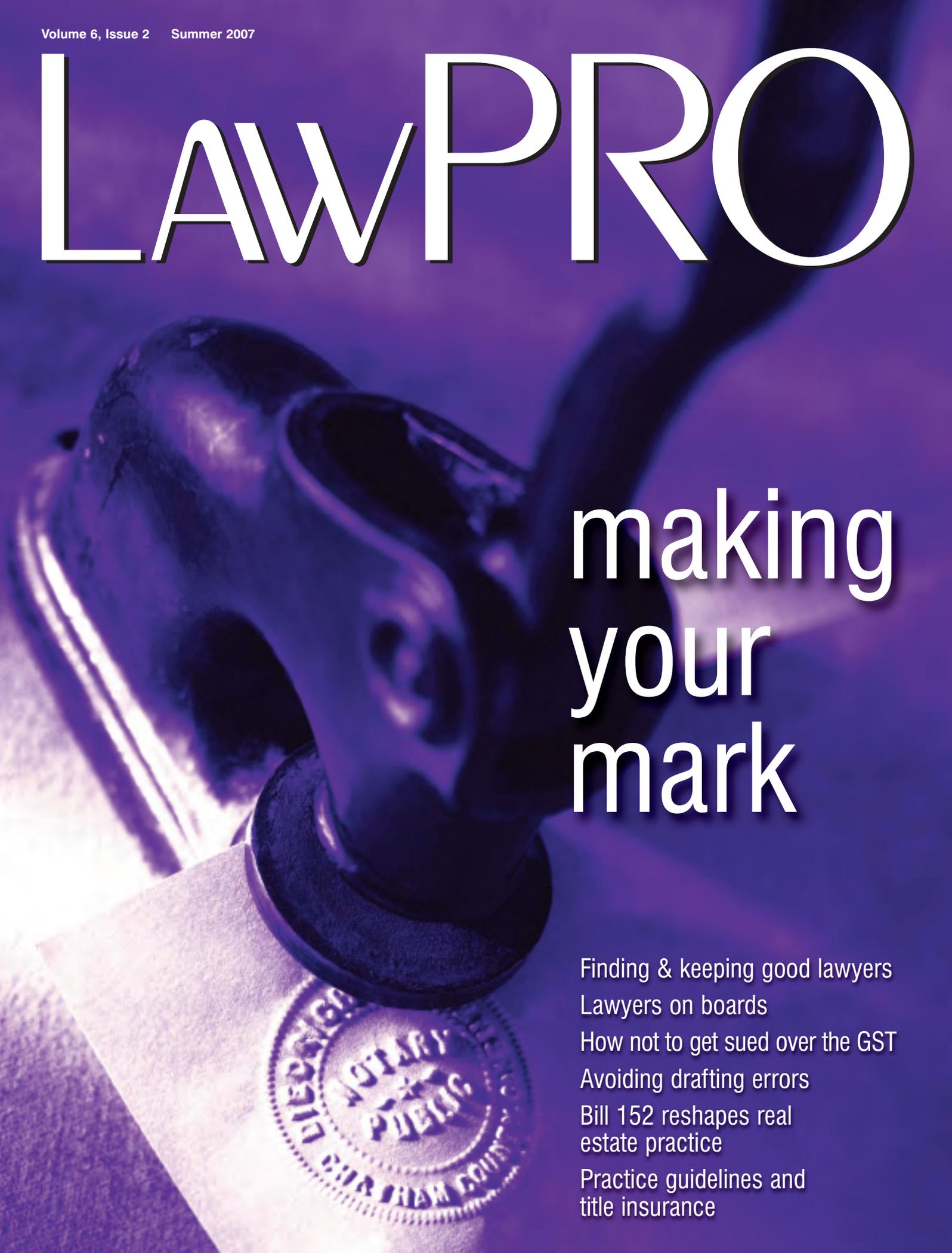


LAWPRO



making your mark

Finding & keeping good lawyers
Lawyers on boards
How not to get sued over the GST
Avoiding drafting errors
Bill 152 reshapes real
estate practice
Practice guidelines and
title insurance



Make time ...to take time

There's something about the long-awaited summer that energizes us, invites us to contemplate new projects and assess what we're doing, where we're going and how we're going to get there.

This summertime issue of our magazine encourages you to simply – take time.

Take the time to dot the “I”s and cross the “T”s: Articles on how to avoid drafting errors, better use blacklining in documents, avoid GST trouble and assess the pros and cons of acting as lawyer-directors illustrate the importance of attention to detail.

Summer time is also as good a time as any to ensure you're using your people resources effectively and efficiently: We tackle the important subjects of delegation and finding and keeping good lawyers.

Real estate practitioners may especially want to make the time this summer to contemplate the major changes happening in real estate practice. With more than 90 per cent of real estate transactions now title-insured, our article on how new real estate practice

guidelines guide lawyers using title insurance on their transactions is both practical and timely. It also reiterates our principal risk management message: Take the time to know your client and the transaction.

We examine how the government's new anti-fraud legislation, and subsequent proposals, such as limiting title transfers to only lawyers, will change the landscape for the real estate bar – and how the insurance program has been called on to respond. And to drive home the point, we remind you of how easily lawyers have been duped into participating in fraudulent transactions – and of the need to be vigilant.

This issue is our largest and most comprehensive yet. Pack it for your summer travels and your sunscreen – and you can minimize any red faces in the future.

A handwritten signature in blue ink, appearing to read 'Michelle L.M. Strom', written in a cursive style.

Michelle L.M. Strom
President & CEO

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Finding and keeping

By any measure, lawyers are a firm's most valuable asset. All successful firms have excelled at finding, recruiting, integrating and keeping excellent lawyers. But how do you build a top-notch legal team? And how you can navigate the path to becoming a valued partner? LAWPRO asked a panel of lawyers with experience in firm recruitment and retention issues from both inside and outside law firms to tackle these questions.

good lawyers

LAWPRO: WHY DO ASSOCIATES AND PARTNERS LEAVE FIRMS THEY HAVE WORKED SO LONG AND HARD FOR?

Kirby: I think that the answers are somewhat different for partners and associates. As law firms get more focused on the bottom line, partners whose practices have failed to grow and who are not delegating lots of work to associates may be asked to leave. As well, some partners are looking for a change and hear the siren call of business, and will go off to join a client in a legal or even non-legal role.

Associates move for different reasons – they feel they have lots of choice and will not put up with a situation in which they feel they are not being offered interesting work in a congenial workplace that offers good training and professional development.

Lorene: Partners may also leave if they have developed a practice in an area that is not supported or valued by their firm, or if they feel they are 'blocked' by a partner above and see an opportunity for further potential growth at another firm. I've also met other partners who want a different challenge (usually with a corporation) or want more control over their hours.

Associates tell us that they want a better work/life balance, better control and predictability over their lives, that they don't feel they are part of the team, and/or they don't feel they have connected with their practice group. Some associates look to the partners and tell us that they don't want to have the partner lifestyle – i.e. if they knew it was going to get better as they became more senior, they would stay, but they see that the partners work just as hard, or harder, than do associates.

Mary: I think that partners and associates who leave private practice to go to corporations and government do so for similar reasons. In private practice performance is measured in large part by time, whereas in other environments, performance may be measured less by time and more by output. Both partners and associates are motivated to leave because they want more control over when they work. It is not that lawyers aren't prepared to work hard – it is the lack of predictability of the hours that makes it difficult. In two-income families it is easier for lawyers to accept positions with lower compensation. The other thing law firms are facing is competition for the best associate lawyers from other jurisdictions, in particular London and New York.

THE PANELISTS

Kirby Chown is Ontario regional managing partner at McCarthy Tétrault. She has practised in the area of civil litigation since her call to the Ontario bar in 1981, specializing in the areas of medical malpractice and family law. Kirby is chair of the University of Toronto Academic Tribunal and past chair of the U of T Law Faculty of Law Alumni Association. She has a particular interest in issues affecting the retention and advancement of women in the legal profession.

Harold Feder is a partner at BrazeauSeller LLP in Ottawa and works in the tax and estate planning, and corporate and commercial law areas. Harold is a member of the Canadian Tax Foundation, the Society for Trust and Estate Practitioners, and the Ottawa Estate Planning Council. He was called to the Ontario bar in 1990 and has been involved in student and associate recruitment for the firm for more than ten years.

Mary Jackson is chief officer of legal personnel and professional development at Blake Cassels & Graydon LLP in

Toronto where she is responsible for the recruitment and development of associates and law students. She practised civil litigation for six years and clerked for Chief Justice McLachlin of the Supreme Court of Canada. She was called to the Ontario bar in 1994.

Lorene Nagata is the executive director of NagataConnex Executive Legal Search and works to place lawyers in firms and corporations in Canada and internationally. Lorene practised law in Toronto in a well-known litigation boutique for five years, and was called to the Ontario bar in 1993.

MODERATOR:

Dan Pinnington is director of practicePRO, LAWPRO's risk management program and claims prevention initiative. He frequently writes and speaks on claims prevention and practice management issues. He writes a monthly column in the ABA Law Practice Management Section's Law Practice Magazine, and was Chair of ABA TECHSHOW 2007.



Lorene Nagata

Harold: I think that in most cases it comes down to connection. Does the lawyer feel connected to the firm, the people they work with, the city? If the answer is no, then the lawyer will be looking for opportunities to move.

LAWPRO: WHAT CAN FIRMS DO TO RETAIN THE PEOPLE THEY REALLY WANT TO KEEP?

Harold: It starts at the beginning during the recruitment stage. You have to be brutally honest about the firm's culture, direction and expectations. You want to establish the buy-in from the outset. The next step is to establish the connection to the firm. For an associate, working closely with a partner is one of the best ways to gain a sense of belonging and value. It is a fluid process. As an associate advances, you want to identify opportunities for that associate to assume leadership roles within the firm. The goal is to instill a "we" mentality within the firm, not an "us and them" mentality.

Lorene: Agreed. Whether you're dealing with associates or partners, they all need to feel that they are part of a team. Take an interest in what they're doing, how their career is developing and what's happening in their personal life. Some firms train partners to help encourage them to delegate work as soon as possible, before it becomes an emergency. This not only helps the work flow, but also demonstrates that the firm respects associates' time.

As well, support programs can be helpful. A number of firms in the U.S. and U.K. have implemented job-sharing and flex-time programs. However, the success of these programs depends on the area of practice and the support of the practice group and firms.

Even if only a few people use these initiatives, they can have a positive effect on the firm's culture and its people, and will communicate to employees that the firm cares.

For these types of programs to be successful, the whole partnership must understand and support the initiatives. If there's a negative attitude to these programs and their participants, no one will want to participate and you're wasting resources setting them up.

Mary: Given our discussion of why lawyers are leaving, it is clear that firms need to be better at determining staffing needs and at managing and distributing workloads so that we provide lawyers with more work-life balance.

E-mail and Blackberries have made lawyers' lives more difficult. There is a huge volume of communication that requires quick responses. This adds pressure and takes away focused work time during the work day. Many lawyers try to cope with this by working evenings and weekends. Coaching and training on productivity may help lawyers have more personal time. Other support programs or systems such as child care, food services, concierges and medical plans can also help people with busy lives.

Obviously we have to make efforts to ensure that people feel valued. Even small gestures to colleagues can make a great difference – whether that means saying "thank you" more often, showing consideration during important events in people's lives, or offering tickets so a lawyer can take her daughter to a ball game. In every firm there are always lawyers who never have any problems finding people to work with them no matter how busy they are. They understand the importance of people and are naturally empathetic.

Kirby: I agree with Mary that simply treating people better is an important step. As well, we need to provide challenging, interesting work, ongoing CLE and other support so that lawyers feel that the firm is concerned about them as individuals and not just as production units. They expect to receive training that will assist them in furthering their careers, whether or not they end up as partners in the law firm.

LAWPRO: WOMEN ARE STILL FAR MORE LIKELY TO LEAVE THE PROFESSION THAN MEN, AND THEY ARE UNDER-REPRESENTED IN THE SENIOR AND MANAGEMENT RANKS OF MANY FIRMS. WHAT CAN BE DONE TO RETAIN MORE WOMEN AND GET THEM INTO SENIOR ROLES AT FIRMS?

Kirby: This is not a simple issue. Private practice is a male-dominated environment and a challenging one for women, as the path to partnership intersects with childbearing years, and the demands placed upon associates at that point in their careers are high. Firms need to understand the business case for retaining women, communicate that business case to the partnership and the women in the firm, and commit resources and effort to

addressing the issue. Activities focused on women such as maternity leave support and flex-time arrangements coupled with community building for women in the firm are a start. But, they must be accompanied by career mentoring of women to ensure that they are being given the same opportunities as men, both with clients and in law firm management. Women who feel loyalty from their firms and support will be more likely to stay for a long and productive career at the firm.

Harold: This is a difficult issue, particularly in a small- to mid-size firm where the size of the firm limits your flexibility. The reality is that in recent years women have made up a disproportionate number of our top candidates. You have to try to be flexible to meet the needs of female lawyers. Communication is key so that you gain an understanding of expectations; then you look for ways to achieve mutually beneficial results. We have been successful with shortened work-week arrangements because everyone involved understands the expectations and is willing to be flexible. Perhaps more importantly, we have provided our female lawyers with the opportunity to develop their own marketing plan and brand. This has fostered a sense of ownership which leads to loyalty.

Mary: One of the changes we all are facing is that men are actually becoming more like women, rather than the other way around. More men are taking parental leaves and structuring their work lives so that they can play a greater role in their children's lives. This is good news for all lawyers because it is pushing firms to try to come up with solutions for the entire workforce. Flexibility is not exclusively a women's issue any more.

With respect to women, the key is mentoring and coaching. At our firm we recently held a facilitated discussion among women lawyers with children. From those discussions it was clear that women lawyers put a lot of pressure on themselves to be perfect parents and lawyers. Building a community of women within a firm can help provide them with both support and resources.

Of course, women still face different challenges than men. For instance, the client base in particular areas of practice is more likely to be male than female. Often women have to find a style of business development that allows them to network with men in a meaningful manner, whereas men, because of similarities of interests and activities, may have more opportunities. Women are also judged more harshly than men for being too "aggressive" or too "soft." Women can benefit from guidance about how to strike a delicate balance in order to be successful.

Lorene: This is a problem. About half of all law school graduates are female, yet on average, only about 20 per cent become

partners. The law firm model does not fit that well with most females' (and males') personal life goals. Some firms have created a two-tier partnership track which allows associates to take a break from the equity partnership track during the years when they're busy with young families or other personal matters. After they get over the 'early years' and their children are of school age, they are able to rejoin the equity partnership track without feeling stigmatized. Many young female associates will tell me that their mentors have been males, not females. Getting successful women who are in senior roles to act as role models and provide support and mentoring will help firms give female associates the confidence and ability to succeed.

LAWPRO: WHAT DO ASSOCIATES AND PARTNERS NEED TO DO TO GET AND STAY ON THE RIGHT TRACK? SHOULD BECOMING AN EQUITY PARTNER BE THE ULTIMATE GOAL FOR EVERYONE?

