

Inadequate investigation/discovery now

#1 cause of claims

The message?

Ask more.

Dig deeper.

Consider checklists.

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

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

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

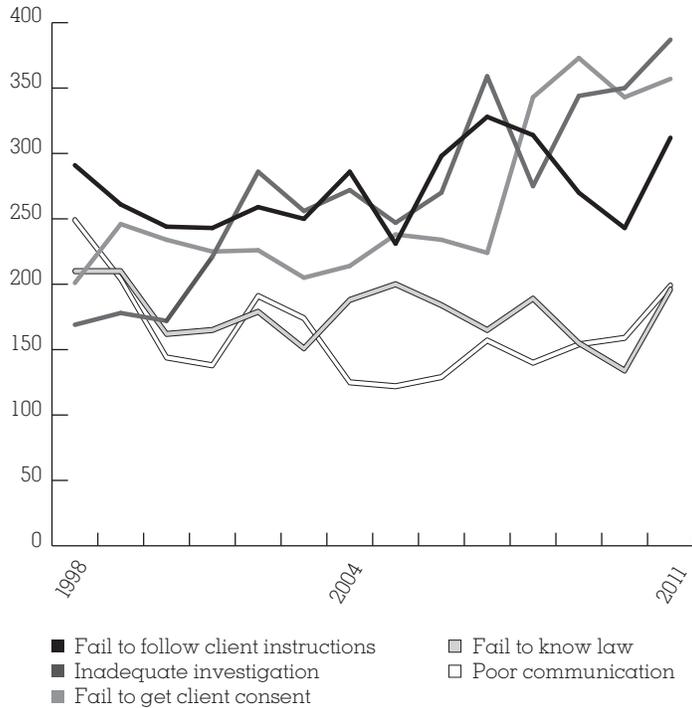
Since then the claims cause of “inadequate investigation” has climbed steadily upwards to the number one spot: By 2011, this category of errors had more than doubled in frequency. Moreover, claims resulting from inadequate investigation or discovery of facts also increased proportionately in terms of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

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

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

Graph 1

Top 5 causes of claims by count



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

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

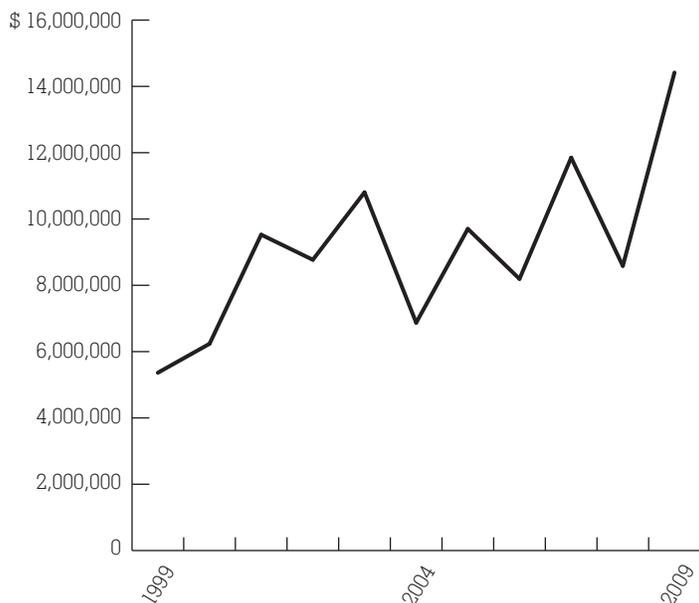
And while it's true that all claims costs have increased over that time, errors resulting from inadequate investigation have increased disproportionately when all LAWPRO claims are analyzed. Between 1999 and 2009, the proportion of claims costs attributable to inadequate investigation increased to 15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

Areas of law in which inadequate investigation claims predominate

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

Graph 2

Cost of inadequate investigation claims



Real estate

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

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

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

Plaintiff litigation

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

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

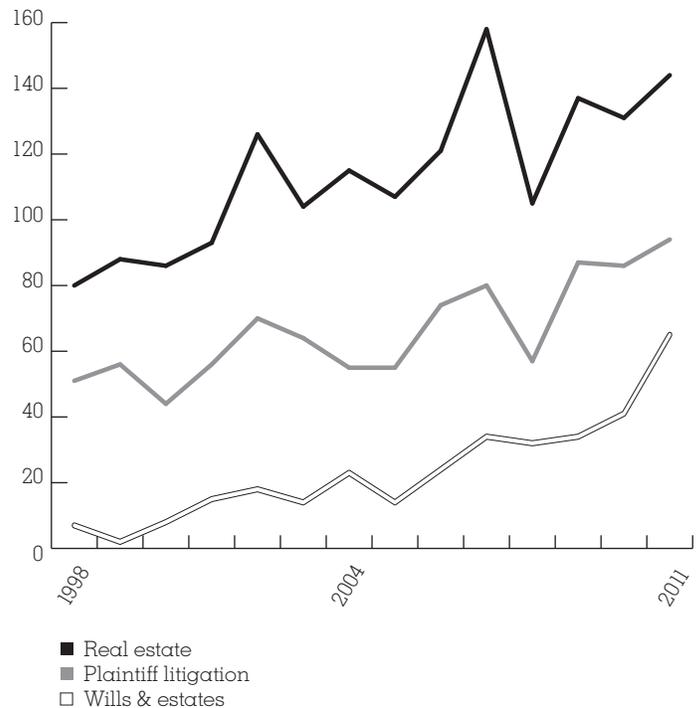
Wills and estates

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

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

Graph 3

Inadequate investigation claims by area of law



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

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

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