Left to right: Domenic Bellacicco, Karen Granofsky, Lorne Shelson, Pauline Sheps

Practice pitfalls

LawPRO looks at specific malpractice hazards in different practice areas

It's a risky world out there. Lawyers are reporting more claims. Claims are getting more expensive and complex.

So how can you avoid a malpractice claim? Members of LawPRO's claims team talk about some of the specific pitfalls to watch out for in different practice areas.

Civil litigation

Limitation periods

The most significant recent development affecting litigation (and other) malpractice claims is Ontario's *Limitations Act, 2002*, says LawPRO Claims Counsel Specialist Pauline Sheps. "It's now really difficult to do anything about it when a lawyer misses a limitation period. Judges used to have more flexibility. Now it's very rigid – two years is two years."

"We're seeing more missed limitation periods, both because it is much harder to get a limitation period extended and because some limitation periods are shorter," adds Claims Counsel Specialist Cynthia Martin. "About 50 per cent of our insurance litigation claims involve missed limitation periods."

Lawyers can no longer afford to procrastinate, Sheps and Martin agree. They must either issue claims in time or enter into a tolling agreement to suspend the running of the limitation period.

The basic limitation period now runs for two years from the "date of discovery" of the claim. The common law doctrine of special circumstances, which gave judges more discretion to extend limitation periods, was taken away by the Court of Appeal in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, notes LawPRO Claims Counsel Domenic Bellacicco. "You're therefore stuck with 'discoverability' to extend the running of the two years. To rely on discoverability, you have to show due diligence and reasonable efforts to discover all the parties you need to sue within the two-year period. You must do a proper investigation – and you must do it promptly."

For a comment on *Joseph v. Paramount*, see "Limitations update," LawPRO Magazine, Summer 2008 – www.practicepro.ca/LawPROmag/LimitationsUpdate.pdf.

For example, says Martin, in a motor vehicle case, a lawyer cannot simply rely on the client's advice about the other parties involved in the collision. "If the lawyer just sues driver A, and then after the expiry of two-year limitation period finally gets around to ordering the police report which discloses the fact that there were other vehicles involved that might have been responsible for the collision, the lawyer can't say 'Oh, I only discovered two years and four months after the accident that these other vehicles were involved.' He's negligent. If he had done the due diligence in the first place of ordering the police report, he would have known at the outset who the other parties to the collision were – the parties he needed to sue."

Administrative dismissals

Another development that has increased the number of litigation malpractice claims is the harder line that courts are taking on administrative dismissals of actions for delay. At one time, administrative dismissals could be set aside relatively easily, but that is no longer the case.

In *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, for example, the Court of Appeal upheld an administrative dismissal because the delay in prosecuting the action and in bringing the motion to set aside the administrative dismissal was not adequately explained and this delay was "not unintentional."

For more on this subject see "Administrative dismissal: Take it seriously and ask for (our) help," LawPRO Magazine, July 2009 (www.practicepro.ca/LawPROmag/AdministrativeDismissal.pdf).

Construction lien limitations

Sheps recently spoke to an insured about a claim arising from a missed limitation period. The insured had failed to comply with s. 37 of the *Construction Lien Act*, which requires a perfected lien to be set down for trial within two years of the commencement of the action.

This is one of the most common errors reported in the construction lien field, notes Sheps. It is also an error that cannot be fixed because the court will not allow this limitation period to be extended.

While the lien action could not be saved, happily for the insured no damages will likely flow from the error because the action was pleaded in the alternative in contract. As there is no requirement under the *Construction Lien Act* that an action in contract be set down within two years, the matter could continue as a contract action. This result was only possible because the cause of action in the statement of claim issued by the insured had been pleaded as both a lien and a contract action.

"two years is two years."

If the insured had not pleaded a contract action in the alternative in the statement of claim, it is likely that this action could not have continued, because the two-year limitation to commence a proceeding in contract had also expired.

It is important when litigating a construction lien matter to pay careful attention to all limitation periods, says Sheps. There are limitation periods for trust actions and contract actions, as well as for lien actions. The appropriate legislation and case law should be consulted and the limitation period diarized in order to prevent errors.

