

LAWPRO



aging boomers: a wakeup call for lawyers

Wills, powers of attorney and the elderly
Changing face of the bar
Fraud: The never-ending problem
Privacy boundaries: Are there any?



Time marches on

By the time you read this article, I'll be at least three weeks older than when I wrote it, and months older than when our editorial team started work on this issue of LAWPRO Magazine.

The reality is that we are aging, individually and as a nation. In 2006, the leading edge baby boomers – the generation that once refused to trust anyone over 30 – hit 60 years of age. In Canada, which leads the world in numbers of boomers as a percentage of population, millions of boomers are now middle-aged and older – and starting to redefine not only what it is to be a senior but also what they expect of society and service providers.

We boomers are, as they say, tough customers. We're accustomed to being catered to. We like our creature comforts. We're the generation that was told the world is our oyster – and we're not about to let aging change that promise.

For the legal profession, Canada's aging population has huge implications. The majority of practising lawyers themselves are boomers: The average age of a lawyer in Ontario now is 47 – the same age as the peak of the boomer generation. Moreover, 40 per cent of non-urban lawyers have reached the age of 55. LAWPRO has examined this aging lawyer demographic in some detail: The highlights are included in an article in this issue. You'll find a more detailed discussion of our

analysis on our website at www.practicepro.ca/elderlaw. Two related articles on retirement planning look at this life-changing event not as an end point, but as part of a renewal process that requires a proactive, positive mindset.

But most of this issue of our magazine is devoted to the practice implications of an aging clientele. Lawyers with extensive experience in wills and estates law provide a first-hand perspective on how their practices have changed, how to practise to minimize risk, and how the profession needs to adapt.

In this issue we also confront another reality: fraud, which in 2006 cost the insurance program close to \$7 million. Again, those on the front lines provide you with practical tips and procedures to implement in your practice to avoid becoming a fraud statistic.

Other articles update you on important privacy-related decisions affecting all law firms, new legislation on full-shield LLPs, and more. As our cover suggests, we've started the new year with a bang: Make it a priority to peruse this jam-packed LAWPRO Magazine at leisure – and better protect your practice.

Michelle L.M. Strom
President and CEO

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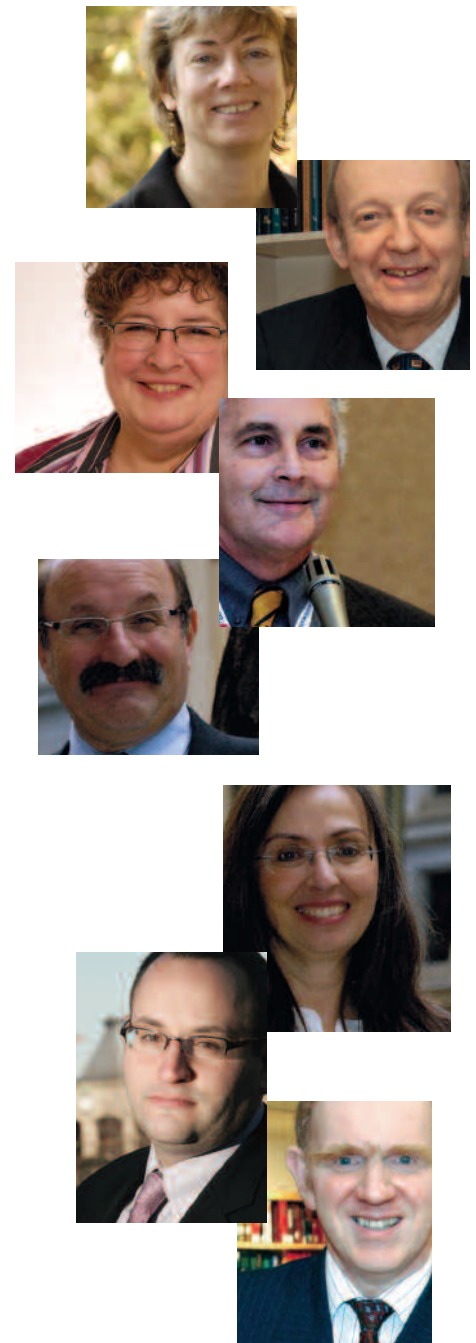
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The boomer challenge: Are lawyers ready?

Last year – 2006 – was a milestone year for more than 10 million Canadians. It was the year in which the leading edge of the baby boom generation hit 60 years of age.

Following close on the heels of those early boomers is a tidal wave that has re-invented every stage of life from birth on – and now is about to redefine what it means to live “the golden years.”

Like all others, the legal profession will inevitably be swept up in this wave, not only because many lawyers themselves are boomers, but because this huge, retiring cohort is destined to leave its mark on lawyers and law practice.

A brief explanation of the numbers and the people behind the numbers is a wakeup call to anyone providing legal services.

The facts: Canada is aging

There is little doubt that grey power is in its ascendancy.

Back in 1921, five per cent of people living in Canada (one in 20) were over 65 years of age. By 2006, that percentage had more than doubled to 13 per cent, and by 2026 Statistics Canada projects more than 20 per cent – one in every five people – will be over the age of 65.

What's driving this increase? Boomers. About 10 million Canadians – nearly one-third of our current population of 33 million, qualify as “baby boomers” born between 1947 and 1966. About 1,000 of them turn 60 every day. By 2031, all boomers who are still alive will be senior citizens.

Not only are boomers the single largest cohort ever, they're also the healthiest and longest living. Boomers' parents, for example, had a life expectancy of about 60 whereas their offspring can expect to live well into their late 70s and early 80s.

But numbers tell only part of the story. Equally important are the characteristics and likely behaviour of the group, says Canadian demographer and University of Toronto professor David K. Foot in his book *Boom, Bust & Echo 2000*.

What makes boomers unique? They are generally well-educated, worldly, and financially comfortable (if not affluent). Because of

their numbers, they have been catered to at each step in their childhood and adulthood, and will expect no less in their senior years. They are demanding, sophisticated purchasers – and as they hit their middle 50s, they'll increasingly become buyers of services in areas such as healthcare and wealth management. Moreover, their service expectations are high: With them, a cookie cutter approach does not cut it.

Wealth management – and related estate planning issues – are a major preoccupation for today's boomers, not only because they are the beneficiaries of likely the single largest wealth transfer ever in Canadian history⁽¹⁾ (thanks to their parents who reaped the financial rewards of a booming economy driven by the boomer generation), but also because they themselves are now squarely in the "saver group". Many own real estate, often mortgage-free, are out of the spending years (associated with raising children) and into their investing years. But at the same time, boomers are confronting the dual realities of longer life expectancies and higher lifestyle expectations – driving a demand for business succession planning, estate planning and wealth management services.

Not to be ignored are the Depression babies – the "golden group of Canadian society" as David Foot calls them. They entered the workforce when the Canadian economy was booming, they benefited from the rise in real estate and stock markets, and ended up with lots of disposable cash. According to Foot: "Parents of boomers are the richest group in Canada – and they are tough customers."⁽²⁾

Boomers and the bar

Lawyers ignore these new realities at their peril. Demand for legal services is already on the increase, say lawyers in the wills and estates planning/management field – and practitioners need to bring themselves up to speed with both the opportunities and the potential exposures that come with servicing older clients.

Mary-Alice Thompson discovered that her concerns about the viability of opening a wills and estates practice in the Kingston market in 2000 were quickly dispelled: "It's indicative of the demand for this type of service that I had a busy practice from day one."

Toronto-based practitioner Ed Olkovich says he's seen a significant uptake in clients looking for estate planning services. Not only are they expecting to manage potentially sizable estates, they also want help in ensuring they have the income needed over the long-term to maintain themselves and their lifestyles – and minimize the tax burden for their children.

And as boomers inherit their parents' wealth, demand for these services will accelerate, says Arthur Fish of Borden Ladner Gervais LLP. "We'll also see other service providers in the insurance and financial services sectors call on lawyers for advice on issues related to their seniors' clientele," he predicts.

But it's not only wills and estates practice that stand to benefit. Boomers' entrepreneurial streak means there will be many family businesses that need to be passed from one generation to the next – and opportunities for corporate lawyers. The increased

demand for retirement accommodation could generate an increase in work for real estate and municipal lawyers prompted by the need for new sites, zoning issues, approvals processes etc. Boomers – accustomed to a better lifestyle than previous generations – will increasingly challenge substandard long-term care facilities, predicts Judith Wahl, executive director of the Advocacy Centre for the Elderly (ACE).

They'll also be looking to better protect themselves when they choose a specific retirement home or long-term care option – and, adds Wahl, it will be critical for lawyers to know how the different options are regulated by legislation as so many of the contracts seniors are asked to sign actually contravene existing protections for seniors. For example, she points out, retirement homes fall under landlord/tenant legislation which regulates how much costs can increase annually – yet many contracts she sees set out increases significantly beyond the scope of what is allowed by legislation.

Boomers and the bar: Dabblers beware!

It's these types of details – and knowledge in numerous practice areas – that lawyers who work with seniors and their families will need to be well-versed in, says Robert Coates, a Law Society certified specialist in wills and estates law. "Family law, real estate, capacity issues, wills and estates – they're all part of elder law practice and the lawyer doing this type of law needs to know about all of these and more to help the client make the right decisions on a number of issues," he says.

INCREASED COMPLEXITY

The increasingly complex legislative environment is another factor that those working with the elderly need to stay on top of: Recent and pending changes in the Health Care Consent Act, the Substitute Decisions Act, Personal Health Information Protection Act, and Mental Health Act present a challenge, says Arthur Fish. "How well these laws function in practice depends on whether we have enough lawyers who really know and understand these laws and how they overlap."

As a practitioner whose clients include public hospitals, long-term care facilities and other health care organizations, Mary Jane Dykeman sees the potential fallout from inadequate legal advice: "The scope of issues that need to be addressed when advising elderly clients – or their children – is becoming larger and increasingly complex, and may put a general practitioner at a disadvantage," she says. "Legislation in the areas of health care, consent, capacity, substitute decisions etc. is fraught with complexities. Moreover, governments are tightening up the regulation of care facilities, and focusing increasingly on seniors issues. These all require lawyers to be consistently up to date and vigilant."

She also suggests that lawyers be cautious when it comes to the directions they take: "Probe, look behind the stated intent. Explain the issues that can arise if the parent gives power of attorney for property to one child, and power of attorney for care to another – in an attempt to treat the two offspring as equals.

There are situations where one child cannot implement the best care option for the parent because the other sibling refuses to loosen the purse strings to pay for that care. Or where the senior who thought he was debt-free discovered a child with a power of attorney had remortgaged the family home – leaving the parent barely able to pay for care. Neither the client, nor the lawyer, is well served when this occurs.”

Not only is the legal arena more complex, but clients themselves are more sophisticated, knowledgeable and demanding, says Ed Olkovich: “Not only do we practise in an increasingly complex environment, but we’re also being held to a higher standard; more accountability seems to rest with us as lawyers. Our exposure potential is significant. The family lawyer who’s trying to advise on the will-related and estate planning issues of a complicated divorce case may want to think twice before giving advice in that area.”

The more complicated lifestyles of boomers – where multiple unions, combined families, various partner arrangements are the norm – further complicate estate planning, and open a potential Pandora’s box of issues for those not well-versed in advising in these areas. Even the fact that female boomers have been more active in the labour force – and will retire with substantial pension benefits – make decision-making regarding tax and estate planning more complex – and retirement planning more difficult.⁽³⁾

Olkovich also points to the potential exposure that the wealth transfer from one generation to the next presents. Citing recent U.S. statistics, he points out that in the next decade the average mid-sized estate will involve millions of dollars in assets. “If you are charging \$250 for a will when that much is involved, you are making a mistake.”

THE CAPACITY TEST

The very fact that more wealth is at stake could mean more litigation around capacity, guardianship and powers of attorney, predict many of the lawyers interviewed. Yet too many lawyers make the wrong assumptions around capacity, says ACE’s Judith Wahl, a lawyer herself. “Only six to eight per cent of

seniors actually lack legal capacity – so it’s important that lawyers understand exactly what legal capacity is, and that they ask for the right assessment if the need arises. Physical appearance, debilitating diseases or incapacity are no indication of a lack of capacity – nor is the mini-mental status test.” (For a detailed discussion of capacity see www.practicepro.ca/elderlaw as well as the next article in this magazine.)

For her part, Mary-Alice Thompson takes the time to get to know the client: “We can’t ship off each client for a \$500 test: It’s our responsibility, as lawyers doing wills, to ask questions that need to be asked to help us assess capacity. I’ll recommend an assessment test if I sense that someone may make a challenge.” Other tools she uses if she expects a challenge include taping the interview with the client (also useful if you believe undue influence may be an issue) or writing into the will the reasons for a specific decision made by the client that could lead to unhappy beneficiaries. Adds Robert Coates: “It’s critical that we as lawyers interview carefully, back up our files with copious notes, even tape instructions – and it’s likely we’ll have to do more of this in the future.”

NO SUCH THING AS A “SIMPLE WILL”

In this environment, doing a will cannot be a loss leader, suggests Robert Coates. “Clients need to know that proper service costs a proper fee – that a lawyer needs to take the time to interview thoroughly, and then take the time to draft information thoroughly into the will. We must all become more diligent and detail-oriented.”

Adds Ed Olkovich: “Dabbling in wills and estates planning is, in my view, a minefield – those who think they can make up in volume what they lack in fees on a file are courting disaster,” he predicts.

What’s needed on the part of lawyers, he adds, is a two-prong approach: First, invest in CLE to keep abreast of legislative changes, new techniques, and precedent-setting cases that are redefining behaviour standards.

Second, the bar has to help educate consumers, and others who are sources of work for lawyers (financial planners, insurance

A seniors-friendly practice

Sensitivity to the client is, says Robert Coates, the hallmark of any successful lawyer. “Estates and family law is personal service law. So it’s just plain courtesy to be sensitive to the client’s needs, to treat everyone with sensitivity and respect, no matter what the age or the issues involved.”

Depending on the specific client, Coates will make any number of accommodations: He’ll slow down the conversation, repeat specific instructions he’s taken, raise his voice, as needed. When doing mediations, he asks beforehand about any physical disabilities that need to be accommodated.

Good lighting is also a must, adds Mary-Alice Thompson, as eyesight deteriorates with age. She tends to print draft documents in larger type to make them easier to read, seats clients so they can easily hear her and, if need be, read her lips as many with hearing disabilities also lip read.

Other tips: Ensure the office and washrooms are wheelchair accessible. Age-appropriate reading materials in the waiting room signal an interest in a seniors clientele, as do chairs that are easy to get into and out of.

Elder law: a broad perspective

The focus on Canada's aging population – and the special needs of seniors – is becoming recognized in legal circles as a practice specialty called elder law.

Elder law, say its advocates, is a multi-disciplinary and multi-faceted practice area that requires practitioners bring more than legal expertise to the table: An understanding of the aging process, knowledge of the services available to and needed by aging clients, sensitivity to relationship dynamics, and an ability to counsel and mediate, are among the skills that lawyers practising elder law may be called on to provide.

The Canadian Bar Association's Elder Law section suggests those practising elder law need to be prepared to deal with numerous issues such as:

- age discrimination;
- general planning for aging;
- elder abuse and exploitation;
- housing of older persons and care facility regulation;
- ethical and practical aspects of advising older clients;
- mental capacity and consent;
- guardianship and court-appointed substitute decision making;
- health care decision-making;
- powers of attorney/mandates;
- elder divorce and separation; and
- lawyer referral panels, and advocacy and *pro bono* work for the elderly of low or middle incomes.

The Elder Law section of the CBA site includes links to articles, presentations, legislative updates and other resources on elder law. For more, see www.cba.org/CBA/sections%5FElder/main/.

Within the Ontario Bar Association, elder law issues are being addressed by the health law, and trusts and estates law sections.

CICA WEBSITE:

A WEALTH OF KNOWLEDGE

Lawyers looking for resources to educate themselves on Canada's aging population may want to visit the Canadian Institute of Chartered Accountants' (CICA) website.

The CICA has launched a multi-faceted program to help chartered accountants capitalize on the wealth management needs of "older clients" and their offspring.

