LawPRO
A publication to help lawyers
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Helping your practice soar

Manage risk through firm structure

Indemnity agreements: reasonable protection?

Preparing for privacy

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flying high

A glimpse at the table of contents for this issue of LawPRO magazine reinforces the message we've been working hard to communicate to the legal community: LawPRO is about more than just liability insurance.

With our risk management hat on, we have focused this issue on information you need to manage your practice effectively, and efficiently, and with an eye to minimize your exposure to risk.

The introduction of new options for the way you structure your law firm presents new opportunities and risks. Our cover story tackles this subject with an in-depth examination of the pros and cons of various firm structures.

LawPRO also believes it is important to ensure you are informed of regulatory and legislative developments that could have risk implications for your law practice: Simon Chester's article on the new federal privacy legislation and his advice on how you can prepare to comply gives you a head start on the January 1, 2004, implementation deadline. We have also lined up Simon to prepare a more detailed discussion of privacy issues and their implications for the legal profession once provincial legislation is enacted. Similarly, a Question-and-Answer article on the new National Mobility Agreement covers the most likely insurance-related scenarios for lawyers seeking to take advantage of this new opportunity. Finally, an article on holdharmless agreements, which law firm clients are increasingly including in their legal service agreements, details the risks presented by these contract provisions.

But equipping you – through information – to make well-informed choices for yourself and your law practice is only one way we exercise our mandate. New outsourcing initiatives being tested by financial institutions present challenges – even a threat – to the thousands of Ontario lawyers who do real estate work. As described on page 22, LawPRO has undertaken a number of initiatives to reinforce, with financial institutions and consumers, the vital role that lawyers play in real estate conveyancing. As well, we are working with a number of legal associations to get information into the hands of lawyers – because information empowers. We believe that the 19,000 lawyers who practise in every nook and cranny of this province are a ready-made network on which lenders and other service providers who are looking to centralize and reduce administrative costs can build. And we are committed to TitlePLUS, the only title insurance product predicated on making lawyers a mainstay of the conveyancing process.

As our cover says, our lofty goal – as always – is to help you and your law practice soar to new heights. Have a safe and happy summer.

Michelle L.M. Strom
President & CEO

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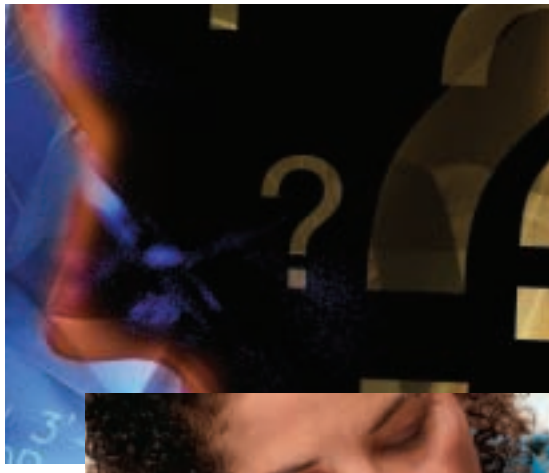

DEPARTMENTS

structuring firms to manage risk

Time was that if you were going to set up a professional practice, how you organized it was pretty simple. If you were going to practise on your own, you were a sole practitioner, or perhaps practising in association with one or two others. If you were going to practise with other lawyers, you formed a general partnership. Either way, you had unlimited liability for claims against the practice, whether or not you, personally, were at fault. And you paid tax on all your income at regular personal tax rates.

Times have changed and so have the ways in which you can organize your practice.

Legislative changes in the Law Society Act, R.S.O. 1990, c.L.8, Business Corporations Act, R.S.O. 1990, c.B.16 and Partnerships Act, R.S.O. 1990, c.P.5 now let you tailor your firm structure to better suit your needs and circumstances.

Today your practice choices are many: You can now also practise through professional corporations, limited liability partnerships, and multi-discipline partnerships – or in some combination.

These new choices create risk management opportunities, which should be taken into account when setting up practice for the first time or when restructuring an existing law firm. As well, tax benefits can now be particularly significant for those practising alone or in small numbers.

In this issue of LAWPRO magazine, we examine the many firm structure choices available to lawyers – and the liability and tax issues associated with each.

Liability and law firm structures

Sole proprietorships

The number of lawyers practising as sole proprietorships is expected to drop significantly in Ontario, as lawyers become more familiar with the tax advantages associated with practising in professional law corporations, alone or perhaps with others.

A sole proprietorship, however, remains a simple and convenient form in which to conduct the practice of law. No separate legal entity is involved: The sole proprietorship is an extension of the natural person. The business, its assets and liabilities, are that of the owner. And like other legal entities, a sole proprietor can have employees and agents, and is responsible for their acts through agency and employment law.

One very important risk management benefit to a sole proprietorship is the opportunity to directly control risks associated with the practice. The owner is responsible for his or her own practice. He or she also directly supervises any employees or agents and can ensure first-hand that they understand and take effective steps to address risks and exposures relating to the practice.

On the down side, the owner faces unlimited liability, and there is no separation between business and personal matters. So, without taking other steps, your personal assets are exposed to payroll, lease and other business obligations, and the business is exposed to any personal or family obligations.

With unlimited personal liability, maintaining adequate insurance protection is very important, including adequate professional liability insurance for the practice, appropriate general liability and office coverages, and fidelity coverage for the acts of employees and agents.

Practising in association

For a variety of reasons, many lawyers choose to associate with other lawyers in practice, without entering into any type of partnership arrangement or a professional law corporation.

They may want to offer the client a greater sense of firm profile, resources or available expertise; or recognize work referral arrangements; or ensure easy access to others to confer and rely upon; or reduce expenses by sharing office and meeting space, reception and administrative facilities, and costs of support staff.

Although associations, as well as partnerships, with non-lawyers are also a possibility, there are limitations on when they may be formed, and significant professional obligations that apply. These are discussed under "Multi-discipline practices" on page 4.

Despite the risk management and other benefits of working in association, lawyers in these practice arrangements should take precautions to ensure that they do not inadvertently assume any liability for risks associated with the others' practices.

As well as buying insurance, a lawyer practising in association needs to manage the "ostensible partner" exposure – likely the single most important aspects of risk management for lawyers practising in association. (For more, see page 5). As well, lawyers must remember that they may have less ability to control and oversee staff when they share resources with other lawyers.

General partnerships

The number of lawyers practising in general partnerships is declining rapidly, as firms adopt other new firm structures, such as limited liability partnerships.[1]

A partnership is the relationship between persons carrying on a business in common, other than in a corporation, with a view to profit. The partnership does not require any specific formalities. However, lawyers should have in place a written partnership agreement to: manage expectations; address the varying degrees of participation of partners; document their interests, duties and responsibilities; and deal with specific events such as the admission of new partners and the withdrawal of existing partners under various circumstances.

Under the *Partnerships Act*, every partner is an agent of the partnership and of the other partners for the purpose of the business of the partnership, and the ordinary acts of each partner will generally be taken to bind the firm. Similarly, acts done or instruments executed by partners and others authorized on behalf of the firm concerning firm business bind the partnership.

Unless they are in a limited liability partnership, every partner in the firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is partner. Wrongful acts or omissions, misapplications of money or property

1 LawPRO statistics indicate that in 2002, close to 40 per cent of the 10,400 lawyers in private practice worked in an LLP.

received for or in the custody of the firm, done in the ordinary course of business, all bind the general partnership and its partners.

Because ownership and control reside with all partners together and not one individual, and because each partner faces unlimited liability on a joint and several basis for the acts of all partners, employees and agents, the stakes facing each partner are substantial, and the risks are more difficult to manage. Internal procedures and controls are critical in effectively managing your practice exposure with this type of practice structure (for a detailed listing of internal controls and procedures, see pages 6-10 in practicePRO's *managing the finances of your practice*. www.practicepro.ca/financesbooklet).

Limited liability partnerships

The number of limited liability partnerships has grown quickly in Ontario since the necessary changes in the *Partnerships Act* and By-Law 26 of the *Law Society Act* came into force in 1999.

A limited liability partnership has the characteristics of a general partnership, but with specific limitations on the liability of partners. Unlike in a general partnership, a partner in a limited liability partnership is not jointly liable for the debts, obligations and liabilities of the partnership arising from the negligent acts or omissions of another partner or of an employee, agent or representative of the partnership, committed in the course of partnership business.

In fact, other partners are not a proper party to such proceedings. Instead, a lawyer is only personally liable for his or her own negligence, and for the negligence of any person under his or her direct supervision or control. Of course, claimants may seek to make others in the LLP personally liable, alleging that other partners ought to have exercised some measure of supervision or control, or perhaps should have implemented procedures to avoid the negligence of others.

Clearly, these limitations on your personal liability are a very important benefit as you look to manage the risk exposure associated with your practice. However, the limited liability partnership itself continues to be fully exposed for the acts of all of its partners, employees and agents, so any assets you have in the firm itself would remain at risk.

If the liability does not arise out of negligence, all partners in a limited liability partnership continue to be fully exposed. So all partners remain fully liable for any non-negligent breach of firm obligations, including failure of the firm to meet its lease and payroll obligations, as well as for any wrongful acts or omissions, or misapplications of money or property placed in the custody of the firm in the ordinary course.

Whether new or amended, the partnership agreement must be in writing, designating the partnership to be a limited liability partnership and providing that the *Partnership Act* shall govern. In continuing a partnership as a limited liability partnership, the limited liability partnership and its partners become liable for all debts, obligations and liabilities of the partnership and its partners arising before the continuance.

Even for limited liability partnerships, insurance remains an important consideration. Clients are anxious to know that there is ample insurance protection backstopping your firm's services, appreciating the restricted access to partners' personal assets. As a partner, you face personal liability for your own negligent acts and those of any person under your direct supervision or control. You are also jointly responsible for the non-negligent acts of all others in your firm, and for any liabilities subsequently arising out of past services you provided to the firm during your tenure with the firm before it became a limited liability partnership. Of course, your assets in the partnership remain fully exposed for the activities of all others in the firm, and indeed, any predecessor partnership.

Multi-discipline practices ("MDPs")

Approval in 1999 of By-Law 25 of the *Law Society Act* enables lawyers to participate in multi-discipline practices.

The MDP model approved by Convocation allows lawyers to enter into a partnership or association with a non-lawyer who practises a profession, trade or occupation that supports or supplements the practice of law, to permit the lawyer to provide these services to his or her clients. Fully integrated MDPs offering a full range of services for clients are not allowed under the By-Law.

Effective control over the non-lawyer's practice of his or her profession, trade or occupation as it relates to the partnership or association, must remain with the lawyer. The non-lawyer must acknowledge this, and agree to certain limitations on his or her trade practice, including that he or she be bound by the *Law Society Act*, its regulations, by-laws, and rules of practice and procedure. The rules, policies and guidelines on conflicts of interest apply in the case of an MDP partnership.

This model provides lawyers with an opportunity to offer a more complete service to their clients, allowing patent and trade mark agents, tax consultants, public policy advisors, human resources consultants, and others to enter into an association or partnership with you.

Is yours a true association or apparent partnership?

Under section 15 of The *Partnership Act*, R.S.O. 1990, c. P.5 lawyers practising in association may be exposed to vicarious liability for the acts of their associates, where there has been a "holding out" of partnership and the client relies on this holding out.

> "15. (1) Every person who by words spoken or written or by conduct represents himself or herself or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to any person who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the persons so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made."

Seemingly the courts have interpreted "giving credit" to include virtually any professional dealing. They have tended to look at the whole of the circumstance, and have looked to the following in determining whether or not the association is a true association or an apparent partnership:

- name on the firm letterhead or stationery;
- signage on the firm's door and elsewhere;
- wording on business cards;
- public announcements and advertising (e.g. Ontario Reports, yellow pages);
- premises and resources shared;
- use of the firm name in pleadings;
- shared or separate bank accounts.

Other issues that you should consider include:

- your firm's promotional materials, including web pages;
- how client referrals are handled among associates;
- how files and billings are treated when associates are called to assist;
- how reception answers the telephone and greets clients;
- what you and staff say and how you conduct yourselves with clients;
- your course of dealings with the client.

LAWPRO recommends that letterhead and other material referencing the association specifically state that you are acting in association and "not in partnership". In *Bet-Mur Investments Limited v. Spring et al* (1994), 20 O.R. 417 (Ont.Ct.Gen.Div.), affirmed [1999] O.J. 342 (Ont. C.A.), the Court held that in the circumstance where the letterhead and the sign on the door suggest that the solicitors may be partners, the solicitors bear the onus of conveying to the public that they are not partners.

From a risk management perspective, however, you need to be aware that **you are responsible** under the by-law for ensuring that the non-lawyer practises his or her profession, trade or occupation with the appropriate level of skill, judgement and competence, and complies with the *Law Society Act*, regulations, by-laws, rules, policies and guidelines. This is regardless of whether it is an association or partnership arrangement. So, in either case, the importance of effective risk management and controls, and insurance, in the context of MDPs is clear.

