

LAWPRO

magazine

SEPTEMBER 2013 VOL 12.2

15 Years of claims prevention

practice

PRO®

Also:

- 8 steps to avoid an administrative dismissal claim
- Could you be duped on a bad cheque scam?

The future of law

The evolution of risk management
practicePRO 15th anniversary pullout

upcoming events

September 30, 2013

Ontario Bar Association
TECHxpo 2013
Time saving legal technology tips and tricks
Dan Pinnington presenting
Toronto, ON

October 4, 2013

Frontenac Law Association
1000 Island Legal Conference CPD
Disaster planning
Ray Leclair presenting
Gananoque, ON

October 5, 2013

Association des juristes d'expression française
Congrès Annuel de l'AJEFO CPD
Disaster planning
Ray Leclair presenting
Ottawa, ON

October 16, 2013

Toronto Lawyers Association
Ethics and Professionalism CPD
Strategies and tips to manage your practice better and avoid claims
Dan Pinnington presenting
Toronto, ON

October 17, 2013

Northeast Colloquium 2013 CPD
Solicitor/client relationships – effective communication, avoiding problem areas, best practices
Ray Leclair presenting
Sudbury, ON

October 23, 2013

Barrie Real Estate Law Association AGM
Barrie Real Estate Law Association
10 ways to keep LAWPRO happy and a review of title insurance
Ray Leclair presenting
Barrie, ON

October 24 & 25, 2013

Thunder Bay Law Association Fall Conference
TitlePLUS department sponsoring and exhibiting
Thunder Bay, ON

October 28, 2013

Law Society of Upper Canada
Contingency planning
Dan Pinnington presenting
Toronto, ON

October 29, 2013

Ontario Bar Association
Real Property Section CPD
Things that scare us
Ray Leclair presenting
Toronto, ON

Things that scare LAWPRO (and how you should avoid them)
Lori Swartz co-chair and presenting

October 30, 2013

Ontario Trial Lawyers Association (OTLA) 2013
Fall Conference
Ontario Trial Lawyers Association
DON'T push it to the limit
Domenic Bellacicco presenting
Toronto, ON

October 31, 2013

CBA Real Property Section Webinar
Canadian Bar Association CPD
Technology and how it's making life easier in real estate across Canada
Ray Leclair speaking
Toronto, ON

November 7, 2013

Hamilton Law Association
Emerging Issues in Real Estate seminar
TitlePLUS department sponsoring
Hamilton, ON

November 13, 2013

Law Society of Upper Canada
Six Minute Real Estate Lawyer
Mitch Goldberg presenting
Toronto, ON

November 15, 2013

Articling and Beyond 2013
Law Society of Upper Canada CPD
New contingency planning resources
Ray Leclair presenting
Toronto, ON

November 21, 2013

Canadian Bar Association
Real Property Section Webinar CPD
How to move "guaranteed" money in 2013
Ray Leclair speaking
Toronto, ON

November 24-26, 2013

Canadian Association of Accredited Mortgage Professionals (CAAMP)
CAAMP Mortgage Forum
TitlePLUS department exhibiting
Toronto, ON

For a list of our recent events, see page 7

LAWPRO and the practicePRO and TitlePLUS programs welcome invitations to speak about professional liability insurance, risk management, title insurance and other topics within our expertise. Interested in arranging for a speaker? Please contact practicePRO at practicepro@lawpro.ca, or call us at (416) 598-5800 or 1-800-410-1013.

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New appointment at LAWPRO

At the annual general meeting of shareholders and board meeting in May, LAWPRO's Board of Directors approved the appointment of Stephen Freedman as the company's general counsel & chief privacy officer. As director of compliance risk & chief privacy officer for the past five years, Mr. Freedman directed LAWPRO's policy and legal compliance efforts. Mr. Freedman graduated from Osgoode Hall Law School with an LL.B. in 1994 and an LL.M. in 2005. He was called to the Ontario Bar in 1996.

New hires in the LAWPRO claims department

LAWPRO is pleased to announce new hires in our claims department over the past several months:

Jessica Bolla, claims counsel in specialty claims comes to us from Vancouver's Nash & Company, where she was a litigation associate. **Debra Eveleigh**, formerly of Cassels, Brock & Blackwell LLP will take on her new role as subrogation and repairs counsel. **Carla Falkeisen** joins us from State Farm Mutual Automobile Insurance Company where she worked in insurance defense. Before joining LAWPRO as claims counsel, **Michael Kortess** was a partner with Lerner LLP, where he represented doctors and lawyers in professional discipline hearings. **David Rainsberry** joins us as claims counsel with work experience including commercial, class actions and fraud litigation.

Field of Gold

In May we honoured Hilda, a past employee who lost her battle with cancer in spring 2012. LAWPRO helped create a Field of Gold, which is a joint initiative of the Canadian Cancer Society and the City of Toronto Parks Department that sees city parks planted with daffodils to create lasting legacies that honour people or organizations.

We thank all of those who made donations in Hilda's name, the Canadian Cancer Society, and the staff, friends and family members who attended the dedication ceremony.



Windsor student visits LAWPRO

In June, as part of the school's alumni job shadowing program, we had University of Windsor law student Jonathan Zameret visit the LAWPRO offices. He visited with Windsor grads Dan Pinnington, vice president, claims prevention and stakeholder relations and Rosanne Manson, claims counsel, as well as Nora Rock, corporate writer/policy analyst, who attended the Windsor Faculty of Law for part of her studies. Topics discussed included career paths and the diverse types of tasks involved in the different departments at LAWPRO. LAWPRO staff gained some useful insights into current issues of concern and interest to students.

eBRIEFS

Below is a summary of electronic communications you should have received from LAWPRO this past spring and summer. The full content of these newsletters is available at practicepro.ca/enews.

To ensure that you receive timely information from LAWPRO about deadlines, news and other insurance program developments, please make sure you have whitelisted service@lawpro.ca. See the sidebar at right for more details.

Insurance News

Transaction levy filings overdue

May 13, 2013

Reminder that the 2013 first quarter transaction levy filings were overdue. Also, information for exempt practitioners and key date reminders.

Reminder: Apply for your LAWPRO Risk Management Credit by September 15

August 20, 2013

A reminder that the deadline to apply for the LAWPRO Risk Management Credit was September 15, 2013.

Webzines

2012 in Review; Plus: Be alert to fraud around long weekends

May 16, 2013

Information on our 2012 "Year in Review" issue of *LAWPRO Magazine*, plus a warning about frauds targeting trust accounts. Notice that LAWPRO was hiring for two positions.

Renew your LAWPRO exemption status: File online now

June 26, 2013

Reminder for lawyers who are currently exempt from the payment of insurance premium levies to verify their status for professional liability insurance purposes for the coming year.

Real estate: On the LAWPRO radar this season

July 10, 2013

Information on title insurance and recreational properties, applying your professional judgment when arranging title insurance, and the Law Society introducing a new real estate acknowledgement/declaration.

Don't miss important messages from LAWPRO or clients

Spam filters aren't perfect. They sometimes catch legitimate messages. The solution is simple: In your spam filter, please whitelist LAWPRO, the Law Society and anyone else that you really need or want to get email messages from. (We published instructions on how to customize filters in various email programs in the May 2013 issue of *LAWPRO Magazine*: See "[Be smart about spam: Use whitelisting so you don't miss key messages](http://practicepro.ca/whitelist-lawpro)" practicepro.ca/whitelist-lawpro.) Once an email address is "whitelisted" in your spam filter, it will never be stopped. On a regular basis, please check your spam filter for messages that it should not have caught. Doing this could help you avoid a number of things, including a malpractice claim, a Law Society complaint, or an unhappy client who didn't hear back from you because you didn't get an email message.



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.

lawpro.ca

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

Editors:

Dan Pinnington
Nora Rock

dan.pinnington@lawpro.ca
nora.rock@lawpro.ca

Design & Production: Freeman Communications studio@freemancomm.com

Photography:

Rick Chard

rickchard@bmts.com

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.

Happy Birthday,



“You can lead a horse to water but you can’t make it drink”: LAWPRO’s practicePRO program has proven for the last 15 years that if you make the “drink” relevant, practical and timely, many will take at least a sip and some will gulp it down.

The introduction of the practicePRO program as a risk management and claims prevention program for the Ontario bar was revolutionary 15 years ago. It marked a departure from the prior focus on improving lawyers’ knowledge of substantive law as the main way to avoid claims and looked more at the underlying causes. This new approach meant taking on issues like soft skills affecting communication and how to manage time and a practice effectively – challenges that many lawyers struggle to address given the day-to-day demands of their practices and personal lives.

A belief that technology is a risk management “friend” in the practice of law – not a danger to be avoided – has been at the core of the practicePRO message from the start. In the 1990s many lawyers were still hesitant and even hostile to computer technology and saw little value beyond using word processing to produce their documents more quickly. If the photocopier had released lawyers and their staff from the horror of carbon paper copies, word processing meant that subsequent drafts could be produced without physical cutting and sticky-taping of the typed first draft or

a complete re-typing of the document from scratch. The practicePRO program has been there over the years as lawyers realized the value of keeping current with technology. We have seen the introduction and widespread adoption of electronic precedents, document generation programs for specific areas of law, practice management software, the electronic registration of title documents. Does anyone remember how we communicated before we had email? More recently lawyers have moved to the “paperless office” and have started coping with e-discovery, social media and moving to the cloud. Along the way, the benefits of technology have been touted and the risks moderated by practical advice from practicePRO.

There have been risk management crises along the way that have called for a speedy response. Think of the relatively sudden advent of widespread real estate fraud 10 years ago – whether identity fraud, value fraud or fraud for shelter. No longer were we talking about the occasional errant spouse having someone imitate the other spouse in order to get mortgage documents encumbering the matrimonial home signed. More recently the practicePRO program has taken on the issue of fraudulent certified cheques and bank drafts. With up-to-the-minute information and advice about fraud attempts pumped out via the AvoidAClaim blog, the practicePRO program has gone from being known throughout North America as



a source of great risk management advice to functioning internationally as a leading aggregator of fraud prevention information for lawyers across the globe.

New claims challenges in the second decade of the 21st century include cyber-attacks on lawyer trust accounts and the rising tide of administrative dismissals of civil actions.

In this edition of *LAWPRO Magazine* we reflect on 15 years of claims prevention efforts under the practicePRO banner. We also discuss the challenges and opportunities the legal profession faces in these changing times. In the centrefold we are pleased to provide you with the practicePRO 15th anniversary pullout that highlights some of our best risk management and claims prevention resources. It has a number of lists, all with 15 items on them. They represent “top 15” choices of the practicePRO staff in a number of areas – such as key resources, documents or claim-avoidance techniques. Browse through them and see if you spot anything you have not yet read or considered.

Speaking of practicePRO staff, I am often asked how big a department it takes to run the practicePRO program, including producing all the content in *LAWPRO Magazine*, webzines, “managing” booklets, speeches, PowerPoint presentations and so forth that LAWPRO releases annually. There is also the LAWPRO Risk Management Credit

program to be administered, plus dozens of live presentations to be delivered on an annual basis.

Lawyers sometimes assume it costs a lot of money. In fact, to say the practicePRO operation has been “lean and mean” would be an understatement. Karen Bell initiated the program and worked part-time when Malcolm Heins was still CEO of LAWPRO. In 2001 Dan Pinnington left private practice in the Niagara region of Ontario to take up the torch from Karen as director of practicePRO. In recent years Dan has been ably assisted by Tim Lemieux as practicePRO co-ordinator. So, although others at LAWPRO, and outside guest contributors, have assisted over the years with writing selected content, the core of the operation has been highly compact.

Last year Dan Pinnington became LAWPRO’s vice president, claims prevention and stakeholder relations. He is now leading a department that has consolidated a number of functional areas, including communications and government relations as well as the practicePRO program. This is enabling LAWPRO to maximize our resources and start getting the risk management message out to even more lawyers, their staff and increasingly, students in law school and other legal profession stakeholders.

The practicePRO program exists to serve the Ontario bar. We want to minimize what

you have to spend on insurance premiums and enhance your daily existence as a lawyer by helping you avoid real claims and be in the best position to defend spurious ones. Few things are more stressful than having a claim brought against you. We want to work together to prevent claims from happening.

As the first 15 years of the practicePRO program draws to a close, we ask everyone to re-commit to reading *LAWPRO Magazine* and our various electronic communications on a regular basis. The most common causes of claims – lawyer/client communications and time/deadline management – still challenge us as they did 15 years ago. Pick a new checklist or document to introduce into your practice, connect with us on social media and get your staff members to sign up for their own free subscription to LAWPRO publications. Who knows how we will interact with the legal profession 15 years from now, but I predict that the underlying aims of the practicePRO program will continue to be very important and we will still need you to “drink in” enthusiastically the advice, precedents and knowledge we are committed to providing.

Kathleen A. Waters
President & CEO

Have you visited our FAQ pages?

Did you know that LAWPRO maintains an extensive collection of Frequently Asked Questions (FAQs) and answers on its website at lawpro.ca/faqs? If you have a question, we invite you to visit our FAQs to find an answer. We'll also be highlighting some of our FAQ content in upcoming issues of the magazine – look out for it under the “LAWPRO FAQ” header.

Email is our preferred form of communication at LAWPRO

Our correspondence and reference documentation is now generated (and saved) electronically, allowing us to save on printing and postage costs as well as delivery time. Keeping your records with LAWPRO updated with respect to a current (and active) email address allows us to stay in touch with you for all your professional liability insurance needs, reminders, and status updates on an instantaneous basis. Visit our website at lawpro.ca/file_online to make sure your address and other contact data is correct. You will need your Law Society number and confidential LAWPRO password – if you do not have or cannot remember your password, follow the online instructions, or call LAWPRO customer service at (416) 598-5899 or 1-800-410-1013.

Insurance renewal season is approaching

All non-exempt lawyers must file an annual renewal application form. It is expected that e-filing of renewal applications will open online on or about October 1, 2013. Applications not received by the annual deadline may be subject to an additional premium equal to 30 per cent of the base premium.

E-file your renewal application in three easy steps:

- Go to lawpro.ca and enter your Law Society number and your password in the MY LAWPRO sign-in box (note that the login fields are NOT case-sensitive);
- Select “Renew Professional Liability Insurance” from the list of options. Your application form will appear, pre-populated with your information pulled from our database;
- Complete the application in full, click ‘Review’ at the bottom of the form, and then ‘Submit.’

Successful filing results in an e-file confirmation number beginning with the letter ‘P.’

If you are practising in a law firm, your firm administrator can e-file a single firm-wide application on behalf of all the lawyers in your firm: All that is needed is a firm password (to be set up through LAWPRO customer service) and firm number.

Need help completing your application form?

Assistance can be provided by calling LAWPRO customer service or by accessing the online Program Guide which contains insurance program information.

keyDATES for your insurance renewal

September 15, 2013

File your LAWPRO Risk Management Declaration by this date to qualify for the \$50 premium discount for each LAWPRO-approved CPD program (to a maximum of \$100) completed by this date.

On or about October 1, 2013

LAWPRO online filing of Professional Liability Insurance renewal applications is expected to begin. If you wish to file a paper application instead, please note that paper renewal applications will not be automatically mailed out, but it is expected that you will be able to download a 2014 pre-populated paper renewal application from our website on or about October 1, 2013.

November 1, 2013

E-filing discount deadline: Renewal applications filed online on or before November 1, 2013 qualify for the e-filing discount to be applied to the 2014 insurance premium.

November 8, 2013

Renewal application filing deadline: 2014 LAWPRO insurance applications filed/received after this date will be subject to a surcharge equal to 30 per cent of the base premium.

recent events

June 13, 2013

Ontario Bar Association
OBA Foundations Repartee
TitlePLUS sponsored
Toronto, ON

June 18, 2013

Ontario Bar Association
Everything You Ever Wanted to Know About Condos But Were Afraid to Ask CPD
TitlePLUS sponsored
Toronto, ON

June 20, 2013

Ontario Bar Association
OBA Award of Excellence in Real Estate and Section Social
TitlePLUS sponsored
Toronto, ON

June 21, 2013

Fasken Martineau LLP
Red Flags in Real Estate CPD
Ray Leclair presented
Toronto, ON

July 15, 2013

Supreme Court Clerks Luncheon
Tips to help you succeed in the practice of law CPD
Ray Leclair presented
Toronto, ON

August 15, 2013

National Association of Bar Related Insurance Companies (NABRICO)
NABRICO Annual Conference
The Future of the Practice of Law
Dan Pinnington presented
Madison, WI

August 18-20, 2013

Canadian Bar Association
CBA Legal Conference and Marketplace
60 must-have apps for every in-house counsel and legal department
Ray Leclair presented

TitlePLUS sponsored and exhibited
practicePRO exhibited
Saskatoon, SK

August 21, 2013

Ontario Bar Association
Excelling at Articles 2013 CPD
Tips for avoiding a malpractice claim
Yvonne Diedrick presented
Toronto, ON

September 16, 2013

Ontario Bar Association/Young Lawyer's Division
Still Human: Mistakes and Apologies in Legal Practice CPD
Most Common Errors
Martine Morin presented
Toronto, ON

September 19, 2013

Oakville Milton District Real Estate Board
Oakville Milton District Real Estate Board Trade Show
TitlePLUS sponsored
Oakville, ON

September 19, 2013

American Bar Association
National Legal Malpractice Conference
Don't be a dupe: Understanding frauds that target lawyers
Dan Pinnington presented
San Diego, CA

September 23, 2013

Law Society of Upper Canada
Opening Your Own Practice Q&A CPD
Dan Pinnington presented
Toronto, ON

September 24 & 25, 2013

Osgoode Professional Development/
Anti-Corruption Compliance CPD
Obligations and Risks to Lawyers with International Partners and Their Advisors
Dan Pinnington presented
Toronto, ON

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.

What does your malpractice policy cover:

**Individual
lawyers**



law firm?



or the

Have you ever wondered why LAWPRO's policy for the Law Society of Upper Canada insurance program (the "primary policy") insures lawyers on an individual basis while excess insurance is issued on a firm-wide basis?

Most Ontario lawyers have probably never considered this question. And while it may seem to be a rather subtle distinction, the reasons for this difference are many and varied.

