Volume 9, Issue 4 December 2010

LawPRO®

file retention

What to keep and for how long?

Why you need a policy

PLUS

Foreign law matters: Are you covered?

New IFRS rules: Why you need to know

Casebook: Fiduciary duty

SPECIAL FEATURE SECTION ON REAL ESTATE CLAIMS AND TITLE INSURANCE

Happy holiday reading

It's customary at this time of year to take stock of where one's been and where one is going. We at LawPRO have endeavoured – through the pages of this publication and through other communications and activities – to help the profession better understand some of the challenges facing lawyers and LawPRO.

Our year-in-review issue of LawPRO Magazine this spring dealt in depth with the subject of claims numbers and trends, and with the overall direction we're taking as a company. Our summer issue featured insights into emerging practice pitfalls as seen by our claims counsel.

We've covered subjects as diverse as absolute privilege, the catch-all implications of the *Limitations Act, 2002*, charitable bequests, franchise law, and how to protect client data – in keeping with our commitment to help lawyers better understand how to minimize their claims exposure. Through the magazine, our electronic publications and practicePRO's Avoid A Claims blog, we've tried to ensure the profession is as current as we are on what fraudsters appear to be up to.

This issue of the magazine upholds this tradition of keeping you current. Our feature on file retention and destruction aims to help you sort out what files to keep and for how long. Practising in a global economy raises major coverage and jurisdictional issues: We provide some insights into risks to consider. Globalization is also making itself felt in new accounting rules that will significantly affect lawyers and LawPRO: On the following pages we tell you how. Also in this issue is a special feature that examines in depth real estate claims and title insurance. Needless to say, there's plenty of insightful and, we hope, useful holiday reading for everyone on the following pages.

It's particularly gratifying to hear from lawyers (such as Allan Papernick, whose email to me is reprinted on this page with his permission) that we're on the right track – and in this vein we invite your feedback. Please take a few minutes to complete the readership survey inserted in the centre of this issue: Your input ensures the information we provide is as relevant to you and your needs as we can make it.

As we count down the days of 2010, I can say that all of us at LawPRO have been proud to support the profession in this, the 15th anniversary of providing the primary professional liability program in Ontario.

We wish you and yours all the best for the holiday season and look forward to working with you again in 2011.

Kathleen A. Waters
President & CEO

Dear Kathleen:

I look forward to receiving the latest issue of LawPRO (Magazine) *for professional reasons to read about how to continue to provide a high level of "customer service" to my clients so as to avoid having to make a claim. But I also enjoy reading about the travails of lawyers practising and the perspectives they bring about practice.*

I am a sole practitioner having survived (successfully so far), 41 years of practice. One thing I know is that I can never stop learning and adapting to a practice vastly changed since my call to the Bar in 1969. A kind of isolation comes with being a sole practitioner, and I feel a real connection to the realities of practice reflected in your publication.

I especially appreciated your comments set out in the inside cover of the September issue and your expressed resolve that LawPRO *– while fulfilling its obligations under our coverage – is attempting to "ring fence" the scope of our apparently ever-increasing potential liability.*

A smile comes to my face when I receive "Fraud Alerts" at the approach of every long weekend and as a result both my bank and I are more diligent and careful than ever. I can't say however that I have received any invitations yet to "collect" on monies owing to an out of country client whose spouse is just waiting to pay up through my trust account.

Thank you for looking out for us.

Regards
Allan Papernick, Q.C.
Barrister & Solicitor
Toronto

Table of Contents

COVER

FEATURES

SPECIAL SECTION ON REAL ESTATE CLAIMS AND TITLE INSURANCE

DEPARTMENTS

Publications Mail Agreement No. 40026252

Return undeliverable Canadian addresses to:
LawPRO
250 Yonge Street
Suite 3101, P.O. Box 3
Toronto, ON M5B 2L7

How long should you keep your closed files?

"How long do I have to keep my closed files?" is one of the most frequent questions lawyers ask practicePRO.

Certainly you don't have to keep all files permanently – this just doesn't make practical or economic sense. Nor is the solution as simple as a one-size-fits-all rule for when to destroy closed files (e.g., toss everything at 10 years). For many reasons, file retention and destruction is a complex issue. This article examines why and provides some direction on how long you should keep your closed files.

Why keep closed files?

There are a number of reasons to keep your closed files. Some benefit your client, others benefit you. One of key reasons is to defend yourself against allegations of malpractice.

A well-documented file is often the best defence, especially if it contains evidence of the work done on a matter. Sometimes there will be no other source for that information. On many malpractice claims the lawyer and client will disagree or have different recollections on what was said or done – or not said or done.

Credibility is a critical factor for defending malpractice claims and LawPRO finds claims are difficult to successfully defend if the lawyer has not made efforts to include written or electronic correspondence, notes on personal or phone conversations and other documentation in the file. Clients usually have very specific recollections of what was said or done, and lawyers frequently have little or no recollection of what happened on a specific file.

Remember that most clients are involved with few legal matters in their lifetimes and are thus more likely to remember the specifics of what happened. Most lawyers will handle hundreds or even thousands of legal matters, making it more difficult to remember the specifics of individual files. When it comes down to credibility, judges often prefer clients with specific memories over lawyers with limited or no memories. This is why the information in a closed file becomes so important and why you should not underestimate the importance of a well documented file.

For these reasons, LawPRO encourages lawyers to ensure that files are well documented and handled in accordance with appropriate file closure, retention and destruction procedures. Consider the consequences of having no file available in the event of a claim:

- A reduced ability to defend the claim, as there is no evidence to establish what work was done on the matter;
- A reputational risk to the lawyer, who may have to appear in open court to defend the claim without a file;
- The increased risk of having to pay the deductible and a claim history levy surcharge, depending on the outcome of the claim and the program options selected by the lawyer;
- Ineligibility for the part-time practice option, as a result of an indemnity payment and/or cost of repair being incurred; and
- An increased risk of exposure outside of policy coverage and above policy limits for the lawyer.

Of course, in reporting a claim matter under the program, the lawyer is obliged to co-operate with LawPRO in the investigation and defence of the matter, including production of his or her file, to the extent that it then exists. Lawyers with excess insurance are encouraged to check with their excess insurers to determine their requirements and/or applicable policy terms.

How long do you keep closed files?

The news here is good and bad. The good news: In most cases, probably not as long as you might think. The bad news: In some cases, perhaps longer than you might think. The trick is figuring out what you can destroy after a reasonable and appropriate period of time and what you should keep for a bit longer.

A file retention policy can provide direction to firm members on what the firm's standard file retention period is and help lawyers identify the files that should be kept for a longer period of time. See page 5 for more information on file retention and destruction policies.

A good starting point for trying to answer the question on how long to keep closed files is LawPRO's data on how long claims take to surface (i.e., an allegation of malpractice is made or circumstances arise that make it appear as if a mistake might have been made).

Categorized by major areas of law, Figure 1 shows the years between the *error date* (the date the work was done) and the *reporting date* (lawyers are obliged to report real or potential errors to LawPRO as soon as they are aware of them) for 22,241 claims reported to LawPRO between 1997 and 2007.

The chart does not include data from more recent years, as many claims files opened in those years are still open and that data would not reflect a true cross-section of reported claims.

The good news appears in the first two columns: In most areas of law, the majority of claims arise in less than 15 years, and in some cases less than 10 years.

The caution column is the percentage of claims that arise beyond 15 years, in particular for real estate, family, and wills and estates claims. The bad news appears in the oldest claim column – some claims take a long time to make themselves known.

Figure 1: Age of claims reported by area of law

	Under 10 years	10-15 years	Over 15 years	Oldest claim
Real estate	90.2%	5.7%	4.1%	42 years
Plaintiff litigation	98.3%	1.3%	0.4%	31 years
Corporate	96.3%	2.5%	1.2%	41 years
Family	92.5%	4.8%	2.7%	26 years
Defence litigation	98.5%	1.1%	0.4%	24 years
Wills	91.0%	5.5%	3.5%	39 years
Labour	98.8%	1.2%	0.0%	14 years
IP	98.6%	0.9%	0.5%	18 years
Tax	95.9%	3.4%	0.7%	24 years
Criminal	96.0%	1.6%	2.5%	24 years
Securities	98.7%	1.3%	0.0%	13 years
Bankruptcy	96.2%	3.8%	0.0%	14 years

Is 15 years a starting point?

If you want to have a file around to defend the majority of the malpractice claims you might face, a reasonable choice, based on the data in the above chart, would be 15 years. This time period also happens to be the ultimate limitation period specified by the *Limitations Act, 2002* – although it appears the ultimate limitation period may not protect you for several years. For more on this topic see "A side note on the ultimate limitation period" sidebar on page 4.

In Ontario, under the *Limitations Act, 2002*, the general limitation period is two years running from the day the claim is discovered. This basic two-year period is subject to discoverability, and there are a number of exceptions that can extend the basic two-year limitation period.

The ultimate limitation does not run if a person with a claim is incapacitated or is a minor and is not represented by a litigation guardian with respect to that claim. The ultimate limitation also does not run if the person who the claim is against conceals that claim or wilfully misleads the person with the claim. There are also exceptions in other legislation. See s. 19 of the *Limitations Act, 2002* for a list of these. Where applicable, you should also keep in mind relevant limitation periods from other provinces or under federal legislation. Note that in some cases there are no limitations on environmental claims.

Thus, based on LawPRO 's claims data, and the ultimate limitation period in the *Limitations Act, 2002*, 15 years is probably a good starting point as a general rule. But it is not a strict rule that can or should be followed in all circumstances. (And as an aside: Should it be 15 years plus six months? Remember that after a statement of claim is issued you have six months to serve

it.) Lawyers must consider a number of factors and make at least some decisions on a file-by-file basis. In many cases the 15-year general rule will apply, but in some cases files should be kept longer than 15 years.

Setting a file destruction date

When a file is closed, the primary lawyer on that file should set a file destruction date, taking into consideration that a general rule — which does ensure some consistency and direction — won't necessarily work for all files. Personal judgment by the lawyer on a file by file basis is necessary. The lawyer should consider ethical, legal and professional considerations. These tend to be strict rules and many of them are unbending. The lawyer should also consider economic and practical factors. These are really business decisions and there is more flexibility here. Ideally the lawyer can look to a formal firm file retention and destruction policy for direction.

In setting a destruction date the lawyer should consider these questions: What is the likelihood I will face a malpractice claim or a Law Society complaint on this file? Is there any other reason I might need it? The answers to these questions will vary depending on:

- the area of law: See the age of claims chart above;
- the relevant limitation periods: What are the specific limitations relevant to this type of matter?
- the type of clients (e.g., limitations can be extended if minors or incapacitated individuals are involved);
- specific client characteristics (e.g., were they difficult or demanding and thus more likely to raise an issue in the future?);
- the type of matter (e.g., very simple vs. very complex with many parties);
- how likely you are to represent the client again in the future on a related matter.

When should you keep a file for more than 15 years?

Consider the above factors, especially if your clients are under a disability or are minors. Family law matters are more likely to come up beyond 15 years, often because issues relating to post-secondary school tuition and expenses come up in this time frame, and the amount of spousal support seems to be an issue that is revisited.

As people often own a property for more than 15 years, holding your real estate files for at least this long makes sense. Original wills and will notes should be kept much longer than 15 years.

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

A side note on the ultimate limitation period

When the *Limitations Act, 2002* was proclaimed in force on January 1, 2004, many lawyers hoped that s. 15 of the Act would provide immediate protection against claims arising from legal services performed more than 15 years before the claim was made.

Section 15(2) of the Act provides that "no claim shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place…"

The judgment of the Court of Appeal in *York Condominium Corp. No. 382 v. Jay-M Holdings,* 2007 ONCA 49 (http://www.canlii.org/en/on/onca/doc/2007/2007onca49/2007onca49.html) (also found at 84 O.R. (3d) 414) put an end to this hope.

The Court held that where the allegedly defective services were rendered in 1978, by virtue of s. 24 of the Act (the "transition provision"), the defective services were deemed to have been rendered on January 1, 2004. Therefore, the 15-year "ultimate limitation period" was inapplicable.

By reason of this judgment, it appears that claims based on legal services rendered on or before January 1, 2004, will be barred only as of January 2, 2019. As we move through 2019, legal services provided throughout 2004 will begin to be shielded from claims by s. 15. Claims for services rendered throughout 2005 will come under s. 15's purview through 2020, and so on into the future. In the meantime, s. 15 appears to be of little practical importance.

What is a file retention policy and why should your firm have one?

A file retention policy is a document that provides a step-by-step outline of the processes and procedures on how firm files should be closed, retained and destroyed. Having a formal policy means clear rules with which all must comply are in place, including a general file retention period for the firm and any exceptions. What gets written gets done. It should give direction on dealing with both the paper and electronic parts of a file.

The Law Society's new *Guide to Retention and Destruction of Closed Client Files* (http://rc.lsuc.on.ca/pdf/practiceGuides/retentionDestructionGuide.pdf) has a Sample File Retention Policy for law firms in Appendix 1.

Although the retention and destruction of client files is a critical issue, best practices would see a firm have a retention and destruction policy for other critical firm documents and records – in particular financial and business records, HR records, important contracts (suppliers, leases), and insurance policies.

And as a reminder, remember that Bylaw 9 provides that trust account documents and records must be kept for the 10 years immediately preceding the lawyer's more recent fiscal year end, and other accounting records and documents for six years immediately preceding the lawyer's more recent fiscal year end.

Tell your clients about your file retention policy

You should tell your clients about your file retention and destruction policy. The best practice would be to tell the client at the time you are retained and to include it in your retainer or initial correspondence.

Providing this information at the start of your relationship sets and controls the client's expectations as to what is to happen with the contents of the file while the matter is progressing and after the file is closed. Appendix 4 of the Law Society's file retention guide has a sample text you can include in a retainer. In your final reporting letter to the client, you should reiterate what was agreed with respect to file retention; do so again when you are returning the client's documents and other property.

Firms that work in a paperless office environment and maintain an electronic file have an opportunity to be very progressive and proactive on file management. Their retainers will provide that most original documents (e.g., correspondence from the other side) will be scanned and forwarded to clients as they arrive at the office, and that the firm will keep only an electronic record of that document. Doing this makes file management and the handling, closing and storage of closed files far easier.

Managing the file destruction process

The best practice is to have a calendar or tickler system that tracks destruction dates and provides a file destruction review reminder when the relevant destruction date arrives.

Setting a destruction date and blindly pulling the trigger when that date arrives is not appropriate. There should be a process whereby the primary lawyer or other appropriate individual reviews the file before destruction to make sure circumstances haven't changed. There also should be a process to postpone an already established file destruction date if there is a change in circumstances. Files that are to be kept indefinitely should be reviewed periodically (e.g., every 10 years) to see if circumstances have changed so they can be destroyed.

Recordkeeping after you destroy the file

In the event you must defend a malpractice claim, showing up with nothing more than a vague memory of having represented the client won't look very good. For this reason, you should retain some basic information about files that are destroyed including:

- The client's name: This is critical for conflicts searches. Consider keeping the names of the other parties to the matter;
- The client's address, the file number and a brief matter description;
- The date of file closure;
- The date of file destruction (or date file was returned to client or transferred out of the firm) and name of person that authorized this; and
- some record or details of what was destroyed.

The above comments provide some direction on the proper procedures to follow with respect to file retention and destruction. See the Law Society's *Guide to Retention and Destruction of Closed Client Files* for more detailed instructions and checklists.

When you do legal work involving foreign law or lawyers:

Are you covered?

Lawyers and their clients are more mobile than ever before. With the Internet, easy international travel and a global economy, relationships and business transactions – and legal matters and disputes – frequently cross international borders. Handling matters that involve foreign law can increase the risk that you will face a malpractice claim, and can have important malpractice insurance implications that you should keep in mind.

This article highlights activities and situations involving dealings with foreign lawyers and foreign law that can lead to situations that will likely not be covered under the LawPRO policy.

E&O issues

Remember that the LawPRO policy provides protection for claims that are the result of your error, omission or negligent act in the performance or failure to perform "professional services" for others involving the practice of the law of Canada, its provinces and territories. What will, or will not, be covered can be very fact-specific, but you should expect that you are not covered for work involving non-Canadian law. Moreoever, in our experience, claims involving foreign law tend to be very expensive and are frequently for amounts in excess of the LawPRO program limits. These claims also often involve some type of joint venture arrangements that are sophisticated frauds or are intended to dupe the lawyer and/or client.

In addition to raising insurance issues, giving advice with respect to foreign law in a jurisdiction where you are not admitted could expose you to an unauthorized practice of law prosecution, even assuming you have sufficient knowledge of the foreign law in question.

Don't overlook or take shortcuts on basic file-opening procedures when handling matters involving foreign law, even where the client also directly retains foreign counsel. Client ID and conflicts checks are necessary to ensure you identify any issues they raise with respect to clients involved with other matters at your firm.

As much as you may want to help a client, don't be tempted to give even the most basic advice with respect to foreign law, even if you know for certain that the information is correct. Just telling a client about a foreign law deadline or commenting on a few words in an agreement governed by foreign law fully exposes you to a claim.

