

# LAWPRO®

## changing direction

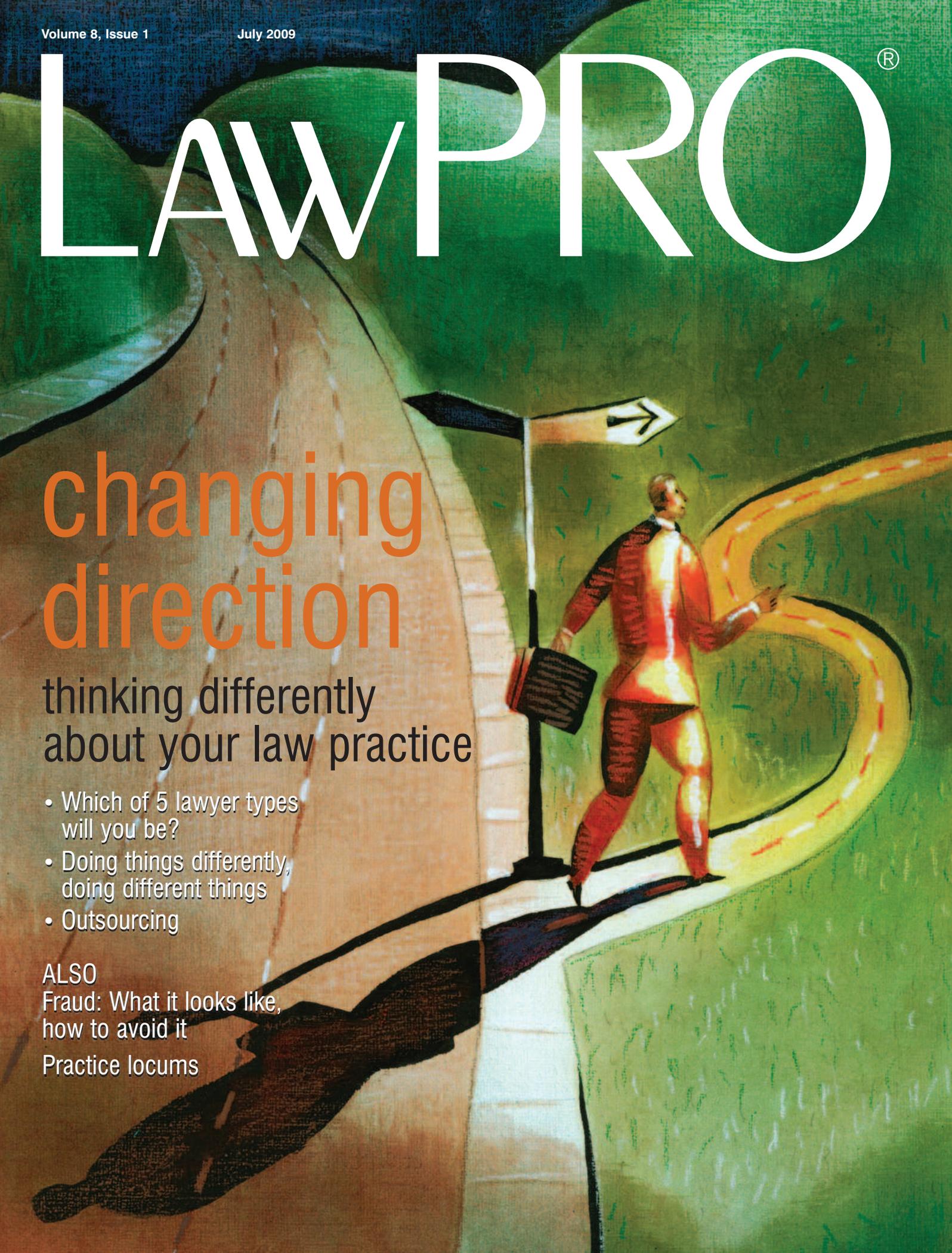
thinking differently  
about your law practice

- Which of 5 lawyer types will you be?
- Doing things differently, doing different things
- Outsourcing

ALSO

Fraud: What it looks like,  
how to avoid it

Practice locums





# Things (and people) aren't always as they seem

As I reviewed copy for this issue of the magazine, I was struck by some common themes that run through seemingly unconnected articles on fraud, the changing role of the lawyer, outsourcing and practice locums.

The first is that the world is changing fundamentally and relatively quickly. If Richard Susskind's predictions come true, we'll see far fewer "expert trusted advisor" lawyers in the future. In their place, legal knowledge engineers, legal risk managers and other reinventions of the lawyer model will become more common.

Who would have thought ten years ago that online Q&A websites would provide basic and relatively inexpensive legal guidance? Or that we'd be talking about outsourcing legal work outside law firms, much less to the other side of the world? Change is on us – and the challenge for the legal profession is to think and act differently, and, in the longer term, to look at possibly reinventing ourselves and changing direction.

A second theme is that no matter what the challenge, the need for due diligence never changes.

I've heard lawyers say they'd never send work offshore to a lawyer they'd never met – but don't think twice about acting for a client they'd only "met" on the phone or whose only contact point is an e-mail address. Yet, as the articles on fraud and outsourcing make clear, the fundamental issue is the same: Know who you are dealing with, no matter what the situation.

We're tackling fraud again in this issue because it's the issue that won't go away. Fraud now represents about 10 per cent of our claims costs. Our lead article also points out that claims costs are on the way up. As well, in 2009, for the third consecutive year, the number of claims reported is expected to exceed 2000. This is a higher number than we experienced at the start of the millennium and a trend that is of significant concern to us at LAWPRO (and will be tackled in more depth in our late summer issue of the magazine).

Why do fraudsters have you in their crosshairs? Because your trust account lets them convert a bad cheque or bank draft into good funds (leaving you with a shortfall).

And when you are the target of fraud, nothing is as it seems. Any identification in the transaction may be fraudulent: The mortgage instructions from what looks to be one of our major Canadian financial institutions may have been falsified; the identity of the lawyer on the other side of the transaction may have been stolen. It could even be your own employee who has co-opted your personal information and/or access to your firm's records and accounts – leaving you with a claim to report to LAWPRO. The fundamental message: Independent verification of all aspects of the transaction is essential.

We may never be able to stop fraud dead in its tracks – but we can reduce the likelihood and costs of fraud by being aware, asking questions, and listening intently to our instincts – as several lawyers did earlier this spring when they told us about a new mortgage fraud scheme involving counterfeit bank drafts and very realistic-looking (but fake) instructions from major lending institutions. As is detailed on pages five to six, those calls helped us piece together a possible major fraud scam and prompted a series of e-mail alerts to all lawyers across the province; even as this issue of the publication goes to press, we continue to get reports from lawyers about how helpful those alerts were in helping them spot an attempt to involve them in a bad cheque scam. All we can say: Keep those tips coming! Help us help you.

And remember as well to always look out for yourself. As the small sidebar on identity theft and social media on page three explains, your personal activities in the new media spaces could have devastating professional consequences if your professional identity is stolen courtesy of the information you've posted.

We cover a lot of ground in this issue of LAWPRO Magazine: Happy summer reading wherever the lazy, hazy, crazy days of summer find you.

Kathleen A. Waters  
President & CEO

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## E&O claims continue upwards putting pressure on insurance premiums

**FACT:** In 2008, lawyers reported 2,175 E&O claims to LAWPRO – more claims than in any year since 1995.

**FACT:** This increase cannot be explained solely by the increase in the number of lawyers in practice. Since 1995, both the number of claims reported and the claims frequency (the number of claims per 1,000 lawyers) has increased annually. In 2005, there were 90 claims reported per 1,000 lawyers; in 2008 that claims frequency had increased to 100.2.

**FACT:** The cost of resolving these E&O claims continues to climb steadily, to \$83 million in 2008 from \$70 million in 2005. Based on current trends and early results for 2009, we project that our 2009 claims costs will be even higher. This increase is driven not only by increased numbers, but also by the growing complexity of law practice: More complex files give rise to more complex claims that inevitably cost more to resolve.

*This deteriorating claims picture is not a new phenomenon at LAWPRO. In our annual report, in presentations and in magazine articles (such as those on fraud), we've been alerting lawyers to disconcerting claims trends and to the pressure that these trends put on insurance premiums.*

*In our next issue of the magazine, due out in late August 2009, we'll examine claims numbers and trends in more detail.*

*In this issue we look at one specific concern: the increase in fraud claims despite a concerted effort by LAWPRO and the Law Society to inform lawyers about the common types of fraud, the red flags of fraud and how they can avoid being a victim of fraudsters.*

### Fraud claims: 10 per cent of all claims costs

Based on the most recent analysis, lawyers reported 136 claims with a fraud component in 2008. The anticipated cost to resolve those claims as of May 2009: \$8.7 million. In 2007, lawyers reported 107 fraud claims at a cost to the insurance program of about \$8.5 million. Real estate fraud continues to account for the majority of fraud-related claims, accounting for about 63 per cent of claims reported and 54 per cent of costs.

But that's not to say other practice areas are immune to fraud claims. What fraudsters are looking for is someone with a trust account and/or access to Ontario's e-reg<sup>®</sup> system. To be successful, they need to find a lawyer who is disinclined to listen to his or her instincts and ask questions if some aspect of the transaction or client does not quite pass the smell test.

### The many faces of fraud

The following are examples of fraud claims that LAWPRO has resolved, or composite scenarios based on trends in fraud experience in specific areas of practice.

#### REAL ESTATE FRAUDS

- **Fraudulent discharges:** Typically, a borrower approaches a lawyer to assist with a mortgage loan. The lawyer's search reveals that a previous mortgage had been discharged; he registers a new mortgage, apparently in first position. The discharge is fraudulent and had been registered by someone in cahoots with the borrower. In a post Bill-152 environment, once it is discovered that the discharge was fraudulent, the old mortgage is put back into priority so that there is not enough equity to cover anything but the first (and possibly a portion of the second) mortgage. On one such file we saw at LAWPRO, there had been a lot of recent activity on the title with large mortgages being registered and discharged in short order, and the lawyer had failed to advise the mortgage client of this kind of activity.
- **Oklahoma rings/value frauds:** These are the standard value frauds in which there is an artificial increase in the value of a property through a series of phoney sales to "straw" buyers for the purpose of obtaining higher value mortgages than can be supported by the true equity in the property. The more interesting of these are the organized rings in which the fraudster borrowers will work with a crooked broker, appraiser and "mortgage specialist" (i.e. bank employee) to run a series of these frauds. LAWPRO has seen this type of activity in both big city and small town environments.

**Risk management tips:** *If you see frequent activity on title in a short period of time, ask questions. Pull some of the deleted instruments and look at the history of trades on the property; watch comparables in a neighbourhood. And let the lender know what you are seeing – because chances are the lender's mortgage instructions state that you are to do just that. If the lender then opts to proceed and advance the mortgage funds, confirm in writing with the lender that s/he has decided to proceed.*

- **Identity theft:** Usually targeting elderly individuals, the fraudsters find homes that are unencumbered, prepare false identification and transfer the property to a co-conspirator who obtains a mortgage. The more creative fraudsters will divert the victim's mail, set up fake entities to confirm employment credentials of the new borrower and run a series of frauds at the same time to increase amounts obtainable before they start to attract attention.

**Risk management tips:** Check ID – know your client. Confirm referral sources. Make sure the terms in the Agreement of Purchase and Sale are legitimate and genuine – don't help create a misleading situation for the lender. Consider reviewing or discussing the transaction with another lawyer in a way that protects client confidentiality. Seek advice from Practice Advisory Services at the Law Society. Work with other professionals who are being equally careful. Avoid having documents executed outside your office.

For more, see the extensive list of real estate fraud articles at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud).

- **Bogus bank drafts on mortgage deals:** A variation of the bogus bad cheque/draft scams (described more fully below), fraudsters in these schemes get real estate lawyers acting on mortgage deals to run bad bank drafts through their trust accounts. In some instances, the supposed fraudster has used the identity of a major national financial institution as the actual lender in the transaction.

A new client or lender contact allegedly from a major bank asks the lawyer to act on a mortgage matter; mortgage instructions and/or a bank draft drawn on a major bank look legitimate. In some instances, the fraudsters have stolen the identity of a real property owner. The instructions and the draft turn out to be counterfeit.

**Risk management tips:** Use the title search, telephone book, Internet and other sources to make an independent cross-check of client and bank names, addresses, phone numbers and other information in the documentation provided to you. Carefully examine all cheques and bank drafts for authenticity, and never let your client directly deposit cheques or bank drafts into your trust account.

Protect yourself when dealing with the bank. Don't rely on oral confirmation from your bank at time of deposit that the bank draft is good. Don't disburse funds immediately – even if your client is pushing! Wait until the second bank-to-bank verification before issuing funds from your trust account. For branches in major centres this often will take one or two banking days, and for branches in more remote locales as long as a 8-10 calendar days.

For more, see **Show Me the Money** article for more information on funds transfers (Summer 2008 *LAWPRO Magazine* at [www.practicepro.ca/magazinearchives](http://www.practicepro.ca/magazinearchives) ).

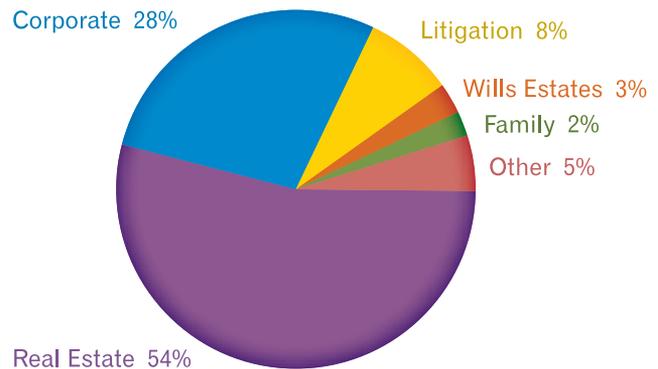
### CORPORATE IDENTITY THEFT

Much like personal identity fraud, corporate identity fraud involves the wrongful taking of the identity of a corporation – with an added level of sophistication. Fraudsters in these instances often enlist someone with expertise to create and falsify corporate minute books, or adopt the personal identity of one of the corporation's controlling individuals, or create a new rogue identity to act as the controlling mind of the target company.

In one such case that cost *LAWPRO* the full \$1 million per claim policy limit, a lawyer acted for an individual who had filed the required form under the *Business Corporations Act* that, among other things, named the individual as a director of a numbered company. The lawyer relied on that form in acting on the subsequent multi-million dollar mortgage on a property owned by the company – and the fraudster promptly disappeared with the funds.

**Risk management tips:** If you're acting for the lender, ask for a corporate opinion from another lawyer. If you're acting for the borrower, get an updated corporate profile and status certificate.

### Fraud claims (2004-08) by cost



Watch for recent changes in directors, officers or addresses. You want to ensure the corporation is properly constituted. Ask to see the minute books. Ensure that the party signing for the corporation is an authorized signing officer and that all formalities with respect to the execution of a document on behalf of a company are taken and adhered to, particularly the requirement for multiple signing officers as per the by-laws of the company.

For more, see the article **Corporate Fraud: Identity Theft with a Difference** by Neil Smiley at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud).