Some of the reasons that LAWPRO insures lawyers individually under the primary policy include:

- (i) Avoiding gaps in coverage: By issuing policies with coverage on an individual lawyer basis, it can better avoid gaps in coverage that can arise once firms have closed, or when lawyers change firms, provide legal services outside of their firm practice, work for more than one firm at a time, etc.;
- (ii) Allowing tailored coverage and payment options: Providing lawyers individually
- (iii) Comprehensive rating: Ensuring that claims against lawyers are assessed and tracked on an individual basis, instead of on a firm-wide basis. While allowing for more precision in recording individual lawyers' claims histories, this also allows for a better understanding of claims and claim trends, through modelling of risks that face the profession generally and

with some choices, so they can tailor their insurance coverage and payment options to meet their particular practice needs, while maintaining reasonably consistent coverage and options amongst all insured lawyers (see below in terms of the areas where even in the primary program firm-wide consistency is required);

lawyers in different types of practice circumstances (e.g., by years of practice, size of practice, area of practice, location of practice, etc.). Very important use is made of this type of data by the practicePRO program, LAWPRO's leading-edge risk management program that assists lawyers in identifying and reducing practice risks.

With all of these benefits, why do insurance companies sell insurance on a firm-wide basis at the excess level?

Many of the benefits from insuring lawyers individually under the primary Law Society program are only possible because LAWPRO provides the insurance for all lawyers called and in private practice in Ontario. If within

a given firm lawyers could purchase their excess insurance from different insurance companies, a number of inefficiencies in the claims-handling process would almost certainly arise. This is because multiple excess insurance policies might respond to the same claim, which would give rise to:

- (i) Duplication in investigating and defence costs by excess insurers in respect of the same claim;
- (ii) The potential for inadvertent stacking of excess limits (as “other insurance” clauses are interpreted as cancelling each other out) when more than one excess policy responds to a claim, possibly driving up damages claimed;
- (iii) More lawyers facing negative effects of a claim, as each excess insurer considers surcharging and other implications for the same claim and error;
- (iv) Costs being incurred by excess insurers in resolving disputes as to which excess policy should respond; and
- (v) Excess insurers seeking recovery from others they don’t insure, possibly leading to subrogation or other recovery proceedings being brought against firm lawyers insured by other excess insurers.

Of course, the added costs associated with these activities would ultimately be passed on to lawyers, perhaps by way of increased premiums, deductible amounts or surcharges.

Other benefits of insuring on a firm-wide basis

There are also administrative efficiencies to consider. Through investment in its online facilities and automated application process for individual lawyers, LAWPRO is able to deal with policy issuance and coordinate lawyer coverage across firms and the profession, with an effectiveness that most excess insurers could not expect to achieve. Given limitations in market share and the substantial amount of communication and activity necessary in dealing with insurance, it is more efficient and cost-effective for excess insurers to deal with insurance on a firm-wide basis than with lawyers individually.

Importantly, lawyers practising within a firm environment share risks. A single error giving rise to a claim can involve several members of the same firm. If lawyers within firms did not have uniform coverage and share the same limit, it would be open for claimants to formulate their claims based upon the broadest coverage and highest available limit. By offering insurance on a firm-wide basis, excess insurers are well protected against this possible concern.

Some of the ways lawyers are treated as part of a firm under the primary policy

Under the Law Society program, a number of coverage options must be coordinated amongst firm members, given the inherent sharing of risk in a firm environment. These include:

- (i) **Deductible options:** Sole practitioners, provided they qualify, can choose whether they want to pay lower premiums and accept a higher deductible, or enjoy the benefits of a lower deductible but with a higher annual premium. Lawyers in a firm setting, however, are required to each choose the same deductible option.
- (ii) **Innocent party sublimits:** Under the Law Society program policy there is an exclusion for claims relating to or arising out of a lawyer’s dishonest, fraudulent, criminal or malicious act or omission. Lawyers who are in practice with other lawyers are required to carry the innocent party coverage which provides limited coverage for claims arising from a lawyer’s malfeasance. There is a standard sublimit of \$250,000 per claim/aggregate which can be bought up to \$500,000 or \$1,000,000 to provide wider coverage for the firm. In order to buy-up the sublimit all lawyers in the firm would have to apply for the same level of coverage.
- (iii) **Restricted area of practice:** Criminal and immigration law practices have been found over time to give rise to fewer claims and lower claims costs than most other areas of practice. Lawyers

who qualify can apply under the Law Society program for the restricted area of practice premium option which provides for a discount equal to 50 per cent of the base rate. However, all members of the firm have to qualify and apply for this option, for it to be made available.

How non-lawyers can be treated as part of a firm under the primary policy

The need for uniform coverage is true for lawyers practising in any kind of partnership. Lawyers who partner with non-lawyers, such as paralegals in combined licensee partnerships or non-licensees in multi-discipline partnerships (MDPs), are required (or will be as of January 1, 2014 in the case of combined licensee partnerships) to purchase liability insurance for all partners from LAWPRO. Partnerships, by their very nature, invite vicarious liability claims. Just like any other type of law firm, if the partners in a combined licensee partnership or MDP were purchasing their insurance from different carriers there would potentially be inconsistency in the coverage provided (such as innocent party coverage) and there would always be a benefit to claimants to name many firm members in order to access multiple policies.

So, wherever possible, insurance for parties practising in association, partnership or in a law corporation should be coordinated to ensure consistent coverage amongst all firm members. Under the Law Society program this is possible even when insuring lawyers individually. But for excess and optional coverage it can only be efficiently done on a firm-wide basis.

If you have any questions about LAWPRO excess insurance, innocent party protection, deductible options or practising with non-lawyers, please visit our website at lawpro.ca for more information on these and other topics, or contact our customer service department at (416) 598-5899 or 1-800-410-1013, or by email at service@lawpro.ca. ■

Victoria Crewe-Nelson is assistant vice president, underwriting and Duncan Gosnell is executive vice president and secretary at LAWPRO.

Excess insurance offers peace of mind to lawyers and law firms

Would your exposure on a negligence claim be over the individual lawyer's \$1 million per claim or \$2 million in the aggregate limits offered under the LAWPRO policy for the Law Society of Upper Canada program (the "primary policy")? Excess insurance – insurance that covers you for claims after the limits under the primary policy are exhausted – offers peace of mind for lawyers, no matter what their practice entails. Regardless of whether you are considering a first time purchase of excess insurance or if you are wondering if your current excess insurance meets your firm's needs, you should consider what limits of liability should be purchased by your firm.

The factors you should consider in determining what amount of excess insurance is appropriate for your firm are outlined in this article.

Size of firm

It's not just large firms that have claims that breach the primary policy limits: Large claims can affect a solo or two-person firm as well. But, as LAWPRO claims statistics indicate, a lawyer can expect to face a claim approximately once every seven years. As the number of lawyers in a firm increases, the odds that the firm will experience a claim in a given year also increase. For this reason larger firms should appreciate that having a greater number of lawyers raises the chances that there will be more claims to erode the firm's aggregate excess limits. Accordingly, firms with 16 to 50 lawyers are more likely to purchase LAWPRO excess insurance with the highest limits offered, being \$9 million per claim and in the aggregate, than smaller sized firms.

Area of practice

When reviewing claims LAWPRO looks at both the "frequency" of claims for different

types of law (how commonly are lawyers sued in that practice area) and "severity" of claims (what is the relative cost to resolve claims). Some areas of practice are more prone to frequent claims (real estate, civil litigation and corporate/commercial law) and some have the more costly or severe claims (securities, bankruptcy, tax, environmental law, etc.). When choosing limits for your excess insurance consider whether lawyers in your firm practice in an area of law that is more likely to have frequent or severe claims.

Underlying value of files

Influencing the severity of claims, the more valuable the assets, size of transaction or potential award at the core of the retainer, the more serious the potential damages if the lawyer makes an error. When looking at these figures, also consider consequential damages that would arise from the sort of legal services provided. A firm that never has matters or transactions with underlying monetary values that exceed \$500,000 may seek lower limits than a firm which handles complex tax planning for wealthy clients or high value farm conveyances. If, for example, a firm routinely handles \$5 million financing arrangements, then the law firm should consider having in place at least enough insurance protection to cover claims of this amount.

Contractual requirements

Sometimes when lawyers bid for contracts or negotiate retainers to act for government agencies or large commercial lenders, the lawyers will discover that there are minimum insurance requirements. If a tender to provide legal services requires a lawyer to carry \$5 million E&O coverage, for example, the lawyer would, as a minimum, apply for \$4 million per claim/aggregate excess limits, on top of the \$1 million per claim/\$2 million

in the aggregate limits of liability afforded the lawyer under the primary policy. The lawyer would then have documentation available to offer in satisfaction of the tender requirements.

Consider all factors that may erode limits

A damages award against a lawyer is not the only thing that will erode limits. Interest and costs associated with defending and/or repairing the claim will also reduce or even exhaust the limits available. Keep in mind that in some scenarios defence costs can be very high. These can include: the lawyer is named as a defendant in a class action; the claim is complicated due to the number of parties or unique legal issues; or the claimant has assumed an aggressive approach to litigation that makes scheduling and discoveries take longer.

Lawyers should also be alert to the potential for erosion of aggregate limits at the primary and excess level in the event a lawyer or firm faces a number of claims in the same policy period. For example, if the same underlying advice is given to many clients on an untried point of law and that advice is subsequently found to be wrong, there could be a large number of claims or even a class action brought. We have seen this occur with respect to advice on tax issues that had not yet been subject to ministerial clarification or judicial interpretation.

Do you have other questions about LAWPRO's policy and coverage?

Visit our online collection of FAQs at lawpro.ca/faqs to find answers to all your questions.

What does it cost?

LAWPRO's excess insurance program is underwritten and rated on an individual basis, so there is no "standard" premium. If a firm is approved for excess insurance with LAWPRO, factors which may affect the firm's premium include, for example, the number of lawyers in or working with the firm, the practice areas, the claims history of the firm lawyers, years in practice, size of practice and the limits of liability being sought. A sole practitioner seeking lower excess limits of liability (\$1 million or \$2 million per claim/in the aggregate over and above the primary policy limits), in a lower risk practice area and with a good claims history would commonly expect to pay in the range of \$50 to \$80 per month (excluding tax) for excess insurance from LAWPRO, based on current pricing. The same practitioner purchasing \$4 million per claim/in the aggregate in excess limits might pay over twice that amount.

Assess yourself

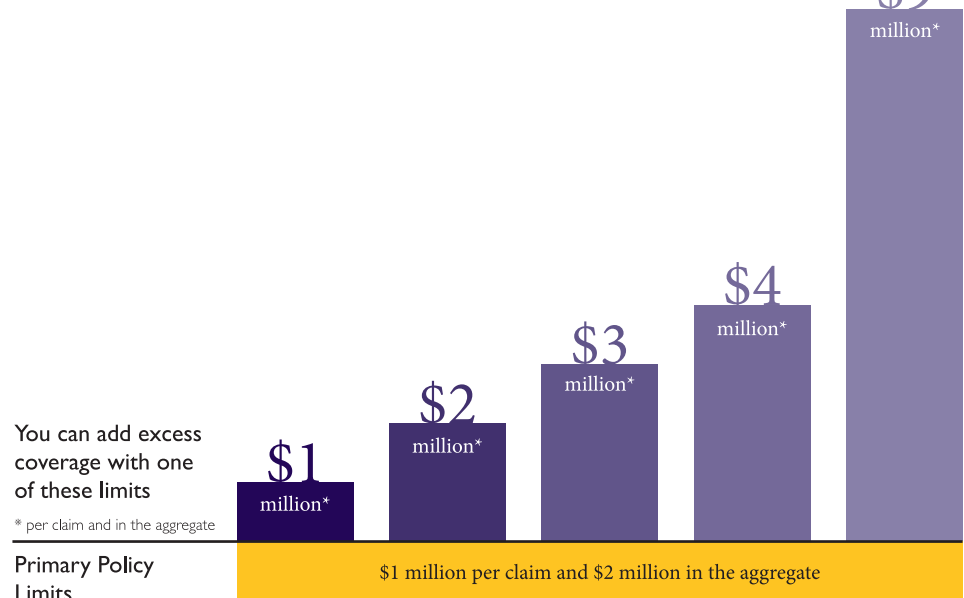
Knowing what exposure your firm has in the event a mistake or series of mistakes occurs is the first step in transferring the risk from the lawyers or the firm itself to an insurer. Exposure can arise from having claims that exceed your primary limits, providing services that are not covered by insurance or having gaps between when the primary limits are exhausted and the excess insurance will step in (for more on this see "Avoiding gaps in coverage").

Peace of mind comes from knowing that the right level of protection has been purchased and put in place. For more information on LAWPRO's excess insurance offerings please visit the excess insurance page on the LAWPRO website (lawpro.ca/excess). There is also a self-assessment tool that will allow you to test your exposure to excess claims at lawpro.ca/stresstest.

For more information on the primary or excess programs please contact our customer service department at (416) 589-5899 or 1-800-410-1013. ■

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

Excess limits available through LAWPRO



Avoiding gaps in coverage

On top of making sure they have sufficient insurance to address claims that might exceed the primary program's limits, law firms should ensure they do not have unintended gaps in coverage where a claim exceeds a sublimit under the primary policy and the excess policy does not "drop down."

For example, under the primary program lawyers who work with other lawyers in a firm setting are required to carry Innocent Party Coverage, which provides a standard \$250,000 sublimit of coverage in the event a lawyer in the firm has a claim brought against him or her arising from a dishonest, fraudulent, criminal or malicious act that would normally be excluded under the policy. Unless the lawyers in the firm choose to "buy-up" from LAWPRO and raise the standard sublimit from \$250,000 to \$1,000,000, the members of the firm may find that there is a gap of \$750,000 between exhausting the sublimit under the Law Society program policy and when the excess policy would begin. For more on this topic please see our website at: lawpro.ca/insurance/Insurance_Type/innocent_party.asp.

Lawyers should consider buying-up the lower sublimits or asking their insurance broker if their excess insurance policy will drop down below the \$1 million threshold to provide coverage in these types of cases.

It is important to address other gaps in coverage that can commonly arise. Most often we see this when claims are brought against lawyers for work done while at former firms when those former firms do not continue to provide coverage for lawyers after they leave or retire, or when the firm has ceased operating.

Lawyers who practice with or for a firm but who are not permanent members of the firm (such as locums, or "of counsel") may not be considered "insureds" under the firm's excess policy. If coverage is required, let your excess insurer or broker know.

The practicePRO program: looking back on what has and hasn't changed in the first 15 years

In 1997, LPIC, as LAWPRO was then known, was in its second year of operating the primary professional liability program for the Ontario bar. At that time, LPIC was working hard to build confidence in a new insurance program (and itself as the new insurer of the program) in the wake of the E&O fund deficit crisis of the mid-1990s. Efforts were being made to be more responsive to the needs of lawyers and to deliver on the promise of improved customer service. Malcolm Heins, then CEO of LPIC, felt that the company's claims management efforts should be complemented with a risk management initiative. This led to the creation of the practicePRO initiative.

Building a risk management program

Karen Bell, a partner at a leading national law firm, was brought in to consult on the project. All felt that a big picture approach should be used and pre-conceived notions about what a risk management program should look like were carefully avoided. The initial idea was that the initiative should be about more than just loss prevention for the insurance program. It was decided that it should also address the changing environment in which lawyers practise; that it should develop tools and resources to help lawyers adapt to the changes in the legal profession and the world around them; and that it should help lawyers adopt new ways of doing business. The ultimate goal was to help lawyers be more proactive in their claims prevention efforts and to encourage them to be equally proactive in making their practices more proficient and profitable. This is what was behind the "practice" and the "pro" in the practicePRO name.

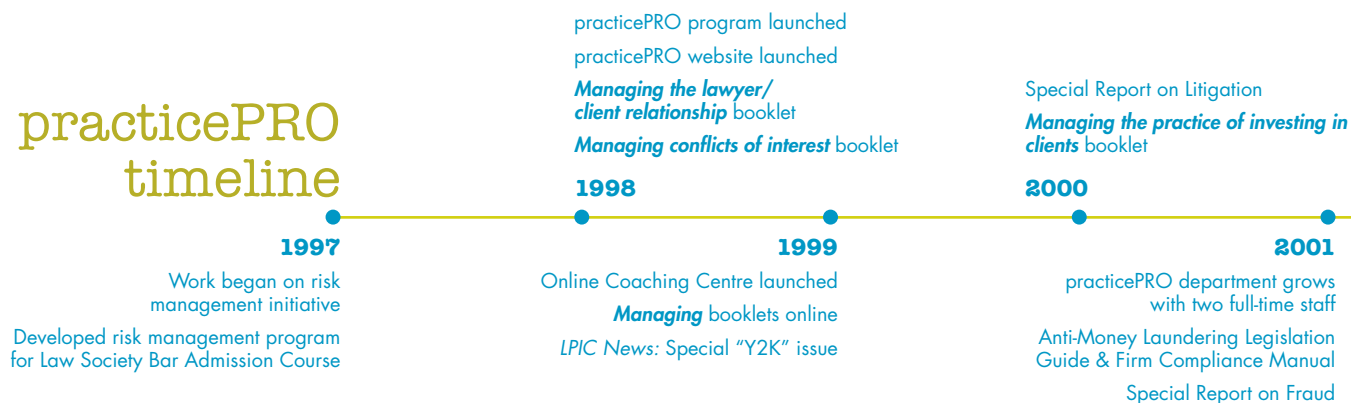
As a key starting point, it was important to study and understand where some lawyers were going wrong. This was critical not only for claims prevention, but also to understand which tools and resources lawyers needed to change how they approached the practice of law. This analysis involved an in-depth examination of LPIC's claims

statistics, as well as investigation of the operations of other established loss prevention programs that targeted malpractice by lawyers. The programs considered were the Attorney's Liability Insurance Society (ALAS), and the Professional Liability Fund run by the Oregon State Bar (which fund operates in the only U.S. state that requires lawyers to have malpractice insurance).

A great deal of work was done to mine LPIC's claims data to see if any trends could be observed. Factors that were considered included: the area of practice, what caused the claim, the number of years the lawyer had practised, the size of the firm, where the firm was located, the cost of the claim, etc. The analysis confirmed that the causes of claims were remarkably similar, right across Ontario, in all areas of law or practice types, and for firms of all sizes. And while some claims involved failing to know the law (which many lawyers still assume is the main cause of claims), the key finding was that many more claims were the result of "human" failings in lawyer/client communication (ranging from miscommunication, poor communication or no communication at all); time and file management mistakes (including missing deadlines or limitations and procrastination); and conflicts of interest (between current and/or past clients or involving lawyer self-interest). These insights were confirmed by research that Professor Neil Gold (former dean of law at the University of Windsor) undertook for LPIC.