Personal injury: beware the desperate client

"Many plaintiffs' lawyers fall victim to clients who desperately need money in the early stages of a personal injury lawsuit," says Martin. "So they settle the client's statutory accident benefits claim early on for a lump sum and have the parallel tort action continue."

But senior, experienced members of the plaintiffs' personal injury bar strongly advise against this course of action, Martin says.

"Accident benefits can be quite extensive, but lawyers will sometimes settle for benefits of only $25,000 in a catastrophic injury case where the client could have received hundreds of thousands of dollars of benefits over a lifetime."

Urged to settle by a desperate client, lawyers will take what they can get on a rush basis from the insurer instead of taking the time to properly investigate and "work up" the accident benefits claim by engaging the expertise of the appropriate medical practitioners.

"And then the tort defendant, later in the day, will challenge the fact that they've compromised some of the benefits, because they're going to try to stick them on the tort insurer," says Martin.

If the client insists on such a settlement in spite of the lawyer's advice, the lawyer should clearly explain the consequences in writing and thoroughly document the settlement instructions.

Public interest advocacy

Representing a public interest group can be risky for lawyers, says LawPRO Litigation Director and Counsel Lorne Shelson. Such a group may, for example, be the target of a SLAPP (strategic litigation against public policy) lawsuit, with enormous costs consequences that its members did not anticipate.

Lawyers are sometimes even named as defendants in such lawsuits. In one case, a lawyer who represented a municipality

also acted for ratepayers who opposed a real estate development. They authorized the lawyer to make an offer to buy a property that the developer was trying to acquire. The property owner used this offer to leverage more money out of the developer, which wound up paying substantially more to purchase the property than it had initially offered. The developer sued the municipality and the lawyer, among others, alleging that he was part of a conspiracy to injure the developer's economic interests. The lawyer had to stop acting for the municipality.

Lawyers who act for public interest groups may find themselves the targets of costs applications. In *Kimvar Enterprises Inc. v. Nextnine Limited* (Jan. 30, 2009), a developer sought to have the Ontario Municipal Board award costs of about $3.2 million jointly and severally against a residents' association and its lawyers after an eight-year battle over plans to build a marina on Lake Simcoe. The developer claimed that the association and its lawyers had unnecessarily extended the length, complexity and expense of OMB hearings. The board dismissed the application, stating "costs should never be used as a threat or a reason to dissuade public participation."

A public interest group may look on its lawyer as a knight on a white charger, but when things go wrong, the group may quickly turn on the lawyer, cautions Shelson. Scattering for cover, the group's members may point fingers at the lawyer, saying "had you properly advised us, we wouldn't have tilted at this particular windmill."

To protect themselves, lawyers should obtain clear written instructions from the client before taking any major steps. They should not encourage false hopes and unrealistically high expectations. They should warn clients in writing about the potential risk of adverse cost awards and SLAPP suits. They might suggest the group confirm that it has insurance that would respond to such a claim. If the group plans to issue a public statement, the lawyer should consider consulting an expert in defamation law. The prudent lawyer will want to document any advice given.

Lawyers should also clearly establish at the outset who is actually retaining and instructing them. Does the person who is giving instructions have authority to do so? Is the public interest group a corporation or association? Are there bylaws? Is there some kind of structure – or is the group just an amorphous ad hoc committee?

As in other areas of practice, excess insurance is a valuable risk management tool for lawyers who represent public interest groups.

Corporate-Commercial

Franchises

Acting for franchisors can be particularly risky for lawyers, warns Claims Counsel Anna Reggio. Although some franchisors are large multinationals, many are small and relatively unsophisticated businesses.

One area of risk involves the onerous disclosure requirements imposed upon a franchisor by the governing statute, the *Arthur Wishart Act*, notes Reggio. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to extensive damages, including the return of its investment in franchise fees, inventory and equipment costs, as well as compensation for any losses incurred by it in acquiring, setting up and operating the franchise business.