### BOGUS CHEQUE SCAMS

In the last year we have seen numerous such frauds. Whether they involve collections or business loans, these scams have a common goal: to run a fraudulent certified cheque or bank draft through your trust account. You disburse funds relying on the bad cheque – on instructions from the fraudster. The fraudster gets real funds from your account, and when the bad cheque bounces there is a shortfall in your trust account.

Debt collection frauds often involve new clients from outside Canada who seek your help on a debt collection, often with the promise of a hefty fee for your services. Surprisingly, the debtor pays up quickly after you send your demand letter and sends a cheque payable to your firm in trust. As instructed, you promptly send the funds offshore – and discover later the shortfall in your trust account.

On a business loan fraud a new client (often offshore) retains you to help with a small business loan. The client's documentation looks real; background checks seem to check out. After you deposit the certified cheque (which also looks authentic) that you receive from the supposed lender and disburse funds as instructed, you learn the cheque was fraudulent.

### PLEDGE OF FRAUDULENT SECURITY

In a variation of the loan fraud scheme that *LAWPRO* saw recently, the client provided a retirement savings plan and a life insurance policy as security for loans. The letterheads of the financial institutions used to evidence the existence of the account and policy contained a number of grammar and syntax errors; documents were also allowed to leave the lawyer's office, ostensibly to have them signed by the financial institutions. Neither the account nor the policy existed. The cost to the insurance program: More than \$560,000.

The article, *Anatomy of a fraud alert* on page 5 details the most recent loan frauds.

**Risk management tips:** Look for grammatical errors, misspellings, unusual sentence construction and the use of cellphone numbers as the only contact number for a financial institution: They are among the many red flags that should prompt you to dig deeper.

For more tips see the extensive list of articles on these types of fraud at: [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud).

#### EMPLOYEE THEFT OR FRAUD FROM THE INSIDE

LAWPRO has seen several cases in which long-serving, trusted employees masterminded stealing money from trust accounts and/or setting up phoney deals in order to scoop mortgage money. In many of these situations, the lawyers abdicated responsibility for running their law offices to law clerks and other employees who could not resist the opportunity to access the lawyers' trust accounts. In some instances, lawyers had given their employees authority to meet with and sign up clients, sign cheques and register documents through Teranet Inc. The employees often had

the lawyer's e-reg® passwords in order to close transactions – in breach of Teranet security protocols and the Rules of Professional Conduct.

**Risk management lessons:** Clerks must not be allowed to sign trust account cheques unless there are exceptional circumstances and special arrangements are made regarding bonding in accordance with By-Law 9. Nor should you leave blank trust account cheques available; only partners should have the authority to sign trust account cheques. Clerks must not have access to your e-reg password. Also ensure every member of your staff takes at least one full week of consecutive vacation days each year – people who love their work so much that they never take a vacation could well be trying to hide fraudulent activity.

For more see the following articles:

- **Fraud on the inside: What to do when partners, associates or staff commit fraud;**
- **Fraud: The threat from within; plus Screening new staff during the hiring process;**

at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud).

# fraud

## Can you keep a secret?

### Identity theft and the dangers of posting personal and professional information on social networking sites

More and more people are using social networking sites. And although they offer all sorts of interesting new ways to interact with people in both personal and business spheres, they also expose you to hidden risks, including identity theft.

How can this happen?

Your FaceBook, LinkedIn or other social networking site profiles can include information such as your birth date, where you went to university, your mother's maiden name, or where you articulated and when. In the pre-Internet era only your family, close friends and co-workers might have been privy to this information. Social networking sites make it freely accessible to anyone.

Someone intent on stealing your identity will visit social networking sites and gather information about you. They then use it to create a new identity for themselves – your identity. For example, they can use it to bypass the standard challenge questions that banks, credit card companies and others use to verify your identity. What

is your mother's maiden name? When did you graduate from university? Do these questions sound familiar?

Having your identity stolen can have severe consequences. It's not only stressful to have to restore your true identity, but also takes time and money and can leave you – even temporarily – with a bad credit rating. This is not only a personal issue; situations in which fraudsters have assumed a lawyer's professional identity have occurred in Ontario.

The lesson is clear: You want to do everything you can to avoid identity theft. And you certainly don't want to do anything to help someone steal your identity. Be careful about how much personal and professional information you post in social networking site profiles, especially where that information might be used to verify or establish your identity.

Also look for a more detailed discussion of social media – the pros, the cons, and how you can best navigate through this new world to benefit your law firm – in an upcoming issue of LAWPRO Magazine.

# Anatomy of a fraud alert:

## How lawyers and LAWPRO avoided millions in potential losses

\$5.5 million in potential trust account shortfalls. Eighteen matters at an average cost of \$301,000 each.

That's the value of fraud avoided, thanks to quick action on the part of both LAWPRO (in warning lawyers about a potential fraud scam), and lawyers who used our warnings to ask their clients a few extra questions – only to have many of their “clients” disappear into the woodwork.

It all started with seemingly innocuous inquiries from a few lawyers who suspected they might be the targets of a bad cheque scam. As the May holiday weekend was a couple of weeks off (and we knew from past experience that fraudsters tend to get more active when banks are closed for several days) we sent out an e-mail in early May alerting lawyers to be vigilant about potential frauds in advance of long holiday weekends. That e-mail prompted calls from several more lawyers – leading us to conclude there could be a large scale and organized fraud scheme targeting Ontario lawyers. A second alert warning to lawyers about the potential frauds we were seeing went out by e-mail on May 11.

That generated even more inquiries, and for LAWPRO more information from lawyers on the elements of the potential fraud scam – many of them strikingly similar. As some were about to close their deals (and were ready to run potentially bad cheques through their trust accounts), we sent out a third e-mail on May 14 detailing the signposts of fraud that we were seeing, and providing tips on how to deal with the bank to avoid a shortfall in their trust accounts.

To date, we have identified 18 matters where we believe frauds that were part of this organized scam were avoided. Many lawyers told us they opted not to act on transactions that were very similar to the potential frauds we had described. No claims have yet been reported arising out of what appears to have been a very organized attempt to defraud Ontario lawyers.

### Bad cheque scam details

The culprit was a classic bad cheque fraud scam. The target: sole practitioners and small firms in the weeks leading up to the May holiday weekend.

The apparent frauds worked as follows: Weeks earlier, a previously unknown client asked the targeted lawyers to act on an incorporation that looked innocuous; that was followed by a request to act on a business loan or equipment purchase matter. Loan proceeds (in the \$235,000 to \$365,000 range) were to go to a third-party corporation, often a numbered company (and not the client's new corporation). The certified cheque or bank draft from the “lender” looked normal – and in some cases would have been difficult to detect as forged and fraudulently issued.

But, as the lawyers involved reported, many of the telltale signs of fraud were there:

- the client paid cash for the incorporation;
- the client and corporate addresses were the same;
- a brand new corporation with no apparent purpose was to get a loan of several hundreds thousand dollars;
- the only security for the loan was a promissory note or General Security Agreement;
- the client had only a cell number or the home phone number given was not working, and the address on the driver's licence was not a real one;
- the client was pushing to have the loan completed as quickly as possible.

### Avoiding this type of fraud

#### 1. PROTECT YOURSELF WHEN DEALING WITH THE BANK

Bad cheque frauds – whether they involve debt collections or business loans – work only if you act immediately on your client's instructions to disburse funds. The fraudsters rely on the delay between when you deposit their (forged) certified cheque or bank draft and when the bank notices that that instrument is fraudulent to abscond with the proceeds.

How do you protect yourself?

- Don't rely on oral confirmation from your bank at time of deposit that the cheque is good. Don't disburse funds immediately – **EVEN IF YOUR CLIENT IS PUSHING!!!**
- Wait until the second bank-to-bank verification before issuing funds from your trust account. For branches in major centres this often will take one or two banking days, and for branches in more remote locales as much as 8-10 calendar days.
- See *Show Me the Money* article on funds transfers (Summer 2008 LAWPRO Magazine at [www.practicepro.ca/magazinearchives](http://www.practicepro.ca/magazinearchives)).

#### 2. BE PREPARED TO PROBE – AND LISTEN TO YOUR INSTINCTS

Many lawyers reported that they followed all requirements for verifying the client's identification – and that the ID clients provided looked authentic. But some lawyers suspected that something was amiss. Take some time to familiarize yourself with the telltale signs of fraud, and be prepared to apply the smell test to a matter that raises your suspicions.

A tip from one lawyer who quickly discovered the very real-looking driver's licence he was presented with was a fake: Check with the Ministry of Transportation's online system for validating

drivers' licences – a check that costs only \$2. You can access the online Driver Licence Check at [www.dlcheck.rus.mto.gov.on.ca/Scripts/OrderForm.asp](http://www.dlcheck.rus.mto.gov.on.ca/Scripts/OrderForm.asp).

### 3. HELP US MINIMIZE FRAUD LOSSES IN THE INSURANCE PROGRAM: CALL US!

If you suspect you have completed or are acting on a matter that, based on this information, causes you concern, immediately call LawPRO at 1-800-410-1013 (416-598-5899). If the matter and/or client raises some questions in your mind, talk to us about those concerns. Both our claims and risk management staff are available to discuss these issues with you and possibly guide you in asking more questions or seeking additional information.

Even if you have stopped acting on a matter that you suspect involved fraud, let us know what you know (respecting relevant confidentiality obligations). You may think yours is an isolated

case, but as we saw with the recent attempted frauds, these schemes often target multiple lawyers. By alerting us to what is happening we can alert others – and together we can help avoid huge fraud losses in the insurance program.

Remember too that every LawPRO claim comes with a cost: Being vigilant about matters you do act on, and being proactive in reporting concerns and potential frauds to LawPRO, helps you and others avoid potentially huge losses in your trust account as well as deductible costs and the time and trouble of having to deal with a claim matter.

### 4. PRESERVE THE EVIDENCE

If you have or come into the possession of a fraudulent cheque or bank draft, carefully place it in an envelope so that an attempt to recover finger prints from it can be made.

## Whitelist LAWPRO

### in your Spam filter to ensure you don't miss important messages

Our recent e-mail fraud alerts apparently helped several lawyers avoid being victims of the commercial loan frauds.

However, two of the lawyers who called us didn't get our warning messages because their spam filter caught our e-blasts. One happened to call us for advice on how to handle a suspicious transaction. The other just happened to come across our e-blast when he checked his spam filter two days after we sent the second warning message.

The lesson is simple and clear: Spam filters aren't perfect. They sometimes catch legitimate messages – these are called *false positives*.

The solution is also simple: In your spam filter, please *whitelist* LawPRO, the Law Society and anyone else that you really need or want to get e-mail messages from. Once an e-mail address is "whitelisted" in your spam filter, it will never be stopped. The opposite to whitelisting is "blacklisting" which prompts your spam filter to always reject a message.

On a regular basis please check your spam filter for messages that it should not have caught. Doing this could help you avoid a number of things, including a malpractice claim, a Law Society complaint, or an unhappy client who didn't hear back from you because you didn't get a message they sent.

**FRAUD**  
How to avoid becoming its next victim

Fraud is a real and growing problem for all law firms and their staff. Each year, fraudsters "trick" dozens of law clerks and lawyers, young and old, in practices large and small, into helping make fraud happen.

Fraudsters come in all shapes and sizes. They could be the promising new "clients" who just walked in off the street. Or a third party you never do get to meet. Or a member of an organized crime syndicate who is laundering money through your trust account. Or even a colleague whom you'd never suspect.

And it's not just real estate firms that are being targeted. Litigation firms, firms specializing in corporate commercial work, wills and estates lawyers and others also are frequent targets.

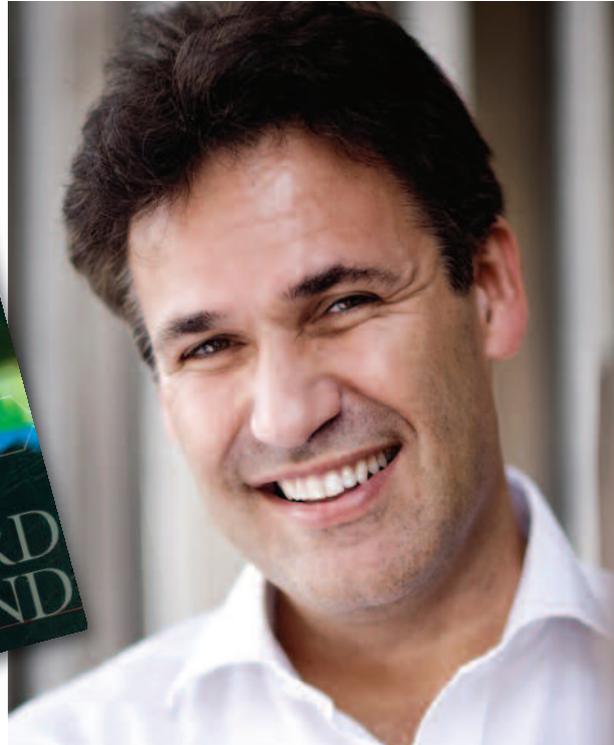
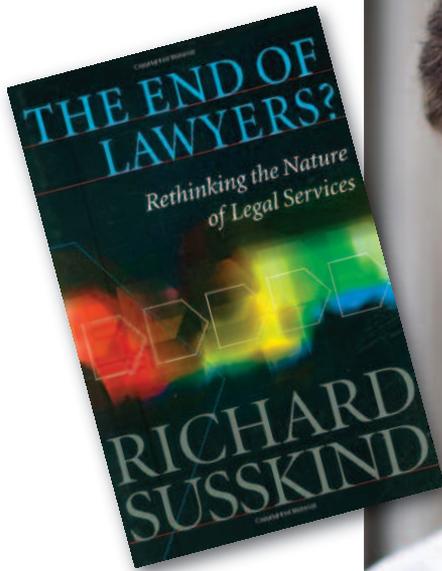
How can you protect yourself and the firm? Take some time to read this information on fraud. It explains the most common fraud scenarios and how to spot them.

LawPRO

## Keep this checklist close by

To help lawyers stay alert to the warning signs of fraud, LawPRO has produced a handy reference guide: The four-page fact sheet describes how the typical fraud scams we have seen work and the red flags for which to be on the look out for. It also provides handy tips to help you avoid being victimized.

Download a copy at [www.practicepro.ca/fraud](http://www.practicepro.ca/fraud) or contact practicePRO for a print copy at 416-598-5863.



# The new reality for legal services:

## Which kind of lawyer will you be?

*In the opening chapter to his book, **The End of Lawyers? Rethinking the Nature of Legal Services**, author Richard Susskind challenges lawyers around the globe to look at themselves, the work they do, and their future, differently. He suggests that two key forces – a market pull to commoditization and the proliferation and increased use of information technologies – make fundamental change in the delivery of legal services inevitable. The challenge for lawyers is to identify what aspects of their work can be delivered more cheaply and efficiently in other ways, and which of their “distinctive skills and talents” can never be supplanted by less costly legal service providers, systems or processes. In the final chapter, Susskind comes full circle, outlining the five types of lawyers that he predicts will be needed in the future.*

“The future for lawyers could be prosperous or disastrous ... lawyers who are unwilling to change their working practices and extend their range of services will, in the coming decade, struggle to survive. Meanwhile, those who embrace new technologies and novel ways of sourcing legal work are likely to trade successfully for many years yet.

