Volume 9, Issue 2 September 2010

LawPRO®

Risky business:
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Protecting client data

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Limitations Act: catch-all statute

The practice of law = climbing the mountain every day

If nothing else, this issue of our LawPRO Magazine should put to rest any notion that it's easy being a lawyer – or lawyer's insurer – these days.

Quasi-social worker, psychologist, mind reader, fortune teller and – of course – an expert on all things legal. Lawyers today are (apparently) expected to wear many hats. Or else. That's the message that our feature article on today's "Practice Pitfalls" suggests.

For this article, we invited counsel from our claims department to put it all on the table: What's happening in practice – as manifested in the claims coming in the door – that keeps you up at night, we asked. Their insights are sobering.

Rarely, in my view, has an article so clearly driven home the nature of the environment in which lawyers practise. One draws the conclusion that people in general are more complaint-oriented these days. Unfortunately, there also seems to be a declining perception of risk in taking a run at a lawyer. Perhaps it is the combination of these trends that leads commentators to suggest that we are becoming more American in terms of our resort to litigation as a problem-solving tool.

What's even more important – to you, our readers, and to us as your insurer – is that lawyers today seem to be expected to meet very, very high standards. The breadth and depth of the obligations that a lawyer assumes each day merely by starting work is awe-inspiring.

This reality, of course, has major implications for LawPRO: More than ever, our job is to be the best professional liability safety net that you can have.

From time to time I am personally barraged by complaints from people suing lawyers; inevitably these plaintiffs are upset that counsel appointed by LawPRO are proceeding with the instructions that we have given. Of course, we give those instructions to fulfill our duty to defend under the policy in situations where liability is not clear. The "Practice Pitfalls" article only strengthens my resolve to do the best job we can to help ring-fence the scope of lawyer's liability, notwithstanding changes in the legal or social environment.

On a lighter note – I encourage you to spend some time perusing the special 15th anniversary publication included in the middle section of this issue of the magazine. It captures the many different ways in which LawPRO serves the needs and interests of the legal community – as told through our vision and values.

We had embarked on a vision and values discussion with our employees some months back as part of a "taking stock" process. To plan, we reasoned, we need to know what we're all about and what is important – to have benchmarks against which we can consistently measure our plans and priorities. The result is our newly minted vision and values statement.

We also wanted to capture the milestones we've already realized, and on which we can continue building the company.

And finally we wanted a resource that we can use to tell the LawPRO story – in government circles where our sphere of influence is getting broader, among prospective employees so we can attract the best talent possible, and of course within the legal community in whose interests we do what we do each and every day.

"Our story" captures all that makes LawPRO unique, the many, many ways in which we make a difference for the profession and why I, for one, am proud to be able to lead this company.

Kathleen A. Waters
President & CEO

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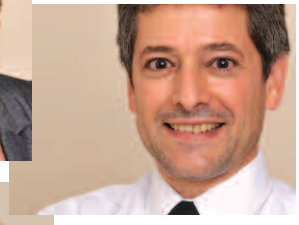

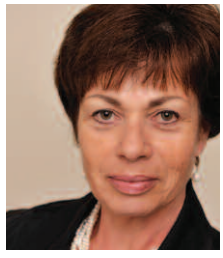


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LawPRO
250 Yonge Street
Suite 3101, P.O. Box 3
Toronto, ON M5B 2L7

Left to right: Domenic Bellacicco, Karen Granofsky, Lorne Shelson, Pauline Sheps

Practice pitfalls

LawPRO looks at specific malpractice hazards in different practice areas

It's a risky world out there. Lawyers are reporting more claims. Claims are getting more expensive and complex.

So how can you avoid a malpractice claim? Members of LawPRO's claims team talk about some of the specific pitfalls to watch out for in different practice areas.

Civil litigation

Limitation periods

The most significant recent development affecting litigation (and other) malpractice claims is Ontario's *Limitations Act, 2002*, says LawPRO Claims Counsel Specialist Pauline Sheps. "It's now really difficult to do anything about it when a lawyer misses a limitation period. Judges used to have more flexibility. Now it's very rigid – two years is two years."

"We're seeing more missed limitation periods, both because it is much harder to get a limitation period extended and because some limitation periods are shorter," adds Claims Counsel Specialist Cynthia Martin. "About 50 per cent of our insurance litigation claims involve missed limitation periods."

Lawyers can no longer afford to procrastinate, Sheps and Martin agree. They must either issue claims in time or enter into a tolling agreement to suspend the running of the limitation period.

The basic limitation period now runs for two years from the "date of discovery" of the claim. The common law doctrine of special circumstances, which gave judges more discretion to extend limitation periods, was taken away by the Court of Appeal in *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, notes LawPRO Claims Counsel Domenic Bellacicco. "You're therefore stuck with 'discoverability' to extend the running of the two years. To rely on discoverability, you have to show due diligence and reasonable efforts to discover all the parties you need to sue within the two-year period. You must do a proper investigation – and you must do it promptly."

For a comment on *Joseph v. Paramount*, see "Limitations update," LawPRO Magazine, Summer 2008 – www.practicepro.ca/LawPROmag/LimitationsUpdate.pdf.

For example, says Martin, in a motor vehicle case, a lawyer cannot simply rely on the client's advice about the other parties involved in the collision. "If the lawyer just sues driver A, and then after the expiry of two-year limitation period finally gets around to ordering the police report which discloses the fact that there were other vehicles involved that might have been responsible for the collision, the lawyer can't say 'Oh, I only discovered two years and four months after the accident that these other vehicles were involved.' He's negligent. If he had done the due diligence in the first place of ordering the police report, he would have known at the outset who the other parties to the collision were – the parties he needed to sue."

Administrative dismissals

Another development that has increased the number of litigation malpractice claims is the harder line that courts are taking on administrative dismissals of actions for delay. At one time, administrative dismissals could be set aside relatively easily, but that is no longer the case.

In *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, for example, the Court of Appeal upheld an administrative dismissal because the delay in prosecuting the action and in bringing the motion to set aside the administrative dismissal was not adequately explained and this delay was "not unintentional."

For more on this subject see "Administrative dismissal: Take it seriously and ask for (our) help," LawPRO Magazine, July 2009 (www.practicepro.ca/LawPROmag/AdministrativeDismissal.pdf).

Construction lien limitations

Sheps recently spoke to an insured about a claim arising from a missed limitation period. The insured had failed to comply with s. 37 of the *Construction Lien Act*, which requires a perfected lien to be set down for trial within two years of the commencement of the action.

This is one of the most common errors reported in the construction lien field, notes Sheps. It is also an error that cannot be fixed because the court will not allow this limitation period to be extended.

While the lien action could not be saved, happily for the insured no damages will likely flow from the error because the action was pleaded in the alternative in contract. As there is no requirement under the *Construction Lien Act* that an action in contract be set down within two years, the matter could continue as a contract action. This result was only possible because the cause of action in the statement of claim issued by the insured had been pleaded as both a lien and a contract action.

"two years is two years."

If the insured had not pleaded a contract action in the alternative in the statement of claim, it is likely that this action could not have continued, because the two-year limitation to commence a proceeding in contract had also expired.

It is important when litigating a construction lien matter to pay careful attention to all limitation periods, says Sheps. There are limitation periods for trust actions and contract actions, as well as for lien actions. The appropriate legislation and case law should be consulted and the limitation period diarized in order to prevent errors.

Personal injury: beware the desperate client

"Many plaintiffs' lawyers fall victim to clients who desperately need money in the early stages of a personal injury lawsuit," says Martin. "So they settle the client's statutory accident benefits claim early on for a lump sum and have the parallel tort action continue."

But senior, experienced members of the plaintiffs' personal injury bar strongly advise against this course of action, Martin says.

"Accident benefits can be quite extensive, but lawyers will sometimes settle for benefits of only $25,000 in a catastrophic injury case where the client could have received hundreds of thousands of dollars of benefits over a lifetime."

Urged to settle by a desperate client, lawyers will take what they can get on a rush basis from the insurer instead of taking the time to properly investigate and "work up" the accident benefits claim by engaging the expertise of the appropriate medical practitioners.

"And then the tort defendant, later in the day, will challenge the fact that they've compromised some of the benefits, because they're going to try to stick them on the tort insurer," says Martin.

If the client insists on such a settlement in spite of the lawyer's advice, the lawyer should clearly explain the consequences in writing and thoroughly document the settlement instructions.

Public interest advocacy

Representing a public interest group can be risky for lawyers, says LawPRO Litigation Director and Counsel Lorne Shelson. Such a group may, for example, be the target of a SLAPP (strategic litigation against public policy) lawsuit, with enormous costs consequences that its members did not anticipate.

Lawyers are sometimes even named as defendants in such lawsuits. In one case, a lawyer who represented a municipality

also acted for ratepayers who opposed a real estate development. They authorized the lawyer to make an offer to buy a property that the developer was trying to acquire. The property owner used this offer to leverage more money out of the developer, which wound up paying substantially more to purchase the property than it had initially offered. The developer sued the municipality and the lawyer, among others, alleging that he was part of a conspiracy to injure the developer's economic interests. The lawyer had to stop acting for the municipality.

Lawyers who act for public interest groups may find themselves the targets of costs applications. In *Kimvar Enterprises Inc. v. Nextnine Limited* (Jan. 30, 2009), a developer sought to have the Ontario Municipal Board award costs of about $3.2 million jointly and severally against a residents' association and its lawyers after an eight-year battle over plans to build a marina on Lake Simcoe. The developer claimed that the association and its lawyers had unnecessarily extended the length, complexity and expense of OMB hearings. The board dismissed the application, stating "costs should never be used as a threat or a reason to dissuade public participation."

A public interest group may look on its lawyer as a knight on a white charger, but when things go wrong, the group may quickly turn on the lawyer, cautions Shelson. Scattering for cover, the group's members may point fingers at the lawyer, saying "had you properly advised us, we wouldn't have tilted at this particular windmill."

To protect themselves, lawyers should obtain clear written instructions from the client before taking any major steps. They should not encourage false hopes and unrealistically high expectations. They should warn clients in writing about the potential risk of adverse cost awards and SLAPP suits. They might suggest the group confirm that it has insurance that would respond to such a claim. If the group plans to issue a public statement, the lawyer should consider consulting an expert in defamation law. The prudent lawyer will want to document any advice given.

Lawyers should also clearly establish at the outset who is actually retaining and instructing them. Does the person who is giving instructions have authority to do so? Is the public interest group a corporation or association? Are there bylaws? Is there some kind of structure – or is the group just an amorphous ad hoc committee?

As in other areas of practice, excess insurance is a valuable risk management tool for lawyers who represent public interest groups.

Corporate-Commercial

Franchises

Acting for franchisors can be particularly risky for lawyers, warns Claims Counsel Anna Reggio. Although some franchisors are large multinationals, many are small and relatively unsophisticated businesses.

One area of risk involves the onerous disclosure requirements imposed upon a franchisor by the governing statute, the *Arthur Wishart Act*, notes Reggio. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to extensive damages, including the return of its investment in franchise fees, inventory and equipment costs, as well as compensation for any losses incurred by it in acquiring, setting up and operating the franchise business.

Faced with such a heavy damages claim, a franchisor will often claim against the lawyer, alleging that the lawyer either drafted an inadequate disclosure statement or failed to warn the franchisor of the consequences of inadequate disclosure. Given the potentially significant damages involved, lawyers who practise in this area should seriously consider carrying excess insurance.

Lawyers should avoid dabbling in franchise law, says Reggio. "A lawyer should either be an expert in franchise law or have his or her client retain a franchise law expert." The client should also retain a chartered accountant familiar with franchises. The detailed financial disclosure requirements are beyond the scope of a lawyer's typical expertise.

For their own protection, lawyers who represent franchisors must thoroughly explain to them, among other things, the disclosure requirements and the severe consequences of inadequate disclosure. Of course, they should document in writing all advice given and instructions provided.

For a more extensive discussion of the risks inherent in practising franchise law, see "Recent claims trends: franchises" on page 21 of this issue of LawPRO Magazine.

Tax and securities class actions

As reported in the national media, several prominent law firms are currently the targets of class action lawsuits as a result of tax opinions provided by their partners to individuals who then used them, without the firms' permission, to promote investment schemes.

In purported reliance on these opinions, the promoters told investors in these schemes that they would be entitled to certain tax credits and deductions under the *Income Tax Act*. However, the Canada Revenue Agency denied the tax credits and deductions. Some investors were reassessed and required to pay taxes, penalties and interest.

Class actions were then launched on behalf of the investors against, among others, the lawyers who had given the opinions, alleging negligence on their part.

The existence of these actions shows that providing tax or other legal opinions can have potentially serious financial and reputational implications, says Shelson. Promoters may seek opinions from well-known law firms simply in order to lend credibility to their ventures.

Lorne Shelson, Karen Granofsky

An opinion letter should therefore contain a restriction on its use, he advises. In particular, it should specify that it cannot be relied on by third parties or in connection with any transaction or documents other than as identified in the opinion. Any assumptions, qualifications or limits to the opinion should be clearly set out. (Of course, this is good advice for an opinion letter in any area of the law).

Some firms obtain the client's written acknowledgment of the terms on which the firm will render the opinion to the client. Some firms, as a matter of policy, will require that an opinion be reviewed by a second partner knowledgeable in the substantive area of law and the subject matter covered by the opinion.

Class actions offer aggrieved investors potential recourse against all parties associated, however remotely, with a poor investment. Because investors are often desperate to recoup poor investments and class actions hold minimal risk for them, the precautions outlined above are unlikely to prevent these lawsuits. And today the Internet facilitates the recruitment of aggrieved investors as class members.