Cash flow planning, pre- and post-retirement planning, insurance reviews, and tax planning are packaged into the PrimePLUS package offered by chartered accountants to help elderly clients (and potential clients) "maintain lifestyle and financial independence." PrimePLUS service providers are expected to have a current knowledge of aging and a commitment to work as part of a multi-disciplinary team that could (for example) include lawyers. CICA helps educate CAs about geriatrics through courses on topics such as health issues associated with aging, communication skills when dealing with the elderly and so on. For more see www.cica.ca and select the **Business Opportunities** link.

agents, accountants, banks, etc.) to the complexities of wills and estates planning. "We need to communicate the **value** that a lawyer's expertise represents. We need to help them understand that it's the service, not the fee, that is important. At the same time, we need to educate lawyers about the need to make wills and estates work the centre of their practice and not a peripheral part of practice. We need to take wills/estates law out of the realm of the commodity which is how it is now seen," says Olkovich.

A legal focus in a multi-disciplinary model

Lawyers looking to capitalize on the boon that Canada's changing demographics represent need to think big says Judith Wahl. "They need to look at this potentially huge client base through a different lens: They'll need to better inform themselves about

the many services that seniors access; they'll need to know about the aging process and its implications. They'll have to bring themselves up to speed with legislation in a wider range of areas than the area in which they may specialize." Experience – in the form of calls from lawyers seeking guidance on where to go for information – tells her that too many lawyers don't understand what they're getting into.

But at the same time, warns Wahl, it's important that lawyers in this arena not confuse themselves with the caregivers. "You're the lawyer: Your client needs you to focus on your legal role and responsibilities – and on knowing the client. You need to see the big picture so that you can help guide your client – but be wary of involving yourself in caregiving or care planning. Leave that to the other experts."

¹ Inter-generational wealth transfer – estimated between \$10 billion and \$1 trillion (Report on Business, Globe & Mail, Oct. 9, 2006 pg B.11)

² Boom, Bust & Echo 2000. pg144

³ New Frontiers of Research on Retirement, Statistics Canada; www.statcan.ca/Daily/English/060327/d060327b.htm

Resources

Advocacy Centre for the Elderly

Contact:

416-598-2656

www.cleo.on.ca

About:

Advocacy Centre for the Elderly (ACE) is the first community-based legal clinic for low-income senior citizens in Ontario. ACE is funded by Legal Aid Ontario to provide a range of legal services including: direct client assistance, public legal education, law reform, community development, and referrals.

Web resources:

- PDF versions of publications on topics such as: consumer, criminal, family, health & disability, immigration & refugee, landlord & tenant, legal services, seniors, social assistant, work & employment insurance, workers' compensation, youth justice, and other subjects.
- Links to: community legal clinics in Ontario, public legal education, international public legal education, community information centres, literacy, social justice, government, boards and tribunals, laws, domestic violence, legal services, and more.

Print resources:

- Order free pamphlets online on topics such as: continuing power of attorney for property, power of attorney for personal care, a checklist if you are shopping for a retirement home or long-term care facilities.
- Summary of *Health Care Consent Act*.
- *Bill of Rights for People Who Live in Ontario Long-Term Care Facilities*.

Ontario Seniors' Secretariat

Contact:

Seniors' INFOline: 416-314-7511

Toll-free: 1-888-910-1999 (Ontario only)

TTY: 1-800 387-5559 (Ontario only)

www.citizenship.gov.on.ca/seniors/

About:

The Ontario Seniors' Secretariat develops and supports government initiatives which improve the quality of life of Ontario's seniors, and supports public education efforts for and about Ontario's seniors.

Web resources:

- Information on Alzheimers, retirement homes, and elder abuse.
- Section called "Senior Smart Ontario," that includes: statistics on seniors, an aging quiz, academic resources, seniors policies and programs databases, national framework on aging, and communicating with seniors.
- A list of seminars on seniors issues.
- A link to a section called "Seniors' Info" with information on: aboriginal services, care facilities, caregivers, community services, computers and learning, e-forms, services, publications, end of life, finances and pension, GLBT services, health and wellness, housing, legal matters, newcomers to Canada, retirement, safety and security, seniors networks, statistics and research, transportation, travel and leisure, veterans services, and work and volunteering.
- PDF version of *A Guide to Programs and Services for Seniors in Ontario*.

Print resources:

- Various free publications for seniors and/or on caring for seniors including: *A Guide to Advance Care Planning*, *Guide to Programs and Services for Seniors in Ontario*, and *The Care Guide*

Community Legal Education Ontario (CLEO)

Contact:

416-408-4420

www.cleo.on.ca

About:

CLEO is a community legal clinic dedicated to providing low-income and disadvantaged people in Ontario with the legal information they need to understand and exercise their legal rights.

Web resources:

- Publications on seniors' issues including elder abuse and rights of seniors living in long term care facilities
- Pamphlets on *Continuing Power of Attorney for Property* and *Power of Attorney for Personal Care*.

Print resources:

- Online order form for publications on wide range of subjects.

Office of the Public Guardian and Trustee

Contact:

416-314-2800

Toll-free: 1-800-366-0335

www.attorneygeneral.jus.gov.on.ca/english/family/pgt/

About:

The Office of the Public Guardian and Trustee is part of the Ontario Ministry of the Attorney General. Contact them for information about Powers of Attorney for Personal Care; Continuing Powers of Attorney for Property; the *Substitute Decisions Act*; and guardianship.

Web resources:

- Information and PDF versions of numerous publications on guardianship, substitute decisions issues, powers of attorney, and capacity assessment.

Print resources:

- Policy manuals of the Office of the Public Guardian and Trustee available for a fee of \$100 (price subject to change).

Consent and Capacity Board

Contact:

416-924-4961

Toll-free: 1-866-777-7391

www.ccboard.on.ca

About:

The Consent and Capacity Board is an independent body created by the government of Ontario under the *Health Care Consent Act*. It conducts hearings under the *Mental Health Act*, the *Health Care Consent Act*, the *Personal Health Information Protection Act*, and the *Substitute Decisions Act*.

Web resources:

- Information sheets on: liberty, capacity, appointing a representative, compliance with rules of substitute-decision-making, and more.
- Links to forms, legal information, FAQs and outside links.

Print resources:

- Many forms available free of charge.

Toronto Police Service

Contact:

Project Senior: 416-808-7300

Fraud Squad: 416-808-7300

Crime Stoppers: 416-222-8477

Elder Abuse Co-ordinator, Toronto Police Service: 416-808-7040

www.torontopolice.on.ca

About:

The Toronto Police Service publishes a handbook to reduce the incidence of frauds and scams against seniors.

Web resources:

- Links to phone numbers, news releases and PDF version of handbook.

Print resources:

- *Toronto Police Community Handbook: Frauds and Scams Against Seniors* includes information and prevention tips on various frauds and scams targeted at seniors.



Jan Goddard

Wills, powers of attorney and the elderly: a practitioner's perspective

by Jan Goddard

Preparing wills and powers of attorney for elderly clients involves a number of challenges. As a lawyer who works at both the document preparation and the litigation end, I see the issues up front – and the fallout when the wills and/or powers of attorney are misused or challenged. The common threads between these two events are the importance of determining that the client is acting free of undue influence, has the capacity to understand and does in fact understand what he or she is doing when the document is signed.

The lawyer preparing a will and powers of attorney for a client has an essential role in determining if the client is freely and capably giving his own instructions. This role is especially vital when you are working with an elderly client who may be experiencing some degree of physical or cognitive impairment. It is equally essential that a client who wants to make a will and powers of attorney and is capable of doing so, is not denied the opportunity because of the interference of others or your uncertainty about what to do.

Who's the client?

A lawyer's first challenge can come before the first meeting with the client even happens. The initial call about an elderly person who wants to make a will and powers of attorney will frequently come from a family member, rather than the prospective client. Usually the caller is trying to be genuinely helpful to the older person, but this situation still requires caution on the lawyer's part. The caller often will give their opinion on the elderly person's testamentary capacity, tell how the elderly person wants to dispose of assets, who should be the executor and what special issues need to be addressed on behalf of the beneficiaries. This information can at times be helpful, but it is no replacement for meeting and observing the client and taking the client's instructions directly.

Sometimes the caller is an existing client who now wants you to meet with a relative. This kind of referral has to be screened carefully. There is great potential for conflict of interest. It could be blatant, but it also could be a more subtle social pressure, which can lead to compromises that would not normally happen. It may be better to thank the client for thinking of you, and refer the relative to another lawyer.

The bottom line is that if you are already confused before the first meeting about who the client is and who wants to call the shots, it may be best to pass on the retainer.

Meet with the client in private

The next challenge can arise when the elderly client arrives at the appointment with an escort and an expectation that they will both meet with you. A variation on this is a third party present during a home visit. It is important to manage expectations by making it clear when the appointment is made that the meeting will be held in private, just you and the client.

Making wills and powers of attorney can be an intimidating prospect. Some clients do want emotional support from a loved one, or simply rely on that person to help them remember and say what they want. Your client will need an explanation as to why it is better for everyone for if you meet the client alone, so have it ready.

Beware the client who has a script

Some clients arrive with a set of typed or handwritten instructions ready to present to the lawyer. Lawyers usually encourage this kind of advance preparation. However, you need to ask who prepared these for your elderly client. Even if they are in the client's handwriting, they may have been dictated to the client. Your use of this "script", once it has been handed to you, can affect your perception of the client's understanding of the instructions. For example, if you read the instructions out loud to the client, and the client agrees with each item you read aloud, have you actually verified that these are the client's instructions, or has the client demonstrated her agreeable nature?

Do not confuse social skills with capacity

It's not unusual for a person with dementia to have well-preserved social skills. A client may be nicely groomed and present well, smiling, shaking hands and responding to small talk about the weather. If you're at his house, he may offer you a cup of tea. He may respond to simple questions appropriately, especially ones that require a yes or no answer. This does not mean that the client understands the question. Other signs of cognitive impairment or short-term memory loss may include repetition of statements or an inability to initiate conversation, ask a non-routine question or introduce a new topic.

Do not confuse diagnosis with incapacity

Just because a client has been diagnosed with dementia is not definitive of incapacity. A few years ago, I was consulted by a client who was troubled by the conduct of the persons to whom he had granted his powers of attorney. He told me he had been diagnosed with a specific form of dementia.

I described three options to him at length, during which time he showed a remarkable ability to remember and use the information I was giving him. He clearly exhibited some memory deficits, but also understanding. He had gathered information he wanted to present to me in advance of our meeting so that I would understand his situation. He asked many questions, and when the time came to make a decision he asked me if it would work if he instructed me to do a hybrid of two of the options, describing exactly which parts of each he wanted to use. He had a great idea, and I followed his instructions in the drafting of his new powers of attorney with great confidence in his capacity.

It is helpful to know that your client has a diagnosis of dementia so that you can be even more thorough in your interview of the client, not so that you give up on the client without ascertaining whether he has capacity.

Ask open-ended questions

When you ask questions that require the client to provide information rather than say yes or no, you will begin to test the client's knowledge and ability to think. For example, you ask, who do you want to be your executor? But that is not all. You ask, why have you chosen this person? And, what does an executor do?

Know the definitions of capacity

These open-ended questions need to be targeted specifically at the knowledge the client needs to demonstrate in order to have testamentary capacity and the capacity to grant or revoke a power of attorney. In this regard, "she knew what she was doing," an assertion we often hear after the fact when a will or power of attorney is challenged, does not meet any sort of standard for a well-informed opinion.

Regarding testamentary capacity, the test was established in *Banks v. Goodfellow*, an English case decided in 1870 that remains relevant today. The client must understand what it means to make a will, the effect of the will, the extent of his property and the claims of others he ought to consider. It is towards these areas of the client's knowledge that your questions need to be directed. To the extent it is possible, the client's answers to some questions, such as the extent of his property, should be verified independently.

The capacity to grant or revoke a continuing power of attorney for property or a power of attorney for personal care are specific legal tests as well, set out in detail in the *Substitute Decisions Act*.

In order to be capable of granting a continuing power of attorney for property, a client must demonstrate knowledge of the following key concepts:

- 1) the nature and extent of her property,
- 2) her obligations to any dependents,
- 3) that the attorney can do anything with her property except make a will,
- 4) that the attorney must account for dealings with her property,
- 5) that if she is capable she can revoke the power of attorney, and
- 6) that unless the attorney manages the property prudently it could decline in value, and that the power of attorney could be misused.

Everyone talks about powers of attorney, but not everyone understands them. These concepts need to be reviewed with the client and her understanding of them tested through the use of open-ended questions.

The capacity to grant a power of attorney for personal care has been described as lower, given that it involves a twofold legal test:

- the client must have the ability to understand whether the proposed attorney has a genuine concern for his welfare, and
- the client must understand that he may need the attorney to make personal care decisions for him.

These may be relatively simple concepts to understand, but the actual selection of an attorney for personal care and execution of the document can have larger implications for the client.

I am sometimes consulted in litigious situations where there are what I describe as "dueling powers of attorney" for personal care. This is when various family members have repeatedly taken an elderly person to different lawyers to make a succession of powers of attorney. If you are the third or fourth lawyer the client has seen about his powers of attorney, perhaps the client would be best served by exploring with him ways of bringing the underlying family conflict under control. If you can't do that, perhaps you should decline the retainer.

Don't get drawn into the drama

Family members often impose a sense of urgency and necessity to the preparation of wills and powers of attorney for an elderly client. Mom has had a recent "episode," or a daughter has arrived from California to find Dad's fridge bare and the bills unpaid, or the current attorney for property has allegedly done some dodgy things with Aunt Mabel's bank account. Due to the still prevalent and incorrect belief that "the government" will take over everything if you don't have a will or power of attorney, panic sets in.

You do not have to be part of that panic. The work may need to be done, and soon, but it also needs to be done well. This may include the need to meet with the client a few times, check background information and, if warranted, obtain an expert opinion as to the client's capacity.

The making of powers of attorney, in particular, should not be done in a rush. The choice of the attorney, and the authority given, can have serious effects on the most personal aspects of your client's life: where she lives, who she sees and how her money is spent, even in relation to the most basic of her needs and wants. Disputes about these kinds of decisions made by attorneys are ending up in court more and more often.

At the end of the day, there can be worse results for your client than ending up incapable without powers of attorney. When it comes to making a will for a client, the conventional wisdom is that if you are in doubt, it is better to make the will. I question this as the correct approach when one is talking about assisting a client of doubtful capacity to make a power of attorney. The actions of an attorney affect a client during his or her lifetime, and challenging the validity of a power of attorney can be an expensive and lengthy process.

Seek out a value-added expert opinion on capacity

Capacity to make a will or powers of attorney is a legal test. It can be very helpful to seek an opinion from a medical doctor or capacity assessor regarding the client's capacity, but if you aren't careful about what you request and who you are requesting it from, you end up with an unhelpful result. The average medical doctor has received almost no training in capacity assessment. If you do not explain the legal tests and ask specific questions of the expert, based upon your own observations of your client, it is unlikely that you will receive a useful opinion.

The expert opinion is only helpful to the process if the expert is qualified to give the opinion and has the information she needs on which to base her opinion. You add value by seeking the right expert and providing the necessary information and questions. And the expert opinion should be second to you making your own inquiries of the client's knowledge and understanding. You are the one who knows the law and has prepared hundreds of previous wills and powers of attorney. Sending the client to her family doctor to get a letter saying she's capable before you even meet with the client will be of no help.

An elderly client of mine with dementia once telephoned and asked me to come see him at his retirement home to talk about some changes he wanted to make to his will. We set a date. He hadn't seen me in over a year, and a few days later, when I showed up at the home, he was waiting in the lobby, but didn't recognize me. When I reminded him of my name, it was obvious it rang no bells for him. Yet he told me he knew he had an appointment at two o'clock that day and was waiting for his guest.

Once we established that I was his guest and went to a private room to talk, I asked him why he wanted to see me. He couldn't remember. I asked a few times, but he was stuck. I could have dismissed the whole idea of meeting him about his will at that point, but he had asked to see me, and I had made the trip at his expense, so I felt I should prompt him. Sure enough, when I asked him whether he wanted to talk to me about his will, he remembered that he did, and started telling me about changes he wanted to make.