Faced with such a heavy damages claim, a franchisor will often claim against the lawyer, alleging that the lawyer either drafted an inadequate disclosure statement or failed to warn the franchisor of the consequences of inadequate disclosure. Given the potentially significant damages involved, lawyers who practise in this area should seriously consider carrying excess insurance.

Lawyers should avoid dabbling in franchise law, says Reggio. "A lawyer should either be an expert in franchise law or have his or her client retain a franchise law expert." The client should also retain a chartered accountant familiar with franchises. The detailed financial disclosure requirements are beyond the scope of a lawyer's typical expertise.

For their own protection, lawyers who represent franchisors must thoroughly explain to them, among other things, the disclosure requirements and the severe consequences of inadequate disclosure. Of course, they should document in writing all advice given and instructions provided.

For a more extensive discussion of the risks inherent in practising franchise law, see "Recent claims trends: franchises" on page 21 of this issue of LawPRO Magazine.

Tax and securities class actions

As reported in the national media, several prominent law firms are currently the targets of class action lawsuits as a result of tax opinions provided by their partners to individuals who then used them, without the firms' permission, to promote investment schemes.

In purported reliance on these opinions, the promoters told investors in these schemes that they would be entitled to certain tax credits and deductions under the *Income Tax Act*. However, the Canada Revenue Agency denied the tax credits and deductions. Some investors were reassessed and required to pay taxes, penalties and interest.

Class actions were then launched on behalf of the investors against, among others, the lawyers who had given the opinions, alleging negligence on their part.

The existence of these actions shows that providing tax or other legal opinions can have potentially serious financial and reputational implications, says Shelson. Promoters may seek opinions from well-known law firms simply in order to lend credibility to their ventures.

Lorne Shelson, Karen Granofsky

An opinion letter should therefore contain a restriction on its use, he advises. In particular, it should specify that it cannot be relied on by third parties or in connection with any transaction or documents other than as identified in the opinion. Any assumptions, qualifications or limits to the opinion should be clearly set out. (Of course, this is good advice for an opinion letter in any area of the law).

Some firms obtain the client's written acknowledgment of the terms on which the firm will render the opinion to the client. Some firms, as a matter of policy, will require that an opinion be reviewed by a second partner knowledgeable in the substantive area of law and the subject matter covered by the opinion.

Class actions offer aggrieved investors potential recourse against all parties associated, however remotely, with a poor investment. Because investors are often desperate to recoup poor investments and class actions hold minimal risk for them, the precautions outlined above are unlikely to prevent these lawsuits. And today the Internet facilitates the recruitment of aggrieved investors as class members.

However, by taking protective steps, a firm can enhance its ability to successfully defend such an action, says Shelson.

Criminal law

Criminal law has not traditionally been a fertile source of malpractice claims, notes LawPRO Claims Counsel Karen Granofsky, but "ineffective assistance of counsel" claims are a growing trend.

For example, a person convicted of a criminal offence appeals the conviction. One of the grounds of appeal is that the lawyer who represented the accused at trial provided ineffective assistance.

The appellate lawyer may ask the trial lawyer to swear an affidavit supporting this ground of appeal. This puts the trial lawyer in an awkward situation. He or she may wish to help the accused overturn the conviction, but swearing an affidavit in support of the ground of "ineffective assistance at trial" may be tantamount to admitting negligence.

These cases should be reported to LawPRO as soon as the allegation is made, says Granofsky, at which time LawPRO can determine whether an affidavit is necessary. If an affidavit is necessary, LawPRO counsel can ensure that no damaging admissions are made.

Lawyers who fail to report such claims to LawPRO promptly may prejudice their insurance coverage.

Family law

When a starry-eyed couple is about to get married, no one likes to think about the possibility of divorce. However, in some cases one side (e.g., the husband – or the husband's family) has assets it wants to protect in the event of a marriage breakdown, so a marriage contract is signed, and the wife agrees to exclude certain property from any

equalization calculation upon breakdown of the marriage. But the couple will live happily ever after, so why worry about understanding the fine print?