Another important observation was that while lawyers could not change the environment in which they practised, they could control the circumstances – that is, how they practised. Thus, one of practicePRO's main jobs was going to be providing guidance and education to help lawyers be more client-focused. This served several of the key interests at hand, namely, preventing claims by helping lawyers take steps to better manage their practices and keep clients satisfied.

practicePRO timeline



The four pillars

Based on these assessments of why lawyers make mistakes, how such errors can be avoided, and the tools that could be useful to help lawyers avoid claims, the practicePRO program was launched in June of 1998. There were four founding pillars of practicePRO: information, practice aids, education and wellness & balance.

Information: Providing lawyers with information and insight was seen as key to helping them appreciate the changing practice climate; to understand how, where and why claims occur; to know where the risks are; and to know how to better manage these risks. The *LPIC News* – the company’s regular print publication at the time – started carrying a regular practicePRO section to help get the word out on these topics. A new practicePRO section was added to the LPIC website to make this information available electronically on this new-fangled thing called the “World Wide Web,” and shortly thereafter the practicePRO program got its own website. The practicePRO staff also worked with various law associations across the province and hit the road – attending as many of their gatherings as possible – to raise awareness of the risks and of the resources it was making available.

Creating information and getting it to lawyers has remained a core practicePRO focus over the years. *LPIC News*, a fairly simple newsletter, morphed into the full-featured *LAWPRO Magazine*. More recently, *LAWPRO* started publishing webzines – electronic publications that target selected areas of practice or focus on specific risks or issues that drive claims. Traffic to the *LAWPRO* and practicePRO website has grown year after year (See “practicePRO by the numbers: Website traffic”), and the AvoidAClaim blog has become a recognized site for information on claims prevention, and in particular preventing frauds due to bad cheque scams. See “practicePRO by the numbers: AvoidAClaim blog traffic.” The practicePRO program has recently become active on social media with regular posts to Twitter, LinkedIn and Facebook.

Practice aids: From the data analysis and research, four top areas of claims were identified: poor lawyer/client communication, conflicts of interest, failure to know or apply law, and missed deadlines/procrastination. Work was done to create tools and resources to help lawyers address these issues. One response was the “managing” series



of booklets: First one on lawyer-client communication, and then a second on conflicts situations. A third managing booklet on the dangers of investing in clients followed. A checklist for properly giving independent legal advice was the first of many checklists that the practicePRO department would publish in coming years.

Practice aids continue to be a key part of practicePRO’s efforts. Five more managing booklets have been published, each addressing specific areas of risk. The practicePRO website has come to include a wealth of practice resources for lawyers, including various checklists, precedent retainer letters/agreements, limitations period tables, articles on law office technology, a firm budget and a business plan and much more. The practicePRO 15th anniversary pullout in the centrefold of this magazine lists the best and most popular practice aids and other resources from the last 15 years.

Education: In its early years, the practicePRO program worked to make information about professional development opportunities for lawyers more widely available (remember that continuing education – or CLE as it was then called – was not mandatory as it is today). practicePRO staff also participated in presentations to new lawyers at the Bar Admissions course. At one point, students in Bar Ads had a full day of programming on *LAWPRO* insurance information and risk management content.

The practicePRO department recognized the value of ongoing education from the start. With the launch of the Online Coaching Centre Credit (later the *LAWPRO* Risk Management Credit) in 2002, the program started ongoing efforts to encourage lawyer participation in CLE or continuing professional development (CPD) programs.

CLE premium credit launched

Technology Roadshow and
Technology Breakfasts introduced

LAWPRO Magazine: “Focus on Mentoring”

Managing a mentoring relationship booklet

LAWPRO Magazine: “Practice Interruptions”

Managing practice interruptions booklet

2002

2003

LAWPRO Magazine:
“Building for Success”

**Managing the finances of
your practice** booklet

LAWPRO Magazine:
“Helping your Practice Soar”

LAWPRO Magazine: “Client Communication”

LAWPRO Magazine: “Fraud”

LAWPRO Magazine: “Practising in an e-world”

**Managing the security and privacy of electronic
data in a law office** booklet

Limitations Act comparison chart

2004

2005

LAWPRO Magazine: “Family Law”

LAWPRO Magazine:
“Electronic Discovery”

Mini version of Limitations Act
comparison chart

LAWPRO Magazine: “Professional Services”

Managing a professional services firm booklet

LAWPRO Magazine: “Work & Wellness”

2006

2007

Lending Library launched

LAWPRO Magazine: “Elder Law”

LAWPRO Magazine: “Making your Mark”

The Online Coaching Centre was itself a very innovative offering, being one of the first online education programs offered to lawyers.

The Online Coaching Centre Credit became the CLE Premium Credit, then the CPD Premium Credit, and most recently the LAWPRO Risk Management Credit. Education remains a cornerstone of the practicePRO program. practicePRO staff administer the Risk Management Premium Credit and this facilitates getting content and LAWPRO speakers participating at CPD programs, where they present on a wide range of subjects, and most particularly risk management and claims prevention. As can be seen in “practicePRO by the numbers: LAWPRO Risk Management Credit approvals and attendees,” this credit helps get the risk management message to thousands of lawyers.

Wellness & Balance: Law is a stressful profession, and it is intuitive that there is a link between lawyer stress and physical and mental health crises and malpractice claims. As a result, practicePRO has always been committed to encouraging lawyers to keep up their mental and physical wellbeing. Through the practicePRO program, LAWPRO has supported lawyer wellness initiatives over the years, most recently, the Law Society’s new Member Assistance Program. The practicePRO website has a Wellness page that makes available

numerous links to agencies and self-assessment tools that can assist lawyers with problems like depression and drug and alcohol addiction.

Some things haven’t changed 15 years on

In 15 years the scope and reach of the practicePRO initiative and the resources it offers have grown tremendously. The timeline adjacent to this article highlights practicePRO’s main events and publications over the last 15 years. The program has become an internationally recognized risk management program and has had many successes and triumphs over the years. However, many of the same problems that were present in 1998 and drove the creation of the practicePRO initiative continue to result in claims today. Indeed, many of the resources created in earlier years remain relevant today.

Beyond the core communication and time management topics, LAWPRO through the practicePRO program has helped educate lawyers on many other relevant and important topics over the years, including: disaster planning; mentoring; file retention; e-discovery; social media, and practice finances. We have also responded to significant new risks as they emerged from time to time, most recently real estate fraud, administrative dismissals and bad cheque frauds.

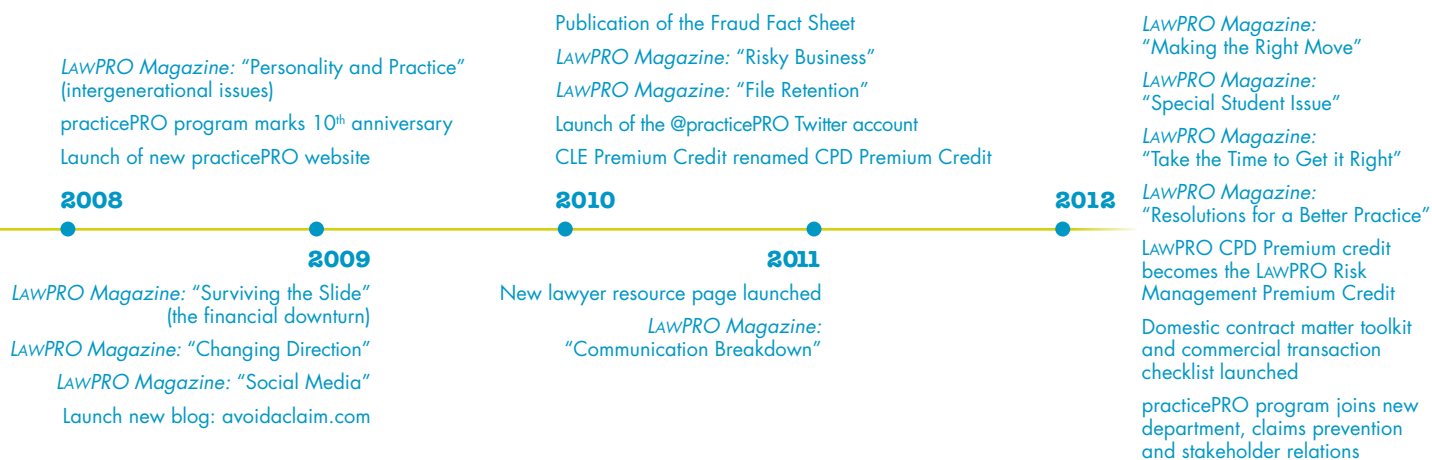
Clearly, the claims prevention message is getting through to some lawyers, but it seems others are not getting the message, or if they are, they are not acting on it. LAWPRO is seeing claim numbers going up, and the costs of resolving those claims are increasing too. Based on current projections more than 2,600 new claims will be reported to LAWPRO in 2013 and resolving those claims will cost approximately \$100 million.

So there is still much work to be done. practicePRO staff need to work hard to reach more lawyers. Those lawyers need to better recognize the dangers and change their attitudes and risky behaviors. The practicePRO program will continue to play an important role in promulgating good practices to the lawyers of Ontario. The next article, “The Evolving Face of Risk management: practicePRO the next 15 years” discusses how risks and risk management have evolved at LAWPRO and where they will go in the future. ■

Tim Lemieux is practicePRO co-ordinator at LAWPRO.

practicePRO by numbers:

practicePRO website traffic	2003	2012
Total annual visits to practicepro.ca	38,188	323,070
Unique visitors	20,611	113,311
Average visits per day	104	1,120
Resources downloaded from practicepro.ca	47,344	322,855
LAWPRO Risk Management Credit approvals and attendees	2003	2012
CPD (CLE) programs approved for LAWPRO Risk Management Credit	12	213
Attendees at LAWPRO-approved CPD (CLE) programs	2,237	53,000
AvoidAClaim blog traffic*	2011	2013
Visitors/day (*2013 numbers as of Sept, 2013)	300	650
	2009	2013
Subscribers	114	730



The evolving face of risk management



The next 15 years

Dan Pinnington joined LAWPRO in January of 2001 as director of the practicePRO program. Over the last 13 years he worked to expand the offerings and reach of this critical undertaking. It has become an internationally recognized risk management and claims prevention initiative. In this interview, Dan reflects on how risks and risk management have evolved over his time at LAWPRO, and where they will go in the future.

From what you have seen in your time at LAWPRO, how do you evaluate the impact of the practicePRO program on claims prevention?

There is direct evidence that our practicePRO efforts are paying off. Every year my LAWPRO colleagues and I get personal comments or emails stating that the information or resources we provided helped lawyers recognize they were in a situation that could lead to a claim and that they took steps to avoid it. These comments are along the lines of “I heard you speak on abc at a CPD program and it helped me avoid a claim...” or “I read the article in *LAWPRO Magazine* about xyz and took steps to avoid that danger...” And in a recent example, the articles we have published on avoiding administrative dismissals claims over the last two years have prompted dozens of calls to our claims department. While some of these situations ended up as costly claims, we were able to take steps to avoid claims in many instances as well.

I also think we are helping lawyers better appreciate where and why claims happen as at CPD programs and law firm presentations we hear comments like “What you said really resonated with me with respect to a matter I currently am handling...” or “The comments you made highlighted a risk I didn’t appreciate and I will take steps to avoid that risk...”

From telephone calls through our customer service department, our Fraud Response Team members have directly confirmed for many Ontario lawyers that the matter they were handling was in fact a bad cheque fraud. And on a daily basis, lawyers from all over the world

are finding helpful information on the AvoidAClaim blog when they search the names of potential clients who may be fraudsters. Some of these lawyers are posting very thankful comments on the blog acknowledging that we helped them avoid being the victim of a bad cheque fraud.

Unfortunately, it is impossible to get an actual total number of prevented claims for several reasons, including lack of data. In addition, proving a negative (i.e., that a claim didn’t happen) is always more difficult than proving a positive (i.e., a claim occurred). Ontario lawyers could really assist by letting us know when our efforts helped them avoid a claim. That allows us to gauge which communication methods are preferred by lawyers and ultimately, most effective in claims prevention.

Where do you think the practicePRO initiative has had the biggest impact?

I think the biggest impact of the program has been making Ontario lawyers more aware of where and why claims happen, and how they can be avoided. This has come about as a result of our extensive education efforts on claims and claims prevention. I don’t think there are any other jurisdictions where lawyers are exposed to as much claims prevention education. Our education efforts include the content in *LAWPRO Magazine*, in our webzines, in our CPD and law firm presentations, and the other print and online resources and checklists we have created for the bar. The LAWPRO Risk Management Credit is another big part of our education efforts and has also had a huge impact.

I also think we have really helped the profession practise better and smarter with the practical and “how to” information and resources we provide lawyers. Take our biggest area of claims – lawyer/client communications – as an example. The Rules of Professional Conduct say we need to communicate with clients, and intuitively, I think most lawyers see and appreciate the need for good client communication. However, some practical application of the theory takes it one step further. By talking about real-world scenarios and examples of claims, we give lawyers a better understanding of where communications with clients can break down or be a problem. This practical information helps lawyers better recognize and avoid these situations.

From the feedback and comments I have received over the years, it is also clear Ontario lawyers have really appreciated receiving the information we have provided about using legal technology and avoiding the dangers associated with it.

Can you tell us more about how you think the LAWPRO Risk Management Credit has had an impact?

The concept of obtaining a premium credit for studying risk management content was first introduced in 2001 when Ontario lawyers could claim a \$50 credit for completing three modules of our innovative Online Coaching Centre. It grew from there when we gave a premium credit for attendance at continuing legal education or CLE programs (as they were then called) that provided substantial risk management advice. In 2003 there were just 2,237 attendees at 12 approved programs. From that small start it has grown substantially. There were over 58,000 attendees at the 240 qualifying programs offered between September 16, 2012 and September 15, 2013. Of course, in the last two years, the Law Society’s implementation of the Continuing Professional Development Requirement has helped boost the number of lawyers attending LAWPRO Risk Management Credit approved programs.

But the growth in the numbers claiming the credit is only part of the story. In its various forms the LAWPRO Risk Management Credit has changed the face of Continuing Professional Development (CPD) in Ontario. Traditionally, CPD programs focused solely on substantive law. Due to the credit, a large number of CPD programs now include a significant amount of risk management and claims prevention content. This is one of our best channels for getting our risk management message to Ontario lawyers.

What are the biggest claims risks?

Most lawyers are surprised to learn that claims coded “failure to know or apply substantive law” account for a relatively small portion of LAWPRO claims. Over the last 10 years, law-related errors were only 12 per cent of LAWPRO’s claims by count (15 per cent by cost).

The most common malpractice errors in our claims portfolio, constituting more than one-half of LAWPRO’s claims in most areas of practice, involve (i) basic lawyer/client communication and

relationship issues (more than one third of LAWPRO’s claims), and (ii) time/deadline management or procrastination issues (18 per cent of LAWPRO’s claims by count). For more information on the most common malpractice errors see the adjacent sidebar.

What are the current and upcoming challenges for risk management and claims prevention and where do you see the practicePRO program going in the next 15 years?

That’s an interesting and tough question. Looking back at this point, I don’t think I had any idea when I started at LAWPRO in 2001 of where things were going to be 15 years on. Perhaps I can make predictions that are a bit more informed this time.

The basic premise of the practicePRO initiative is that claims can be reduced by helping lawyers to better appreciate where and why malpractice claims happen, and to know the proactive steps that can be taken to avoid or reduce the likelihood of malpractice claims occurring. This premise drives everything the program does and I don’t see this changing. While the premise won’t change, the deliverable will.

The recent rise in the numbers of claims we are seeing (both in raw numbers and in the rate of claims) and in the overall cost of claims is a concern. And when we look at the breakdown of those claims, unfortunately, despite our best efforts, the most common errors and biggest malpractice risks really haven’t changed over the last 10 years. While we would like to see that change, our past experience suggests this is unlikely. When you take a more detailed look at claims, you can see some changes over time by area of law and error type. In the last two years we have had a huge spike in claims driven by administrative dismissal claims. We are working hard to bring these under control. Anecdotally, dabblers seem to be a greater problem. We expect to see wills and estates claims rise given the bulge of baby boomers that will finalize their estate plans and then pass away over the next couple of decades.

Carrying on with that theme, I see us providing content that is more focused on different segments of the bar as it becomes far less homogenous than it was 15 years ago. There are fewer general practitioners and most lawyers are becoming more specialized. Thus, we will need to target different areas of law, as well as lawyers at different stages of practice.

Checklists are one of the best ways to make sure all necessary steps and communications occur on every matter. We have provided the bar with a number of checklists over the years, and I expect we will provide updated and new ones in the future. The same goes for our “how to” resources.

LAWPRO and its practicePRO program have a huge presence on the web and we are very active on social media. I see this growing even more and as we all become more wired and connected, I think the

web will offer other new and interesting ways for practicePRO staff to reach out, communicate and collaborate with members of the profession. We plan to offer multi-media content on our website and perhaps even a YouTube channel.

And, while I am excited about all the new ways we are connecting with Ontario lawyers and other legal professional stakeholders online, I also think direct contact with people will continue to be very important. My colleagues and I will continue to participate in CPD programs, law firm presentations and other events. And in the very near term, I am pleased to say we expect to add a new lawyer to my department of LAWPRO, claims prevention and stakeholder relations, to assist our practicePRO outreach and content creation efforts.

As mobility and globalization increase, I also think we will be working more closely with our Law Society and the law societies and insurers in the other provinces and territories in Canada on insurance and risk management issues. And as is discussed in more detail in the Future of Law article (see page 25), the profession is on the threshold of some huge changes. No doubt, these changes will bring new risks and claims exposures, and in a broader context, new and interesting policy and coverage options and issues for the LAWPRO program.

