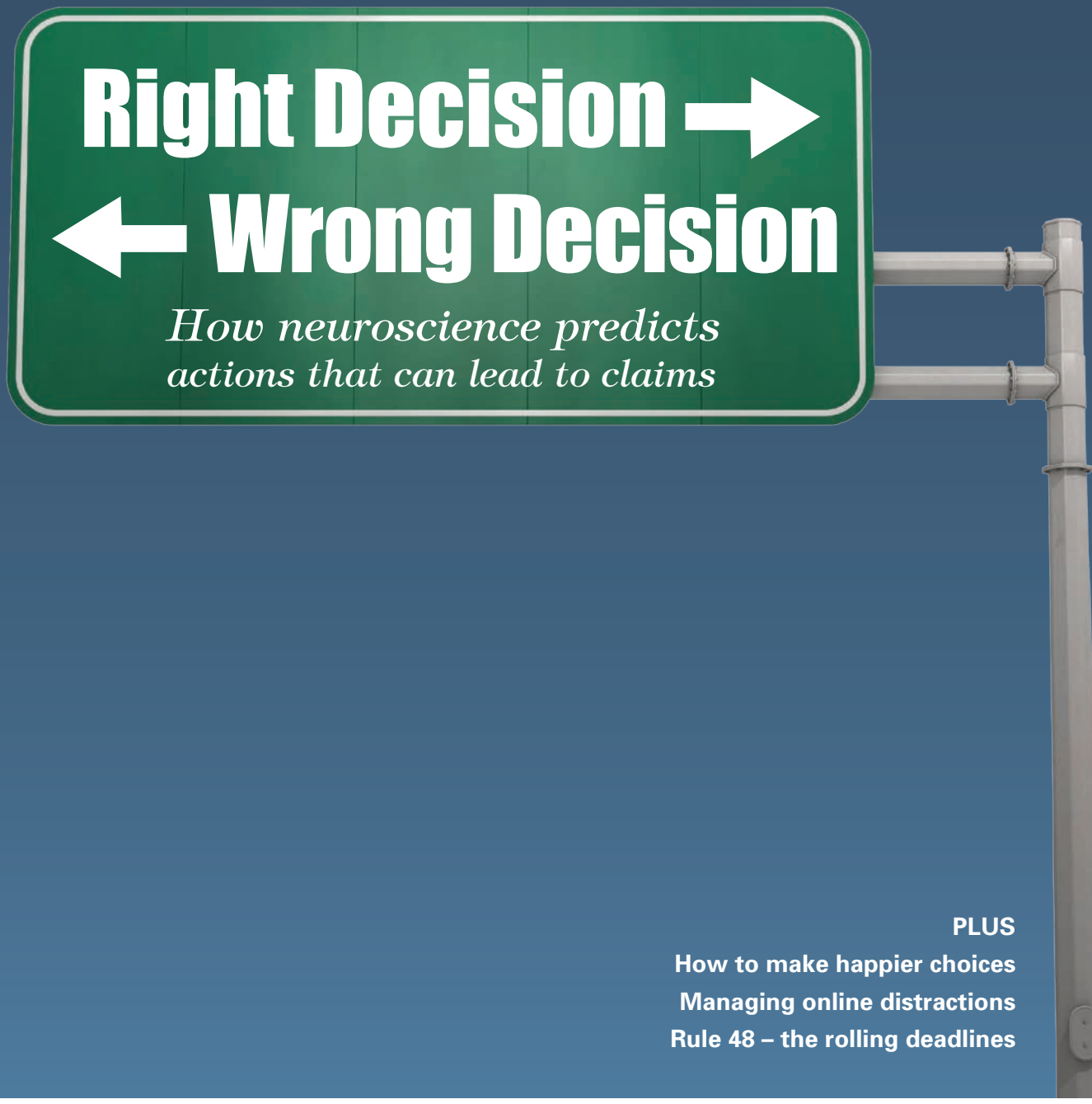
LawPRO magazine

FEBRUARY 2017 VOL 16.1



How neuroscience predicts actions that can lead to claims

PLUS

How to make happier choices

Managing online distractions

Rule 48 – the rolling deadlines

upcoming events

February 9, 2017
Hamilton Law Association
15th Annual Estates & Trusts Seminar
What insurance do you need to enjoy your retirement?
Victoria Crewe-Nelson presenting
Hamilton, ON

February 9, 2017
Ontario Bar Association
Real Property Program – Institute
Claims and claims avoidance in closing documents
Ray Leclair presenting
Toronto, ON

March 30, 2017
Law Society of Upper Canada
Oatley Mcleish Guide to Motor Vehicle Litigation 2017
Adverse cost insurance
Ian Hu presenting
Toronto, ON

March 31, 2017
Georgian College
Introduction to LawPRO and to claims risk management for law firm staff
Nora Rock presenting
Barrie, ON

March 31, 2017
Law Society of Upper Canada
Oatley Mcleish Guide to Motor Vehicle Litigation 2017
Five most common claims risks and how to avoid them
Dan Pinnington presenting
Toronto, ON

April 19, 2017
Barrie Real Estate Law Association
File retention best practices
Ray Leclair presenting
Barrie, ON

recent events

November 22, 2016
Dutton Brock LLP
The New Rule 48: Avoid Administrative Dismissals
Ian Hu presented
Toronto, ON

December 1, 2016
Middlesex Law Association
Personal Injury Conference
Adverse cost insurance
Ian Hu panelist
London, ON

December 2, 2016
Law Society of Upper Canada
LSUC PCPO Training
Diversity and claims
Ian Hu presented
Toronto, ON

December 5, 2016
The Law Office Management Association
An update from LawPRO: recent cyber threats, claims prevention, and 2017 policy changes
Dan Pinnington presented
Toronto, ON

December 7, 2016
Ontario Bar Association
OBA Mentoring Program
Solid foundations for building a successful real estate practice
Ray Leclair chaired
Toronto, ON

December 8, 2016
Ontario Bar Association
OBA Tax Section
Claims statistics, how to avoid a claim, life cycle of a claim
Ray Leclair presented
Toronto, ON

December 8, 2016
Gowling WLG
Cybercrime dangers and how to avoid them
Dan Pinnington presented
Toronto, ON

December 9, 2016
Law Society of Upper Canada
Real Estate Practice Basics

Introduction to title insurance
Lori Swartz presented

Fraud in real estate transactions
Ray Leclair presented

Toronto, ON

December 14, 2016
Zuber & Company LLP
Rule 48 Lunch and Learn
The New Rule 48: Avoid Administrative Dismissals
Ian Hu presented
Toronto, ON

January 16, 2017
Law Society of Upper Canada
Title and Off-title Searching 2017
Competency, quality of service, and claims
Ray Leclair presented
Toronto, ON

January 18, 2017
Toronto Lawyers Association
Real estate claims, causes and tips
Ray Leclair presented
Toronto, ON

February 2, 2017
Durham College
Introduction to LawPRO and to claims risk management for law firm staff
Nora Rock presented
Oshawa, 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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How neuroscience predicts actions that can lead to claims

Departments

In practice

Publications Mail Agreement No. 40026252

Return undeliverable Canadian addresses to:
LawPRO
250 Yonge Street
Suite 3101, P.O. Box 3
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Key Dates

January 31, 2017
Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ended December 31, 2016.

February 7, 2017
Last date to qualify for a $50 early payment discount on the 2017 policy premium (see page 13 of the 2017 Program Guide for details).

April 30, 2017
Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending March 31, 2017.

April 30, 2017
Annual exemption forms are due from lawyers not practising civil litigation and/or real estate in 2017 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, is awarded each year to a second year University of Toronto Faculty of Law student. This year's recipient is Amanda Nash.

Amanda is particularly interested in criminal law and litigation. She is an Articles Editor on the Law Review, Co-President of the Health Law Club, a student panel member on the University Tribunal and a student member on the Health and Wellness Student Advisory Committee.

LawPRO magazine

President & CEO:	Kathleen A. Waters	
Editor-in-chief:	Dan Pinnington	dan.pinnington@lawpro.ca
Editors:	Naomi Dummett Nora Rock	naomi.dummett@lawpro.ca nora.rock@lawpro.ca
Design & Production:	Freeman Communications	studio@freemancomm.com
Photography:	Rick Chard	rickchard@bmts.com

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

Reminders

Reminder to confirm your practising status by November 10

November 3, 10, 2016

A reminder to confirm whether you are exempt from filing for insurance due to your practice status.

Renew your firm's professional liability insurance for 2017 now

October 3, 12, 27, and November 5, 2016

Messages to firms to e-file the 2017 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 2017

October 4, 13, 26, and November 8, 2016

Messages reminding lawyers to e-file 2017 renewal insurance applications by November 3 to save $25; message about impending final deadline of November 10 for filing.

Renew your LawPRO exemption status for 2017: file online now

September 23, October 6, 2016

This issue notified our insureds of the deadline for renewing exemption status was November 10, 2016.

2016 Second quarter transaction levy filings overdue

September 21, 2016

A reminder that the deadline for submission of levy filings relating to transactions completed between April 1, 2016 and June 30, 2016, was July 31, 2016.

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

August 24, September 7, 2016

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.

Alerts

Answers to common Rule 48 questions; Dec. 2/16 last day to set down pre-2012 matters

In the case, *Daniels v. Grizzell*, 2016 ONSC 7351, Associate Chief Justice Marrocco provided some comments that clarify the interpretation of Rule 48.14 and give clear answers to a number of the more common questions.

Webzines

Base premium reduced; other policy changes for 2017

September 22, 2016

Every fall, LawPRO publishes a special issue of *LawPRO Magazine* to announce the changes to the insurance program for the coming year.