Harold: The days when becoming a partner was everyone's goal are long gone. Again, communication is key to ensure that expectations are in line with the anticipated realities. Ultimately,

the goal for the firm is to develop and retain talented and productive people. To achieve this goal the firm must understand the expectations of its professionals, and then adapt to ensure that those expectations can be met.

Kirby: Law firms are struggling with how flexible they can be with alternate track positions for those who do not want equity partnership: How many of these positions can be created and maintained without stifling work opportunities for others?

As for staying on the right track – lawyers themselves need to be more proactive at speaking up for what they would like: partnership track, flex time, a wind-down coming up to retirement, or help to relocate in-house with a client. Such discussions should be encouraged and assistance offered wherever possible so lawyers can align their behavior with their goals and the firm goals, or leave if there is no obvious fit.

Mary: In terms of "being on the right track", there is no magic recipe. Even if an associate hasn't made the assumption that the goal is to become partner, it is important to do great work, network

Harold Feder





Mary Jackson

with as many people within and outside the organization as you can, and treat everyone you deal with in a positive and professional way. At every point in your career, you are "building your own brand." It is events along the way that often define what course a lawyer will take.

Lorene: The "right track" will differ for each individual. If the right track means equity partnership, then ongoing communication between the associate/partners, the practice group leaders and the firm is important. The firm needs to clarify what is expected to move to the next level, and the candidate needs to know if he or she is accomplishing what is required. Individuals also need to be honest with the firm as well as themselves about their goals. I speak with many candidates at different stages in their careers who have not yet set long- and short-term career goals. Everyone should set and revisit goals on an ongoing basis. Goals will change as lawyers progress through their career; they should always be thinking of the next two steps they want to take.

LAWPRO: Now, turning to the issue of new and lateral hires, how do job candidates and firms best assess whether they are a good fit for one another?

Kirby: Firms need to ensure that more than one person from the firm meets with the candidate. Firms need to have straight talk about firm culture and expectations with the candidates. They also should be doing confidential due diligence on whether someone will be a good fit.

Lorene: It's important that both the interviewers and interviewees have accurately determined what they are looking for before they go in to the interview. It's common practice to determine what skill sets are required, but sometimes the employer fails to determine other important factors such as personality fit, work-time requirements, motivation and ambition.

Likewise, interviewees should know what type of work environment they want, including the time commitments that will fit with their lifestyle. Both parties need to be very candid with each other

throughout the interview process – about both strengths and weaknesses. It is becoming more popular in the U.S. and U.K. to assess candidate traits with psychometric tests. Of course, references should always be checked – by both parties.

Mary: I completely agree that you have to understand what qualities a candidate needs to succeed in a particular environment. You need to interview in a manner that knocks the candidate off-script (i.e. their prepared answers) and gets at personal stories that will reveal their underlying qualities.

When you are close to making a decision, you need to be completely candid with the candidate about the nature of the position and the challenges that they may face. My advice to candidates is to try to speak to different people within an organization about the position and the lawyers they will be working with. Asking hard questions shows that you are taking the position seriously.

Harold: The trick is to stay true to your instincts. The tendency, especially when there is a pressing need to be filled, is to hope that people will change to adapt to the firm culture. From experience, this is seldom the case. You have to hold out for the right people and not compromise.

LAWPRO: AFTER FIRMS DECIDE TO HIRE SOMEONE, WHAT STEPS SHOULD BE TAKEN TO TRULY INTEGRATE THAT PERSON AS A FULL AND PARTICIPATING MEMBER THE FIRM TEAM.

Lorene: Integration is key to making people part of the team and keeping them for the long term. The integration process is an ongoing one. Often, there's a flurry of activity when the new hire starts and then the attention dies down. Depending on personality and level of experience, it can take months or more for a person to become truly integrated into the team and with the clients. It is important to introduce partners to clients and partners in other departments. It's also important that partners within the department and in other departments understand the new partner's background and expertise (so they can effectively use the new hire's services and cross-market).

Associates should be formally introduced to the associates and partners in their group, and others from whom they will be expected to draw work. All in the group should make an effort to include the new hire and immediately give them work. The

fastest way to make the new hire feel like they are part of the team is to keep them busy.

Ideally, someone should be touching base with the new hire, regularly for the first six to 12 months, and longer if it looks as if the person needs more time. They should be reviewing the person's hours (to make sure he or she is receiving work), finding out whether work is coming from a number of partners, and seeing if the person is getting involved with internal firm activities (such as a committees). There should also be confidential discussions with respect to networking initiatives within the department and firm.

Mary: Integration is an issue that all laterals need to focus on. My best advice to laterals is to take advantage of all opportunities to network with people, whether it be through professional development programming, social events, recruiting or mentoring. In my experience, partners and associates who want to be involved integrate very quickly no matter what formal systems you set up.

Harold: Integration is about structure and connection. From a structural standpoint you want to build in working relationships that will create opportunities for success. We have found that entrenching one-on-one relationships as opposed to a scatter-gun approach to associate development to be very effective. When one person is responsible for the integration and success of the associate, it creates accountability.

On the other side of the integration process is building a connection. You have to be proactive in finding opportunities to engage at a personal level. Simple things such as grabbing a lunch or a coffee, or going to a hockey game can go a long way towards speeding up the integration process.

Kirby: Develop a formal plan for the integration and make a current partner responsible for integration of the lateral partner. That responsible partner needs to assist with social integration as well as integration into files and transactions and onto client teams. Reporting by the responsible partner to a practice group leader or the managing partner can ensure that the integration is progressing. As well, it is important to understand that few laterals can be up and running instantly so a lag period in which file transfers and integration can happen should be expected and accepted. Also, build in opportunities for the lateral to comment on how the integration is going.



by Gerry Riskin

Delegating responsibly and effectively

The excuses lawyers offer for not delegating work are many:

- *"I'll lose control."*
 - *"The delegatee or student might botch it up."*
 - *"I need to maintain a level of billable hours."*
 - *"It takes too much time. I can do it myself just as quickly."*
 - *"I like to keep my hand in by doing some of these kinds of files myself."*
- or*
- *"It's my client and if I delegate the work I won't have the answers to questions I may be asked."*

The fact is, these objections rarely stand up to scrutiny: Done right, delegation is a win-win-win-win.

Delegating work, especially routine work, frees up the lawyer (delegator) to tackle more difficult and demanding work. It also better serves the interests of the firm and the client if these tasks are delegated to a lower level of competence in the firm. The delegatee (associate to whom the work is delegated) develops new skills and insights. The client receives quality work at an affordable price. Often, clients are also impressed by the higher level of motivation, enthusiasm, intensity and drive that an associate brings to the file compared to a more senior lawyer who considers the matter routine.

So the benefits of delegating – the art of getting things done through other people – are unassailable. Yet the process of delegating can be difficult for many lawyers.

Effective delegation begins with an understanding of your objective: Your goal is to maintain control and responsibility while motivating others to help you by performing at their peak performance.

First, you need to fully understand the nature of the client's work, and then determine what routine matters can be delegated to a junior, or what specific issues are best assigned to someone with more expertise than you have in that area.

You also need to be prepared for resistance from the delegatee. "I've never done anything like this," might be one excuse offered.

Or "I'm going flat out right now and can't see the light at the end of the tunnel," or "I have to give priority to a file for one of the other partners."

Overcoming this resistance is not as difficult as it appears. Sometimes resistance is most easily neutralized by simply asking questions which can be followed by some basic negotiating. One way to address the first situation might be to ask for more information on what is being done for whom and by when, which may lead to a simple solution of adjusting the timing or talking with the other partner. Understanding the art of delegating can overcome all the concerns and resistance identified above.

Confusion and client problems may result if a lawyer suddenly begins delegating responsibilities to untrained juniors. A gradual approach to delegating is best. Each lawyer should identify client work that can be delegated. The effectiveness of delegation can be enhanced through training and practice.

Being effective at delegating client work requires trust in the delegatee. That trust can be enhanced through proper supervision and coaching. Many abdicate instead of delegate, and then complain about the inadequate result.

Based on research that Edge International has conducted over many years, we have determined that there are six key steps to effectively delegating work on a file:



Gerry Riskin

1. Advise your delegatee of the framework of the matter

"As you can see from your preliminary review, this has the ingredients of a fairly contentious contractual dispute. Our client is a company that the firm has represented in numerous corporate, taxation and labour matters. Some time ago they entered into a joint venture with this other company on a fairly lucrative government deal, and now the relationship has soured."

Many lawyers may choose to give the delegatee the particular matter to review in advance of discussing it in detail.

When you finally come to review the file, you need to explain the matter and how it fits into the bigger picture. The person to whom the work is being delegated must have an appreciation of your views of the file, its priority and the likely result. When the matter is underway, the delegatee will perform better if the background is understood. He or she needs to understand the broader context in order to exercise good judgment and be flexible if things prove different than expected.

2. Define the particulars of the client's expectations

"Our client has some real concerns over the loss of revenue because of this dispute. I indicated that we would examine the relevant agreements and documents early this week, initiate a claim within two weeks, and push for speedy discovery. If at any point you feel that we won't be in a position to move things that quickly, please warn me."

By covering client expectations you will give the delegatee a better sense of your responsibilities to the client; you will also reduce the likelihood of surprises on the file. Clarifying client expectations provides the delegatee with a guideline and helps keep her on track.

3. Communicate any limitations of time, money or other resources

"I'm assuming that time spent drafting pleadings won't exceed three thousand dollars, and that you can make this matter your highest priority over the next two weeks. Unlike most other matters we are handling in this firm, time is more important than money to this client on this matter."

Many misunderstandings can occur if the delegatee does not understand the urgency or seriousness of the matter, or financial constraints. Therefore, you need to tell the delegatee how much you expect to be spent on the assignment. We all function better with a clear idea of the boundaries in which we can operate.

4. Ask the delegatee to restate the assignment for understanding

"Okay, let's review what you see as the general scope of this matter. Why don't you summarize what you anticipate doing as a result of this discussion."

The best way to review the delegatee's understanding of instructions is to ask the delegatee to repeat his or her understanding of the task. In asking the delegatee to restate the assignment you might accept some responsibility for giving clear instructions.

"Just to make sure I explained it clearly, tell me your understanding of what we need to have done."

Clarify it now instead of waiting for potential misunderstandings to emerge. A review of the basic matter, priorities, and questions the delegatee has will improve the level of enthusiasm and commitment to the task.

5. Discuss your associate's ideas for completing the matter

"Based on your own experience, have you any ideas about this matter that we haven't discussed yet?"

By discussing the associate's own ideas, you can get a sense of how well the matter is being grasped, provide suggestions, or explain where the delegatee can get help, and cover important areas that would otherwise be missed.

If the delegatee suggests an innovative course of action and you approve, you get the double benefit of better work and increased motivation.

6. Establish monitoring procedures

"Let's compare notes after your initial meetings with the client and set a time early next week to review your draft pleadings. How about Tuesday morning at nine, right here?"

Delegating does not mean losing control. Specify what you want the delegate to report and how often. Explain how and when you'll touch base. Even though you want the delegatee to assume a certain amount of responsibility, the ultimate responsibility to the client rests with you. Remember – you're delegating and not abdicating responsibility.

For best results, you need to delegate with quality. Provide specific instructions in a focused, calm way. Ensure the delegate understands the context into which tasks fit, and communicate limitations. Obtain input and feedback from those to whom you delegate, based on the delegatee's understanding of the matter and experience with similar work. Establish timelines and deadlines, and set up a schedule for supervision and feedback.

Although this process sounds time-consuming, it takes less time than does ineffective delegation. If you delegate effectively, people will understand what you need them to do. You end up with a higher quality work product, and will spend less time correcting mistakes and redoing work that could and should have been done properly in the first place.

Gerry Riskin is a lawyer, and partner and co-founder of Edge International, an international management consulting firm. Writing credits include The Successful Lawyer (book and Audio Program – ABA 2005) and Practice Development: Creating The Marketing Mindset, Herding Cats and beyond KNOWING. He is also co-creator of the acclaimed video productions Practice Coach® and Rainmaking®.



Lawyers on boards

assessing
the risks

and limiting
the liability

by Alan L. W. D'Silva, Patrick O'Kelly and Ellen M. Snow

For business development reasons, sitting on the board of directors of a client has long been popular with lawyers. At first blush, adding a legal counsel to the board of directors appears to benefit both the corporation and the lawyer.

The corporation benefits from having the legal advice of its lawyer readily available at all board meetings, and the benefit of any extra knowledge and expertise the lawyer brings to the table.

From the lawyer's point of view, there is prestige and status in being appointed to a board, and sitting on a client's board may solidify or enhance the business relationship between the client and the lawyer's firm.

However, sitting on a client's board is not without its risks, and prudent lawyers should tread carefully. This article reviews the concerns and issues a lawyer should consider before accepting an invitation to sit on a client's board.

Professional obligations and conflicts of interest

A good starting point is Rule 2.04(3) of the *Rules of Professional Conduct*. This Rule imposes a responsibility for all members of the profession to avoid placing themselves into positions of conflicting interest. A “conflict of interest” is broadly defined to encompass any situation where the lawyer had an interest that “would be likely to affect adversely a lawyer’s judgment on behalf of, or loyalty to, a client or prospective client” or that “a lawyer might be prompted to prefer to the interests of a client or prospective client.”

Clearly, providing services as both a director and a lawyer creates a potential conflict of interest. Indeed, the commentary to Rule 2.04 specifically cites an example of a lawyer taking on a directorship as performing a dual role that:

“may raise a conflict of interest because it may affect the lawyer’s independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization.”

Rule 2.04(3) should be read in conjunction with Rule 6.04, which governs a lawyer’s professional obligations when engaged in another occupation concurrently with the practice of law. Rule 6.04 provides that:

“(1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer’s professional integrity, independence or competence.

(2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer’s independent judgment on behalf of a client.”

Once again, the commentary to this rule specifically cites the example of a lawyer as a director.

Directors of a corporation owe statutory and common law duties of care and fiduciary obligations to the corporation and its shareholders which require that directors must, at all times, act honestly and in good faith in the best interests of the corporation. Generally, though not always, this requires directors to act with a view to maximizing shareholder value in the corporation. These duties may also require the director to take account of broader interests, including those of the corporation’s employees, creditors, suppliers, consumers, governments and the environment.

Legal counsel also have fiduciary obligations to the corporation as the client and to the legal profession generally. These professional duties include providing competent and professional legal services to the corporation, maintaining the confidentiality of information provided to the lawyer in confidence by the

corporation, and maintaining a strict code of professional ethics. The lawyer’s fiduciary duties are generally less broadly construed than those of the director, and involve taking into account the interests of fewer constituents.

Providing multiple services to the corporation may affect the lawyer’s continuing ability to provide legal representation to the corporation. For example, where the lawyer-director participates in board meetings that give rise to future litigation, the lawyer-director may be prevented from acting as legal counsel on the future matter where he or she will be called on as a key witness. This can occur when other directors on the board seek to protect themselves by suggesting they relied on the advice of the lawyer-director in agreeing on the course of action that led to the litigation.