The main change involved writing a "black sheep" son back into the will, after he had previously been written out. I reviewed with the client what he had done in his previous will and the reasons he had given me at the time. I asked him what his reasons were for changing his mind. He told me what they were in concrete terms that made sense.

We reviewed the effect the change would have on his overall estate plan and he instructed me regarding some adjustments that would have to be made after being presented with options. We

took a few minutes to review a recent statement from his financial adviser to remind ourselves how much money we were talking about. Finally, I asked him to tell me in his own words what he had instructed me to do, and he gave me a clear summary.

Despite the shaky start to our meeting, I came away satisfied that my client had testamentary capacity and was not being unduly influenced by anyone regarding the changes he wanted to make to his will. I was helped enormously in making up my mind by the fact that I had known the client for a few years and we had discussed the situation with his son before. I was also only the client's lawyer – I had never acted for anyone else in the family.

I still arranged for a capacity assessor to meet with the client. I had seen previous reports from this assessor and knew that she understood the legal test for testamentary capacity. I gave her background information about the client and told her what he had instructed me to do and why. After interviewing the client, she advised me that it was her opinion as well that he had testamentary capacity. He told her exactly the same instructions he had given me and gave the same reasons. The assessor told me that she thought the short-term memory problems my client had exhibited at the start of our meeting were secondary to his obvious ability to understand the nature of a will and its effect, state his instructions and give reasons for these.

It's not a simple process

Lawyers know that clients always want a simple will. A simple will is one of those things that, like a unicorn, can be believed in, but can't be found.

An elderly client has more than an average lifetime of experiences that may be weighed in the balance as decisions are made about making a will and powers of attorney. These can include serious illnesses, the death of a spouse, second marriage, ups and downs with children and grandchildren and in-laws, a desire to remain living at home, increasing dependency on others, personal or business failures or successes and a host of other formative events. In addition, the client may have physical frailties and a progressive dementia.

This client, with all her baggage, comes through the door of your office seeking assistance with important planning for her life and death. To provide real assistance will never be a simple process. As described above, it involves getting to know the client and applying your knowledge of the law to her unique situation. In doing so, you have to resist the pressure from others and prejudice about elderly clients. It is challenging and very, very satisfying work.

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Wills and estates law: Claims slowly on the increase



In both count and cost, wills and estates-related legal malpractice claims have slowly increased over the last several years. By area of law, wills and estates is the fifth most common area of claims: Only litigation, real estate, corporate and family claims are higher.

Over the last five years, wills and estates-related claims averaged 6.0 per cent of LAWPRO's claims count (112 claims per year), and 5.4 per cent of our claims costs (\$3.9 million per year). On average, resolving a wills and estates claim costs LAWPRO \$34,404.

This article examines the reality behind the numbers: It highlights the most common errors, and the steps you can take to reduce the likelihood of a claim.

The most common errors

In the wills and estates area, the most common causes of claims are the following:

- lawyer/client communication failures;
- inadequate discovery of facts or inadequate investigation;
- failure to know or properly apply the law;
- time and deadline-related errors;
- conflicts of interest; and
- clerical/delegation.

Figure 1 illustrates the relative proportion of these errors. What is striking to most lawyers is that law-related errors rank third. Lawyer/client communication-related errors are actually the most common, representing almost 40 per cent of the errors in the wills and estates area.

Communications-related errors

Lawyer/client communication-related errors fall into three categories:

- A failure to follow a client's instructions;
- Poor communication with the client; and,
- A failure to inform the client or obtain the client's consent.

A review of common fact scenarios for each type of error will give you a good understanding of why these errors happen and the steps you can take to avoid a communications-related claim.

Figure 1.
Wills & estates by type of error (2001 to 2005)



FAILURE TO FOLLOW CLIENT'S INSTRUCTIONS

A "failure to follow client instructions" is the most common communications-related error. It really amounts to nothing more than a simple failure to follow a client's specific instruction. The most frequent scenarios for this error (and what you can do to avoid it) include:

- Not comparing the drafted will with your will notes to ensure that they match. Make and take the time to cross-check the draft will with your notes.
- Not ensuring that the number of parts, in a division of residue, matches the number of beneficiaries, or that the percentages add up to 100. Do the math.
- In the same vein, failing to proofread the drafted will to ensure, as much as possible, that there is no ambiguity in the wording. If it is not practical to have someone else in your office review the will, then try to review it yourself a few days after the initial proofreading so that you might be able to look at it with fresh eyes.
- Failing to proofread the will to ensure that there are dispositive provisions in it and that there is a residue clause.

Poor communication with client

Poor communication with client is the second most common communications-related error. Common scenarios for this error include:

- Failing to delineate for whom you are acting: e.g., the executor as representative of the estate or the executor personally.
- In estate litigation, failing to document options available to the client regarding settlement.
- In preparing a will, if you are relying on information provided by a testator, it would be best to confirm in writing that reliance. For example, if the testator advised that his estate is the beneficiary of his insurance policies, and you are relying on those assets for making the dispositions the testator wants, confirm this in your reporting letter.
- Failing to ensure that the client understands what you are telling him and that you understand what he is telling you, particularly if there is a language barrier.

Failure to inform client or get consent

The final type of communications error involves a failure to obtain the client's consent or to inform the client. Examples of this type of error include:

- In estate litigation, failing to advise the client of the possibility of his personal liability for costs. It is no longer a certainty that the estate will be responsible for all costs in estate litigation.
- Failing to advise the executor of the deadline for filing tax returns.
- Failing to clarify what steps you will be taking and what steps are the responsibility of the executor, in the administration of an estate.

Avoiding communications errors

When it comes to avoiding or reducing the likelihood of a communications-related claim, the importance of putting things in writing cannot be over-emphasized. While the failure to have written confirmation of instructions and advice is not negligence in and of itself, such written communication can be extremely helpful in defending you in the unhappy event that a claim is made against you. Why? Because more often than not, this type of claim involves the lawyer recalling that one thing was said or done, or not said or not done, and a disappointed beneficiary that alleges something different. This type of claim is very hard for LawPRO to defend successfully. At the end of the day it essentially comes down to a question of credibility. Unfortunately, we frequently find inadequate documentation in the lawyer's file to back up the lawyer's version of what occurred. All too frequently, we see files with no correspondence or reporting letters whatsoever.

Fortunately this error is one of the easiest to prevent. You can significantly reduce your claims exposure by documenting your work. Confirm the information that your client provided to you, your advice to the client, the client's instructions to you, and what steps were taken on those instructions. Document the

time spent reviewing the provisions of the will, including what issues were discussed. This can be done in your notes, and in interim or final reporting letters, or even in an e-mail message.

Even taking a few seconds to make more detailed dockets can be a lifesaver. "Conference with client re review of draft will, including provisions re cottage" is much better than just "Conference with client re draft will."

A special caution is warranted for matters involving family members and close friends: We do see claims on these matters, and quite often find almost no documentation in the file. This probably happens because the lawyer is familiar with the personal circumstances of the client, and fails to make and document all appropriate enquiries. It would be best not to act for them; but, if you feel that you must, treat them as though you had never met them before. Remember, often it is not your client who is the potential claimant, rather it is a beneficiary or disappointed beneficiary, with whom you have no personal relationship.

Inadequate discovery of facts or inadequate investigation

The second most common malpractice error in the wills and estates area is an "inadequate discovery of facts or inadequate investigation."

This error has become much more frequent over the last eight years, and examples include:

- Not adequately inquiring, or documenting that inquiry, into the testator's mental capacity. Ask the questions, and make note of the answers, regarding general knowledge, assets, relatives, etc.
- Failing to document your inquiry into the possibility of undue influence.
- Failing to meet with the testator alone. Ask your client the usual questions to satisfy yourself that there has been no undue influence.
- In administering an estate, making distributions without ensuring that sufficient money is held back to pay the taxes. Err on the side of caution when making an interim distribution.
- In acting for the spouse of a deceased, making a *Family Law Act* election prematurely, before sufficient information is known about the deceased's net family property. If necessary, consider obtaining an order extending time for making the election.
- Not making the usual inquiries when acting for friends and family. The best advice would be not to act for family or friends, but if you do, be extra vigilant about documenting the answers to your inquiries.

Don't take shortcuts – they can and will come back to haunt you. Lack of attention to details also arises when there are time pressures created by lawyers, clients or the courts – and details get missed or drafting errors occur. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day.

Failure to know or properly apply the law

Wills and estates is one of the more complex areas of practice. It involves many different federal and provincial statutes, and voluminous case law. The third most common type of error in the wills and estates area is a failure to know or apply the law. Law-related errors are more than twice as likely to occur in the wills and estates area as compared to other areas of practice.

The law-related mistakes we most frequently see are the following:

- In estate administration, not being aware of some provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice).
- Drafting a complex will involving sophisticated estate planning when you do not have the necessary expertise.

Time and deadline-related errors

Time and deadline-related errors are the fourth most common error we see in the wills and estates area.

They fall into one of two distinct types: missing deadlines or limitations; and just not completing tasks in an appropriate amount of time (aka procrastination).

Commonly missed limitation periods include:

- The six-month deadline for making an election, and issuing the necessary Application, under Section 6 of the *Family Law Act*
- The six-month-from-probate deadline for bringing a dependent's relief claim under the *S.L.R.A.*
- The two-year deadline to sue a trustee under the *Trustee Act*

The procrastination-related errors we frequently see include:

- Delay in preparing the will. Liability will depend on a number of factors, such as complexity of the will, length of time between instructions and preparation of the will, and whether you were aware of any urgency.
- Delay in converting assets into cash in an estate administration, assuming that it was part of your retainer.

As a piece of general advice, it would be a good idea to review your file before closing it and/or putting it into storage to ensure that nothing still needs to be done. If there is, you should ensure that either you complete the outstanding work, if it is part of your retainer. If it is not, confirm in writing to the client that it is the client's responsibility to complete the work.

Conflicts of interest

The wills and estates area is not immune to conflicts of interest claims, and these claims tend to be very expensive to resolve as they involve complex issues. They often arise when a lawyer who has done extensive work for many members of a family, usually

also in the context of doing work for a family business, attempts to act for one of the family members on a wills or estates matter.

When it comes to avoiding conflicts, you need to be vigilant from the very start of the matter. Follow firm conflicts checking procedures religiously. In most cases conflicts checking systems catch potential conflicts, and the warning is ignored because of poor judgment and/or greed. Don't fall into this trap – listen to your instincts. Ask yourself – who is my client? Is there a real or potential conflict? Also, remember that you probably can't objectively judge your own conflicts – get input from someone who is outside the matter.

Lastly, take appropriate action when real or potential conflicts arise. This includes declining the retainer or getting off the matter if it is appropriate to do so, even if it means turning down work from a good client or a matter that will involve substantial fees.

When preparing a will, from a conflicts point of view and otherwise, think of what will happen when the testator client dies and what the reaction will be of the beneficiaries and wannabe beneficiaries. That may help you to foresee potential claims and thereby take steps to prevent claims from being made, or at least from being successful.

Even if no allegations are made...tell us!

If you become aware that the validity of a will that you prepared is being challenged on the basis of lack of testamentary capacity or undue influence, you should immediately report it to LAWPRO, even if no allegations of negligence are made.

Putting us on notice will help us help you, and will most likely help reduce the damages on any potential claim. We may retain counsel to assist you and protect your interests, including assisting you in drafting an affidavit and attending with you if you are examined as a witness. And remember, best practice is not to turn your file over without a court order. We can assist in ensuring that the court order is worded appropriately to protect your interests. It is interesting to note that we close about 85 per cent of our wills and estates claims without any indemnity payments.

Your marching orders

With the changing demographics of the population at large, there is more work in the wills and estates area, and at the same time, more exposure to a malpractice claim. You can't totally eliminate the risk of a malpractice claim. However, you can substantially reduce your risk of a claim by improving your lawyer/client communications and documenting your work. Review and consider the types of errors that occur in the wills and estates area, and set aside time to integrate the various risk management strategies outlined above into your practice.

Deborah Petch is claims counsel at LAWPRO. Dan Pinnington is director of practicePRO, LAWPRO's claims prevention initiative.



C. Robert Vernon

Reverse mortgages 101

by C. Robert Vernon

Ed note: Because only one reverse mortgage lender is currently active in Canada – Canadian Home Income Plan, (CHIP) – this article refers to the provider by name. Naming the service provider should not be viewed as an endorsement of CHIP by either the author or LAWPRO.

Retired clients, particularly those who are property rich but cash poor and rely on relatively fixed pension or investment income, frequently consult their solicitors about reverse mortgages.

Very simply, a reverse mortgage loan is a transaction in which a mortgage lender agrees to advance a fixed sum to an older home owner on the express understanding that, although neither principal nor interest need be repaid until the property is sold or the owner dies, interest accrues and is compounded regularly throughout the term.

For many home-owning seniors, a reverse mortgage is worth serious consideration. Lawyers advising clients who are interested in these transactions need to fully understand both the legal and financial issues associated with reverse mortgages.

Reverse mortgages offer seniors several benefits:

- A sum of money, limited by the value of the property and the owner's age, is generally advanced in a single payment,
- No repayment of principal or interest is required while the mortgagor continues to own and occupy the house,
- No recourse can be had against the owner or the owner's estate in the event that the aggregate amount of principal and interest eventually exceeds the value of the house when the mortgage comes due or is paid off, and

- Title to the property remains in the homeowner's name and the owner retains the right to decide when to move or sell the house.

Lawyers advising clients about reverse mortgages need to also consider these features:

- CHIP does not advance principal monthly, like an annuity, but rather advances most, if not all, of the principal amount of the mortgage at the outset, and leaves the homeowner with responsibility for investing any amount that may not be immediately required.
- The CHIP mortgage must be registered as a first charge on the property and secondary financing is not permitted.
- Interest rates are adjusted every six months, annually or every three years, depending on the option selected by the homeowner, and CHIP's interest rates seem high – generally 4.75 per cent above Government of Canada Treasury Bills and Bonds with similar terms; and
- Significant interest rate differential and prepayment penalties apply in cases other than the death of the last surviving mortgagor who has signed the reverse mortgage.

When advising clients about reverse mortgages, lawyers should ensure seniors fully understand all aspects of these types of transactions:

- Thoroughly discuss with clients not only the terms and conditions of the proposed reverse mortgage but also its advisability, to ensure that clients clearly understand the nature and consequences of the transaction.
- Since the principal amount of the reverse mortgage is paid to the homeowner in a lump sum, rather than in regular periodic payments, investment decisions must be made and budgeting issues addressed.
- Identify the impact of accumulated semi-annual compounding of interest in the estate planning process, as well as the cost of early termination of the reverse mortgage contract.
- Appropriate alternatives, such as secured lines of credit and mortgage-financed life annuities, should also be considered in the context of the individual client's needs and resources.
- Confirm your advice in writing, since surviving family members and heirs who were not consulted may be surprised to learn about the existence of the reverse mortgage.

Advising seniors on life lease housing

by C. Robert Vernon

Scan virtually any weekend real estate section these days and you'll find ads, and sometimes feature articles, on a major new development often aimed at seniors: life lease housing.



Although life lease housing has been marketed primarily to seniors, it is not necessarily limited to that group. In the spectrum of available housing tenures, life lease falls somewhere between traditional short-term rental accommodation and ownership.

The two essential ingredients of life lease are:

- A sole and exclusive right to occupy a designated housing unit, fee simple title to which is owned by a third party, and to enjoy shared use of common areas, and
- An entitlement to realize, in whole or in part, the equity in the unit when the period of occupancy ends, subject to any restrictions in the life lease.

The “market value” model is most commonly used for life lease projects in Ontario. When the resident dies or leaves, the unit is either redeemed by the sponsor, for resale, or sold by the resident/estate at market value, with the sponsor generally retaining up to 10 per cent of the selling price.

The age of the resident and the length of occupancy do not affect the amount received by the resident. Accordingly, this model offers the possibility of capital appreciation. On the other hand, the purchase price is often close to, and occasionally higher than, comparable condominium units, even though the purchaser does not acquire registered title and the ability to freely sell, lease or mortgage the unit.