LawPRO Magazine: Unlocking Access to Justice

September 14, 2015

This issue of *LawPRO Magazine* explained how the insurance program supports lawyers in contributing to access to justice and gives helpful tips for those wanting to do more.

Who or what is really making our decisions?

The room was abuzz. Audience members were whispering questions and asking how to apply the new information in their offices. The event was a Law Society of Upper Canada Continuing Professional Development program entitled Neuroscience and Behavioural Economics for Legal Practitioners and I don't remember sensing as much engagement in other recent events I have attended.

The speakers, Michael Sherman, BA, JD, MBA, and President of BrainThinks and Nathalie Boutet of Boutet Family Law, were engaging and knowledgeable. And the session provided an opportunity to see a new way to approach old issues. From litigation, to family law, real estate and corporate, brain science applications can help manage client expectations, smooth negotiations, and help avoid costly mistakes.

There are many ways in which behavioural economics can be applied in a practical way in our law offices, and even more particularly, can help us avoid malpractice claims – it is an intriguing development in legal study.

The articles on page 5 and 12 investigate specific biases that can lead lawyers to make mistakes and a few ways to help overcome those biases. As well, there are ways we can use the natural instincts of our brain activity to our best advantage.

Our behaviour isn't always the result of the logical thought process we think we are employing. This puzzle is just now being unravelled. It seems to me that understanding more about how we think can be half the battle to better practice.

Kathleen A. Waters
President and CEO

Putting your best brain forward:

How neuroscience awareness and evolutionary psychology can help lawyers avoid claims and offer better client service

The success of books like Malcolm Gladwell's *Blink* and Norman Doidge's *The Brain that Changes Itself*, has brought discussion of neuroscience out of the medical lab and into everyday conversation. The potential for what we know about the brain to be used to our advantage in the business and professional realms has spurred a growing body of research, and lawyers are beginning to pay attention.

From LawPRO's perspective, the most interesting implication of this research is that a basic understanding of neuroscience may provide lawyers with insights into how to shape their own behaviour so that they can better serve clients and avoid malpractice claims.

To learn more, we spoke to two lawyers who have studied the application of neuro awareness and evolutionary psychology to legal work. Nathalie Boutet is a Toronto family lawyer and mediator, and the founder of the Neuro Family Law Institute.™ Craig E. Jones, Q.C. is a professor in the Faculty of Law at Thomson Rivers University in Kamloops, B.C. His litigation career includes work on the Polygamy Reference, the *Election Act* challenge, the Missing Women Commission of Inquiry, and the "Occupy Vancouver" courthouse-access case.

Brain basics

To understand what is being said about the impact of brain physiology on how we practise law, we need to be familiar with the relevant terms (see the definitions sidebar on page 7 for a quick guide).

Professor Jones says that "**evolutionary psychology** offers an explanation for the **neuroscience**. Neuroscience has confirmed the psychological evidence, which has been gathered since the 1960s, that many of our decisions are made **sub-rationally**." In other words, they are made outside the realm of our awareness. Functional magnetic resonance imaging (fMRI) studies, Jones explains, have shown that between 90 and 100 per cent of our decisions are made subconsciously.

The theory of evolutionary psychology suggests a distinction between two decision-making mechanisms, which Jones refers to as "**System 1** and **System 2.**" System 1, sometimes described as our "reptile brain," is located in the **basal ganglia** region, an area that was well-developed from the beginning of our evolution as a species. Decisions originating in this part of our brains are primal, basic and instinctual, and they happen sub-rationally. System 2, which evolved later, is based in our brain's **neocortex**. Its workings are within our conscious awareness – we perceive them as conscious thought. Neuroscience suggests that System 2 does not actually make many (or even any) decisions; instead, it either provides rationalizations for our System 1 decisions, or acts as an override mechanism that allows us to revise them.

The benefits of neuro awareness

The process of making an effort to take into account the interaction of the two systems when interpreting our own behaviour is what Nathalie Boutet describes as "**neuro awareness**." Boutet views neuro awareness as a tool lawyers can use to gain a deeper understanding of "how we show up in the world, how we show up in negotiation." Both Boutet and Jones believe that we can benefit greatly from an understanding of our clients' psychology and thought processes. When we realize that our client's reasoning is shaped by the same forces as our own, we can tailor our communications so that they are better understood.

But what does it mean to be neuro aware? How do we know what to watch for?

Heuristic biases

Biases in the neurological sense of the term, explains Jones, are forces that influence our decisions. A **heuristic** is a mental shortcut developed by our brains that promotes our capacity to make what Jones calls "fast and frugal" decisions – decisions that allow us, using as little mental energy as possible, to take action. A heuristic bias is one that allows us to interpret and classify the information that underlies our decisions in an efficient – though often imperfect – way.

While we are not aware of our biases on a conscious level, studies of decisions analyzed in the aggregate can, by proving that aggregate results diverge from a random distribution, reveal our biases at work. Researchers have identified many different kinds of biases, including **confirmation bias** and **anchoring bias**.

While a review of all of the various types of bias is beyond the scope of this article, an examination of just those two can provide a convincing argument for the benefits of neuro awareness.

CONFIRMATION BIAS

Confirmation bias is a heuristic that leads us to interpret new information in a way that serves to entrench our pre-existing beliefs.

Jones cites voter reaction to stories about the candidates in the November 2016 presidential election as a demonstration of confirmation bias at work. While there was no shortage of information available about the candidates, "it became clear that as they piled on, rather than changing minds, new facts tended to entrench people ever more deeply into their positions."

Confirmation bias can be dangerous for investigators or justice system participants who are charged with drawing conclusions from facts, because it prevents the decision-maker from being dissuaded from early impressions, even if new facts don't support those impressions. It's the effect behind investigative "tunnel vision."

Jones notes that research about the operation of confirmation bias has the potential to undermine the testimony of expert witnesses, because it has been demonstrated that a witness's prior knowledge

of inculpatory evidence about an accused can skew even his or her "technical" evidence, for example, fingerprint analysis.

Jones warns that to consider oneself immune from confirmation bias is dangerous, because the research suggests that the most intelligent and the most educated among us – and lawyers often see themselves as falling into that category – are also the most successful at rationalizing their decisions. "This means that the people who do the most thinking are actually the most likely to fall prey to confirmation bias."

ANCHORING BIAS

Anchoring bias is a heuristic that prompts us, when we need to propose a numeric value, to skew toward a number we have recently seen. In negotiation or litigation, this can mean that the first number put forward by a party can strongly influence the eventual settlement.

But the anchor number need not even be relevant to the context: even reading a room number on the meeting room door can trigger the anchoring effect. It's a brain shortcut with daunting implications.

Not only are we biased, says Jones, "but all of our biases manifest themselves in a self-interested way. That means, for instance, that not only may you rationalize putting off a call to a difficult client to the afternoon when your decision-making processes are at their worst, but also, by the time the afternoon arrives you may rationalize not making the call at all because you have to prepare for court in the morning."

How stress impacts decisions

Our System 1 thought processes are highly sensitive to perceived threats (though not very good at threat assessment). "It's very traumatizing to encounter the legal system," says Boutet of her clients. "When we are traumatized, there are reactions in our body that are identical to what would happen if we were encountering a beast in the wild." These reactions prompt behaviours – for example, a **fight-or-flight reaction** – that are designed to help us save ourselves.

"These reactions destabilize us," explains Boutet. "Understanding this really helped me, as I looked back on my interactions with clients. It explained that vacant look I would sometimes get. Now I understand that it means that the client is being triggered by something I am saying." Being in the midst of a fight-or-flight reaction has a profound impact on short-term memory, which explains why clients may have difficulty remembering what was discussed in a meeting.

Emotional turmoil can also impair reasoning abilities, which can affect the quality of clients' decisions in certain circumstances, for instance, in a negotiation where ex-spouses and their counsel are in the same room. "A raised eyebrow between spouses can set someone off, without the lawyers having any idea what is going on."

While lawyers may be better acclimated to the workings of the justice system, they are not immune to stress. Aggressive tactics by opponents can have a real impact on lawyers' ability to reason

Speaking the language

New to the language of neuroscience and evolutionary psychology? Here's a primer of key terms:

Anchoring bias: a bias that prompts us to perceive and reflect, in our choices, a connection that may not actually exist between one piece of information and a subsequent piece.

Basal ganglia: a collection of structures called subcortical nuclei, located at the base of the forebrain, the primary function of which seems to be task switching and prioritization.

Confirmation bias: a bias that prompts us to interpret new information as reinforcement for our existing beliefs or conclusions.

Evolutionary psychology: the study of psychological and thought processes as evolutionary adaptations.

Fight-or-flight reaction: a physiological (including biochemical) response to a perceived threat. It is designed to prepare our bodies for action (to fight or to flee).

Heuristic: a technique that enhances our capacity to understand something quickly; or in other words, a mental shortcut.

Neocortex: the grooved part of the brain sometimes described as the "gray matter." It is divided into many distinct sub-regions that are responsible for a wide range of cognitive processes.

Neuro awareness: the state of being able to formulate potential neuroscience explanations for thoughts and behaviour based on information one has gathered about brain science.

Neuroscience: the scientific study of the nervous system, including the brain.

Sub-rational decisions: decisions below the level of conscious reasoning.

System 1: according to the dual-process theory of reasoning, System 1 choices are unconscious, rapid, low-effort, "default" dominated, and arose early in our evolutionary history.

System 2: System 2 choices are conscious, explicit, logical, slow, high-effort, and the capacity to make them arose relatively recently in our evolutionary history.