If the marriage ends, the spouse who signed away rights to those assets might have serious second thoughts along any of the following lines: "I didn't understand what I was signing." "All assets weren't properly disclosed." "The lawyer did not advise me properly."

"If the agreement blows apart, the person wanting to be protected sues the lawyer saying 'you didn't give me an airtight agreement,'" says Martin, "Or the other party will say to their lawyer 'you didn't make sure that I had proper disclosure of the excluded assets and I didn't realize what I was giving up.' They usually claim they wouldn't have signed the agreement if they had understood what they were agreeing to sign away. If the contract is upheld, they may look to their lawyer for the value of the assets (or the growth on those assets) that they claim they would not have excluded if they had received proper disclosure. On the other hand, if the contract is set aside, the party seeking the protection of the contract may look to his or her lawyer for indemnification for any additional amounts that have to be paid to the spouse by way of equalization."

Such claims can be expensive, considering both parties' costs to litigate as well as, potentially, the value of the excluded asset(s). Conflict of interest could also be alleged, if the lawyer is advising both spouses rather than insisting that one get independent legal advice.

LawPRO continues to see these claims, despite a court ruling (*LeVan v. LeVan*, 2008 ONCA 388) that clarified what needs to be disclosed when creating a marriage contract. Lawyers need to make sure clients are making an informed decision about what they are agreeing to exclude. Too often lawyers don't understand the disclosure obligations or just rely on the word of their clients who say, "We've been living together for years, and *of course* my fiancé knows exactly what I have." Lawyers should document the fact that they have overseen what was disclosed to the other partner. For instance, a spouse may own "1000 shares in John Smith Corporation," but what does that really mean? Should an accountant or business valuator be reviewing the contract? That costs money, and often the client just wants to get on with things and not pay more than they think is necessary.

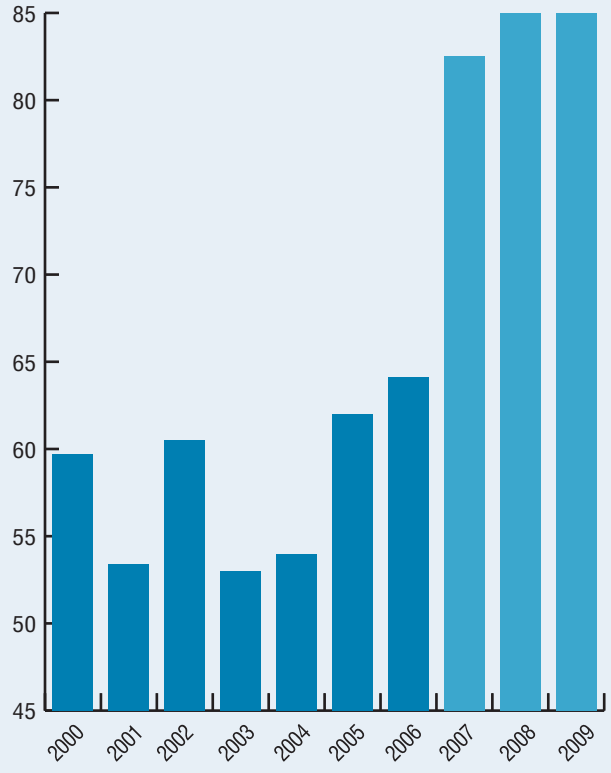
The lawyer's best protection: Document exactly what the client was advised to do, and what advice the client declined to follow despite being advised of the potential risks.

Sheps advises insureds that if the lawyer has done all of the above it makes it easier for LawPRO to defend a claim. "Reporting letters are extraordinarily important," she says "We know we have to do them in real estate transactions. We should do them in family matters, too." Having a standard template or checklist for reviewing agreements can make the process of documenting your advice easier.

Separation agreements negotiated "on the courtroom steps" when counsel don't have their precedents with them are another frequent source of claims against lawyers, says Sheps. Her practice tip: Use technology to protect yourself. Take your laptop with you to court so that your precedents are readily available and you can draft a proper separation agreement. Have your client sign off on the draft contract. Otherwise, you are open to a claim from your client that "no, I didn't agree to that."