Professional law corporations

Amendments to the *Business Corporations Act*, R.S.O. c.B16, the *Law Society Act*, and Convocation's approval of By-Law 34 in 2001 allowed Ontario lawyers to practise law through professional law corporations.

Many Ontario lawyers practising alone or in small firms are now incorporating their practices so that they can realize the tax savings that apply to these practices, as described on page 8. Although it is possible for larger firms to use professional corporations in their structure, the tax savings are effectively shared among all in the firm, so the tax advantage quickly diminishes with more than a few in the firm.

Like other types of corporations, a professional corporation is a legal entity, separate and apart from its shareholders. A professional corporation, however, may only be owned and operated by members of the same profession, and may not carry on a business other than the practice of the profession, or activities related to or ancillary to the practice of that profession.

From a risk management perspective, lawyers need to remember that many of the traditional protections against personal liability associated with the use of a corporate entity DO NOT exist in the case of professional corporations.

In particular, the *Business Corporations Act* provides that:

(a) the acts of a professional corporation are deemed to be the acts of the shareholders, employees or agents of the corporation;

(b) the liability of a member for a professional liability claims is not affected by the fact that the member is practising the profession through a professional corporation;

(c) the shareholders are jointly and severally liable with a professional corporation for all professional liability claims made against the corporation for errors and omissions that were made or occurred while a shareholder; and

(d) if a professional corporation is a partner in a partnership or limited liability partnership, the shareholders have the same liability for that partnership as they would if they themselves were the partners.

Therefore it is as important for professional law corporations to have effective risk management and insurance protection in place as it is for other types of firm structures.

Combined firm structures and management companies

In structuring their law practices, a number of lawyers are also combining these practice forms, as well as continuing to make effective use of management companies.

For example, some small firms are choosing to become limited liability partnerships with one or more firm lawyers forming personal law corporations which act as partner. In doing so, these lawyers look to achieve the benefits of limited liability protection through the firm partnership, and share in the tax benefits by having his or her personal professional law corporation act as partner.

Similarly, lawyers have elected to practise in general associations or partnerships while using personal professional corporations. Other law firms have elected to form multi-discipline partnerships while realizing the benefits of a limited liability partnership.

Of course, many law practices continue to limit the scope of the activities of the law firm itself to the provision of legal services by lawyers, while providing other services and conducting various administrative functions in common corporations.

In this situation, intellectual property, ADR and other types of services are provided through a corporation at the side, and management companies are formed to deal with lease, payroll and other obligations.

These corporations are formed for many reasons, including to provide principal stature to non-lawyers in the firm, to facilitate income splitting, to provide services that are not incidental to the practice of law, and to limit personal liability.

By assessing their objectives and identifying the opportunities available, more than ever lawyers are able to tailor their firm structure to suit their practice and personal needs.

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A taxing question: The tax implications of different firm structures

Sole proprietorship and lawyers in association

This is the one type of business structure that has not changed significantly in recent years. From a tax perspective, working alone or in association may be an excellent option for those just starting out in practice, perhaps working part-time or out of their home. Your net professional income, essentially fees billed less practice expenses, is included in your income for tax purposes. If you operate your business from your home, you can deduct a reasonable proportion of your home office expenses. You must calculate your professional income on a calendar year basis. As well, you have the option of realizing additional tax benefits from incorporating as a professional law corporation, as discussed later in this article.

If you decide to work with a group of other professionals (either in association with other lawyers, or with non-lawyers as an MDP) sharing office, secretarial and other costs, you can still operate as a sole practitioner, for tax purposes. However, once the arrangement moves to one in which you share profits rather than costs, you will need to consider one of the other two structures described below.

Limited liability and other partnerships

Since 1999, when changes to the *Law Society Act* and By-Law 26 came into effect, lawyers have been able to carry on professional practice through a limited liability partnership (LLP). Prior to that, professionals could carry on practice only through a general partnership (GP) which brought with it all the problems of joint and several liability. Most professional law partnerships in Ontario have now converted into LLPs which, from a tax perspective is the preferred method of carrying on practice[1]. Carrying on business through a partnership, whether a GP, an LLP or MDP, has a number of tax implications:

- Partnerships are not considered separate legal entities and are therefore not subject to tax. Profits are calculated at the partnership level, applying the normal tax rules, and are then allocated proportionately among the partners, who each pay their own tax.
- Provided the partnership files the appropriate election with CCRA, there is no need to place a value on work in progress in the calculation of income. This means that, for tax purposes, income is recognized when a fee is billed and not when the time is docketed or recorded.
- A partnership must adopt the calendar year as its fiscal period.
- For tax purposes, a partner's interest in a partnership is treated as an asset separate and distinct from the underlying assets of the partnership. As with any other asset, an interest in a partnership has a cost base for tax purposes which must be tracked. The cost base is increased by contributions of capital to the partnership plus the partner's share of income computed on a tax basis, and reduced by drawings on account of income or capital. When a partner disposes of his or her interest in the partnership upon resignation or retirement, a capital gain or loss may result because of differences in the calculation of income for book and tax purposes.
- A partnership offers maximum flexibility in structuring the ownership interests of the individual partners. Interests can be changed to reflect changes in the profit contributions of individual partners. It is also possible to have income interests in different proportions to capital interests.
- Special rules in the tax legislation permit partnerships to allocate profits to former partners, which eases the transition when partners retire or withdraw from the partnership.
- The one major tax disadvantage of a partnership is that all profits are taxed currently in the hands of the partners and

[1] LawPRO statistics indicate that in 2002, close to 40 per cent of the 19,400 lawyers in private practice worked in an LLP.

there is no opportunity to reduce or defer tax, as there is with a corporation (see below). However, profits of the partnership taxed in the hands of the partners are considered to be earned income for the purposes of calculating an individual's ability to contribute to an RRSP, provided the partner is "actively engaged in the business".

- As far as the individual partners are concerned, they are treated as being self-employed for tax purposes, which means that they contribute to the Canada Pension Plan but they do not have to pay Employment Insurance (EI) contributions nor, in Ontario, the Employer Health Tax (EHT).
- The partnership, and not the partners, must obtain a business number from CCRA, for GST and payroll withholding purposes. The partnership must also file an annual information return on form T5013 with CCRA and issue each partner an information slip showing the amount of income to be reported on the partner's individual income tax return.

Professional corporations

Since 2001, lawyers and certain other professionals in Ontario have been able to carry on practice through a professional corporation (PC). While a PC does not provide any additional liability protection in respect of professional risk, it offers a wholly different set of tax planning opportunities.

The Canadian tax regime has always provided a favourable tax environment for a small business corporation, technically known as a "Canadian-Controlled Private Corporation" or CCPC, by providing a significantly reduced tax rate on the first $200,000 of annual income. Until recently the setting up of a corporation was denied to most professionals. Not only did the law change to allow the setting up of PCs but the tax benefits were also enhanced, for all CCPCs, by a reduction in the tax rate and a raising of the threshold to which the reduced tax rate applied.

Currently, in Ontario a tax rate of 18.6 per cent applies to the first $225,000 of annual income and, by 2006, the rate will be reduced to 17.1 per cent on the first $300,000 of annual income. How does this impact your professional practice?

Corporations are taxed quite differently when compared to partnerships and their partners:

- A corporation is a separate legal entity and taxed independently from its shareholders.
- If a practitioner wishes to withdraw funds from his PC, he can either receive the money on a pre-tax basis as a salary or bonus, or on an after-tax basis as a dividend. The difference is that a salary or bonus reduces the taxable income of the corporation and creates an equal amount of taxable income in the hands of the recipient, while a dividend is paid out of the after-tax income of the corporation. Although a dividend is taxable in the hands of the shareholder, the shareholder is given credit for part or all of the tax paid at the corporate level. The following illustrates the tax impact of paying a salary or dividend out of a PC to its owner/shareholder.

		Salary	Dividend
PC	Revenue	1,000	1,000
	Salary paid	(1,000)	–
	Taxable income	–	1,000
	Corporate tax	–	(186)
	After-tax income	–	814
Individual	Salary/dividend received	1,000	814
	Dividend gross-up	–	203
	Taxable income	1,000	1,017
	Federal & Ontario tax	464	255
	After-tax income	$536	$559

There are two interesting points to note from this example. First, of the $1,000 profit earned in the PC, $186 goes in taxes

and $814 can be reinvested in the business. Second, even when profits are withdrawn from the business, the combined effective tax rate is 2.3 percentage points lower than it would have been had the income been withdrawn as a salary, and the shareholder receives an additional $23.

- If you are a sole practitioner, you can set up a PC to carry on the practice and enjoy the full benefit of the small business rate. If you are in practice with one or more other professionals, you can still use a PC to carry on the practice, but you have to share the benefits of the small business rate, and the more practitioners you have, the smaller each person's share of the tax reduction.
- Once the PC's income exceeds the amount eligible for the small business rate, the combined tax rate in the corporation increases to about 36.6 per cent (reducing to 31.6 per cent in 2005). It then becomes tax inefficient to pay tax in the PC and distribute the after tax income as a dividend. At this point it is more tax efficient to pay a salary or bonus to the practitioner to reduce the PC's income down to the level of the small business rate.
- Most practitioners should ensure that they have sufficient income to maximize their RRSP contribution. This requires approximately $80,500 of earned income to generate an RRSP contribution of $14,500 (the maximum in 2003). Salary or bonus constitutes earned income, a dividend does not. A salary or bonus at this level will also cause maximum CPP contributions to be made.
- While EI contributions are not required on a salary you receive from a corporation you control, if total salary and bonuses paid by the PC exceed $400,000 the PC will be liable to EHT up to an amount not exceeding 1.95 per cent of its payroll.
- Unlike other corporations, a PC is required to use a December 31 year end for tax purposes.
- If the PC is in the position of reducing its taxable income by paying a bonus, a small measure of tax deferral can be achieved by accruing the bonus as an expense in the corporation in one year and paying it to the practitioner in the following year. Provided the bonus is paid within 179 days of the end of the corporation's tax year, the bonus is deductible in the year that it is accrued by the PC even though it is only paid, and taxed in the hands of the recipient, in the following year.
- PCs tend not to be used in larger professional practices. If you have ten professionals practising together, spreading the benefits of the small business tax rate among ten individuals does not produce large individual tax savings. If the ten practitioners each set up their own PC to carry on business in partnership, the tax rules require that the benefits of one small business rate be spread among all ten PCs.

With the introduction of PCs, practitioners now have the same choice of business entities to organize their practices as other Canadian business people, and each have their particular advantages and disadvantages.

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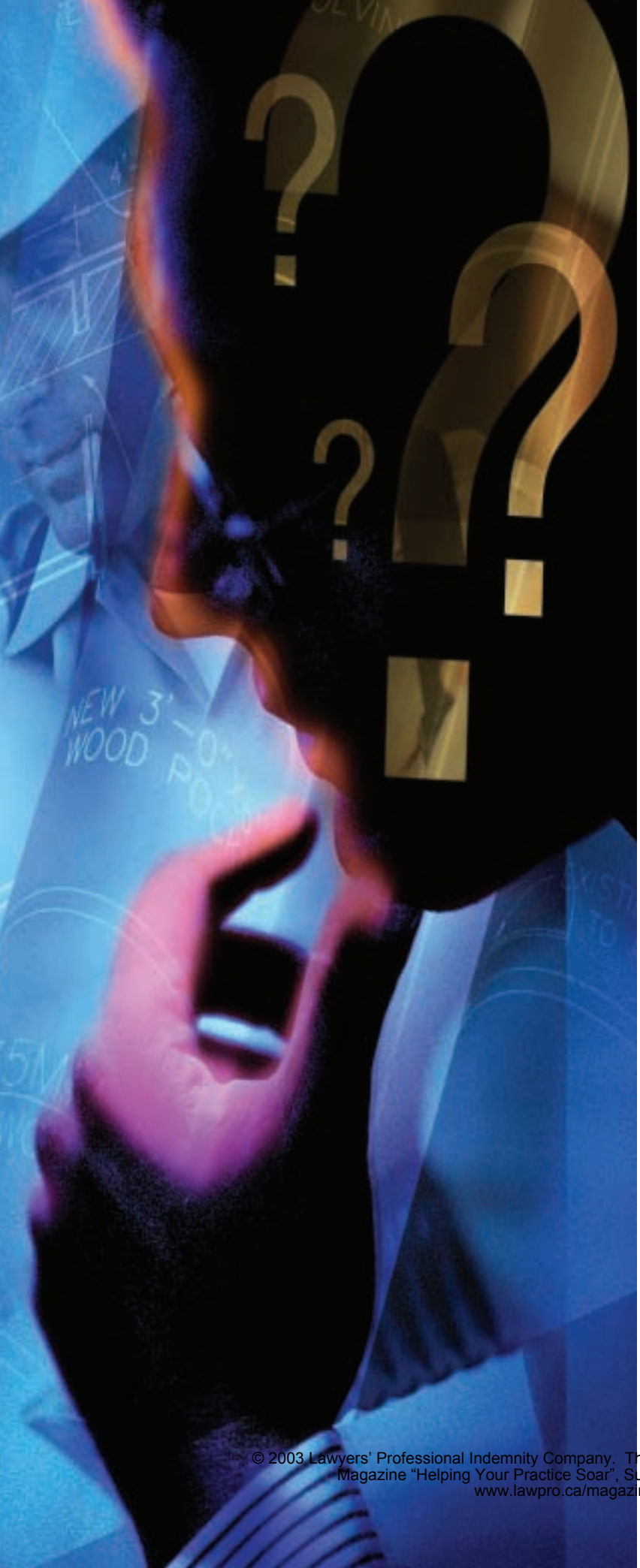


Indemnity & holdharmless provisions:

A request for reasonable or excessive protection?