Truthiness: the capacity of a belief to be perceived as fact – for example a "gut feeling" that it is true – regardless of whether it is actually true.

clearly and to react in a measured way. Long-established advice designed to allow for the reconsideration of reactions – for example, the practice of allowing an email reply to "sit" for twenty-four hours before sending – can help to counteract the ill effects of stress.

Stress need not necessarily be acute, or generated by opponents, to impact performance; it can flow from simply taking on more work than we can effectively handle. Jones acknowledges that pressure to work faster is part of the reality of legal work, but he suspects that it may come at a cost: "One of my students studied the increase in the number of ethical complaints made to a law society alongside the increase in the cost of law school tuition over the same period within a jurisdiction, and found a possible correlation. One interpretation might be that as new lawyers graduate with higher debt, they take on a higher volume of work to try and pay for that debt, their reasoning is taxed, and one result is a greater number of complaints."

The impact of energy on decision quality

Research studies of decisions analyzed in the aggregate[1] show that the quality of our decisions decreases significantly when our brains are low on energy. Jones notes that brain functioning requires a high proportion of our body's energy resources, compared to other organs – up to 20 per cent of our total energy consumption at any given moment. To conserve energy, our brains "push down" as many routine decisions as possible to the System 1 subconscious, primal brain.

The effective use of routine (for example, by relying on checklists; more on this below) can help unburden a lawyer's brain so that he or she has more energy available to make important decisions. Even then, there is a limit on effective decision-making capacity. Says Jones: "any time you believe you are working at full capacity, you are really working at overcapacity" – and the quality of your decisions may suffer. Lawyers can compensate for this by scheduling their most difficult thinking work for times of the day when their energy is highest, and by being careful to control their workload so that enough time can be taken for important decisions.

Boutet is careful to monitor her clients for decision fatigue. She reminds them, when preparing for a negotiation or mediation session, to pack foods high in protein and low in sugar (for example, nuts) that promote a slow and continual release of energy, and to make sure that they remain well-hydrated, preferably with water instead of sugary or caffeinated drinks. Boutet considers this kind of advice to be well within a lawyer's scope, because she has found that her clients appreciate anything that has the potential to improve the results that they get from the legal process. "I think it would be great if, as lawyers, we go beyond simply providing clients with information about the law. They ask broad questions, and they want to know how to prepare themselves for the process."

Boutet takes care to monitor her own nutrition for the same reason: to be certain that she is bringing her most effective self to the task. Boutet's training in event preparation has taught her how important a healthy lifestyle, including healthy eating and sufficient sleep, are to a lawyer's own brainpower. "Lawyers must try to be mindful of what their brains and bodies need for a gruelling event, like a full day of trial or a long mediation."

Practical strategies for improving our decisions

For many, the revelation that 90 to 100 per cent of our decisions happen sub-rationally can be discouraging. If we don't have conscious insight into our choices, how can we have any control over our performance? Are we simply doomed to make mistakes?

Jones reminds us that our System 1 decision-making process evolved to promote the making of *good* decisions in a fast and frugal way. In general, we can count on our gut reactions to be useful – there is no reason why a sub-rational decision is automatically a bad decision. But the process is not perfect, and so when it comes to our most important decisions, it is helpful to take steps to ensure that our System 2 decision-making process is doing what it is designed to do: provide an effective override mechanism.

The seven strategies that follow can help you apply the emerging lessons of neuroscience and evolutionary psychology to the day-to-day work of your practice.

1. THINK SLOWLY – AND LET CLIENTS DO THE SAME

A heavy workload combined with emotional arousal – for example, feeling pressured by a client or bullied by an opponent – have the potential to derail clear thinking. To ensure that we are making the best decisions possible, says Jones, "it helps to be aware of how many decisions we are making, at what time of day, and under what conditions."

Both stress and fatigue tend to make our choices more conservative, and making too many decisions too quickly risks pushing important decisions down to our sub-rational System 1 processes. To avoid mistakes, it is important to allow sufficient time for decision-making, and to do so at a time when our brains can handle the work. If a task requires problem-solving or creativity, for example, a lawyer should reserve it for a time when the brain has plenty of available energy. For many, says Jones, it can be helpful to heed common advice: "as soon as you arrive at work in the morning, complete the hardest task on your schedule" (that is, if you can keep your biases from convincing you that some other task is more important).

The opportunity to apply slow thinking can be even more important for clients, who may be unfamiliar with legal concepts and the legal process. Says Boutet, "I always ask a client, what's the best time of the day and the best day of the week for a meeting?" To ensure that clients make good decisions, Boutet also schedules multiple negotiation meetings instead of a single long meeting so that the client has appropriate time between meetings to reflect on the options.

[1] See, for example, Danziger, Shai; Levav, Jonathan; and Avnaim-Pessoa, Liora; "Extraneous factors in judicial decisions"; *Proceedings of the National Academy of Sciences of the United States of America* (PNAS); Volume 108 Number 17; April 2011.

A problem that has sometimes caused claims against family lawyers is settler's remorse. In some cases, clients who have sought to repudiate settlements have alleged either having been pressured into settling by a lawyer, or not having been provided with sufficient information prior to making a decision. Boutet believes that an understanding of neuroscience can help prevent settler's remorse. "Clients sometimes regret decisions when they feel they have been rushed. Breaking up a negotiation into multiple sessions can allow the client to move gradually in the direction of agreement, which can help them to solidly endorse what they are signing." Boutet notes, however, that some clients will still make agreements they later regret in an effort to get themselves out of a high-conflict situation. Where the lawyer observes that a client may be doing this, it can be useful to leave the negotiation with an agreement in principle in place, and to wait a few days before concluding a binding settlement.

2. LAY A SOLID FOUNDATION FOR ROUTINE DECISIONS

Not every task in a lawyer's workday requires laser-focus and time to reflect. Many areas of practice follow well-established patterns of activity.

When we undertake routine work, our brains rely heavily on System 1 decision-making. This is not necessarily inappropriate, unless we zone out so completely that we overlook exceptional details or, for example, red flags that would otherwise alert us to fraud.

Routine work is less memorable to us than more complicated work (because we have completed the same actions many times), and so it can be difficult, at a later date, to remember specific answers to questions we asked the client – or whether we asked a particular question at all.

To ensure that routine tasks are completed correctly and that our System 2 override function will kick in when we encounter an exception, it can be helpful to develop and adopt routinized, ritualistic work habits that reflect established best practices.

A simple example is an email handling routine. It might go something like this:

1. Read email at specific times each day (for example, at 9:00 am, 1:00 pm, and 4:00 pm);
2. If the response required will take 5 minutes or fewer, respond immediately, and then file the email in the appropriate client folder;
3. If the response will require more than 5 minutes, BEFORE closing the message, make a note on a task list or a to-do list about the actions required and the date/time by which they must be completed;
4. File the email in the appropriate client folder.

Checklists: a safer autopilot

To preserve energy, our brains make many decisions at a sub-rational level. When we do routine or familiar work, this kind of decision-making predominates, making it easier to miss steps, or to forget whether work has been completed.

Using an area-of-practice specific checklist to track progress can help eliminate oversights and preserve a record of the status of the transaction.

From our historical database of issues that drive claims, and with the contribution of expert lawyers in each area, we have developed a useful collection of practice management checklists and toolkits. Visitors to practicepro.ca are welcome to download them free of charge and to adapt them to their purposes. Here's a sampling of what's available at practicepro.ca/checklists:

For managing transactions and client services

Client trial preparation checklist

Commercial transaction checklist

Domestic contract matter toolkit

General checklist for the giving of independent legal advice

Using Title Insurance Safely: Issues to Consider

To keep your practice running smoothly

Employee departure checklist

Post-matter client service survey precedent

Sitting on a non-profit board: A risk management checklist

To help clients identify their legal needs

Annual legal health check-up

Lawyers can also create routines for summarizing outstanding tasks at the end of a week, reviewing the status of client files at regular intervals, or even gathering relevant documents and equipment before leaving the office for a meeting.

Checklists are an excellent tool for helping lawyers adhere to best practices, and for ensuring uniformity in how matters are handled by all firm staff. Whether completed electronically, as part of transaction-management software, or simply printed out on paper and attached to a file, a checklist can ensure that steps are not missed, and that any staff member who reviews a file can determine what work remains to be done. Lawyers can develop their own checklists or adapt those prepared by others – we have a number of area-of-law specific checklists available at practicepro.ca for download.

Jones explains that consistent routines improve the quality of tasks we de-prioritize, and they can be helpful if our work is later challenged. If an aspect of a lawyer's work is challenged and there is no specific memory of what was done, the lawyer can at least testify to the usual practice. Being able to produce a checklist that is used to structure a routine is even better evidence of what has been completed.

3. CONSULT WITH OTHERS

As long as lawyers are mindful of client confidentiality, they can benefit from asking colleagues to weigh in on important decisions. Research has shown that group decisions are less prone to bias and other distortions than are individual decisions.[2] From a practical perspective, checking in with others allows the lawyer to bring a broader range of experience to bear on the issue.

Consulting with others provides an excellent opportunity to practice countering confirmation bias: when asking colleagues for second opinions, lawyers can monitor themselves for the tendency to seek confirmation of early conclusions. Jones notes that because we have a bias in favour of agreeing rather than disagreeing, and yet another bias in favour of the opinions of more senior colleagues, it's useful, when consulting with others, to carefully consider who speaks first in these exchanges. Jones reports that some judicial panels maintain a practice of allowing the most junior justice on a panel to speak first, because of the natural tendency of the panel to agree with the chief justice (or most senior member).

