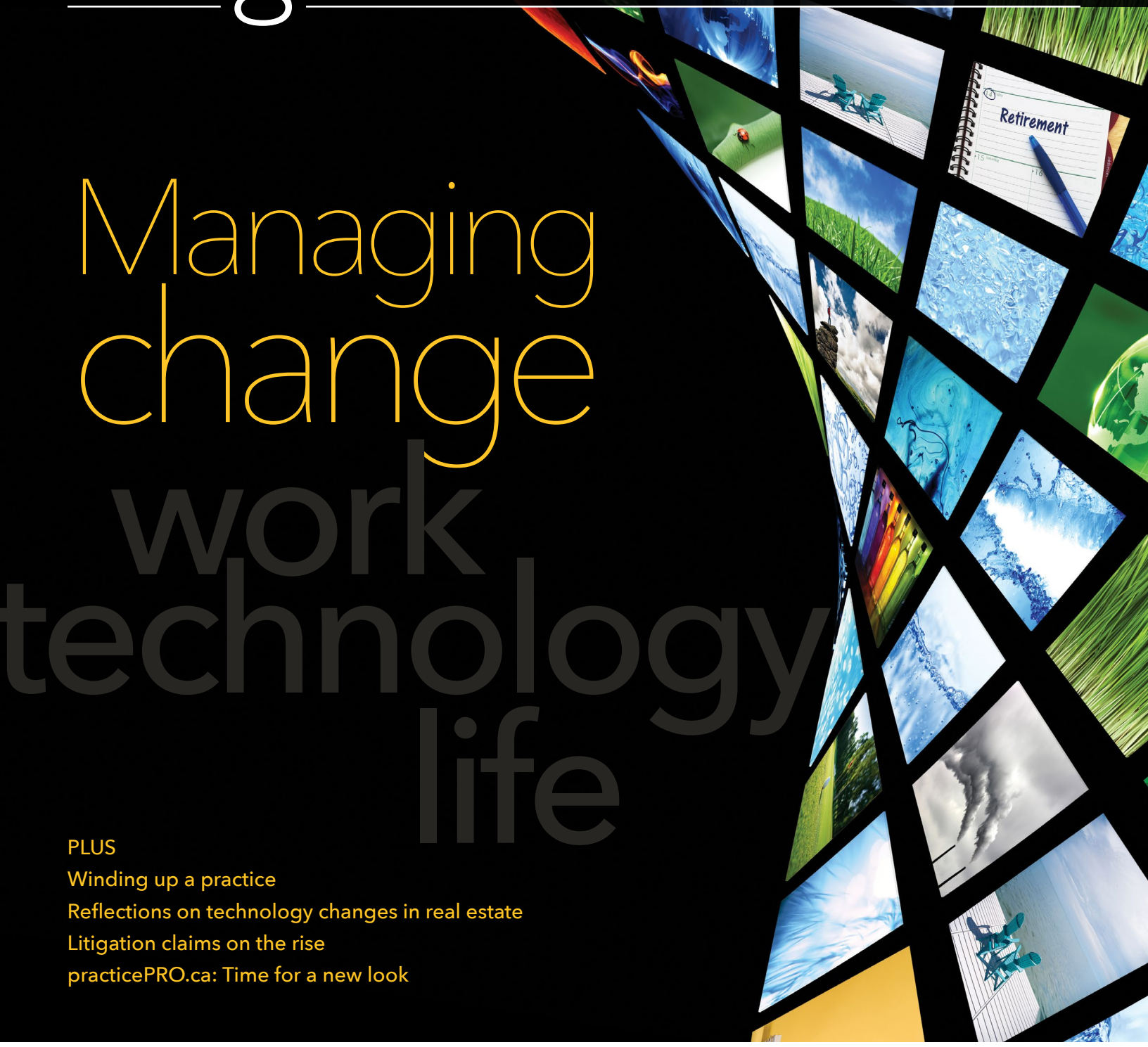
LAWPRO magazine

SEPTEMBER 2017 VOL 16.3



Managing change

work
technology
life

PLUS

Winding up a practice

Reflections on technology changes in real estate

Litigation claims on the rise

practicePRO.ca: Time for a new look

upcoming events

September 27, 2017
Osgoode Professional Development
Dealing with the amendments to Rule 48
Cynthia Miller presenting
Toronto, ON

September 29, 2017
Frontenac Law Association
1000 Islands Legal Conference
Cyber risks and LawPRO after retirement
Ray Leclair presenting
Gananoque, ON

October 12, 2017
Sudbury District Law Association
Colloquium 2017
Cyber risks and LawPRO after retirement
Ray Leclair presenting
Sudbury, ON

November 2, 2017
Hamilton Law Association
Current issues in professional responsibility in real estate transactions
Ray Leclair presenting
Hamilton, ON

recent events

June 3, 2017
Lerners LLP
Lerners Retreat
Cybercrime dangers and how to avoid them
Ian Hu presented
Minett, ON

June 8, 2017
Law Society of Upper Canada
Solo and Small Firm Conference 2017
Insurance policies for your law firm
Ian Hu presented
Toronto, ON

June 9, 2017
Simcoe County Law Association
Family Law Conference
Cybercrime dangers and how to avoid them
Ian Hu presented
Barrie, ON

June 9, 2017
Canadian Bar Association
CBA's Annual Immigration Law Conference
Cybercrime dangers and how to avoid them
Dan Pinnington presented
Toronto, ON

June 12, 2017
Ontario Superior Court of Justice & Court of Appeal
Judicial Law Clerks Lunch & Learn
From law clerk to lawyer
Ian Hu presented
Toronto, ON

June 15, 2017
Law Society of Saskatchewan AGM
Panel Discussion
Technology and the changing legal landscape
Dan Pinnington presented
Regina, SK

June 22, 2017
Zuber & Co Lunch & Learn
Cybercrime and law firms; neuroscience and malpractice claims
Ian Hu presented
Toronto, ON

June 22, 2017
American Bar Association
Law Practice Webinar
Getting and keeping the right clients
Dan Pinnington presented

July 21, 2017
Advocates' Society
Stress Free Litigation – A Myth?
Reducing your stress with proper time and practice management tools
Ian Hu presented
Toronto, ON

July 30, 2017
Association for Continuing Legal Education
ACLEA's 53rd Annual Meeting
Is the substantive law focus of CLE all wrong?
Dan Pinnington presented
Montréal, QC

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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LawPRO® (Lawyers' Professional Indemnity Company)

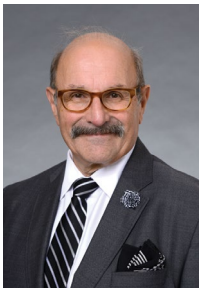
TitlePLUS program celebrates 20 years!

On September 25th, the TitlePLUS program will celebrate a significant milestone – its 20th anniversary. Twenty years ago, few people had heard of title insurance but today, it is an integral part of the real estate transaction. The TitlePLUS program is about more than just title insurance – it is designed to address the changing realities facing the real estate bar and consumers.

"Helping Canadian lawyers and Québec notaries better meet their clients' needs while providing excellent protection for their real estate transactions is the mission of this important initiative," Lisa Weinstein, Vice President, TitlePLUS.

Congratulations to the TitlePLUS program!

Jerry Udell receives OBA Award of Excellence in Real Estate



Congratulations are also in order to LawPRO board member, bencher, and well known real estate lawyer, Jerry Udell. On June 20th, the Ontario Bar Association presented Jerry Udell with the Award of Excellence in Real Estate.

This award recognizes Jerry's exceptional contributions and achievements in real estate law and we are proud to work with him.

Key Dates

September 15, 2017

File your LawPRO Risk Management Credit Declaration by this date to qualify for the $50 premium discount on your 2018 premium for each LawPRO-approved CPD program (to a maximum of $100) completed by this date.

On or about October 2, 2017

LawPRO online filing of Professional Liability Insurance renewal applications for 2018 is expected to begin. If you wish to file a paper application instead of filing online, please note that paper renewal applications will not be automatically mailed out, but it is expected that you will be able to download a 2018 pre-populated paper renewal application from our website starting on or about October 2, 2017.

October 31, 2017

Real estate and civil litigation transaction levy filing and payments are due for the quarter ended September 30, 2017.

November 7, 2017

E-filing deadline: Renewal applications filed online on or before November 7 qualify for a $25 per lawyer e-filing discount applied to the 2018 insurance premium.

November 14, 2017

Renewal Application filing deadline: 2018 LawPRO renewal applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium.

LawPRO magazine

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LawPRO Magazine is published by Lawyers' Professional Indemnity Company (LawPRO) to update practitioners about LawPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LawPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

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

The full content of these newsletters is available at lawpro.ca. To ensure you receive timely information about deadlines, news and other insurance program developments, please make sure LAWPRO has your up-to-date email address and that your spam filter allows emails from LAWPRO.

Webzines/Magazines

Business law changes and claims trends in corporate, commercial and IP Webzine

June 20, 2017

This webzine contained risk management resources for corporate and commercial lawyers. When it comes to avoiding claims, old school skills like lawyer-client communication, proofreading, and staying organized still offer the best protection.

Inspiration and resources for new lawyers Webzine

May 24, 2017

The articles featured in this webzine help new lawyers get a running start. An intentional, disciplined approach to building a practice will pay business and risk-management dividends.

2016 Year in Review Magazine

May 16, 2017

This issue looks back at our financial and claims management performance in 2016. An article chronicling a year in the life of the practicePRO initiative, and coverage considerations for lawyers acting as general counsel within law firms is also featured in this issue.

Frequently asked questions and a CPD program on the LTT and NRST changes Webzine

May 1, 2017

To assist the real estate bar, LAWPRO shared information provided to us by representatives of the Ministry of Finance on some of the questions and issues raised by the changes to the Land Transfer Tax (LTT) and the new Non-Resident Speculation Tax (NRST).

Alerts

LTT/NRST changes mandatory as of today: Get answers to common questions

May 8, 2017

Changes to the Land Transfer Tax and the new Non-Resident Speculation Tax (NRST) became mandatory starting May 8, 2017. To help real estate lawyers take steps to comply with these changes, a list of questions and answers are available on avoidaclaim.com: see the post "Always up-to-date LTT and NRST Frequently Asked Questions."

Insurance Reminders/News

Apply for your LAWPRO Risk Management Credit by September 15

August 16, 2017

A reminder that up to $100 can be saved on your 2018 LAWPRO premium by completing the online Risk Management Premium declaration form no later than midnight, September 15, 2017.

Transaction levy filings overdue

June 20, 2017

A reminder that the deadline for submission of levy filings relating to transactions completed between January 1, 2017 and March 31, 2017 was April 30 of this year.

The amorphous now

Dealing with ambiguity is one of the most important skills a leader can master. Making decisions when all necessary information is not at hand helps to keep our economies, businesses and even families moving forward. There often isn't enough time to gather all the pertinent data – it just doesn't exist, or it's too expensive. Every day, we make decisions, which will affect our own lives or the lives of those around us. This state is what I call *the amorphous now*.

How can we best deal with the amorphous now?

When the shape or form of our present, let alone our future, is not well defined it can be difficult to know the best way to move ahead.

This issue of *LawPRO Magazine* looks at a number of changes that we may face: selling or retiring from practice; technology to help us succeed or cybercrime we need to avoid; rules and regulations that mean we need to change to avoid costly mistakes; and actions we need to take that can help protect us in the future. It's amazing that we're not all frozen with indecision.

When I think about insurance and its place in our lives and businesses I am comforted that its role is to assess future risks now so we can follow a safer path for our future. Insurance companies need to set aside resources not knowing exactly what, or how much, will be needed in the future. We manage ambiguity as a core business function.

Actions we take are aimed at making our insureds feel more comfortable with the ambiguity they face each day.

Now is amorphous because we're in the thick of it but even though we can't see all the answers, our future is dependent on the actions we take now, even though our vision may be obscured.