It is therefore critically important to recognize that professional obligations require an awareness of the conflict inherent in providing business as well as legal advice to a corporation, and that conflicts of interest can manifest themselves in many ways.

Although the accepted standards of professional ethics do not broadly prohibit lawyers from acting as both directors and legal advisors to the corporation, there is a strict ethical obligation to assess the risks of a conflict before accepting a position on a client’s board.

At a bare minimum, it is incumbent on any lawyer contemplating a dual mandate, or who may be asked to sit on the board of an existing client, to consult the client and clarify the risks involved. The client needs to understand the ramifications of those conflicts, such as the possibility that the lawyer may, in future, be required to recuse himself from further acting on behalf of the client as a lawyer because his or her independent judgment has, or may be, compromised.

Statutory liabilities

Pursuant to a number of provincial and federal statutes, all directors face the potential for personal liability arising out of the failure of the corporation to meet specific obligations.

The most common (there are many more) statutory liabilities for directors include:

- up to six months’ wages and 12 months accrued vacation pay which the corporation fails to pay;
- income tax withheld at source from employee wages which the corporation fails to remit;
- Ontario Health Premiums which the corporation fails to collect from employees and remit;
- employee and employer contributions to CPP that the corporation neglects to remit;
- employment insurance remittances that the corporation fails to make; and
- GST which the corporation fails to remit.

In addition, there are statutes that create offences which impose potential criminal or quasi-criminal penalties on directors for acts of their corporation such as:

- failure to take all reasonable care to prevent the corporation from causing an unlawful discharge of pollutants; and
- failure to take all reasonable care to ensure a safe workplace.

Most of the statutes creating civil or criminal liability for directors also provide for a due diligence defence. But keep in mind, a lawyer-director may be held to a higher standard of care than a non-lawyer director.

Loss of solicitor-client privilege

One of the most serious corporate risks by virtue of the lawyer's participation on the board of directors is the possible waiver of solicitor-client privilege.

Part of the traditional rationale of having a lawyer serve as director is having a ready supply of legal advice to the board. However, the lawyer-director's advice and opinions to the board are not guaranteed blanket privilege merely because the director is also the corporation's counsel.

Solicitor-client privilege only attaches to communications where three criteria are met (*Solosky v. The Queen*, [1980] 1 S.C.R. 821):

- (i) the communication is between solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be maintained as confidential by the parties.

Meeting the burden of proof that privilege attached can be difficult where the communication arises as a part of a board meeting which dealt with multiple issues, only one of which gave rise to the lawyer-director rendering legal advice.

Added burdens of a public company lawyer-director

Directors of public companies today are expected to perform at higher levels, the result of recent spectacular financial disasters for which the boards have been justly criticized for lack of independence.

Best corporate governance practices suggested by regulators focus on the need to have effective and independent board members to provide a real check on management.

Ontario has adopted National Policy 58-201 entitled "*Corporate Governance Guidelines*" which defines as "independent" directors who have "no direct or indirect material relationship" with the corporation.

A "material relationship" means a relationship "which could, in the view of the issuer's board of directors, reasonably interfere with the exercise of a member's independent judgment."

For greater certainty, the definition states that the payment to an entity that provides legal services in which the director is a partner would mean that the director was in a material relationship with the corporation and would, therefore, not be considered independent. Thus, the appointment of a lawyer whose firm has served management for years as external counsel and whose firm continues to act for the corporation would not qualify as an independent director.

One of the best practices recommended by National Instrument 58-201 is for the board to adopt a written code of business conduct and ethics that applies to all directors, officers and employees. Such policies are supposed to include "reporting of illegal or unethical behaviour." This laudable goal creates a further strain on the lawyer-director's obligation to maintain "in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship."

Rule 2.03 of the Rules of Professional Conduct allows for disclosure of confidential information where it is "expressly or impliedly authorized by the client or required by law to do so." Therefore, a code of conduct mandating disclosure of unethical behaviour by the lawyer-director may well require such disclosure, whereas the same lawyer likely would not have to report unethical behaviour that falls short of illegal behaviour if not also acting as a director.

Another challenge all directors of public companies face is the new secondary market liability regime introduced in Ontario at the end of 2005 arising from certain amendments to the *Securities Act* (Ontario). Under these amendments, directors can be held personally liable for misrepresentations made by the corporation in some circumstances. This is another circumstance where a lawyer-director may be held to a higher standard.

Dealing with challenges faced by the lawyer-director

Lawyers and their firms have a number of options to respond to the risks inherent in acting as both a lawyer and a director.

LAW FIRM POLICIES

Many larger law firms have instituted formal policies that, subject to exceptional circumstances, generally prohibit lawyers from acting as directors of either public or private companies. There are some exceptions, such as serving as a director for non-profit charitable organizations because of the public service aspect and the significantly reduced risk associated with taking on such directorships.

Lawyers are also routinely allowed to act as directors with respect to personal holding companies. Most law firm policies also have increasingly rare exceptions for lawyers to serve as directors for corporations that are clients of the firm if there is a

material benefit to the firm without significantly increasing the risk to the firm. Typically any lawyer granted permission to serve as a director would be expected to resign if continuing to serve puts the law firm in a conflict of interest or otherwise impairs its ability to serve as counsel to the corporation.

As a matter of caution and, in many cases policy, many law firms would not allow a lawyer sitting as a director to render legal advice during his or her tenure as director. Furthermore, prudent law firms will usually require written confirmation from the client that the lawyer serving as a director does so in his individual capacity and not as a representative of the firm, and that the client understands the risks associated with the lawyer sitting as director. With these limitations imposed by law firms, the potential benefits from the perspective of the corporate client of having a lawyer sit as a director are substantially reduced.

Lawyers who do assume directorships would do well to remember their own advice on solicitor-client privilege and ensure a clear record is created that clarifies when the lawyer-director is acting as a lawyer. It is particularly important in reviewing the minutes of board meetings to be alert to this issue, and to insist that the secretary accurately reflect these discussions as being privileged in the minutes. In any subsequent litigation it becomes much easier to defend a privilege claim if the board minutes record that the board's expectation was that the portion over which privilege is claimed would remain confidential and privileged.

INSURANCE CONSIDERATIONS

Dual capacities also expose lawyers, and possibly their firms, to liability for conduct related to the lawyer's role as director. Lawyers serving as directors therefore should protect the interests and limit the exposure of both the lawyer-director and the law firm.

Because LawPRO's professional liability insurance policy does **not** provide coverage for liabilities arising as a result of a lawyer's actions as a director, any lawyer considering acting as director for a corporation should secure adequate liability insurance coverage to minimize risks of personal exposure to judgment.

Directors' and Officers' insurance policies (D&O policies) are the principal means of protecting directors from the risk of personal liability as a result of their corporate activities. The two types of D&O coverage available are:

- (i) single policy coverage for all directors and officers of the corporation, often maintained by the corporation; and
- (ii) outside director insurance policies ("ODL Policies") secured by lawyers and/or their firms.

The standard D&O policy is underwritten and issued on a group basis, and is intended to insure all of the corporation's directors and officers for the services provided to the corporation in those capacities. D&O policies generally are not written with any specific profession in mind, nor with particular regard to the particular group covered.

A corporation can indemnify a director for any liability arising out of his or her role as director, and may maintain D&O insurance for this purpose. Indemnification by the corporation is permitted provided that any civil or regulatory liability of the director arises out of actions taken honestly, in good faith and with a view to the best interests of the corporation.

Given the wide variation in D&O policy terms noted above, it is important to thoroughly investigate what kind of D&O insurance the corporation offers, if any, before taking on the role of director. In addition, it is sound practice to stipulate as a condition of directorship that the corporation provide indemnification and undertake to maintain adequate levels of D&O insurance to this end. If the corporation is unwilling or unable to provide this assurance, the lawyer may want to reconsider whether or not to join that company's board of directors.

Even if the corporation agrees to indemnification, this is not an absolute guarantee against the risks of personal exposure. If a corporation faces insolvency, the corporation may be unable to fulfill its obligations of indemnity and maintain adequate levels of insurance to protect directors, particularly if extended or "tail" coverage is not obtained. Moreover, if there is doubt about whether the lawyer was giving advice in his or her capacity as lawyer or director, the D&O policy and lawyer's professional liability policy may both deny coverage.

In addition to D&O coverage, lawyers who accept directorships may also want to consider ODL coverage, available for example from the Canadian Bar Insurance Association (CBIA). ODL policies are intended to operate as excess insurance coverage, providing defence and indemnity coverage for lawyers over and above any corporate indemnity agreements and D&O policies that exist.

The ODL policy offered by the CBIA is fairly flexible and provides three bases for coverage including: (i) individual coverage for a named lawyer; (ii) group coverage for selected lawyers who act as directors within a firm; or (iii) group coverage for all lawyers within the firm. In addition, policy limits can be adapted to the particular circumstances of a lawyer or firm and the extent of underlying insurance coverage.

Conclusion

The growing trend today is for lawyers to decline the invitation to become a director for a client corporation. The traditional view that a board seat would cement the relationship between the lawyer and the client must be re-examined in light of the potential for conflicts of interest, the ever-growing list of potential liabilities facing modern directors, and heightened expectations for good governance standards and independent directors. Acting as external counsel at a board meeting is one of the best ways to avoid potential liabilities and provide the legal advice and a direction that corporate clients expect and value.

Alan L.W. D'Silva and Patrick O'Kelly are partners, and Ellen M. Snow is an associate, with the Toronto office of Stikeman Elliott LLP.



How not

to get sued over the GST

by David M. Sherman

Are you at risk of being sued over a GST mistake?

If you practise real estate law, commercial litigation or corporate/commercial law, the answer is "yes." As counsel who's frequently called on by LAWPRO, I've seen numerous GST-related negligence claims, many made against lawyers by clients who have received an unexpected GST assessment from the Canada Revenue Agency (CRA). The examples below are fictitious scenarios based on that experience and illustrate some common areas where a lawyer can unexpectedly get into GST trouble.

The GST legislation is found in the Excise Tax Act (ETA).

Real estate law

The GST rules for real property are extraordinarily complex. Although the general rules are often simple to understand, there are myriad exceptions and special cases in the legislation. You should assume that you need to check the GST rules carefully on all but the simplest of transactions.

1. NOT UNDERSTANDING HOW THE GST APPLIES ON A COMMERCIAL SALE

Everyone who practises real estate law knows that you don't collect GST on a sale of commercial property to a GST-registered purchaser. But does that mean the sale is not taxable?

George is a real estate lawyer. His client, Tony, comes to him with an offer to review. Tony wants to sell a commercial property for \$1 million. The purchaser's offer is for \$1 million, on an OREA standard Agreement of Purchase and Sale form. The agreement states: "If GST applies, it is included in the price above." Should George let Tony accept the offer?

NO. This is not an offer for \$1 million. It is really an offer for \$943,396 plus GST. Because GST is stated to be included if it applies, GST of 6/106ths, or \$56,604, is included in the \$1 million.

If Tony signs this offer, he will have a nasty surprise on closing. Instead of \$1,000,000, he will get less than \$944,000.

Some lawyers think that the price is still \$1 million because they believe GST does not apply on a sale to a GST-registered purchaser. This is incorrect. GST *does* apply. The sale is taxable. However, under ETA subsection 221(2), the vendor does not collect the tax. Under subsection 228(4), the purchaser must "self-assess" and pay the tax directly to the CRA.

"But" – some lawyers say – "the purchaser doesn't really pay the GST, because he has an offsetting input tax credit!" Yes, the purchaser has an ITC, and that may net his payment obligation down to zero. But the sale is still taxable.

For a case confirming this interpretation, see *Bumac Properties Inc. v. 1221 Limeridge Inc.*, [2001] GSTC 4 (Ont. SCJ, Fedak J., Dec. 4, 2000).

2. NOT MAKING SURE THE PURCHASER IS GST-REGISTERED

George, the real estate lawyer, has another client, Laura, who is selling a commercial property for \$1 million. The purchaser is "12345678 Ontario Ltd." The purchaser's lawyer has faxed George a 2005 letter from the CRA confirming that the company is registered for GST.

George knows that, on closing, his client doesn't need to collect GST because the purchaser is GST-registered. Is George right?

NO. The registration could have been cancelled, or the letter could be a forgery. In either case, if the purchaser is not currently GST-registered, Laura will be assessed for \$70,000 in unremitted GST, plus interest, once this transaction comes to the CRA's attention. There is no "due diligence" defence to such an assessment. (If Laura is not filing GST returns, there is no time limit on such assessment – it could show up 15 years from now!)

George should check the CRA's GST/HST Web registry, www.cra.gc.ca/gsthstregistry, to ensure that the purchaser really is registered.

George should also determine, if possible, that the purchaser is not acting as a bare trustee for another party that is not GST-registered. If it is, the law is unclear as to whether Laura must collect GST.

3. HOUSE HOPPERS

Poor George has another client, Jimmy, who works in the construction industry. In 2005, Jimmy built a new home for his family, and they moved in. They decided they didn't like the home, so they built another home and moved there a year later, in 2006. Happily, Jimmy sold the first home for a nice gain.

Now they've decided to move again, and Jimmy has built a third home where the family will move. He has an offer on the second home, and wants George to handle the sale. Does George have to worry about the GST?

YES — but not in the way you may be thinking. There is no GST to collect on the sale of the second home. Because it's been lived in, it will be GST-exempt. (ETA Schedule V, Part I, section 4.)

However, George should be warning Jimmy about a very serious problem Jimmy is facing. If the CRA considers that he's a "builder" (ETA subsection 123(1)), who built the homes with the intention of selling them, he will be assessed for GST on the value of the home *upon moving into each home*. This is the so-called "self-supply" rule. Jimmy may be facing a very substantial GST assessment, plus interest and penalty, on all three homes. The onus will be on Jimmy to prove that his family really intended to live in each home for a long time, and only sold because of unexpected circumstances.

To make matters worse, the CRA will also assess Jimmy for income tax on the profits from each home. The "principal residence" income tax exemption applies only to capital gains,

and Jimmy's gains will be considered business profits, not capital gains.

4. IS THE SALE OF VACANT LAND TAXABLE?

It's George again. His client, Millie, is selling a piece of vacant land. She comes to George to handle the sale. George tells Millie that since the land is vacant, she doesn't have to collect or remit GST. Is he setting himself up for a call to LAWPRO?

MAYBE. A sale of vacant land may be exempt, but George needs to check a number of facts first. He should review ETA Schedule V, Part I, section 9, which provides the exemption.

Examples of facts which *may* cause the sale to be taxable:

- Millie has been using the land for profit.
- Millie subdivided the property many years ago.
- The property is actually owned by Millie's corporation.
- Millie holds title to the property, but as a bare trustee for a corporation.

If tax applies and George doesn't advise Millie to collect and remit GST, the CRA may catch up with Millie years down the road, and assess her for the GST plus substantial interest. Guess where she'll look for recourse?

Commercial litigation

Sally is a litigation lawyer. Her client, MCo, had an agreement to provide services to JCo. JCo has terminated the deal. MCo was entitled to \$10,000 monthly, or \$50,000 if JCo terminated early. Sally files a claim against JCo for \$50,000. JCo quickly comes up with a cheque for \$50,000 to stop the litigation, and seeks a release and withdrawal of the claim. What's wrong?