4. CHECK YOUR BIASES

An understanding of some of the biases that shape our decisions can offer us the opportunity to bring to bear the "override" function of System 2 reasoning on problems. Because System 2 most often provides a rationalization for our unconscious decisions, this won't always sway our choices, but it may slow us down and provide the chance, for example, to consult with others, or, as Jones puts it, to "pay attention to the difference between '**truthiness**' and truth."

Skills for challenging confirmation bias have long been an important part of the training of scientists, law enforcement personnel, and other investigators. Lawyers are beginning to pay attention, too – and not only with respect to the impact of the bias on their own decisions. An understanding of confirmation bias has useful implications for litigators. For example, while many of us may feel compelled, in an argument, to have the last word, studies of legal decisions suggest that juries are more likely to latch onto early information and to interpret subsequent testimony and argument as confirmation of their preliminary conclusions.[3]

Having the *first* word – especially where that word is a number – may also be important when it comes to negotiating settlements, because of anchoring bias. And where the first number is proposed by someone else, it can be useful to consciously resist the natural impulse to be drawn toward it – an impulse that gets even stronger if we have our eye on a compromise position that is an even number, or one that is a multiple of five.

There are many different kinds of biases that our brains use as short-cuts – lawyers who take time to learn about them may well discover other strategies for improving performance and avoiding mistakes.

5. NOURISH YOUR BRAIN

As noted above, brain function requires substantial energy. To be able to think clearly, we need to eat sufficient calories, and it is best to choose foods that are digested slowly (for example, proteins and healthy fats, rather than simple carbohydrates and sugar) so that the level of glucose in our blood is fairly consistent. Drinking adequate water helps nutrients circulate in the bloodstream, and there has been considerable research about the brain's specific nutrient needs (for example, omega-3 fatty acids have been found to be especially important to the brain).

Eating healthy meals and avoiding complex tasks when we are very hungry can help our brains work best. Boutet regularly reminds her clients to pay attention to their own nutrition, and to get enough sleep before stressful events.

Find a coach or advisor

The Law Society's Coach and Advisor Network (CAN) provides lawyers and paralegals with access to shorter-term, outcome-oriented relationships with Coaches and Advisors drawn from the professions. Coaches support the implementation of best practices and Advisors assist with substantive and procedural law inquiries on client files. You can learn more by visiting lsuc.on.ca/coachandadvisor/.

[2] See, for example, Charness, Gary and Sutter, Matthias; "Groups Make Better Self-Interested Decisions"; *The Journal of Economic Perspectives*, Volume 26, Number 3, Summer 2012, pp. 157-176 (20).

[3] See, for example, Carlson, Kurt A. and Russo, J. Edward; "Biased Interpretation of Evidence by Mock Jurors"; *Journal of Experimental Psychology: Applied*; Volume 7, Number 2; pp. 91-103; 2001.

6. REFLECT ON YOUR CLIENTS' PSYCHOLOGY

Even a basic introduction to evolutionary psychology can offer useful insights into clients' experiences with the legal system. After taking a course on the subject, Boutet found herself better able to detect when a client was feeling triggered into a fight-or-flight response by a conversation. Armed with the knowledge that short-term memory suffers in these situations, Boutet now gives clients notepads so that they can write down information. She follows up meetings with an email that summarizes instructions and advice given, and also reminds clients of tasks they have been asked to complete.

Here at LawPRO, we have long recommended summarizing instructions and advice in writing, because problems with lawyer-client communication are the most common cause of claims. We may not have had the benefit of knowing the underlying science behind communication failures, but we've certainly seen the evidence: lawsuits against lawyers.

"Trigger" reactions are just one effect lawyers can look for in their clients. Jones reminds us that just as we can strive for awareness of our biases, it can be useful to identify them in clients, too. "When you are speaking with a client," says Jones, "be aware that [because of the effect of confirmation bias] he is trying to reinforce what is already in his own mind." This means that after a loss, a client may have a salient memory of anything the lawyer said that the client interpreted as "egging him on" to go ahead with the litigation, and may not remember any qualifications expressed. An understanding of confirmation bias might prompt a lawyer to put into writing any words of caution that she might have about the action's chances for success.

7. STRIVE FOR SELF-AWARENESS

The most important risk-management insight that evolutionary psychology may offer lawyers is more general than the foregoing tips. It's the basic lesson that most of our choices are not motivated by neutral, objective reason. Rather, the decisions we make are shaped by perceptions and motivations that lie below the level of our consciousness, and were important to our species thousands of years ago, in a very different environment.

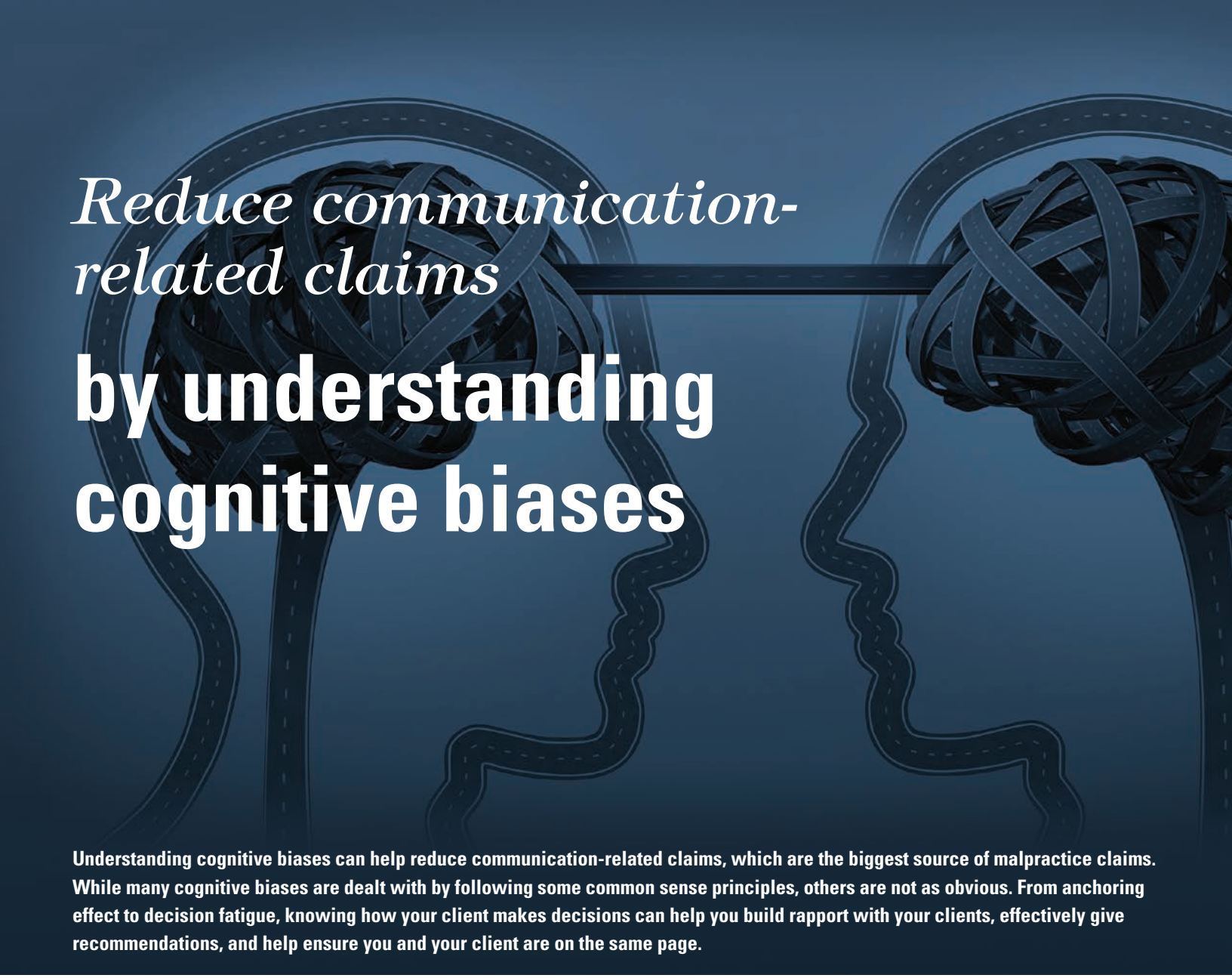
It takes effort to adjust our behaviour to the modern world, where mistakes are more likely to lead to ethics complaints or malpractice claims than to being eaten by sabre-toothed tigers. Says Jones, "don't let one poor choice snowball into something worse." Once a small thing happens – for example, a lawyer oversells the odds of a client's success – "our impulse can be to pile on self-serving decisions." The result? Those improbable cases in which a small exaggeration culminates in someone forging a court order.

Difficult ethical situations can often be averted by drawing our attention to the existence of these self-serving impulses, so that we have an opportunity to slow down our decisions. Slow thinking allows us to explore a wider range of options, which can be the key to identifying a less destructive path out of the weeds.

Boutet is a firm believer in the benefits of self-awareness. When asked what single piece of advice she would give a lawyer just beginning to delve into an understanding of neuroscience, she recommends looking inward: "develop more awareness of your own triggers." A lawyer who knows what creates fight-or-flight mode – for example, bullying tactics from an opponent – can take steps to avoid turning the client's fight into the lawyer's own. "Because if you've lost it emotionally, whatever fee you charge your client is too much."