Protecting yourself and your firm against possible claims by clients may not come naturally to you, when your usual focus is protecting your clients.

Increasingly though, law firm clients are looking to enhance protection for themselves by including indemnity and holdharmless provisions in their legal service agreements, much as they do in their contracts with other types of service providers.

Usually, these clients are substantial corporate entities, or provincial, municipal or other governmental bodies, who are holding out the prospect of some substantial volume of legal work in tender or other form. On occasion though, this type of protection has also been raised in the context of a substantial client or perhaps the only client of a single lawyer. Similar provisions may also be found in various types of software and other user and subscription agreements, which law firms and others routinely enter into.

In the usual circumstance, the contract is unilateral in form or is presented as a standard form contract with little or no opportunity to negotiate. Some contracts include provisions which are quite specific in nature and form, perhaps to address the prospect of intellectual property right infringements or the like. Many are broad in form and onerous in nature. Often, your client's administrator is unaware of the indemnity and holdharmless provision and the significant burden that it may place on the lawyer and law firm.

For our part, LawPRO encourages you to recognize the significance of indemnity and holdharmless provisions in your contracts, to consider the implications to you and your firm with care, and to negotiate the removal or restriction of these provisions, where you can.

Often clients who first present these contracts on a "take it or leave it" basis, are, in fact, prepared to modify terms when the unreasonable aspects of the provision are brought to their attention. Ultimately though, you may need to consider whether the benefits to you and your firm in entering the contract warrant this type of provision.

Clearly, turning a blind eye to this type of provision is of no benefit to you or your firm when the client subsequently goes to exercise its rights against you under this part of the agreement.

Of course, it is not unreasonable for the client to expect the lawyer to bear responsibility for his or her legal services. In fact, the *Solicitors Act*, R.S.O. 1990, c. S.15 expressly provides that any provision in a client contract providing that the solicitor is not to be liable for negligence is void, unless it is in the context of an employment relationship.

Specifically, Section 22 of the *Solicitors Act*, R.S.O. 1990, c. S.15 provides:

> **"Agreements relieving solicitor from liability for negligence void**
> 22. (1) A provision in any such agreement that the solicitor is not to be liable for negligence or that he or she is to be relieved from any responsibility to which he or she would otherwise be subject as such solicitor is wholly void. R.S.O. 1990, c. S.15, s. 22.
>
> **Exception, indemnification by solicitor's employer**
> (2) Subsection (1) does not prohibit a solicitor who is employed in a master-servant relationship from being indemnified by the employer for liabilities incurred by professional negligence in the course of the employment. 1999, c. 12, Sched. B, s. 14."

Many indemnity and holdharmlesss provisions, however, go well beyond protection for them in the case of the lawyer's negligence. Consider, for example, the following clause used by one government agency:

> "The bidder agrees that the bidder shall at all times indemnify and save harmless the Board, and their employees, members, and agents from and against all claims, demands, losses, costs, damages, actions, suits or other proceedings by whomsoever made, sustained, brought or prosecuted in any manner *based upon, occasioned by or attributable to anything done or omitted to be done by the bidder*, or its officers, employees, or agents in connection with the provisions of Services by the bidder under the Contract." (emphasis added)

Some provisions of this nature also impose a broad obligation on you and your firm to defend the client, its employees and agents, against such claims and suits. Of course, this is not intended to ensure that your firm actually acts on behalf of the client in the underlying matter, but rather to ensure that you are obligated to make arrangements to ensure their active defence. Where their own interests diverge, this may mean multiple defences. For its

part, your firm may be unable to act by virtue of its own conflicting interests under the services agreement.

Policy coverage

Entering into an agreement with an indemnity and holdharmless provision of this nature does not jeopardize your policy coverage *per se*. If a claim is covered in accordance with the ordinary terms and conditions of the policy, the fact that you have entered into an agreement with the client which includes this type of clause will not void your policy coverage.

On the other hand, the contractual provision will not operate to expand your policy coverage either. Any claim made in reliance upon the indemnity and holdharmless provision will be solely and exclusively governed by the policy terms and conditions, which will remain unmodified by this contractual provision.

However, it is important to recognize that an indemnity and holdharmless provision such as this is considerably broader in scope than what you can expect would be covered under a professional liability insurance policy, including your Law Society program coverage or any excess policy coverage your firm may carry with LawPRO. Where the policy coverage is triggered, of course, you can expect your various policy obligations (deductible payment, claim surcharges, etc.) to apply in the ordinary course.

Although it is clearly open to you to accept uninsured exposures, we suggest that you consider the extent of your contractual obligations and what exposures are likely to be uninsured.

Consider, for example, that:

- the indemnity, defence and holdharmless obligations in the contract are not limited to negligent acts or omissions, which is the basis of the LawPRO coverage;
- appreciating your remoteness to the claimant, you may not have otherwise owed any duty to the claimant or you may have been held to a different standard than the client or its agents;
- appreciating your remoteness of the client's agent, you may not have otherwise owed any duty to the client's agent or you may have been held to a different standard as the client;
- not all losses, suits or claims for damages are likely to be covered, appreciating that your policy covers claims for damages only and not other types of remedies (such as injunctive relief), and that there is no coverage for most types of statutory and other types of fines or penalties;
- the scope or measure of damages claimed against the client may not otherwise have been compensible by you (e.g. as the client and its agents' relationship with the client is different from your own, and may also involve circumstances of special knowledge on their part);
- not all expenses incurred in the defence of the client and its agents may otherwise have been compensible by you at law, appreciating that your litigation cost obligations are ordinarily limited to that prescribed by the courts;
- the contracted obligations may apply to you in whole without any right of contribution, even though accompanied by fault on the part of the client, its employees or agents, or others; and
- your indemnity and expense obligations are likely unlimited in amount, whereas your policy protection is limited to the amount of the stated policy limits.

As such, your contractual commitments may exceed the scope or measure of coverage available under the Law Society program and any LawPRO excess policy that you and your firm may carry.

As well, most indemnity and holdharmless provisions do not provide that:

- you be advised promptly by the client and its agents of any claim or suit brought or likely to be brought against them;
- you have rights of investigation and defence with respect to such claims or suits;
- you be allowed to actively defend such claims or suits, or that the client and its agents take active steps to defend such while allowing you to associate in the defence;
- you be allowed to take steps to actively resolve or settle the dispute, or that the client and its agents take active steps to resolve or settle the dispute while allowing you to participate in this process; and
- your views and recommendations in the handling of the defence, in the resolution of the or settlement of the dispute, and any decisions concerning any appeal, be given appropriate consideration.

Consider as well that LawPRO insures you and not the client or its agents, and as such would not afford the client or its agents a defence in the event of a claim. Ultimately, your Law Society policy and any excess policy your firm may carry with LawPRO will only protect you to the extent that your liability would otherwise have existed at law as a result of an error, omission or negligent act in the performance of professional services, so you may well have uninsured exposures in agreeing to this type of provision. You may also have some protection through the Innocent Party provision under the Law Society program.

Although it is clearly open to you to accept uninsured exposures, we invite you to be cautious in doing so and to consider the limitations under both your primary and excess policies. If your firm's excess insurance is with other insurance providers, you will want to be sure to review this type of contractual provision with your insurance broker.

Duncan Gosnell is Vice-President, Underwriting with LawPRO.

Privacy and your clients

An agenda for every firm

When lawyers think of privacy compliance, many probably think about advising business clients about the requirements of the federal ***Personal Information Protection and Electronic Documents Act*** *(PIPEDA). This statute, which will apply to all businesses on January 1, 2004, requires all Canadian businesses to implement policies and procedures to safeguard personal information. What lawyers may not fully recognize, is that they too are businesses – and they too must act to protect personal privacy.*

By Simon Chester, Partner
McMillan Binch LLP

al Indemnity Company. This rticle originally appeared in LAWPRO
g Your Practice Soar", Sur er 2003. It is available at
www.lawpro.ca/magazin rchives

Where is this coming from?

PIPEDA has applied to federally regulated employers for almost three years now. It sets out rules for the collection, use and disclosure of "personal information" about customers, clients and employees in the course of commercial activities.

Effective January 1, 2004, Ontario businesses will also become subject to the requirements imposed by PIPEDA, until any "substantially similar" provincial legislation is proclaimed in force. In 2002, Ontario circulated a draft privacy bill for consultation purposes. All indications point to provincial legislation being shelved until after the Ontario election – or perhaps indefinitely. Whatever the source of privacy obligations, the standards are going to be substantially similar to PIPEDA – and law firms are going to have to comply.

What is "personal information"

The statute cuts a broad definition. Personal information includes any factual information about an "identifiable individual," recorded or not, and includes age, identification numbers, income, ethnic origin, employee files, evaluations, credit and loan records, and medical records. Personal information does not include an employee's name, title, business address or phone number. An e-mail address seems to be personal information.

What is required to protect personal information

PIPEDA's requirements stem from 10 basic principles, developed by the Canadian Standards Association, which are explicitly set out in the legislation. These principles articulate guidelines for what businesses must do when they collect, store and use or disclose confidential information. (See **The 10 principles of privacy** on page 16 for a brief explanation of each of these principles.)

What will PIPEDA require law firms to do?

First, every law firm will have to formalize its privacy practices and procedures. This will mean systematically examining their practices and how they use personal information. Not all practices are the same, since difference practice areas handle greater or lesser amounts of personal information. Criminal defence lawyers' offices are likely full of extremely confidential personal information. A small firm which deals in family law or estates matters, or whose clients are largely individuals, is more likely to have sensitive information in its files than a large business firm whose clients are corporations.

Coping with the new law

A number of Ontario firms have already taken steps to comply with the new law. For Merv White of Orangeville's Carter and Associates, the firm's privacy policy sprang out of work he was doing to advise the firm's many charitable and not-for-profit clients. He drafted a Privacy Policy which can be found on Carter and Associates' Web site (www.carters.ca/privacy.pdf), as well as a detailed internal Policy Implementation Manual. His advice to his colleagues in other firms – "you'd better get your privacy policy in place – this issue is not going away."

Gowlings is an Ontario firm that ranks as one of the largest in the country. Michael Power of Gowlings' Ottawa office drafted its policy initially. Because the firm maintains offices in Vancouver and Calgary, it will face a complex implementation task, taking account of new bills introduced in the western provinces.

Mr. Power's draft went through a round of "peer review" by colleagues and then went to the firm's executive committee. The most controversial issue was how privacy obligations matched up against professional responsibilities. Gowlings explains carefully to the clients and potential clients the concept of solicitor-client privilege and when it arises within a professional relationship.

Powers predicts that the new rules will not dramatically affect his firm – "we deal in information so we're likely to have an easier time adjusting." It would affect any firm that engages in "shotgun" marketing techniques as you will need consent to market in this way.

What does your firm need to do now: A compliance checklist

Building on the 10 principles, the following checklist will help you sort through the steps you need to take to comply.

- **Read the Personal Information Protection and Electronic Documents Act.** Understand privacy law and how the privacy principles impact your firm. The Web sites of the Privacy Commissioner of Canada – www.privcom.gc.ca – and of the Information and Privacy Commissioner of Ontario – www.ipc.on.ca – provide good starting points for both you and your clients.
- **Select a privacy officer.** Pick a firm member who can assume responsibility for privacy. Give this privacy officer the resources needed to meet the new requirements.
- **Look at your practice.** Assess the impact of the privacy principles on your clients. Not all firms will be affected in the same way.
- **Develop a privacy policy.** Your new privacy officer should work over the next year to set policies and procedures for protecting privacy and addressing complaints, train staff to adhere to the privacy policies and procedures, and develop your public positions on privacy.
- **Track data flow.** Identify your personal information holdings. Track how personal information is collected. What sensitive information do you have on clients or third parties? How is it circulated internally? What is personal information used for? Is it ever sent outside your business? You need to map data flow within your business to identify vulnerabilities. Rationalize your personal information handling practices.

