Volume 7, Issue 2 Summer 2008

LawPRO®

FRAUD UPDATE:
- funds handling
- employee fraud
- powers of attorney

10 critical practice issues

Biggest malpractice risks

LawPRO going green

Special Insert:
practicePRO tools & resources

practicePRO®

helping lawyers for 10 years

practicePRO more vital than ever

Our cover this issue says it all: On the one hand, we've got much to celebrate as our very successful practicePRO program marks its 10th anniversary.

But those celebrations are tempered by the reality that fraud continues to be a major issue facing all lawyers in all areas of practice.

Young and old, seasoned practitioners and new calls; lawyers doing commercial work, litigators as well as real estate lawyers: All are targets. Fraud is alive and kicking – and likely to cost the insurance program up to $10 million in 2008.

The good news is that reducing the risk of fraud in your practice is possible. But it does take a concerted effort on your part.

First, understand that you – no matter who you are – are as vulnerable as the next lawyer. No one – literally **no one** – is safe when it comes to fraud.

Second, make the time to educate yourself about how to best protect your practice from fraud. Consider these resources:

- The LawPRO website at www.practicepro.ca/fraud includes more than 30 articles on how to fight fraud.
- In this issue of the magazine: Tips on how to protect your practice from employee fraud. As well, three experts in the field of funds handling talk about how lawyers can mitigate the risk associated with fraud involving certified cheques and other financial instruments.
- The Law Society's new "know your client" requirements come into effect October 31. Make sure you and your practice are prepared to implement these new crime-fighting measures.

Third, make sure you have in place controls and procedures to help minimize fraud. We know this is not always as easy as it sounds. As an insurance company subject to the scrutiny of regulators, we too have to be vigilant and have in place systems and controls in all areas of our operations. But as your insurer, we also see first hand the damage wreaked by inadequate scrutiny and due diligence. Many of our claim files (and especially the theft matters) involve poor controls within law firms that have been highlighted and written about many times in the past.

We urge you to take the likelihood of fraud seriously. Insurance can spread the financial impact after the fact, but cannot prevent the problem from happening or repair the psychological damage once the fallout starts. When all is said and done, the buck stops with you. Only you can prevent fraud from happening to your practice and thus protect clients, employees, family and yourself.

Yes the message is sombre. But there's every reason to be optimistic. Lawyers are listening and telling us they've avoided being duped, thanks to the information we and others have put out there. We look forward to continuing to help the profession manage these and other risks – and to celebrating many more milestones for practicePRO and other LawPRO programs with you and your peers.

Kathleen A. Waters
President & CEO

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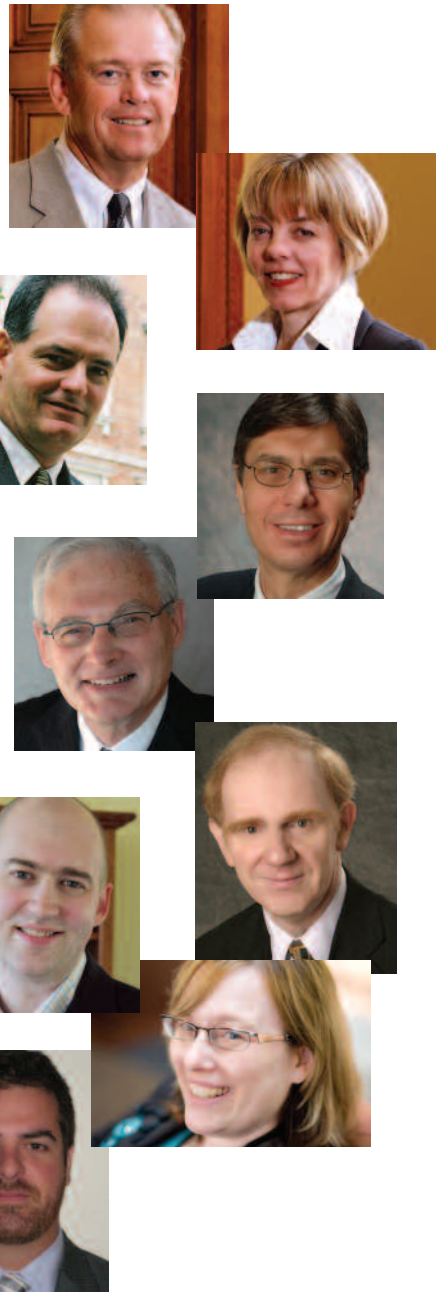

Fraud: A growing problem affecting all lawyers

The claims reported in 2008 to date are troubling. They are troubling because of the size of the claims, and the fact that so many of them are as a result of fraud. They are also troubling because not all of the losses suffered by the lawyers involved are covered under the LawPRO policy.

In the first five months of 2008, more than 50 claims with a fraud component have been reported to LawPRO, compared to 35 for the same January to May period in 2007. We estimate the cost to the program of these frauds at more than $4 million.

In addition to this, there is no easy "quick fix" to avoid these frauds. The reality is that, as never before, lawyers have to take control of the processes and procedures in their offices and be constantly vigilant.

Many of you will already have read about, and some of you may be the victim of, two new types of fraudulent scams.

Business loan fraud

In the first scenario, a new client introduced to you by a broker or a former client is in the process of setting up a business and is borrowing money to buy inventory or materials. The loan documentation looks legitimate and the deal is processed. A certified cheque is deposited in your trust account. You draw a certified cheque on the trust account as directed. Several days after that cheque is cashed, you are advised that the deposit cheque is counterfeit and there is a shortfall in the trust account.

Using this type of scheme, fraudsters successfully duped 10 lawyers over the Christmas and New Year holiday time. They struck again just before the May long weekend when four more claims were reported and four more lawyers were left with shortfalls in their trust accounts.

The lesson? Be extra vigilant during periods of time when there are banking holidays. When banks are closed for a day and offices are short staffed, the fraudsters have a bit more time to complete their plans.

Debt collection fraud

Equally disturbing is that these fraudulent schemes are not unique to Ontario. In Nova Scotia, an alert to members of the bar described a situation in which the lawyer narrowly missed becoming a dupe in a fraud situation. This involved a UK company asking for representation in the collection of an $110,000 debt owed by an Ontario company. The creditor offered to pay fees of 20% of the amount collected to the lawyer.

Notwithstanding that the law firm never formally agreed to represent the UK creditor, the lawyer received a telephone call from a woman who identified herself as being the accounts payable department of the debtor company. A $110,000 certified cheque from the company was delivered to the law firm. The cheque looked authentic, and appeared to have all the normal security features. Via e-mail, the lawyer was directed by the creditor to send the funds, minus legal fees, to an accountant in Singapore.

This lawyer too was aware of earlier fraudulent schemes that had been reported, and before complying with the direction, he directed his staff to do some independent checking on the debtor and creditor companies.

A Google search of the debtor company revealed an Ontario company with the same name, or close to the same name; but when contacted the legitimate company advised that it did not have an office in Ottawa. A reverse phone search of the company phone number shown on the cheque showed an address for what appeared to be an apartment complex in Ottawa, Ontario. Nothing could be found about the UK company. The law firm also reviewed the bank's website to determine if the bank address listed as a branch on the debtor cheque was shown on the bank's website. The bank's website did not list the address on the debtor cheque.

The lawyer then asked the local branch manager to check with the bank whose transit number was shown on the cheque, and that bank advised that they did not have a branch at the address noted. They confirmed that this was the sixth call they had received that day relating to this type of fraudulent scheme.

Lawyers are listening

The good news is that many lawyers are reading articles like this one, and paying attention to alerts, notices and e-mails from trusted legal sources. Many lawyers are alert to the fact that someone might be trying to dupe them, and they are developing a heightened sixth sense. Michel Castillo of the firm Advocates LLP contacted LawPRO and wrote us the following note:

> "I recall reading the Fraud Scam Alert in the Winter 2008 edition of the LawPRO magazine. In particular I recall reading about the fake UK business man. Sure enough, a few days ago I received an unsolicited e-mail from a UK business man calling himself Bill Stevens. With the article fresh in my mind, I followed up with Stevens. Meanwhile, I researched the

company he purported to work for. It is a legitimate company, but does not do the type of work that Stevens described. I wrote to the company to confirm whether Stevens worked there. As it turns out, surprise-surprise, Stevens does not work for that company. And strangely enough, I never heard from Stevens again."

What protected this lawyer was not simply that he was alert to the issue, but that he took several steps to ensure that he was dealing with a legitimate person. In addition, he wrote back to the potential client before accepting the retainer, and requested certain information.

"Thank you for your e-mail below. We do not undertake this type of work on a contingency basis. If you would like to retain our services, we will require a CAN $10,000 retainer. In addition to the retainer we will need:

1) the names of all parties involved in the transaction/dispute so we can undertake a conflict check;
2) all documents relating to the sale, including correspondence, bills of lading, receipts, invoices, proof of payment, etc.;
3) a telephone discussion to obtain full particulars of the potential claim;
4) a director's resolution from (the firm) confirming (the firm) agrees to retain our services and will undertake to pay our account.

Lastly, please advise how you obtained my name and reference. Thank you."

LawPRO has been publishing fraud alerts since 2004, but methods of committing fraud continue to evolve. There is no simple answer to protecting your clients, your firm and yourself.

But as these lawyers have demonstrated, by being alert it is possible to avoid being the victim of a fraud. Continue to educate yourself and your staff. The more people in your firm who are alive to the unusual elements in a transaction, and who are willing to ask the next question, the better positioned you and your firm are to avoid being a victim of fraud.

Not all claims are covered

The LawPRO policy is an errors and omissions policy and protects lawyers in the event that they have made an error in the course of providing professional services for clients. It provides coverage for claims for damages, provided that the liability of the lawyer is the result of an error, omission or negligent act in the performance of or the failure to perform professional services.

Not all claims made against lawyers are covered under the policy. If, for example, a client fell on a mat in your office and broke an ankle and subsequently sued you for damages, the LawPRO policy would not respond. Part III (e) of the policy specifically excludes claims for this type of injury. Similarly, claims for fees and claims arising out of business ventures are among other exclusions listed in Part III of the policy.

Coverage for claims involving counterfeit bank drafts and certified cheques are not specifically insured or excluded from coverage under the Law Society insurance program policy with LawPRO.

Under a professional liability insurance policy, LawPRO looks to the circumstances of the claim reported to determine whether the necessary elements are there for coverage to apply, and then ensures that there is nothing within the policy that may serve to restrict or exclude coverage.

For example, this means ensuring that, under the principle insuring agreement under the program policy (Part I "Coverage A. DAMAGES"), the claim;

- arises out of the performance of Professional Services for others,
- that the insured's liability is the result of an error, omission or negligent act,
- that Damages arise out of the Claim.

Presuming the special provisions (dealing with territory and policy period) and general conditions of the policy are met, and no exclusions apply, coverage then would be provided.

In situations in which a lawyer has suffered a shortfall in a trust account because of reliance on a counterfeit instrument, claims are likely to arise once the true nature of the instrument has become known and the instrument is declined.

To the extent that a shortfall is experienced by the lawyer's clients to whom professional services had been or were intended to be provided, coverage is generally available. To the extent that a shortfall rests between the lawyer and his/her bank, no coverage is generally available in the absence of any Professional Service having been provided to the bank.

It is very important therefore that you are alive to any potential fraud. If you have not educated your staff, please ensure that they are familiar with the indicia of fraud and that they come to you with any concerns, no matter how minor. Your trust account is the key to a successful practice.

Caron Wishart is vice-president, Claims, for LawPRO.

Fraud: The threat from within

The lawyer leaves the office on a Friday night, wishing his long-term, still hard-at-work law clerk a great weekend. He comes back to the office on Monday to a quickly unfolding nightmare. His trusted employee does not show up for work. He soon discovers that his client files and trust records are missing and ultimately realizes that trust funds are gone as well. Irate mortgagors and mortgagees start calling, demanding mortgage funds and discharges but his trust account has been depleted of funds which were earmarked for those purposes. In some cases, he discovers that the mortgages are fraudulent or have never been registered. Everyone is looking to him for having breached a trust owing to his clients.

This is not the storyline of the next legal thriller. This is reality. While value, title and identity fraud are now commonplace in commercial and real estate transactions, and lawyers tend to be much more alive to these issues when meeting with new clients, they may not appreciate that long-term employees are also responsible for millions of dollars of losses each year.

Fraud by trusted long-service employees

The time for background checks of these employees had long-since passed. They have usually been employed with the same law firm for upwards of 20 years. They have intimate knowledge of their employer's law practice, clients, schedules, signatures and trust records. They are usually relatively autonomous and are rarely supervised (if at all) by their employer.

Sole practitioners and small firms are particularly vulnerable to employee fraud. Sole practitioners, especially those with a high-volume real estate practice, often significantly rely on their administrative support team. Their clerks, bookkeepers and assistants are often the ones that "run the practice."

Generalists who do not limit their practice to real estate files but also handle litigation matters are possibly at an even greater risk. As a result of being out of the office and in court some of the time, they may give their employees authority to meet with and sign up clients, sign cheques and register documents through Teranet. The employees often have the lawyer's e-reg® passwords in order to close transactions in breach of Teranet security protocols and the Rules of Professional Conduct.

Hundreds of thousands of dollars of client trust funds often pass through their trust accounts each month. Based on LawPRO's claims experience, the relatively easy access to these funds becomes irresistible to their employees.

Warning signs

There are often warning signs which are overlooked or even ignored. Lawyers are often reluctant to accept that an employee, especially a long-term one, has done anything wrong.

But the signs are there: The employee's opulent lifestyle, for example, may not accord with what he is earning. The employee may be acting erratically or in a manner different from his previous behaviour. He may find himself explaining away or apologizing for numerous inconsistencies in the books and records when they are brought to his attention by the lawyer. He may be meeting or associating with people who are known to the lawyer to be of unsavoury or suspicious character. He may take few, if any, days off so that a replacement cannot find out what he has been up to.

If enough indicia of fraud are present and the lawyer fails to turn his or her mind to it or take steps to question or deal with the employee, the lawyer's conduct may amount to wilful blindness and may jeapordize any coverage that may have been otherwise available to that lawyer under the LawPRO policy.

How can you avoid becoming a victim of employee fraud?

1. Start by being mindful of Rule 5.01 of the Law Society Rules of Professional Conduct and the commentary to that Rule which deals with supervision of employees and the electronic registration of title documents. **Never give anyone your Teranet PSP and password.**
2. Never authorize your employees to sign cheques on your behalf and never sign blank cheques for any reason. If you do, you will be in breach of Part IV, section 11 of By-Law 9 which deals with Trust Account Transactions. Only your partners should have authority to sign your trust cheques. Your surplus trust cheques should be securely stored where no employees can access them. Large trust cheques should require the signature of two partners.
3. Implement internal controls and safeguards in your law practice. Although by no means an exhaustive list, the following controls should be implemented to protect yourself from employee fraud:
   - When something seems out of place or unusual, ask questions until you get to the bottom of the inconsistency.
   - Fraudulent employees often work alone and are protective of their "turf." Avoid having one employee responsible for all accounting and bookkeeping functions. Inconsistencies are more likely to be discovered if multiple employees are handling the banking and bookkeeping entries.

- If vacation or illness forces you to be away from the office, your office should either be shut down or another lawyer should be engaged to monitor your practice and staff while you are away.
- Other employees may have significant insight into a particular employee's behaviour. Listen carefully to what your other employees may be telling you … and trust your instincts.
- Stay involved in the reconciliation of your accounts and reconcile your accounts on a monthly basis.
- Consider whether fidelity insurance or bonding your employees would protect you.
- Purchase excess insurance.
- Consider hiring a consultant to review your internal controls and suggest changes.

Lawyers who carefully supervise their staff are less likely to be caught by surprise by employee fraud. A sloppily-run practice is a breeding ground for employees who may feel they are underpaid or have a real or perceived grievance which they may wish to remedy by biting the hand that feeds them.

No matter how busy your practice, do not abdicate responsibility for running your office to your staff. Take an active role in managing your risk by implementing as many internal controls as is practical. It is ultimately each and every lawyer's responsibility to manage and control their own practice in order to protect themselves and their clients from dishonest employees.

See page seven of the *Managing the Finances of Your Practice* booklet for a more complete list of internal controls (www.practicepro.ca/financesbooklet).

Karen Granofsky is claims counsel at LawPRO.

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Avoiding the bad apple

Screening new staff during the hiring process

Productive and honest staff are a critical part of every law firm. From an internal control and fraud prevention point of view, you want to make sure from the very start of the hiring process that you avoid hiring anyone that has skeletons in the closet.

To help you arrive at your shortlist, consider searching the Internet via Google and other search tools for information on job candidates that look promising. Don't overlook checking MySpace, Facebook, LinkedIn or other similar Web 2.0 social networking type sites for information.

Ask everyone you interview for multiple and appropriate references that will allow you to make all necessary inquiries into the candidate's background, both in respect to skills and experience, but also with respect to issues that may be of concern. Don't stop at just reading over the list of references – no matter how impressive it may be. Contact all references and make appropriate enquiries of them.

In addition to reference checks, other background checks to be considered are:

- education verification
- employment verification
- proof of eligibility to work in Canada.

If you are hiring a lawyer, check that he or she is a member in good standing of the Law Society, and has an appropriate level of competence, as confirmed by checks of discipline and claims records.

For employees who will have access to financial or other sensitive information, consider doing a criminal background check and a Credit Bureau and identification verification. This task is far easier if you use a background checking service such as BackCheck, ADP or ISB Corporate Services.

Note that these background checks will require the consent of the job candidate (get a duly signed consent form). The information you obtain must be used only for employment related purposes compliant with human rights, labour, and privacy laws, as applicable.

Follow-up with the candidate on anything that raises any concerns, and do not hire the person unless any concerns you have are explained to your complete satisfaction.

Dan Pinnington is director of LawPRO's practicePRO program.