Boutet credits law schools and law societies with doing a better job, in recent years, of educating lawyers about effective conflict resolution, including outside the courtroom. "But I think," she says, "that we are now beginning to move into the next phase of evolution in law schools, and that is going to be developing better self-awareness. Because our internal triggers operate before we have a chance to identify them, we need to do the work of understanding what we ourselves bring to the process *before* we encounter it." ■

Nora Rock is Corporate Writer and Policy Analyst at LawPRO.



Reduce communication-related claims by understanding cognitive biases

Understanding cognitive biases can help reduce communication-related claims, which are the biggest source of malpractice claims. While many cognitive biases are dealt with by following some common sense principles, others are not as obvious. From anchoring effect to decision fatigue, knowing how your client makes decisions can help you build rapport with your clients, effectively give recommendations, and help ensure you and your client are on the same page.

1. Let your clients make a good decision – decision fatigue

Decision fatigue has perhaps the highest profile of any cognitive bias – Facebook founder Mark Zuckerberg famously wears the same outfit every day as part of his bid to stave off decision fatigue. Your clients' ability to make good decisions may fade throughout the day or even during a meeting with each decision made, no matter how small or large. At the end of a long day, as decision fatigue settles in, irrationality and weakened self-control can take hold.

An end of the day client meeting discussing complex issues can make an already-difficult conversation even more fraught with dangers. Aside from physical fatigue, decision fatigue can cause clients to act impulsively, make unwise trade-offs in negotiation, or retreat into a conservative shell. If difficult choices are anticipated, it may serve everybody better to book such meetings in the morning.

Similarly, making a bunch of decisions in one sitting can also cause decision fatigue. In a study where participants made a series of choices in buying a car – selecting colour, engine size, rust-proofing, trim level, etc. – it was found that the more choices that were made available, the more likely the default or recommended choice was selected once decision fatigue set in. The selection could then be manipulated to ensure more expensive choices were selected as the default, resulting in a higher bottom line for the seller. Clients facing multiple decisions may be better off making fewer decisions at a time – you may wish to break the decisions up into segments or give your clients time to think over and sleep on such decisions, when possible.

While we're on the topic of helping your client make good decisions, research has shown that people are more likely to pay heed to anecdotes rather than bare probabilistic assessment. It is one option to say that "A is more likely than B;" it is more compelling to tell a story

explaining why. The risks involved with a decision can be better illustrated by recounting a lesson learned or describing what the world would look like. Word choice can also play a role – using words that rhyme, or putting points in terms of threes (e.g., "the three main points are…"), has been shown to be an effective way to help people memorize and focus.

2. Shaping client expectations – anchoring effect

Your clients may have a tendency to be heavily influenced by the first piece of information you feed them – the anchoring effect. If you set an expectation from the beginning, this can set the measuring stick by which your client judges the outcome of a file and ultimately your performance. A client anchored to an outcome or a number far out of reach can send a client and a file off the rails when the expectation is not met. Consider setting a wide range where appropriate. In some circumstances it may be unwise to establish any expectation at all, if the matter is unpredictable.

Civil litigators are often pushed to give the client a value for the case at intake. But litigation is full of ups and downs, and during the life of a file the initial valuation may change. In a personal injury case, if the client recovers well, resulting in plummeting damages, the client anchored to a high number is more likely to be dissatisfied with the outcome despite the improvement in health, and no matter how reasonable the resolution. It may be better to provide a wide range of values from the beginning, or, in the majority of cases, none at all – the outcome of a case depends on a number of factors ranging from the client's long-term prognosis, pre-morbid history, expert analysis, and unpredictable juries.

Another place to be wary of the anchoring effect for litigators is at mediation. The first offer is typically not close to the last. A client anchored to the first offer will be sorely disappointed at the end of the mediation. Setting expectations before the mediation – explaining that the first offers on both sides can be multiples of what the final result may look like – can help emotionally prepare the client for what's to come.

Solicitors who fail to communicate expectations clearly can also end up with clients anchored to unreasonable outcomes. A client looking to complete a commercial or real estate deal may need to complete a series of investigative steps before closing. Sunny optimism may not serve the client well if fees, permits, taxes, and costs are not known and out of the lawyer's control prior to closing. Discussion at the initial stages should establish a range that is close to the final numbers insofar as the lawyer is capable of doing so. The old adage to under-promise and over-deliver is an effective way to deal with the anchoring effect.

3. Building rapport with affinity bias and authority bias

Studies have shown that people who present a professional look and are well groomed are perceived to be more honest and credible than those who are less so. Fortunately, looking professional is something all lawyers can control. Photofeeler.com, a website where people can judge each other's photographs on measures such as influence and competence, has found in its research that simple steps such as wearing a suit and grooming well can take your level of influence up a notch. People tend to defer to the appearance of status and wealth.

If improving attractiveness seems like a superficial way to build rapport, perhaps just as effective is to take advantage of affinity bias, the tendency in people to like and trust those that are similar to them. Like attractiveness, similarity starts with appearances. A client coming from the same age demographic, racial, religious, or cultural background may be more likely to trust you right off the bat. But how can you build rapport with a client that is obviously different at first blush, whether in culture, temperament, or education level? The answer lies in matching body language, pace and volume of speech, and to use words familiar to your clients. Matching body language is perhaps more art than science. It is probably not helpful to respond to a client sitting in a closed position with arms folded and facing away from you by doing the same thing. Instead, consider maintaining an open position with palms facing up, but refrain from making gestures and other overt signals. Similarly, a client that is yelling at you and speaking quickly is unlikely to trust you more if you do the same. And if you speak in the same local vernacular as your client, you may be perceived as patronizing or even insulting. Matching is about stepping slightly outside of your comfort zone to make your client feel comfortable. It is not about changing who you are.

Building rapport is important to the overall goal of better client communications. But getting your client to like you is not a goal in itself. Malpractice claims can also occur when a lawyer goes overboard trying to appease a client, overlooks red flags, or skips necessary steps.

Conclusion

Working around or taking advantage of cognitive biases can help you communicate better with your client. The goal is to ensure your client understands the risks involved with legal decisions, whether it's coming to terms with an agreement or taking a step in litigation. You can supplement good practice habits with these insights to manage your clients relationships better and avoid malpractice claims. ■

Ian Hu is Counsel, Claims Prevention and practicePRO at LawPRO.

Does my LawPRO insurance cover assumed risks

There are different types of risks that can lead to claims against lawyers: those that develop from errors or omissions, those that arise through intentional wrongdoing, and those that lawyers willingly accept for themselves.

A lawyer's professional indemnity (E&O) policy is intended to respond to claims arising from a lawyer's error, omission or negligent act in the course of providing professional services. On the other hand, intentional harms (such as theft, fraud, dishonest conduct or malicious acts that lead to loss) are not the types of claims that would normally be covered by E&O policies. This brings us to a third category of liability: situations in which a lawyer's risk arises through a voluntary agreement to be liable. Lawyers are presented with requests to assume responsibility for losses on a regular basis and may not be aware of the risks attached to what they are agreeing to. This assumption of risk may cause the lawyer to have an uninsured exposure to claims.

Consider the common scenario where a lawyer is asked to give an undertaking. If the lawyer has the power to fulfill the undertaking, such as by agreeing to personally follow-up with enquiries following a certain date, the lawyer would normally have coverage if the lawyer's failure to follow-up led to a loss. However, assume the lawyer gives an undertaking with respect to someone else's performance of a task and the lawyer has no control over that party (e.g., giving an undertaking that a client will pay something within a certain time). While the lawyer had no responsibility to perform the task, by giving the undertaking she has assumed responsibility for the non-performance.

No one should ever give an undertaking that they cannot personally ensure is fulfilled. If responsibility for carrying out the action is outside of the lawyer's control, the undertaking provided is nothing more than an expression of wishful thinking. For this reason, the policy excludes coverage for these types of claims.

Another situation in which lawyers can be asked to assume liability is when they enter into contracts to receive or provide services. Some parties will include clauses in their contracts such as hold harmless or indemnity agreements. These contract terms can be more or less onerous for the counterparty and mean that the service provider or client is held harmless for any and all (direct or consequential) losses that occur as a result of the contract. These can even include intentional harms by the party seeking to stand behind the agreement. The wording of some of these agreements will mean the service provider or client is held harmless from all losses

except those caused by the party's gross negligence. What "gross negligence" is and whether that can be considered the sole cause of the loss can be a difficult (and expensive) thing to determine.

It is interesting to note that lawyers cannot enter into hold harmless or indemnity agreements with their clients that would shift liability from the lawyer to the client. Under s.22 of the *Solicitors Act*, R.S.O. 1990, c.S.15, any provision in an agreement that would render the solicitor not liable for negligence or relieves her of responsibility that she would otherwise be subject to is void.

How these hold harmless and indemnity agreements with service providers or clients may increase a lawyer's personal exposure and impact how the Law Society policy would respond to a claim may best be illustrated through a couple of examples.