And, don't give foreign advice and try to pretend you are not doing so. LawPRO sees this scenario when lawyers write long opinion or reporting letters providing information and advice on foreign law, but also include a disclaimer with respect that information and advice at the end of the letter. Of course, the disclaimer states that the information in the letter is not to be relied on and that the client should get a foreign lawyer. Despite the disclaimer, you are potentially in trouble if a client relies on the information in the letter.

Tricky scenarios

There are some common scenarios where foreign law issues can sneak up on you. For example: What country does that tiny little governing-law clause at the end of the contract specify – Canada or another country?

Consider as well if there are local law requirements that might frustrate what you are trying to accomplish. This can arise if you are drafting a will gifting real property located in another country. A will that is otherwise valid under Ontario law, may not be valid and cause the gift to fail under the law of the country where the property is located due to non-compliance with local execution or attestation requirements. There can also be local requirements involving taxes, bookkeeping or records when there are transfers of money, securities or real property.

You will likely be dealing with a foreign counsel if your client needs assistance on a matter in a foreign jurisdiction where you are not admitted and insured. LawPRO strongly advises you to consider having the client retain the foreign counsel directly. This will give the client a direct relationship with foreign counsel, rather than a relationship that flows through you. Although not a guarantee, this can help insulate you from a malpractice claim by your client for the work done by the foreign counsel. For a case study on this very situation, see the sidebar article, "Cross-border selection of lawyers: Issues to consider."

Clearly document the advice given to your client with respect to the requirement for advice from a foreign law qualified counsel. Ideally, your retainer should also explicitly provide that your advice will solely be respect to the laws of Canada.

Beware of the potential for a "right-hand left-hand" disconnect when dealing with foreign counsel. This can easily happen where there are language barriers or time pressures due to a pending closing date on very complex corporate transactions in which the client has local and foreign entities involving multiple lawyers in different countries. LawPRO sees claims in these situations when changes in plans or revisions to draft documents are not communicated to all who need to see them.

Malpractice coverage: Is there any?

When dealing with foreign law and lawyers, ask your clients if they expect a certain minimum level of malpractice coverage. Client expectations and requirements can vary. Also ask if the foreign counsel has legal professional liability insurance. Don't assume this is the case! In most jurisdictions lawyers are not required to have malpractice insurance, and even if they do, the coverage can be substantially less than LawPRO 's standard

coverage or $1 million per claim, $2 million in the aggregate.

Ask foreign counsel how much coverage they have. What is covered and what is excluded? Are there limits in the policy or by agreement with the client? Although Ontario law forbids any agreements between lawyer and client that would limit a lawyer's liability, such limitations are common practice in some other jurisdictions. Get a copy of the foreign lawyer's professional liability policy and review it to determine if there are other provisions that cause concern. Consider as well the obligation to maintain insurance in case a claim arises many years after the work was done.

If you are dealing with a situation where there is foreign malpractice insurance, ask yourself these additional questions:

- What are the foreign malpractice insurance requirements?
  - Does the foreign jurisdiction have minimum requirements?
    - Minimum limits?
    - Required coverage through the local Law Society or Bar?
    - And if your firm has coverage for foreign legal work in place, are foreign carriers allowed to provide any or all of the insurance that you require?
- If coverage is required, what levels of insurance are available in the foreign jurisdiction?
- Consider how to structure your insurance coverage to avoid any gaps.

Other considerations involving foreign jurisdictions

And while not directly insurance-related, consider the other often complex requirements that can come into play if you are working on matters in a foreign jurisdiction, and in particular if you are physically doing work there.

These can include:

- finances, banking and retainer arrangements and records
- entity structure
- professional regulation and licensing
- corporate and business regulation
- criminal and civil regulation
- taxation
- immigration and employment regulation
- insurance
- client expectations and needs
- national culture.

For a much more detailed outline of issues to consider, see the ethical requirements document for "registered foreign lawyers" or RFS's that the Solicitor Regulation Authority in the United Kingdom has published.

Handling legal matters that touch on foreign law and issues are becoming more commonplace for many lawyers. Exciting and rewarding as these matters may be, they need to be handed with caution and care, as coverage for these types of matters generally will not fall within the scope of LawPRO coverage. Recognizing this, lawyers are well advised to structure their retainers to ensure the client understands that the Ontario-based lawyer will only handle that part of the matter that is the practice of Canadian law, and that the client may need to retain other counsel for work involving the law of non-Canadian jurisdictions.

If one of your lawyers is properly admitted in a foreign jurisdiction and doing work involving the laws of that jurisdiction, arrange your own coverage for that work, as it will not be covered under the LawPRO policy.

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

Cross-border selection of lawyers:
Issues to consider

When you shop for a contractor for a home renovation, you are often reminded about the need to ensure your contractor has third party liability insurance and workers' compensation insurance – just in case.

Do you ask that same question when you shop for a lawyer outside of Ontario? Do you remember to ask if the foreign lawyer carries professional liability insurance? And do you know what his/her coverage is?

Imagine this. A 40-year-old client's husband dies in a plane crash in the United States, the result of alleged negligence by air traffic controllers who fail to identify a storm and instruct the pilot to fly into an extreme thunderstorm. All on board are killed. The client is left a widow with two young children.

Because the widow resides in Ontario, she comes to you – an Ontario lawyer – for help. You find out that liability is not an issue as another individual in the United States successfully filed a claim through the Federal Aviation Administration (FAA) for negligence against the air traffic controllers. Clearly the case needs to be commenced in Michigan; but because you are not licensed to practise in Michigan, you cannot act for your client as it would be a breach of the Rules of Professional

Conduct. As well you would not have E&O coverage under your LawPRO policy, pursuant to the territoriality exclusion.

Recognizing the importance of proportionality and professionalism by taking into consideration the complexity of the matter and significant damages claim (about $7 million), this case would justify that you assist the client as legal advisor. Your client instructs you to find the best possible Michigan lawyer to carry out the litigation on her behalf; you are to assist her in liaising with that lawyer. A thorough search leads you to a lawyer who will take the case on a contingency arrangement, with you and the lawyer taking a share of the proceeds of any settlement or judgment.

Initially things move smoothly – until the day the lawyer informs you the limitation period was missed to file a notice to the FAA regarding the claim against it. Your client's lawsuit is now one in negligence against the lawyer in Michigan for missing the limitation period – but discover his errors and omission insurance only provides coverage with diminishing insurance limits of $250,000 – nowhere close to covering your client's $7 million claim.

A claim for negligent referral

While the concept of negligent referral has received minimal consideration in Canada, the topic has been widely discussed in the United States and recognized as an issue by the courts in the United States. Generally, the U.S. courts have been reluctant to impose liability on a referring counsel for the negligence of a recipient lawyer if the referring counsel has taken minimal care in his/her selection. There are policy reasons for this. We live in a world of legal complexity, and it is ethically responsible (and a lawyers' obligation under our Rules of Professional Conduct) for a lawyer to seek out specialists and refer clients to the appropriate counsel,[1] particularly in a foreign jurisdiction.

However, the factors examined in the discussion of whether a referring lawyer should be found responsible for the negligence of the recipient lawyer include the following:

- the due diligence of the referring lawyer in selecting the recipient lawyer including investigating the background of the receiving lawyer[2];
- the fee arrangement, if any, in place for the referring lawyer[3];
- whether the referring lawyer maintained a joint responsibility with the recipient lawyer such that the referring lawyer was in a "general counsel" or supervisory role[4];
- whether an indemnity agreement was in place[5]; and
- whether there were any conflicts of interest arising because of some relationship between the referring lawyer with the recipient lawyer[6].

While the courts in the United States generally swing in favor of the referring lawyer, referring lawyers are not immune to the claims made against them for negligent referral and at least one court, in Florida, has imposed liability on a referring lawyer[7].

One factor that can tip the scales against a referring lawyer is whether the innocent lay victim will be compensated for the damages to which he or she is entitled. In other words, did the recipient lawyer have professional liability insurance to cover the damages sustained by the client?

This consideration is especially important to practising lawyers in jurisdictions such as Ontario that have a mandatory error and omission insurance program with minimum limits. Many countries require practising lawyers to carry E&O insurance, but the limits vary from one jurisdiction to the next. In the United States, only Oregon has a mandatory errors and omissions program. Some jurisdictions in the United States may have a mandatory requirement to be insured if lawyers work in a large corporation. It's therefore important for Ontario lawyers to ask if lawyers in foreign jurisdictions have professional liability insurance with sufficient coverage for their client's case.

A referring lawyer may not be able to avoid a claim simply because he does have insurance coverage and the recipient lawyer does not or has only limited insurance coverage. If you're in a situation where you are selecting counsel in a foreign jurisdiction – do your due diligence: Evaluate the foreign lawyer's credentials diligently. And make sure the recipient lawyer carries up-to-date errors and omissions insurance with limits sufficient for the client's case.

Ed. note: See the practicePRO website for a table comparing the professional liability insurance requirements of various jurisdictions around the world.

Jennifer Ip is senior claims counsel at LawPRO. Research for this article was provided by Victoria Margolin, articling student at LawPRO.

1 Barry Temkin, "Can Negligent Referral to Another Attorney Constitute Legal Malpractice" (2001) 17 Touro Law Review at 639
2 *Wildermann v. Wachtell*, 149 Misc. 623, 267 N.Y.S. 840 (S.Ct. New York Co. 1933) aff'd, 241 A.D. 812, 271 N.Y.S. 954 (1st Dep't 1934) at 624-25, 267 N.Y.S. 2d at 842; *Tormo v. Yormark*, 398 F. Supp, 1159 (DNJ 1975); *Ibid*
3 *Norris v. Silver*, 701 So. 2d at 1238 (Fla. Dist. Ct. App. 1997); *Supra* note 1
4 *Broadway Maintenance v. Tunstead & Schechter*, 110 A.D. 2d 587, 487 N.Y.S. 2d 799 (1st Dep't 1985); *Supra* note 1; Rachel Bosworth, Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era, 84 Texas Law Review, December 1, 2005, 509 at 514
5 *Supra* note 1
6 Erin Coe, "5 Ways to Avoid Referral Mishaps" (22 September 2010), online: Portfolio Media Inc.
7 *Supra* note 3 at 1239

New rules and guidelines

Assessing your client's outstanding claims for audit purposes

By Carmele N. Peter, Aikins, MacAulay & Thorvaldson, Winnipeg, & Fred Headon, Air Canada, Montreal

On January 1, 2011, certain organizations will begin using International Financial Reporting Standards (IFRS) as the basis for preparing their financial statements. In this article we examine the implications of IFRS for lawyers and the Interim Guidance that will help lawyers comply with recent changes to Canadian and international accounting and auditing standards.

This morning's mail brings an inquiry letter from your client. The auditor is reviewing the company's financial statement and the client wants your input. The letter lists several outstanding claims involving your client and asks you to confirm that the claims are properly described and that the evaluations of loss or gain are reasonable. Your client is also asking you to review the list to see if any other claim should have been included.

Red flags: *What period of time does the audit cover?*

What approach should you use to assess the outstanding claims?

How can you preserve solicitor-client privilege?

By when does your client need your reply?

It is the responsibility of a corporation's management team to prepare financial statements. Auditors then review those statements to confirm that they reasonably reflect the corporation's financial status. During this process, corporate clients may ask their lawyers to confirm corporate information about current claims and possible claims. None of this is new. What is new are different accounting rules that some corporations will begin to use in 2011.

As of January 1, 2011, publicly accountable, for-profit corporations, government business enterprises, and other enterprises which

Comments?

The joint Canadian Bar Association and Auditing and Assurance Standard Board Working Group welcome input on the Interim Guidance. Write to epii@cba.org

choose to do so will begin using International Financial Reporting Standards (IFRS) as the basis for preparing their financial statements. Corporations have been getting ready for this conversion for some time. Their lawyers need to be ready too, as IFRS also changes the ground rules for them.

The IFRS have different rules for reporting "contingencies" or uncertain items, including unresolved legal claims. These rules differ in some important ways from the current Canadian Generally Accepted Accounting Principles (GAAP), found primarily in Section 3290 "Contingencies," which Canadian auditors, clients, and lawyers have been following.

The IFRS contingency rules are found in International Accounting Standard 37, *Provisions, Contingent Liabilities and Contingent Assets* (IAS 37). IAS 37 has been in place for over ten years, but is being revised with the date of a finalized new version expected to be in 2012 – at the earliest.

In the meantime, lawyers with clients subject to IFRS will have to respond to inquiries about unresolved legal claims following the existing IAS 37 rules. Since these rules differ in some important ways from the current GAAP, the Canadian Bar Association and the Auditing and Assurance Standards Board have been working together to provide lawyers and auditors with immediate guidance on audit-related inquiries about unresolved legal claims.

The *Interim Guidance (Assurance and Related Services Guidance AuG-46*) is intended to bridge the gap between January 1, 2011 and the date on which a revised *Joint Policy Statement on Audit Inquiries* (JPS) comes into effect, reflecting a revised IAS 37.

The Interim Guidance takes as a starting point the JPS prepared by the Canadian Bar Association and the Canadian Institute of Chartered Accountants in 1978. The JPS sets out what lawyers and auditors can "properly expect of the other in connection with the audit inquiry process."

The JPS guides lawyers on how to answer audit inquiries to meet "meaningful disclosure" audit standards while preserving their obligations to their client, including the protection of privilege.

Reporting on contingencies,

including unresolved legal claims – simplified

GAAP approach

Including a potential claim:

- likely
- "non-determinable" a possible entry in a report

Estimating liability:

- reasonable estimate

Not disclosing:

- OK to omit if significant adverse effect

Timing:

- substantial completion approach with effective date of response the date of completion of auditor's field work

IFRS approach

Including a potential claim:

- more likely than not

Estimating liability:

- best estimate

Not disclosing:

- justification for non-disclosure rare – has to be seriously prejudicial and some information still required

Timing:

- tighter turnaround – effective date of response five days before auditor's report date

It recognizes that clear expectations and good communication between a lawyer and client and between the client and auditor are essential to avoiding a qualified audit report and its potential prejudicial impact on a client's business.

The JPS will continue to apply when clients follow current GAAP and not IFRS. The JPS will also apply to IFRS clients when the Interim Guidance is silent on a matter. Be sure you and your clients know which rules to apply.

Interim Guidance for lawyers with IFRS clients

The *Assurance and Related Services Guideline – Communications with Law Firms Under New Accounting and Auditing Standards* (AuG-46) was adopted by CBA and AASB in August 2010. Its main topics are:

- the threshold for identifying a claim
- the approach to estimating the expected value of a claim
- disclosures
- the dates that apply to a letter of inquiry and a response.

The threshold for identifying a claim

IAS 37 uses a wider net than the current rules when identifying claims which must be considered – financial statements should recognize a present obligation that arises out of a past event when it is probable that a payment will have to be made to settle the legal or constructive obligation.

This is a "more likely than not" approach. In contrast, GAAP's Section 3290 rule requires reporting when it is "likely," i.e. the chance is high, that a future event will confirm that payment is required. While there is no official interpretation of these phrases, one way to think about this would be to say that under the IFRS approach, a corporation would be expected to report claims when there is a greater than 50 per cent chance that a payment might have to be made. Under the GAAP approach, "likely" is viewed as a higher hurdle, so a corporation might only report legal claims that are estimated to have a 70 per cent or greater likelihood of being settled against the corporation. These percentages are a rough guide, not hard and fast rules.

Section 3290 also says that claims do not have to be included when there is insufficient or conflicting evidence upon which to determine amounts. Only amounts that can be reasonably estimated ("determinable") have to be included.

IAS 37, on the other hand, recognizes that using estimates does not undermine the reliability of a financial statement and that in almost all cases an estimate is possible. "Not determinable" will not likely appear on financial statements under IAS 37.

For those enterprises reporting under IFRS, clients and auditors may need to re-assess claims previously categorized under

Resources for lawyers

About the JPS

The *Joint Policy Statement on Audit Inquiries (JPS)* was written by the Canadian Bar Association and the Canadian Institute of Chartered Accountants. In place since 1978, it provides guidance to lawyers who are asked to respond to questions about a client's unresolved legal claims in the context of an audit.

The rules for reporting on contingencies will change for some Canadian enterprises in 2011 when they convert to the International Financial Reporting Standards (IFRS).

The JPS has therefore been enhanced by the *Interim Guidance (Assurance and Related Services Guidance AuG-46)* to assist lawyers advising clients who are now following the IFRS. The JPS will be revised once International Accounting Standards for reporting on contingencies are finalized.

