due from lawyers not practising civil litigation and/or real estate in 2016 and wanting to exempt themselves from quarterly filings.

Caron Wishart scholarship

The Caron Wishart Memorial Scholarship, initiated by LawPRO and supported by many members of the bar and the Government of Ontario's funds matching program, was awarded in November. The 2016 recipient is University of Toronto Faculty of Law second year student Vivian Lee. Vivian's legal interest is criminal law, specifically how visible minority youth interact with the criminal justice system.

Does your lifestyle suit a condo?

As part of LawPRO's public awareness efforts to promote the role of lawyers and the value they bring to real estate transactions, we have produced a new video *Does your lifestyle suit a condo?* It emphasizes how important it is for condo buyers to be aware of the rules and regulations that are part of condo life. We will be promoting this video through social media and other channels, and you are welcome to use it to promote your own services, including posting it on your firm's website and social media feeds. You can view the video on LawPRO's YouTube channel.

e-briefs

Don't miss out – have you seen our recent emails?

2015 Third quarter transaction levy filings overdue

December 8, 2015

A reminder that the deadline for submission of levy filings relating to transactions completed between July 1, 2015 and September 30, 2015, was October 31, 2015.

Renew your firm's professional liability insurance for 2016 now

October 2, 16, 28, and November 6, 2015

Messages to firms to e-file the 2016 renewal insurance application on or before November 3 to save $25 per lawyer; message about impending final deadline of November 10 for filing.

Renew your professional liability insurance for 2016 starting October 1

October 1, 15, 28, and November 5, 2015

Messages reminding lawyers to e-file 2016 renewal insurance applications by November 3 to save $25; message about impending final deadline of November 10 for filing.

2016: Base premium holds steady, REPCO reduced

September 24, 2015

Every fall, LawPRO publishes a special issue of *LawPRO Magazine* to announce the changes to the insurance program for the coming year. This issue provided links to the latest issue of *LawPRO Magazine*, along with details and deadlines for filing and renewing insurance coverage.

Renew your LawPRO exemption status for 2016: file online now

September 25, October 8, 2015

This issue notified our insureds of the deadline for renewing exemption status was November 10, 2015.

2015 Second quarter transaction levy filings overdue

September 21, 2015

A reminder that the deadline for submission of levy filings relating to transactions completed between April 1, 2015 and June 30, 2015, was July 31, 2015.

Reminder: Apply for your LawPRO Risk Management Credit by September 15

August 18, September 9, 14, 2015

A reminder to insureds to complete the declaration on the LawPRO Risk Management Premium Credit declaration page no later than midnight on September 15, 2015.

Webzines

Blue sky: wellness and balance for a demanding profession: *LawPRO Magazine*

September 16, 2015

LawPRO Magazine focused on the unique stressors faced by lawyers and law firms, some of the repercussions of not dealing with these factors, and strategies to address them.

Premium and Payments FAQ

I have filed my renewal application for 2016 and want to take advantage of the early payment discount. How can I do that?

Insureds who have renewed their coverage for 2016 and pay their annual premiums in full, by cheque or by providing pre-authorized banking information, dated and received by LawPRO on or before February 5/16 are entitled to claim the early payment discount. Deduct $54 per insured from the invoiced amount – $50 for the discount and $4 for PST.

Toward a new understanding

Having written my Master's major research paper on the interaction between Aboriginal title and statutory land registration systems, I have had some vicarious exposure to the experiences of Indigenous people with the law. It was an eye-opening experience to learn some of the profound differences in fundamental assumptions regarding governance, law, the land and our role as its inhabitants. I have since been interested in deepening my understanding of how the legal profession can serve Indigenous peoples, with everyone starting from the same place to the greatest extent possible.

I am thrilled that this issue of *LawPRO Magazine* includes an in-depth discussion of the interaction between Ontario lawyers and their Indigenous clients. From the perspective of LawPRO, it is important that our insureds are aware of relevant legal issues, as well as how to elicit information from their clients that shines a light on their needs and desired outcomes, whether their clients are Indigenous or otherwise. Hopefully, our article on page 5 will contribute to a greater comprehension of how we can best relate to one another.

As the artists who designed the mosaic featured on our cover said, perhaps we truly are entering a time when a new understanding of how we can all live together is upon us. I certainly hope so.

Kathleen A. Waters
President & CEO

LawPRO magazine

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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 malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

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Providing high-quality service to

Indigenous clients

Just as the final research for this article was being completed in November, newly-elected Prime Minister Justin Trudeau announced his Cabinet, including the appointment of Jody Wilson-Raybould as Minister of Justice and Attorney General. The next morning, a cautiously hopeful mood filled the room as a group of Aboriginal lawyers gathered at the Law Society of Upper Canada for the 2015 continuing education program on Indigenous issues.

Ms. Wilson-Raybould is one of two new Aboriginal cabinet ministers. Many Indigenous Ontarians believe that the Trudeau appointments may herald a new era of "nation-to-nation" relations between the government of Canada and Indigenous leadership. These are hopeful times, but the task of improving the lives of Indigenous people in the province is sobering. Speaking at the Law Society program, Chief Kelly LaRocca of the Mississaugas of Scugog Island First Nation noted that her nation's reserve – located just 90 kilometres east of the Law Society's Osgoode Hall – has been under a boil-water advisory since 2008. "But we're thinking of building a water-treatment plant," explained an upbeat LaRocca. "Sell services to the other islanders. They could use it."

The water treatment plant development project, which will likely employ a lawyer or two, is not the kind of work that comes immediately to mind when we think of Aboriginal law. Lawyers who have never had an Indigenous client are more likely to think about land claims, the Indian Residential Schools Settlement, or *Gladue* reports in criminal court. But for many Indigenous communities, the most promising approaches to infrastructure deficiencies and social inequality lie in the self-help remedies of economic and resource development. As many Aboriginal communities are gathering economic strength, non-Indigenous industries are shopping for resources, territory and labour. It won't be long before lawyers in every area of practice will be practising Aboriginal law in the broadest sense of that vague term: that the client sitting across the desk is an Indigenous person.

Some aspects of practice never change: lawyers' best strategy for remaining relevant, useful, and employed continues to be providing high quality legal work that meets clients' needs. While each client has his or her own specific interests and objectives, some Aboriginal clients may have certain interests in common.

Collaborative and development skills needed

Traditional advocacy will always be an important part of a lawyer's cadre of skills, but as the needs of Aboriginal clients evolve, it will not be enough. Instead of simply giving voice to their clients, effective lawyers will need to develop their skills as educators and collaborators.

One of the most common criticisms Indigenous clients have of the Canadian legal system is that it provides few opportunities for parties to be heard directly (see, for example, Caitlyn Kasper's comments in the child protection sidebar on page 10).

Aboriginal communities are increasingly demanding the opportunity to negotiate with government on a nation-to-nation basis and with industry as equal partners. Chief Kelly LaRocca of the Mississaugas of Scugog Island First Nation has noted that lawyers can best support these initiatives by working collaboratively with community members to develop the legal and business acumen of their own leaders and spokespeople.

Serving Aboriginal clients effectively has the potential not only to assist individual clients and their families, but also to contribute to the development of a better understanding of issues facing Indigenous people. It can also help lawyers avoid malpractice, since problems with lawyer-client communication continue to be the leading cause of claims.

Is my client Aboriginal?

As a threshold issue, lawyers should be aware that not all clients who are Aboriginal will necessarily disclose this fact. However, because certain laws apply differently to some Aboriginal people (especially "Status Indians"), as part of the routine information-gathering process, lawyers should ask questions to find out whether a client is an Indigenous person.

Jonathan Rudin of Aboriginal Legal Services of Toronto (ALST) explains that some clients may hesitate to volunteer that they are Indigenous. "For many, being identified as Aboriginal has not, in their lives so far, been an advantage." Clients may even be suspicious of the motives of a lawyer who seems overly nosy. "The question needs to be asked in an expansive way," advises Rudin, "and the lawyer needs to explain why he or she is asking it."

Learning that a client is an Aboriginal person is just a basic first step. There are dozens of distinct Indigenous cultures in Canada, and within cultures, individuals have many different ways of life. A downtown-Toronto resident of Inuit heritage may have very little in common with a First Nations person who identifies as Haudenosaunee and lives on-reserve, or with a woman with one Cree parent who lives off-reserve and farms land outside Sioux Lookout. Understanding a client as an individual and not just as an Indigenous person requires avoiding what Karen Drake, Assistant Professor in the Faculty of Law at Lakehead University calls "pan-Aboriginalism": the tendency to assume that Indigenous cultures are sufficiently alike that knowledge of one culture can readily be applied to another culture.

Rudin adds that non-Indigenous lawyers can be too quick to make broad assumptions about Indigenous clients. "Most Canadians," he says, "believe we know things about Aboriginal people, but much of what we know is wrong." There is also a tendency to make judgments about whether a person is or is not "*really* Aboriginal": for example, some lawyers assume that a person who lives off reserve, in an urban setting, lacks the same attachment to her culture than one would expect in a person who lives in an Aboriginal community, but this is not the case. Also many First Nations people, despite living on a reserve, feel a deep disconnection from their culture as a result of the disruption of intergenerational cultural transmission caused by the residential school system.

Lawyers should make room for clients to define their individual identities, and should be accepting of a wide range of diversity in heritage, beliefs, and values, rather than making assumptions about how an Aboriginal client should act, or what he should want from the legal system. Aboriginal cultures are not, after all, frozen in historical context – they are living and growing cultures like any other. Speaking at the Law Society of Upper Canada's Indigenous Law Issues 2015 program, Randall Kahgee, former Chief of the Saugeen First Nation and now practising law in affiliation with Pape Salter Teillet LLP, urges lawyers to understand that the rights of Aboriginal people, like the rights of all people, are continually evolving. These rights will continue to be defined by Aboriginal people themselves, and should be allowed to achieve a natural expression.

To avoid making limiting assumptions, lawyers should ask relevant questions about a client's daily life and his or her previous exposure to and understanding of the legal system. This can include questions about values and even feelings, where the answers might help the lawyer develop a clear understanding of the client's expectations and concerns.

Am I qualified to serve this person?

Once a lawyer has determined that a new client is an Aboriginal person, the next line of inquiry should turn inward: am I qualified to serve this person?

Whether or not a lawyer is ready to represent an Aboriginal client is a question with both practical and deeply personal components; it will also depend on the area of practice involved.

Objective readiness: substantive competence

First, as with any client, the lawyer must be familiar with the relevant law, including those aspects of the law that have unique application to some Aboriginal people. The federal *Indian Act*, for example, applies to Status Indians (a defined term, and not including "non-status Indians" nor Inuit or Métis people), and many sections do not apply to First Nations people living off-reserve. It applies to many aspects of life including band governance, enfranchisement and disenfranchisement, property on reserve, expropriation and seizure, wills and estates, education, taxes, and more.

The *Indian Act* is not the only legislation specific to Aboriginal people – the *First Nations Land Management Act* (SC 1999) provides a framework for First Nations to develop regimes for resource development, succession, and other important issues; the *First Nations Fiscal Management Act* (SC 2005) prescribes certain reporting requirements with respect to real property taxation; and the recently passed *Family Homes on Reserves and Matrimonial Interests or Rights Act* (SC 2013) seeks to provide protections to parties living on reserves in the context of family breakdown. There are also dozens of specific references to Aboriginal people in other Canadian legislation at all levels – from s. 35 of the *Constitution Act, 1982*; through the *Criminal Code*, labour, and natural resources statutes at the federal level; to child protection, family law, education, employment, and other statutes at the provincial level.