Show me the money

Funds handling – and the benefits of wire transfers

The recent increase in the number of frauds – many involving counterfeit financial instruments – have been a wake-up call to the bar on two fronts:

- First – fraudsters are targeting all lawyers, not only real estate practitioners. For more on this, see the article ***Fraud: A growing problem affecting all lawyers*** in this issue.
- Second – that there is some confusion about how financial instruments move through the Canadian payments system and how lawyers can verify that funds deposited to their trust accounts are "good" – that is, final and irrevocable.

The following article is based on interview responses provided to LawPRO Magazine by three experts in the field of funds transfer: Martin Sclisizzi of Borden Ladner Gervais LLP, Mike Seto of Teranet, and Pierre Roach, Vice President of Payment Services with the Canadian Payments Association.

The principal conclusions to be drawn from the interviews are as follows:

1. Funds cleared through the conventional system – the Automated Clearing Settlement System (ACSS) – are not "good" the minute they hit your trust account.

In fact, in certain circumstances, these funds could be subject to return for weeks or even months.

Pierre: There is a distinction between a payment item "having cleared" and the payment being final or good funds. Clearing refers to the exchange of paper and electronic payment items between financial institutions (FI) and the reconciliation of balances among participating FIs.

Cheques and other paper payment items are generally cleared overnight following the day of deposit (as explained above, this does not necessarily equate to "good funds" or funds being final and irrevocable). Settlement occurs on the morning of the next business day through the major financial institutions' settlement accounts at the Bank of Canada.

Bank drafts and certified cheques cannot normally be returned through the clearing system and are final in most instances; however, there are certain exceptions. If either of these items has been materially altered after it was issued (e.g. change of payee or amount), it can be returned through the clearing system for up to 90 days after the date of receipt by the drawee FI.

An item bearing a forged endorsement can be returned for up to six years (prior to June 2008, the return period was unlimited). In the rare event of the drawee financial institution's default, they could also be subject to return until they are settled the following morning.

Martin: Upon deposit of a certified cheque or bank draft for collection, the payee is normally given immediate provisional credit by his bank for the full amount of the instrument. Generally speaking, the collecting bank has the right of "chargeback" by reversing or eliminating the provisional credit where the cheque or bank draft received by it for collection has been dishonoured.

If the drawee bank wishes to dishonour a cheque or other payment instrument (other than a certified cheque or bank draft), it is required to return the item "no later than the business day following receipt by the first organizational unit of the drawee (the bank on which the cheque is drawn) that is able to make or act upon a decision to dishonour the item." This is usually a branch. A certified cheque or bank draft, strictly speaking, cannot be returned except for "material alterations" or a forged endorsement.

As the clearing process reaches every branch of every deposit-taking financial institution in the country, the time required to present an item physically to a branch of account varies from a day or two for branches in major centres to as long as eight to 10 days for those in more remote locales. It also depends on whether there are intervening statutory holidays.

As a result, generally speaking, it would not be safe to withdraw funds which have been provisionally credited for at least eight to 10 days. Cheques drawn on U.S. banks can take as long as 30 days to clear.

2. The other funds handling system operated by the CPA – the Large Value Transfer System (LVTS) – addresses lawyers' need to know that funds in their trust accounts are "final and irrevocable."

Mike: LVTS was introduced in 1999 and is currently the settlement process behind all wire payments between Canadian financial institutions transacting in Canadian funds. (Care should be exercised in relation to inter-branch wires; while a financial institution may use similar message formats (SWIFT), these transactions do not typically go through LVTS and do not automatically attract the same benefits.)

A bit of a misnomer, LVTS is not limited to large value transactions. Payments of just several dollars can be made through this system. However, in 2005, the CPA reported that 89 per cent of the total value of transactions cleared and settled through its systems were made through LVTS (compared to about 1 per cent of the number of transactions).

The unique aspects of LVTS are:

1) Funds from a completed transaction are backed by pledged collateral and ultimately guaranteed by the Bank of Canada. To participate in LVTS transactions, financial institutions must pledge security to the Bank of Canada to cover the net balances of transactions made during the day. As a consequence, the Bank of Canada guarantees all completed transactions, backed by collateral pledged by financial institutions.
2) Once completed, transactions are irrevocable. Each LVTS transaction passes through controls operated by the CPA, that ensure there is sufficient collateral to back it. If controls are successfully passed, including sufficient security remaining, the transaction is completed **irrevocably** (and evidenced by a Payment Confirmation Reference Number – or "PCRN"). The payment is final.[1]
3) Timeliness. Typically, it takes under one minute for the CPA to complete a LVTS transaction from the initiation by a financial institution; therefore the claim of "near real-time processing."

In the early days of LVTS, financial institutions were batching their transactions, thereby frustrating the benefits of near real time processing to wire customers. More recently, all of the major banks have introduced online commercial banking suites that include an online wire service (i.e. LVTS) and have been processing transactions individually. However, it is important to note that all of the banks have various and differing internal regulatory processes that may result in manual processing. This may delay a financial institution in processing a LVTS transaction but regardless, LVTS processing is far faster end to end than ACSS.

COST ISSUES

The practical disadvantage of LVTS is its cost. A transaction usually costs $10-$15 for the entity making the payment and another $10 to the party receiving payment. This varies slightly between financial institutions. (Not overly onerous when compared to the cost of obtaining certified cheques – around $12 – and potential courier costs for delivery, but many firms have successfully negotiated with their banks to waive certification fees.) Additionally, if online services are used, some institutions require set up costs (some implement security devices with users) and others have monthly service charges.

An LVTS payment will not completely assure you that the underlying transaction is good (i.e. although the payment transaction is final and irrevocable, if there is a problem with the making of the payment itself – e.g. money laundering – there could be a claim that results in a reversal outside of the actual payment process). But it should provide a situation where your trust account will not be short due to a fraudulent instrument.

Pierre: A clear benefit for beneficiaries is that LVTS payments are final and irrevocable, once received by the beneficiary's FI. In addition, the receipt of "good funds" can generally be confirmed the same day (with the potential exception of payments sent towards the end of the day).

As a sender of LVTS payments, one caution is to ensure you are dealing with a legitimate party as a beneficiary. Since payments are final once sent, they could not be stopped or reversed through the clearing system in the event of a scam. However, this issue is not unique to LVTS.

1 As provided under the Payment Clearing and Settlement Act, S.C.1996, c.6 and the LVTS BY Law, sections 42 and 43 (available: http://www.cdnpay.ca/systems/lvts_overview.asp)

RISK MANAGEMENT RECOMMENDATIONS

Pierre: As a payment recipient, the best option from an irrevocability perspective is to request payment by wire transfer through the Large Value Transfer System (LVTS). LVTS payments are final and irrevocable as soon as they are received by the beneficiary's FI.

At a minimum, you should be very cautious about accepting items that have been endorsed over to another party, as there could be a risk of forged endorsement. Only accepting certified cheques directly from the account holder, or confirming the key details such as payee and amount with the account holder can avoid the risk of material alteration.

Martin: The reality is that certified cheques will continue to be the predominant method of payment. Given this, lawyers should ask their bank to "call" certified cheques – that is, have your bank call the bank that certified the cheque to confirm the details on the cheque and the certification. This is not bullet-proof, but is a measure of insurance.

Mike: It's all about risk. The firm must make its decision cognizant of its willingness to assume risk, its knowledge about the client/entity making the payment and the amount. Mindful that most payments do not go astray, there will be circumstances in which lawyers can continue to use certified cheques that will not be subject to return.

However, in situations involving identifiable risk factors (a new and unfamiliar client, client pushing to complete deal quickly, funds moving offshore or other circumstances that are unusual or suspicious), the minimum that should be done is to check with your financial institution as to whether it is safe to withdraw from the deposit (note the absence of reference to "clearing" or "settling"). Expect, however, a response indicating upwards of several days.

If timeliness is an issue, consider a wire. Return the certified cheque or other instrument and kindly ask the payor to wire funds to your account. By using LVTS, risks associated with paper instruments (e.g. forged endorsements and fraudulent instruments) are avoided. While this may not prevent a claim down the road that the payment itself should never have been made, this should prevent you from having to deal with a shortage in your trust account.

LawPRO: If you have decided that wiring funds as LVTS payments is the way to go, be sure to also consider the following:

- You may not be able to get confirmation of the receipt of "good funds" where the transaction is occurring late in the business day. The earlier in the day you can move funds and close your transaction, the better.
- Although the CPA can do its part of an LVTS transaction very quickly, your instructions have to be sent to your individual financial institution to initiate the transfer, and then by the FI through the LVTS. Contact your financial institution to review its on-line or other systems for initiating and receiving wire transfers, and the costs per transaction and/or per month. You need to be confident that delays or mistakes are unlikely in the handling by the financial institutions at either end of the process.
- Is it enough for you to confirm receipt of a wire transfer by reference to your on-line banking system? Ask your financial institution for advice, including whether wire transactions as line items on a statement are referenced in a specifically identifiable way on which you can rely.
- Ask your financial institution if it uses true LVTS wires for inter-branch wires or if it will offer the same protections against reversibility as LVTS regardless of the clearing system that it uses.
- Don't forget that the Law Society of Upper Canada's By-law 9 contains requirements related to electronic transfers of trust funds. You must keep those requirements in mind when evaluating any electronic system for wiring funds.

Powers of attorney and solicitors' liability:

The case law

The 2007 ruling in the *Reviczky v. Meleknia* case put the spotlight on questions about a solicitor's duty to "go behind" a power of attorney. The case has generated discussion within various practice sectors – and among lawyers within the same practice area – about a lawyer's obligations when dealing with matters involving powers of attorney. Some argue that the ruling suggests a new standard of care requiring lawyers not to take a power of attorney at face value; others maintain what lawyers are doing now is appropriate and sufficient.

A look at case law provides some insight and direction on this question. This Casebook column examines "power of attorney" issues confronting lawyers in two parts:

1) preparing and explaining powers of attorney; and
2) transactions carried out with a power of attorney.

Preparing and explaining power of attorney

In *Thibeault v. Household Realty Corp.; Walsh, Greenberg and Robinson, third parties*, [1993] O.J. No. 2024 (Ont. Ct. Gen. Div.), Mr. Justice Binks severely criticized a solicitor who obtained the signature of an extremely ill and elderly woman on an unlimited power of attorney. The power of attorney allowed the elderly lady's daughter and son-in-law to place mortgages against her home as security for their indebtedness to Household.

The same solicitor acted for Household Realty, as well as for the daughter and son-in-law. The solicitor and the son-in-law went to the plaintiff's house and obtained her signature on the power of attorney. No effort was made to explain its meaning or the potential consequences of signing it.

The mortgages went into default and the home was sold under power of sale. In resisting Household's action for payment of the proceeds, the plaintiff relied upon the defence of *non est factum*, the failure of Household's lawyer to recommend independent legal advice, and the fact that the transaction was unconscionable. Household's solicitor was third partied by Household, but settled with it prior to trial. The plaintiff's action was upheld by Mr. Justice Binks on all three grounds.

The following expert evidence was adduced on the standard of care of a solicitor overseeing the execution of a power of attorney. Mr. Justice Binks accepted it:

> "It is my opinion that any lawyer practising in Ontario in obtaining a power of attorney has a responsibility to fully explain the nature of the document to the person executing it. The lawyer must be in a position to be able to testify, if necessary at a later date, that there was no doubt of the fact that the person giving the power was fully aware of all the consequences. This statement is even of more importance when the solicitor has had no previous contact with the person involved, and is in fact acting on behalf of another client.
>
> "In circumstances where the solicitor involved is acting on behalf of a client who will benefit from the execution of the document by being granted security for a debt which might otherwise be uncollectible, the solicitor has an even greater duty to the person granting the power and should insist upon that person obtaining independent legal advice."

The trial judge termed the solicitor's behaviour as "slipshod and appalling". His comments about Household's behaviour were also scathing.

In *Macedone v. CL Collins*, [1996] NSWSC 634, the Court of Appeal for New South Wales was sharply divided about the scope of the advice necessary when advising about the risks of giving a power of attorney to complete a corporate transaction.

A company controlled by Mr. and Mrs. Collins on the one hand, and Mr. and Mrs. Wallis on the other, contracted to buy a property. A lender agreed to provide the financing, provided the Collinses and the Wallises provided personal guarantees and mortgages on their homes. Mrs. Collins intended to be on holidays in the Fijis at the time set for closing. She agreed to give Mr. Wallis a power of attorney to execute the necessary documents on her

behalf. Mr. Willis, the solicitor for the borrower company, prepared the power of attorney. Mr. Wallis executed the guarantee and mortgage on Mrs. Collin's behalf, although, unbeknownst to Mr. Wallis, Mrs. Collins had by then returned to Australia.

Default eventually occurred. The lender called in the guarantees and the mortgages. Mrs. Collins alleged, and the trial judge accepted, that solicitor Willis was negligent in failing to properly explain the power of attorney to her. Willis told her that she risked losing her home on the basis of the documents which Wallis would sign on her behalf. Willis failed to expressly tell her that the power of attorney would be used not only to place a mortgage on her home, but also to sign a guarantee rendering her jointly and severally liable, along with the other investors, for the borrowing company's entire indebtedness. The trial judge also faulted Willis for failing to make the power of attorney time limited to the period in which Mrs. Collins would be absent from Australia.

Two of the three justices sitting on Willis's appeal agreed that his explanations were adequate. It seemed to them that a sensible way of explaining to a legally unsophisticated person the impact of granting the power of attorney was to stress the risk that her home could be lost. Mrs. Collins worked as a cleaner and had no other assets. The temporal duration of the power of attorney was irrelevant to Mrs. Collins. The power of attorney was used for the purpose intended. The third justice on appeal agreed with the trial judge and would have upheld the finding of liability.

Transactions carried out with a power of attorney

A firm of solicitors came to grief in *Al-Sabah v. Ali*, [2000] E.W.J. No. 3721 (Eng.C.A.), allowing in part appeal from Ferris, J., 22nd January 1999 (the Times 27th January 1999).

The plaintiff invested in real estate in London. His property manager, Ali, forged a power of attorney from the plaintiff to a solicitor. Ali then had the solicitor use the forged power of attorney to mortgage the property. The proceeds were evidently misappropriated by Ali. Next, Ali forged the plaintiff's signature on a transfer to himself. Ali then obtained another mortgage to pay out the first. These documents were registered on proof of the power of attorney. Ali eventually defaulted on his mortgage payments, and the "new" mortgagee carried out a power of sale.

The plaintiff successfully sued the solicitors who acted on the mortgages and on the conveyance. They accepted the instructions from a person claiming to represent the supposed client without ascertaining the true position. They did not speak with the plaintiff, or seek his written instructions. The transactions involved the transfer of the supposed client's property to his agent; thus the duty imposed on the solicitor was heavier still.

In *Carr v. Bower Cotton* [2002] EWCA Civ 1788, a British solicitor saved himself from liability by going back to the donor of a power of attorney to confirm the instructions given to him by the donee of the power.

Mr. Carr, an Australian solicitor, represented a syndicate of investors. He entered into an investment agreement with, and signed a limited power of attorney in favour of, Kelci Management Consultants. Under the agreement, $4 million belonging to Carr and others was transferred into an account held by Bower Cotton, a respected London firm. The agreement and power of attorney authorized Kelci to ask Bower Cotton to transfer funds out of their account for the purpose of making specified investments. Carr believed that fantastic profits were in the offing. The English Court of Appeal observed that both documents were poorly drafted. Neither Carr nor Bower Cotton expressed concern.

Kelci asked Bower Cotton to transfer the money to a separate bank account in Copenhagen, controlled by Kelci. Mr. Simms of Bower Cotton was worried. Bower Cotton would have absolutely no control over the money. Bower Cotton would have no way of ensuring that the money was properly used to purchase investments. Kelci was providing no security to ensure the return of the money. Simms was concerned that the investment agreement and power of attorney did not permit this transfer. Simms contacted Carr, who agreed that the money could be sent from the solicitor's account, to Kelci's account. This was done, and afterwards the money duly disappeared.

Carr sued Bower Cotton. The judge at first instance dismissed the claim; the Court of Appeal affirmed the dismissal. Carr had instructed Bower Cotton that he wanted the funds to be placed under Kelci's control, and that he did not require any safeguard. Bower Cotton were entitled to act as they had. The English Court of Appeal was highly critical of Bower Cotton's involvement in this scheme.

The most recent notorious real estate fraud case is *Reviczky v. Meleknia; Caplan (Intervenor)* 2007 Canlii 56494 (On S.C.).

Justice Macdonald voided the HSBC Bank's mortgage because it did not take steps to scrutinize the power of attorney pursuant to which its chargor took title. Fraudsters forged the power of attorney, and used it to sell the house they did not own to an innocent purchaser. The HSBC funded the purchase.

Caplan, the lawyer representing the fraudulent seller, sent a copy of the forged power of attorney to the lawyer acting for both the purchaser and the Bank. Both lawyers were unaware the document was a fake.

At this point, the second lawyer failed to "inform himself about the terms, conditions or validity of the power of attorney." The power of attorney was ostensibly dated only one month before the

transaction closed. The power of attorney stated on its face that the donor of the power of attorney was over 88 years old, that the power could be revoked at any time, and was valid until the donor's death. The power of attorney was witnessed by only one person, instead of the two mandated by the *Substitute Decisions Act*.

The Court suggested that the Bank's solicitor should have made inquiries as to whether the donor was still alive, had ever revoked the power of attorney, or was mentally competent when the power of attorney was signed. The lack of proper witnessing might also have been questioned. Had the Bank's solicitor made inquiries on these points, it is likely that the fraud would have been prevented.

Since HSBC, through its lawyer, had an opportunity to avoid the fraud and did not do so, the court decided it could not succeed in its claim that the mortgage was valid.

This case raises difficult issues about a solicitor's duty to "go behind" a power of attorney. Where a power of attorney has ostensibly been signed very recently, but the donor is elderly, must a solicitor really make inquiries about the donor's mental capacity at the time of signing, and whether the donor is dead or alive? And what sort of evidence is adequate to satisfy these inquiries? What if the donor is out of the country, or has become mentally incompetent in the meantime? Must the donor be contacted to see if he has revoked the power of attorney?