More information on the most common errors and malpractice claims

The following articles have more information on the common areas of claims, including specific claims scenarios for the different types of errors and specific areas of practice:

- “The Biggest Malpractice Risks”
practicepro.ca/biggestrisks
- “Real Estate Claims Trends”
practicepro.ca/realestateclaims
- “Litigation Claims Trends: Errors & Insights”
practicepro.ca/litigationclaims
- “Corporate Law Claims trends”
practicepro.ca/corporatecommercialclaims
- “Family Law: Increasingly a Risky Business”
practicepro.ca/familyclaims
- “Wills and Estates Claims Causes”
practicepro.ca/willsestatesclaims

The most common malpractice errors

In almost all areas of practice the most common errors and the biggest causes of claims are problems with **lawyer/client communication** and relationship issues. Communications-related claims occur when important aspects of a matter are not handled properly due to miscommunication, poor communication or no communication at all. These claims occur because there is not enough time or effort spent on setting and controlling client expectations on the nature and scope of the retainer; explaining how the matter will proceed and how long it will take; outlining what strategies or options exist and what the potential outcomes of the matter will be.

The second biggest issue in most areas of practice is **missed deadlines and procrastination**. Deadline errors involve not knowing a limitation period, missing a limitation because it was not entered in a tickler system, or a failure to respond to a deadline that was in a tickler system. We are currently seeing a significant spike in claims due to the failure by lawyers to respond to Rule 48 status hearing notices. Procrastination claims occur because a lawyer did not do work as promised or on a timely basis. Lack of follow-up claims occur when draft documents or instructions are sent and there is no follow-up (e.g., the draft will is sent to a client but never signed).

The third most frequent error, **inadequate discovery of fact or investigation**, arises when lawyers do not pay attention to details or ask clients all the questions they should. Examples of this type of error include not: investigating details of an injury or physical limitations as a result of an injury; understanding the nature of a transaction and the intended outcomes; or investigating the extent of assets or liabilities on an estate planning or family matter.

Failure to know or apply substantive law is the fourth most common error. Unfortunately, lawyers don't always recognize when they are getting in over their heads and when this happens, making sure they take steps to seek help or refer the matter to a lawyer with appropriate knowledge. A good portion of the “law” errors arise from dabblers – people doing work outside their usual area of expertise (often with the good intention of helping a family member or friend).

Conflicts of interest errors are the next most common. These occur when lawyers act for more than one person or entity with a related interest (e.g., previous vs. current clients, family members and businesses, and/or company and directors/shareholders). They can also occur when a lawyer has a self-interest in a matter (e.g., when fees are owing or when the lawyer has invested in the client).

Clerical/delegation/supervision errors come next. These typically involve misfiled or lost documents, mistakes on filings or forms, or the failure to complete critical steps on a matter (e.g., issue a claim, file pleadings, serve a document). They can also involve a lack of supervision or poor delegation, usually when work is given to a non-lawyer employee and it is not checked.



and outside of Ontario. To easily find our best and most popular resources, I hope Ontario lawyers will use the practicePRO 15th Anniversary Pullout, which appears in the centrefold of this issue of *LAWPRO Magazine*.

By sheer number of visitors – currently more than 650 per day – the AvoidAClaim blog is one of our most popular resources. And we know the blog is helping lawyers avoid being duped by bad cheque frauds. However, at least a few times each year we hear from an Ontario lawyer who was successfully duped notwithstanding the exact name of the fraudster client and details of the fraud were posted on AvoidAClaim. This situation is one of my biggest frustrations as these frauds are so easily avoided by recognizing the red flags of fraud and/or a quick visit to the blog. The feelings of frustration are compounded by feeling badly for a lawyer who easily could have avoided being personally liable on a shortfall of tens or hundreds of thousands of dollars of overdraft in the firm trust account, depending on the circumstances. (See the “Could This Happen to You?” article on page 19.)

Our practicePRO Lending Library is probably one of our most under-utilized resources. To help lawyers improve their practices, this library has more than 120 books on various topics that Ontario lawyers can borrow for free. There are some fantastic books on practice management, firm finances and billing, legal technology, software programs, social media marketing, how to start and build a practice, selling and winding down a practice, and many other topics. Lawyers can go to practicepro.ca/library for a full list of books and borrowing instructions.

What is the most important risk management message you would like to leave lawyers with?

There will always be claims that come out of left field that no one could anticipate or avoid (and for this reason it is a huge comfort to have the LAWPRO insurance program standing behind you). But the errors that lead to the majority of LAWPRO’s claims, including many of the most common ones, are easily preventable. And with a bit of extra care in documenting a file, lawyers can put themselves in a far better position to defend a claim. I wish more lawyers appreciated these things – then maybe they would take steps to avoid or lessen the risk of a claim and be better prepared to help us defend a claim, or as LAWPRO CEO Kathleen Waters put it in her editorial, “drink the water” that the practicePRO program is offering. Please, everyone, read the Most Common Errors sidebar and take steps to avoid these types of claims.

Are there any practicePRO resources you wish more lawyers were using?

Judging from the feedback we get and the traffic and number of downloads on our websites and the AvoidAClaim blog, our resources are clearly very popular with members of the profession, both inside

Is there anything Ontario lawyers can do to assist practicePRO’s efforts in helping members of the profession avoid claims?

Yes, two things. Firstly, the feedback, questions and suggestions we get directly from Ontario lawyers help us better understand what lawyers are struggling with and where they need help. We use this information to decide the topics we will cover in *LAWPRO Magazine*, the risk management messaging we want to see addressed in programs we are approving for the Risk Management Credit, and the types of resources and checklists we will create. We can do a better job of reducing claims if the risk management messaging and resources that we are providing to the profession are addressing current issues and risks.

Secondly, as I stated at the start of the interview, we would love to know when our efforts helped someone avoid a claim. Needless to say, we would use this information to target or increase our efforts to do more of the same thing. We really appreciate any and all comments – they make our job easier and more enriched. ■

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

Could this happen to you?

Getting duped on a bad cheque scam

In our newest effort to help Ontario lawyers appreciate where claims happen – and how to avoid them – we are pleased to introduce a new column to *LAWPRO Magazine*: “Could this happen to you?”

Lawyers have told us they like to hear about real scenarios and circumstances that resulted in malpractice claims. They say that this helps them better see how they can avoid making mistakes in their own practices. So, in this new column we will present the facts behind some of our actual claims files, and highlight the risk management lessons to help you avoid finding yourself in the same situation.

For our first “Could this happen to you?” column we are focusing on bad cheque frauds. When we deliver presentations to lawyers about how to recognize and avoid these frauds, we often hear “How could anybody actually fall for these schemes? I never would.”

Thanks to our efforts, we feel Ontario lawyers have greater “street smarts” when it comes to recognizing and avoiding bad cheque frauds. But, unfortunately, we are still seeing costly claims when lawyers occasionally fall for these frauds.

Reproduced on the next page is a sample of the report we get when a lawyer reports a claim using our online claim report form. It is a classic textbook example of a bad cheque fraud where the lawyer was duped. Upon discovering these frauds, banks generally reverse the credit that was given on the deposit of the fake cheque. Because the lawyer already disbursed funds in reliance on the fake cheque, this reversal removes trust funds belonging to other clients and/or leaves the lawyer's trust account with a negative balance.

Please read the claim report. Can you spot the red flags? Could it happen to you?

On these bad cheque frauds we would generally afford coverage under the LAWPRO policy for the loss of the trust funds belonging to other clients. Any remaining overdraft would be the responsibility of the lawyer as the lawyer's indebtedness to the bank would not fall within the coverage provisions of the LAWPRO policy, unless the lawyer complied with the coverage requirements of LAWPRO's enhanced coverage for overdraft resulting from counterfeit certified cheques and bank drafts (Endorsement 7). Those requirements are:

- (1) You must have waited at least eight business days following deposit of the instrument into your trust account before disbursing funds as instructed; or you must have received confirmation from either your financial institution or the drawee financial institution that the drawee financial institution has verified the validity of the instrument. As well, this confirmation must be documented in writing (whether by you or the financial institution) before payment instructions are given.

- (2) The drawee financial institution indicated on the counterfeit certified cheque or counterfeit bank draft must be a Canadian financial institution, and the instrument must have been inspected and deposited by you, or a partner or employee of yours.

Note that the amount of coverage provided is subject to a sublimit of \$500,000 per claim and in the aggregate (i.e. for all such claims reported by the lawyer or lawyers in the firm that year), inclusive of claim expenses, indemnity payments and/or costs of repairs. The coverage does not apply to retainer deposits, untransferred fees, or other amounts relating to legal fees, accounts or fee arrangements. As well, some limitations in deductible may apply.

The risk management lessons

Please don't be complacent about these frauds. They are evolving and getting ever more sophisticated. Be vigilant! The supporting documents from the fraudsters – and the stories behind them – can be incredibly convincing. If a file you are handling seems like easy money, or otherwise too good to be true, think critically: Are there any details of the transaction that give you pause? Watch for the red flags that can indicate that an otherwise legitimate-looking matter is a fraud.

When in doubt, visit the AvoidAClaim.com blog and compare the potential client's name and story to those of dozens of names known to be used by fraudsters. If you suspect you are acting on a matter that might be a fraud, call LAWPRO at 1-800-410-1013 or (416) 598-5899. We will talk you through the common fraud scenarios we are seeing and help you spot red flags that may indicate you are being duped. This will help you ask appropriate questions of your client to determine if the matter is legitimate or not. If the matter you are acting on turns out to be a fraud, we will work with you to prevent the fraud and minimize potential claims costs.

If you have been successfully duped, please immediately notify LAWPRO as there may be a claim against you.

If you have been targeted by any of these frauds, please forward any of the emails and supporting documents that you have received to fraudinfo@lawpro.ca.

More fraud prevention information and resources are available on the “practicePRO Fraud page” (practicepro.ca/fraud), including our “Fraud Fact Sheet,” a handy reference for lawyers and law firm staff that describes common frauds and the red flags that can help identify them.

Be sceptical, stay safe and don't let it happen to you.

A sample claim report.

Can you spot the "red flags"?

CLAIM NOTICE REPORT – CONFIRMATION NO. PC11111

Received: 08/24/2013

To: <claims@lawpro.ca>

From: Mort.I.Fied@outofpocket.ca

Subject: Claim Notice Report

I am reporting a claim or potential claim against me.

INSURED INFORMATION

1. Insured LAWYER LSUC Number: 12345

Insured LAWYER Name: Mort I. Fied

Mailing Address: 123 Blissful Lane, Unawares, ON, N0T 2T2

Telephone Number: 1-800-555-5555

Firm Name: Babin Woods LLP

Email: Mort.I.Fied@outofpocket.ca

CLIENT/CLAIMANT INFORMATION

2. Claimant Last Name: Big Canadian Bank

CLAIM INFORMATION

How did you become aware of the claim or potential claim: see below

Has a proceeding been commenced against you: not yet

Does your firm carry excess insurance: no

Area of practice: general litigation

DESCRIPTION OF CLAIM

In summary, my practice's trust account has incurred an unexpected overdraft of approximately \$132,000.00 after, at a purported client's request, I wired funds to an overseas bank account, having deposited a cheque that later turned out to be counterfeit. The details are as follows:

Last month I received an email from a party who **claimed to reside overseas**, and who was seeking to **retain my services in a collection matter**. The purported client claimed to be the payee on a promissory note for \$260,000.00, which was alleged to be in default. The named debtor on the note (a **scanned copy of which the "client" forwarded** to me via email) was alleged to be a **resident in my city**. The purported client instructed me to make attempts to collect on the note.

As a result of my collection efforts, the purported **debtor forwarded to me a cheque** in the amount of \$134,768.99. The payor of the cheque was a well-known insurance company, though the cover letter was **from an intermediary company** called The Consultants Partnership. The payment was alleged to be payment in satisfaction of a claim by the purported debtor against his own insurance, which the debtor was forwarding in partial satisfaction of the promissory note debt.

Mistakenly believing that the cheque bore all the indicia of authenticity, I **deposited the cheque into my trust account**, and, as I had been instructed, immediately advised my "client" of my receipt of the funds. My "client" explained that he was **eager to receive the funds** because as soon as possible because they were needed to secure a **time-sensitive investment** overseas.

My "client" instructed me to **wire him, from my trust account, an amount representing the amount recovered from the "debtor", less my fees** for my services and disbursements so far and less a reserve pending further possible litigation. In accordance with these instructions, on the morning following my deposit of the insurance company's cheque, I wired to the client funds in the amount of \$132,250.00 CDN.

Four days later, I received notice from my bank, Big Canadian Bank, that my trust account was overdrawn in the amount of approximately \$108,000.00, because the insurance company cheque forwarded by the purported "debtor" was counterfeit and did not clear in advance of my wiring of the funds to the "client".

I contacted local and provincial police, but have been advised that prospects for recovering the funds are poor.

My trust account, at the time of the fraud, contained \$24,250 in funds held in escrow on behalf of other clients.

Red flags of a fraud

- 1 Out-of-the blue request for service by non-resident
- 2 Retainer involves collection of funds
- 3 No opportunity to review originals of supporting documents
- 4 Payor/debtor alleged to be a local resident (to you)
- 5 Debtor pays up after little or no effort on lawyer's part
- 6 Debtor's cheque will appear authentic, but is from the account of an entity that appears to be unrelated
- 7 A third party is involved in facilitating the payment
- 8 Client pushes for immediate payment
- 9 Client has urgent need for the funds
- 10 Client requests a wire transfer from the lawyer's trust account and tells lawyer to hold back his/her fee

practicePRO 15th anniversary pullout

LAWPRO's best claims prevention tools and resources

Nobody wants to deal with a claim – but it happens to Ontario lawyers – more than 2,500 times each year. Some of the claims reported to LAWPRO arise out of honest mistakes or novel circumstances. As you can neither see these claims coming nor do much to avoid them, it is nice to have the LAWPRO insurance program standing behind you.

However, the majority of the claims LAWPRO handles are preventable and flow from errors that we see time and time again. Lawyer/client communications problems are the most common cause of claims for law firms of every size and in almost every area of practice. Missed deadlines and procrastination are the second largest cause of claims. Inadequate investigation or discovery of fact is the third largest cause of claims.

Over the last 15 years, the practicePRO program has produced a large collection of tools and resources aimed at helping lawyers avoid claims. This pull-out has LAWPRO's best claims prevention content. We strongly encourage all Ontario lawyers to review and use these tools and resources in their practices.

For an electronic version of this pullout with links to these resources, visit practicepro.ca/15thpullout

The top 15 things you can do to avoid a malpractice claim

Many claims are preventable, often with very little effort. The following is a list of the top 15 proactive steps you can take to avoid a malpractice claim:

1

Start out on the right foot with a formal file opening procedure and a written retainer: Every new client should go through a standard file opening procedure that includes client/matter screening and a conflicts check. If you are going to act you should prepare a retainer letter or agreement that sets the key terms of engagement for the matter. It should clearly identify who the client is and what you are retained to do, and in particular, any limitations on the scope of the retainer. Consider including a provision that describes your firm's policy on disbursing money

from your trust account, in order to protect yourself against counterfeit cheque fraud: Put the client on notice that you reserve the right to hold funds for a specific time period or until you are sure they have "cleared."

2

Don't dabble or handle a matter you are uncomfortable with: If you are unsure or hesitant about handling the matter for any reason, get appropriate help or refer it to another lawyer. Send the matter away if you are unfamiliar with the area of law, a real or

potential conflict exists, the matter is for a relative or friend and you are not able to be objective, or the client is very demanding and difficult.

3

Get the money up front at every stage of a matter: At the time you are retained, get a retainer that is sufficient to cover all work that needs to be done at the initial stage of

cont'd on next page

the matter. Replenish retainer funds before they are exhausted and at the start of each stage of a matter or file. Configure your accounting system to remind you when the amount in trust is getting low relative to the WIP on the file or when the accounts have not been paid within 30 days. Stop work if the retainer is not replenished or accounts are not paid on a timely basis. Working on credit with a growing A/R greatly increases the likelihood you will not get paid and the potential for a malpractice claim (see #13). (This is especially important for plaintiff litigation, where you could find yourself in the middle of a malpractice claim due to an administrative dismissal of the action. If the retainer is not replenished, get off the record in a timely fashion.)

4

Control client expectations with good communications at all times: Clearly and accurately communicate to your clients the available courses of action and possible outcomes; all the implications of any decisions or actions; how long things will take; and the expected fees and disbursements. Immediately advise them if changed circumstances affect any aspect of your initial advice to them.

5

Document (almost) everything: It is just not practical to document everything on every matter, but strive to document as much as you can in some contemporaneous manner. Formal letters are fine, but e-mails, detailed time entries or marginal notes on documents can be equally effective. In particular, record advice or instructions that involve significant issues or outcomes, as well as major client instructions or decisions (especially with respect to settlements). Documentation takes on a greater importance when dealing with difficult or emotional clients. Memorialized communications are invaluable to confirm what was said to, or done for, the client in the event of a malpractice claim. Make sure nasty or embarrassing comments never appear in your client files or records.

6

Meet or beat deadlines: Set realistic deadlines for completing tasks and/or delivering

documents or advice to clients. Under-promising and over-delivering (i.e., earlier than promised) on work for clients will make them very happy. Don't leave work to the very last minute as unexpected events beyond your control may intervene and lead to missed deadlines (e.g., blackouts, snow storms or a sick staff member). Give yourself a margin of safety by setting deadlines a day or two early.

7

Delegate but supervise: Delegation is an essential part of running a practice, but make sure there is appropriate supervision and review of junior lawyer or staff work. Never allow others to use your Teranet PSP.

8

Dig deeper to get all required information and ask questions if things don't add up: Lawyers in many areas of practice are not taking the time to get all the information they need to give proper and complete advice to their clients. (For example, identifying all assets and liabilities on a will or family law matter; getting details of injuries on a tort claim, etc.) You must dig deeper, spot relevant issues and ask all appropriate questions of a client, especially if there is something on a matter that doesn't quite make sense.

9

Do not allow yourself to become a pawn: Do not allow loyalty to a client, pressure by a client, greed, or other motivations get in the way of your professional duties and ethics. Do not cut corners, cover up irregularities, or forgo investigative steps at the urging of a client. Doing any of these things will come back to haunt you.

10

Don't do any of the things that most annoy clients: These are all the things that would equally annoy you. They include not returning phone calls or e-mails, long periods of inactivity, and surprising a client with bad news

or a large account. If you have certain standards or practices that govern your client communications, such as phone calls will be returned within 48 hours (not same day), describe them in the initial retainer letter (See #1).

11

Don't wait until after the file is closed to ask how you did: Ask clients for feedback as the matter progresses, at milestones, or when interim accounts are rendered. Proactively address any concerns or issues the client raises.