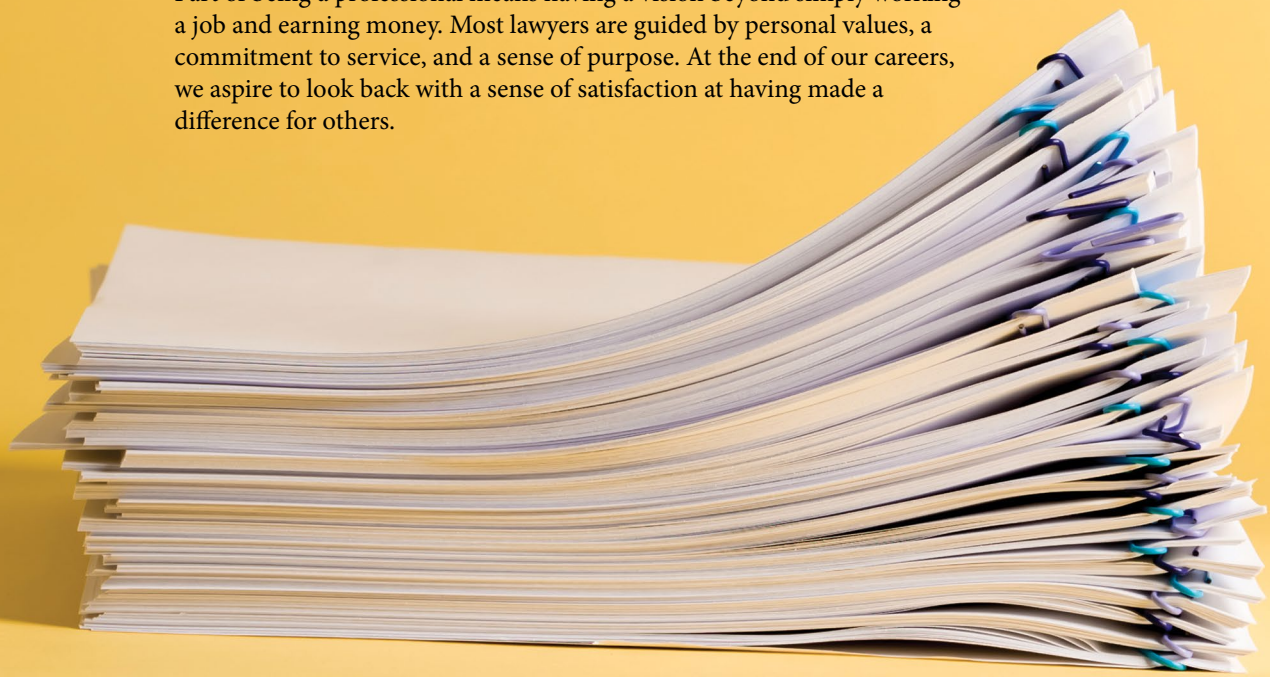
Kathleen A. Waters
President and CEO

The graceful exit:

leaving practice on a high note

In the last few years of their careers, many lawyers begin to think about the meaning of legacy. What has been my contribution? How will I be remembered?

Part of being a professional means having a vision beyond simply working a job and earning money. Most lawyers are guided by personal values, a commitment to service, and a sense of purpose. At the end of our careers, we aspire to look back with a sense of satisfaction at having made a difference for others.



The way in which we bring our legal careers to a close can greatly influence whether or not we succeed in achieving that sense of satisfaction. While the money we've saved for retirement can help us feel financially secure, money can't buy the conviction that we have served honourably and in a manner consistent with our values. Taking care to wind up our practices while leaving our clients, colleagues and employees better off than when we found them is essential to a satisfying legacy. So how do we do it?

Build for the future, close the doors, or both

Despite increased interest in recent years in the purchase and sale of law practices, most lawyers choose instead to simply wind up their files. Long-lasting and successful lawyer-client relationships are often driven by intensely personal factors like trust, familiarity, and fit. To clients, a lawyer, especially one in sole practice, and his or her firm can be synonymous – when the lawyer retires, the client may not necessarily be content to simply be transferred (or sold) to a replacement. This can be especially true if the relationship has been long, and the proposed replacement lawyer is much younger than the original lawyer; or if the retiring lawyer was a recognized expert in his or her area of practice and the newcomer is just starting out.

Lawyers who practise with others may have the opportunity to have their business bought out by partners, either via a lump sum or in the form of a percentage paid on transferred files. Relationships with trusted partners and associates make it much easier to seamlessly transfer open files, and offer a sense of comfort that valued clients will continue to receive high-quality service. Working in a firm can also allow for the re-allocation of clerks and other staff within the organization, and for the preservation of closed client files in an existing and secure data management system.

The "of counsel" approach

Many lawyers, near the conclusion of their careers, opt to serve the firm for a time in an "of counsel" role. Some retiring sole practitioners have also had success moving their practices under the umbrella of a local firm to become of counsel there. This strategy allows for the gradual transfer of client files to other firm lawyers while the retiring lawyer has his or her name on the letterhead – a factor that can enhance the likelihood that the clients will stay with the firm. The arrangement provides an income stream (often, explains Leclair, in the form of a percentage of billings on the acquired files) to the retiring lawyer while he or she transitions gradually out of practice by taking on a new role as advisor to the firm instead of to clients directly. Of counsel work allows retiring lawyers to mentor others and to maintain some connection with the law, at least for a period of time.

Of counsel arrangements don't eliminate the need to comply with Law Society practice-closure rules: clients still need to be given notice, and the lawyer still needs to get off the record. Funds in the

lawyer's trust account must still be carefully accounted for, whether they are transferred or disbursed. Also, especially in smaller centres, a certain number of files may need to be transferred to external lawyers due to conflicts. But anecdotal reports suggest that transferring a practice to an existing firm may be a more successful strategy, on average, than a traditional sale.

You need a long term plan

Retiring from a small practice requires long-term planning. Jan Goddard, founder of Goddard Gamage LLP, recommends that succession planning be incorporated into a firm's strategic planning from the beginning: "As soon as you hire someone else, [the practice] is no longer about you alone. We owe it to younger lawyers to provide them with opportunities, and that means making a commitment to them at the firm level."

Retiring lawyers who wind up a practice from within a firm must still comply with the Law Society's *Rules of Professional Conduct* as they apply to closing a practice. This includes giving notice to clients, terminating retainers without prejudicing client interests, getting off the record in litigation matters, returning client property and money, and taking steps to destroy and/or store client files while maintaining confidentiality. (See the box on the right for highlights of these rules; for detailed information, consult the Law Society's "Guide to Closing Your Practice for Lawyers" which is available at lsuc.on.ca)

Sole practitioners and lawyers in small firms can also choose the winding-up route, but it will involve a little more planning and lead time, particularly where the lawyer was very busy, or practised in a niche area. In general, it's best to choose a date well in advance of your proposed retirement date after which you will stop taking on new retainers. From that day forward, you can focus on completing the work required in active files, and in advising and/or referring clients who will need to retain new counsel.

Looking for a buyer? Timing is key

Selling an active practice is an option investigated by many lawyers who practise alone or in small firms. While challenging to achieve, a sale can be particularly appealing to lawyers working in remote or under-served communities. Where a retirement would leave a community without access to a local lawyer, selling instead of closing a practice can benefit not only the lawyer, but also his or her clients. Ray Leclair, now Vice President, Public Affairs at LawPRO, once purchased a practice from a mid-career lawyer who was moving across the country. Leclair found the practice attractive because he could continue to serve clients in the departing lawyer's office, which shared space with the local family doctor. "But what turned out to be the most important factor in the success of the transition," says Leclair, "was the departing lawyer's mother. She was the receptionist at the doctor's office, and she was very friendly and

Rules of Professional Conduct applicable to practice closure:

The highlights

- Give notice to clients of your pending retirement (Rule 9.2)
- Get off the record in all active tribunal files (Rule 9.4)
- Complete all undertakings and satisfy trust conditions (Rule 9.5)
- Keep your insurance in place until the last reporting letter is sent (Rule 9.6)
- Maintain the confidentiality of client files whether you destroy or retain them (Rule 9.8)
- Keep files that might be relevant to a claim against you (Rule 9.8)
- Follow the rules for closing your trust account (Rule 9.12)
- Give LawPRO 60 days' notice of your intent to close your practice (Rule 9.14)
- Have your mail and email redirected (Rule 9.14)

well-regarded in the community. She recommended me to people at every opportunity. She was trusted in the community, and so her recommendation had weight."

Jan Goddard has, like many others in the profession, observed the phenomenon of small-town lawyers struggling to find someone to take over their practices as they approach retirement age. She observes that this problem might be best avoided by hiring another lawyer much earlier in one's career. Developing as a lawyer often requires making space for younger lawyers to come in and take on simpler matters so that the founder can tackle more complex files and avoid boredom and stagnation.

If selling your practice is your goal, it is essential to begin planning for it well in advance of the date you hope to retire. For one thing, it can be difficult to attract a lawyer in whom you have confidence and who has the financial means to buy a practice, particularly if you work far from a major centre. Many lawyers who have sold practices report that it's important to be prepared for false starts: the new arrangement has to satisfy both you and your successor, and it's not uncommon for the fit to be wrong. If you are not confident in the commitment or ability of the new lawyer, you won't feel good about the deal.

A poor fit can also mean a poor rate of return business. Depending on how you structure the purchase deal, this may have significant financial consequences not only for your buyer and your former clients, but also for you. Many purchasers prefer to see the purchase price paid in instalments, with instalment amounts contingent on the profitability of the practice after the transition.

Some arrangements provide for an initial up-front payment, with a second instalment payable a year (or more) later. The amount of the second instalment can be tied to a metric (for example, a billings target, or a number of return retainers) devised by the parties. Another option involves the purchasing lawyer paying a percentage of (collected) billings from return business from former clients.

Sellers who insist on an upfront price may have trouble getting a buyer to agree to a valuation formula. Kathleen Geiger, proprietor of Geiger Law Practice Sales, contributed to the "Succession Planning: Buying and Selling A Law Practice" module of the Ontario Bar Association's Enterprising Lawyer series. In her presentation she reported often finding herself in a position of having to talk lawyers down from their initial assessment of what a law practice is worth. For example, some lawyers fail to take into account the contribution of their own labour to a practice's value. Said Geiger, "you have to come up with a figure that represents the value of your labour – whatever it is you require to cover your living expenses – and subtract that number from the firm's net earnings." In other words, if a firm brought in net billings of $200,000 annually, the true profit is not $200,000, but rather, $200,000 minus $75,000 – the notional value of the lawyer's labour – so, $125,000.

The other valuation mistake commonly encountered, notes Leclair, relates to failure to sell the practice at the peak of its profitability. "After several years of financial success, lawyers may begin to decline retainers or work fewer hours. When attributing a value to their practices, however, these same lawyers may call to mind the peak years before the slowdown." These lawyers may believe that the more leisurely recent pace was a matter of personal choice, and so does not reflect what the practice is worth. "They may set an asking price based on the firm's peak earnings," says Leclair, "but the buyer will likely argue that those earnings are no longer achievable: many clients have moved on, and open files are stagnant."

In the worst-case version of this scenario, the lawyer has been not simply leisurely, but negligent. The incoming lawyer may discover that limitation periods have passed, file deadlines have been missed, or renewable agreements have lapsed. Errors of law may plague some files if the lawyer hasn't made the effort to maintain current legal knowledge. The result can be claims against the retired lawyer, and even against the purchaser, if he or she doesn't act promptly to identify and tackle problems.

The takeaway? If you are hoping to sell your practice, sell it while it's firing on all cylinders, at the peak of profitability. Also, buy-up your run-off coverage for at least a few years after retirement to ensure you have high enough coverage limits to handle potential large-value claims (see "Don't let claims follow you into retirement" on page 23 of this issue for details).

Whatever your plan, you'll need to invest some time and effort

Even if you plan to simply wind down your practice, doing it in an organized and responsible way is essential if you hope to protect your legacy from claims. Settling on a retirement date several months – or even a couple of years – in advance will give you the time you need to properly close and store certain files, and to identify trusted colleagues to whom you can refer the rest. This is a process that requires both strong communication and an openness to lawyers who have different needs and career goals. Says Goddard, "as a profession, we need to help lawyers speak to each other across the generations and figure out each other's priorities."

To be truly productive, this conversation must be both open and respectful. The lawyers of Goddard Gamage LLP hired an outside facilitator to support their succession planning efforts. "We hoped it might be a way to overcome any imbalance of power as between the younger and older cohorts so that, as a firm, we could forge a common commitment to everyone's needs."

You will also want to consider client service related succession planning issues, some of which we touch on in "Don't let claims follow you into retirement" on page 23. At least two months ahead of the big day, you'll need to be sure to contact LawPRO to advise of your upcoming retirement and to obtain information about run-off coverage. ■

Nora Rock is Corporate Writer and Policy Analyst at LawPRO.

Reflections on technology changes in real estate practice

Online real estate portals support client satisfaction, risk management, and profitability

Facilitating transfers of real estate has been the bread-and-butter of thousands of Ontario lawyers for generations. Despite occasional market wobbles, real estate business has helped firms to flourish in communities of all sizes, often supporting the delivery of family, estates, commercial and even criminal law services. Healthy real estate practices support both lawyers' own families and access to justice for their neighbours. But there is danger in taking the bread-and-butter work of one's practice for granted, and in forgetting that just as real estate supports lawyers, lawyers must support the system in which those real estate transactions are completed.

Real estate under pressure

While property law is long-standing and traditional, modern influences are shaping the real estate market. Population growth and the concentration of employment in major cities have spurred sharp increases in property values. Demand for urban property has quickened the pace of deals, folding elevated risk into the mix as homebuyers forego home inspections and financing conditions to gain an edge in bidding wars. At the same time, new technologies reduce lawyer-client and client-lender face time, creating a changing dynamic in those relationships.

Most of the opportunities created by emerging technologies, however, are legitimate. The electronic transmission of transaction information between lenders and lawyers saves time and money, prevents communication lapses, and allows those lawyers who are willing to adopt new approaches to interaction to handle more deals. And pressure to adopt new technological supports is coming not only from the lender client, but from buyers and sellers as well.