Shiokawa v. Tohyama; Woods Adair (T.P.), [2005] B.C.J. No. 294 (B.C.C.A.), Dismissing Appeal From [2003] B.C.J. No. 1997; [2004] B.C.J. No. 230 (B.C.S.C.) ended more happily for the solicitors involved.

A firm of solicitors which represented a lender, and a purported borrower in a transaction were not negligent in failing to detect that the powers of attorney presented by the "borrower's" fraudulent agent were forgeries. The borrower was later successful in having the mortgage expunged from title. The lender lost its security and its money.

The standard of care for this transaction was stated to be:

> "… a reasonably competent solicitor in dealing with documents executed out of the province, having determined that the form of documentation meets the criteria of due execution will accept those documents for the purpose intended without making further inquiry of the witnessing lawyer unless circumstances relating to the documentation suggests that further inquiry would be warranted."

The facts surrounding the transaction were not sufficiently suspicious to put the solicitors on inquiry. The power of attorney initially presented contained certain errors, e.g., legal descriptions, which were corrected.

The lender made no inquiries of its own concerning the authenticity of the power of attorney. It did not instruct the solicitors to make any inquiries. Solicitors are not expected to authenticate legal documents, unless instructed to do so. There was no reason to believe that if the initial errors were reported to the lender, it would then have made inquiries which would have disclosed the forgery.

Debra Rolph is LawPRO's director of research.

Lessons to be learned

What do these examples show us? A review of the current case law provides some guidance on how lawyers may want to approach clients and files involving powers of attorney. Lawyers should take note that the following are not intended to be a projection of where a court may say the standard of care is or what the lawyer best practices should be.

- Fully explain the nature of the power of attorney to the person executing it. Make sure that the person giving the power is fully aware of all the consequences. This is even more important when you have had no previous contact with the person involved, and are in fact acting on behalf of another client.
- Where you are acting on behalf of a client who will benefit from the execution of the power of attorney, because it will be used to grant security to the client for a debt which might otherwise be uncollectible, insist upon independent legal advice for the person being asked to execute the power.
- Where the power of attorney is given for the purpose of executing documents in an upcoming commercial transaction, consider whether you ought to advise the donor about the consequences of the documents to be executed under the power. This may or may not be practicable, depending on whether your have personal knowledge of the transaction.
- Consider making the power of attorney time limited, and its terms no broader than absolutely necessary.
- Be VERY concerned if the donee of the power of attorney proposes to take the donor's property for himself or herself. Seriously consider confirming the propriety of the transfer with the donor, unless the power of attorney expressly allows for the donee to take the property.
- Scrutinize the power of attorney for irregularities on its face. Was it signed by two witnesses? Are there any suspicious circumstances, i.e., was the document witnessed overseas, yesterday?

practice PRO®

a look back

On June 10, 1998, practicePRO had its official launch. A year of research and planning had gone into LPIC's (as LAWPRO then was called) newest venture: a risk and practice management program that was unlike any other. The program reflected the vision of its two creators: Malcolm Heins, who was then president and CEO of LPIC, and is now CEO at the Law Society; and Karen Bell, then partner with a leading law firm who was brought in to develop and implement the practicePRO project. In this interview, Heins and Bell look back – and to the future.*

practicePRO Timeline

1997

- Work began on risk management initiative
- Developed risk management program for LSUC Bar Admission

1998

- practicePRO launched
- practicePRO website launched
- ***Managing the lawyer/client relationship*** booklet
- ***Managing conflicts of interest*** booklet

1999

- Online Coaching Centre launched
- ***Managing*** booklets online
- LPIC News: *Special "Y2K" issue*

2000

- Special Report on Litigation
- ***Managing the practice of investing in clients*** booklet

2001

- Anti-Money Laundering Legislation Guide & Firm Compliance Manual
- Special Report on Fraud

2002

- CLE premium credit launched
- LAWPRO Magazine: *"Focus on Mentoring"*
- ***Managing a mentoring relationship*** booklet
- LAWPRO Magazine: *"Practice Interruptions"*
- ***Managing practice interruptions*** booklet

Where does practicePRO have its roots? What was the vision for the program?

Heins: We did not have any pre-conceived notions about what our risk management program should look like. We knew that, as part of our plan to rebuild confidence in the insurance program after the deficit crisis, we wanted to be more responsive to the needs of lawyers and deliver on the promise of improved customer service. And I knew, from previous experience insuring other professionals, that successful claims management should be complemented with a risk management component.

What goals did you have for the program?

Bell: We established early on that this was going to be about more than loss prevention and claims reduction – although that would have to be one aspect of any risk management program.

Right from the outset, Malcolm and I agreed that we needed to think big picture – and help lawyers do likewise. We wanted a program that would incorporate the context of the practice environment in any tools and resources we would develop. We recognized that lawyers need help adapting to changes in the world around them and adopting new ways of doing business. Our goal was to be proactive – and to encourage lawyers to be equally proactive in making their practices more proficient and profitable.

Where did you look for inspiration, ideas – how did you know what was needed?

Bell: ALAS (U.S.-based Attorneys' Liability Insurance Society) was doing some interesting risk management things so we looked at their program. We also talked to the people at the Oregon State Bar about their loss prevention initiatives.

The data mining we undertook was also useful to help us determine what direction to take. Working with the LPIC actuary, we dug deep into LPIC's databases and examined what we might learn from the claims statistics. What areas of law generated the most claims? Do age, geography, years in practice make a difference? What types of errors do lawyers commit – and what gives rise to claims? Is a certain lawyer more claims prone? This research provided important direction – and substantiated that risk is widespread among the profession.

To this mix, we added the insights from research that Professor Neil Gold (former dean of law at the University of Windsor) undertook for LPIC. Professor Gold concluded that the underlying causes of claims include failure of the lawyer-client relationship, poor communication, poor file management, and self-interest among others.

It quickly became clear that while lawyers cannot change the environment in which they practise, they can control the circumstances, that is, how they practise. So the job was to provide guidance and education on just that. Helping lawyers be more client-focused was a very big element in the program because it served the key interests at hand – their own, those of clients and ours.

How did you massage all that information into the practicePRO program?

Bell: Stepping back, it then became quite obvious that there should be four founding pillars on which we could build the practicePRO program and keep it growing in the future:

Information: We knew we needed to help lawyers appreciate the changing practice climate, to understand how and why they are claims prone, where the risk is, and how to better manage this risk. The LPIC News – the publication at the time – started carrying a regular practicePRO section that helped us get the word out. The new practicePRO section of the LPIC website allowed us to share lots of information that gave context for our messages. We also worked with various law associations across the province and hit the road – attending as many of their gatherings as possible – to raise awareness of the risks and the resources we were making available.

Practice aids: Based on our data analysis, we zeroed in on the top four areas of claims that we had identified at that time: poor communication, conflicts, failure to know or apply law, and procrastination.

Then we set about creating tools to help lawyers address these issues: One result was the ***managing*** series of booklets – first one on lawyer-client communication, and a second on conflicts situations. We determined that by focusing on these issues, we would be addressing two of the most significant risks facing all lawyers regardless of where they were or what area of law they practised.

A third pillar was *Education* so we became an aggregator of information on professional development opportunities for lawyers, and made this information available to lawyers. We also presented at the Bar Admission course, providing new lawyers with information on the insurance program and promoting the client service message (and of course the resources offered through practicePRO).

Wellness & balance – the fourth pillar – evolved out of Professor Gold's finding that law is stressful and a healthy work environment is a component of a successful law practice. LPIC committed to help sponsor and promote the Ontario Bar Assistance Program (which has since merged with LINK to form the Ontario Lawyers'

2003	2004	2005	2006	2007	2008
• LawPRO Magazine: *"Building for Success"*	• LawPRO Magazine: *"Client Communication"*	• LawPRO Magazine: *"Family Law"*	• LawPRO Magazine: *"Professional Services"*	• Lending Library launched	• LawPRO Magazine: *"Personality and Practice"* (intergenerational issues)
• ***Managing the finances of your practice*** booklet	• LawPRO Magazine: *"Fraud"*	• LawPRO Magazine: *"Electronic Discovery"*	• ***Managing a professional services firm*** booklet	• LawPRO Magazine: *"Elder Law"*	• practicePRO marks 10th anniversary
• LawPRO Magazine: *"Helping your Practice Soar"*	• LawPRO Magazine: *"Practising in an e-world"*	• Mini version of Limitations Act comparison chart	• LawPRO Magazine: *"Work & Wellness"*	• LawPRO Magazine: *"Making your Mark"*	• launch of new practicePRO website
	• ***Managing the security and privacy of electronic data in a law office*** booklet				
	• Limitations Act comparison chart				

practicePRO numbers tell the story

One way to measure the impact of practicePRO is through statistics: And a look at the numbers indicates that, no matter what the yardstick, practicePRO fills a need for practising lawyers.

	2003	2007
Total annual visits to website	38,188	156,701
Unique visitors	20,611	79,068
Average visits per day	104	429
Number of files downloaded from practicePRO site (articles, resources, booklets etc)	47,344	145,000
Number of CLE programs approved for LawPRO CLE Credit	12	116
Attendees at LawPRO-approved CLE credit programs	2,237	14,350

Assistance Program), and through its website put a myriad of information, counselling and mentoring resources at lawyers' fingertips.

The year following the launch of practicePRO we presented the Online Coaching Centre as an additional resource to assist lawyers hone the many types of people skills necessary for serving clients, working with colleagues and looking after themselves.

Why the name practicePRO?

Bell: That was both the most difficult and easiest part. We wanted just the right word to describe all of what we were doing. So we sat down with LPIC's communications team who'd drawn up a list of possible word combinations – and when I heard "practicepro" I knew that was it. The name spoke to our commitment to professionalism in practice, and reflected our goal of helping lawyers be more proficient and profitable – I saw it as a name that would withstand the test of time – and it has.

It's now 10 years later – Has practicePRO accomplished what you set out to do?

Heins: The major challenge then – and now – is to be able to demonstrate impact. The downward trend in claims that we saw in the late 90s and until recently is due, in part, to the practicePRO program. The success of the TitlePLUS program – which is built on a risk management model; the popularity of LawPRO Magazine and online resources; the increase in the number of lawyers signing up for the CLE credit; the real jump in the number of professional development and CLE programs seeking the LawPRO CLE accreditation; the increased interest in wellness initiatives; the merger between OBAP and LINK to create OLAP – all point to the beginnings of a fundamental change in the way lawyers think and practise. practicePRO's message is being heard.

Bell: And what I personally find most gratifying is that many of the resources we produced at the start are as relevant today as they were then – and perhaps more so. But then as now, the critical issue is that you can produce the best possible tools and resources – but if lawyers don't act with that information, has the program accomplished its purpose?

The fact is – not all lawyers get it. Too many need to have the imperative to act before they'll look for help. So a lawyer with a conflict claim will not discover the benefit of the ***managing conflicts*** booklet until it is too late; or a lawyer who has lost various records because of a systems crash only reads the ***managing practice interruptions*** booklet after the fact.

Our focus when we started practicePRO was to target the engaged, responsible, receptive lawyers: They bought into our message – which is that law practice, at its most basic, is not only about competence but about quality of service too. The challenge then and now is to get through to those who aren't ready to hear that message and encourage them to weave the ideas and resources that practicePRO offers into their practices.

Heins: To change the way a body of people do things takes time – and 10 years is really still early days when it comes to practicePRO. We need to continue to work on changing attitudes and behaviour among lawyers – both here at the Law Society and at LawPRO through the practicePRO program. practicePRO's role is to promulgate good practice. The Law Society regulates good practice. In that sense, practicePRO feeds into what we at the Law Society are doing.

Bell: But the job is never done. As a practice management advisor working with law firms, I see a real and ongoing need for a broad-based program such as practicePRO. Its message today is as relevant as ever. It may be that the message has to be delivered differently, or that the issues facing the bar are different. But fundamentally a proactive client service approach – and all it entails – is, was and will be, the critical component of a successful law practice. And that's the strength of practicePRO.

* Karen Bell left the practicePRO program at the end of 2000 to become knowledge management counsel to a large national law firm. In late 2005, she established her own consulting practice, advising law firms and legal departments on risk management, practice efficiency, knowledge management and client relations.

practice PRO®

the next 10 years

Dan Pinnington joined LawPRO as director of the practicePRO program in early 2001. As well as building on initiatives described in the previous article, he expanded its reach. practicePRO is now one of the leading risk and practice management initiatives in North America. In this interview, Dan reflects on the last seven years of practicePRO.

Has practicePRO helped attune the profession to risk management and claims prevention?

I think so. On an almost monthly basis we get calls and e-mails from lawyers tellling us how a recent article or CLE presentation prompted them to do something differently on a matter with the result that they avoided a claim. In the last few months several lawyers have told us that they had avoided being duped by fraudsters after recognizing "red flags" on a matter involving some of the common fraud scenarios highlighted in our recent publications.

Where has practicePRO made its biggest impact?

I would identify two places. First, the LawPRO CLE Premium Credit which has changed the face of CLE in Ontario by making claims prevention content an explicit part of the majority of CLE programs. For the 2008 insurance year, more than 14,300 lawyers qualified for the credit by attending one or more of the 116 CLE LawPRO-approved programs. Our numbers for 2009 and are even higher: more than 150 approved programs so far. Non-profit CLE providers are now asking to have their programs approved for the credit. And CLE attendees are saying that they liked that risk management and practice management content was included in CLE programs.

Secondly, I think the huge collection of resources that practicePRO has created for the profession has made a mark. These range from the articles in LawPRO Magazine to all the checklists, precedents and papers that are available online. Judging from the number of downloads – more than 145,000 in 2007 and 81,000 by the end of June this year – they are clearly popular with the profession (see centre section insert for a listing of the most popular practicePRO downloads). It is a compliment to practicePRO that many of the resources we have created have been adapted and reproduced for use in other provinces, the U.S. and many other countries around the world.

What advice would you give to lawyers to help them avoid a claim?

As is highlighted in more detail in the article on the biggest claims risks (see page 17), in most areas of the law lawyer/client communication problems are the number one cause of claims, followed closely by deadline and time management issues.

So, while knowing substantive law is important, from a claims prevention point of view you get more for your risk management efforts by focusing on improving client communications and focusing on getting things done on time. With this in mind, my top tips for avoiding a malpractice claim are as follows:

1. **Start out on the right foot with a written retainer:** The retainer letter or agreement is your terms of engagement. It should clearly identify who the client is and what you are retained to do.
2. **Get the money up front:** At the time you are retained, get a retainer that is sufficient to cover all initial work that needs to be done on the matter. Replenish retainer funds *before* they are exhausted (set up your accounting system to monitor and remind you when the amount in trust is getting low). Stop working on the file if the retainer is not replenished – working on credit greatly increases the likelihood you will not get paid for your work. Of course, you can and should do pro bono work, but only when you choose to do it.

3. **Control client expectations at all times:** Clearly and accurately communicate to your clients the available courses of action and possible outcomes; all the implications of any decisions; how long things will take; and the expected fees and disbursements.
4. **Document everything (almost):** It is just not practical to document everything on every matter, but you should document as much as you can in some contemporaneous manner. Letters are fine, but e-mails, detailed time entries, and marginal notes on documents can be equally effective. In particular, you want to record advice or instructions that involve significant issues or outcomes, and major client instructions or decisions. Documenting things is especially important when you are dealing with difficult or emotional clients. Memorialized communications help confirm what was said or done for the client in the event you ever need or want to look back to explain why or what work was done, to justify an account, or to defend yourself on a malpractice claim.
5. **Meet or beat deadlines:** Set realistic deadlines when it comes to completing tasks and/or delivering things to clients. Under-promising and over-delivering (i.e. earlier than promised) on work for clients will make them very happy. Don't leave things to the very last minute as unexpected events beyond your control (blackouts, snowstorms, taxi got lost on way to file documents) will prevent things from happening as required. Giving yourself an extra day or two by setting your deadline before the real deadline can be a lifesaver.
6. **Don't do any of the things that most annoy clients:** These are all the things that would equally annoy you. They include not returning calls or e-mails, long periods of inactivity, surprising a client with bad news or a large account.
7. **Don't handle a matter with which you are uncomfortable:** If you are unsure or hesitant about handling the matter for any reason (e.g. unfamiliar with the area of law, a potential conflict exists, matter for a relative or friend, demanding or difficult client), get appropriate help or refer it to another lawyer.
8. **Don't wait until after the file is closed to ask how you did:** Ask clients for feedback as the matter progresses, at milestones or when interim accounts are rendered. Talk to major clients at least once a year, and do this off the clock!
9. **What goes around comes around:** Your reputation will precede you. Be civil all of the time, to your client, the counsel and client on the other side, judges and court staff.
10. **Send interim and final reporting letters:** They should confirm what work was done, and the successes obtained for the client. For example: *For example: Retainer terminated, futures steps,* and so on.
11. **Don't sue for fees:** This almost guarantees a counter-claim alleging negligence.
12. **Document everything (almost):** Read #4 again – it is the best way to avoid a claim.

Doing all these things will ensure you have happy clients, and remember, happy clients don't tend to sue their lawyers.

What upcoming trends do you see affecting lawyers?

I think Dave Bilinsky's article (see page 21) does a great job of reviewing the key trends and issues lawyers need to be aware of. And further, the sidebar and supplemental papers to those articles provide lawyers with direction on the things they need to do to respond to these challenges and exploit the opportunities that they present.

In the shorter term, it is very clear that we are in an economic downturn. This means client finances will be squeezed, and doubtless those financial pressures will in turn be felt by lawyers. Also, as is highlighted in other articles in this issue of LawPRO Magazine (see pages two to eight), we have recently seen a significant increase in both the count and cost of fraud-related claims. It has moved beyond the real estate bar and now litigators and transactional lawyers are being targeted. This is a trend we are concerned about and will continue to monitor closely.

And as much as there are huge changes ahead, I think looking back is helpful to remind us that, at its core, the impetus behind the practicePRO message remains very relevant today. Our claims statistics still clearly indicate that, from a claims prevention point of view, lawyer/client communication and basic deadline and time management are the most common causes of claims. It is clear that practicePRO is more relevant than ever.

What do you see practicePRO doing over the next 10 years?