12

Send interim and final reporting letters: At milestones, confirm to the client the work that was done and the results or outcomes, good and bad. Be sure to note any follow-up tasks that are the responsibility of you or the client. In the final reporting letter be clear that your retainer is concluded.

13

Think VERY carefully before suing for fees: Suing for fees almost guarantees a counter-claim alleging negligence, even if there are no grounds for the allegation.

14

What goes around comes around: Your reputation will precede you. Be civil at all times to: your client, judges, court staff, and the counsel and client on the other side.

15

Communicate and document (almost) everything: Read #4 and #5 again – controlling client expectations with good communications is the best way to avoid a claim, and having some documentation of those communications is one of the best ways to defend a malpractice claim.



15 of our most practical and helpful checklists, precedents and resources

We have a large collection of checklists, precedents and other resources that give you practical and helpful direction on steps you can take to reduce the risk of a claim. Here are 15 of our most helpful and practical claims prevention tools:

1 Retainer agreement precedents:

One of the best ways to reduce the risk of a claim is a retainer agreement that clearly identifies the client and the scope of work to be done. We have a variety of retainer agreement precedents for different types of matters which you can adapt for your practice.

2 Client administrative information and billing information letter precedents:

These helpful letters tell a client everything they need to know about dealing with you and your staff and how legal fees will be dealt with.

3 The Canadian Bar Association's Conflicts of Interest Toolkit:

A great collection of practical checklists and precedents that will help you recognize and avoid conflict of interest claims.

4 Post-matter Client Service Survey:

What did your clients think of your service? Use this post-matter client service survey to find out.

5 Independent legal advice (ILA) checklist:

A hasty \$150 ILA consult can easily lead to a claim and a \$5,000 deductible. Use this ILA checklist to make sure you cover all the bases when giving independent legal advice.



6 Domestic Contract Matter Toolkit:

This toolkit helps lawyers systematically consider and discuss all relevant information at the initial interview and signing of a domestic contract. It includes an intake form, an intake checklist, a post-meeting client assignment form, and a review and signing checklist.

7 Commercial Transaction Checklist:

This checklist contains a series of questions lawyers should ask themselves to help ensure that the commercial documents they are drafting correctly reflect the client's instructions and expected results. It helps ensure that your communication with the client has been thorough, too.

8 Fraud Fact Sheet:

This pamphlet describes the bad cheque and real estate frauds that most commonly target lawyers and lists the "red flags" that can indicate that an otherwise legitimate looking matter is actually a fraud. Share this with your staff too!

9 Sitting on a non-profit board: A risk management checklist:

Serving as a director of a charitable or not-for-profit corporation can be a rewarding but potentially risky undertaking. Here are some questions you should ask yourself before serving as a director of this type of organization.

10 Managing a mentoring relationship booklet:

Practical advice on how mentors and protégés can build mentoring relationships that are productive and successful.



11 Managing a better professional services firm booklet:

Loads of advice on how you can improve client communication and service at your firm.

12 Managing the finances of your practice booklet:

Details of the steps you can take to better manage and improve the finances of your practice.

13 Business plan outline:

Looking to grow your practice or to borrow some money from the bank? This business plan outline will help you set some long-term goals for the finances, management and marketing of your practice.



14 Sample budget spreadsheet:

This detailed 12 month budget spreadsheet will help give you detailed insights into your practice revenues and expenses.

15 Electronic Discovery – A Reading List:

Peg Duncan's list of the best Canadian focused websites and online resources on electronic

discovery issues is one of the most popular pages on our website.



AvoidAClaim.com



LAWPRO



@LawPRO

@practicePRO

@TitlePLUSCanada



LAWPRO insurance

TitlePLUS Home Buying Guide – Canada

Top 15 Technology articles and resources

Technology has become an essential part of practising law. These tips, articles and papers will help you use technology to become more effective and efficient. They will also help you avoid some of the dangers inherent in the use of technology in a law practice setting.

-  **1** Technology for solo/small firm, home & mobile lawyers
-  **2** 10 Essential technology skills
-  **3** Technology and stress: Good tool, bad tool
-  **4** Docketing dos and don'ts
-  **5** Six tech tools for improving client communication
-  **6** Technology in trying times: How and why you should use technology in your practice
-  **7** Is Facebook secretly sharing what you're reading and watching?
-  **8** Be smart about spam: Use whitelisting so you don't miss key messages
-  **9** Danger signs: Five activities not covered by your LAWPRO policy
-  **10** Social media pitfalls to avoid
-  **11** Essential dos and don'ts for LinkedIn users
-  **12** Protecting client data: 11 steps to take when using technology
-  **13** Are your passwords secure?
-  **14** Employee departure checklist
-  **15** Windows gone wild



Practice advice for avoiding claims: 15 articles we wish lawyers would read

Below are the 15 claims-prevention articles we most wish lawyers would read. Many of these articles appeared in past issues of *LAWPRO Magazine* or one of our webzines. You can find these and other past articles online in the *LAWPRO Magazine* archives. They are fully searchable and are listed chronologically and by topic.

1 New Year's resolutions for a healthier law practice and a new you: If you are going to read one article this is it – 15 pages of practical tips for reducing risk and avoiding claims and stress.

2 Is anyone listening? It's easy to prevent communications breakdowns: This article describes specific communication pitfalls and how to avoid them in many areas of practice.

3 Lets get talking: A look at communication breakdowns: Lawyers don't always communicate as well as they could. Read this article to improve your communications skills.

4 Inadequate investigation/discovery now #1 individual cause of claims: Lawyers in many areas of law are not taking the time to get all the information they need to give proper and complete advice to their clients. Read this article to learn how to dig deeper, spot relevant issues and ask all appropriate questions of a client.

5 Avoiding administrative dismissals: Know how administrative dismissal claims happen, and take 8 steps to immunize yourself against them. This article is a must-read for litigators.

6 Litigation claims trends: errors & insights: This article examines the most common civil litigation-related errors that LAWPRO sees, and the steps you can take to reduce the likelihood of a litigation claim.

7 Self-represented litigants: A survival guide: Having a self-represented litigant on the other side of a matter can be very frustrating for you and your client. This article will help lessen those frustrations.

8 Real estate claims trends: A detailed review of where and why real estate claims happen – and what can be done to avoid them.

9 Six things I hate to read in a real estate claim file: LAWPRO President & CEO Kathleen Waters runs through the unfortunate explanations we see on all too many real estate claims files.

10 Unbundled legal services: Pitfalls to avoid: "Unbundled" or limited scope legal services are here to stay; but providing these services creates risks that must be managed. Read this article to understand and avoid those risks.

11 Landmines for lawyers when drafting wills: LAWPRO claims counsel Pauline Sheps outlines some of the areas of greatest malpractice danger for wills practitioners.

12 Diversify without dabbling: Before expanding your practice, expand your competence. Dabblers – lawyers working outside their usual area of practice – cause a significant number of claims. Read this to understand why.

13 Wondering when to report that claim or potential claim? Do it now: Late reporting of a claim can have severe consequences. Read this article so it doesn't happen to you.

14 The morning after mediation: Settling a matter can require lots of give and take and some compromise, with the result that clients may have second thoughts about what they agreed to the day before. Avoid this predicament with the advice in this article.

15 A checklist for avoiding conflicts on lateral transfers: On lateral transfers being a good fit and having the right credentials is important, but so is avoiding conflicts of interest. Get the advice to do it right here.

For an electronic version of this pullout with links to these resources, visit practicepro.ca/15thpullout

Currently there is a lot of discussion about changes in the practice of law and the future of the legal profession. When you are in the midst of changing times, it can sometimes be hard to see the changes that are occurring, much less understand where things are going. For some perspective, it can help to look at the before and after.

your parents resided. He was likely a general practitioner and all his work was done in person or on paper. He was also probably a member of the local men's service and golf clubs (as was your father). And last, but not least, he was subject to regulation and ethics rules and had malpractice insurance (at least in recent decades).

For the after, consider your child's "lawyer." He or she will live somewhere in the global village that our world has become. He or she was educated and could be located anywhere on the planet. No paper here – electronic documents and virtual communications

will be the norm. In fact, this person could be a non-lawyer, and might not even be a person: The advice could be coming from a website or computer program. It is unlikely that this person, website or program will be admitted to a bar, subject to regulation or ethics rules, or have malpractice or similar insurance in the same way as your parents' lawyer.

There are some fairly obvious differences in these two scenarios, and when you consider them more deeply, they raise some interesting and profound questions about what legal services are, who delivers them, and how they will be delivered and regulated. But before we talk about the future, we should start with some reflection on where we came from – the time when your parents' lawyer was in his prime.

Looking back

Looking back, it would appear that the latter part of the 20th century was the golden era of the traditional law firm. Aside from a few big but temporary bumps, the economy grew steadily for several decades. Lawyers were the only game in town for legal advice and services as they were the only ones with access to the required knowledge and tools. In almost all areas of law and for firms of every size and type, from the biggest firms on Bay Street to the smaller firms and sole practitioners in smaller and rural communities, this created a steady supply of new clients and a growing demand for the services which only lawyers could provide.

Leveraging the billable hour (which increased year after year with few, if any, complaints from clients) and large numbers of hard-working articling students and associates, most firms were profitable and being a lawyer meant you were reasonably or very well off financially. In general, life was very good for lawyers and law firms.

The present

But as we start the second decade of the 21st century, this idyllic existence seems to be coming to an abrupt end. By many measures, the legal system is not functioning as it should. It has become very complex. Going to court is incredibly time consuming and expensive. Self-represented parties are struggling to handle their own matters and are described as bogging down the court system. There is a large legal services gap, even for the middle class. Many people are unable to afford or access the legal services they need. Some are going outside the judicial system for dispute resolution.

There is also a shrinking demand for traditional legal services. Clients (and in particular, corporate clients) are paying a lot closer attention to their legal costs. They have come to recognize that the billable hour rewards the wrong behaviour and does nothing to encourage greater efficiency. Clients want greater predictability and value for their legal spends. They are doing cost/benefit and risk analyses, undertaking RFPs and are demanding more affordable legal services and alternative fee arrangements (e.g., flat or fixed fees, blended rates, phased fees, fees with a collar¹, value fees, etc.). Many corporate clients are doing more work in-house. These things are creating pricing pressures

and are decreasing the profitability of law firms. Reduced demand for traditional legal services (typically billed by the hour) also means there is less demand for articling students and a tendency towards over-supply of lawyers (while paradoxically at the same time, many rural and smaller communities don't have enough lawyers). Competition between law firms is increasing for both getting clients and keeping good lawyers.

For a variety of reasons there is also a breakdown in traditional law firm structures. With fewer articling students and associates, firms are becoming top-heavy and the pyramid model is no longer working financially or for work-flow structures as demanded by corporate clients, who often do not want to pay for multiple lawyers on a file and certainly do not want to pay to train associates. When you consider outsourcing, some are suggesting firms will move to the "starfish" model, with few permanent lawyers and staff, but a range of outsourced suppliers, independent contractors and temporary employees who come and go as the work demands². Some firms are experiencing succession planning issues as fewer lawyers are moving up the ranks and willing to take on equity partner and leadership roles.

Changes on the horizon

The picture looking forward from the present doesn't look much better – we certainly aren't going to go back to the idyllic era of your parents' lawyer. Needless to say, many of the issues and changes mentioned in the previous section will drive change. But there are other major drivers of change that are starting to have some impact now and will become more significant in coming years. They include:

- **Globalization:** Both corporate and individual clients (who might themselves be from outside Ontario) are more likely to have matters involving non-Ontario law and parties.
- **Demographics:** The profession is aging and there are large numbers of lawyers approaching retirement age. This is a significant issue in many smaller and rural communities because younger lawyers are not starting up new practices in these communities.
- **Technology:** The internet and other technologies are having a disruptive impact, allowing many new ways for lawyers and clients to communicate and collaborate and opening the door for new types of legal service offerings.
- **Self-help and DIY tools:** The internet has given individual or consumer clients access to virtually all the legal information and resources that only lawyers could access just a few decades ago.
- **Legal process outsourcing:** Firms are exploring new ways to cut costs, including outsourcing legal work (e.g., research, document drafting and review, e-discovery, etc.) and non-legal work

¹ An agreed-upon fee is established with a collar, typically 10 per cent. Should the value of fees be above or below the collar, the law firm and client agree on a percentage of the overage/underage to be credited or paid. The percentage is normally 50 per cent. This type of fee arrangement allows the firm and client to share fee upsides or downsides with each other.

² Thomas S. Clay in "Trends and Uncertainties in the Legal Profession: Law Firms in Transition" a presentation to North Carolina State Bar Association Cary, NC September 10, 2010.

(back-office support and services) to entities that are both onshore and offshore. There can be significant savings here. For example, hourly rates for legal work in India are typically 25 per cent or less than the rates for comparable work here.

- **New entrants:** There are various types of alternative non-traditional “legal service” providers, almost all of which offer services at lower costs than traditional law firms.

These pressures and changes will shape the legal system your child’s lawyer will live and work in. With these changes will come some interesting questions and challenges regarding who should offer legal services and how they should be regulated. Let’s look at these pressures, questions and challenges in more detail.

Who will provide legal services?

Our current legal system is predicated on lawyers – and more recently paralegals – delivering “legal services” (the definition of this term is discussed in the next section). Can Ontario lawyers maintain a monopoly on professional legal services? The answer is probably not. In fact, some would argue the monopoly ended when paralegals were given regulated status to provide legal services.

As mentioned above, access to justice is a problem for many members of the public and there is a massive and growing legal services gap. Lawyers and the legal system do not seem to be changing or evolving to address this gap adequately. This effectively opens the door for non-lawyers to fulfil this unmet need for legal services. Ontario was very progressive in regulating and licencing paralegals. British Columbia is considering the same issue and notaries already do much of the residential real estate conveyancing work in B.C.

Non-lawyers are stepping up to provide legal services in other jurisdictions, too. Washington State has created an education and professional framework for Limited Licence Legal Technicians (“LLLTs”). LLLTs will have more training and responsibility than the paralegals in that state, but will not appear in court or negotiate on behalf of clients. California and several other U.S. states are looking into doing something similar for immigration consultants.

Computer programs and websites are already providing various types of legal services and it appears they will become a much larger part of the legal services market in coming years. In both paper and electronic form, “DIY” will kits are widely available. The online segment seems poised for very significant growth as there are many start-ups targeting the legal services market, some with capital backing from venture capitalists and major corporations like Google®.

Sites like LegalZoom® and RocketLawyer™ have become major legal services players, selling standard forms and documents that are customized for a client. Some sites offer pre-fab work product that is ready for client use “as is.” There are many sites with self-help information and many Q&A sites (e.g., Quora®) where you can directly ask a lawyer questions. You can talk to a lawyer in real time and be billed by the minute on your credit card on Ingenio™. Other sites offer

Can computers give competent legal advice?



Without a thought we rely on a GPS to take us across town or to another province. Planes takeoff, fly, and land by themselves. Self-driving cars are here. Think of all the decisions that have to be made to make these things happen. Many of those decisions are made on the fly and in response to changing circumstances. Are these things more complicated than legal advice? Likely not.

Many lawyers will tell you that every matter they handle is unique. While no doubt some legal matters are truly unique, if you look at a large number of matters you will see patterns repeated time and time again. These patterns can be used to build intelligent systems that can give legal advice or create documents tailored to many different clients’ specific circumstances. There might be several hundred or more questions in the decision tree behind a system to create a “basic” will. A more complicated matter could have thousands of questions. Visit the neotalogic.com site for demos of these types of systems.

One could argue that computers could do a better job than lawyers because well-built intelligent legal systems that know all relevant law and will ask every relevant question about the client’s needs and circumstances will give properly tailored advice every single time.

Technology can also do a better job at some of the tedious work lawyers do. There are studies that indicate software systems can do a better job of reviewing documents for relevance or privilege than trained associates can.

lawyers the opportunity to bid on matters or work that potential clients have posted. Cybersettle® is a consumer settlement and payment site that has, without lawyer involvement, facilitated the settlement of almost \$2 billion in claim-based transactions for insurance companies, Fortune 500 corporations, and municipalities.

The services offered by these types of sites are usually significantly cheaper than comparable services offered by lawyers, and in some cases are free. They have transformed many common types of personal or consumer legal work into low price, low margin and high volume commodity legal services. Many of these sites are monetized, at least in part, by being a source of referrals for lawyers (this raises ethics issues in many jurisdictions), and in some cases non-lawyers, that own or participate on them.

Most of the websites offering legal forms at the present time are doing basic document automation on common documents like wills, incorporation forms and basic court pleadings. However, work is being done to build intelligent document and advice generation systems that will have artificial intelligence. These systems will be able to handle very complex matters. But, can computers give competent legal advice? See the sidebar, above, for the answer to this question.

So it looks like we will have non-lawyers and computers becoming a much larger part of the legal services market. Will lawyers still provide legal services? Yes, they will still have a part, albeit probably a shrinking part. This is discussed in more detail in the last section of this article.

For the rest of article we will call anyone or anything that provides legal services a “legal service provider.” What do legal services providers do? They provide legal services.

What are “legal services”?

Perhaps the more relevant question here is “What is the practice of law?” Coming up with a definition of the practice of law has proven to be very difficult. Many have tried, and many have failed, including an American Bar Association Commission. For the purposes of this article we won’t attempt to come up with the definitive definition of the practice of law. Let’s just say that the practice of law includes giving legal advice. We also won’t attempt to define what “the giving

of legal advice” is other than to say it is what lawyers have traditionally done. The key point to note is that the practice of law or the giving of legal advice is important as either triggers inclusion in the legal services regulatory regime.

But, what about the services offered by some of the newer forms of legal service providers? Is a legal forms site that helps you complete a document giving you legal advice? How about an answer to a query you posted on a legal Q&A site? Or when a problem with your online purchase is resolved with an online dispute resolution process? Is a software program that creates a document tailored to your facts giving you legal advice? In many cases these websites and online tools are doing work that is the same or very similar to what lawyers do. However, if you take a look at the terms of service on online legal services sites you will find they all explicitly say they are not practising law or providing legal advice. It almost seems as if incremental unauthorized practice of law (known as UPL) is chipping away at the foundations of the legal profession. This leads to the next question we will consider.

