

LAWPRO

magazine

DECEMBER 2012 VOL 11.5

resolutions for a better practice

Also:

- Insurance considerations for retiring lawyers
- Casebook: Perils of incomplete pleadings and missing expert evidence
- How litigators can avoid communication-based claims



upcoming events

January 24, 2013

Manitoba Bar Association's Mid-Winter Meeting
TitlePLUS exhibiting
Winnipeg, MB

February 7 & 8, 2013

Ontario Bar Association's Institute 2013
Real Property Program
Sole Small Firm and General Practice Breakfast
TitlePLUS Sponsors and exhibits
Toronto, ON

November 12 & 14, 2012

University of Ottawa
Title Insurance
Lisa Weinstein presented
Ottawa, ON

November 16 & 17, 2012

Legal Education Society of Alberta Conference
TitlePLUS sponsored
Calgary, AB

November 21, 2012

Law Society of Upper Canada Six Minute Real Estate Lawyer
Top of the List for Real Estate Claims: Communication Problems and Inadequate Investigation CPD
Kathleen Waters presented

Ways title insurers can respond to claims
Ray Leclair presented

TitlePLUS sponsored
Toronto, ON

November 22, 2012

Hamilton Law Association Corporate Commercial Law Seminar
Use of Technology in Corporate Commercial Practice
Dan Pinnington presented
Hamilton, ON

November 23, 2012

Law Society of Upper Canada
Articling and Beyond Workshop
Succession Planning Seminar
Ray Leclair presented
Toronto, ON

November 23, 2012

CCLA Civil Litigation Conference 2012
15 Practice Tips in 15 Minutes: Avoiding a Malpractice Suit
Kathleen Waters presented
Mont Tremblant, QC

November 25-27, 2012

Canadian Association of Accredited Mortgage Professionals Conference
TitlePLUS exhibited
Vancouver, BC

November 28, 2012

Osgoode Professional Development
Improv(ed) Legal Skills for Lawyers CPD
Most Common Communications Claims
Dan Pinnington presented
Toronto, ON

December 4, 2012

Ontario Bar Association
Tax Lawyers: Professional Responsibility and Ethics Series CPD
It's Your Mistake – Now Fix It
Ray Leclair presented
Toronto, ON

December 4, 2012

Presentation at Miller Thomson LLP
Claims Prevention for In-House Counsel: The Importance of Communicating
Dan Pinnington presented
Toronto, ON

December 5, 2012

Law Society of Upper Canada
Six Minute Family Law Lawyer CPD
Technology Tips and Websites to Make Your Practice More Efficient
Dan Pinnington presented
Toronto, ON

November 9, 2012

Large Municipality Chief Building Officials Bi-Annual Meeting
Title Insurance Overview and Work Order Issuance to Facilitate Claims Process Review
Ray Leclair presented
Caledon, ON

November 12, 2012

University of Ottawa: Faculty of Law
Division of Common Law (French)
Title Insurance 101
Ray Leclair presented
Ottawa, ON

recent events

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Issue 5
December 2012

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CASEBOOK



Resolutions for a better practice

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Regardless of your area of expertise or your particular practice challenges, we have resolutions to add to your New Year's list.

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Social Media

- LAWPRO gets social
Social media profile: Lisa Weinstein

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< PREVIOUS

NEXT >

“Next year, I will: _____”

Need some 2013 resolutions for your law practice? We have some!



As you'll learn in these pages, lasting positive change is less likely to come from radical self-reinvention than from the slow and steady accretion of many positive “baby steps”.

Would you like your practice to be more efficient, more profitable, more claim-proof, and more personally rewarding? Who wouldn't? But who has the time to think about practice management, when just practising law takes up every waking hour?

It's easy for busy lawyers to fall into the trap of thinking that there's no time for reviewing processes and changing habits. However, many of the changes that improve a practice for the better create efficiencies that allow you to be more successful in *less* time.

For example, one work habit that we at LAWPRO never tire of recommending (because it makes a big claims-resolution difference) is taking the time to document the steps taken on a matter. At first blush, more documentation seems like something that would take *more* time... but it depends on how you do it, and what use you make of the information you've recorded. A great way to document progress is to use a checklist. It's true – building or finding a checklist (and we have some excellent ones available at practicePRO.ca/checklists) requires an initial investment of time; but once you have one, it serves as a shorthand that you can use to organize the way you document your progress across a wide range of files. It also means time savings when you return to a file you haven't worked on in a while, because the checklist allows you to quickly pinpoint the status of the matter without having to wade through the file's contents.

Already using checklists? We applaud you; but we have plenty of other suggestions that can help organize your practice and protect you from claims. The theme of this issue – as you've likely guessed – is “resolutions.” As

you read through the articles, you'll find a wealth of suggestions for changes that can help you achieve the results you want.

Your resolutions can support our results, too. Our analysis suggests that the year 2012 will end, as did 2011, with a claims costs tally in excess of \$100 million (once internal claims handling expense is considered). We'd love nothing more than to miss that mark in 2013.

As you may have read in my editorial in the previous issue, we've taken steps to analyze the reasons behind the escalation in claims costs in the last few years. Not all of the contributing factors are within our control, or yours. But some certainly are. For example, we have seen a troubling increase, in certain areas of practice, in the number of claims attributable to the cause we label “inadequate investigation” or “insufficient discovery.” Proper investigation of the facts behind a matter is well within lawyers' control. We'd like to encourage lawyers to consider how they can change their work habits – even slightly – to ensure that sufficient effort is devoted to developing a full understanding of all of the facts relevant to a matter. Are there questions you're not asking that you should be asking? What kinds of questions generate the most useful responses?

Perhaps the first resolution you might consider is simply to step back and reflect on your practice. How do you work today, compared to the way you did things when you first entered private practice? Are you more rushed? Under pressure? Do you ever skip steps or make assumptions? If you do, does the time you save truly improve your practice's bottom line or the enjoyment you get from your work? If not, it's time to adjust your habits, or to learn new ways of doing things.

Of course, we wouldn't ask you to learn new things if we weren't prepared to do the same

ourselves. Like many other organizations, we at LAWPRO set aside time in the late fall of 2011 to identify goals and priorities for the coming year. One of our key goals for 2012 was to increase our fluency with and participation in social media. In the past year, we have increased our participation on LinkedIn and on Twitter, with a number of our employees (we call them “Social Media Actives”) making a special effort not only to post information we hope will be of interest to our followers and contacts, but also to pay attention to what other influencers in our field have to say. Starting with this issue of *LAWPRO Magazine*, we will be profiling at least one of these social media pioneers in every issue, beginning with Lisa Weinstein, whose profile you can read on the inside back cover.

We also launched Facebook sites for both the TitlePLUS program and for LAWPRO – if you haven't connected with us yet, we invite you to “Like” our pages and have a look at the content there.

Speaking for myself personally, I will be solidifying a new set of social media habits in 2013. What began as a weekly beginner's discipline of choosing content for LinkedIn, Twitter and Facebook has become easier and more enjoyable with each passing week: I've become accustomed to thinking about news and information not only from LAWPRO's perspective, but from the perspective of our LinkedIn contacts, Twitter followers, and most recently, Facebook friends. It's been a rewarding journey, and I look forward to pursuing it further in the coming year. I hope our readers have some rewarding learning experiences of their own – perhaps starting with this magazine issue!

Kathleen A. Waters
President & CEO

LAWPRO makes submission on Rule 48.15

This fall, LAWPRO filed a submission to the Civil Rules Committee on proposed amendments to Rules 48.14 and 48.15. The administrative dismissal provisions of Rule 48 have been very costly for LAWPRO over the last two years. LAWPRO's submission highlighted how administrative dismissals result in malpractice claims and provided some suggestions on how the rules could be amended to reduce claims.

LAWPRO CPD Premium Credit is renamed the LAWPRO Risk Management Credit

In 2002, LAWPRO launched a premium credit to encourage lawyers to attend education programs that contained a risk management component.

With the recent implementation of the Law Society's CPD requirement, there has been confusion among some lawyers as to the difference between the Law Society's mandatory CPD requirements and LAWPRO's premium credit. To help avoid confusion and to better represent the credit, the LAWPRO CPD Premium Credit has been renamed the **LAWPRO Risk Management Credit** as of September 16, 2012. This name reflects one of LAWPRO's over-arching goals: Helping lawyers avoid malpractice claims by educating them about risk management. In-house programs offered by law firms can now also qualify for the credit, provided they meet the criteria for approval. All other aspects of the credit remain the same. For more information, please visit lawpro.ca/clecredit.

eBRIEFS

Below is a summary of electronic communications you should have received from LAWPRO this past summer and fall. To ensure that you receive timely information about deadlines, news and other insurance program developments, please make sure you have whitelisted service@lawpro.ca with your email service provider. The full content of these newsletters is available at practicepro.ca/enews

Insurance News:

Renew your LAWPRO exemption status for 2013: File online now
October 9, 2012

Reminder of the November 8 deadline to renew for exemption status; instructions on how to file and online resources from the LAWPRO website.

Renew your firm's professional liability insurance for 2013 now
October 2, 2012

Reminder for your firm to e-file 2013 insurance applications by November 1 to save \$25 per lawyer; quick summary of the 2013 insurance program and filing instructions.

Renew your professional liability insurance for 2013 starting
October 1

October 1, 2012
Reminder for individuals to e-file 2013 insurance applications by November 1 to save \$25 per lawyer; quick summary of the 2013 insurance program and instructions to file.

Transaction levy filings overdue
September 19, 2012

A reminder to anyone who has outstanding transaction levy filings overdue, along with contact information and other key dates.

CPD declaration due September 15
September 12, 2012

A reminder if you have attended a LAWPRO-approved CPD course between September 16, 2011, and September 15, 2012, to file your CPD declaration to receive up to \$100 off your 2013 premium. This feature also includes the LAWPRO CPD premium credit now known as the LAWPRO Risk Management Credit.

Webzines:

Issues we're watching in wills, estates and trusts
November 13, 2012

Late-life marriage and will amendments; proper execution matters; wills and trusts casebook; TitlePLUS wills poll suggests marketing opportunities for lawyers.

2013 insurance program highlights; debunking myths about Excess insurance
October 11, 2012

Holding the course on premiums with an uneasy eye on claims. The complete version of the "Insurance Issue" of *LAWPRO Magazine* is released.

Real estate: Six things we hate to see
August 21, 2012

Kathleen Waters, CEO of LAWPRO, reveals which protestations from claims-plagued real estate lawyers are the least musical to her ears. Plus real estate casebook, family law issues, and our TitlePLUS department's new Facebook page.

Great practice tools in our new issue; CPD Premium Credit deadline reminder
August 14, 2012

The summer issue of the *LAWPRO Magazine* is now available and includes two new practice resources for lawyers from practicePRO: the Commercial Contract Content and Execution Checklist, and the Domestic Contract Matter Toolkit. Plus a reminder to apply for your CPD Premium Credit for 2013 no later than September 15, 2012.

Organizational changes at LAWPRO

Merging of departments

As mentioned in our 2011 Annual Review, LAWPRO has brought government relations and the practicePRO department under one roof known as the Claims Prevention and Stakeholder Relations department. The Communications and practicePRO departments have been LAWPRO's smallest departments, with some significant overlap in goals and work products. LAWPRO has decided to merge the Communications department and the Claims Prevention and Stakeholder Relations department. Claims prevention and stakeholder relations are mission critical and will continue to be growth areas for LAWPRO.