Finally, there are special procedures that apply to Aboriginal people in certain Canadian courts. In Ontario, these are called *Gladue* courts, after the name of the defendant in *R. v. Gladue* ([1999] 1 S.C.R. 688). Proceedings in a *Gladue* court can differ significantly

Aboriginal language rights now recognized in the *Rules of Professional Conduct*

At its September 24, 2015 Convocation, the Law Society of Upper Canada announced new amendments to the *Rules of Professional Conduct* that recognize the right of First Nations, Métis or Inuit (FNMI) clients to use Aboriginal languages, in appropriate circumstances, when accessing legal services. Lawyers serving these clients are responsible for bringing this right to the attention of clients who may wish to exercise it. The amended language rule provides as follows:

Language Rights

3.2-2A A lawyer shall, when appropriate, advise a client of the client's language rights, including the right to use

(i) the official language of the client's choice; and

(ii) a language recognized in provincial or territorial legislation as a language in which a matter may be pursued, including, where applicable, Aboriginal languages.

3.2-2B If a client proposes to use a language of his or her choice and, the lawyer is not competent in that language to provide the required services, the lawyer shall not undertake the matter unless he or she is otherwise able to competently provide those services and the client consents in writing.

These amendments have also been incorporated into the *Law Society's Guidelines for Lawyers Acting in Aboriginal Residential School Cases* (see guideline 11).

Gladue reports admissible in lawyer discipline matters

In *R. v. Gladue* ([1999] 1 SCR 688, 1999 CanLII 679 (SCC)) the Supreme Court highlighted the application of s. 718.2(e) of the *Criminal Code*, which requires sentencing judges to pay special attention to the circumstances of Aboriginal offenders and to consider all available sanctions other than imprisonment. In their reasons for judgment, the court mandated the use of a special pre-sentence report, prepared by the defence, setting out information that would assist the court in understanding the accused's circumstances, and in particular "[t]he unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts" (from s. 718.2(e)).

These reports have since come to be known as *Gladue* reports, and a system for obtaining them from specialist preparers has been established (see below for tips on using *Gladue* reports). They are regularly introduced in criminal cases. However, a recent decision of the Ontario Law Society Appeal Panel (ONLSAP) made it clear that the duty to take into account the circumstances of Indigenous people extends beyond the criminal justice system. In their reasons in *Law Society of Upper Canada v. Terence John Robinson* (2013 ONLSAP 18 (CanLII)), the ONLSAP members noted that *Gladue* factors had already been recognized as relevant in, for example, decisions about extradition, or civil contempt of court. In considering whether evidence of *Gladue* factors was admissible in a lawyer discipline proceeding, the ONLSAP held (at paras. 72 and 73):

> "… hearing panels are concerned with the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation. They are concerned with the culpability or moral blameworthiness of the licensee, and any facts that bear on those issues. They are concerned about the character of the licensee who appears before them. And they are concerned about crafting dispositions that meet the required objectives while promoting access to justice for everyone, including of course, the Aboriginal community. The latter is especially true for the Aboriginal community and others whose access to justice has been deeply problematic.
>
> None of the above concerns are incompatible with maintaining public confidence in the legal profession. Indeed, consideration of unique systemic and background factors, as they reflect upon the seriousness of a licensee's conduct, and his or her culpability or moral blameworthiness, is necessary to enhance respect for, and confidence in our profession and the self-regulation of all of its members."

After considering the circumstances of the lawyer subject to discipline, the ONSLAP held that the hearing panel had erred in finding that *Gladue* factors had not influenced the lawyer's conduct (for instance, his hesitation in reporting a threat to the police), and reduced his penalty from a 2-year suspension to the 1-year period already served.

from "traditional" criminal proceedings, and lawyers should familiarize themselves with these procedures before appearing before one. Even in a court not specifically created as a *Gladue* court, a lawyer who is making representations in respect of a sentence or other disposition (for example, an extradition proceeding) that affects the liberty of an Aboriginal person is encouraged to arrange for the preparation of a specialized "*Gladue* report." These reports set out the factors for consideration in sentencing Aboriginal offenders as per *Gladue* and s. 718.2(e) of the *Criminal Code*. A *Gladue* report is prepared by a qualified member of a *Gladue* roster, and must be ordered several weeks before it is required.

Finally, where an Ontario lawyer seeks to represent a client in accessing a remedy prescribed under the Indian Residential Schools Settlement Agreement announced by the federal government in 2006, he or she is expected to comply with the Law Society's "Guidelines for Lawyers Acting in Aboriginal Residential School Cases."

Philosophical readiness: cultural competency and sensitivity

As explained in the sidebar on page 12, the effective representation of Aboriginal clients requires an appropriate awareness of the Indigenous experience to avoid re-victimizing clients who have had

negative experiences with the legal and other government systems. While many Aboriginal people believe that non-Indigenous Canadians will never be able to fully understand the Indigenous experience, cultural competence training for lawyers and others who work with Indigenous people can make a difference.

The Indian Residential Schools Settlement Agreement prescribed, at Schedule N, the establishment of the Truth and Reconciliation Commission of Canada (TRC). In June 2015, the TRC published a 94-item list of Calls to Action, put forward as steps toward reconciliation of the relationship between Aboriginal people and the Crown. Call to action #27 deals specifically with lawyer education:

> "We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."

A separate call to action, #28, recommends that a similar program of education be a required element of a law school education.

In response to Call to Action #27, Law Society Treasurer Janet E. Minor reported, in a June 4, 2015 press release, that the Society is "…committed to enhancing cultural competency within the legal professions" and to taking steps to improve the services provided by lawyers and licensed paralegals to Métis, First Nations, and Inuit people, as well as access to those services.

As Karen Drake explains, these traditions are best learned through long-term cultural immersion. She notes that "Anishinaabe tradition is passed down typically through storytelling (Nanabush the trickster is a prominent character); while Métis legal tradition often incorporates songs, and is somewhat more likely to follow a prescriptive format." While elders play an important role in communicating legal custom and tradition, they are not lawmakers; their role is closer to that of wise interpreters. And according to Aboriginal legal scholar Hannah Askew, for non-Indigenous learners, understanding Indigenous legal traditions will require not only finding a way to access the content of these traditions, but also learning how to interpret a completely different style of legal system – one that substitutes "a set of interlocking and overlapping processes" for rigid rules, and that requires that those processes be understood via the full range of senses: sound, touch, sight, taste and smell.

At the Law Society's recent Indigenous Law Issues program, Grant Wedge, Executive Director, Policy, Equity & Public Affairs asked panel members what ought to be included in an Indigenous issues curriculum for lawyers.

Elizabeth Jordan, National Director, Aboriginal Markets at the Royal Bank of Canada answered that a well-rounded cultural competence curriculum ought to explore the legal aspects of the roots of the fractured relationship between Indigenous people and the Canadian government. "It needs to include a critical review of the many legal fictions that have been developed to deny the rights of Aboriginal

Practical advice for complex problems: Managing a mountain of evidence

Some of the most important barriers to justice for Aboriginal people are the same ones that plague all litigants… but multiplied: for example, the high cost and increasing complexity of litigation.

Establishing a right to Aboriginal title to territory is a time-and evidence-intensive process. Parties must first agree on a strategy and come to a consensus about the focus and parameters of the litigation, a process that requires strong communication and negotiation skills on the part of both clients and their lawyers. Next, many hours must be spent in researching, documenting, and organizing decades' – or even centuries' – worth of evidence. Compiling the evidence required to establish a land claim requires both a significant degree of analytical ability on the part of researchers, and a document organization system that is both reliable and flexible. Rama, Ontario firm Nahwegahbow, Corbière employs a dedicated researcher and uses state-of-the-art evidence compilation software to organize and analyze land claim and Aboriginal rights evidence.

Dabbling in Aboriginal land claims law is not a realistic option: when developing a land claims or Aboriginal rights practice, lawyers will need to have in place both research capacity and up-to-date technology.

"Paralyzing": The impact of child protection proceedings on Aboriginal families and communities

Perhaps the most challenging impact that law has on the lives of Ontario Indigenous people comes via the child protection system. Despite the requirement, under the Ontario *Child and Family Services Act* (CFSA), that a child's Indigenous heritage be taken into account when making decisions about interventions and placements, Caitlyn Kasper of Aboriginal Legal Services of Toronto describes the threat of having a child removed from his family and community as "paralyzing" for parents.

Given what is now known about the impact of the Indian Residential School system on Aboriginal families, it's clear that the removal of children from their homes has unique and profound implications for Indigenous people. Katherine Hensel of Hensel Barristers, speaking at the Law Society's 2015 Indigenous Law Issues program, described First Nations' jurisdiction over the care of their children as "an element of self-government that has never been ceded or surrendered." Hensel believes that allowing First Nations to resume care for their children is a critical aspect of the process of reconciliation agreed to by the government under the Indian Residential Schools Settlement Agreement.

When an Aboriginal child does come to the attention of a child protection agency, says Kasper, the role of the lawyer representing the parents is critical. Aboriginal parents are often shocked to discover the lack of opportunities to have a voice in the system – a deficiency that is only partly remedied by the requirement, under the CFSA, that a representative of the child's band or community have notice of certain proceedings (see s. 39). A parent's lawyer, says Kasper, can do his or her best to reduce the stress of involvement with the child protection system by educating the parents as much as possible about the relevant procedures, by suggesting steps the parent can take to improve his or her position, and by recommending resources that may offer help. "Above all," adds Kasper, "a lawyer needs to keep in touch with the client: call often, provide updates as soon as they are available, explain processes, and do everything possible to remind the client that he or she is there for them."

people." Kimberley Murray, Ontario Assistant Deputy Attorney General, Aboriginal Justice Division added that instead of simply providing interesting information about "sweat lodges and medicines," lawyer education programs must focus on the more serious – and difficult – work of relationship building. As the professional indemnity insurer for Ontario lawyers, we at LawPRO agree with this prescription, because healthy lawyer-client relationships help prevent the communication failures at the heart of many claims.

What does my client want out of the legal or justice system?

A lawyer may be much more familiar with the problem an Indigenous client is having – for example, a marital separation, a criminal charge, or a human rights complaint – than with the kind of person his or her client is. This greater comfort with the legal context than with the personal context can lead lawyers to quickly zero-in on the familiar (legal) details and to launch immediately into pursuit of the "usual" remedy, instead of taking the time to determine whether the usual remedy is actually what the client wants.

This narrow focus can lead to misunderstandings or even malpractice claims based on a client's allegations that the lawyer acted without, or contrary to, the client's instructions.

Determining what a client wants requires a two-way conversation in which both parties speak and listen. Most lawyers believe themselves to be skilled interviewers, and might protest that they always ask questions about what a client wants. But what if the client can't articulate those wants because he or she lacks information about the available options? When a client is new to the legal system, a first meeting with a lawyer can feel like having to answer a quiz before taking a course. Obtaining thoughtful and informed instructions from a new client requires that the lawyer have the patience to thoroughly explain the substantive law, the procedures for applying it, and the range of remedies available.

There are no shortcuts for this process. It requires patience, the characteristic identified by both Jonathan Rudin and Caitlyn Kasper of Aboriginal Legal Services of Toronto as the most important for lawyers who work with Aboriginal people. Says Rudin, "it's essential, instead of immediately having all the answers, to really be aware of what you *don't* know. Take the time to fully unpack why a person thinks the way he or she thinks."

Where a client has a history of oppression or lack of opportunities, his or her expectations of what is possible may be unfavourable or limited. If the lawyer believes that the client's expectations are unnecessarily low, it's appropriate to say so; but it is never appropriate for a lawyer to substitute his or her own judgment for the client's.

Grappling with terminology

Many terms have been used, historically, to describe Canada's original inhabitants. Because labels influence our understanding of cultural identity, it is important for lawyers to make thoughtful choices about terminology when interacting with clients and when presenting clients' cases in court.

There are a range of opinions about the most appropriate terms for describing cultures, and usage evolves over time. For example, after taking office, the most recent Canadian government adopted a new name, "Indigenous and Northern Affairs Canada", for the department formerly called "Aboriginal Affairs and Northern Development Canada."

Here are basic definitions for some of the terms used in this article.

Aboriginal:

In Canada, this term includes First Nations, Métis, and Inuit people. "Aboriginal" is used in certain other countries to describe original inhabitants of a territory. It describes a historic context rather than an ethnicity.