- **Revise your contracts.** The new law will require that privacy is protected when data leaves your firm. In your agreements, you must ensure that the other parties (e.g. process servers, title searchers, investigators, experts) who receive or process personal information provide the same protection that you do, and will not disclose this information to others.
- **Ensure consent.** Do you ask for consent when you collect information? You should review all your consent provisions to ensure they meet the new law. Make consent meaningful. The form and manner of consent that is required will depend on the sensitivity of the information and the surrounding circumstances.
- **Security systems.** Computer security is very important. Make sure personal information is secure, by keeping it physically and, where applicable, electronically protected. Design or change existing information management systems. Check firewalls of your computer system for vulnerability. Test and evaluate systems and processes.
- **Support staff training.** Your assistant or secretary has a key role to play in ensuring that personal information is kept truly confidential. Train your legal support staff on the changes you are implementing.
- **Allow access.** Establish procedures to allow individuals access to their personal information, and to correct or update information when appropriate.
- **Finally, educate your clients and help to inform the public.** The obligations are going to fall on every business or other entity in the province engaged in commercial activities. They are going to need help to understand a broad-ranging and unusual statute that speaks in terms of principles rather than specific statutory requirements.

Model privacy policy for law firms

LawPRO has a generic policy, which you can use as a precedent and checklist to guide you as you examine your own firm's procedures for dealing with confidential information. The policy deals with a fictitious firm called Smith & Partners. It is available at www.practicepro.ca/privacypolicy.

What are the risks of non-compliance?

A failure to comply can expose your firm to a number of costly, time-consuming and potentially embarrassing circumstances. PIPEDA makes the federal Privacy Commissioner responsible for ensuring compliance with the Act and for promoting its purposes. The Commissioner has five main ways of ensuring that organizations subject to the Act adhere to its principles:

- investigating complaints;
- mediating and conciliating complaints;
- auditing personal information management practices;
- publicly reporting abuses; and/or
- seeking remedies in court.

An individual may complain to the organization in question or to the Privacy Commissioner about any alleged breaches of the law. The Privacy Commissioner may also initiate a complaint. This will prompt an investigation and the preparation of a report.

After receiving the Commissioner's investigation report, a complainant may, under certain conditions, apply to the Federal Court for a hearing. The Privacy Commissioner may also apply to the Court on his own or on the complainant's behalf. The Court may order an organization to change its practices and/or award damages to a complainant, including damages for humiliation suffered.

The Privacy Commissioner may, with reasonable grounds, audit the personal information management practices of an organization.

An audit or complaint that results in a public report about breaches of compliance at your firm would be very embarrassing.

Anyone who believes that any of Sections 5 to 10 of PIPEDA have been or are about to be contravened, may notify the Privacy Commissioner, and ask that his or her identity be kept confidential. Once the Privacy Commissioner has given his assurance, he is bound to protect the person's identity.

It is an offence to:

- destroy personal information that an individual has requested;
- retaliate against an employee who has complained to the Privacy Commissioner, or who refuses to contravene Sections 5 to 10 of PIPEDA;
- obstruct a complaint investigation or an audit by the Privacy Commissioner or his delegate.

A person is liable to a fine of up to $10,000 on summary conviction or up to $100,000 for an indictable offence.

Employees

For constitutional reasons, the federal law stops short of imposing privacy obligations on workplaces. It grants privacy rights only to employees in federally regulated workplaces. Until Ontario passes its own privacy legislation, there are no mandatory requirements. Nevertheless, given an increasingly privacy-conscious public, your employees may wonder whether their personal information is being adequately protected.

As with other personal information, you will need to ensure that your personnel files are both physically and electronically secure. You will also need to safeguard health information about your employees, and protect the identity of those who take advantage of employee assistance programs.

Ensure that your employees understand the importance of privacy. Develop clear written policies for your employees about how you, as their employer, treat privacy issues.

Michael Powers of Gowlings adds "firms with offices in BC, Alberta and Quebec will have to address the subject of employee privacy. This will impact student as well as employee evaluations (since people will have access rights)." Firms are going to have to be more careful on hiring practices and employee evaluations.

Next steps

For most law firms, complying with privacy law should not impose a significant burden. It's going to require some attention over the next six months, but once your policy and systems are in place, you'll largely be responding to any inquires and making sure that your firm is living up to its commitments. As Ontario's Information and Privacy Commissioner, Dr. Ann Cavoukian tells businesses "the fact is that good privacy is good business – it fosters trust, builds consumer confidence, strengthens brand recognition, increases customer loyalty and ultimately delivers competitive advantage."

For lawyers, a final point is that protecting privacy aligns with our professional obligations to preserve confidentiality. By January 1, 2004, it will also be a legal requirement.

The 10 principles of privacy

The following 10 principles provide an overview of what businesses must do when they collect, store and use or disclose confidential information. For the full text of the principles see www.privcom.gc.ca.

#1 Accountability – An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the legislation's privacy principles.

#2 Identifying Purposes – The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.

#3 Consent – The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

#4 Limiting Collection – The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

#5 Limiting Use, Disclosure, and Retention – Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

#6 Accuracy – Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

#7 Safeguards – Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

#8 Openness – An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

#9 Individual Access – Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

#10 Challenging Compliance – An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

TitlePLUS claims...

the stories behind the statistics

Just as title insurance has gone from a novelty to becoming the practice norm, the number of claims reported by title insurance policy holders has increased. Insurers are reporting increases of 45 per cent or more claims reported in 2002 over 2001, and 20 to 30 per cent increases in the cost of resolving those claims.

TitlePLUS, has fared better than many of its competitors. While TitlePLUS sales volumes grew by 40 per cent in 2002, total claims payouts were up about five per cent.

Stringent yet competitive underwriting has played a key role in keeping TitlePLUS claims statistics at these relatively low levels: Less than one per cent of all TitlePLUS policies issued to date have resulted in a claim. Moreover, most of these claims have a value of less than $1,000 (expenses and indemnity combined). Many TitlePLUS claims are resolved at relatively low expense and quickly (many in less than one month, although two to three months is the average), using the in-house expertise of a TitlePLUS/LawPRO claims team and occasionally the resources of an external expert.

That's not to say that TitlePLUS does not see more complex and costly claims; but they are few and far between. For example, we have very few fraud and forgery claims, which other insurers have reported as a significant issue. The majority of TitlePLUS claims centre around building permit issues and realty tax arrears. The following are summaries of some of the claims that our TitlePLUS/LawPRO claims team has resolved recently – to the satisfaction of both the policy holder and lawyer involved.

Survey coverage

In place of an up-to-date survey, Mr. and Mrs. A obtained TitlePLUS coverage two years ago for their purchase of an isolated rural property measuring 200 by 600 feet, on which was built their dream home. This spring, a neighbour planning to build on an adjacent parcel of land obtained a survey, and then informed Mr. and Mrs. A that part of the As' driveway was actually located on the neighbour's property.

As part of its investigation of this claim, TitlePLUS explored the possibility that Mr. and Mrs. A could claim adverse possession of the land underneath their driveway. Subsequent investigation indicated that we would likely not be successful with this approach. Instead, TitlePLUS has paid to build a new driveway to the As' home, and restore the land on which the driveway had been built. Total cost was just under $10,000.

Compliance risks

The increased attention that municipalities (primarily outside Toronto) are paying to outstanding notices of violation such as open permits and lack of building permits has also prompted increased claims activity for TitlePLUS.

"These types of claims are often very time-consuming," explains DJ Campbell, staff adjuster. "In the case of an open permit, we have to figure out why the permit was not closed – and for that we may have to hire engineers, investigators or other experts to help us determine the nature of the deficiency, and the cost to resolve it. If there has been misrepresentation on the part of the vendor, we have a subrogation interest to pursue, which again takes time and resources."

Adding to the complexity, says Claims Examiner Rosanne Manson, is the fact that the standards and approaches to these outstanding violations by municipalities vary from one city or town to another. "Different municipalities have different requirements. So we first have to determine how that specific municipality handles that specific problem, and what they require to resolve it."

Typical is a home in northern Ontario where the vendors had obtained a permit to construct a deck, but never had a final inspection completed on the finished deck. The permit remained as an "open" permit with the municipality. After our insureds purchased the property, the municipality issued an Order to Comply. Deficiences such as handrail requirements on the height of the deck, and an engineer's report for the structure of the deck would have to be completed before the municipality would close the permit. Because the property was a whole of a lot, TitlePLUS did not require a building department search before the deal closed. The problem therefore was covered under our policy, and we paid to have the required work completed so that the permit could be closed.

A helping hand

While on the one hand TitlePLUS will take measures to recover costs via subrogated claims, at other times, it has gone to bat for insureds.

One such example involves the purchaser of a condominium unit who believed her purchase included use of a specific locker and parking space in the condo building. When the purchaser subsequently decided to sublet her parking space, she was informed by the condominium corporation that it was their responsibility to assign spaces, and that she in fact had no right to the specific parking space she believed to be hers.

TitlePLUS worked on behalf of the insured to resolve the dispute with the condominium corporation, pointing out that its Declaration did not reference the corporation's exclusive right to assign spaces. The condominium corporation acknowledged the discrepancy, and the insured was granted use of both the specific locker and parking space. The corporation subsequently changed the wording of its Declaration to avoid this type of confusion in the future.

Declining coverage

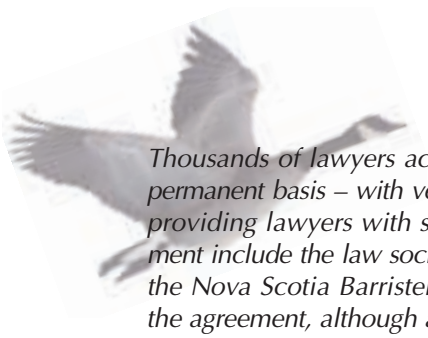
Having to decline coverage – because insureds turn to TitlePLUS for issues that clearly fall outside the scope of coverage – goes with the territory, says Manson.

One situation that she and Campbell handled recently involved an insured who asked TitlePLUS to replace the liner on his pool this spring, when it became apparent that the liner had not fared well through the winter. "The fact that they had used the pool all of last summer without any problem did not deter them from trying to make a claim," said Campbell.

In another example a purchaser who complained that she detected a sewer-like smell whenever she did her laundry was advised to contact her public works department and a contractor to discuss her plumbing problems.Yet a third situation involved a couple who bought a home two years ago and, to their chagrin, were told this spring that they could not build the pool they wanted in their back yard because of zoning bylaws. "Absent specific knowledge of the insured's intentions, title insurance does not provide compensation because an insured cannot build what they want on the land," points out Manson.

"Moreover, situations such as this – where purchasers come to their lawyer with a binding agreement of purchase and sale, and fail to disclosure their plans for the property with the lawyer – fall outside the scope of our policy's legal services coverage, because there was no error or omission made by the lawyer in question. What insureds typically fail to understand is that even if the lawyer had done a zoning bylaw inquiry, without a warranty in the agreement by the vendor as to the future use of the property, they had bound themselves to complete the transaction."

How the new mobility agreement affects you and your insurance coverage



Thousands of lawyers across Canada can now practise in another Canadian jurisdiction on either a temporary or permanent basis – with very few impediments. On July 1, 2003, the National Mobility Agreement came into effect, providing lawyers with significantly more mobility than they had previously enjoyed. Signatories to the new agreement include the law societies of British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, the Nova Scotia Barristers' Society and the Law Society of Upper Canada. The Barreau du Québec also signed the agreement, although as a civil law jurisdiction, different criteria will apply.*

An important component of the Agreement is the co-ordination of professional liability insurance coverage for lawyers practising in each others' jurisdictions. To ensure the Ontario program is consistent with the practice criteria outlined in the mobility protocol, LawPRO recently received Convocation's approval for a change to its exemption criterion (see next page).

The following Q&A summarizes typical situations which apply to lawyers from Ontario who practise elsewhere, and lawyers from other signatory jurisdictions who practise in Ontario on a temporary basis. More detailed information on the insurance coverage implications of the new mobility protocol is available on the LawPRO Web site at www.lawpro.ca.

Q ***I am a member of the Ontario Bar and am representing a client in a proceeding in British Columbia that will take several months to resolve.***

Can I practise in B.C., now that the Mobility Agreement is in effect? Do I have to notify anyone of my intention to do so?

Will I have insurance coverage, and if so, which jurisdiction's coverage is in effect (i.e. do I have B.C. coverage for those services provided in B.C. or Ontario coverage?)

The Mobility Agreement enables lawyers to practise in another signatory jurisdiction on a temporary basis (i.e. up to 100 days total in a calendar year without permit), provided that they meet all requirements of the Agreement pertaining to their status with the law society of their home jurisdiction (i.e. they are entitled to practise law without restriction in a signatory common law jurisdiction, have liability insurance and defalcation coverage, are not subject to criminal or disciplinary proceedings and have no discipline record).