Sally has forgotten the GST. If she accepts \$50,000 for MCo, MCo will only get \$47,170. ETA section 182 deems a settlement (or Court award) received by a supplier to be a "GST-included"

amount, and MCo will have to remit 6/106ths of the settlement as GST it is deemed to have collected.

Sally must make sure to claim \$50,000 plus \$3,000 for the GST, and to accept a settlement of \$53,000 if her client is to be made whole.

So what does the poor sole practitioner do?

Unfortunately for the non-specialist, you're stuck with the GST – and if you don't advise your clients about it in cases where it's relevant, you may find yourself making a call to LAWPRO.

Although you don't need to have all the answers on GST, you have to know what the issues are, and when to call a GST specialist, or to tell your client to consult their accountant.

At a minimum, you should have the GST legislation and CRA's GST publications. If you know what section or document you're looking for, use www.canlii.org for the legislation and www.cra.gc.ca for the publications (both free). However, these sites are not indexed or annotated, so you may find yourself lost at times.

For fully annotated and indexed legislation, see *The Practitioner's Goods and Services Tax Annotated*, and for annotated and indexed CRA publications, see *GST Memoranda, Bulletins and Policies*. Both are written by me and published by Carswell.

Another resource you may find useful is my book *Basic Tax and GST Guide for Lawyers*, published annually by Carswell. It's full of answers to the questions that come up in each area of practice.

For detailed analysis of every provision of the legislation, see the 14-volume *Canada GST Service* (online at www.taxnetpro.com). And don't make any assumptions about how the GST will apply before you check the legislation!

David M. Sherman (www.davidsherman.ca) is a leading expert on the GST and income tax law, and the author of numerous Carswell publications including The Practitioner's Income Tax Act, Canada GST Cases, GST Times, and the books mentioned above.

Drafting errors



a simple error can cost you

by Nadia Dalimonte

Given the complexity and the number of commercial agreements drafted each year in Ontario, it is surprising that corporate and commercial claims account for only 13 to 15 per cent of the number of claims reported against lawyers in Ontario annually. Although commercial leasing errors represent a small percentage of those claims, they illustrate where drafting errors occur – and how they can be avoided. Even a simple drafting error could be a costly mistake that leads to protracted litigation. So making an effort to catch and avoid errors is a worthwhile investment of your time.

Proofread, proofread, proofread

One of the issues involved in drafting commercial leases, and indeed many other types of agreements, is the number of changes that are made between the initial draft and the final version. Lease transactions for example, often involve lengthy negotiations, with several drafts being circulated before the final agreement is executed. During such a tiring process, it is not surprising that, for example, a draft agreement which stipulates that the lease of the premises would be on a "triple-net basis" (so that the landlord would not be responsible for any payments under the lease) is mistakenly changed so that the final agreement stipulates that the lease is on a "net-net basis" (creating additional obligations on the landlord). Similarly, a practitioner drafting a lease for a commercial unit may forget to include a right to use of the parking lot for the unit.

To avoid these types of drafting errors, have someone not involved in the transaction proofread each draft, with an eye to finding inconsistencies between the drafts and the final version of the document.

A significant drafting error can result in a substantial claim for liability. One such LAWPRO case involved a

solicitor who failed to recognize that a draft lease treated the calculation of an administration fee obligation differently than the final executed lease agreement.

The agreement to lease stipulated that the tenant would pay for various items including an administrative fee of *four per cent of the operating costs, taxes and utilities*.

However, the final executed lease agreement stated that the operating costs for the commercial condominium included an administration and management fee of four per cent *of the rents* received or receivable by the landlord from the tenants of the commercial condominium. The four per cent fee concept contained in both versions of the lease may have lulled the drafter into overlooking the change. However, the difference in wording between the two versions resulted in the tenant owing substantially more over the full term of the lease.

What should the solicitor in this case have done differently? This type of situation could have been avoided if the solicitor had kept track of the differences between the draft lease and the final version, explained the consequences of the change in wording to the client, and received clear instructions (preferably in writing) from the client to finalize the lease.

Explain significant clauses, keep wording simple

In any type of agreement, unusual clauses are often complicated and can be difficult to understand. Clients are more likely to simply skim over such clauses, and may not fully appreciate how the clause will affect the client's overall interests. If the clause does not reflect the client's intentions, the lawyer may end up with a claim on his hands.

So, for example, when negotiating and drafting a commercial lease, it is easy for a solicitor to be consumed with the usual key issues such as the monetary terms of the agreement. But a deal is not fully considered, and a lease is not properly drafted, unless the client's overall interests have been sufficiently contemplated and addressed. A lease may impose certain use covenants or other restrictive covenants, or bind the client as a guarantor. These can have serious implications for the client, and may be terms that the client never would have accepted had he or she understood what the lease actually says.

When discussing the terms of any agreement with a client, take the time to explain significant or unusual clauses. Ensure that the client fully understands the implications of each and every term and clause in the document. And document these discussions for future referral. Test the clause on yourself: Do you understand what it means? If you have trouble understanding a clause, chances are your client will not understand it either.

Termination clauses

Pay special attention to termination provisions to ensure your client fully understands all possible scenarios under which a leasing or other commercial relationship could be terminated. A good example is one of our recent files in which a solicitor prepared a commercial lease for a landlord client. When the tenants could not obtain a building permit to renovate the premises, they terminated the lease. The landlord claimed against the solicitor for inappropriately drafting the lease so as to allow the tenants to exit the agreement.

Practitioners should call attention to clauses that are significant and which may terminate the agreement, and should canvass possible "termination scenarios" with the client to ensure that the lease accurately reflects the client's intentions and understanding of the terms of the relationship.

Renewal rights

Many agreements, including leases, are drafted with renewal options or rights. Although your client may be perfectly aware of the option to renew, he or she may not be familiar with the mechanics of renewal. For example, a lease may contain written notice requirements or deadlines by which to apply for renewal. Failure to comply with these requirements may result in a renewal not taking effect.

If there are renewal dates, advise your client about any conditions and procedures associated with the option to renew. You may

also want to establish who has responsibility for renewal from the outset. It helps to clarify this in writing, so that there can be no uncertainty later on.

Boilerplate clauses

In drafting any type of agreement, it is often convenient to simply tweak standard form clauses (or even an entire boilerplate agreement) to suit the client's particular situation. However, lack of attention to detail and sloppiness in drafting terms can result in ambiguous, misleading or even conflicting terms and obligations. This could affect future transactions where others look to and rely on the terms of the document as originally drafted.

For example, an individual may decide to buy a business based, in part, on a particular understanding of the terms of the lease agreements that govern the business. Sloppy drafting that creates ambiguities on what the wording of the lease actually means may result in the business having less market value than the purchaser initially thought. To avoid uncertainty and possible future disputes, make sure the intention of the original parties to the lease is made clear. If you have delegated the drafting of a lease to a junior member of your staff, it is essential that you review the lease and ensure that they understand the implications of all of the clauses.

Understanding the terms of an agreement

Other claims are made against lawyers when they are acting for clients who are making business decisions based on the terms of an agreement. For example, if clients are purchasing commercial properties, the terms and value of ongoing leases are extremely important. You should review each of the ongoing leases carefully to ensure that your client understands the value and consequences of each of the terms. It is one thing for you to understand the terms of a lease. It is quite another thing for your client, and ultimately it is the client who makes business decisions.

Conclusion

No matter how hard we try, some drafting errors are inevitable. What's important is that these mistakes don't end up forming part of the final executed agreement. Equally important is the need to discuss the terms with the client. A commercial relationship will run more smoothly if the final executed document clearly reflects the intentions of the parties to the agreement. Diligence in drafting is the first step. If there are significant onerous and complicated clauses, be sure to draw these to the attention of your client and document these discussions.

Keep these practice tips in mind when drafting a document for your clients and you will decrease your exposure to a malpractice claim.

Nadia Dalimonte is a student-at-law at LAWPRO.



In one scene in the science fiction classic, The Andromeda Strain, actress Kate Reid, playing a leading genetic scientist, has to visually review thousands of Petri dishes passing by her in conveyor-belt-like sequence, all to the monotonous rhythm of a red strobe light, looking for the one Petri dish that would save the world from alien invasion. She sees so many of these Petri dishes in a row that she falls into an epileptic trance, and actually ends up missing the one needle-in-a-haystack Petri dish that would have saved the world.

The

Andromeda strain:

Blacklining charts

by Jeff Lem

The typical modern commercial lease has much in common with that monotonous, never-ending stream of bacterial test cultures in *The Andromeda Strain*: Many leases run upwards of 100 legal-sized pages, often in non-serif fonts measured in single-digit points. Blacklining leases so the client sees what changes have resulted (or could result) from ongoing negotiation makes an already long document even longer. And the “deal fatigue” that comes with a steady procession of increasingly bigger, blacklined leases only adds to the *Andromeda Strain* effect.

So what's a practitioner to do? We know that in commercial leasing, perhaps more so than in any other type of commercial transaction, the devil really is in the details: Subtle changes in the text that can have huge commercial consequences are introduced to or removed from the lease at almost every turn.

How can we ensure that clients actually review and approve all of the many dozens of seemingly minor changes being implemented in every turn of the lease?

I have a technique that I often use to help my clients avoid the *Andromeda Strain* affect:

- Start with the usual blacklined document (with "strike-out" being used to show deletions of text).
- Create a three-column chart (in "landscape" format), with columns labelled A, B and C, from left to right.
- Cut the amended provisions out of the blackline (so that they retain all of their markings) and paste these into Column B.
- Cut the corresponding pre-amendment provision from the penultimate version of the lease and paste these into Column A.

Columns A and B, respectively, are then labelled as "Provision as it was in Version X" and "Provision as amended in Version X+1." Even with many changes to the lease, the resulting chart is almost always shorter than the lease, since the chart reflects only those provisions that have in fact been changed.

The result is a much shorter document for your clients to review and approve (thus hopefully taking some of the dread out of reading yet another draft of the lease). Moreover, by setting out the changes side-by-side, the true impact of the changes are all the more obvious to clients.

My assistant will prepare Columns A and B, but it is my job as the solicitor to ensure that all amendments have been included. This is an easy task and I rarely find any problems because no discretion is involved (although I will occasionally add more text before and after a given amendment to help with context or to remove some of that text where it is not needed).

The third column of the chart, Column C, titled "Proposed Response," is left blank and reserved for me to complete. In Column C, I usually add a combined editorial comment and legal analysis, together with a prospective course of action. For example, I might say something like, "This clause is not market, totally unfair, in contravention of both statute and case law, and utterly ridiculous. I propose deleting this clause." In my cover letter or covering e-mail, I will often explain that "my observations are set forth in Column C, together with my proposed responses

thereto. Unless you instruct me otherwise, I will turn a draft of the lease incorporating these proposed responses and return same to the landlord/tenant."

This form of chart is actually very easy to do. An experienced assistant can easily complete Columns A and B, and can even give you a running start on Column C if he or she is familiar with your standard responses to standard lease provisions (so, if your assistant knows that you always reject/insist on capital tax recoveries, he or she can set forth your typical response to attempts to include/reject same).

The result is a chart that is: not that difficult to prepare; generally reader-friendly (well, as reader-friendly as anything in commercial leasing can be); isolates issues very clearly for you and your clients; and, in effect, presents a timely reporting package on each turn of the lease.

In the end, Kate Reid's oversight in *The Andromeda Strain* did not end up destroying the world. But those of us practising commercial leasing law are not always as lucky: The consequences of a similar oversight in reviewing complicated commercial leases are often far less forgiving. Hopefully, this way of using blacklining software will help to ameliorate some of that risk.

Jeff Lem practises with Davies Ward Phillips & Vineberg LLP in Toronto.

ACME CO LEASE

SEC. No.	PROVISION AS IT WAS IN VERSION 2	PROVISION AS AMENDED IN VERSION 3	COMMENTS AND PROPOSED RESPONSE
1.1	... or (ii) then fair market Gross Rent for the Leased Premises based on comparable fair market Gross Rent for similar premises (as they then exist) at the commencement of each Renewal Term, respectively, as established by the mutual agreement of the Landlord and the Tenant.	... or (ii) then fair market Gross Rent for the Leased Premises based on comparable fair market Gross Rent for similar premises <u>unimproved premises</u> (as they then exist) at the commencement of each Renewal Term. <u>"Unimproved premises" shall mean the Leased Premises, exclusive of the improvements constructed by, or at the expense of, the Tenant. If the parties are unable to agree as to the Gross Rent for any Renewal Term, then the same shall be determined in accordance with Section 2.4(b) hereof.</u>	Renewal rent based on "unimproved premises" (i.e. base building condition) will always be significantly lower than the approved, ready-to-operate premises. We should revert to the previous definition to ensure that the renewal rent reflects what would be a market rent for these premises as they then are.
2.3	"Habitual Default" means: (i) any two (2) failures, in the immediately preceding rolling twenty-four (24) month period, for any reason whatsoever, to punctually pay all of the Rent then due; and/or (ii) any two non-Rent defaults for substantially the same breach, in the preceding rolling twenty-four (24) month period.	"Habitual Default" means: (i) any two (2) failures, in the immediately preceding rolling twenty-four (24) month period, for any reason whatsoever, to punctually pay all of the Rent then due; and the (ii) any two non-Rent defaults for substantially the same breach, in the preceding rolling twenty-four (24) month period.	Definition was deleted in its entirety. The Tenant wants notice provisions on default of rent before the Landlord can have the right to terminate. This can be abused by making the Landlord, in effect, have to issue invoices monthly. The introduction of an "Habitual Default" clause was intended to be a compromise. The Tenant gets notice unless the default becomes habitual, in which case the Landlord no longer needs to give notice for subsequent, chronic defaults. We should reinstate the "Habitual Default" concept or delete notice on non-payment of rent.
10.3	"Rules and Regulations" means such rules, regulations, policies and operational guidelines, that may be promulgated by the Landlord from time to time governing the operation of the Property generally.	"Rules and Regulations" means ... governing the operation of the Property generally, <u>provided same do not conflict with this lease or adversely affect the Tenant's rights or obligations hereunder.</u>	All rules and regulations "adversely affect the Tenant's rights or obligations" to some degree. There really should be some sort of materiality threshold inserted here. We could also add that the Rules and Regulations are enforced uniformly against all tenants.

British jurisprudence and the corporate/commercial solicitor



by Debra Rolph

British jurisprudence is now readily available on the Internet. As well as being a useful guide to corporate solicitors, this material can also provide valuable assistance in defending corporate solicitors who are sued for malpractice.

Keeping proper notes

Some judgments, although lengthy and complex, are rich in human interest. For instance, in *Fulham Leisure Holdings Ltd. v. Nicholson Graham & Jones*,¹ the plaintiff company was controlled by Mohamed Al Fayed. The events which gave rise to Al Fayed's claim against his solicitors occurred just three months before the car crash which killed his son Dodi and Diana, Princess of Wales, in Paris.