Anishinaabe:

This term describes a subset of Indigenous peoples who are the descendants of speakers of Anishinaabemowin-Anishinaabe languages. It includes the Odawa, Ojibwa, Potawatomi, and Algonquin peoples, as well as certain Métis peoples; but excludes the Inuit and Haudenosaunee peoples (Haudenosaunee peoples include the Mohawk, Cayuga, and Oneida, among others).

First Nations:

A term used in Canada to denote Indigenous people who are neither Métis nor Inuit.

FNMI (First Nations, Métis, Inuit):

Because this acronym is specific to the Canadian context, it is preferred by some to the more generic Aboriginal or Indigenous.

Indigenous*:

An adjective used globally to describe the original inhabitants of a place

Inuit:

A people indigenous to northern North America and Greenland. An individual member of this people is called an Inuk.

Métis:

In the Canadian context, the Métis are a nation separate from other Aboriginal cultures. Members of the Métis nation are descended from individuals who, many generations back, had mixed Aboriginal/European parentage, and whose descendants intermarried and produced a distinct people.

Status Indian:

This term refers to a legal status applied to certain First Nations individuals who are registered under the *Indian Act* on the Indian Register. The *Indian Act* places restrictions on who can be registered, and the Canadian government has not historically recognized Métis or Inuk individuals as eligible for registration.

* The term "indigenous" is not capitalized by some publishers in contexts where it is used as a generic adjective. Because it is used more narrowly in this article to refer to specific peoples, and because some individuals may adopt it in preference to the alternatives as a cultural identifier, we have chosen to capitalize the initial "I."

Randall Kahgee agrees that lawyers must be careful to avoid making assumptions about which course of action is best for a client. In the context of resource development consultations in particular, he explains that the jurisprudence that has developed under s. 35 of the *Constitution Act, 1982* makes it clear that Aboriginal people must not only be consulted, but also accommodated – which goes well beyond simply being heard. Accommodation means allowing Aboriginal people to be full decision-makers with respect to their own land, and requires that their concerns, as articulated by them, be substantially addressed.

Taking into account Indigenous legal traditions

Multiple legal traditions exist in Canada

Taking the time to understand an Indigenous client is a very important step, but there is much more lawyers can do. In her paper "Indigenous Legal Traditions and the Challenge of Intercultural Legal Education in Canadian Law Schools," Hannah Askew describes

Do it right or not at all

"As a non-Indigenous lawyer," Jonathan Rudin warns, "you need to understand that even though you may see yourself as his advocate, your Indigenous client may see you instead as 'part of the system'."

This perspective means that if the client's interaction with his lawyer is stressful, shaming, or otherwise negative, despite the fact that the lawyer is ostensibly on the client's side, the overall result of the client's interaction with the law will be to perpetuate hundreds of years of colonialism – and the lawyer will be a part of that harm.

Taking on an Indigenous client without being properly prepared to do so and without investing appropriate time to learn about the client's circumstances, beliefs and needs is to do the client a disservice – and in the worst cases, to re-traumatize the client.

It's the importance of avoiding this re-traumatization that prompted the Law Society, for example, to develop guidelines for lawyers seeking to represent clients who wish to assert claims under the Indian Residential Schools Settlement Agreement.

Says Rudin: "if, as a lawyer, you are willing to take the time to learn how to support Indigenous clients in a manner that is respectful, you should take this work on. But if not – then don't do it. We just don't have time to do this badly."

the growing recognition, in Canada, that the development and protection of the rights of Indigenous people must draw not only on common law and civil law, but also on Indigenous legal traditions.

This recognition of Canadian legal pluralism was also reflected in the Canadian Bar Association's (CBA) 2005 resolution (Resolution 05-01-A) calling for representation of all Canadian legal traditions when making judicial appointments. The resolution expresses the CBA's view that to achieve "a reconciliation of the prior occupation of Canada by Indigenous societies with the subsequent assertion of Crown sovereignty" as required by s. 35 of the *Constitution Act, 1982*, an effort must be made to appoint Aboriginal judges to appellate-level Canadian courts, including the Supreme Court of Canada.

In 2013, the CBA introduced another resolution (Resolution 13-03-M) urging "judges, lawyers, lawmakers and legal academics" to affirm the promise contained in s. 35 and to recognize and comply with the *United Nations Declaration of the Rights of Indigenous Peoples* in concrete and specific ways:

> BE IT RESOLVED THAT the Canadian Bar Association:
>
> 1. urge judges, lawyers, law-makers and legal academics to recognize and value Indigenous legal traditions within the Canadian legal system;
> 2. advance and support initiatives to recognize and advance Indigenous legal traditions in Canada, including:
>   - participation in working groups, advisory committees and other organizations;
>   - continuing professional development and training for lawyers and law students; and
>   - public education and information.

Understanding Indigenous perspectives

David Nahwegahbow is a lawyer from Whitefish River First Nation and a partner in Rama, Ontario firm Nahwegahbow, Corbière. He recently represented the Indigenous Bar Association when it participated as an intervener before the Supreme Court of Canada in the *Tsilhqot'in Nation v. British Columbia* land claim case. He believes that the most important thing for non-Indigenous lawyers to be aware of when representing Indigenous people is that they may be working with clients with a perspective and worldview radically different from their own. Nahwegahbow explains that Aboriginal history, customs and culture continue to influence the way Indigenous people experience the Canadian legal system.

Non-Indigenous parties and lawyers, notes Nahwegahbow, are comfortable with the adversarial design of the system, and they trust that if they have a conflict, "the system will take care of it: the adversarial process will produce justice." But Indigenous people often struggle to understand and to trust adversarial processes. "The Indigenous way," explains Nahwegahbow, "is to view everyone as being related." Indigenous people approach disputes not as an adversarial exercise, but instead as a process of negotiation between related parties. "Respect is very important. You don't burn bridges."

For example, many legal system participants readily take advantage of legal loopholes or errors made by an opponent to advance their own causes. This behaviour is seen as clever legal strategy by non-Indigenous parties, but may be perceived by Indigenous clients as dishonourable trickery. If used effectively by the opposing party, these tactics may lead to results that Indigenous clients consider

fundamentally unjust, further eroding their trust in the system. From a malpractice perspective, this creates a potential for claims. Lawyers representing Indigenous clients may have to carefully explain the role of adversarial strategies so as not to lose an important advantage (and to avoid dangerous communication gaps).

"But at the same time," notes Nahwegahbow, "lawyers must be mindful not to totally compromise clients' culture when obtaining their consent to use these strategies." Nahwegahbow believes that lawyers who represent Aboriginal clients have a responsibility for helping the system to adapt to the Aboriginal perspective. The fundamental challenge for the courts, as he sees it, is how to grapple with the growing realization that the Crown's *de facto* sovereignty has been illegitimately overlaid on the sovereignty of pre-existing societies. Courts are required, both morally and under s. 35 of the *Constitution Act, 1982*, to find a way to reconcile Indigenous sovereignty with the authority of the Canadian state. He sees signs of willingness, on the part of judges, to take on that challenge – most recently in the context of the *Tsilhqot'in Nation* litigation. "You really get a sense that judges who have listened to the many hours of evidence presented in these cases come to understand it, and want to do the right thing – despite the wide-ranging implications of issuing a declaration of Aboriginal title."

"We are all treaty people" – the lawyer's role in reconciliation

Ultimately, a lawyer's responsibility with respect to providing professional legal services to Aboriginal people can perhaps best be understood as just one facet of the same lawyer's general responsibility, as a Canadian, to honour Canada's agreements with our land's first peoples. The phrase "we are all treaty people" has been widely used by Indigenous groups to communicate a belief that individual Canadians cannot fully support decolonization without first accepting personal responsibility for benefiting from that colonization.

On November 3, 2015, the government of Canada established the National Centre for Truth and Reconciliation at the University of

Taking Indigenous legal traditions into account – an example

An example of how a lawyer can take Indigenous legal traditions into account is offered in the reasons for decision in *Lemaigre v. Première nation des Dénés de Clearwater River* (2015 FC 601 (CanLII)). *Lemaigre* was a Federal Court application for judicial review of a Dene band decision made under the *Clearwater River Dene Nation Election Act and Regulation*. The "decision" was a vote about whether or not a band chief had forfeited his position as chief by failing to move onto the band's main reserve as required under the Act.

The vote by the Election Committee of the Clearwater River Dene Nation (CRDN) had ended in a 3-3 tie, and the court was being asked to rule on the implications of the tie. In doing so, Mr. Justice de Montigny – presumably at the suggestion of counsel – considered the historical use of the processes of consensus-building and majority rule by the CRDN. He noted that "…one could object that the general principles of majoritarian democracy do not sit well in an Aboriginal context, where the prevalent tradition (at least among many First Nations) is to rule by consensus…". He found that an inquiry into a band's historical processes were "…particularly apposite where a First Nation continues to select its leadership based on its own custom. In such a case, the principles applicable to the interpretation of these customs should be derived first and foremost from that First Nation's own law and customs, instead of borrowing blindly from the principles and the jurisprudence applicable to decision-making in legislative assemblies or municipal councils."

A review of past decisions by CRDN panels revealed, however, that the band had an established history of deciding by majority vote, and that they had incorporated tie-breaking rules into their election statute. These rules prescribed that when a vote on a yes/no decision ended in a tie, the results would be treated as a negative result – which, in this case, meant that the chief had forfeited his position.

This case presented a clear opportunity to allow Indigenous legal tradition to inform a decision. Opportunities will not always present themselves so readily. However, any time a lawyer can obtain an answer to the question "how would this issue be decided according to the culture's custom?", he or she ought to consider how that answer might best form part of the arguments made on the client's behalf.

Ensuring that proceedings take into account and are informed by the principles and traditions of the client's own legal tradition can help the client feel ownership of the result – even if it is ultimately unfavourable – because it may better align with his or her own views of what is fair. A client who considers a result to be fair – or at least logical – is less likely to bring a claim against the lawyer.

Law Society to offer specialist certification in Aboriginal law

The Law Society's Professional Development and Competence Division is engaged in the development of a new area of specialization in Aboriginal law that will be recognized under the Certified Specialist Program for lawyers. The process has involved working with subject matter experts and practitioners from across Ontario to establish standards and criteria that will form the basis for credentialing as a certified specialist in this area. The development of the new Aboriginal law specialization is expected to be completed by the fall of 2016. For more information about the Certified Specialist Program, please visit the website at: lsuc.on.ca/For-Lawyers/About-Your-Licence/About-the-Certified-Specialist-Program/.

Manitoba, in recognition that achieving reconciliation with Indigenous peoples goes beyond the mandate of the Indian Residential Schools Settlement Agreement and will continue beyond the December 2015 release of the Truth and Reconciliation Report.

Lawyers who take on the work of representing Indigenous people have a special opportunity to contribute to the reconciliation process. Whether by assisting Indigenous clients in exercising their rights, by supporting Aboriginal economic development, or even just by improving the level of understanding of a client's perspective within the system, lawyers can support the progress of Indigenous families and communities toward self-determination and a better standard of living.

Speaking at the recent Law Society Indigenous Law Issues program, Signa Daum Shanks, Assistant Professor at Osgoode Hall Law School and Director of York University's Indigenous Outreach program, suggested that the most useful approach for lawyers working with Indigenous people is to "have a bigger ear," in the sense of actively resisting the tendency to rely on our assumptions and preconceptions. As challenging as listening can be for lawyers, it's a skill with the potential to both reduce malpractice risk and to improve the quality of client service. We owe it to ourselves and to our clients to learn how to slow down, to delay moving into familiar problem-solving mode, and to listen to other perspectives with a bigger ear. ■

Nora Rock is Corporate Writer & Policy Analyst at LawPRO.

About the cover

The cover image features a close-up of the mosaic table top entitled The *Gathering of the Clans*. This permanent outdoor work on display at Todmorden Historic Site depicts the original Anishinaabe Clan governance system as a wheel with checks and balances. The whole community is involved in decision-making with each animal clan representing a specific responsibility for the growth and care of the community.