“With clients cutting costs and finding alternative ways of sourcing work or sharing costs and collaborating regularly with one another, what does this mean for lawyers? ... I predict that there will be five types of lawyer in the future.

“The first will be the ‘expert trusted advisor’. This is the purveyor of bespoke legal service. ... market pressures will generally discourage lawyers from handling matters in a bespoke manner wherever this is possible. Instead standardized or computerized service will be preferred. However, on some occasions bespoke work will be unavoidable. For the foreseeable future, intelligent, creative lawyers will be needed in certain circumstances – to fashion new solutions for clients who have novel, complex or high value challenges (the expert element) and to communicate guidance in a highly personalized way (the trusted component) where this is wanted. The end of the expert trusted advisor is not therefore in sight. The danger facing many lawyers, however, is to assume that their client’s work always requires this expert or trusted treatment. Lawyers who handcraft while their competitors introduce new efficiencies (computerizing or outsourcing for example) will not be practising in ten years’ time, because bespoke is a luxury that clients will not generally be able to afford.

“My second category of lawyer for the future will be the ‘enhanced practitioner’. This is the individual whose legal skills and knowledge are required not to deliver a bespoke service but, enhanced by modern techniques ... This lawyer will be supporting the delivery of standardized, systematized, and (when in-house) packaged legal service. The crucial point here, though, is that the market will only tolerate this lawyer’s involvement where legal experience is genuinely needed. Otherwise other less costly sources of support will be favoured, such as paralegals, legal executives, and legal process outsourcing service providers. Today clients frequently pay lawyers to do work that intelligent and trained non-lawyers could undertake. This will stop in years to come and the need for lawyers who perform routine work will diminish accordingly.

“In contrast, there will be a much greater need for my third category of lawyer – the ‘legal knowledge engineer’. If I am right and legal service will increasingly be standardized and (in various ways) computerized, then people with great talent are going to be needed, in droves, to organize the large quantities of complex legal content and processes that will need to be analysed, distilled, and then embodied in standard working practices and computer systems. This new line of work will need highly skilled lawyers. The development of standardized documents or procedures and the organization and representation of legal knowledge in computer systems is, fundamentally, a job of legal research and analysis; and often this knowledge engineering will be more intellectually demanding than conventional work (working out a system that can solve many problems is generally more taxing than finding an answer to one problem). It is entirely misconceived to think, as many lawyers do, that work on standards and systems can be delegated to junior research or support lawyers. If a legal business

is going to trade on the strength of outstanding standards and systems, then it will need outstanding lawyers involved in their design and development. These legal knowledge engineers will also be needed to undertake another central task – the basic analysis and decomposition of legal work that I claim will be required if legal work is to be multi-sourced effectively and responsibly. Legal knowledge engineering, in the twenty-first century, will not be a fringe show at the edge of the legal market. It will be a central occupation for tomorrow’s lawyers.

“Fourth will be the ‘legal risk manager’. This category of lawyer is sorely needed and is long overdue. Senior in-house lawyers around the world insist that they are in the business of legal risk management – clients prefer avoiding legal problems rather than resolving them ... Hardly a lawyer or law firm on the planet has chosen to develop methods, tools, techniques or systems to help their clients review, identify, quantify, and control the legal risks they face. I expect this to change. Urgent demand from the market will lead lawyers (perhaps bolstered and emboldened by external funding) to offer a wide range of proactive legal services whose focus will be on anticipating and pre-empting legal problems. This will be quite different from legal work that concentrates on addressing specific deals or disputes. In some ways more like a form of strategy consulting, this legal work will be wider ranging and more generic, helping clients to prepare more responsibly for the future. Again, this is not a peripheral job for the legal fraternity. This could fundamentally change the way in which the law is practised and administered.

“My final category of future lawyer is the ‘legal hybrid’. My premise here is that successful lawyers of the future, wherever they sit on my evolutionary path, will be increasingly multi-disciplinary. Many already claim that they are deeply steeped in neighbouring disciplines, as project managers, strategy and management consultants, market experts, deal-brokers, and more. In truth, though, these forays into other fields are not strategically conceived, or formally planned, or supported by rigorous training. They are rather ad hoc and piecemeal initiatives. In contrast, legal hybrids of the future will be superbly schooled and genuinely expert in these related disciplines and will be able to extend the range of the services they provide in a way that adds value for their clients.

Taking these five categories together, it is clear that there will be work for lawyers to do in the future. What is much less obvious is whether today’s lawyers will be equipped to take on the jobs I envisage. While the expert trusted adviser and the enhanced practitioner look much like contemporary lawyers, I predict that their number will be greatly reduced. The range of work of the expert trusted adviser will be reduced by standardization and computerization, while the enhanced practitioner’s domain will be diminished by the emergence of alternative, lower cost individuals who can work responsibly with standards and systems. In some areas of law, lawyers will be less dominant, while in others (where there are, for example, online legal services or there is legal open-sourcing) they will no longer have a role.”

*An excerpt from **The End of Lawyers? Rethinking the Nature of Legal Services** (Chapter 8 – Conclusion – the Future of Lawyers pp 271-273) by Richard Susskind, Oxford University Press, 2008. Adapted with permission of the author.*

# Practice innovation

## It's time to do different things ... and do things differently!



Innovation! It may not be the first thing most lawyers think of when it comes to practising law. But there are compelling forces at play today that challenge our traditional model of legal services and invite innovation.

Globalization inter-mingles cultures and different political, social and economic models, resulting in multi-dimensional communities – giving us clients with diverse needs, expectations and demands. New and disruptive technologies defy engrained principles of confidentiality, control and privacy while others automate processes and, to some degree, “think” for us. A proliferation of tools promote more instantaneous and transparent communication and collaboration. And very significantly, the many parties who pay for the ever-rising costs of legal services are growing intolerant of such costs and are just not prepared to continue to bear them.

What does all that mean for lawyers? It means that it's time to reset our model – to start thinking “outside the box” with different services, skills and tools.

Fundamentally, what clients want today is access to more *legal preparedness*: they want to be educated and more “in the loop.” They expect more due diligence, best practices, prevention, compliance evaluation, and risk management.

Clients want their legal counsel to be more proactive in guiding them, in educating them on rights and responsibilities, and providing practical information: They want lawyers to direct more of their resources to the purpose rather than simply the legalities of a problem or issue. They want initiatives and deals to reflect healthy business principles and practices, not just legal

perspectives. They want to avoid or contain problems at an early stage or possibly deal with problems differently when they arise through personal or business channels rather than legal ones. And today's tough economy is making them more focused than ever on the need to control the unprecedented legal spending of the past decade and ensure that dollars spent reflect the value delivered.

### Legal preparedness – its many shapes

So what does legal preparedness look like? It has many shapes including:

1. general education and awareness,
2. preventive law,
3. compliance evaluation, and
4. legal risk management.

#### 1. General education and awareness

Education and awareness of the law, and its interpretation and application in a particular context, are the underpinning of access to justice. Education makes law more accessible by making it understandable and relevant. It ultimately empowers the individual, the organization or the public, to identify and understand rights and entitlements, and duties and obligations. Technology has been a key driver in enabling access to information at a more detailed level but it is not alone. What follows are some examples of how to make education and awareness support legal preparedness.

# What clients want: The bare facts you can't ignore

The diversity of your clientele makes it even more important to be vigilant in identifying and meeting their differing needs and expectations. Although these needs may be wide-ranging, most clients have the same fundamental expectations, regardless of the type of legal services that may require.

- Clients seek and retain lawyers because they have needs that are rooted in some aspect of the law.
- Sometimes, clients do not know what they need and look to us as legal advisors to provide them with this knowledge.
- Clients want information and services provided in context to their needs.
- Clients do not want to wade through information that they do not need.
- Clients want more control over the information and results that we as lawyers produce for them.
- Clients want more certainty around the results expected to be achieved as well as the costs to achieve them.
- Clients are not prepared to pay for things that are done over and over again.
- Clients expect that the amount they pay will have a direct relationship with (be a function of) the results achieved.
- Clients (whether an individual or an organization) either have less money to spend on legal services or are determined to spend less on legal services.

## ONLINE Q's & A's

There was a time when providing information about the law and its application only happened in the course of retaining a lawyer for a particular service. The Internet has changed that, prompting a meteoric increase in the quantity and quality of information that is available for free. The result: Clients expect more than just a basic level of guidance to be available for little or no charge.

Some legal thought leaders predict that the success of Wikipedia, the online community-created encyclopaedia, will spur a version explaining the legal world. In the meantime, some law firms continue to offer information in newsletters or on websites about legal issues, trends and developments still routed in legalese without reference to specific problems or questions.

But the creative types are tilling new ground with a more practical approach. They are making themselves available to share information and provide answers to specific 'questions that come up' for relatively insignificant fees.

Just Answer ([www.justanswer.com](http://www.justanswer.com)) is such an example. Just Answer is a portal that makes hundreds of experts available on various topics including legal experts from different jurisdictions. Based on their reviews, client users feel their questions are being answered promptly, fully, to the point, and in a caring fashion. In short, they are then primed with information and guidance that enables them to take some incremental helpful action on their own terms.

## "ORGANIZED" PRO BONO

*Pro bono* legal services is another example of education and awareness for legal preparedness. Although *pro bono* work itself

is not new, how *pro bono* services are being organized and delivered is today different.

The creation of Pro Bono Law Ontario (PBLO) in 2002 led to the launch of a new platform that, says executive director Lynn Burns, lets qualifying individuals more effectively access a broad spectrum of brief services and navigate the justice system more effectively. *Pro bono* services have expanded beyond traditional litigation representation into community economic development initiatives and advocacy for children and youth.

To support this new *pro bono* platform, PBLO coordinates and facilitates the bar's participation in *pro bono* activities. This includes advocating for regulatory reform, providing continuing legal education to lawyer volunteers and developing *pro bono* opportunities that cater to lawyers' capacity and interest. The call has also gone out to Ontario's legal community including the private, corporate and public sectors. The response has been substantial: 18 of the 25 largest law firms in the province have signed on. That means adopting formal *pro bono* policies, establishing committees and creating systems to track *pro bono* hours and recognizing *pro bono* work by the same measure as billable hours. Another 30 law firms also participate in specific projects. Some of the business projects also have attracted in-house corporate counsel as well as government lawyers to play leading roles in community projects.

But it's not only client users who benefit from this more organized and expanded *pro bono* offering. The more systematic approach has made it easier for lawyers to become involved in the community and contribute time and resources to projects that reflect their specific expertise and values – something that many of the

# Resetting the toolkit with different skills

Lawyers typically come into the practice of law with diverse educational backgrounds, life experiences and skills – all developed outside of our legal training. The traditional model of practice built on precedent has not fostered much thinking outside of the box. Today, however, we need to engage or hone different skills to be effective in delivering the legal preparedness services just described. Here are some of the skills in demand and the value they bring to the table.

- **Client-centred** means approaching the issues from the client's perspective and developing solutions that protect or advance or empower them.
- **Proactive** means anticipating or identifying needs and taking the initiative to respond to them rather than reacting to events or requests.
- **Efficient** means achieving the desired result with the minimum use of resources, time, and effort.
- **Team-oriented** means recognizing the value of working together to leverage a variety of expertise and perspectives.
- **Multi-dimensional thinking** means looking at the client as well as the legal, personal, social, emotional and economic environment in which they operate in order to foster a better understanding of how to achieve the final result.
- **Creative problem solving** means engaging processes from business, psychology, economics, neuroscience and sociology to develop a solution that allows the client to appreciate and manage the circumstances.
- **Distilling and repackaging** means gathering information and legal advice into solutions rather than simply providing a recitation or application of the law or legal principles.
- **Relationship savvy** means being able to develop, manage and grow relationships, including extended relationships, and contacts in ways that regard the world as a potential client base.

lawyers say is extremely gratifying. For more information about Pro Bono Law Ontario opportunities, go to [www.pblo.org](http://www.pblo.org).

## COLLABORATIVE CLIENT COMMUNITIES

The disadvantaged and uninformed aren't the only client groups looking for less costly – if not free – information, guidance and resources. Corporate counsel from some of the largest companies in North America with limited legal budgets are asking that their legal advisors (current or prospective) provide a range of resources – awareness, analyses and precedents – at no charge.

An interesting example is the development of a networking and collaborative workspace. Legal OnRamp is an invitation-only web community that gives companies free access to major law firms' contributed work product (opinions, precedents and updates) as well as networking facilities such as wiki's and online chat rooms. It helps in-house corporate lawyers connect to each other and to law firms, using elements modeled in part after popular networking sites such as [Facebook](https://www.facebook.com) and [LinkedIn](https://www.linkedin.com). It also allows them to pose a general legal question on the site and have law firms provide responses *gratis*. If more detailed counsel is required, a law firm is engaged. If the lawyers from a particular firm do not keep contributing fresh content, they are subject to being dis-invited from the group. Time will only tell what and how much law firms are prepared to share and how demanding the in-house crowd will be.

## 2. Preventive law

A second pillar of legal preparedness – preventive law – focuses on anticipating problems and planning for them. Doing it right from the beginning figures large. It is also about assisting clients by identifying legal rights they might not even know they have.

The benefits are clear: Clients don't miss out on entitlements or run into unnecessary legal problems or take unnecessary risks. A classic example of preventive law in action is a legal health review from a particular perspective.

### BUSINESS LEGAL CHECK-UP

Igor Ellyn, QC of Ellyn Law LLP in Toronto is a senior litigation and arbitration counsel whose firm is developing new ways to deliver preventive law services to small and medium-sized businesses.

Over the course of his 30-year career as a litigator, Ellyn concluded that many business litigation problems could have been eased, settled sooner or completely avoided by better preventive planning: better contracting drafting, better strategy and greater client awareness of and preparation for litigation.

The result: Canadian Business Legal Checkup (BLC) – a diagnostic audit of various aspects of the business to determine if they are compliant with the law and practice and which need attention. The true value of the BLC developed by Ellyn's firm is that it will

provide input of experts from various aspect of business law at a pre-determined cost.

The BLC requires the business owner to answer a series of questions that touch on all aspects of the undertaking. When the BLC is completed, the business owner receives a report red-flagging matters which need correction, improvement or further legal advice.

Clients can then take corrective action on their own or with further guidance of counsel, to ensure that the business is better situated to operate effectively and minimize risk in the future – risk of litigation as well as the significant and sometimes crushing costs that litigation generates. For more information about Business Legal Check-up, go to [www.ellynlaw.com](http://www.ellynlaw.com).

### 3. Compliance evaluation

Compliance evaluation involves assessing systems that an organization is obliged to have in place under a particular

regulatory scheme. It includes developing the systems as well as evaluating a system once implemented, with a focus on ensuring the organization and its personnel fully understand the relevant laws and regulations. It also includes measuring the degree to which their actions are in accordance with the procedures in place. When gaps in understanding and implementation are identified in advance and addressed, the risk of compliance failure and the many penalties and adverse effects that typically attach to such failure are avoided. In today's marketplace, compliance failure can also have a debilitating impact on an organization's reputation, so any initiative to help a client manage the compliance effort in a cost-effective way is highly valued.