Life lease housing in this province is not a creature of statute, although it is governed by numerous statutes of general application. In particular, the subdivision and part lot control provisions of Section 50 of the *Planning Act* must be part of any consideration of the enforceability of a life lease agreement. If the agreement limits the length of the interest granted by it, thereby creating a term of years – a leasehold interest – and if it is for a housing unit that is part of a building, it will be saved by the exemption contained in Section 50(9) of the *Act*.

If the project sponsor or developer has only a leasehold interest in the property, other serious issues arise. The life lease interest cannot extend beyond the term of the underlying ground lease and the ground lease must be kept in good standing by payment of rent and fulfillment of the lessee’s covenants; failure to do so would put the subsequently created life lease interests in serious jeopardy.

However, the most important factor to be taken into account is the risk element. Unlike the purchase of a new condominium unit, where the purchaser’s deposits must be held in trust or deposit insurance effected, there is no similar protection for purchasers of new life lease units.

Most life lease agreements require deposits of at least 25 per cent of the purchase price. Except when the sponsor decides not to proceed with construction, the deposits are non-refundable and may be applied to the costs of construction. The entitlement of the sponsor to use purchasers’ deposits in this fashion is generally non-negotiable.

What makes life leases work financially is the fact that the deposits, in addition to the building site which the sponsor generally provides, constitute the equity that the construction lender requires be injected into the project before any mortgage funds are advanced. The expectation is that the balance of the purchase monies, paid after the building has been finished, will discharge the construction mortgage, after which the project will be debt free. The only effective way to substantially reduce this risk is to ensure that the life lease agreement permits its registration, or notice thereof, on title, and obliges the sponsor to obtain from all mortgagees written postponement agreements in favour of individual purchasers.

Although Ontario has no legislation expressly governing the marketing, construction and management of life lease housing, the regulations under two Ontario statutes now specifically recognize and extend significant benefits to life lease housing. In 2000, the regulations under the *Assessment Act* were amended to provide that life lease housing units are to be assessed in the same way as condominiums, equity co-operatives and other residential properties having less than seven self-contained units. In 2004, most life lease transactions were exempted from the *Land Transfer Tax*.

The documentation for each individual life lease project should be carefully reviewed and considered by the purchaser’s solicitor. Title insurance protection is generally available for life lease transactions, provided that the life lease agreement, or notice of it, is registered on title.

C. Robert Vernon is Certified Specialist (Real Estate Law) and sole practitioner in Toronto and frequent speaker on life leases and reverse mortgages.

Mutual wills: Solving the lawyer's dilemma



by Debra Rolph

The dilemma

A solicitor prepares mutual wills on behalf of a couple. Later, one of them returns to the solicitor, asking that his or her will be changed without the knowledge of the other spouse. What should the solicitor do? Must the solicitor refuse to act? Or, under what circumstances is the solicitor entitled to act? Even if the solicitor refuses to act, is there still a duty to the "other" spouse to disclose that the solicitor was approached on this subject? Or would doing so be a breach of confidentiality to the spouse who raised the issue?

Rodney Hull, Q.C., addressed these issues in an article prepared in July, 1992, for the *Errors & Omissions Bulletin* published by the Law Society of Upper Canada and Lawyers' Professional Indemnity Company. It was his position that the preparation of spousal wills constitutes a joint retainer. He suggested that a lawyer should not subsequently prepare a will or codicil for either spouse without disclosure of this request to the other spouse.

In that situation, Hull suggested advising the clients at the outset that if one of them later chooses to change his or her will, and approaches the lawyer to do so, the lawyer will be obliged to inform the other spouse of this intention. If the parties agree, the lawyer may act, and if the parties do not agree, the lawyer should decline to act.

The controversy continued. The Law Society Advisory Services continued to receive queries from practitioners on this subject. The issue was eventually referred to Convocation. A Committee was struck and extensive consultations

with the profession took place. Especially contentious was whether the "second" spouse must be informed, even where the solicitor declined a "new" retainer by the "first" spouse to change the terms of the first spouse's will.

The solution

In February, 2005, the following Commentary to rule 2.04(6) was adopted. The Commentary differs slightly from the advice given by Hull, who suggested that the solicitor should have the spouses agree, in advance, that if one spouse should subsequently approach the solicitor to revise the will, the second spouse must be told.

The Commentary sets out that in this circumstance, the "second" spouse or partner should NOT be told, BUT the solicitor cannot accept the "new" retainer UNLESS the "second" spouse or partner consents to the "new" retainer, or is dead, or unless the spousal or partnership relationship is at an end.

The full text of the Commentary is reproduced below:

2.04 (6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that:

(a) **Joint Retainer**

the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but

- (c) the lawyer would have a duty to decline the new retainer, unless;
- (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

Disregarding mutual wills

When considering this Commentary, it is well to remember that the estate of a spouse who made a mutual will, then made a subsequent will inconsistent with it, may be liable to the other spouse's heirs for breach of contract. *Hall v. McLaughlin Estate*, 2006 Canlii 23932 (On S.C.), [2006] O.J. No. 2848 illustrates this fact.

Emily and John McLaughlin married in 1992. The bride was 80, the groom 78. They had children from former marriages, who, unfortunately, did not get along. Shortly after their wedding, the couple made identical mutual wills. The wills provided that if either spouse died first, the entire estate should go to the other; if both died together, the estate would be divided in half, with one half going to Emily's children, and the other half going to John's children.

Emily began exhibiting signs of Alzheimer's; by 1998, she was totally demented. John made two further wills after Emily lost testamentary capacity. They required that his family renounce any claims to Emily's estate before they were to take under his estate.

Emily died in January 2002. Her estate of \$322,017.59 went to John. Before his death in December, he made it clear to several members of Emily's family that they would be taken care of. When John died, his estate was worth \$706,291.39. All but \$48,074 of that was distributed to his family pursuant to his last will. Emily's family received nothing. Emily's family brought an action against John's estate and family for a declaration that one half of John's estate was to be held in trust for them.

Madam Justice Helen M. Pierce of the Ontario Superior Court of Justice allowed the action. Justice Pierce found that there was clear and satisfactory evidence that Emily and John intended to enter and did enter into a binding agreement that the survivor of them would divide his or her estate into two equal shares to be divided among their surviving families. The wills reflected the best evidence of the formalized agreement between them. John recognized and felt bound, legally and morally, by the agreement.

There were two alternate explanations for his changing his will: 1) he expected to die first and he intended to protect Emily's estate for her children, or 2) he intended to make an *inter vivos* gift to Emily's children after their mother's death.

Unfortunately, John's efforts to identify and protect Emily's estate for her children failed because, at his death, Emily's estate was co-mingled with his. She no longer had an identifiable estate. His

intention that his beneficiaries renounce any claims to her estate was therefore defeated.

Once Emily lost her testamentary capacity in 1997, she had performed her part of the bargain with John, as reflected in their 1992 wills. John was legally bound to the agreement they had earlier made, that the survivor would divide his or her estate equally between the two families.

Justice Pierce found that there was an agreement not to revoke the 1992 wills and make new ones. Even John's two subsequent wills referred to Emily's 1992 will, suggesting he felt bound to protect Emily's estate for her children. John was not prohibited from making a new will; he was, however unable to execute a new will that did not adhere to the agreed upon scheme.

The court imposed a constructive trust on one half of the net value of the John's estate for the benefit of Emily's children. Because all but \$48,074 of the estate had been disbursed, there was an order for the tracing of the estate proceeds. An injunction was granted preventing John's family and estate from dissipating any assets attributable to the estate.

The judgment did not say whether the same lawyer prepared the 1992 wills, and John's subsequent wills as well. Nor was there any hint as to what advice or warnings John was given concerning the subsequent wills.

The new Commentary to rule 2.04(6), and the *Hall v. McLaughlin* case, gives solicitors both guidance and warning when approached to prepare mutual wills, or to make a subsequent will inconsistent with the mutual wills.

Debra Rolph is director of research at LAWPRO.

The changing face of the legal profession:

Fact or fiction

1. There are too many lawyers in Ontario.
Yes No
2. If you answered YES to 1 above, the reason is:
 - a) Because there are too many newly called lawyers; or
 - b) Older lawyers aren't retiring.
3. Practice areas in which the number of E&O claims is on the increase correspond to areas of practice in which there has been the highest growth in the number of practitioners.
True False
4. In non-urban areas 40 per cent of lawyers are over age 55.
True False

Answers and insights

The answers to those questions – and a number of other surprising facts – can be found in an analysis of the legal profession in Ontario that LAWPRO conducted recently. The findings, based on information gleaned from our database, indicate that the profession is aging, that the areas in which most lawyers practice are changing, and the lure of urban practice is stronger than ever.

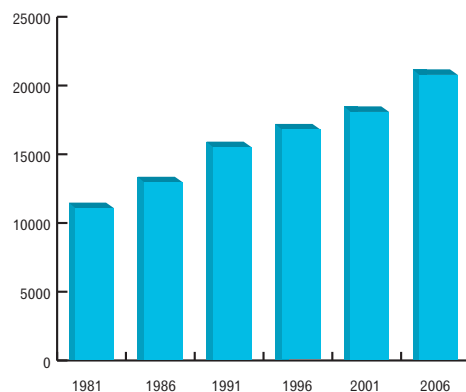
FACT

The practising bar continues to grow at approximately 2.5 per cent annually (about the same rate as it has for the past 25 years).

Lawyers have always had many career opportunities open to them: Private, government or corporate practices

are the primary ones. The fact that there has been a consistent trend would indicate an economic equilibrium is being achieved.

Number of lawyers in private practice, by year



FACT

The growth in the practising bar is a combination of two separate forces: more lawyers coming into practice, and fewer retiring.

- In recent years an average of about 1,300 lawyers were called to the Ontario bar, up about eight per cent from the average in the 1990s.
- As well, it appears that lawyers are deferring retirement. Not only are there more senior practitioners around (1,330 over 65 years age in 2006 compared to 670 in 1996), but the average age of the bar is continuing to increase and now stands at 47 – up from 45 in 2000 and 41.5 in 1990. This trend is particularly apparent in the personal legal services fields (real estate, family law, wills, criminal law); increased demand for these specific legal services in turn is a function of population growth.

FACT

The areas that have seen the highest growth in the number of lawyers are corporate, plaintiff litigation and criminal law. Despite the growth in the number of practitioners in these areas, claims frequency has been decreasing or stable.

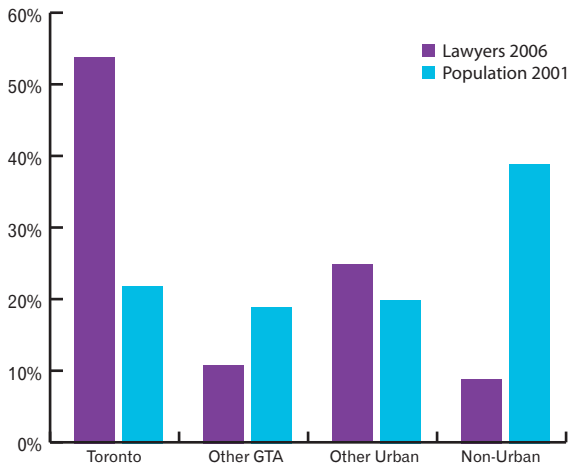
- For example, in the area of plaintiff litigation, the number of lawyers increased just over 50 per cent to 2,221 from 1,474 lawyers while claims in this area of law actually decreased 11 per cent to 477 claims in 2005 compared to 536 in 1997.
- Similarly, the number of lawyers practicing corporate law increased nine per cent between 2003 and 2005, while claims attributed to these lawyers increased only four per cent.

Real estate and wills practices appear to be more stable in terms of the numbers practising in these areas. Interestingly, those practising primarily real estate and wills law are, on average, eight to ten years older than those practising in other areas. Of the two, only real estate has demonstrated volatility in claims frequency. Between 1996 and 2005, the number of real estate claims has bounced from a high of 717 in 1996 to a low of 432 in 2003 and back up to 526 in 2005.

FACT

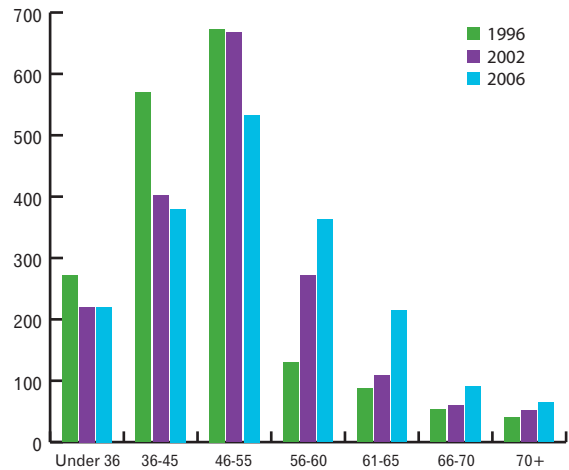
Urban areas, especially the Toronto area, attract a disproportionate number of lawyers – likely a function of higher level of corporate activity in these areas.

Percentage distribution of lawyers in private practice in 2006 and geographical distribution of Canadian population in 2001



In non-urban areas, the number of lawyers has remained fairly stable over the past 10 years but the aging of the practice in these areas over time is noticeable: 40 per cent or more are over 55 years old – approximately twice that found in Toronto.

Count of lawyers in non-urban areas, by age



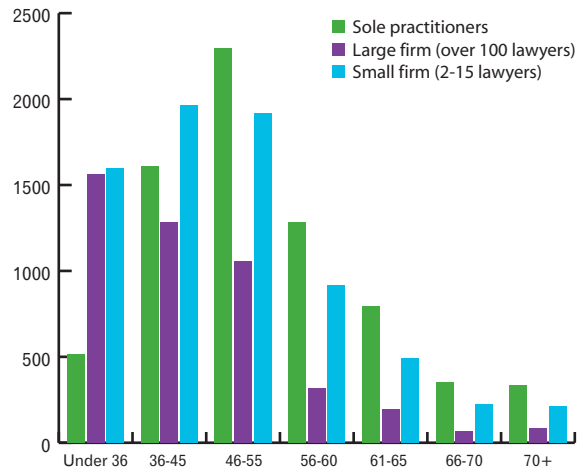
FACT

The age profiles of lawyers in sole practice is quite different from that of small or large firms.

Sole practitioners across the province are under-represented in the “under 36” age group and over-represented in the “over 55” age group. For example, of the 6,889 lawyers in sole practice in 2006, only 500 (seven per cent) were under the age of 36.


Large firms – and to a lesser extent small firms – tend to attract younger lawyers. In large firms, for example, 34 per cent of lawyers are under 36 years of age.

Count of lawyers by firm size (2006)



FOR MORE FACTS

Want to know about other trends? Go online to www.practicepro.ca/elderlaw



Winding down
the law practice:

Retirement as a renewal process

by Stephen P. Gallagher

Instead of viewing retirement as an end-point in itself, we need to begin thinking of retirement as a series of developmental steps taken by individuals on an ongoing basis.

Retirement today needs to be seen as more a journey than a destination. To more effectively participate in this journey, retirees need to learn new skills and competencies well before they begin their retirement experience.

Today's more highly educated, accomplished, and affluent pre-retirees are looking to find more personal purpose in their lives than they ever had before. They want something new, different, and certainly something interesting at deep personal levels. The traditional meaning of retirement is a single event – “withdrawal”

from the workforce into leisure, relaxation, a slide into the end of life. *Webster's Dictionary* defines retirement as “removal or withdrawal from an office or active service; to seek privacy or seclusion.” The word retire comes from the French word *retirer* meaning “to withdraw,” the same root “martyr” comes from. The dictionary often has trouble keeping up with society's changing definitions of nomenclature, but also perhaps, not only should retirement be redefined, but also indeed the whole notion of age needs to be reviewed.

The question of age and phased retirement

Research from Retirementoptions.com, a training organization devoted to pre-retirement planning, indicates that a new career developmental stage is emerging, called the "renewal stage."