Animals in the mosaic are shown in white. White is a sign of entering the eighth fire – a time that is prophesied to be when western and Indigenous thinking will come together to build a new understanding.

"We are all Relatives," says Rebecca Baird as she describes the artwork. "The whole community is involved and has a place. We share this land with all the creatures and the respect we give to each other needs to include the animals. In our Creation Stories, the animals were here first. We were the last to be put on the earth and required the help of all the other creatures to survive. We look to the natural world to understand our place and responsibilities in this lived experience."

The mosaic table is an artistic collaboration with design by Philip Cote, facilitated by Rebecca Baird and Red Pepper Spectacle Arts, in partnership with Todmorden Mills and the Tecumseh Collective. Funds for the project were received through the Toronto Arts Council's "Animating Historic Sites" program.

Potential claims related to serving Indigenous clients

We hope that this issue of *LawPRO Magazine* has contributed to your understanding of the incredible breadth and complexity of "Aboriginal law." We would not be fulfilling our risk management mandate, however, if we didn't contribute our own perspective as claims prevention specialists.

To avoid claims, lawyers need to know how they develop. What are the key areas of risk when practising Aboriginal law?

1. Communication errors: as noted by all of the lawyers we've consulted, Indigenous people often have a perspective on the law that is radically different from that of non-Aboriginals. This creates a "culture gap" that becomes an additional challenge in the already-difficult process of building a relationship of mutual trust and understanding between lawyer and client.

Failing to build that trust and understanding opens lawyers up to a wide range of potential claims based on miscommunication, information gaps, lack of consent to legal steps taken, and failure to meet client expectations.

Prevention:

- Listen at least as much as you speak.
- Be aware of your own gaps in understanding.
- Avoid making unfounded assumptions.
- Maintain regular contact with the client and provide frequent updates.
- Confirm all instructions and advice in writing.
- Seek out high-quality cultural competence training.

2. Inadequate investigation errors: failure to investigate all of the relevant facts of a matter can be related to communication problems, and to the tendency to make unfounded assumptions.

Prevention:

- Follow the good communication strategies outlined above.
- Schedule multiple interviews with a client if you anticipate that building trust will take time.
- Be aware that clients may avoid talking about matters that cause them stress or remind them of past traumas; exercise patience and offer alternatives (for example, ask whether the client would be more comfortable relating the facts to a support person, or putting them down in writing).
- Carefully organize the information gathered so that nothing is overlooked.

3. Ineffective assistance: a poor lawyer-client relationship, especially in criminal law matters, can give rise to appeals based on ineffective assistance by counsel, which can in turn lead to claims.

Prevention:

- Take the time to build a relationship of mutual trust with a criminal law client: meet in person, in private, and with sufficient time to listen thoroughly and understand all the issues.
- In all appropriate circumstances, order and file a *Gladue* report. Do not assume that a person who lives in an urban setting is "not really Aboriginal" and that the *Gladue* analysis does not apply.
- Be aware that *Gladue* reports can be relevant outside the narrow context of *Criminal Code* sentencing.
- If your client is not fluent in the language you speak, consider whether there is alternative representation available to him or her, and if there is not, whether you can understand each other well enough to collaborate effectively.

4. Failure to know or apply the law: there are a wide range of statutes that contain provisions specific to Aboriginal people, as well as a well-developed body of common law. Failure to identify the law that applies to a client's situation can lead to a poor result and a claim based on failure to know or apply the law.

Prevention:

- Familiarize yourself with the law that applies to the clients you represent, and keep your knowledge up to date. There are many written resources, including statute annotations, available to assist you.
- Be aware that many courts (and the CBA) have recognized that there are multiple valid legal traditions in Canada, including Aboriginal legal traditions, and that Aboriginal people have the right to have their own legal traditions taken into account. Investigate Aboriginal approaches to the issues that face your clients, and consider ways to give effect to those approaches in your representation.

The clock is ticking

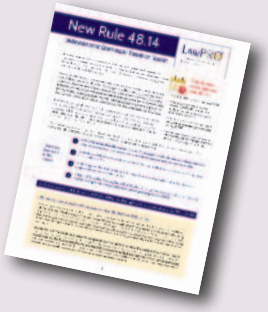
Pre-2012 matters not set down will be automatically dismissed January 1, 2017

As we begin the New Year, it's a good time to review your litigation files and make sure they are proceeding as appropriate. The clock is ticking! Remember, under the new Rule 48.14 of the *Rules of Civil Procedure*, matters commenced before January 1, 2012 will be automatically dismissed – without notice to you – on January 1, 2017, if the action is not set down for trial.

Take immediate action to ensure your pre-2012 files will either resolve or be set down for trial by the end of this year. If you anticipate you cannot do so, obtain consent from all parties to file a timetable and draft order with the court by December 1, 2016 (Rule 48.14(4) requires this happen 30 or more days before the dismissal date). And if you cannot resolve, set down, or file a consent timetable on a pre-2012 file, then you will need to bring a motion for a status hearing before the dismissal deadline. However, before doing so, please contact LawPRO as you have a potential claim. Early notice will hopefully allow the opportunity to repair potential claims – and avoid the $10,000 increase in deductible that will apply if a dismissal is not set aside (see next page).

Be proactive and dictate the pace of litigation on your files. Be aware of the three most common reasons files are dismissed for delay – and don't let them happen to you (see next page). Consider using LawPRO's Rule 48 Transition Toolkit (practicepro.ca/Rule48), which provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule (see Toolkit sidebar).

Rule 48 Transition Toolkit



There are four tools in the toolkit:

1. A **Firm Transition Checklist** containing a list of the steps firms should take to update ticklers and other firm systems and processes to ensure Rule 48 requirements are met on all files.
2. An **Individual File Checklist** containing a list of the steps to be taken and ticklers to be updated for an individual file.
3. A **File Progress Plan** that can be used to help actively manage and monitor the status and progress of work on an individual file.
4. A **Rule 48 Transition Training PowerPoint®** to help train lawyers and staff on Rule 48 and file management best practices (available at practicepro.ca/Rule48).

The top three reasons files are dismissed for delay

Far too often, litigation files are dropped for the same three preventable reasons. Take a look and ensure your files are not at risk.

1. **The file has languished because damages are minimal and/or there are difficult issues of liability:** This typically results from a poor evaluation of a file at the time of retainer, or because a re-evaluation didn't occur when circumstances changed as the matter progressed. Proper screening at the time of retainer, and as a file proceeds, can help you avoid investing in a file with limited prospects for success.
2. **A lawyer's personal crisis or unexpected hiatus from legal practice:** When a lawyer stops practising because of illness, family emergency, or substance abuse, all of the lawyer's files may face administrative dismissals. LawPRO sees multiple claims arise in such circumstances. Don't let this happen to you. Ensure a backup plan is in place. Who will handle your urgent client matters if you are unable to do so? Do you have an agreement with another lawyer to help out or take over files when needed?
3. **A junior lawyer is overwhelmed:** When a senior lawyer assigns responsibility for files to a junior who is overwhelmed, the junior may be too embarrassed or intimidated to speak up. Senior lawyers may be ultimately responsible for work they delegate to juniors under their supervision. A good "open door" policy means more than just being available – check in on junior lawyers and ensure they are moving their files along.

$10,000 increase in deductible for certain administrative dismissal claims

In our efforts to control escalating claims costs for administrative dismissals (more than $10 million in the last four years), LawPRO has circulated repeated warnings and resources about the risk of having a claim dismissed for delay or by reason of abandonment under Rule 48 of the *Rules of Civil Procedure*. Since 2009, we have written numerous articles in legal publications, educated the bar by giving presentations, speeches, and CPD programming, and released the Rule 48 Transition Toolkit.

Key dates

- New Rule 48.14 was effective **January 1, 2015**
- Actions commenced before **January 1, 2012** will be automatically dismissed, without notice, **January 1, 2017**
- Actions commenced on or after **January 1, 2012** will be automatically dismissed, without notice, 5 years after commencement
- Transition provisions impact whether a status hearing will occur for **pre-January 1, 2015** actions

Nevertheless, these highly preventable claims continue to occur, and are becoming more challenging than ever to defend. Starting with the 2014 policy year, where an administrative dismissal is not set aside through steps taken by or under the direction of LawPRO, in regard to a resulting claim, the deductible for that claim will be deemed to apply to claim expenses, indemnity payments and/or repair costs and be $10,000 more than the deductible chosen by the insured and/or listed on the declarations page of the policy. (There is an exception to this, for claims arising out of certain *pro bono* work.)

> **"Matters commenced before January 1, 2012 will be automatically dismissed – without notice to you – on January 1, 2017, if the action is not set down for trial."**

Often these types of claims can be repaired if early notice is provided, so we urge lawyers to continue to report actual and potential claims as soon as they are discovered to permit LawPRO counsel every opportunity to have the proceeding reinstated and to avoid the application of the increased deductible. For this reason the increased deductible will apply only to claims resulting from administrative dismissals that are not set aside. ■

New Small Claims Court Rule 11.1: Actions will be dismissed for delay after two years without notice

On September 1, 2015, The *Rules of the Small Claims Court* were amended to bring administrative dismissals in small claims in line with the spirit of the new Rule 48. With this change the small claims court will no longer provide notice that an action will be dismissed. And note, small claims court actions will be dismissed **two years** after the date the claim was issued (a much shorter period of time than the five years under Rule 48.14), if it has not been resolved or a date has not been requested for a trial or assessment hearing. The Plaintiff's Claim (Form 7A) now includes wording that reflects the changes (available at ontariocourtforms.on.ca).

Four things that can lead to a denial of coverage under your LawPRO policy

Insurance is different from other types of contracts. Besides the ongoing obligations (as described in the policy's terms and conditions) that exist between the insurer and insured, there is also a duty of utmost good faith (*uberrimae fidei*, for you Latin fans). Just as an insurance carrier can't act in bad faith in denying a claim, a purchaser of insurance coverage is required to deal honestly and fairly with the insurer.

Most Ontario lawyers insured under the LawPRO policy seem to keep these contractual and good faith obligations in mind. However, there are four common scenarios that lead us to coverage denials (and, sometimes, even have ethical implications for lawyers). It is worth discussing them in more detail.

1 Late notice of a real or potential claim

> *"If during the POLICY PERIOD the INSURED first becomes aware of any CLAIM or circumstances of an error, omission or negligent act which any reasonable LAWYER or LAW FIRM would expect to subsequently give rise to a CLAIM [the] INSURED shall immediately give written notice thereof or cause written notice to be given..."*
>
> – Condition E of the LawPRO Policy no. 2016-001 (the "Policy")

Any delay in giving notice can make it harder for LawPRO to investigate and defend or effect a repair. There are a number of

recurring reasons why lawyers don't give immediate notice of a claim: they worry it will cost them (e.g. a deductible or claims history levy surcharge – simply reporting a claims costs nothing), or it will negatively impact their eligibility for certain options (such as a nil deductible), or they don't think the circumstances are serious enough to merit giving notice or they just find it embarrassing.

Some people may delay providing notice because they want to improve their coverage terms by first applying for increased sublimits or waiting until policy limits are reinstated annually (for claims-made policies like the Law Society program, this doesn't work).

Weigh any of these considerations against potentially breaching the *Rules of Professional Conduct* (see Rule 7.8-2) and having no coverage in place for a claim that winds up costing a lot.

The choice is clear: always provide immediate notice to *all* applicable insurers, including your excess insurer(s).

Attempting a self-repair

> *"The INSURED shall not interfere in the investigation and defence of any CLAIM... "*
>
> – Condition G of the Policy

On many occasions we see lawyers attempting self-repairs where the error appears small and easy to rectify, and as such, lawyers seem to think that it isn't necessary to give notice. However, if a self-repair goes badly, and the lawyer didn't give notice to LawPRO beforehand, there may not be any coverage, particularly if the lawyer's actions hindered LawPRO's ability to defend or repair the matter. Even if the LawPRO policy does respond, negative consequences such as an increased deductible or claim history levy surcharge could be avoided if LawPRO had been involved and repaired the claim.