Find out more about the *Joint Policy Statement on Audit Inquiries (JPS)* and *Interim Guidance (Assurance and Related Services Guidance AuG-46)* at http://www.cba.org/CBA/jointpolicystatement/main/default.aspx

New Accounting Standards in Canada

The CICA Handbook – Accounting has been restructured to move away from the single financial reporting framework currently in place under Canadian Generally Accepted Accounting Principles (GAAP). The revised Canadian GAAP has five financial reporting frameworks:

- Part I – International Financial Reporting Standards (IFRS)
- Part II – Accounting standards for private enterprises
- Part III – Accounting standards for not-for-profit organizations
- Part IV – Accounting standards for pension plans
- Part V – Canadian GAAP prior to the adoption of Parts I, II, III or IV (Pre-changeover accounting standards)

There are no changes to the way to account for contingencies, including unresolved legal claims, for entities covered by Parts II to V. Entities that fall under Part I will follow IFRS accounting standards which have a different accounting approach for reporting on contingencies.

Section 3290 rules, because claims or potential claims previously excluded may now need to be included under the IAS 37 rules.

The approach to estimating the expected value of a claim

IAS 37 expects clients to be able to give a reliable estimate of the amount that might be owing. The expected value is to be included as an accrual. In the rare situations where no reliable estimate is possible, for example in some lawsuit situations, the liability is to be disclosed as a contingent liability.

The IAS 37 rules require a "best estimate," a higher standard than Section 3290's "reasonable estimate" approach. To make a "best estimate," the IAS 37 "may require the client to perform more complex measurement calculations, and take different factors into account, than required under "Contingencies" Section 3290. (paragraph 10). Factors may include previous experience with similar claims, management's intentions regarding an out-of-court settlement or trial, the range of possible outcomes, and the likelihood of cash flows relating to the possible outcomes (paragraph 11).

Clients may wish to confirm their analysis of the factors that led to their conclusions with their lawyers. The Interim Guidance says that to protect privilege, the client should communicate directly with the law firm without disclosing the communication to the auditor. The audit inquiry letter, once prepared, should provide only a brief description of the factors the client considered and their conclusions, and ask the law firm to confirm the reasonableness of the client's conclusions (paragraph 13).

Disclosures

IAS 37 has more extensive disclosure requirements than Section 3290. Section 3290 allows for information to be omitted if there might be a significant adverse effect to the client. IAS 37 only allows omissions that would be seriously prejudicial and then requires the financial statement to include a general description of the nature of the dispute and the reasons why the information is not being disclosed.

The Interim Guidance (paragraph 15) foresees that "clients may consult with law firms on more aspects of the proposed wording of financial statement disclosures of claims and possible claims under IAS 37 … than they would for financial statement disclosures under … Section 3290."

The dates that apply to a letter of inquiry and a response

The JPS uses a substantial completion approach, requiring that the contingency information should be accurate up until the date of the completion of the auditor's field work. It anticipates that a law firm will receive an inquiry letter three weeks before the auditor's field work is to be completed and that there will be a two-week time lag between the completion of the auditor's field work and the issuance of the auditor's report.

IAS 37 shortens the period between the effective date of a law firm's response and the anticipated audit report date to five days. It anticipates that a law firm will receive an inquiry letter three weeks before the effective date for the response. The inquiry letter should include a date by which a response is required.

The Interim Guidance recognizes that law firms may have trouble meeting the deadlines and says that the law firm should advise the client if it is unable to meet the response date. The client would then bring this to the auditor's attention to see if the extension of the response date deadline is acceptable. If not, the auditor would ask the client and the law firm to find a "mutually agreeable solution to the timing problem" (paragraph 16[c]).

Both the Interim Guidance (paragraph 16[d]) and the JPS (section 09) foresee the possibility of the client having to ask the lawyer to update information at the request of the auditor.

To preserve solicitor-client privilege

Clients are likely to call on their lawyers to advise them on the application of the IFRS to claims and possible claims in respect of their enterprise. To preserve solicitor-client privilege, lawyers should:

- Keep consultations between the client and lawyer.
- Avoid becoming involved with the auditor – the client should be the point of contact.
- Resolve with the client any disagreements that arise with the client. Only if no resolution is possible should the matter then be raised among the lawyer, the client and the auditor.
- In response to audit inquiry letters, only confirm or deny the reasonableness of the client's descriptions and estimates and do not provide explanations or your reasoning. If further discussion is required, it should be with the client only, at least until it is clear no resolution can be reached.

The value of clear communication

The JPS and the Interim Guidance both attempt to balance the need for lawyers to hold client information in strict confidence with the need for meaningful disclosure of claims and possible claims in a client's financial statements. The documents set out the parameters of a lawyer's obligation to respond to a client's audit inquiry letter and, to the benefit of all, promote clarity of communications between clients, their lawyers, and auditors.

Gearing up for IFRS at LawPRO

IFRS may be a fairly new subject for most lawyers.

But for LawPRO, it's been an important focus since the words "International Financial Reporting Standards" were first mentioned several years ago.

Why does a company such as LawPRO – which is not publicly traded – have to move into an IFRS world from the current GAAP regime? Because we are an insurance company and, as such, are considered to be a "publicly-accountable entity." We collect premiums so members of the "public" (in our case, lawyers under the professional liability program, and purchasers and lenders under the TitlePLUS program) are viewed as having an interest in holding us accountable.

It did not take long for us to realize that this new financial reporting regime would bring changes to the way we account for and present our financial results – and would require a plan of action to ensure we were ready to work in an IFRS world when this new standard came into force.

Educating ourselves about IFRS and its implications for LawPRO has been made easier by the many articles, backgrounders and education programs that accounting firms have been sending us non-stop for years. Since Canada is following Europe and Australia (among other jurisdictions) in adopting IFRS, we can learn from the experiences of others who have cut their teeth on IFRS elsewhere, and from the many precedents now out there.

So we have our plan of action for moving into the IFRS world: Our Finance group has produced the project structure document, resource assessments and many impact analysis documents, to ensure we stay current with what has turned out to be an evolving topic.

We have been keeping members of our Audit Committee up-to-date with IFRS and its implications for the company. As well, we have been reporting on our preparations for IFRS to our primary regulator, the Financial Services Commission of Ontario, on a semi-annual basis since February 2009. From time to time, this column in LawPRO Magazine will bring lawyers up to speed with the changes we are making as we move into an IFRS world.

What will change?

As of today, it is hard to say, as IFRS standards evolve over time and the most important standard from our perspective (IFRS 4 - Insurance Contracts) is still being finalized.

What we do know today is that:

- Our December 31, 2011, financial statements must be IFRS-compliant, and the LawPRO Audit Committee is supervising the transition to a new form of balance sheet, among other presentation changes.
- The notes to our financial statements will be longer under IFRS, as there is a major emphasis on disclosure. Some European insurance companies saw the length of their notes double once they adopted IFRS. So watch for the longer form of financial statements to be released in the spring of 2012; we hope you will find the additional disclosure helpful. Bear with us as we try to balance our ongoing "greening" of LawPRO against the voluminous notes that we expect to have to produce in our annual report. We've already begun to cut back on printing that report as much as possible – and will look for other options to minimize the number of trees this conversion to IFRS requires.
- It appears that the financial impact for LawPRO as of the 2011 transition will be minimal (in fact, many of the accounting options offered on transition to IFRS have been pre-determined for the insurance industry by the regulators).
- There will be a further transition date once IFRS 4 is finalized. The impact on insurance companies may be significant at that time. International debate is currently hot and heavy over some very important concepts, such as how insurance companies set the discount rate applicable to analyzing claims reserves. We have described in past articles and reports (see for example, "Financial results explained" in the May/June 2010 issue of LawPRO Magazine) how the choice of the discount rate (that is, the assumed future interest rate applied by our actuaries to determine how much money we need today to pay claims in the future) can affect whether we need more or less money in our claims reserves. Major tinkering with such concepts, depending on how the debate is resolved, could mean LawPRO has to move money from shareholder's equity to our claims reserves, for instance. This second transition is likely still a few years away.

Only time will tell if the goal of IFRS – to make companies more financially accountable to their stakeholders – is achieved. We will, however, try to make the transition as painless as possible for all involved and affected – and to continue helping the profession understand its new responsibilities (and potential risk exposure) under IFRS.

There's more to title insurance than meets the eye

On the surface, the title insurance business looks to be a roaring success: In 2009, title insurance premiums in Ontario alone were more than $130 million. Over the last 10 years, the revenue of major Ontario title insurers has increased more than 500 per cent.

But one does not need to scratch too far below the surface to discover that for the bar, this business has come with – and continues to have – its fair share of challenges.

Lawyers continue to express surprise at the fact that title insurance does not take the risk out of real estate practice. In this editorial and on the following pages, we examine why real estate lawyers continue to report claims in numbers we have not seen for many years – and why the use of title insurance has not necessarily taken the pressure off the errors and omissions (E&O) program.

As we discuss on the following pages, many lawyers using title insurance still don't understand the product they're using and how it works – even though an estimated 95 per cent of residential purchase transactions in Ontario are now title-insured and a lawyer "not at that time in the employ of the title insurer" must issue a certificate of title for each policy, under O.Reg. 69/07. Several articles examine this conundrum – and provide insights into what is and is not covered.

Our goal with this special focus on real estate and title insurance: To share information that will help the practising bar make better choices and decisions – and ultimately help keep real estate negligence claims in check and real estate lawyers in the game.

Title insurance and the E&O program

Has the advent of title insurance in Ontario helped take the financial pressure off of the errors and omissions (E&O) program?

It may be tempting for some to point to all the claims paid by title insurers and say that they represent savings to the E&O program to the tune of 100 cents on the dollar. For example, in 2009 title insurers in the aggregate (including LawPRO) reported to the regulators more than $50 million in title insurance claims costs in Ontario. But those claims would not necessarily all have been covered under an E&O policy for lawyers' negligence; they could, for example, arise out of risks such as post-policy date coverages and lawyer fraud where there are no innocent partners to pursue, or

from title insurer acceptance of risk where a search was waived by the title insurer.

We have to assume that in a non-title insurance world, lawyers would have continued to make title and off-title searches consistent with the legal standard of practice, and the latter category of claims (waiver of searches) would not have arisen, or would have been much smaller. In terms of risk areas that would **not** have been covered under a lawyer's E&O insurance, this is a benefit for the insured clients, but not necessarily a big cost savings to the E&O program.

As mentioned above, title insurance premiums in Ontario for 2009 were in excess of $130 million. So, on a simplistic analysis, about 40 cents of each per premium dollar is going towards claims, based on regulatory filings. With a claims ratio for the industry as a whole in the neighbourhood of 40 per cent, it is not surprising that title insurers feel able to offer protection that one doesn't necessarily obtain from a lawyer's opinion on title. And that extra protection is all good for clients!

The "lawyer-as-advisor" model

Protection for consumer clients is at the heart of the lawyer-focused model of title insurance that we have come to take for granted. But keeping intact this model (which pivots around consumer protection issues and the value that a lawyer adds to the transaction) has been and continues to be a struggle.

Back in the mid-1990s, the real estate bar successfully held at bay what it saw as efforts to start us down the road towards a U.S. conveyancing model – in which a real estate closing handled by a title agent, backed by title insurance, is often an alternative to using a lawyer.

What galvanized the Ontario bar to repudiate the U.S. non-lawyer model back then was the conviction that lawyers play an important role in protecting the consumer interest in conveyancing. Homebuyers go to their lawyers to help them avoid or solve problems: They look to their lawyer to take care of the "legal stuff" and prevent problems down the line. Title insurance, then, is but one tool in the lawyer's conveyancing toolbox. And to ensure it is used appropriately, the Law Society in the late 1990s revamped its *Rules of Professional Conduct* to reflect this fundamental change in the Ontario real estate landscape.

In the intervening years, this model of the lawyer as the quarter-back of a real estate purchase transaction has carried on notwithstanding closing centre pilot projects, the insourcing of mortgage-only document preparation by some title insurers, and certain lenders outsourcing mortgage work to third-party processors (or intermediaries) on purchase transactions. The concern raised by these process models: whether access to independent legal advice for clients is necessarily as embedded; and thus whether the lawyer's role as independent legal advisor and source of value-added information is being undermined.

But for the real estate bar to continue to be a pivot point in conveyancing, lawyers need to seriously take on the mandate of being their clients' valuable and trusted advisor: To be embedded for the long term, lawyers must continue their vigilance and oversight. You need to be adding value, and demonstrating to your clients how you add value.

Another ongoing concern is the recent use of contests among title insurers: When aimed at law clerks working in law firms, these programs appear to solicit policy orders in return for the chance of some type of reward. Who is running the show at a firm where the central protection for the client in the deal (that is, a title insurance policy instead of an opinion on title) can be influenced by the availability of a contest entry for a staff member?

These types of programs raise issues: Although LawPRO has no jurisdiction or interpretive power over the *Rules of Professional Conduct*, one wonders how such contests jive with the commentary to Rule 2.02(12) which states that the fiduciary relationship between lawyer and client prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm and any employee or associate of the firm. Of course, it is unlikely that any client knows to complain, or has even connected the dots to figure out who ultimately bears the cost of such contests.

Needless to say, LawPRO and our TitlePLUS program will not play the game of rewards (or the chance of rewards) for policy orders. We have recently voiced our concerns and questions about this type of activity on the part of other title insurers with the appropriate insurance regulatory body. Even if our technical analysis were proven to be incorrect, we cannot see how this approach to distributing insurance helps your clients, the prospective insureds under the title insurance policy.

If these activities are left unchecked and unchallenged, we could in Ontario find ourselves in a similar situation to that found in various states south of the border: In the past some title insurance sales and marketing programs existed which resulted in certain title insurers paying millions in response to allegations of market misconduct (civil and/or regulatory), often (if not always) settled without a finding of contravention or liability. It behooves us, as members of the bar, to put our own integrity at the forefront and to avoid a title insurance world where detailed rules are needed to regulate marketing and distribution.

After all, isn't it a pretty simple rule when the client's best interests must be paramount?

Kathleen A. Waters
President & CEO

Real estate claims trends: errors & insights

Real estate law accounts for the second highest number of legal malpractice claims in Ontario, after civil litigation. But real estate law is responsible for a higher percentage of claims costs than litigation – and the trends are up for both the count and cost of real estate claims.

Over the last ten years, real estate-related claims averaged 29 per cent of LawPRO 's claims count (612 claims per year), and 30 per cent of our claims costs ($19.7 million per year). On average, resolving a real estate claim cost LawPRO $43,325 over that period.

But Figures 1 and 2 below reveal that averages tell only part of the story. There has been considerable variation over the past decade. The number of real estate claims dipped to 425 in 2003 and rose to 651 in 2009. Claims costs dropped below $12 million in 2001 but rose to over $23.5 million in 2009.

As costs in the real estate area of practice have significantly increased, it is clear that real estate claims represent a major risk for LawPRO and the bar. As well, revenues from real estate transaction levies have decreased with the widespread use of title insurance. To effectively risk rate the program, as per our mandate, it was necessary to increase the real estate transaction levies to $65 per transaction in 2010. Without the real estate transaction levy, real estate lawyers would be paying a base premium of $9000 in 2011.

This article examines the most common real estate-related errors LawPRO sees, and the steps you can take to reduce the likelihood of a claim.

The most common errors

In the real estate area, the most common causes of claims are the following:

- lawyer/client communication failures;
- inadequate discovery of facts or inadequate investigation;

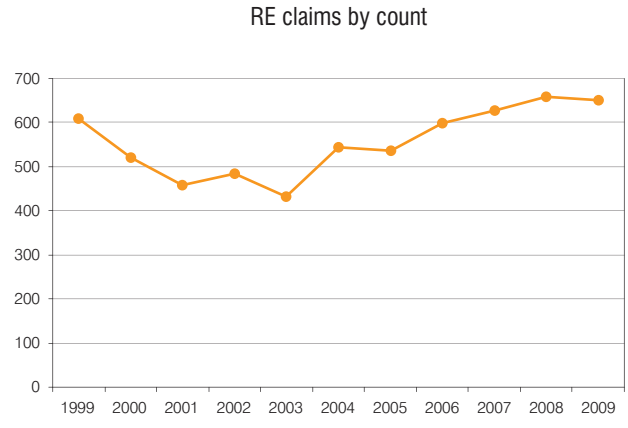


Figure 1: Claims count by area of law

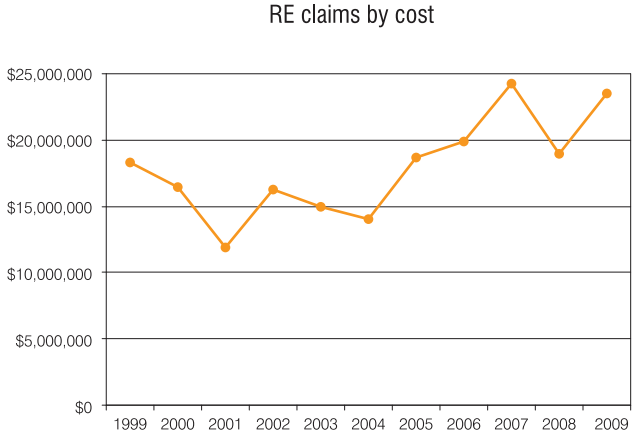


Figure 2: Claims costs (case incurred) by area of law

- failure to know or properly apply the law;
- conflicts of interest;
- fraud;
- clerical/delegation; and
- time- and deadline-related errors.