#### COMPLIANCE POSITIONING SYSTEM

A progressive example of compliance evaluation is CRSTL Solutions' Compliance Positioning System (CPS), designed specifically to help Canadian financial institutions demonstrate compliance with obligations mandated by the Office of the Superintendent of Financial Institutions.

## Resetting the toolkit with different tools

Using different skills is only part of the equation. Equally important is the need to use new or updated tools to enhance how services are delivered. Some are new, others have been refined over the years to meet new needs. All of them provide lawyers with opportunities to be more effective in meeting client needs today and tomorrow.

**Triage** is a program that helps clients navigate through issues and solutions, identifying the resources (which are often scarce) best suited to address the need(s), which are typically most urgent.

**Systematic process** is a collection of policies, procedures and checklists that ensure that a process is undertaken consistently, completely and in a timely manner.

**Unbundling of services** means delivering a particular solution that reflects a piece of a large legal process – one that is specific and expert-oriented to address the particular need as in a limited scope of retainer.

**Project management** is the discipline of planning, organizing and managing resources to bring about the successful completion of specific project goals and objectives while honouring the project constraints (typically being scope, time and budget).

**File management system** is a storehouse or catalogue of information about a file and its progress that can be shared

among those active on the file as well as with the client; also provides a view of that catalogues information about a particular type of file or group of files (by type of work; by client; by lawyer etc).

**Knowledge sharing** means identifying, sharing and re-using the specific knowledge and experience of others to provide the same or better solutions in a more timely, efficient and cost-effective manner.

**Smart documents** are documents created using an electronic workflow tool that develops content according to a decision tree constructed from the application of legal principles to the factual information used to answer the questions.

**Collaborative spaces** are technologies accessed through the Internet that support lawyers and their staff within firms and across firms (individuals or groups) working together and with clients to exchange information, ideas, documents and assessments on files, projects and initiatives.



Karen Bell and Felicia Salomon

CRSTL principal Felicia Salomon, a lawyer with experience as a litigator and corporate counsel, and insurance specialist law firm Blaney McMurtry LLP worked together to develop a compliance methodology delivered on a practical, accessible technology platform.

CPS is essentially a roadmap that allows the organization using it to navigate through the legislative and regulatory regimes that affect its business operations. At the heart of the system is a database that consists of assessment questionnaires designed to be completed by the employees with core responsibility for the regulations covered, and a set of executive summaries specifically outlining the requirements of the particular regulatory regime.

What makes the CPS solution so compelling is the degree to which speed, consistency, completeness and cost effectiveness are maximized when the client and his or her lawyer use this tool. Says Salomon: "We have been able to create a winning solution for clients and their counsel by doing two things – leveraging knowledge that is typically reapplied over and over again, and employing technology that can automate and monitor the management of the massive amount of information that compliance regimes tend to encompass." For more information about CPS, go to [www.crstlsystems.com](http://www.crstlsystems.com).

#### 4. Legal risk management

A fourth pillar of legal preparedness is legal risk management – identifying, assessing, mitigating (to an acceptable level) and monitoring risks. The strategies include transferring the risk to

another party, avoiding the risk, reducing the negative effect of the risk, and accepting some or all of the consequences of a particular risk. Overall, the value of risk management is in its results – clearer understanding, better communication, increased process efficiency, more responsive client service and less costs flowing from crises or omissions.

#### ADVISOR AT RISK PROGRAMS

Although Ellen Bessner's advisor at risk program is not new, it stands as a good example of legal risk management at work.

While representing financial advisors in the investment and insurance industries in a variety of disputes, Bessner, a partner at Gowlings, noticed consistently that the advisors she was representing were not sufficiently aware of the many duties imposed on them.

"They were expected to know so much yet they did not have the tools available to self-educate and prepare to meet their responsibilities," explains Bessner. "I saw an opportunity to empower these professionals by helping them to be more effective in their relationships with their clients."

That foresight matured into the development of a series of risk management programs that she designed for advisors, agents and traders and their supervisors; the programs focus on how to reduce litigation and regulatory risk by better understanding the bases for liability, ethics and compliance. Their usefulness has been corroborated by the decision of investment and insurance regulators to approve these courses for continuing

# Managing risk in changing times: Stick with the basics

Embracing change and developing different services and delivery systems does not mean that we can abandon our professional obligations as lawyers. On the contrary, it's more important than ever to adhere to the best practices that support us in fulfilling our responsibilities to our clients.

- **Know your client** – Be clear on who you are and are not representing so you can identify needs and provide the appropriate guidance.
- **Define the scope of the engagement with a written retainer** – Be clear on what you are going to do or not do. Avoid making assumptions based on what you have done for others.
- **Review, confirm and control client expectations** – Set out the timeframe, objectives and responsibilities of all involved. Reset expectations where they are not realistic.
- **Identify pricing at the start and get money up front** – Provide the client with the basis for your charges and how you intend to bill for services from the get-go. Ask for a retainer that sufficiently covers all initial work that you and the client agree needs to be done. If circumstances change along the way, update the client on how the costs will change and have the client accept the changes. And replenish retainer funds before they are exhausted.
- **Communicate, communicate, communicate** – Ensure that the client knows what is happening (or not happening) as the matter progresses. Avoid surprising the client with bad news – or a large account. Return calls and e-mails promptly. The more often and the better you inform your client, the more informed your instructions will be, and the more successful the overall relationship.
- **Declare completion** – When you have completed the engagement, check that concluding details have been covered and then tell the client you are done. Duties to former clients differ from those owed to current clients.
- **Don't dabble** – Serving the client does not mean doing everything yourself. Good and competent service means drawing on the expertise of others – lawyers and non-lawyers, as required – especially if and when your role extends beyond the legal realm.
- **Review your insurance policy** – Your LAWPRO policy provides coverage only for the *professional services* (a defined term) that you provide in your capacity as a lawyer. If you are providing services that fall outside the scope of coverage provided by your LAWPRO policy, you may want to obtain coverage for these services from other insurers.

education credits. Recently they have evolved to both live and online programs as well as a book that has been highly touted by the financial services sector. For more information, go to [www.gowlings.com/advisoratrisk/](http://www.gowlings.com/advisoratrisk/).

## LOOKING AHEAD

As the examples in this article illustrate, opportunities await those lawyers who commit to rethinking the legal services they provide as well as the way in which they provide the services. Whether you call it practice innovation or something else is not the point. It is the effort that counts. As the world changes, so do the needs and expectations of our clients. We need to be more

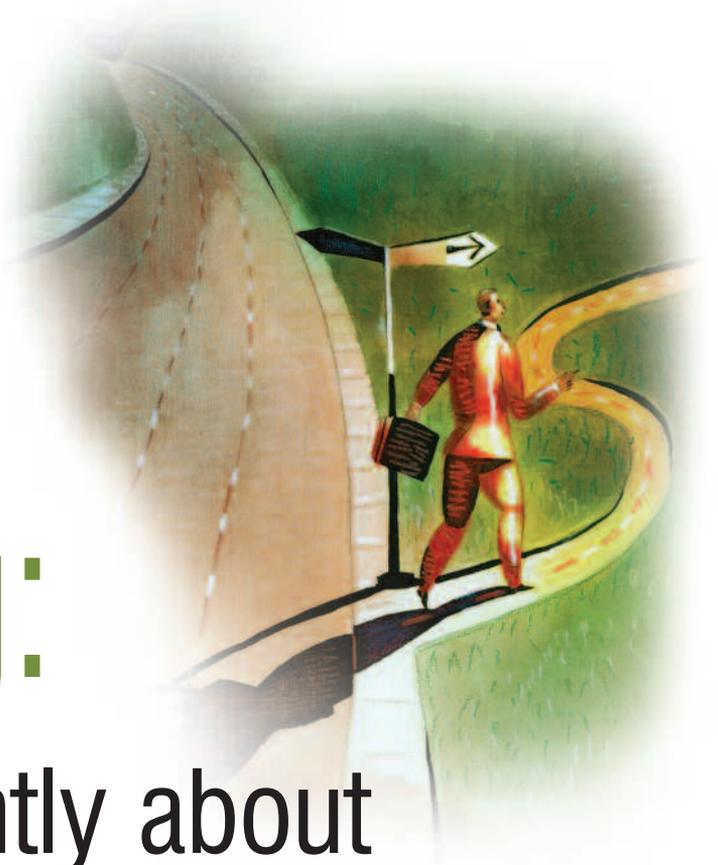
proactive and attentive to those needs and expectations than we have been in the past. The most effective responses will require a careful balance of creative thought and practical application. We must ensure that the skills we apply and the tools we employ are appropriate to support the marketplace of tomorrow. They will comprise the toolkit for doing different things and doing things differently.

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# Strategic resourcing:

## Thinking differently about delivery of legal services



*Strategically sourcing legal services may not be a new phenomenon, but the current economic downturn, coupled with the growing realization that the legal profession needs to rethink its business model to survive in the long term have put one such option – outsourcing – in the spotlight, say two outsourcing providers.*

*Both Gavin Birer, president of Toronto-based Legalwise Outsourcing Inc., and Stephen Taran, president of Taran Virtual Associates (TVA/The Legal Outsourcing Network), say lawyers and law firms large and small are giving the outsourcing option a second look – largely because it addresses some of the pressure points facing lawyers and law firms today.*

“The pressure on lawyers and law firms to run efficient businesses, especially in this climate, is tremendous. Clients want more for less, but they also want firms to know and understand their needs, issues and concerns – to be proactive advisers and problem-solvers,” says Birer. “Giving lower-skilled, repetitive work to someone who is overqualified for that kind of work is a waste of firm and client resources. We as lawyers need to be thinking differently and looking at how we can better service clients with quality services at reduced costs and improved turnaround times.”

Many clients, says Taran, use his firm’s outsourcing services as a profit center. For example, a litigator who spends 10 hours on research at his hourly rate of \$350 would be charging the client \$3,500 for that prep work; an associate might be billed out at \$1,250 for the same work. But TVA’s charge for that same work would be closer to \$600. Even if the lawyer grossed up that rate, he could still pass on significant savings to his client, says Taran.

“Strategically outsourcing what they cannot cost-effectively do themselves gives lawyers an opportunity to better service their

clients – opening the door perhaps to a successful discussion about topping up the retainer or taking on other work that the client may be sending elsewhere – or even devoting a portion of that time to building work on the practice and do some business building.”

But cost control and improved profitability are not the only reasons to reconsider the outsourcing option, says Taran, “Firms are starting to understand that they need to offer a more balanced lifestyle to their associates and future leaders; they’re starting to see that outsourcing the repetitive, lower-skilled work not only helps keep overhead down, but also makes for happier, more engaged and ultimately valuable associates.” Could outsourcing displace associates or other legal service providers? Not at all, says Birer. “It takes the mechanics out of the process – and gives associates the opportunity to do work of a higher standard.”

### **TVA: Outsourcing to local lawyers**

TVA’s network of 75 lawyers (most practising in Ontario) will undertake a wide variety of assignments: drafting documents or corporate agreements; doing specific legal research; appearing as a lawyer’s agent (to argue motions for example); or acting as a backup to a lawyer at trial.

“If you’re a sole practitioner, you can’t afford to take on an injunction that would take you out of practice for weeks at a time; but we can help by taking on the other work in your practice. Or if you don’t have the resources or skill set to take on the specific matter for an existing client, we can take on that assignment, enabling you to better service your client’s legal needs. We’ll even step into your practice to let the sole practitioner take a vacation – making it possible for you to generate revenue while you’re on holiday.”

Adds Taran: “Outsourcing often levels the playing field for small firms and sole practitioners.”

Larger firms often use TVA’s lawyers on files where they cannot justify the cost of an associate or more senior lawyer, such as agency work for court appearances, for specialized services (such as wrongful dismissal reports that he’s standardized for a flat rate) and more recently for electronic discovery work.

The process starts with his project manager, a seasoned lawyer, who works with the client to undertake conflicts checks, receive instructions, determine the parameters of the project and suggest

which lawyers could do the work. Budgets and deadlines are all agreed to ahead of time. Quality control resides with TVA’s project management team: “The client delegates fully to us – he or she tells us what is needed and we take it from there and ensure we deliver a quality finished product.”

### **Legalwise: Offshoring to India**

Legalwise outsources work to a stable of lawyers that it employs in India – hence the term offshoring. All are trained in Canadian law, and are employed to work only for Legalwise. Lawyers sign confidentiality agreements – and work for a salary that’s a fraction of what associates in Canada might be paid.

Offshoring, says Birer, works best when there is a flow of repetitive work: for example, document review, drafting standard documents based on existing precedents, subjective and objective document coding and the like. “I know of one law firm that charged more than \$1 million to review documents and prepare the schedules for an affidavit of documents. That, in my mind, is unacceptable and not sustainable in today’s economy. This is a good example of the kind of work that can be outsourced, for a fraction of the cost.”

Before taking on an assignment, Birer insists on an in-depth conversation with prospective clients (whether the client is a lawyer working in an in-house legal department, or a lawyer working in a law firm) to better understand how the client is structured, the project and how the work is currently being done.

With a better understanding of the big picture, Birer then drills down to see where his offshoring solution can add value for his client. “A good upfront discussion and analysis that includes a test of the proposed work and a review of the client’s precedents, are key. Our goal is to build a long-term relationship with our clients and to do that we need to understand fully the client’s needs.”

Control of the work – including conflict checks, defining expectations, assigning the work and quality assurance on the finished work product – reside with Legalwise’s Canadian team. The information management system which Legalwise’s India-based lawyers access resides in Canada. Control over access to the system and the lawyer’s permissions also reside with Legalwise’s Canadian team.

“As a lawyer, you don’t often find yourself in a time when something new and compelling happens,” says Birer. “Real change is coming to the legal industry around the world through offshoring – and if done right, this change can benefit everyone.”

# On being a virtual associate



Cindy Cohen and Steven Taran

The day Rebecca Jaremko Bromwich took her walk through the snow (literally) and came face to face with a sign for Taran Virtual Associates (TVA), she knew she'd found her answer to practising law a little differently.

An idealist with a strong interest in marginalized clients and environmental issues, she had a definite idea of the kinds of clients she wanted to work for, and the cases she wanted to take on. Six years and several moves later, she's a committed virtual associate

Cindy Cohen signed on with TVA back in 2000 to help make ends meet when she opened her own practice – but has stayed with TVA for the freedom that comes with being able to pick and choose what to work on and when.

"Flexibility is the main reason I got involved," says Cohen, who is today one of TVA's most senior lawyers and runs a busy sole practice. "I get to decide whether I have the time to focus on a job. And if I can't take on an assignment, it doesn't hinder my chances for the next one."

The work from TVA varies: Rebecca's done legal research and tribunal appearances, undertaken examinations for discovery, attended at court, done witness interviews and drafted facta. She also has provided research on some significant and cutting edge cases. "It was exciting to be a ghost in the machine participating in the process of evolving law, especially when it means helping level the playing field so smaller firms or sole practitioners have access to the help of an associate on an ad hoc basis," she says.

For their part, clients say they like being able to outsource some of their work. It not only allows them to take on cases they might not be able to otherwise, but also contributes to their work/life balance. One client who had discovered his small claims court case conflicted with a European trip was pleased to discover he had won his case while on holiday.