So provided that the B.C. proceeding requires not more than 100 days of your participation, you will be able to continue to act as legal counsel to your client on this matter in British Columbia. You do not have to notify anyone of your intention to do so, and you will have insurance coverage for the services you provide in British Columbia. Because your home jurisdiction is Ontario, you will have coverage under your LawPRO insurance policy, which has been amended to reflect this expanded ability of lawyers to practise in other jurisdictions.

If a claim arises out of these services you provided in British Columbia, you would report the claim to LawPRO. To ensure a client is not prejudiced as a result of the differing coverages offered by various jurisdictions, the signatories to the Mobility Agreement have determined that the law society of the home jurisdiction will provide coverage of at least the same scope as the liability insurance provided by the host jurisdiction for a given claim, where the claim most concerns the host jurisdiction. The claim would remain subject to the Ontario policy's limits of $1 million per claim/$2 million in the aggregate.

Q ***If I move my law practice to Nova Scotia permanently, but wish to stay a member of the Ontario Bar, do I have to maintain my insurance coverage in both jurisdictions and who do I have to notify? If a claim arises out of services I provided in the past in Ontario, which plan covers me?***

One of the goals of the Mobility Agreement is to make it easier for lawyers to become a member of a law society in another jurisdiction without having to pass transfer exams. If you have been called to the Bar in one signatory jurisdiction but wish to become a member of the Bar in another signatory jurisdiction, you must meet some basic criteria before being admitted to the Bar in another jurisdiction.

For example, you must be a lawyer in good standing in a host jurisdiction (in this case, Ontario). You may also be required to: disclose criminal and disciplinary records in any jurisdiction; consent to give the law society to which you are applying for membership access to your regulatory files in any jurisdiction in which you are a member; and complete some supplementary readings, before being allowed to join the Bar in that jurisdiction.

Recognizing that it is not reasonable for lawyers to maintain duplicate insurance coverage in several jurisdictions, the insurance requirements have been similarly simplified to support this mobility of lawyers. For example, the Law Society has expanded its exemption criteria to allow you – the member of the Ontario Bar who plans to take up residency in Nova Scotia and practise there – to exempt yourself from the Ontario insurance coverage. The principal criterion here is where you are resident, the assumption being that you will practise and maintain insurance coverage in the jurisdiction in which you are resident.

* The Agreement only comes into effect in each signatory jurisdiction once that jurisdiction has passed the necessary rule changes. Lawyers are advised to contact individual law societies for details.

In other words, provided you meet the following conditions, you will be able to exempt yourself from paying the Ontario insurance premium but will be able to maintain your Law Society of Upper Canada membership:

- You are resident in Nova Scotia;
- You are a member of the Bar in Nova Scotia;
- You maintain the mandatory professional liability insurance coverage in Nova Scotia.

If a claim arises out of your Nova Scotia practice in this coming year, it is your Nova Scotia policy that would respond.

The Ontario program, however, will continue to provide you with protection for claims that subsequently arise out of your earlier practice in Ontario, appreciating that you had practised in Ontario on a permanent basis at the time and maintained the program coverage there. You would have coverage of $1 million per claim/$2 million in the aggregate if practising, and $250,000 per claim and in the aggregate if not in practice.

Q: A Calgary-based law firm has a long-standing client with some interests in Ontario. Can the firm's Calgary lawyers now provide services to that client in Ontario? If a claim arises out of services provided by that Calgary lawyer in Ontario, which jurisdiction's liability policy is in effect? Is that lawyer provided the same level of coverage – i.e. $1 million per claims/$2 million in the aggregate, as we are in Ontario?

Provided that the Calgary lawyer meets all of the requirements of the National Mobility Agreement, he or she can, on a temporary basis, practise in Ontario and provide services to his client and others. One condition is that the total number of days in which she or he practises in Ontario on a temporary basis cannot be more than 100 days in a calendar year (without any individual extension on the part of the host law society).

If there is a claim, the responding jurisdiction would be the home jurisdiction, in this case the Law Society of Alberta. The lawyer would have coverage that is at least the same scope of coverage as that offered in Ontario, with respect to the claim. If the Alberta program under which he or she is insured offers greater scope of coverage, that coverage would apply, subject to the claim limits of $1 million per claim/$2 million in the aggregate.

New exemption criteria

At its June Convocation, Benchers of the Law Society passed the following change to the criteria under which lawyers who are members of the Law Society of Upper Canada can apply to exempt themselves from paying the LAWPRO insurance premium.

The first provision preserves the traditional occasional practice exemption for lawyers who are resident in a Canadian jurisdiction other than Ontario, and engage in the practice of law in Ontario on an occasional basis.

The second provision speaks to the mobility of lawyers and specifically to the instance where a lawyer is called to the bar in more than one reciprocating jurisdiction in Canada.

"9. (1) The following are eligible to apply for exemption from payment of insurance premium levies:

2. Any member who, during the course of the year for which a levy is payable,
   i. will be resident in a Canadian jurisdiction other than Ontario,
   ii. will engage in the practice of law in Ontario on an occasional basis only, and
   iii. demonstrates proof of coverage for the member's practice in Ontario under the mandatory professional liability insurance program of another Canadian jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.

2.1 Any member who, during the course of the year for which a levy is payable,
   i. will be resident in a reciprocating jurisdiction, and
   ii. demonstrates proof of coverage for the member's practice in Ontario under the mandatory professional liability insurance program of the reciprocating jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.

Interpretation: occasional practice of law

(2) For the purposes of paragraph 2 of subsection (1), in any year, a member engages in the practice of law on an occasional basis if, during that year, the member,
   (a) practises law in respect of not more than ten matters; and
   (b) practises law for not more than twenty days in total.

Interpretation: "reciprocating jurisdiction"

(2.1) In subsection (1), "reciprocating jurisdiction" means a Canadian jurisdiction other than Ontario,
   (a) which is a signatory to the agreement on the inter-provincial practice of law originally entered into in December 2002 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Nova Scotia Barristers' Society and the Law Society of Newfoundland;
   (b) in which a member is authorized to practise law; and
   (c) which would exempt the member from its mandatory professional liability insurance program if the member were resident in Ontario and demonstrated proof of coverage for the member's practice in the jurisdiction under the Society's insurance plan which was reasonably comparable in coverage and limits to the professional liability insurance that would otherwise be required of the member by the jurisdiction.

Interpretation: "resident"

(5) In subsection (1), "resident" has the same meaning given it for the purposes of the *Income Tax Act* (Canada)."

LawPRO raises concerns about current lender programs

LawPRO has thrown its support behind a joint OBA-CDLPA-ORELA working group created to help make lawyers more aware of and vocal about new lender outsourcing initiatives being piloted in various regions across Ontario.

Over the coming months, the OBA-CDLPA-ORELA working group will mount an education-and-action campaign designed to ensure that lawyers understand the costs and consequences of mortgage processing programs introduced by third parties such as First Canadian Title and CLN Highlander, who are working in conjunction with a variety of lending institutions. Carleton County Law Association (CCLA) has voiced its concerns in a strongly-worded letter to TD Canada Trust executives, and has mobilized lawyers in the Ottawa Valley to make known their views on a TD-First Canadian Title initiative in the area. In a recent issue of Lawyers' Weekly, Deborah Rogers, chair-elect of the OBA Real Property Section, provided an overview of the lender outsourcing initiatives and concerns these programs raise among the bar.

For its part, LawPRO will work with the OBA, CDLPA, ORELA and other lawyer representatives to reinforce, with financial institutions and consumers, the vital role that lawyers play in real estate conveyancing.

"As the profession's malpractice insurer, we can talk with some authority about the respective benefits that lawyers and title insurance provide in a real estate transaction," points out LawPRO President & CEO Michelle Strom. "In our view, the outsourcing models now being tested, which interpose an intermediary between the lawyer and the lender, create obstacles to consumer protection and good client relations – and add risk for both the lawyer and the consumer in the transaction. Any efficiencies that may be created for the financial institution come at the cost of decreased protection for the consumer – and decreased choice.

"As well, we want to ensure that lenders see lawyers as vital conduits, not only in conveyancing but in business building in communities across the province," adds Strom. "Lenders have much less presence in non-urban Ontario than in the past; but lawyers are well represented in every corner of this province; instead of looking to limit the involvement of lawyers, lenders should be looking on them as potential distribution network."

One of the programs being criticized by lawyers in the Ottawa Valley sees First Canadian undertake mortgage documentation and do all post-closing reporting for TD Canada Trust; consumers who want a TD mortgage for their purchase are required to purchase a lender-only title insurance policy from First Canadian for $159; to secure their own interests, consumers would have to pay an additional $109 – for a total of $268 – significantly more than if they had insured the purchase through TitlePLUS (which automatically insures both the lender and purchaser on a home purchase for $185 – including all applicable fees), or if they had closed through other means.

As well as economic concerns, the program raises potential conflict issues: Because of the intermediary role that First Canadian plays (lawyers receive instructions from First Canadian, not TD Canada Trust, do all searches and due diligence, register the mortgage and then report to First Canadian which in turn reports to TD Canada Trust), there is some doubt as to who the lawyer's client(s) actually are. Moreover, the interests of the purchaser and lender client (if the lender is a client) are not clearly aligned, raising additional potential Rules of Professional Conduct issues. Lawyers also take issue with the lack of disclosure by First Canadian and TD to purchasers – thus putting lawyers in the position of having to explain the scheme and charges to consumers who have already negotiated TD Canada Trust mortgages.

A similar, but more costly venture for consumer purchasers, has been rolled out by CLN Highlander in conjunction with a number of lending institutions, including ING Bank nationally, and with RBC in the London/Niagara/St. Catharines areas.

In these scenarios, lawyers are being told to bill clients a "technology and processing fee" of about $200, imposed on the transaction in addition to costs for the lawyers' fees and any title insurance policy purchased. Lawyers continue to do much of the same work as they normally do in these transactions, with the added complexity of having to report to CLN which processes the electronic mortgage, does the post-closing reporting to the lenders and may have deposited mortgage funds. The practice of having a non-financial institution responsible for depositing mortgage funds to a lawyer's trust account raises concerns about the liability for lawyers should funds not clear – among others.

The OBA-CDLPA-ORELA working group is encouraging lawyers to educate themselves about what is happening with title insurers, lenders and third party suppliers of services in their communities, in an effort to thwart any future initiatives of the kind now being tested. As well, it is encouraging lawyers to be proactive in their communities, raise their profiles and build stronger lender relationships as part of an overall campaign to ensure that lawyers continue to play a key role in real estate conveyancing in Ontario.

As Deborah Rogers says in her column in the July 18, 2003, issue of Lawyers' Weekly: "TitlePLUS is the only lawyers' title insurance company that has a mandate of ensuring that the lawyer continues to have a role in the real estate transaction – and the stronger we help make it, the more secure is our future as real estate professionals."

Law Society notice cautions lawyers on *Rules* issues raised by lender outsourcing

The Law Society recently issued a notice to the profession that outlines how some of the requirements imposed on lawyers by programs in which lenders outsource services to third party providers are inconsistent with lawyers' obligations under the Society's *Rules of Professional Conduct*. Specifically, the notice describes conflict of interest, professional independence, unauthorized practice, referral fee and risk management issues raised by these programs.

For more information, see "Real Estate Transactions' Use of Third Party Service Providers by Lenders to Process Residential Mortgages" on the Law Society Web site at www.lsuc.on.ca or contact Practice Advisory at 1-800-668-7380 ext. 3369 or 416-947-3369 or by e-mail: advisory@lsuc.on.ca

TitlePLUS takes lead in online services

If your excuse for not using TitlePLUS is that it's too difficult to use – it's time to give TitlePLUS a second look. Because securing a TitlePLUS policy for your transaction is now an easy "point-and-click" exercise that you can complete in minutes via the Web.

Applying for TitlePLUS coverage online is easy, fast and completely intuitive. Highlight a common title-related defect and the appropriate wording pops up in the required boxes. Online definitions, descriptions, hints and help guides make the application process virtually foolproof. Because of the back-end intelligence built into the system, the application is dynamic: That means questions change to reflect the information you enter; and action checklists that are created as you enter data reflect your specific transaction and remind you specifically of the items you need to review before closing. Information from online searches is easily imported into the TitlePLUS application from Teraview®, further reducing the amount of data entry required by you and your staff. Best of all, all of the documents related to your TitlePLUS application are created automatically and pre-populated with the transaction-specific data – further streamlining your workflow.

The next step for TitlePLUS is to provide the title insurance piece of the puzzle for a Web-based real estate practice management and document production system being rolled out by LawyerDoneDeal Corp. later this year. The system will co-ordinate various aspects of a real estate transaction.