However, by taking protective steps, a firm can enhance its ability to successfully defend such an action, says Shelson.

Criminal law

Criminal law has not traditionally been a fertile source of malpractice claims, notes LawPRO Claims Counsel Karen Granofsky, but "ineffective assistance of counsel" claims are a growing trend.

For example, a person convicted of a criminal offence appeals the conviction. One of the grounds of appeal is that the lawyer who represented the accused at trial provided ineffective assistance.

The appellate lawyer may ask the trial lawyer to swear an affidavit supporting this ground of appeal. This puts the trial lawyer in an awkward situation. He or she may wish to help the accused overturn the conviction, but swearing an affidavit in support of the ground of "ineffective assistance at trial" may be tantamount to admitting negligence.

These cases should be reported to LawPRO as soon as the allegation is made, says Granofsky, at which time LawPRO can determine whether an affidavit is necessary. If an affidavit is necessary, LawPRO counsel can ensure that no damaging admissions are made.

Lawyers who fail to report such claims to LawPRO promptly may prejudice their insurance coverage.

Family law

When a starry-eyed couple is about to get married, no one likes to think about the possibility of divorce. However, in some cases one side (e.g., the husband – or the husband's family) has assets it wants to protect in the event of a marriage breakdown, so a marriage contract is signed, and the wife agrees to exclude certain property from any

equalization calculation upon breakdown of the marriage. But the couple will live happily ever after, so why worry about understanding the fine print?

If the marriage ends, the spouse who signed away rights to those assets might have serious second thoughts along any of the following lines: "I didn't understand what I was signing." "All assets weren't properly disclosed." "The lawyer did not advise me properly."

"If the agreement blows apart, the person wanting to be protected sues the lawyer saying 'you didn't give me an airtight agreement,'" says Martin, "Or the other party will say to their lawyer 'you didn't make sure that I had proper disclosure of the excluded assets and I didn't realize what I was giving up.' They usually claim they wouldn't have signed the agreement if they had understood what they were agreeing to sign away. If the contract is upheld, they may look to their lawyer for the value of the assets (or the growth on those assets) that they claim they would not have excluded if they had received proper disclosure. On the other hand, if the contract is set aside, the party seeking the protection of the contract may look to his or her lawyer for indemnification for any additional amounts that have to be paid to the spouse by way of equalization."

Such claims can be expensive, considering both parties' costs to litigate as well as, potentially, the value of the excluded asset(s). Conflict of interest could also be alleged, if the lawyer is advising both spouses rather than insisting that one get independent legal advice.

LawPRO continues to see these claims, despite a court ruling (*LeVan v. LeVan*, 2008 ONCA 388) that clarified what needs to be disclosed when creating a marriage contract. Lawyers need to make sure clients are making an informed decision about what they are agreeing to exclude. Too often lawyers don't understand the disclosure obligations or just rely on the word of their clients who say, "We've been living together for years, and *of course* my fiancé knows exactly what I have." Lawyers should document the fact that they have overseen what was disclosed to the other partner. For instance, a spouse may own "1000 shares in John Smith Corporation," but what does that really mean? Should an accountant or business valuator be reviewing the contract? That costs money, and often the client just wants to get on with things and not pay more than they think is necessary.

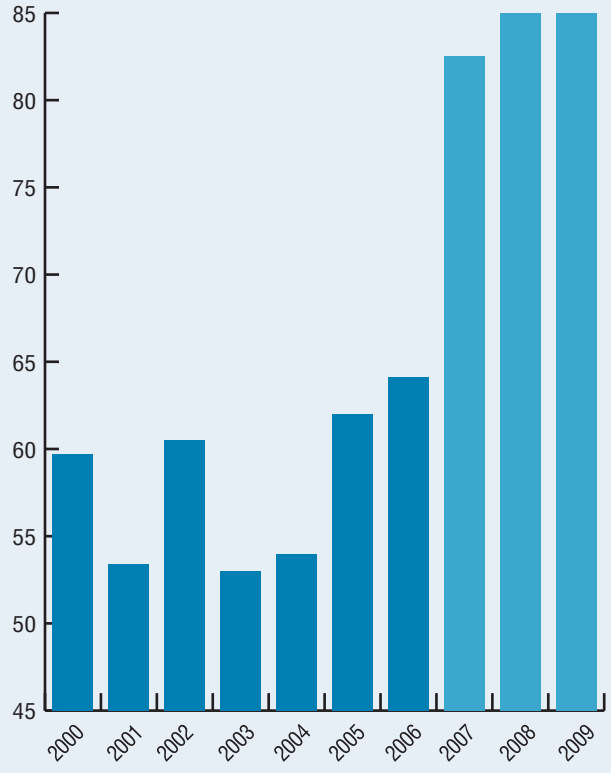
The lawyer's best protection: Document exactly what the client was advised to do, and what advice the client declined to follow despite being advised of the potential risks.

Sheps advises insureds that if the lawyer has done all of the above it makes it easier for LawPRO to defend a claim. "Reporting letters are extraordinarily important," she says "We know we have to do them in real estate transactions. We should do them in family matters, too." Having a standard template or checklist for reviewing agreements can make the process of documenting your advice easier.

Separation agreements negotiated "on the courtroom steps" when counsel don't have their precedents with them are another frequent source of claims against lawyers, says Sheps. Her practice tip: Use technology to protect yourself. Take your laptop with you to court so that your precedents are readily available and you can draft a proper separation agreement. Have your client sign off on the draft contract. Otherwise, you are open to a claim from your client that "no, I didn't agree to that."

For more on avoiding family law claims, see "Family law: An increasingly risky business," LawPRO Magazine, July 2005 (www.practicepro.ca/LawPROmag/Familylawclaims.pdf)

Case incurred claim costs (in $millions)



As reported earlier this year, claims costs have entered a new era in which annual costs are projected to be in the $85 million plus range. Generally, claims costs are up more than 30 per cent for the last three years of this decade: Where at the beginning of this decade the average cost of claims reported annually stood at about $56 million, that number has now jumped to about $84 million for the 2007-2009 period.

Note: For 2000 to 2007, costs include claims paid plus reserves assigned to unresolved claims for each fund year, but exclude costs for general program administration and applicable taxes. For 2008 and 2009, costs reflect management projections based on claim reports as of June 30, 2010, as between 30 and 50 per cent of claims reported in those years are still unresolved.

Internet liability

The Internet, of course, is not an area of practice.

But statements that lawyers make on the Internet, whether on law firm or other websites, in blogs, or on social media sites such as Facebook, are a significant potential growth area for claims, says Shelson. The Internet makes it all-too-easy to rapidly broadcast information to a huge audience.

Lawyers need to think carefully about the consequences of their posting Internet press releases or blogging, particularly because these activities do not attract coverage under the LawPRO professional liability program.

Statements made on behalf of a client before a statement of claim is issued are potentially defamatory. Although absolute privilege attaches to a statement of claim used in the ordinary course of the administration of justice, communications made in advance of litigation may not be entitled to this defence. Republishing on a law firm website allegations made in a statement of claim may also be defamatory.

> For more on this subject see "Is the defence of absolute privilege available for communications in advance of litigation?" LawPRO Magazine, May/June 2010 (www.practicepro.ca/LawPROmag/AbsolutePrivilege.pdf).

Answering legal questions over the Internet is also an area of potential risk – "an exposed flank for claims by non-clients," says Shelson. Lawyers should provide only general legal information to non-clients, accompanied by clear warnings that it is only general information and that the recipient is not a client, and by a recommendation to retain a lawyer for specific legal problems.

Since many Internet exposures are not insured under a professional liability insurance policy, lawyers should identify with their insurance broker their particular exposures and what types and scope of insurance may be available to them, as this type of claim is not covered under the LawPRO program.

Email poses another set of risks. "Beware the informality of email," cautions Shelson.

Implicit undertakings may lurk in email messages and pass unchallenged. In one case, lawyer A forwarded an email from his client to lawyer B. Lawyer B treated a statement made in this email as sufficient evidence of an undertaking by lawyer A, although lawyer A had not intended to give one.

Never let any suggestion that you've undertaken to do something go by without setting the record straight, says LawPRO Litigation Director and Counsel Yvonne Bernstein. If you don't respond and disabuse the sender of that notion, you won't have any evidence later on that you didn't give the undertaking. The informal nature of email makes it particularly easy to overlook such a suggestion in an email message.

Even where an undertaking is intended, "loosey-goosey" email communications may create uncertainty about its nature and scope.

Real estate

When lawyers think about real estate fraud, they tend to think about fake clients with forged ID obtaining fraudulent mortgages, or flip frauds where the value of a property is artificially inflated. They rarely think of shelter fraud – a very real source of claims involving real people who want real places to live.

In this scenario, people who don't qualify for a mortgage enlist the help of a "friend" or family member. For a payment, the "friend" becomes the borrower and takes title to the property and presents himself to the lawyer as the happy purchaser of the home. In effect he's selling his good credit. Of course he has no intention of living there, and the person(s) who hired him will move in and promise to make the mortgage payments.

The risks for lawyers in this arrangement are obvious: When the person(s) behind the scheme default on the mortgage, the "friend" will find he is on the hook, pursued by the bank and facing financial ruin. The friend may sue the lawyer claiming that he was not aware of what he was getting himself into, and that the lawyer knew (or should have known) that he was buying on behalf of others and should have made him aware of the consequences of defaulting on the mortgage.

Also, lawyers in the majority of residential real estate matters represent the lender as well as the borrower, but their duty of care to the lender is sometimes overlooked. "Lawyers often forget, because they see the purchaser right in front of them talking about when they get the keys, that the bank is their client too," says Mitch Goldberg, senior claims counsel at LawPRO. "They have to provide the bank with any information that is material to the transaction." The lending bank can bring claims against lawyers for failing to disclose all the relevant information they knew (or should have known).

This type of claim could also be considered "inadequate investigation," which is an especially prevalent error type in high-volume real estate practices. Often, there are signs that a shelter fraud is taking place: The client may not seem to know much about the property being purchased. Or he may be taking instructions from others who are not part of the transaction. If lawyers have suspicions about the intent to occupy where it appears that the lender thinks it is making a mortgage loan to an owner-occupier, lawyers must take some steps to satisfy themselves that the purchaser is indeed planning to live in the property, and not just take the deal at face value. (Of course, where the purchaser is a prospective landlord, other obligations can apply relating to the assumption of tenancies, rent control or building compliance issues.)

Granofsky stresses that it's important to document the inquiries lawyers make. "Lawyers often don't document the nature of their inquiries, even if they do ask the questions. Then it comes down to credibility, because the claimant will invariably deny that she was asked the questions." While there is only so much lawyers can do to ensure the borrower is in fact the person planning to live in the house, even having the client sign a declaration to that effect could be protection against a claim later on. Also, thoughtful disclosure

Left to right: Anna Reggio, Mitch Goldberg, Yvonne Bernstein, Cynthia Martin

to the clients (both purchaser and lender), which is part of meeting the joint retainer obligations under the *Rules of Professional Conduct*, can help to protect a lawyer in a situation where it was impossible to obtain clear evidence.

Wills & estates

Changing demographics are also leaving their mark on trends that concern LawPRO counsel: We are seeing increased potential for claims surrounding issues of the capacity of elderly clients and undue influence. The increased number of elderly clients with large estates also increases the risk that family disputes will entangle the lawyer.

If elderly clients come in requesting a major mortgage refinancing or change to their wills, it is important that lawyers not just take matters at face value. Dig below the surface to find out what's going on. Be very wary of undue influence and ask "who's benefiting from this arrangement?"

Don't have the client in the same room as their son or daughter if they've all come to discuss changing the will or refinancing the family home for the children's benefit. If there is a language barrier, don't just rely on the "translation" of another family member. Have written proof that the advice was given regarding risks inherent in what the elderly clients are proposing or the need for independent legal advice, and perhaps have the client provide a letter explaining his or her motives.

Some lawyers now tape their meetings with clients in such situations (with client consent, of course). And finally, the lawyers must be aware of who they are acting for and avoid giving advice to parties with conflicting interests. All of this puts a burden on the lawyer, but as Goldberg says, "the reality of practice today is that you have to spend enormous amounts of time protecting yourself."

Complicating things further is the question of capacity. When acting for elderly clients who want to make significant changes to their wills, lawyers have to be very careful about how they satisfy themselves that the clients have capacity and how evidence of that capacity is documented, because there's a good chance that the will may be challenged and the lawyer will be drawn into the dispute.

Bernstein sees this as an issue of spotting the danger signs. "If you have clients who are in their late 80s, in a nursing home, with a substantial estate and numerous children, I see red flags. And if the new will distributes the estate in a dramatically different way so that some children get less than what they would have received under the old will, I see a will challenge on the horizon." Having documentation that steps were taken to rule out undue influence and verify capacity could protect lawyers from costly claims.

For more on dealing with elderly clients, see the Winter 2007 issue of LawPRO Magazine (www.practicepro.ca/LawPROmag/LawPROmagazine6_1_Jan2007.pdf)

Norman MacInnes is corporate writer/editor at LawPRO. Tim Lemieux is practicePRO coordinator at LawPRO.

A systematic approach to law firm risk management

by Malcolm M. Mercer

Risk is an inevitable reality of law practice. The only way to eliminate risk is to stop practising law – an option most readers of this article are not yet contemplating. A more realistic option is to actively mitigate risk through structured, systematic risk management. This approach is particularly helpful at the law firm level, where risk management can sometimes be seen to be contrary to the perceived self-interest of individual lawyers in the firm. A systematic approach – that begins with a risk analysis and includes strategies to mitigate identified sources of risk – not only helps overcome this issue of self-interest, but also contributes to the prospects of success of the firm.