Cohen points out that using a virtual associate not only saves clients money, but also helps lawyers avoid the commitment and overhead that comes with taking on new staff. "TVA will fill the void a firm may need to fill on a temporary basis without the obligation to keep that position filled going forward."

For lawyers considering taking the plunge into outsourcing work Cohen advises that they stick with their comfort zone and not overextend themselves.

"It's a great way to stay busy and earn some extra money," Cohen says. "But it's important that you stay within your skill set and not take on more than you can handle."

You also need to be a strong self-starter who can plan and see through a project, says Rebecca. And, adds Rebecca, "treat it as a long-term proposition," rather than a way to fill time. "Be prepared to do it for at least a year."

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*Tim Lemieux is practicePRO coordinator at LAWPRO. Gary Edgar is communications advisor with LAWPRO.*

# Virtual associates

## help when you need it

For Hamilton lawyer Dermot Nolan, the term virtual associate (VA) sums up perfectly the benefits of outsourcing: “The VAs are the ‘associate down the hall’ that I can call on when I need help on a specific file – but those associates are not on my payroll, not part of my fixed overhead, and are already well trained and supervised.

“It’s a completely ad hoc thing – I use a VA only if and when I need it – and that’s the real plus,” he adds. “When I need intensive legal research done – for example I might want someone to do serious legal research or an independent case study of three or four legal issues – that’s when I might call on the resources of a virtual associate. I tell Taran Virtual Associates (TVA) what I need, my deadline and my budget, and they take it from there.”

A certified litigation specialist, Nolan ensures that his clients approve of the outsourcing and, with their approval, his firm bills TVA’s charges as disbursements. He views the virtual associates’

work as a resource on which he builds: “The VAs’ work is just a starting point. My job is to take the information they have provided and use it to help develop the final product. I’m still the quarterback and I take full responsibility for effectively advocating on behalf of the client, using all the skills and resources available to me – including the VAs’ input. It is much the same as it would be if I had delegated the research to a reliable associate down the hall.”

A long-time user of TVA’s services, Nolan has not hesitated to recommend the service to colleagues. “These are experienced, capable Ontario lawyers who speak the language we speak and know what we are looking for. They also provide useful insight and perspective, and sometimes specialized expertise on an esoteric subject. For us, as a small/medium-sized firm, VAs can give us extra heft without some of the headaches that would come with unnecessary expansion.”



# Offshoring saves

## legal team time, money



Cindy Cross and Gavin Birer

When faced with a huge – but repetitive – assignment that they did not have the in-house resources to handle, Travelex’s<sup>1</sup> Legal Department decided it was time to give offshoring a try.

And thinking ahead, Travelex decided to also benchmark the services of Legalwise Outsourcing Inc. against those of more conventional providers.

The task: To review and summarize leases for the company’s 615 retail operations as a first step in renewing insurance coverage for these operations.

The test: To determine who could do the work faster, less expensively and still deliver a quality product.

The set-up: Travelex’s retail operations were split into three groups, with Legalwise, an articling student and a contract lawyer each assigned to analyze and summarize key provisions in the leases for a specific region.

The result: “Legalwise did the job in three days instead of the 8-10 it took the other providers at a rate less than half of what we paid the articling student,” says Cindy Cross, VP and General Counsel. “The quality of the work was comparable – but we had the added benefit of Legalwise’s management and quality control skills on the project.”

In fact, Travelex was so impressed that it contracted Legalwise to design and build a database to help the Travelex legal team manage the company’s global business and IT contracts. “We needed a single contracts database that ensured the more than 800 contracts around the world would be consistently managed.” The success of that venture has already prompted Cross to look for other ways to streamline and standardize the masses of data she and her team need to manage: “Despite our limited internal resources, we can now better manage our global responsibilities – and deliver better service for the company.”

<sup>1</sup> Travelex is a non-bank foreign exchange provider operating in 140 countries around the world

# How to reduce the risks associated with outsourcing

Outsourcing work on a matter that your firm is handling means that tasks normally done by you or others at your firm are being done by someone outside your firm. Keep in mind your obligations to provide clients with competent and cost effective legal services.

Although over time you may develop a relationship with one or more outsourcers (which in turn will give you greater knowledge of and trust in their services), you should take steps to address the inherent risks that arise when work is outsourced.

When you are outsourcing legal work, reduce your risks by keeping in mind the Rules of Professional Conduct and the following issues:

**You are ultimately responsible for the work you delegate:** In most cases, the primary lawyer on a file can expect to be held responsible for the work on it, even if that work is delegated (i.e. outsourced). Pay attention to Rule 5.01 and By-Law 7.1 which outline what you can and can't delegate.

**Know the competencies of the people you are outsourcing work to:** Make sure you are dealing with someone who can competently do the work you are outsourcing. Check the credentials of the individuals working on your matters. Make sure they have experience in the relevant practice area. Ask to see samples of work they have done. Ask for and check references. Ask your outsourcer what it does to ensure quality control.

**Communicate with your client:** Your client should be advised and consent to having work on his/her matter done by a third party outside your office. Ideally this should be highlighted in your retainer or engagement letter. This is extremely important as in appropriate circumstances it may exempt you from civil liability, creating a direct retainer of the outsourcer by the client. However, that depends on how the relationship is being structured.

**Be clear with your client on outsourcing costs:** Outsourcing has the potential to reduce a client's legal costs – something your client will likely approve of. But make sure that you and your client agree, at the start of a matter or when you have more information as it progresses, what the outsourcing costs might be and how they will be billed to the client.

**Avoid conflicts:** Ensure that the outsourcer you are using takes appropriate steps to check for conflicts of interest on any work going to them.

**Protect client confidentiality and privilege:** The Rules of Professional Conduct oblige you to protect the confidentially

of client information and that any disclosure requires the consent of the client. Make sure you obtain your client's consent before there is any disclosure to an outsourcer, and ensure that outsourcer has taken appropriate steps to protect client confidentiality. Take care not to waive privilege on privileged information.

**Carefully manage outsourced projects and budgets:** When engaging an outsourcer, treat him the same way you treat your clients: Clearly communicate and confirm in writing expectations as to the scope of the work to be done, timing and deadline, deliverables and costs.

**Hold outsourcers responsible for their work:** Outsourcers should be responsible for the work they do for you. Attempts in their contract to limit what liability or exposure they may have for their work should be respectfully refused. In fact, if the work is not being outsourced to another practising Ontario lawyer, an indemnity from the outsourcer protecting you in relation to claims involving the outsourced work is likely appropriate. As well, ensure that the outsourcer carries errors and omissions insurance appropriate in its scope and terms to cover the work, and continues to carry this insurance in the following years during which a claim is likely to arise.

**LAWPRO insurance issues:** Putting aside the actual merits of a malpractice claim, an unhappy client will ultimately look to hold you responsible for work done by you or others on your behalf in relation to a client matter.

Generally, your Law Society coverage with LAWPRO will respond to allegations of negligence in respect of your legal services for the client, including aspects of that work that you may have outsourced. If legal work is outsourced to you as part of your law practice, as an insured lawyer under the Law Society program LAWPRO would respond to claims of negligence against you in relation to this work as a matter of course. Otherwise, the party doing the outsourced work would not find protection under the Law Society program policy.

**Excess insurance issues:** Keep in mind your potential exposure for outsourced work, as you consider whether the costs of a malpractice claim may exceed your \$1 million per claim /\$2 million aggregate Law Society program limits. If your firm purchases optional excess insurance from LAWPRO, that excess policy also responds to allegations of negligence in respect of your legal services for the client in the ordinary course, including aspects of that work that may have been outsourced by you. But, not all excess insurers necessarily afford this protection. Those buying excess insurance from others should obtain written confirmation from their excess insurer(s) that their outsourced work is covered.



Jean Bédard

# Technology opens doors to new thinking

## Outsourcing IT

When Jean Bédard struck out on his own in 2006 after 31 years as general counsel and practitioner in a law firm, he knew he wanted technology comparable to what was available at his most recent firm. This included remote access so he could keep up with work while on the road, contact management and calendaring functions; integrated time and billing software, a professional web presence and the regular suite of office software programs.

What he did not know is that he could get some of this functionality for a fraction of the expected cost by outsourcing it. "Outlook has features that are only available if you are running it with Exchange Server, which requires a separate server computer. So the question I faced was: Do I invest in a server or do I free up that capital by using a hosting service," explains Bédard. The upfront cost of \$3,000 for buying a server plus the time and cost

of running it on an ongoing basis compared to the \$30 he now pays each month in server, software and maintenance costs made the decision easy.

The mainstay of Bédard's time and billing when he's in the office is PCLaw; outside the office, he uses MS Outlook Web Access to access emails and other Outlook functions and LogMeIn Pro to access his documents. In the office, he and his assistant share the features Outlook offers through the Exchange Server. LogMeIn Backup allows him to regularly back up his Outlook and other files and store them on a computer that he owns and which is in another location – a must given his decision to limit the amount of server space he's willing to pay for monthly. "To manage costs, I decided that I would archive regularly and keep only a minimum amount of files on the server. You learn to work within the limitations of what you are paying for on your server."

Bédard advises lawyers in the same boat as he was to invest in a knowledgeable IT consultant – not only because he or she can put the right technology solution in place, but also because the consultant can troubleshoot when things go awry. “We tell our clients to come to us, the expert, at the outset. Sometimes we need to take that advice ourselves,” says Bédard. “Your IT consultant will make sure your systems are tested, current and a good fit; and because they speak the language, they’re more likely to get to the right people who can fix your technology problems than you are.

“With the right approach, you can have secure and effective technology solutions without extensive capital investment – and still get the results you need.”

### A new type of business model

When Mike McArthur embarked on a major technology upgrade for his firm, Cline, Backus, Nightingale, McArthur LLP, he never thought that the new administrative system being built would become a driving force for a very different and innovative business model for the Simcoe-based firm.

But it did not take long for the firm partners to realize that with a solid backbone in place, they had the capacity to “bolt on other practices and practitioners.” At about the same time, a seasoned practitioner looking to continue to practice without investing in technology and other office overhead costs asked about joining the firm.

The result: A type of “co-op” arrangement in which the lawyer and the firm split the lawyer’s billings, while Cline, Backus covers the lawyer’s expenses.

Over the last eight years, the firm has worked on similar arrangements with two lawyers and with a retiring partner. For lawyers looking to ease into retirement, this arrangement has allowed them to wind down their practices without risk, and ensure their client files are attended to. It’s also allowed new young lawyers to develop their practices without the upfront investment in technology that is essential to successful law practice today.

Cline, Backus too has seen numerous benefits – the most obvious being the opportunity to spread the costs of technology infrastructure between more lawyers, explains Mike.

“Working with lawyers who are winding down their practices has also helped us build a new client base for our younger lawyers,” explains McArthur. “Moreover, it’s allowed us to recruit and hire junior lawyers and articling students – something that would have been unheard of for us a few years earlier.”

Less expected were benefits of mentoring juniors – and the levity and level of relaxation that senior practitioners added to the

practice. “They are a touchstone for practice – a reminder of what the practice of law needs to maintain as its fundamental character,” says McArthur.

His advice to others looking at different practice models: Make known everyone’s expectations at the outset, and deal up front with issues that could create problems. “The goal is to capitalize on each other’s expertise, learning, and resources.” Most important he says, is that all parties share a commitment to develop each other’s practices.



# A checklist for using a Software as a Service (SaaS) vendor

Under the *Software as a Service* or SaaS model (formerly called the *application service provider* or ASP model) you do not install the software you use on your own computer. Instead, you use an Internet browser to access the SaaS provider's website and you "run" the program and access your data across the web.

Almost all traditional law office software programs are now available in SaaS form. There are several benefits to SaaS. First, you can access your data and work from anywhere in the world as long as you have an Internet connection. Second, SaaS gives you access to powerful functionality for a low monthly fee. You avoid the large upfront and ongoing maintenance costs for hardware and software.

But there are potential drawbacks to the SaaS model: For example, your data is on a computer outside your physical control. Thus, before using a SaaS service, you should understand how SaaS works and complete adequate due diligence on your SaaS provider. The following checklist outlines some of the issues you should consider. It is an abbreviated version of a more detailed checklist that you can find on our website at [www.practicepro.ca/saaschecklist](http://www.practicepro.ca/saaschecklist).

## SERVICES AND OPERATION

- What functionality does the SaaS provide and how does it compare to traditional software programs?
- Is there a working demo you can try?
- How will the SaaS integrate with your other software?

## PRICING

- What are the costs and are there different levels of service or pricing plans? Can you change plans?
- Is pricing based on usage and/or storage and can you accurately predict what your costs will be?
- What are payment terms: monthly, before or after service, payment by credit card etc?
- Is there a minimum contract period and are there long-term discounts?
- Are there extra charges for backup, restoring data or other services?

## VENDOR DUE DILIGENCE

- What reviews and other information about the SaaS vendor can you find?
- How long has the vendor been in business, is he financially healthy, will he provide references?
- Does the vendor have experience with working with law firms and the special needs lawyers have for handling confidential information?
- Does the vendor's website give you confidence and are there support or customer forums? Are they active and generally positive?
- Does the vendor use a Tier 1 data center? Does the vendor own the data center or is hosting it outsourced?
- How much detail will the vendor provide about data center security, including employee screening and certifications for privacy and security?
- What forms of insurance does the vendor have?

## CONTRACT ISSUES

- Is the vendor willing to negotiate contract terms or are you given only the choice of a "clickthrough" agreement?
- Do you understand what user rights you have and are they adequate to cover what you need?
- What warranties are provided (and not provided)?
- What disclaimers and limitations of liability are in the contract?
- Is there a Service Level Agreement (SLA) specifying uptime, response times, help desk and escalation procedures, and other technical requirements in detail?
- Are there remedies and/or penalties for failure to meet SLA requirements?
- Is there a named single point of contact to handle your account?
- Does the contract clearly spell out
  - Security, backup and similar requirements?
  - How and in what format your data will be returned to you if you request or the contract is terminated?
  - That the vendor will provide reasonable transition services in case you move to another SaaS vendor or decide to move the data back in-house?
  - What training and consulting services are provided?
- Are dispute resolution, choice of law and similar provisions acceptable to you?
- How and when must the contract be renewed and what will happen to pricing?
- When and how can you or the vendor terminate the contract? Are there termination fees?
- What rights, especially unilateral rights, does the vendor have to change or eliminate the services or to change the contract terms?

## TECH SUPPORT

- What are the options for tech support? Is it 24x7x365? Are these in the SLA?
- What support is free and what requires extra fees?
- Are e-mail addresses, phone and pager numbers for support available and easy to find?
- Is tech support handled by the vendor or outsourced?
- Does vendor notify you about interruptions or downtime, including scheduled maintenance?

## SECURITY AND OTHER TECHNICAL DETAILS.

- Does the vendor use Secure Socket Layer (SSL) or other security measures?
- Does the vendor encrypt data during transmission and when stored?
- Are there policies and procedures in place for security breaches, data theft, privacy and other concerns?
- Are the vendor's servers in the U.S. or elsewhere in the world? With regard to the data you will store on those servers, are there any issues under PIPEDA, The Sarbanes-Oxley or Homeland Security acts?