The renewal stage starts about the mid-50s and lasts well into the 70s. The renewal stage can be a time of great personal growth and development, or it can degenerate into just the opposite. The transition we call retirement is actually the beginning of a new career/life stage called "renewal." The key to success in this renewal stage is how well a person prepares for it.

The renewal stage is a time when individuals begin taking a much more personal approach to living. They are more free to ask themselves what they want, free for the most part from former family obligations, free from the press of having to climb the ladder of success. The renewal stage is a time when even "hard-chargers" re-evaluate how they live their lives. They don't have to prove to anyone what they're made of. Now they only have to answer to their own needs, their own impulses, their own calling, and their own passion. That's really what renewal is all about – pursuing your passion, your dream, your own goal, not someone else's.

Today's retirees generally aren't looking to fade away. They want to find fulfilling activities, they want enriching endeavours. But, contrary to the popular media view of retirement, the most important thing persons anticipating retirement are looking for is their own fulfillment – their own sense of purpose and meaning.

Studies show that the majority of retirees work for pleasure, mental stimulation, and personal fulfillment. In the Cornell Retirement and Well-Being Study, 44 per cent of retirees say they work for pay at some point after their careers. The most popular reason for returning to work (89 per cent) was to keep active, not financial need. Innovative law firms are beginning to look to their senior partners to see how they might be able to help the firm solve one of the greatest leadership challenges the

firm will be facing in the years ahead. Ensuring an adequate supply of qualified leaders will separate successful firms from the others. Could it be that the same senior partners that many firms are now looking to sunset may become the untapped resources firms will need to lead the talent pool of the future?

The law firm's role in retirement planning

Dr. Phyllis Moan, director of the Cornell Employment and Family Career Institute at Cornell University, who has studied couples' retirement traditions says, "We plan our careers, but we don't plan our retirement." Once you leave full-time law practice, you may need time and possibly support as you move away from the external, material, achievement definition of self, toward the more personal, intimate and, for many, the spiritual definition of self. The journey from full-time work to full-time retirement in its traditional sense may take years to accomplish.

If retirement is seen as a new journey, a path full of challenges and opportunities that individuals may begin in their mid-fifties, increasingly, law firms will need to get involved in directly helping senior partners as they work through this planning process. With the proper planning, retirement should hold up as a new prospect of growth for you, your loved ones, and your law firm.

For years, David H. Maister, widely considered one of the world's leading authorities on the management of professional service firms, has been promoting skilled managers and team leaders whose job it is to manage the team and coach the individual players. In David H. Maister's book *Practice What You Preach*, he shows (statistically) that success in professional business actually returns greater profits to the firms that provide coaching to individuals than firms that provide no coaching or mentoring.

The phenomenon, sometimes called phased retirement, is becoming increasingly common among white-collar professionals. Increasingly, professional service firms are turning to retirement

Self-exploration retirement exercise

1. When you imagine being retired, what picture comes to mind?
2. What do you anticipate adding to your life when you retire?
3. What do you envision giving up when you retire?
4. Do you have ideas about what your retirement should be?
5. Imagine not retiring. What image comes to mind? Is it positive? Negative?
6. Whose retirements have you observed? Parents? Aunts or uncles? Friends?
7. What would you like to emphasize or do differently?

Law Society guide to winding up practice

Winding up your law practice properly involves a great deal of time, effort and planning. To assist you in the process, the Law Society of Upper Canada and LAWPRO have developed a comprehensive resource, the **Guide to Closing your Law Practice**.

There are many circumstances in which you may have to deal with the transfer or wrap-up of your practice: changing firms, retirement, sudden illness or accidental death. Leaving a law firm will have a greater impact on solo or small firm where – unlike larger firms – there may be no one available to carry on with, or to wind-up the practice in an orderly fashion.

Your duty of competent representation includes an obligation to take appropriate steps to safeguard your clients' interests in all circumstances: A failure to properly plan or prepare for both anticipated and unexpected departures from your practice may expose your clients to risk, and subject law partners and family members to financial and emotional stresses associated with the winding-up process.

The guide is available online in PDF format at: <http://mrc.lsuc.on.ca/jsp/guideClosingYourPractice/index.jsp>. Law Society members can also request a print copy by contacting the Member Resource Centre at 416-947-3315 / 1-800-668-7380 ext 3315.

coaches or mentors to help senior partners set retirement goals and exit strategies. As a rule, retirement plans include both long-term goals (e.g., to continue working three-days a week for two more years) and the more immediate performance goals that move lawyers toward those long-term goals (e.g., to transition ten of my clients to younger partners in the next thirty days).

An ever-increasing number of professional coaches are being brought in to work with sole practitioners and senior partners in firms of all sizes. Research shows that individuals who are able to set goals for themselves that are Specific, Measurable, Achievable, Realistic, and Time-limited (SMART) are much more successful in achieving what they wish to accomplish. When the goals are for the individual's own benefit, motivation increases and success of the relationship is assured.

Persons approaching their first retirement transition need exactly the same process of self-analysis and sound consultation that they would receive from a competent career consultant if they were going through a job change. Time to work on such a plan is very hard to find with other responsibilities in a busy law practice. As job changers need to generate their career options in a clear and understandable way, so too, pre-retirees need the same "options generation" process but with slightly different content, slightly different goals, and an entirely different purpose. That's exactly what persons approaching retirement at any age need: Options.

Today, coaching has achieved wide-spread recognition as being of value, relevance and importance in business, and we are now beginning to see increasing numbers of independent coaches working in the legal marketplace. Innovative law firms are now beginning to offer senior partners assistance in finalizing retirement plans through the use of outside coaches, who have specialized in retirement planning. The coaching engagement is generally provided through a series of confidential telephone consultations made over a period of three to six months. Individual attorneys can invest in retirement coaching on their own; however, there are a number of benefits law firms can get from extending coaching as a pre-retirement benefit. The number one benefit to law firms is helping the senior people who built the firm determine how they might want to continue to be involved with the firm in the future.

Stephen P. Gallagher is an executive coach and management consultant specializing in the legal arena, and president of LeadershipCoach.us, a coaching and law firm consulting practice based in Philadelphia, PA. This article is adapted with permission of the author from a paper delivered by Mr. Gallagher to the New York State Bar Association General Practice Summer Meeting in 2004. The full-text of this article, along with several self-exploration exercises, can be found at: www.practicepro.ca/elderlaw.



Fraud: The problem that won't go away

by Caron Wishart

Lawyers' ability to hold money in trust and transfer it from one entity to another is a unique professional responsibility. It makes the lawyer's role essential to real estate and commercial transactions - and lawyers an attractive target for fraudsters.

Five years ago, homebuyers and owners would not dream that their home could be stolen out from under them. Today, fraud is a frequent topic in both the legal and consumer media. Consumers are increasingly better informed about how fraud

works. In legal arenas, fraud has become the subject of presentations, articles, publications and Continuing Legal Education programs. Despite this increased awareness, the cost of these frauds to the lawyers' insurance program has not decreased.

The number of ways that fraud can be committed by those who interact with lawyers is complex. Previously LAWPRO tracked two types of fraud – fraud by the lawyer or fraud by someone else.

The “someone else” category has expanded quite dramatically. We now track:

- Fraud by client
- Fraud by insured
- Fraud by partner
- Fraud by lawyer employee or associate
- Fraud by non-lawyer employee
- Fraud by real estate agent/mortgage broker
- Fraud by non-client party to transaction
- Fraud by other

Lawyers are vulnerable to all of these types of fraud. Here are some examples:

Fraud by non-lawyer employee

Funds in the amount of more than \$50,000 were certified and stolen from a lawyer’s trust account. This lawyer had left signed trust account cheques available for the convenience of the staff. One short-term employee used this convenience to steal money from the trust account. In other situations, staff employees have created false mortgages.

Fraud by client

This is the most prevalent type of fraud and the schemes involving identity theft and value fraud are widely publicized. Clients tender false identity documents and register fraudulent mortgages.

Fraud by insured, associate or partner

In some unfortunate cases, lawyers are complicit in the fraud and participate in the fraudulent mortgage transactions. Other situations start off more innocently. The lawyer enters a lawyer-client relationship in the normal course and is involved in a series of real estate transactions. The promise of ongoing work is enticing. However, the catch is that some of these transactions do not make commercial sense. Funds are paid to third parties who are not involved in the transaction. Multiple transactions are completed, and in many cases, the person whom the lawyer meets with and considers to be his client, is not the one who is actually purchasing, selling and signing mortgages. The lawyer turns a blind eye. The lawyer may initially be a dupe, but at some point he or she knows that the transactions are fraudulent. Yet he continues to act.

Fraud by non-client party to transaction

The lawyer acts for a lender only, but does not follow instructions concerning photo ID, searching title and commenting on purchase

price. The borrower successfully completes a fraudulent transaction.

The price of fraud

At the end of the day somebody will pay for these fraudulent transactions. The financial institutions, the title insurers, Canada Mortgage and Housing Corporation and other mortgage insurers, the Law Society Fund for Client Compensation, the Land Titles Assurance Fund, LAWPRO or the victim all stand to lose. Rarely, of course, does the perpetrator of the fraud pay.

Needless to say, when a fraud is committed by any member of a firm or association, there are many other costs to the partnership and the lawyer that are not financial. The emotional toll on those left to pick up the pieces can be huge. They will have lost the trust of the clients; they will be involved in time-consuming investigations and explanations; everyone in the firm will be affected.

The cost to LAWPRO

Fraud-related claims are not disappearing. In 2003, we had in our claims portfolio 33 fraud-related files with a value of \$500,000 at six months into the fund year. Three and a half years later, the 2003 fund year claims have increased to 111 with a value of \$4.4 million. In 2006, we had 108 fraud claims with a value of \$6.7 million.

Coverage provided by the LAWPRO policy

Under the LAWPRO policy, fraud and dishonest acts by the insured lawyer are excluded from coverage. Except for sole practitioners, lawyers generally must secure minimum Innocent Party insurance coverage at a premium cost of \$250 for \$250,000 of coverage.

Many firms pay another \$249 per lawyer to ensure that they have Innocent Party coverage up to \$1 million. Therefore, if an employee or a partner commits a fraud, firm lawyers are covered and the client will receive compensation. This coverage is available on an optional basis to sole practitioners as well, as long as they qualify. Subject to underwriting, a lawyer with a good claims record usually can purchase this coverage.

What can you do?

The best you can do is to make efforts to protect yourself, your firm and your clients from fraud. Be vigilant. Educate your staff. Create processes and procedures that help identify suspicious transactions and adhere to them.

The articles that follow provide some practical advice that you may want to incorporate into your law practice.

Caron Wishart is vice-president, claims at LAWPRO. This article is based on a presentation on fraud at the OBA’s A Viper in the House: Real Estate Fraud and You conference in November 2006.



Guarding against real estate fraud

Catarina Galati and Jerry B. Udell

It's a war out there!

by Jerry B. Udell and Eli M. Udell

A quick look at the daily media confirms that transactional fraud has become a growing problem for real estate practitioners across Ontario. Although law firms across the country are tightening their policies and procedures in response to the increased frequency and severity of fraud, the fraudster – as we all have come to label the 'enemy' – has proven to be a formidable foe, capable of fooling even the most attentive lawyer.

This is a new battle to be waged against an old enemy. Using a clever technique of 'guerrilla warfare', the fraudsters usually lie low and out of sight: They study and test our complex regime of real property law, looking for each and every hole to exploit. The best fraudster is not a copycat – in most cases, the techniques are entirely original and well-disguised. We, in turn, can no longer rely on our old and outdated tools when we go into combat. If we do, we are doomed to fail.

In short, the fraudster is intent on staying ahead of the game. Conversely, lawyers want to prevent the advance

as best we can. We all have a duty to stay vigilant – not only to help protect our clients against being victimized by fraud, but also because it's in our best interests to do so. We are, after all, the gatekeepers to the transaction itself. By virtue of this role, we give the lending institutions and the government a valid, viable reason to involve us in the entire real estate process. If we absolve ourselves of the responsibility that comes with our role, then there will be no need for us at all.

A strategic approach: “The battle plan”

In the fight against real estate fraud, every lawyer can do his or her part by incorporating a number of simple mechanisms into his or her practice. This article outlines a layered strategy for fraud prevention at three separate levels:

- the **client intake**;
- the **deal phase**; and
- the **universal approach**

You should develop a routine with your team. At the very least, there should be a system of checks and balances in your office. Whether you choose to use all of the tools below, or only a few, just remember: This is a decision that may very well make the difference between catching the crook or being caught by one.

Client intake

CONFIRM YOUR CLIENT’S IDENTITY

When a new client comes through your door, a member of your staff should complete a reverse phone number search of that person on <http://www.canada411.ca>. This search is absolutely essential, unless you have dealt with the person or corporation in the past. Always insist that your client provide you with a land-based telephone number, because directory assistance does not yet support cellphones. This search should be conducted to ensure that the information your client has given you is valid.

CHECK YOUR DATABASE & FILES

Have a member of your staff crosscheck your firm’s roster of past and present clients to determine if you have done any work for the person or corporation in the past, and, if so, what type of work was done. Most importantly, this type of search usually rings a bell if there have been previous problems or issues with the client. This search is also an excellent preliminary tool for identifying a potential conflict of interest (should one exist).

Doing the “deal”

TAKE THE LEAD

- a) Be an active participant in every deal that comes across your desk. Most importantly, before executing any payouts to any of the parties, ensure that you personally review any and all trust statements that are associated with the deal and with your client.
- b) Consistently encourage the rest of your staff to ask you questions should someone become suspicious. Always stay in close contact with each member of your team about each file as you move towards the closing.
- c) Make it loud and clear – documentation matters. If something suspicious arises, it should be documented without delay. Ensure that every member of your staff can identify and recognize the overly anxious, nervous or restless client. E-mail is a powerful tool in this respect: It is essential that



Eli M. Udell

you foster a policy of immediate communication from the outset. If any member of your staff becomes apprehensive about a file, he or she should feel comfortable telling you about it right away.

IDENTIFICATION, TAKE TWO

- a) Prior to completing a mortgage deal on behalf of your client, instruct your staff to take a number of precautions. This cautious approach is necessary to confirm that the information your client has given you remains properly aligned with what any other parties to the transaction – such as a lender – may desire.
- b) Train your receptionist or front line person to request at least two pieces of government-issued identification when the client arrives. When your client makes an appointment, let him or her know that **two** pieces of identification are required. Not all lenders require the same form of identification. You are obligated to play by their rules and meet their requirements.
- c) Make sure that the client knows in advance what is expected of him or her, **before** he or she shows up at your doorstep.
- d) Have your receptionist or front line person electronically scan the client’s identification.

(cont’d on page 30)

Real estate fraud: Being creative & fighting back

Real estate fraud is a serious issue. Lawyers should consider implementing some of the following procedures within their firms to fight fraud.

ELECTRONIC REGISTRATION – PERSONAL SECURITY PACKAGE (PSP)

- Implement policies in your firm to safeguard all PSPs issued under your Teraview account.
- Train staff to ensure they understand the importance of not sharing PSPs.
- Take steps to cancel PSPs belonging to those no longer with your firm.
- Periodically review disbursements made through your Teraview account looking for any unusual disbursements or activity.

JOINT RETAINERS

If you are acting in a joint retainer, ensure that you act in the best interests of both clients throughout the retainer and that you do not prefer the interest of one client to the other.

If you are acting for both a borrower and a lender in a mortgage transaction, disclose to the lender all information that you know and that in your reasonable opinion may be material to the lender's decision to lend or not to lend. This information might include:

- the fact that there is a flip;
- the fact that there are amendments to the agreement of purchase and sale changing the terms of the agreement upon which the lender has based its mortgage transaction.

Examples include:

- changes in the purchase price;
- extra deposits payable;
- renovation or other credits;
- changing the parties to the transaction.
- the fact that the mortgage documentation is to be executed under power of attorney, where this fact is not apparently known to the lender;
- information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the lender's ultimate decision to advance funds. Examples include:
 - the actual proceeds of sale expected by the vendor;

- the use of counter cheques;
- identification irregularities;
- information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment. Examples include:
 - changes in the mortgagor's economic circumstances, employment or marital status,
 - evidence of inaccurate appraisals.