For law firms, the two principal sources of risk are also its principal assets – its clients and its lawyers.

Client risk

Client-related risks fall into four, overlapping categories; claims risk, departure risk, credit risk and conflicts risk.

Claims risk: The most obvious risk facing law firms is that their clients will seek compensation through professional negligence or fiduciary duty claims. Lawyers also face the risk of complaints by clients to their regulators. The consequences may be direct – e.g., the law firm is obliged to pay an award of damages or is faced with litigation costs or insurance costs. Indirect consequences include damage to the firm's reputation and morale.

"Dangerous clients" present another major claims risk. In fact, analysis of major claims against law firms indicates a significant

association between major claims and situations in which "dangerous clients" face legal scrutiny on matters where their lawyers assisted. Such claims often fall in the high severity category – uncommon but ugly when they arise.

Departure risk: The risk that a good client leaves the firm not only has major implications in terms of revenue, reputation and the professional cohesion of the firm, but is also tightly connected with claims risk. Clients who are dissatisfied are more likely to leave and are more likely to make claims. Clients for whom work is not properly performed may fire their lawyers whether or not they also assert claims.

Credit risk: Related to the first two client risks is credit risk. Unhappy clients don't always pay their bills. Some also depart and/or make claims against their lawyers. But payment risk has another aspect. Just as dangerous clients are a greater source of claims risk, the risk of non-payment is also a risk associated with taking on dangerous clients.

Conflicts risk: Whether a matter of legal conflicts or simply business reality, every client carries the risk that acting for that client means another prospective retainer is not available.

Lawyer risk

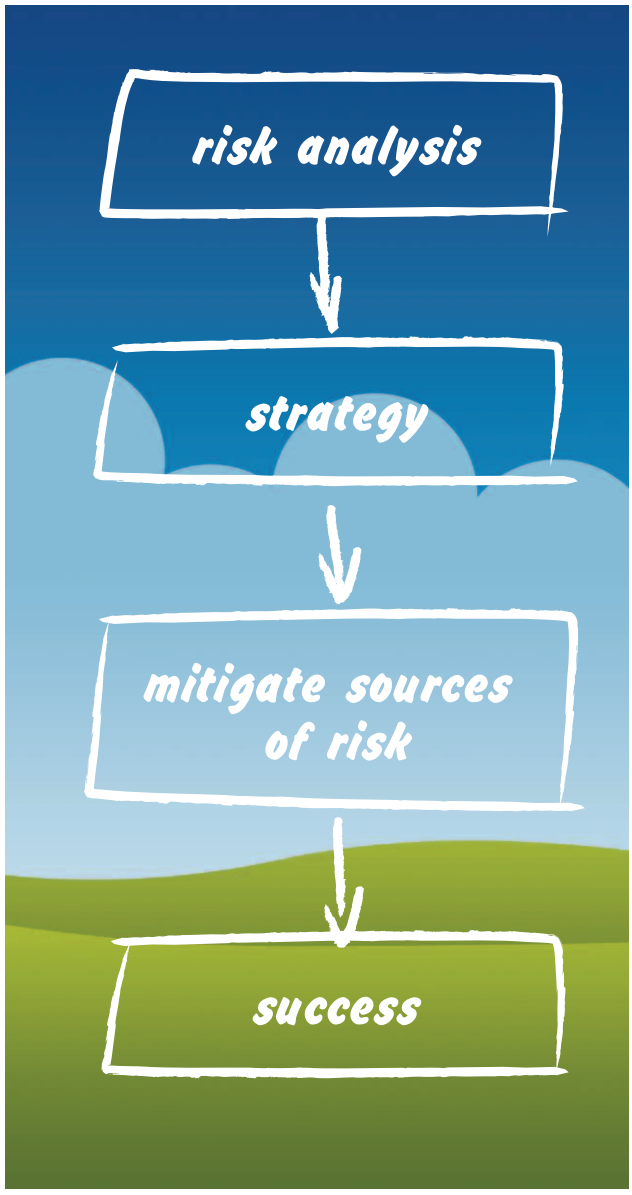
Current, new and departing lawyers are all sources of risk for the law firm. Not surprisingly, lawyer risk and client risk are closely connected, as they are essentially flip sides of the same coin.

Current lawyers: Lawyers in the firm are the source of several different kinds of risk. First is performance risk. Everyone at some time fails to practise at the level required. Sometimes we are too busy. Sometimes we are not well organized. Other times we act outside of our area of expertise or experience. Some lawyers prefer to do everything themselves rather than delegate or refer matters to other more appropriate lawyers.

Misconduct risk is another possible concern. Some lawyers do act improperly, perhaps as a result of stress or the opportunity of "the moment." Other times misconduct is a matter of character. It is not uncommon for the risk associated with a dangerous client to be magnified by the involvement of a lawyer who does not have the strength of character to "do the right thing."

Conflicts risk arising out of the personal activities of current lawyers is another significant source of risk – but also one that firms often are not as well equipped to identify and prevent as client-client conflicts. Lawyers who wear multiple hats such as trustee, executor or other fiduciary or who have a direct or indirect personal interest in the matter at hand are a good example of this risk.

Arriving lawyers: Two risk issues arise with new lawyers. The first is that the new lawyer may not be what he or she appears to be in terms of character or expertise. Why the lawyer left a firm may not be self-evident – but the reason for the departure may have consequences for the new firm. As well, arriving lawyers bear conflicts risks – especially the risk that the presence of the arriving lawyer may interfere with the ability of the law firm to continue to act for an existing client or on an existing matter.



Lawyer departures: The loss of a valuable lawyer, including the potential gaps in expertise that may be created by the departure, is an obvious risk. Departing lawyers also potentially compromise client and firm confidential information and property.

Strategies for mitigating risk

Law firms can mitigate the client and lawyer-related risk factors a number of ways.

Client-focused mitigation: Strategic client management that is firm-based – i.e., in which the firm rather than individual lawyers decides on whether to take on clients and matters – is one way to reduce client risk.

Client intake that is firm-based has many advantages:

- Acting as a firm permits deliberate choice as to the best retainer to take on rather than just taking the first retainer that walks through the door – the usual result of individual choice.

- Acting as a firm permits more dispassionate consideration of the legal conflicts which may arise and of the type and character of client that the firm wants to take on. For whatever reason, individual lawyers find it harder to say no to new work and sometimes saying no is the best answer.
- Firm-oriented client and matter intake also helps firms ensure that proper retainer letters are required for new clients and new matters. Client conflicts, an important client risk, can be better managed with proper disclosure and agreement at the outset. Clear identification of the scope of the retainer at the outset and over the course of the retainer mitigates performance risk.

Of course, acting as a firm can be difficult. People making the decisions must be properly informed and motivated, and trusted by others to act in the interests of the firm as a whole. But the alternative is simply sharing space.

Client teams are more effective at risk management because the firm then acts as a firm rather than as a collection of sole practitioners. Client teams reduce performance risk by delivering breadth of experience and expertise to the client. Client teams reduce the risk that individual lawyers will be beholden to or "captured" by the difficult client. Use of client teams increases the chance that client concerns will surface to be dealt with positively before it is too late. Client teams decrease the risk arising from the departure of any one lawyer from the firm.

Firm-based client communication also can help mitigate risk more effectively. Client audits by the firm permit client concerns and complaints to surface which may not be raised with the lawyers concerned. They also permit clients to advise what the law firm is doing right and, if asked, what else the law firm may do to assist the client.

As well, firm-based financial management can mitigate risk. Vigilance with respect to accounts receivable and work-in-progress can help identify client dissatisfaction before it is too late, as well as identify a client under financial stress, which can lead to "dangerous client" behaviour.

Lawyer-focused mitigation: Providing lawyers with continuing education and training are important ways in which a firm can mitigate performance risk. Effective continuing education involves more than keeping lawyers up-to-date with legal developments: It also includes practice management and professional responsibility. Encouraging legal excellence and intellectual interest in the law mitigates performance risk, as well as reducing the risk that lawyers will leave by increasing collegiality and professional satisfaction.

To reduce the risk associated with incoming lawyers and staff, firms need to have systems that ensure diligence in interviewing, reference and background checking, and proper decision-making. This is more important than it sometimes appears, as the risk of an unsuccessful lateral transfer is significant and comes with significant direct and indirect costs.

Reducing the risk associated with departing lawyers requires proper procedures and protocols for protecting client and firm confidential information and property and proper client file transfer. Diligent and thoughtful exit interviews that help the firm better understand internal problems also can mitigate the risk of subsequent departures.

Systems and policies

Claims management: Having proper errors and omission insurance is a very important aspect of risk management. Coverage needs to be properly assessed in terms of the scope and amount of coverage.

As well, proper internal reporting of claims and potential claims preserves coverage, and enables the firm to be proactive about addressing potential risks and to ensure proper disclosure to the client when a potential problem is identified. The internal cultural mindset should be that the greater sin is in failing to report and seek help.

Firm policies and systems: The following are some important policies and procedures that firms should consider as part of their risk management toolbox:

- Standard policies with respect to audit enquiries, client confidentiality, conflicts, opinions and retainer letters help mitigate risk by better educating lawyers within the firm and by encouraging a law firm culture in which risk management is understood in the context of day-to-day practice
- The risk of current and former client conflicts requires a proper conflict database and proper conflicts searching. Adding the new entities which become involved during the course of a retainer, whether as clients or adverse parties, to the conflicts database is very important and a frequent omission.
- Sophisticated electronic screening of confidential client information is increasing important. Equally, the ability to open matters and clear conflicts on a confidential basis is crucial.
- The involvement of "un-conflicted" experienced lawyers to manage and clear conflicts mitigates conflicts risk and mitigates the risk of "tainting" the lawyer doing the client work.

Conclusion

The most effective risk management starts with a structured and methodical approach to identifying sources of risk. It includes appropriate mitigation strategies. Moreover, proper risk mitigation requires that lawyers act together as a firm and not as a collection of sole practitioners. The result is not only better risk management, but also a firm that is ultimately more productive and profitable.

Malcolm M. Mercer is a partner and general counsel at McCarthy Tétrault in Toronto. He can be reached at mmercer@mccarthy.ca

DANGER SIGNS:

Five activities generally not covered by your LawPRO policy

On occasion, lawyers have engaged in activities that have made them front-page news, subject to embarrassment and possibly lawsuits or discipline complaints. Not only can this kind of attention be bad for a lawyer's reputation, it can also damage or even destroy client relationships.

That's reason enough to be aware of and avoid activities that could lead to these types of outcomes. But there is another – equally if not more compelling – reason to avoid them: In some instances, it may be the law firm, not LawPRO, that foots the bill when these activities lead to problems.

Remember that the LawPRO policy provides coverage that is tailored to your role as a lawyer. The policy affords protection against claims for damages arising out of a claim, provided liability is the result of an error, omission or negligent act in the performance or failure to perform "professional services" for others (For the definition of the term "professional services" under the LawPRO policy, please see page 13.)

What will or will not be covered can be very fact-specific; but generally you will be insured for the work you do with your lawyer hat on, and not insured for activities where no solicitor/client relationship exists and no legal advice or service is provided.

This article highlights some of the dangerous activities that can lead to problems that will likely not be covered under the LawPRO policy.

⚠ **Don't infringe copyrights or trademarks:** The very foundation of the web is the ability to easily and broadly share information with others. When lawyers or law firms are posting information online they will sometimes include trademarks or information upon which others hold the copyright. With "cut and paste" it is easy and tempting to use large amounts of information from another

LawPRO policy excerpts

Part V: Definitions

Under the LawPRO policy "Professional Services" is defined as follows:

> (y) "**PROFESSIONAL SERVICES** means the practice of the Law of Canada, its provinces and territories, and specifically, those services performed, or which ought to have been performed, by or on behalf of an INSURED in such INSURED'S capacity as a LAWYER or member of the law society of a RECIPROCATING JURISDICTION, subject to Part II Special Provision A; and shall include, without restricting the generality of the foregoing, those services for which the INSURED is responsible as a LAWYER arising out of such INSURED'S activity as a trustee, administrator, executor, arbitrator, mediator, patent or trademark agent."

Part III Exclusions

The policy does not apply:

> (e) "…to any CLAIM in any way relating to or arising out of INJURY to any person, or to mental anguish, shock, humiliation or sickness, disease or death of any person, or destruction or loss of any tangible property, including the loss of use thereof, unless as a direct consequence of the performance of PROFESSIONAL SERVICES;"

The word "INJURY" is defined in *Part V: Definitions* as follows:

> "**INJURY** means bodily injury, false arrest, wrongful detention or imprisonment, *libel, slander, defamation of character*, invasion or violation of privacy, assault, battery, sexual misconduct, harassment, discrimination or wrongful dismissal." *(emphasis added)*

source in a newsletter or in content for the web. Remember there are few, if any, scenarios where it can be argued that the use of trademarks or copyrighted information without permission was in some way professional services for a client. So, be especially careful to avoid the use of trademarked or copyrighted information unless you have consent, as this may result in expensive claims that are not covered by professional liability insurance.

2 **Be careful what you say about others:** The web's informality makes it easy for the unwary to fall into saying something inappropriate about someone. Aggressive or nasty comments made in an unguarded moment or in the heat of a contentious matter can well result in a defamation claim. Making a nasty comment to the media, online or elsewhere, in the course of providing professional services for a client isn't worth it. The circumstances in which the comments were made can determine whether the LawPRO policy coverage is triggered as well as whether the policy exclusion addressing defamation of character applies (See sidebar for exclusion details). Often, no coverage is available for defamatory comments made about a non-client. If you want it, some protection for defamation type claims may be available through other forms of insurance offered by commercial markets. Consider speaking with your insurance broker about this.