TitlePLUS department announces co-heads

Mark Farrish, director, sales and marketing for TitlePLUS and Lisa Weinstein, director, national underwriting policy for TitlePLUS have been providing leadership for the TitlePLUS department on a joint basis for a period of time. Continuing in their existing roles, they will be co-heads of the department on a permanent basis, as the arrangement has been working well.

New member appointed to LAWPRO board of directors

Alan J. Silverstein

A sole practitioner in Thornhill, Alan G. Silverstein has been at the forefront of real estate and mortgage issues for over three decades as a writer, lecturer, commentator and media personality. Between 1997 and 2003, Alan was a director of the Real Estate Council of Ontario, the regulator of real estate agents and brokers in Ontario, where he remains a member of the insurance committee.

keyDATES

January 31, 2013:

Real estate and civil litigation transaction levies and forms are due for the quarter ended December 31, 2012.

February 7, 2013:

Last date to qualify for a \$50 lump sum discount on the 2013 policy premium.

April 30, 2013:

Real estate and civil litigation transaction levies and forms are due for the quarter ended March 31, 2013.

April 30, 2013:

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

Robin McNamara is first recipient of the Caron Wishart Scholarship

The Caron Wishart Scholarship was created in memory of Caron, a long-standing senior LAWPRO employee. It will be awarded annually to a deserving student at the Faculty of Law, University of Toronto. The first recipient of this award is **Robin McNamara**, a second year student. Mr. McNamara has a special interest in written and oral advocacy and has worked as a volunteer advocate on behalf of youth with educational and criminal law problems. Congratulations Robin!

LAWPRO
magazine

President & CEO: Kathleen A. Waters

LAWPRO Magazine is published by 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.

www.lawpro.ca

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Disclaimer:

This publication includes techniques which are designed to minimize the likelihood of being sued for professional liability. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

E&O and R&R: Insurance planning for retirement



Victoria Crewe-Nelson

When looking forward to your retirement it's important to have an idea of what liabilities and activities from your practice will follow you. It's false comfort to think that just because a claim wasn't brought prior to retirement means one won't appear in the future or that you can rely on the coverage that was in place while in practice to respond to future claims. The Law Society Program coverage you have in place when the claim is made against you (or when you became aware of circumstances that would reasonably be expected to give rise to a claim) is what will respond, not the policy you had in place when the error occurred. Research indicates that it takes an average of two to three years after legal services are rendered for a claim to surface and up to ten per cent of claims are not reported until five years after the services are provided. Claims can continue to be brought years after you retire, but there are steps you can take to reduce the

likelihood of having coverage issues if a claim arises.

**"SEMI-RETIREMENT" also known as
"NOT RETIRED AT ALL"**

Lawyers will sometimes refer to themselves as being "semi-retired" when they mean they have reduced their workload or are taking time away from practice. You are required to maintain your LAWPRO coverage while

you continue to do some legal work or wrap up your practice. When lawyers apply for exemption under the Law Society insurance program they receive limited run-off coverage that, with

only two exceptions, provides no coverage for legal services provided while on exemption. The cost of paying the annual premium versus the prospect of no insurance for a claim arising out of legal services (beyond the permitted exceptions) provided while on exemption, is a small price to pay.

*There's never enough time to
do all the nothing you want.*

*- Bill Watterson
(Calvin and Hobbes)*

If you want to continue to do wills for friends and family, act for one or two old clients, or give legal advice to a condo board, your LAWPRO coverage is mandatory. Being a lawyer can be a hard habit to break, but there is relief generally available for lawyers whose practice of law (including the provision of free legal advice) in the previous fiscal year and continuing forward is limited to not more than 20 hours per week on average for each week actually worked and 750 hours per year, and gross billings of up to \$75,000 per year. If you qualify for this part-time practice option you'll enjoy the same claims limit that you had while in full-time practice, but your premium will be based on just half of the base premium.

If you need time away but intend to return to practice in the future, a temporary leave of absence under Exemption (c) of the Law Society program may be the answer. This isn't, however, a way for lawyers to test "semi-retirement". When applying under Exemption (c), and for as long as you are on the temporary leave of absence, you must refrain from practice but have the intention to return to active practice within the time limits set out in the Rules for Exemption Eligibility.

Some work you do as part of your practice might be continued into "semi-retirement" and still allow you to apply for exemption. If as part of your practice you were named to act as an estate trustee, trustee or attorney for property for a non-family member, you may be eligible under Exemption (h) for relief from the LAWPRO premium if your work as a trustee (for example) will be the only ongoing aspect of your practice. While the standard run-off protection would not cover such services provided by you after retirement, you may apply for increased run-off coverage that could cover such work as an estate trustee, etc. during retirement.

Retirement is wonderful. It's doing nothing without worrying about getting caught at it.

- Gene Perret

TAKING THE PLUNGE

If you decide to cease practising law, you must notify both the Law Society and LAWPRO of your pending change in status.

Upon applying under Exemption (a) (not practicing in Ontario) or Exemption (h) (estate trustee, etc.), LAWPRO provides \$250,000 standard run-off coverage to cover the defence costs, indemnity payments and costs of repairs for claims that arise after retirement out of services provided while in practice or out of certain *pro bono* legal services that you are permitted to perform while on exemption. This is provided to retiring lawyers at no charge.

For many retired lawyers the \$250,000 limit may not be enough when considering the risks of future claims. The standard run-off coverage is not renewable, so if even one claim is made against you it could wipe out the \$250,000 limit and, unless other insurance is in place, you would be left uninsured for the balance of your retirement. To meet this need LAWPRO offers Increased Run-off Coverage with a selection of limits and terms. Particularly if you are going to continue to act as a trustee/attorney and apply under Exemption (h), you may want to consider purchasing the Increased Run-off as it can cover the work done as trustee *after* you retire. On expiry of the original term (being between two and five years) you may either apply for a further term or revert to just the \$250,000 standard run-off coverage (as reduced by prior claims). If you are interested in this option you should plan to apply at least 60 days before the start of retirement to minimize the likelihood of a gap in coverage, as Increased Run-off Coverage is individually underwritten.

If a claim triggers run-off protection, a \$5,000 deductible applies and you are bound by all of the same obligations to assist in the defence as a lawyer in active practice. This includes the obligation to promptly provide notice of a claim, provide access to the relevant files, assist in the defence and to otherwise abide by the terms and conditions of the policy.

Other insurance may respond to claims made after retirement, including the excess E&O policies maintained by your former firm and partners. However, if you are relying on your

former firm to have adequate coverage in place to respond to a claim made against you during retirement, you may be in for an unpleasant surprise. Problems that arise include (but are in no way limited to):

- *The firm doesn't carry excess insurance.* Maybe it once did, but let it lapse. Maybe it never had excess insurance. Unless you have an agreement in place that places an obligation on your former firm to continue to carry this coverage, you can't compel your former firm to maintain excess coverage.
- *The firm has excess insurance, but it doesn't extend to you.* Perhaps the firm changed excess insurers and the new policy doesn't extend to former members of the firm. Maybe the structure of the firm has changed and the policy doesn't include members of the old firm. Once you leave a firm you may not know what changes are taking place that could adversely affect you.
- *The wording of the excess policy has changed and the claim is no longer covered.* Changes in limits, terms, conditions or exclusions may all have an impact on what coverage is available to you in the event a claim is made.
- *Other claims exhaust the firm's limits.* Claims made against the other members of the firm (current members and former ones like you) can erode the limits available leaving you personally exposed.
- *The claim doesn't relate to services performed on behalf of your former firm.* The claim may relate to services provided to an earlier unrelated firm that you worked for, or to legal advice or services that you provided outside of your work for the firm, such as for friends, community groups, or family members. If the work wasn't done on behalf of the former firm, that firm's coverage may not apply.
- *You don't have access to your former firm's insurance policies.* Without having a copy of the policy and knowing who the insurer is, you will not know what (if any) coverage is provided to you, what conditions have to be met, how notice of claim is to be given, or what you need to do to avoid a possible denial of coverage.

What seemed like sufficient insurance coverage at the start of retirement may disappear over time. A gap or lapse in coverage for former members of firms can happen through inadvertence and without any ill-will on the part of new management. Wherever possible you should strive to safeguard your own interests and be cautious of relying on third parties to maintain coverage for your benefit.

In retirement, I look for days off from my days off.

- Mason Cooley

There are risk factors listed on the LAWPRO website ("Assess your insurance needs") that can help you determine whether increased run-off protection is right for you. Depending on the nature of your practice, your exposure for other people's work, the number of files you had and the monetary value of transactions you worked on, the standard coverage may not match your level of risk.

RETURNING TO PRACTICE

What happens if you've entered retirement only to discover that you're not ready to quit the practice of law? If what you miss is applying your knowledge and helping others, and the financial benefit of being a lawyer is not what is drawing you back, consider providing *pro bono* legal services for a LAWPRO approved program. This can both benefit society and the retired lawyer who needs to keep active. While the LAWPRO policy has a general exclusion for exempt lawyers performing any legal services, an exception is made for lawyers who provide professional services through LAWPRO approved *pro bono* programs associated with Pro Bono Law Ontario (PBLO). LAWPRO's standard run-off coverage extends to cover the work done for these programs even after the lawyer has otherwise gone on exemption and no deductible applies in the event a claim is made against the lawyer for professional services provided through the PBLO program. If you want to provide *pro bono* services for a not-for-profit organization that isn't associated with PBLO, you can still maintain your exemption if you apply

for and are pre-approved by LAWPRO, but your run-off coverage will not cover the legal services you provide in that case.

If you decide you want to resume your practice and provide services that don't fall within the two permitted exceptions, you will want to contact the Law Society in regard to your practice status and LAWPRO in regard to your insurance coverage, *before* you start providing professional services again.

A guide to LAWPRO exemption categories

There are many exemption codes applicable to the LAWPRO primary insurance program, a number of which may be relevant to prospective retirees:

Exemption (a): "Any LAWYER who during the course of the year(s), will not engage in the practice of law in Ontario."

Exemption (c): "Any LAWYER on a temporary leave of absence from practice, provided that the temporary leave of absence is not more than 5 years if taken for reasons of family or illness, or not more than 2 years if taken for other reasons; this exemption shall not be available to a LAWYER who has taken alternative employment."

Exemption (h): "Any LAWYER who during the course of the year(s) will act in the capacity of an estate trustee, a trustee for *inter vivos* trust, or an attorney for property in respect of an estate, a trust or a property of a person other than a related person of the LAWYER of which the LAWYER was named as estate trustee, trustee or attorney while the LAWYER was engaged in the practice of law in Ontario, and

- (i) will not otherwise engage in the practice of law in Ontario, or
- (ii) who otherwise qualifies for exemption under:

- eligibility rule (d) employed LAWYER – employed in government or education,
- eligibility rule (e) employed LAWYER – employed as in-house corporate counsel, or
- eligibility rule (f) employed or volunteer LAWYER – legal aid clinic,

and will not engage in the practice of law in Ontario other than as provided for herein or under eligibility rule (d), (e) or (f) for which the LAWYER would otherwise qualify."

If you take care of the small things, the big things take care of themselves.

- Emily Dickinson

If you are a lawyer planning to retire within the next few years, don't wait until your retirement party to start thinking about liability insurance.

All lawyers make mistakes during their practice, but a failure to plan for retirement shouldn't be one of them. ■

Victoria Crewe-Nelson is assistant vice president, underwriting at LAWPRO.