TitlePLUS, through its strategic alliance with LawyerDoneDeal Corp., now also has the technological capability to deliver virtually all of the services that lenders are now outsourcing to third party suppliers, points out TitlePLUS Vice President Kathleen Waters. "In fact, we believe we're ahead of the pack in terms of what we can offer to lenders: We got the capability to provide lenders with a one-stop shopping opportunity where they can post mortgage documentation, which lawyers can access electronically, and from which we can do all post-closing reporting. This is a core message that we will be working hard to communicate to the lending community in the coming weeks and months."

TitlePLUS is available at titleplus.lawyerdonedeal.com.

Title insurance:
THE FINE PRINT

$50 transaction levy payable on some title-insured transactions

The widespread use of title insurance among real estate lawyers has led to a misconception that all title-insured transactions are exempt from the real estate transaction levy surcharge.

In fact, the opposite is true.

Under the terms of the LawPRO insurance policy, **Endorsement No. 2: Real Estate Transaction Levy Surcharge**, only those title-insured transactions in which the title insurer has agreed to waive its right to maintain a negligence claim against the lawyer, and agreed to indemnify and save harmless the lawyer against any claims under the title insurance policy, are exempt from the $50 per transaction levy surcharge.

This release and indemnity provision usually appears in the lawyer's subscription agreement with the insurer.

If there is no such release and indemnity and save harmless agreement in place with the title insurer for claims that may arise, the lawyer must pay the $50 levy surcharge for any and all title-insured real estate transactions insured with that title insurance company.

Why does LawPRO require payment of the transaction levy on title-insured transactions for which there is no release and indemnity provision, and exclude other title-insured transactions from the requirement to pay the levy?

Because the $50 levy surcharge represents additional premium to help offset the higher risk – and cost – associated with real estate practice.

In the mid-1990s, when the levy surcharge was introduced, real estate claims accounted for close to 50 per cent of LawPRO 's claims costs. Although that number has declined to approximately 30 per cent in 2002, real estate practice continues to be a high risk area of practice. The transaction levy surcharge ensures that the total premiums paid by real estate lawyers matches the risk (and losses) they represent to the insurance program.

When a title insurer agrees to waive its right to maintain a negligence claim against the lawyer and to protect the lawyer for claims arising out of the transaction, the risk inherent in the transaction is, in fact, transferred to the title insurer and out of the LawPRO liability insurance program. Thus the exemption from having to pay the $50 levy.

However, where the title insurer refuses to release and indemnify the lawyer for claims arising out of the transaction, LawPRO is responsible for any claims – title-related or not – that arise out of that transaction. In fact, this type of transaction represents exactly the same risk to LawPRO as a real estate transaction on which there is no title insurance coverage whatsoever. Thus the requirement to pay the $50 levy surcharge.

Transactions insured through TitlePLUS are exempt from the $50 levy surcharge because all TitlePLUS lawyers are provided with the required release and indemnity protection in the lawyers' TitlePLUS agreement. TitlePLUS covers both the title-related risks and the legal services of the lawyer in a transaction. Claims for errors or omissions made by the lawyer in the transaction thus are handled through the TitlePLUS program, and do not represent a risk (or cost) to the LawPRO liability insurance program.

Transaction surcharge payable on many mortgage outsourcing pilot programs

The pilot programs involving lender outsourcing of mortgage services (see pages 22/23 of this issue of LawPRO magazine) come with an added complication for lawyers involved in these programs: As well as requiring their clients to pay the additional costs that come with these programs, they must pay the real estate transaction levy surcharge of $50 per transaction.

The only exception would be where the lawyer has obtained a title insurance policy that covers both the **lender and consumer client**, AND the title insurer has agreed in writing to waive its right to maintain a negligence claim against the lawyer, as is more fully described in the accompanying article. Note some programs require only a lender-only title insurance policy, and accordingly a $50 transaction levy surcharge would be payable, unless a title insurance policy had also been purchased in the name of the purchaser client in the transaction.

Real Estate Transaction Levy Surcharge

Reproduced below is the relevant section of the 2003 LawPRO Professional Liability Insurance Policy. The full text of the policy and endorsement are available at: www.lawpro.ca/insurance/LawPRO_policy2003.asp#Endorsement2.

"C. EXCLUSIONS

No levy surcharge is payable by a member under this endorsement in respect of a real estate transaction if:

(v) the real estate transaction closes on or after January 1, 1998, and a title insurance policy(ies) is(are) issued in favour of all of the transferees and chargees obtaining an interest in or charge against the land which is the subject of the real estate transaction, provided that:

(a) the member does not act for the transferor in respect of the transaction;

(b) the title insurer(s) issuing the title insurance policy(ies) has(have) in all cases (except for the member's gross negligence or willful misconduct):

(i) agreed to indemnify and save harmless from and against any claims arising under the title insurance policy(ies); and

(ii) waived its right to maintain a negligence claim against; the member(s) acting as solicitor(s) for the transferee(s), chargee(s) and/or the title insurer(s); and

(c) the member(s) is(are) not obliged to pay any deductible amount to the title insurer(s) in respect of one or more claims made under the title insurance policy(ies) where the deductible amount is or may be the subject of recovery under the POLICY."

www.canlii.org

practicePRO

An excellent Internet source for free legal research

Traditionally, books published by legal publishers were the sole vehicle by which primary legal materials were created and circulated. With the advent of the Internet, there has been a major shift in user preference and reliance on electronic rather than print resources. The Web now offers researchers a wide range of legal materials and law-related resources, both free and fee-based.

Your starting point for free access to Canadian case law and legislation should be the Canadian Legal Information Institute or CanLII site – www.canlii.org (pronounced "can-lee"). This site is the result of an initiative by the Federation of Law Societies of Canada to create a public and free Canadian virtual law library. It provides access to Canadian primary legal materials (including statutes, regulations and case law) from the federal government and all provinces and territories.

The CanLII site is simple and intuitive to use. On the home page you will find a listing of the "collections" available on CanLII, by jurisdiction and type (statutes, regulations, case law by court level etc.). The middle part of the home page has a simplified search interface which enables you to do a global search of all CanLII's collections.

The advanced search page gives you the ability to narrow your search by choosing one or more collections in one or more jurisdictions, the language of the documents to be queried, etc.

For those that want to hone their search skills, the Help page provides an excellent tutorial on how you can more quickly find the information you are looking for by narrowing your search and using Boolean logic with the advanced search feature.

The scope of the decisions included in each case law collection is clearly specified on its initial page. Given that most courts have only recently started working with electronic versions of their decisions, in many provinces the case law on CanLII only goes back four or five years. This should not create major concerns as lawyers appear to use decisions that are less than five years old about 80 per cent of the time.

CanLII has limited case law in the family and young offender areas as the courts have not released electronic versions of these decisions for privacy reasons. At present you can only update federal level decisions on CanLII. The ability to update provincial level decisions will be added in the future.

Many courts are now recognizing CanLII as an official source. The information in CanLII's collections is being actively added to and updated, for both ongoing and older decisions. As the CanLII collection grows, it will become an even more valuable resource.

CanLII is one of your best options for fast and free access to recent case law and legislation. If you are not already using CanLII, set some time aside to familiarize yourself with it, and keep it in mind next time you need fast access to a recent case.

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The wills and estates bar

breathes a sigh of relief...

Contrary to a recent trial judgment, a solicitor cannot be liable to a "disappointed beneficiary" for declining to draw a will for a dying man who was barely able to maintain consciousness during the interview.

The case

In the March 2003 Edition of LAWPRO, we featured a case commentary on *Hall v. Frederick*, (2001), 40 E.T.R. (3d) 65; [2001] O.J. No. 5092. (Ont.S.C.J.).

The defendant solicitor Frederick received a telephone call early one Saturday morning requesting that he go immediately to Kingston General Hospital to prepare a will for Bruce Bennett, who was expected to die imminently. Frederick arrived at the hospital at 10:00 a.m.

All witnesses agreed that when Bennett was awake, he was lucid and communicated whatever instructions he wished to communicate. There were, however, frequent periods when Bennett drifted in and out of consciousness. To try and keep Bennett awake through the interview, it was necessary to elevate the head of his bed, turn on the fluorescent lights, speak loudly, and squeeze Bennett's hand from time to time.

One of the instructions which Bennett was able to impart was that he wanted his store left to the plaintiff Hall. However, Bennett was unable to tell Frederick what his net assets were, or what his debts were, or what the exact value of his property was. Bennett was unable to give instructions concerning his residuary estate. The instructions which he did give related to about 25 per cent of his property.

Frederick terminated the interview because he felt that he could not safely draw Bennett's will. Frederick could not obtain complete instructions, and it was unlikely that Bennett could maintain alertness long enough to have a will read to him and to understand its contents. Bennett was in any event about to receive strong medication. Bennett died at 7:00 p.m. that evening.

When Hall learned that Bennett intended to leave him the store, but the will had not been drawn, Hall sued Frederick.

Despite the evidence of two expert witnesses that the defendant had met the requisite standard of care, Manton, J. held that Frederick was negligent in the circumstances. Manton, J. held that Bennett did have testamentary capacity, and that a will should have been prepared based on the instructions given.

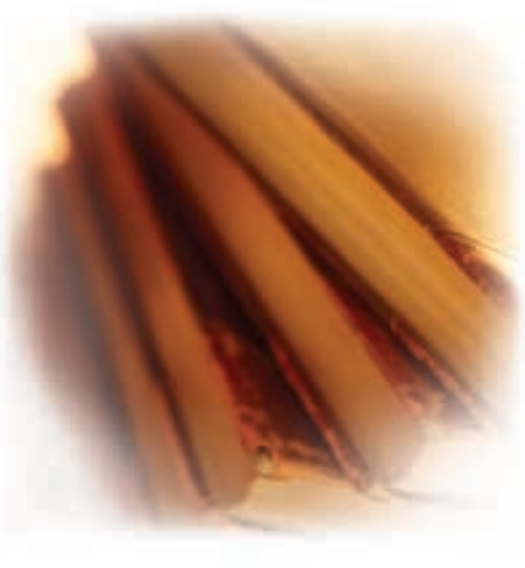
In reasons for judgment released May 14, 2003, the Court of Appeal reversed the trial judgment.

The Court of Appeal held that simply because Bennett was able to give several instructions concerning his assets during lucid moments as he drifted in and out of consciousness, it did not follow that Bennett had testamentary capacity.

The trial judge fell into error by failing to address the question of whether Frederick's view that Bennett lacked testamentary capacity was a reasonable one. The evidence in support of Frederick's opinion that he was unable to obtain complete instructions, and that Bennett lacked testamentary capacity, was overwhelming. It was Frederick's duty to decline Bennett's retainer to prepare a will.

Since there was no retainer between Frederick and Bennett, there could be no duty of care owed by Frederick to Hall, despite admissions to the contrary by Frederick at trial.

The Court raised the issue of whether a solicitor could ever have civil liability for declining a retainer. The Court declined to come to any conclusion, but noted that



breaches of the *Rules of Professional Conduct* do not in and of themselves give rise to civil liability. The presence or absence of civil liability must be determined according to the general principles of the law of tort.

Lessons learned

This case is helpful to the profession in that it refutes the notion that a solicitor owes a duty to a prospective third party beneficiary to draw a will on the instructions of a testator who can neither maintain consciousness nor give complete instructions. It was the solicitor's duty to decline to draw the will, and he did so. Since there was no accepted retainer to draw the will, there could be no liability to a third party based on a breach of this retainer. It is also a helpful reminder that a breach of a *Rule of Professional Conduct* is not in and of itself the basis for a negligence suit.

In one way, however, the judgment adds to the complexity facing a lawyer asked to draw a will in circumstances where testamentary capacity is doubtful. Justice Manton suggested that on the authority of *Scott v. Cousins*, [2001] O.J. No. 19 (Ont.S.C.J.), a lawyer, when in doubt, should draw the will and let a court decide whether testamentary capacity did or did not exist. The judgment of the Court of Appeal suggests that in some circumstances there is an affirmative duty not to draw the will at all.

Suppose Frederick had followed the procedure suggested by Justice Manton and had drawn up the will, but made extensive notes afterwards about why he doubted that Bennett had testamentary capacity. Suppose the estate representative decided to propound the will anyway, and was unsuccessful. Would Frederick have been liable to the estate, or to the estate representative for any costs thrown away? One would hope not. See *Philp v. Woods* (1985), 66 B.CL.R. 42, 34 C.C.L.T. 66. (B.C.S.C.)

Mr. Justice Hutchinson suggested that where a testator (trix)'s mental capacity is in doubt, the will should be prepared, along with a statement setting out the solicitor's concerns. If the estate representative nevertheless decides to propound the will in the face of this evidence, the estate representative does so at his or her own risk.

If time permits, it would be wise for a solicitor to suggest a capacity assessment.

But what if the client refuses? Hall v. Frederick suggests that the solicitor would then be within his or her rights to refuse to accept the retainer to draw the will. But may the solicitor proceed with the will, after taking the precautions outlined in the foregoing paragraph? One would hope that the answer would be "yes", but it is impossible to answer this question with perfect conviction.