The defendant solicitors acted for Al Fayed in connection with his deal to acquire a controlling stakeholding in the Fulham Football Club. Al Fayed obtained a 75 per cent shareholding and the vendors of the club retained 25 per cent.

The negotiations in the share purchase transaction were complex and protracted. Many draft agreements were prepared and exchanged. The defendant solicitor omitted from the final draft a provision which would have allowed Al Fayed to "dilute" the minority shareholders' interest once his investment exceeded £60 million. At the time the share purchase closed, no one thought it likely that Al Fayed would invest over £60 million.

Five years later, Al Fayed's injection of funds exceeded £60 million, but he was unable to dilute the minority shareholders' position. Al Fayed eventually bought out

the minority shareholders entirely for £7.75 million. Al Fayed claimed this sum from the solicitors on the basis that this was the position he would have been in from the outset had the solicitors not acted negligently in omitting the provision which would have allowed Al Fayed to dilute the vendors' shareholdings.

Mr. Justice Mann found that Al Fayed was not a helpful witness, and did not attempt to be a helpful witness. The Court treated his evidence with the greatest caution, and was reluctant to accept it unless corroborated by other evidence or the probabilities. Mr. Justice Mann also found that Al Fayed could be an impulsive decision maker. He did not agonize over big decisions in this case, nor did he give detailed consideration to important financial implications of the transaction.

Nevertheless, the Court found that the solicitors had been negligent in accidentally deleting this key provision from the final draft. The solicitors argued that Al Fayed knew that this provision was not included in the final draft, but they had no documentary evidence to support this.

The solicitors may have lost the liability battle, but they won the war. The Court took into account that, by buying the minority shareholders out, Al Fayed had obtained benefits beyond the mere ability to dilute their shareholdings. The £7.75 million deal involved "a horse-trade in which matters other than the missing right were firmly in play." Furthermore, this payment was for a minority interest in an insolvent football club with uncertain prospects. The Court could not say that

this payment by Al Fayed was "reasonable" within the meaning of the case law on mitigation of damages. Mr. Justice Mann concluded that £7.75 million was not a reasonable sum to pay to cure the negligence, and did not provide a proper measure of Al Fayed's loss due to the solicitors' negligence. The Court did allow Al Fayed £6,750 incurred for legal fees.

Subsequent reports on various websites state that the defendants had offered to pay £500,000 to settle this claim; the plaintiff had demanded £6 million. The defendants were awarded their costs of the action.

Advising sophisticated clients

In *Pickersgill v. Riley*², the Privy Council held that solicitor Pickersgill was NOT negligent in failing to advise Riley, an experienced businessman, to investigate the financial substance of the limited company that was purchasing Riley's company. Riley had personally guaranteed his company's lease. The landlord refused to release Riley's guarantee at the time of sale. However, the purchaser company agreed to indemnify Riley for any liability under the lease. Some years later, the purchaser defaulted on the lease, and Riley's guarantee was called on. It then emerged that the purchaser was and always had been a shell company.

Riley sued Pickersgill, alleging that Pickersgill should have investigated the financial substance of the purchaser company, or advised Riley to do so.

Riley was successful in the Royal Court in Jersey, and the Court of Appeal in Jersey. Pickersgill's appeal was allowed by the Privy Council.

Their Lordships held:

- Riley was an experienced businessman who understood the nature of personal guarantees. Although the company which he had sold, and whose obligations he had personally guaranteed, had the potential for profit earning, its future profitability was speculative. It followed that the guarantee has no "hidden pitfalls" for him;
- The possibility that the purchaser might be a company of little or no financial substance was a commercial risk of which Riley, an experienced businessman, could have been expected to have been aware. It was not a risk arising out of any legal complexity or "hidden pitfall" about which Pickersgill had a duty to warn him;
- In giving clear and fair advice about the risk of taking a contractual indemnity from a limited company, Pickersgill had discharged any duty that he had, and he was not under an obligation to go further.

The scope of a solicitor's duty in any given case will depend, first and foremost, on the contents of the instructions given to him or her. It will also depend on the particular circumstances of the case. The experience of the client may also be relevant. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering a transaction. Offering an experienced businessman the same advice would be pointless or even an impertinence.

Avoiding conflict of interest

Canadian case law gives ample warning to solicitors of the peril of acting for two conflicting interests. The judgment of the House of Lords in *Hilton v. Barker Booth & Eastwood (A Firm)*³ is yet another dire warning.

The defendant law firm acted for both Hilton and Bromage. Hilton had agreed to buy land, build flats on them, and then sell the property to Bromage. The law firm knew that Bromage had served time in prison for fraud, and had previously been bankrupt. The law firm did not disclose this information to Hilton. The law firm loaned Bromage the £25,000 he was required to contribute to the transaction; Bromage had no money of his own. The law firm did not disclose this fact to Hilton. Hilton borrowed money³ to buy the land and build the flats. Bromage was unable to purchase them. The bank sold the property for less than Hilton invested in them.

Hilton sued the law firm for his losses. He testified that if the law firm had made proper disclosure about Bromage's background, he would never have dealt with Bromage.

The House of Lords agreed that the law firm owed a duty to Bromage not to disclose the information about his bankruptcy and incarceration. The law firm owed a duty to Hilton to inform him (first) that they could not act for him and (second) that he should seek legal advice from other solicitors, starting afresh (and not relying on any advice that he might already have received from the firm). A bare refusal to act, without clear advice about going to new solicitors, would not have been sufficient to discharge their duty. The law firm failed to do so. Lord Walker found it unnecessary

to consider whether they should also have given the same advice to Bromage.

The law firm placed itself in a hopeless conflict of interest, and was responsible for its own predicament. The law firm was responsible for Hilton's damages.

The trial judge and the Court of Appeal noted that there was no evidence whatsoever that if Hilton had been represented by independent counsel, independent counsel would have learned of the bankruptcy and fraud convictions. The House of Lords did not discuss this point at all.

This paradox has occurred more than once in our files. That is, if the client had gone to an independent solicitor from the outset, the likelihood is that he would never have discovered the information which the "conflicted" solicitor knew simply because he also acted for the "other" party. The "independent" solicitor would have had no means of discovering this information.

Because compensation for breach of fiduciary duty is available to the client by reason of the "conflicted" solicitor's non-disclosure, the client is better off than if he had received independent advice from the outset. If any reader has an answer to this conundrum, this writer would be most grateful to hear it.

There is not sufficient time or space in this column to review the many British decisions worthy of discussion. But these three cases illustrate that a modest effort to explore the British jurisprudence will yield rich rewards to anyone interested in legal malpractice and the corporate/commercial lawyer.

Debra Rolph is director of Research at LAWPRO.

1 [2006] EWHC 2017 (Ch.)

2 <http://www.privacy-council.org.uk/files/other/pickersgill.rtf>; [2004] UKPC 14

3 [2005] 1 W.L.R. 567, Reversing [2002] E.W.J. No. 2333 (Eng.C.A.); [2002] Lloyds Rep P.N. 500 (C.A.)



Real estate fraud legislation: shaping the new practice reality

Prompted largely by extensive media coverage of title and mortgage fraud, the Ontario government last year embarked on extensive consultations with the various parties involved in real estate transactions. Among the issues discussed were: how the land titles system works; who can access it to register title documents; what lenders do before they make mortgage loans; and lawyers' role in the transactions.

In the fall of 2006, the Ontario government announced a two-phase program of reform that will reshape residential real estate practice.

Phase one: Taking care of problems

This first phase was reflected in the Ontario *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, released in October 2006 and often referred to as Bill 152.

Phase one focused on:

- increased Ministry ability to suspend and/or revoke electronic registration credentials;
- clarification of the effect of registration of fraudulent documents; and

- clarification that title insurers cannot seek reimbursement from the Land Transfer Assurance Fund (LTAF).

For real estate practitioners, the Bill raises a number of practice issues.

- First is the need to learn the substantive provisions of Bill 152's treatment of fraudulent instruments (found in the provisions which amend the *Land Titles Act*). You can access the most current version of the *Land Titles Act* at www.e-laws.gov.on.ca/DBLaws/Statutes/English/90105_e.htm.
- A major practice issue for lawyers is how to reduce the risk that they become a target for the Director of Land Registration to suspend, and potentially revoke, the lawyer's ability to submit documents electronically. These powers were incorporated in the *Land Registration Reform Act* by virtue of the Bill 152 amendments.

The Director has the power to issue an immediate suspension where it is in the public interest or the Director has reasonable grounds to believe that an electronic document is not authorized. When a lawyer receives a notice of proposal to revoke the authorization to register (that is, to make the suspension permanent), the lawyer has 15 days to serve a written request for a hearing on the Director. If the lawyer wishes an oral (as opposed to written) hearing, that must be specified.

PRACTICE IMPLICATIONS

From your client's perspective, your suspension could have disastrous consequences in terms of an upcoming closing. You should note that the Director has the power under the Act to withdraw the suspension, pre-revocation, where the Director considers the withdrawal in the public interest. So, don't hesitate to advise the Director immediately if you believe that you have been the target of a suspension by mistake.

For a variety of reasons, it is worthwhile for lawyers who practise in a firm to ensure that at least one other lawyer in the firm has electronic registration credentials. That way another partner or associate would be able to assume carriage of a file on short notice, if necessary. (The definition of "electronic document submitter" in the Act indicates that the power to suspend is on an individual person, not firm-wide, basis. Therefore, it is reasonable to expect that firm members will be able to back each other up this way.)

For sole practitioners, the Joint Committee on the Electronic Registration of Title Documents has long recommended that lawyers have an understanding with another lawyer in the community who could provide assistance in appropriate circumstances. Traditionally this has been discussed in the context of registrations needing compliance with law statements when a sole practitioner is on vacation. However, it could apply where there is need to refer a client on short notice. (Of course, the practitioner agreeing to assist needs to assure him or herself that there is nothing suspicious in connection with the client or transaction being referred.)

If you think that a suspension or revocation may cause a loss for one or more clients, contact LawPRO immediately as those clients may have a potential claim against you, depending on the circumstances.

Do not forget that complying with the Law Society's Residential Real Estate Transaction Practice Guidelines may be the best way to ensure that you never get caught up in this problem.

The Guidelines suggest that you:

- Check the client's identification carefully, retain details of the I.D. presented and get an authorization signed in your favour to make the registration.
- Keep the back-up documentation for any compliance with law statements you make to facilitate the registration.
- Look at the pattern of deleted instruments on title: apply your common sense to what the title of the average client looks like. Does this look different? Don't act where you are suspicious about the client, the circumstances of the deal or your referral source!

Phase two: Tightening the ground rules

In phase two, rolled out this spring, the government focused on increasing accountability for access to the electronic registration system and processes, among other things.

One of the major proposed changes will restrict access to the electronic registration system to lawyers for certain document types. Specifically,

- only lawyers will be able to register transfers, and
- registration of a transfer will involve two lawyers, one for the transferor and one for the transferee.

It is expected that there will be very few exceptions to this two-lawyer requirement – the exceptions are still under consideration – but as a matter of principle will likely only include same-party transfers. However, the Ministry of Government Services is prepared to continue the dialogue with the Law Society on this issue in the future, after an initial rollout period.

Many lawyers are surprised that transactions between family members are unlikely to be exempt from the two-lawyer requirement. Unfortunately, there is evidence that in the modern world, identity theft often involves a family member or co-worker¹. In terms of real estate fraud, there have been high profile cases in Ontario where a family member was the first true victim of the fraud, often because a power of attorney was fabricated or used incorrectly. Spousal impersonation has also been a problem for many years. Further complications arise because it can be challenging to establish the good faith of the alleged victim once a family member, now outside the jurisdiction, obtained significant proceeds from a real estate fraud.

Non-lawyers who meet certain standards of identity, financial solvency and appropriate qualifications regarding character and/or regulatory oversight will be allowed to register mortgages,

discharges and similar documents. As well, lawyers who qualify to register transfers will qualify to register other documents.

The most common question from lawyers is: Why just transfers? Don't many of the reported cases involve fraudulent mortgages?

While that is correct, the Ministry of Government Services has stated that "by restricting the ability to register transfers of land to this group, the main documents involved in title fraud could be isolated, and consumers would be provided with additional protection."

When you think about it, the worst nightmare for the government, and all stakeholders in the real estate industry, is to have two families fighting in good faith over who gets possession of a property. To end up with two consumers at odds over a property, there has to be a transfer somewhere along the way, whether prepared fraudulently in the name of the original owner or as the result of a power of sale based on a fraudulent mortgage. The more lawyers involved in any transfer scenario, the greater the chance the problem will be caught: That is the flattering implication of the government regard for the legal profession. Mortgages, on the other hand, are about money and the defrauded lender can always be made whole with money.

Lawyers should expect to go through a new application process with the Ministry of Government Services later this year, in order to become eligible to access electronic registration in the future. The sooner you get this done, the less chance of disruption to your practice.

LawPRO's mandatory program evolves: meeting the new challenge

When it proposed to restrict access to register transfers to lawyers, the government also sought to have fraud by a lawyer covered by insurance when it involved registering a fraudulent instrument within the meaning of the *Land Titles Act*. Any lawyer intending to practise real estate would be required to purchase this new coverage, which is to be provided by LawPRO.

LawPRO has proposed to provide this coverage subject to certain conditions. First, to keep premium costs to a minimum – about \$500 per year – the following would be ineligible for applying for this fraud coverage:

- persons who are in bankruptcy;
- persons who have been convicted or disciplined in connection with real estate fraud; and
- those under investigation, where the Law Society obtains an interlocutory suspension order or a restriction on the lawyer's practice prohibiting the lawyer from practising real estate, or an undertaking not to practise real estate.

As well,

- Protection will be limited to the registration of a fraudulent instrument under the Land Titles Act, and not for other types of circumstances involving fraud.

- This protection applies regardless of whether any legal service was ever provided – that is you do not have to have been acting on the transaction that was ultimately involved in the fraud.
- This new coverage would not apply to transactions that occur before the coverage comes into force, nor for claims to which title insurance would apply.
- The sub-limit protection will be \$250,000 per claim/\$1 million aggregate;

So, put simply, when a lawyer is involved in a file where there is a fraudulent registration, there are three possibilities.

- The lawyer could be innocent of any fault. In that case, there continues to be no exposure for the lawyer at common law, nor of the LawPRO program.
- Secondly, the lawyer could have been negligent, in which case LawPRO's standard mandatory coverage would be applicable.
- Thirdly, if the lawyer was involved in the fraud and it involved registration of a fraudulent instrument, the new coverage would come into play.

Note that there can be other types of fraud or theft that do not involve fraudulent instruments. For example, a lawyer could intentionally lie to a lender about the past value of a property based on registered title, in order to help a borrower client. The lawyer eventually registers a mortgage in the lender's favour, but given that the true registered owner of the property appropriately authorized the lawyer to register the mortgage, it is not a fraudulent instrument and the mortgage is enforceable.

In the alternative, a lawyer simply steals money from his or her trust account. In these circumstances the lawyer would not have protection under the new fraud coverage; depending on the individual lawyer's choice of LawPRO options, the lawyer may have innocent party coverage under other aspects of the lawyer's insurance policy with LawPRO.