Acknowledging liability and failing to cooperate

> *"The INSURED shall not voluntarily assume any liability or settle any CLAIM, other than in regard to [Prescribed Penalty expenses]"*
>
> – Condition G of the Policy

Notwithstanding Ontario's *Apology Act*, there are instances where apologizing *will* still constitute an admission of liability (for more on this, see Yvonne Diedrick's judicially cited article, *The Apology Act 2009: A new dispute resolution tool* on practicepro.ca). To safeguard a relationship with an ongoing client, lawyers will sometimes say things to accept blame for errors and losses, or do things to try and help the client (e.g., act as a witness on behalf of the client). Other times, lawyers may have findings of negligence made against them in fees assessment proceedings. In these circumstances, if the client later sues the lawyer, LawPRO may end up fighting an uphill battle because of the incriminating statements and findings. By not giving notice to LawPRO at the start of all of this, the lawyer may have severely prejudiced LawPRO's ability to defend the claim.

Other common ways that lawyers make it difficult to defend them include failing to provide relevant documents to LawPRO, destroying records after receiving notice of a claim, and not responding to LawPRO requests, calls and correspondence. Like the general duty to give notice of claims, this is contrary to the obligations imposed under Rule 7.8-3 of the *Rules of Professional Conduct*.

Failing to advise LawPRO of a risk or material change

> *"The keeping back [of information in an insured's knowledge relevant to risk] is a fraud, and therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention: yet still the under-writer is deceived and the policy is void; because the [risk] run is really different from the [risk] understood and intended to be run at the time of the agreement."*
>
> – Per Lord Mansfield in *Carter v. Boehm* (1776), 97 E.R. 1162 at 1164

Appropriate disclosure of a LawPRO insured's circumstances is important for our underwriters because it ensures that the premiums we charge reflect risks we are insuring. It is important to be frank when applying for any kind of insurance and when requesting any changes in coverage. If lawyers fail to disclose something relevant to their risk rating (e.g., they do real estate and should be carrying the Real Estate Practice Option Coverage), this failure to act in good faith may mean there is no coverage available in the event of a claim.

This duty to disclose is an on-going obligation: if a material change occurs during the course of the year that may impact risk, lawyers should notify LawPRO (and any excess insurers). Examples of what may constitute a material change include: no longer qualifying for premium discounts under the part-time practice or restricted area of practice options; or requiring innocent party coverage because the lawyer has assumed vicarious responsibility for others.

The coverage provided to you by the LawPRO policy is there for your benefit and the indirect benefit of your clients. Please protect that coverage by avoiding the above scenarios. If you are ever in doubt about what to do about a real or potential claim, or your obligations under the policy, please contact LawPRO's Customer Service at 416-598-5899/ 1-800-410-1013 or service@lawpro.ca. ■

Managing risk: Who pays for crime?

One of the questions we often get asked at LawPRO is why certain areas of claims don't get the full $1 million per claim amount of coverage.

For example, think of how the LawPRO policy treats counterfeit certified cheques causing an overdraft, cybercrime, and intentional misbehaviour within the real estate registration system – these coverages all have a $250,000 or $500,000 sub-limit. On occasion, lawyers will ask us to give higher coverage limits for these crime-related risks, presumably because they think that will take the risk off their shoulders. That, of course, puts the risk on us. And, while we think of ourselves as having broad shoulders when it comes to coping with the risks facing the legal profession in Ontario, no insurance company has sufficient resources to be a complete answer to crime.

It is the same for other insurers. Think about areas where insurance companies sell coverage in the market that helps to protect businesses from crime. Two examples that come to mind are cyber liability policies and fidelity bonds. You can probably guess what a cyber liability policy insures you for; fidelity bonds insure a company for risks like employee dishonesty, forgery, counterfeit money, and/or extortion.

For a business that is buying such insurance, a large part of the value comes from what it learns when filling out the application form to request coverage. The questions on the application highlight areas of risk and assist the insurer in underwriting (assessing) the dangers that could lead to the business making a claim. I can speak to this from personal experience in having to deal with arranging insurance for LawPRO, having had a few "oh, my" moments over the years when I realized what the insurance underwriter expected the common operational practices to be for a company like LawPRO. Almost every year we have to change some internal process to continue our eligibility for an existing type of coverage, or to be able to buy a new coverage.

If the above description is typical of the insurance industry approach to such coverages, why is that the case? Because otherwise the criminals will bleed us all dry. Unless insureds work hard to stop the

Limited coverage for crime

The LawPRO policy is designed to cover the liability of insureds as a result of an error, omission or negligent act. However, over the years, endorsements with smaller limits have been added to the policy to draw attention to the risk of certain crimes and provide some limited coverage. Any payments under these coverages count towards (i.e., reduce) the $2 million per year aggregate coverage.*

Innocent party coverage
Endorsement No. 5

The LawPRO primary policy covers losses due to dishonest, fraudulent, criminal or malicious acts or omissions of other Lawyers or Paralegal partners or shareholders with whom you practice up to $250,000 per claim and in the aggregate. The cost of this is a $250 levy surcharge per calendar year.

Real Estate Coverage Option (REPCO) coverage
Endorsement No. 6

This coverage option provides insurance protection against registration of fraudulent instruments under the *Land Titles Act*. This required coverage for those practising Real Estate Law has a premium of $100 for up to $250,000 per claim and $1 million in the aggregate.

Limited trust account overdraft coverage
Endorsement No. 7

The LawPRO primary policy covers liability for a trust account overdraft resulting from the handling of a counterfeit certified cheque or bank draft resulting from an error, omission or negligent act up to $500,000 per claim and in the aggregate.

Cybercrime coverage
Endorsement No. 14

Because law practices have access to confidential client information and often maintain substantial balances in trust accounts, lawyers and law firms are appealing targets to cyber criminals. LawPRO's policy covers $250,000 for losses related to cybercrime defined as incursion, intrusion, penetration, impairment, use or attack of a computer system by electronic means by a third party.

Each of these coverages highlight crime risks that have the potential to create large losses. Law firms need to do what they can to minimize their risks and determine if additional insurance is necessary.

* These are general descriptions of the insurance and services available to qualified insureds through LawPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

LawPRO resources available at lawpro.ca to help avoid losses due to crime:

LawPRO Magazine – December 2013
Cybercrime and law firms: The risk and dangers are real

Fraud fact sheet – tips on how to protect yourself and your firm

crooks in their tracks, insurance claims will go up to the point where no one can sell the relevant coverage at a reasonable price and the insurance type will disappear. Then everyone suffers, both the good risk operations and the bad risk ones.

Now think about this in the context of the LawPRO mandatory professional liability program. While we undertake certain types of risk rating, there is minimal customized underwriting that goes into our primary program. It would not be feasible for us to replicate the sort of specialized underwriting that commercial insurance companies use for crime-related risks, given our aim of providing a universal professional liability program with broad-based appeal at as reasonable a cost as possible.

And why should we do that when there are coverages available in the market for those who see themselves as being at risk? A key part of the Law Society's mandate is to protect the public interest, and the mandatory program contributes to Law Society fulfilment of that mandate. Therefore, the main focus of the mandatory program must be on (indirectly) protecting the lawyer's client for negligence by the lawyer, not protecting the lawyer for every type of risk that a business could encounter.

LawPRO has taken a middle ground. We provide some coverage (that is, a sub-limit smaller than the normal $1 million per claim limit) for certain crime-related risks. While providing some comfort for the lawyer, the smaller amount also helps draw the lawyer's attention to how significant the risk is and (hopefully) to the resources we provide to help lawyers stop the criminals in their tracks. It is a balancing act, in fact one that has a good societal purpose. ■

Kathleen A. Waters is President & CEO at LawPRO.

Business insurance for law firms

Professional liability insurance is just one component of comprehensive insurance protection for your firm. If you haven't already, you should assess your exposures and speak with an insurance professional to see what policies are available that might give you peace of mind. If the variety of policies seem intimidating, ask your broker whether there's a 'business' package that would satisfy your insurance needs. It's also useful to ask about add-ons (such as business interruption/loss of earnings, valuable papers and records coverage, and mail & transit coverage) that can expand a policy to meet more than one type of exposure. The following descriptions are not meant to be exhaustive.

Property

Typically covers: physical assets such as buildings, contents, equipment and inventory, and possibly valuable papers and records, business interruption and mail & transit.

If the firm owns its own building, has insurance obligations under a lease, or has personal property (such as office equipment), property insurance is essential and is intended to respond when losses arise from fire, vandalism, theft, etc. Valuable papers and records coverage typically covers the cost of re-creating valuable papers and records following a covered loss.

Commercial General Liability

Typically covers: claims for bodily injury, property damage, personal injury and sometimes advertising injury to third parties arising from a firm's premises and operations.

If a member of the firm causes bodily injury, property damage, personal injury or advertising injury to a third party, this is the policy law firms will want to have in place to respond. The personal injury coverage can possibly provide coverage for claims alleging, for example, defamation, violation of privacy, false arrest and malicious prosecution.

Crime (Fidelity)

Typically covers: money and securities-related losses arising from crimes, mail & transit coverage, counterfeit currency, extortion and more.

Originally, this would have only covered dishonest acts of the firm's employees, but may now include coverage for computer systems fraud, and acts by outside parties.

Excess E&O

Typically covers: claims for compensatory damages arising from an error or omission on the part of a member of a firm that exceeds the limits of liability available through an underlying policy.

Lawyers will sleep better at night knowing that if the defence and indemnity costs for a claim exceed the limits under the mandatory insurance, they are covered. Excess insurance options are available from LawPRO.

Employment Practices Liability

Typically covers: defence for employment litigation or "wrongful employment practice."

While you would expect this to cover things like actions for wrongful termination, harassment, breach of contract, or invasion of privacy, this can also cover claims from non-employees contrary to equality rights.

Network Security/Cyber Liability

Typically covers: at this point, there's nothing "typical" about this area of insurance in terms of what coverage or sub-limits may apply. Types of losses that may be covered include privacy breaches, theft or unauthorized access of sensitive information, extortion/ransom coverage, and business interruption.

Depending on the policy, these policies may cover first party (the firm and its lawyers) and third party (e.g. clients) damages and claim expenses arising out of data being accessed, used, stolen, or held for ransom, or service being denied or malicious code transmitted to the insured's computer system. This form of insurance is particularly relevant to law firms which are expected to store sensitive information and hold funds in trust.

Equipment Breakdown Coverage

Typically covers: mechanical and electrical equipment, computers and commercial equipment, air conditioning and refrigeration systems, and boilers and pressure vessels, and possibly lost business income resulting from such breakdown.

The coverages available under this type of policy, also known as a policy of boiler and machinery insurance, are very often excluded under policies of property insurance.

Dealing with a self-represented litigant who really needs legal advice

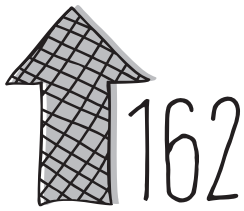
Self-represented litigants are a challenging reality in today's legal landscape. In addition to the extra time and effort that can make dealing with a self-rep more expensive for your client and more frustrating for you, it seems there is a greater potential for a malpractice claim. This is highlighted by the number of claims LawPRO is seeing where the opposing party was a self-rep. In 2014, there were 162 such claims, almost double the 86 we saw a decade earlier, in 2004.