Future “law firm” models

So what will the law firm of the future look like? There are a number of possibilities, some that will be similar to or evolve from existing types of firms, others that will be entirely new. These are the types of firms we will probably see 10 to 15 years from now:



- 1. Global full service:** Following a consolidation of some of the major national firms, there will be a few international mega-firms in this group. This is what has happened in the accounting profession. These firms will be multi-national and have tens of thousands of lawyers. They will handle very complex matters and will provide legal and other professional services (such as accounting) that have not been viewed in the past as legal services.
- 2. Global niche:** This is a new category of firm that will focus on niche areas but be able to deal with niche issues on a global and international basis. They will also be multi-national, but they will be small in size.
- 3. Local/national full service:** The existing regional and national firms that embrace change and adapt to the changes that the profession is seeing will count themselves in this group. They will have moved away from the billable hour, will be doing more commodity work, and will be doing everything they can to be working better, cheaper and faster for their clients.
- 4. Local niche or boutique:** Some of these firms already exist, but there will be more of them. In many cases they will be breakaways from current larger firms and they will be fairly small in size. Clients will seek them out and pay a premium because they are the best at what they do.
- 5. Solo and small general practice firms:** These firms will still be around, but given the demographics of the bar they will be fewer in number, especially in smaller communities and rural areas.
- 6. Legal process outsourcers (LPOs):** Law firms and corporate legal departments are sending more and more work outside to companies that specialize in particular tasks (e.g., legal research and analysis, document drafting and review for due diligence and litigation, e-discovery, patent and IP work, contracts) and non-legal work (clerical work, back-office support and services). Much of this work was traditionally done by teams of lawyers at the larger firms. This is one of the fastest growing segments of the legal services market.
- 7. Virtual firms:** This is a new category. We are at the start of a huge expansion in lawyers providing legal services without founding their practice in one or more specific bricks and mortar locations. The firm may have multiple lawyers, all working together and/or with clients via shared technology. When meetings are needed they will use technology like Skype, visit the client’s premises or meet in a facility rented for this specific meeting. In a variation of this arrangement, in some cases lawyers from different firms will come together and use “virtual deal rooms” to work on a single matter.
- 8. Alternative business structures or ABS:** This is another new category. Lawyers and/or non-lawyers will own and operate these firms. They will initially focus on low-price/high-volume commodity work, but they will start work on higher value matters. The advent of Ontario paralegals as independent business owners providing legal services related to traffic tickets, landlord and tenant hearings and small claims court cases (to name just a few areas) presages the likely tsunami of services to come from the expansion of this model.

Should legal service providers be regulated?

By stating that they are not practising law or providing legal advice, these legal service providers shrewdly aim to take themselves out of the current legal services regulatory scheme and nicely avoid all the education, admission, ethics and insurance obligations that lawyers must fulfill.

You can better understand the impact of this if you go back to the “before” and “after” scenarios outlined at the start of this article. Your parents had some guarantee as to the quality of the legal services they got, and some recourse if there was a problem. If the legal services your child gets come from a legal service provider that is outside the regulatory framework, it is quite possible they will have no guarantees as to the quality of the legal services they will get and little or no recourse if there is a problem. For the sake of consumer protection, this suggests that all legal service providers should be regulated.

For this reason, ultimately regulators may look to regulate all legal services providers – not just lawyers. This “entity regulation” has started to happen in some jurisdictions. The alternative business structures (“ABS”) approach in the United Kingdom is one example of this. See the adjacent ABS sidebar for more details on what ABSs are.

When considering the regulation of legal service providers, two other related questions come up. First, should legal service providers be on the hook if they make a mistake? As a matter of consumer protection, the obvious answer to this question is “yes.” There can be very significant legal, financial and/or personal consequences if there is a problem with the legal services provided to a client. Buying legal services is different from buying running shoes on Amazon™ or trinkets on eBay®. The terms of service on almost all online legal service provider sites have very broad waivers of liability. At best there is a money-back guarantee. This would not properly compensate a client that has been seriously harmed by erroneous legal services (e.g., a will purchased for \$30).

Alternative business structures (“ABS”)

The current regulatory approach to permitted business structures and financing rules for law firms or other entities delivering legal services varies greatly by jurisdiction. The continuum ranges from jurisdictions restricting the delivery of legal services to traditional practice structures, where external ownership of law firms and external capital are prohibited, to jurisdictions that have expanded the range of structures through which legal services may be delivered by permitting new forms of law firm ownership and financing.

Alternative business structures or “ABS” is a term that can apply to any form of non-traditional law firm business structure as well as alternative means to deliver services. It may include, for example:

- Alternative ownership structures, such as non-lawyer investment in or ownership of law firms, including equity financing;
- Firms offering legal services together with other professionals or non-professionals; and
- Firms offering an expanded range of products and services, such as do-it-yourself legal forms.

Australia was an early adopter of ABS regulation. Since 2000, legal practices in New South Wales have been permitted to incorporate under ordinary company law without any restrictions on who may own shares or what type of business may be conducted. In 2007, Australia was the first jurisdiction in the world to permit the public listing of a law firm.

England and Wales are experiencing rapid change in how legal services are regulated and provided to the public. Following the Clementi Report, which recommended major reforms to the regulation of legal services in England and Wales, the *Legal Services Act 2007* (“LSA”) was enacted. Under the LSA, the objectives of the regulation of legal services have been broadened. In addition to improving access to justice, the regulation of legal services is also founded on objectives such as protecting and promoting consumer interests and competition. The LSA expressly permits the provision of legal services through ABSs in furtherance of these objectives. More than 230 ABSs have successfully become licenced to provide legal services in England and Wales under the LSA, and a further 250 applications are in the pipeline.

The majority of ABSs look a lot like ordinary law firms. Firms of various sizes, including sole practitioners and smaller firms, are themselves or own ABSs in which non-lawyer staff have become equity partners and in which family members, including spouses, have become part owners. It would appear the motives here are profit sharing and/or income splitting. One very large firm was granted five separate ABS licences. Australian mega firm Slater and Gordon purchased a large firm and converted it into an ABS. Some ABS firms offer legal services together with related professional services (e.g., architecture) or expert consulting services (e.g., human resource management).

“Grocery store law” has arrived thanks to Co-operative Legal Services (“CLS”), part of the Co-Op Group, the UK’s largest mutual business. Its businesses include, among others, a national chain of food stores, banking, insurance, pharmacy, and funeral services. The Co-Op Group operates over 5,000 retail outlets, and employs over 106,000 people. As an ABS, CLS currently provides fixed fee legal services in conveyancing, family, wills and probate, personal injury, and employment law by phone, online and in-person at many of its stores.

While it is too early to see if the LSA’s objectives are being met, none of the dire predictions opponents of ABSs made have come to pass. Some say that ABSs under the LSA have opened the door to innovation, but others say they are still too restrictive. The Law Society of Upper Canada has a working group of Benchers studying the ABS phenomenon.



The second question is whether legal service providers should have “malpractice” or similar insurance. As insurance is mandatory in every province and territory in Canada, we probably take it for granted. In the United States only one state (Oregon) has mandatory malpractice insurance. There is a wide variation in other countries around the world (see this *LAWPRO Magazine* article: “Errors & Omissions: Mandatory professional liability insurance and a mandatory provider: A global perspective”). This is also a matter of consumer protection. If there is a problem – it means the client is assured some financial recourse. It can also help lawyers avoid dire personal financial circumstances in the event they make an error.

Jurisdiction matters

In most every jurisdiction, including Canada, legal services regulation is very much based on jurisdiction – you must comply with the regulatory regime in the jurisdiction where you are providing legal services. In Canada we have mobility rules which allow lawyers to practice across the country. A similar regime is in place in Europe, but this is not

typical of most jurisdictions in the rest of the world. Mobility is difficult if not impossible in most other jurisdictions, including the United States, although there are signs that this is starting to change in some places. For example, discussions are ongoing about legal services falling under GATT, the General Agreement on Trade and Tariffs.

However, the current regulatory model doesn’t work well in the world of your child’s lawyer. This is because your child’s lawyer could easily be a non-lawyer or computer, and may be outside of Ontario. Practically speaking, this puts such legal service providers beyond the reach of any Ontario regulation, education, ethics rules and insurance requirements.

And it gets even more complicated when you deal with matters involving multiple jurisdictions. Which jurisdiction is relevant if an Ontario resident purchases a lease document for a Florida condo from an online forms site owned by an Irish company (not a law firm) with servers in Germany?

Dealing with the complications that the “different jurisdictions” issue raises will have to be sorted out by legal service regulators. Presumably they will look to a jurisdiction where the matter has some physical or virtual nexus. And we may ultimately need some kind of international regulator or enforcer – like an Interpol for legal services providers.

Facing the challenges and opportunities

Big changes – positive and negative – have happened to the profession in the past. We have gone through economic cycles and seen both emerging and disappearing areas of law. Court rules and procedures have changed. There was the consolidation and growth of big firms and the general movement from general practitioners to specialists. Technology has – and will continue to – change the profession and the delivery of legal services in many, and sometimes very disruptive, ways.

No one can really predict for sure how fast change will come to the legal profession, nor with any certainty, the exact changes that will occur. There are many uncertainties. What will the global economy look like? Which purchase and delivery models will develop for legal services? What type of regulatory and compliance environment will exist? To what extent will non-lawyer legal service competition move upstream into areas traditionally served by lawyers? Will the legal profession face deregulation?

The one thing that is certain is that significant changes are coming to the profession in future years and decades. They will occur at different times and in different ways in different jurisdictions. While we are very progressive in Ontario in some ways (e.g., mobility and the regulation of paralegals), we have seen relatively



little impact from some of the other big changes that have occurred or are occurring elsewhere (e.g., legal process outsourcing, which has taken off in the U.S. and Europe). Considered from a global perspective, Ontario is a small and relatively isolated jurisdiction which may delay some of the changes coming our way. Our comparatively healthy economy and isolation protected us from the financial stresses and changes U.S. law firms and their clients experienced in the downturn that happened there. But when change catches up to us, it will come quickly.

It will not be easy for many to face these changes. The *status quo* is coming unstuck. Based on a review of what has happened elsewhere, some lawyers will lose their jobs. Entire practice groups will become unprofitable and will have to be abandoned, and some law firms will fail. Not all law school graduates will be able to get jobs. Institutions and businesses associated with the legal industry that fail to evolve will also face hard times. For lawyer associations, CPD providers and publishers that may mean offering memberships or services to non-lawyers. Our systems of adjudication (whether courts or administrative tribunals) need to adapt and change as well. They need to be simpler, more accessible, easier to navigate and faster. Adding more self-help options could help those without lawyers.

Lawyers tend to be slow to change and it seems many lawyers don't see or won't acknowledge the changes that are coming. Some think they are different or they say that their matters are "unique" and require the services of a lawyer. Lawyers should not fool themselves: The basic market forces of supply, demand and pricing apply to them. There is an oversupply of traditional and high (some say over) priced legal services. The client demand for lower-priced legal services is being filled by the new types of non-lawyer legal services providers.

Lawyers and law firms need to recognize that changes to the legal services market are occurring and embrace them. People will always need lawyers, or something like them, for some types of matters. For "bet the company" work there will always be a solid and lucrative demand for services, but it is a very small part of the legal services market. In the middle comes relatively sophisticated or higher value work that is not rocket science but needs a firm that has specialized and competent people. This too is a market that won't disappear, but it is not a huge one. At the bottom is the largest part of the market – the commodity work we have discussed above: people buying houses, preparing wills, settling estates, resisting eviction or prosecution, and so on.

Many people can't afford the legal services or get the help they need in our current system. These unmet legal needs are an opportunity that lawyers and law firms must recognize. Lawyers need to innovate and think like business people and entrepreneurs – this is what their non-lawyer competitors are doing. That will mean looking at offering new services. It almost certainly means using technology to work better, faster, cheaper, and in new ways. To compete with legal service providers who are offering commodity services, lawyers must offer more affordable services. Options include going head-to-head by retrenching to offer commodity services to clients as well or by exploring alternative fee arrangements to make existing services more affordable.

Another option is to put more effort into showing clients the value-add that having a lawyer brings to legal services. This involves thinking beyond just doing one matter for a client and thinking about what the client's longer term needs are. In other words, when a new client walks in, don't think of just doing an incorporation that will pay a few hundred dollars in fees. This is commodity work. Think about what a new business person will need for the short- and long-term growth and success of his or her business. What information could be provided to the client to help them deal with issues they may come across? What related work can be recommended to them? Think beyond one matter – aim to become the business lawyer for the client's new company. This is where the longer term and more lucrative fees are. A client won't get service like this from a \$50 incorporation done on a forms site.

As a closing thought, we turn to a comment Richard Susskind made in his book, *The Future of Lawyers?* He suggests lawyers need to move from being reactive legal problem solvers (the ambulance at the bottom of the cliff) to proactive legal risk management advisors (the fence at the top of the cliff).

Consider how prepared you and your firm are to face the changes that are coming to the legal profession. No doubt you have some work to do. Take proactive steps to face these challenges and the opportunities they present. ■

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

Resources

- *Law21 blog* by Jordan Furlong (law21.ca)
- *Legal Futures blog* (legalfutures.co.uk/blog)
- *Reinvent Law Laboratory* (reinventlaw.com)
- *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, by Ray Worthy Campbell in New York Journal of Business and Law, Fall 2012, Vol. 9 No. 1

- *Sea Change: Inside the Changing Legal Marketplace*, a video of a presentation to the Colorado Bar Association by Mark E. Lassiter (vimeo.com/74653671)
- *The Future of Lawyers?* By Richard Susskind, published 2010 by Oxford University Press. 352pp.
- *Tomorrow's Lawyers: An Introduction to Your Future* by Richard Susskind, published 2012 by Oxford University Press. 224pp.

Know how administrative dismissal claims happen, and take 8 steps to immunize yourself against them



Over the last two years LAWPRO has seen a major spike in Rule 48 administrative dismissal claims.

Rule 48 claims arise when it is alleged that the dismissal of a claim was due to the lawyer's negligence with respect to either a defended (Rule 48.14) or an undefended (48.15) action. Many of these claims have been very costly for LAWPRO. While certain Rule 48 claims can be repaired by speaking with opposing counsel or court staff, in larger centres (Toronto especially), repairs require a motion to set aside the dismissal and reinstate the action. Not only do these repair efforts consume significant defence costs, but success is not guaranteed. Both the courts and LAWPRO are losing patience with what is almost always an easily preventable error.

LAWPRO urges lawyers to take every possible precaution against claims based on the administrative dismissal of an action.

Avoiding these claims means, first, understanding how these claims happen; and second, taking practical, active steps to protect against them.

How Rule 48 claims happen

Actions are dismissed when plaintiffs, for whatever reason, lose sight of litigation deadlines on a matter and then don't receive or fail to act on a status notice sent by the court. Here at LAWPRO we are uniquely placed to observe how these errors happen.

In a few cases, the reason for the oversight is administrative or clerical. The tickler system doesn't function properly and the timelines for the matter are missed and/or the resulting status notice is missed, misinterpreted, or is lost in the mail. Better management of office

procedures and systems (for example, the use of the "inactivity" reports or warnings from account software) and better staff training can help with this cause.

Good office management also means careful supervision of juniors: On some claims, a senior lawyer who is ultimately responsible for a file delegates it to a junior who is overwhelmed with workload and is too embarrassed or intimidated to speak up. When the junior lawyer misses deadlines, the senior lawyer is not supervising him or her closely enough to notice.

On other claims, the limitation period goes by while the plaintiff is waiting for a medical prognosis, discoveries are proceeding, or there are active settlement discussions occurring.

A very dangerous scenario arises when a lawyer's unexpected hiatus from legal practice (for example, due to an illness or family emergency) leads to the ball being dropped on several files triggering a "cluster" of administrative dismissals. When we see these clusters it appears that the departed lawyer's active files are not being monitored by a staff person or transferred to a colleague.

Finally, sometimes the result of a status hearing is the imposition of a timetable for progress on the plaintiff's lawyer. We see claims, in some instances, where the matter is dismissed when the lawyer did not or could not meet the timetable.

Eight practical precautions to avoid Rule 48 claims

Administrative dismissal claims are almost universally preventable. Take these eight steps for your best chance at avoiding a claim:

1. Ensure that your tickler system is effective, is being populated properly, and that staff has been well-trained in the use of the system.
2. Consider using your tickler system or the "inactivity reports" or warnings that many law office accounting or practice management programs have to identify files in which nothing has happened for a specified period of time.
3. Don't assume that you can wait to take prescribed procedural steps in an action while awaiting completion of medical reports, discoveries, or settlement negotiations. Instead of relying on an opponent's informal or implied waiver, either meet litigation deadlines or obtain a written and signed "tolling" or "standstill" agreement confirming the parties' mutual agreement to extend time.
4. Train staff to recognize status notices, and to bring them to the attention of counsel without delay.
5. Supervise junior lawyers appropriately; ensure that they understand the operation of Rule 48, and pay attention to signs that suggest they are overwhelmed and at risk of missing deadlines.
6. Be prepared for unexpected work interruptions. Consider the possibility that an illness, injury or other contingency could cause your practice to be suddenly interrupted for a significant amount of time. Who would handle urgent client matters in those circumstances? Would that person be able, when reviewing your files, to identify matters requiring prompt action?
7. When time is passing and you can't get instructions from the client or a replenished retainer, you can't just let the file sit in abeyance. The court will be monitoring even if your client and the other side are content to let the matter slide. If you don't consider the file from this angle and the matter is eventually administratively dismissed, all of a sudden the client may show great interest in his or her cause of action, and effectively pursue it through an action against you. Knowing when to get off the record is one key to practising safely.
8. As there is the potential for a malpractice claim, contact LawPRO promptly for advice if you are required to attend at a show cause hearing. ■

Nora Rock is corporate writer and policy analyst at LawPRO.

Some helpful resources

Litigation to keep a delayed action alive is complicated by jurisprudence that establishes FOUR separate tests, depending on the particular rules triggered. The chart on page 34 provides a handy guide to understanding which test will apply, and identifies the key precedents.

For a more detailed analysis of these tests and their application, and the case law in this area, read Debra Rolph's article "Plaintiff counsel beware – it is now easier to dismiss an action for delay." practicepro.ca/now-easier-to-dismiss-for-delay.pdf

LAWPRO KEY REMINDER DATES MARK YOUR CALENDAR NOW!

On or about October 1, 2013

LawPRO online filing of Professional Liability Insurance renewal applications for 2014 begins. If you wish to file a paper application instead, please note that paper renewal applications will not be automatically mailed out, but you can download a 2014 pre-populated paper renewal application from our website on or about October 1, 2013.