How the real estate bar entered the insurance business, or what happens when a lawyer is also an insurance intermediary

Many of us deal with licensed insurance agents or registered brokers every year to purchase coverage, whether life, auto or home policies. When someone in Ontario wishes to obtain title insurance, the real estate lawyer effectively functions as insurance intermediary (although not technically an agent or a broker). Lest anyone think there is anything improper in this role, a review of sub-section 2(2) of the *Registered Insurance Brokers Act* reminds us that Ontario lawyers are permitted to arrange insurance for clients so long as it is in the course of acting for them.¹ And of course, the *Rules of Professional Conduct* expressly contemplate the lawyer ordering title insurance for clients, subject to the prohibition that the lawyer cannot receive compensation, directly or indirectly, for fulfilling this role.²

On the one hand, there is limited upside to this journey into the insurance world, as the lawyer does not receive any particular financial benefit for arranging the title insurance. On the other hand, is there any actual downside for, or burden on, lawyers undertaking this role? From dealing with negligence claims and operating a title insurance business, LAWPRO has a unique view of the various issues that can arise.

When a real estate lawyer chooses to provide the service of ordering title insurance for his/her clients, the lawyer is viewed by the title insurer like an insurance intermediary, even if non-commissioned. An agreement with the title insurer may be required, with many obligations being imposed on the lawyer. The title insurer may wish the right to view relevant documents on files it has underwritten (as the lawyer has effectively helped with that underwriting) and may

want assurances about how the law firm operates, who the employees are and so forth. Furthermore, absent a specific contractual obligation, if at some point you come to be considered an unacceptable risk, the title insurer does not have to continue accepting applications from you on behalf of your clients.

Nor does a title insurer have to accept applications from you in the first place. A diligent title insurer could ask for consent to search your E&O records and/or discipline history, plus seek representations and warranties about certain features of your office systems and practice standards.

It comes as a shock to some lawyers to learn that they have been cut off by a title insurer and that as a result of that decision or otherwise, other title insurers may not wish to receive applications from them. This issue can arise when looking for a new title insurer and you are asked to warrant that you have not had applications declined by any other title insurer.

U.S. attorneys involved in real estate have lived with this reality for many years. For that reason, some will always choose to do business with more than one title insurer: After all, you don't want your real estate practice to be shut down overnight because you are suddenly viewed as an undesirable risk as an insurance intermediary.

The American Land Title Association (ALTA), an industry group for title insurers and agents, is considering best practices. Those acting in the role of insurance intermediary (and closing deals) may be called on to facilitate electronic verification of trust

account reconciliation, adopt written privacy and security plans to protect information, maintain fidelity insurance coverage in addition to malpractice coverage, and create procedures for resolving consumer complaints, among other requirements.

In Ontario, lawyers view their compliance with the Law Society by-laws and *Rules of Professional Conduct* as their main obligation. It can come as a surprise to realize that title insurers, while happy to piggyback their risk management on the obligations under the *Rules*, may actually evaluate the lawyer quite differently: Are you submitting premiums as quickly as the title insurer would like? Are you drafting exceptions in accordance with the title insurer's standards? Do you produce enough applications that it is worthwhile for the title insurer to bother training your new staff? The questions could go on. Some issues can require careful balancing between your obligations as a licensee of the Law Society and the practical realities of your (unpaid) relationship with the title insurer.

Please consider the above comments so you can properly wear the hats of both a real estate lawyer and an insurance intermediary. ■

Kathleen Waters is president and CEO at LAWPRO.

¹ *Registered Insurance Brokers Act*, R.S.O. 1990, CHAPTER R.19, at s. 2:
2. (1) No person shall act as an insurance broker unless the person is a registered insurance broker under this Act.
(2) Subsection (1) does not apply to,
(a) lawyers, accountants or actuaries acting in their professional capacity...

² *Rules of Professional Conduct*, Rule 2.02(11): "A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client."



What is it?

- Innocent Party coverage protects you against the dishonest, fraudulent, criminal or malicious acts or omissions of present or former partners, associates, and employed lawyers in your firm.

Is this coverage mandatory?

- Minimum level Innocent Party coverage (sublimit coverage of \$250,000 per claim/aggregate) is required for all partners practising in association, partnership (including general, MDP and LLP partnerships) or in a law corporation (with more than one lawyer).

Cost of mandatory Innocent Party coverage

- LAWPRO offers Innocent Party coverage sublimits of:

\$250,000 per claim/in the aggregate for an annual premium of \$250; or

\$500,000 per claim/in the aggregate for an annual premium of \$400; or

\$1 million per claim/in the aggregate for an annual premium of \$499.

Can sole practitioners purchase Innocent Party coverage?

- Sole practitioners are not required to carry Innocent Party coverage; however if you choose not to purchase this coverage, you should appreciate that your policy will NOT protect you or your clients against the dishonest, fraudulent, criminal or malicious acts or omissions of former partners, associates, and employed lawyers.
- Even as a sole practitioner, you can continue to have vicarious exposure for the acts and omissions of partners, associates, and employed lawyers with whom you once practised.
- Carrying Innocent Party coverage when you are a sole practitioner can provide comfort to opposing counsel and their

clients in circumstances in which it is expedient that you handle opposing clients' funds (for example, when funds are entrusted to you in escrow).

- Optional Innocent Party coverage is underwritten on an individual basis, based on a risk assessment of information provided in the Innocent Party Sublimit Buy-Up application.

How to apply for optional Innocent Party coverage

- You can easily and quickly complete your application for Innocent Party coverage online at the secure section of the LAWPRO website (www.lawpro.ca). Go to MY LAWPRO to sign in using your Law Society number and confidential password. ■

Still have questions?

Speak to a LAWPRO customer service representative at 416-598-5899 or 1-800-410-1013 or send an email to service@lawpro.ca.

Temporary leave of absence

Back in 5 months

- LAWPRO understands that there may be circumstances in which a lawyer may have to take some time away from the private practice of law due to illness, family issues or other circumstances.
- Lawyers who temporarily leave the practice of law and do not take any alternate employment may be eligible to apply for exemption from paying insurance premiums.
- The appropriate exemption category is Exemption (c): *temporary leave of absence*.
- Lawyers may qualify for Exemption (c) for any reason for up to two years.
- If the temporary leave is for family or medical reasons, a lawyer can remain on Exemption (c) for up to five years.
- Lawyers currently claiming exemption under another category are not eligible to amend their exemption category to Exemption (c).
- Please review the “Rules for Exemption Eligibility” for detailed exemption criteria.

Coverage while on a temporary leave of absence

- Lawyers who apply for Exemption (c) commencing January 1 do not pay any premium but are nevertheless provided with the standard practice policy coverage limits of \$1 million per claim/\$2 million in the aggregate, subject to a \$5,000 per claim deductible. The policy limit and deductible are applicable to claim expenses, indemnity payments, and/or cost of repairs together.
- For lawyers who apply for Exemption (c) commencing during the course of a policy year, their current (non-exempt) policy coverage continues in place for the remainder of that policy year.

- Exemption (c) is a type of run-off coverage, meaning that it does NOT provide coverage for claims arising out of professional services that you provide while claiming an exemption (some exceptions apply).
- This coverage applies only to claims arising out of services provided while in private practice.

How to apply

- You can easily and quickly complete your exemption filing online at the secure section of the LAWPRO website (www.lawpro.ca). Go to MY LAWPRO to sign in using your Law Society number and confidential password. ■

Still have questions?

Visit our website at lawpro.ca, which includes an FAQ page (www.lawpro.ca/Insurance/faqs/faqs.asp) that may provide some answers. You can also speak to a LAWPRO customer service representative at 416-598-5899 or 1-800-410-1013 or send an email to service@lawpro.ca.



New Year's resolutions

for a healthier law practice
and a new you

by Dan Pinnington and Tim Lemieux

The start of a new year is a time for self-reflection and self-improvement. Many of you will think about making changes in your personal and work lives. But while you all have good intentions, it can be difficult to break old habits, especially when you are running hard on the treadmill of a busy life and practice. So, to harness the good intentions you all have at this time of year, this article provides a collection of New Year's resolutions you can make to improve your practice and have a more fulfilling personal life.

Some of the resolutions we have collected focus on specific areas of law. Others will help you with various law practice operation and management issues – and many will help you avoid or at least lessen the likelihood you will face a malpractice claim. A good number of the resolutions will have a positive impact on your personal life.

A lot of the resolutions we present are fairly small or simple things that you can easily do. Some are bigger and will require some effort on your part. To help you successfully implement the resolutions we have presented, first a word on change and how change takes place.

In a perfect world, you could show up at your office tomorrow and follow through on all the resolutions in this article, and all your personal resolutions too. Unfortunately, it's just not that easy. It can be hard to make changes, even when you need and want to make them happen. Just remember that change is not a one-time event. Change is incremental. It takes time and effort. For change to happen, you must make a commitment to change, and change one thing at a time. Don't give yourself a self-improvement hangover by trying to tackle a bunch of resolutions at once. This will guarantee frustration and failure.

Start by identifying the resolutions that will help you deal with a problem or issue that you think should be addressed. Start small – take baby steps. Pick the smallest things that will make the biggest differences. Break resolutions that require multiple steps and big changes into smaller steps and changes. You will find it is easier to begin and successfully complete each step, and you'll be amazed at how easily you can successfully follow through on the larger resolutions by doing this.

No doubt, you are extremely busy. Billable work for clients has a high priority and will win most of the time, but it shouldn't win all of the time. Budget time for change. Set aside a bit of time, each day, each week, each month. Make an appointment with yourself – in your calendar – and don't break that appointment. It's the only way to avoid the "I'm too busy" excuse.

With small steps, over time, our resolutions can help you can make big changes. Good luck with your efforts.

Resolutions

for better file and matter management

Effective file management provides the foundation for timely, valuable client service and appropriate management of client matters. Here are some resolutions to help you complete the critical steps in file management:

I will complete a conflicts check before opening a file: Conflicts of interest can lead to ugly and expensive malpractice claims. The best time to catch and avoid a conflicts claim is during a thorough conflicts search before a file is opened. A thorough search looks for conflicts involving both the client(s) and others connected with a matter.

I will open a file for every matter I handle: Doing “off-books” work not only bypasses firm administrative procedures and checks, it often leads to short-cuts and mistakes. Open a file for every matter you handle to make sure that the file is properly handled.

I will use a tickler system for limitations periods and time-sensitive tasks: Missed deadlines and procrastination are the second most common cause of malpractice claims. A formal tickler system that tracks critical deadlines and tasks is the best way to avoid missing deadlines.

I will have signed retainer agreements or engagement letters in all my files: Start out on the right foot with a written retainer letter or agreement. It establishes your terms of engagement and should clearly identify who the client is and what you are retained to do.

I will send a final reporting letter at the end of every retainer: A final reporting letter clearly signals the end of a retainer to a client. Along with a final account, it should summarize the work that was done for the client, including outlining the key terms of any documents or agreements, the outcome of the matter and any ongoing steps or obligations that the client has.

I will not handle matters I am uncomfortable with: Dabblers are more likely to face a malpractice claim. If you are unsure or hesitant about handling the matter for any reason (e.g., unfamiliar with the area of law, a potential conflict exists, a matter for a relative or friend, or a demanding or difficult client), get appropriate help or refer it to another lawyer.