Title insurers will not be able to access this coverage, just as they are not able to bring claims to the Land Titles Assurance Fund. So, lawyers remain exposed personally to claims from title insurers where the lawyer acts fraudulently; there is no protection for this in the contract between the Law Society and the various title insurers.

Where is the good news in any of this? If real estate lawyers are not the fraudsters, or implicated criminally in the fraud when a fraudulent instrument is registered, LawPRO may be in a position to moderate the premium for this special coverage in future years. As well, under Order ODOT-2007-02 issued by the Director of Titles on May 25, 2007, lenders who want to pursue a claim to the Land Titles Assurance Fund are required to take reasonable steps to verify the identity of the borrower and that the registered owner is, in fact, transferring or mortgaging the property.

With lawyers increasingly on the lookout for suspicious deals, and lenders playing their part, there is reason to be optimistic on the part of all participants in the real estate industry, although fraud in our society will never be totally eradicated.

1 For example, in a 2005 study on identity theft by a California research firm, the fraud victim knew the person who had misused their personal information in 26% of cases: "Typically, it was a family member, friend or neighbour, or in-home employee." (Robin Sidel, *The Wall Street Journal*, October 10, 2005).

New practice guidelines

guide practitioners in title insurance era

Changes in real estate practice over the past decade have been many: The introduction and now widespread use of title insurance, advent of electronic registration and related Land Titles system changes – all pointed to a need to update practice standards for residential real estate practice.

The CDLPA-OBA-ORELA group known as the Working Group on Lawyers and Real Estate first tackled this issue more than two years ago. The Working Group created a set of principles and discussion papers that focused on the value-added that a lawyer who is engaged with the clients and their transactions brings to the table.

These principles became a starting point for the subsequent Law Society Working Group on Real Estate issues: In January 2007 the Law Society adopted a new set of *Residential Real Estate Transactions Practice Guidelines*.

The new Guidelines are not only the first comprehensive updating of practice standards in a decade, but also are a tool in sync with the times, says Ray Leclair, co-chair of the CDLPA-OBA-ORELA Working Group and a member of the Law Society Working Group.

“For a lawyer committed to using title insurance in his or her practice in a positive, client-centred way, these Guidelines are an indispensable tool,” he says.

“For the real estate bar, this is an issue of our long-term survival. To avoid being shuffled aside by non-legal competitors who want the public to believe they can close a transaction without the benefit of a lawyer, we need consumers to recognize how important the lawyer is. This means we in turn need to do a much better job of projecting our value to our clients – to demonstrate the protections and services that a lawyer as quarterback brings to the table. These guidelines – which require us to interact and engage with the client in many ways – do just that.

“For example, they guide us on how to do intake of our client’s needs and plans for the property; they guide us in how to advise the client in the sign-up meeting before closing; and they guide us in the use of title insurance in the transaction,” says Leclair.

Among the principal ways in which the Practice Guidelines provide guidance in the conduct of a title-insured transaction are the following:

- The lawyer is encouraged to obtain necessary and relevant information from the client at the outset of the transaction. This information helps the lawyer meet the due diligence requirements of title insurers and ensures that appropriate endorsements are obtained, if needed. For example, special searches may be required by the title insurer if the property has private services and a rural property endorsement may then be available from the title insurer.
- The lawyer is encouraged to communicate with the client at the outset of the transaction about the future use of the property. This allows the lawyer to determine if a special endorsement should be obtained for a proposed future use involving a change of the property. It also allows the lawyer to consider whether to recommend title insurance at all, or to advise the client to obtain an up-to-date survey and fuller inspections/searches to determine more conclusively if the proposed use can be implemented.
- The lawyer is reminded to review with the client what searches or inquiries the lawyer will not be undertaking (if any) due to the choice of title insurance and the possible impact of those searches.

For example, in many cases a building department search will not be undertaken if title insurance is being purchased. If the property includes a basement apartment, some clients may be more interested in knowing that the apartment is definitely legal and can be rented out rather than knowing that they are entitled to make a claim under an insurance policy for a loss of property value if the apartment must be removed. Also,

there are possible adverse consequences for the client if the lawyer allows a requisition date to pass without making a given search, a problem comes to light before closing that would have been revealed by the relevant search and the title insurer will not insure over the problem. The lawyer needs to bear that issue in mind, along with any published policies of title insurers on the issue, when deciding not to make a given search.

- The impact of the knowledge exclusion in a title insurance policy is highlighted, so that the lawyer remembers to determine if the client has any adverse knowledge that must be disclosed to the title insurer.
- The lawyer is reminded to review with the client the coverage that will be available under the client's title insurance policy before closing, the lawyer having him/herself reviewed the exclusions and exemptions in the draft title insurance policy.

The Guidelines provide an overall list of items for the lawyer to consider when reviewing the draft policy or binder/commitment.

- The lawyer is reminded to issue the policy as soon as possible after closing, in case the client needs to put in a claim in the early days of owning the property, and to compare the issued policy to the draft.

Most title insurance policies generally available in Ontario do not include legal service coverage (although the TitlePLUS® policy for purchases and/or mortgages does). All of the above are possible areas of liability related to the use of title insurance for the unthinking lawyer. The Practice Guidelines are a resource and a safety net for lawyers wanting to maximize their clients' protection through title insurance while managing their own risk exposure along the way.

Residential Real Estate Practice Guidelines in action

The *Residential Real Estate Transactions Practice Guidelines* were adopted by the Law Society in January of this year after a province-wide consultation with the profession. They were developed with the assistance of the real estate bar.

The guidelines have a dual purpose: They clarify for lawyers the steps that they should or must take in the usual circumstances when handling residential real estate transactions; and they assist in educating the public on the role and value of a lawyer in a residential real estate transaction.

WHAT IS THE EFFECT OF THE *GUIDELINES*?

Different terminology is used in the *Guidelines* to explain different concepts. While some provisions are mandatory, others are not.

MANDATORY PROVISIONS

Some of the *Guidelines* are expressed using the word "shall." These provisions incorporate obligations contained in the Law Society *By-Laws* or *Rules of Professional Conduct* and are mandatory. If a lawyer breaches one of these provisions, the lawyer could be disciplined.

RECOMMENDED PRACTICES AND PROCEDURES

Some of the *Guidelines* are expressed using the words "should" or "should consider." These provisions contain recommended

practices and procedures that lawyers should follow in the usual circumstances. It is recognized that in some situations, the lawyer might have to deviate because of the circumstances of the individual transaction. If a lawyer fails to follow one of these recommended practices or procedures in a situation where he or she should have done so, the Law Society may take this into account when performing its regulatory function. For example, the Law Society might take this into account if determining whether a lawyer had failed to serve a client competently and breached the rule on competency – Rule 2 of the *Rules of Professional Conduct*.

OPTIONAL PROVISIONS

Finally some of the *Guidelines* are expressed using the words "may" or "may consider." These provisions are discretionary on the part of the lawyer. The lawyer may or may not follow them depending upon the circumstances of the transaction.

To access the new *Practice Guidelines*, go to <http://mrc.lsuc.on.ca/jsp/residentialRealEstate>.

Caterina Galati is senior competence counsel with the Law Society.

A man in a dark suit and white shirt is shown in profile, facing left. Instead of a human head, the back of his head is filled with a dense crowd of many small, diverse human faces, suggesting a complex or overwhelmed mind.

If you are a sole practitioner just beginning or ending practice, you may be vulnerable to being recruited by charismatic and convincing scam artists to assist them in perpetrating frauds.

Dangerous liaisons

Over the last seven years, LawPRO has been alerting lawyers to the existence of fraudsters who use bogus real estate transactions to defraud lenders and innocent homeowners. To succeed, they need you – the lawyer. And despite a litany of examples and advisory notices from other financial institutions, regulatory bodies and the general press, these fraudsters continue to profit.

Our claims experience at LawPRO suggests that there is a profile of a lawyer who is more susceptible to being enticed to participate in fraudulent schemes. Often these lawyers do not have a busy practice and welcome a steady stream of real estate transactions to help build the practice.

The set-up

There are two common scenarios that occur:

EXAMPLE A

A vulnerable lawyer is approached by a paralegal or a real estate operation that is active in funding mortgages. There is no lawyer “in charge,” and the recruit is approached to take on that position. The promise is that the lawyer will have to do very little, except participate in the registration of documents, and the movement of money back and forth.

EXAMPLE B

The recent criminal case of Vishnu (Joey) Poonai is a good example of another set-up. Recently disbarred, Poonai was convicted of four counts of fraud over \$5,000 relating to twelve separate real estate transactions. He played a significant role in this fraudulent scheme, acting for vendors and purchasers, but not for lenders. Instead, he recruited other lawyers to complete the mortgage transactions on behalf of the lenders. He told these lawyers that he was very busy, and that he referred his mortgage work out to other counsel. The recruited lawyers needed the work, and agreed to act.

The promise

The promise is that the recruits will have steady work, and will not have to worry about the clientele. In many cases, the recruited lawyer doesn't even meet with the borrowers and/or lenders. The transactions are presented as *fait accompli*, and the lawyers simply sign where they are told to sign, register documents when ready, and distribute the money as directed. Attention to detail is discouraged. Questions are deflected. Passivity is a valued trait.

The scheme

The scheme generally involves flip transactions and identity theft. The property is purchased at a low price, or at market value, resold immediately for a substantially higher price, and mortgage funds are advanced by a lending institution based on the higher price. The difference between the funds required to close the deal and the mortgage advance is the profit for the fraudsters.

Poonai: The real deal

The reasons in the Poonai decision explain how these particular frauds were consummated. The real deal is that these were mortgage flips. Remember that Poonai did not act for the lenders – only the vendors and purchasers. The agreed facts establish that fraudulent MLS listings, fraudulent market appraisal reports, and false information about the employment income and assets and liabilities of the mortgagor applicants were provided to the banks. In some cases identify theft and impersonation of ostensible borrowers for the purpose of using their name and credit to secure mortgages on various properties were also involved. In most of the transactions, the lending institutions were provided with an agreement of purchase and sale reflecting only the final price, but were given nothing to indicate that there was a flip. Although one of the recruited lawyers testified that she expressed concerns to Poonai concerning the increase in value of the property in one day, he allayed those concerns by telling her that it was not illegal and that the Law Society said that there was no problem.

The result

Poonai was convicted of fraud and has been disbarred. What about the recruits? One has been disbarred and the other allowed to resign. Neither will practise again. Lawyers cannot be passive and turn a blind eye to activities around them. The reasons in the Poonai decision remind all lawyers that recklessness and wilful blindness are tantamount to dishonesty.

An accused is reckless when he or she is knowingly careless with respect to the occurrence of an element of the *actus reus*. Recklessness "is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal laws, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance." There is an element of the subjective in that an accused must have knowledge that such conduct may involve a consequence or a circumstance that constitutes or forms part of the *actus reus* of an offence. See *R. v. Sansregret*, [1985] S.C.J. No. 23 at para. 16.

Wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth: "... where an accused is aware that certain facts may exist which would make his actions criminal but deliberately refrains from making inquiries so as to remain ignorant." Where the accused suspected the fact, realized the probability, but refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge, wilful blindness is made out. See *R. v. Sansregret*, [1985] S.C.J. No. 23 at paras. 21-22 and *The Zamora No. 2*, [1921] 1 A.C. 801 (P.C.)

What about the money? No one knows where the money has gone. If the losses to the lender were title insured and the loss arose out of title fraud, the title insurers would pick up the loss to the lender. If the losses arose strictly out of value fraud, most title insurers would not be involved although that could depend, if the insurer's policy includes legal services coverage. If the lawyers were negligent, the LAWPRO policy would pay the loss, but in cases in which lawyers are wilfully blind or so reckless as to be dishonest, coverage under the policy is denied.

The lesson

The lesson is obvious. Don't be a dupe. To read the Poonai decision, see www.canlii.org/en/on/onsc/doc/2006/2006canlii43618/2006canlii43618.html.

*Caron Wishart is vice-president, Claims, at LAWPRO.
Debra Rolph is director of Research at LAWPRO.*

The TitlePLUS® OwnerEXPRESS® policy:

Peace of mind in new anti-fraud era

New fraud-prevention and consumer protection measures¹ introduced by the government have prompted lawyers to ask if current owner title insurance, such as the TitlePLUS OwnerEXPRESS policy, is still relevant.

What is a TitlePLUS OwnerEXPRESS policy?

It is a title insurance policy for homeowners across Canada who did not get a title insurance policy when they acquired their property. For a one-time premium, you can provide these clients with automatic coverage for matters related to fraud (including future fraud) and registered title.²

For residential properties in Ontario, including houses, condominiums, cottages, residential rental (up to four units), vacant land, and rural properties with property values up to \$2 million, you can order an OwnerEXPRESS policy quickly and easily on www.titleplus.lawyerdonedeal.com. For property values over \$1 million, additional search requirements may apply. For all other provinces or for leasehold properties in Ontario, you can order an OwnerEXPRESS policy by completing an order form on www.titleplus.ca.

Why is it still a useful tool for real estate lawyers to use?

The OwnerEXPRESS policy contains coverage for more than future fraud. It automatically covers matters related to fraud and forgery before and after the policy date, and registered title matters up to the policy date. It also provides survey

coverage as of your client's purchase or acquisition of the property.

For instance, the OwnerEXPRESS policy provides coverage for future encroachments onto your clients' property by neighbours. It may also provide coverage for other types of title and off-title issues that existed at the time of purchase of the property, subject to meeting the TitlePLUS underwriting requirements (if any).

A classic example would be a renovation that occurred without a building permit before your client's purchase. Even though you may have done a building department search at the time of the purchase, it is possible that the building department did not know the renovation had been done illegally and therefore, the building department files looked "clean." If the illegal renovation later comes to light (as often happens when a later, compliant owner goes to the building department to do a further renovation), your clients would be able to make a claim under their OwnerEXPRESS policy for the cost of cleaning up the old problem. This can be particularly helpful if a title or off-title issue is only raised when the clients sell, and suddenly you need to resolve a problem quickly to get the deal to close. Your title insurer will often suggest "insuring over" the problem for the new owner, in order to have the sale close as scheduled.

Coverage for fraud-related costs: In the event that a fraud is perpetrated against your homeowner clients, even if they are in a good position to get title restored under the new law, do they really want to go through the ministry process of filing(s) and/or hearing(s) without a lawyer? Your

clients may even end up having to go to a court hearing if there are competing innocent interests.

For example, what if your clients went to Florida for the winter and a fraudster sold their house to another innocent family? Because of the "duty to defend" coverage in a title insurance policy, you or your clients can contact the title insurer and ask that a lawyer be retained for the clients. It saves the homeowners having to come up with a deposit for the lawyer's fees, which could be a problem up-front even if that money will later be refunded by the ministry.

Back-stop coverage if no compensation under new law: Under the new law, even an innocent homeowner may have to be able to demonstrate some level of due diligence (i.e., reasonably cautious behaviour) in protection of his/her home ownership, in order to seek compensation under the new law from the Land Titles Assurance Fund. We will not know what (if any) that due diligence will be until the Director of Land Titles issues guidelines.