According to the 2016 *Home Buyer and Seller Generational Trends* study conducted by the US National Association of Realtors, millennials (aged 35 and under) made up the largest share of US homebuyers – 35 per cent – in 2015. The same study found that millennial and Gen-X buyers were the most likely to use a tablet

or mobile-based search tool in their property search, and that millennials were less likely than the older Gen-Xers to rely on in-person strategies like visiting open houses. These tech-friendly millennial homebuyers will have the same influence on Canadian markets. In its own 2016 study[1], BMO reported that 76 per cent of millennials currently renting expect to buy homes within the next five years.

Too young to remember life before the internet, many millennials are more comfortable than are older generations with accelerated change. They are accustomed to quickly getting up-to-speed with new technologies. It is not surprising that they expect the same technology-friendly attitudes in their legal advisors, and that they also expect to be given access to shared tools – such as online transaction management portals – to monitor and participate in transactions. Lawyers who hope to continue in the practice of residential real estate law will need to engage with technology, actively considering and comparing solutions, including online portals, which propose to streamline and safeguard real estate deals.

Foot-dragging with respect to electronic solutions has been defended, by some, on the basis of risk avoidance. A vague awareness of cyber threats has led some lawyers to view technology with blanket distrust. But uninformed attachment to dated practices like internal data storage and email communications may leave lawyers exposed to greater privacy risks than would innovation. The pace and cost of change in security standards is quickly outstripping firms' capacity to keep up. Safeguarding client data is a complicated and critical task to which law firms must turn their attention. This means firms must come to grips with the time, money, and expertise needed to deal with information security.

Concerns about other risk exposures, such as the risk of practice errors, may be equally unjustified. While technological supports to practice may lead to the "automation" of certain tasks, the systems currently available anticipate a robust role for legal oversight and free up administrative time, allowing lawyers to focus on the aspects of transactions that most require their involvement. The increased transparency of electronic communication systems that allow information-sharing among multiple parties – including buyers, sellers, and lenders – minimizes the gaps in communication and misunderstandings that lead to about 40 per cent of malpractice claims. In other words, embracing technology may actually make the practice of law safer for lawyers.

It is worth remembering that technology-savvy millennials need to be considered not only in the context of the client base, but also, as the newest members of law practices. Recent law graduates are comfortable with technological change, and are likely to judge potential employers at least partly on the basis of how effectively they incorporate technological supports and solutions into the work of the firm. A lack of strategic leadership from the top when it comes to technology may leave firms struggling to attract or retain new talent.

The adoption of technologies to systematize real estate practice imposes a learning curve and requires an investment of time. However, it is becoming increasingly clear that opting out of that investment or even delaying the transition will mean lawyers are in danger of being left behind by other market players who seek to replace them. In fact, the wisest lawyers will instead demand to be at the forefront of the development of the tools that shape their future practices.

The challenge: Real estate is a B2B/B2C system that requires multi-party communication and collaboration

Real estate transactions require a uniquely collaborative approach. Leading up to a transfer of title, buyers must collaborate with lenders (sometimes through brokers), often with the support of other specialists such as property valuators and insurance professionals. Sellers collaborate with real estate agents. As the proposed deal moves toward closing, both buyers and sellers engage the services of lawyers, who may in turn recommend the services of search and survey providers. Lawyers may act as the liaison between parties and land developers or condominium corporation representatives, and may assist with the purchase of title insurance.

As a result, the real estate community is at the same time a business-to-business (B2B) and a business-to-consumer (B2C) system. It depends, for successful operation, on the timely compilation, interpretation, and dissemination of many different but interrelated reports and analyses.

Communication between the business and consumer parties involved in a real estate transaction is multifaceted, and communications serve a wide range of purposes. Here are just a few examples:

> **Parties receive instructions** – for example, a lawyer receives instructions from a buyer to waive conditions, or a borrower receives notice of the terms of a mortgage commitment from a lender.
>
> **Parties assign tasks to each other** – for example, a buyer may ask a home inspector to conduct an inspection, a lawyer may ask a buyer to arrange home insurance, or a lender may ask a lawyer to obtain details from a borrower.
>
> **Parties receive advice** – both seller and buyer receive advice from their lawyers, buyers receive advice from mortgage brokers and home inspectors, and lenders receive advice from valuators.

[1] See "First-Time Millennial Home Buyers Expect to Spend Average of $350,000: BMO Report" at newsroom.bmo.com/press-releases/first-time-millennial-home-buyers-expect-to-spend--tsx-bmo-201604131050390001

Parties confirm completion of steps – for example, the buyer confirms receipt of a financing commitment, the seller confirms mortgage particulars, or an insurer confirms that coverage is effective.

Parties share results of investigative processes – valuators share valuations, home inspectors share findings, surveyors share survey results, and lawyers share results of searches for encumbrances on title.

Parties demonstrate compliance with requirements – similarly, parties may need to share data or documents that prove compliance: for example, identification documents, mortgage or loan discharge statements, building permits, etc.

Prior to the advent of web-based communication, these tasks were tracked on paper in various parties' offices and files. Confirmation of completion of steps often required the transmission of paper, or that party A telephone party B, obtain an answer, and then make another phone call to party C to report the answer. Each party was required to rely on others to maintain orderly files and to complete tasks on time.

Electronic data transmission and cloud-based data storage have altered the process fundamentally by permitting real-time tracking to replace the traditional, labour-intensive "checking-up" process. A wide range of applications now permit users to access online document storage and sharing through multi-user platforms. But this is only the tip of the iceberg in terms of what is possible, and of what clients of the future will demand.

For example, some lawyers now use customized web "portals" that allow document sharing and the tracking of progress and processes on complex transactions. These portals can be built with individualized access profiles for different types of users (for example, some users will be able to edit documents, others only to view them), thereby protecting the integrity and confidentiality of information. Web portals also offer the potential to alert parties instantaneously to another party's completion of a step and to communicate automatically what must happen next, who is responsible for making it happen, how, and when.

Sophisticated portals make it possible to carry out these transaction-related tasks without leaving the portal itself; for example, by filling out a form that has "popped up" within the portal, that will be checked electronically for completeness and accuracy, and that may be submitted to the relevant individual or agency with the click of a button. Services like TD VIP from LawyerDoneDeal Corp. have already given lawyers a taste of the ease with which online transaction management systems can streamline key aspects of real estate transactions.

Because everything happens within the portal and because documents are stored there, parties will be able to see the current status of the transaction for themselves (as appropriate, based on their roles and system permissions). This level of transparency has the potential to eliminate not only effort, but also errors and misunderstandings that can threaten the transaction or even lead to malpractice claims.

Web-savvy clients will expect no less

Today's real estate vendors and purchasers are increasingly likely to access both commercial and government services online. In 2014, the Globe and Mail reported that more than 75 per cent of Canadians were filing their taxes electronically, and that the percentage was increasing each year. A number of tax filing websites allow taxpayers to "pull" information, including T4 forms, directly from the Canada Revenue Agency site as part of the filing process.

Many Canadians now apply for passport, health card and drivers' licence renewals online, and submit health insurance claims over the web. Millions shop for goods online, where they can track shipping and delivery information. In some jurisdictions, elementary school children are taught to access information about educational resources through school-sponsored web portals. They receive homework assignments and upload completed work through the system. Related systems communicate with parents about student absences. Some medical clinics even offer portals through which patients can view results of medical tests as soon as they are posted by the laboratory, saving the patient and the clinic the trouble of calling to report results.

Increasingly, consumers of services of all kinds expect electronic access to information about those services. They will expect the same immediacy and transparency in the reporting of legal "results" as they have grown used to receiving about the location of a purchased item that is in transit. It is equally likely that, within a few years, a *lack* of access to the details of legal transactions will provoke concern and even suspicion in some clients.

These disclosure expectations may initially feel foreign to lawyers who are used to tighter control of the timing and flow of information. However, after acclimatizing to these new expectations, savvy lawyers will come to understand that allowing clients a "window" into the details that must be managed in closing a real estate deal can promote an appreciation of the work involved and of the value those clients are receiving for their money. Lawyers who hesitate to adopt collaborative online portals may be perceived by consumers as secretive, protectionist, or simply out-of-date; and they may lose ground, at least among younger clients.

Losing millennials' business may not be the only risk. The systematization of real estate transactions is inevitable and underway, and if lawyers fail to "step up" and adopt (or even design) the relevant systems, other service providers will pick up the slack. It is up to lawyers to decide whether they are willing to be shoe-horned into systems created by, for example, lenders or real estate brokerages; or whether they will invest time and effort in developing or influencing the development of systems that support legal services delivery as effectively as possible.

Web-based platforms can support malpractice risk management

For LawPRO, one of the most compelling benefits of web-based real estate portals is their potential to limit malpractice claims by reducing potential for errors and improving lawyer-client communications.

Real estate practice has been responsible for at least 20 per cent of LawPRO claims by area of law since the company was founded, and because the value of claims in this area is tied to rising property values, real estate is associated with an equally significant proportion of overall claims costs.

Reducing communication-based claims

While causes of loss vary, approximately 25 to 40 per cent of real estate-related claims reported to LawPRO each year flow from problems with lawyer-client communication. As a result, tools that improve communication, including web-based platforms that allow clients to communicate with their lawyers online, have the potential to reduce claims.

By providing a dedicated channel through which clients and lawyers can reach each other, online portals offer a convenient approach to documenting instructions, directions and waivers. A system that allows the client to log in to review information such as mortgage instructions, status certificates, search results, and other legal information at his or her convenience can ensure that the client is well-informed.

Systems can also be designed to track and document the timing and content of lawyer-client communications, including whether or not the client has reviewed the information posted. This built-in confirmation feature can provide a clear mandate for next steps, and can minimize disputes about both the content and timing of communications. This clarity, in turn, can make it easy to prove parties' knowledge of various transaction details in the event of a dispute.

Supporting thorough investigation of issues

Besides communication errors, another important cause of claims is the failure of parties to fully investigate the details of a matter and to follow through with actions based on the result of those

investigations. Many web-based programs designed to support the delivery of legal services track (and confirm) the completion of steps in a matter, allowing lawyers and other professionals (law clerks, lenders, insurers, etc.) to easily review whether key questions have been asked and answered, and to see which issues remain unresolved on a pending transaction.

Preventing missed deadlines

Many electronic systems can be programmed to prompt for completion of inquiries and tasks that might otherwise be missed, or to send alerts when a deadline for completion of a step is approaching, making it less likely that a lawyer will miss an important step.

Enabling clear delegation

Some claims against lawyers flow from problems with the delegation of work. Electronic transaction management systems can allow all users to quickly gain familiarity with the status of a transaction so that work can be shared seamlessly with others in real time, clearly identifying who is responsible for which tasks.

Supporting client satisfaction

Finally, some claims result from client dissatisfaction with perceived value delivered in exchange for fees. Electronic systems that allow clients to see the range of tasks that lawyers must complete and to see evidence that those tasks are being completed on schedule can give clients a clearer picture of the efforts being expended on their behalf, and may help to justify fees.

Secure data storage and management requires outsourcing for affordability

The secure management and storage of client data has always been an essential practice standard for Canadian lawyers. However, the move to electronic file storage has significantly complicated compliance with that standard.

Now that sensitive client data can be transported in a pocket, firms must grapple with how to prescribe and enforce rules for its protection. This task has become daunting and time-consuming in the face of the proliferation of privacy laws and the rapid evolution of data storage technologies. Many firms are coming to the conclusion that, without the kind of dedicated information systems departments that only the very largest firms can afford, information management policies become outdated as soon as they are put in place.

In a world of ever-expanding cyber liabilities, there is a risk that the storage of client and transaction data within lawyer and firm computers may often be insufficient from a security and confidentiality perspective. A consensus may even be emerging that storage of this data in local servers is suboptimal, as it puts too much reliance on the excellence of the firm's perimeter security; in other words, how hard would it be for someone to break in and grab the server?

While lawyers have been cautious about moving their firm data to the cloud,[2] many experts are advising that outsourcing data storage is more resource- and cost-effective than spending money and time building and updating local storage solutions to keep up with ever-changing compliance requirements.

Those compliance requirements come not only from legislation and law societies, but also from the private sector. Lenders, under scrutiny by their own regulators,[3] have been exerting pressure on law firms to prove that their data is secure.

Law firms, as the recipients of sensitive data about mortgages, loans, and borrower details, pose a risk to lenders. As third parties to financial transactions, firms are a significant source of potential privacy exposure. In early 2007, for example, the Canadian Imperial Bank of Commerce (CIBC) revealed that account information for 470,000 customers of Talvest Mutual Funds, a subsidiary, had been

[2] Most provincial and territorial law societies have so far shied away from explicit rejection or endorsement of cloud storage. The exception is the Law Society of British Columbia, which introduced a "Cloud Computing Checklist" (lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf) in 2013.

[3] See, for example, the "Cybersecurity Self-Assessment" for federally-regulated financial institutions (FRFIs) developed in 2013 by the Office of the Superintendent of Financial Institutions (OSFI): osfi-bsif.gc.ca/eng/fi-if/in-ai/pages/cbrsk.aspx

lost when a computer file went missing while in transit between company offices.[4] Eager to prevent similar breaches, the CIBC and other banks have begun seeking assurances from third party recipients of borrower data, including law firms.