Figure 3 illustrates the relative proportion of these errors. What is surprising to most lawyers is that law-related errors rank third, well behind communication and inadequate investigation errors. Lawyer/client communication-related errors are actually the most common, representing 40 per cent of the errors in the real estate area.

There are some interesting changes in the proportion of errors by type over the last ten years. As a percentage of the total number of real estate claims, law-related errors have declined in recent years. From 1999 to 2004, on average they accounted for 10 per cent of real estate claims, but from 2005 to 2009, they averaged only five per cent. In the latter period, clerical and conflicts errors are now exceeding law-related errors.

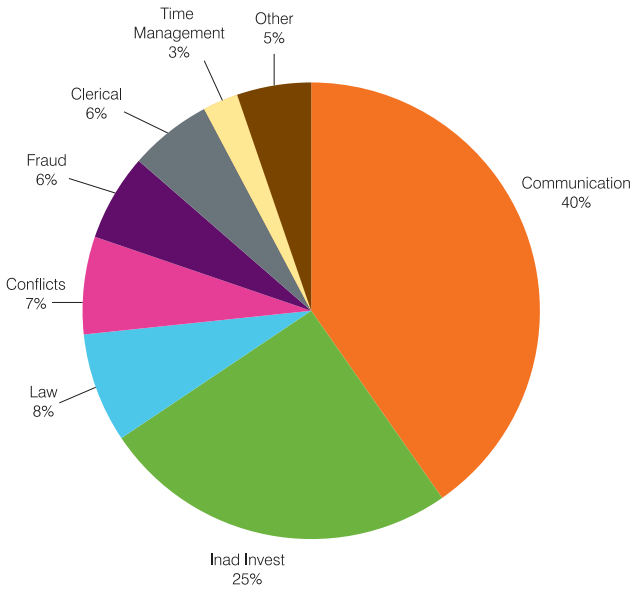


Figure 3: Real estate claims by type of error (1999-2009)

Communications-related errors

The most common cause of malpractice claims on real estate files are lawyer/client communication-related errors. These fall into one of three general categories:

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

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

Failure to inform client or get consent

The most common type of communications error on real estate files – 49 per cent of communications-related claims – involves a failure to obtain the client's consent or to inform the client. Examples of this type of error include:

- Failing to disclose material information to a lender client. Such material information could include, for example:
  - A recent transfer of the property for a lower amount.
  - A series of recent transfers of the property for escalating amounts.
  - The existence of outstanding tax arrears or arrears on a mortgage in priority.
  - The fact that the deposit was paid by someone other than the purchaser or is a "phantom deposit" (i.e., although the agreement of purchase and sale indicates there was a deposit, no deposit was actually made).
- Failing to inform a client about restrictions on land use contained in a subdivision agreement.
- Failing to review the survey and to discuss the risks or problems it reveals with the client.
- Failing to explain the location of a condominium parking space to a client. The number posted for a parking space in the parking garage may not correspond with that parking unit's number on the condominium plan.
- Failing to inform a client who selects title insurance 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.
- Failing to inform a client who does not select title insurance about the post-closing protections provided by title insurance that the client is not receiving (e.g., regarding post-closing encroachments onto the property and fraud).
- Failing to inform a client well before closing about any significant problems arising out of requisitions going to the root of title that might result in the transaction being aborted.

Failure to follow client's instructions

A "failure to follow client instructions" is the second most common communications-related error and accounts for 41 per cent of communications-related claims. It really amounts to nothing more than a simple failure to follow a client's specific instruction. The most frequent scenarios for this error include:

- Not inquiring about or following through on the client's intentions for future use of the property. For example, not doing the necessary zoning searches or getting title insurance with a future use endorsement. The client may intend to build a swimming pool, but sewers or utility easements may make this impossible. Zoning may not permit a home-based business or multiple dwelling units.

- Failing to ensure that the condominium unit shown on the plan meets the client's expectations, (e.g., whether it overlooks a lake or a parking lot.)
- Failing to do a proper title search and review the survey to ensure that the access route to an otherwise "landlocked" rural property that a client is relying on is properly deeded and reflected on title.
- Failing to inform a client about possible environmental contamination arising from the existing or a prior use of the property (e.g., as a gas station or dry cleaning operation) that might interfere with the client's intended future use.

Poor communication with client

Poor communication with the client is the third most common communications-related error and causes 10 per cent of this type of claim. Common scenarios for this error include:

- Failing to ensure that the client understands what you are telling him/her and that you understand what he/she is telling you, particularly if there is a language barrier.
- Failing to ensure that the client understands clearly what you will be doing as the lawyer and what the client is responsible for doing.
- Failing to establish clearly who your client is, (e.g., where two or more family members have an interest in the transaction.)

Avoiding communications errors

When it comes to avoiding or reducing the likelihood of a communications-related claim, the importance of putting things in writing cannot be over-emphasized. While the failure to have written confirmation of instructions and advice is not negligence in and of itself, such written communication can be extremely helpful in defending you in the unhappy event that a claim is made against you (or about you to the Law Society, or if you are defending your account before an assessment officer).

Why is having something in writing so helpful? Because more often than not, this type of claim involves the lawyer recalling that one thing was said or done, or not said or not done, and a disappointed or upset client who alleges something different.

This type of claim is very hard for LawPRO to defend successfully. At the end of the day it essentially comes down to a question of credibility. Judges tend to prefer the client's evidence, as the client usually has a much better recollection of what transpired and what was said.

Remember, most clients are only involved in one or two real estate deals in their lifetimes, so they tend to remember exactly what happened. On the other hand, lawyers who have done hundreds or thousands of deals tend to have little or no recollection about what happened on a specific transaction, especially one in the distant past.

And unfortunately, we frequently find inadequate documentation in the lawyer's file to back up the lawyer's version of what occurred. All too frequently, we see files with no notes or correspondence documenting what was said and done, and on occasion, even files with no reporting letters whatsoever.

Fortunately, communications-related errors are among the easiest to prevent. You can significantly reduce your claims exposure by documenting your work:

- Confirm the information that your client provided to you, your advice to the client, the client's instructions to you, and what steps were taken on those instructions.
- Document the time spent reviewing the title search, and note what issues were discussed with the client. This can be done in your notes, and in interim or final reporting letters, or even in an e-mail message. Admittedly, you can't document everything on every file, but taking the time to document unusual things or issues that seemed to concern the client can be very helpful in the event of a claim, especially if you have a difficult or demanding client.

Consider docketing time

Most real estate lawyers do not track or docket the time they spend on real estate files. This is a shame, as there are two benefits of doing so.

First, by tracking lawyer and staff time you can determine the actual amount of time you are spending on each file – a critical piece of information for determining if you are making any money on each real estate deal you complete.

Secondly, even taking just a few seconds to make detailed dockets can be a lifesaver. "Conference with client re: condo purchase, including re: parking space and locker" is much better than just "Conference with client re: condo purchase"; "Conference with client re: review of subdivision agreement, including restrictions on future building" is much better than just "Conference with client re: subdivision agreement." Weeks, months or even years after a deal is completed, detailed dockets such as these can serve to confirm that particular issues were discussed with the client.

Inadequate discovery of facts or inadequate investigation

The second most common malpractice error in the real estate area is "inadequate discovery of facts or inadequate investigation." Examples include:

- Misreading (or not reading) a survey, search, or reference plan.
- Not noticing inconsistencies in condominium unit numbering between the agreement of purchase and sale and the condominium plan.
- On a condominium purchase, failing to ensure that the parking space and locker specified in the agreement of purchase and sale are actually for sale and that the legal description of both units is correct.
- On a condominium purchase, failing to ensure that the parking space and locker are specified in the title insurance policy.

- Failing to carefully review a condominium status certificate and to bring any deficiencies to a client's attention.
- Not doing a title search on a commercial lease.
- Not fully researching sublimits and other restrictions on title insurance that affect coverage.
- Giving an undertaking to discharge a mortgage as vendor's solicitor, but failing to carefully review and ensure the accuracy of the discharge statement – in particular, failing to ensure that the statement reflects all the amounts owing by the vendor to the lender that are secured by the mortgage.
- In condominium purchases, failing to ensure that the draft transfer and mortgage, and the title insurance policy if there is one, include the correct PIN, unit and level numbers for parking spaces and lockers.
- Failing to follow up on a requisition to clarify whether outstanding tax arrears are for municipal taxes or retail sales tax.

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

Failure to know or properly apply the law

The third most common type of error in the real estate area is a failure to know or apply the law, accounting for eight per cent of the number of claims between 1999 and 2009. The good news here is that law-related claims seem to be on a downwards trend over the last several years. The law-related mistakes we most frequently see are the following:

- Failing to fully understand or properly apply the part-lot control provisions of the *Planning Act*.
- Failing to know about or fully understand s. 3(9) of the *Land Transfer Tax Act* regarding tax deferrals on transfers of property between affiliated corporations.
- Not being sufficiently aware that different types of searches are required depending on the type of property being purchased (e.g., single unit vs. multi-unit, commercial vs. residential).

Conflicts of interest

Conflicts of interest accounted for seven per cent of real estate claims reported between 1999 and 2009. Of concern is the fact that conflicts claims are on the rise.

Examples include:

- Acting where you have a personal interest in the transaction, for example:
  - Acting for the mortgage lender where you have a personal interest in the property, (e.g., a mortgage in priority on the property).
  - Acting for the vendor of the property where you have a personal interest in the purchase.
- Acting for more than one party/entity
  - Acting for vendor and purchaser (for example, when it contravenes Rule 2.04.1 of the Rules of Professional Conduct).
  - Acting for two or more family members or related family business entities.
  - Acting for both a corporation and one or more of its individual directors or shareholders.
  - Acting for a borrower and guarantor of a mortgage.

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

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

Fraud

Fraud is the fifth most common cause of claims in the real estate area, but in recent years it has overtaken law-related and conflicts claims to move into third place. Fraud accounted for only five per cent of the number of real estate claims from 1999 to 2004; from 2005 to 2009 it was responsible for eight per cent.

Note also that while fraud accounts for six per cent of the *number* of real estate claims, it is responsible for 12 per cent of the cost of those claims – and fraud costs are also going up. From 1999 to 2004, fraud accounted for only eight per cent of the cost of real estate claims. From 2005 to 2009, it accounted for 15 per cent.

Here are the common types of real estate frauds:

Fraudulent discharges: A "borrower" asks a lawyer to help with a mortgage loan. The lawyer's search reveals that a previous mortgage has been discharged. The lawyer registers a new mortgage, apparently in the first position. But the discharge turns out to be fraudulent, registered by someone in cahoots with the "borrower." Once the fraud is discovered, the old mortgage is put back into priority so that there is not enough equity to cover the (now) second mortgage.

Value frauds: A series of phony sales results in an artificial increase in the value of a property for the purpose of obtaining higher value mortgages than can be supported by the true equity in the property.

Identify theft: Usually targeting elderly homeowners, the fraudsters find homes that are unencumbered, prepare false identification and transfer the property to a co-conspirator who obtains a mortgage.

Bogus bank drafts on mortgage deals: Fraudsters get real estate lawyers acting on mortgage deals to run counterfeit bank drafts through their trust accounts. A new client or lender contact allegedly from a major bank asks a lawyer to act on a mortgage matter. Mortgage instructions and/or a bank draft drawn on a major bank look legitimate. In some instances, the fraudsters have stolen the identity of a legitimate property owner. The instructions and the draft turn out to be counterfeit.

Shelter frauds: An individual who doesn't qualify for a mortgage enlists the help of a "friend." For a payment, the friend acts as the borrower/purchaser and takes title to the property – effectively selling his good credit. The person who hired him moves into the property and promises to make the mortgage payments. When this person defaults on the mortgage payments, 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 another and should have made him aware of the consequences of defaulting on the mortgage. The lender may also claim against the lawyer for failing to disclose all the relevant information s/he knew (or should have known).

Examples of lawyers' errors include:

- Not diligently checking the identification of a new and previously unknown client to help prevent identity theft fraud.
- Not challenging and investigating the bona fides of a power of attorney that is suspicious on its face.
- Not doing further investigation after discovering frequent activity on title in a short period of time.
- Not informing the lender about such frequent activity. If after being so informed, the lender opts to proceed and advance the mortgage funds, not confirming in writing with the lender that s/he has decided to proceed.
- Not taking steps to confirm that a purchaser client is planning to live in the property where there is reason to believe that s/he does not intend to do so and is merely pretending to be a legitimate purchaser on behalf of someone else, e.g., where the client does not seem to know much about the property being purchased or appears to be taking instructions from others who are not part of the transaction.

Deposit fraud: The newest and latest variation of real estate bad cheque fraud involves an aborted promise to pay a deposit. We have seen at least a dozen of these frauds attempted in locations all over the province – on multiple occasions in Toronto and Ottawa – and also in London, Thunder Bay and Keswick.

In this scam, a "client" is looking to purchase property, either a specific property or one that a lawyer or real estate agent is to help the client locate. In the latter scenario, parameters are provided, e.g., a three-bedroom house with a pool in downtown London priced between $500,000 and $750,000.

The client will be new to the firm and may appear to come from a trusted referral source, either a real estate agent or another

cont'd on page 22

Why so many real estate claims in a title insurance world?

Title insurance is now widely used in residential transactions in Ontario, but the number and cost of real estate-related claims have been climbing steadily in recent years.

Why is this happening? Among the reasons are the following:

- Title insurance only covers the purchaser's side of the transaction. It does not address claims by vendor clients.
- Title insurance is still less common in commercial real estate transactions – which can result in very costly claims.
- Claims that arise from transactions completed a decade or more ago are often not covered by title insurance.
- Lawyer/client communication and inadequate investigation errors – the two largest types of errors leading to real estate claims — are less likely to be covered by most title insurers, although it can depend on how the loss manifests itself.
- Not all real estate transactions are title-insured. Purchasers are not required to buy title insurance and may prefer to rely on a lawyer's opinion on title.

cont'd on page 21

The increase in the cost of real estate claims can be attributed in part to the significant increase in real estate property values over the last few years. Average house prices rose 22 per cent in Ontario between 2005 and mid-2010, for example. So when problems arise on properties on which there is no title insurance (as is the case with transactions completed years ago), losses are often significant.

Similarly, claims on commercial real estate – where title insurance is not as widely used – also tend to be more costly than in the past, again because of the significant increase in property values.

Why is there an E&O claim when the transaction is title-insured?

But even where there is title insurance, claims may occur for a variety of reasons.

Some claims may result from improper delegation to, and inadequate supervision of, support staff. For example, a lawyer may end up securing the wrong type of title insurance policy, e.g., a single-unit policy for a multi-unit property or a residential policy for a commercial property. A problem subsequently surfaces, the title insurer legitimately denies coverage – and the client sues the lawyer.

A claim may arise because a lawyer fails to include in the application for a title insurance policy all the interests appurtenant to the property being purchased, e.g., a right-of-way or the parking and locker units in a condominium transaction. As a result, these interests are not covered by the policy.

Many claims are the result of lawyer/client communication errors related to title insurance.

LawPRO has seen claims against lawyers for not recommending title insurance to clients and for obtaining title insurance without fully informed consent. We have even seen claims occur because a lawyer simply fails to purchase a title insurance policy, although instructed to do so by the client!

A common client communication error is failing to ask about a purchaser client's plans for the property being purchased and to apply for an appropriate future use endorsement to the title insurance policy, if necessary.

The client may be buying a parcel of vacant land, for example, with the intention of building a large "dream home" on it. However, in the absence of a specific future use endorsement, a title insurance policy only insures what exists on the date of closing, i.e., a vacant lot. If the client later discovers that because of setback requirements, s/he will only be able to build a much smaller house, the policy will not likely respond – and the client will come after the lawyer.

Another communication error that may lead to a claim is failing to explain exceptions and exclusions to the client. If the title insurer denies coverage because of an exception or exclusion, the client may assert that the lawyer never told him or her about it.

Failing to advise a client about a title insurer's sublimit on the amount of coverage for a specific issue and /or in a specific geographical area can also lead to a claim.

The widespread use of title insurance does not prevent a lender client from making a claim against a lawyer for failure to disclose material information that would have affected its decision to enter into a mortgage transaction and advance funds.

Traditional title insurance (that is, without legal service coverage) will protect the lender if a mortgage is fraudulent and invalid, but most title insurance policies will not protect the lender if the mortgage is valid and enforceable, but there has been "value fraud" – i.e., the transaction has been engineered to obtain a greater amount of mortgage financing than is justified by the true value of the property.

In the latter case, if the lender enforces the mortgage and suffers a shortfall, it may contend that the lawyer failed to inform it about important information relating to the true value of the property and seek to recover its loss from the lawyer.

Any proposed real estate transaction that doesn't come to fruition can be the subject of a claim against a lawyer. Title insurance – even if contemplated – is not available to help in this situation, because if a deal doesn't close, no title insurance policy is purchased.

lawyer. The client will be overseas, most commonly in the U.K., and will provide copies of identification, including passport, driver's licence, business card, etc. In some cases the identification documents provided were allegedly notarized by someone who turned out to be a fake lawyer who claimed to work at a genuine U.K. law firm.