November 1, 2013

E-filing deadline: Renewal applications filed online by November 1 qualify for a \$25 per lawyer e-filing discount applied to the 2014 insurance premium.

November 8, 2013

Application filing deadline: 2014 LawPRO renewal insurance applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium.

If you have any questions regarding the renewal of your insurance coverage, contact LawPRO Customer Service Department at 416-598-5899 or 1-800-410-1013; by fax at 416-599-8341 or 1-800-286-7639; by e-mail at service@lawpro.ca



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Dismissal Motions: What is the Test?

MOTION TYPE & RULE(S)	TEST(S)	AUTHORITIES
Dismissal of Action for Delay – Rule 24		
<p>Available to defendant where plaintiff fails:</p> <ul style="list-style-type: none"> to serve statement of claim on all defendants within prescribed time; to note in default any defendant who has failed to deliver a defence, within 30 days after the default; to set an action down for trial within six months after close of pleadings; to move for leave to action to trial list, within 30 days after the action was struck off. 	<p>An action should not be dismissed unless:</p> <p>(a) the delay is intentional and contumelious; or</p> <p>(b) the plaintiff or his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible.</p>	<p><i>Woodheath Developments Ltd. v. Goldman</i> 2001 CanLII 28019 (ONSC), (2001), 56 O.R. (3d) 658 (Master), aff'd. 2003 CanLII 46735 (ON SCDC), (2003) 66 O.R. (3d) 731 (Div. Ct.), leave to appeal refused (2004) 44 C.P.C. (5th) 101 (C.A.). Approved and adopted in <i>Armstrong v. McCall</i> 2006 CanLII 17248 (ONCA), at para. 11</p>
Setting Aside a Registrar's order Dismissing Action – Rule 37.14 and Rule 48.14(4) and (5); Rule 48.15		
<p>Available where a Registrar dismisses an action under Rules 48.14(4) or (5), or Rule 48.15:</p> <p>Rule 48.14(4)</p> <p>The registrar shall dismiss the action for delay... 90 days after service of the status notice, unless:</p> <ul style="list-style-type: none"> the action has been set down for trial or restored to a trial list; the action has been terminated by any means; documents have been filed in accordance with subrule (10) [timetable and draft order establishing timetable]; the judge or case management master presiding at a status hearing has ordered otherwise. <p>Rule 48.14(5)</p> <p>If an action is not set down for trial, restored to a trial list or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs.</p> <p>Rule 48.15</p> <p>The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:</p> <ul style="list-style-type: none"> more than 180 days have passed since the date the originating process was issued; none of the following has been filed: <ul style="list-style-type: none"> i. A statement of defence ii. A notice of intent to defend iii. A notice of motion in response to an action, other than a motion challenging the court's jurisdiction the action has not been disposed of by final order or judgment; the action has not been set down for trial; or the registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned. 	<p>The plaintiff must satisfy at least some of the four criteria set out in <i>Reid v. Dow Corning Corp.</i> (2001), 11 C.P.C. (5th) 80 (affirmed as to the four-pronged test, (2002) 48 C.P.C. (5th) 93 (Ont. Div. Ct.)),</p> <ol style="list-style-type: none"> (1) explanation of the litigation delay; (2) inadvertence in missing the deadline; (3) the motion is brought promptly; and, (4) no prejudice to the defendant. 	<p>See: <i>Scaini v. Prochnicki</i>, 2007 ONCA 63 (CanLII), 85 OR (3d) 179 (CA)</p> <p>And also: <i>Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited</i> (C.A.) (2007) 87 O.R. (3d) 66, (C.A.), 2007 ONCA 695, allowing appeal From [2006] O.J. No. 2898; <i>Wellwood v. Ontario Provincial Police</i>, 2009 CanLII 1476 (Ont.Div.Ct.); [2009] O.J. No. 235; <i>Finlay v. Paassen</i>, 2010 ONCA 204; <i>Viola v. Tortorelli</i>, 2010 CarswellOnt 9219, 2010 ONSC 6148; reversing 2010 ONSC 711, 2010 CarswellOnt 633; <i>Machacek v. Ontario Cycling Association</i>, 2011 ONCA 410, dismissing appeal from 2010 ONSC 7065; <i>Municipality Of Greenstone v. Marshall Macklin Monaghan Limited</i>, 2013 ONSC 933; as to costs 2013 ONSC 2030</p>
Showing Cause at a Status Hearing – Rule 48.14(13)		
<p>A defendant may require a plaintiff to show cause at a status hearing, as to why its action should not be dismissed for delay:</p> <p>Rule 48.14(13)</p> <ul style="list-style-type: none"> at the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay; if the presiding judge or case management master is not satisfied that the action should proceed, the judge or case management master may dismiss the action for delay. 	<p>A plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation AND that, if the action was allowed to proceed, the defendant would suffer no non-compensable prejudice</p>	<p><i>1196158 Ontario Inc. v. 6274013 Canada Ltd.</i> 2012 ONCA 544, 112 O.R. (3d) 67 at para. 32; <i>Faris v. Eftimovski</i>, 2013 ONCA 360, dismissing appeal from 2012 ONSC 1126 and 2012 ONSC 2227; see also 1667207 <i>Ontario Inc. v. Botnick</i>, 2013 ONSC 153</p>
Restoring Action to Trial List – Rule 48.11		
<p>Available to a defendant where a plaintiff seeks to restore an action to the trial list:</p> <p>Rule 48.11</p> <p>Where an action is struck off a trial list, it shall not thereafter be placed on any trial list except,</p> <p>(a) in the case of an action struck off the list by a judge, with leave of a judge; or</p> <p>(b) in any other case, with leave of the court.</p>	<p>The plaintiff bears the burden of demonstrating that there is an acceptable explanation for the delay in the litigation AND that, if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice</p>	<p><i>Nissar v. Toronto Transit Commission</i>, 2013 ONCA 361</p>

This chart was prepared by
Debra Rolph, director of
research at LawPRO.

Making the application process easier and quicker: Streamlined TitlePLUS® underwriting for many residential properties over \$1 million

Constantly looking for ways to improve processes, we are pleased to provide an easier application process for some residential properties in Ontario over the \$1 million mark.

Our standard automated underwriting now applies to the following types of properties (for purchase, mortgage-only and OwnerEXPRESS® policies):

- New and resale condominiums, up to \$2 million;
- New homes purchased from builders, up to \$2 million;
- Vacant land intended for residential purposes, up to \$2 million; and
- Resale freehold homes with municipal water and septic/sewage systems, up to \$1.5 million.

Additional due diligence and completion of an Excess Coverage Chart are no longer required for these properties.

If you have any questions, please call the TitlePLUS Customer Service Centre at 1-800-410-1013. ■

The TitlePLUS Home Buyer Worksheet is a great tool to use with clients

Our Home Buyer/Client Worksheet continues to be a popular and useful tool when meeting with your real estate clients. It explains the benefits of title insurance and touches on various issues related to residential real estate conveyancing. The Worksheet also provides the opportunity to discuss other legal matters that may need to be addressed, such as the need to update any wills. To request copies for your office, click on "Order Materials" under the "Quick Links" section on lawpro.ca. ■



Keeping your staff in the loop

In today's web environment, our goal is to provide electronic updates about any changes to the TitlePLUS program and other real-estate related matters. Our TitlePLUS Tips e-newsletter, created specifically for the legal support community, provides useful information about the TitlePLUS program, including TitlePLUS application completion tips, as well as information on other real estate-related topics that may be of interest to your staff. It's easy to sign up – have your staff complete our Communication Sign-Up Form available at titleplus.ca (visit the Publications tab) and mail or fax it back to us. ■

TitlePLUS staff update

Congratulations to Helen Antonopoulos, senior analyst, underwriting, on her expanded role as supervisor of the TitlePLUS client and administrative services groups. We wish her success in her new role.

Now overseeing the western provinces, Chris March is actively promoting the benefits of TitlePLUS title insurance in Alberta, British Columbia, Manitoba and Saskatchewan.

With the integration of the TitlePLUS application system and RealtiWeb® in Alberta earlier this year, it's never been easier to generate TitlePLUS policies for properties in Alberta. For more information or an in office demonstration, contact Chris by email at chris.march@lawpro.ca or by phone at (780) 938-7638. ■

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



New broker for Québec

Operating as Assurance LAWPRO® in Québec, we are pleased to announce our new partnership with HUB International Québec Limitée, a leading insurance broker. Together we will work towards providing TitlePLUS title insurance to consumers and lenders in the Québec real estate market. ■

The TitlePLUS conundrum: Can you help?

“Everything we do supports lawyers” – that’s the tag line on a brochure that the TitlePLUS program released several years ago. While owned and underwritten by LAWPRO, the TitlePLUS initiative was designed by members of the Ontario real estate bar and intended to have a symbiotic relationship with the bar. By providing an excellent scope of coverage, including full legal service coverage for all the lawyer’s services for the purchaser and lender in connection with the real estate transaction (see the sidebar on page 37 for more details on TitlePLUS legal service coverage), TitlePLUS insurance was intended to help the real estate bar best protect their clients while practising to a standard of professionalism and excellence in conveyancing that could make any lawyer feel proud.

LAWPRO’s admission as the only Canadian member in the North American Bar-Related* Title Insurers (“NABRTI”) is recognition of the depth of our commitment to lawyer-centric conveyancing. To gain entry to NABRTI, we demonstrated compliance with 10 operating principles, such as:

- a commitment to working with the real estate bar in the public interest over the long term;
- delivering the title insurance product only through lawyers;
- proven financial strength and viability; and
- evidence of educational initiatives aimed at informing both the public and lawyers about the role of the lawyer and title insurance in the real estate transaction.

Living up to our NABRTI commitments, the TitlePLUS program sponsors many CPD events each year, and produces both the *TitlePLUS Today* for lawyers and the

TitlePLUS Tips for law clerks (visit titleplus.ca for current and past issues). We are also very active on social media with our @TitlePLUS Twitter account and our TitlePLUS Home Buying Guide page on Facebook. Several of our staff members are also active on LinkedIn, Twitter and Facebook.

The TitlePLUS program promotes lawyers in our marketing materials and our interactions with lender, real estate agent and consumer audiences. We talk to lenders about the benefits of keeping business local and why it makes sense to deal with local lawyers. We meet with MPPs regularly to emphasize the importance of having lawyers all throughout Ontario, and how real estate practice is often the workhorse that keeps the doors of a law firm open. MPPs well understand that their local communities will be much diminished if lawyers no longer provide the myriad of services (both professional and volunteer) that keep the business and institutional framework of Ontario functioning.

But we can’t tell (or even ask) you to order TitlePLUS insurance for your client because LAWPRO’s efforts are in your best interest! Integrity and professionalism are paramount in our world – just think of our LAWPRO Vision, Mission and Values statement. The *Rules of Professional Conduct* are quite clear in our view that you must consider what is best for your client and put that first. We don’t want to tempt you to breach that principle, or take any risk of opening you to accusations from others. That is why for example, the TitlePLUS program has never provided any sort of premium splitting with its subscriber lawyers, despite requests received. We charge what we charge and you charge what you charge: It really is that simple for the client. We also treat the active subscriber who orders one policy per year the same as the subscriber who orders 20 per month.

So, all LAWPRO can do is appeal to your fiduciary duty to consider what is best to protect your client. Use our updated Home Buyer/Client Worksheet to help you explain the benefits of TitlePLUS title insurance to your client. Consider Bob Aaron’s comments on the benefits of legal service coverage in the May 24, 2013 Toronto Star article “Some Title Insurance is Better Than Others.” See how streamlined we can make your work (and the savings we can deliver for your clients) through our new home projects and/or our New Home Direct premium pricing.

Is the TitlePLUS program experiencing a history like some vaccination programs? People want diseases to be eradicated, but

may not feel the need to vaccinate their own children if they think everyone else is doing so. Similarly, few real estate lawyers will say they are opposed to the TitlePLUS program and its goals, and indeed most are happy to see its continued existence. The rubber hits the road, however, when a law clerk would prefer another title insurance program with less legal rigour and due diligence or the lawyer may have to contemplate giving up other benefits that accrue to their practices from the use of some other title insurance.

After all, providing legal service coverage means that the TitlePLUS program has always had to address a broader spectrum of risks than traditional American-style title insurance underwriting, and in the insurance world, more coverage usually means a higher premium. So, we surmise that some lawyers are probably happy to see the TitlePLUS program exist, and continue to pursue its mission, without having direct involvement on a regular basis. Dare I suggest it is akin to a “free ride” syndrome?

Could you find one client per month (or more) that could benefit from a TitlePLUS policy? Think about what is best for the client. If so, you know what to do: call us at 1-800-410-1013, become a TitlePLUS subscriber or ask for a refresher meeting with your TitlePLUS Consultant, and start getting your clients great coverage from the only bar-related title insurer in Canada. ■

Kathleen A. Waters is president & CEO of LawPRO.

TitlePLUS® Legal Service Coverage: Why it's important for clients and their lawyers

Unlike other title insurance policies widely available in the market today, TitlePLUS policies automatically cover all the standard aspects of a real estate deal plus the legal services¹ provided by the lawyer in the transaction. The Legal Service Coverage is included in TitlePLUS policies at no extra charge.

Our coverage explicitly covers losses resulting from the lawyer's negligence regardless of whether or not the loss otherwise falls under one of the covered title and compliance risks. This means that there are no circumstances in which a purchaser or lender protected by a TitlePLUS policy should be forced to sue their lawyer to obtain compensation for a loss suffered in relation to the transaction where the lawyer was negligent at law. Most other title insurance providers do not cover *all* services provided by the lawyer – they only indirectly cover such lawyer's negligence if the result is a loss which is otherwise a covered risk.

For example, there could be a financial mistake in the detailed adjustments of property costs made between a purchaser and vendor on closing. Such mistakes don't make the purchaser's ownership invalid, but can cost the purchaser money.

Moreover, LAWPRO's claims statistics demonstrate that more than 40 per cent of real estate claims arise out of communications-related issues – such as the lawyer not acting on a client's instructions, or not ensuring the client fully understands all aspects of the transaction or the implications of certain decisions. This is where the legal services coverage of the TitlePLUS policy can save the day.

Legal Service Coverage versus Errors & Omissions Coverage

Other title insurance companies sometimes argue that legal service coverage is unnecessary because clients are protected by their lawyer's E&O insurance. This is not quite accurate. Although all lawyers in private practice in Canada are required to carry E&O insurance, this coverage protects the *lawyer* from liability for their clients' losses suffered as a result of the lawyer's negligent error or omission. It does not directly protect the client and the client does not have the right, as an insured, to make a claim directly against the lawyer's E&O policy.

If the client has a TitlePLUS policy, he or she would simply submit a claim directly to LAWPRO under his or her TitlePLUS policy. The lawyer's E&O policy need not be engaged, and in Ontario there would be no impact on the lawyer's deductible or premium in respect of the claim.²

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

¹ Excluding OwnerEXPRESS® and Québec policies.

² Outside Ontario, please review the requirements of your individual E&O insurer.

15 Tips for preventing identity theft and online fraud

Cyber criminals and identity thieves want to steal your personal information to commit fraud. They may try to get a credit card in your name or to access funds in your bank account. On top of directly losing money, your credit status can be damaged and it can take a great deal of time and expense to restore your good name.

And this goes beyond being an issue of personal concern. LAWPRO has seen situations where law firm bank accounts were hacked and where law firm bank account information was used on counterfeit cheques.

There are many different ways to steal personal information. Identity thieves will target you online and by “dumpster diving” in your garbage. You should also be familiar with the common ruses that criminals use to trick you into disclosing personal information.

Here are some simple steps you should take to protect yourself from identity theft and online fraud:

1 Protect your Social Insurance Number: It is a cornerstone of your identity and one of the best pieces of personal information an identity thief can have to create a new you. Don’t carry your SIN card in your wallet or write your SIN number on your checks. Only give out your SIN when

absolutely necessary for tax purposes, and never for identity purposes.

2 Keep your PINs private: Never write the PINs for your credit/debit cards on the cards themselves or on a slip of paper kept in your wallet. Watch for “shoulder surfers” and always use your free hand to shield the keypad when using an ATM or paying a cashier.

3 Don’t let your mail fall into the wrong hands: Thieves can get a considerable amount of personal information from your mail. Empty your mailbox promptly, or better yet, install a mail slot that goes directly into your house. Ask the post office to hold your mail or get a neighbour to collect it when you are away. Pay attention to your billing cycles and if bills or statements are late, contact the sender.

4 Keep your receipts: Receipts are essential for cross-checking your

billing statements (see the next tip.). Keep receipts for refunds and incorrect charges as well.

5 Review bills and statements: Carefully review your bills, credit card and banking statements for unauthorized charges or transactions. They are an indication that your credit card has been compromised or that someone has access to your account.

6 Store personal information in a safe place at home and at work: Never leave sensitive personal information lying around. This just makes it easier for a thief to steal your information.

7 Tear up or shred unwanted or discarded receipts, credit offers, account statements, expired cards, etc.: Destroying these documents will prevent dumpster divers from easily getting a wealth of personal information.



8 Never respond to “phishing” requests for personal information in the mail, over the phone or online: This includes cold-calls asking you to complete a survey or offering a prize. And most importantly – this is probably the most common way that personal information is stolen – never ever reply to unsolicited or suspicious emails, instant messages or web-pages asking for your personal information (e.g., usernames, passwords, SIN number, bank account numbers, PINs, credit card numbers, mother’s maiden name or birthday), even if they appear to be from a known or trusted person or business. These “spoofed” messages or websites (see the next tip) will suggest your account has been compromised and will ask you to reset your password. By replying to them you are giving your personal information directly to the thieves.

9 When logging in always check for a secure connection to the correct website: First, look at the address bar in your browser or place your mouse over the link to see if the URL looks correct. It should start with the proper URL (e.g. cibc.com) and not a URL that appears unrelated (e.g., http://124.67.876.5/aed/banklogin). You should also check to see if the web address begins with https://, as opposed to http://. Look for the “s” which signals that

your connection to the website is encrypted and more resistant to snooping or tampering. It’s always better to go directly to a site by using a bookmark or typing in the site’s address directly into the browser address bar.