We intend to continue growing practicePRO and will offer even more tools and resources to help Ontario lawyers avoid malpractice claims and grow successful practices.

We just launched a new website which makes the practicePRO tools and resources more accessible (see the center section of this magazine). There will shortly be a practicePRO blog focusing on risk management and law practice management issues.

We will continue to be innovative, and in a broader context we will be keeping up with changing times by working to have more direct interaction and collaboration with Ontario lawyers through the use of various Web 2.0 tools.

The feedback, questions and suggestions I get directly from Ontario lawyers provide insights on what lawyers need help on. We also plan to survey the profession to give us deeper insights into the issues that lawyers are struggling with, and where they want or need help. This will drive the tools and resources that we will create in the future.

In some practice areas the malpractice issues and types of errors we see are quite different, so we are digging deeper into claims statistics to help customize the risk management information we provide to lawyers in different areas of the law. It is an exciting time as a lot has been accomplished, but there is still much work to be done.

The biggest malpractice claim risks

Dan Pinnington

Most lawyers are surprised to learn that failures to know or apply substantive law account for a relatively small portion of LawPRO claims. Over the last eleven years, by both count and cost, law-related errors were only the fourth most common cause of claims.

In most areas of the law, lawyer/client communication problems are the number one cause of claims, followed by basic deadline and time management issues. The pie chart on the next page illustrates the relative proportion of claims by area of law for 1997-2007.

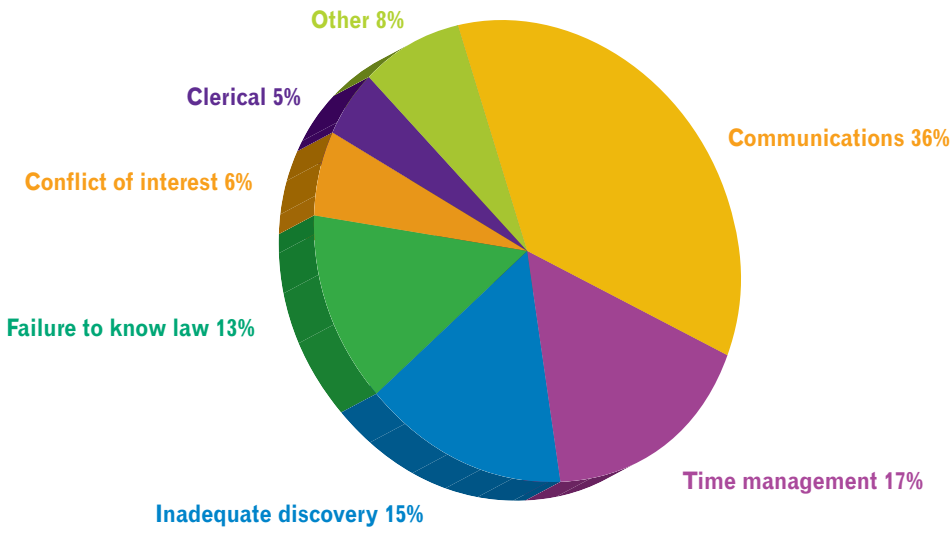
Communications-related errors #1 claims concern

Lawyer/client communication-related errors are the biggest cause of malpractice claims. Over the last eleven years, by cost and count, more than one-third of LawPRO claims involved this type of error – almost $22 million or close to 7,200 claims.

It is interesting to note that for sole, small, medium and large firms alike, one-third of claims were communications-related. This is a profession-wide issue.

There are three types of communication-related errors. The most common is a failure to follow the client's instructions. Often these claims arise because the lawyer and client disagree on what was said or done – or not said or done. These claims tend to come down to credibility, and in handling claims LawPRO finds these matters are difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.

Causes of claims 1997 to 2007



The second most common communications error is a failure to obtain the client's consent or to inform the client. These claims involve the lawyer doing work or taking steps on a matter without client consent (e.g. seeking or agreeing to adjournment; making or accepting a settlement offer); or failing to advise the client of all implications or possible outcomes when decisions are made to follow a certain course of action (e.g. pleading guilty on DWI; exercising a shotgun clause).

Poor communications with a client is the third most common communications error. These claims often involve a failure to explain to the client information about administrative things such as the timing of steps on the matter, or fees and disbursements. This type of error also arises when there is confusion over whether the lawyer or client is responsible for do something during or after the matter (e.g. sending lease renewal notice to landlord, renewal of a registration or filing).

On top of being the most common malpractice errors, communications-related claims are also among the easiest to prevent. You can significantly reduce your exposure to this type of claim by controlling client expectations from the very start of the matter, actively communicating with the client at all stages of the matter, creating a paper trail by carefully documenting instructions and advice, and confirming what work was done on a matter at each step along the way.

Deadline and time management

Missed deadlines and time management-related errors are the second biggest cause of LawPRO claims at all sizes of firms. Over the last eleven years they represented 17.3 per cent of claims by count (3,566 claims) and 14.2 per cent of claims costs ($8.8 million).

The most common time-related error is a failure to know or ascertain a deadline – missing a limitation period because you didn't know it. The good news is that this specific error has declined by almost 50 per cent over the last ten years. The bad news is that the other time and deadline-related errors are holding stable or increasing slightly.

While in the longer term we expect that the new *Limitations Act* will result in fewer limitations period claims, at this stage it does not appear to have had any impact. Indeed, over the last year it may have resulted in more claims due to confusion over transition provisions. (For more see the Practice Tips article, *Limitation update* on page 41.)

A failure to calendar is the second most common time-related error (a limitation period was known, but it was not properly entered in a calendar or tickler system). The fourth most common time-related error is the failure to react to calendar error. In this case the limitation period was known and entered into a tickler system, but was missed due to a failure to use or respond to the tickler reminder.

Lawyers at firms of all sizes seem to have a dusty file or two that sits on the corner of their desks for far too long, and this makes procrastination-related errors the third most common time-related error. By count and costs, procrastination-related errors are on an upwards trend.

These deadline and time management errors are easily preventable with better time management skills and the proper use of tickler systems. Practice management software programs such as Amicus Attorney and Time Matters are excellent tools for helping lawyers manage deadlines and tasks, and for helping them better manage client communications and relationships. Not waiting to the last minute by building in a one-day or two-day cushion can also help prevent this type of error when there are unexpected problems that prevent you from meeting a deadline for a filing (e.g. ice storm or taxi in accident on way to court house on last day to file).

Digging a bit deeper

Inadequate investigation or discovery of facts is the third most common error at firms of all sizes (except firms of more than 75 lawyers, where it was the fourth most common error) and over the last eleven years accounted for 3,202 claims (15.6 per cent) and $9.8 million (15.9 per cent) of LawPRO's claims costs.

This error has been on the rise for the last several years in many areas of law. Perhaps it is a symptom of "BlackBerry legal advice": quick questions and answers without context exchanged between people in a rush. It goes to the very core of what lawyers are supposed to do for their clients – give legal advice – and basically involves the lawyer not taking extra time or thought to dig deeper and ask appropriate questions on the matter.

On a real estate deal this type of claim might involve not delving into the client's long-term plans for the property, and then failing to follow up on appropriate zoning or bylaw searches to ensure the client can use the property as intended. On a family law or will or estates planning matter it might involve not digging into more detail about the status of past marital relationships, other children or step-children, or the amounts of assets or liabilities. On a merger and acquisition matter this error would arise where shortcuts are taken in due diligence work.

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

Law

Over the last eleven years failures to know or apply the law accounted for approximately 2,703 claims (13.1 per cent) and $9.1 million in costs (14.8 per cent).

A failure to know or apply the law arises when a lawyer does not have sufficient or current knowledge of the relevant law on the matter on which he or she is working. Over the past few decades, the law has become far more complicated. There are fewer general practitioners as more lawyers tend to specialize in a given area of law. Legislation has become more complex, there are increasingly more regulations, and new case law is coming out of the courts at an increasingly rapid rate. For these reasons it is important that lawyers participate in CLE programs to maintain a current knowledge of the law.

Extensive federal and provincial legislation, as well as voluminous case law, help make failure to know or apply law the most common error for family law lawyers, representing more that 21 per cent of family law claims in the last eleven years.

"Dabblers," or lawyers acting outside of their usual practice area, are far more likely to commit this error. Lawyers who are asked to handle a legal matter for a family member seem to feel obliged to help and often find themselves dabbling in an area of law they don't know. Dabbling is dangerous – don't do it.

Remember that family and friends can be the most demanding of clients because they can, and will, call at all hours of the day or night. They also tend to not pay their fees on time, if at all. Given the relationship, it can also be difficult or awkward for the lawyer to give a family member or friend independent legal advice. Lawyers should steer clear of representing family members. The best solution is to refer them to someone else in the firm, or, ideally, to send them to another firm with expertise in the area of law.

Lawyers should also tread carefully when giving advice or working on matters relating to U.S. or other foreign law. The LawPRO policy does not cover lawyers for advice involving U.S. or other foreign law.

Conflicts of interest

Over the last eleven years, conflicts of interest claims ranked fifth by count (1,322 claims) and cost ($6.0 million), accounting for 6.4 per cent of claims reported and 9.7 per cent of costs, respectively. Conflicts claims are proportionally more costly to defend and indemnify as they tend to be complex and involve multiple parties.

There are two types of conflicts claims: The first arises when conflicts occur between multiple current or past clients represented by the same lawyer or firm. The second is a conflict that arises when a lawyer has a personal interest in the matter.

Multi-client conflicts claims have been on a general downwards trend for most of the last 10 years. During the same period, lawyer self-interest conflicts claims have occurred at the same rate. However, since the Supreme Court of Canada's decisions in *R. v. Neil* and *Strother v. 3464920 Canada Inc.*, there is clearly

increased sensitivity to the duties of loyalty and confidentiality that lawyers owe their clients.

As they regularly act for multiple clients and/or entities, real estate and corporate commercial lawyers experience more conflicts claims than other areas of law, while litigators have a relatively low rate of conflicts claims.

To avoid conflicts of interest, make sure your firm has a procedure and system in place for checking conflicts at the earliest possible point in time. Ideally it should be an electronic system and include more than just client names. A system that includes individuals and entities related to the client, including corporations and affiliates, officers and directors, partners, and trade names etc. will flag more real and potential conflicts.

Often, firm conflicts-checking systems do catch real or potential conflicts. Unfortunately, decisions are made to overlook these conflicts, either to please the client (often to keep fees down) and/or keep the matter at the firm for the fees it will generate. In the end these decisions come back to haunt firms.

LawPRO is also seeing more conflicts arise with the lateral hiring of partners and associates. In a desire to bring on the new person, real or potential conflicts are also ignored or overlooked.

Clerical and delegation errors

Clerical and delegation-related errors are the sixth most common type of error by count and cost (1,093 claims and $1.6 million in costs, 5.3 per cent and 2.7 per cent, respectively).

Delegation errors include things such as simple clerical errors, errors in mathematical calculations, work delegated to an employee or outsider that is not checked, and failures to file document where no deadline is involved.

Delegation of tasks to knowledgeable support staff is an essential part of the operation of every practice as it makes lawyers more efficient and effective. However, ultimately the lawyer is responsible for delegated work, and steps should be taken to review delegated work where appropriate. Extra care is especially warranted if there is something different or unusual on the matter.

Fraud claims

As is detailed in the articles on pages two to eight, fraud-related claims are on the rise and of significant concern to LawPRO. Although real estate fraud has been a concern for several years, counterfeit cheques now are being used to target litigators (on collection matters) and commercial lawyers (on financing deals), as we are seeing more frauds by firm lawyers and staff.

Regardless of firm size, it is important that every firm implement appropriate internal controls to ensure that funds in trust accounts are handled properly and that all transactions involving client monies are properly documented.

Firms have different claims "personalities"

It is interesting to note that, on an aggregate basis, the malpractice error types and proportions can vary significantly from firm to firm. Sometimes this is a reflection of practising in a different area of law, but it can also very much reflect an individual firm's culture, calendaring procedures and time management practices.

For example, firms that do a poor job of managing tasks and deadlines have more time management and missed deadline-related claims. To reduce claims risks, firms should proactively identify and address shortcomings in their operations practices and procedures. One large Toronto firm seems to have kept conflicts claims very low by having excellent conflicts checking procedures and an increased sensitivity to conflicts claims through an annual conflicts education program that is mandatory for all lawyers and staff.

Avoiding a claim: your marching orders

Over the last eleven years LawPRO has averaged 1,846 new claims each year. Over this time period LawPRO successfully defended 86 per cent of these claims (of all claims closed during this 11-year period, 39 per cent were closed with only defence costs incurred, and 47 per cent with neither defence costs nor indemnity payments). But, while only 14 per cent of these claims ultimately involved an indemnity payment, it still makes sense to do everything you can to avoid the stress, time and cost of dealing with a malpractice claim.

The six most common malpractice errors detailed in this article represent more than 92 per cent of the malpractice claims handled by LawPRO in the last eleven years. The biggest claims risks, and the biggest opportunity to reduce claims exposure, lie in basic lawyer/client communications, and in time and deadline management – accounting for more than 50 per cent of the claims. Taking some proactive steps to address these types of claims is your best opportunity to reduce your claims exposure. See the practicePRO resources centerfold for tools and resources that you can use to reduce your claims exposure.

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David J. Bilinsky

10 critical issues facing the legal profession

I've been taking care of business, it's all mine
Taking care of business and working overtime
– Randy Bachman

The legal profession stands at a unique time. The rate of change both in and oustide the profession is unprecedented. In a short 100-year time span we have progressed from traveling by horse to meet a client to meeting them on the web; from court filings being documents laboriously copied by hand to filing hypertext-linked arguments containing all facts, documents, argument and the law burned onto a shiny silver disk that can only be read on a computer screen; and from producing discovery in large paper stacks to producing e-documents such as databases that have no paper equivalent.

Many of these changes have – or will – profoundly affect legal practice. This article is one writer's view of the 10 critical issues facing the legal profession. This list is neither inclusive nor scientific – and you may disagree with the issues cited and/or point to other issues as your "top 10" (being named Dave has given me this hankering towards Top 10 Lists...but I digress…). So here are my thoughts:

To expand on and supplement this article, we have canvassed several subject matter experts to provide in-depth commentaries on some of Dave's topics, both in sidebars to this article, and in even more detail in papers that are available for download at www.practicepro.ca/criticalissues. We also reference past articles of LawPRO Magazine that cover these topics. These papers and articles provide you with practical advice on how you and your firm can respond to these issues and exploit them as opportunities to grow more successful practices.

1. Changing demographics

Courtesy of the baby boom, society in general – and the legal profession in particular – is facing the imminent retirement of the largest group of lawyers in practice. The effects of this demographic shift will be felt in many ways. Most law firms were predicated on a 'pyramid' – a small number of partners supported by a large number of associates and staff. Today, most smaller to mid-size firms resemble a pyramid turned upside down – a large number of partners with a smaller number of associates and staff.

If the partners have not already made plans for their retirement (and that time is on them now), then financing the retirement of so many lawyers will place a burden on firms trying to bring in associates. After all, the cost of setting up a new office will be, in most cases, less than the retirement buy-out requested by the retiring lawyers.

On top of this, firms in smaller communities are having difficulty recruiting lawyers – a trend that will become even more acute as the existing lawyers ease out of practice. Furthermore, the new generation of lawyers is seeking changes to the economic basis of practice: They are less willing to work 1,800 plus billable hours a year only to see those profits flow into someone else's retirement.

More on demographics
See the articles on changing demographics in the Winter 2007 issue of LawPRO Magazine at www.practicepro.ca/elderlaw.

2. Gender and generational differences

Catalyst, an independent and non-profit organization, published a report on Canadian law firms in 2005 titled: *Beyond a Reasonable Doubt: Building the Business Case for Flexibility*. The key findings in the chapter: Making the Link – Work-life Balance and Associates' Intentions to Stay were that:

- Sixty-two per cent of female associates and 47 per cent of male associates intend to stay with their firms for five years or less.
- Women and men report the same top factors as important to consider if they were to change firms: an environment more supportive of family and personal commitments, and more control over work schedules.
- Associates with positive perceptions of their firms' work-life cultures intend to stay with their firms for a longer period of time.

The profession is under pressure to accommodate a new economic model – one that is premised on lower billable hours for associates and a greater amount of time spent on non-office activities. These changes are being advocated by younger men and women alike who have differing views towards work from those held by the boomers.

Other factors are also at work. Since more than 50 per cent of graduates from law schools today are female, law firms cannot afford to lose the female members of the current generation in the same numbers as in the past. Associates are looking for mentoring, for flexibility in how they work and for greater time spent with their families. Associates also recognize that the current economic model is based on 'churn' – and in many cases, they peremptorily leave the firm as they recognize that the partnership carrot is too uncertain and has too great a personal cost. If the baby-boomer partners wish to attract younger associates to their firm (and thereby pay for their retirement buy-out packages), they are going to have to change to meet the needs of the younger generation or face the bottom dropping out of their firms as the younger members leave.

More on differences
See the Finding and keeping good lawyers *article in the Summer 2007 issue of LawPRO Magazine at www.practicepro.ca/magazinearchives.*

3. Innovation and innovative leadership

Lawyers have traditionally been servants – knights in shining armour – in the service of their client. But today, a new breed of lawyer is required. They need to be willing to blaze new trails and strike out in new directions.

What has prompted this shift? The unrelenting economic pressures on lawyers and law firms in the information age, where technology has driven down costs, increased efficiencies, prompted instant messaging and e-mail, and introduced so many new ways of doing things.

Lawyers and law firms need to change from a precedent-based "what is everyone else doing?" approach to an innovative business model that embraces change and identifies a new competitive edge – since the competition today is no longer just lawyers. Indeed, this entire article is aimed at being a catalyst for change, for encouraging innovative thought and new models of law firm leadership.

More on leadership
See Dick Potter's article on page 25 for more thoughts on innovative leadership and leadership in innovation.

4. Focusing on the law as a business

Five years ago, any discussion of law firm profitability would quickly move to a discussion of billings, rates and collections – "top line" metrics (meaning these are measures of income *before* expenses).