# Minister discusses changes

## to Land Titles Assurance Fund



*Earlier this year, LAWPRO was given the opportunity to interview Ted McMeekin, then Minister of Government Services, on changes to the land registration system for which his ministry is responsible. The following is an edited version of that e-interview. The full text is available at [www.practicepro.ca/mcmeekin](http://www.practicepro.ca/mcmeekin). (Note: Mr. McMeekin was appointed Minister of Consumer Services as this publication went to press).*

**Over the past years your Ministry, the Law Society and LAWPRO have worked closely on initiatives that are designed to enhance consumer protection and education on fraud prevention. How successful do you feel these initiatives have been?**

I am pleased to say that our Real Estate Fraud Action Plan has been very successful in protecting property owners from real estate fraud. ... As part of (this plan), our government has been able to address significant issues related to real estate fraud and help protect property owners with the passage of the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006* (Bill 152). This legislation ensures that property owners do not lose their property as a result of the registration of a falsified mortgage, fraudulent sale or counterfeit Power of Attorney. We have improved the ability of the land registration system to rectify title in the event of fraud and introduced additional safeguards for suspending and revoking access to the electronic land registration system. In addition we raised existing fines for offences related to real estate fraud from \$1,000 to \$50,000.

Furthermore, the legislation transformed the Land Titles Assurance Fund (LTAF) so that it is now more responsive to each individual case that comes before it. The Act now allows

for an earlier payment process to homeowners and purchasers of residential properties by removing the requirement that those applicants must pursue the individuals who are primarily responsible for the loss, prior to being entitled to any compensation from the LTAF. In cases where an innocent homeowner has suffered a loss, title can be rectified and any loss compensated in a timely fashion. I would encourage anyone looking for more information on the fund or related to this process to visit us on-line at [www.ontario.ca](http://www.ontario.ca).

Also, the Real Estate Fraud Action Plan ensures that only appropriate parties have access to register documents in the electronic land registration system.

In this regard, we introduced a set of criteria based on three standards that are important in the development of an effective strategy against fraud. They are:

- identity;
- financial resources; and
- appropriate qualifications which must be met by those who wish to register documents in the system.

Parties wishing to register are required to apply to the ministry for authorization to register in the electronic land registration

system and are required to enter into a registration agreement. By requiring that all registrants meet these criteria, we can ensure that only appropriate parties register in the system and that victims have recourse where registrants have acted fraudulently.

As well, we have restricted the right to register most transfers of title to lawyers who meet the criteria, while allowing other documents, such as mortgages and related documents, to be registered by all others who meet the criteria. By restricting the ability to register transfers of title to lawyers, we can isolate one of the main documents involved in title fraud and provide consumers with additional protection. Also we have strengthened the standards surrounding the use of powers of attorney in registering real estate transactions.

Most importantly, we have worked hard to ensure innocent homeowners do not lose their homes because of someone else's illegal actions.

### **How many consumers have approached the fund, and how much has it paid out?**

There are now two processes that apply to applications to the fund:

- the new, earlier payment process that applies to a prescribed class of persons who are registered owners of land used for residential purposes (homeowners) and individuals who are purchasers, in good faith for valuable consideration of land for residential purposes; and
- the traditional fund process which continues to apply in all other circumstances.

I am pleased to say that the backlog of claims to the fund that previously existed has been cleared and all files are current as a result of additional resources being applied to this important matter. A number of straightforward claims have been processed and compensation payments have been made within our new service standard.

Since October 19, 2006, the date of introduction of Bill 152:

- 34 claims related to fraud have been received by the Land Titles Assurance Fund;
- 29 claims related to fraud have been paid and closed. The total amount paid is \$3,632,184. The 29 claims consist of some claims that were received prior to October 19 and other claims received subsequent to the October 19<sup>th</sup> date;
- In addition, 25 claims related to fraud have also been closed as a result of the claims being withdrawn, abandoned or denied. These claims also consist of claims received prior to and subsequent to October 19<sup>th</sup>;
- There are currently 23 claims of fraud before the Land Titles Assurance Fund.

As well, as part of the overall streamlining of the Land Titles Assurance Fund process and making the fund more user friendly, tribunal rules of procedure were developed and are available on our website at [www.ontario.ca](http://www.ontario.ca).

An information document has also been created and is posted on the ministry website, to advise what losses may be covered by the fund, how to make an application, what claims qualify for compensation, examples of what would be required to establish fraud and prove the loss and what happens at an LTAF hearing. Some prior fund decisions of the tribunal are available for searching electronically and we continue to update this information.

### **Some frauds have been perpetrated with fraudulent powers of attorney. Is the government contemplating changes to the form and execution of a power of attorney?**

The ministry has implemented new standards regarding the use of a power of attorney in real estate transactions. As part of the Real Estate Fraud Action Plan, a lawyer is required to review the power of attorney with his or her client and make a law statement related to authority for the use of the power of attorney when an individual has granted a power of attorney and a document is being signed under the authority of that power of attorney.

Additional statements that do not involve a lawyer have also been added for the use of other powers of attorney.

### **Heightened due diligence on the part of all parties in a real estate transaction appears to be one of the tenets of the government's anti-fraud campaign. Order ODOT 2007-02 issued by the director of titles required that lenders would be required to demonstrate they had exercised due diligence in mortgage transactions if they wanted to pursue a claim to the Land Titles Assurance Fund. What has happened or will be happening with respect to this order and the ministry's requirements of lenders?**

The director of titles issued an order specifying the requisite level of due diligence required to be eligible for compensation from the Land Titles Assurance Fund. Financial institutions must demonstrate that reasonable steps have been taken to verify identification and to verify the transaction to be eligible for compensation from the fund. These steps may include an in-person meeting with the borrower within a reasonable time prior to closing or performing an onsite appraisal or visit to verify the transaction.

My ministry has worked closely with industry representatives through the Real Estate Fraud Stakeholder Committee throughout the introduction of the Real Estate Fraud Action Plan. The roles and responsibilities of all parties involved and the need to practice due diligence was included in our discussions.

I have been advised and I am pleased to report that at a recent Real Estate Fraud Stakeholders Committee meeting, it was acknowledged that the work of that committee and the initiatives undertaken have been instrumental in addressing fraud.

We will continue to work with this committee to develop effective strategies and approaches to combat real estate fraud and to increase the security related to the processing of documents obtained for mortgage purposes.

# Retired solicitors:

## Do you have enough insurance to fight “ancient” or recent claims?

In 2002, a plaintiff sued lawyers A and B, and lawyer B’s law firm, alleging that the two lawyers failed to competently represent the plaintiff, and negligently advised him to settle his personal injury claim for an inadequate amount in 1977. The judgment dismissing the action against the solicitors was rendered on September 22, 2008, nearly 31 years after the plaintiff’s motor vehicle accident was settled.

The plaintiff was injured in a head-on collision in November, 1974. The police could not determine in which lane the collision had occurred. The plaintiff and his passenger were unable to recall the accident. The other driver said that the plaintiff was speeding and that the collision had occurred in the driver’s lane.

Lawyer A was retained to sue the other driver. Lawyer A got a second opinion from lawyer B, before settling the claim for \$5,000 in December, 1977. Although the plaintiff suffered serious injuries, the two lawyers were concerned that the plaintiff could not establish liability against the other driver. The plaintiff had returned to work full time 18 months before the settlement.

Twenty-five years after the settlement, the plaintiff sued these solicitors, alleging that they were negligent in failing to obtain an accident reconstruction, and in failing to further investigate the plaintiff’s head injuries.

The judge dismissed the plaintiff’s action.

The judge preferred the evidence of the defendants’ engineer to that of the plaintiff’s engineer. There was simply not enough evidence available at the accident scene to do a worthwhile accident reconstruction. The photographs were poor, and the measurements imprecise. The plaintiff’s engineer used techniques not available in the 1970s.

The court also preferred the evidence of the litigation expert called by the defendants, to that of the expert witness for the plaintiff.

The court disagreed with the plaintiff’s expert evidence that the decision not to retain or recommend retaining an accident reconstruction expert was a departure from the standard of care. The hiring of such experts in civil cases was not unheard of in the 1970s, but it was not common. The extent to which forensic experts should be used was a matter of discussion in the profession at the time.

The court found it impossible to say, as the plaintiff’s expert witness did, that the glaring lacuna in the physical and eyewitness evidence required the hiring of an expert. The expert’s report would necessarily have depended on the quality of the input available to him. The lack of objective evidence was a factor militating against, not for, the hiring of an expert. In the 1970s professionals were not accustomed, as they are today, to take steps designed solely to help defend themselves from future negligence actions.

The court disagreed with the plaintiff’s contention that with experts anything is possible. It is not difficult to attack an expert opinion when the weakness of its underlying factual assumptions is evident. Lawyer B’s view was that while you might get an accident reconstruction expert to give an opinion, you might be met by a better opposing one. This is exactly what happened.

The court did not accept that lawyer A fell below the standard of care in failing to pursue further evidence about head injury. The orthopedic surgeon reported that the plaintiff had made a good recovery. There was nothing in the hospital records to suggest otherwise. The defendants’ expert

testified, and the court agreed, that it was the practice in the 1970s to proceed on the basis of such a report, and lawyer A did not need to hire another doctor. The migraine headaches which developed many years after the accident were not caused by the accident.

Neither lawyer A nor lawyer B were negligent. Lawyer B was given a \$300.00 retainer. He did more than his retainer required. He visited the scene of the accident, drove the other driver’s route, and spoke with the police. He ascertained that the plaintiff’s passenger would be of no assistance on the liability issue. Lawyer B discussed obtaining an accident reconstruction with the plaintiff, but felt that nothing would be gained from it. Far from failing to meet the standard of care, lawyer B went well beyond it.

The action was also statute barred. The court rejected the plaintiff’s contention that there was any connection between his viewing a computer animated reconstruction of Princess Diana’s car accident, and the plaintiff’s discovering that he had a cause of action against the solicitors.

A pdf copy of the reasons for judgment, which was never reported, may be found at: [www.practicepro.ca/runoffcase](http://www.practicepro.ca/runoffcase).

Defending a lawsuit arising from legal services rendered more than a quarter of a century earlier is difficult. In this case, the other driver as well as lawyer A were dead by the time the malpractice action was tried.

### **The need to evaluate insurance coverage limits**

A retired solicitor cannot assume that he or she will have adequate insurance when faced with an “ancient” claim, or any claim, for that matter. If a solicitor is

sued after he or she retires from practice, and ceases to pay errors and omissions premiums, the solicitor has the benefit of \$250,000 in Run-Off coverage under the Law Society's insurance program. This coverage limit is per claim and in the aggregate, and is a one-time limit. It is not re-instated annually. A retiring solicitor is covered to a maximum of \$250,000 for all of the claims made against the solicitor while in retirement or otherwise on exemption under the Law Society program (for reasons other than temporary leave of absence or mobility). This \$250,000 per claim/in the aggregate limit is applicable to claims payments, defence costs and pre-judgment interest. All such payments made to resolve a claim reduce the funds available under the

policy to respond to all other claims against the solicitor.

In short, the \$250,000 must cover all payments by LAWPRO associated with all claims against the retired solicitor, from the date of retirement, until the solicitor's death, and beyond. A substantial claim can easily consume the entire \$250,000.

Retiring lawyers are encouraged to buy-up their run-off limit protection under the Law Society program. Increased limit options include \$500,000 per claim/\$1 million aggregate, and \$1 million per claim/\$2 million aggregate. Retiring lawyers may also consider applying for optional excess insurance above the latter increased limit option.

For details concerning the various insurance options available to retiring lawyers, and the kinds of things that lawyers might consider in deciding what option best suits them, see LAWPRO's Insurance Matters booklet for retired lawyers at: [http://lawpro.ca/insurance/pdf/Retired\\_Lawyers\\_Policy.pdf](http://lawpro.ca/insurance/pdf/Retired_Lawyers_Policy.pdf).

Forms and further information are available on-line at: [http://lawpro.ca/insurance/Practice\\_type/retired\\_lawyers.asp](http://lawpro.ca/insurance/Practice_type/retired_lawyers.asp).

*Debra Rolph is director of research at LAWPRO.*

# Starting a green committee



One of the key components in LAWPRO's sustainability program has been the creation of a company-wide Green Committee. It's helped to put focus around our ideas and encouraged sober and thoughtful debate on the merits of each initiative before the idea is moved up the ladder.

Starting a Green Committee at your company has the dual effect of helping the environment and engaging your employees in a cause that they can relate to – and can be fun.

LAWPRO's Green Committee has tabled a number of initiatives in six short months, a few of which have been brought to our management team for consideration. Ideas implemented at LAWPRO include: reducing the amount of material we automatically print (i.e. moving more information online); tracking each department's monthly paper consumption with a goal of reducing that consumption; switching to recycled paper and identifying a "green" charity for the employees and the company to support.

Here are some of the things we took into consideration when developing our Green Committee. Feel free to borrow liberally or come up with your own take.

- Get at least one representative from each department.

- Write a mandate or mission statement and follow it. This ensures that you have a clear and focused goal.
- Make sure that you're not pushing political agendas – present the information in an unbiased way.
- Allow everyone to have a say.
- Make it fun – put together competitions and initiatives that bring the entire organization together.

For more information on starting a Green Committee, check out this resource – <http://tinyurl.com/cb7qke>.

## New toolkit to help lawyers re-establish lender connections



Lawyers need to be proactive and visible in the lending community if they want to capture a slice of the lending and refinance business. That's the key message of a new TitlePLUS toolkit designed to help lawyers develop a relationship with their local mortgage lender.

The quick and informative online guide titled *Get Legal Work From Local Lenders*, begins by posing a simple question –

When was the last time you dropped by your local lender's office and talked about the legal services you can offer? The advice: Get out there and get yourself known rather than rely on an e-mail or phone call.

The toolkit walks lawyers through eight simple steps they should undertake to effectively promote themselves to local mortgage lenders. It also provides links

to sample contact lists, introductory letters and other resources that would help lawyers better promote legal services and establish valuable contact and business leads.

The *Get Legal Work From Local Lenders* toolkit can be found on the TitlePLUS website or by going to <http://www.titleplus.ca/Lawyers/News/Default.asp>. More information is also available from Mark Farrish, TitlePLUS Director of Sales and Marketing, at 416-598-8566.

One important point the guide makes is that the TitlePLUS program is different. It is the country's only all Canadian and Bar-Related® title insurer, and works to keep local real estate lawyers across Canada involved in real estate transactions. Unlike some other title insurers and/or their affiliates, the TitlePLUS program does not operate or send work to document processing centres; instead, it encourages consumers to work with lawyers so that they can receive independent legal advice.

® BAR-RELATED Mark is a registered Mark of North American Bar Related Title Insurers used by LAWPRO under License.

## TitlePLUS “work with a lawyer” message gets heard

No matter what type of real estate transaction you plan to complete, you'll benefit from working with a lawyer. This central message in a TitlePLUS consumer public awareness campaign was read and seen more than 40 million times in 2008.

Launched in 2006, the campaign comprises two key elements:

- proactive media relations campaigns centered around specific media pitches detailing how working with a lawyer assists the consumer in the transaction; and
- a series of articles (matte stories) on specific aspects of home buying, refinancing and working with a lawyer that are made available free of charge through a national distribution service to publications and websites across Canada.