For more on avoiding family law claims, see "Family law: An increasingly risky business," LawPRO Magazine, July 2005 (www.practicepro.ca/LawPROmag/Familylawclaims.pdf)

Case incurred claim costs (in $millions)



As reported earlier this year, claims costs have entered a new era in which annual costs are projected to be in the $85 million plus range. Generally, claims costs are up more than 30 per cent for the last three years of this decade: Where at the beginning of this decade the average cost of claims reported annually stood at about $56 million, that number has now jumped to about $84 million for the 2007-2009 period.

Note: For 2000 to 2007, costs include claims paid plus reserves assigned to unresolved claims for each fund year, but exclude costs for general program administration and applicable taxes. For 2008 and 2009, costs reflect management projections based on claim reports as of June 30, 2010, as between 30 and 50 per cent of claims reported in those years are still unresolved.

Internet liability

The Internet, of course, is not an area of practice.

But statements that lawyers make on the Internet, whether on law firm or other websites, in blogs, or on social media sites such as Facebook, are a significant potential growth area for claims, says Shelson. The Internet makes it all-too-easy to rapidly broadcast information to a huge audience.

Lawyers need to think carefully about the consequences of their posting Internet press releases or blogging, particularly because these activities do not attract coverage under the LawPRO professional liability program.

Statements made on behalf of a client before a statement of claim is issued are potentially defamatory. Although absolute privilege attaches to a statement of claim used in the ordinary course of the administration of justice, communications made in advance of litigation may not be entitled to this defence. Republishing on a law firm website allegations made in a statement of claim may also be defamatory.

> For more on this subject see "Is the defence of absolute privilege available for communications in advance of litigation?" LawPRO Magazine, May/June 2010 (www.practicepro.ca/LawPROmag/AbsolutePrivilege.pdf).

Answering legal questions over the Internet is also an area of potential risk – "an exposed flank for claims by non-clients," says Shelson. Lawyers should provide only general legal information to non-clients, accompanied by clear warnings that it is only general information and that the recipient is not a client, and by a recommendation to retain a lawyer for specific legal problems.

Since many Internet exposures are not insured under a professional liability insurance policy, lawyers should identify with their insurance broker their particular exposures and what types and scope of insurance may be available to them, as this type of claim is not covered under the LawPRO program.

Email poses another set of risks. "Beware the informality of email," cautions Shelson.

Implicit undertakings may lurk in email messages and pass unchallenged. In one case, lawyer A forwarded an email from his client to lawyer B. Lawyer B treated a statement made in this email as sufficient evidence of an undertaking by lawyer A, although lawyer A had not intended to give one.

Never let any suggestion that you've undertaken to do something go by without setting the record straight, says LawPRO Litigation Director and Counsel Yvonne Bernstein. If you don't respond and disabuse the sender of that notion, you won't have any evidence later on that you didn't give the undertaking. The informal nature of email makes it particularly easy to overlook such a suggestion in an email message.

Even where an undertaking is intended, "loosey-goosey" email communications may create uncertainty about its nature and scope.

Real estate

When lawyers think about real estate fraud, they tend to think about fake clients with forged ID obtaining fraudulent mortgages, or flip frauds where the value of a property is artificially inflated. They rarely think of shelter fraud – a very real source of claims involving real people who want real places to live.

In this scenario, people who don't qualify for a mortgage enlist the help of a "friend" or family member. For a payment, the "friend" becomes the borrower and takes title to the property and presents himself to the lawyer as the happy purchaser of the home. In effect he's selling his good credit. Of course he has no intention of living there, and the person(s) who hired him will move in and promise to make the mortgage payments.

The risks for lawyers in this arrangement are obvious: When the person(s) behind the scheme default on the mortgage, the "friend" will find he is on the hook, pursued by the bank and facing financial ruin. The friend may sue the lawyer claiming that he was not aware of what he was getting himself into, and that the lawyer knew (or should have known) that he was buying on behalf of others and should have made him aware of the consequences of defaulting on the mortgage.