The top 10 downloaded LAWPRO Magazine articles



- 1 'Beware the Dangers of Metadata' by Dan Pinnington
- 2 'Capacity and Capacity Assessment in Ontario' by Judith Wahl
- 3 'Critical Issues Facing the Legal Profession' by David Bilinsky
- 4 'Dealing with Difficult Clients' by Justice Carol Curtis
- 5 'Dos and Don'ts for Twitter' by Dan Pinnington
- 6 'Administrative Dismissals, Part 2' by Domenic Bellacicco
- 7 'How Long Should You Keep Your Closed Files?' by Dan Pinnington
- 8 'Practice Pitfalls' by Tim Lemieux and Norman McInnes
- 9 'Herding Cats: Revealing the Lawyer Personality' by Dr. Larry Richards
- 10 'The Biggest Malpractice Claim Risks' by Dan Pinnington

Available at: www.practicepro.ca/topdownloads


Resolutions to avoid litigation claims

- **#1 area of law for LAWPRO claims (33%)**
- **Average of 682 claims per year**
- **Average of \$20 million per year in costs**
- **Average individual claim cost \$30,000**

(For the years 2007-2011)

Top 5 errors

- **Failure to ascertain a deadline**
- **Inadequate investigation or discovery of fact**
- **Failure to calendar**
- **Poor communication with client**
- **Procrastination**

- 
- ☐ *I will enter target dates a few days early to avoid last minute complications.*
Unforeseen circumstances can arise on the day a document needs to be filed. Setting your target date a few days before a deadline could prevent a snow storm, traffic jam or sick-at-home clerk resulting in a missed deadline.
 - ☐ *I will familiarize myself with the Limitations Act, 2002.*
We continue to see claims related to lawyers' unfamiliarity with the new limitations rules. Take the time to review the rules and the related jurisprudence: See, for example, practicePRO's limitations resources at practicepro.ca/limitations, and LAWPRO's limitations casebooks, including this comprehensive review: www.practicepro.ca/LawPROmag/LessonsLearned_LimitationsAct.pdf
 - ☐ *I will avoid administrative dismissals.*
Rule 48 of the Rules of Civil Procedure allows for the administrative dismissal of non-progressing actions. Be sure to take timely steps to move litigation forward.
 - ☐ *I will talk to my clients more often and not rely on email so much.*
Lawyers are increasingly using emails to communicate with clients, and this is resulting in misunderstandings. Clients and lawyers read things into emails that aren't there, miss the meaning of what is said, or read between the lines and make assumptions. During a long litigation matter, arrange some face-to-face meetings, or at least a phone call if distance is an issue.
 - ☐ *I will make sure to have written confirmation of instructions and advice.*
As in all areas of law, this is a crucial to helping LAWPRO defend you in the event of a claim where you may have no recollection of the details years later. Take notes on your conversations with the client, and document in writing things like the details of settlement offers, the extent of what you will do in limited retainer cases, your advice on accepting (or not) offers, and the likelihood of winning or losing a case and the costs involved.
 - ☐ *I will create more detailed docket notes.*
Like the resolution above, this has the benefit of helping protect you in the event of a claim (e.g. "Conference with client re risks and costs of litigation" is much better than just "Conference with client re lawsuit.") It also will help you determine if you are making money on a particular case by giving you a better understanding of the amount of time you and your staff are spending on it.
 - ☐ *I will review my file before closing it to make sure every task is accounted for.*
It's 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 and it is part of your retainer, you should ensure that you complete the outstanding work. If it is not, confirm in writing to the client that it is the client's responsibility to complete the work.



Resolutions

to better set and control client expectations

Clients can be demanding and will sometimes have expectations that will be unreasonable. Unmet expectations, even if they are totally unreasonable, are a recipe for unhappy clients. Setting and controlling client expectations is one of the best things you can do to ensure that you have a happy and satisfied client at each stage and the conclusion of a matter. Follow these resolutions to better set and control your clients' expectations:

I will carefully explain how the matter will proceed: While you may have handled a particular type of matter hundreds of times before, remember that your client is going through it for the first time. Make sure the client understands the process and steps that will occur as the matter proceeds.

I will avoid legal jargon when explaining things to my clients: Don't use legal jargon when explaining things to clients as it may confuse them.

I will give the client a realistic indication of how long the matter will take: Clients will want their matter resolved as quickly as possible. Give them a true indication of how long the matter will take, and highlight any issues that might arise and delay a resolution of the matter.

I will provide the client with a full picture of all costs and disbursements: Clients don't want to spend money on legal fees and they will want to keep fees as low as possible. If you quote a range of fees they will remember the lower number. Give your clients a clear explanation of all fees and disbursements that they will or might incur. Be honest here – don't quote a lower cost to please them. In the litigation context you should include a warning that they could be responsible for paying the fees of the opposing party.

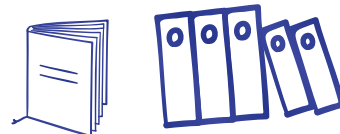
I will clearly explain to the client all possible outcomes or results: Clients always want a positive outcome to their matter. Unfortunately, not every client will get what they want. Make sure your clients have a clear appreciation of all possible outcomes, including negative or unpleasant ones.

I will answer all my clients' questions to their satisfaction: Carefully listen to and address any questions your clients ask. Do the questions indicate that they don't understand something or that there could be another relevant issue you need to give advice on?

Confirm the above information and advice in writing: In a personal meeting or phone call, unsophisticated and stressed clients who have worries and financial concerns may struggle to listen and understand what you are telling them. To avoid any possible confusion, confirm important discussions and advice in writing.

I will immediately highlight for clients any unexpected changes that arise: Unexpected things can happen through the course of handling any matter. If something happens that will change the process, timing, costs or outcome of a matter, make sure the client is immediately made aware of the change and why it happened. Confirm this advice in writing.

The top 10 downloaded papers and supplemental resources



- 1 E-Discovery Reading List
- 2 LAWPRO Fraud Fact Sheet
- 3 Managing the Finances of Your Practice booklet
- 4 Transition Rules chart: *Limitations Act, 2002*
- 5 Top 10 Technology Tools (and Tips on How to Use Them)
- 6 'Dealing with Difficult Judges' by Justice Carol Curtis
- 7 Managing the Lawyer/Client Relationship
- 8 Managing Conflict of Interest Situations
- 9 Managing a Mentoring Relationship
- 10 Managing the Security and Privacy of Electronic Data in a Law Office

Available at: www.practicepro.ca/topdownloads

Resolutions to avoid real estate claims

- #2 area of law for LawPRO claims (30%)
- Average of 626 claims per year
- Average of \$23 million per year in costs
- Average individual claim cost: \$37,000

(For the years 2007-2011)

Top 5 errors

- Inadequate investigation or discovery of fact
- Fail to obtain client consent
- Fail to follow client instructions
- Fail to know or apply the law
- Poor communication with client

☐ *I will ensure I meet with my clients in person at least once.*

In most real estate practices the staff handle many aspects of the client's matter. However, ultimate responsibility still lies with the supervising lawyer. Take the time to meet with the client in person to review the transaction and understand the client instructions, particularly with respect to the client's intended uses of the property. Not every matter is straightforward, and you don't want to have to be addressing a problem that was only noticed the day the deal is to be closed, or never noticed at all.

☐ *I will remember that the lender is also my client in most residential transactions.*

Lawyers often forget, because they deal face-to-face with the purchasers, that the lender is also their client and is owed a duty of care. You have to provide any information to the lender that is material to the transaction. The lending clients can bring claims against lawyers for failing to disclose all the relevant information they knew (or ought to have known).

☐ *I will make sure I take my instructions from the person with the true interest at risk in the transaction.*

At times it may be easier to gather information relevant to the transaction from intermediaries like a mortgage broker or real estate agent. However, in the event of a claim lawyers need to be able to show that they took their instructions from the person with the value at risk in the transaction, or at least have documentation from that person authorizing the lawyer to take instructions from the intermediary in all circumstances.

☐ *I will document my conversations with and instructions from the client.*

This is the best defence you'll have against a malpractice claim. The client may only be involved in one or two real estate transactions in their lifetime and will remember the details, while the lawyer who sees countless transactions will likely have little specific recollection of one matter. Keep notes of your conversations with the client and document what you discussed and what actions you took in a detailed reporting letter to the client.

☐ *I will not give my electronic registration password to my clerks or anyone else.*

Only the lawyer who received the electronic registration credentials provided by the Ministry of Government Services is entitled to use the lawyer disc and password to register an instrument on title using the electronic system. And yet LawPRO sees claims in which the lawyer allowed (or claims not to have been aware) that someone else in the office was using the password. As tempting as it may be in a busy real estate practice to let the clerk register instruments requiring a lawyer's electronic signature...don't.



to better document your files

You can still find yourself being sued for malpractice, even if you have done everything correctly. A well-documented file can help to explain what work was done or to justify an account and can be a lifesaver when it comes to defending a malpractice claim. A good paper trail can help show what work was done on a file long after your direct and specific memories of the file have faded. Here are some resolutions you can make to help you keep a better-documented file:

I will document the important conversations and communications on my files: It is just not practical to document everything on every matter, but you should document as much as you can in some contemporaneous manner (i.e. notes in a file, a formal confirmation letter or quick email to the client, detailed time dockets, a memo to file, etc.)

I will make specific efforts to document and confirm major discussions and decisions on my matters: For the sake of reconstructing the work that was done on a matter, you want to make sure you record advice or instructions that involved significant issues or outcomes, and major client instructions or decisions (e.g., strategy discussions, settlement discussions, changes to previous decisions or advice), and send confirmation of key discussions and decisions to your client.

I will be especially careful to document situations where my client wanted me to follow a course of action that I did not recommend or that could have possible negative outcomes: Every action you take and decision you make will be judged with harsh 20/20 hindsight. Clients have a tendency to not remember the advice they received as to negative outcomes, longer times for resolution or higher costs. Protect yourself in these situations by confirming these discussions with your client.

I will also be extra careful to document my files with difficult or emotional clients: Take extra care to document your file if you are dealing with difficult or emotional clients as they may not hear or understand your advice (no matter how hard you try to communicate it) and are more likely to complain about it later.

I will get signed directions for major decisions on a matter: On major decisions, a signed direction is your best option for confirming that a client did indeed give instructions to follow a particular course of action.



I will use written offers to settle: Offers to settle have to address many details, and there are many opportunities for confusion or mistakes. A written offer to settle can help eliminate misunderstandings and miscommunications and make sure all details of a settlement are documented and confirmed.

I will not document nasty or embarrassing things: In moments of frustration you might find yourself mad at your opposing counsel, the opposing party, the judge handling your matter or even your client. These thoughts should *not* be documented in your file as they could come back to haunt you in the event they are disclosed to your client in a malpractice proceeding.

I will capture all manners of communication in my file: Some clients will use email as their primary communications channel. In this situation documenting email conversations is important to tracking what occurred on a matter. However, there is no need to print and store every email in the paper file, as long as you have the emails stored in an organized and regularly backed-up electronic form so you can retrieve them if necessary.

I will keep draft versions of documents in the file: Draft or interim versions of a document can assist in showing how a file progressed, in particular if there are marginal notes reflecting discussions with clients.

I will keep a copy of the final version in the file: For obvious reasons, having a copy of the final signed document in the file is essential. But, consider whether you really want or need to have the final signed original document in your file. Sending the original to the client means you can avoid the onerous and potentially costly obligations of taking care of the original as long as it is in your possession, including in your closed file storage.