In the US, title agents and/or title insurance companies, not lawyers, handle most real estate deals. With no regulated fiduciary like a lawyer to rely upon as the protector of borrower information, US lenders are increasingly demanding that title agents obtain formal industry certification for their data security compliance.[5] To date, those closing deals in Canada have mostly avoided the need for such certifications, largely because transactions in this country occur under the scrutiny of lawyers who are overseen by their own regulators and rules of professional conduct.

But as pressure continues to mount for firms to prove their compliance with current security standards, lawyers in an already cost-sensitive area of practice may find themselves hard-pressed to afford the time and expense to secure data in-house. The safer and more affordable strategy may well be to outsource data management completely to a third-party provider who in turn certifies compliance to a specified standard.

Web-based portals and practice management systems that include the storage of data remotely on servers managed by data storage specialists have come to be viewed as a welcome solution.

What is available in the market today?

Web and software-based real estate management products already exist, and new features are being added at a rapid pace. The introduction of Ontario's electronic land title registration system and professionals' increasing comfort with online file sharing systems have created both demand and opportunity for the development of internet-based transaction management tools.

Many lawyers are familiar with area-of-law specific software that supports the completion of documents (including precedents of the lawyer's own creation) using one-time-only data entry. Even without an internet component, these systems can both increase efficiency and reduce errors. In recent years, providers have incorporated features that allow lawyers to import information (for example, search results) directly from external sources into the program over the internet. Other features allow vendor and purchaser counsel to collaborate and exchange documents within the program itself. Title insurance for the property can be applied for without having to re-enter property or transaction

data. Finally, many of these systems, including RealtiWeb from LawyerDoneDeal Corp., allow title documents to be registered directly from within the program.

Considering the systems that already exist, the question is not *when* these portals will be introduced, but rather, who will be in a position to shape them.

LawPRO has always taken the position that consumers benefit when lawyers are maintained as the fiduciaries and quarterbacks at the heart of real estate transactions.[6] In the US, where real estate conveyancing is often completed by title insurance companies and title/escrow agents, complex regulatory safeguards have had to be introduced to protect the public. If lawyers fail to take an active role in developing and influencing the design of online real estate portals, it is likely that other parties – whether title insurers, lenders, real estate agents or others – may see an opportunity to take control of the process, leading to lawyers being squeezed out.

Lawyers have sometimes been criticized for being slow to adopt new technologies. It is evident that this criticism is not entirely fair, judging by the number of lawyers who have embraced electronic practice management systems. But if there has ever been a time to disprove it by taking an active role in investigating and shaping new technologies, that time is now. Clients are pressing for access, transparency, and value for money. Lenders are looking for support in meeting onerous data security and privacy regulations. Lawyers can satisfy both groups and reduce their own risk by moving real estate transactions under the shelter of an electronic umbrella that minimizes errors and offers certified security compliant protection for client data. ■

Maurizio Romanin, President & CEO, LawyerDoneDeal Corp. &
Nora Rock, Corporate Writer & Policy Analyst, LawPRO.

[4] See "Privacy breaches expose flaws in law" by Michael Geist, Toronto Star, January 2007: thestar.com/news/2007/01/22/privacy_breaches_expose_flaws_in_law.html

[5] See, for example, the American Land Title Association (ALTA)'s Title Insurance and Settlement Company Best Practices certification, which requires successful completion of testing based on the Service Organizations Controls (SOC) 2 requirements.

[6] See for example "The future of law: Why the real estate lawyer is the quarterback of the real estate deal" in the February 2017 edition of LawPRO Magazine.

Litigation claims on the rise

In recent years, the growth in civil litigation claims has outstripped the overall growth in claims. For example, from 2006 through 2010 LawPRO received an average of 708 civil litigation claims each year, and during 2011 through 2015, the average increased to 948 each year. This growth of 34 per cent vastly exceeds the 7 per cent total growth of claims for all other areas of law over the same time period.

In addition, costs of civil litigation claims have remained resiliently high. During 2007 through 2014 the average annual cost of these claims was $5,935 per civil litigation practitioner, an amount far in excess of what was collected in premiums (including civil litigation transaction levies). As seen in Graph 1, on a gross claims cost percentage basis, litigation claims have shown an upward trend and have exceeded real estate claims since 2011.

Time management and procrastination

There are a multitude of deadlines that must be met when handling litigation matters. Right out of the starting gate, there are notice periods and limitation periods that can't be missed. Next, issuing a claim creates a cascading series of deadlines that have to be met: serving the claim, responding to pleadings, serving and sticking to a discovery plan, serving an affidavit of documents, responding to undertakings given on discovery, serving expert reports, setting down for trial, and so on. Reflecting the deadline-driven nature of litigation practice, 42 per cent of litigation claims are caused by missed deadlines and procrastination.

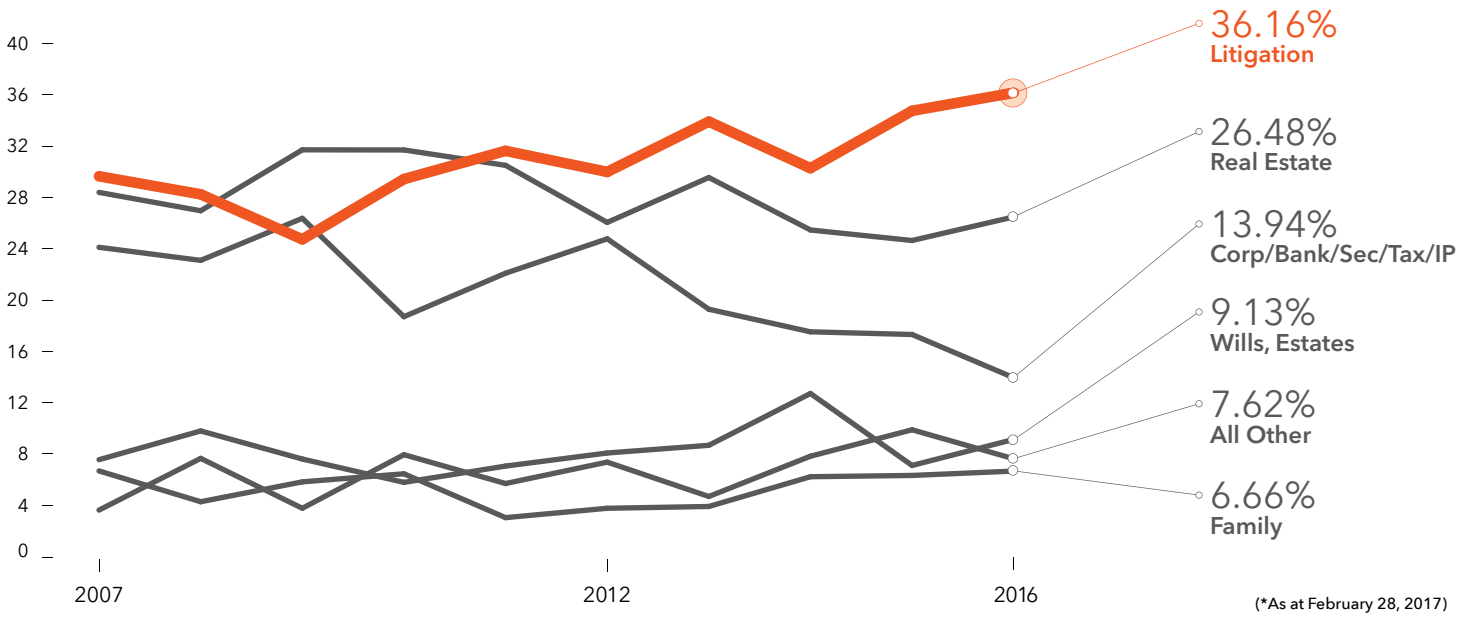
As noted above, administrative dismissals under the old Rule 48.14 were very costly for LawPRO. Thankfully, the new Rule 48.14 appears to have reduced administrative dismissal-related claims, but there are still risks that the new processes and deadlines will trap unwary lawyers. On a rolling basis matters commenced on or after January 1, 2012 are being automatically dismissed five years after they were commenced. And unlike the regime under the old Rule 48.14, these dismissal orders go out without notice to counsel or parties. As of the start of this year the courts in many jurisdictions are sending dismissal orders promptly when the five-year dismissal deadline occurs. LawPRO has started to see claims from these dismissals.

Law firms are encouraged to update their internal firm systems to tickle relevant Rule 48.14 dismissal dates on all files. LawPRO also encourages lawyers to be proactive and keep their files moving along. Repairs may be harder under the new Rule 48.14 as you will have had five years to move a matter along, not the two years as was the norm for a dismissal under the old Rule 48.14. Consider using LawPRO's Rule 48.14 Transition Toolkit (practicepro.ca/Rule48),

34% growth
far exceeds all other areas of law

per practitioner litigation claims cost of $5,935
far higher than premiums collected

Graph 1 Distribution of claims by area of practice* (% of gross claims costs)



(*As at February 28, 2017)

which provides advice and tools for lawyers and law firms to lessen the risk of a claim under the new Rule 48.14.

Notwithstanding the *Limitations Act, 2002* has been in force for more than 13 years, we continue to see claims due to lawyers' unfamiliarity with the *Act*'s limitations rules, or more frequently, misapplication of the discoverability rules contained in the legislation. In some cases, the date on which the claims was discovered or was reasonably discoverable is not self-evident. "Threshold" claims are a good example – when did the client know that his or her injuries met the "threshold" prescribed by the *Insurance Act?*

Three of the most commonly missed limitation periods are:

- Failing to issue a claim within two years of the date when a claimant knew or ought to have known that he/she had a claim;
- Failing to commence an action for injuries sustained in a motor vehicle accident before the expiry of the two-year (from date of discovery) limitation period; and
- Failure to give a municipality 10-days notice after the occurrence of a personal injury on a municipally-controlled highway, bridge or sidewalk.

We encourage lawyers to issue actions within two years of the event giving rise to the claim, unless there is a very good reason for not doing so. Uncertainty about whether a claim meets the "threshold" may be one such reason. Discoverability may, or may not, extend the limitation period beyond the two year anniversary date of the action. Litigating this point is extremely expensive, even where successful.

Lawyers are encouraged to take the time to review the *Limitations Act, 2002* and the related jurisprudence: See practicePRO's limitation period resources at practicepro.ca/limitations. See also the comments on the ultimate limitation period in the sidebar at page 24.

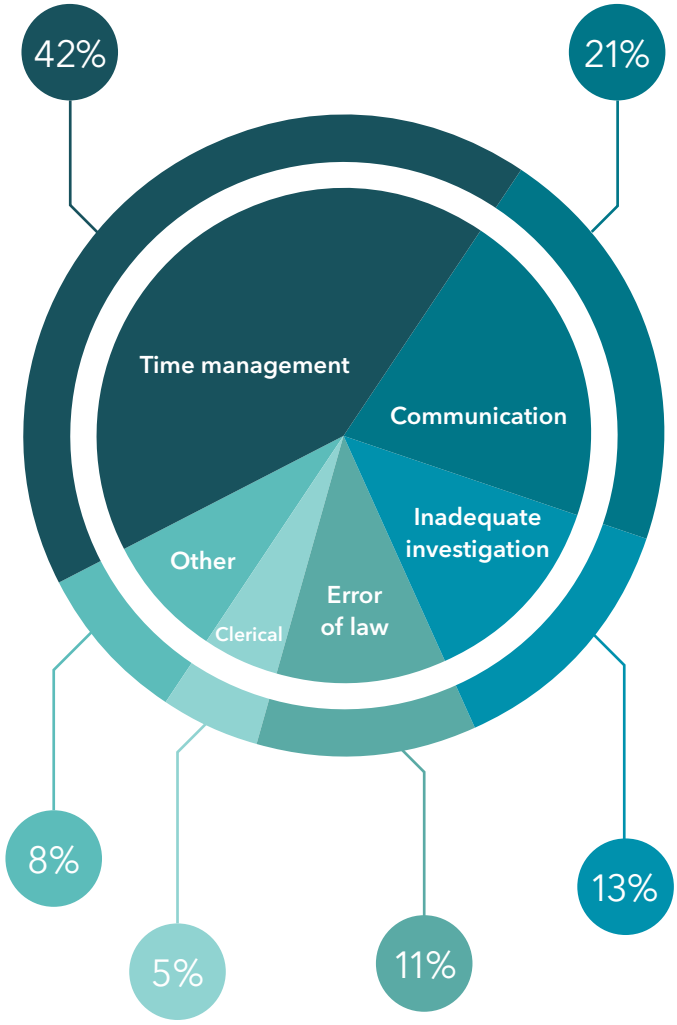
Lawyer/client communication errors

Lawyer/client communication issues are the second most common cause of claims in the litigation area – 21 per cent of claims over the last 10 years. Simple miscommunications or misunderstandings around what actions the client or lawyer are expected to take, or the expected timing, outcome or cost of a case, often result in claims. In more detail, here are some of the common lawyer/client communications errors that lead to claims:

- Failing to manage client expectations or clearly explain the chances of success and the associated costs of litigation;
- Encouraging false hopes and unrealistically high expectations for damages that will be received;
- Failing to explain to a client adverse cost consequences in the event of a loss;
- Failing to ensure that the client understands your advice and recommendations, and you understand your client's instructions; and
- Failing to provide the client with breakdown of settlement monies when obtaining instructions to settle, including a clear "take home" amount that represents what the client will receive, and how much would be paid to the lawyer as fees, costs, disbursements, & HST.