Finally, none of the provisions of the new law have been interpreted by a court yet. Until the courts interpret the legislation, it is not possible to predict what a court may say. Consider how long it took for the Court of Appeal to hand down their decision in the *Lawrence*³ appeal.

For more information on the TitlePLUS OwnerEXPRESS program or to order a free supply of brochures to help explain the OwnerEXPRESS policy to your clients, please contact the TitlePLUS Customer Service Centre or go to www.titleplus.ca/Lawyers/Products/Services/OwnerExpress.asp.

¹ In May 2007 the government announced changes to the *Land Titles Act* contained in the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* (previously called Bill 152).

² OwnerEXPRESS policies do not insure mortgage lenders or include TitlePLUS legal services coverage (please refer to the policy for full details, including actual terms and conditions).

³ *Lawrence v. Maple Trust Company & Wright*, [2006] O.J. No. 2907 (S.C.J.), 2007 ONCA 74.

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TitlePLUS® campaign supports lawyer role in “mortgage-only” deals

The Spring 2007 TitlePLUS promotional campaign focused on educating consumers about how to protect themselves when they refinance their mortgage or arrange a new second mortgage, such as a secured line of credit.

Like its predecessor campaigns last spring and fall, this campaign has a core message: Having a lawyer involved in the process helps consumers understand the transaction, know their legal options, and better protect what is likely their biggest single investment, their home.

“Based on our consultation with TitlePLUS lawyers from across Ontario, we know that consumers often don’t understand the implications of what they are signing when they go to renegotiate a mortgage,” said Kathleen Waters, vice president of TitlePLUS.

“We’ve heard, for example, of homeowners who don’t realize their home may be security for a line of credit – which then needs to be repaid when the property is sold. Or they don’t know the legal implications of proposed changes to names on title or of being a guarantor or co-borrower.

The campaigns address the results of an omnibus survey of consumers undertaken by Decima Research for LAWPRO in 2006. That survey revealed that only one in 10 consumers understand how to use their lawyer as a trusted advisor on real estate matters; most consumers see their lawyer as only the person taking care of the paperwork. “We saw a real opportunity to support the Working Group on Lawyers and Real Estate (a CDLPA-OBA-ORELA initiative) through a campaign that highlights the valuable role of real estate lawyers, and educates the public about the many ways in which a lawyer protects their interests in a real estate transaction.”

The campaigns to date include:

- A consumer-directed radio and print ad campaign that ran in major daily media across Ontario last spring, highlighting how using a lawyer and TitlePLUS title insurance protects buyers against unexpected disasters.

- A website – *The Real Simple Real Estate Guide* – that includes tools such as mortgage calculators, “to do” checklists, and information on the role of a real estate lawyer.
- A complementary media campaign in spring 2006 that focused on providing consumers with tips and insights into what they could expect their lawyer to do.
- A second campaign in fall 2006 that educated condominium buyers about issues they should know about – and how a real estate lawyer can help avoid common pitfalls.
- A number of articles placed in consumer and commercial media informing consumers about issues such as: the role of title insurance; what to ask a real estate lawyer; how to plan for costs associated with home buying; and how commercial title insurance works.



The TitlePLUS Real Simple Real Estate Guide has been updated to include content on mortgage refinancing.

Osgoode student wins inaugural TitlePLUS[®] Essay Prize

LAWPRO is pleased to announce that Robin Senzilet, a second-year student at Osgoode Hall Law School, is the first-ever winner of the TitlePLUS Essay Prize.

In her essay, "Mitigating Error in the Practice of Real Estate Law," Ms. Senzilet uses the theories of British psychologist James Reason – one of the world's leading experts on the subject of human error – as the framework for a discussion of the possible explanations for the high incidence of LAWPRO claims by real estate lawyers. She looks at his "person approach" and "systems approach" in determining causes of error, and discusses active and latent factors that can contribute to errors. She also applies Reason's theories to explore options to help lawyers prevent these errors in the future, including using available risk management resources provided by LAWPRO and other legal bodies and attending CLE courses.

Robin spent two months researching and writing her paper as part of the coursework for Adjunct Professor and Law Society Medal winner Reuben Rosenblatt's real estate course. She is a senior editor of the Osgoode Hall Law Journal and a member of Osgoode's Entertainment and Sports Law Association. Robin will be spending the summer working at the ministries of: the Attorney-General; Citizenship and Immigration; Culture and Tourism. On graduation, Robin will be articling at the



(l to r) Stephen Freidman, Robin Senzilet and Michelle Strom

Ontario Superior Court of Justice. The multi-talented student has previously studied musical theatre, fine arts and humanities, and has performed in Anne of Green Gables at the Charlottetown Festival and in other summer stock productions.

Robin received the award at the TitlePLUS 10th anniversary conference in Niagara Falls. The award, including the cash prize of \$3,000, was presented by Michelle Strom, president & CEO of LAWPRO, and Stephen Freedman, legal counsel for TitlePLUS. "I feel very honoured that my essay was chosen,"

said Robin. "I was really excited to go to the conference. I enjoyed getting to meet people and hearing what they had to say, it was a great experience."

LAWPRO created the TitlePLUS Essay Prize to encourage and recognize outstanding legal scholarship in the practice of real estate law. Students from law schools across Canada (excluding Quebec) were invited to enter the essay contest. The entries, which had to address a current issue relevant to the practice of real estate law and be under 6,000 words in length, were judged by a panel of five judges appointed by LAWPRO.

Summary of winning TitlePLUS essay prize entry

“Mitigating error in the practice of real estate law”

Robin Sensilet uses the theory of James Reason, world renowned expert on human error and system failure, to form the framework for her discussion of the possible explanation for the relatively high rate of error on the part of real estate lawyers.

James Reason’s “person approach” focuses on the unsafe acts of people and views these unsafe acts as arising primarily from aberrant mental processes such as forgetfulness, inattention, poor motivation, carelessness, negligence and recklessness. Under this approach, it is the individual person who is considered solely responsible for the error that has occurred. One type of failure under the “person approach” occurs when people act without paying enough attention to what they are doing. Reason discovered that common errors may be the result of the human brain’s capacity to adapt. Humans cannot function without delegating some tasks to be carried out automatically by the brain; this creates the opportunities for the mind to go on “autopilot” and for errors to result.

Under Reason’s “system approach,” the focus is placed on the contextual factors that have contributed to the error made by the individual. Errors are seen as consequences rather than causes, whose origins lie not so much in perversity of human nature as in the ‘upstream’ systemic factors. Under the system

approach, the focus of error prevention is placed on changing the system as a whole, not simply the individual, as the errors are seen as the result of the convergence of multiple contributing factors.

Reason has developed a “Swiss cheese model” to illustrate the situation in which a series of events occur simultaneously that breach the defenses and safeguards that have been put into place to protect against error. The presence of a single “hole” in the system’s defences, in and of itself, doesn’t cause the error to occur. Errors occur only when holes in the many layers momentarily line up to permit a trajectory of accident opportunity.

Reason has argued that a hole in the system’s defences arises for one of two reasons: active failures or latent conditions; errors are almost always the result of a combination of the two.

Active failures are those failures that are attributed directly to the person performing the task. Legal examples include lapses, such as forgetting to give a client certain information; or slips, such as proceeding without the consent of the client. These active failures are often the result of latent conditions. Latent conditions include preconditions of either human or technological factors, such as poor management, unreasonable work hours, or unreliable equipment.

When active failures are combined with latent conditions the stage is set for possible error to occur.

Sensilet applies Reason’s framework to examine the most common types of errors that lead to malpractice claims in the area of real estate law. These include, communications errors, time management errors and failure to meet deadlines, errors due to lack of investigation, errors resulting from the delegation of tasks, and failure to keep current with the law.

Using Reason’s theory, Sensilet recognizes that efforts at reducing claims, such as instructive articles, online resources, CLE programs, and checklists, have likely played an integral role in reducing the risk of claims against members of the real estate bar.

Using Reason’s framework, the efforts made to help lawyers keep up to date, and remind and caution lawyers about pitfalls that exist that may lead to future malpractice claims, could be said to be defenses that are part of the “Swiss cheese model.” The stronger these defences are, the less likely it is that there will be “holes” in them, and the less likely it is that active failures and latent factors will work together to create an “error trajectory” through those defences, leading to errors and malpractice claims.

Carolyn Stanley is a student-at-law at LAWPRO.

Voice mail 101

**“I’m not here right now.
Please leave a message.”**

<beep>

Like so many nascent technologies in their early stages of adoption, voice mail was despised by most of us when it was first widely implemented in the early 1980s. Why? It just didn’t work properly. Messages were garbled, lines got dropped, and you often ended up in the dreaded voice-mail jail – an endless loop of messages that left you with no way to a live person.

But jump ahead 25 years and voice mail has become an essential part of our everyday lives. I’m willing to bet that just about all readers of this column use it in their offices (and quite likely at home, too). If used properly, voice mail can help you work more efficiently, improve your client service and communications, and most importantly, help you avoid a malpractice claim. So, how well are you using voice mail? Can you make better use of it? Let’s review

Handling incoming calls

Ask yourself this question: “Have any of my clients ever felt frustrated when they tried to contact me by phone?” To avoid aggravating clients, consider the following pointers for handling incoming calls.

If your firm’s incoming calls go through a receptionist, be sure you know how callers to your office are greeted, and what options they are given for leaving a message. Even if you think you know, call your office to find out for sure. You might be surprised by what you hear.

Consider setting a policy to give callers the option of either leaving a voice mail for you or leaving a traditional message with the receptionist. This will prevent someone who is uncomfortable with using voice mail from being forced to do so – yes, there are still some holdouts out there who really don’t like it.

Also, are callers to your office asked to identify themselves? You need to tread carefully with call screening. If you don’t take a call after a client has been asked to identify herself, you are likely leaving the impression you are avoiding the call. Oops!

To avoid that gaffe, set up this protocol with your receptionist: If you don’t want to be disturbed, put your phone on hold so the receptionist knows you are not available. Then when a call comes in, it can go directly to your assistant or to your voice mail. No need for the receptionist to ask for the caller’s name.

And if you really want to think outside the box, ask yourself whether your calls really even need to go through a receptionist. Most clients will feel better served if they have your direct line.

Now, some of you are going to say, “I don’t want the interruptions.” Perhaps, but consider if call display would help. Many lawyers who have call display report that they initially thought they would use it to avoid calls. In fact, they tend to find they actually take more calls because knowing the caller’s identity allows them to understand how much time will be involved before they pick up the phone – and that four seconds between when the name pops up and you take the call magically seems to get you in the right frame of mind. When you really don’t want interruptions, you just put your phone on call forward.

Setting up great greetings

Your voice mail greeting speaks to your clients when you can’t, so you need to make sure it says everything it should. To be of maximum assistance to callers, your voice mail message should do the following:

- Open with your name and title so that callers are sure they have reached the correct voice mail box.



- Be updated on a daily basis, including details of your schedule (but not your life story) if you expect to be unavailable for part of the day (e.g., “I am in meetings all morning”). If you’re going to be out of the office, indicate whether you’ll be checking voice mail or e-mail while away, as well as when you expect to be back (especially if you’re away for an extended period).
- Always give callers an option to transfer to a live person, either your assistant or the receptionist. This is important if they need immediate assistance. Remember to adjust messages if both you and your assistant will be out of the office at the same time.
- Encourage the caller to leave a detailed message. This will help pry out a few more facts from those who are reluctant to say much, and will help you learn exactly what the caller wanted before having to phone back.
- Lastly, state your policy with respect to how quickly voice mail messages will be returned (e.g., “I return calls within 24 hours,” “... by the end of the next business day,” or the like). Set a time frame that fits you, your practice and your clientele – and make it clearly known to clients at the time of the retainer so that you set and control their expectations.

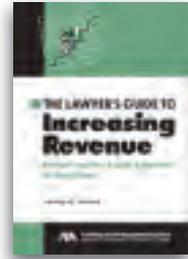
Leaving messages

When you leave a message in someone else’s voice mail box, make the most of it by (1) stating the date and time of your call; (2) leaving a detailed message giving the information you want to pass on, or asking the questions you need answered; and

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The Lawyer's Guide to Increasing Revenue:

Unlocking the profit potential in your firm



Arthur G. Greene

ABA Law Practice Management Section

Publication Date: February 2005, ISBN: 1-59031-422-0

When it comes to increasing revenues, many firms look for ways to decrease expenses. Yes, extravagant and unnecessary spending should be eliminated. However, repeatedly slashing expenses to meet financial challenges is an ill-conceived approach to financial management for two reasons.

First, at most firms the percentage of costs that would be classified as discretionary is low, perhaps in the 20 to 30 per cent range. And assuming that some of the discretionary expenses are desirable (marketing expenses will bring in new business), the savings potential here is small.

Second, the majority of law firm expenses are either fixed or production-related. Does it make sense to eliminate staff positions if the result is to put more administrative functions on the lawyers and paralegals? Of course not; such an approach would reduce the amount of billable work product.

Firms can actually put themselves out of business by trying to forge their way to success through cost-cutting year after year, especially if those cuts negatively affect production, staff morale and client relationships.

What then is the answer? *The Lawyer's Guide to Increasing Revenue: Unlocking the Profit Potential in Your Firm* suggests that you need to stop looking for ways to cut expenses, and start looking for places that new revenue can be generated.

Written by Arthur G. Greene, a recognized expert in law firm financial issues, this book benefits from Greene's 30 years as a practising lawyer, (including three years

as managing partner of a large New Hampshire firm), and from his insights as a consultant to many firms on practice management, strategic and financial aspects of maintaining a healthy firm.

Greene points out that lawyers often do not welcome changes in the way they practise, and many react by trying to pedal faster and faster to keep up. Blinded by the work at hand, they are not receptive to spending the time necessary to think about how to improve their profits in the years ahead. To break this pattern and achieve improved profits, the first step is to develop a "revenue mind-set." This is covered in the first several chapters of the book.

In the remainder of the book you'll learn strategies that focus on maintaining positive client relations and healthy law firm environments, and find practical step-by-step plans that will result in improved revenue and larger profits at your firm. Some of the specific strategies include:

- Increasing billing realization rate: This is the percentage of the recorded billable hours that is actually billed to the client. Greene says in most firms this can be improved by five per cent or more.
- Increasing collection realization rate: These are bills that are submitted to clients and never paid. Greene shows you how to do a better job at collections.
- Increasing efficiency of production: Lawyers tend to lose from 20 per cent to 40 per cent of their potential billable time through poor time-management skills or inadequate support. Greene's experience is that most lawyers can

improve the efficiency of their law practice by capturing more hours during the day. Even just one additional hour of productive time a day can make a huge difference in revenue.

- Increasing the profit margin: Firms that have clung to hourly billing have seen their profit margins tightened, meaning they have to bill more hours to stay even. The book reviews other value-based billing methods that will allow a firm to be more profitable.

Included with the book is a CD-ROM featuring sample policies, worksheets, plans, and documents designed to help implement the ideas presented in the book.