Debra Rolph is LawPRO's Director of Research.

Failure to know or apply the law

Only 6 per cent of malpractice errors

Although knowing black-letter law is important, in most areas of practice a law-related mistake is not your greatest risk of a malpractice claim. A review of 20 years of LawPRO claims data, covering all practice areas, shows that only six per cent of claims involve a failure to know or apply the law. This surprises most lawyers, who expect this type of error to be among the most common that lawyers make. In fact, it is only the sixth most common error.

There are always the exceptions. For example, in the area of family law, law-related mistakes are actually the most common error, representing about twenty percent of claims. This is likely attributable to the very complex nature of family law legislation, and to the complex issues that are often involved in a family matter.

But for most lawyers, the risk of a claim lies elsewhere. What are your greatest risks? The five most common malpractice errors all involve client communication and basic practice management issues.

The most common error is failure to follow client's instructions, which accounts for almost 23 per cent of errors. On these matters it is often unclear as to what instructions were given, or not given, by a client, and what steps were, or were not, taken by the lawyer. The client's recollection of what was said or done is often different from that of the lawyer; the lawyer's file often contains limited, or no documentation confirming instructions and what steps were taken. For more on this subject, see LawPRO Magazine Volume 1 Issue 3 at www.lawpro.ca/lawPRO/2002lawPROMag.asp

The second biggest cause of claims is procrastination. It accounts for just over 15 per cent of the errors that occurred. The predominance of this cause is not a surprise to most lawyers.

The next three most common types of errors are conflict of interest, failure to calendar, and poor communication with client, respectively at approximately nine, eight and seven per cent.

The good news is that the five most common malpractice claims are all easily preventable. Client communication is the key. Be proactive in your efforts to communicate with your clients. At the time of retainer make sure they understand the terms of the retainer, and the process, procedure and timing for the matter you are to handle for them. Make sure you keep the client informed at all stages as the matter proceeds. In your file, carefully document client communications and instructions.

Basic practice management is also essential. Make sure you keep an up-to-date calendar, manage your time and priorities, and systematically check for conflicts. Case management software can help you with these tasks.

LawPRO provides a number of tools and resources to help you address these very needs:

- **The Online COACHING CENTRE:** The OCC's modules in the *powerful communications and practice management* workshops (www.practicepro.ca) assist you in developing your client communications and practice management skills. Building rapport with the people you deal with, in particular with clients, is key to developing a strong, open and trusting relationship. The OCC's Module #9 (see page 30) from the *powerful communications workshop: Speaking effectively by...building rapport* provides some specific instruction on this point.
- **Managing the lawyer/client relationship booklet:** To help you better understand and manage the dynamics of your interactions with clients, and how you can reduce your risk of a malpractice claim, practicePRO created the managing the lawyer/client relationship booklet. It is one in a series of booklets to help lawyers manage the risks associated with law practice. Copies are available at www.practicepro.ca/practice/lawyerclient.asp or you can call Customer Service at 416-598-5899 or 1-800-410-1013 or e-mail service@lawpro.ca.
- **CLE Premium Credit Program:** LawPRO believes it is critical for its members to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. To encourage participation in CLE programs that include risk management content, LawPRO offers a $50 Premium Credit (to a maximum of $100) for each CLE qualifying program you attend. The credit will be applied to your 2004 insurance premium. LawPRO is working closely with the main CLE providers to create programs that qualify for the LawPRO Premium Credit. Look for programs that have the Approved for CLE Credit logo. A list of approved programs is available at www.lawpro.ca/LawPRO/CLE_list.asp

The Online COACHING CENTRE

Workshop: *powerful communications*
Module: *#9 - Speaking effectively by . . . building rapport*

Coaching

Some people either naturally or consciously "connect" better with others in conversation. Connecting with people has the potential advantages of building trust, building openness, making discussion easier and increasing comfort.

We prefer to be in the company of people with whom we have rapport. It's just easier. In fact, people gravitate to people with whom they feel rapport.

Here are a number of ways to build rapport with people you meet.

Smile honestly.
- Don't paste on a phony smile; start smiling with your eyes.

Keep your body relaxed.
- Look for hints that you are tense; avoid crossed arms and legs.

Lean slightly forward.
- Don't invade their space but make it clear that you are paying attention to them.

Maintain eye contact.
- Even if you have the habit of looking up when you're thinking, return to their eyes when you begin to speak.

Use their name when speaking to them.
- This shows friendliness (and helps you remember their name).

Try to mirror their actions.
- Breathe at the same rate as they are, talk as fast as they do, stand with a similar posture.

Find a common interest or talking point.
- This could refer to some common attribute of your life: work, children, school, complaint, hobby etc.

Mentoring

Do this exercise after you have had the opportunity to meet a new person or expand on your relationship with an acquaintance.

How did you do building rapport? What did you do?

- I was able/unable to smile honestly
- I was able/unable to keep my body relaxed
- I was able/unable to lean slightly forward
- I was able/unable to maintain eye contact
- I was able/unable to use their name when speaking to them
- I was able/unable to mirror their actions
- I was able/unable to find a common interest or talking point

About the OCC

The Online COACHING CENTRE (OCC) is LAWPRO's innovative online education tool. It lets you quickly and easily enhance a variety of "soft skills" that not only help you survive and thrive, but also help reduce malpractice claims.

The OCC is entirely Web-based, allowing lawyers across Ontario to use it at a time and place convenient to them. It is organized into six workshops, each of which contains approximately 25 learning modules, such as the one profiled on this page. Modules encourage self-teaching and self-evaluation; answers you provide when working in the modules should be saved for review at a later time.

To access the OCC, go to www.practicepro.ca/occ

Tips and tricks
for becoming an Outlook power user

One of the best tools available to help lawyers better manage their practices and prevent claims is practice management software. Although not the ultimate in practice management programs, Microsoft Outlook also serves this purpose. Many lawyers use Outlook for e-mail, calendaring, contact management, to do's, and for tracking miscellaneous information. This article describes some configuration changes and work-arounds you can use to make Outlook a more practical practice management tool.

General tips

These five general tips will help you move around and work with items more quickly within Outlook:

1. **Learn keyboard shortcuts** for completing the more common tasks. The essential Outlook keyboard shortcuts include:
   - Ctrl+Shift+M to create a new message
   - Ctrl+Enter to send a message
   - Ctrl+Shift+I to jump to the Inbox
   - Ctrl+Shift+B to jump to the address book
   - Ctrl+Shift+K to create a new task
   - Ctrl+Shift+N to create a new note

   (If you are not familiar with the syntax for describing keyboard shortcuts, simply remember that a plus sign (+) between two keys means that you press the listed keys, almost simultaneously, moving from left to right. For example, a capital B would be described as Shift+B.)
2. **Use plain English dates:** Outlook understands plain English entries in date fields, and will enter the next occurrence of the described date. For example: typing "tomorrow" will enter tomorrow's date, "nov 4" will enter the next occurrence of this date, "one week" will enter the date one week from today, and "2 days" will enter a date two days from the current date.
3. **Drag and drop items of one type to create another** – and save time. For example, dragging an e-mail message to the taskbar Calendar icon will open a new appointment. Dragging an e-mail to the Contacts icon will create a new contact. Information from the original item will automatically be transferred to the new item so you do not have to retype it.
4. **Use a "right click" for format and configuration settings.** In Outlook many options or features available with a simple right mouse click, including formatting and configuration settings. These options and features are "context sensitive" – in other words, you will be presented with a list of choices that are relevant to the item, field or text you are right clicking on.

   For example, right clicking on an e-mail in your Inbox presents you with Open, Print, Reply, Reply all, Forward etc. Right clicking on a blank spot on your calendar will let you create new appointments, and configure the calendar. You can right click on almost everything - try it!
5. **Sort items to quickly find the information** you want. In all views you can sort items listed in a column with a click on column title bars. Clicking a column heading a second time will reverse the order. This sort feature works the same on column style information in all Microsoft Office applications.

Coping with e-mail

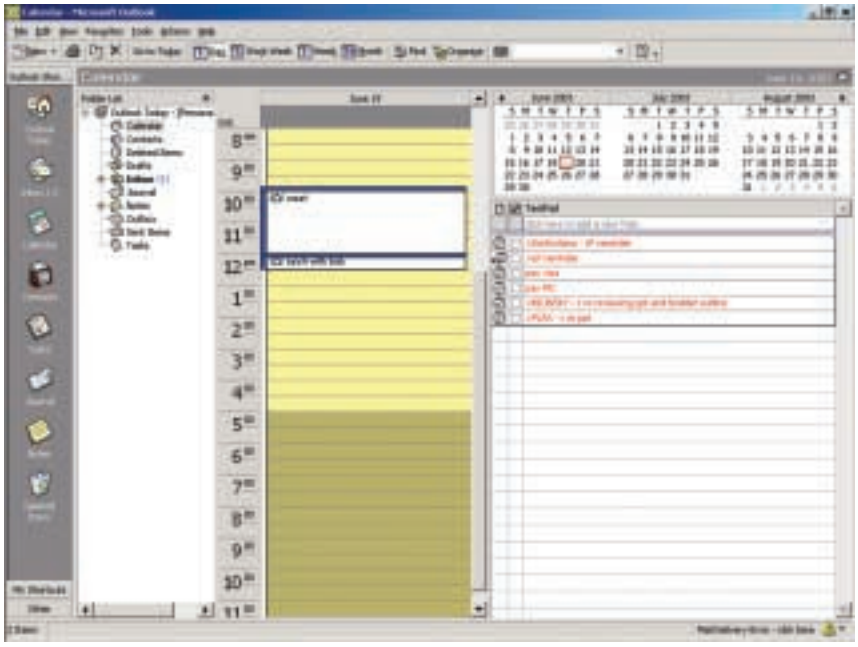
These Outlook-specific tips will help you better manage the e-mail tide:

- To avoid having to type out or copy long e-mail addresses, enter contact information in your Address book, and configure Outlook so that it automatically looks-up e-mail addresses. Outlook will search your Address book and fill them in automatically when it recognizes a complete name.
- Put full names in your Address book, not just a generic e-mail address. Using generic addresses such as "fred123@aol.com" increases the likelihood that you will unintentionally send something to the wrong person.
- Be extra cautious before you hit Send. Make it a habit to double-check that the e-mail is addressed to the correct person.
- To help you keep your Inbox to a manageable size, use the Rules feature to

automatically forward, move to another folder, or delete incoming messages, especially those from e-mail lists. Click on Tools, then Rules Wizard to create a new Rule.

- To more effectively manage messages that you regularly send to large groups of people (such as client newsletters), create Distribution Lists. They are collections of internal and/or external e-mail addresses within the Outlook address book that allow you to send a message to multiple people by using a single e-mail address. To create a Distribution List, go to your Contents folder, select File, then New, and Distribution List.

For even more e-mail related tips, see the *Surviving the E-mail Onslaught* article from our December 2002 LawPRO Magazine (www.lawpro.ca/LawPRO/surviving email.pdf).



Get organized with folders

Create folders to organize and separate items of the same type – for example, e-mail folders for individual clients with whom you exchange e-mails frequently, a generic folder for others, even individual archive folders for various e-mail lists to which you subscribe. For quick access to your most frequently used folders, create a link to them on the shortcut bar. To do this drag a folder from the Folder list and drop it on the shortcut bar. Select View, then Folder List to see your folders. Use different folders as your "files", rather than printing items and storing them in separate physical client files.

Working remotely

If you are using a laptop, you can configure Outlook to keep a full duplicate copy of all your data on its hard drive. This will allow you to work outside the office, reviewing e-mails, setting dates etc. Any additions or changes you make while at court or elsewhere will be updated in the main database when you next synchronize. You can also set Outlook up to allow you to send or receive e-mail remotely. The time is takes to set this up is well worth your ability to have full e-mail access while away from the office.

Leverage the power of outlook with a PDA

For those who don't want or need a laptop, taking all your key contact and calendar information on the road with you is easy with a Personal Data Assistant (PDA). Most PDAs include software that will transfer all of your key information from Outlook to a PDA. Although you can spend and do more on a fancy wireless PDA, a basic $150 model will suffice for basic calendaring and contact management. With Outlook and a PDA, you can eliminate the need to keep any paper-based diaries.

Calendar View

Using the Calendar in day/week/month view shows you both your calendar and a task list on one screen. In this view (shown above) you can edit or change either Tasks or appointments. To do more in calendar view try these ideas:

- At the beginning of each day, print out of your calendar in Daily Style. This gives you a one-page hard copy of that day's appointments and tasks, and a handy central place to make miscellaneous notes as the day progresses. Review it at the end of the day to make sure you complete all necessary tasks.
- To see the entire day without scrolling, make the default appointment length 1 hour (right click on the time column, and pick 60 minutes).