On claims involving communications errors, the lawyer and client will frequently disagree on what was said or done during the course of a matter. As claims often happen years after a matter is closed, lawyers often don't remember what transpired due to the passage of

Graph 2 Litigation claims percentage count by type of error (2007-2016)



time. Even if a lawyer remembers some details, LawPRO usually finds that there is little or no documentation or notes in the lawyer's file to substantiate the lawyer's account. In contrast, as a legal matter is typically a once in a lifetime event, clients often have a much more specific memory of what transpired. In LawPRO's experience, these types of claims tend to come down to credibility, and the client's more specific recollection will often carry the day.

The simple conclusion – and excellent risk management advice – is that detailed notes of client conversations and reporting letters can be extremely helpful for LawPRO when defending communications-related claims. Take notes of conversations with the client, and document in writing discussions involving options, strategies, outcomes or settlements. In particular, document circumstances where the client does not follow your advice or recommendations, and even better, send an email or letter confirming this.

You can't, of course, make and keep notes of every discussion. But some small tricks can help you capture details of client interactions. A short email can document a conversation. Detailed time entries can also capture interactions. "Conference with client re risks and costs of litigation" is much better than just "Conference with client re lawsuit." But don't enter sensitive information as time entries can end up before a court in cost submissions.

Lawyers are increasingly using email to communicate with clients, something that can result in misunderstandings. Clients and lawyers may miss the meaning of what is said, read between the lines and make incorrect assumptions, and they might overlook an email. During a long litigation matter, arrange some face-to-face meetings, or at least a phone call if distance is an issue. Face-to-face discussions are better than email when the discussion relates to important topics or when there is bad news. Make sure you keep your clients informed of the progress of their matters.

Inadequate investigation of fact or inadequate discovery

The third most common cause of litigation claims are errors involving an inadequate discovery of fact or inadequate investigation. This error caused 13 per cent of LawPRO's litigation claims over the last ten years, and the cost of this type of claim has been on an upward trend since 2009. These claims happen when the lawyer does not take extra time or thought to dig deeper and ask appropriate questions on the matter. Common examples of this type of error include the following:

- Failing to name proper defendants due to improper review or lack of corporate searches, property searches, motor vehicle accident reports, and police investigation files;
- Failing to name proper insurer as defendant due to an unidentified, uninsured or underinsured claim;
- Failing to name all proper plaintiffs such as corporate entities and *Family Law Act* claimants; and
- Failing to properly assess accident details, injuries or income loss due to not obtaining or reviewing investigation reports, medical reports or other expert reports.

To avoid this type of claim, be diligent in your work. Take the time to read between the lines so you can identify all relevant issues and concerns on the matter you are handling. 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. While a client will want to keep legal fees down, you should resist pressures to take shortcuts, unless the client is aware of the risks of doing so, and the required work or advice was provided to the client.

Seek help and don't dabble

If you find yourself struggling with a difficult client or opposing counsel, or the options or strategy that you should recommend to a client, seek help from a firm colleague or from an external mentor. The Law Society's Coach and Advisor Network (CAN) (lsuc.on.ca/coachandadvisor) provides lawyers and paralegals with access to shorter-term, outcome-oriented relationships with Coaches and Advisors drawn from the professions.

From the claims LawPRO has seen, it is clear "dabblers" (lawyers acting outside of their usual practice area) are more likely to commit malpractice errors, and in particular a failure to know or apply substantive law. Lawyers who are asked to handle a legal matter for a family member seem to feel obliged to help and often find themselves dabbling in an area of law they don't know. Dabbling is dangerous – don't do it.

Take steps to avoid claims

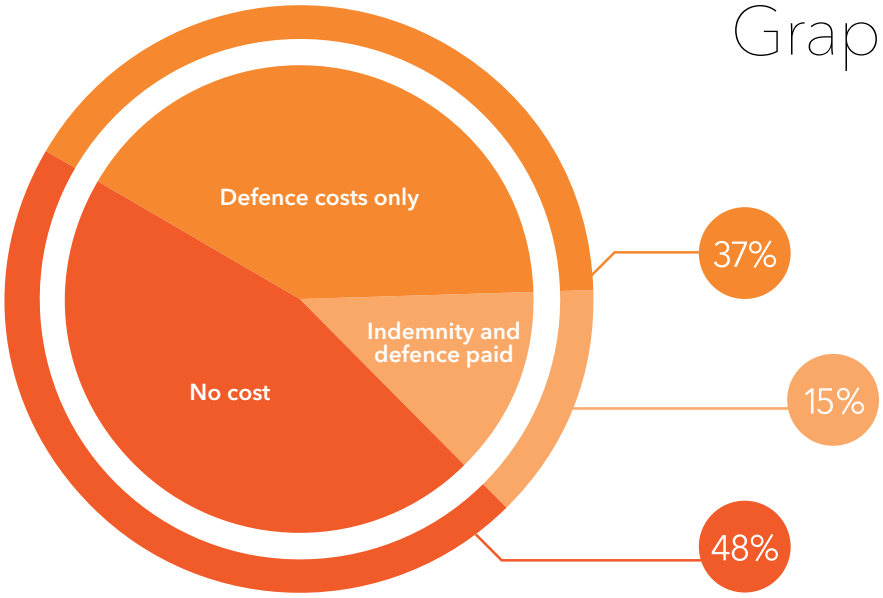
As is noted on the next page, only 13 per cent of litigation claims ultimately result in an indemnity payment. And while 87 per cent of claims are resolved without an indemnity payment, it still makes sense to do everything you can to avoid the stress, time and cost of dealing with a malpractice claim. The majority of litigation claims involving lawyer/client communications errors and missed deadlines or procrastination are easily preventable. Take some proactive steps to address these types of claims as it is your best opportunity to reduce your claims exposure. ■

Resolution of litigation claims

On average, LawPRO opened 823 litigation claims per year over the last ten years.[1] During this period only 13 per cent of litigation claims required an indemnity payment. As graph 3 shows, LawPRO successfully defended the lawyer on 87 per cent of litigation claims. And breaking down the 87 per cent, 48 per cent of these claims were closed without any costs whatsoever, and 37 per cent were closed with defence costs only (i.e., cost of hiring outside defence counsel).

These statistics should help lawyers overcome any reluctance they have to report a claim to LawPRO. If you report a claim and nothing develops, your deductible won't be triggered and there won't be any surcharged increase in your premium. Further, a failure to report promptly can lead to missed limitation periods, adverse judgments, imprudently-brought appeals or lost appeal opportunities, or other negative outcomes that could have been avoided or mitigated if LawPRO had been notified sooner. If LawPRO has the opportunity to act early – even before a claim is asserted – we have a better opportunity to gather and secure evidence, seek settlement, and assist you in avoiding a claim being made at all. It's far riskier to delay or attempt a DIY repair and have your coverage denied. And remember, a delay or self-repair could also jeopardize your firm's excess insurance coverage.

Graph 3 **Disposition of litigation claims (2007-2016)**



[1] 2006-2016

Commercial title insurance: What you need to know

A discussion regarding title insurance (or any insurance for that matter) requires the understanding that it is insurance. It does not fix problems, it underwrites risks. As lawyers, it is incumbent upon us to be able to convey this clearly to our clients, whether lenders or more likely borrowers/purchasers. In the days of yore, the lawyer conducted a comprehensive array of searches for every transaction. This allowed the lawyer to identify issues and ensure any issues were addressed prior to closing a transaction. Times have changed. Quick closing dates, ease of access to information, sophisticated and cost sensitive clients, and of course title insurance, have altered the way a commercial transaction is carried out.

Commercial title insurance is a different product than a residential policy. For the most part, residential policies can be characterized as being "one size fits all" or "off the rack." Yes, there are times when a residential policy may require an amendment or an exclusion to accommodate a particular situation, but often times, assuming the lawyer is using the document production software (e.g., LawyerDoneDeal's Realti-Web or Due Process' the Conveyancer) the software will assist in identifying these concerns (assuming data has been correctly entered). The bottom line is that ordering a residential title insurance policy is a fairly straightforward process.

lf a residential policy is "off the rack," a commercial policy is a tailored, custom-made article. Every situation is unique. The type and details of the transaction will dictate what is included or excluded from the final policy and its endorsements. Prudent lawyers will have their thinking caps on early and will evaluate the situation to determine the most commercially reasonable approach to each situation. Granted, tight deadlines can have an impact on the structure of the deal.

Commercial deals require tailoring and adjustments; for the most part commercial transactions are not compatible with the document production software to enable automatic ordering. This means being on your toes and understanding what needs to be done, when it needs to be done and what the policy does and does not cover. It will also require you to adjust your client acknowledgement form for title insurance – indicating that the client understands what is not covered. Once you add a lender into the fold, it can become a quagmire for the uninformed.

It is my hope this paper will provide some guidance in navigating a commercial title insurance policy from the point of view of the transactional lawyer.

What is commercial title insurance?

Title insurance is a form of indemnity insurance which insures against financial loss from defects in title to real property and from the invalidity or unenforceability of mortgage liens. Title insurance is a product originally developed in the United States as a result of a deficiency of the U.S. land records laws. It is intended to protect an owner's or a lender's financial interest in real property against loss due to title defects, liens or other matters. The policy will defend against a lawsuit advanced against the title as it is insured, or reimburse the insured for the actual monetary loss incurred, up to the dollar amount of insurance provided by the policy. The first title insurance company, the Law Property Assurance and Trust Society, was formed in Pennsylvania in 1853. Title insurance may be relatively new to us, but it's not a new thing!

Typically the real property interests insured are fee simple ownership or a mortgage. However, title insurance can be purchased to insure any interest in real properly, including an easement, lease or life estate.

There are two types of policies – owner and lender. Just as lenders require fire insurance and other types of insurance coverage to protect their investment, nearly all institutional lenders also require title insurance (a loan policy) to protect their interest in the collateral of loans secured by real estate. Buyers purchasing properties for cash or with a mortgage lender often want title insurance (an owner policy) as well. A loan policy provides no coverage or benefit for the buyer/owner and so the decision to purchase an owner policy is independent of the lender's decision to require a loan policy.

It is important to remember that title insurance is retrospective. It insures covered risks prior to the policy date that arise after the Policy Date. The Policy Date is normally defined as the date of registration of the Transfer or Charge. Title insurance can provide coverage for either a lender or an owner and a lender.

The insurance policy, with its endorsements will indemnify the lender or owner against an actual loss or damage suffered for covered risks. A typical owner policy covers: defects in title; liens or encumbrances on tile; unmarketability of title; and lack of access.

A lender policy will cover the above, as well as: invalidity or unenforceability of a mortgage; the priority of any lien or encumbrance.

Generally speaking, a policy will cover survey related issues, municipal work orders, building permit issues, tax arrears, zoning matters, fraud (see comments below), survey errors, boundary disputes and unregistered easements. The coverage is subject to a number of qualifications depending on the amount insured, but all must pre-date the Policy Date.

What title insurance is not

Commercial title insurance starts with a policy jacket and endorsements are added to it. This is contrary to the residential policy, which is a comprehensive policy. A commercial policy gets assembled depending on the type of property, the value of the property and the amount of the loan. In a commercial policy, environmental matters are not covered. Do your diligence or ensure you client has done it. lf your client is doing this work, ensure this is documented. I would encourage everyone to read the case of *Outaouais Synergest Inc. v. Lang Michener LLP*, 2013 ONCA 526 as it highlights the importance of being clear in what is being done and not being done and who is doing it.

A few examples of areas that are not covered in a commercial title insurance policy that frequently cause lawyer's issues are listed below:

Future Use – the policy covers continuation of the existing use as of the Policy Date. Coverage does not extend to changes in use. Be sure you know what your client's intention for the property is. lf the client is going to do something different with the property – advise the insurer.

Property Valuation issues are not covered.

Fraud – matters relating to non-title issues may not covered.

It is important to note that there is also coverage provided under a lender policy that is not covered under an owner policy. Understanding what is and what is not covered in a particular policy is critical for the lawyer, so that the lawyer can explain to

an owner that their lender may be covered for such things as Fire Department compliance, Electrical Safety Authority and Technical Standards and Safety Authority, but the owner is not covered for these. Business interruption losses are also not covered under a title insurance policy.

One more thing to remember, there needs to be a loss suffered for the policy to "kick in," for example, if taxes were not up to date, but the lender does not suffer a loss as a result – there is no claim.