As you work to resolve a matter, you may find yourself negotiating directly with a self-represented litigant. In the discussions that will occur, facts will be disclosed, legal issues will arise, and decisions will have to be made by both parties. As the lawyer in the middle of these discussions, you may be faced with the question of what duties you owe and to whom. Consider the following hypothetical situation:

MALPRACTICE CLAIMS

WHERE OPPOSING PARTY WAS A SELF-REP

IN 2004



MALPRACTICE CLAIMS

WHERE OPPOSING PARTY WAS A SELF-REP

IN 2014

You represent the wife in a matrimonial proceeding. The husband is unrepresented. The marriage was of short duration and there were no children. The only asset is the husband's pension. At a mediation, the parties agree to settle on the basis that the husband's pension will be divided equally. The husband, who is in a new relationship and is anxious to settle, signs the minutes. Before you have your client sign the settlement documents, you require a clarification from the pension provider.

Following the mediation, you review additional disclosure provided by the husband and discover that the husband made an assignment in bankruptcy following the separation. You also realize you overlooked documents in your file which mentioned the assignment. You conduct a bankruptcy search and, to your surprise, learn that the husband had been discharged following your retainer and prior to the mediation.

An order of discharge from bankruptcy releases the bankrupt from all claims provable in bankruptcy. In this case, because of the husband's assignment in bankruptcy, the wife should have obtained a court order under Section 69.4 of the *Bankruptcy and Insolvency Act* for leave to pursue her claim. Pensions are not assets that vest with the trustee in bankruptcy and are exempt from bankruptcy proceedings. As such, the husband's creditors would not have been prejudiced and a leave order most likely would have been granted. Assuming leave had been granted, the wife would have been free to pursue the claim for part of her husband's pension. However, as the husband was discharged from bankruptcy, it is too late to seek leave. In this case, the wife could very well lose her claim to the husband's pension. As mentioned earlier, the husband is in a new relationship and is still eager to sign the minutes of settlement. He emails and calls you repeatedly asking whether his wife has now signed the settlement documents.

As it turns out, the minutes of settlement need minor amendments due to information given by the pension provider, which requires the husband to re-sign them. You are concerned about the ethics of asking the husband to re-sign a settlement now that you know the husband has no legal obligation to divide his pension.

What do you do? Fortunately the *Rules of Professional Conduct* provide guidance for this situation. First, as a lawyer you owe a duty to your client. Having said that, Rule 7.2-9 provides that when a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

- Take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and
- Take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

After having reported this matter to LawPRO, you also consult with Practice Advisory at the Law Society of Upper Canada. As a result of direction provided to you, you draft a letter to the husband which encloses the Minutes of Settlement and includes the following paragraph:

> "Please be informed that I do not represent you in any way and am not protecting your interests. You should therefore seek legal advice prior to signing these documents. I act exclusively for Ms. Smith and any comments that I have made may be partisan. Again, we strongly suggest and recommend that you review these documents with a lawyer of your own choosing and obtain independent legal advice before signing them. We trust that this is perfectly clear, and remain…"

Although it is not required by the *Rules of Professional Conduct*, it is prudent to urge the self-represented litigant to obtain independent legal advice as indicated in the above letter. Whether the husband seeks independent legal advice and signs the minutes remains to be seen. Either way, Rule 7.2-9 provides excellent loss prevention advice. Following it will rebut any allegation by the non-client husband that he relied upon the lawyer to protect his interests. Failing to follow the rule invites the risk that such an allegation will succeed. Indeed, there are numerous reported decisions which criticize lawyers for failing to recommend ILA.

Consider the above scenario next time you have a self-rep on the other side. Always remember who your client is, and where your duties lie. ■

Yvonne Diedrick is Claims Counsel at LawPRO.

OHIP subrogated claims

Counsel liability issues raised by OHIP subrogated claims

Counsel representing clients who seek compensation for injuries caused by another's negligence or wrongdoing are encouraged to be mindful that the Ministry of Health and Long-Term Care may also be entitled to recover its costs for health care and medical treatment provided to the injured party from the tortfeasor. Failure to advance OHIP's subrogated claim can lead to adverse consequences for both the injured plaintiff and plaintiff's counsel.

Accordingly, solicitors are wise to develop a working knowledge of the principle of subrogation, and to implement file management procedures to ensure that OHIP's subrogated interest is not forgotten when a personal injury file is resolved through settlement or at trial.

OHIP's statutory right to subrogate and your obligations

OHIP's right to subrogate is conferred by statute. Sections 30 through 36 of *The Health Insurance Act* (Ontario) ("the Act") and Regulation 552 thereunder prescribe OHIP's entitlement to be reimbursed for hospital and medical costs incurred in treating injured persons involved in accidents caused by another. This issue will come up in most types of personal injury cases, including slip and fall accidents, product liability cases, medical malpractice, municipal liability, and assaults. The one noteworthy exception to this right of subrogation is in relation to a person insured under a motor vehicle liability policy where the person's injuries arise from the use or operation of a vehicle (section 267.8(18) of the *Insurance Act*).

Section 31 of the Act creates a solicitor and client relationship between claimant's counsel and the General Manager of OHIP which effectively obliges plaintiffs' counsel in personal injury matters to properly advance the subrogated interests of OHIP when prosecuting and resolving the claims of their injured clients. Significantly, costs for both past and future insured health care services that an injured person may need can be recovered by OHIP.

Managing OHIP's subrogated claim

After the duty to advance a subrogated claim has been identified, plaintiff's counsel must notify OHIP of the litigation and seek instructions to advance the subrogated claim. OHIP will normally provide these instructions along with a payment summary to date. Thereafter it would be prudent to implement internal procedures to ensure that the subrogated claim is not overlooked when the case is being resolved.

Some practical management techniques include:

1. Having a separate paper or electronic subfolder to file all documentation related to the subrogated claim.
2. Having correct contact information for the Subrogation Unit at OHIP.
3. Ascertaining how often OHIP wants case updates and the documentation OHIP staff require to properly instruct you regarding the resolution of OHIP's interest.
4. Creating a tickler system to ensure the file is flagged to request up-to-date payment summaries at key milestones when it will be relevant (prior to a mediation, pretrial and when going to trial).
5. Confirming with OHIP the details of the payment of legal fees and disbursements for your work involved in recovery of the subrogated interest (so there is no confusion between the plaintiff and OHIP as to who is paying you for your services and how much each party will net).
6. Making sure your client fully understands the terms of a settlement. See sidebar for more information.

Remember, failure to advance OHIP's subrogated interest could lead to legal difficulties for both the plaintiff and plaintiff's counsel as a release or settlement of a claim is not binding on OHIP without OHIP's approval of the release or settlement. Be proactive and take steps to deal with OHIP's subrogated interest when it is appropriate to do so.

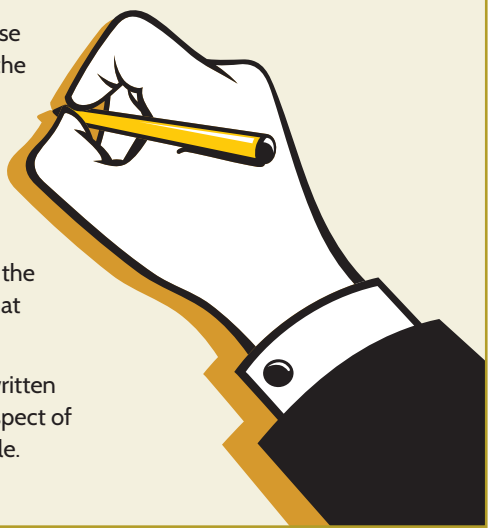
For more information about subrogation or how it may affect your client, counsel are encouraged by the Ministry of Health to call 613-548-6663. ■

Cynthia F. Miller is Unit Director & Counsel at LawPRO.

Protect yourself when dealing with settlements

All too often, LawPRO sees claims arise when a client is unhappy with a settlement. Sometimes these complaints come up, literally, the morning after a settlement is reached. They also come up when the client receives the final account – and gets less than they expected. By following these steps you can avoid settlement disputes and better defend an allegation of an improvident settlement:

- Communicate settlement offers in writing: A paper trail clearly establishes what was said, and when.
- Make sure the client understands the terms of the settlement: Review and explain the terms of the settlement, including any calculations, as well as potential outcomes and cost considerations that were considered.
- Document the client's instructions: This can be done in a formal letter, via email, or even handwritten notes. In particular, note any reasons they want to settle quickly (e.g., liability concerns, the prospect of insufficient policy limits or a litigation discount) or if they reject an offer you believe is reasonable.



Applying old case law to the new Rule 48.14

What will the administrative dismissal test be?

On January 1, 2015, Rule 48.14 of the *Rules of Civil Procedure* was substantially amended.

The first result of the amendment was that plaintiffs' solicitors received respite from "show cause" status hearings. Status notices ceased to be issued as of January 1, 2015. Status notices received by parties prior to January 1, 2015 under the "old" Rule 48.14 ceased to have effect on that date, unless a status hearing had already been scheduled or the action had already been dismissed.[1]

This respite was helpful, because in the wake of the Court of Appeal's judgments in *Faris v. Eftimovski*,[2] and *1196158 Ontario Inc. v. 6274013 Canada Ltd.*[3], a "show cause" status hearing is far from a routine matter. The Court of Appeal held that the burden on a plaintiff at a show cause status hearing is stringent. Even if the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if continuing the action would prejudice the defendant. Even if there is no proof of actual prejudice, it is still open to the court to dismiss the action if the plaintiff is not able to provide a satisfactory explanation for the delay. The test is conjunctive, not disjunctive. Show cause status hearings have been carried forward into the amended Rule 48.14(5), (6) and (7), and will soon make a comeback.

The second reason why the amended Rule 48.14 benefitted plaintiffs' solicitors was that it put off the administrative dismissal of actions until the later of January 1, 2017, or the five year anniversary of the action's commencement. Under the "old" Rule 48.14, if an action had not been placed on a trial list within two years after the first defence was filed, the action could be dismissed by the Registrar 90 days after a status notice had been served on all parties. Likewise, the action can now be administratively dismissed where it has not been restored to the trial list within two years of being struck off, rather than within 180 days, as the "old" Rule 48 provided, again 90 days after a status notice had been served.

Under the amended rule, there is no provision for status notices to warn of an impending administrative dismissal. In early 2017, the courts will start sending out dismissal orders on all pre-January 1, 2012, matters that have not been set down for trial.

Also repealed was Rule 48.15, which provided that an action would be dismissed as abandoned where no statement of defence or notice of intent to defend had been filed within 180 days of the commencement of the action.

Don't get surprised by a dismissal order in early 2017

The new Rule 48.14 stemmed the tide of status review hearings and very costly claims for LawPRO – over $10 million dollars in the last 4 years. However this respite is temporary. Practitioners must immediately start to "batten down the hatches" to avoid the storm which will make landfall on January 1, 2017. Indeed, the storm's effects may well be felt even before January 1, if waves of status hearings for actions commenced prior to January 1, 2012, are scheduled in order to avoid automatic administrative dismissal on January 1, 2017.

Solicitors who commenced actions before January 1, 2012, risk having their actions automatically dismissed if they are not set down for trial by January 1, 2017.[4] The amended Rule 48.14 provides several ways to avoid this result. One obvious way is to set the action down for trial before January 1. Plaintiffs' counsel may also file, at least 30 days before January 1, 2017, an agreed upon timetable identifying the steps to be completed before the action is set down or restored to the trial list, their dates for completion, and a date no more than two years after January 1, 2017, by which time the action must be set down for trial or restored to the trial list, and a draft order establishing the timetable.[5] Where the parties do not consent to a timetable, any party may bring a motion for a status hearing before January 1, 2017. At the status hearing, the plaintiff must

1 Rule 48.14(11) and(12)
2 2013 ONCA 360
3 2012 ONCA 544, 112 O.R. (3d) 67 (C.A.)
4 Rule 48.14(1)1
5 Rule 48.14(4)

show cause why the action should not be dismissed for delay or the court may set time limits for the completion of the steps necessary for the action to be restored to the trial list, and may order that it be placed on the trial list within a specified time.[6]

What will the administrative dismissal test be?

Amended Rule 48.14(7) says nothing about the test to be applied at a "show cause" status hearing under that rule, but the test set out in *Faris* and *1196158* is the likely candidate.