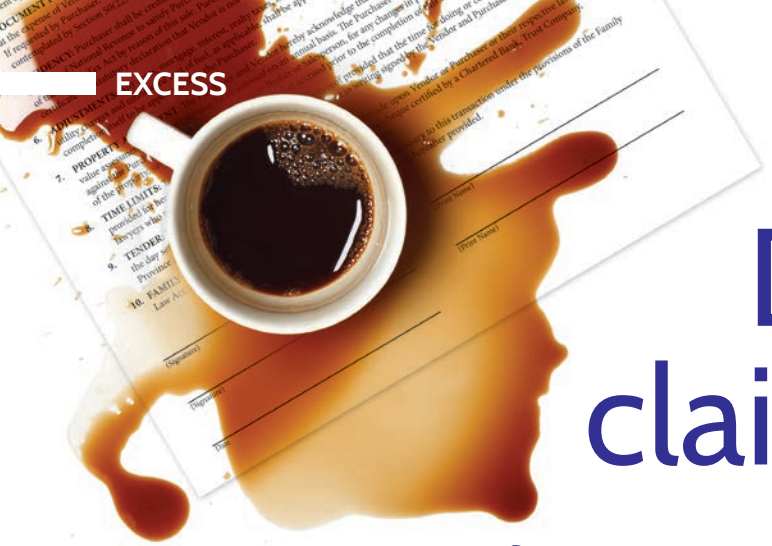
Scenario A: You elect to sign a contract with a service provider that includes an indemnity agreement (the service provider is the indemnitee and you are the indemnitor). The service being provided is one typically used by law firms, such as document storage or shredding services, the provision of software for a specific area of practice, or the outsourcing of a law firm function. The service provider makes an error and your clients sue both you and the service provider. The clients, remember, are not parties to the agreement and are not bound by the contract. The service provider then looks to you to indemnify it. In this scenario, assuming you met the applicable standard of care and the only liability facing you as a lawyer arises from the indemnity agreement, there would typically be no coverage under the policy to defend any cross-claim from the service provider, or for any damages, costs awards or settlement amounts as the loss in this situation does not flow from the provision of professional services to a client and would be in any event expressly excluded under the policy.

Scenario B: Your firm has won a competitive bid to provide legal services to a large client. As part of the contract, you agree to hold the client harmless from any and all tort claims that may arise. In acting on a real estate transaction, your client provides measurements for a property being sold that prove to be wrong. The purchaser, who has learned of this after the closing, sues your client for misrepresentation and your client looks to you under the indemnity agreement. Coverage would not be expected to apply since the harm did not arise from your error, omission or negligent act, but that of your client and coverage does not extend to your clients. To make this even more clear, there is both an exclusion and a condition in the Law Society policy that would prevent the policy from applying or coverage being extended when lawyers voluntarily assume liability for another.

What are your options?

The costs of insuring certain risks and the commercial interest parties have in moving liability exposure from themselves to others means that hold harmless and indemnity agreements are going to be common features in many types of contracts, including client retainers and supplier agreements. This does not mean that lawyers should always agree to them. There are options available such as obtaining or confirming your firm has contractual liability insurance in place, entering into negotiations regarding these terms (with the understanding this may have financial or relationship implications), or contracting with a different party who has more favourable contract terms in this regard. ■

Victoria Crewe-Nelson is Assistant Vice-President, Underwriting at LawPRO.



Does a big claim scare you?

Excess insurance from LawPRO can give you peace of mind

1. What is excess coverage?

Excess coverage is insurance that covers (for eligible claims) losses in excess of those covered under Ontario lawyers' mandatory professional indemnity coverage, up to a limit chosen by the insured. Unlike the primary layer of coverage, under which the lawyer him or herself is the insured, excess coverage covers the firm as a whole.

2. Is excess coverage a practice requirement?

No – excess is an optional coverage that lawyers can purchase as a "layer" of additional protection beyond the standard coverage that is mandated by the Law Society of Upper Canada.

3. Is excess coverage ever required for reasons other than practice eligibility?

Certain clients stipulate, as a condition of hiring a firm to represent them, that the firm show proof of professional indemnity coverage up to a stated limit (often $10 million). Firms may take such stipulations into account when making a decision to purchase excess coverage, because the limits of the primary program are $1 million per claim and $2 million in the aggregate.

4. Is coverage restricted to lawyers in particular practice areas?

No – excess coverage can benefit lawyers in all areas of law, even in areas where lawyers don't represent clients with specific coverage stipulations. Even where clients are individuals (for example, in family, real estate, or estates practice), increasing property values can mean higher potential losses from a single mistake.

5. How do I know if I need excess coverage?

Try our convenient online "stress test" at lawpro.ca/excesstest to determine your potential for a high-value claim.

6. Why might my need for coverage increase over time?

As a practice grows, potential exposure to risk grows. More closed files means there's a greater possibility that a past error will come to light and result in a claim. Adding new lawyers to the firm means a greater volume of work that, in itself, increases risk. And finally, as a lawyer's client base ages along with the lawyer, clients' net worth – and the financial risk of working with those clients – generally increases.

7. How likely is it that I will have a claim that will exceed the primary coverage limits?

One in every 150 lawyers will have a claim that exceeds the $1 million mark.

8. How do I find out if I'm eligible for LawPRO Excess coverage?

Simply contact LawPRO's Customer Service and Underwriting Department at 416-598-5899 or 1-800-410-1013 and speak to any of our Program Coordinators to receive a no-obligation estimate. The estimate provided will be based on existing information in our database such as firm size, practice circumstance, areas of practice, claims experience and other underwriting criteria.

9. What are the limits for excess coverage, and what are the premiums?

The following limits are above the $1 million per claim/$2 million in the aggregate limits provided under the primary LawPRO program:

- $1 million per claim/$1 million in the aggregate
- $2 million per claim/$2 million in the aggregate
- $3 million per claim/$3 million in the aggregate
- $4 million per claim/$4 million in the aggregate
- $9 million per claim/$9 million in the aggregate

Premiums under the LawPRO Excess Insurance program are underwritten and rated on an individual firm basis, based on a number of criteria including: the nature and size of the firm; individual lawyers' areas of practice; practice status; and loss exposure of firm members. For an indication of premiums for your firm, contact the LawPRO Customer Service and Underwriting Department.

10. Where can I review the current LawPRO Excess policy terms?

Review the current LawPRO Excess policy at lawpro.ca/excess ■

5 year rolling administrative dismissal date

Rule 48 after January 1, 2017

LawPRO reminds lawyers that on a rolling basis beginning January 1, 2017, matters commenced on or after January 1, 2012 will be automatically dismissed five years after they were commenced. Remember, the courts will dismiss actions without sending notices of any type to parties or their lawyers. Update internal firm systems to tickle all relevant Rule 48 dismissal dates on all files. Please be proactive and keep your files moving along. 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 Rule 48.

Reminder for defence lawyers

Defence lawyers are reminded that based on a plain reading, Rule 48.14 also applies to third party actions. Defendants who have commenced a third party action should tickle relevant Rule 48.14 dates.

Recent case answers Rule 48.14 questions

In a recent case, *Daniels v. Grizzell*, 2016 ONSC 7351, Associate Chief Justice Marrocco provided some comments that clarify the interpretation of Rule 48.14 and give clear answers to a number of the more common questions LawPRO has received from Ontario lawyers. The clarifications provided are as follows:

1. Where a consent timetable is submitted to the Registrar at least 30 days from the dismissal date, a draft order must also be included [para. 5].
2. If a party brings a motion before the Rule 48.14 dismissal date, the matter shall not be dismissed for delay until the motion is heard, even if the matter is heard after the dismissal date [para. 7].
3. A Rule 48.14 dismissal for delay by the Registrar shall not contain a costs order [para. 8].
4. Rule 24.05.1(1), which provides that a party can seek costs on a matter dismissed for delay, does not apply to a matter dismissed under Rule 48.14 [para. 9].
5. Rule 48.14 does not apply to case managed actions [para. 10] (e.g., class actions).
6. Rule 48.14 does not apply to matters on the Commercial List [para. 10].
7. Rule 48.14 applies to proceedings commenced as an action [para. 11]. Estates and other matters commenced by application are not subject to the Rule, while those commenced by action are.
8. Rule 48.14 does not apply to applications that are converted to actions [para. 11].
9. Rule 48.14 does not apply to actions that are stayed [para. 12].

Referencing the plainly stated points in the endorsement, paragraph 13 notes that Rule 48.14 is intended to keep court information current (i.e., remove inactive matters from court lists) and that it should not be interpreted in a way that makes it a trap for the unwary. ■

Ian Hu is Counsel, Claims Prevention and practicePRO at LawPRO.

Reduce the distraction from the casino in your pocket

In the early days of email, one of the common bits of productivity advice was "turn off your inbox notifications." The "You've Got Mail" sound or pop-up was a constant source of distraction while trying to get work done. Even with the advent of smartphones that advice was still mostly good enough. The phone meant you could check email everywhere you went, but the distraction was still limited to emails and texts from friends and clients. Jump forward to 2017, and we're all carrying around what some call a casino in your pocket. That choice of words refers to more than just the pings, pop-ups and multi-coloured notifications from a myriad of apps that can make your phone look and sound like a Vegas slot machine. The apps mimic some of the techniques casinos use to lure customers in and get them to stay.

Some of these techniques are based on science that shows that the same pleasure/reward centres in the brain that light up for slot machine wins react in a similar way to "likes," friend requests, message notifications and @ mentions. And just like slot machine wins, these come at unpredictable times so you can become obsessed with watching for them. App makers are designing notifications to keep you constantly coming back for more.

And just as casinos carefully control the environment to lull you into not noticing how much time has passed and divert you away from exits, app makers want to keep you inside their site. The time spent and the ads you might see are lucrative to them. You

might think it only takes a second to check a Facebook like or Twitter mention, but once there you are tempted by news, videos, suggested contacts and a truly never-ending supply of new posts to see. Facebook itself estimates that users spend nearly an hour a day visiting its apps: more than most people spend reading, eating or exercising.[1]

One study has shown that the end result of all of this app surfing can be hours of lost productivity. A 2016 survey of thousands of employers and employees by Career-Builder estimates that two or more hours of work a day is lost to checking phones (the phones that 80 per cent of people surveyed say they keep within eyesight[2]). For a profession that revolves around the billable hour, that time can become expensive.