BE ON GUARD AGAINST BECOMING THE TOOL OR DUPE OF AN UNSCRUPULOUS CLIENT

If you have suspicions or doubts that you might be assisting a client in dishonesty, fraud or illegal conduct:

- make reasonable inquiries about the client;
- make reasonable inquiries about the subject matter and purpose of the retainer;
- make notes of the results of these inquiries;
- disclose your concerns to all of the clients in the retainer;
- if appropriate withdraw from representing the client(s).

Verify that the person retaining you and/or signing documents under your supervision has reasonable identification to substantiate that he or she is the named client/party and retain details or information in the file about the identification obtained.

CLOSING TRANSACTIONS AND DUE DILIGENCE

- Develop and use checklists of red flag indicators to assist you and your staff to identify transactions that could involve real estate fraud.
- Review instructions from the lender carefully as soon as possible upon receipt and develop a list of requirements. If you are unable to meet the requirements immediately notify the clients.
- Prior to registering electronic documents, obtain and retain in your file the client's written authorization.
- Develop a policy that whenever possible only a lawyer in your firm will sign for completeness documents that require electronic registration.
- Carefully review documents before they are signed.

Catarina Galati is senior competence counsel, Law Society of Upper Canada.

(cont'd from page 28)

- e) Use this scanned copy to confirm that the documents provided by the client will satisfy the requirements of any lender(s) involved.
- f) Double-check your scanned document and scanned license against any instructions received vis-à-vis the transaction itself. If any of the listed names differ, draft a formal affidavit for your client to sign, confirming that he is who he claims to be.
- g) A common form of identification provided by most clients is their Ontario Driver's Licence. For as little as \$200 you can purchase a magnetic strip reader and software that reads the magnetized strip on the back of their licence. It can then be stored with the scanned copy of the other identification provided in your database. For a small fee you can also access the Ministry of Transportation website and confirm whether or not the licence is valid or if there are any fines.

OTHER INDICIA

Other unusual items may give you signals or flags that a fraud is at hand. These items are:

- a) there are substantial Cash Net Proceeds from the sale;
- b) the closing is rushed;
- c) sale proceeds are not payable to the registered owner;
- d) the property is vacant;
- e) the property is mortgage free; or
- f) the client offers only a cellphone number for contact purposes.

If any of these flags are raised, you should instruct your staff to take the necessary steps to ensure that you are not unwittingly being dragged into a fraud scheme.

The universal approach

Beyond intakes and retainers, what can your office do, on a continuing basis, to identify the enemy and prevent the harmful occurrence of fraud?

TRAIN YOUR TROOPS

Each year, make sure that you send at least one member of your staff to the Law Society of Upper Canada's annual seminar for law clerks. These seminars regularly discuss the evolution of the guerrilla warfare we have discussed – and its attendees are always shown new techniques that have developed over the past year, what to look out for, and how to pre-empt their use. When your staff member returns from the meeting, designate him or her as the team leader for fraud prevention in your office. Schedule an information-sharing session – led by your team leader – with the rest of your current staff. When a new person comes onboard, have your team leader meet with him or her immediately to discuss the importance of fraud prevention.

Mobilizing your “battle plan”: Discovering an anomaly or fraud

IT'S ALL IN A NAME

It is not unusual for the name on the instruction document to be different from the actual client name. The name “Sean” or “Jean” may be recorded on a birth certificate, yet on the driver's licence the same person may use the name “John.” Some people use their second name as their name of choice; others, for valid reasons, use nicknames or pseudonyms.

In these situations, it is not good enough simply to ask your client about the discrepancy. Get it in writing. Ask the client to sign an Affidavit confirming the change of name **and** call the lending institution to confirm that it is aware of the change or difference. Paper the file to confirm that all parties know about the situation, and ask the lender for a fax confirming that you are safe to proceed.

WHO'S YOUR CLIENT?

Not everyone has a driver's licence or other forms of identification which the lending institution has mandated you to obtain in the ordinary course. If your client has no acceptable form of identification, you **must** confirm with the lender – by telephone, fax or e-mail – that the lender is aware of the discrepancy or issue. Paper the file to confirm that the lender knows about the situation, and ask the lender for a fax confirming that you are safe to proceed.

GOTCHA!

What if you catch a fraudster? Today, with mortgage brokers and other independent individuals involved in many aspects of your transaction, you can assume nothing. At the outset, if you have a problem, you should immediately request instructions in writing from both parties. If the client declines, resign from the file.

Overall, unless you are certain that a fraud is being committed, tread carefully. However, if you are certain that things are askew, you must act quickly to protect the integrity of your practice. Here are a few helpful hints for getting started:

1. Resign in writing from the file;
2. If possible, get written confirmation from the client that he or she has received a notice of your resignation;
3. Call the Law Society of Upper Canada; and
4. Document everything.

Jerry Udell is a partner with McTague Law Firm LLP in Windsor. Eli Udell is a law student. The authors thank Steven Shub, Ray Leclair, and Sally Burks for their comments and suggestions on dealing with fraud in daily practice.

Ed note: This article is a précis of a paper presented at the OBA seminar, “A Viper in the House: Real Estate Fraud & You” in November 2006. The full text is available at www.practicepro.ca/elderlaw.

Personal information and privacy: Where are the boundaries?

by Simon Chester



Simon Chester

An earlier article on privacy (see www.lawpro.ca/LawPRO/privacy.pdf) raised the possibility that a law firm might find itself the subject of a Privacy Commissioner's investigation. A recent finding of the federal Privacy Commissioner not only drives this home, but also has implications for Ontario lawyers.

On May 2, 2006, the Privacy Commissioner of Canada released its first findings concerning the business activities of law firms. The cases involved two law firms which obtained consumer credit reports on individuals from credit bureaus, as part of their litigation preparation. The lawyers had hoped that the credit reports would reveal whether a potential party was worth suing and would assist in a dispute involving the law firm's clients.

The law firms hadn't reckoned with the fact that they could be considered to have breached their contract with the consumer reporting agency, and violated the *Ontario Consumer Reporting Act* and the *Federal Personal Information Protection and Electronic Documents Act*.

By the time the Privacy Commissioner's finding was released, the law firm's consumer reporting agency membership had been cancelled, and the provincial Registrar of Consumer Reporting Agencies had conducted an inconclusive complaint investigation.

The Privacy Commissioner asserted its jurisdiction and argued that the firms had both collected personal information on individual's

without their consent and without fitting into any of the exemptions provided for in the legislation.

Initially neither firm took the Privacy Commissioner's investigations terribly seriously. It took a threat by the Commissioner's litigation counsel to take the matter to the Federal Court before the firms agreed to implement the findings. The fact that the firms backed down left some of the jurisdictional issues unsettled.

The findings make sobering reading. The Commissioner found that in doing the credit check, the firms had collected personal information without the consent of the subject. The firms could not point to any applicable exemption in the Act. They had breached federal law.

The finding ended with recommendations that the firms implement a policy to ensure consent when obtaining consumer reports or conducting other background checks.

Privacy experts are scratching their heads about the finding since it seems to apply broad language under federal law to override detailed provincial law establishing the specific circumstances under which credit reports can be lawfully obtained. The findings can't easily be squared with the 2004 Superior Court decision in *Ferenczy v. MCI Medical Clinics*, dealing with video surveillance of a personal injury plaintiff.

Nevertheless, the fact that the firm's jurisdictional arguments cut no ice with the Commissioner is worth noting. We can hope that Parliament's current review of the federal Act or future court decisions clarify how the issues of competing federal and provincial statutes should be resolved. It should be noted that there are significant differences of opinion on this matter, especially regarding how far the process of civil litigation will be affected by federal privacy legislation (see, for example, PIPEDA Case Summary #352: "Airline delays granting access to personal information, citing ongoing litigation").

On one side, this federal legislation is limited in the extent to which it can regulate property and civil rights, given that it was arguably enacted as an extension of the federal trade and commerce power. But on the other side, the Supreme Court of Canada has begun to afford privacy a quasi-constitutional status. Either way, re-characterizing legal professional privilege is not a trivial matter.

But that sort of interpretive wrangle should not detract from the serious impact of the findings. What should Ontario lawyers do?

- Prudence suggests rereading your membership contract with the credit bureau, if you rely on the bureau to help you assess the credit worthiness of potential clients.

- Familiarize yourself with the *Consumer Reporting Act*, and the provisions under which you can access credit information.
- Review the *Personal Information Protection and Electronic Documents Act*, and in particular Schedule 1, and train your lawyers to recognize the obligations it imposes.
- Treat any investigation by the Privacy Commissioner seriously. While the two law firms weren't named, it's clear that they both initially rebuffed the enquiry and then backed down.
- Recognize that in today's technologically-empowered practice, privacy will become an increasingly serious concern. Better to get your firm ahead of the law.

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.

Simon Chester is a partner with Heenan Blaikie LLP in Toronto.

Amended legislation introduces full shield protection for LLPs

by Duncan Gosnell

Full shield protection for limited liability partners appears to be well on its way to becoming a reality in Ontario.

Changes to the *Partnerships Act*, R.S.O. 1990, c. P.5 have been introduced under section 19 of the *Consumer Protection and Service Modernization Act*, 2006 (Bill 152), which received Royal Assent on December 20, 2006. As of the date of publication, section 19 remains unproclaimed.

Currently, partners of limited liability partnerships (LLP) in Ontario are provided with "partial shield" protection. They are afforded protection in respect of negligent acts and omissions of other partners and employees committed in the course of the partnership business, but are personally responsible for their own negligence and for the negligence of others under their direct supervision or control.

Partners in LLPs are not presently protected for wrongful acts or omissions of other partners and employees. They are jointly and severally liable for the general obligations of the LLP, and their interest in partnership property remains generally available to satisfy the obligations of the firm.

Once proclaimed, changes to the *Partnerships Act* will provide the following “full shield” protection for LLP partners:

- A partner will no longer be personally liable for the negligence of a person who is merely under the partner’s “control”, but will remain liable for a person under the partner’s direct supervision;
- A partner will no longer be personally liable for the non-professional debts or obligations of the LLP;
- A partner will be personally liable for the negligent or wrongful act or omission of another partner or an employee not under her or his direct supervision, if:
 - the act or omission was criminal or constituted fraud, even if there was no criminal act or omission; or
 - the partner knew or ought to have known of the act or omission, and did not take the actions that a reasonable person would have taken to prevent it.

As presently proclaimed, subsection 10(1), under the *Partnerships Act* provides that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner. Subsections 10(2) and 10(3) restrict the scope of this broad liability for the purposes of limited liability partnerships. The current amendments provide that these two subsections be repealed and the following substituted:

Limited liability partnerships

“(2) Subject to subsections (3) and (3.1), a partner in a limited liability partnership is not liable, by means of indemnification, contribution or otherwise, for,

- (a) the debts, liabilities or obligations of the partnership or any partner arising from the negligent or wrongful acts or omissions that another partner or an employee, agent or representative of the partnership commits in the course of the partnership business while the partnership is a limited liability partnership; or
- (b) any other debts or obligations of the partnership that are incurred while the partnership is a limited liability partnership.

LIMITATIONS

(3) Subsection (2) does not relieve a partner in a limited liability partnership from liability for,

- (a) the partner’s own negligent or wrongful act or omission;
- (b) the negligent or wrongful act or omission of a person under the partner’s direct supervision; or
- (c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner’s direct supervision, if,
 - (i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or
 - (ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it.

SAME

(3.1) Subsection (2) does not protect a partner’s interest in the partnership property from claims against the partnership respecting a partnership obligation.”

These changes are intended to bring Ontario’s provisions concerning LLPs more in line with that of other jurisdictions in Canada and the United States. They are also designed to ensure that Ontario can continue to attract and retain top professional talent by giving professionals the legal protection they need to do their jobs without fear of unfair and potentially ruinous liability.

For an earlier discussion on LLPs and firm structure, and related tax implications, see “Structuring firms to manage risk” in the Summer, 2003 issue of LawPRO Magazine (www.practicepro.ca/lawpromag/firm_structure.pdf). Note that only lawyers, chartered accountants and certified general accountants may form LLPs in Ontario.

Lawyers should be aware that the tax treatment of partial shield and full shield LLPs may be different. Once changes are proclaimed, partners and prospective partners in LLPs should be certain to obtain professional tax advice promptly, to avoid any unintended negative tax consequences.

Duncan Gosnell is vice-president of underwriting with LawPRO.

TitlePLUS consumer campaigns reach millions

Millions of Ontario consumers know a lot more today about home buying, the role of their real estate lawyer and TitlePLUS title insurance: That's because real estate lawyers in Ontario played a starring role in a major campaign launched by TitlePLUS in 2006 to educate consumers about the important role of a professional real estate lawyer in conveyancing.

The result: A record-breaking 2006 for the TitlePLUS program. And a foundation on which the real estate bar can build additional campaigns to reinforce the value of a lawyer in a real estate transaction.

Ads speak frankly

Things can and do go wrong when you buy a home: And the best way to protect yourself against this possibility is to use both a real estate lawyer and TitlePLUS title insurance in a purchase transaction.

This was the consistent message in a series of TitlePLUS ads that ran in major daily newspapers from Thunder Bay to Windsor and Ottawa – and major points in between – in spring and summer 2006. Complementing the print campaign was a radio ad campaign that encouraged listeners to seek advice from a professional real estate lawyer and to ask for TitlePLUS insurance when closing on a transaction.

The ad campaign also directed consumers to a new TitlePLUS tool: *The Real Simple Real Estate Guide* – a consumer-oriented website that includes numerous tools such as mortgage



calculators, “to do” checklists, information on the role of a real estate lawyer, and information on TitlePLUS insurance.

To date more than 50,000 people have visited the site (www.titleplus.ca/RSREG). Close to 10 per cent of those visiting the site click through to the “Locate a Lawyer” link that lets visitors find a TitlePLUS lawyer in their area or who is associated with a specific development project.

Media/consumer education campaign

The first step in the campaign was an omnibus survey of consumers who had bought a home in the last five years. Decima Research asked a random sampling of homebuyers why they used a lawyer, how they selected the lawyer handling the transaction, and the extent of their knowledge of title insurance and

its role. Key results of that survey were as follows:

- Only about 10 per cent of consumers see their lawyer as a counselor or advisor in the transaction, and only one per cent say the lawyer can help them save money;
- Although close to 100 per cent of recent transactions were title-insured, only 50 per cent of those participating in the survey knew that they had obtained title insurance and more than 30 per cent said they did not know what title insurance was.

The subsequent media relations campaign focused on providing consumers with tips and insights into what they could expect their lawyer to do.

Through media releases and interviews, Kathleen Waters, vice-president, TitlePLUS, talked about the need for a qualified real

estate lawyer, essential steps in buying a home, and some key questions to ask when choosing a lawyer.

The media/public education campaign generated extensive media coverage:

- A *Canadian Press* column on the hidden costs of homebuying (and the need for a contingency fund) was picked up by papers as far away as Regina and Vancouver, as well as by major papers in Ontario markets and the CBC website.
- The *Toronto Star* ran several articles on the research results and the importance of a lawyer.
- Television talk shows in several GTA and southwestern Ontario locations

featured interviews with Kathleen Waters based on the research findings and the role of title insurance.

- Legal and insurance trade press (including *Lawyers Weekly*) carried information on the TitlePLUS campaigns.

To capitalize on this media interest, TitlePLUS launched a second media campaign in the fall of 2006 that focused on educating condominium buyers about some of the issues they should be aware of – and how a real estate lawyer can help buyers avoid some common pitfalls. CITY-TV (Breakfast Television), the *Hamilton Spectator*, *Canadian Press*, *Yahoo Finance* and other media outlets picked up the story. Exhibiting at a major

Toronto condo show later in the year enabled TitlePLUS to reinforce its presence among condominium buyers and owners: More than 5,000 people visited the TitlePLUS booth and took away information on the TitlePLUS program and other information materials.

According to Environics Communications, the agency retained to conduct and track the media campaigns, the print articles and television interviews were read or seen by close to nine million people (based on printed circulation and audience numbers). Plans are underway to build on the momentum of this education effort in conjunction with the Working Group on Lawyers and Real Estate (a CDLPA-OBA-ORELA initiative) in 2007.