- Share your Calendar with your assistant so he/she can add or edit appointments in it. This will eliminate the need to keep and synchronize a traditional paper-based date book.
- To gain some extra space on your desktop, make the Outlook Shortcuts bar narrower once you learn what the various buttons are. To do this, drag and drop the double-headed arrow when over right side border of the of Short Cuts bar. Leave just left part of the button labels visible so you can see enough of the label to differentiate similar types of folders.
- To gain even more space, turn the Folders list off. To view it again, click on Folders toolbar button.
- Use the group scheduling feature which uses shared calendar info to display free/busy times for everyone that has their data in Outlook. This is great when you have to schedule meetings.
- For things that repeat, create recurring appointments, events, or tasks. Do this at the time you create the item. Click on the Recurrence button to access the dialog box that has the parameters for setting the timing of recurring items. Note that you can edit individual instances of recurring items if you need to.

Managing matters by taking tasks to Task

You can use Outlook Tasks to help manage your files and make sure you complete all necessary tasks by required deadlines. Keeping in mind that only today's and overdue Tasks appear by default in Calendar view, you can do the following to systematically track your client matters:

- Create one main task for every matter, and indicate in point form in the subject area what is to be done, what you are waiting for, what dates are coming up etc. You can also create other separate Tasks for other matter related tasks or deadlines.
- Start the subject in all work related Tasks with a ">", followed by the client name in capitals. This makes individual client matters easy to spot. Create personal items without the ">", and they will appear at the bottom of the task list.
- In Calendar set your Tasks to be sorted alphabetically by subject (right click on the column heading, and chose this sort type).
- As you complete the current work on any particular matter, edit its subject to add a description of what is to be done next, and enter a due date on the appropriate future date when the next step on the matter must be done. Doing this will make you trip over each matter at the appropriate time. As well, a quick review of the subject of any Task lets you know the exact status of every client matter.
- Set alarms on Tasks when you want to be reminded of a limitation period or other important deadline. These alarms will pop-up reminder windows on the time and/or date specified.

Limitation periods

To keep track of limitation periods in Outlook, create events on the set dates and set alarms on those events that warn you – via a popup window – of upcoming limitation period deadlines days, weeks or months ahead. You can also run a separate card system as a backup.

Virtual sticky notes

The Outlook Notes folder contains individual "Notes" items, which are the electronic equivalent of a paper scratch pad or sticky notes. You can add text to these Notes by any of the conventional means. Use them to jot down questions, ideas or for any text or information that you may want to access in the future.

Make Outlook work the way you do

To get the most out of Outlook, you have to tweak features and change settings to match your own needs and preferences. To make some changes to Outlook's configuration, select the Tools menu bar item, then Options. The Options dialog box contains dozens of configuration settings that may make Outlook work better for you.

Training is key

Outlook is a complex program, and the interface is not terribly intuitive at times. To get the most out of Outlook, you must spend some time formally educating the people who will be using it.

If you like self-paced learning, check Keystone Learning Systems (www.keystonelearning.com). A set of Basic, Intermediate and Advanced tapes for Outlook 2000 costs US$160.

Dan Pinnington is Director of practicePRO, LawPRO's risk and change management program. He can be reached at dan.pinnington@lawpro.ca.

CLE Premium Credit deadline: September 15

How would you like to save up to $100 on your 2004 insurance premium? It's easy, with the LawPRO CLE Premium Credit program – a risk management initiative that provides a $50 credit for each qualifying CLE program you have completed between September 15, 2002, and September 15, 2003 (to a maximum of $100 per lawyer). Your credit will be automatically applied to your 2004 insurance premium invoice.

To obtain the credit, you must complete the online Survey and Declaration on the LawPRO Web site at www.lawpro.ca/clecredit/CLE_list.asp no later than September 15, 2003.

Two types of programs currently are eligible for this premium credit initiative:

LawPRO-approved CLE programs: LawPRO has worked closely with major CLE providers over the past two years to develop CLE programs that include a risk management component and therefore qualify for the CLE Premium Credit program. A list of CLE programs that qualify for the premium credit is available online at www.lawpro.ca/clecredit/CLE_list.asp. Promotional material for programs that qualify for the credit also carry the LawPRO "seal of approval."

The practicePRO Online Coaching Centre (OCC): This online, self-help tool offers 150 modules that help lawyers enhance the "soft skills" that are vital to law practice. To qualify for a $50 premium credit, you must complete three OCC modules in 2003 that you have not completed previously. The maximum credit for using the OCC in 2003 is $50.

To learn more about the CLE Premium Credit program contact practicePRO by e-mail: practicepro@lawpro.ca, or call 416-598-5899 or 1-800-410-1013.

Reminder: Transaction levies due July 31

Real estate and civil litigation transaction levies and forms for the second quarter of 2003, ending on June 30, 2003, were due and payable on July 31, 2003. All real estate and civil litigation lawyers must file a transaction levy form indicating the number of civil or real estate transactions undertaken for the period from April 1 to June 30, 2003. A filing must be made even if there were no transactions to report for this period. Transaction levy filing forms are available on the LawPRO Web site at www.lawpro.ca. To complete your transaction filings electronically, click on **File Online**; to access blank forms in PDF format, click on **Insurance Forms**.

Technology for Lawyers 2003 Conference

LawPRO is pleased to sponsor the LSUC/OBA Technology for Lawyers Conference and Vendor Expo. Mark your calendars for November 27-28, 2003. This two-day conference, to be held at the OBA Conference Centre in Toronto, will feature 27 unique sessions presented by a faculty of practitioners and legal technology experts. The Vendor Track (new this year) will feature product demonstrations. The Vendor Exposition will feature at least 25 vendors.

The CLE sessions are organized in four tracks. The Litigation Track will highlight the practical technology tools the most successful litigators are using, including case strategy, e-discovery, and practice management software. A "mock motion" in Toronto's new electronic courtroom will demonstrate the latest courtroom technology.

The Tools and Tips Track will provide practical information that will help you reduce the paper in your office; work away from your office; protect yourself from viruses and hackers; and comply with the new privacy legislation.

The Strategies Track will help you increase your efficiency and better manage the finances of your practice; work more closely with your clients with various collaboration tools; and help you more successfully acquire, implement and support legal technology.

The Tech University Track will feature hands-on teaching sessions aimed at increasing your Web and electronic research, word processing and document automation skills.

Technology is now an integral part of the practice of law. It offers a competitive advantage that can make you more effective, more efficient, and ultimately, more profitable. Come to this conference to learn about the technology tools you should be using, and how you can do more with them.

Register through the Law Society, or online at ecom.lsuc.on.ca. Register before October 15, 2003, to take advantage of the early bird discount.

2004 insurance program news:

LawPRO opts for Web over paper

Prompted largely by the success of our e-filing programs of the last few years, LawPRO has opted to expand the range of services it offers lawyers over the Web for the 2004 Law Society program.

Insurance applications, invoices and other relevant information will be delivered primarily electronically, resulting in a significant reduction in the amount of paperwork associated with annual insurance renewals and other mandatory insurance filings.

The more than 14,000 lawyers who e-filed their insurance applications last year will be invited to access the required forms only online, through our Web site at www.lawpro.ca starting in early October 2003. Printed paper applications will be mailed only to lawyers who have never e-filed – although they too will be invited to file online.

This Web-based process not only streamlines lawyers' interactions with LawPRO, but also saves the company more than $40,000 in printing and mailing costs (in the past, we mailed pre-populated applications and program guides to each lawyer and law firm insured under the Law Society insurance program).

As well, insurance premium invoices and related policy materials will be available online, via a secure, password-protected service. Lawyers and law firms who prefer to receive their invoices and policy declaration pages by mail will be invited to indicate this preference on their insurance applications.

For specific groups of lawyers, the decision to move most of our transactions into the electronic domain applies as follows:

For lawyers who e-filed on an individual lawyer basis in 2002 for the 2003 insurance program: You will receive e-mail notification that your pre-populated 2004 insurance application is available online in early October 2003. You will be able to access your application in two formats:

- as a pre-populated PDF document similar to the version mailed to you in the past. This document will be pre-populated with information from our database on you, your law firm, and your coverage and payment options. This document is a reference document only, and replaces the paper version that would have been mailed to you in past years.
- as a pre-populated, online application form that you can review, update and submit electronically in minutes. Filing online will again qualify you for a $50 per lawyer discount that will be applied to your 2004 insurance premium.

For all law firms of five or more lawyers: In early October, the managing partner, firm administrator or other insurance contact identified on your most recent online filing will receive e-mail notification that the firm summary form is available online, enabling firm-wide filing for all lawyers in the firm. The online form will be pre-populated with information from our 0status, and the coverage and payment options selected for the firm.

The online firm form has been simplified to make it easy for law firms to add the names and other relevant information for new lawyers in their firm. Rather than complete an online or paper form for each new lawyer, the insurance contact will provide only some basic information such as the new firm member's Law Society number, name, status and specific practice options that apply (e.g. part-time practice).

Filing online will qualify the firm for a $50 per lawyer discount that will be applied to the firm's 2004 insurance premium.

For all lawyers who completed paper/fax applications in 2002 for the 2003 insurance program: You will be invited to complete your application online, via the LawPRO Web site and qualify for the $50 online filing discount. You will continue to receive a package containing your pre-populated paper application and the printed instruction booklet. However, filing by mail or fax will not entitle you to the $50 discount available to those who file electronically.

Invoice and policy packages for all lawyers: If you or your law firm filed the 2004 application electronically, you will automatically receive your 2004 insurance premium invoice online; you will be informed via e-mail later this fall that your electronic invoice and policy documentation have been issued and are available, in a secure, password-protected portion of our Web site. Lawyers and law firms can request a printed invoice.

As in the past two years, LawPRO will send printed packages of the 2004 policy and the booklet containing forms for transaction levy filings only to those lawyers who do not e-file and for whom we do not have an e-mail address. Printed copies of both will continue to be available on request.

Events calendar

2003

The following is a listing of events at which LAWPRO representatives, including staff from TitlePLUS and practicePRO, will be presenting and/or participating in the coming months.

August 17-19
Canadian Bar Association Annual Trade Show
Case Management & Software Accounting Solutions
Dan Pinnington, practicePRO
TitlePLUS and practicePRO exhibitors
Palais Des Congres, Montreal

September 10-11
Thunder Bay Real Estate Board Northern Regional Real Estate Conference & Trade Show
TitlePLUS exhibiting
Ramada Prince Arthur Hotel, Thunder Bay

September 12
Canadian Women's Foundation Professional Women's Breakfast
TitlePLUS sponsoring

September 18
OBA Excelling at Articles
Optimize Your Mentor/Mentee Relationship
Dan Pinnington, practicePRO
OBA, Toronto

September 18
Hamilton District Real Estate Board 3rd Annual Realtors without Borders Trade Show
TitlePLUS, exhibiting
Hamilton

September 21-22
TitlePLUS Lawyer Conference
Keeping You in the Picture
Westin Hotel, Ottawa

September 26
practicePRO Technology Breakfast: *The Magic of Document Assembly*
Come to this session to learn about document assembly, and how it can make you more efficient and your practice more profitable.
Doug Simpson, GhostFill Technologies Inc.
LAWPRO, Toronto

October 3
York Region Real Estate Board
Money Laundering & Grow Houses
TitlePLUS sponsoring

October 16-18
Thunder Bay Law Association Annual Fall CLE Program
TitlePLUS and practicePRO exhibiting
Victoria Inn, Thunder Bay

October 22-25
TLOMA 15th Annual Educational Conference
TitlePLUS sponsoring
White Oaks Conference Centre, Niagara-on-the-Lake

October 27
LSUC New Lawyer Experience
Managing Your Clients and Your Time
Dan Pinnington, practicePRO
LSUC, Toronto

October 31
practicePRO Technology Breakfast: *The Courtroom of the Future Has Arrived*
Come to this session for a hands-on demonstration of the new electronic courtroom.
361 University Ave., Toronto

November 27-28
LSUC/OBA Technology for Lawyers – 2003 Conference and Vendor Expo
practicePRO sponsoring & exhibiting
TitlePLUS exhibiting
OBA Conference Centre, Toronto

For more information on practicePRO events, contact Dan Pinnington at 416-596-4623 or 1 800 410-1013, or by e-mail at dan.pinnington@lawpro.ca

For more information on TitlePLUS events, contact Marcia Brokenshire at 416-598-5882 or e-mail marcia.brokenshire@lawpro.ca

About practicePRO technology breakfasts

These presentations focus on legal technology; some sessions feature product comparisons; others are practical discussions and demonstrations of specific products by actual users; others review practical technology skills at a basic level.

Written summaries and online versions of past breakfasts, including handouts if available, are available for download at www.practicepro.ca/techbreakfasts.

Online versions of some breakfasts also are available for only $29.95 at the BAR-eX Communications Web site at www.bar-ex.com. These online versions provide screen captures and audio of the actual presentation.

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