



# The most common malpractice error:

## Failure to follow client's instructions

A review of the LawPRO claims data for the last 20 years shows that one error stands out above the rest, both in terms of frequency and cost: the failure to follow client's instructions.

Twenty-two percent of the claims we have handled since mid-1982 involved this error. The costs associated with resolving claims that involve this type of error also are significant. They represent 19.8 per cent of estimated and incurred costs for all claims over this period of time.

What is a failure to follow client's instructions? It can truly be a simple failure to follow the instructions of a client. However, on many of these matters it is unclear what instructions were given or not given by a client, and what steps were taken or not taken by the lawyer. In many of these types of claims, there are limited, or even no notes in the lawyer's file, and/or no letter to the client confirming what instructions were given, and what steps were taken. Often the client's recollection is different from the lawyer's recollection as to what was said or done; often too the client's recollection is more specific.

Consider, for example, a real estate deal. Most clients buy or sell only one or two properties in their lifetimes, whereas a real estate lawyer may act on thousands of real estate deals. It should be clear who will have the better recollection of the details on any specific real estate matter. These types of claims are difficult to defend because they come down to credibility, and the client's more specific evidence often wins out over the lawyer's more general recollection.

This most common and most costly error is also one of the easiest to prevent. How? Write it down.

Send something in writing to the client confirming what instructions were given, and what steps were taken or not taken further to those instructions. Your communication can be a letter, a fax, or even an e-mail. No matter what form it takes, this confirmation serves to confirm, in a contemporaneous manner, exactly what was said and done. Having such a confirmation can be of great assistance in the event of a malpractice claim.

As a backup, consider creating a detailed docket. For example, don't just docket "telephone call with client, 0.3 hrs." Add more details to the docket such as: "telephone call with client re don't bother writing to City Hall for a clarification of the interpretation of By-Law 345, client feels it is clear, and the deal must go through, 0.3 hrs."

Recognizing when you are dealing with something that should be written down is essential. The Online COACHING CENTRE module included in this issue will provide you with some instruction on this point. See page 25 for Module #20 from the **Powerful Communications** workshop: *Writing effectively by... knowing when to write it down.*

For more assistance on how and when to communicate with clients, consider reviewing the other Online COACHING CENTRE modules in the **Powerful Communications** workshop.