Endorsements

The true benefits of the commercial title insurance policy are found, not in the jacket, but in the endorsements.

Some lenders have a set of standard endorsements that attach to every policy, which is helpful. Some endorsements that are commonly found in a title insurance policy include: Access Endorsement, Future Insurance Endorsement, Contiguity Endorsement, Leasehold Endorsement, Government Response Endorsement, Survey Endorsement and Super Priority Liens.

What searches do you need?

No matter what – title insurance is not a substitute for work or searches – it is a tool that can assist a lawyer in getting a deal done. Many insurers will accept a statuary declaration from the borrower that taxes, utilities, and other items are current. Where commercially reasonable – there is no substitute for the search results. Companies offering commercial title insurance for the Canadian market include FCT; Stewart Title Guaranty Company; TitlePLUS title insurance and Chicago Title.

Something unique – TitlePLUS title insurance

While most commercial insurers provide policies with unlimited policy amounts and must be tailored to fit the situation, TitlePLUS insurance offers commercial title insurance policies up to a maximum limit of $2,500,000. What makes this policy unique is that it is a full all-inclusive policy that also covers legal services. As previously described the typical commercial title insurance policy is a stripped down policy with a number of endorsements added to it and it is the lawyer's role to determine what endorsements are required. The TitlePLUS policy requires a comprehensive list of due diligence searches. The process requires the lawyer to send in an order request describing the parameters of the transaction; TitlePLUS staff will review the structure and report back to the lawyer as to what searches will be required to obtain coverage. The legal services coverage can be a very desirable element in the policy and TitlePLUS insurance is the only insurance that generally offers this type of coverage. In keeping with the TitlePLUS program's efforts to highlight the role the lawyer plays in a transaction, ordering this policy provides the opportunity to identify and resolve issues prior to closing a transaction, which really is part of our role after all.

How does commercial title insurance help the lawyer?

In days of short turnaround times, sophisticated parties and cost conscious clients, a title insurance policy can assist the lawyer in closing a deal. It is a tool that helps us do our jobs – it does not do our job for us.

Pitfalls and notes

- Most commonly missed are building and zoning issues (a search is done but there is no follow up).
- Most common types of claims are tax arrears, but in particular insurers are seeing more instances of super priority lien claims.
- What type of property is it? The insurer needs to know what type to provide correct coverage – commercial/industrial/retail/commercial condominium/multi-unit.
- Not realizing what "construction" means. If the property is "under construction" coverage can be afforded for lien claims.
- Make sure to insure for the correct amount.
- Insurance companies waive right of subrogation against lawyers (except for the lawyer's gross negligence or wilful misconduct).
- Speak with the insurer when ordering the policy; they can assist in identifying issues to provide correct coverage.
- Read the issued policy to see if you need anything added.
- Be sure to be clear with your client – put in writing what the policy covers, what searches you are doing or not doing and what your role is in the transaction. ■

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This paper was prepared for the OBA's Real Property Section for the February 2014 OBA Institute and since been updated.

Don't let claims follow you into retirement

Lawyers often approach retirement feeling good about their legacy. Whether you devoted your efforts to crafting airtight contracts, supported clients as they worked toward mediated settlements, or stood up for the rights of those who needed you, you're entitled to feel proud of your accomplishments. Looking back, however, may heighten your awareness of just how many decisions your work required you to make. How likely is it that 100 per cent of your choices were correct?

While it's impossible to be certain whether you'll be "home free" from a claims perspective after you retire, you can take steps to limit the potential for claims to derail your financial plans. This article provides an overview of insurance considerations for lawyers making the transition out of traditional practice.[1]

What's your risk?

Your exposure to claims in retirement depends on a range of factors, the most important of which are the nature of your work while practising and your professional activities after retirement.

How your pre-retirement practice area impacts your exposure

Just as malpractice risk varies based on area of practice during active practice, it also varies in retirement. While some types of claims are discovered shortly after services are rendered, others take years to develop.

Examples of long-tail exposure activities include real estate work, and the preparation of domestic contracts and wills. LawPRO's experience with claims reveals the following information about how long claims take to develop:

TIME BETWEEN DATE OF ERROR AND DATE OF REPORT OF CLAIM TO LAWPRO*

	UNDER 10 YRS	10 TO 15 YRS	OVER 15 YRS
Real Estate	9,961	678	510
Wills Estates	2,571	203	120
Family	2,904	159	104
Corporate	3,748	135	46
Plaintiff Lit	11,592	194	40
Tax	610	40	27
Criminal	627	22	12
Defence Lit	2,340	17	5
Securities	174	4	2
IP	708	13	2
Labour	902	11	1
Bankruptcy	164	4	0

* For claims reported between 1998 and 2016.

[1] This article is based on a more detailed paper *Leaving practice: Insurance considerations* prepared by Victoria Crewe-Nelson, AVP Underwriting at LawPRO, for presentation at the Hamilton Law Association's 15th Annual Estates & Trusts Seminar on February 9, 2017. The full paper is posted with the online copy of this article on practicepro.ca

Counting on the ultimate limitation period?

As most lawyers know, section 15 of the *Limitations Act, 2002* (the *Act*) sets a 15-year ultimate limitation period from the day the act or omission on which the claim is based took place, regardless of when the claim was discovered. Under the transition rules set out in s. 24, if a claim was not discovered before January 1, 2004, then January 1, 2004 is the deemed date the act or omission took place, and so January 1, 2019 would be the ultimate limitation period.

However, there are exceptions, some of which have the potential in rare circumstances to create liability for a lawyer beyond January 1, 2019. These include:

- The limitation period does not run during any time during which the person having the claim is under a disability and is not represented by a litigation guardian with relation to the claim (s. 15(4)(a));
- The limitation period does not run during any time during which the person having the claim is a minor and is not represented by a litigation guardian with relation to the claim (s.15(4)(b));
- The limitation period does not run for the period during which the defendant wilfully conceals the claim from the person who has it (s.15(4)(c)(i)); and
- The limitation period does not run during the period during which the defendant misleads the person having the claim about the appropriateness of bringing an action (s.15(4)(c)(ii)).

Another type of exposure that may survive beyond the ultimate 15-year limitation period would be a claim for contribution and indemnity, as anticipated by s. 18(1) of the *Act*.

As a result, lawyers cannot safely assume that, as of January 2, 2019 they will be free from liability flowing from all legal work done prior to January 2, 2004.

Whether a claim will come back to haunt you in retirement depends on the application of limitation periods, which can be affected by issues like delayed discoverability and whether potential claimants have been under a disability during the intervening years. Protecting yourself financially may require that you increase the run-off coverage available to you – even if you practised with a firm that carried excess insurance (more on this on the next page).

While you are thinking about your claims exposure, you may also want to review your history of providing services that fall outside the ambit of your LawPRO coverage – for example, acting as a director on a client's board of directors, acting as an estate trustee, managing private mortgages, or serving as an intellectual property agent. Will you be continuing in these capacities after retirement? If so, you may want to consider obtaining other categories of insurance, such as directors' and officers' insurance ("D&O") or executors' insurance.

What, exactly, do you mean by "retirement"?

The other important factor to consider when assessing your risk is whether or not you will continue with any professional activities that could attract liability after you officially "retire."

For many lawyers, retirement is less a date than it is a process. Transitioning out of practice may mean declining new retainers but continuing to work on existing files as you transfer matters to other lawyers, reducing the hours worked over time. How you choose to transition out of practice will have an impact on your insurance requirements and options, especially if you decide to keep a foot in the door by acting as a trustee, by mentoring younger lawyers, or by providing *pro bono* services.

What are your coverage options?

For a few lawyers who maintain a significant involvement with the law, it will be necessary to keep the regular LawPRO program coverage in place even in retirement. If you continue to provide legal services in any capacity – including as a mediator, arbitrator, trustee, or attorney, new risks for claims will continue to arise, and you may have to maintain practice coverage despite the services only being provided on a very occasional basis.

For most retired lawyers, however, retirement means new options.

Coverage for part-time practice

Lawyers making a gradual transition out of practice may be eligible for the part-time practice option. To qualify a lawyer must, in both the current and previous fiscal year, restrict his or her work to 20 hours per week

on average for each week actually worked, and 750 hours per year. Maximum annual billings must not exceed $75,000 per year. The lawyer must also have not had a claim reported under the mandatory insurance program with a repair and/or indemnity payment in the last five years. If eligible, the lawyer will have the same level of coverage as is available under the base program, while paying 50 per cent of the annual premium.

Considering a retirement test-drive?

A few lawyers may need – or choose – to step away from practice temporarily before they are ready to retire. While some such leaves are prompted by the illness of a family member, others are taken to make time to study, to pursue a personal project, or even to sail around the world. As long as the lawyer has the intention to return to practice after the proposed leave of absence, he or she can apply under exemption C of the Primary Professional Liability Program to maintain the coverage limits offered to practising lawyers ($1 million per claim/ $2 million in the aggregate) for up to five years for a leave taken for reasons of family or illness, or up to two years for other reasons.[2]

Run-off coverage

Once a lawyer is truly out of the private practice of law, he or she enjoys the protection of LawPRO's standard run-off coverage without having to pay annual premiums.[3] This coverage, though reassuring, is basic: it covers up to $250,000 in claims in the aggregate. Unlike the standard program mandated by the Law Society, the coverage limits are not refreshed annually – once claims hit the $250,000 threshold, there is no further coverage.

A limit of $250,000 will be adequate for certain lawyers, including those who were never in private practice and who may only be worried about "phantom client" scenarios (instances in which individuals may have misinterpreted casual conversations or presentations as legal advice). However, the majority of lawyers will need to think hard about the potential for the basic run-off coverage to be wiped out by a single large claim. The number of claims handled by LawPRO with a value of over $100,000 has risen sharply in the past ten years; and one out of every 40 claims exceeds $250,000. When you consider the current pace of growth in the value of residential properties in Ontario, it becomes clear that any area of practice that involves disputes over property – including real estate, family law, and wills – has the potential to generate a high-value claim.

Run-off coverage buy-up

Retiring lawyers eager to protect their retirement savings can apply to "buy-up" their run-off coverage to a higher limit for a term of between two and five years (a further term can be applied for afterwards, if necessary). The level of run-off coverage can be increased to $500,000 per claim/in the aggregate, or $1 million per claim/$2 million in the aggregate. This coverage is individually underwritten, so the cost of the buy-up premium varies according to risk.

Run-off coverage generally applies to the same activities that were once covered by the lawyer's previous LawPRO policy coverage. However, to reflect the fact that many lawyers are named to act as estate trustees or attorneys for property for non-family members and that these obligations extend into retirement, lawyers can apply under exemption rule H to have increased run-off coverage apply to post-retirement services as estate trustee, *inter vivos* trustee or attorney for property, provided that the relevant appointment(s) were made while the lawyer was in active practice.

Don't assume a former firm's excess coverage will take care of it

Lawyers sometimes make the error of believing that an excess coverage policy held by the firm for which they once worked will make run-off buy-up unnecessary. However, excess coverage typically only "kicks in" above a certain threshold (usually the $1 million per claim limit provided by the Law Society mandatory program). This means that the lawyer will be responsible for the $750,000 gap between his or her run-off coverage and the firm's excess coverage. Another caveat – reliance on one's firm's excess coverage presumes that the firm will remain in business, or will maintain the coverage for a sufficient period if it does dissolve.

What about claims against a lawyer's estate?

Run-off buy-up can also be purchased by a lawyer's estate. This can be especially important where a lawyer dies unexpectedly while in active practice – before he or she has taken steps to wind down and / or transfer files. See the article "A critical issue often overlooked in lawyers' estate planning" on the next page for an example. In fact, few lawyers instruct their spouses or estate trustees to purchase increased run-off insurance after they die. This risks leaving the estate and its beneficiaries vulnerable to claims.

For solo and small firm lawyers, limiting the claims exposure of your estate also means having a contingency plan ready in case, whether due to death, illness, or any other cause, you can't continue acting for clients. The Law Society of Upper Canada has created the *Contingency Planning Guide for Lawyers*,[4] a free resource to guide the creation of a contingency plan. At the heart of the plan will be the selection of a replacement lawyer who can take over the practice, avoiding prejudice to clients and related claims against the planning lawyer or his or her estate.

An effective plan depends on having a discussion with the replacement lawyer about a number of key issues. These include: whether the practice should be wound up or preserved for sale, compensation for the replacement lawyer, making arrangements

[2] This exemption is not available to lawyers who have taken alternative employment or who have been required to cease practice by the Law Society.

[3] For full details of run-off coverage, see Endorsement No. 9 of your LawPRO policy.

[4] The Law Society of Upper Canada's *Contingency Planning Guide for Lawyers* is available at lsuc.on.ca/ContingencyPlanningLawyers/

for the replacement lawyer's access to trust and general accounts, creation of a power of attorney to support the transition, and the appointment of the replacement lawyer as estate trustee for the planning lawyer's practice.