3 **Be wary of what others say in replies to your social media conversations and in comments on your blog:** The defamatory comments of third-parties can also expose a lawyer to defamation law suits. Comments on blogs and social media tools allow total strangers to take part in very public conversations. Although a real benefit for sharing information, these conversations can have very negative consequences when someone posts something inaccurate or unpleasant – both of which can be judged in the biased eye of the beholder. Carefully monitor (and consider moderating) the comments posted to your personal or firm blog and the replies to any conversations you have using social media tools. You want to avoid being sued due to (allegedly) defamatory comments that appear in conjunction with you or your firm.

4 **Avoid the unauthorized practice of law (UPL):** Lawyers need to appreciate that any content they post on the Internet can easily be accessed from anywhere in the world. Ontario lawyers practising law in other jurisdictions by providing legal services on the Internet should respect and uphold the law of the other jurisdiction, and not engage in the unauthorized practice of law. Clearly indicating the jurisdiction(s) in which you are licensed to practise in your online content and posts will help potential clients understand where you can and cannot practise. You want to avoid a negligence suit in a jurisdiction outside of Canada involving non-Canadian law.

5 **Avoid online dangers:** Social media sites and other online tools offer lawyers all sorts of interesting new ways to interact with people in both personal and work spheres. There are, however, some risks associated with using them. Some of these risks are obvious, some are not, and many won't be covered by the LawPRO policy. The "Social Media Pitfalls to Avoid" article in the December 2009 issue of LawPRO Magazine (www.practicepro.ca/LawPROmag/SocialMediaPitfalls.pdf) highlights the risks – and how to avoid them. You might want to review that article if you have not already done so.

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

Insurance Biz 101

Why profit is not always a bad word

Ed note: Running an insurance company is – in today's economic climate – more complicated than ever. Companies are under heightened scrutiny – in part because of upheaval in world economies and the recent collapse of major companies and financial institutions. Many results are driven in part by external regulatory and compliance requirements over which the company has no control. And, of course, companies must comply with regulations, file regular financial reports and regularly prove to regulators that they have sufficient capital and resources to meet their obligations.

This new **Insurance Biz 101** *column aims to help you – our insureds – know and understand more about the business of LawPRO and the obligations we face as a regulated insurance company operating in a climate of increased scrutiny and control. Why should you care? Because we believe it is important that you understand why we make the business decisions we make. Because most of those decisions directly affect you. And because, as a member of the Law Society of Upper Canada (our shareholder) you should evaluate LawPRO like an owner.*

Our first column tackles the question lawyers often ask when they see our annual financial results: Why does LawPRO even have to make a profit? In future columns we will unravel the complexities of new accounting standards that will fundamentally change how we report our financial results.

If you have a business topic you've always wondered about, let us know. You can help ensure this column addresses your questions about LawPRO operations.

Should LawPRO even try to make a profit?

The answer to that question lies partly in the tightly regulated environment in which we as a licensed insurer operate.

To be able to provide any type of insurance, a company must first be licensed to provide one or more specific classes of insurance by the appropriate regulator in each jurisdiction in which it intends to do business.

As a provider of malpractice and title insurance in Ontario, LawPRO is licensed and regulated by the Financial Services Commission of Ontario (FSCO), and is licensed appropriately by regulators in other jurisdictions to provide TitlePLUS title insurance. We are required to operate and comply with very specific regulations

and standards governing Ontario insurers. Moreover, we are required by FSCO to report our financial results regularly and – most importantly – provide proof of our ability to meet our financial obligations and satisfy solvency tests.

The most important of these benchmarks is the Minimum Capital Test – the MCT. This is a mandatory solvency test set by FSCO in conjunction with the federal Office of the Superintendent of Financial Institutions (OSFI). The MCT is one way the province's insurance regulator can determine how stable and secure an insurer is. Simply put, the MCT is the ratio of the company's available capital (assets) to the amount of *capital required* (a defined calculation set by FSCO), expressed as a percentage. So for example, if a hypothetical company has $100 million in assets and $70 million in capital requirements, its MCT would be 143 per cent (100 divided by 70 x 100).

Although strictly speaking this fictitious company's available capital exceeds its requirements, it would not meet the minimum capital adequacy test of 150 per cent set by FSCO for property and casualty insurers (the insurance class to which LawPRO belongs). This firm would likely be placed under close FSCO supervision – a prospect insurers strive to avoid. Keeping MCT at levels considered adequate and appropriate by FSCO requires diligent monitoring of the many variables that go into the MCT calculation. The MCT for the insurance industry in Canada as a whole hovers in the 250 - 260 per cent range; commercial insurers, because of market volatility and issues around premium increases, tend to have MCTs in the 300+ per cent range.

How then is the MCT determined?

Determining the MCT is not a simple process of measuring assets against liabilities. Instead it is a complicated and strictly prescribed calculation, especially when it comes to calculating the minimum capital requirements of a company.

Broadly speaking, the *capital available* part of the equation refers to a company's net assets – including, of course, investment gains and net income.

The *capital required* part of the equation is the result of a complex set of calculations that are applied to a specific set of a company's various assets and liabilities, such as the insurer's claims reserves (i.e., its unpaid claims).

What does this all mean for LawPRO? It means we need to watch specific numbers closely.

The first is our *capital required* – which is based largely on our claims liabilities, over which we have little control and which tend to grow year over year.

We also monitor two factors that affect the amount of *capital available* – which simple math tells us needs to continue to grow (and perhaps outpace) the capital required to maintain a healthy MCT. To do this, we need to either increase net income (i.e., post a profit) or achieve significant unrealized gains on the surplus portion of our investment portfolio.

What MCT is right for LawPRO – and how does that affect premiums?

LawPRO's MCT fell to 206 per cent at the end of 2009 from 238 per cent in 2007. As of mid-2010, the MCT has fallen below the 200 per cent level to 186 per cent, driven largely by an increase in claims reserves.

Although an MCT around 200 per cent exceeds minimum thresholds set by FSCO, it may not provide LawPRO with sufficient capacity to absorb unexpected losses (resulting, for example, from several large claims) or weather deteriorating market conditions (that lead to poorer than expected investment returns, for example).

Based on our recent analysis, LawPRO believes that an MCT of 220 to 230 per cent is an appropriate long-term operating goal that balances our unique ability to propose an annual base premium (and effectively raise capital through the premium collection process) against our risk profile.

To ensure a healthy and stable MCT in the 220+ per cent range (and keep our regulator onside) we have limited options. There's not much we can do to reduce claims reserves when the number of claims reported and the costs of resolving them keep increasing – so we're unlikely to be able to do much about the *capital required* line of the MCT equation.

So that means we have to find ways to increase our assets – i.e., the *capital available* portion of the calculation either through healthy investment returns or by posting solid profits. Volatile investment markets of the past few years make the former more difficult: And the historically low central bank rate means that as our investments mature we have to reinvest at lower rates of return than we might have seen five years ago.

One factor we can control – and which also is our major source of income – is, of course, insurance premiums. Calculating the proposed insurance premium for the coming year thus becomes a complicated process that takes into account the continued increase in claims costs as well as our ability to generate a positive bottom line in support of an MCT in the desired range, among other factors.

For 2011 and onwards, premiums must be set at levels that generate more than break-even income: They must be set at levels that contribute to a healthier, more stable MCT. To achieve a stable to slightly increasing MCT ratio, we estimate that LawPRO needs to generate annually at least $5 to $7 million of net income (to which premium income contributes) and/or unrealized gains on our surplus investment portfolio.

So, although many lawyers may think a perfect budget for LawPRO would forecast a break-even outcome (without profit or loss), in fact a growth in assets through net income or unrealized gains on the surplus portfolio is essential to keep us on-side with our regulatory tests. In other words, by running very hard, we are hoping to not lose ground further on the MCT and in fact make up some ground in coming years.

TitlePLUS essay contest

Osgoode Hall law student wins 2010 prize

The courts may be increasingly willing to enforce oral agreements for the sale of land.

That's the conclusion reached by Toronto law student Neil Wilson in his winning entry in the 2010 TitlePLUS Essay contest sponsored by LawPRO.

"Part Performance: An Invaluable Tool in the Practice of Real Estate Law," examines the legal doctrine that provides that an oral agreement for the sale of land, which would otherwise be unenforceable, may be enforced if steps have been taken towards its performance.

Wilson was awarded his prize on June 10, 2010, at the Gala Evening of the Ontario Bar Association Real Property Section in Toronto. The award – including the cash prize of $3,000 – was presented by Kathleen A. Waters, president & CEO of LawPRO.

LawPRO created the TitlePLUS Essay Prize in 2006 to encourage and recognize outstanding legal scholarship in the practice of real estate law. Students from law schools across Canada (excluding Québec) were invited to enter the essay contest.

Ray Leclair, Vice-President, TitlePLUS; Neil Wilson; Kathleen Waters, President and CEO, LawPRO

TitlePLUS campaign targets Quebec

More than 1.4 million Quebecers reached with awareness promotion.

An awareness campaign is underway in Quebec targeting the 64 per cent of Quebecers who say they don't know much about the legal aspects of buying a home.

As part of its ongoing program to support the use of legal advisers in real estate transactions, the TitlePLUS group (through a question on a Leger marketing poll) surveyed the Quebec market and found an overwhelming majority of new home-buyers have little to no knowledge of the legalities of home buying.

The TitlePLUS media release announcing these results generated extensive and positive media coverage in Quebec. The release lists the many benefits of using a notary for real estate transactions, such as helping to find a home that suits the client's needs, detailing the risks associated with buying new properties and ensuring clients are fully informed about their rights. Like its counterpart in Ontario, this campaign aims to highlight the importance of notaries and the benefits of title insurance, specifically the TitlePLUS program.

Ray Leclair, TitlePLUS insurance vice-president, spoke at length with the media. He and a young Quebec couple who were purchasing their first home with the help of TitlePLUS title insurance, gave nine interviews on the subject. To date the campaign has reached more than 1.4 million Quebecers through print and online articles, radio broadcasts and TV spots, including four mentions on Radio-Canada. Throughout the campaign, LawPRO worked closely with Quebec broker Dale Parizeau Morris Mackenzie Inc. to spread the message.

As a side benefit, the public awareness campaign will also drive traffic to the TitlePLUS French website (www.titreplus.ca), which provides links to important resources and information for notaries and the public on title insurance in Quebec.

It's easy to review your e-filing history

E-filing summary now available on MY LawPRO

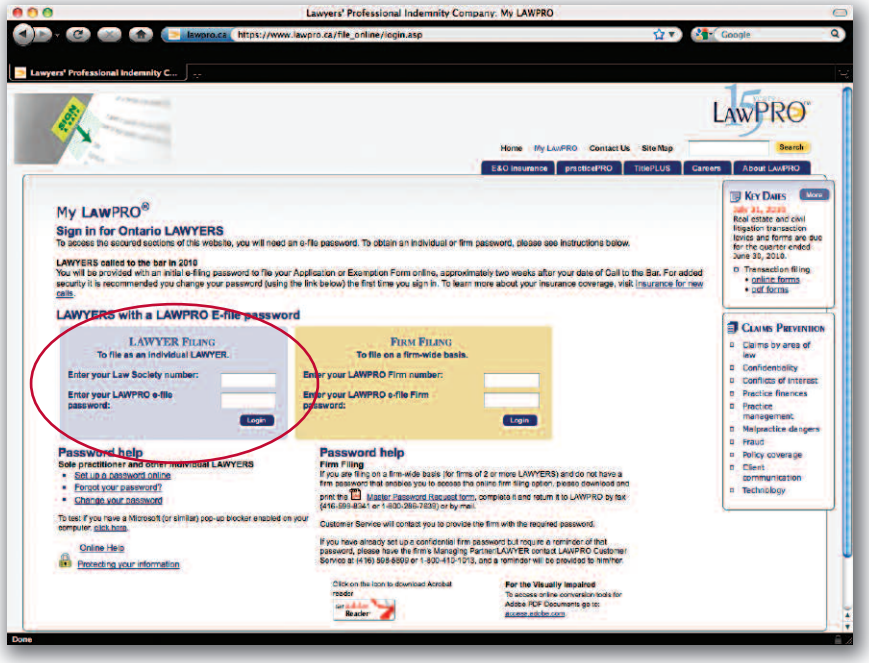
Want to confirm the date when you filed your professional liability insurance renewal application? Or the date and time when you filed your innocent party buy-up application?