Today, it is quite common for managing partners, administrators and CFO's to discuss how to measure profitability in a firm (effective hourly rates, return on investment, profits per partner) and use that information to focus the firm on strategic objectives, emerging markets, most profitable clients and measurable profitability goals. This information is used to drive firm strategy, partnership advancement and retirement models, compensation, practice group objectives and associate recruitment and advancement. More discussion focuses on moving to alternative billing strategies rather than simply just billing by the hour – and that discussion often is prompted by the clients themselves. This indicates that law firm management has entered a new plane – where the business side of the practice is not only acknowledged but is given weight equal to the professional side of the practice.

More on metrics
How does your firm measure up? See Dave Bilinsky's sidebar for the financial numbers you need to be looking at on page 26.

5. Technology – the continuing challenge

The rate of change in the practice of law has been unequalled when considering the impact of technology. Although the thought processes of the practice of law have not changed since the days of Socrates, the ways of practising law are as different now as night and day. Since we live in the beginning of the Information Age, it is a given that changes yet to come will make the recent past look like the Stone Age to us.

One of the most promising new technologies to emerge falls under the name Web 2.0 (pronounced "web-two-point-oh"). This name symbolizes the interactive web – where collaboration, cooperation and jointly working with clients on projects is the norm. Contrast this with the image of the traditional lawyer – working quietly away in his/her office in seclusion.

Today, the web offers the ability to create an extranet – a secure, protected area on the web where a lawyer, client and experts can come together to share documents, information, ideas and strategy and work jointly on a file. As they say, the whole is greater than the sum of the parts.

Some lawyers will flee from this concept. Others will realize that this offers an unprecedented ability to 'bind' with your client and create a strategic advantage over their competition.

Web technologies also offer new approaches to knowledge management and tapping into the stored knowledge inside everyone in the firm. Studies have shown that firms who have implemented Microsoft's *Sharepoint Services* and other similar extranet technologies have seen collaboration and knowledge sharing both within their firms and with firm clients.

More on Web 2.0
Are you and your firm Web 2.0 savvy? Read Steve Matthews' article on page 27 to find out how you can use the web to deepen your relationships with your clients, attract the types of clients that you desire to your firm and reach out and build a community around your firm on the web.

More on knowledge management technologies
Technology is enabling – to the winners come the spoils, and Connie Crosby in her article shows how knowledge management technologies not only bring younger lawyers up to speed, but also generate a new firm culture based on collaboration, breaking down silos and fostering client teams (à la Dick Potter's article on leadership and innovation). See page 28.

6. Physical and virtual mobility

Traditionally, lawyers were geographically tied to one location. They served clients in a distinct physical area – whether that was a city, a town or a region. Now, courtesy of the Internet and the National Practice Protocol, a lawyer can build a niche practice from anywhere in Canada and literally market it to the country and to the world. The Internet has eliminated the geographically localized law practice.

For example, Donna Seale has launched a practice (and associated blog) *Human Rights in the Workplace* (http://donnasealeconsulting.typepad.com) from small-town Manitoba. But she has a country-wide perspective and ambitions – for good reason. She has realized the power of the Internet in being able to reach out to her clients based on her expertise and not her physical location.

Courtesy of the Internet, lawyers in Canada can look for emerging markets within and without Canada – and use the power of the web to reach out to those clients in ways that are effective, efficient and low-cost.

Moreover, the mobile web allows you to work from virtually anywhere you can obtain an Internet connection. Not only can you market yourself to the world, you can also attract clients from around the world and bring them to you. Someone once said, "Build a better mouse trap and the world will beat a path to your door." The challenge for the rest of us is to embrace the changing landscape and see the new possibilities in the same manner.

More on mobility
See Dominic Jaar's sidebar for advice on how you can take your practice with you (page 29) and Steve Matthew's article on how you can leverage the power of the Internet to take your practice to the world (page 27).

7. The new economics of law

When goods and services are bought and sold in a free market, buyers seek out lower costs. This applies equally to clients buying legal services from lawyers, and to firms looking to engage other lawyers. At the present time many factors are fundamentally changing the economics of the practice of law.

Outsourcing has burst onto the legal scene. Using part-time lawyers allows you to reduce your costs by hiring a "temp" lawyer for short-term assignments, or even a single task. And, the major difference in the cost of legal expertise in India and other common-law jurisdictions compared to North America is spawning a whole industry, namely the outsourcing of legal work to lower-cost jurisdictions. Some law firms and in-house corporate counsel are currently experimenting with sending work directly to lawyers in these jurisdictions, and the real entrepreneurs are already actively doing it.

This is just *one* indicator that the legal profession is under unprecedented economic attack. Another indicator is the growth of paralegals and notaries (who are seeking to enlarge their mandate in provinces that allow such activity). Other economic factors are a renewed interest in alternative billing, the growth of alternate dispute resolution methods (using lawyers and even non-lawyers as mediators and arbitrators) and of course, the emerging field of online dispute resolution (for example, see: www.smartsettle.com).

More on outsourcing
See Simon Chester's sidebar on page 30 for more insights on alternative billing and how the economics of law is changing.

8. Need for standardization of laws

This is not an issue that has been traditionally discussed in terms of critical issues facing the profession. However, the patchwork of laws and regulations across the country (and indeed, across the world) has its own cost in terms of regulation and compliance.

It is a given that we live in a global economy. The differences in laws across jurisdictions have many consequences: they increase costs, the risk of error and the complexity of trying to carry on business across differing jurisdictions. This is being addressed in some areas. The work of the Uniform Law Conference of Canada, in particular the Commercial Law Strategy, is to be commended in this regard.

Lawyers (and clients) would be better served if laws could be made more consistent if for no other reason than to encourage the development of substantive technological practice systems in discrete areas of the law that could be marketed across Canada. DIVORCEMate® and ChildView® software are good examples: A sufficient user base across Canada merits the investment to build, market and support these practice systems.

But for certain areas of practice (wills and estates, for example) no national provider has built a product that assists lawyers to practice in this area in each province and territory. Standardizing laws would: encourage development of substantive practice support systems that would raise the bar in terms of quality and consistency of practice; allow lawyers to build a true national niche practice; help smaller practitioners access practice systems that would be cost-prohibitive otherwise; and advance access to justice.

9. Deregulation

Economics tells us that innovation rarely occurs in a tightly-regulated market. Some may say that innovation is not what is wanted or needed in the legal profession. However, in other jurisdictions – England and Australia in particular – others have looked at the legal profession and pronounced that there is a need to increase the level of competition and tear down some of the traditional walls surrounding the provision of legal services.

A good example is the Australian firm of Slater & Gordon. The 140-lawyer firm is the first law firm in the world to go public through an Initial Public Offering. As a result, the seven senior partners will each end up owning stakes of between $2 million (US) and $8.5 million (US). The new firm will have a market capitalization of roughly $89.7 million (US) (as per law.com). The theory is that greater access to capital markets will allow law firms to invest in greater innovation (R&D).

(See: tinyurl.com/59l27w for the Australian Security Exchange listing on S&G.)

The UK is looking at the Clementi Report and the Legal Services Bill (see www.legal-services-review.org.uk/content/report). The proposed changes to the practice of law in the UK go much further than just opening up law firms to ownership by non-lawyers. The proposed changes are designed to provide the capital for and foster the development and innovation of legal services and products. Increased efficiency and lower costs are two stated goals in the report.

There are two ways this change can happen: Either it occurs from within the legal profession or it can be thrust on lawyers by outside forces. As we are a self-governing profession (at least at this time), in my opinion, the preferred route is for lawyers to embrace greater change themselves – and examine ways and means to allow this to happen – before it is too late.

10. The middle class...the class left behind

No discussion of the legal profession in Canada would be complete without an acknowledgment that the one group in Canada with the greatest distance between themselves and the legal profession is the middle class. Certainly legal aid provides top legal defence to those charged with a crime who are without the economic means to afford a lawyer. We can pride ourselves on the fact that we have a system that provides that no person without means in Canada is convicted simply because he or she could not afford a lawyer.

In theory, those of sufficient economic substance can afford a lawyer to meet their legal needs. However, if a person falls into the middle class, things are different. The average Canadian would pale if forced to initiate a lawsuit to remedy a perceived wrong, especially given the uncertainty, costs and delays inherent in the dispute resolution process. If there is one challenge facing the legal profession, it is to be able to provide cost-effective legal services to all – regardless of means. Henry Ford once had a vision that every employee in his business should be able to afford one of his automobiles. It would be admirable if as lawyers, we could say that every employee of every law firm in Canada should be able to afford to engage a lawyer to meet their legal needs, if the need so requires.

Looking forward and rising to meet the challenges

These are but one lawyer's views of the challenges facing the legal profession today. Perhaps you agree with them, perhaps you see other challenges. In either case, I think you will agree with my view that we are, as lawyers and a profession, at a critical juncture. We face a period in which there is the potential for unprecedented change in the legal profession. If these changes are not met head-on, the legal profession as we know it will disappear.

I encourage you to be proactive. Read the sidebars and papers that supplement this article so you can recognize and seize the opportunities that these challenges and changes present. By being innovative leaders we can embrace the future and meet these challenges head on. In so doing, we will ensure the self-governing future of the profession and find that our successors down the road are still happily taking care of their business – perhaps even working overtime – because the future of their profession still comfortably rests in their hands.

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Innovation in leadership and leadership in innovation

By Richard Potter QC

If there is one critical issue on which the others are dependent, it is this one – the symbiotic relationship between leadership and innovation.

Law firms desperately need a modern approach to leadership because their concepts of leadership have not kept pace with changes in their external world, especially in relationships with clients. Too often the model for firm leadership is based on replicating the mythical ideal of the sole professional: the self-employed, self-made, and highly skilled "best" lawyer in the firm. Although this is indeed one version of "boss-ship", it does not equate to leadership. In reality, the "best lawyer" model is incapable of producing leadership in a collaborative, networked world of complex relationships.

As argued by management guru Henry Mintzberg, (his book *Managers, Not MBAs* is sub-titled *A hard look at the soft practice of managing and management development*), true innovation derives organically from the bottom of an organization; it does not arrive ordained from the top. The very best managers are those who have learned to become the premier listeners in their organization. They sift information from the front lines, from the people who interact daily with clients, they analyze and synthesize it into a strategic response to the marketplace. They do this not from a misplaced, fuzzy ideal that listening is somehow more "democratic"; it's because it is far more authentic to discover what is actually going on at the client interface than it is to fashion strategy, and tactics, out of thin air.

For all sizes of firm, the most critical aspect of a new look at leadership is how that new look translates downward into practice management. Since even a 20-lawyer firm is today an organization far too complex to be managed solely by a single managing partner, to survive in the brave new world of e-discovery, podcasts, blawgs and the next big thing, firms must devolve management down to what in the outside world are called "business units" and what we lawyers call practice groups. In medium and large firms these will be organized on the basis of areas of law or, increasingly, on the basis of industry sectors. At the smaller firm level a practice group is effectively the whole firm.

And in firms of all sizes – from the very large to the smallest boutique – services are being delivered by client teams comprising lawyers who make it their business to be completely familiar with all the nuances of their clients' needs, no matter what the area of law.

Regardless of the type of practice group, we have to apply the same observation about qualities of leadership: These leaders will be chosen for their qualities of management (read "good listening skills"), not necessarily – and certainly not solely – because they are the best lawyers. Their task and the measure of their success will be how well they: discern what innovations at the level of the client interface will differentiate the firm from competitors; respond to and anticipate client needs; and inspire the members of the practice group to want to excel.

Predictably, greater devolution of authority to the practice group level will entail missteps, but if law firms are to have any hope of re-tooling their structure to suit the information age, they must tackle the leadership issue. Real devolution to a practice group unit will include power over expenditures, accountability for revenues, an element of autonomy in hiring and, naturally, mentoring and all the other critical aspects of managing human resources. But managing partners who are comfortable with giving greater autonomy to their lieutenants below quickly discover that lawyers become re-engaged in the firm's business – and, in this virtuous circle, the more engaged the lawyers become, the more they become the source of innovation. Finally, as a side-effect, this plants the seeds for a natural succession plan, a feature of long-term success that seems to elude most firms, both large and small.

In all firms, a third leadership quality will be highly prized – that is, how well the executive management melds the skills and experience of the non-lawyer staff, the professional-support lawyers and the front-line practising lawyers into a cohesive team in which each understands the others' roles and is motivated to collaborate and support each other.

In a nutshell, here is the prescription for this critical issue – innovative leaders will be leaders in innovation!

For a more detailed discussion on leadership and innovation read Dick's paper at www.practicepro.ca/criticalissues.

Richard Potter QC (www.i-lawmarketing.ca) provides strategic advice to professional services firms.

The financial numbers all lawyers (and managing partners) should be looking at

By David J. Bilinsky

Many lawyers ask for advice on the cheapest accounting system they can buy. I often spend an hour explaining to them that a proper integrated (general, trust and practice management) legal accounting system will pay for itself many times over in just the first year by allowing them to not only report on required historical results but to also forecast goals in financial terms and track progress in real time. That kind of power is invaluable and can make the difference between being successful and just getting by.

What can a proper financial system tell you? In a nutshell, a good system can provide you with the ability to:

- Set a budget (which is a forecast of your income and expenses) and track your progress towards meeting your goals of keeping expenses in line and achieving your income expectations.
- Determine your cost of providing an hour's worth of services. We all know what hourly rates lawyers are charging; without any analysis of what it costs you to render an hour's worth of services you have no idea of where your break-even point is on a file – and whether or not you can benefit by moving to fixed-fee quotes.
- Determine if your timekeepers are recording their time accurately, writing off excessive amounts of time or achieving a businesslike and acceptable realization rate.
- See if your accounts receivable are ballooning and if so, why.
- Create a good 'dashboard report' that allows you to see the financial workings of your firm and in particular, how the finances of the firm are matching your expectations (see the full article at www.practicepro.ca/criticalissues for a suggested dashboard report). Early warning of a problem(s) can allow you to take action – now – before you are facing a financial crisis.

Once your financial technology and systems are in place, here is a list of the top 10 ways to focus your practice and achieve a greater financial return based on focusing on the financial performance of your firm:

1. Determine your overall profit and loss for last year.
2. Compare your profit and loss against your budget forecast (or draw a budget for this year if you don't already have one).
3. Find out your profit or loss on a file-by-file, client-by-client and practice area-by-practice area basis for the last year.
4. Crunch the numbers and determine your five most profitable (and least profitable) files, clients and practice areas. Think about how to strategically move your firm away from the least-profitable areas.
5. Set your strategic direction, vision and marketing plans to pursue the most profitable files, clients and practice areas (and drop the five least profitable ones from your business plan and from your marketing. After all, you have already shown that your time results in a greater return in other areas.)
6. Set up your annual budget for next year targeting your annual income after expenses, your total expenses and your target gross income. Build in money and time to pursue your target market!
7. Determine if alternative billing arrangements can be used to your advantage and structure your systems accordingly.
8. Tweak your compensation/measurement system so that it supports your strategic plan (and isn't eat what you kill…).
9. Be ruthless on dropping clients and files that do not meet their financial obligations on a continual basis (according to your new written fee agreement).
10. Bill – regularly and often.

The numbers that underlie a law practice are just as important as rendering good service to the client. They ensure that your law practice continues as a business and meets your personal and professional needs in the same way that your services meet the needs of your clients.

For a more detailed review of financial reports and calculations summarized in this article, see Dave's paper at www.practicepro.ca/criticalissues.

David Bilinsky (daveb@thoughtfullaw.com) advises firms on enhancing law firm practice group profitability, strategic business planning and the application of technology to the practice of law.

Legal web marketing in a Web 2.0 world

By Steve Matthews

Not more than five years ago, a lawyer's web presence could almost exclusively be found on a firm website. But in recent years, many lawyers and firms have greatly expanded their online presence with a variety of new web tools that help create a more complete online persona and a greater indication of their practice expertise.

Is the firm website still relevant in a Web 2.0 world? Absolutely! The firm website remains an important cog in the business development process – it qualifies the lawyer, establishing trust, experience and expertise. Other Web 2.0 tools may grab the attention, but the firm website establishes credibility.

Think: practice group pages, detailed lawyer profiles, success stories, client lists, transaction lists, speaking engagements, media quotes, publications, and so on. The firm site should: 1) tell the visitor your experience with the issue; 2) show you're good at what you do; and 3) that others have trusted and benefited from your past service. Regardless of how someone arrives at your website, it must close the lead opportunity – convincing him or her to pick up the phone or make e-mail contact.

The following list reflects a sampling of the more popular techniques for marketing a modern legal practice online:

- **Law blogs** – Personal blog commentary can be used for an infinite number of reasons, but for lawyers, the goals are: crafting an image of expertise, networking, and increased exposure. Blogging is an easy way for lawyers to rapidly expand their web presence. Regular posts can position a lawyer for mainstream media quotes, referral network expansion, and increased exposure in the search engines. Leveraged properly, the value of incoming blog-to-blog links can also be passed to the firm website, ensuring the firm is found for its core areas of expertise.
- **LinkedIn** (www.linkedin.com) – LinkedIn is a social networking site developed exclusively for business professionals (unlike Facebook). It's widely used by the Fortune 500, and currently lists more than 216,000 lawyers. The value proposition of LinkedIn is putting your formal CV online where it can easily be found by other business professionals.
- **Facebook** – (www.facebook.com) Larger firms are blocking Facebook access in the name of business productivity. Justifiable? Perhaps. But for solos and small firms this also represents an opportunity. Identifying and targeting relationships with key industry decision makers, especially when a younger and less formal demographic is involved, can be good for business.
- **Wikis** – Most people have heard of Wikipedia these days, but the exciting part of wiki technology is what's going on with closed groups collaborating in a public way. Expect to see more firms developing industry based wikis, or using wikis to collaborate with clients.
- **YouTube** (www.youtube.com) – In the next year or two internet video will be the next big thing. You can expect video based blogs, web-based TV programs, video whiteboard discussions and other video genres. For the incredibly persuasive lawyer or 'the storyteller' in your firm – it might be a perfect match.
- **Lawyer specific social networking sites:** Legal Onramp (www.legalonramp.com) and JD Supra (www.jdsupra.com) are examples of legal community-specific social networking sites.
- **Twitter** (twitter.com): The newest and hottest Web 2.0 tool of influence is Twitter. Sometimes called "micro-blogging", the big selling point of Twitter is that it captures human reaction. News stories are reported before media outlets can respond, and discussion between groups – including lawyers – can provide candid and quotable commentary. But, with entries capped at 140 characters – about one sentence – brevity is both desired and required.