In 2008, three media pitches – one on rental units, one on recreational properties, and a third on how buying and selling property has changed in the last decade – generated coverage in more than 40 newspapers, websites and broadcast outlets that reached an estimated 3.5 million consumers across Canada. The series of matte stories were seen or read about 38 million times (i.e. generated 38 million impressions) in 128 publications and online media outlets.

A principal focus of the campaign has been to drive traffic to the *Real Simple Real Estate Guide* on the TitlePLUS website, which provides information on title insurance and the importance of a real estate lawyer, as well as checklists, calculators to help consumers work through the financial aspects of the transaction, and other online tools and resources.

# New TitlePLUS Facebook page

The TitlePLUS program has dipped its toes into the new media space, launching a *Home Buyers in Ontario* group on Facebook, the popular social networking site.

The group was created to provide home buyers in Ontario with tools and resources to help them make informed decisions when buying a home. Buyers are able to interact with real estate agents and lawyers, build contacts and discuss the home buying process with other buyers.

"Facebook's platform really allows us to bring all the parties together and facilitate dialogue between them," says Mahwash Khan, Training & Communication Counsel, TitlePLUS.

This is the first TitlePLUS foray into the social media realm – and is a sign of things to come. According to Khan, the response has been good. The TitlePLUS Facebook page now has just under 100 members. For lawyers and consumers alike, the new site offers many opportunities for information sharing. Home buyers are engaging with real estate agents, and lawyers are able to share best practices with each other.

Although encouraging dialogue is the site's primary objective, it also provides links to a number of informative resources such as: the *Real Simple Real Estate Guide* (a TitlePLUS website that includes tools such as mortgage calculators and numerous resources useful to home buyers); the *Locate a Lawyer* feature to help consumers connect with TitlePLUS lawyers in their area; informational videos about title insurance; and helpful articles penned by real estate practitioner, Bob Aaron.



The *Home Buyers in Ontario* Facebook group is one more step in the TitlePLUS program's plan to find new and creative ways to reach out to and engage its many stakeholders.

This new forum also allows the TitlePLUS program to advance its mandate as the only all-Canadian title insurer working to keep local real estate lawyers involved in the real estate transaction.

Check out the *Home Buyers in Ontario* group on Facebook at: <http://tinyurl.com/cnrof7>.

## Together we have all the tools

To ensure your clients get the most comprehensive coverage in one title insurance policy, take a look at the TitlePLUS® Program<sup>1</sup>.

PROTECTION AS GOOD AS IT GETS

1-800-410-1013

titleplus.ca

Title PLUS®



<sup>1</sup> Please refer to the policy for full details, including actual terms and conditions. The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LWP<sup>®</sup>)/ Assurance LawPRO<sup>®</sup>. Assurance LawPRO is the registered name used in Quebec by Lawyers' Professional Indemnity Company. Contact LWP<sup>®</sup> for brokers in Saskatchewan, Manitoba, Alberta and Quebec. TitlePLUS policies issued with respect to properties in Quebec and OwnerEXPRESS<sup>®</sup> policies do not include legal services coverage.  
 ® Registered trademark of Lawyers' Professional Indemnity Company.

# Practice locums:

## E&O insurance issues to consider

Recognizing that a positive professional life depends on a healthy lifestyle, and that periodic breaks from work are essential to maintain work-life balance, the Law Society recently adopted a recommendation<sup>1</sup> to support practice locums. Locums enable you to take a break from your practice by arranging for another lawyer to provide legal services to your clients while you are away.

Locum, short for the Latin phrase *locum tenens*, is a person who temporarily fulfils the duties of another. The term is commonly used for professionals (e.g. doctors, clergy, lawyers), who are still governed by their respective regulatory bodies despite the temporary nature of their position as locum.

In the case of the legal profession, a locum is a lawyer who stands in for another practitioner while he or she is away from his or her practice, whether for a maternity or parental leave, vacation, sickness leave, or any other type of leave. Typically, the locum will be retained to work in the contracting firm/lawyer's office and deal with every type of file handled by the practice. The locum may also be brought in to handle specific matters. The locum could be full-time or part-time, depending on the arrangement.

The insurance issues that a lawyer planning to act as a locum needs to consider are many, as you are standing in for another lawyer to cover or run his/her law practice while away. In this replacement capacity you are considered by clients and others to be part of that lawyer's law firm.

Fundamentally, it is **your responsibility – as locum** – to ensure that you have in place E&O coverage under the Law Society program that properly accommodates your locum work, as well as any law practice of your own that you may be conducting.

### Issues to consider if you are acting as locum

One of the first questions to ask yourself is if the practice and coverage options in

place for you under the insurance program still apply. For example, if you opted for the restricted area of practice coverage option but your locum work will not be confined to only criminal and/or immigration law, you need to notify LAWPRO of this coverage change.

Similarly, if you had qualified for the part-time practice option, but now will be working full-time, (whether as a locum for a single lawyer, or for more than one lawyer, or combined with your own personal law practice), you would no longer meet the criteria for this practice option and would first need to have that coverage option removed before practising on a full-time basis.

If your locum work is to include the practice of real estate law, you would first need to ensure that the required real estate practice coverage is in place for you under the program.

### Innocent Party Coverage needs

If as locum you are standing in for a lawyer in an association, partnership or law corporation with more than one lawyer, you would be required to carry at least the minimum \$250,000 per claim/aggregate Innocent Party sub-limit protection. This is even if you otherwise maintain a personal law practice as a sole practitioner.

If lawyers in the contracting firm have opted to buy-up their Innocent Party protection, then as a locum in the contracting firm you would need to carry at least that same amount of increased Innocent Party protection.

Note that LAWPRO strongly recommends that the locum, as well as lawyers in the contracting firm, apply for the full amount of Innocent Party protection available to ensure that they are well protected against claims that may arise out of dishonest acts.

If a claim does arise in relation to locum work, it is the locum's policy coverage under the Law Society program that would respond.

### Issues for the contracting firm to consider

Lawyers in the contracting firm also should pay attention to the insurance implications of a locum, as the locum is considered to be acting as a member of the firm.

The firm therefore should ensure that the locum maintains E&O protection with coverage options that are consistent with both the locum work and the coverage of the firm's other lawyers.

Firm lawyers should keep in mind the following: Limit protection for a claim made against the locum would not be increased by virtue of the program coverage maintained by other lawyers in the contracting firm; partners in the firm could find themselves responsible for paying the locum's program deductible; and no protection is available in respect of allegations of damage to the goodwill and reputation of the firm. As well, the aggregate limit protection provided to locums could also be eroded by claims that are not related to locum work.

### Excess insurance considerations

Another question to ask is: What excess insurance protection would apply? Although under LAWPRO's optional Excess program, locums and their locum work are automatically covered under the excess policy issued to the contracting firm, not all excess insurers may do so.

Firms purchasing excess insurance from other insurers are **strongly encouraged** to obtain written confirmation from their excess insurer that the locum and contracting firm are **both** insureds under any excess policy issued, and that coverage is fully afforded in relation to locum work that has or may be done.

For more information on retaining a locum and establishing oneself as a locum, a contract checklist, sample contract clauses, and ethical and practice management considerations, visit the Resource Centre on the LSUC website at <http://rc.lsuc.on.ca/jsp/locum/index.jsp>.

<sup>1</sup> This recommendation has its genesis in the work of the Law Society's Retention of Women in Private Practice Working Group. It recommended that the LSUC develop a five-year pilot project to promote and support practice locums that address the challenges women face in finding competent and available lawyers to maintain their practice during leaves of absence, and in particular, maternity leaves. Practice locums are available to all eligible Ontario lawyers.

# Administrative dismissal:

## Take it seriously and ask for (our) help

It's Friday afternoon, and you are almost ready to begin what promises to be a relaxing weekend. One file remains at the corner of your desk and there is a telephone message from opposing counsel. It has been difficult to obtain instructions from the client and you have a nagging feeling that you have put the matter off for too long. You listen to your telephone message and defence counsel has let you know that the registrar dismissed the action for delay about six months ago and he is closing his file.

When you review the file, you find buried with some client documents the dismissal order which never came to your attention. You are not even sure if you received the status notice advising of the pending dismissal. You don't see it in the file. Your first thought is that a registrar's dismissal order is easy to set aside. Wrong!

Unfortunately, this scenario (or a similar version) is something we at LAWPRO see on a weekly basis. Many lawyers are unfamiliar with the case law and think that the registrar's dismissal order is routinely set aside. They do not call LAWPRO. Instead, they bring a motion but are not successful in restoring the action. The motion materials are poorly drafted and the affidavit lacks crucial details.

By reporting the matter late, you are not only jeopardizing your coverage, but also endangering hopes of an appeal because this is likely not a case where we would be able to introduce fresh evidence on appeal. Typically, all relevant information was available prior to the motion.

The test that the court is to implement when setting aside the order of the registrar made pursuant to Rules 48.14(3) and 77.08 has been set out by the Court of Appeal in *Scaini v Prochnicki* (2007) 85 O.R. (3d) 179, and *Marche D'Alimentation Denis Theriault Ltee v Giant Tiger Stores*

*Ltd.* (2007), 87 O.R. (3d) 660. The court noted that the four factors set out in *Reid v Dow Corning Corp* (2001), 11 C.P.C. (5th) 80, are not to be applied rigidly, but rather contextually, along with all relevant factors, and the court must determine what is just in all of the circumstances of a particular case.

The four *Reid* factors are:

1. an explanation of the litigation delay from the start of the action until the deadline for setting the action down;
2. evidence that the plaintiff always intended to set the action down by the deadline but failed to do so through inadvertence;
3. the motion to set aside was brought promptly after learning of the dismissal; and
4. a lack of significant prejudice to the defendants arising from the delay or as a result of the dismissal.

The court will have no difficulty in dismissing a motion for want of proper evidence being adduced.

As an example, one of our files involved an action for non-payment of a mortgage insurance policy. The affidavit in support of the motion was 11 paragraphs, and basically a procedural chronology, which the court referred to as containing the "barest minimum of information." The affidavit did not address all four criteria in *Reid*. Although the motion to restore the action was brought six months after the dismissal order, there was no explanation for the delay.

Our insured explained that he received little cooperation from the defendant in scheduling discoveries. But he did not explain this in his material even though the defendants contributed to the delay. There was no evidence as to why the action was not set down for trial. There

was no evidence as to whether the status notice was received, nor what was or was not done in response to the status notice. There was no explanation as to when the dismissal order came to our insured's attention, and what was done in response thereafter. There was no evidence that the plaintiff intended to proceed with the action, which was important because on the pleadings, there was a real question about the merits of the action. Even though the defendant did not allege prejudice, the court was of the view that there was not enough information to exercise its discretion under Rule 48.

In some cases, the motion will fail because the action simply dragged on for too long. The key is that the lack of prejudice is not the sole criterion. In *Giant Tiger* the court stressed the importance of not countenancing delay. If there has been inordinate delay in advancing the action prior to the dismissal, or in bringing your motion to restore the action, this may trump lack of prejudice.

When you realize that an action has been dismissed for delay, call LAWPRO immediately. Don't bring the motion without telling us first, and don't advise us of the situation on the eve of motion. We can help by reviewing your motion material. In some cases, a consent to set aside the order may be available. In some circumstances, we may agree that your firm can proceed on its own with experienced counsel handling the motion. In most cases, it is necessary for us to retain counsel for you to prepare the motion record and argue the motion. We have been successful when we have time to properly respond. We are here to help.

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*Domenic Bellacicco is claims counsel with LAWPRO.*

# Land Titles Office

## Alert for Ontario lawyers!

Land Titles offices are getting strict about their seven-day limit for the return of documents sent back for correction.

When a document is submitted for registration electronically, the system performs some registration checks and then receipts the document with a registration number. Land Titles office staff subsequently check the document and, if errors are found that prevent certification, call the appropriate parties and send the document back for correction. If the document is not corrected and returned within seven days, Land Titles

office staff will make two follow-up calls to the registrant. If the document is still not returned, it may be **cancelled** or **certified subject to the outstanding interest**.

In situations where the registrant is no longer with the firm, Land Titles office staff will not return the document, but instead, advise the registrant to contact Teranet Inc. to arrange for access to the document.

Although this formal policy has been in place since 2002, Land Titles offices are now strictly following it as outlined in Land Registry Bulletin 2002-1 and section 78

of the *Land Titles Act*. To view the bulletin see the "Land Registration" section on [www.ontario.ca](http://www.ontario.ca).

Registration volumes are in excess of two million per year. With over 92 per cent of registrations being received electronically last year, the Land Titles offices seem eager to clear any backlog that may exist and complete the certification process in a timely manner.

*Mahwash Khan is TitlePLUS training and communication counsel.*

book review

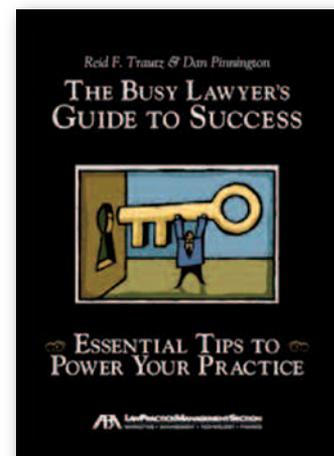
# New book

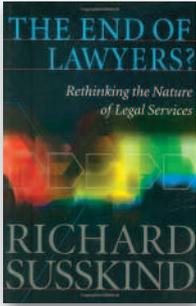
## helps lawyers build successful practice

Looking for new tips and ideas to enhance and streamline your practice? *The Busy Lawyer's Guide to Success: Essential Tips to Power Your Practice* may be the answer.

Authored by Dan Pinnington, director of LAWPRO's practicePRO risk management program, and Reid F. Trautz, a practice management advisor based in the U.S.A., this pocket guide provides tips, ideas and techniques designed to help lawyers build their practices. The booklet covers a myriad of topics from client service to making (more) money, to strategy and planning.

Copies of the booklet are available in the practicePRO Lending Library. To borrow a copy for free, go to: [www.practicepro.ca/library](http://www.practicepro.ca/library).





# The End of Lawyers?

## Rethinking the Nature of Legal Services

Richard Susskind, OBE, published 2008, 256 pages

Who would dare to think such a thing?

A lawyer! In fact, one held in esteem by a cadre of legal thought leaders.

Richard Susskind, a Glaswegian (as in born in Glasgow, Scotland) is not your typical lawyer. From the very start of his career, he has embraced technology as being not only an enabler but also a driver of legal service delivery. Among a long list of compelling accomplishments, he is IT advisor to the Lord Chief Justice of England and Wales and Emeritus Professor of Law at Gresham College in London.

*The End of Lawyers?* is considered the sequel to his earlier book entitled *The Future of Law* (1996) in which he made a number of predictions (considered outlandish at the time) on how technology would impact the legal profession around the world. Many of those predictions have come true. And now, he challenges us to turn our profession upside down to meet a new set of demands from clients and the general public. According to Susskind, change is charging at us and it is laden with opportunities to be enjoyed or risks to be suffered.

He describes his purpose on page one: "My aim is to explore the extent to which the role of the traditional lawyer can be sustained in coming years in the face of challenging trends in the legal marketplace and new techniques for the delivery of legal services." His thesis is that our role will be shaped by two forces: commoditization and IT. Traditional lawyer functions will be eroded and replaced with different ones. In his words, the challenge is "for lawyers to ask hand on heart what elements of their current workload could be undertaken differently – more quickly, cheaply, efficiently or to a higher quality – using alternative methods of working."