TitlePLUS – a perfect 10!

To mark the tenth anniversary of the TitlePLUS program, LAWPRO is celebrating with a Tenth Anniversary TitlePLUS Conference from May 6 to 7, 2007, in the Niagara Falls, Ontario area. TitlePLUS also is participating at various events across the province throughout 2007. Mark your calendars and watch for more information in the coming months.

The TitlePLUS program was launched in 1997 to support the real estate bar and to counter the introduction of American-style title insurance models. The TitlePLUS program is the only “all Canadian” and “Bar-Related™” title insurance program operating in Canada.

™ BAR-RELATED mark is a mark of North American Bar Related Title Insurers used by LAWPRO under license.

LAWPRO policy exclusion for investment advice/services

Under the Law Society's insurance program, specifically Part III Exclusion (d) of the policy, there is an investment advice/services exclusion which specifically provides that the policy does not apply:

"to any CLAIM in any way relating to or arising out of an INSURED* providing investment advice and/or services, including without limitation, investment advice and/or services relating to or arising out of a business, commercial, or real property investment, unless as a direct consequence of the performance of PROFESSIONAL SERVICES."*

As a result, any investment advice or services which you provide are not insured under the program, unless provided as a direct consequence of the performance of legal services.

It is clear that the practice of law may involve some incidental investment advice or ancillary financial service. This is particularly the case for those lawyers involved in establishing trusts for clients and in estate law, where you may have some limited investment or banking authority concerning trust or estate funds which is incidental and related to your legal services mandate.

So, for example, as part of your law practice, you may act as estate trustee or assist a client in his or her role as estate trustee, which will involve taking inventory of the assets and debts of the estate. You may be responsible for safe



guarding and valuing the assets, dealing with banks, brokerage and insurance companies, and arranging for investment or liquidation of investments. The investment advice and/or services that you provide in this context, as a lawyer and as part of your law practice, would be covered in the ordinary course and would not be excluded under Part III Exclusion (d).

On the other hand, if you provide investment advice or services that are not related to and are not a direct consequence of the performance of legal services, you can expect that coverage will not be extended to you for such services under the policy. Investment advice or services which are not incidental to your

law practice require a different type and level of investment expertise, which most lawyers are not trained or educated in, nor are they in a position to readily provide.

Providing investment advice or services which are not provided as a direct consequence of your performance of legal services would represent an inordinate exposure to the program when compared with the exposure associated with incidental investment advice provided as part of your ordinary practice, or compared to the exposure associated with most lawyers' law practices generally.

Duncan Gosnell is vice-president, underwriting with LAWPRO.

*defined terms under the Policy

Representing the snowbird client

You receive a voicemail message at your law office from a long-time client who is calling from his temporary home in Florida. He is one of many retired or semi-retired Canadians who prefer to spend extended periods of time in warmer climates over the winter months. This species of Canadians who migrate south for the winter is so common that they are given their own nickname: snowbirds.

Before returning the snowbird client's call, you should be aware that the professional services you provide to this client may not be covered under your professional liability insurance policy with LAWPRO.

Generally, the Law Society program policy provides coverage to lawyers for the performance of professional services (as defined in the policy), anywhere in Canada, where such services are performed with respect to the laws of Canada, its provinces and territories.

So, for example, if your snowbird client is calling to retain your firm to sell his Florida condo, to provide advice on a motor vehicle accident there, or on other matters, you should be aware that there would be no coverage for professional services performed with respect to U.S. law or other foreign laws. This is regardless of whether you or your firm provide this advice or service directly, or retain an American law firm on behalf of your client to do so.

If you or your law firm are qualified and provide this foreign legal advice or service, you should be sure to apply for and purchase separate insurance coverage for this otherwise uninsured exposure.

With regard to your practice of Canadian law, you should also be aware that the scope of coverage under the policy for professional services provided while you are outside of Canada is limited.

If you happen to be outside Canada while providing legal services, the territory provisions found in Part II. SPECIAL PROVISIONS A, of the policy, states that the Lawyers' Professional Indemnity Company will indemnify you with respect to the performance of

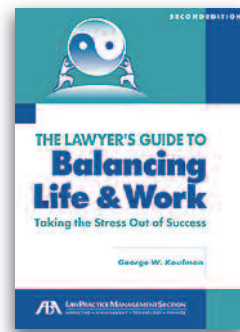
professional services where such services are performed outside of Canada, with respect to the laws of Canada, its provinces and territories, provided that:

- (a) such services occupy less than ten per cent of your docketed time or gross billings for professional services for the year; or
- (b) the claim or civil suit against you is brought in Canada, and the related issues, including liability and damages, are adjudicated on their merits in Canada pursuant to the laws of Canada, its provinces and territories, by a court in Canada.

Therefore, if you are providing legal services with respect to the laws of Canada, and are performing and docketing more than ten per cent of your professional services outside of Canada, you would not be covered by your professional liability insurance, unless the claim or civil suit is adjudicated on its merits in Canada.



The Lawyer's Guide to Balancing Life and Work



Second Edition

George W. Kaufman, ABA Law Practice Management Section

Publication Date: June 2006, ISBN 1-59031-674-6

Stress and work pressures are part and parcel of the practice of law, and as a result, many lawyers struggle with balancing life and work. Most lawyers acknowledge the need to do a better job of balancing life and work. But at the same time, they say it is a real struggle to make the changes necessary to find an appropriate balance.

If you are looking for help in finding more balance in your life, *The Lawyer's Guide to Balancing Life and Work* is for you. In this book George W. Kaufman offers practical examples and exercises to help lawyers reconcile their goals and expectations with the realities and demands of the legal profession.

But Kaufman, who was a successful and seasoned partner for forty years at a large U.S. law firm, goes beyond the usual review of steps you can take to reduce stress. Using personal anecdotes and stories, he takes the reader through a deep and personal journey of self-discovery.

The book is divided into three parts. The first part will help you trace your history

from childhood to your current work. This is *your* story. We are all a product of our parents and our upbringing, often in ways we don't appreciate and recognize. This book will help you appreciate who, why and what makes you, both at home and at work. This appreciation is the first step to making changes and finding more balance in your life.

The second part of the book walks you through your story, and helps you evaluate what is good and bad about your work and habits. It will make you reflect on what you find is positive about the practice of law, and how the practice of law affects you in negative ways. This part of the book will help you identify the sources of stress in your life, and give you tools and strategies to cope with them.

The third part of the book brings it all together, and as Kaufman puts it, asks "how the law fits in you, not how you fit in the law." The book is self-empowering in that it gives you a true understanding of what really makes you tick. You will figure out what your key personal values

are, and how to prioritize them. This understanding will, in turn, help you understand how and where you need to change, whether it means changing how you practise, shifting your practise to something different, or leaving the law altogether. The last chapter helps you build a personal action plan for change.

Updated and revised from the first edition, this book will help new and long-term lawyers achieve better work/life balance, as well as professional and personal satisfaction in their career. Included with this 280-page book is a CD-ROM, which contains the exercises found in the book. It is very reasonably priced at US\$39.95.

For more information on this book, and the other excellent ABA LPM Section publications go to www.abanet.org/lpm/catalog.

Dan Pinnington is director of practicePRO, LAWPRO's claim prevention initiative.

How to do more with your mouse



Most people use their mouse as their primary Windows navigation tool. Spending a few minutes to learn how to do more with this essential two-button computing tool therefore is time well spent. This Tech Tip column looks at how you can make your mouse more speedy, use it to jump to context-sensitive features, and overall work more efficiently. Laptop users will learn how to make better use of their touch pad.

Making your mouse more sensitive

Few things are more annoying than having to move the mouse about two feet across the desk to get the cursor to move just a few inches across the screen (or having to pick the mouse up two or three times to do the same thing with shorter strokes). On a laptop, the equivalent is moving your finger across the touch pad several times to move the cursor completely across the desktop. Everything seems to be in slow motion. What's the cause?

By default, Windows seems to require a relatively large mouse or touch pad motion to move a cursor across a desktop. Fortunately, it is very easy to make your mouse more sensitive – that is, to make it so that a smaller mouse movement moves the cursor farther.

Assuming that your firm allows users to customise their settings, you can change your mouse configuration by clicking on Start; selecting Settings, then Control Panel; and then double-clicking on the Mouse icon. This opens the Mouse Properties dialog box.

Look for the Pointer Options or Motion tab. Within this tab, you will see a Motion or Movement slider, which goes from “slow” to “fast.” Moving this slider away from slow toward fast will make your mouse more sensitive. Try moving it to about three-quarters of the way to fast.

But be warned: Don't speed your mouse up too much at once. It takes some time to adjust to using a faster mouse. Initially, you will likely find that you can speed it up a fair bit. After getting used to working with it at that faster setting, you can then decide whether you want to speed it up a bit more.

I prefer to have a very sensitive mouse and touch pad. On my laptop about three-quarters of a stroke across the touch pad will move the cursor completely across my desktop. And just an inch or so on my mouse will do the same on my PC. The key is to find a speed that works for you.

Within the Mouse Properties dialog box, you can also change some other mouse settings, including your double-click speed and cursor size. Look around to see if there are any other mouse tweaks that will help you work more efficiently on your computer.

Using the remarkable right-click

If you are right-handed, your right-hand index finger will be able to execute left-clicks with virtually no effort or thought. A left-click, in case it isn't obvious, is a click on the left mouse button – unless you are left-handed, of course.

If you are left-handed, just swap right for left (and left for right) in the following comments.

We'll focus on the right-click (a click on your right mouse button) because few people use it to its full potential. You can do amazing things by right-clicking on almost everything on your screen.

A right-click is a really powerful little action because it gives you a way to instantly jump to various features, format options and configuration settings. And the key to it all: The options presented to you are “context-sensitive.” In other words,

the choices are going to be relevant to the item or text on which you are right-clicking.

Here some examples:

- In Outlook, right-clicking on an e-mail in your inbox presents you with Open, Print, Reply, Reply All, Forward and so forth.
- In your Outlook calendar, right-clicking on a blank spot on the calendar allows you to create new appointments and configure the calendar.
- In Word, right-clicking on text gives you font and paragraph formatting, bullets and numbering, the dictionary, synonyms from the thesaurus and more.
- And this is one of my all-time favorites: In Word, a right-click on a misspelled word gives you a list of correctly spelled alternatives, and the correct one is almost always at the top of the list.

Try right-clicking on the various things on your screen. Do it now. You will be amazed at what you find!

Practising your new skills

Now, should you need a bit of practice using your faster mouse, you can always try the built-in Windows mouse training tool: Solitaire. For those who don't know where it is, click on Start, Programs, Games, and then Solitaire.

To practise your double-clicks, remember that a double left-click will move a card from either the deck or a row stack to a suit stack. And the most amazing right-click of all: you can move all playable cards to their respective suit stacks by right-clicking. You can't do that with a real deck of cards.

Dan Pinnington is director of practicePRO, LawPRO's claims prevention program.

Planning for career adjustments

“Modern neuroscience demonstrates that it is never too late to use the brain to prevent losing it.”

Gene D. Cohen

There are expected and unexpected career adjustments during a lawyer’s lifetime. The adjustment to retirement or semi-retirement can be a controlled and planned adjustment with a specific time-frame. The timing of a sudden illness or accident is less predictable and therefore even more important to plan for. These changes have a major impact on personal lifestyle, professional responsibilities, family roles and relationships. Many lawyers do not plan even for the expected and predictable change of retirement let alone the unexpected event of illness or accident.

What do we know for sure? Lawyers won’t practise law forever – although some expect to practise as long as they live!

The risk factor

Who is most at risk as a result of not planning for adjustments? Lawyers in sole practice or lawyers in small firms are least likely to have health insurance or disability insurance plans. Of the approximately 20,600 lawyers in private practice in Ontario, about one-third are sole practitioners. This group of lawyers is most likely to have difficulties with the adjustment to illness or retirement. They are vulnerable because they have not planned, and this puts the individual and his family members at risk. Not having a plan affects financial stability, mental health and relationships.

We see many lawyers who have devoted their lives to law practice and have few outside interests. These individuals are lost when health concerns or retirement preclude them from practising law. They can then be at risk of depression, frustration and loss of meaning in their lives.

The procrastination factor

About 80 per cent of the sole practitioners in a recent survey in Oregon had not made any arrangements to cover the practice should they be temporarily unable to practise due to disability or extended absence.

Why is it so easy to procrastinate on these matters? The obvious and most common answer is lack of both time and money. Time is in high demand for lawyers, especially lawyers who practise on their own and also cope with the additional demands of managing a business. The additional money often just isn’t there, and competing demands mean that it is easy to put off setting aside money for a later time. Less acknowledged – but as real – are fear and denial: Lawyers fear change and can be in denial about illness. For many lawyers, the practice of law is what they are most comfortable with and what they know best.

Retirement as a career change

Retirement or semi-retirement is a major career change. Some lawyers eagerly look forward to retirement while some cannot imagine it. The Oregon Attorney Assistance Program recently conducted a major survey of lawyers and retirement issues.⁽¹⁾ Its findings, soon to be published in a book *Assisting Lawyers Plan for Retirement*, are discussed below.

Lawyers envisioning retirement

The findings of the Oregon Study indicate:

- 11 to 12 per cent of those surveyed do not plan to ever retire;
- 30 per cent plan to continue practising law part time after age 65 for a sense of purpose and stimulation;
- 11 per cent plan to continue practising law part time after age 65 primarily for financial reasons;
- 40 per cent plan to continue to practise law after age 70;

- 71 per cent envision retirement as a new chapter in life.

Financial concerns

Not surprisingly financial concerns are a major concern when considering career adjustments. It is a challenge to project long-term financial needs. There are decisions to be made about health insurance and long-term care insurance products. Increased anxiety about the availability of pension plans and government support in future years is a stated concern of mid-career lawyers. Younger lawyers start out with a large student loan debt, leaving fewer years to accumulate savings and plan for career change or retirement.

Personal concerns

Younger lawyers express concerns about maintaining health and independence. It seems that younger lawyers are aware of the importance of health and wellness issues. They are more likely to be members of a gym, exercise regularly, join yoga classes and try to eat properly. We don’t know yet if this translates into better planning for adjustments in their careers.

Personal and professional relationships change with career adjustments. It is important to acknowledge these changes and plan to manage different roles and responsibilities. There is stress associated with change. Awareness of potential anxiety, depression and frustration and support to deal with interpersonal changes will help.

Career adjustment and retirement

Findings in the study *Purpose, Potential and Productivity in Later Life* ⁽²⁾ found that most people approaching retirement have received no formal preparation. Less than 10 per cent had any information other than financial planning. Although they know that financial planning is important, they often overlook the other changes

New OLAP offers support to Ontario bar

The Ontario Lawyers' Assistance Program (OLAP) – www.olap.ca – is a new organization that has been built on the foundation of the former Ontario Bar Assistance Program (OBAP) and the Lawyers' Assistance Program (LINK). The merger of the two organizations is now complete: OLAP continues the work of OBAP and LINK on behalf of Ontario lawyers and their families in helping them deal with issues such as addictions, stress, work/family pressures and mental or physical wellness.

Founded in 1978, OBAP provided confidential assistance to members of the legal profession and their families through one-on-one peer support, assessment, referrals, and education. LINK was a confidential professional counselling service delivered through Shepell.fgi (formerly Warren Shepell Consultants).

According to John Starzynski, volunteer executive director of OLAP, merging LINK and OBAP will eliminate any confusion created by having two services with overlapping mandates. A single call to one central intake number will give lawyers access to assessment and referrals to peer support assistance or counseling or both," said Starzynski. "We can also provide a more streamlined, cost-effective organization that

eliminates current duplication in processes, tracking and administration. That means we can put more of our financial resources to work for lawyers in need."

A new OLAP Board of Directors has been constituted, with Roderick M. McLeod, Q.C. as chairman. "We are excited about this opportunity to create a broader safety net that can respond seamlessly and effectively to the needs of Ontario lawyers," said McLeod.