What if plaintiff's solicitor neglects to take any of these steps, and finds that the action has been automatically dismissed by the registrar in January, 2017? Again, amended Rule 48.14 does not say what test will be applied to set aside these dismissals, but the logical choice would be the extensive case law developed for setting aside administrative dismissals under the "old" Rule 48.14. In considering whether a registrar's dismissal order should be set aside, the following factors are relevant: (1) the explanation for the litigation delay, (2) inadvertence in missing the deadline, (3) whether the motion to set aside was brought promptly, and (4) no non-compensable prejudice to the defendant if the action were restored.[7]

Rule 48.11 – "actions struck off trial list" – was carried forward unchanged into the amended Rule 48. In *Nissar v. Toronto Transit Commission*,[8] the Court of Appeal adopted the same test for restoring actions to trial lists, as for "showing cause" at a contested status hearing under the "old" Rule 48.14(13).

In *Carioca's Import & Export Inc. v. Canadian Pacific Railway Inc.*,[9] the Court of Appeal followed the test it developed in *Nissar*, but gave it a slightly more liberal "spin." The *Nissar* test is to be applied where refusing to restore an action to the trial list would result in its dismissal, for instance, a registrar dismissal under Rule 48.14. Otherwise, the test is whether the action is ready to be tried. The parties are not to play a "blame game," nor is the plaintiff required to account for delay on a month-to-month basis. Rather, the issue is whether the plaintiff presented an "acceptable explanation" for the delay. Actions should be tried on their merits when an "acceptable explanation" is presented.

> "Use 2016 to "batten down the hatches" and take all necessary steps to avoid having actions dismissed on January 1, 2017. Counsel who commenced actions in 2012 will face these same concerns throughout 2017. Set the action down for trial. Restore the action to the trial list. Enter into and file a timetable. If these steps fail, move for a status hearing."

In assessing whether a plaintiff's explanation for the delay is reasonable, the court should consider the overall conduct of the litigation, in the context of local practices. Practices for scheduling pre-trial conferences and trials differ throughout the province. These practices can affect the expectations of the parties, their counsel, and the courts in assessing whether a plaintiff's explanation for delay is reasonable.

The second question is whether the defendant would suffer non-compensable prejudice if the action were to proceed. The plaintiff bears the onus of demonstrating that the defendant would suffer no non-compensable prejudice, but the mere passage of time cannot be an insurmountable hurdle in determining prejudice; otherwise, timelines would become inflexible and explanations futile. A defendant is not required to offer evidence of actual prejudice. However, the court is entitled to consider the defendant's conduct in light of its assertions of prejudice.

Fortunately, there is a series of judgments holding that clients should not suffer for their solicitors' inadvertence where a just result can still be obtained if the requested relief were granted.[10] Clients ought not to be forced to seek new counsel to pursue an indemnity claim against their former counsel. Such an action will first require the proof of the likely liability of the defendants in the original action without having the normal rights of discovery and production from them. In addition, more costs and court time will be consumed in addressing whether or not the lawyer was negligent and ought to be responsible for the plaintiff's alleged losses.[11]

Despite the courts' reluctance to allow plaintiffs to suffer for their counsels' inadvertence, counsel should not assume that a court will exercise its discretion in their clients' favour. Furthermore, such motions are expensive, even when they are successful. You also want to avoid the $10,000 increase in deductible that can apply to administrative dismissal claims (see page 17).

We therefore urge counsel who commenced actions prior to January 1, 2012, to use 2016 to "batten down the hatches" and take all necessary steps to avoid having their actions dismissed on January 1, 2017. Counsel who commenced actions in 2012 will face these same concerns throughout 2017. Set the action down for trial. Restore the action to the trial list. Enter into and file a timetable. If these steps fail, move for a status hearing. See the practicePRO program's *Rule 48.14 Transition Toolkit* for additional advice.[12] But don't just do nothing. ■

Debra Rolph is Director of Research at LawPRO.

6 Rule 48.14(7)

7 *Reid v Dow Corning Corp.* [2001] O.J. No. 2365; *Marche D' Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited* (2007), 87 O.R. (3d) 660, 2007 ONCA 695; and in *Scaini v. Prochnicki*, (2007) 85 O.R. (3D) 179 (C.A.), 2007 ONCA 63; *Finlay v. Paassen*, 2010 ONCA 204; *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386; and *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173.

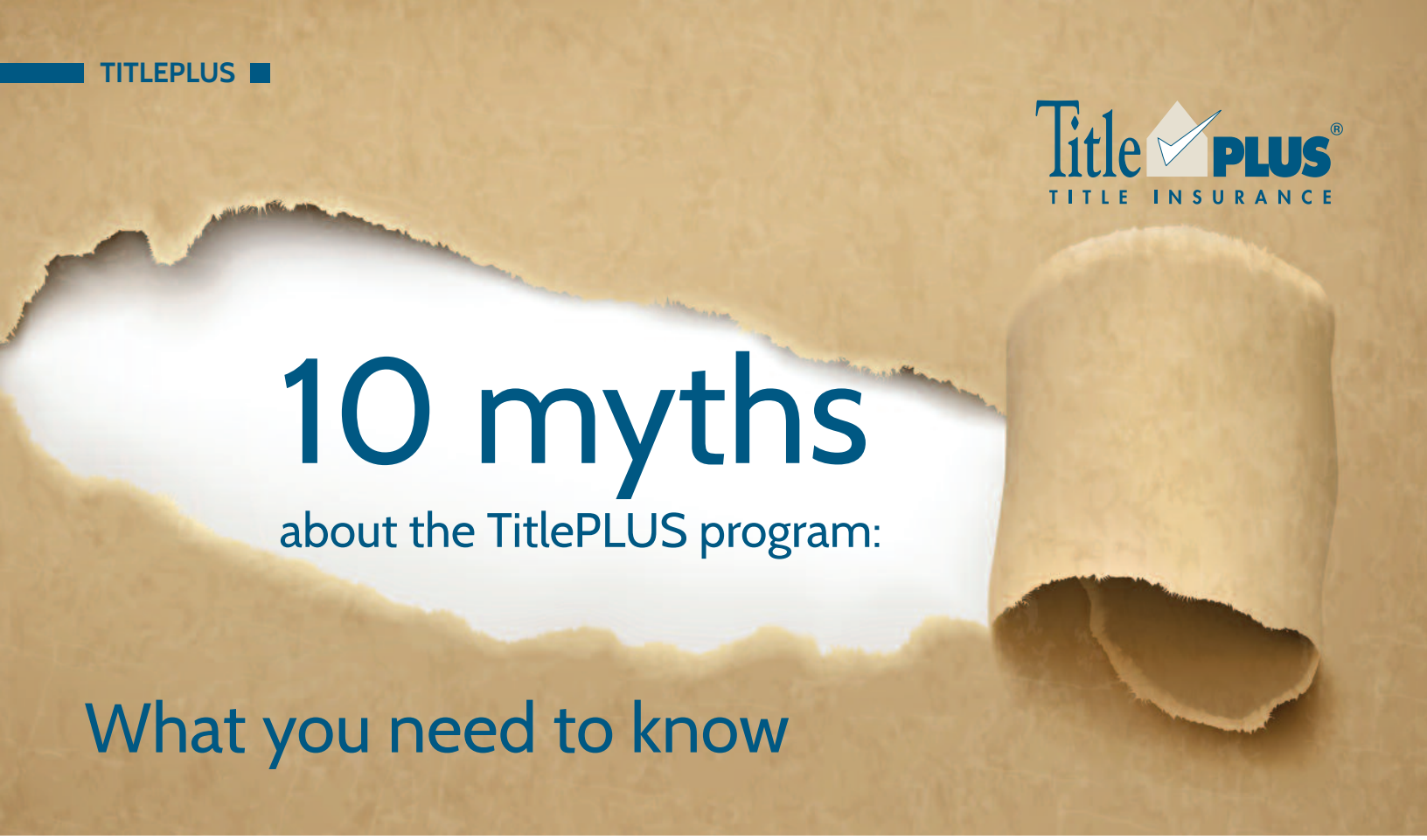
8 2013 ONCA 361, 115 O.R. (3d) 713 (C.A.)

9 2015 ONCA 592

10 *Chiarelli v. Wiens*, (2000) 46 O.R. (3d) 780 (C.A.); *Finlay v. Paassen*, 2010 ONCA 204; *Margaret Grace Kerr v. CIBC World Markets*, 2013 ONSC 7685 (Div.Ct.); *Elkhouli v. Senathirajah*, 2014 ONSC 6140; *Klaczkowski v. Blackmont Capital Inc.*, 2015 ONSC 1650 (Div.Ct); and *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173.

11 *Elkhouli v. Senathirajah et al, Ibid.* at paras 37-38; *Klaczkowski v. Blackmont Capital Inc., Ibid.*, at para 27-28. *Michie v. Turalinski*, 2015 ONSC 5491 at paras 59-60.

12 practicepro.ca/Rule48



10 myths

about the TitlePLUS program:

What you need to know

MYTH 1.

TitlePLUS® policies[1] are more expensive

TitlePLUS "plain and simple" pricing includes premium, processing fee and taxes. See this chart for the total cost of TitlePLUS policies insuring residential resale purchases:

Ontario pricing: [2]
House $285.85 House price from $200,000.01-$500,000
Condo $180.55 Condos from $200,000.01-$500,000

MYTH 2.

Other title insurers have legal services coverage

TitlePLUS purchase and mortgage policies include legal services coverage at no extra cost (and with no separate order required) for the lawyer's errors or omissions in providing legal services for the transaction. Certain other insurers' legal services coverage is generally restricted to issues affecting title or use and enjoyment of the property, because of the nature of the insurance licences held by those insurers. That is narrower than the coverage under a TitlePLUS policy.

MYTH 3.

A building search is needed for every residential property

To simplify and speed up the closing process for you – we do not require a building department search for most resale single family houses.

[1] The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LawPRO®). Please refer to the policy for full details, including actual terms and conditions. TitlePLUS policies issued with respect to properties in Québec and OwnerEXPRESS policies do not include legal services coverage.

[2] Amounts shown include processing fee and applicable taxes, breakdown available upon request. The processing fee and related taxes are collected by LawPRO as agent on behalf of LawyerDoneDeal Corp. Prices are subject to change without notice. Premium is calculated based on purchase price. The policy pricing above applies to the following types of residential properties: houses, condominiums, cottages, rural properties, vacant land (some restrictions may apply), and residential rentals (up to six units).

® TitlePLUS, LawPRO and OwnerEXPRESS are registered trademarks of Lawyers' Professional Indemnity Company.

MYTH 4.

Need to call for gap coverage

Gap coverage is now automatically included in all TitlePLUS residential purchase and mortgage policies, eliminating the need to request or call in for coverage. See Coverage 37 in the Supplementary Coverage Endorsement for Residential Properties (Version: November 24, 2015).

MYTH 5.

Commercial policies provide limited coverage

A TitlePLUS commercial policy provides the most comprehensive coverage generally available in the market today. Your clients receive all the benefits of TitlePLUS protection, including title, fraud, and survey coverage, plus coverage for the lawyer's legal services in the real estate deal.

MYTH 6.

Application website can be time-consuming

The TitlePLUS application website for residential transactions is integrated with RealtiWeb®, LawyerDoneDeal Corp's automated document production and file management program. For non-RealtiWeb users, PINS, transfers and charge files can be imported into applications on titleplus.lawyerdonedeal.com, saving you time while reducing the risk of errors. Call us for instructions on additional importing options.

MYTH 7.

Residential policies only cover properties with up to 4 units

TitlePLUS residential purchase and mortgage policies are available for 5 and 6 unit properties, and can be ordered online.

MYTH 8.

Policy types are limited

Purchase, OwnerEXPRESS® (existing owner), mortgage only (refinance), farm, residential leasehold and commercial policies are all available for Ontario properties. Also, the TitlePLUS New Home Program and New Condo Select are well-known, innovative products where underwriting for the entire development is done on a centralized basis, saving you time and your clients money.