There is an elaborate workup to the deal, including loads of email or phone communications and even signed agreements of purchase and sale. The communications will be very sophisticated, and a great deal of background information will be provided. In one case, on the strength of the reputation of the lawyer involved, a house inspection was done after an agreement of purchase and sale was signed but before a deposit was paid.

A deposit in an otherwise reasonable amount will be promised but will not be delivered.

Closing will be imminent, and the client will be unreachable for a short while. When the client is again reachable, there will be some excuse provided (e.g., medical issues), and then a very large cheque will show up – far in excess of the promised deposit and in some instances more than the purchase price. This cheque sometimes will come from a third party (frequently some kind of investment advisor) and will be counterfeit. The client will then ask for part of the funds to be returned to the client or paid to a third party (e.g., for medical expenses, to buy furniture) and will instruct the lawyer to wire the money offshore.

Clerical and delegation errors

Clerical and delegation errors also account for six per cent of the number of real estate claims. It is disconcerting to LawPRO that these errors are on the rise. Typical examples include the following:

- Not meeting with the client. Delegating the entire file/transaction to a law clerk.
- Failing to meet with the client to explain all the legal consequences of the transaction, such as the nature and consequences of a mortgage.
- Failing to establish clear law office policies and procedures regarding what the lawyer will do and what the law clerk will do in a real estate transaction.
- Failing to inform a client about title insurance and searches.
- Failing to review the statement of adjustments for clerical errors.
- Giving the lawyer's personalized e-reg™ pass phrase to a law clerk. This is a violation of the Rules of Professional Conduct and may lead to a denial of coverage in the ordinary course, subject to some fraud protection under the Real Estate Practice Coverage Option.
- Failing to register a discharge of mortgage (vendor's lawyer).

Time- and deadline-related errors

Time- and deadline-related errors are the seventh most common type of error we see in the real estate area. They fall into one of two distinct types: (1) not completing tasks in an appropriate amount of time (i.e., procrastination) causes 60 per cent of real estate claims in this area, and (2) missing deadlines or limitation periods causes 40 per cent of real estate claims in this area.

The procrastination-related errors we frequently see include:

- Failing to respond to requisitions well before closing, e.g., re: outstanding writs of execution.
- Failing to respond to requisitions that go to the root of title well before closing.

Commonly missed deadlines or limitation periods include:

- Failing to submit requisitions on time.
- Failing to complete the required searches before closing.

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

Even if no allegations are made…tell us!

If you become aware of a potential claim, you should immediately report it to LawPRO, even if no allegations of negligence are made.

Putting us on notice will help us help you, and will most likely help reduce the damages on any potential claim. We may retain counsel to assist you and protect your interests, including helping you draft an affidavit and attending with you if you are examined as a witness. And remember, best practice is not to turn your file over without a court order. We can help ensure that the court order is worded appropriately to protect your interests. It is interesting to note that we close about 84 per cent of our real estate claims without any indemnity payments.

Your marching orders

You can't totally eliminate the risk of a malpractice claim. However, you can substantially reduce your risk of a claim by improving your lawyer/client communications and documenting your work. Review and consider the types of errors that occur in the real estate area, and set aside time to integrate the various risk management strategies outlined above into your practice.

Prepared by Norman MacInnes, corporate writer/editor at LawPRO and Dan Pinnington, director of practicePRO with assistance from Tim Lemieux, practicePRO coordinator and members of the LawPRO claims departments.

Title insurance: Separating fact from fiction

In just over a decade, title insurance has gone from a little-known development to a mainstay of real estate practice. In Ontario alone, title insurance is a $100 million a year industry: Between 1999 and 2009, the revenue of the major title insurers of Ontario grew 534 per cent. Not surprisingly it is estimated that upwards of 95 per cent of Ontario residential real estate transactions are title insured.

Despite its widespread use, title insurance appears to be somewhat of an enigma to many lawyers, say LawPRO claims counsel. The misconceptions around coverage, claims filing, and the fine print in the different title insurers' policies are many, they say.

"Sometimes the only reason a lawyer gets title insurance is because the lender client says 'Get title insurance,'" says Dale Herceg, LawPRO claims counsel. "I had one lawyer tell me he thought title insurance was there if there was a shortfall on the mortgage caused by a change in the market value."

This article, based on conversations with members of the LawPRO claims and TitlePLUS departments, aims to dispel some of the myths that surround title insurance.

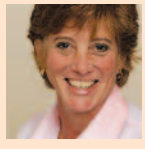
Myth: Title insurance is a one-size-fits-all policy that eliminates the need for searches or surveys

Fact: One of the most common errors that lawyers make is purchasing the wrong title insurance policy for the property says, Rosanne Manson, LawPRO claims counsel. "So, for example, they'll purchase a policy for a single-family dwelling when it's a multi-unit property."

Certain types of properties will require more searches, while others require virtually none. For example, few searches generally are required for basic single-family homes while residences with basement or attic apartments (or otherwise multi-unit) require additional searches, Manson says.

She cites the following scenario: The client purchases a multi-unit property, but the lawyer purchases a policy for a single-family residence; therefore the title insurer would not require a building department search. After closing, outstanding

"It's important to know what the client is buying and the different title insurers' requirements depending on the type of property being purchased," says Rosanne Manson.



work orders are discovered. But because the wrong policy was purchased, the title insurer denies coverage.

It's important, says Manson, that lawyers take the time to ask their clients about the property so they can perform the required searches – and ensure the client ends up with the right type of title insurance policy.

"Had they done the searches, they would have discovered problems with the property," she says. "So the title insurer denies coverage, because the homeowner's policy covers a single-family home when it's actually a multi-unit building."

The result: The policyholder files an E&O claim against the lawyer – a potentially time-consuming and costly process that raises issues of the lawyer's deductible and claims history surcharge levies if this ends up being a claim paid under the LawPRO E&O program.

"It's important to know what the client is buying and the different title insurers' requirements depending on the type of property being purchased," Manson says. Title insurance doesn't absolve the lawyer from extra work, she adds. "Rather it's an added level of protection for the clients and the lawyers. Lawyers must still do their due diligence."

Myth: Title Insurance covers future use of the property

Fact: Title insurance will cover many problems that could have been discovered if certain searches (which were not required by the title insurer) or a survey of the property were completed before closing.

Manson and Herceg warn that not everything that would have been uncovered by searches will be covered by title insurance: They give the example of floodplains and other environmental restrictions placed on properties.

"Many lawyers don't sit down with the client and say 'By purchasing title insurance, I'm not going to give a title opinion, and I'm not going to do these searches,'" Manson says.

"And most clients – lay people – wouldn't know what the effect of the searches would be — which means they don't necessarily have a full picture of the property they are buying and a proper understanding of what title insurance will or won't cover in the event a future problem is discovered. People just don't always understand." That is why it is so important for lawyers to sit down with the clients and explain what title insurance is, and what it covers and will not cover, she adds.

For example, if the clients decided they wanted a pool built in their backyard, but after closing learn they can't proceed because the land sits in a floodplain, title insurance will not compensate the owners because they cannot use the property as intended.

Some title insurance companies do offer a "future use" endorsement. However, this coverage often comes at an extra cost to the client, and can't be obtained unless the lawyer has an understanding of what the client will need or want in the future.

"Many lawyers don't sit down with the client and say 'By purchasing title insurance, I'm not going to give a title opinion, and I'm not going to do these searches,'" Manson says.

Myth: Title Insurance will cover all future building compliance risks

Fact: Manson stresses that title insurance policies will only cover defects that would have been identified if a search had been completed prior to closing. Generally, title insurance policies will not cover compliance defects that would not have been discovered in a traditional search of building department records.

For example, if renovations are done on the property without a permit and not up to code (e.g., illegal wiring behind drywall), defects would not have been identified through a building department search – and generally are not discovered until the drywall is torn down. Since there are no outstanding work orders on this property for this issue, and the issue is not discovered by the policyholder until after closing, a title insurance policy generally will not cover the cost of bringing the wiring up to code.

However, title insurers typically provide coverage in the event a homeowner is required by work order, court order or other authority to correct deficiencies on the property.

Myth: Title insurers will always pay to settle a claim

Fact: Title insurance providers will find the most cost-effective way of making an insured "whole." This doesn't always mean putting money on the table says Chris March, TitlePLUS national sales manager.

"It's up to the title insurer to determine how to rectify the situation when there's an actual loss and the policy gives the insurer some choices," says March. "So for example, if there is a dilapidated garage on the property, maybe a foot over the property line and the city is now saying 'that has to be moved and fixed,' it's up to the title insurer to decide how to address that problem.

"As a title insurance company we can step in and say 'What's the value of that property?' If we determine that the property will be worth more by just knocking down the garage and taking it away – then it is our prerogative to do so where that is allowed under the policy."

"It's up to the title insurer to determine how to rectify the situation when there's an actual loss," says Chris March.

Myth: E&O coverage offered by title insurers is comparable

Fact: Each title insurance company has its own unique title insurance policy, with subtle differences in covered risks, requirements for searches, exclusions and/or underwriting practices. Herceg advises lawyers to take the time to understand these differences, so they are better able to ensure a client gets the right kind of title insurance policy.

One area in which there are significant differences is in the area of E&O (or legal service) coverage. The name may be similar – but the coverage details and costs can vary widely from insurer to insurer.

If your title insurer says that it has E&O coverage, here are some questions that you may wish to ask, in order to protect your client and/or yourself:

- Does the coverage come with every policy at no extra charge, or does a special endorsement or additional form of coverage need to be arranged as part of each policy? If the latter is the case, you should check that it is being issued for each policy where the client wants it, and that any exclusions or exceptions pertaining to this coverage are acceptable. Where applicable, is the cost acceptable in light of the coverage obtained?
- Does it provide coverage to resolve the actual problem, thus benefiting your client, or just reimburse you personally for your LawPRO deductible and claims history levy surcharge, after you have reported the problem to LawPRO?
- If the E&O insurance policy is a free-standing policy (that is, not part of the title insurance policy itself), does its coverage only extend to claims arising from deals where you arranged for your client to buy a title insurance policy from that insurer? Are there aggregate limits per annum on the coverage?
- Is there any limitation that ties the E&O coverage, in whole or in part, to issues affecting the title to the property or use and enjoyment of the property? In other words, consider whether, in your view, it is as broad as true E&O insurance coverage. Sometimes a few innocuous looking words in an insurance policy can have an appreciable impact on coverage.

Your professional judgment will lead you to conclude what is best for your clients, in the context of your practice.

But sometimes half the battle is knowing the right questions to ask.

"Sometimes the only reason a lawyer gets title insurance is because the lender client says 'Get title insurance,'" says Dale Herceg.

Myth: I made a mistake – so it must be an E&O claim

Fact: In the span of only one month, Claims Counsel Dale Herceg had four files come across his desk in which lawyers assumed they had an E&O claim when in fact the errors were covered by the title insurance policies the lawyers had secured for the clients. In two of the cases, Herceg says there were missed outstanding writs of seizure and sale.

"When I told the lawyers to tell their client to file a claim with the title insurer, they were reluctant to do so. They assumed that issue was not covered,'" he says. "In each of those cases the title insurer responded positively and agreed to pick up the claim, and the matter was resolved.

"The lawyers told me that they didn't know title insurance would cover that specific issue," he says. "Sometimes lawyers dismiss the applicability of title insurance without ever filing a claim (on behalf of their client) with the title insurer."

He adds this doesn't mean lawyers shouldn't report the matter to LawPRO. If they are unsure if a claim is covered under their E& O policy or by title insurance policy on a transaction, they should notify both LawPRO and the title insurer. But if the claim is clearly covered under the title insurance policy, then reporting only to the title insurer is appropriate.

"My advice: Read the policy," says Herceg. "And understand it. Know precisely what is covered and what isn't. And when there is a potential loss situation, report it! A report is a letter – it takes five minutes to write up."

Megan Haynes is communications coordinator at LawPRO.

Title insurance – not the panacea solicitors had hoped for

LawPRO initially hoped that title insurance would result in decreased costs to the errors and omissions program. To obtain exemption from the real estate transaction levies, certain title insurers agreed with The Law Society of Upper Canada (Law Society) in March 2005 to "indemnify and save harmless" Law Society members "from and against any claims arising under the title insurance policy(ies), except for the member's gross negligence or wilful misconduct." The form of agreement was subsequently amended, in 2009, after discussions between the title insurers and the Law Society. There are no reported cases interpreting the new form of agreement.

Unfortunately, on occasion LawPRO has been forced to incur expense to enforce this agreement in its earlier form, as its applicability in different situations has come before the courts. In many other cases, the agreement is working satisfactorily and the reported decisions will help to guide all interested parties in the future.

Furthermore, recent case law shows that title insurance, and the existence of the agreement with the Law Society, do not necessarily protect lawyers involved in title-insured transactions from negligence claims. The courts will look closely at the

nature and source of the allegations; just because one party involved in the transaction bought title insurance protection does not mean that every lawyer involved is necessarily insulated from every type of claim, from every possible source.

Stewart Title Guarantee Company v. Zeppieri

The first case to consider the 2005 Indemnity Agreement was *Stewart Title Guarantee Company v. Zeppieri.*[1]

Shlomo and Zvia Ziv sued their lawyer, Enio Zeppieri, for negligence regarding a real estate purchase. The Zivs purchased title insurance. Initially, the Zivs' suit was based on alleged negligent advice concerning an easement, which was an excluded risk under the policy. In 2007 they amended their claim to include an allegation that the conveyance contravened the Planning Act and that Zeppieri had failed to obtain good title to the property for them.

Zeppieri called upon the title insurer to honour the 2005 Indemnity Agreement and cover his ongoing costs of defending the Zivs' action. The title insurer refused.

The title insurer first took the position that it was only obliged to pay defence costs once the action was disposed of by trial or settlement. It denied that it was obliged to pay defence costs on an ongoing basis.

Justice David Brown rejected the title insurer's argument: It had agreed to "indemnify and save harmless." While "indemnify" might mean to reimburse for defence costs at the conclusion of the litigation, "save harmless" meant to pay defence costs on an ongoing basis. Justice Brown accepted the solicitors' submission that the obligation to "save harmless" means that a Law Society member should never have to put his hand in his pocket in respect of a claim covered by the terms of the 2005 Indemnity Agreement.

The court also noted that the subject title insurer signed the 2005 agreement in order to obtain exemption for its title insurance products from the $50 real estate transaction levy. The real estate transaction levy was put in place because of the high costs of both claims payments AND defence payments arising from real estate malpractice claims.

The title insurer also argued that it had no obligation to defend, because there was in fact no *Planning Act* problem – any *Planning Act* difficulty had been cured at the time of closing. Justice Brown held that whether or not this was true did not matter. As long as a statement of claim alleges a claim that falls within coverage, the insurer is obliged to defend.

Since there was no coverage under the title insurance policy for the Zivs' claim regarding the easement, Justice Brown encouraged the parties to negotiate an allocation agreement. If no agreement could be reached, then the title insurer was obliged to fund all defence costs incurred by Zeppieri, subject to retroactive adjustment upon final disposition of the litigation.

Freedman v. Toronto (City)

In late 2009, Justice Katherine Swinton applied the *Zeppieri* case in *Freedman v. Toronto (City).*[2] Sheldon Silverman acted for the plaintiffs in a real estate purchase. The plaintiffs purchased title insurance from Stewart Title. After closing, the plaintiffs discovered that the property had a progressively worse tilt. The plaintiffs sued Silverman, alleging that he failed to search for work orders from the City of Toronto against the property. Had he done so prior to closing, they alleged he would have found an order from the city in 1988 requiring an engineer's report about the condition of the property, as well as reports of follow-up inspections. Silverman also sued the City of Toronto. Cross-claims were issued.

The plaintiffs also made allegations which fell outside of the ambit of the title insurance policy, including Silverman's alleged failure to protect the plaintiffs' interests, consult with competent persons to determine the extent of the property's defects, provide competent legal advice, respond to telephone calls from the plaintiffs or to meet with them, advise of the status of the file, keep appointments, maintain adequate records of conversations with representatives of the owners, and respond to communications from representatives of the owners.

Justice Swinton was unable to determine the allocation of defence costs between the various types of claims. She did grant a declaration that the title insurer owed Silverman a duty to save him harmless from his reasonable defence costs incurred in defending claims arising under the title insurance policy – namely, those relating to his failure to make inquiries about municipal orders and encumbrances against the property – and that he was entitled to be reimbursed for his reasonable defence costs incurred to date and in the future until the final disposition of the action and cross-claims relating to those allegations.

Justice Swinton declined to declare that the title insurer was required to save Silverman harmless from all the defence costs in the action and cross-claims.

Yasmin Nakhuda v. Stewart Title Guaranty

A few months ago, in *Yasmin Nakhuda v. Stewart Title Guaranty,*[3] two solicitors – Nakhuda and Katz – brought applications for declarations that the title insurer was obliged to defend them in lawsuits arising from real estate transactions in which the applicants were involved, and in which the title insurer had provided title insurance to one or more parties in the transactions.