This book will also show you how to fully develop your plans into a multi-year strategy for improved long-term financial results. Increasing revenue, while maintaining the same expense structure, is the most powerful approach to improving the firm's bottom line. The key is that extra revenue dollars go straight to the bottom line and make a profound impact on partner profits.

This 180-page book costs US\$79.95. For more information about it, and other excellent ABA LPM Section publications, go to www.abanet.org/lpm/catalog.

You can also borrow this book from the practicePRO Lending Library. (www.practicepro.ca/library)

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

Living well while living large

It's likely not surprising that the work/life imbalance that we at OLAP deal with all too often starts with work – or at least the public view of work. There's a widely accepted ethos in the legal community, at least in public, that lawyers are all grown-ups and understand and even welcome the challenge and sacrifice that come with a busy law firm practice. In public, they'll scoff at 'New Age' notions of work/life balance or self-care and tell you that if you can't take the heat, get out of the boardroom.

In private, however, when partners and fellow associates are out of ear-shot – perhaps at home with a sympathetic spouse or on the telephone with a counsellor at the Ontario Lawyers' Assistance Program – more and more lawyers voice a different view.

The current landscape

The practice of law carries with it unique challenges, regardless of the firm or firm size. Most counsel endure:

- billing and collection pressures;
- legal adversaries out for blood;
- competition among associates;
- the constant pressure to remain on top of the ever-evolving jurisprudential landscape; and above all,
- extreme time pressures.

According to a Canadian Bar Association-Ipsos Reid survey, 68 per cent of lawyers surveyed have difficulty achieving a balance between their professional and personal lives; 84 per cent said time demands are the greatest challenge.

In another survey, nearly half (48 per cent) of supervised lawyers from all practice sectors agreed with the statement: "I feel stressed and fatigued most of the time."

To be sure, work/life balance is a subjective game. Two associates, working at precisely the same pace, may have diametrically opposing opinions of the work they're doing and what type of 'life' that represents. Many legal practitioners simply love the work and can't get enough of it. Long hours at the office mean doing more of what fuels them. Others, however, scratch and claw their way through each day. They can't wait to get their work done so that they can finally have a moment's peace – a respite from the grind. Undoubtedly, the majority of counsel find themselves somewhere in the spectrum between these two poles.

Where you stand depends on who you are

There is no global solution to finding balance in work and life. The only common aspect in everyone's experience of balance is the utter lack of commonality. Each person must strike that individual balance based on his or her unique values, preferences, needs and goals.

So where are you on the work/life spectrum? What values do you bring to the table? At your core, what's most important to you? When you look back at your life and career at age 80, what will that person think of the life you're now living?

This last question, often referred to as the Future Self exercise, is a telling one. Lawyers generally find themselves where they are, on a treadmill to somewhere, not entirely conscious of the purpose or ultimate goal of the whole exercise. A quick way to spring into consciousness about the road you're on is to check in with your Future Self.

What most people find when they visualize a conversation with that person is that the Future Self has a more expansive, less judgmental view of the purpose in their lives and what truly is fulfilling to them. One lawyer's Future Self may tell her to give herself a break and not be so hard on herself. She may give her a perspective on the relative importance of money versus spiritual or social pursuits. Warren Buffett, the second wealthiest person in the world, recently told an audience of university students that to him, the true measure of success is the number of people who genuinely care about and respect you when you near the end of your life.

Another lawyer's Future Self may look at the long hours spent on complex, challenging projects with passion and verve, and reflect on how that pursuit will stand that lawyer in good stead at the end of a long, rewarding career. The key is that when one strips away the immediate concerns of face time in the office or this month's billable hours goal, one can more clearly see the true motivation for one's trajectory in life. One can take a longer view, more attuned to who one is and how one wants the professional and personal life to unfold.

The key piece of the puzzle lies in knowing yourself. It strikes some as ridiculous to suggest that a person would not know him or herself. Who else would know what makes them tick, what excites them, what scares them, what fulfills them, if not themselves? Furthermore, lawyers are some of the brightest and most creative and accomplished members of our society. If anyone has the requisite brain power necessary for self-awareness, it's lawyers.

And yet, when you ask people about the lawyers they know – family members, friends, high school or university

classmates, etc. – aside from almost universally being impressed with the accomplishment of becoming a lawyer, those non-lawyers reveal how so many of the legal practitioners they know are unhappy or even unwell.

Ultimately, it is the firm and not just the associate that suffers. Catalyst Canada, in its recent report on flexibility in Canadian law firms, found that 62 per cent of female associates and 47 per cent of male associates say they intend to stay with their current firms for five years or less. Further, both women and men reported the same leading factor in choosing to leave their current firm for a new one: an environment more supportive of family and personal commitments, as well as more control over their work schedules. Catalyst found that associates with positive perceptions of their firms' work-life cultures intended to stay with those firms for a longer period of time.

On the other hand, when a firm invests time and money in new associates, only to have them leave at the very time that they are about to reap profits for that firm, the cost is measurable. Catalyst calculated that an associate's departure costs a firm an average of \$315,000. Clearly, the firms that heed these retention warnings foster not only a healthier work environment, but also a healthier bottom line.

What you can do

No matter what the work environment, associates seeking less stress and more

balance and fulfillment can, on their own, take steps to attain this goal. And the options available are as varied as the types of people using them.

Some of most widely accepted suggestions include:

- eating a well-balanced diet;
- not skipping meals;
- drinking lots of water;
- engaging in regular aerobic activity;
- practising relaxation techniques such as meditation and deep breathing; (When you're under stress, before speaking, take three deep breaths and then exhale. Deep breathing can be like a 'reset' button.);
- reducing or eliminating the use and/or abuse of alcohol, tobacco/nicotine or caffeine;
- monitoring the use of prescription drugs to guard against either physical or psychological dependence;
- getting sufficient sleep and rest to allow the body to recuperate;
- learning to say 'No!' to demands that are too much and knowing where that line is;
- doing something nice for someone else on a daily basis without them knowing about it and without expectation of reward;
- maintaining a gratitude journal or some other regular reminder of the good things in one's life; (Lawyers tend to

focus on the negative. In fact, many are paid to be pessimistic);

- taking regular vacations;
- maintaining a strong and active family and social network with frequent interaction;
- pursuing interests and hobbies.

Chances are you've simply skimmed this list with minimal thought: That desensitization is an integral part of the human mind's survival mechanism. It protects us from being overwhelmed and over-stimulated. However, desensitization can also numb us to obvious truths. We see so many self-help lists that we stop truly taking in the content.

So now read this list again, as if it was the first time. Take a breath, think about the ideas, internalize those suggestions that may resonate with you in your life and will steer you to living well while living large.

Doron Gold is a case manager at the Ontario Lawyers' Assistance Program (OLAP). He is a lawyer and certified personal coach with a private coaching practice working primarily with lawyers. He can be reached at the OLAP offices at (toll free) 1-877-576-6227 or in the GTA at 905-238-1740.

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(3) indicating if there are specific times when you'll be available for a return call.

Doing these three things will help the person understand why you called and, depending on the circumstances, enable him to get back to you with the information you require, even if he must leave a detailed message in your voice mail. If used properly, voice mail is an excellent

way to eliminate the time-waster of phone tag.

And, to those of you who restrict people to leaving 60-second messages: Please do us a favour and configure your voice mail so that we can leave you a longer and more detailed message.

Now, for the most important part of the entire column: Clearly and slowly state your phone number. Most people say their

number at speeds approaching Warp 5, with the result that it is unintelligible. Slow down and take a deep breath between each digit. Okay, maybe not quite that slow, but you get the point.

Dan Pinnington is director of practicePRO, LAWPRO's risk and practice management program. He can be reached at dan.pinnington@lawpro.ca

Deadline reminders



CLE Premium Credit deadline: September 15, 2007

How would you like to save up to \$100 on your 2008 insurance premium?

It's easy, with the LawPRO CLE Premium Credit program – a risk management initiative that provides a \$50 credit for each qualifying CLE program you attend between September 16, 2006, and September 15, 2007 (to a maximum of \$100 per lawyer).

You can claim the credit for reviewing an approved program on an archived webcast, CD-ROM or audio tape, provided you watch or listen to the entire program and have a copy of the program materials. Completing three modules of the Online Coaching Centre or one section of the Law Society's Best Practices Self Assessment Tool also qualifies for a \$50 credit.

To obtain the credit, you must complete the online Survey and Declaration on the LawPRO website no later than September 15, 2007. Your credit will be automatically applied to your 2008 insurance premium invoice.

For more information on the CLE Premium Credit, a list of programs that qualify, and to file your online Declaration please visit www.lawpro.ca/cledec.

Transaction Levy Filings due

INDIVIDUAL FILINGS AND FIRM FILINGS

The annual exemption form and the first quarter filing for real estate and civil litigation transaction levies for 2007 were due on April, 30, 2007. If you or your firm have not filed these form(s), please visit our website, www.lawpro.ca, and sign in using your Law Society member number or Firm Number and your e-file password (the same password used to file your insurance application online). Under the 'My Personal Account' menu, select the 'Transaction Levy Filing' tab.

Real estate and civil litigation transaction levy surcharge payments for the second quarter of the year ending June 30, 2007, are due on July 31, 2007.

2007 INSURANCE PREMIUM PAYMENTS

The next quarterly instalments by preauthorized bank account withdrawal or credit card will be processed on July 15, 2007, and October 15, 2007.

Monthly instalments by preauthorized bank account withdrawal or credit card are processed on the 15th of each month.

Sedona Canada E-discovery Principles released

The Ontario E-discovery Guidelines were very well received. After they were released in 2006 they were cited in case law and referenced at CLE programs in other provinces. It became apparent that a set of national guidelines that took into account local rules and practices in the different provinces and territories would be useful.

A number of individuals who helped develop the Ontario guidelines joined other practising lawyers, judges, in-house counsel, court staff and law society representatives from across Canada. They and The Sedona Conference®, an organization that developed e-discovery guidelines in the U.S., created the Sedona Canada E-discovery Principles.

These principles provide practical advice and best practices on how to handle electronic discoveries. They are available at www.sedonaconference.org.

The Sedona Canada Principles supersede the Ontario Guidelines, and they will be updated as practices develop and evolve. Input from members of the profession is welcomed.

See www.practicepro.ca/ediscovery for more information on e-discovery related issues, including links to precedent documents.

2006 LawPRO Annual Report: now online

In 2006, LawPRO posted solid results once again: Net income for the year was \$9.4 million, claims results were consistent

with the company's expectations, and our TitlePLUS® program strengthened its position as the Canadian Bar-related® title insurer.

A copy of the annual report has been sent to each law firm in Ontario. If you would like additional copies, please contact LawPRO Customer Service at 416-598-5899 or 1-800-410-1013. To download all or a portion of the 2006 LawPRO Annual Report, see www.lawpro.ca/annualreport.

Unpaid deductibles merit suspension

Convocation of the Law Society has clarified and confirmed the responsibility of insured members of the Law Society to promptly pay any outstanding deductible(s) on LawPRO claims, or face summary suspension.

For more information please refer to the March 2007 Report to Convocation of the Professional Regulation Committee at http://www.lsuc.on.ca/media/convmar2907_prc.pdf.

practicePRO Lending Library

The practicePRO Lending Library has opened its doors. This resource for Ontario lawyers contains almost 100 books on a wide variety of law practice management related topics, including: firm finances and billing; marketing and client service; technology and the internet; career and work/life balance issues; and firm management.

Several books are specifically written for solo and small firm lawyers. The library is located in the LawPRO office at One Dundas St West, Suite 2200 in Toronto and can be visited during regular business hours. We invite lawyers to come by to peruse our selection. You may borrow books in person or via e-mail/courier. A full catalogue is available online at www.practicepro.ca/library. You can borrow books for up to three weeks and we will ship the book anywhere in Ontario free of charge. They must be returned at your expense.

Events calendar



Upcoming events

June 20

OBA's Young Lawyers Division-Central
Charity Casino
Pier 27, Toronto
TitlePLUS sponsoring

June 20

How to avoid a malpractice claim
Dan Pinnington, practicePRO
Lang Michener, Toronto

June 21

Young Lawyers Division – East
Ottawa
TitlePLUS sponsoring

June 27

How to avoid a malpractice claim
Dan Pinnington, practicePRO
Heenan Blaikie, Toronto

July 5

Brampton Real Estate Board
*Title insurance & fraud: What realtors
need to know*
Kathleen Waters, TitlePLUS
Brampton

August 12-14

CBA Canadian Legal Expo
& Conference
Why electronic documents are different
Dan Pinnington, practicePRO
Tech tips for judges & litigators
Dan Pinnington, practicePRO
Jack & Jill take on technology
Dan Pinnington, practicePRO
Calgary, AB
TitlePLUS exhibiting

September 20

Oakville, Milton and
District Real Estate Board
Halton Symposium and Trade Show
The Oakville Conference & Banquet
Centre, Oakville
TitlePLUS exhibiting

Recent events

May 23

Stormont, Dundas & Glengarry Law
Association
Why e-documents are different
Dan Pinnington, practicePRO
Cornwall

May 24

Women's Law Association Alternative
Careers in Law Event
So you're a lawyer – Now what?
Yvonne Bernstein, LAWPRO manager &
claims counsel
Upper and Lower Barristers' Lounge,
LSUC, Toronto

May 31

OBA/LSUC/Advocate's Society
New Sedona Canada Electronic
Discovery Guidelines
Why e-documents are different
Dan Pinnington, practicePRO
Toronto

June 1

CCLA Annual Family Law Program
Why e-documents are different
Dan Pinnington, practicePRO
Ottawa

June 8

Niagara Legal Technology Day
City Hall, Welland
TitlePLUS exhibiting

June 11, 2007

LSUC Teleseminar panel
*Independent legal advice –
protecting yourself*
Mitch Goldberg, LAWPRO claims counsel

June 12

OBA How to Practise Law After Bill 152
– Title Fraud and the Land Titles Act
TitlePLUS exhibiting

June 12

Coldwell Banker Crampsie Realty
Cabuto Club, Windsor
TitlePLUS presenting

June 13

Family Lawyers of Waterloo Region
Tips for running an e-office
Dan Pinnington, practicePRO
Kitchener

June 13

Calgary Real Property Section, CBA
Using title insurance safely: tips & traps
Kathleen Waters, TitlePLUS
Calgary, AB

June 14

OBA's Real Property Program
*New Practice Guidelines, rules
and fee schedule*
OBA Conference Centre, Toronto
TitlePLUS exhibiting

June 19

Credit Union Lenders Presentation
*Title insurance & fraud:
What lenders need to know*
Kathleen Waters and Mark Farrish,
TitlePLUS
Prince Arthur Hotel, Thunder Bay

*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*

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President & CEO: Michelle Strom

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Editor: Dagmar Kanzler
dagmar.kanzler@lawpro.ca

Contributing editors: Stephanie Wei
stephanie.wei@lawpro.ca

Dan Pinninton
dan.pinninton@lawpro.ca

Design & Production: Freeman Communications

Tel: (416) 598-5800 or 1-800-410-1013
Fax: (416) 599-8341 or 1-800-286-7639
www.lawpro.ca

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