MYTH 9.

Premiums for new homes are the same as resale

There is reduced pricing available for new homes purchased from builders, for policies obtained through the TitlePLUS New Home Program, New Condo Select and New Home Direct.

MYTH 10.

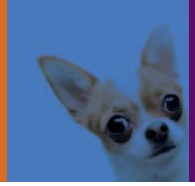
Exceptions to coverage for private lenders

Some title insurance policies contain exceptions to coverage where mortgage advances will be paid to those other than specified recipients. This exception is not added to TitlePLUS policies as a matter of course, although TitlePLUS underwriting requires the lawyer to advise if funds are going to non-permitted payees.

We offer customer support through onsite visits, virtual meetings and by phone.

Call us – we're listening. 1-800-410-1013 ■

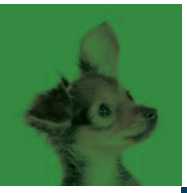
* RealtiWeb is a registered trademark of LawyerDoneDeal Corp. and is used under licence.



We're listening…

We know you want great coverage for a great price.

That's why TitlePLUS® residential resale purchase policies include legal service coverage and all inclusive pricing.[1] *Plain and Simple.*



Ontario pricing: [2]	House	Condo
	$285.85	$180.55
	House price from $200,000.01-$500,000	Condos from $200,000.01-$500,000

Plain and Simple pricing includes:

Premium, processing fees and taxes

All mortgages insured under the same policy

Legal service coverage

Simplify your practice today and offer the title insurance developed with the support of the members of the real estate bar.

TitlePLUS®

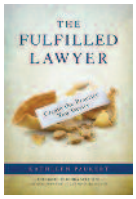
titleplus.ca

[1] TitlePLUS policies issued with respect to properties in Québec and OwnerEXPRESS® policies do not include legal services coverage. Amounts shown include processing fee and applicable taxes, breakdown available upon request; some restrictions may apply; please refer to the policy for full details, including actual terms and conditions. The TitlePLUS Policy is underwritten by Lawyers' Professional Indemnity Company (LawPRO®). The processing fee and related taxes are collected by LawPRO as agent on behalf of LawyerDoneDeal Corp. Prices are subject to change without notice.

[2] Premium is calculated based on purchase price. The policy pricing above applies to the following types of residential properties: houses, condominiums, cottages, rural properties, vacant land (some restrictions may apply), and residential rentals (up to six units). Please call for pricing for (a) residential properties under New Home Direct, New Home Program and New Condo Select; (b) residential properties with 7 or more dwelling units, farm, leasehold or commercial properties; (c) transactions up to $200,000; or (d) transactions over $500,000, up to a maximum of $2 million.

Financial success and work satisfaction – the perfect combination

There are two new titles in the practicePRO library that can help lawyers be happier in their jobs in two ways: inner fulfillment and proper compensation.



Kathleen Paukert, author of *The Fulfilled Lawyer: Create the Practice You Desire*, doesn't have a lot of time for the negativity she increasingly hears from lawyers about the practice of law. Newly called lawyers complain on social media that law school was a waste of time and money, others are frustrated at the inflexibility of firms when they try to juggle work and family, while other lawyers end up hating their jobs or burning out. Paukert, on the other hand, has created a practice that gives her satisfying work and a good living with the right level of work/life balance.

So what's her secret? In her view, the law remains the noble profession it always was, so if lawyers are increasingly unhappy in it they need to take hard look at their expectations and motivations. If you're working in an area of law you don't like, ask yourself why. Is it worth sacrificing home life to meet billable hour targets for the huge office and high salary? Or can you make do with a little less? Are lawyers operating out of enjoyment of what they do, or out of fear of what might happen if they make a change?

Paukert puts the onus squarely on the lawyer: if you aren't happy, it's on you to do something about it. That "something" is up to each individual, and her book covers many of the possibilities. There are chapters for those who want to stay in their jobs but make it more rewarding and there are chapters for those considering more drastic changes, such as leaving a firm, changing areas of law or striking out on their own.

The focus always comes back to looking inward and making a cold, hard assessment of yourself. What kind of lawyer are you? What kind do you want to be? Does your personality match the kind of law you practise? What kind of clients do you want to work with, and can you make changes to attract them if you aren't already?

Finally, to rebut the comment Paukert often gets ("easy for her to say!"), she uses examples of her own career ups and downs throughout the book. The takeaway message is that anyone can make the practice of law fulfilling if they are willing to make the right changes.

When speaking of workplace fulfillment, compensation is a big component. The 6th edition of *Compensation Plans for Law Firms*, edited by James D. Cotterman examines how firms compensated their partners, associates and staff in the years since the financial crisis of 2007/8. Since that time, some firms disappeared while others made drastic changes to adapt to financial pressures, new technologies and changing client needs.

The message this book offers is that "any compensation plan can work at any firm, and any compensation plan can fail at any firm." While best practices are suggested here, there isn't one solution for all firms. Each situation, history, personnel (and personalities), financial goals and pressures need to be considered and weighed. The book is divided into chapters dealing with partners, Of Counsel, associates, paraprofessionals and staff.

Compensation is an emotional topic that goes to the heart of how someone feels about the value of their work. When handled poorly, bad feelings can cause trouble in the workplace. The lessons and examples offered have been taken from studying the best ideas (and cautionary tales) in the legal marketplace for the past twenty-five years.

The practicePRO Lending Library has more than 100 books on a wide variety of law practice management topics. Ontario lawyers can borrow books in person or via email. A full catalogue of books is available online (practicepro.ca/library). Books can be borrowed for three weeks. LawPRO ships loaned books to you at its expense, and you return books at your expense. ■

Tim Lemieux is Claims Prevention & Stakeholder Relations Co-ordinator at LawPRO.

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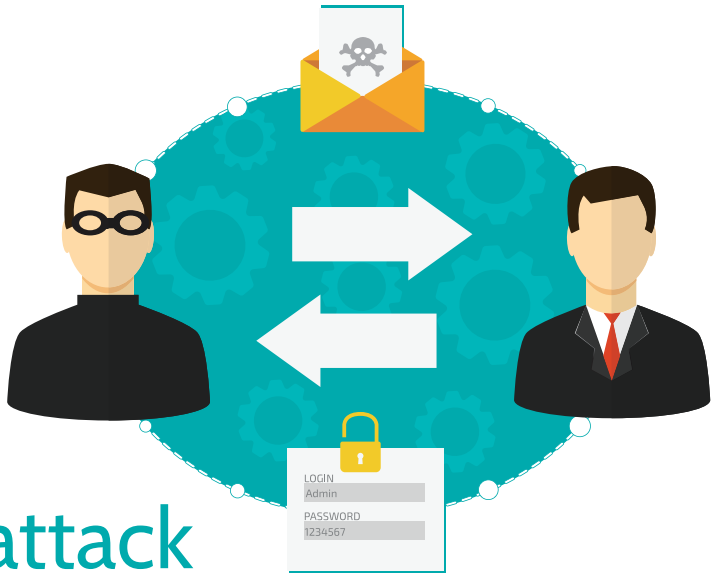
Don't take the bait

on a spear phishing attack



By now, most lawyers are familiar with phishing attacks. For those who are not, phishing is the attempt to acquire sensitive information such as usernames, passwords, and credit card details by masquerading as a trustworthy entity in an email. They take the form of a message, allegedly from your bank or an online retailer you deal with, that suggests your account has been compromised or that payment is overdue. Phishing scams are usually bulk emails sent to large numbers of people. Even if only two or three per cent of recipients fall for them, hundreds or even thousands of people can be victimized.

Like convincing bait, these messages include the same layout, logos and links as legitimate emails from these companies. Phishing messages try to create a sense of urgency and ask you to login to reset your password or verify a payment was made, etc. However, the link you click takes you to an imposter website that looks much like the familiar company site, but when you login you are actually giving your password or other personal information to the hackers. They will use your information for malicious purposes such as ID theft or credit card fraud.

Spear phishing attacks take phishing to a higher level. They are a concern to LawPRO as Ontario firms have been targeted as have firms elsewhere.

The "spear" in spear phishing alludes to the fact that messages are targeted to specific individuals. Spear phishing messages are more convincing because they are personally addressed, appear to be from someone you already know, and may include other detailed personalized information.

In one case, a senior accounting staff member at a large firm received a request on an active file, purportedly from the firm's managing partner, to send a bank account number and account signatures to a person in Europe so they could verify a certified cheque was from the firm. While spear fishing scammers will sometimes use public information from social media or the web to personalize the message, in this case, the fraudster seemed to know details about the matter that were not public. The email was even followed up with a phone call.

Thankfully, the person receiving the email noticed some irregularities: the email opened with an honorific and surname, notwithstanding that these two people had worked together for more than two decades and always addressed each other using their first names; the message used odd phrasing; and, on the call, the person had an accent that was incongruous with the ethnicity of the name used in the email.

Stay off the hook

Educate the lawyers and staff at your firm to make sure they will not fall for a spear phishing scam. Follow firm processes and procedures for the review and approval of financial transactions – and don't bypass them due to urgent circumstances. Never share confidential client or firm information without being sure it is appropriate to do so by getting confirmation from someone familiar with the file. Be on the lookout for and question any last minute changes on fund transfers or payments. ■

Dan Pinnington is Vice President, Claims Prevention & Stakeholder Relations at LawPRO.

For more advice on keeping your data safe and secure, see the Cybercrime and Law Firms issue of *LawPRO Magazine* (practicepro.ca/cybercrimemag)

Danger: When a hacker emails you instructions in the name of your client

The determination and energy of hackers knows no bounds. They show remarkable imagination and ingenuity in coming up with ever more devious ways to steal trust funds by duping lawyers.

As an example of this, we have recently seen several instances where a fraudster hacked into a client's email with the intent to divert funds coming out of a lawyer's trust account. After gaining access to the client's email account, the hacker surreptitiously monitors emails going back and forth between the lawyer and the client. At the opportune time, usually just before a real estate deal is closing or the loan funds are to be advanced, the hacker sends an email redirecting where the funds should go. This change of instructions appears to be coming from the client via the client's email, but if the lawyer follows these instructions, the money ends up going to the fraudster.

Our malpractice insurance colleagues from across Canada and the U.S. tell us they are also seeing examples of this type of fraud. We are aware of a variation where the lawyer's email is hacked, and the instructions allegedly from the client are sent from a different email account that very closely mimics the client's email address.

Communicating by email has become the norm for clients and their lawyers. Both lawyers and clients readily and unquestionably accept the legitimacy of an email sent by their counterpart. That's what makes this fraud work so well.

How do you protect yourself? At the start of the matter, get specific written instructions as to how funds will be transferred and where they will be going. If those instructions change, especially via an email at the very last minute, and/or the recipient of the funds seems odd (a red flag of fraud), seek confirmation of the instructions from the client through another communications channel (i.e., call them on the telephone).

And one other essential takeaway – this type of fraud can be prevented if people regularly change their passwords. Good advice for you and your clients. ■

Dan Pinnington is Vice President, Claims Prevention & Stakeholder Relations at LawPRO.

Social media profile:

Nora Rock

Nora Rock

Corporate Writer & Policy Analyst

Time at LawPRO: 5 years

Nora has been active on LinkedIN and Twitter for four years. She researches and writes articles, webzines, submissions and other documents for LawPRO.

Target audience:

- Lawyers and law clerks from all areas of practice
- Legal and general media
- Academics, universities and colleges

Topics of interest:

- Law practice management
- Risk management
- Insurance industry regulations
- Health care policy and women's issues
- Football

When asked what role social media plays in her job, Nora shared:

> **Twitter offers many benefits for a writer. It allows me to take the pulse of the legal profession and to research outside my usual area of focus. Just by seeing which accounts experts follow, I can identify issues, events and community resources. Twitter can be both a tailor-made community in which to exchange ideas with colleagues and a starting point for exploring new concepts.**

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