Relieving worry about post-retirement mentoring and *pro bono* activities

Mentoring new lawyers is popular among retired lawyers seeking to retain a connection with the law. In recognition of the real value that experienced mentors can provide to new members of the profession, LawPRO has taken steps to reduce aspiring mentors' worries about liability. LawPRO's standard run-off coverage of $250,000 in the aggregate applies to claims against a retired lawyer arising out of a mentoring relationship, provided that:

- The mentor and mentee agree to a formal mentoring relationship, as evidenced by a written document of some kind;
- The mentor has no contact with the mentee's client that would create a solicitor-client relationship; and
- The mentee understands that the mentee is responsible for individually and independently being satisfied of the soundness of any suggestions, recommendations or advice-like comments made by the mentor.

What about *pro bono* practice?

While LawPRO does not generally cover the performance of legal services by lawyers on exemption (including retired lawyers), there is an exception for those lawyers who provide professional services through LawPRO-approved *pro bono* programs associated with Pro Bono Ontario (PBO). LawPRO's standard run-off coverage covers work done for these programs even after the lawyer has gone on exemption. No deductible applies in the event a claim is made against the lawyer for legal services provided through approved PBO programs.[5]

A critical issue often overlooked in lawyers' estate planning

When a lawyer passes away while still in active private practice, LawPRO's run-off coverage kicks in. While standard run-off may be enough coverage for lawyers who have been retired for several years (since potential claims will have had time to develop), it may not be sufficient for a lawyer who was practising full-time at the time of his or her death.

A real example from our files demonstrates what can happen. Carol's husband, a lawyer, passed away in 2010. When Carol reported her husband's death to LawPRO customer service, the program coordinator who responded advised her of the option to purchase increased run-off insurance above the standard $250,000 limit set out in the policy. Carol opted to increase the run-off coverage insurance to $1 million. Two years later, Carol was served with a Statement of Claim in relation to legal services performed by her husband. Damages in that litigation may well reach $1 million. LawPRO is defending the action.

Subject to exclusions or other policy provisions, the LawPRO policy provides coverage limited to $1,000,000 per claim and is subject to an aggregate limit of $2,000,000 per policy period (i.e., per year.). However, upon retirement or death, standard run-off coverage is limited to $250,000 in total, regardless of the number of claims made against the insured or the time period in which they are made. Given that we see claims reported, on average, two to three years after legal services have been provided (and nearly half of wills and estates claims take at least five years to develop), there is no question that a lawyer or the lawyer's estate remains exposed to liability even after retirement or death.[1] For many lawyers, $250,000 in coverage, inclusive of defence costs, will simply not be enough.

Unfortunately, few lawyers leave instructions for their spouse or other estate representative to purchase increased run-off insurance after they die – thus leaving the estate with the total maximum coverage of $250,000 for all future claims against the lawyer. Consider the type of work you do: the subject matter of your litigation files, the transactions you have closed, the wills you have drafted. Would $250,000 be enough coverage? Unless your estate or next of kin purchases increased run-off insurance, your coverage will indeed be limited to the standard $250,000 run-off coverage outlined in Endorsement 9 of the policy. We highly recommend that you prepare instructions for your estate representative to ensure that run-off coverage is considered and the estate is adequately protected. For complete details of the Run-off Buy-up coverage offered by LawPRO, please visit lawpro.ca.

Martine M. Morin, is Senior Claims Counsel at LawPRO.

[1] For a detailed analysis of how long it takes claims to develop, see the chart on the page 23.

Keep us in the loop

To ensure that you have the coverage you need and that you are kept aware of policy changes that might affect you, it's important that even after retirement you inform us of changes to your contact information (address, phone number, and email). You can also get in touch with us to ask questions about the coverage status of professional activities you're proposing to undertake. LawPRO's Customer Service department can be reached by phone at 416-598-5899 or 1-800-410-1013, or by email at service@lawpro.ca ■

[5] Lawyers wishing to provide services for a not-for-profit organization that isn't associated with PBO can maintain their exemption by applying to LawPRO and getting pre-approved. However, in these circumstances LawPRO's standard run-off coverage will not cover the legal services provided, and in the absence of an indemnity agreement or insurance coverage being arranged by the organization, the lawyer may have exposure in the event of a claim.

The mysterious magic of routines

As a child, did you step carefully over every sidewalk crack? Tap each post of the hockey net before settling into the crease? Wear your lucky socks to every law school exam?

Even those of us who scorn superstition rely on routines and rituals for our own protection: we swallow a daily multivitamin, fasten our seatbelts, return our passport to the drawer after a trip. Routines conserve mental energy, allowing us to sidestep day-to-day hazards while saving our intellectual energy for novel or challenging problems.[1]

Building routines is not a flashy career strategy, but it works. Once in place, the practice management tasks we complete on auto-pilot cast an invisible shield of protection over our files, repelling malpractice claims like gnats off a screen.

In an Ontario case affirmed by the Court of Appeal last year, there was a dispute over the registration of mortgage discharges and the plaintiffs sued the lawyer who had registered the discharges, alleging that these had been completed without their authorization. The plaintiffs denied having ever attended at the lawyer's office, and alleged that their signatures on the discharge authorizations in the lawyer's file were forged.

At trial, the lawyer testified that the plaintiffs had been referred to him by a friend of the mortgagor. In support of his authority to register the discharges, the lawyer produced photocopies of the plaintiffs' citizenship cards and driver's licences, along with the signed authorizations.

The lawyer testified that he remembered the plaintiffs' attendance at his office because they brought in the parcel register, a copy of which he placed in the file. He remembered advising them of the consequences of discharging the mortgages, and that the plaintiffs had told him that they had been paid.

The lawyer's wife, who worked in the law office, witnessed the authorizations. She testified that she obtained their identification documents, compared their appearance to the photos on the documents, and photocopied the identification, as was the firm's established practice. (At the time of the discharges, By-law 7.1 under the *Law Society Act*, R.S.O. 1990, c. L-8, which requires that lawyers check client identification, had not yet come into force.)

The court noted that in 2008, the lawyer's practice was extremely busy – he was retained by nearly 500 new clients that year, and must have met two or three new clients each working day. It would have been difficult for him to remember each individual meeting. But despite the pace of his work, the lawyer's orderly files and established practice habits made a favourable impression. In finding in his favour, the court noted that "[The lawyer]'s evidence was consistent with his practice and the contemporaneous documentation in his file. It was supported by the evidence of his wife, and her practice… The defendant met the standard of practice."

The lesson for lawyers? The busier your practice, the more important it becomes to adhere to routines and attend to details. Check and copy identification, obtain signed and witnessed instructions, file documents quickly and accurately, and send a reporting letter.

Exciting advice? No… But like fastening your seatbelt, good practice habits require little second thought – until life, as it will, goes sideways. ■

Nora Rock is Corporate Writer and Policy Analyst at LawPRO.

[1] For details about the neuroscience behind the benefits of routine behaviour, see the article "Reduce communication-related claims by understanding cognitive biases" in the February 2017 issue of *LawPRO Magazine*.

Outsourcing your law firm's cybersecurity

According to a survey[1] of UK law firms, a quarter of them have been the victims of cyberattacks, as have almost a third of US firms according to the ABA *Legal Technology Survey Report*. While there has not been a similar survey done of Canadian firms, the numbers are probably similar. And the high-publicity hacks keep coming: recent examples of firms suffering cyber breaches include Cravath, Swain & Moore in New York, Johnson & Bell in Chicago, and of course the Panama Papers hack of Mossack Fonseca.

In the examples above the hackers were after client data stored on firm servers, but they can also target client trust account money through spear-phishing attacks or malware attached to emails. Recently, firms' networks have been the victim of ransomware attacks in which firm data was locked until a ransom was paid to the hackers.

The financial and reputational damage of a cyber-breach to both clients and law firms can be severe. Clients are increasingly demanding to know what cybersecurity safeguards firms have in place and making it a condition of doing business.

It can be challenging for medium and small firms to develop and implement their own cybersecurity policies and infrastructure. Hardware and software can be costly, and hiring (and keeping) knowledgeable IT people can be difficult when they are in such high demand. Keeping up with the constantly evolving nature of cyber risk can be beyond the expertise of a typical firm. While large firms may be able to afford to spend what it takes to shore up their cyber defences, what should smaller firms do?

To meet this need, a number of data protection services have emerged that allow companies (including law firms) to outsource their cybersecurity. Companies offering these services include Ekota (ekota.ca), Cyberscout (cyberscout.com), and FireEye® (fireeye.com).

The benefits are similar to outsourcing of other IT functions: it can be cost effective for firms to essentially share the costs of infrastructure and expertise, while ensuring that software and threat detection is always up-to-date. Using these companies can also have the advantage of flexibility as the services can be purchased depending on the particular needs and size of a firm. And as firms grow or data security needs change, the services offered can be scaled accordingly.

In addition to standard IT functions like storage and communications that some firms have already begun to outsource, the security services offered by these companies that would be of interest to law firms may include:

- Consultants to assess your firm's data security needs and identify vulnerabilities
- Data security software and training staff on its use
- 24-hour technical support in the event of a breach
- Incident response planning
- Outreach to clients affected by the breach
- Advice on dealing with cybersecurity insurers in the event of a breach

While LawPRO is not in a position to make recommendations as to any one company and the services they offer, it may be worthwhile for firms to consider this option if they are struggling with how to offer the best cybersecurity to their clients within their own particular staffing and budget constraints.

For further reading on the threat of cyber risks, and why law firms are considered to be lucrative targets, see *Locked Down: Practical Information Security for Lawyers* and the *ABA Cybersecurity Handbook*, both available in the practicePRO lending library (practicePRO.ca/library) as well as December 2013 Cybersecurity issue of *LawPRO Magazine* (lawpro.ca/magazine). ■

[1] The survey results are published in the *NatWest annual legal benchmarking report.*

Retirement, identity, and mental health: It's an adjustment

Lawyers often pay lip service to looking forward to retirement. However, when pressed on the subject, many admit that their true feelings are mixed.

Those who equivocate may have good reason: for many professionals, the adjustment to retirement can be psychologically challenging. A 2013 study[1] showed that retirement increased the risk of clinical depression in British men by 40 per cent.

Related research has shown that professionals, and especially male professionals, draw much of their sense of personal identity from their work. When work ends, retirees can struggle with a loss of a sense of self. Lawyers may feel that, in retirement, their views are no longer relevant; or even that their lives are suddenly without purpose.

Making a happy and healthy adjustment to retirement requires reflection, planning, and a willingness to seek support when it's needed. We share some ideas about these strategies here.

Prepare emotionally, not just financially

Earlier in this issue we discussed how to prepare for closing your practice; but it's equally important to prepare for your new lifestyle. Retirees often report an exciting first year of retirement in which they undertake travel they've always wanted, or move to a new home. But the year following that "honeymoon phase" can be a letdown.

As retirement approaches, lawyers should take time to think not only about the highlights – like fantasy trips – but also about the day-to-day. What will it be like when you are *not* travelling, not spending time with children and grandchildren, not working on your garden because it's winter?

Reflecting on everyday life post-retirement can lead some lawyers to grasp at ways to fill the time – not only hobbies, but also charity or project work. These activities can be satisfying, and keeping physically and mentally busy has been shown to support mental and physical health. However, "solving" the "problem" of free time can give a soon-to-be retiree the illusion of being prepared without actually having performed any real introspection.

As the date of your retirement approaches, consider asking yourself the following questions to assess your emotional readiness:

- How will I describe myself, when introduced to new people, once I'm retired?
- Do I have any critical views of retired people that could turn into *self*-criticism? For example, do I view retired people as lazy, boring, opinionated, etc., and what can I do to challenge those stereotypes in my own mind?

[1] Sahlgren, Gabriel H., "Work longer, live healthier: The relationship between economic activity, health and government policy", Institute of Economic Affairs (UK) Discussion Paper No. 46, May 2013.

- When I imagine myself telling others I am retired, how do I imagine feeling? Proud? Sheepish? Old? Do I imagine rhyming off a list of professional commitments I've maintained, and if so, why do I feel the need to do this?
- Do I have any secret fears? For example: running out of money, getting bored, drinking too much, or getting tired of my partner?

Confronting these worries ahead of time is much healthier than assuming you'll be blissfully happy all the time. Talking about concerns with a trusted friend – ideally someone who has already made the retirement transition – is even better.

It's equally important to sit down with your spouse, if you have one, and compare expectations. You may be surprised to discover that your visions of what retirement will be like don't completely align. One spouse, for example, may expect to spend a great deal of time as a couple, while the other imagines developing new friendships and individual hobbies. Talking explicitly about expectations can minimize misunderstandings and even conflict later on.

Expect an adjustment period

All major life changes require an adjustment period. Thinking back to your first years as a lawyer, as a spouse, or as a parent can be a powerful reminder that life changes involve a process of growing into a new role. Most lawyers understand that retirement involves a priority shift, but many are surprised that this change is gradual, not instantaneous. After decades of a routine built around work, it's unrealistic to expect that you will wake up on Monday mornings *without* feeling like there is somewhere you need to be.