You can now review a summary of all your e-filings on the LawPRO website within the last five years. Simply follow these easy steps:

Step 1:

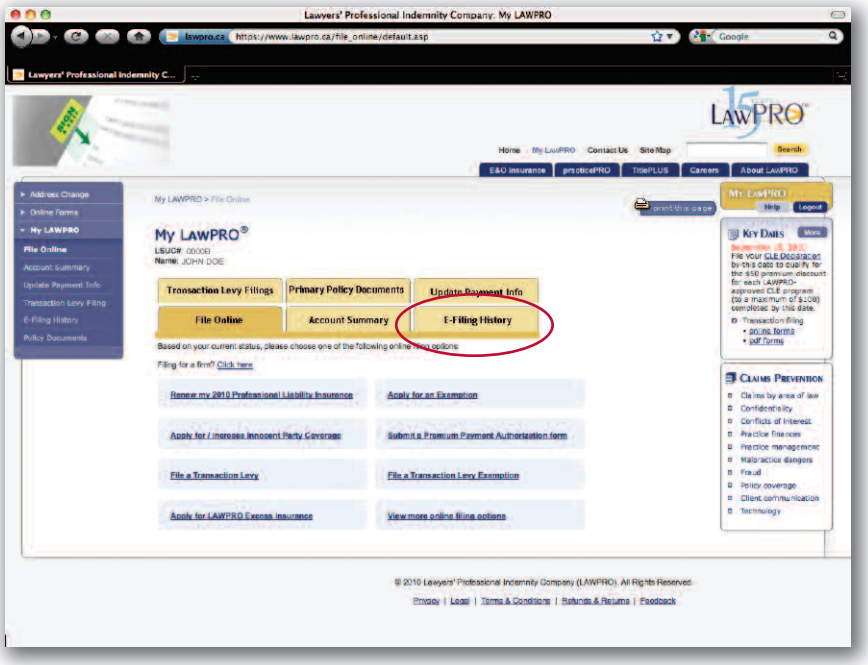
To access the **MY LawPRO** section, you must first sign in to the secure part of the LawPRO website using your Law Society number and LawPRO e-file password. You have three options to sign in:

- Sign in using the **MY LawPRO** sign-in box, which you will find on every page; OR
- Select **MY LawPRO** in the top navigation bar to access the sign-in page; OR
- Select *File Online* in the **Quick Links** box on the home page to access the sign-in page.



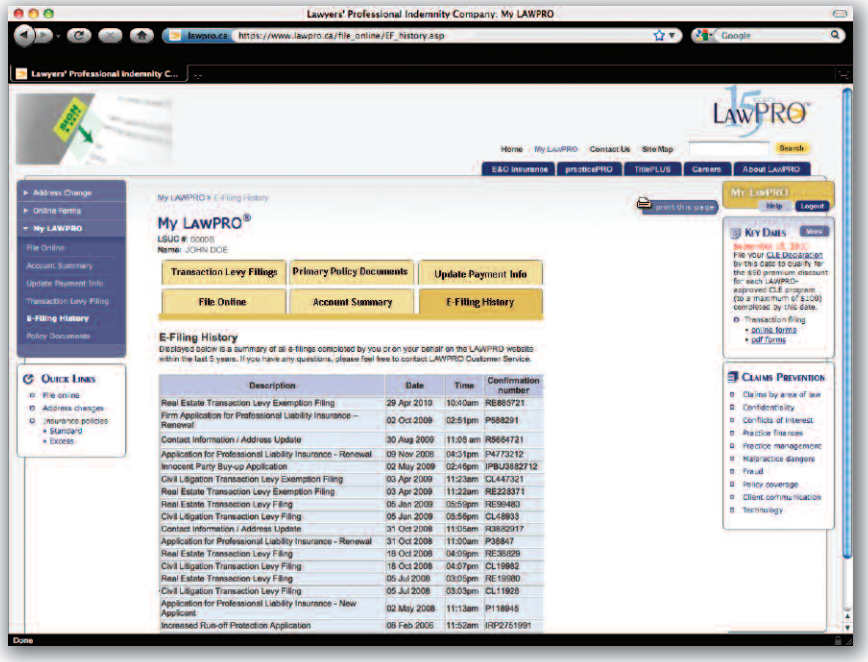
Step 2:

Sign in using your Law Society number and your LawPRO e-file password.



Step 3:

The new E-Filing History tab now appears on the list of online services on your **MY LawPRO** page. Select the E-Filing History tab.



Step 4:

The E-Filing History tab will display a summary of all e-filings completed by you or on your behalf on the LawPRO website within the last five years.

We also invite you to take some time to explore the other tabs and links leading to the many other online services available to you in MY LawPRO.

Protecting client data

11 steps to take when using technology

By Peter Roberts

The intersection of lawyer ethics and technology use can be murky, especially given the pace at which technology advances continue. So where's the line on how you should safeguard the client information on your systems?

The Law Society of Upper Canada's Practice Management Technology Guideline (http://rc.lsuc.on.ca/jsp/pmg/technology.jsp) specifically reminds lawyers to address concerns about client confidentiality, security, disaster management and technological obsolescence.

The Guideline stipulates that lawyers who use electronic means of communications must ensure that they comply with the legal requirements of confidentiality or privilege set out in Rule 2.03 of the Rules of Professional Conduct. Accordingly, when using electronic means to communicate in confidence with clients or to transmit confidential messages about a client, lawyers should "use reasonably appropriate technical means" to minimize the risks of disclosure, discovery or interception of such confidential communications. If the information is "extraordinarily sensitive," lawyers should use and advise clients to use encryption software.

The Guideline also says that a lawyer should "develop and maintain law office management practices that offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages."

Further, the Guideline says that lawyers "should adopt adequate measures to protect against security threats" such as unauthorized copying, computer viruses, hackers, power failures and hardware theft. Moreover, lawyers should have back-up and disaster recovery plans and "should ensure that information in electronic form will be accessible in the future."

Thus, the Guideline gives a "heads-up" to Ontario practitioners in describing the concept of (changing) lawyer competence for protecting client information when using technology. We know keeping up with the changes in the law is difficult enough. But the Guideline tells us that a certain level of lawyer competence in the security of technology is necessary to comply with the Rules of Professional Conduct.

What does "competence" mean in this context? Here, in order of importance and offered from a practice management advisor's perspective, is a list of the present requirements of competency for protecting client information when using technology.

Data safeguarding checklist

1. Turn off the computers at night. Leaving a computer running after you have left for the day allows access to client information to anyone who comes through your office. If you have a storefront or street-level law office (not an office in a secure tall building), it is all the more important to turn off the computers when you close up shop.

2. Use a password to open your operating system. Whether you use a Macintosh or a Windows computer, be sure to set up the user accounts with a secure password. In Windows, go to Control Panel–User Accounts and follow the prompts. On the Mac, go to System Preferences, then Security.

3. Back up client data. This means making a copy of your electronic client data in case the original data is lost owing to a system failure, accidental deletion, file corruption or otherwise. Your backup system might involve CD-ROMs, DVDs, a flash drive, an external hard drive or an Internet backup vendor. A best practice is to use at least two methods of backup. For example, more lawyers are now using an external hard drive as a "local" (in office) backup as well as an Internet account where the files are also backed up on a regular basis. Disk imaging, which is another method of backup, enables copying the software applications, settings and so forth on your hard drive, too.

4. Run a test-restore on the backup. What a concept – actually finding out if you can retrieve the lost files from a backup! You don't want to find out your backup isn't working properly when you are attempting to recover data after your hard drive has crashed. Show yourself that the backup did its job by following these steps: Create a file, back it up, delete the file, and attempt to retrieve the file from the backup. You'll be glad you did.

5. Secure your wireless network. This prevents unauthorized persons from using your network, although technically it can be tricky. You can use the step-by-step instructions on the practicePRO.ca site or ask your technology vendor to assist you with this important task.

6. Use antivirus software and a firewall. Use anti-virus and anti-spyware and keep both updated on a routine basis. Also, be on your guard if you notice an e-mail that is out of the ordinary. Visit only known and trusted websites because malware is transmitted more often by websites than by e-mail.

7. Remove the metadata before e-mailing files. Metadata is "data about data." Sounds geeky, but it is the common term for the potentially embarrassing data that resides hidden from the eye within your electronic files. Think edits, deletions, author names, date created and the like. (See http://tinyurl.com/yand6f2 for details on the subject.) You do not, for example, want the other side to be able to see the edits to your settlement offer or demand letter. Convert the file to a PDF before e-mailing it. Also, in Word 2007, go to the Office button and choose Prepare–Inspect Document to check for metadata.

8. Use a password to protect sensitive e-mail attachments. Oh no! You were tired and accidentally sent the draft settlement offer file to the other side – not to your client with the similar last name! But not to worry because on the attached file you set a password that is required for the recipient to open the file. In Word 2007, go to the Office button and choose Prepare–Encrypt Document–Set the password. In Adobe Acrobat 9 Professional (not Adobe Reader), go to File–Properties–Security, then Security Method–Choose Password Security. At the outset of a matter, discuss your security policy about electronic data with the client and agree on a password that is easy for the client to remember but difficult for others to guess. Password-protected files are harder (but not impossible) to open if the wrong person comes into possession of them.

9. Be familiar with Adobe Acrobat or PDF Converter 6. I like to think of these products as "environments" and not simply software applications. Why? Because the more you work within these programs, the more comfortable you become. Like visiting a foreign country, the longer you are there, the more familiar you become with the area. Soon, with PDF files and features, you realize there is very little you need to do with paper – and remember, using PDF helps reduce the metadata that could be unknowingly shared outside the office.

10. Move the Reply To All *and* Forward *buttons away from the Reply button in your e-mail program.* Nobody is perfect. We have all sent an e-mail message to an undesired recipient at one point or another. Fortunately, to reduce the odds of it happening again, those little toolbar buttons can be moved around by (in Outlook) going to Tools, then Customize. When you see the dialog box appear, ignore it and simply move the cursor to the button that you wish to move. Left-click the mouse and drag the button away from the *Reply* button. Then let go, and voilà.

11. Use Outlook's practice management features, or even better, practice management software. Okay, this is not exactly a security tip, but it can help you manage client files better. Beyond being simply an e-mail or a calendar program, Outlook and practice management products (e.g., Amicus Attorney, TimeMatters, etc.) have many ways to manage information in your practice. Examples are conflicts checks using the Contacts feature; managing telephone conversation records by caller, topic, date or case; tracking case calendars; and managing access to important documents, PDFs and images by attaching a shortcut to the document with the contact. (See http://tinyurl.com/y9o33ka for tutorials from Microsoft on using Outlook features.)

Implement as many of these tips as possible and rest easier that you are closer to achieving that level of technology competence that is increasingly being expected of lawyers.

This article was adapted from a similar article that originally appeared in the March/April 2010 issue of Law Practice magazine, Volume 38, No. 2 (www.lawpractice.org), published by the American Bar Association's Law Practice Management Section. Sections are reproduced with permission of the author.

Peter Roberts is the practice management advisor in the Law Office Management Assistance Program (LOMAP) of the Washington State Bar Association. Formerly a legal administrator in law firms in Washington, DC, New Hampshire, Boston and Seattle, he is a frequent speaker and writer on practice management topics.

Franchise law tenet:

Disclosure! Disclosure! Disclosure!

LawPRO is seeing an increase in claims against lawyers by franchisees and franchisors. These claims tend to involve significant damages which often approach or exceed the available limits under the primary LawPRO policy.

Franchises are governed by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "Act") which was enacted by the Ontario government to provide protection to franchisees in relation to their dealings with franchisors, and to address the imbalance of power that exists between the parties.

Franchisees often share similar characteristics: They are not sophisticated business people or are not experienced with franchises; they are running a "mom-and-pop-style" family business; they are usually financially (and more importantly, emotionally) invested in the business; and they have scraped together their life savings to open the franchise. These characteristics frequently result in "sympathetic" claimants.

While the franchisee's key consideration may be "location, location, location," lawyers acting for both sides of a franchise transaction should be much more wary of ensuring that their clients are aware of the disclosure obligations which the Act (and the courts) have placed on franchisors.

The Act seeks to protect franchisees before they invest by requiring franchisors to provide full disclosure in a formal disclosure document. This document must be provided to the potential franchisee not less than 14 days before the candidate signs a binding franchise agreement or pays any amount of money to the franchisor.

Disclosure obligations of franchisors

The information that is to be disclosed is set out in the regulations to the Act and is extensive. Among other things, the Act requires the franchisor to:

- tell prospective franchisees personal information about the franchise owners;
- give detailed financial disclosure about both the franchisor's operations and the budget for the franchisee, etc.;
- explain operating policies of the franchisor; and
- reveal past history of the franchisor and other franchisees.

The franchisor must also provide the prospective franchisee prompt notice of any material change to any of the above.

Failure on the part of the franchisor to comply with disclosure obligations provides the franchisee with an extraordinary remedy – it allows a franchisee to rescind the contract within two years and to obtain the return of its investment in franchise fees, inventory and equipment costs. The franchisee is also entitled to obtain compensation for any losses incurred for setting up and operating the franchise business.

To take advantage of the right to rescission within two years of purchase, timing and notice are key components under the Act. One potential area of exposure for lawyers involves the timing of a Notice of Rescission under the Act. Another is the failure to refer to the Act when seeking to rescind the franchise agreement. Should the rescission remedy not be available to a franchisee as a result of one of these errors, the lawyer becomes a natural target for a claim.

Many of the larger cases at LawPRO have involved allegations that a lawyer failed to advise the franchisor or franchisee regarding proper disclosure. Regrettably, lawyers' files rarely document the fact that the statutory provisions of the Act and the consequences of non-compliance were explained to the client. As a result, liability is often a foregone conclusion or turns on a credibility contest, which commonly favours the client.

When the client is the franchisor

Franchisees are not the only potential claimants. Lawyers can also face significant liability to franchisors for failing to advise franchisors of their obligations relating to disclosure under the Act and the consequences that flow from inadequate disclosure. In one case, a lawyer who failed to advise his franchisor client to provide the franchisee with up-to-date, audited financial statements was found to have breached his duty of care to his client to ensure that adequate disclosure had been provided to the franchisee.

Lawyers must also ensure that disclosure documents are dated and signed by two officers or directors of the franchisor. The failure to provide a signed Certificate of Disclosure often triggers the franchisee's right to rescind. Furthermore, if the disclosure documents contain a misrepresentation, the signatories are exposed to personal liability, jointly and severally, for the full amount of the loss, provided that the loss results from the misrepresentation.

The current trend in the courts seems to be to protect franchisees by fashioning a remedy for them one way or another. Lawyers practising in this area need to be extremely cautious and should be careful to protect themselves by documenting advice to their clients in writing.