He points to how IT and, in particular, expert systems, the personal computer and the web have had a profound impact on the ability to spread and share legal knowledge and expertise. He warns of even more profound changes based on the exponential growth of technology and its delivery of vast amounts of information and experience, social networking and online communities. Legal technologies that he labels as 'disruptive' to current legal practice will become characteristic of our legal service model: automated document assembly, relentless connectivity, an electronic legal marketplace, e-learning, online legal guidance, legal open-sourcing, closed legal communities, workflow and project management and embedded legal knowledge.

Susskind shares an array of research with us. He draws on experiences and examples from the legal profession and other walks of life – the business community, the health sector and the tech world – and includes insights about human behaviour, psychology, workflow management and networking.

Then there are Susskind's probing sub-questions and propositions that lead directly to the title's question. His responses, which largely rely on a combination of two strategies – efficiency and collaboration – are well-reasoned and supported with detailed facts and case studies. He addresses these questions from many perspectives: clients and their needs and demands (both in-house lawyers as well as individuals); types of legal services and the tasks involved (dispute resolution, transactions, personal services); and outputs likely to be most valued going forward (communication, knowledge sharing, legal risk management). He also speaks to new approaches such as legal triage and multi-sourcing

along with a more entrepreneurial third sector service provider distinct from the traditional law firm. Quite uniquely, Susskind devotes a significant amount of attention to the difficult issue of access to law and justice and goes well beyond the traditional discussion of access to the courts. To this issue he brings a fresh, practical and all-encompassing approach built on a 'client service chain' comprising three elements: recognition (the ability to identify that a problem does or will exist); selection (the ability to select from a complement of available legal guidance); and service (the ability to receive the right legal guidance).

In the end, Susskind answers his title's question with a "no, not quite yet". But his prognosis is that various client-driven forces mean lawyers will no longer be the dominant means of securing access to legal understanding and justice; our role as expert trusted advisor will belong to only a small number of lawyers. Lawyers will have new roles such as the legal knowledge engineer or the legal risk manager or a legal hybrid with multi-disciplinary expertise. If you are ready to look into Susskind's question, this book makes for fascinating reading. And if you are serious about embracing the changing environment, it is a primer for new ideas and bold action.

The practicePRO Lending Library has one copy of *The End of Lawyers?* To borrow it, go to [www.practicepro.ca/library](http://www.practicepro.ca/library).

*Karen Bell LLB is a law practice management expert. She is the creator of The Resilience2Risk Program™, working with law firms and legal departments across Canada to help them drive productivity and growth by building resilience to the many risks inherent in the business of law. She can be reached at [karen@karenbell.ca](mailto:karen@karenbell.ca)*

# Tough times and suicide:

## How to help lawyers in distress

In the first three months of 2009, three lawyers (that we know of) considered suicide. That comes hard on the heels of six serious suicide situations and two suicides (again, that we know of) in the last quarter of 2008. We know of only one serious suicide situation in the first nine months of 2008.

Legal assistance programs in Canada and the U.S. are reporting similar trends. The number of serious calls for help, and the number of attempted and successful suicides has shot up sharply.

Why is all this happening? Certainly the deteriorating economy contributes to unemployment, severe depression, desperation and erosion of hope. Many are struggling to make ends meet. As well, lawyers work long hours, experience high levels of stress and pressure, lack of appreciation from clients, and a stigma

attached to our work by the public. Add in financial concerns, lawsuits, client claims, negligence allegations, job dissatisfaction and trauma, you have the recipe for a potentially tragic event.

### What to look for

What are the common warning signs that we can look for in others or in ourselves for that matter?

Among the red flags that we should notice are:

- neglecting personal appearance;
- chronic or unexplained illnesses;
- nagging aches or pains;
- sudden weight loss or gain;
- inability to enjoy friendships;
- anxiousness, exaggerated fears, or sadness;
- tension, agitation or lethargy;
- daydreaming, loss of ability to concentrate or loss of rational thought;
- changes in personality – for example an outgoing person becomes withdrawn;
- feelings of worthlessness;
- unexplained misuse and abuse of alcohol or drugs;
- sexual promiscuity;
- changes in sleeping and/or eating patterns.

Indicators that call for immediate action include:

- moving beyond being depressed into the realm of suicide-risky behaviours such as threats of suicide especially when there have been previous attempts;
- feelings of extreme isolation, hopelessness, helplessness or futility;
- loss of rational thought;
- increased risk-taking such as careless driving or dangerous use of firearms;
- giving away prized possessions;
- suddenly making a will, or writing stories about death or suicide, or writing goodbye letters or “taking care of business.”

## Resources to access:

### DIRECT SERVICES:

- [www.olap.ca](http://www.olap.ca) – Ontario Lawyers Assistance Program – 1-877-576-6227
- [www.ontario.cmha.ca](http://www.ontario.cmha.ca) – Canadian Mental Health Association – 1-866-531-2600
- [www.dcontario.org](http://www.dcontario.org) – Distress Centres Ontario – 416-486-2242
- [www.ospn.ca](http://www.ospn.ca) – Ontario Suicide Prevention Network – 905-897-9183
- [www.suicidehotlines.com](http://www.suicidehotlines.com) – 1-800-SUICIDE

### INFORMATION SITES:

- [www.suicideinfo.ca](http://www.suicideinfo.ca) – Centre for Suicide Prevention
- [www.casp-acps.ca](http://www.casp-acps.ca) – Canadian Association for Suicide Prevention
- [www.lawyerswithdepression.com](http://www.lawyerswithdepression.com) – Lawyers created depression resource
- [www.livingworks.net](http://www.livingworks.net) – Suicide – safer communities – saving lives for tomorrow
- [www.psychcentral.com](http://www.psychcentral.com) – independent mental health network

### Dispelling myths

What are the myths surrounding suicide?

1. **Talking about suicide may give someone the idea.** Talking about suicide does not increase the risk. The best way to identify the intention to commit suicide is to ask directly. Open talk and genuine concern is a source of release for the person considering suicide and a key element in preventing the immediate risk of suicide.
2. **A person who attempts suicide is only looking for attention.** For some, these behaviours are serious invitations

to others to help them live. For others, it is a final exit.

3. **Those who attempted suicide in the past won't try again.** Four of five people who have died by suicide have made at least one previous attempt.
4. **A suicidal person wants to die.** A person may not want to die but rather to avoid life in its present form. Escape from pain may be the intention.
5. **Suicide is generally carried out without warning.** In about one-third of suicides there are warning signs (see list on previous page).

### Stepping in to prevent suicide

What do you do if you think someone is suicidal? Difficult as this situation may be, there are some strategies to help:

- Talk to the person, tell them you are worried about them and ask them directly if they are thinking of committing suicide or taking their own life.
- Listen without judgment even if you are shocked by what you hear – be non-judgmental.
- Talk about upcoming events such as a planned holiday, dinner next Sunday, how their sports team is doing; try to re-establish looking to the future and a connection to the present.
- Give the person a hug or hold hands to establish a physical presence – bring him or her back into the tactile, real world.
- Get him or her something to eat and drink – establish contact with here and now and with their bodies.
- Ask the person to look at you and keep eye contact so that he or she cannot avoid direct questions.
- Keep talking – get their feelings out into the light of day where they can be examined.
- Do not leave him or her alone! Stay and talk for as long as the person wants to talk.
- If you can, take the person to the hospital emergency room to get professional help.

## Facts on suicide

According to Statistics Canada, suicides increased 10 per cent between 1997 and 1999, to 4,074 from 3,681. In Ontario alone, suicides rose to 1,032 in 2001 from 930 in 1997. Suicide is the leading cause of death among men aged 25 to 29 and 40 to 44, and among women aged 30 to 34. It is the second leading cause of death among youth aged 15 to 24.

Women attempt suicide at two times the rate of men, but men complete suicide at a rate four times higher than that of women, usually by violent means.

How does this relate to lawyers? First, consider that more than 90 per cent of suicide victims have a diagnosable psychiatric illness. According to a 1990 Johns Hopkins University study of depression in 105 professions, lawyers ranked number one in the incidence of depression, a major factor in suicide, and were 3.6 times more likely to have this illness. According to the National Institute of Mental Health, 15 per cent of people with clinical depression commit suicide. An upcoming American Bar Association program description on suicide states that "Attorneys have the highest rates of depression and suicide of any profession." Anecdotally, it has been said that lawyers commit suicide at three times the rate of the general population.

*Note that not all suicides are reported as such but are often listed as death by accident, physical or natural causes to save the families and the deceased from the stigma that comes with a suicide.*

### Are you considering suicide?

If you are reading this and are suicidal, call for help. Right now! Please.

Call a family member or friend you trust.

Call your local crisis line – you can get the number for where you live at [www.dcontario.org](http://www.dcontario.org). Crisis lines are listed at the front of the phone book (my book has it on page 2 on the left side, about three-quarters of the way down).

Go to the hospital with a friend or family member and tell them you are suicidal – they will immediately help you.

**Call the Ontario Lawyers Assistance Program at 1-877-576-6227.** Someone is always available to help. After hours, a counsellor is available if the matter is urgent. Be sure to indicate that you are feeling at risk when you call. If you can be specific about your feelings and thoughts of suicide, say the words out loud so they become real to you, and your situation

can be addressed quickly. Do not be alone. Act to save yourself.

Suicide is a death that leaves more questions than it answers. Survivors wonder why, and what they could have done to save a loved one or friend. Survivors suffer terribly. In my personal experience, I have seen persons struggle with their battle to live or die. I have seen others lose the battle. I see the early loss of life as tragic and avoidable with proper help. And I bear the scars of those losses.

*John Starzynski, LLB, is the volunteer executive director of the Ontario Lawyers Assistance Program. He is the president of the Mood Disorders Society of Canada and a past director of the Ontario Suicide Prevention Network. April 2009.*

*If you think someone is suicidal or if you are yourself, immediately call the Ontario Lawyers Assistance Program at 1-877-576-6227.*

## 2008 annual report now online

In 2008 LAWPRO posted net income of about \$7 million despite increased claims costs and claims numbers: As reported in the company's 2008 annual report, a commitment to excellence on the part of the LAWPRO team helped the company weather the economic uncertainties of the past year and again post solid results for the year.

The full annual report is available online at [www.lawpro.ca/annualreport](http://www.lawpro.ca/annualreport).

In keeping with LAWPRO's green program, only one copy of the 2008 LAWPRO Annual Report was mailed in early May to each law firm in Ontario. If you prefer to receive your own print copy please contact the Communications Department at 416-598-5814.



Dan Pinnington also taped a separate session on *Using Technology To Be More Efficient*.

LAWPRO's Chief Information Officer David Reid taped a session on *Planning For The Unexpected – Managing Practice Interruptions*.

## Transaction levy filing due dates

### First and second quarter transaction levy filings

Lawyers practising real estate and/or civil litigation must complete and file the appropriate transaction levy form and payment as follows:

- For the first quarter ended on March 31, 2009, filings were due and payable by April 30, 2009;
- For the second quarter ending on June 30, 2009, filings are due and payable by July 31, 2009.

To file these forms online, visit the LAWPRO website, [www.lawpro.ca](http://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.

## Smile: You're on camera!

Four members of the LAWPRO team participated in a series of tapings recently for the Law Society of Upper Canada's Private Practice Refresher Program. The videos will be available to lawyers re-entering practice, and will be used in the bar admissions program.

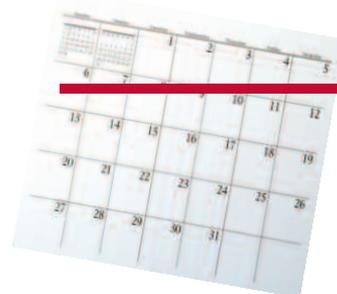
Module 4 on *Understanding Your Insurance Policy With LAWPRO* featured speakers Duncan Gosnell, Executive Vice President; Mitchell Goldberg, Claims Counsel; and Dan Pinnington, director of LAWPRO's practicePRO program speaking on topics such as:

- the LAWPRO policy and coverage, exemptions, and exclusions under that policy;
- general claims statistics and the most common malpractice risks;
- what to do if you have a claim and how LAWPRO handles a claim.



Mitchell Goldberg, Dan Pinnington and Duncan Gosnell

# Events calendar



## Upcoming events

### September 10

TitlePLUS presentation to subscribers  
TitlePLUS, Claims & practicePRO presenting  
Winnipeg, MN

### September 17

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

### September 24-25

ABA LPL Conference  
*The Top Five Claims Risks*  
Dan Pinnington, practicePRO presenting  
Chicago, IL

### September 25-26

The College of Law Practice Management  
*The Futures Conference*  
Dan Pinnington, practicePRO presenting  
Denver, CO

For more information on practicePRO events, contact practicePRO at 416-598-5863 or 1-800-410-1013 or e-mail [dan.pinnington@lawpro.ca](mailto:dan.pinnington@lawpro.ca).

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

## Recent events

### May 4

Ontario Bar Association Young Lawyers Division program  
*Intellectual Property In The Insurance Context*  
Dan Pinnington, practicePRO presented  
Toronto, ON

### May 6

The Halton County Law Association – Real Estate Seminar  
TitlePLUS presented  
Halton, ON

### May 6-7

Toronto Real estate Board's Realtor Quest  
TitlePLUS exhibited  
Toronto, ON

### May 7

Law Society Solo and Small firm conference  
*Microsoft Office Tips and Tricks*  
Dan Pinnington, practicePRO Co-Chaired and presented  
Toronto, ON

### May 8-9

Carleton County Law Association Solicitors' Conference  
*Practice Management and Technology Tips*  
Dan Pinnington presented  
TitlePLUS exhibited  
Montebello, QC

### May 12

TitlePLUS/LawyerDoneDeal Working Group Roadshow  
TitlePLUS hosted  
Windsor, ON

### May 19

Law Society Bar Ads Program  
*LAWPRO and Malpractice Claims*  
Dan Pinnington presented  
Toronto, ON

### May 20-23

The Institute of Law Clerks of Ontario Annual Conference  
TitlePLUS exhibited  
Markham, ON

### May 26

Ontario Bar Association Special Webinar on Fraud  
Dan Pinnington, Rosanne Manson and Lisa Weinstein of LAWPRO presented  
Toronto, ON

### May 28

LawyerDoneDeal/TitlePLUS Lender Lunch Session  
TitlePLUS presented  
Toronto, ON

### May 28

Barrie Real Estate Lawyers Association's Annual Meeting  
*Practice Management and Technology Tips*  
Dan Pinnington, practicePRO presented  
*Standard Closing Documents*  
Ray Leclair, TitlePLUS presented  
Barrie, ON

### June 9

Ontario Bar Association's Restructuring Distressed Real Estate  
TitlePLUS exhibiting  
Toronto, ON

### June 25

Ontario Bar Association's Real Property Section Award and Comedy Night Dinner  
TitlePLUS sponsoring  
Granite Club  
Toronto, ON

### June 25-27

AJEFO 30<sup>th</sup> Congress  
TitlePLUS sponsoring  
Sheraton Hotel  
Kingston, ON



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