The new organization will continue to be a confidential assistance program, and has expanded to meet the anticipated increased demand by hiring additional case managers. Joining the OLAP team are Doron Gold, BA, LL.B and Terri Wilkinson, R.N., B.A., LL.B.

Doron and Terri will be working alongside Leota Embleton to confidentially meet with members of the legal community in need – either in the OLAP office or offsite. Lawyers, judges and members of their immediate family can contact OLAP 24 hours a day, seven days a week to access services such as: assessment, peer support, professional counselling, referrals, and resources.

For confidential assistance, please call:
Toll Free: 1-877-576-6227
GTA: 905-238-1740

associated with career adjustment. This study found that developing a social portfolio is as important as developing a financial portfolio.

The financial portfolio

Three major concepts that influence the financial portfolio are:

- Assets to draw on;

- Insurance back-up; and
- Build over time – It is never too late (better to start late than not at all).

The social portfolio

Three major concepts that influence the social portfolio:

- **Assets:** diversified interests and relationships that you can develop and draw on;

- **Insurance:** individual vs. group activities. Consider the mix of high energy/high mobility and low energy/low mobility;
- **Build over time:** Start to develop other interests early that you can build on when time permits so there is not a drastic and sudden empty space when you are not working.

Two important considerations for inclusion in a social portfolio for lawyers:

- A contribution toward helping others. An example of volunteering is peer volunteer programs. The Ontario Lawyers' Assistance Program benefits from the rich experience of lawyers in retirement who share their experiences on a voluntary basis as one of our peer volunteers. Opportunities for lawyers in retirement to use the skills they have used in their active careers abound.
- Active mind and lifelong learning. Travel, teaching and learning new skills provide meaning and a sense of purpose.

A staged approach to planning

The following stages can help you focus your plans and realize the positive potential rather than the negative aspects of change.

Mid-life re-evaluation (mid- to late-30s through mid-60s)

This is a drive to re-evaluate, explore and make changes. The energy allows people to re-evaluate their lives and work and consider ways to make things more meaningful. Characterized by reflection, a successful mid-life evaluation makes later changes – either forced or chosen – less stressful. This type of evaluation used to be called a mid-life crisis, but is more accurately a practice run at finding meaning in one's life.

Liberation (mid-50s to mid-70s)

Creative endeavours are possible. Professionals return to earlier interests

(cont'd on page 45)

Web enhancements: FAQs and transaction levy chart

The newly revamped lawpro.ca website has been up and running for several months now, and helped make the fall 2006 e-filing process faster and easier than ever before. In addition to the new design, we've introduced some features and resources to put more information at your fingertips.

FAQs

Our Frequently Asked Questions section (Under the E&O Insurance Tab) has been expanded to a comprehensive resource that includes answers to dozens of questions.

Transaction Levy Chart

We have recently added a Transaction Levy Chart (available on the File Online page once you have signed in) to help you determine whether or not transaction levy surcharges apply. This chart lists different scenarios, and under which conditions the levy surcharges would apply.

Firm Filings for Transaction Levy: Filings or Annual Exemption

Reminder to Firm Administrators: Did you know you can file transaction levy surcharge forms online on behalf of your firm? Once you have logged in – using your firm number and firm password provided by Customer Service – you will see a list of the names and Law Society numbers of lawyers listed with your firm. Simply select the names of the lawyers on whose behalf you are filing (if a lawyer is not listed, there is an area for you to enter the required information).

If a lawyer is not exempt (i.e. a form exempting them from levy surcharges was not filed), but did not have any applicable transactions for that quarter, they MUST still be included in your filing.

Please do not forget to file for those lawyers who may have left your firm or

for new lawyers who have joined your firm. If your firm hired a recent call after you filed the Annual Exemption Form for Real Estate and/or Civil Litigation, please ensure that you file this form on their behalf as well.

TitlePLUS essay prize

The first-ever TitlePLUS Essay Prize competition is now open. The Canadian law student who wins will be awarded a \$3,000 prize to put towards his or her education next year. LawPRO created the competition to encourage and recognize outstanding legal scholarship in the practice of real estate law.

Canadian law students¹ are invited to submit an essay on a number of topics related to the practice of real estate law such as: ethical issues in the practice of real estate law, reform of law society rules, practising law in an electronic environment, the role of the lawyer in preventing real estate fraud, and the use of title insurance in real estate transactions. A panel of judges will review the submissions and award the \$3,000 prize in spring 2007. The contest deadline is March 31, 2007. Full contest rules are available at: www.titleplus.ca.

Kathleen Waters appointed secretary- treasurer of NABRTI

Kathleen Waters, vice president, TitlePLUS, has recently been appointed secretary-treasurer of NABRTI, the North American Bar Related™ Title Insurers. LawPRO is the only Canadian member of NABRTI, a North American association of title insurance companies which are controlled and operated by a broad base of lawyers, and which operate primarily through lawyers who issue the title policies.

Membership in NABRTI represented a significant milestone for LawPRO's TitlePLUS program, as applicants have to demonstrate compliance with 10 operating principles such as: a long-term commitment to working with the real estate bar in the public interest, delivering the title product only through lawyers, demonstrated financial strength and viability, and evidence of educational initiatives aimed at informing both the public and lawyers about the role of the lawyer and title insurance in real estate transactions.

"Our goals are very much consistent with the vision of NABRTI members for title insurance companies: We all believe that lawyers should be at the centre of a real estate transaction and that title insurance is a tool that enables lawyers to better serve and protect the public," says Waters.

NABRTI has its roots in the Florida Fund, founded in 1948. Excluding LawPRO, NABRTI represents more than 1,600 law firms in 20 states in the U.S.A.

E-filing breaks new record

More than 90 per cent of lawyers eligible to file their insurance applications electronically opted to do so for the 2007 insurance year. Almost 18,600 of the 20,600 practising lawyers completed insurance applications online, via the newly redesigned LawPRO website. More than 16,800 lawyers completed their online filings before the November 1 deadline, making them eligible for a \$50 per lawyer e-file discount on the 2007 insurance premium. Since the introduction of e-filing in 1997, the number of lawyers who choose to e-file has increased steadily.

As well, lawyers filed almost 3,800 LawPRO CLE credit declarations, making them eligible for a \$50 per program

¹ LawPRO regrets that residents of Quebec currently are not eligible.

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premium credit (to a maximum of \$100) for each CLE qualifying program they had completed by mid-September 2006. Programs eligible for the LawPRO CLE credit must include a risk management component that must be pre-approved by LawPRO.

LawPRO's Dan Pinnington to chair ABA TECHSHOW 2007

Dan Pinnington, director of practicePRO, will be chairing the American Bar Association's ABA TECHSHOW 2007, to be held March 22-24, 2007, at the Sheraton Chicago Hotel & Towers in Chicago, IL.

ABA TECHSHOW regularly attracts more than 2,000 attendees from around the globe. It is the world's premier legal technology CLE conference and stands alone among major legal technology conferences because of its focus on education and its independence from vendor influence.

On the slate are more than 50 CLE sessions presented by leading legal technology speakers, and a vendor expo with more than 100 exhibitors. You can see the full ABA TECHSHOW sessions grid at www.techshow.com/program/grid.html.

The Honorable Judge Shira A. Scheindlin, of the U.S. District Court for the Southern District of New York, is the ABA TECHSHOW 2007 keynoter. Judge Scheindlin is renowned for a series of landmark decisions on electronic discovery in *Zubulake v. UBS Warburg*.

For more information about ABA TECHSHOW 2007 go to www.techshow.com.

Teranet pilots electronic funds management system for real estate closings in Ontario

Teranet Inc. has launched a pilot for its Closure service, which enables lawyers to securely control the transfer of real estate closing funds online. Following successful beta testing that began in March 2006, Teranet is inviting a select group of real estate law firms in Ontario to pilot the service.

The Closure service is built to work seamlessly with regular commercial online banking and wire systems offered by the banks, with transactions guaranteed by the Bank of Canada. Teranet's new service uses the Large Value Transfer System (LVTS): It allows for rapid, irrevocable and certain funds clearing and cash settlement. Scotiabank worked with Teranet to provide the automated banking services used by the Closure service. TD Canada Trust, RBC Royal Bank and Scotiabank are participating in the pilot and are launching joint marketing programs to promote the new service. Participating pilot law firms banking at the Bank of Montreal can also wire funds to Closure. The BAR-eX website, www.bar-ex.com, will offer the Closure service to lawyers following the pilot.

Deadline reminders

Please note the following deadlines:

Transaction filings:

- Real estate and civil litigation transaction levy surcharge payments for the final quarter of the year ending December 31, 2006, are due on January 31, 2007.
- Real estate and civil litigation transaction levy surcharge payments for

the quarter ending March 31, 2007, are due on April 30, 2007.

Annual levy exemption forms to exempt yourself from having to file quarterly real estate and/or civil litigation forms are due on April 30, 2007.

Lump sum discount

To qualify for a \$150 lump sum discount on the 2007 policy premium, insurance premiums must be dated and received by March 1, 2007. Payments must be made in full by either cheque or by providing pre-authorized banking information.

New principles for dealing with electronic discovery

The Ontario E-discovery Guidelines highlighted in the September 2005 issue of LawPRO Magazine garnered a lot of attention, both inside and outside of Ontario.

A number of individuals who helped develop the Ontario guidelines eagerly joined other practising lawyers, judges, in-house counsel and law society representatives from across Canada, together with the organizers of The Sedona Conference®, to create The Sedona Principles, Canadian Edition. These Principles build upon the Ontario Guidelines and are compatible with the discovery rules in all the Canadian provinces and territories. They will be posted on the Sedona Conference (www.sedonaconference.org) and OBA e-discovery sites (www.oba.org/ediscovery) in early February.

Members of the Ontario Bar Association and the Advocates' Society are working to develop the protocols and precedents to complement the Principles. These should be available to the profession in the near future.

Events calendar



Upcoming events

February 5-6

OBA 2007 Institute of Continuing Education

TitlePLUS sponsoring/exhibiting
practicePRO sponsoring/exhibiting
Metro Toronto Convention Centre
Toronto

February 5

OBA 2007 Institute of Continuing Education

Anatomy of a LAWPRO File

Yvonne Bernstein, LAWPRO and
Richard W. Greene, Epstein Cole LLP
Metro Toronto Convention Centre
Toronto

February 6

OBA 2007 Institute of Continuing Education

Powerful and Persuasive Presentations
Dan Pinnington, practicePRO

*What you need (and can get)
from your computer*

Dan Pinnington, practicePRO

LAWPRO Reports on Claims
Deborah J. Petch, LAWPRO

About Your E&O Insurance
Duncan Gosnell, LAWPRO

Marketing Real Estate Profession
Kathleen Waters, LAWPRO

Future of Real Estate Lawyers
Michelle Strom, LAWPRO

Metro Toronto Convention Centre
Toronto

February 7

Century 21 Kick-Off 2007

TitlePLUS exhibiting
Toronto Congress Centre
Toronto

February 23

Solo & Small Firm Conference

Law Society of British Columbia CLE

Dan Pinnington, practicePRO presenting
Vancouver, BC

February 28 - March 1

Ontario Real Estate Association Annual Leadership Conference

TitlePLUS exhibiting

Sheraton Centre Hotel, Toronto

March 1

OBA Trusts and Estates

The Lawyer and the Witness

Deborah J. Petch, LAWPRO and
Archie Rabinowitz, Goodman and Carr

OBA Conference Centre
Toronto

March 1-2

OBA 2nd Annual Solo and Small Firm Conference and Expo

TitlePLUS sponsoring/exhibiting

LSUC, Toronto

March 2

OBA 2nd Solo and Small Firm Conference and Expo

Protecting the Security and Confidentiality of Law Firm Data

Dan Pinnington, practicePRO
LSUC, Toronto

March 15-16

CBA Alberta Law Conference

TitlePLUS exhibiting

Hotel Macdonald
Edmonton, AB

March 21

Edmonton Real Estate Board Realtors' Showcase

TitlePLUS exhibiting

Mayfield Trade Centre
Edmonton, AB

March 22-24

American Bar Association
ABA TECHSHOW 2007

Dan Pinnington, practicePRO chairing and presenting

Sheraton Chicago Hotel & Towers
Chicago, IL

March 25

Canadian Real Estate Association Leadership Conference

TitlePLUS exhibiting

Westin Hotel, Ottawa

April 12-13

CBA National Civil Litigation CLE Conference

Dan Pinnington, practicePRO
Montreal, QC

April 18-19

LSUC 4th Annual Real Estate Law Summit

TitlePLUS sponsoring/exhibiting
LSUC, Toronto

May 4

Independent Mortgage Brokers Association of Ontario Annual Conference

TitlePLUS sponsoring/exhibiting
Toronto Congress Centre
Toronto

May 6-7

10th Anniversary TitlePLUS Conference
practicePRO exhibiting
Location TDB

May 9

Law Society of Upper Canada
Teleconference

How to Provide Better Professional Service

Dan Pinnington, practicePRO

May 9-12

The Institute of Law Clerks of Ontario
Conference 2007

TitlePLUS sponsoring/exhibiting
Halifax Marriott Harbourfront
Halifax, NS

May 31

OBA/LSUC/Advocate's Society

*New Sedona Canada Electronic
Discovery Guidelines*

Dan Pinnington, practicePRO
Toronto

*For more information on practicePRO events,
contact practicePRO at 416-598-5863 or
1-800-410-1013 or e-mail dan.pinnington@lawpro.ca*

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

Recent events**practicePRO****January 9**

practicePRO presentation
Avoiding a Legal Malpractice Claim
Dan Pinnington, practicePRO
Willms & Shier Environmental Lawyers
LLP, Toronto

January 11

practicePRO presentation
*Why Electronic Documents are
Different and Avoiding an E-discovery
Malpractice Claim*

Dan Pinnington,
practicePRO presenting
Dutton Brock LLP, Toronto

January 18

practicePRO presentation
*Why Electronic Documents are
Different and Avoiding an E-discovery
Malpractice Claim*

Dan Pinnington,
practicePRO presenting
Nelligan O'Brien Payne LLP, Ottawa

TitlePLUS**January 12**

CBA Nova Scotia Annual Professional
Development Conference
TitlePLUS exhibiting
Halifax Marriott Harbourfront, NS

January 17

Calgary Real Estate Board Conference
& Tradeshow
TitlePLUS exhibiting
Roundup Centre, Calgary, AB

January 17

LSUC
Title and Off-Title Searching
TitlePLUS sponsoring/exhibiting
LSUC, Toronto

January 25-27

Banff Western Connection VII
TitlePLUS exhibiting
Fairmont Banff Springs Hote
Banff, AB

(cont'd from page 41)

or the path not taken (joining a band, riding a motorcycle, writing, music). There is a degree of personal freedom during this time. Energy is available (if not now, when?).

Empowered perspective (late-60s into 90s)

Look back on the wealth of experiences – review life through personal storytelling, memoirs. This translates into community-focused actions. Many people in this stage feel they want to make a contribution – helping gives them meaning and purpose in their lives.

Encore (late-70s on)

Seize opportunity, take care of unfinished business and deal with unresolved

conflicts. Celebrate family, community and provide influential models for others.

Time for a check-up

The message is clear that if you prepare and plan to make adjustments for unexpected changes in health status and retirement, the results will be more positive. Planning relieves the stress associated with change.

The check-up questions are:

1. Do you have a financial plan?
2. Do you have insurance coverage for critical illness or disability?
3. Do you have a back up plan to manage your practice?
4. Do you have a social portfolio?

If you have not thought about the adjustment of retirement take the Retirement Readiness Questionnaire in the career section of the OLAP website www.olap.ca. You might be surprised by the results.

References

1. Mike Long, *Assisting Lawyers Plan for Retirement and Disability*, In Sight Newsletter, Issue 63, Oregon Attorney Assistance Program, Sept 2006.
2. Gene D. Cohen, *Purpose, Potential and Productivity in Later Life: A 21 Century Retirement Study*, The Atlantic Philanthropies, 2004

If you believe that you or someone you know would benefit from peer counseling and support, contact OLAP. You can reach program manager Leota Embleton at 1-877-576-6227 or volunteer executive director John Starzynski at 1-877-584-6227.

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