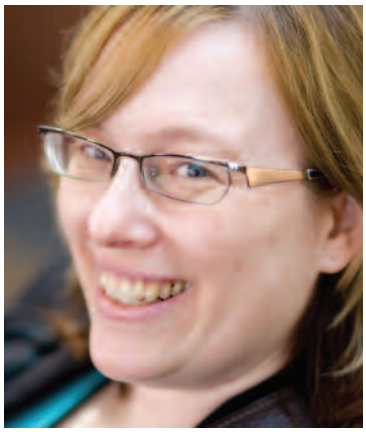
Bringing it all together is Search Engine Optimization (SEO). Search engines are still a big part of the digital lifestyle. With all the talk of blogs, wikis and social networks, it's easy to forget that search is the number one tool available to drive new readership. Lawyers who employ SEO tactics actively market and position their content at the top of the search results – thus driving increased volume and the potential for leads. SEO is also about employing an overall strategy that makes the collection of web tools mentioned in this article work together.

For a more detailed discussion on Web 2.0 and SEO read Steve's paper at www.practicepro.ca/criticalissues.

Steve Matthews (steve@stemlegal.com) runs Stem Legal Web Enterprises, Inc. and advises firms on SEO and Web 2.0.

Using knowledge management for collaboration and team building

By Connie Crosby



There was a time, not so long ago, when a lawyer would spend his or her entire working life with the same firm, from articling student right through to retirement. But, times have changed. Partners and associates are much more likely to make lateral moves to other firms or to the corporate world as in-house counsel.

Meanwhile, senior partners are also retiring in record numbers. The departure of a lawyer is both disruptive and very costly. Proactive law firms are using knowledge management tools to capture and keep the knowledge that might otherwise leave a firm when a lawyer walks out the door.

Knowledge management (commonly referred to as KM) is a business management strategy that has been around for well over a decade. Developed to improve efficiency, KM programs were initially used to capture and reuse information and knowledge created inside a firm. Early KM programs collected firm work product such as research memoranda, factums, model language for agreements, and other precedents. Early KM programs were usually run by law firm librarians. As they evolved and became more specialized, many larger firms hired dedicated KM Directors, and sometimes support staff, to administer and develop these programs further.

The information and knowledge that new associates can access within KM programs can help them integrate into their practice group more quickly, reducing the time partners need to spend on initiating new associates into the ways of their firms.

For knowledge management programs to work well, everyone at a firm needs to participate. There must be a culture of sharing and learning. For firms where individual lawyers develop their own precedents and are not used to making them available to others, this may demand a real shift in both individual work style and firm culture.

Knowledge management is tied closely to a firm's technology, whether it's library databases or robust systems employed by larger firms such as:

- document management system (DMS) – used to organize and track client documents;
- content management system (CMS) – used to manage content on an intranet, extranet or website;
- customer relationship management system (CRM) – used to manage a firm's clients and other contacts and track the interactions;
- intranet – a series of secure web pages inside the firm providing information and news, pulling together both private and public sources;
- portal – similar to an intranet, but is the only platform used inside the firm and includes access to all software; usually allows the individual to customize the homepage; or
- extranet – a secure website, often part of the intranet, in which someone from outside the firm (such as a client or firm alumnus), can view private information and collaborate with those inside the firm.

Some firms are now on their second, third or even fourth generation of these systems. Meanwhile, smaller firms often have not put any of these into place largely because of the time and cost that is often necessary to implement them.

This is rapidly changing with the rise of Open Source (OS) and Web 2.0 technologies. OS, such as the CMS Drupal or the DMS Alfresco, is free software developed by large numbers of enthusiasts. Installing and using OS technology requires technical expertise which can either be in-house or hired. As well, newer Web 2.0 technologies – notably wikis – are relatively inexpensive and can be quickly implemented inside the firm to provide easy-to-edit web pages and space for collaboration. With these newer technologies, smaller firms and solo lawyers can develop their own knowledge management programs and thereby catch up with the perceived advantage previously held by larger firms.

At the individual level, many lawyers today are struggling with information overload. "Personal KM" strategies can help them cope. Capturing key pieces of information and thoughts that may be reused later should be part of the natural work-flow. Many practitioners rely on sending and filing e-mail for this, but e-mail is not always efficient. The trick is finding a set of tools that are easy to use and allow for easy retrieval of past collected thoughts and information.

For a more detailed discussion of how KM can help your firm capture and share knowledge while building a more collaborative culture read Connie's paper at www.practicepro.ca/ criticalissues.

Connie Crosby of Crosby Group Consulting (www.crosbygroup.ca) advises on Web 2.0 and knowledge management strategy for organizations and individuals.

Physical and virtual mobility – client service anywhere at anytime

By Dominic Jaar

The laptop was the first technology that enabled lawyers to be truly mobile. But even with laptops lawyers were limited: They worked in isolation as they didn't have wireless internet access. To compensate for this, communication with the outside world required access to a telephone unless you had a five-pound cellular phone (which on top of the 20-pound laptop was a bit much).

But oh, how times have changed with the advent of the Internet. If you have the right tools, you can access almost everything from almost anywhere. Laptops are lighter than those first cellular phones, and Smartphones are smaller than ever and just as powerful as desktop computers. These tools allow you to provide seamless 24/7 client service – clients will love you.

But, 24/7 client service has some potential downsides. Remember when leaving the office meant that you had time off? You would just close the door, and unless someone was running after you, your day or your week was over. You would go home and relax. Wow! It seems like a century ago now. Today, leaving the office with a Blackberry or laptop means you can work while you commute, at night and over the weekend. You have the ability to work or socialize from anywhere at anytime. The trick, for you and your clients, is finding the right balance.

When 24/7 client service is a necessity, consider the following tips for putting your Smartphone to work (beyond using the classic features that everyone knows about: e-mail, calendar, phone and contacts):

- You can use your Smartphone as a modem to access the Internet. By using, normally free, software provided by your cellular phone provider and by connecting your Smartphone to your computer via either a USB cable or Bluetooth, you can access the Internet even if there is no wifi cloud where you are. We also talk about tethering if you use an air card for connectivity. This solution might reduce your expenses to connect to paying wifi networks in hotels, airport or coffee shops which generally goes for around $10.
- **Google:** Big Brother now offers most of its Internet solutions and webapps for free on your mobile device, thanks to GoogleMoTethering:bile. Therefore, you can receive your e-mails from your Gmail accounts, synchronize your calendar with your GAgenda, get access to your documents on GoogleDocs, share your pictures on Picasa and even watch Youtube!

Document edition: Everyone knows it is possible to receive and send documents from a Smartphone but few are aware of the ability to create and edit documents as if you were sitting at your desk in front of your computer. Many third parties offer solutions for Blackberry, Palm, iPhone or pure cell phones to create and edit Word documents, PowerPoint presentations, excel spreadsheets, etc. I use Dynoplex's eOffice suite which also provides you with a fax and printer, an online document store, a password manager and remote access software. However, mind your corporate policies as many of these features require full rights on your Smartphone.

Remote access: Even if Smartphones now act as computers, their memory and the number of software packages available are limited. Therefore, I sometimes need to use software on my computer while I am away from the office and not carrying my laptop. In such circumstances, I remotely access my PC from my Blackberry with a little application called RDM+. True, I could use eOffice remote access but I much prefer RDM+'s interface.

Dictation: The other must for your Smartphone is a dictaphone that enables you to dictate letters, proceedings, etc. and e-mail the recording to your assistant. I use VR+ which turns your Smartphone into a dictaphone for $30! I even use it to reply to e-mails as it integrates in your inbox.

To learn more about how you can use technology to work away from your office read Dominic's paper at www.practicepro.ca/criticalissues.

Dominic Jaar is in private practice in Montreal and has a blog on wine and information management at dominicjaar.blogspot.com.

Outsourcing, value billing and key trends in the new economics of law

By Simon Chester

Whenever I read of a coming transformation in the economics of legal practice, I'm reminded of all the previous transformation articles I've read. Prophets such as Dick Reed and Richard Susskind offered extraordinary insights into a new future in which the economics of practising law will be quite different. The slogans are seductive. Value-billing. Total Quality Management. Leverage through technology. Web-delivered legal services. In a longer article on the website (see *www.practicepro.ca/criticalissues*), I discuss what we can still learn from their insights.

In this brief sidebar, I'll focus on the newest candidate for revolutionary impact – the outsourcing of legal services. So what's actually being done in outsourcing of legal services? Remember the line in Thomas Friedman's *The World is Flat*, that "anything that can be digitized will be outsourced eventually?" Did that apocalyptic prophecy come true for law? Not quite.

While outsourcing business processes to India and other sites on the other side of the world has been going on for more than a decade, outsourcing in relation to law firms and legal services is barely four years old. Yet in that time there have been enough examples of outsourcing to show that the phenomenon is here to stay.

The best tracker of legal outsourcing is run by Ron Friedmann (of Integreon and Prism Legal) and veteran legal blogger Joy London. They show more than a hundred examples of legal work being done in India, the Philippines, South Africa, Singapore, Hong Kong, Malaysia, Mauritius, and even Chile, Argentina and Finland.

The indicators are impressive. Clifford Chance in New York, London and its many offices worldwide handle back-office matters in Delhi and Mumbai. Eversheds runs its day-to-day information technology from India. U.S. corporations have substantive legal work in patent drafting, contract drafting and legal research done in South India.

What's caused this? The confluence of four trends:

- high speed secure web access shuttling data around the world;
- the availability of a highly educated, English-speaking, common-law trained, web-savvy legal workforce;
- the rise of energetic entrepreneurs extending the model of business process outsourcing, looking to connect legal demand with service supply; and
- client willingness to consider new ways of getting legal work.

Yes it's true that the relative size of the Canadian market has put us some years behind the U.S. and England in the experience of outsourcing. But there are Canadian firms (such as Legalwise.ca) which are actively promoting outsourcing of legal services from Canada to India. Legalwise claims it has access to a team of 430 lawyers based in Mumbai and Pune in Maharashtra, each of which is fully trained and qualified in English common law.

What about those who believe that their practices won't be affected by outsourcing or any other economic trends? Think you're immune? Litigation was long thought of as an advocacy area requiring close contact and physical presence. Yet the rapid evolution of outsourcing reveals that even the tasks in litigation can be unpacked. Document review and coding have long been done overseas. But some U.S. firms are doing initial issue brainstorming and drafting of motion materials using teams in India.

Savvy practitioners will take a number of lessons from these developments:

- The definitions of what lawyers do and where the boundaries of protected practice lie are not fixed. If clients are sorting through what lawyers do for them and making decisions about what can be unpacked and done by others, that is a very important insight which applies beyond outsourcing. That same unpacking can be done to justify giving work to paralegals or to sophisticated software.
- Play to your strengths. Focus your energies on where you add value for clients. That's where your focus should be, rather than on lower-value activities of the sort that can be outsourced.
- A practice powered by technology can operate from virtually anywhere, and the threats to your business may come from the other side of the world, or even from a piece of software.
- Collaboration with clients and co-counsel is driven by available technologies.
- Stay close to your clients, and understand their needs and concerns. Client loyalty will be crucial and firms which maintain strong client relationships need not fear for their futures.

For more insights on alternative billing and how the economics of law is changing, read Simon's paper at www.practicepro.ca/criticalissues.

Simon Chester is a partner in the litigation and business law groups of Heenan Blaikie's Toronto office.

Future friendly

LawPRO's new "go green" program

There's really no escaping it: Being environmentally conscious isn't just a part-time hobby or a trendy lifestyle choice. It's becoming a part of our daily lives and engrained into our everyday vocabulary.

And it's never been easier to "go green." Retail shelves are full of environmentally friendly alternatives from food to furniture and everything in between. Consumer and business publications have jumped on the bandwagon, educating consumers and the business world about ways in which to "green" their environment. Companies large and small are joining the sustainability movement, with commitments and campaigns to reduce their carbon footprint and revamp products and processes.

LawPRO is no exception. We've always been committed to doing our part for the environment, largely by practising the 3Rs: Reduce, Reuse and Recycle. Initiatives such as our "virtual" claims system, profiled in this issue of the magazine, has helped us significantly reduce paper use and costs. Computer equipment that is old and obsolete is scrubbed clean, then sent to organizations that refurbish this equipment and provide it to non-profits, schools and other organizations. Waste paper is recycled, not trashed. Old batteries and printer cartridges are collected and recycled through appropriate organizations.

But we recognize there's much more we could be doing – both as a company and as individuals in our private lives. Our newly launched "go green" initiative brings focus to the need to do our part for the environment. As part of this program, all aspects of our organization will come under scrutiny as our employees help us identify how we can further "green" our processes.

Lawyers will see the first major signs of this "go green" program this fall: As detailed in the accompanying article, information on the 2009 insurance program is going paperless, to the extent possible. Over the coming months and years, we'll keep you updated on how we are walking the green talk at LawPRO – and we'll provide information and insights into how greening your practice benefits your business.

Nine simple things you can do right now to make your office greener

1. **Recycle**: Sounds easy but you would be surprised at how many offices still don't recycle.

2. **Avoid printing and copying whenever possible:** Only print out the e-mails and documents that you really need. If you're having a meeting, think about using a PowerPoint presentation instead of printing agendas and plans for everyone. If you do have to print, consider printing on both sides of that page – most printers now have a duplex setting.

3. **Use recycled products:** Pens, printer cartridges, paper and many more commonly used office products are available in recycled formats. It takes a regular toner cartridge 1,000 years to decompose in a landfill: Try to use refillable ones instead.

4. **Turn computers off at the end of the day**: Turning a computer off saves 70 per cent more energy than letting it go into sleep mode. A computer monitor left on overnight uses the same amount of energy as printing 500 laser copies.

5. **Use local distributors**: Reduce the amount of shipping needed to get your products by using local businesses.

6. **Start a car-pool**: Cut down on the number of vehicles on the road and give yourself a little company on the way to and from work.

7. **Don't waste energy**: Turn out all the lights at the end of the day, set the thermostat a few degrees higher in the summer than you would normally keep it and use office equipment with auto shut-off and sleep modes.

8. **Rethink your promotional material**: Instead of giving away pens and paper branded with your company logo at trade shows and conventions, consider things like reusable shopping bags and other environmentally friendly giveaways.

LawPRO supports sustainability

9. **Start a Green Committee**: Get like-minded people in your office together to form a Green Committee that can organize events and projects for your staff. Plant trees, buy carbon offsets, run contests, etc. Get people excited about being environmentally conscious.

The list above was compiled from the following sources:

- www.treehugger.com/files/2006/12/how_to_green_your_work.php
- content.monster.ca/14503_en-CA_p1.asp
- www.go-green.com/node/134
- www.reusethisbag.com/25-reasons-to-go-reusable.asp

Greening the insurance program by reducing paper

If you've been accustomed to receiving your insurance information in paper form – in the mail – you'll likely see a dramatic change as we begin implementing our green initiative.

Starting with this fall's annual insurance renewal process, we'll be dramatically cutting back on the amount of paper-based information we send out. With all of our documents available online and more than 92 per cent of lawyers last year choosing to file their annual insurance application via our website, the choice to steer lawyers to our website to complete their LawPRO-related transactions seemed obvious.

Starting this fall, lawyers will be encouraged to access information related to the 2009 insurance program online.

Application packages will be mailed only to a small subset of lawyers for whom we do not have an e-mail address, or who have specifically asked for a paper application. The down-sized packages will contain only an instruction sheet, an application form, and a premium payment authorization form.

Program guides will generally not be available in print; instead lawyers will be asked to access this document online, for reference or downloading.

The 2009 LawPRO policy wording, and the booklet containing transaction levy filing forms, will primarily be available on our website. Invoices, policy declarations information and instructions will be available in print, on request.

More than 20,000 lawyers will renew their indemnity insurance this year and we estimate that by taking these steps we'll avoid printing more than 650,000 pieces of paper. No small feat. Moreover, this initiative will, we estimate, save the program $40,000 to $50,000 this year alone in printing costs.

Improved web presence

We're also taking steps to improve our online options and make it even easier to file your insurance application – or any other required filings – online. We're introducing a more streamlined interface so you can find what you're looking for quickly. And we'll be redesigning the My LawPRO section of the site with more personalized options and information to encourage lawyers to do all of their LawPRO business online. All of our materials can still be found online, anytime of day, and can be accessed instantly.

We're serious about our commitment to the environment and our "go green" initiative. We're also committed to making this important transition as seamless as possible for you, our customers. And we hope to, in turn, make you as excited and committed as we are about working with us to go green.

Paper on request

Although the 2009 insurance information packages will be scaled back in terms of the printed contents, you will always find the program guide, transaction levy and/or policy books online. Our customer service staff will be pleased to help you navigate our site, and show you where to download them, or arrange to fax copies directly to you. If you still prefer hard copies, we'll gladly send them via regular mail to those who call our Customer Service Department and make that request.

Although "going green" benefits us all, we recognize that some lawyers are unable to file their annual insurance application online, and we will continue to accept completed paper applications by mail.

In addition, we will continue to mail out confirming coverage documentation to those who specifically request it.

TitlePLUS program founded on green practices

When the TitlePUS program was launched just over 10 years ago, going "green" was an idea whose time had not yet come.

But LawPRO's title insurance program was designed to be paperless – and environmentally friendly – from the get-go. From the application process right down to an internal database, almost every aspect of the program is done electronically.

Nearly 100 per cent of the application process is done with online software, meaning a lawyer completes and submits the application in a paperless environment.

All TitlePLUS applications are reviewed over the web and, once the process is underway, many lawyers opt for all application-related communications to be done online. While not everyone prefers electronic communications, currently only about two per cent of the total subscribers still insist on paper mail for general communications not related to TitlePLUS applications.