It should go without saying that dabbling in franchise transactions is risky and should be avoided at all costs. However, even those lawyers regularly practising in this area would be well advised to prepare a detailed letter or memorandum which provides information to their clients about

a franchisee's right to receive full, complete and proper disclosure and the timing of their rights and remedies under the Act. Similarly, lawyers acting for a franchisor are well advised to prepare a detailed summary of what must be disclosed to a potential franchisee, the risk the franchisor faces if the disclosure documents are determined to be inadequate, as well as the personal risk that the signatories to the disclosure document face if the disclosure document contains misrepresentations that may be grounds for a claim for rescission and damages.

It would also be wise for lawyers to confirm, in writing, that they are not providing financial advice and that all financial statements should be reviewed by an accountant.

With regard to disclosure, the list of what must be included in disclosure documents is lengthy and beyond the scope of this article. As well, the definition of what constitutes a "material fact" is somewhat of a moving target and has been broadly expanded by the case law, creating further challenges for lawyers advising franchisees and franchisors. For example, in one case, the Court of Appeal found that the failure to provide the franchisee with a copy of the head lease or sublease amounted to material non-disclosure.

Defending claims against lawyers in the current climate is an uphill battle: Franchisees are often treated by the courts almost as a "protected class" as judges seem to strive to make findings in their favour in disputes with franchisors over disclosure. Indeed, to some this has created an impression of near absolute liability in favour of franchisees when it relates to disclosure.

As well, the uncertainty regarding what a court may find "material" creates significant risk for lawyers acting for both franchisors and franchisees. Ensuring, at the very least, that clients are aware of this uncertainty in the law, in writing, may serve to avoid or avert a potential negligence claim in the future.

Karen Granofsky is claims counsel at LawPRO.

Buyer beware:

Title insurers' policy sublimits create new risks for lawyers

The increasing popularity of title insurance in Ontario over the past 15 years has created some new risks for lawyers. LawPRO has seen claims against lawyers for not recommending title insurance to clients and for obtaining title insurance without fully informed consent.

As Ontario title insurers get a better understanding of their exposure under their existing title insurance policies, some are changing the terms of those policies. Those changes present significant potential risks to lawyers.

A title insurer may, for example, add to its policy a sublimit on the amount of coverage for a specific issue and/or a specific geographical area. For example, an insurer may put a sublimit of $25,000 for issues related to conservation authority compliance in a specific geographical area.

Assuming that a lawyer does not want to assume the risk for losses over such a sublimit, he or she needs to address two questions:

- Is there an alternative policy available that does not have such a sublimit (although obtaining it for the client may mean additional due diligence)? and/or
- Would the client be better off if the lawyer did the appropriate searches that would enable him or her to give an opinion on the relevant issue?

Either way, the lawyer should always advise the client about the sublimit and what the lawyer is (or is not) doing about it.

The Residential Real Estate Transactions Practice Guidelines, released by the Law Society in January 2007 (see page 23), address the risks related to the use of title insurance in a transaction. A lawyer should aim to have the client's informed consent to the use of title insurance to assure title. If the policy does not entirely satisfy the client's risk in a given area, and the lawyer is not addressing the risk through the traditional method of making searches and opining on the results, the lawyer should obtain the client's agreement that neither the policy nor the lawyer are able to offer protection on the subject issue.

Real Estate Practice Guidelines (excerpts)

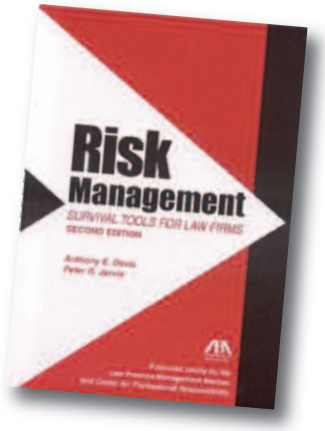
Guideline 1 – Client/Lawyer relationship states the following in relation to Communication:

- The lawyer should advise the client of the options available to assure title in order to protect the client's interests and minimize the client's risk. In this regard, the lawyer shall comply with his or her obligations regarding title insurance and real estate conveyancing pursuant to subrules 2.02(10) - 2.02(13) of the Rules. If the client selects title insurance, the lawyer should advise the client about the searches that the lawyer will not be performing and the type of information that these searches would reveal about the property such as zoning, encroachments or survey issues. Where title insurance is not being used, the lawyer should advise the client about the post closing protections provided by title insurance which the client is not receiving (e.g. regarding post-closing encroachments onto the property and fraud).
- Where title insurance is being used, the lawyer should communicate with the client to determine whether the client has any adverse knowledge about the property that could give rise to the insurer relying on the "knowledge" exclusion if the matter is not disclosed and "insured over" pre-closing.

Guideline 2 – Due Diligence states the following in relation to the use of title insurance:

- Where title insurance is being relied upon to close a transaction where registration is delayed, there should be an express obligation on the part of the title insurer as part of the binder/commitment pre-closing, addressed to the insured-client(s), to provide coverage to the client for any adverse registrations which occur between releasing the closing proceeds and registration of the title document(s). This obligation may be satisfied by obtaining a draft policy from the title insurer in the name of the insured clients including an endorsement or policy terms providing the coverage described.
- The lawyer should review the draft title insurance policy or binder/commitment, to ensure the following:
    - Is the insured named correctly?
    - Is the legal description correct? Since only the lands described are insured, there may be off-site lands that should be included in the description, so that easements or rights-of-way located on other properties, but benefiting the subject property, and encroachments from the subject property onto other lands, will be covered by the insurance.
    - Are there other title issues, not apparent from the insurance commitment, of which the client should be warned? For example, problems may have been found when the search was conducted but the title insurer has not entered them on the Schedule to the policy because those problems are removed from coverage by the standard, pre-printed exceptions.
    - In the alternative, have problems emerged with respect to the title that it would be preferable for the owner to have resolved under the terms of the agreement of purchase and sale?
    - What coverage is excluded from the commitment/policy?
- The lawyer should issue the title insurance policy as soon as possible after closing, to insure that an issued policy exists should the insured-client(s) need to make a claim, and to minimize the risk of the client's being obliged to disclose adverse information obtained between closing and the issuance of the policy.
- The issued policy should be compared carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

Risk Management: Survival Tools for Law Firms



By: Anthony E. Davis, & Peter Jarvis. Published 2007. 200 pages

There's a lot that lawyers can themselves do to avoid claims. They can keep abreast of the latest substantive changes in their areas of law through CLE, improve their communications and time management skills, and take advantage of all the precedents, checklists and articles that practicePRO makes available.

But individual lawyers' efforts are just one way in which firms can avoid claims. The firms themselves also need to have a culture of risk management in everything from taking on new clients to planning for disasters.

Risk Management: Survival Tools for Law Firms demonstrates what firms can do at a management and organizational level to reduce the chances of E&O claims. The authors are Anthony E. Davis, a partner at a New York law firm who advises lawyers and firms on risk management and loss control, and Peter Jarvis, whose practice background is in the area of professional responsibility and ethics.

The book is divided into two parts. The first explains the concepts of risk management and loss prevention as they relate to law firms. Insurance companies have long factored risk management into their underwriting strategies to try to reduce losses from the businesses they insure. The same principles can be applied to a law practice: improvements in internal controls, personnel management and client relations at a firm will result in an improved "product," fewer malpractice claims and reduced financial losses.

Even if there is coverage under the LawPRO policy, a claim can be a costly experience for a firm. Aside from the financial cost, there is the time needed to deal with the claim, and a potential loss of reputation and clients. As well, many dangers (e.g., fraud) could fall outside the scope of coverage. Reviewing firm practices BEFORE a situation arises can save both money and headaches. The authors drive home this point by providing a case study of how good risk management practices could have helped prevent an American law firm from being devastated by claims resulting from its involvement in a failed savings and loan bank.

So what is good risk management? It entails knowing what risks your firm is exposed to by the way in which it accepts clients, does conflicts checks, tracks billing, etc. What are the procedures and practices already in place, how diligently are they observed, and what changes may need to be made? The way to determine this is through an audit of your firm. Audits (either by an outside source or a self-audit) are common in the insurance and accounting fields, but less used at law firms. The book devotes several chapters to explaining why audits are necessary, how to conduct them and how to implement the results.

The categories to be audited are the same ones that practicePRO regularly highlights in our material. They are management structure, risk management oversight, new client intake, client relations, docketing, practice & human resource management, trust accounts and disaster planning. Sample questionnaires are provided, and the second half of the book provides a detailed examination of the importance of each category to a strong firm risk management strategy.

Risk management is more than just a beautifully written code of practice that sits on the shelf. It is an ongoing process at a firm and requires constant work. For firm managers thinking it's time to revisit firm strategies for avoiding practice pitfalls, this book is an excellent resource.

This book can be purchased through Chapters/Indigo or Amazon.ca

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Tim Lemieux is practicePRO coordinator at LawPRO.

The practicePRO Lending Library has more than 100 books on a wide variety of law practice management topics. Ontario lawyers can borrow books in person or via e-mail. A full catalogue of books is available online (www.practicepro.ca/lendinglibrary). Books can be borrowed for three weeks. LawPRO ships loaned books to you at our expense, and you return books to us at your expense.

We have books on these topics

- Billing & financial management
- Law firm management & administration
- Marketing & client relations
- Law office technology
- Career issues
- Wellness & balance issues
- Solo and small firm issues

The *Limitations Act, 2002* is a 'catch-all' statute

Since the *Limitations Act, 2002* came into force on January 1, 2004, it has given rise to a torrent of court decisions. Everyone understands that the *Limitations Act, 2002* radically reformed Ontario's limitation law. But one must be mindful of one crucial distinction between the *Limitations Act*, R.S.O. 1990, c. L.15 and the *Limitations Act, 2002*. The "old" Act was NOT a "catch-all" statute. Either a cause of action fell within an express provision of that Act, in which case it was governed by the Act, or it did not, in which case the Act did not apply. On the other hand, the *Limitations Act, 2002* applies to all claims, unless they are expressly exempted from its application.

This distinction is illustrated by T*oronto Standard Condominium 1703 v. 1 King West Inc.,* 2010 ONSC 2129 (Div. Ct.), dismissing the plaintiff's appeal from 2009 CanLII 55330. The events giving rise to this claim occurred after January 1, 2004.

The court had to consider whether an action to set aside two mortgages as fraudulent conveyances fell within ss. 1 and 4 of the *Limitations Act, 2002*. The plaintiff argued that it did not. The court found that it did.

The Divisional Court distinguished *Perry, Farley & Onyschuk v. Outerbridge Management Ltd. et al.* (2001), 54 O.R. (3d) 131, on which the plaintiff relied. *Perry* was decided under the "old" limitations regime. In *Perry*, the Court of Appeal held that an action based on s. 2 of the *Fraudulent Conveyances Act* was not governed by the "old" *Limitations Act*, because it was neither an action on a simple contract, nor an action on the case. Since no provision of the "old" Act was applicable to a fraudulent conveyance action, no limitation period applied to the action brought in *Perry*.

A claim based on s. 2 of the *Fraudulent Conveyances Act* is, however, a "claim" within the meaning of s. 1 of the *Limitations Act, 2002*, and is governed by the two-year limitation period set out in s. 4.

The distinction between the *Limitations Act, 2002*, as a "basket" statute, and the "old" Act, which applied only to causes of action expressly governed by it, has ramifications for claims based in equity.

Under the "old" limitations regime, equitable causes of action, with few exceptions, fell outside of the *Limitations Act*, R.S.O 1990, c. L.15. Sections 43 and 44(2) of the "old" *Limitations Act* were notable exceptions. These provisions governed claims to recover trust property. These sections were repealed as of January 1, 2004, and were not carried forward in either the *Limitations Act, 2002* or the *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

Under the "old" limitations regime, in the majority of equitable claims, plaintiffs had to concern themselves with the doctrine of laches, but NOT with any statutory limitation period.

For example, in legal malpractice claims against solicitors, it was clearly understood that claims for negligence and breach of contract were governed by s. 45(1)(g) of the "old" Act, which required that such actions be brought within six years from the date of discovery of the cause of action. Claims for breach of fiduciary duty, on the other hand, were NOT governed by that provision. Some plaintiffs went to considerable lengths to present their claims as actions for breach of fiduciary duty, since s. 45(1) (g) did not apply to breach of fiduciary duty claims, and laches is difficult to establish.

Case law decided under the *Limitations Act, 2002*, suggests that legal malpractice claims against solicitors, whether based on negligence, breach of contract, or breach of fiduciary duty, are governed by the two-year limitation period set out in

s. 4 of that Act: *Hughes v. Kennedy Automation*, 2008 ONCA 770, dismissing appeal from 2008 CanLII 8603 (ON S.C.); *Sheeraz v. Kayani*, 2009 CanLII 47571 (ON S.C.). An action for breach of fiduciary duty is, after all, a "court proceeding" within the meaning of s. 2 of the Act.

In *Toronto Standard Condominium*, the parties and the Master accepted, but apparently without argument, that a claim for constructive trust over money in the defendant's hands was subject to a two-year limitation period under the *Limitations Act, 2002*. It was unnecessary for the Divisional Court to deal with this point.

In *Syndicate Number 963 (Crowe) v. Acuret Underwriter*, [2009] O.J. No. 4002, it was apparently accepted that the two-year limitation period under the *Limitations Act, 2002* applied to an action arising out of a failure to account for trust funds.

In *Estate of Blanca Ether Robinson (Re)*, 2010 ONSC 3484, it was accepted by the parties and the court that a claim for rectification is subject to s. 4 of the *Limitations Act, 2002*. Under the "old" regime, claims for rectification were not governed by the *Limitations Act*, although it was subject to being barred by laches: *Mentary v. Welsh* (1973), 1 O.R. (2d) 393 (C.A.).