I will send interim and final reporting letters on my files: At significant milestones and especially at the end of the matter, reporting letters can confirm what work was done and the successes obtained for the client, and next or further steps to be undertaken on a matter, by you or the client. A final reporting letter should confirm that the retainer is terminated. (And in the final reporting letter don't forget to ask a happy client for a referral to friends, family and business colleagues – some clients think you may be too busy to take on new matters, so politely disabuse them of that notion!)

Resolutions to avoid corporate/commercial claims

- **#3 area of law for LAWPRO claims (11%)**
- **Average of 230 claims per year**
- **Average of \$13.9 million per year in costs**
- **Average cost per claim of \$61,000**

(For the years 2007-2011)

Top 5 errors:

- **Failure to follow client instructions**
- **Inadequate investigation or discovery of fact**
- **Failure to obtain client consent**
- **Conflict of interest: Acting for more than one party**
- **Failure to know or apply the law**

☐ *I will carefully document instructions, advice and steps taken.*

Sometimes claims against corporate lawyers are a result of an incomplete or improperly drafted document or other mistake by the lawyer, but in many cases there is simply a dispute over what was said and done or not said and done, or confusion over who was to look after which tasks. Taking detailed notes and documenting conversations with the client helps avoid this, as does using LAWPRO's new "Checklist for Commercial Transactions", available at: practicepro.ca/LawPROmag/Commercial_Transaction_Checklist.pdf

☐ *I will not dabble in areas outside my expertise.*

Corporate and commercial law is complex and diverse, so don't stray outside your area of expertise. If necessary, retain the services of an expert in specialist areas like franchise law, IP or tax if you don't have thorough knowledge of those fields.

☐ *I will follow the firm's conflict checking system and take action on conflicts.*

Most law firms now have rigorous conflicts checking systems in place, and they do a good job of catching potential conflicts. The problem is that often these warnings are ignored because of poor judgement or greed. Listen to your instincts, and ask yourself "who is my client?" You can't always objectively judge your own conflicts, so get the opinion of someone outside the matter. If there's a conflict, decline the retainer even if it means turning down work for a good client or turning down substantial fees.

☐ *I will take the time to catch all the details and do the job right.*

Whether it is misreading (or not reading) information on a corporate document, not doing a title search on a corporate lease matter, or failing to ensure that two merged corporations don't lose a 'grandfathered' exemption, rushing or taking shortcuts can come back to haunt you. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day.

Resolutions

to avoid doing things that annoy clients the most

Clients will, understandably, get upset if they are treated badly or confronted with surprises. Make sure you appreciate how your words, actions, or inactions can annoy or even distress your clients. Here are some resolutions you can make to avoid doing the most common things lawyers do that annoy clients:

I will promptly return phone calls: Unacknowledged or unreturned phone calls are some of the most common complaints about lawyers. To avoid these problems, set and control client expectations at the very start of the relationship. Establish a reasonable policy on how quickly calls will be returned (e.g., within 24 hours, by the end of the next business day, or whatever is appropriate for your area of law or clients). Inform the client of the policy, and abide by it. Set up a mechanism for staff to return calls within the established timeframe if you are not available.

I will promptly reply to e-mails: In like fashion, emails that go unanswered are also a common client complaint. Some clients expect virtually instant answers to e-mail messages. Control this expectation by setting a policy on email communications (e.g. how and when to communicate by email, how long replies will take, alternative contacts and alternatives to email).

I won't make clients wait in reception: Do you remember how you felt the last time you were made to wait for an appointment when you had arrived on time? Don't make your clients feel the same way. Get off the phone or stop whatever else you are doing if a client is waiting for a scheduled appointment.

I will deliver on promises of performance: When it comes to deadlines, you can guarantee a happy client if you under-promise and over-deliver. Be realistic and don't make promises to deliver if you cannot keep those promises. Be realistic in your assessment of what you can accomplish and by when. In like vein, be careful not to promise an unlikely or impossible outcome or resolution on a matter. Extra caution is warranted here as clients will hear what they want to hear when it comes to a promised outcome. To protect yourself, clearly document your advice to clients on what the expected outcome will be.

I will be prepared for client meetings: Don't kid yourself – clients can instantly tell when you are not prepared. Shuffling through papers, using the wrong names or facts, and other similar clues make clients think to themselves that they may have the wrong lawyer. Make sure you are properly prepared for client meetings.

I will keep my clients informed and will communicate with them during long periods of inactivity: Clients always want to feel their matter is moving toward a resolution. But in litigation and other areas of law there can be long periods of inactivity as a matter of course. Keep them informed of the status of a matter and when they can expect it to move forward. Send copies of all incoming and outgoing correspondence to the client.

I will not send large bills without warning or explanation: This scenario calls for an in-person meeting to explain the charges to the client. Better yet, avoid it altogether with a strict retainer policy.

I will apologize if I fall down on the level of service my clients deserve: If you fail to do any of the foregoing things or otherwise come below an acceptable level of client service, acknowledge it to them, sincerely apologize, and make sure it doesn't happen again.



Resolutions to avoid family law claims

- #4 area of law for LawPRO claims (8%)
- Average of 165 claims per year
- Average of \$4 million per year in costs
- Average cost per claim of \$25,000

(For the years 2007-2011)

Top 5 errors:

- Failure to follow client instructions
- Failure to obtain client consent
- Failure to know or apply the law
- Inadequate investigation or discovery of fact
- Planning error in choice of procedures

☐ I will make better use of checklists and reporting letters.

Family law involves complex documents that deal with complicated issues involving emotional clients. There are many risks of errors by the lawyer, and misunderstandings by the client. LAWPRO's new *Domestic Contracts Matter Toolkit* (practicepro.ca/LawPROmag/Domestic_Contract_Matter_Toolkit.pdf) has checklists and forms that contain points and questions lawyers should systematically consider as they conduct the initial interview on a domestic contract matter and when they meet with the client to review and sign the document. And a final reporting letter detailing what you did and what advice you gave can be a lifesaver in the event of a claim, which may arise long after you've forgotten the details of a particular file.

☐ I will be aware of the limitations of my legal knowledge.

Family law is one of the most complex practice areas, with dozens of federal and provincial statutes and a huge amount of case law to keep track of. No lawyer can hope to be an expert in all aspects of this field, so it's important to know when to seek advice from more specialized counsel (for estate planning, for example) or third party experts such as tax advisors, accountants or actuaries.

☐ I will proactively direct and control client expectations.

Given the stress and emotions involved in their cases, many family law clients can be difficult to deal with. They may have unrealistic expectations as to the process, timing, costs, and potential outcomes of their matters. This makes it especially important that you manage their expectations from the outset to avoid disappointment and surprises later that might result in a claim. It's also very important, in this area of law, to carefully explain the terms of domestic contracts so that clients cannot later allege that they did not understand the effects of these agreements.

☐ I will learn to say "no" and not take on a potentially difficult client.

Further to the resolution above, there may be cases where the client will never be satisfied and it might be best to not take on the case at all. Lawyers involved in claims often tell LAWPRO that their instincts told them a client was going to be trouble. Have they changed lawyers several times? Do their demands seem unreasonable? Ask yourself if it's worth accepting the retainer.



to avoid fee disputes (and make more money)

Fees disputes commonly lead to unpaid accounts, Law Society complaints and/or malpractice claims. For these reasons you should do your best to avoid fee disputes with your clients. Here are some simple resolutions that will help you accomplish this:

I will get a sufficient retainer at the start of a matter: At the start of the matter ask for a retainer that is sufficient to do all of the initial work on the matter. Ask for a retainer that will cover all the work – asking for less gives the client unrealistic expectations about fees and means you are facing collection issues when you ask the client to replenish the retainer.

I will ask clients to replenish the retainer before it runs out: Monitor your work-in-progress so that you don't perform work for which you may be unable to collect payment, and request replenishment of the retainer before it is exhausted.

I will bill my matters regularly: Keep the client informed of the ongoing costs of the work you are doing for them by sending a regular bill. Consider billing monthly, or send accounts at milestones to report how the matter is progressing.

I will stop work if a retainer is not replenished or I am not paid: Monitor your work-in-progress and stop working if a retainer is not replenished. Don't wait until just before a court date to try and get off the record on a matter.

I will not sue for fees: Suing a client to collect an unpaid account almost guarantees you will face a counter-suit alleging negligence. In most cases that allegation of negligence will be completely unfounded, but it still will trigger a duty to report a claim to LAWPRO.

I will use the reports in my accounting software to monitor retainer amounts, WIP hours and outstanding accounts: Most law office accounting packages have reports you can run that will tell you retainer amounts in trust, WIP hours and outstanding accounts. Use these reports to proactively manage your retainer and billing practices so you don't find yourself in a position of needing to sue a client to collect an outstanding account.

Resolutions to avoid claims with LAWPRO and practicePRO resources

With a bit of effort, the risks of a malpractice claim can be significantly reduced. LAWPRO and practicePRO have created various practice aids and resources to help you pro-actively reduce your risk of a malpractice claim. Make an effort to use the following LAWPRO claims prevention resources:

I will save \$100 on my premium by claiming the LAWPRO Risk Management Credit: By taking two CPD programs that are approved for the LAWPRO Risk Management Credit, you can save \$100 on your premium. Visit lawpro.ca/creditapproved to see a list of approved programs and remember to claim your credit by September 15, 2013.

I will visit the LAWPRO Magazine Archives page: You can easily find every article from every past issue of *LAWPRO Magazine* on the LAWPRO Magazine Archives page (practicePRO.ca/MagazineArchives).

I will visit the topical listing page: On our topical listing page articles and risk management resources are easy to find as they are listed by practice area and other topics (practicePRO.ca/TopicListing).

I will borrow a book from the practicePRO Lending Library: This library has more than 120 books on various topics that Ontario lawyers can borrow for free. There are books on practice management, firm finances and billing, legal technology, marketing, how to start and build a practice, selling and winding down a practice, and many

other topics. Go to practicePRO.ca/lendinglibrary for a full list of books and borrowing instructions.

I will regularly use practicePRO checklists in the coming year: In the course of working on many files over many years, it is inevitable that a step or issue of concern will be missed at some point on one of those files. A checklist is one of the best ways to make sure all necessary steps and communications occur on every matter. To address areas of high risk practicePRO has prepared several checklists for Ontario lawyers. At practicePRO.ca/checklists you can find checklists for an ILA consultation, a corporate agreement, client intake on a domestic contract matter, the risk of sitting on a non-profit board, employee departures, and a post-matter client survey.

I will check the AvoidAClaim.com blog to confirm my fraud suspicions: Spidey-sense tingling? If any aspect of a transaction smacks of possible fraud, visit the AvoidAClaim.com blog to compare your client's name with the names of confirmed fraudsters as well as fake client ID, cheques and other documents. While you're there, sign up for the RSS feed, or to receive email notice of new posts.