The solicitors relied on the March 2005 Indemnity Agreement between the title insurer and The Law Society of Upper Canada.

Justice Michael Penny held that the title insurer had no obligation to defend solicitor Nakhuda where Nakhuda was sued by a party who had no title insurance. Nakhuda represented Denise Francis, Tracy Francis and a man who allegedly impersonated Ray Oake in the transfer of land from Denise and Oake to Tracy. Denise was Oake's estranged spouse. Tracy was Denise's daughter. Immediately after the transfer of the property, Tracy obtained a mortgage from a bank. The entire transaction was a fraud and the net proceeds were misappropriated.

Nakhuda also acted for the bank, which had title insured the mortgage. Oake had no title insurance. Oake sued Nakhuda, Denise, Tracy, the bank and the person posing as Oake for damages, and to remove the transfer and the mortgage from his property.

The title insurer defended the bank under the terms of its title insurance. The bank made no claim against Nakhuda.

Stewart Title denied that the agreement it made with the Law Society in March 2005 entitled Nakhuda to any indemnity on the basis that the plaintiff, Oake, was not covered under any title insurance policy issued by it, and that the indemnity provided under that agreement only applies where an insured under a title insurance policy brings a claim against the lawyer acting on the title-insured transaction. Justice Penny accepted the title insurer's position on the facts of this claim.

On the other hand, Justice Penny held that solicitor Katz was entitled to a defence from the title insurer. Katz's clients, the Ferreiras, purchased a residential property. They also purchased a title insurance policy. A building permit had not been issued by the City of Hamilton. The home was defective in a number of ways. The Ferreiras sued the developers, the City of Hamilton, and the building inspector.

The city commenced a third party claim under the *Negligence Act* against Katz. The City alleged that Katz caused or contributed to the Ferreiras' damages by failing to make appropriate inquiries with respect to building permits and orders to comply and inspections.

Justice Penny rejected the title insurer's argument that "arising under the policy" requires not only that the subject matter be consistent with the policy, but also that the claim against Katz only be asserted by the named insured under the policy (the Ferreiras).

The claim asserted by the city was not independent of the Ferreiras' rights. Katz owed no duty to the city. The city's third party claim under the *Negligence Act* was based on the theory that Katz owed obligations to the Ferreiras and that he breached those obligations, causing all or part of the Ferreiras' loss. The claims of the City against Katz could be said to "arise under the insurance policy" owned by the Ferreiras. Accordingly, the title insurer was obliged to fund Katz's reasonable defence costs.

McFlow Capital Corp. v. Carter

McFlow Capital Corp. v. Carter[4] is the latest case to be decided in this area.

Garry Shapiro acted for a borrower, who agreed to give a first mortgage to McFlow. Shapiro did not act for McFlow. McFlow obtained title insurance from Stewart Title.

As part of the transaction, Shapiro undertook to McFlow to obtain the postponement of the existing second charge, in order that McFlow would enjoy first position. Shapiro unfortunately failed to obtain the postponement. The mortgage subsequently went into default and the property was sold under power of sale. The first chargee was paid in full; McFlow suffered a shortfall.

McFlow sued the title insurer on its title insurance policy. The title insurer issued third party proceedings against Shapiro on the basis that had the postponement been registered, McFlow would not have suffered the loss. Essentially, it was a subrogated claim. Justice Sandra Chapnik held that the third party claim was proper under Rule 29.

Conclusion

These cases show that although the 2005 Indemnity Agreement appears simple, its application has become the subject of litigation in some cases, as difficult fact situations have arisen. LawPRO has done its best to insure that solicitors obtain the protection provided by the agreement, but recent case law illustrates that title insurance does not in every instance protect the solicitors involved in title-insured transactions, especially where the lawyer's client did not obtain the subject title insurance or the allegations go beyond the policy coverage. Understanding the approach of the courts will help real estate practitioners understand where their exposures exist and take appropriate risk avoidance steps.

Debra Rolph is director of research at LawPRO.

[1] 2009 CanLII 2329 (ON S.C.)

[2] 2009 CanLII 82620 (ON.S.C.)

[3] 2010 ONSC 4926 (9 September 2010) [Unreported]. A PDF copy of this case is available on request from debra.rolph@lawpro.ca

[4] 2010 ONSC 5792 (CanLII)

TitlePLUS claims:
What the numbers tell us

When studying claims trends at LawPRO, we prefer to look at longer rather than shorter periods of time to ensure we have sufficient numbers to be able to identify trends. When it comes to title insurance, the need to wait is even more important, given that many claims do not surface until a title-insured property changes hands. Now 13 years old, the TitlePLUS program has a sufficient volume of claims that can be analyzed for trends.

The following analysis looks at claims from policy years 2000 through 2009 and categorizes those claims into four principal causes of loss, based on the frequency (number) of claims in each area of loss.

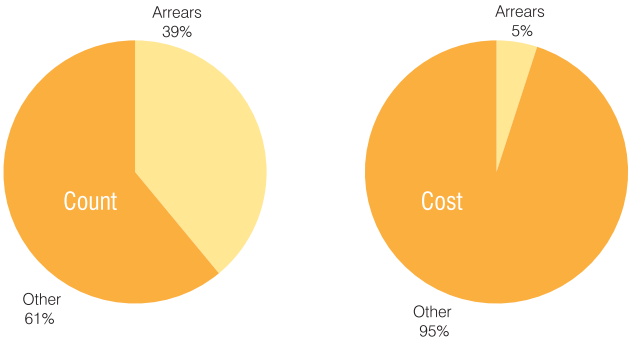
Arrears

The numbers

By number of claims reported, these are the most common claims in the TitlePLUS program, accounting for one-third of claims from 2000-2004 and rising to almost half of all claims for 2005-2009.

However, they are also the most straightforward to deal with and generally not as costly as other types of claims, as they are nearly

Arrears claims 1999-2009



all handled by internal staff. Arrears-type claims account for only five per cent of overall TitlePLUS claims costs. The average cost of these claims is about $1,400.

The details

Falling into this category of claims are any kind of payment arrears for which the owners of a property are responsible and which form a lien on title, but which are for a time period pre-dating the purchase of the property. Realty taxes or unpaid utilities account for about 90 per cent of these arrears claims, but this category also includes condo common element fees, local improvement levies and other retroactive assessments.

By far the two most frequent claims scenarios are:

- Homeowners receive a notice from the city that their home in a relatively new development has finally been assessed for property taxes dating back to the time of completion. It can commonly take a few years for municipalities to complete this assessment. The problem is, the current owners only just moved in and the previous owners lived there for most of the taxed time period. Since taxes "run with the land", the current owners are responsible.
- Previous owners not estimating the correct amount of water or utilities charges or sometimes not paying them at all, leaving the current owners stuck with the bill.

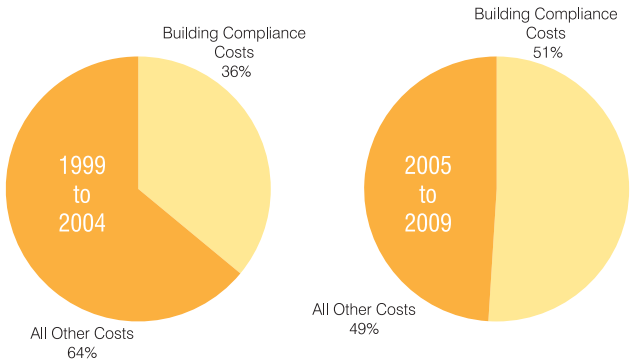
In the past, homeowners would have absorbed these costs themselves or tried to locate the previous owners and persuade them to pay the arrears (or sue them). Removing this relatively common problem from the homeowners' hands can make the price of their title insurance policy worth it – even if it's the only claim they ever have to make.

Building compliance issues

The numbers

The second most common type of claims in the TitlePLUS program – accounting for about 25 per cent of claims reported – falls into the broad category of building compliance issues.

Rising cost of building compliance claims 1999-2009



But while the numbers have held steady, the cost of resolving these claims is rising steadily. In the first half of this decade, building compliance claims accounted for about 36 per cent of costs. For the 2005-2009 period, these claims represented more than 50 per cent of all claims costs. The average cost of these claims has almost doubled to $27,000 in 2005-2009 from about $14,000 in 2000-2004, as construction costs have increased steadily during that time.

The details

Included in this category are any order from a municipality to bring a property into compliance with applicable building codes or other regulations, provided (of course) that the insured did not create the non-compliance. This could involve wiring, a deck, an addition or in rare cases even the entire home.

Scenarios here include:

- open building permits the purchasers were not aware of
- work orders relating to renovations on the house done by the previous owners without a permit
- electrical or fire code violations existing when the home was purchased.

Problems can be discovered in a number of ways. The home-owners may apply for a permit to do some new work only to discover existing permits that were not closed, or the homeowners may notice deficiencies with earlier work and have the municipality confirm that no permit was obtained.

Rectifying these problems may sometimes be as straightforward as requesting a permit and having a municipal inspector confirm the work was done to code. However, in the worst case scenarios the previous owner's renovation work was substandard and now the municipality is demanding that the property be brought into compliance. Then costs can rise quickly when adjusters and contractors have to be retained to determine the extent of coverage under the policy and the scope of work that is required. In addition,

Recovering costs under our subrogation rights

The TitlePLUS program has always attempted – under its rights of subrogation – to recoup claims costs where it can be determined that responsibility for paying the claim clearly rests with the previous owner or some third party. New processes and parameters to track our successes implemented in 2010 reflect the higher priority assigned to this effort.

Depending on the nature of the matter, our claims staff will assess the likelihood of success of pursuing a subrogated claim. We may seek the opinion of outside counsel. Unfortunately not every case has a clear-cut line of responsibility from the seller to our policyholder. For instance in a building compliance claim, the previous owners may not have been the ones who did the work; it could be several owners back and it may be difficult to establish who is responsible at law.

A multi-step process then commences which consists of a letter sent to the previous owners or their lawyers informing them of their responsibilities on a matter. If that fails to elicit a satisfactory response, we may initiate a proceeding in Small Claims Court or, if the amount is large enough, in Superior Court.

Our goal is not only to recover costs: We also want to establish a reputation for pursuing our rights. We believe the existence of title insurance should not be seen as a escape clause from paying tax arrears or other obligations.

To support our recovery efforts – and to ensure an effective investigation of each claim – LAWPRO asks that lawyers advise their clients to report any title insurance claims as soon as possible and before trying to correct a situation themselves. Homeowners who wait too long to report a claim, or take action (e.g starting repairs) before consulting a TitlePLUS claims specialist can jeopardize our ability to investigate coverage for their claim, as well as prejudice our subrogation rights. This can also negatively impact their policy coverage in some circumstances.

there are the costs of repair, demolition, rebuilding, or whatever the situation requires.

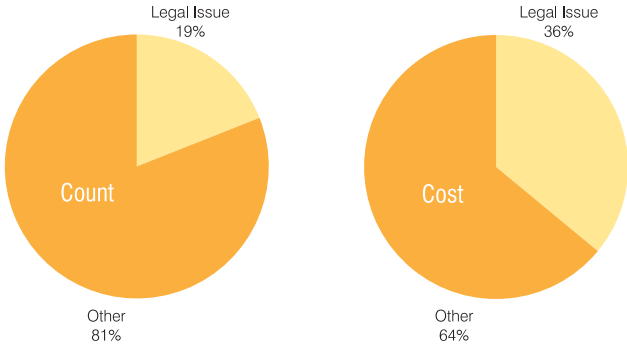
Why do we see so many of these claims? The current popularity of "DIY" shows has many homeowners believing they too can be Mike Holmes and undertake major renovation projects; however, they may not be as enthusiastic about obtaining permits as they are about doing the work. Municipalities facing budget pressures may not have the staff to enforce building code compliance on these "improvements" as rigorously as they'd like.

Perhaps more so than other types of claims, this is an area where the protection available to the homeowners exceeds what they would have had in the days when they would rely only on lawyers' searches. A search would have discovered open permits or existing work orders, of course, but any orders issued after the purchase date relating to pre-purchase work not approved by the municipality would have left the owners on their own to deal with a costly situation and attempting to recoup costs from the previous owners in court.

In situations where the lawyer knows that the renovations are an important factor in the buyer's decision to purchase, it's important that the lawyer advise the client of the option to spend some extra money to search to confirm if the vendor obtained the required permits from the municipality.

The client may say "we love what they've done with the reno," but it's best not to let clients rely on the title insurance policy. They may choose to proceed with the purchase anyway, even

Legal issues claims 1999-2009



though they know there may be building department issues, but some clients may not want to purchase a potential future claim.

Keep in mind that what satisfies the building department and the terms of the title insurance policy may not satisfy the homeowners (e.g., having their 10-foot deck replaced with a three-foot deck – or no deck at all).

Legal issues and TitlePLUS Legal Service coverage

The numbers

These claims are expensive to deal with in relation to their numbers, accounting for about 19 per cent of claims reported but more than 35 per cent of claims costs. Much of that cost can be attributed to the cost of the fraud claims, which on average cost more than $140,000 to resolve.

The details

When looking at these claims, it's important to distinguish between issues relating to legal problems with title or off-title compliance that are specifically covered by a traditional title insurance policy, and *Legal Service* coverage, which is not as broadly available in the marketplace.

The *Legal Service* coverage provided under the TitlePLUS program, for example, expands the coverage for legal issues, in that it offers protection against any error or omission on the part of the lawyer involved in the transaction **over and above** matters strictly relating to problems with title or other risks that are traditionally listed in a title insurance policy. These would be claims that, in the absence of a TitlePLUS policy, would otherwise involve an E&O claim against the lawyer.

Some examples include:

- Lawyer overlooks or does not make the buyer aware of information that may have affected the decision to proceed with the purchase, such as the presence of asbestos.
- Lawyer does not ensure that the buyer's intended future use of the property is protected (e.g., by ensuring a future use endorsement is included in the buyer's title insurance policy). For instance the vacant lot on which the buyer wishes to build may be subject to conservation laws that prohibit development.
- Lawyer fails to ensure that each unit on the property is protected (e.g., by obtaining a multi-unit residential title insurance property). The basement rental unit the owners had counted on for income may be illegal because the property is not zoned for a duplex.
- Tax consequences resulting from the purchase or sale of the property.
- Value fraud situations where it should have been apparent to the lawyer from the registered title that there was an anomaly.

The benefit to the homeowner or lender here is having a direct link to the insurer, sparing the policyholder the trouble and expense of suing the lawyer. The lawyer also benefits, as the claim will not result in a future claims history levy surcharge or any request for a deductible payment if an error or omission is found to have occurred (and assuming that the lawyer was not engaged in gross negligence or wilful misconduct).

In the LawPRO E&O program over the past 10 years, there have been about 200 claims that cost the E&O program more than $19 million in which title insurance was purchased; these claims, however, were reported to LawPRO as E&O claims because coverage was rightly denied by other title insurers as being outside the scope of the title insurance policy purchased. Many of these are situations in which legal services coverage could have proved helpful to purchasers and might have been covered under the Legal Service provision in the TitlePLUS policy. Mirroring the experience in other real estate E&O claims (see "Real estate claims trends" on page 16), 77 per cent of these claims were for issues resulting from poor communication with the client or inadequate investigation on the part of the lawyer.

Land and zoning disputes

The numbers

These claims have stayed fairly consistent in terms of count and cost over the past 10 years, accounting for about 15 per cent of claims reported and claims costs. The average cost of dealing with these claims has risen to about $14,000 in the 2005-2009 period from about $11,000 in the 2000-2004 period, due largely to increases in legal and construction costs in that time.

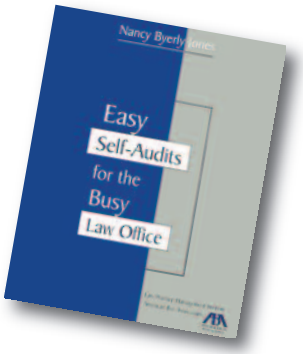
The details

Claims in this category tend to involve "tangible" property problems, which can cause significant stress to the homeowner, as they involve physical structures that the homeowner may use every day, or parts of their land that they are now threatened with losing.

Examples include:

- Homeowners discover a shed, driveway, or other structure is encroaching onto their property (or theirs is encroaching onto a neighbour's). This is usually discovered when one of the property owners obtains a survey sometime after the closing date.
- A right of way that the homeowners thought was theirs when they bought a property was not registered on title.
- The homeowners receive a claim of adverse possession for part of their property from a neighbour.
- Zoning violations, such as the homeowners finding out their new property's garage size exceeds local zoning laws.

Tim Lemieux is practicePRO co-ordinator at LawPRO.



Easy Self-Audits for the Busy Law Office

By Nancy Byerly Jones. Published 1999, 352 pages with diskettes

The previous issue of LawPRO Magazine contained a book review of *Risk Management: Survival Tools for Lawyers*. This book stressed the importance of self-audits as part of a law firm's efforts to identify areas where a firm's practices could put it at risk of, among other things, a malpractice claim.