One important statute which survives outside of the *Limitations Act, 2002* is the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. For all practical purposes, it carries forward the sections of the *Limitations Act*, *1990* which dealt with real property. Section 2 of that Act expressly preserves the equitable defence of acquiescence "and otherwise." "Otherwise" includes laches: *Egnatious v. Leon Estate*, [1990] O.J. No. 1700.

Particularly important is s. 4 of the *Real Property Limitations Act* (RPLA), which provides a 10-year limitation period to bring an "action to recover land." This limitation period has traditionally governed claims dealing with adverse possession and a mortgagee's right to recover possession of a property after the mortgagor's default.

An interesting question is whether this 10-year limitation period might apply to claims for a constructive or resulting trust over real property. In *Hartman (Estate) v. Hartfam Holdings*, 2006 CanLII 266 (C.A.), the plaintiff asserted a constructive or resulting trust over real estate to which the defendant trustees retained title. Gillese, J.A. held that the plaintiff's action was not statute-barred, because she was entitled to avail herself of s. 43(2) of the "old" *Limitations Act*, that is, the trustees still retained the trust property; therefore, no statutory limitation period applied. As previously noted, s. 43 of the "old" *Limitations Act* was not carried forward into the "new" Act, or any other current statutory provision.

Gillese, J.A. raised, but did not resolve, the question of whether the 10-year limitation period under s. 4 of what is now the RPLA might apply where a constructive or resulting trust over real property is sought. She noted at para. 57 of her judgment that:

> On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the *Act*. In *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court." See also *OAS Management Group Inc. v. Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect.

Thus, it is POSSIBLE that where a constructive or resulting trust over real property is asserted, the 10-year limitation period under s. 4 of the RPLA may apply.

Unless you are absolutely sure that your claim is NOT governed by the two-year limitation period in s. 4 of the *Limitations Act, 2002*, you had better comply with that two-year limitation period.

It goes without saying that you should carefully review the *Limitations Act, 2002* and the Schedule referred to in s. 19 to ensure that your action is not subject to a limitation period even shorter than the "two years from discoverability" stipulated in s. 4.

For instance, the Schedule refers to s. 148, statutory condition 14 of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides that a claim against an insurer for a fire loss must be brought within one year of the date of the loss. Likewise, s. 259.1 of the *Insurance Act* provides that a claim for loss or damage to an automobile or its contents must be brought within one year of the loss. Also, be wary of s. 38(3) of the *Trustee Act*, R.S.O 1990, c. T.23, which stipulates that a claim by or against executors or administrators must be brought within two years of the death of the deceased. Discoverability is inapplicable.

Carefully reviewing the *Limitations Act, 2002* and its exemptions and Schedule could save you from a future negligence claim.

Debra Rolph is director of research at LawPRO.

Surviving being sued

In the midst of your busy practice, your world suddenly comes crashing down. You receive a letter alleging that you have made a mistake or have been served with a claim for negligence. Your emotions run the gamut from anger, defensiveness, giving up, and loss of control to fear and guilt. You may feel sick to your stomach and start losing sleep; your practice suffers because of a lack of focus; you withdraw socially or want to just talk about the problem *ad nauseam*; you may use or abuse alcohol and/or drugs. And the process has not even started yet!

Here are some tips to deal with the potential stress associated with this situation.

- **Do something quickly** – Even if you put the letter or claim off to the side, it will not go away. You must do something quickly so that things do not get worse or limitation periods are not missed. Report to LawPRO ASAP as required under your insurance policy. Complete the Claims Notice Report available on the LawPRO website or provide notice in writing. Include your contact information, information about your client, the retainer and the nature of the claim, how you became aware of the claim (or potential claim), the amount of potential damages, and a chronology of events. Remember to include pertinent documentation.
- **Talk to claims counsel and legal counsel if one is appointed** – Remember, the lawyer who represents him/herself has a fool for a client. Your claims counsel needs to have all the facts, promptly, so that she can assess the situation and determine the best strategy to follow. Defence counsel, if appointed, is your legal representative: Treat him or her as such.
- **Do what you are asked or advised to do!** – Do a memo to refresh yourself and get a quick outline of the salient facts. It can be fleshed out later as you review your file and speak to the claims or legal counsel. Get all documents together. Make additional notes. If information is needed, provide it, quickly and accurately. Discuss strategy but listen to what's being said: You'll be able to participate more fully if you take the time to understand.
- **Review the file fully** – Turn over the whole file to defence counsel when requested, but make copies of all relevant documents for yourself for personal review.
- **Check the factual accuracy** of anything your defence counsel prepares. Ensure you always know what is being written and said on your behalf. Ask questions before anything is filed, to avoid having to question strategy and accuracy later on.
- **Understand the winding nature of the process** – As you know from your own experience, it often takes time to resolve a matter. Practise patience. Of course you want to get this claim out of the way as quickly as possible: LawPRO counsel (and defence counsel) are working on your file as expeditiously as possible. They know the process and will look after your matter in a timely fashion.
- **Set priorities** – Let go of things that distract your concentration on this matter such as unreasonable clients, unrealistic expectations or overwork. Focus on what you can do to best assist your claims counsel or lawyer. Review your practice to see where the stressors are and try to address them to lighten your worries on a daily basis.

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Ontario Lawyers' Assistance Program

- **Use effective stress management techniques and self-care methods** – Take care of yourself physically – sleep eight hours per night, eat three healthy meals a day, exercise regularly, breathe deeply when you feel the stress overwhelming you, cut down or cut out coffee, nicotine and alcohol. If you are not feeling physically well, go to your family doctor and get a full physical checkup. Emotionally – meditate and talk about your feelings with someone you love and trust. Spiritually – appreciate what you have and do not focus on what you do not have. Call the Ontario Lawyers Assistance Program for a referral to a peer support lawyer or counselling. – 1-877-576-6227.
- **Access resources** – Go to www.lawpro.ca and follow the practicePRO section to the online Coaching Clinic. You will find 150 modules to help you with stress relief, practice tips and communication skills. Invest some time in yourself. Review the resources available at www.olap.ca.
- **Look at the situation realistically** – It is easy to look at the worst case scenario and expect that that will happen. This is called catastrophising. Alternatively, it is also possible to look at the situation and get the mindset that nothing bad will happen. This is the Heaven's Reward Fallacy. With your claims counsel and defence counsel, realistically assess the situation with the upsides and downsides. Put your situation into perspective.
- **Stay in control** – Control what you can – your responses, your attitude, your thoughts. Leave the rest of the

things that you have delegated to those you assigned them to. If you obsess about the case and cannot seem to shake the fear, guilt or anger, allow yourself a set time limit every day to devote to the issue – ten minutes maybe but a half hour tops. When the time limit is up, it is up. Shut it down for the day. Move on to other responsibilities and self-care needs. Live in the moment. Write a journal about your feelings, make an audio tape of affirmations, read a daily reflection, work with your hands, play sports, scream into a pillow, pray or take a long walk to meditate about the joys in your life.

- **Accept your feelings** – Balance your doubts with self-belief and confidence. Identify and limit self-recrimination. Do not allow yourself to sink into despair. Talk to someone who understands and who can listen sympathetically and non-judgmentally like an OLAP peer support lawyer. Get professional help from a therapist or counsellor through your doctor or through an OLAP referral.
- **Prepare for the discovery, trial or hearing, if necessary** – Review the file carefully. Review the questions with your lawyer that will be asked of you and prepare for cross-examination. Be prepared to address the tough issues head on. Speak confidently and with precision. Do not try to tell your whole story in a gush of information when you are asked your name. Answer only the question asked. Try not to get defensive or angry. Stay as calm and clinical as you can in the circumstances where you are under pressure you may not have experienced before.
- **Put yourself in a defendant/respondent's shoes** – Do not take the system for granted because you work in the courts. It is different when you are one of the parties. Review where you sit, how you act, how you dress and what you are to do.

OLAP contacts

1-877-576-6227 or in Toronto: **905-238-1740**

Program Manager:	**Leota Embleton**, MSW, IACAD	leota@olap.ca
Clinician:	**Judy Grout**, MSW	judy@olap.ca
Case Managers:	**Doron Gold**, BA, LLB	doron@olap.ca
	Terri Wilkinson, BA, LLB, RN	terri@olap.ca
	Jill Fenaughty, BA, MA, LLB	jill@olap.ca.
Office Manager:	**Jill Keaney**	jill.Keaney@olap.ca

Volunteer Executive Director:
John Starzynski, LLB 1-877-584-6227 john@olap.ca

www.olap.ca

- **Use the "Best Friend" technique** – Imagine that your best friend is being grilled and put yourself in those shoes. Stand up for yourself as you would for your best friend. Speak confidently and with precision.
- **Call OLAP** – Talking to another lawyer who understands the legal system, the legal culture that we work in and the stresses of everyday practice is important to prevent isolation. OLAP case managers are all lawyers. They help lawyers, law students and their immediate families with issues of stress, burnout, addictions and mental wellness concerns. This is a free, 24-hour, confidential service to the profession.

  OLAP also has a corps of 100 volunteer peer support lawyers who understand other lawyers and are willing to lend a friendly, sympathetic ear to any caller who needs help. OLAP can refer you to other free counselling resources in your own local community if that is needed as well.

  OLAP has a lawyers support group that meets the first and third Wednesday of each month. Call Jill Fenaughty at 1-877-576-6227.

  A Lawyers Twelve-Step group meets every Monday at Bellwoods Health Centre. Call Terri Wilkinson at 1-877-576-6227.

The Women's Wellness and Balance Group, in association with the Women's Law Association of Ontario, have quarterly luncheon presentations. Call Jill Keaney at 1-877-576-6227.

LawPRO e-newsletters:
Keeping you informed

Editor's note:

For the past 12 months, LawPRO has been communicating breaking news, upcoming deadlines and risk management information to our lawyers by email newsletter. We believe this communication ensures that you, our insureds, get the information you need quickly and efficiently: That's particularly true for Alerts, through which we alert you to urgent information such as new fraud schemes targeting lawyers.

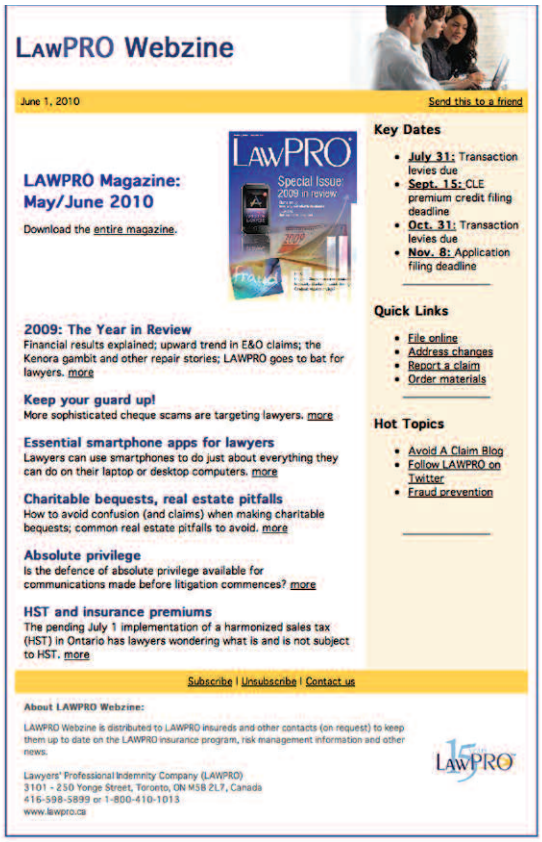
Every lawyer for whom we have an email address, and other contacts (on request), receives one of the following electronic newsletters:

- ***LawPRO Webzine**: New and current risk and practice management information from our practicePRO department not available through the magazine, as well as links to the electronic version of LawPRO Magazine.*
- ***LawPRO Insurance News**: Information about the insurance program and filing deadlines.*
- ***LawPRO Alert**: Urgent messages, such as imminent deadlines or breaking news.*

But to date only about one-third of recipients actually open the email to read its content. In other words, the majority of lawyers are missing out on important information that could be critical to their law practice.

We hope to improve those statistics (even though we already exceed industry norms). Starting with this issue of LawPRO Magazine, we'll provide a summary of information that you received by email. We hope this encourages you to review LawPRO e-newsletters as they arrive in your inbox.

To access the full content of any of the newsletters highlighted below, go to our LawPRO e-newsletters page on our website (www.practicepro.ca/eNewsletters/default.asp). Click on the specific e-newsletter category to see all of the recent issues of that e-newsletter.


LawPRO Webzine

June 1, 2010 — Send this to a friend

LAWPRO Magazine: May/June 2010

Download the entire magazine.

2009: The Year in Review
Financial results explained; upward trend in E&O claims; the Kenora gambit and other repair stories; LAWPRO goes to bat for lawyers. more

Keep your guard up!
More sophisticated cheque scams are targeting lawyers. more

Essential smartphone apps for lawyers
Lawyers can use smartphones to do just about everything they can do on their laptop or desktop computers. more

Charitable bequests, real estate pitfalls
How to avoid confusion (and claims) when making charitable bequests; common real estate pitfalls to avoid. more

Absolute privilege
Is the defence of absolute privilege available for communications made before litigation commences? more

HST and insurance premiums
The pending July 1 implementation of a harmonized sales tax (HST) in Ontario has lawyers wondering what is and is not subject to HST. more

Key Dates
- July 31: Transaction levies due
- Sept. 15: CLE premium credit filing deadline
- Oct. 31: Transaction levies due
- Nov. 8: Application filing deadline

Quick Links
- File online
- Address changes
- Report a claim
- Order materials

Hot Topics
- Avoid A Claim Blog
- Follow LAWPRO on Twitter
- Fraud prevention

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About LAWPRO Webzine:
LAWPRO Webzine is distributed to LAWPRO insureds and other contacts (on request) to keep them up to date on the LAWPRO insurance program, risk management information and other news.