Resolutions to avoid wills & estates claims

- #5 cause of LAWPRO claims (7%)
- Average of 145 claims a year
- Average \$5.7 million per year in costs
- Average cost per claim of \$40,000

(For the years 2007-2011)

Top 5 errors:

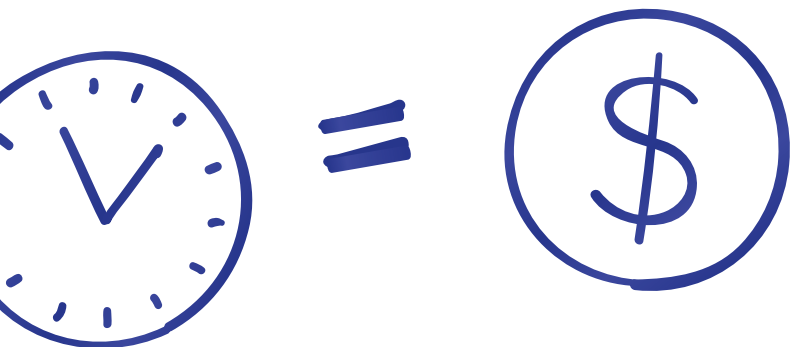
- Inadequate investigation or discovery of fact
- Failure to know or apply the law
- Failure to obtain client consent
- Failure to follow client instructions
- Poor communication with client

- 
- ☐ *I will ask more probing questions when meeting with a client to prepare a will.*
Too many lawyers are not asking the questions that could uncover facts that could cause problems later, or making clear to the client what information they need to provide. Was there a prior will? Are all the beneficiaries identified correctly? What about gift-overs? Were all assets identified, and how are they registered? Was there a previous marriage? Ask, ask, ask. And then do a reporting letter to confirm everything that was discussed.
 - ☐ *I will not act for family members or friends.*
We see claims where lawyers didn't make proper enquiries or take proper documentation because they assumed they had good knowledge of their family or friends' personal circumstances. It's best not to act for them, but if you must, treat them as if they were strangers. And remember if a claim arises it will likely not be from the friend or family member, but from a disappointed beneficiary with no personal relationship with you.
 - ☐ *I will confirm as best I can the capacity of the testator and watch for undue influence.*
With greater numbers of elderly clients, lawyers need to be vigilant about these issues. Meet with the client separately from those benefiting from a will change, and have written proof that the client understands what they are asking and the advice you've given. And while it is difficult to be completely certain of capacity, be sure to document what steps you've taken to satisfy yourself that the client's capacity has been verified.
 - ☐ *I will take the time to compare the drafted will with my notes.*
It sounds like obvious advice, but we see claims where the final version of the will did not adequately reflect the instructions that the client gave, or overlooked some important contingencies. Many of these errors could have been spotted by simply reviewing the notes from the meeting with the client. It can help to have another lawyer proofread the will, or set it aside for a few days and re-read it with fresh eyes. When you review it, consider the will from the position of the beneficiaries or disappointed would-be beneficiaries. Ask yourself if you were going to challenge this will, on what basis would you do so?
 - ☐ *I will review the completed will with my client.*
Once you have a final draft of the will, meet with the client to review and explain the will's terms.

Resolutions

to capture more time (and make more money)

With technology and a few tricks, you can increase your billable time by catching more of the actual time you spend on tasks. This gives you more time to bill, which will ultimately transfer to a better bottom line. Here are some of the best ways you can use technology to capture and bill more time:



I will use electronic timesheets and enter my own time: Paper timesheets are error-prone and inefficient because they require double entry. The efficiency, extra speed, and greater accuracy of entering your own time on electronic timesheets make this resolution a no-brainer.

I will enter time contemporaneously as I complete tasks throughout the day: Trying to create time entries for work done in the distant past is time-consuming, and not likely to be very accurate or complete. Studies have shown that lawyers gain up to 20 per cent in their billable time when they docket their time contemporaneously to doing their work.

I will review my dockets and "to do" list at the end of the day: At the end of the day spend a few minutes reviewing your dockets, and make any necessary corrections or additions while things are still fresh in your mind.

I will use standard billing codes and include details in my dockets: Many law office accounting programs have standard billing codes, for example, "conference with client," or "review of

correspondence." While these codes are convenient (and you should use them for this reason), they don't include enough detail. Having detailed time entries is a great record of the work you did on a file, and for communicating to the client the details of that work. A detailed entry should look something like this: "telephone conference with client re details of weekend access problems." Or, "drafting of correspondence to client confirming instructions to skip zoning search." Clients will have fewer fee complaints when your accounts have detailed time entries.

I will record every minute I spend on a file: Don't pre-judge and write off time spent on a file by not recording it on the day it was done. Wait until your final or interim bill is prepared on the file, at which time you can properly judge all the factors that determine what should be billed, including the time that was spent on it, the outcome, etc. You can easily make adjustments to an account by editing it at this stage. And, if you do elect to write-off certain billing entries, show them on the bill, as they are still part of the work done for the client, notwithstanding the write-off.

I will docket all my administrative and other non-billable time: To properly evaluate where your time is being spent, your efficiency, and ultimately the profitability of your practice, it is important that you understand how much time you are spending on non-billable tasks, and what they are. You can't do this without knowing how much time you spend on non-billable tasks and what those tasks are.

I will review detailed time and billing reports for my practice: Practice management software and accounting products can give you detailed reports that breakdown your time by file, client, matter type, practice area, etc. Review these reports to better understand where your time is going, and where you can make changes in how you allocate your time.

Resolutions to avoid criminal law claims




- 2% of LAWPRO claims
- Average of 32 claims per year
- Average of \$404,000 per year in claims costs
- Average cost per claim of \$13,000

(For the years 2007-2011)

Top 5 errors

- Failure to obtain client consent
- Poor communication with client
- Failure to follow client instructions
- Failure to know or apply the law
- Inadequate investigation or discovery of fact

- 
- ☐ *I will take the time to ensure the client understands my recommendations.*
Failing to effectively communicate with the client is just as much a claims pitfall in criminal law as in other areas. This could be because of the rushed nature of many “courthouse steps” conversations, or the fact that the lawyer’s years of experience on cases may obscure the fact that the client doesn’t fully understand the course of action the lawyer recommends. There is a risk that clients may later regret their choices and make a claim against the lawyer. To guard against this, be sure to provide detailed information about your analysis of the case, the plea options available, your recommendations, and a reminder that the plea decision is the client’s alone. It may not be required to document ALL your communications with the client, but it is good practice to do so as much as possible.
 - ☐ *I will discuss with the client the potential consequences of pleading guilty (and document it).*
While criminal law is traditionally a low claims-risk area of law, those claims we do see often involve a failure by the lawyer to communicate all the long term ramifications of pleading guilty to a charge. For instance, a truck driver pleading guilty to DWI may find out later that he may have difficulties with his job if he can’t cross the U.S. border. Be sure to document your conversations with the client in this regard.
 - ☐ *I will promptly notify LAWPRO of any appeals based on “ineffective assistance of counsel.”*
A client may appeal a guilty verdict based on grounds that the trial lawyer provided ineffective assistance. The appellate lawyer may ask the trial lawyer to sign an affidavit supporting this ground of appeal. If asked to do so, you should call LAWPRO right away so that we can advise on whether it is necessary and if so, how to do so without admitting negligence.
 - ☐ *I will meet with my client in my office whenever possible.*
Client meetings held at the courthouse while awaiting appearances sometimes lead to poor documentation of the content of the meeting, and incomplete understanding, by the client of what was explained. Wherever possible, and especially where charges are serious, you should make the effort to hold dedicated meetings at your office to discuss important issues if a client is not in custody.



for stress relief, wellness and balance

The life of a lawyer, especially a solo or small firm practitioner, is often stressful. Stress itself is not necessarily a bad thing; our body's reaction to stress actually helps us to meet the sudden demands that we face as busy lawyers. However, too much stress too often becomes chronic stress, and takes its toll on our physical, mental and emotional well-being. That, in turn, affects our personal lives and our ability to serve our clients. The trick is to eliminate some of the stressors in life, and build our resiliency for the stresses we cannot change. Try to incorporate several of the following practical tips into your daily routine in an effort to help you reduce your stress and enhance your performance in the practice of law.

I will take a real lunch break: Make time at midday for exercise, or invite an old friend to lunch. Catch up on business, but don't make that your primary focus. Laugh and enjoy the time. The time away from work will pay stress-reduction dividends.

I will read a good book: Find and read a book, fiction or non-fiction, on a subject that really interests you and that – this is the important part – is not connected to the law. Reading helps renew the mind and spirit!

I will get help if I need it: The fine line between “ordinary” stress and a mental health problem or addiction can be easy to miss, so it's important to tune in to how you feel. Prolonged feelings of hopelessness or unusual anger; complaints by others about your mood or behaviour; and making mistakes because of stress or addiction symptoms are just a few clues that you may not be able to manage your stress on your own. There are many places you can turn for help,

including to your family physician or a trusted confidante. Know when to reach out.

I will make time for exercise: Exercise is one of the most effective ways to combat the effects of stress on the human body. Commit to making exercise a regular part of your schedule. You are most likely to succeed if you start with short exercise sessions three times per week, then build to longer more frequent sessions. (As lawyers, we have to add: “Consult your doctor before beginning a new exercise regime.”)

I will go outside: Mounting evidence suggests that exposure to the natural world improves mental health and cognition for many people. Need to brainstorm ideas for an article or an argument? Try thinking on your feet as you walk around a local park; or park farther away so that you can walk a few blocks before and after work. Spend a few hours every weekend outdoors.

The top 10 precedents and checklists



- 1 Sample law firm budget spreadsheet
- 2 Law firm business plan outline
- 3 General retainer agreement
- 4 Employee departure checklist
- 5 Sample associate agreement

- 6 Sitting on a non-profit board:
A risk management checklist
- 7 Independent legal advice checklist
- 8 Criminal law retainer agreement
- 9 Family law retainer agreement
- 10 Sample law firm privacy policy

Available at: www.practicepro.ca/topdownloads

Seven New Year's resolutions for a better practice

We have assembled a whole bunch of resolutions in this article, but there are some that are truly suited and appropriate to being annual New Year's resolutions. All of them help to reduce stress: Less stress will immediately guarantee you a better New Year. Here they are:

- ☐ **I will fire my worst client:** This client is the one that calls you almost every day, sends you hourly emails, never has enough for a retainer and bickers about paying your fees. When ending the retainer, make sure you comply with the *Rules of Professional Conduct*.
- ☐ **I will book my vacation:** Your body and mind need a vacation and some downtime. Grab your calendar and block off two weeks for a vacation. Make sure to coordinate with your spouse/significant other. Under no circumstances do you book anything during those two weeks. Schedule it now and make sure you both take it!
- ☐ **I will book a medical appointment:** Are you seeing the doctor or other health professionals as often as you should? Don't put off your regular check-up because you are too busy. Investing some time now may mean that small health issues don't become big ones.
- ☐ **I will give more priority to exercise this year:** Put this in your calendar, too. Even if it is just a walk around the block at mid-day, bowling with the kids or using that dusty treadmill while you watch TV, it all helps to improve physical and mental health.
- ☐ **I will tackle that file I have been avoiding:** Set aside some time in your calendar in the first two weeks of the year to deal with that dusty file on the floor in the corner of your office that you have been avoiding. Unlike a fine wine, the file won't get better with age!
- ☐ **I will connect with my spouse/partner:** The practice of law is very stressful and demanding, on both you and your spouse or partner and family members. Take your significant other out to dinner and ask them: How and where does my work bug you? What needs to be changed to make this year better?
- ☐ **I will connect with a few of my best clients:** Take your best client(s) out to lunch, dinner or a coffee (if strapped for cash) and ask them: What am I doing well? What am I not doing well? What needs to be changed to make this year better? And the most important point – do this off the clock. An off-the-clock visit to the premises of a business law client is often appreciated – everyone likes to show off their operations.

by Dan Pinnington, vice president, claims prevention and stakeholder relations and Tim Lemieux, practicePRO



TitlePLUS program celebrates its 15th anniversary

On September 25, 2012, the TitlePLUS program reached its 15th anniversary. LAWPRO staff marked the event with an afternoon celebration.