10 Be careful with odd messages from people you know: If you get a message from someone you know that has odd information in it, their email account may have been compromised by a cyber-criminal who is trying to get money or information from you. These usually take the form of an urgent request for money because the person is stranded in another country and their passport or wallet has been stolen. Don’t reply to or click on links in these messages. Contact the person by phone or use an alternate email address to tell them this has happened.

11 Install anti-malware software and firewalls on your computers: Computer viruses, spyware and other types of malware are a fact of life. Just clicking a link in an email or on a website can infect you. All your computers should have anti-malware software installed on them. And to keep up with current threats, make sure your anti-malware software is configured to automatically update itself. When you are connected to the internet, the internet is

connected to you. Information can flow freely both ways across your internet connection. You also need a firewall to act as a gatekeeper to prevent unauthorized access to your computers and network.

12 Learn how to safely surf the web: Your internet browser is one of the more dangerous tools in your office. Even casual surfing on the web can expose you to malware and divulge personal data. Learn how to safely surf the web and how to configure your browser so that surfing is less dangerous. This involves disabling some browser features, controlling which cookies can be stored on your computer, and preventing pop-ups.

13 Use “strong” passwords: Don’t use a common word or name – and especially one connected with you. Any new password should be significantly different from passwords you have used previously. Make your passwords at least eight characters long – the longer the better. Use a mix of uppercase and lowercase letters, plus numerals and symbols. Use different passwords for different programs, and especially for bank accounts and other sites with sensitive information.

14 Protect the confidentiality of your passwords: Never share your passwords (even with family or friends) and be careful that no one sees you type in a password. If you absolutely have to write down passwords, write them out so they have to be translated in some way. Don’t save passwords on your hard drive unless you use a password manager (e.g., LastPass, RoboForm, 1Password). Change any compromised password immediately, even if you only suspect it has been compromised. Change important passwords every 60 to 90 days. Don’t let your operating system, browser or other programs cache your passwords.

15 Check your credit report once a year: This can help you spot if someone is using your identity without your knowledge. Check it more frequently if you suspect someone has gotten access to your personal information. ■

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

Steer clear of real estate claims by asking these five questions on every deal



The real estate lawyer's job is more than just conveying title, and not every matter will be straightforward. Communication errors and inadequate investigation are the biggest causes of real estate claims at LAWPRO, respectively 41 per cent and 26 per cent of claims reported between 2001 and 2011. Busy, high-volume practices often lead to situations where the lawyer is not taking the time to communicate with the clients properly. Lawyers need to take the time to speak to clients to ensure they've gathered all the relevant information.

Here are five questions lawyers should be asking their clients or themselves on a real estate matter.



Is there a spousal interest in the property?

Although only one person may be registered on title, there could be a spousal interest in a matrimonial home. LAWPRO has seen a number of claims where the lawyer did not get the consent of the spouse to change the

ownership status or encumber the property with a mortgage. Take the time to discuss the client's marital status to determine whether the consent of a spouse – or any other person with an unregistered interest

in the property – needs to be obtained, or whether the spouse needs to be sent for independent legal advice (depending on the nature of the transaction).



Even with title insurance, are there more inquiries I should be making?

Even if a title insurer waives certain searches or a survey requirement, lawyers still need to ask clients if they want the searches or survey done, and explain what the consequences could be of not doing so. The title insurance policy may rectify a problem to some extent or indemnify the client, but going through the process of dealing with the problem may still

not be a situation the client welcomes. Think of a boundary dispute which leads to a hostile relationship with the neighbours, a deck needing to be torn down without the possibility of replacement or grow-op damage that could be harmful to the family's health: All things that searches might have uncovered depending on the circumstances.

The lawyer should also look beyond the searches that are required by the title insurer and apply his or her own knowledge of the particulars of the transaction to determine which searches ought to be considered. For example, is it a property on a ravine that may be under the jurisdiction of a Conservation Authority?



What is the future use of the property?

Often the lawyer fails to ask clients about possible future uses of the property that the client might have in mind, and as a result fails to get a title insurance endorsement that would protect the clients (e.g., they planned

to build a pool, but later discovered an easement prevents it). In the alternative, the lawyer must personally investigate the feasibility of the plans (and presumably bill accordingly) or document with the clients

that they did not wish to undertake the expense of investigating their options at this time and therefore no assurances are being provided beyond the existing legal state of the property.



Is the person obtaining the mortgage actually the person who will be living in the house?

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

If the person(s) behind the scheme default on the mortgage, the "friend" is on the hook, pursued by the bank and facing financial ruin. The friend may sue the lawyer claiming that he was not aware of what he was getting himself into, and that the lawyer knew (or should have known) that he was buying on behalf of others and should have made him aware of the consequences of defaulting on the mortgage.

While there is only so much lawyers can do to ensure the borrower is in fact the person planning to live in the house, a good intake process can ensure that the client's answers to relevant questions are documented. After all, most real estate lawyers will also wish to know if there will be a tenant in the house instead of the owner, as residential rental investment properties bring many other legal issues of their own.



What information should I pass on to the lender?

Lawyers need to remember that lending institutions are also their clients in many real estate transactions. We've seen claims in which lawyers have failed to communicate material information to the lender client so the lender can make an informed decision on whether to advance mortgage funds.

Throughout the course of the transaction, lawyers should always consider whether

information received from any party, a title search, or other due diligence may be considered information material to the lender's decision to advance funds under the mortgage or is expressly requested in the lender's instructions. This includes, for example, information that may suggest that the property is being purchased at an inflated price. As well, information that suggests that the purchaser is misrepresenting the true

circumstances of the purchase (as in the shelter fraud described above) should be reported to the lender before the lawyer proceeds to close the transaction and advance funds under the mortgage. In such circumstances lawyers must be careful to fulfill their duties to each client, as required by the *Rules of Professional Conduct*, and in particular Rules 2.02(5) and 2.04(6.1). ■

Mental illness and lawyers: Moving from stigma to solutions

Legal professionals struggling with mental illness often do so in silence – especially in the workplace. They fear the loss of their jobs, their professional reputations or even their licences. As a result, they don't seek the help they need – often, with catastrophic results. In 2011, mental illness cost Canadian business six billion dollars in lost productivity and absenteeism. Efforts to reduce the stigma associated with lawyers and mental illness have the potential to limit these losses while protecting the careers, dignity and professional reputation of lawyers.

Mental illness affects all of us – but lawyers face particular stigma

No business is too big or too small to escape the impact of mental health challenges. According to Health Canada, about 20 per cent of the general population will suffer from a mental illness at some time in their lives. The other 80 per cent will be affected after a family member, friend or colleague is diagnosed. And yet, the recent Canadian Bar Association Ipsos study found that “[s]tigma surrounding suffering from or seeking treatment for personal issues is pervasive in the culture of the profession.” So if we're all touched by mental illness, why is there such a stigma attached to it?

The word “stigma” is defined as a mark or sign of shame, disgrace or disapproval. It also relates to being shunned or rejected by others. This is how many in the legal profession dealing with a mental health issue feel. Why? Consider the way people talk about physical and mental illnesses. Those with a serious physical illness are viewed with sympathy – as troopers courageously fighting the good fight. But those with a serious mental illness are often viewed as weak and unreliable. In the profession, these negative stereotypes can result in prejudice and discrimination.

“More than seven million Canadians will experience mental health problems this year, and the sad reality is that many of them will find the stigma they face is actually worse than the illness itself,” said Michael Pietrus, director of the Mental Health Commission of Canada's anti-stigma initiative *Opening Minds*, in a 2012 press release from the Canadian Human Rights Commission.

What constitutes a mental illness?

According to Health Canada, “Mental illnesses have a serious impact on a person's ability to function effectively over a long period of time. Depending on the illness, a person may have a serious disturbance in thinking, mood or behaviour. They may not be able to cope with aspects of everyday life and may need help in regaining balance in their lives.”

Mental illnesses can involve severe and less severe conditions including among others, schizophrenia, psychosis, dementia, bi-polar disorder, depression, eating disorders, phobias, obsessive-compulsive behaviour, post-traumatic stress, or anxiety. Mental illnesses require treatment, yet some people attempt to alleviate their symptoms through self-medication with alcohol or prescription and non-prescription drugs. This may temporarily provide relief, but it ultimately compounds the problem.

Fortunately, more and more public figures – including speed skater Clara Hughes, actress Margot Kidder, talk show host David Letterman and activist Margaret Trudeau – are speaking openly about their own struggles with mental illness. Unfortunately, many in the legal profession still suffer in silence, afraid they'll be “found out” – especially in their workplaces or by the Law Society.

The cost of mental illness

Of all the mental illnesses, depression is the most pervasive and the most costly. Approximately eight per cent of Canadians – usually in their peak earning years – will experience major depression. Worldwide, depression is the leading cause of disability. It's a misunderstood condition, often disregarded as a case of “the blues” that people can “snap out of” if they try hard enough. However, depression is not just a temporary sadness or low mood. Low moods pass. Depression does not. It's a feeling of despair and hopelessness that lasts for weeks or months or years. For those with clinical depression, it may feel that there is no light at the end of the tunnel.

A Conference Board of Canada report stated that mental illnesses cost Canada about \$20.7 billion in 2012 by reducing the number of participants in the Canadian workforce. The report looked at the costs of lost workforce participation by Canadians suffering from the most common mental-health conditions: depression, bipolar disorder, social phobia, panic disorder and agoraphobia. These conditions alone prevented almost 452,000 Canadians from working.

Mental health challenges are *medical* conditions that can be treated, often with excellent results. But to be successfully treated, people must first ask for help and the stigma associated with mental illness prevents too many from doing so.

The business case for eliminating stigma

There is a strong business case for improving mental health among lawyers. In the legal profession, it has been noted that countless Law Society complaints and civil claims

against lawyers have their roots in a lawyer's mental health or addiction challenges.

As a result, the legal profession needs to make the eradication of stigma associated with mental illness a priority, not only because it's the right thing to do for the membership, but because it is in service of reducing discipline complaints and negligence claims. It also pays off with higher productivity and increased morale, less turnover, lower absenteeism, lower prescription medication costs, and reduced short-and long-term disability claims.

A profession-wide strategy is needed to eradicate stigma

The necessary changes in the profession cannot occur by themselves. Eradicating the stigma surrounding mental illness requires a profession-wide strategy – from partners taking leadership roles in making the organizational culture more conducive to supporting mental health, to the Law Society adopting more preventative measures such as the recent initiation of a Member Assistance Program (MAP), to colleagues looking out for and respecting each other. Supervisors play a critical role in supporting employees

and reducing stigma, and studies find that most are well-informed about mental health issues. Unfortunately, many feel ill-equipped to help – 44 per cent have had no training on how to manage employees with mental health issues. Supervisors want, and need, more training to bridge this gap.

The trajectory is positive but the road to eliminating the stigma of mental health challenges in the Ontario bar is just beginning. ■

Doron Gold is staff clinician and presenter at Homewood Human Solutions.

Your Member Assistance Program (MAP)

COUNSELLING COACHING SUPPORT INFORMATION

For lawyers, judges, paralegals, law students and their families

Each of us faces challenges in life... sometimes we welcome those challenges, like marriage, job promotion, or moving to a new location. And sometimes we don't, like divorce, job loss, or a serious illness.

The Member Assistance Program can help you prepare yourself to respond to these challenges and be the best you can be.

CHOICES

MAP services are available to you 24 hours a day, 7 days a week, in a variety of convenient ways and without needing a referral. You can access services:

- Face-to-face
- Over the phone by calling our Client Services Centre
- Online by visiting the protected Member Area of our website

GET HELP WITH:

- Childcare, elder care
- Stress, anxiety, depression, substance abuse
- Burnout
- Smoking cessation
- Grief and bereavement
- Career planning
- Pre-retirement
- Shift work
- Weight and nutrition
- Workplace issues
- Financial planning
- Relationships and life transitions

MAP is a confidential service funded by and fully independent of the Law Society of Upper Canada and LawPRO

Contact us 24/7

1.855.403.8922

TTY: 1.866.433.3305

International (call collect): 514.875.0720

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THREE WAYS TO GET HELP

1. Online resources

Access our member website at any time for:

- E-counselling: simultaneous chat, or secure message-based counselling
- Online library of health and wellness articles
- Elder care and child care resource locators
- E-courses to help you improve skills (wellness, workplace effectiveness, etc.)
- Health-e multimedia centre including audio, video and podcast resources

2. Counselling

Receive counselling support in a confidential environment to address a wide range of issues, including: substance abuse, stress, anxiety, burnout, depression, life transitions, and workplace conflicts. We offer support from both credentialed counsellors and lawyer peer volunteers.

3. Plan Smart coaching

Access information and coaching to help you manage a wide range of life-balance, health, and career issues.

bookreview

The practicePRO Lending Library continues to grow with the addition of two new books: iPad for Litigators, and Google Gmail and Calendar in One Hour for Lawyers.



iPad for Litigators

Lawyers have quickly learned that their new iPads are for more than just entertainment. Many have seen how they can be utilized in their law practices to make them more productive. One such lawyer is Tom Mighell, a

consultant who helps companies deal with records management and e-discovery issues. His previous books were the very popular *iPad in One Hour for Lawyers* and *iPad Apps in One Hour for Lawyers* (both of which are also available in our lending library).

The new *iPad in One Hour for Litigators* looks at apps that would be useful as one goes through the phases of an imaginary case. The book is broken into six chapters: intake and docketing, discovery, preparing for trial, legal research, selecting a jury and presenting a case. Along the way there are apps for taking notes with clients, scanning documents and managing files, creating transcripts of discoveries, reviewing case law, presenting evidence, and much more.

Mighell distinguishes between those apps he recommends now, and those that show promise but may not work quite as well as others. In addition to apps, the book looks at accessories for the iPad to make it easier to use, like styluses and keyboards.

As Mighell says, the iPad won't make you a better lawyer, but it can make you a more productive lawyer and improve the services you offer clients.



Google Gmail and Calendar in One Hour for Lawyers

“Our primary reason for investigating Google Apps... was to start preparing our firm to keep up with this new culture of constant communication

and to help employees enhance client relationships through better sharing and collaboration.”

This quote appears in the introduction to *Google Gmail and Calendar in One Hour for Lawyers* by Carole A. Levitt and Mark E. Rosch, co-founders of an internet skills training company. The quote sums up why the use of Google Apps' cloud-based suite of tools continues to grow in popularity with lawyers. These apps include Gmail, Calendar, Drive, Docs, Sheets and Slides. This book focuses on Gmail and Calendar.

Why are firms adopting Google's email and calendar services? The ability to have access to your critical practice information from anywhere, at any time of day and on any device, from desktop to tablet to phone. Many lawyers already use Gmail as a personal account, but by paying a per-person fee to sign up for Google Apps for Business their firms can get dedicated account names (@mylawfirm.com instead of @gmail.com) along with increased storage, tech support and back-up security. The Gmail and Calendar services can also be synced to the software (Outlook, Clio, Rocket Matters, etc.) many firms already have.

The book explains how to migrate your existing contacts, emails and calendar entries to Google, and explores the features of Gmail and Calendar that go beyond sending emails and entering dates. For instance, Google Chat and Call Phone features allow real time instant messaging or phone calls with your email contacts. And additional apps and plugins can be downloaded from the Google Chrome webstore to add additional features and functions, such as an app that will search the web for information about an unknown sender, or Google Vault, which archives emails in a way that makes them easy to retrieve and search later.

Many lawyers have concerns about the security of client information stored in the 'cloud'. The final chapters of the book look at the various opinions on the ethics of cloud storage from a number of state bar associations, and a review of the security and back-up measures Google has put in place. The authors encourage firms to weigh the risks and benefits and decide for themselves.

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 (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.

socialmedia

Our social media platforms through the ages

In continuing with the 15th anniversary theme, we decided to take a look back on how far LAWPRO and practicePRO have come in participating in the social media world.

The AvoidAClaim blog has been providing lawyers with current information and tips on avoiding malpractice claims since 2009. One of the most popular features of the blog is the fraud warning posts on scams targeting lawyers. While we predominantly see Ontario lawyers sending us information about active fraud attempts, we've also received information from lawyers across Canada, the United States, and as far away as Europe, South America and Australia. Activity on the blog has increased significantly over the years. AvoidAClaim currently averages 650 page views per day and is on target for 250,000 page views in 2013. Visit AvoidAClaim.com for the latest updates and information on risk management.



We joined the Twitterverse in 2009 and @LAWPRO sends daily updates on important corporate information and reminders as well as articles from *LAWPRO Magazine* and our other publications. @LAWPRO currently has almost 1,900 followers and we've sent almost 2,000 tweets. Our Twitter activity grew in 2010 with the launch of the @practicePRO account. With over 2,100 tweets, this account is heavily focused on risk management and technology-related resources and tools.

LAWPRO launched a corporate Facebook page in 2012 and it features posts on some of our internal and external events and activities. In 2013 we launched a LAWPRO corporate page on LinkedIn. The TitlePLUS program is also active in social media via @TitlePLUSCanada on Twitter and the TitlePLUS Home Buying Guide – Canada page on Facebook.

Last, but not least, more than a dozen of our employees are active on social media in a professional capacity.

We've been listening to you and monitoring the issues that matter to you through several forms of social media over the years. Please connect, follow or like us on one or more social media channels. We hope to continue the conversation and we encourage you to let us know about items and information you would like us to share, tweet and post! ■

Victoria Caruso is communications co-ordinator at LAWPRO.

Social media profile: Dan Pinnington

Dan Pinnington
Vice president, claims
prevention and
stakeholder relations



Dan was an early adopter of social media and has been active for many years on LinkedIn, Twitter, Facebook and Google+. More recently, he has started using Flickr and YouTube.

When asked about the benefits of social media, Dan said:

“It is a great way to network with peers, colleagues and friends on topics of interest and concern. The different tools help you easily find and share relevant and practical information with large audiences of interested people.”

Target audience:

- Lawyers and others interested in claims prevention and law practice management issues
- Stakeholders and others interested in issues impacting lawyers and the legal profession
- Legal press and social media influencers

Topics of interest:

- News and information of interest to lawyers
- Risk management and legal malpractice claims prevention
- General and legal technologies, practical technology tips, social media and security
- Law practice management (client service, firm operations, technology, finances, marketing, ethics and leadership)
- The future of law and the legal profession
- Presenting and presentations
- Photography



Risk management
practicepro.ca



Additional professional
liability insurance
lawpro.ca/excess



Title insurance
titleplus.ca



Return undeliverable Canadian addresses to:
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