Internally, the TitlePLUS program practises its commitment to "go green" in a number of ways. Any and all information, records and materials are housed in a massive electronic database which takes the place of bulky paper files. Employees are also encouraged to avoid printing whenever possible, and to print double-sided if necessary.

Lastly, the TitlePLUS website (www.titleplus.ca) offers not only an extensive amount of information for lawyers, home buyers and lenders, but also multimedia presentations and the Real Simple Real Estate Guide, which covers a number of real estate and title insurance-related questions.

"Having so much information on our website and being able to direct customers there is a huge advantage and time saver – as well as saving countless trees," says Lori Swartz, TitlePLUS Training and Communication Counsel.

Less paper to paperless

A paperless office – in today's business world it is becoming common place to operate almost entirely in an electronic environment. With e-mails, scanners, improved document security and secure file transfers, more and more business transactions can be done without printing a single piece of paper.

However, while the technology exists to avoid it, businesses still print the majority of their documents and invoices, keeping them filed away "just in case."

It's hard to shake the old guard from their habits and taking the plunge into a paperless world takes time. Such was the case with LawPRO's transition to a paperless claims system.

In 2004 we challenged ourselves to take the necessary steps and start changing our processes towards a paperless claims process. Reducing paper usage and file storage not only meant significant cost savings, it was also a smart environmental move.

Step one was to stop using printed correspondence externally. Formal letters and requests were moved to e-mail with the necessary documents attached. Seemingly a small step, but a very necessary one to encourage people in the mindset of working electronically.

Step two came in 2005 and was the labour-intensive task of scanning all incoming paper correspondence and converting them into electronic documents. While we still kept paper copies to run in parallel with the electronic files, the first major move toward a paperless office was underway.

Then, at the beginning of 2006, LawPRO stated that our primary claims filing method would now officially be electronic. Only documents deemed "important" were included in the physical file, while all other incoming mail was scanned and shredded. Scanned documents were turned into PDFs (Portable Document Files) to ensure security and address any confidentiality issues.

With the "Less Paper" project officially underway, our claims counsel and staff focused on encouraging our defense counsel to work in an electronic environment whenever possible.

As the paperless files shrank in size, the electronic files became more and more robust. The digital files were easier to sort and search through and offered more options than their paper ancestors. Files could now be accessed by more than one person at the same time, and our internal claims counsel weren't restricted by geography. As long as they had access to the Internet they could access the files seven days a week, 24 hours a day.

Other features helped to make the transition even easier. Dual computer monitors are being introduced throughout the LawPRO offices to make it simple to peruse a file on one monitor and run applications on the other.

By 2007, 80 per cent of the preferred defense counsel had bought into our "Less Paper" initiative and LawPRO officially did away with any paper files. Less paper became paperless and we stopped keeping physical files for any new cases. When we recently moved offices, our file room shrank to a tenth of the size of its predecessor.

As with any new process of this size and scope, we expected some growing pains. But in a relatively short time our defense counsel embraced the new process and in many cases commented that the new electronic model lent itself to better, more streamlined communication.

Although the entire process has been an extremely successful one, LawPRO recognizes that technology is constantly changing and our challenge is to change with it. By always looking for new and innovative ways to incorporate technology into our business, we strive to not only make our claims system easier and more functional but to also do our part environmentally.

Gary Edgar is communications advisor at LawPRO.

Ray Leclair

new TitlePLUS VP

Ray Leclair, a well-known and respected leader of the real estate bar, joined LawPRO as the new Vice President, TitlePLUS in early June.

Ray assumed the reins for the TitlePLUS program from Kathleen Waters who was appointed LawPRO President and CEO in March.

Ray has extensive experience with both the TitlePLUS program and with issues and concerns of the real estate bar. He was one of the first beta testers for the TitlePLUS software in 1997, and has supported the program and its goals ever since. He is past-chair of the Real Estate Section of the Ontario Bar Association and is currently vice-chair of the National Real Property Section of the Canadian Bar Association. As well, Ray is co-chair of the Working Group on Lawyers & Real Estate and is president of the Ontario Real Estate Lawyers Association (ORELA).

Formerly general counsel for the Kanata Research Park Corporation in Ottawa, Ray was called to the bar in 1984. He has practised in both major national law firms and as a sole practitioner, and was a part-time professor at the University of Ottawa Law School and Cité Collégiale instructing the French language portion of the real estate law course. He has also served for nearly 15 years as the Ottawa senior instructor for the French and English Real Estate Sections of the Bar Admission Course, and is on the Advisory Committee for the Cité Collégiale Legal Assistants Program.

Québec launch makes TitlePLUS program truly national

One of Québec's most respected and established insurance brokers – Dale Parizeau LM – is working with the TitlePLUS program to make TitlePLUS title insurance available to the Québec real estate marketplace.

Notaries in Quebec whose clients are interested in TitlePLUS title insurance coverage will work with Dale Parizeau to complete the required TitlePLUS application and obtain a TitlePLUS policy for their clients.

Founded in 1859, Dale Parizeau LM employs about 250 professionals to provide insurance services to more than 100,000 individuals and companies across the province. Its recent merger with Morris & Mackenzie makes the merged organization the largest privately owned independent brokerage firm in Québec, with about $200 million in written premiums and close to 400 employees.

Queen's University student wins $3,000 TitlePLUS 2008 Essay Contest prize

A Queen's University, Faculty of Law student – Julie Lowe – is the winner of the second annual TitlePLUS Essay Prize.

Lowe won for her essay titled "Fraud and the Land Titles System: Deferred Indefeasibility," which examines who should have to bear the loss where there is a fraudulent link in the chain of title to property. Her winning essay explores theories of indefeasibility, and ultimately argues for a more flexible approach, which would provide for greater equity for victims of title fraud.

A second-year student at Queen's University, Lowe also holds a Bachelor of Applied Science in Mechanical Engineering from the University of Waterloo.

LawPRO created the TitlePLUS Essay Prize in 2007 to encourage and recognize outstanding legal scholarship in the practice of real estate law. Students from law schools across Canada (excluding Québec) were invited to enter the essay contest.

Kathleen Waters, President & CEO of LawPRO presents Queen's student Julie Lowe (left) with a cheque for $3,000 at a ceremony at LawPRO's Toronto offices in late May.

Mortgage broker

exclusion amended

LawPRO has amended the mortgage broker exclusion under the LawPRO policy to allow coverage for specific mortgage brokering-related services provided by lawyers on or after July 1, 2008.

The changes coincide with key provisions of the Ontario government's *Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c.29, which came into force on July 1, 2008. This legislation introduces licensing, insurance and other requirements for those dealing, trading, lending and administering mortgages in Ontario, but exempts lawyers acting in their professional capacity in specific instances in respect of some of these activities.

Those whose activities as a lawyer fall within the prescribed exemptions for lawyers or constitute a "simple referral" under the new *Act* will not be excluded from program coverage by virtue of the mortgage broker exclusion, for services performed on or after July 1, 2008.

Similarly, circumstances in which a lawyer's professional services under the policy are provided in conjunction with a lawyer acting as a mortgage broker or as an intermediary arranging any financial transaction usual to mortgage lending, will no longer be subject to the mortgage broker exclusion, for services performed on or after July 1, 2008.

Since changes were made to the insurance program in 1995, the policy has expressly excluded coverage for claims arising out of lawyers acting as a mortgage broker or as an intermediary arranging any financial transaction usual to mortgage lending, and for claims arising out of lawyers' legal services provided in conjunction with the same.

Effective July 1, 2008, under the *Act*, those dealing or trading in mortgages in Ontario for remuneration, and those carrying on the business of dealing in mortgages, trading in mortgages, acting as a mortgage lender or administering mortgages in Ontario, may only do so where licensed or exempt from the requirement to be licensed, pursuant to the *Act*.

Mortgage brokerages, mortgage brokers, mortgage agents and mortgage administrators will all be subject to the regulatory oversight of the Superintendent of Financial Institutions. By regulation, mortgage brokerages will be required to maintain errors and omissions insurance (or other approved form of financial assurance) for claims against the brokerage, its brokers and agents. Similar provisions apply to those licensed as mortgage administrators.

Specific exemption is made for lawyers acting in their professional capacity in certain instances of dealing in mortgages, trading in mortgages and administering mortgages. Provision is also made for "simple referrals" in certain instances of dealing in mortgages. For further information on the scope of these exemptions, lawyers should refer to the specific language of the *Act* and its regulations.

As mortgage brokers will be regulated and insured by others, the modified mortgage broker exclusion under the Law Society program will continue to exclude coverage for claims arising out of an insured lawyer acting as a mortgage broker.

In respect of services performed on or after July 1, 2008, "mortgage broker" will mean a person performing services for which a licence is required under the *Act*, thereby allowing coverage to apply in respect of lawyers' activities falling within the prescribed exemptions.

In respect of services performed before July 1, 2008, in keeping with the earlier scope of the exclusion, "mortgage broker" will mean a person who lends money on the security of real estate, whether the money is the person's money or that of another person, or holds himself, herself or itself out as or who by an advertisement, notice or sign indicates that the person is a mortgage broker, or a person who carries on the business of dealing in mortgages, or who acts as an intermediary arranging any financial transaction usual to mortgage lending.

As well, lawyer's professional services under the policy that are provided in conjunction with a lawyer acting as a mortgage broker or as an intermediary arranging any financial transaction usual to mortgage lending, will no longer be subject to the exclusion, for services performed on or after July 1, 2008.

A copy of the 2008 program policy (LawPRO Policy no. 2008-001) and Modified Mortgage Broker Exclusion Endorsement are available online at: lawpro.ca/insurance/insurance_type/standard_policies.asp.

Duncan Gosnell is vice-president, Underwriting at LawPRO.

10 essential technology skills and practices

Technology has become an essential part of practising law and working in a law office. This column summarizes 10 essential technology skills and practices with which every lawyer and law office staff person should be familiar.

1. Learn keyboard shortcuts

Odds are your hands are on the keyboard most of the time. Taking them off to reach for the mouse just breaks your rhythm and slows you down. With keyboard shortcuts you can do almost everything you can do with a mouse – the key is learning the shortcuts for the various programs you use.

Basic Windows and document editing shortcuts are described below. Take time to learn the shortcuts for the most common tasks you complete in the programs you most frequently use. You will be able to complete things much faster.

To learn and use keyboard shortcuts you should be familiar with the syntax for describing them. Simply remember that a plus sign (+) between two or more keys means that you press those keys, in the order they are listed, almost simultaneously, moving from left to right. For example, a capital B would be described as Shift+B. You release them in the opposite order.

2. Alt+Tab for switching between programs

Switching between open programs is one of the most frequent things we all do as we work on our computers. For this task most of us use a mouse to select a button on the task bar. There is a much faster way.

Pressing Alt+Tab will open a rectangular grey pop-up window in the centre of your screen. It will have an icon for each program that is running on your computer. Hold down the Alt key, and repeatedly press Tab to jump from one icon to the next. To help you find the window you want, the text from the title bar of each window appears in a box at the bottom of the pop-up. Simply release both keys when you get to the window you want.

In this pop-up window, the icons are presented, from left to right, in the order you last looked at their respective windows. This means that the window you were in previous to the current one is just one Alt+Tab away. This lets you jump back and forth between two programs in the blink of an eye.

3. Switching between documents

On occasion you will want to jump from one document to another within a single program. For example, switching between two or more letters within Word. Use Ctrl+F6 to do this. Hold down the Ctrl key, and repeatedly hit F6. Again, release both keys when you get to the document you want. This shortcut works on many, but not all, Windows programs.

4. Jumping text shortcuts

Even the most experienced computer users often take the long road when it comes to editing text and moving around a document. They're either clicking away like crazy with the mouse, or using the arrow keys to move the cursor around a document, one character or line at a time. With a few simple shortcuts you can move around a document much more quickly.

When editing a document, the following shortcuts help you jump a whole word, or even a whole paragraph, with a single press of an arrow key:

- Ctrl+Right Arrow will jump the cursor forward a whole word at a time;
- Ctrl+Left Arrow will jump the cursor backwards a whole word at a time;
- Ctrl+Down Arrow will jump you down a whole paragraph at a time;
- Ctrl+Up Arrow will jump you up a whole paragraph at a time.

If you want to select or block a larger portion of text, add the Shift key to the above combinations:

- Ctrl+Shift+Right Arrow will jump the cursor forward a whole word and select the text at the same time;
- Ctrl+Shift+Left Arrow will jump the cursor backwards a whole word and select the text at the same time;
- Ctrl+Shift+Down Arrow will jump you down a whole paragraph and select the text at the same time;
- Ctrl+Shift+Up Arrow will jump you up a whole paragraph and select the text at the same time.

After blocking the words, sentences or paragraphs you wanted to select, you can copy, move, or reformat as you wish.

5. Cut, copy and paste

Why retype things when you don't have to? The ability to transfer text or other data from one program to another via cut, copy and paste is one of the most powerful features of Windows.

To move or copy text or other data (e.g. a picture) you must first select or highlight it.

Next, to move the text, press Ctrl+X or Cut on the Standard toolbar (the button with scissors). To copy the text, press Ctrl+C or click the Copy button (two white sheets of paper).

The text you are moving or copying is now in the Windows Clipboard, a temporary holding area.

Now move your cursor and click where you want to place the text you are moving or copying. This can be somewhere else in

the source document, another document in the same application, or even a completely different program.

To add or "paste" the text in the new location, press Ctrl+V or click the Paste button (a clipboard with a sheet of paper). The text will appear in the new location.

If you want to clean up the format of pasted text, use Paste Special.

6. Paste Special

Want to add text from a website or other source to an e-mail or Word or WordPerfect document and not deal with formatting issues (i.e. just get the basic text with no formatting)? You can use the Paste Special function to do this.

Highlight and "copy" the text you want to copy and paste. Next, place the cursor at the point you want to add it to your document. But instead of clicking the "Paste" icon, click on "Edit", then "Paste Special", and then select the "Unformatted" option. The text will adopt the format of the receiving document and any formatting from the source document will be lost.

7. Text formatting shortcuts

Few things are more finicky than typing case citations. With these three keyboard shortcuts case typing citations will be a breeze:

- Press Ctrl+B to turn Bold on/off
- Press Ctrl+I to turn Italics on/off
- Press Ctrl+U to turn underline on/off

Two things to note, you can use these shortcuts together, and they are all toggles, that is, pressing the noted key combination cycles between on and off.

If you want to type a case name in the middle of a sentence with bold and underline do the following: When you get to the point the case name starts, simply press Ctrl+B, then Ctrl+I, then type the case name. To turn bold and underline off, press Ctrl+B and then Ctrl+I again, and continue with the sentence.

8. Use A "right click" for format and configuration settings

There are many formatting and configuration settings buried away in various menus and dialog boxes. They can be very hard to find. The "right click" button on your mouse comes to the rescue and makes many of these settings available with a simple right mouse click.

These options and features are "context sensitive" – in other words, you will be presented with a list of choices that are relevant to the item, field or text you are right clicking on. For example, in Outlook, right clicking on an e-mail in your Inbox presents you with Open, Print, Reply, Reply all, Forward etc. Right clicking on text in a Word document gives you access to font, text and paragraph formatting settings.

You can right click on almost everything on your desktop – try it!

9. Eliminate your biggest daily interruption: Banish the new e-mail pop-up

Many people are presented with a beep and the "new message" pop-up window every single time a new e-mail message arrives in their Inbox. This is a huge interruption. Your train of thought gets interrupted and you get bounced out of whatever you were working on.

To get more done, turn off that notification window! Go with just the beep if you have to. And, if you don't need to know the instant when something arrives in your inbox (and most of the time you don't), consider turning off the beep too. You're going to check your inbox reasonably regularly anyway.

10. Poor docketing habits let time and money slip through your fingers

To make sure you capture all the time spent by lawyer and staff time keepers in your office, everyone should do the following: Directly enter their own dockets on their computer. This saves time and transcription errors by eliminating the double-entry by another staff person.

Docket work throughout the day. Trying to create dockets for work done earlier in the day (much less in the more distant past) is very time-consuming, and not likely to be very accurate or complete. Some studies have indicated contemporaneously recording time dockets capture 20 per cent more time.

Most time and billing programs have a timer feature to help track how much time you have spent on any given task. It works just like a stopwatch. Most lawyers grossly underestimate the time they spent on individual tasks. Try timing your own tasks; you will be shocked by how much time you are missing. If you get interrupted while working on one task, pause or close the docket for it, and create a new docket for the new task. Re-open the original docket when you return to the task. At the end of the day, you should still review your dockets. Look for missed time, and make any necessary corrections or additions while things are still fresh in your mind.

Create detailed dockets. For example, "telephone conference with client re details of weekend access problems." Detailed dockets serve as a record of the work you did on a file, and for communicating to the client what was done.

Docket every minute spent on a file. Wait until you final or interim bill the file, at which time you can properly judge all the factors that determine what should be billed on the matter.

Make sure all the lawyers and staff in your office know, understand and use the above tips and practices. They will help improve firm profitability by letting all technology users be more efficient.

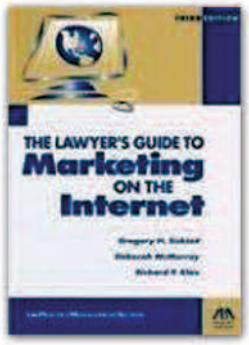
Dan Pinnington is director of practicePRO, LawPRO's risk and practice management program. He can be reached at dan.pinnington@lawpro.ca.

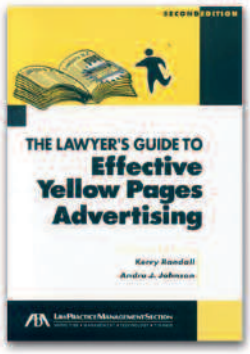
The Lawyer's Guide to Effective Yellow Pages Advertising 2nd Edition

Kerry Randall & Andru J. Johnson, published 2005, 224 pages

The Lawyer's Guide to Marketing on the Internet 3rd Edition

Gregory H. Siskind, Deborah McMurray & Richard P. Klau, published 2007, 192 pages





To build a successful practice today you need to market yourself in both the traditional print-based world (the Yellow Pages) as well as the online world.