TitlePLUS title insurance was created in 1997 to provide the market with a Canadian-based title insurance product designed to

be purchased with the advice and assistance of real estate lawyers. TitlePLUS title insurance is sold across Canada. Coverage is arranged through the insured's trusted legal advisor, and includes legal services coverage (except for OwnerEXPRESS® policies and Québec policies). The philosophy underlying the TitlePLUS program has always been that

title insurance is an additional protection arranged by lawyers, NOT a replacement for legal expertise. We are very proud of our fifteen-year history of standing behind the work of the Canadian real estate bar. To learn more about TitlePLUS coverage, visit titleplus.ca. ■

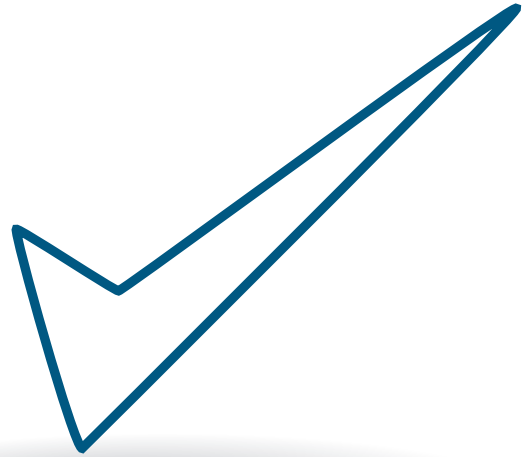
TitlePLUS program now on Facebook



Looking for a resource to support your homebuyer clients? Why not recommend that they visit the "TitlePLUS Home Buying Guide – Canada" page on Facebook? The TitlePLUS program launched their Facebook page earlier this year. It provides prospective home buyers with real estate-related information, budgeting, how to protect oneself from fraud, and other issues of interest to consumers in the real estate market. You can find us at: www.facebook.com/titleplushomebuyingguide. ■



Applying for TitlePLUS coverage simplified



effective August 15th

Fifteen years of experience in the title insurance business have led to ongoing refinements to the TitlePLUS program. This year was no exception. Read on to learn about the changes that took effect on August 15, 2012.

Underwriting streamlined for mortgage lenders

For residential transactions up to \$1 million, the underwriting requirements have been simplified. As of August 15, 2012, status certificates for condominiums and searches for realty taxes were no longer required for an application for a **mortgage-only policy**.

In addition, with respect to exceptions to coverage, mortgage-only policy applications no longer require the entry of exceptions to coverage for: rights of re-entry in favour of a builder/developer; maintenance easements; easements for mutual drives; reservations of ores, mines and minerals; smoke easements, and party wall agreements. As well, searches for building department, zoning, Fire Department work orders and compliance or Electrical Safety Authority work orders and compliance are no longer required.

For **purchase policies**, items listed above should continue to be entered as exceptions to coverage for the purchaser.

"Multi-Unit Properties" now include up to six dwelling units

The TitlePLUS residential policy now includes coverage for properties with up to six dwelling units. Houses with basement apartments or secondary suites are considered multi-unit.

Underwriting streamlined for purchase of residential multi-unit properties

An application for the purchase of a multi-unit property no longer requires entries of exceptions to coverage for Electrical Safety Authority work orders and compliance or Fire Department compliance. Searches

continue to be required for building department compliance, including confirmation that the use being made of the property is permitted under the zoning by-law. A search must also be performed for Fire Department work orders, unless the purchaser chooses instead to request the appropriate exception to coverage.

For further details about these changes or to learn how to complete an application on titleplus.lawyerdonedeal.com or RealtiWeb®, please call the TitlePLUS Customer Service Centre at 1-800-410-1013 or 416-598-5899 or visit titleplus.ca. ■

* RealtiWeb is a registered trademark of LawyerDoneDeal Corp. and is used under licence.

Don't be trapped by old habits of thought – The limitation period for equitable claims is now two years

It is difficult to let go of fundamental principles. Many generations of Ontario lawyers were taught that equitable claims are not subject to any limitation period.

These lawyers were correct, until the *Limitations Act, 2002* came into force.

Limitation periods are creatures of statute. The *Limitations Act*, R.S.O. 1990, c.L.15 and its predecessors had no provisions governing equitable claims. Therefore, equitable claims were subject solely to equitable principles such as laches and acquiescence. No statutory limitation period applied to them.

The *Limitations Act, 2002* changed all of this. In *Boyce v. Toronto Police Services Board*¹, the Ontario Court of Appeal expressed itself with absolute clarity on this point:

“The appellant alleges that the fiduciary claims can survive the *Limitations Act* as no time limit applies to such claims. While that was the case under the previous regime, under the present *Act*, fiduciary claims are caught by the phrase “claims pursued in court” in s. 2(1). The fiduciary claims do not fall within any of the exceptions in that section.”

Do not be trapped by old habits of thought!

For additional discussion of this and other limitations topics, see “The *Limitations Act, 2002* is a ‘catch all’ statute”², which provides

a general overview of the legislation; and “Lessons learned: The *Limitations Act, 2002*”³ which summarizes key case decisions under the new statute. Both articles are available in the *LAWPRO Magazine* archives at www.lawpro.ca, and in practicePRO’s topical article listing at practicePRO.ca. ■

¹ 2012 ONCA 230

² *LAWPRO Magazine* “Risky Business”, September 2010 (Vol 9.2).

³ *LAWPRO Magazine* “Take the time to get it right: the checklist issue”, August 2012 (Vol 11.3).

Keep your clerks, assistants, and other staff in the loop!

Law office staff play a key role in risk management.

Your staff are your risk management front line: They update your tickler system, maintain your files, relay client messages, conduct searches, and handle many other tasks that have a direct impact on your firm’s successful avoidance of malpractice risks.

We believe that much of the content we publish in *LAWPRO Magazine* and in our Webzines is just as relevant to clerks and legal assistants as it is to lawyers. Recently, several law office staff have expressed interest in receiving our publications directly. Not only do we welcome these requests, but we’re planning to create content tailored specifically to law clerks and legal assistants.

Is there a member of your staff who might like to receive *LAWPRO Magazine* and our newsletters? Please encourage him or her to get in touch with us directly at communications@lawpro.ca, or by calling Nora Rock at 416-598-5809.

Correction and Apology

The case book column at page 41 of the August 2012 edition of *LAWPRO Magazine*, “Lessons learned: The Limitations Act 2002,” contained a summary of the case of *Isailovic v. Vojvodic* (2011 ONSC 5854 (CanLII)). Due to the placement of names in the style of cause, one could have concluded that Vojvodic represented the plaintiff when the alleged improvident settlement was signed. In fact, the plaintiff was represented by another lawyer at the time of settlement. We apologize for any negative implication on the reputation of lawyer Vojvodic which this article may have caused.

Lawyers' negligence actions: experts and pleadings

*Ribeiro v. Van Moorlehem*¹: A modest dollar, successfully defended malpractice action highlights issues surrounding pleadings, expert reports, amendments and partners' liability.

In 1994 the plaintiff became partners with two brothers. Each of the three partners invested \$45,000 into a business and each held one third of the shares. No sooner was the venture started, however, than the partners had a falling out. By the end of the year the brothers had fired the plaintiff and excluded him from the business.

The plaintiff retained a lawyer who attempted to negotiate a resolution of the dispute. With no settlement ultimately finalized, the plaintiff decided to commence court proceedings against the brothers with new counsel. In June 1995, the plaintiff met the defendant lawyer who arranged for his partner to act. The defendant's partner represented the plaintiff from June 1995 through March, 1996 when he left the law firm. The defendant lawyer then took over the plaintiff's matter until May, 1998 at which point he was discharged. At the outset, the defendant's partner had commenced proceedings by way of application. By three years later, there had been several attempts by the parties to resolve the matter, resulting in numerous adjournments, but no actual settlement or hearing on the merits.

Amendments following the expiry of a limitation period

The plaintiff sued the defendant lawyer in April, 2004 but did not name the defendant's partner (or the firm) as a defendant. The plaintiff alleged that the defendant lawyer breached the standard of care by, *inter alia*, failing to advise of the importance of moving quickly. The judge hearing the matter noted that all of the breaches alleged arose in the early stages of the plaintiff's proceedings during which the defendant's partner, *and not the defendant*, represented the plaintiff. The plaintiff accordingly moved after closing arguments to amend his statement of claim to plead vicarious liability and a duty to supervise. The amendments were not allowed: the judge found that the amendments constituted an entirely new cause of action that was now statute barred and, as such, dismissed the motion.²

Vicarious liability for partner

In considering the plaintiff's arguments on their merits, the judge found that the defendant lawyer could not be vicariously liable for his partner in the absence of a judgment against the partnership or the partner himself. There was likewise no evidence to support

the allegation that the defendant was under a duty to supervise his then partner.

The absence of expert evidence

The judge further held that, in any event, negligence was not made out against the defendant given the absence of expert evidence with respect to the appropriate standard of care. With reference to the general rule that it will not be possible to determine professional negligence without the benefit of expert evidence as outlined in *Krawchuk v. Scherbak*³, the plaintiff relied primarily on the first exception set out in that case. The plaintiff argued that the need for expeditious prosecution if there is to be any hope of recovery is a non-technical matter commonly known to an ordinary person and therefore expert evidence was not required. The judge disagreed, noting that in this case, the parties in the underlying action had been interested in an out-of-court settlement and the amount at issue was quite small. There is, the judge outlined, a balance in such cases (between keeping the opponent's feet to the fire versus allowing time for an out-of-court resolution) which calls for considered and professional judgment. As such, expert evidence was needed.

The allegations of negligence; causation and damages

The judge noted in closing that, even had he embarked upon the exercise of evaluating the appropriate standard of care, he would not be prepared to find that the defendant lawyer was negligent as alleged. Moreover, causation and damages were not made out as there was no evidence led to establish that the plaintiff had lost the opportunity to recover his \$45,000 investment, given that his application was never dismissed.

The action was dismissed. ■

Martine Morin is senior claims counsel at LawPRO.

¹ *Ribeiro v. Van Moorlehem*, 2011 ONSC 5430.

² The motion to amend was decided under the "old" limitations regime and, as such, there was a presumption of prejudice. For a discussion of what constitutes a new cause of action see *Ascent Incorporated v. Fox 40 International Inc.* 2009 CanLII 36994 (On S.C.) at para 3; *Rotvold v. Rocky Mountain Diesel Ltd.* [1994] B.C.J. No. 2718 at para 18.

³ 2011 ONCA 352 (CanLII) paras 132-135; see also *Precision Modeling Ltd. and Levy v. Soskin, Soskin & Potasky LLP*, 2008 CanLII 31411 (ONSC) para 57.

Avoiding communication-based claims: some tips for litigators

Claims against litigation lawyers often involve allegations of communication errors. In this article, we consider steps that lawyers can take to avoid such claims right out of the gate – at the outset of their retainers.

When we attribute a claim to a communication problem, what exactly do we mean? Here are some examples:

- a) failure to warn clients that they were likely to lose a motion, trial or appeal;
- b) failure to warn clients that they could face an adverse costs order if they lose;
- c) misunderstandings regarding the scope of the retainer (for example, misunderstandings about which claim(s) the lawyer was retained to bring, which parties to name as plaintiffs or defendants, etc.);
- d) failure to seek and/or follow client instructions; and
- e) failure to warn clients about the applicable limitation period (this becomes a problem if a client ceases to retain a lawyer and then misses a limitation period).