Easy Self-Audits for the Busy Law Office by Nancy Byerly Jones provides an extensive series of checklists to help firms carry out these audits. Ms. Jones established the practice management service for the North Carolina state bar, and then went on to found a consulting company to assist law firms on-site and through training seminars. Her book was published by the American Bar Association in 1999, and while it is now out of print, it is still a valuable addition to any practice management collection. The practicePRO Lending Library has two copies available.

The audits are broken into categories that mirror practicePRO's risk management content, and consist of a series of questions and checklists to be completed by all firm managers, lawyers and staff. Not every audit is applicable to every firm member, but it is important that as many staff as possible provide input into the various areas.

The main self-audit topics are:

- **Client interactions:** Does the firm solicit feedback from clients and ensure it is taking on the "right" kind of clients?
- **Individual assessments & planning:** Are lawyers and support staff happy in their work? Job satisfaction can be reflected in workplace performance.
- **Support staff management:** They keep the firm operating, and are also often the public face of the firm. Make sure their morale and professionalism are both kept high.
- **Office management systems & procedures:** These are essential practice management areas that will help firms avoid a claim, such as calendaring, confidentiality, conflicts checking, proper documentation, timekeeping, and trust accounts.
- **Time and stress management:** Lawyers able to manage their time and reduce stress are much more effective, and less likely to make a costly mistake.
- Additional audits cover things to keep in mind when opening and closing a practice, ethics, and goal setting.

For firms that have decided to review or revamp their office procedures, perhaps after completing some of the audits above, there are two additional resources available from our library: the *Law Office Policy & Procedures Manual, 5th Edition* by Howard I. Hatoff and Robert C. Wert, and the *Law Office Policy & Procedures Manual for Solos and Small Firms, 3rd Edition* by Demetrios Dimitriou (both published by the ABA).

Both cover every aspect of basic law firm operation and are designed as templates to help firms develop their own procedure and policy guides for firm employees. Although some aspects are particular to American employment law, they still contain a wealth of content covering topics such as staffing, personnel issues, privacy, office security, filing systems, technology, billing procedures and travel policies. CD-ROMS are included with Word versions of all the templates and sample forms.

practicePRO can't stress enough that good firm management helps avoid mistakes that lead to claims. All of the above titles are useful resources for firms wanting to review their internal practices to identify and correct any shortcomings. It's an exercise that will pay long-term benefits for all members of the firm.

Tim Lemieux is practicePRO co-ordinator at LawPRO.

The practicePRO Lending Library has some new titles worth checking out:

- The 3rd edition of *Women Rainmakers' Best Marketing Tips* by Theda C. Synder contains more than 150 tips to help you develop a practical, creative and cost-effective marketing strategy that fits your personality (and is useful for men too).
- *Virtual Law Practice* by Stephanie L. Kimbro explores the ways law firms are moving beyond bricks and mortar offices to offer clients greater services online.
- *Google for Lawyers* by Carole A. Levitt, Mark E. Rosch helps practitioners understand how they can put all of Google's powerful online tools to work in their practices.
- And coming soon, the 6th edition of **Law Office Policy & Procedures Manual** featured here. The new edition covers new areas such as social media and going green.

For full descriptions of these titles, including downloadable tables of contents, go to practicepro.ca/library

Do you owe a fiduciary duty to your office manager?

The case

The Supreme Court of Canada's judgment in *Perez v. Galambos*[1] is unusual – indeed, the Supreme Court of Canada says its facts are "unique." Nevertheless, this judgment establishes several points that have already proven useful in defending Ontario solicitors.

The plaintiff Perez was office manager for solicitor Galambos. Without being asked to do so, she loaned Galambos's law practice $200,000 without security. The main issue in this case was whether the relationship between Galambos and Perez was a fiduciary one at the time the loans were made.

When Perez began her employment in 2001, the law firm was doing reasonably well. In early 2002, Perez noticed that there were insufficient funds available to cover the pending payroll. Without being asked, Perez deposited $40,000 into the law firm's bank account.

The law firm's financial position worsened during 2002 and 2003. Perez deposited more of her own money into the firm's general account. Galambos never provided any security for this indebtedness, nor did he suggest that she get independent legal advice.

In 2002, one of the firm's lawyers prepared wills for Perez and her husband. The following year, lawyers in the firm completed mortgage transactions for her. Galambos was aware of this.

In 2004, Galambos assigned himself into bankruptcy. Perez recovered nothing of the $200,000 owing to her.

Perez obtained leave of the bankruptcy court to bring an action against Galambos which she hoped would be paid by Galambos's professional liability insurer. Perez alleged negligence, breach of contract and breach of fiduciary duty.

Mr. Justice Rice dismissed Perez's action.

He held that the wills and mortgage retainers were separate, distinct, and limited to the specific services the plaintiff had requested. The plaintiff was not a client when she made loans to the firm.

The trial judge also found that no fiduciary relationship arose outside of the solicitor-client relationship. Perez did not relinquish her decision-making power with respect to the loans, and Galambos had no ability to exercise unilateral discretion over her interests. Perez was not vulnerable. Galambos was the boss, and Perez respected and trusted him. However, admiration and respect is not sufficient to create a fiduciary relationship.

Mr. Justice Rice also found that Perez was more knowledgeable than Galambos himself about many aspects of the firm's financial affairs. Aside from the limited retainers, their relationship was one of friendship between employer and employee, which gave rise to a creditor-debtor relationship.

In allowing Perez's appeal, the British Columbia Court of Appeal described the relationship between Perez and Galambos as one of "power-dependency," akin to the relationship in *Norberg v. Wynrib.*[2] Norberg, who was Wynrib's patient, was addicted to prescription drugs. Wynrib persuaded her to provide sexual favours in exchange for drugs. Wynrib's conduct was found to have been a breach of fiduciary duty.

The Court of Appeal held that Galambos took advantage of Perez's trust in him. Perez was in a position of vulnerability in terms of her employment, her knowledge of the firm's prospects and her knowledge of her legal rights and obligations. Perez expected that he would look out for her best interests.

At no point did Galambos suggest to Perez that it was imprudent for her to make advances to the firm that were unsecured, or suggest that she obtain independent advice.

Perez was granted judgment for $200,000, plus interest and costs.

The Supreme Court of Canada allowed Galambos's appeal, and restored the trial judgment.

The Court of Appeal erred in three respects. First, the conclusion that Galambos was in a position of power and influence relative to Perez was directly at odds with the clear findings of fact at trial. The trial judge found that Perez was not vulnerable in her relationship with Galambos, that she probably had more knowledge of the state of Galambos's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans, and that Galambos had no discretion over her interests that he was able to exercise, unilaterally or otherwise.

Second, the Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking by Galambos that he would act only in Perez's interests in relation to the loans, and when it based its conclusion that a fiduciary duty existed on Perez's expectations alone.

Third, the trial judge's findings that Perez did not relinquish her decision-making power with respect to the loans to Galambos, and that Galambos had no discretionary power over Perez's interests, were fatal to Perez's claim that there was an ad hoc fiduciary duty on Galambos's part to act solely in her interests in relation to these cash advances.

The trial judge correctly found that Galambos did not breach his duty of care arising from the retainers in the wills and mortgages transactions. Given the very limited nature of those retainers and the

manner in which the advances were made – unsolicited and frequently without advance notice – there was no duty on the firm under negligence principles to give Perez advice about those advances or to insist that she obtain independent legal advice about them.

The upshot

Had the judgment of the Court of Appeal NOT been set aside, the legal profession would have had reason for concern. For instance, is the relationship between a solicitor and his staff really analogous to that between a physician and his drug-addicted patient, so as to give rise to a fiduciary duty?

More ominously, the Court of Appeal's judgment lent substantial support to plaintiff/clients' attempts to use one or more small, routine retainers as a "hook" on which to allege a continuing, overarching fiduciary duty owed to the client, even after the retainer terminated. A solicitor's subsequent derelictions of duty, perhaps in a business context, could then be described as a breach of the relationship of trust which arose from the prior solicitor-client relationship.

Recently, LawPRO counsel successfully used *Perez v. Galambos* to obtain the dismissal of a bizarre action brought against one of our insureds.[3] Plaintiff A sued his former lawyer for allegedly breaching his fiduciary duties by having sex with A's wife. The plaintiff said that the trauma of seeing his wife having sex with lawyer B caused the plaintiff to embark on a series of criminal acts which in turn resulted in many months of incarceration and the loss of his job.

The plaintiff's action was dismissed. The breach of fiduciary duty claim failed for three reasons: 1) The court found that the lawyer did not have sex with A's wife; 2) Even if B did have sex with A's wife, this did not amount to a breach of fiduciary duty owed to A. The insured was A's lawyer, but his obligations to A stemmed from a routine decision to add A as an FLA claimant in his wife's personal injury action. This retainer was very limited. B had little to no discretion over the legal claim, and A was not vulnerable. If a lawyer has sex with a client (here the wife was the primary client) this would likely be a breach of professional standards of conduct, but did not necessarily amount to a breach of a fiduciary duty that is owed to the husband, even where the husband was also a client. 3) Even if a breach of fiduciary duty could be established, the damages claimed were not recoverable in law.

Perez v. Galambos also reiterates that a breach of duty by a fiduciary is not always a breach of fiduciary duty. Such breaches are frequently no more than negligence or breach of contract.

LawPRO has always understood this to be the case. The distinction was extremely important before the *Limitations Act*, 2002 came into force, because the "old" *Limitations Act* prescribed a six-year limitation period for breach of contract and negligence claims, while claims for breach of fiduciary duty were not subject to any limitation period under the *Act*.[4] The distinction is less important now, but some plaintiffs find it worthwhile to frame their claims as breaches of fiduciary duty, in order to potentially obtain a greater measure of damages and costs.

Lastly, *Perez v. Galambos* re-iterates that while Law Societies' *Rules of Professional Conduct* "are of importance in determining the nature and extent of duties flowing from a professional relationship… They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence."

Earlier this year, in *Dinevski v. Snowdon,*[5] LawPRO successfully resisted the plaintiff's attempt to present his claim as a breach of fiduciary duty. The solicitor was allegedly negligent in failing to take proper notes of a meeting. The Court referred to the Law Society of Upper Canada's *Practice Management Guideline*, which states that lawyers should consider implementing and employing systems "to document every meeting, conversation or telephone communication, including telephone messages left and received, by way of dated file notation or memo to file."

The court declined to find that the solicitor's failure to follow this recommendation was negligent. No expert evidence was presented on this issue. In declining to hold that the solicitor had breached any standard of care, the court referred to the above statement from *Perez v. Galambos*.

The fine work of British Columbia defence counsel in *Perez v. Galambos* has presented LawPRO with a useful means to combat 1) attempts by plaintiffs to sue solicitors for actions outside of their retainer, on the basis of some supposed overarching fiduciary duty arising from the retainers; 2) attempts to hold solicitors liable for breach of fiduciary duty, where their actions were at most negligent or in breach of contract; 3) attempts to hold solicitors liable in negligence solely because they breached a rule of professional conduct.

Debra Rolph is research director at LawPRO.

[1] 2009 SCC48, allowing appeal from 2008 BCCA 91, which reversed [2006] B.C.J. No. 1396 (B.C.S.C.)

[2] [1992] 2 S.C.R. 226

[3] Passarelli v. Startek, 2009 CanLII 63371 (On S.C.)

[4] Frumusa v. Ungaro [2006] O.J. No. 686 (C.A.), affirming [2005] O.J. No. 2412

[5] Dinevski v. Snowdon, 2010 ONSC 2715

Lawyers who do too much

The law is a profession with a culture of hard work with long hours, demanding clients, loads of files, due diligence, trial preparation, and more importantly, unrealistic demands lawyers put on themselves.

Some lawyers revel in the hours they log by bragging, as if it were a badge of honour, about the late nights and the volume of output. Others bemoan the sheer quantity of work that must be done to practise competently but complain, without strategies, about how to manage their time better. Many lawyers literally try to talk to a client on the phone while simultaneously sending an email and reviewing a contract or separation agreement in front of them on their desk. They may even have another document set up on their computer screen, or even on split screens with a chat box in the corner and a favorite website minimized in another corner.

Although many people say that multitasking makes them more productive, research shows that multitaskers have trouble focusing while trying to shut out irrelevant information. In the process, they experience higher levels of stress. Instead of actually doing many things at the same time, they switch attention from one task to another extremely quickly, which results in taking more time to get the tasks done and with a high probability of errors. Scientists say that, even after the multitasking ends, fractured thinking and lack of focus persist. One writer calls multitasking a habit akin to an addiction!

When the Apple iPad was launched, a website proclaimed in March, 2010 that it was "a disappointment for the legal profession" and that it had "missing features." The criticism was summarized in a blog response to Apple – "Multitasking – For me, this is huge. The ability to run multiple processes is critical as a work device. I typically have 6 – 10 programs or windows open on my desktop. It isn't unreasonable to conceive of needing a few different applications running to use the iPad OS 4 as a true working device."

In April 2010, the iPhone garnered this comment: "Multitasking – This feature allows you to move slow-moving apps to the background while you continue using other apps."

These "problems" have been rectified to now keep us active, multitasking, and, arguably, counter-intuitively less productive.

But this focus on multitasking highlights and at the same time overlooks the underlying issue of workaholism.

At what point do hard work and extended hours become unhealthy? In substance addictions, that point is fairly clear. Persons can use, misuse, abuse and then become dependent on alcohol or other drugs in a growing succession of tolerance and volume of usage. The addiction is easy to identify and there are 12-step support groups to assist in abstinence and daily recovery.

However, a process or behavioral addiction such as workaholism is harder to identify and treat. (Other process addictions include Internet addiction, gambling addiction and sex addiction). Work is a vital part of our daily activity so that we do not seek 12-step recovery groups to abstain from work.

So how much work is too much or is there never too much? How do we know when we have a problem with work boundaries and dependence? Interestingly, the same negative effects for substance dependence involve a workaholic's family, friendships and physical and emotional health and finances as well.

The workaholic quiz

Dr. Barbara Killinger, author of *Workaholics, The Respectable Addicts* provides a quiz to identify attitudes and behaviours that indicate a workaholism problem.

1. Is your work very important to you?
2. Do you like things done "just right"?
3. Do you tend to see things as black and white, not grey?

4. Are you competitive and often determined to win?
5. Is it important for you to be "right"?
6. Are you overly critical of yourself if you make a mistake?
7. Are you afraid of failing?
8. Are you restless, impulsive and easily bored?
9. Do you drive yourself and have high levels of energy and stamina?
10. Do you suffer periodic bouts of extreme fatigue?
11. Do you take your briefcase home and work nights and/or weekends?
12. Do you feel uneasy or guilty if there is nothing to do?
13. Do you think you are special or different from other people?
14. Do you read work-related material when you eat alone?
15. Do you make lists of things to do and keep a daily diary?
16. Do you find it harder and harder to take long vacations?
17. Do you often feel hurried, rushed, or a sense of urgency?
18. Do you keep in touch with your office while you're on holidays?
19. Do you "work" at play, and get upset if you don't play well?
20. Do you avoid thinking about your retirement?
21. Are you responsible at work, but not in personal matters?
22. Do you try to avoid conflict instead of dealing with it?
23. Do you act on impulse without considering the effect on others?
24. Do you fear rejection and criticism, yet judge and criticize?
25. Is your memory for what others have said getting worse?
26. Do you get upset if things don't work out as you expected?
27. Does being interrupted at work or at home annoy you?
28. Do you create pressure situations with self-imposed deadlines?

29. Do you concentrate on future events instead of enjoying the present?
30. Do you forget or minimize family occasions or celebrations?

The more "Yes" answers to these questions can help you identify thinking or behaviours that indicate that you should get help.

Consider these other observations that Dr. Killinger makes:

- "The obsession with work grows out of the workaholic's perfectionism and competitive nature."
- "Workaholics cannot **not** work without becoming anxious."
- "Workaholism is a major source of marital breakdown."
- "Work is a substitute religious experience for many workaholics."
- "Denial is the ultimate defence that protects this addiction."
- Workaholics see themselves as "Mr. Nice Guy" or "Ms. Nice Gal."

How to achieve balance?

Working on achieving balance for workaholism or other process addiction means working on beliefs and behaviours. To achieve balance, Dr Killinger suggests you try to be

- Humble
- Other-centered
- Realistic – able to understand limits
- Thorough
- Valuing of harmony
- Self-directed
- Competent
- Patient
- Accepting
- Tolerant
- Flexible, open
- Responsible at work
- Objective, aware
- Peaceful, calm
- Contemplative
- Easy-going
- Keeping things in perspective
- Open, available
- Having a gentle sense of humour

Practically, there are small and simple things that can be done to get some semblance of balance back:

- Put yourself, your family, exercise and your outside interests into your appointment book first in pen, not pencil. Fit work around your life and what matters most instead of the opposite. This a principle of Franklin-Covey, the time-management people.
- Leave your briefcase at the office.
- If you must work at night or on a weekend because of an extraordinary file,

give yourself a time limit and then take those hours worked and mark them out of your book as compensation for yourself as soon as the immediate pressure of the file is off.