Lawyers' Professional Indemnity Company (LAWPRO)
3101 - 250 Yonge Street, Toronto, ON M5B 2L7, Canada
416-598-5899 or 1-800-410-1013
www.lawpro.ca

Highlights:

July 14, 2010: LawPRO Alert
Subject line: Frauds involving stolen identity of lawyer Jack S. Lambert.

Warned that someone purporting to be Ontario lawyer Jack Stephen Lambert is handling real estate deals under his name.

June 29, 2010: LawPRO Alert
Subject line: Fraud warning update, LVTS feedback

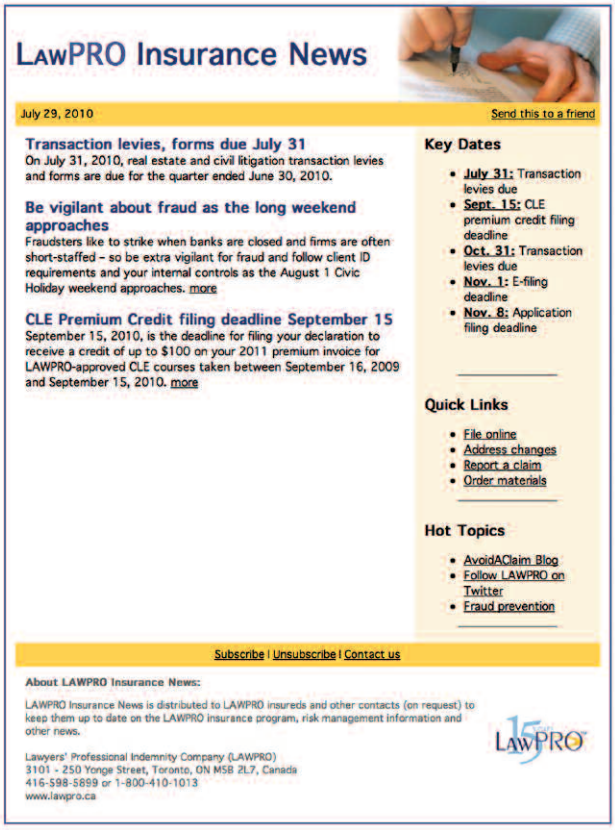
Updated the June 17 LawPRO Alert about the collaborative family law agreement scam. Also included a request for feedback from lawyers who have used (or attempted to use) the Large Value Transactions System (LVTS) for funds transfers.

June 17, 2010: LawPRO Alert
Subject line: Fraud warning, G20 Summit

Warned about a spousal support collection scam involving a collaborative family law agreement and advised about LawPRO's plans for operations during the week of the G20 Summit.

June 9, 2010: LawPRO Insurance News
Subject line: G20 Summit, HST FAQs

Provided advance notice about LawPRO preparations for the G20 Summit. Included information about the harmonized sales tax (HST) and insurance premiums, with a link to a comprehensive set of FAQs on the LawPRO website.



LawPRO Insurance News

July 29, 2010 — Send this to a friend

Transaction levies, forms due July 31
On July 31, 2010, real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2010.

Be vigilant about fraud as the long weekend approaches
Fraudsters like to strike when banks are closed and firms are often short-staffed – so be extra vigilant for fraud and follow client ID requirements and your internal controls as the August 1 Civic Holiday weekend approaches. more

CLE Premium Credit filing deadline September 15
September 15, 2010, is the deadline for filing your declaration to receive a credit of up to $100 on your 2011 premium invoice for LAWPRO-approved CLE courses taken between September 16, 2009 and September 15, 2010. more

Key Dates
- July 31: Transaction levies due
- Sept. 15: CLE premium credit filing deadline
- Oct. 31: Transaction levies due
- Nov. 1: E-filing deadline
- Nov. 8: Application filing deadline

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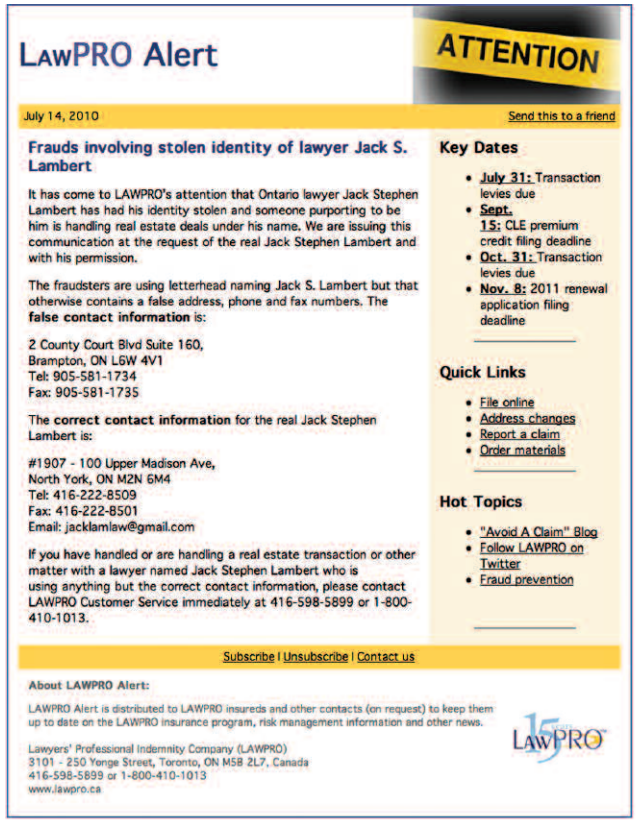

LawPRO Alert

ATTENTION

July 14, 2010 — Send this to a friend

Frauds involving stolen identity of lawyer Jack S. Lambert

It has come to LAWPRO's attention that Ontario lawyer Jack Stephen Lambert has had his identity stolen and someone purporting to be him is handling real estate deals under his name. We are issuing this communication at the request of the real Jack Stephen Lambert and with his permission.

The fraudsters are using letterhead naming Jack S. Lambert but that otherwise contains a false address, phone and fax numbers. The **false contact information** is:

2 County Court Blvd Suite 160,
Brampton, ON L6W 4V1
Tel: 905-581-1734
Fax: 905-581-1735

The **correct contact information** for the real Jack Stephen Lambert is:

#1907 - 100 Upper Madison Ave,
North York, ON M2N 6M4
Tel: 416-222-8509
Fax: 416-222-8501
Email: jacklamlaw@gmail.com

If you have handled or are handling a real estate transaction or other matter with a lawyer named Jack Stephen Lambert who is using anything but the correct contact information, please contact LAWPRO Customer Service immediately at 416-598-5899 or 1-800-410-1013.

Key Dates
- July 31: Transaction levies due
- Sept. 15: CLE premium credit filing deadline
- Oct. 31: Transaction levies due
- Nov. 8: 2011 renewal application filing deadline

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June 1, 2010: LawPRO Webzine

Subject line: 2009 review, smartphone apps, HST & premiums

Electronic version of May/June 2010 LawPRO Magazine. Articles included "2009: The Year in Review," "Keep your guard up! An update on frauds that target lawyers," "Essential smartphone apps for lawyers," "Is the defence of absolute privilege available in advance of litigation?" and "HST and insurance premiums."

April 29, 2010: LawPRO Insurance News

Subject line: Transaction levies due April 30

Reminder that transaction levies and levy exemption forms due on April 30.

Feb. 18, 2010: LawPRO Webzine

Subject line: Limitations Act, pro bono, charities

Topics included a review of case law interpreting the *Limitations Act, 2002* and liability insurance for lawyer/directors of charities and non-profits.

Jan. 26, 2010: LawPRO Insurance News

Subject line: Lump sum payment deadline

Reminder of February 9 deadline for the lump sum payment discount.

Dec. 15, 2009: LawPRO Webzine

Subject line: Counterfeit cheque FAQs; $65 real estate levy

Comprehensive set of FAQs about LawPRO's enhanced protection for counterfeit certified cheques and bank drafts.

Dec. 4, 2009: LawPRO Webzine

Subject line: Social media: why, what and how to do it right

Electronic version of December 2009 LawPRO Magazine. Focus on social media. Articles on the social media tools that are most useful to lawyers and interviews with five lawyers who walk the social media talk, how to use online social networking tools to market your practice, social media pitfalls to avoid, litigation and online social networking sites, and *The Apology Act, 2009*.

Key dates

Sept. 15: File your CLE Declaration by this date to qualify for the $50 premium discount for each LawPRO-approved CLE program (to a maximum of $100) completed by this date.

Oct. 1: Online filing for the 2011 Professional Liability insurance program begins on or about this date. Keep visiting www.lawpro.ca for more details.

Oct. 31: Real estate and civil litigation transaction levies and forms are due for the quarter that ends September 30, 2010.

Nov. 1: Deadline for e-filing insurance application to qualify for $25 e-filing premium discount.

Nov. 8: Applications and Exemption forms due.

Dec. 3: Excess Liability Insurance forms are due for the coming year.

TitlePLUS insurance ads: Keep an eye out!

New TitlePLUS insurance ads highlighting the benefits of using a lawyer in the home-buying process are making their way across the Internet. The ads have been recently released on popular consumer sites, such as Canadian Consumer Real Estate magazine online, Canadian Mortgage Trends online and Insurance Canada online.

A simple click redirects consumers to the TitlePLUS homepage. The page offers useful information about the benefits of using a lawyer in the home-buying process and a quick link to the "find a lawyer" page, which helps connect TitlePLUS-eligible lawyers and their clients.

Don't forget to file your insurance application.

Starting on or about Oct. 1, lawyers will be able to file their 2011 liability insurance online and by mail. November 8 is the deadline to have your material in to LawPRO. And remember to e-file by November 1 for a $25 discount towards your premiums.

Keep visiting www.lawpro.ca for up-dates and more details.

Events calendar

September 16

Oakville Milton District Real Estate Board trade show
TitlePLUS exhibiting
Oakville Convention Centre

September 16 to 18

PME Internotaires Conference
Ray Leclair presenting
TitlePLUS sponsoring
Hotel le Dauphin, Drummondville, QC

September 22

Law Society of Upper Canada teleconference: Frauds Against the Lawyer – Building a Better Shield
Kathleen Waters presenting
Toronto

September 30

Realtors Association of Hamilton Burlington Trade Show
TitlePLUS exhibiting
Hamilton Convention Centre

September 30 to October 1

Thunder Bay Law Association Fall Conference
TitlePLUS exhibiting
Victoria Inn, Thunder Bay

October 1

Peterborough and Kawarthas Association of Realtors
Technology Day and Marketplace
TitlePLUS exhibiting
Living Hope Church, Peterborough

October 2 to 5

2010 National Credit Union Lending Conference
TitlePLUS exhibiting
Westin Bayshore, Vancouver

October 3 to 8

International Bar Association 2010 Annual Conference
Duncan Gosnell presenting on underwriting
Vancouver, BC

October 7

Ontario Bar Association CPD The Lost Art of Requisitions
Ray Leclair presenting
TitlePLUS exhibiting
OBA Conference Centre

October 13

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

October 13

Law Society of Upper Canada CPD
9th Annual Real Estate for Law Clerks
Lisa Weinstein presenting
Law Society of Upper Canada, Toronto

October 18

Law Society of Upper Canada CPD
Opening your Law Practice 2010
Dan Pinnington presenting on avoiding malpractice claims
Toronto

October 23

The College of Law Practice Management 2010 Futures Conference and Symposium
Dan Pinnington presenting on social media

October 28

Ottawa Real Estate Board Trade Show
TitlePLUS exhibiting
Centurion Conference Centre, Ottawa

November 4

Hamilton Law Association's
Emerging Issues in Real Estate
TitlePLUS exhibiting
McMaster University, Hamilton

November 17

Hamilton Law Association's 24th Annual Joint Insurance Seminar
Dan Pinnington presenting on claims prevention
Hamilton

November 19 to 21

CBA BC Annual Branch Conference
TitlePLUS exhibiting
Scottsdale, Arizona

November 21 to 23

CAAMP Conference
TitlePLUS exhibiting
Palais des Congrès, Montreal

November 29

Lawyers Insurance Association of Nova Scotia's Solo and Small Firm Conference
Dan Pinnington presenting
TitlePLUS exhibiting
Westin Nova Scotia Hotel

November 23

Law Society of Upper Canada CPD
The Six-Minute Real Estate Lawyer 2010 conference
Kathleen Waters presenting
Donald Lamont Learning Centre, Law Society, Toronto

December 3

Law Society of Upper Canada CPD
New Lawyer Practice Series, Real Estate Law
TitlePLUS Vice President Ray Leclair presenting
Law Society of Upper Canada, Toronto

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

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

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1 Please refer to the policy for full details, including actual terms and conditions. The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LawPRO®)/Assurance LawPRO®. Assurance LawPRO is the registered name used in Québec by Lawyers' Professional Indemnity Company. Contact LawPRO for brokers in Saskatchewan, Manitoba, Alberta and Québec.

2 Excluding OwnerEXPRESS® policies and Québec policies.

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LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO®)

President & CEO: Kathleen A. Waters

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

Editor:
Dagmar Kanzler dagmar.kanzler@lawpro.ca

Contributing editors:
Dan Pinnington dan.pinnington@lawpro.ca
Norman MacInnes norman.macinnes@lawpro.ca

Design & Production: Freeman Communications

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