But soothing these dissonant feelings by piling on new responsibilities only postpones the required priority shift. Instead of overscheduling yourself, consider committing to the practice of patience about your emotions as your routines change. You will grow into your role as a retired person just as you grew into your role as a lawyer or a parent; but it will take time. Be careful to avoid making irreversible commitments – whether to a new part-time job, a volunteer post, or to providing day care for grandkids – before your new priorities have had time to solidify. Be patient.

Be intentional about your choices

As you think about what kind of person you will be in retirement, do yourself the great favour of being intentional. Don't take on a second career because others assume you will, or because they have been asking if you will. If you choose to do volunteer work, don't just accept the first option that presents itself. Instead, choose opportunities carefully with clear objectives in mind. For example, if you see volunteerism as a way to build new friendships, sitting in your study drafting grant applications for a local charity won't achieve that.

It's also a good idea to be intentional about your time. It's not unusual for the newly retired to be bombarded with requests for (unpaid) help. Be prepared with polite but non-negotiable ways to say "no" to commitments that don't appeal to you, and be careful about managing expectations. For example, if your children drop hints about hoping you'll provide daycare for the grandkids, and you know that this is not something you want to do, don't give vague answers that might lead them on. Instead, be clear and specific: "We'd be happy to be put on the list of emergency contacts at the daycare, and we'd love to host the kids three or four weekends a year, and at the cottage for a week in July."

Get by with a little help

If you do find that retirement has an impact on your mental health, don't ignore it. Depression, anxiety, and other psychological disorders are amenable to a range of different treatments. Mental health issues are a very common reason for visiting a health care professional – you won't be laughed out of the office for being dissatisfied with your new life of leisure.

As a retired lawyer, you also have the option of accessing resources from Homewood Health, which provides the confidential Member Assistance Program (MAP) for Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, licensing-process candidates, and their families, with financial, arm's-length support from the Law Society of Upper Canada and LawPRO. To learn more about the MAP, please visit myassistplan.com or call 1-855-403-8922. ■

Nora Rock is Corporate Writer and Policy Analyst at LawPRO.

Retirement preparedness from the MAP

Homewood Health™ provides the confidential Member Assistance Program (MAP) for Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, licensing-process candidates, and their families, with financial, arm's-length support from the Law Society of Upper Canada and LawPRO. They offer e-courses that can help lawyers prepare for retirement.

- Preparing for your retirement
- Embracing workplace change
- Responsible optimism
- Resolving conflict in intimate relationships
- Leading the human side of change

You can access the MAP resources at myassistplan.com

Member Assistance Program

Your Member Assistance Program (MAP) is available 24/7

1-855-403-8922 (toll free)
TTY: 1-866-433-3305
International (call collect): 514-875-0720
myassistplan.com

"I will be out of the office...forever" and I don't want to deal with claims

Are you thinking of changing careers or law firms, selling the practice, or retiring? As other articles in this issue have highlighted, even after you retire, malpractice claims can engage your LawPRO E&O run-off coverage. Real estate lawyers should consider TitlePLUS title insurance since claims covered under the Legal Service Coverage[1] in a TitlePLUS policy will not affect your run-off insurance.

In other words, TitlePLUS Legal Service Coverage significantly broadens the protection that your clients receive – and it protects you in these situations too.

Coverage that sets you apart

TitlePLUS polices automatically cover all the standard aspects of a real estate deal plus the legal services provided by the lawyer in the purchase or mortgage transaction whether or not the loss otherwise falls under one of the covered title and compliance risks.[2] This goes well beyond the coverage provided under other title insurance policies generally available in the market today. In TitlePLUS policies, this coverage is automatically included at no extra charge.

What this means for you

If a purchaser or lender protected under a TitlePLUS policy suffers a loss in relation to the transaction where the lawyer missed something while closing the deal, they would simply submit a TitlePLUS claim directly to LawPRO, eliminating the need to commence proceedings against their lawyer to obtain compensation. This means, the lawyer's primary E&O policy will not be engaged and will not trigger a deductible or claims history levy surcharge in respect of the claim.

Most other title insurance providers do not cover all services provided by the lawyer – they only indirectly cover such lawyer's negligence if the result is a loss which is otherwise a covered risk.

Although some title insurers offer additional coverage for aspects of the lawyer's services in the transaction (which can be purchased on an individual application basis at an additional charge), lawyers should review the terms of these coverages very carefully. Some of them contain limitations or exceptions, such as a requirement to give notice of a claim within one year of closing, or exclusions for transactions associated with mortgage enforcement proceedings or private lenders.

TitlePLUS Legal Service Coverage is part of the policy and remains in force as long as the policy does. It provides protection for you and your client for as long as the property is owned by the client or his/her heirs. It protects the mortgage lender for as long as the insured mortgage constitutes a charge on the property, even if the mortgage is renewed, extended or amended. The TitlePLUS policy also continues to cover insured mortgages after they have been assigned.

Claims data

LawPRO's E&O program shows that real estate claims are high in cost and numbers. Some claims have involved title insurance policies that do not contain the type of legal service coverage offered under the TitlePLUS policy and, therefore, the title insurers of those policies rightfully denied coverage.

Issues that may fall under TitlePLUS Legal Service Coverage, but are not generally covered under other title insurance policies include:

- errors in drafting and/or reviewing the agreement of purchase and sale;
- failing to disclose information to the lender client that is material to the decision to advance funds under the mortgage;
- an error made in the application for title insurance, such as applying for the wrong type of title insurance policy (which may result in insufficient coverage for the client);
- failing to ensure that a purchaser's intended future use of the property is protected (where the lawyer was retained to confirm the legality of a proposed future use);
- obtaining title insurance for a single family dwelling when the property features multiple units;
- incorrectly advising (or failing to advise) about taxes applicable to the transaction or tax consequences; and
- inadequately drafting undertakings, warranties or other documents in connection with the transaction.

Move on to your next adventure with peace of mind

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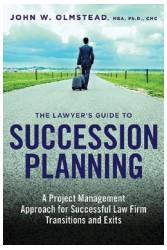
The Lawyer's Guide to Succession Planning



by John W. Olmstead

No one likes to think about getting older, and lawyers may tend to put off thinking about the day they have to retire from the profession they love and the firms they have spent a lifetime building. However, the fact is that there is a wave of Boomers hitting retirement age (90 million in North America over the next twenty years) and according to the American Bar Association 65 per cent of law firm equity partners are in their late 50s and early 60s. So before long, many lawyers and firms will need to turn their attention to this issue.

The Lawyer's Guide to Succession Planning, by John W. Olmstead aims to give lawyers a roadmap to help them consider the options available to them. Olmstead has been a legal management consultant for over thirty years, and says that over 80 per cent of his law firm engagements now involve succession planning. His book is based on his observations of both firms that set plans in place well in advance, and those that have buried their heads in the sand and faced a crisis when key people depart.

Waiting too long to begin the process of succession planning can have serious consequences to the health of the firm. Clients may leave when a lawyer retires, as could key staff or other lawyers. If that lawyer represented a large amount of business, the firm's finances could suffer. In the case of a solo firm, a lifetime's worth of sweat equity could amount to nothing if the firm simply closes its doors. To prevent this, Olmstead recommends that planning begin at least five years before a contemplated retirement date.

The entire process begins with lawyers accepting the fact of aging and being willing to contemplate no longer being part of the firm. Olmstead has found that for many lawyers, the firm is their life and they can't imagine not practising law. Some plan to work as long as they possibly can, either because their entire sense of self-worth is tied to their profession, or because they haven't prepared financially and *need* to keep working to maintain their lifestyle. Olmstead urges lawyers who still have years to prepare to find outside interests that can provide fulfillment, and also to figure out how much money will be needed in retirement and start planning on how to achieve that.

How the planning process unfolds depends a lot on the particular nature of the firm. A sole practice may have all its 'goodwill' and financial value largely tied to one lawyer, so the question will be whether that can even be passed on to another lawyer willing to buy the practice. A firm owned by a small group of partners may consider laterally bringing in another partner with similar expertise to the lawyer retiring, keeping the lawyer on as of counsel, or merging with another firm. Larger firms can create a partner track for associates who wish to someday be equity partners in the firm. There are a number of courses of action for firms of all sizes. The book gives examples of real firms that have navigated these issues; some successfully carrying on past a vital partner's retirement, and some waiting too long or finding that a partner was irreplaceable, and so winding up as 'single-generation' law firms.

A concept outlined by Olmstead is that the WHO will dictate the WHAT. In other words, identify the unique traits of the person retiring and what the firm needs in a replacement. Personal qualities and fitting into a firm culture can be as important to consider as legal expertise. Thinking about this at the outset of a search will affect how the process of finding a replacement will unfold. Though as the search progresses, finding the right relationship fit may require some flexibility on the part of the planners.

The last few chapters of the book deal with the practical issues of succession planning: valuing of a firm, creating a strategy for a partner's exit, and searching for candidates. Appendices to the book include sample sales agreements and partnership agreements, a sample transition plan template and retirement readiness assessment checklist. There is also a chapter on ethics and ensuring that local rules are followed in terms of protecting client interests in the event of firm sales, mergers and transferring files (Ontario lawyers will want to refer to the Law Society's *Guide to Closing Down Your Practice for Lawyers*).

Retirement is inevitable, and even lawyers who plan to 'work 'til they drop' will want to ensure that the firm can carry on without them, or get the maximum value for what they've spent a lifetime building. John Olmstead's book is a great place to start for firms that are beginning the process of navigating the wave of Boomer retirements heading our way.

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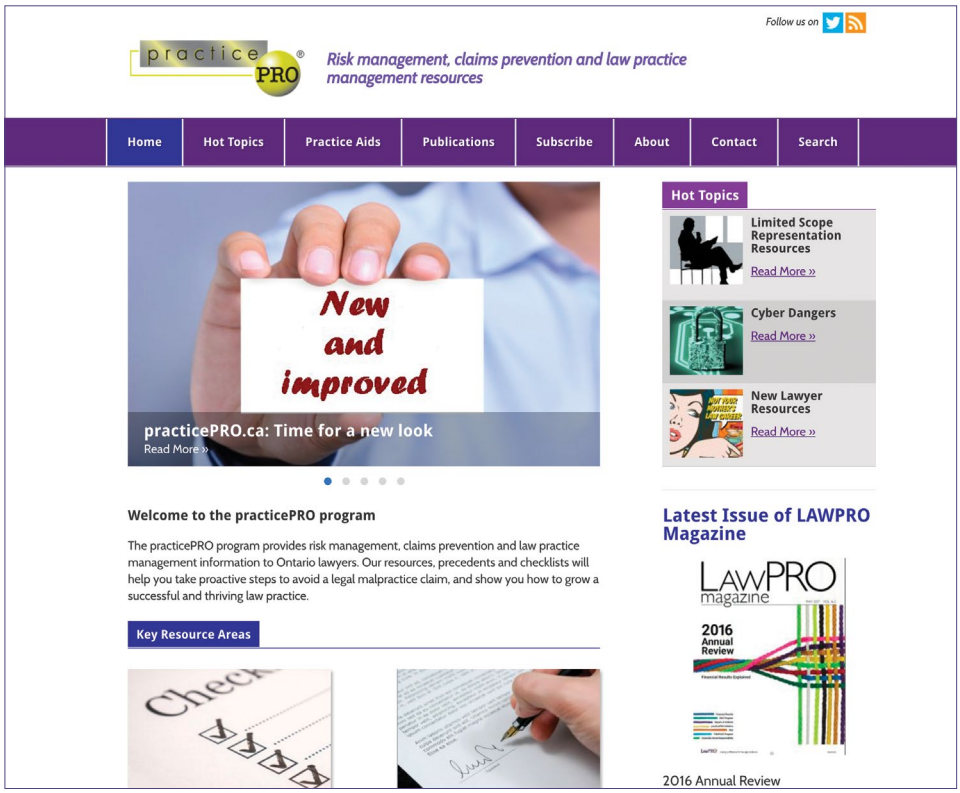
It's been nearly 20 years since the launch of the original practicePRO.ca website. While the site was basic by today's standards, it offered the high quality risk management articles, checklists and precedents lawyers would come to expect from the program.

In its first few years, practicePRO.ca averaged 30,000 visitors and 7,000 downloads per year. By 2016, those number had grown over 10 times larger with an average of 355,000 annual visitors and 362,000 downloads.

The practicePRO program has increased the scope of its content to help lawyers practise more effectively, and the site has grown larger and more complex to navigate. So, as part of an ongoing project to update all our websites and in preparation for *Accessibility for Ontarians with Disabilities Act* (AODA) changes we decided to give practicePRO.ca a completely new look and improved layout in 2017.



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- An easier-to-navigate, more intuitive design will get you to what you're looking for faster. In addition, the most important topics of the day will be displayed prominently at the top of the page.
- You can search articles, checklists, precedents and library books by area of law or by risk management topics (e.g. 'firm management,' 'communications issues,' 'disaster planning'). Everything we have to offer that is related to your search topic will appear in one place.

The practicePRO.ca website has evolved along with the program over the past 20 years, and we're pleased to introduce this new design. We invite you to explore the new practicePRO.ca and to give us your feedback at practicepro@lawpro.ca ■

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