A problem that is less easy to measure is how phone distraction could affect the work you are doing for your client. "Poor communication" and "inadequate investigation" are two of the leading causes of malpractice claims against lawyers. We used to call it BlackBerry legal advice; missing details because of the fast and superficial nature of a quick question and reply via email. If you're skimming your Facebook feed while on the phone with a client, or glancing at the phone while reviewing documents, your lack of focus could mean missing a key piece of information that could result in a claim later.

Obviously social media apps and smartphones are here to stay, and so is the constantly connected world they've created.

So what can you do to make your phone a little less distracting?

1. Change the notification settings in the individual apps. Most of the social media apps let you adjust when you receive alerts. Look for a Settings button in the app's menu, and then click on Notifications. The exact location of these settings will vary from app to app. In Facebook you can choose whether to be notified of messages, comments, friend requests, wall posts, etc. In Twitter, you can turn on/off notifications for likes, retweets, mentions and new followers.

   You will still see these when you log into the app, but you won't get an alert from your phone every time they happen.

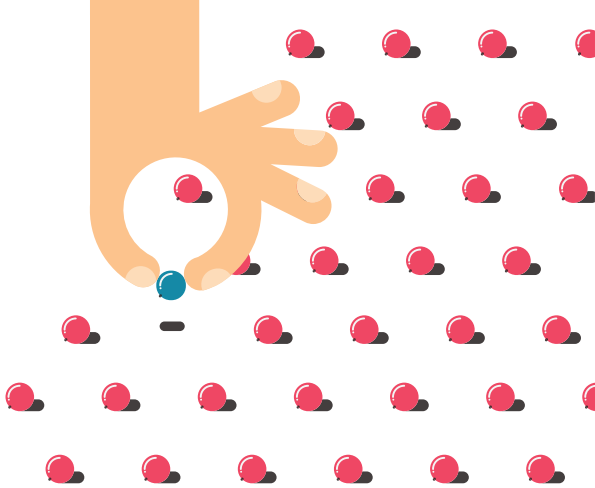
2. Turn off the notifications for the entire app in your phone settings. Open your Settings, click Notifications, and turn on/off notifications for every app on your phone. The process is similar on all types of phones. Most phones have a "do not disturb" function in their Settings menus, which can temporarily turn off all notifications (sounds, lights and vibrations).

3. Sometimes just seeing all those tempting looking app icons is enough to make you want to tap them to see what's new. If you want to avoid temptation, move the icons into a separate folder or off your home screen onto a screen that requires you to swipe left or right to find them. To move app icons around, just press and hold on them and drag them to another screen or on top of another app to create a new folder. This will add one extra step to find them next time. Leave the home screen for the 'boring' apps like the weather, the coffee shop, or your bank! ■

Tim Lemieux is Claims Prevention & Stakeholder Relations Coordinator at LawPRO.

[1] nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html?_r=0

[2] prnewswire.com/news-releases/new-careerbuilder-survey-reveals-how-much-smartphones-are-sapping-productivity-at-work-300281718.html



Are you a maximizer or a satisficer?

How to make happier choices

The last time you bought a house or searched for a rental apartment, how did you choose, and how did you feel about your choice afterward?

Psychologists studying the relationship between how we make choices and our life satisfaction have found that those who put the greatest effort into making choices are rewarded with less happiness.

In his book *The Paradox of Choice*, Dr. Barry Schwartz, a professor of psychology from Pennsylvania sorts decision-makers into two broad categories. "Satisficers" settle promptly on the first option that meets their basic criteria, while "maximizers" take considerable time canvassing and comparing all possible options in a quest to make the optimal decision.

Though the categories themselves are distinct, most people don't fall squarely into one camp. We all have decisions we agonize over. Lawyers, however, may fall more consistently into the maximizer group because they tend to score high on measures of skepticism and perfectionism. Skeptics are quick to doubt that an item will live up to the sales hype, and may feel compelled to investigate reviews and ratings. Perfectionists, especially professionals accustomed to being held accountable for performance at a high standard, may develop similarly high standards for the goods and services they consume. These factors can lead to a refusal to accept anything perceived as "good enough" or "second best."

But from a life satisfaction perspective, it turns out that making "good enough" choices makes us happier overall.

Studies comparing the actual (rather than perceived) quality of choices made by maximizers and satisficers have shown mixed results, which suggests that decision quality does not necessarily improve as the effort spent making it increases. What's worse, the process of comparing all available options can provoke anxiety since many items don't lend themselves to direct comparison.

Consider an apartment search. Each of the apartments that a maximizer considers might be "optimal" according to separate standards: one may be largest, another may boast the best location, and yet another may possess a special desirable feature. Faced with hard-to-reconcile choices, maximizers get increasingly frustrated, setting themselves up for disappointment with their eventual choice. Dr. Schwartz and his colleagues Sheena Iyengar and Rachael Wells demonstrated this effect in a study[1] of the job search results for 548 college graduates. While the students identified as maximizers secured jobs that paid, on average, 20 per cent more than the satisficers did, when questioned about their satisfaction with those jobs, the maximizers were significantly less happy. In fact, Dr. Schwartz's research reveals that maximizers experience more depression and are less satisfied with their lives *overall*.

Maximizers don't intentionally pursue disappointment; they may tell themselves that they are trying to make responsible use of money and time. But according to *Psychology Today* author Marina Krakovsky, "…though maximizers are more likely to be perfectionists, on average maximizers are only slightly more conscientious than the rest of us… [I]nstead, the Big Five personality trait they score highest on is neuroticism."[2]

If you've recognized maximizer tendencies in yourself, is there anything you can do to fret less over decisions and feel more satisfied? Here are some strategies:

- Set a time or effort limit for a choice: for example, if you're comparing cars, you might limit yourself to two hours of online research and four test drives.
- Practice making quick and irrevocable decisions when you're making less critical choices (like what kind of soup to order for lunch).
- Need to choose a veterinarian? Instead of going into the search "cold" and trying to assess all of the options in your area, ask for and follow through on a trusted friend's recommendation.
- When shopping for a gift, control the scope of your search by visiting one small brick-and-mortar store instead of browsing for hours online.
- Once you've made a choice – whether it be a soup flavour, a job, or a life partner, stop shopping.

Above all, remember that the "perfect" choice is almost always an illusion, and that the pursuit of it won't lead to happiness. Put away the spreadsheet of pros and cons, and learn to embrace the freedom of "good enough." ■

Nora Rock is Corporate Writer and Policy Analyst at LawPRO.

[1] Iyengar, Sheena S.; Wells, Rachael E. and Barry Schwartz; "Doing Better but Feeling Worse Looking for the 'Best' Job Undermines Satisfaction"; *Psychological Science*; vol. 17 no. 2; February 2006.

[2] Krakovsky, Marina; "Field Guide to the Maximizer"; *Psychology Today*, September 6, 2011.

The future of law

Why the real estate lawyer is the quarterback of the real estate deal

On June 22, 2016, surrounded by family and colleagues, Kathleen Waters was honoured with the 2016 Ontario Bar Association's Award of Excellence in Real Estate. Her remarks included comments on the lawyer as quarterback and advice on moving successfully into the digital future.

"I'm a passionate believer in the role of the lawyer as defender of freedoms in a democracy," she said. This concept was outlined by the United Nations in its "Basic Principles on the Role of Lawyers,"written in 1990.[1]

That document captures many ideas that are foundational to life in a democracy: "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession." Governments and lawyer associations are called upon to promote programs to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms.

Even LawPRO's Statement on Corporate Social Responsibility views a committed, healthy and diverse bar as essential to the functioning of a democracy and to the protection of individual rights in society.

"Where I diverge from many commentators is that I don't believe the important role of a lawyer in a democracy is reserved to the barristers among us," she said. More than half of the 26,000 lawyers in private practice in Ontario do predominantly solicitor's work and 21 per cent (approximately 5,400 lawyers) identify themselves as having real estate law as their primary or secondary area of practice.

Waters pointed out that real estate practice is a financial mainstay of the typical solo or small firm solicitor's office, without which it would be very difficult to maintain a broad distribution of lawyers throughout Ontario. These same small law firm lawyers are preparing wills, incorporating small businesses, advising estate trustees, helping troubled spouses and even doing some criminal defence work. "Talk to an MPP at Queen's Park about what it would mean if there were no lawyers left in the constituency. How will the MPP explain to a constituent with a child protection issue that the nearest lawyer is 100 kilometers away?" she queried.

In Waters' view, it is so important that we maintain real estate legal practice in Ontario. This is not about protectionism for lawyers. It is a societal issue that serves a greater good.

Consider the contrast with our neighbours to the south, where real estate conveyancing has largely been taken over by title insurance companies and escrow agents. Waters observed, "what we learn, by comparison, is the tremendous simplicity and cost effectiveness of having the lawyer as fiduciary and quarterback at the heart of the deal as we do in Canada. Tons of expensive government regulation is avoided."[2]

What does the future of real estate practice in Ontario look like?

Financial institutions that provide mortgage loans are often the most powerful clients in residential real estate practice. Banks and lenders are subjected to onerous data security and privacy obligations by regulators. In the coming years, lawyers practising real estate law in Ontario will be called upon to help banks fulfill these obligations by operating under an electronic umbrella that gives better protection to all their client data. An example of expectations might be providing and receiving mortgage instructions electronically.

For this and many other reasons, operating a real estate law practice and relying on faxes and couriers just won't cut it in the future. Faxes are hard to read, not private, and susceptible to data errors. And after surviving the digitization of real estate data and automation of conveyancing – more secure electronic communications should be plain sailing for the Ontario real estate bar, "whatever waves may seem to be on the horizon."

