LawPRO magazine

FEBRUARY 2015 VOL 14.1

INSIDE
- From crisis to innovation: 20 years of professional liability insurance
- Rule 48 transition and risk management tips
- How simple mistakes can lead to large claims
- Casebook: 20 years of leading cases

20 YEARS of E&O INSURANCE

upcoming events

February 27, 2015
University of Toronto, Faculty of Law
Internationally Trained Lawyers Program
Introduction to LawPRO and prudent practice
Ray Leclair presenting
Toronto, ON

March 10, 2015
Ontario Bar Association
Your First Franchise Client Program
Potential liability of franchise counsel for failure to comply with franchise disclosure requirement
Karen Granofsky presenting
Toronto, ON

April 22-23, 2015
Law Society of Upper Canada
Real Estate Summit

LawPRO real estate claims
Kathleen Waters presenting
Toronto, ON

What do title insurers expect from their lawyers?
Ray Leclair presenting
Toronto, ON

recent events

January 21, 2015
Law Society of Upper Canada
Practice Gems: Title and Off-Title Searching 2015
Work Orders – To search or not? Is title insurance the answer?
Ray Leclair presented
Toronto, ON

January 23, 2015
Ontario Bar Association
OBA Institute: Real Estate
Reviving the lost art of requisitions
Ray Leclair presented
Toronto, ON

January 23, 2015
California State Bar Association
Trustees' Retreat
Legal technology, ABS, A2J and the future of law
Dan Pinnington presented
Remote Toronto to Sonoma

January 24, 2015
Cochrane Law Association
CPD program
Cybercrime and law firms
Ray Leclair presented
Timmins, ON

January 29, 2015
County of Carleton Law Association
CPD Program
Cybercrime and law firms
Ray Leclair presented
Ottawa, ON

February 2, 2015
Georgian College Law Clerks Program
Malpractice risk management for law clerks and legal assistants
Nora Rock presented
Barrie, ON

February 4, 2015
Ontario Bar Association
OBA Institue

Ethical issues when dealing with clients
Dan Pinnington presented
Toronto, ON

Managing disasters for the real estate lawyer or firm
Ray Leclair presented
Toronto, ON

Presentation and PowerPoint® skills
Dan Pinnington presented
Toronto, ON

February 5, 2015
Ontario Bar Association
OBA Institue
Cybersecurity: Protecting client information and decreasing your risks
Ray Leclair presented
Toronto, ON

February 6, 2015
Borden Ladner Gervais LLP
In-firm presentation
Email scams
Ray Leclair presented
Toronto, ON

February 10, 2015
Shades Mill Law Association
CPD Program
Cybercrime and law firms
Ray Leclair presented
Cambridge, ON

February 12, 2015
Hamilton Law Association
13th Annual Estates and Trusts Seminar
Wills and estates claims
Ray Leclair presented
Hamilton, ON

February 12, 2015
Building Industry and Land Development Association
BILD Breakfast Forum
Boundary disputes and title insurance
Ray Leclair presented
Toronto, ON

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 416-596-4623.

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Celebrating 20 years of E&O excellence

Departments

In practice

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LawPRO® (Lawyers' Professional Indemnity Company)

e-briefs

Don't miss out – have you seen our recent emails?

Insurance news

Mark your calendar: 2015 key dates for LawPRO filings

January 14, 2015

A message to lawyers who file individually advising of the key dates for LawPRO's 2015 insurance program.

2014 Third quarter transaction levy filings overdue

December 8, 2014

A reminder that the deadline for submission of levy filings relating to transactions completed between July 1, 2014 and September 30, 2014, was October 31, 2014.

Renew your firm's professional liability insurance for 2015 now

October 2, 16, 29, and November 6, 2014

Messages to firms to e-file the 2015 renewal insurance application on or before November 4 to save $25 per lawyer; message about impending final deadline of November 11 for filing.

Renew your professional liability insurance for 2015 starting October 1

October 1, 15, 28, and November 5, 2014

Messages reminding lawyers to e-file 2015 renewal insurance applications by November 4 to save $25; message about impending final deadline of November 11 for filing.

2015: fifth year of premium stability

September 24, 2014

Every fall, LawPRO publishes a special issue of *LawPRO Magazine* to announce the changes to the insurance program for the coming year. This issue provided links to the latest issue of *LawPRO Magazine*, along with details and deadlines for filing and renewing insurance coverage.

Renew your LawPRO exemption status for 2015: file online now

September 24, October 9, 2014

This issue notified our insureds that Convocation of the Law Society of Upper Canada had approved LawPRO's program of insurance for 2015. The deadline for renewing exemption status was November 11, 2014.

2014 second quarter transaction levy filings overdue

September 16, 2014

A reminder that the deadline for submission of levy filings relating to transactions completed between April 1, 2014 and June 30, 2014, was July 31, 2014.

Key dates

January 31, 2015

Real estate and civil litigation transaction levy filings and payment (if any) due for the quarter ended December 31, 2014.

February 5, 2015

Last date to qualify for a $50 early payment discount on the 2015 policy premium (see page 13 of the 2015 Program Guide for details).