Also, lawyers in the majority of residential real estate matters represent the lender as well as the borrower, but their duty of care to the lender is sometimes overlooked. "Lawyers often forget, because they see the purchaser right in front of them talking about when they get the keys, that the bank is their client too," says Mitch Goldberg, senior claims counsel at LawPRO. "They have to provide the bank with any information that is material to the transaction." The lending bank can bring claims against lawyers for failing to disclose all the relevant information they knew (or should have known).

This type of claim could also be considered "inadequate investigation," which is an especially prevalent error type in high-volume real estate practices. Often, there are signs that a shelter fraud is taking place: The client may not seem to know much about the property being purchased. Or he may be taking instructions from others who are not part of the transaction. If lawyers have suspicions about the intent to occupy where it appears that the lender thinks it is making a mortgage loan to an owner-occupier, lawyers must take some steps to satisfy themselves that the purchaser is indeed planning to live in the property, and not just take the deal at face value. (Of course, where the purchaser is a prospective landlord, other obligations can apply relating to the assumption of tenancies, rent control or building compliance issues.)

Granofsky stresses that it's important to document the inquiries lawyers make. "Lawyers often don't document the nature of their inquiries, even if they do ask the questions. Then it comes down to credibility, because the claimant will invariably deny that she was asked the questions." While there is only so much lawyers can do to ensure the borrower is in fact the person planning to live in the house, even having the client sign a declaration to that effect could be protection against a claim later on. Also, thoughtful disclosure

Left to right: Anna Reggio, Mitch Goldberg, Yvonne Bernstein, Cynthia Martin

to the clients (both purchaser and lender), which is part of meeting the joint retainer obligations under the *Rules of Professional Conduct*, can help to protect a lawyer in a situation where it was impossible to obtain clear evidence.

Wills & estates

Changing demographics are also leaving their mark on trends that concern LawPRO counsel: We are seeing increased potential for claims surrounding issues of the capacity of elderly clients and undue influence. The increased number of elderly clients with large estates also increases the risk that family disputes will entangle the lawyer.

If elderly clients come in requesting a major mortgage refinancing or change to their wills, it is important that lawyers not just take matters at face value. Dig below the surface to find out what's going on. Be very wary of undue influence and ask "who's benefiting from this arrangement?"

Don't have the client in the same room as their son or daughter if they've all come to discuss changing the will or refinancing the family home for the children's benefit. If there is a language barrier, don't just rely on the "translation" of another family member. Have written proof that the advice was given regarding risks inherent in what the elderly clients are proposing or the need for independent legal advice, and perhaps have the client provide a letter explaining his or her motives.

Some lawyers now tape their meetings with clients in such situations (with client consent, of course). And finally, the lawyers must be aware of who they are acting for and avoid giving advice to parties with conflicting interests. All of this puts a burden on the lawyer, but as Goldberg says, "the reality of practice today is that you have to spend enormous amounts of time protecting yourself."

Complicating things further is the question of capacity. When acting for elderly clients who want to make significant changes to their wills, lawyers have to be very careful about how they satisfy themselves that the clients have capacity and how evidence of that capacity is documented, because there's a good chance that the will may be challenged and the lawyer will be drawn into the dispute.

Bernstein sees this as an issue of spotting the danger signs. "If you have clients who are in their late 80s, in a nursing home, with a substantial estate and numerous children, I see red flags. And if the new will distributes the estate in a dramatically different way so that some children get less than what they would have received under the old will, I see a will challenge on the horizon." Having documentation that steps were taken to rule out undue influence and verify capacity could protect lawyers from costly claims.

For more on dealing with elderly clients, see the Winter 2007 issue of LawPRO Magazine (www.practicepro.ca/LawPROmag/LawPROmagazine6_1_Jan2007.pdf)

Norman MacInnes is corporate writer/editor at LawPRO. Tim Lemieux is practicePRO coordinator at LawPRO.