Let's start with your yellow pages ad. Most firms do not take the time to create yellow pages advertising that really works. With their eye on costs, they focus on the size of the ad, and/or whether or not to include colour elements.

Now, grab a copy of your current Yellow Pages ad to see if it has the six elements for creating high-performance ads that Kerry Randall lists in the *Effective Yellow Pages Advertising:*

1. strong headlines that command attention and engage readers;
2. a laser sharp focus; a willingness to ignore most readers;
3. arresting, eye-captivating illustrations or photographs;
4. clearly identifiable differences (from competitive advertisers);
5. relevant copy (text) that covers less than 50 per cent of the ad space;
6. professional looking, clutter-free layouts.

How did your ad fare? If not well, look to the Randall book for the advice you need to create an effective and powerful Yellow Pages ad. You'll find information on identifying and focusing on your target market, as well as how to plan and design the perfect ad that not only reaches potential clients, but motivates them to call.

Moving beyond the Yellow Pages, today it is a business necessity that your firm also market itself on the web. For firms thinking about entering this world, the newly updated and revised 3rd edition of *The Lawyer's Guide to Marketing on the Internet* will be a valuable resource. The book is co-written by Greg Siskind (an immigration lawyer who was one of the first to set up a law firm website way back in 1994), Deborah McMurray (a marketing consultant to the legal industry), and Richard P. Klau (a Google employee).

The first chapters of the book go back to basics: How do you develop a web marketing plan? What should be in a marketing plan? What resources should be allocated to it? The book will help you build a customized web-marketing plan.

With a plan in place, the next chapters explore the various types of content firms can make available on the web, and what

tools are available to effectively present this content.

The book is full of screenshots of some of the more effective law firm websites, and the addresses of those sites are provided as well so you can explore them for yourself. The book reviews other online marketing tools including e-mail lists, blogs, extranets, webinars and social networking. Not all of these features are appropriate for every firm, and the authors discuss the pros and cons of each, as well as how to walk the fine line between getting out your firm's message and turning people off (for instance, the difference between informative e-mails to a particular audience and annoying spam).

This book will be invaluable to any firm wondering where to start in terms of using the potential of the web to raise the firm's profile and increase business. It does an excellent job explaining new technologies and website features in layman's terms, so even the most technophobic will not be daunted. Marketing a firm has come a long way from putting an ad in the Yellow Pages (not that this isn't still important), and this book will help firms choose from among the various options for marketing on the web.

You can borrow both of these books for free from the practicePRO Lending Library (www.practicepro.ca/library). Full tables of contents for both books are online.

If you wish to purchase your own copy, *Effective Yellow Pages Advertising* costs US$69.95, *Marketing on the Internet* costs US$84.95. For more information about these and other excellent ABA LPM Section publications, go to www.abanet.org/lpm/catalog.

Also in the practicePRO Lending Library are the following books you can borrow on marketing:

- **The Lawyer's Guide to Marketing Your Practice 2nd Edition**
  Edited by James A. Durham & Deborah McMurray, published 2003, 328 pages with CD-ROM

- **The Lawyer's Field Guide to Effective Business Development**
  William J. Flabbery, Jr, published 2007, 150 pages

- **Marketing Success Stories: Conversations with Leading Lawyers 2nd Edition**
  Hollis Hatfield Weishar & Joyce K. Smiley, published 2004, 240 pages

- **Personal Marketing and Selling Skills**
  Catherine A. MacDonagh and Beth M. Cuzzone, published 2007, 146 pages

- **Through the Client's Eyes: New Approaches to Get Clients to Hire You Again and Again 3rd Edition**
  Henry W. Ewalt and Andrew W. Ewalt, published 2008, 300 pages

- **Women Rainmakers' Best Marketing Tips 2nd Edition**
  Theda C. Snyder, published 2003, 142 pages

For a full list of titles available see www.practicepro.ca/library.

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Limitations update:

Some periods preserved and courts have limited discretion to extend time to commence action

"Only one year to start the action? I thought I had two years!"

You are packing up to head off to the cottage on a sunny Friday afternoon when suddenly a young associate barges into your office to talk about pleadings on one of your files. The cottage will have to wait.

The client on the file in question has a dispute with his insurance company over a stolen vehicle. The loss occurred almost a year ago and your associate is off to the courthouse to ensure that an action is commenced immediately.

Don't we have two years to start the action according to the *Limitations Act, 2002* you wonder? No, she correctly points out. Some limitation periods have been preserved under the new limitations regime, including section 259.1 of the *Insurance Act*. You only have one year from the date of loss to start your action.

But surely, if you only missed it by a couple of days, the court would allow the action to proceed? You recall having exchanged letters with the insurance adjuster and giving timely notice. How could the insurance company argue prejudice? You astutely point out that there is a series of recent cases in which the courts use their discretion to permit the commencement of a new action outside the limitation period if there are special circumstances and a lack of prejudice.

"Not any more," your young associate points out. The Court of Appeal in *Joseph v. Paramount Canada's Wonderland* [2008 ONCA 469] and *Meady v. Greyhound Canada Transportation Corp.* [2008 ONCA 468] has tried to straighten all this out.

The *Joseph* decision clarified that even before January 1, 2004, the courts did not have discretion to extend the time for commencing an action. The common law doctrine of "special circumstances" only applied where the plaintiff commenced a timely action against someone, and then wanted to add another defendant or new cause of action after the expiry of the Limitation period. For fact situations arising after January 1, 2004, this discretion no longer exists unless some other statute expressly permits the extension.

You begin to think about other files in the office and whether you need to add parties, and worry that "special circumstances" is gone forever unless it arises in those rare occasions "by or under another Act."

"Not exactly," responds your eager associate. Remember that motor vehicle accident which occurred on March 15, 2001, and the pending motion to add the lessor of the third party vehicle as a defendant? The two-year limitation period under the *Highway Traffic Act* has expired, but there is hope! According to *Meady*, if a claim falls within the transitional provisions of s.24 of the *Limitations Act*, then the former law applies and for most limitation periods, you could argue "special circumstances."

Thinking ahead, you and your associate realize that it is not going to be easy to commence an action and add parties later because you may only be able to argue discoverability, and that requires reasonable evidence of due diligence. You agree that it is important to conduct a proper and early investigation, and move your action along to discoveries. You make a note to review your file list first thing next week.

What about your client's claim for the stolen vehicle? Well, that does not expire until Monday, but your trusty associate is taking no chances and is on her way to the courthouse. As for you, the cottage awaits!

Domenic Bellacicco is claims counsel at LawPRO.

Workshop: powerful communications

Module: # 19 – Writing effectively by…writing better letters

Coaching

Letter writing takes up a significant amount of a lawyer's time. Writing letters well signals effective communication by a lawyer. There are three common objectives that letters might have:

- Provide information.
- Get the reader to take some action.
- Create a favorable impression .

Here are five hints for writing letters better.

1. Have one central theme:
   - The idea that pulls everything in the letter together.
   - This helps you include what's relevant and exclude what isn't.
2. Somewhere, close to the beginning, say exactly what you want:
   - Tell what your letter is about in the first paragraph.
3. Make the letter enjoyable to read, not a chore:
   - Be positive.
   - Be nice (Read the letter out loud. Does it sound friendly?).
   - Be natural.
   - Don't be cute or flippant.
4. Be specific:
   - Don't make the reader work to find out what the letter is about.
   - Keep it short and to the point.
   - Distinguish opinions from facts.
   - Start and finish with a summary.
5. Make it look good:
   - When possible put it on one page.

Mentoring

In the following (excercises), try to start letters for the reasons given.

- Write the opening paragraph of a letter to a longstanding client to update them on your range of services.
- Write the opening paragraph of a letter requesting a meeting with a member of city council.
- Write the opening paragraph of a letter presenting your credentials to a prospective client.

About the OCC

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

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

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

Debunking the 'lone sufferer' myth once and for all

Conventional wisdom in our society about lawyers is that they're high achieving, productive, successful, disciplined, pulled-together people. They're 'pick themselves up by their bootstraps' types. For prospective clients, it's reassuring to think that the person you rely on to negotiate your deal or fight for your rights in court is solid and true, unfettered by the petty personal problems that plague the average Joe or Jane. Also true is that members of the profession themselves readily buy into this stereotype.

Undoubtedly, legal professionals are achievers. You cannot get into law school, let alone graduate, complete articles, get called and practise, without significant fortitude and ability. Running that gauntlet is no small feat, especially when you take into account that life is not only about professional endeavours but also involves personal pursuits such as marriage, raising children, caring for aging parents, keeping healthy and leisure.

And so, there's no question that we're an impressive bunch. It's no accident then that non-lawyers are almost always impressed when they discover a specific person is a lawyer – even if they view the profession generally in a negative light. More than one member of the bar has heard an individual waxing indignant over the transgressions of the legal profession – lawyer jokes included – only to then, once advised as to the listener's vocation, utterly gush over that person's admirable professional status. It can all be very confusing.

Still more confusing is the assumption that legal professionals are immune from personal distress. Take, for example, the family lawyer engaged in a pitched battle with opposing counsel over every issue that arises in a matter. While many counsel keep it civil and are even professionally friendly with the other side, many more attempt to maintain a veneer of emotional detachment and super-control. They're on top of every detail and fear nothing. To quote Sun Tzu: "Invincibility is in oneself, vulnerability is in the opponent." When in battle, to some it makes only good sense to put up a strong, invulnerable front. It intimidates. It demoralizes. And it deprives the adversary of ammunition.

The reality behind the façade

Without question, many lawyers live healthy, productive lives. When they come across as 'together', it's because, by and large, they are.

But what of the other significant segment of these professionals? What of the litigator who boisterously plows through adversary after adversary in court, but can't find a way to stop herself from finishing a bottle or two of wine on her own once she reaches home at night, with all of the attendant destructive consequences this poses to her health, family and career? What of the articling student who can't seem to find a job no matter how many interviews he gets, with the spectre of the Call quickly approaching? He can't help but fear that all of his work was for naught because the big bad legal profession won't let him in, and he's got loans to pay off and a family to support, not to mention a career to build. What about the associate who needs to keep it together and meet her billing targets while suffering from debilitating depression and anxiety that make it hard to even get out of bed in the morning?

These vignettes are not anomalies in an otherwise idyllic system. Each day, the Ontario Lawyers' Assistance Program (OLAP) fields calls from lawyers, judges and members of their families across Ontario struggling with various forms of stress and distress.

We're not understating the situation when we say that issues such as depression, addiction and anxiety disorders, among many others, are more the rule than the exception throughout the Ontario bar. As hard as it is for many to believe, we have among us heroin addicts, those with bipolar disorder, gambling addicts and those paralyzed by fear and anxiety. They suffer terribly. More disturbingly, they usually suffer alone.

The inspiration for the topic of this article is the shockingly consistent strain that runs through the experience of most of the lawyers suffering these divergent challenges: They think they're the only ones out there like them. Like clockwork, OLAP staff wait for the question and more often than not, it comes: "Is there anyone else out there going through this?"

OLAP can field 20 calls from those who suffer depression and 15 of them may separately proffer this query, oblivious to the malady they share with so many others like them. And so, they suffer alone, convinced that they're weak, wrong, bad and with irretrievably flawed characters. After all, as was noted earlier, lawyers are bootstrap picker-uppers. They run gauntlets and survive. They defeat powerful enemies. "Then why can't I stop crying?" "Why am I letting my life disintegrate over this damn pill that I can't keep from taking?" "Why am I terrified to open that file?" "I'm a complete failure."

Why does this happen?

Many reading this will wonder if it's even true. It comes across as so unusual. "Just talk to someone!" or "Just get help!" is the default attitude.

The problem with that is two-fold. First, people have trouble self-diagnosing. It would not be unusual to hear a person declare that he is tired all the time, has lost interest in things he used to love doing, has trouble sleeping and often feels hopeless. Then he'll confidently declare: "But I'm not depressed."

The same holds true for addictions and even abusive situations. Have you ever come across a person in a physically and emotionally violent relationship who refuses to let you call it 'abuse'? The label is scary and unnerving. To many, it connotes failure. If you don't label it, maybe that's just the way life is.

The second problem is that once a person realizes she is at the end of her rope and just can't do it on her own, she may be too ashamed to reach out for the much-needed assistance. A lawyer who is used to figuring things out on his own and being a self-starter in his practice, vehemently resists the concept of reaching out. He muses: "I got myself into this, I can get myself out of it."

The problem is that in the throes of depression or addiction, one's reserves of resiliency are depleted. Besides, depression, addiction and other such diseases – and they are diseases – powerfully distort the perception of the sufferer. Minor challenges become pressures that are so overwhelming that for some, suicide seems the only escape. That's a distorted reality. That's what the disease does to a person.

Further, often you'll find a lawyer suffering from a condition that renders him or her terribly sad; and instead of getting treated or even simply being kind to him or herself, he or she will add a layer of self-abuse to an already painful circumstance. These people may heap frustration and abuse on themselves for what they perceive as failure or weakness. At the very time that they desperately need care, acceptance and the total absence of judgment, they judge themselves more harshly than anyone else would. It's a self-sustaining system and in all of it, they convince themselves that they're the only one of their peers going through this.

Let the myth die here

From the perspective of a helping professional able to see the larger picture, the irony of 20 people suffering the same affliction all believing they're the only one might be amusing, were it not so utterly sad and debilitating. That belief keeps those individuals from reaching out for help when that help is readily available and undeniably effective. They're ashamed. They need to know that they're not the only one. They haven't identified their dearth of character, they've illuminated their humanity. All of us, from time to time, face challenges that seem insurmountable. That's not failure, it's life.

So let's put this 'Lone Sufferer' myth to bed once and for all. We in the profession share not only our professional pursuits and accomplishments, we share also a humanity that allows us to sometimes be vulnerable to disease or hardship without it connoting a personal failing. We share not only keen intellect but also the emotional resiliency to face down personal distress – with the help of others – and to reclaim the lives we've worked so diligently to build. No one need suffer on their own, so long as they know they're not alone.

Doron J. Gold is a case manager at the Ontario Lawyers' Assistance Program. In addition, having previously practised law, he is now a 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.

Events calendar

Upcoming events

August 8
ABA Annual meeting
90 Tips in 90 Minutes!
What's New in 2008!
Dan Pinnington, practicePRO presenting
New York, N.Y.

August 17-19
CBA Canadian Legal Conference
Quebec City Convention Centre
TitlePLUS exhibiting

August 18
60 Tips in 60 Minutes! What's New in 2008!
Dan Pinnington, practicePRO moderating
Quebec City, QC

September 5
ABA Legal Professional
Liability Conference
Strategies for Helping the "At-Risk" Lawyer
Dan Pinnington, practicePRO presenting
San Francisco, CA

September 11
Leader's Edge Training "Revolution"
Conference
TitlePLUS exhibiting
International Centre
Toronto, ON

September 13
College of Law Practice Management
Annual Meeting
Great Ideas, Innovations & Upheavals: Looking Back and Looking Ahead in Changing Political & Economic Times
Dan Pinnington, practicePRO presenting
Chicago, IL

September 18
The Oakville, Milton and District Real
Estate Board's Halton Symposium and
Trade Show
TitlePLUS exhibiting
Oakville Conference Centre
Oakville, ON

September 18
Canadian Women's Foundation
Breakfast
TitlePLUS sponsoring
Sheraton Centre Toronto Hotel
Toronto, ON

September 19
OBA Council Meeting
30 Law Practice Management Tips in 30 Minutes
Dan Pinnington, practicePRO presenting
Kingston, ON

September 25
Brampton Real Estate Board Trade
Show
TitlePLUS exhibiting
The Garden Banquet & Convention
Centre
Brampton, ON

September 26
PME Conference
TitlePLUS sponsoring & exhibiting
Quebec City, QC

October 2
Niagara Association of Realtors
Trade Show
TitlePLUS exhibiting
Americana Conference Resort & Spa
Niagara Falls, ON

October 3-5
Home Buyers & Sellers Expo
TitlePLUS exhibiting
International Centre
Toronto, ON

October 5-7
Credit Union Central of Canada's 2008
National Credit Union Lending
Conference
TitlePLUS exhibiting
Fairmont Newfoundland Hotel
St. John's, NF

October 7
London & St. Thomas Association of
Realtors Commercial Breakfast & Mini
Trade Show
TitlePLUS exhibiting
London, ON

October 16
IBAS Convention Trade Show
TitlePLUS exhibiting
Delta Regina Hotel
Regina, SK

October 20
Realtors Association of Hamilton-
Burlington "Realtors Without Borders"
TitlePLUS exhibiting
Hamilton Convention Centre
Hamilton, ON

October 23-24
Thunder Bay Law Association
TitlePLUS exhibiting
Victoria Inn
Thunder Bay, ON

October 29
Winnipeg Realtors Technology
Conference & Trade Show
TitlePLUS exhibiting
Victoria Inn
Winnipeg, MB

November 6
Hamilton Law Association
Annual Conference
Risk management and claims prevention
Dan Pinnington, practicePRO presenting
Hamilton, ON

November 18
Legal Aid Regional Conference
60 Tips in 60 Minutes
Dan Pinnington, practicePRO presenting
London, ON

Recent events

July 31

LAWPRO 2008 Second Quarter Real Estate and Civil Litigation Levy Surcharge filings and applicable payments due

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.

Transaction levy filing due dates

Second quarter transaction levy filings
Lawyers practising real estate and/or civil litigation must complete and file the appropriate transaction levy form and payment for the quarter ended June 30, 2008, by July 31, 2008.

First quarter filings were due and payable on April 30, 2008.

To file these forms online, visit the LAWPRO 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.

2008 insurance premium payments
The second quarterly installment by preauthorized bank account withdrawal or credit card was processed on July 15, 2008. Monthly installments by preauthorized bank account withdrawal or credit card are processed on the 15th of each month.

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LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO®)

President & CEO: Kathleen A. Waters

LAWPRO Magazine is published by the Lawyers' Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to potential claims.

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