Clients who bring communication-based claims often seek reimbursement of their legal fees in addition to compensation for their other losses. Claims for reimbursement of legal fees are not covered by LAWPRO.

One of the first steps a lawyer can take towards avoiding communication-based claims is requiring clients to sign a written retainer agreement. Such agreements can help to clearly establish the identity of the client(s), the scope of the retainer, and the identities of the parties who are to be named in any lawsuit. The retainer agreement should specify any unusual or noteworthy limitations to the retainer. For example, if the clients only want to commence one of two possible lawsuits, the retainer agreement should confirm this. By requiring clients to sign detailed retainer agreements, lawyers reduce the potential for misunderstandings.

Another good risk management practice is to explain the litigation process to clients and to provide the information that clients may need to adequately assess litigation-related risks. For example, lawyers should consider advising clients who are thinking about commencing a lawsuit that:

- a) litigation is slow;
- b) litigation is expensive;
- c) they could lose, no matter how strong the case appears to be at the outset;
- d) costs may be awarded against them and these awards can require payment of tens or hundreds of thousands of dollars;
- e) once they commence a lawsuit or a motion, they may not be able to abandon it without paying costs to the other side, even if they change their mind quickly;
- f) even if they win at trial, the judgment may not be enforceable;
- g) any damages that are recovered may be taxable;
- h) they have the option at any time to try to settle the case; and
- i) if they are going to commence a claim, they must do so before the expiry of the applicable limitation period.

The delivery of this advice should be confirmed in writing. For even greater safety, lawyers should consider providing further warnings prior to taking significant steps, like bringing motions or proceeding to trial.

Although a failure to provide the above-mentioned information and warnings does not constitute negligence in all circumstances, the protection afforded by doing so is worth the time if a claim is avoided. By providing clients with the information that they need to assess litigation-related risks, lawyers not only ensure that they are meeting the applicable standard of care, but they also reduce the likelihood that their clients will be surprised by an adverse outcome. Clients whose expectations have been adequately managed are less likely to turn on their lawyers (rightly or wrongly) than those who are taken by surprise.

Although this article focuses on steps that can be taken at an early stage, good communication practices should be maintained throughout the course of a retainer. Among other steps, lawyers should document significant communications and instructions (for example, settlement instructions received from the client) on an ongoing basis. While lawyers cannot prevent every malpractice claim, the steps outlined above can reduce the likelihood of a claim and put the lawyer into a better position if a claim is made. ■

Jordan Nichols is claims counsel at LAWPRO.

bookreview

The theme of this issue of *LAWPRO Magazine* is “making resolutions.” At the start of a year you might be looking to make changes or improvements in your practice. Here are some of the books from our Lending Library that could help you with your resolutions.



The Complete Guide to Designing Your Law Office

The Complete Guide to Designing Your Law Office by Suzette S. Schultz and Jon S. Schultz takes the view that your office is a marketing tool that can make you more profitable and improve your firm’s effectiveness. And like any marketing strategy, it’s good to rethink it once in a while. Whether you’re planning a move to a new office, or looking to remodel your existing space, this book covers all the steps from the planning to the actual move or renovation. It will help you think through what image you want your office to convey. It also discusses the latest law firm design trends, gives suggestions of how to put a team together and hire a design consultant, and provides abundant checklists and questionnaires to keep your project on time and on budget.



Marketing Success Stories: Conversations with Leading Lawyers

Marketing Success Stories: Conversations with Leading Lawyers by Hollis Hatfield and Joyce K. Smiley is a collection of marketing anecdotes from a wide range of lawyers in both urban and rural settings, different types of practice and varying firm sizes. For the lawyer looking for some rainmaking inspiration, this book shows how the most successful lawyers market themselves. The stories are divided into three sections: building a relationship through outstanding client service, developing a reputation or niche for your practice, and creating a winning marketing approach.



The 2012 Solo and Small Firm Legal Technology Guide

Thinking of getting some new technology for your office, or upgrading some of your existing technology? *The 2012 Solo & Small Firm Legal Technology Guide* by Sharon D. Nelson, John W. Simek and Michael C. Maschke is an annual overview of the best hardware and software lawyers can get for their dollar. You’ll find impartial reviews of computers, operating systems, scanners, smartphones, security software, practice and case management software and great overviews of social media and the paperless office. The philosophy of the authors is that your legal technology should help you be more profitable, better serve your clients, avoid malpractice and have a better quality of life.



Guides to Microsoft Outlook, Word, Excel and OneNote

Many computers come with the latest version of the Microsoft Office suite, so if you’ve upgraded recently you should take some time to learn what the newest features are. The Lending Library has the *Lawyer’s Guide* books on Outlook 2007, Outlook 2010, Word 2007, Word 2010 and Excel 2007. These books are written specifically for lawyers to help improve the productivity and efficiency of a law office. We also have *Microsoft OneNote in One Hour for Lawyers*, a guide to Microsoft’s note-taking software that now comes with every edition of Office 2010. What is OneNote? Imagine your yellow spiral notepad with the ability to search text, add audio, tag ideas, etc. It may be new to lawyers, but its popularity will quickly grow.

About the practicePRO Lending Library

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

We have books on these topics:

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

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

How to untag yourself on Facebook (and why you might want to)

Have you ever been tagged in a picture or post on Facebook? If you have a Facebook account, the answer to this question is likely yes. And don't feel comforted if you aren't on Facebook: Anyone can be tagged in a photo, even someone who doesn't have a Facebook account.

Given the nature of Facebook, a tagged photo or status update can easily reach a very large number of people. Being tagged in a way that portrays you in a positive or neutral way is likely not a problem for most people. However, being tagged in an unflattering photo or post will at least be embarrassing, and at worst, it could seriously damage your reputation or relationships.

If you are on Facebook – and even if you are not – you should understand tagging and know how to untag yourself if you are tagged in an unflattering photo or post.

What is tagging and how does it work?

A tag is a special kind of Facebook link. You can tag people, photos, places and pages in anything you post on Facebook. And it's a two-way street – anyone can tag you in photos and other information they post on Facebook. Anyone clicking on a tag has a direct link to the tagged person's timeline.

Creating a tag is easy. When viewing a photo click on *Tag photo*, place the crosshairs over a person's face, click once and type a name. Facebook will give you name suggestions from your friends list. In a status update or comment the names of friends will automatically turn into tag links. You can also create a tag by including the @ symbol in front of any names you mention. People often do this in status updates to say who they are with.

When you tag someone in a photo, people will see “Tagged by [Your Name]” when they hover over the name of the person you tagged.

Who can see tags? Lots and lots of people. When someone is tagged in a photo or post it is likely visible on the timelines of the following people:

- The audience selected for the post by the person posting the content (by using the audience selector drop-down next to the *Post* button) and can include their friends, friends of friends, or if they select custom, selected individuals or groups;
- The person tagged;
- Friends of the person tagged; and
- Anyone else tagged in the post and the friends of that person.

And it doesn't end there. Anyone who can see a photo or post an update can also tag it, like it, or comment on it.

Removing a tag you don't like

Even well-meaning friends might tag you in unflattering photos or mention you in comments you'd rather not see shared with a large audience. If you're not happy with a post you're tagged in, you should take steps to remove the tag or the post. To do this, place your cursor over the photo or post, click the edit button (the pencil in the top right corner), click on *Options* and then select *Report/Remove Tag* in the dropdown. From there, choose why you want to remove the tag. If you select the option *I want to remove this tag* you can choose to:

- Remove the tag so the post no longer links to your timeline;
- Ask the person who tagged you to remove the post; or
- Block the person who tagged you (this is mutual).

In this dialog box you can also report harassment and offensive content to Facebook. You could also directly ask the person to remove the tag or post, but would need to rely on them complying with your request.

Knowing when you are tagged

Facebook sends you a notification on your activity log (click on the globe icon) whenever your friends tag you and – by default – there will also be an update on your timeline. To review and approve posts from anyone (including your friends) before they go on your timeline, you may want to consider enabling Timeline Review. When this is turned on, posts may already be visible in other places on Facebook (and will stay that way), but they won't appear on your timeline until you approve them. When you have a post to review, it will show up in your activity log. You can enable Timeline Review in your Privacy Settings. Note that tags from non-friends require your approval before they appear on your timeline, even when Timeline Review is off.

Make sure you understand how Facebook tagging works and actively monitor status updates that you are tagged in. This can help preserve your online reputation in the event embarrassing or damaging content about you is posted on Facebook. ■

Dan Pinnington is vice president, claims prevention and stakeholder relations at LawPRO.

LAWPRO® gets social



Not a day goes by without someone mentioning social media. Clients, lawyers, law firms and other businesses are all getting social with these new communication tools: LinkedIn, Facebook, Twitter, blogging, Flickr, Pinterest and others. LAWPRO joined the conversation early on, starting with practicePRO's AvoidAClaim blog and @practicePRO on Twitter.

We believe social media offer us many opportunities to deliver relevant and focused content to the lawyers we insure and other important stakeholders in the legal profession. Thus, through 2012 LAWPRO has worked to increase our social media participation significantly with a stronger corporate and employee presence on several social media channels.

To help spread the LAWPRO corporate message we now have a LAWPRO company page on LinkedIn. Many of our senior staff and claims professionals have individual profiles and are also active on LinkedIn. Our @LAWPRO Twitter account features regular updates on important company information and reminders.

Our TitlePLUS department launched a Twitter handle and a Facebook page – the TitlePLUS Home Buying Guide – Canada. It provides tools and resources to help educate home buyers on the home buying and mortgaging processes, along with information on home ownership, such as maintenance and decorating. On Twitter, @TitlePLUSCanada provides lawyers with updates on the program, as well as real estate-related information.

To better highlight the personal face of LAWPRO – and one of our greatest strengths, our staff – we recently launched a LAWPRO Facebook page that will give some profile to our corporate social responsibility efforts and to our staff.

With LAWPRO's increased participation on social media, we're adding a social media profile column. This column will introduce our "social media actives" (that is, those LAWPRO employees who have committed to building their own presence in this new world) and help you find the people that you will most want to connect with online.

Our first profilee is a long-serving employee, Lisa Weinstein, director, national underwriting policy, TitlePLUS. In upcoming issues we will feature profiles of our staff that are active on social media, including Dan Pinnington, vice president, claims prevention and stakeholder relations; Victoria Crewe-Nelson, assistant vice-president, underwriting; and Mark Farrish, director, sales and marketing, TitlePLUS.

On a corporate and personal level, LAWPRO and our staff look forward to meeting you online. ■

Victoria Caruso is communications coordinator at LAWPRO.

Social media profile: Lisa Weinstein

Lisa Weinstein
Director, national
underwriting policy
TitlePLUS



When asked how Lisa has seen social media shape the ways in which we communicate, she responds,

“One thing is for sure, it's definitely different. I believe this is a great opportunity to obtain new clients, retain old ones and make your brand more visible.”

Time at LAWPRO: 15 years

Target audience:

- Lawyers in general practice, with an emphasis on real estate lawyers
- Quebec notaries
- Law firm real estate staff

Topics of interest:

- News and information of interest to the real estate bar
- Developments in real estate law and related fields across Canada
- Title insurance and title insurance policies and coverage
- Claims prevention and avoiding real estate fraud
- Commentary for TitlePLUS subscribers



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