In conclusion, Waters urges real estate practitioners to take pride in their role as ambassadors to clients and the community and the significant role they play in our democracy and economy. ■

Mahwash Khan is Communications Specialist at LawPRO.

[1] ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

[2] Kathleen A. Waters & Jonathan L. Schwartz, "What is '*RESPA*' and Why should you Care?", in The Law Society of Upper Canada, *The Six-Minute Real Estate Lawyer 2003*, Tab 21; Rich Patterson, "Keeping Lawyers in the Future of Residential Real Estate Conveyancing: The American Experience", CBA, Canadian Legal Conference, August 13-15, 2006; Letter from James R. Maher, Executive Vice President, American Land Title Association to Steve Forbes, Editor in Chief, Forbes, undated; Mark Shroder, "The Value of Sunshine: The Efficacy of the *Real Estate Settlements Procedures Act* Disclosure Strategy", in July/August 2008 *Probate & Property.*

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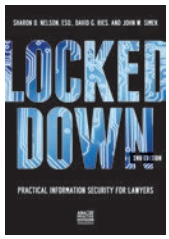
Locked Down:

Practical information security for lawyers, 2nd edition

Sharon D. Nelson, David G. Ries and John W. Simek



The first edition of *Locked Down: Information Security for Lawyers* was published in 2012. It introduced law firms to the increasing importance of having proper cybersecurity for client and firm data. At the time, that concept was still new to a lot of firms and often not taken as seriously as it should have been. In the years since, there have been high profile breaches at companies like Target®, Ebay®, Yahoo® and Panamanian law firm Mossack Fonseca. Law firms in Ontario have been hacked and ransomware infections have become much more common. On a daily basis firms across Ontario are targeted by phishing scams and bad cheque frauds.

Fortunately, most firms now understand the scope of the danger and are making efforts to improve all aspects of their cybersecurity, from employee training to firewalls. The second edition of *Locked Down*, now titled *Practical Information Security for Lawyers* was published in 2016 and offers a roadmap for firms trying to figure out steps to better protect themselves and their clients. The authors, Sharon D. Nelson, David G. Ries and John W. Simek, have backgrounds in the practice of law and information security.

The new edition begins by reminding lawyers why they are considered ripe targets by hackers: the money in their trust accounts and the valuable information about their clients. The law firm of a big corporation is also considered an easier target than the company itself. To paraphrase an expert quoted in the book, "why hack Boeing when it's simpler to hack Boeing's law firm?" To drive the point home, real-life stories of security breaches are included that would keep many firm administrators up at night.

The nature of cyber-attacks has evolved since the first edition was published. For example, phishing attempts are no longer obviously fake emails claiming to be from your bank. They have become more sophisticated and individually targeted, and can appear to come from senior members of your own firm. On the other hand, many of the security vulnerabilities are the same as they've always been: weak passwords, unsafe storage and remote access habits, and outdated software.

Each chapter examines a particular vulnerability. Some could be considered 'front end' issues, such as email, laptops, mobile devices, and desktops. Many hackers find these to be the weakest link because they depend on employees' diligence in following proper security procedures. Other chapters look at the 'back end' of a firm's IT network: storage, servers, backup systems, and wireless encryption.

It's also important to predict what could become security problems in the near future, so the authors devote time to the "internet of things," cloud computing, the expansion of social media, and even drones – imagine a drone hovering outside an office high-rise trying to detect your WiFi signal. Hackers are always adapting their methods to new technologies, so the work of securing your information is never truly done.

There is also a discussion of a lawyer's professional obligation to keep client data secure. In this book, it's in the context of the American Bar Association's *Rules of Professional Conduct* and opinions from American state bar associations. Ontario lawyers will want to refer to the Law Society of Upper Canada's *Technology Practice Guideline* (lsuc.on.ca/with.aspx?id=2147491197). Not only do lawyers have an ethical responsibility to protect client data from cyber breaches, but clients are increasingly demanding to know that a firm's network is secure.

It's beyond the scope of a single book to address every aspect of cybersecurity, and the authors make it clear that their goal is primarily to help lawyers understand the concepts and issues. It is then up to firms to hire their own experts in this field to tailor cyber solutions to their own needs. While immediate steps can be taken in some areas (such as strengthening passwords or improved staff training on security protocols), an expert will be required to address more technical subjects like backup systems, encryption, and firewalls. The book will help the average lawyer understand *why* these issues are critically important.

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 and Stakeholder Relations Coordinator at LawPRO.

Understand how changing your practice status affects your insurance needs

A few of our most common questions about changes to practice status

I may be taking a leave of absence from my practice. Do I have to continue to purchase insurance coverage?

If you are planning a temporary leave from practice, you may become exempt from the requirement to buy insurance. If you meet the eligibility rules, complete an application for exemption on the LawPRO website. You will be entitled to a return of premium while you are on a leave of absence, subject to a minimum 30 days premium and limited to the premium relating to the 30-day period immediately preceding LawPRO's receipt of your written notice, and any subsequent period thereafter. Regretfully, for those carrying the real estate practice coverage option, we are not able to backdate for this 30-day period.

I am currently a sole practitioner but will be setting up a partnership with another lawyer (also a sole practitioner). What do I need to do to let LawPRO know and what effect does that have on my insurance policy?

As a sole practitioner, innocent party coverage is not mandatory. However lawyers practising in association or partnership, (including a general, multi-discipline, combined licensee, or limited liability partnership) are required to have innocent party coverage. Innocent party coverage protects members of the public and lawyers against the dishonest, fraudulent, criminal, or malicious acts or omissions of present or former partners, associates, employed lawyers and firm employee(s). In addition, as you will now be practising in a partnership, all lawyers are required to choose and qualify for the same insurance coverage options.

I have recently left a large firm to work as a sole practitioner. Does LawPRO automatically cancel the insurance policy I had with the firm and if yes, how do I reinstate it?

The professional liability insurance policy belongs to the individual lawyer, and not the firm. This means that if you leave one firm to join another, your coverage follows you. You must provide written instructions to LawPRO to make any changes to your policy coverage options or status. ■

For answers to more questions about insurance, visit our FAQ page under E&O insurance at lawpro.ca

It's easier than ever to jump into Twitter

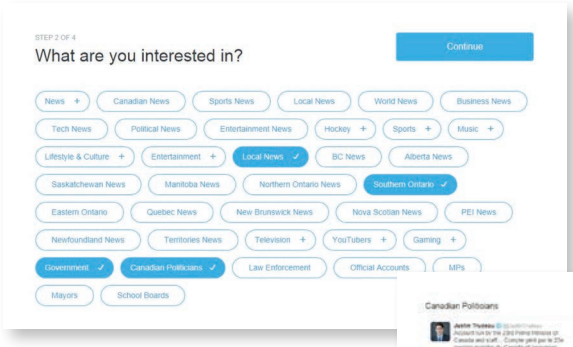
There are two common statements by people who don't want to sign up for Twitter: "I don't have anything to say" and "I don't know who to follow." In recent years the social media app has put a lot of effort into making it easier for new users to jump right in and take part.

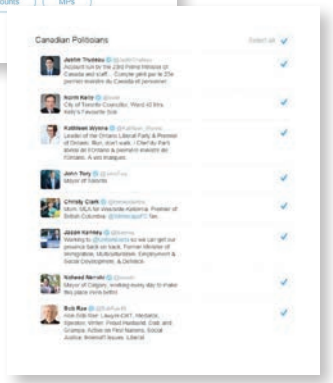
First, there is no need to ever "tweet" anything. Many Twitter users simply follow accounts of news organizations, politicians, sports writers, musicians and mentors. It's a great way to get up-to-the minute news and opinions as the day unfolds.

Signing up for Twitter is simple. It can be done on your desktop or through the Twitter app (free to download) on any smartphone. All you will need to provide is an email address and password, then select a username in the format of @yourusername. If the name you want is taken, Twitter will suggest some close variations.

And when you sign up for Twitter, it asks about your interests so it can tailor a package of popular accounts for you to follow.

After selecting "Canadian politicians," for example, Twitter will suggest these popular accounts to follow:





With a few clicks you'll be able to hit the ground running on Twitter. The initial suggestions will, no doubt, lead you to follow other related accounts. You can constantly refine your list of "Follows" (and be sure to follow @lawpro, @practicepro and @TitlePLUSCanada)!

So don't be nervous to take the plunge into Twitter. Like millions of others, you'll probably be hooked in no time! ■

Social media profile: Keri Gammon

Keri Gammon

Claims Counsel

Time at LAWPRO: 3 years

As Claims Counsel at LAWPRO, Keri manages a diverse portfolio of files. Prior to joining LAWPRO in 2014, Keri practised litigation with a national full-service firm, first in its Vancouver office and then in Toronto. Her practice ran the gamut of civil litigation but with an emphasis on commercial disputes and international arbitration. She is a graduate of the Schulich School of Law at Dalhousie University, and the University of British Columbia (B.Sc.).

Target audience:

- Lawyers from all areas of practice
- Academics, universities and colleges
- Others interested in issues impacting lawyers and the legal profession

Topics of interest:

- Law practice management
- Risk management
- Canadian legal trends
- Access to justice
- Women in the law
- Lawyer wellness
- Claim trends
- Cooking

When asked about the benefits of social media to lawyers, Keri said:

> **"Social media is a great way to grow your professional network and stay in touch with colleagues. For lawyers in private practice, social media is an effective way to promote one's brand and distribute content such as blog posts. For all of us, it's a great way of staying in touch with our network, making new contacts, staying current on relevant issues, events and trends, and participating in timely conversations."**

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