- Take at least two weeks off twice a year for holidays. Do not take work with you. "Forget" your cellphone. Have your office refuse to accept calls from you when you are away.
- Read non-legal stuff out of the office – history, murder mysteries, sports books or romance novels. Let your imagination soar.
- Get involved with activities that you really enjoy – swimming, dancing, stamp collecting, choir. Set up a lesson one evening per week to pursue your interests. Love your passions; it makes work more enjoyable and keeps it in perspective.
- Play golf or some other competitive sport you like (even bridge) without keeping score.
- Work out a realistic retirement plan to take the pressure off of not knowing where you are financially to give yourself options for the future that do not include work.
- Go to every family birthday, anniversary, baptism, bar/bat mitzvah, baseball game, dance recital or anything that will not be repeated. Videos of the event do not count! Trite as it sounds – you will only have one opportunity to participate in these historical family events.
- Make a date with your partner at least once a week, leave the cellphone at home and talk about everything other than work.
- Talk to your parents about their lives and notice that they will talk very little about work but mostly about family.
- Pray in the sense of taking a personal inventory of who you are, where you are, where you want to be and how you fit into the big picture of life and other service.
- Volunteer to help others through a service club, major charity or church.
- Sleep eight hours per night and eat three meals a day.
- Remember not to sweat the small stuff and that it's all small stuff.

For tips on dealing with multitasking, consider the following:

- Cultivate the art of paying attention.
- Only check email a few times a day and on a scheduled basis.
- Turn off the "auto-notification" sound/box to avoid disruptions to your concentration.
- Exercise judgment about what is worthy of your attention right now until the task is completed.
- Limit the number of websites you visit.
- Create stronger divisions between work time and social time.
- Simplify and shorten messages.
- Use "Reply All" with care.

As with other things in our lives, work obsession can get out of control. Putting it into perspective along with everything else is not easy to do but it can be done. Talking to someone else who is living a life of balance helps. Talk to another lawyer who understands. Professional help and counseling can be arranged.

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 **Terri Wilkinson**, BA, LLB, RN **Jill Fenaughty**, BA, MA, LLB	doron@olap.ca terri@olap.ca 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

LawPRO e-newsletters:

Keeping you informed

Editor's note:

LawPRO communicates breaking news, upcoming deadlines and risk management information to our lawyers by email newsletter. This ensures that you get the information you need quickly and efficiently.

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

- ***LawPRO Webzine:*** *New risk and practice management information from our practicePRO department and 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 warnings about new fraud schemes that target lawyers.*

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

To show you what you're missing, we've provided a summary below of the information that you recently received by email. We hope this encourages you to read LawPRO e-newsletters as they arrive in your inbox.

If anyone in your firm who is not a lawyer (and therefore not automatically receiving e-newsletters from LawPRO) would like to subscribe to any one or all of LawPRO's e-newsletters, they can do so on our website at www.practicepro.ca/enews

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

Highlights:

August 17, 2010: LawPRO Insurance News

Subject line: CLE credit filing deadline

Reminder about September 15 deadline for filing declaration to receive credit of up to $100 on 2011 premium invoice for LawPRO -approved CLE courses taken between September 16, 2009 and September 15, 2010.

August 26, 2010: LawPRO Insurance News

Subject line: Ongoing frauds; CLE credit & Q2 levy filings due

Update on ongoing collaborative family law agreement frauds, including links to sample fraudulent initial contact letter and counterfeit cheques. Reminder about September 15 deadline for CLE credit declaration. Reminder that real estate and civil litigation transaction levies and forms for quarter that ended on June 30 were due on July 31.

September 9, 2010: LawPRO Webzine

Subject line: Risky business: pitfalls in practice today

Reminder about September 15 deadline for CLE credit declaration. Warning about ongoing collaborative family law agreement scams. Electronic version of September 2010 LawPRO Magazine. Articles included "Practice pitfalls: malpractice hazards by practice area," "Law firm risk management: a systematic approach," "Danger! Activities generally outside coverage," "Insurance Biz 101: Why profit is not always a bad word," "Protecting client data," "Franchise claims on the rise" and "The Limitations Act: a catch-all statute."

October 1, 2010: LawPRO Insurance News

Subject line: Renew your LawPRO exemption status for 2011: File online now

Asked lawyers who are exempt from the payment of insurance premium levies to verify their exemption status for 2011 online, thus saving printing and postage costs.

October 4, 2010: LawPRO Insurance News

Subject line: Renew your professional liability insurance for 2011 starting Oct. 1

Notified lawyers that they could begin e-filing their 2011 LawPRO insurance applications.

Note: The following e-newsletters were sent only to those who had not filed as of the date of mailing.

October 20, 21 and 22, 2010: LawPRO Insurance News

Subject line: Renew your 2011 insurance now!

Reminder to file 2011 insurance renewal application on or before November 1, 2010, to qualify for $25 e-file discount.

October 28, 2010: LawPRO Insurance News

Subject line: Reminder to file 2011 insurance application

Final reminder to e-file 2011 insurance renewal application on or before November 1, 2010, to qualify for $25 e-file discount.

November 4, 2010: LawPRO Insurance News

Subject line: Final renewal application filing deadline – November 8

Final reminder of November 8 deadline to file 2011 insurance renewal application.

December 1, 2010: LawPRO Insurance News

Subject line: LawPRO has not yet received your 2011 application for insurance

Notice to lawyers who have not filed that they have until December 3, 2010, to file their 2011 insurance application or they will be surcharged.

Key dates

Jan. 31: Real estate and civil litigation transaction levies and forms are due for the quarter ended December 31, 2010.

Feb. 8: Last date to qualify for a $50 lump sum discount on the 2011 policy premium (see pg 13 of the 2011 program guide for details).

April 30: Real estate and civil litigation transaction levies and forms are due for the quarter ended March 31, 2011.

April 30: Exemption forms from lawyers not practising civil litigation or real estate and wanting to exempt themselves from quarterly filings are due.

July 31: Real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2011.

LawPRO announces changes in claims group

Earlier this fall, LawPRO announced a number of changes in the claims management function.

Both the Claims and Underwriting & Customer Service departments now report to Executive Vice-President Duncan Gosnell. A member of the LawPRO executive group since 1995, Gosnell has been instrumental in developing the underwriting and customer service functions at the company. For much of the past year, he has been acting vice-president, claims as well as overseeing the underwriting and customer service department as Executive Vice-President.

The claims function at LawPRO now consists of two departments, each headed by a vice-president.

Jerzy Adamowicz is vice-president of the new specialty claims department, responsible for a number of areas including, among others, TitlePLUS and Excess Insurance claims and claims involving coverage issues. Adamowicz holds LL.B. and LL.M. degrees from universities in Israel, and has extensive experience as a practitioner, counsel and claims examiner in both Israel and Canada. He has held several managerial positions in the LawPRO claims department since 1994, most recently as claims director.

Jack Daiter is vice-president of the new primary professional liability claims department, responsible for most of LawPRO's primary professional liability claims. Daiter holds LL.B. and LL.M. degrees, and worked in private practice before joining LawPRO as a claims examiner in 1997. He was appointed a claims manager in 2007 and claims director in 2009. As well, he has taught courses in ADR and has spoken on risk management issues to a variety of student and professional audiences.

TitlePLUS Essay Contest: $3,000 prize for top real estate law essay

Canadian law students have a chance to win $3,000 in the 2011 TitlePLUS Essay Contest, created by LawPRO to encourage and recognize outstanding legal scholarship in the practice of real estate law.

Essays on a topic related to the current practice of real estate law, such as ethical issues in the practice of real estate law, reform of law society rules, practising law in an electronic environment, the role of the lawyer in preventing real estate fraud, and the use of title insurance in real estate transactions, are eligible for the prize. A panel of judges will review the submissions and award the $3,000 prize in spring 2011.

Sponsoring this contest is consistent with the value that LawPRO puts on the continued growth of the real estate bar, says LawPRO President and CEO Kathleen A. Waters. Fostering excellence in legal research and writing also is consistent with LawPRO's role as the only Bar-Related® title insurance fund in Canada. "LawPRO is committed to working with the real estate bar in the public interest and to undertaking educational initiatives aimed at informing both the public and lawyers about the role of the lawyer and title insurance in real estate transactions."

The contest deadline is March 31, 2011. Full contest rules are available at www.titleplus.ca.

Note: Residents of Quebec are not eligible for the TitlePLUS Essay Prize.

LawPRO recognized as a leader in privacy and data protection

The Association of Corporate Counsel has recognized LawPRO as a leader in privacy controls and data protection.

LawPRO is one of seven national and multinational corporations who, because of their exemplary privacy practices, are profiled in this report. The report, titled "Leading Practices in Privacy and Data Protection – What Companies are doing (ACC)," examines trends on privacy and data protection and leading practices.

Highlighted in the report were LawPRO's privacy working group, our external and internal privacy codes, and the way we present our information to both customers and employees.

Stephen Freedman, director, compliance risk & chief privacy officer, says LawPRO's privacy and data protection program works well because of the time invested up front in establishing the program, and creating a policy that was readable and understandable by everyone.

The ACC is a world-wide organization that represents in-house counsel in 70 countries. The Leading Practices Profile outlines best practices in order to help in-house counsel deal with various issues. Other organizations profiled included Hewlett-Packard, eBay, the United Health Group and a fortune 500 company.

It's not too late to get Excess Insurance

If you missed the early-bird (December 3) deadline to apply for LawPRO Excess Liability insurance and waive the 60-day waiting period – don't worry, it's not too late to apply.

You can submit your Excess Liability insurance application any time – but applications submitted now will be subject to a 60-day waiting period before coverage comes into effect. Your premium will be pro-rated from the date your coverage kicks in.

Take the online test to assess your potential exposure to claims – and your need for Excess Insurance. The online test is available at http://www.lawpro.ca/insurance/pdf/Excess_Stress_Test.pdf

It's easy to apply – contact our Customer Service department at (416) 598-5899 or 1-800-410-1013 or email at service@lawpro.ca and ask about Excess Liability insurance policy. They will send you a no-obligation quote.

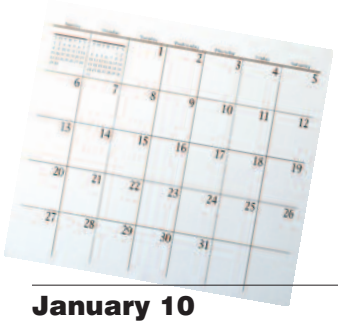
Get peace of mind coverage – apply for Excess Liability insurance today.

Avoid A Claim makes ABA's top 100 blogs list

The *ABA Journal*, the flagship magazine of the American Bar Association, has selected LawPRO's "Avoid A Claim" blog as one of this year's 100 best legal blogs. "Avoid A Claim" Blog (http://avoidaclaim.com) is authored by Dan Pinnington, director of practicePRO, LawPRO's risk management and claims prevention program.

The American Bar Association is the world's largest voluntary professional membership organization with approximately 400,000 members.

The *ABA Journal* has invited readers to vote on their favourite blogs from among the top 100 at http://www.abajournal.com/blawg100. Voting ends at close of business on December 30, 2010.



Events calendar 2011

January 10

311 Jarvis Family Court

The Importance of Being an Officer of the Court

Dan Pinnington presenting

Toronto

January 14

CBA Nova Scotia Professional Development Conference

TitlePLUS exhibiting

Halifax Marriott Harbourfront Hotel

January 18

Calgary Real Estate Board: Forecast Conference and Trade Show

TitlePLUS exhibiting

BMO Centre, Calgary

January 20

Hughes Amys LLP

The Future of Law Practice

Dan Pinnington presenting

Toronto

January 27 to 28

CBA Alberta Law Conference

TitlePLUS exhibiting

Hotel MacDonald, Edmonton

January 27 to 29

Banff Western Connection

TitlePLUS exhibiting

Fairmont Banff Springs Hotel, Banff

February 3 to 4

OBA Institute 2011

TitlePLUS sponsoring and exhibiting

practicePRO sponsoring and exhibiting

Dan Pinnington presenting on professional responsibility issues for entertainment and media practices

Fairmont Royal York Hotel, Toronto

April 11-13

ABA Techshow 2011

Dan Pinnington presenting on Excel tips and Blackberry Love

Chicago Hilton

May 4 to 5

Toronto Real Estate Board's "Realtor Quest"

TitlePLUS exhibiting

Toronto Congress Centre

May 11 to 14

ILCO Annual Conference

TitlePLUS exhibiting

The Westin, Ottawa

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.

practice PRO®

Risk management
www.practicepro.ca

LawPRO eXcess Insurance

Additional professional liability insurance
www.lawpro.ca/excess

Title PLUS®

Title insurance
www.titleplus.ca

www.lawpro.ca

CANADA POST / POSTES CANADA

Postage paid / Port payé
Publications Mail
40026252

Return undeliverable Canadian addresses to:
LawPRO • 250 Yonge Street • Suite 3101, P.O. Box 3 • Toronto, Ontario M5B 2L7

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

About *LawPRO Magazine*

Please take a few minutes to complete this survey on our flagship publication, *LawPRO Magazine*, and on our electronic newsletters. Your views will help us ensure that these communication vehicles address issues that are relevant to you and your practice.

To quickly and easily complete this survey online, go to: http://www.surveymonkey.com/s/lawpro

1. LawPRO Magazine is published 3 times a year. How many of the 3 issues published in 2010 have you read or looked through?
   ❒ 3 of 3 ❒ 2 of 3 ❒ 1 of 3 ❒ None

2. How thoroughly do you read or look through a typical issue of *LawPRO Magazine*?
   ❒ read all or almost all ❒ read about 3/4 ❒ read about 1/2 ❒ read about 1/4
   ❒ skim only ❒ do not read/look through

3. Please indicate to what extent you agree with each of the following statements about *LawPRO Magazine*.

	strongly agree	agree	neutral	disagree	strongly disagree
It contains practical information that I can use in my work	❒	❒	❒	❒	❒
It is a magazine I look forward to receiving	❒	❒	❒	❒	❒
It is a must-read	❒	❒	❒	❒	❒
It is well-written	❒	❒	❒	❒	❒
It presents information in an inviting, easy-to-read way	❒	❒	❒	❒	❒

4. Would like to see more, about the same, or fewer articles on the following general topics:

	More	Same	Fewer
Claims trends and how to avoid a claim	❒	❒	❒
Analysis of risks in practice areas	❒	❒	❒
Practice trends/ issues & associated claims risks	❒	❒	❒
Fraud (types, trends, avoidance)	❒	❒	❒
E&O coverage issues (what is and is not covered)	❒	❒	❒
Technology (trends, tools, impact of new technologies on law practice)	❒	❒	❒
Management (client service issues, work/life balance, trends in law firm management/administration, outsourcing & other trends)	❒	❒	❒
Finance (billing/fees trend, & compensation issues)	❒	❒	❒
Starting/ending practice	❒	❒	❒
Marketing (trends, techniques, online networks, Web 2.0/Social media)	❒	❒	❒
Profiles of firms or lawyers who are leading by example on a practice or risk management topic	❒	❒	❒
TitlePLUS program updates	❒	❒	❒
Work/life balance & other wellness topics	❒	❒	❒

Other _____

5. Which of the following regular features (columns) in *LawPRO Magazine* do you read? (check all that apply)

- ❒ Casebook: leading cases of interest to LawPRO
- ❒ E&O insurance: discussions of policy coverage
- ❒ TitlePLUS update: news from the TitlePLUS program
- ❒ practicePRO Tech Tip: tips on how to use specific technologies
- ❒ practicePRO Practice Tip: tips on risk issues – by LawPRO claims counsel
- ❒ practicePRO Book Review: mini-review of topical books on practice management issues
- ❒ OLAP: articles on lawyer wellness, work/life balance from OLAP staff

About LawPRO electronic newsletters

LawPRO currently publishes several electronic newsletters.

- **LawPRO Webzine** is an electronic newsletter that contains breaking risk management articles/tips and is the electronic version of the printed publication, *LawPRO Magazine*.
- **Insurance News** keeps you up to date with pending deadlines and developments in the insurance program.
- **LawPRO Alert** warns you about deadlines and breaking news that you need to know about.

These publications are sent to you by email.

6. How useful do you find the information in:

	very useful	somewhat useful	not useful	do not read
LawPRO Webzine	❒	❒	❒	❒
Insurance News	❒	❒	❒	❒
LawPRO Alert	❒	❒	❒	❒

7. How interested would you be in electronic publication from LawPRO tailored to your specific practice area/practice and risk issues?
❒ very interested ❒ somewhat interested ❒ not interested

8. Many publications are now available in digital format – that is they contain the same information as a print version of a publication, as well as links to resources referenced in articles, the ability to search content and the ability to print specific articles of interest.
If a digital version of *LawPRO Magazine* were available with the same content as the print version, in what format(s) would you prefer to receive/read *LawPRO Magazine*?
❒ print publication only ❒ email with links to online digital version ❒ both print and electronic versions

Comments