April 30, 2015

Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending March 31, 2015.

April 30, 2015

Annual exemption forms are due from lawyers not practising civil litigation and/or real estate in 2015 and wanting to exempt themselves from quarterly filings.

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

August 14, September 10, 2014

A reminder to insureds to complete the declaration on the LawPRO Risk Management Premium Credit declaration page no later than midnight on September 15, 2014.

Webzines

Diversity and cultural competence: *LawPRO Magazine*

September 17, 2014

LawPRO Magazine celebrates the changing face of legal profession in this webzine, which provides links to the whole magazine and individual articles.

Alerts

Warning re: claims exposure where private mortgage advance goes to third party

October 7, 2014

This alert warned and provided details to insureds that they might be exposed to a claim if they released a private mortgage advance to a third party.

Cybercrime road show presentations a success!

This year we focused many of our risk management presentations on cybercrime, an emerging and serious danger that affects us all in our professional and personal lives. After seeing many high profile breaches in the news, it is safe to say people are more aware of cybercrime and want to know about the dangers and how to avoid them.

Ray Leclair, Vice President, Public Affairs, presented our "Cybercrime roadshow" over 20 times this year at CPD events and law firms. Feedback was positive and it is clear that this threat isn't going away. If you would like LawPRO to speak on cybercrime at a CPD event or at your firm, please contact us at practicepro@lawpro.ca

Charity activities continue at LawPRO

Through the course of the year many of our staff spent a day volunteering as part of our charity day program. Two groups of employees went to the Daily Bread Food Bank to help sort and seal boxes of food. They now better understand which items are needed.

New hire

Jordan Halpern joins LawPRO in the role of Claims Counsel. Jordan comes to LawPRO after seven years in private practice. He has had significant exposure to corporate commercial and real estate transactional work and is also fluent in French. Welcome Jordan!

Carla Falkeisen's memorial

A memorial ceremony for Carla Falkeisen took place on November 8th at The Salvation Army Jackson's Point camp for children. Over 15 sugar maple trees were planted in her memory at this camp where Carla was actively involved and helped many children attend. The trees, which were planted with a plaque in memory of Carla, are located around the central part of the camp. Thank you again to everyone who donated to this memorial.

Caron Wishart scholarship

The Caron Wishart Memorial Scholarship, initiated by LawPRO and supported by many members of the bar and the Government of Ontario's funds matching program, was awarded for the third time this year. The 2015 recipient is University of Toronto Faculty of Law student Evan Rankin. Evan's legal interests include commercial litigation and human rights.

LawPRO magazine

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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 malpractice claims. 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.

The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LawPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

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Our history shapes our future

At least once a month I ask myself a few questions. Has LawPRO remained true to its roots? Have we lived up to the expectations set out in the 1994 Insurance Task Force Report? Is it not true that, in many ways, we've surpassed them and are on the way to achieving goals that weren't even imagined 20 years ago?

We're celebrating 20 years of professionalism: 20 years of insurance discipline, actuarial expertise, financial rigour, commercial viability and fair treatment of our insureds.

Some days the answer is a resounding "yes," and others it can feel like a struggle, but overall I'm tremendously proud of the accomplishments of this "little company that could."

For those who were not yet licensees (or "members," as we were then called) of the Law Society of Upper Canada in the mid-1990s, the term, "insurance crisis" may have no particular meaning. Mention it to someone who was in private practice in 1994, and they may suffer a small spasm of pain: the memories can be traumatic. From 1972 to 1993, professional liability insurance was something Ontario lawyers had to have, and we knew the Law Society was involved in the insurance process. But beyond that, it wasn't often on anyone's radar screen unless (presumably) one happened to be a bencher assigned to the Insurance Committee.

This issue of *LawPRO Magazine* does more than review the past. To celebrate 20 years of operating the primary insurance program on behalf of the Law Society, we start with the future and look back to how our history shaped us.

We're celebrating 20 years of professionalism: 20 years of insurance discipline, actuarial expertise, financial rigour, commercial viability and fair treatment of our insureds. That's the "PRO" in LawPRO, and it is a constant reminder of our mandate to act with innovation, integrity, service and leadership.

As we look forward to insuring the risks of a changing bar, informing practice, and helping our insureds succeed in the practice of law, we reflect on our past top 20 cases, the evolving coverage options we developed to deal with changing needs, and the risk management education we put in place to help our insureds stay out of danger.

Insurance is about two things: money and people. You know we spend a lot of time at LawPRO worrying about the money – how much premium to collect, when and how to pay claims, how much capital we need to meet regulatory solvency requirements. But having LawPRO provide the primary insurance program would not work to your benefit without the people who take your calls, make the decisions about claims, and manage the money day in and day out. And over the years, they have been relentlessly called on to work more effectively and more efficiently. That is why LawPRO has been able to maintain a relatively steady headcount for many years, notwithstanding the growth in number of insureds and in the range of value-added services we provide (such as our world-class practicePRO risk management initiative). That is also why for 2013, for example, our general expense ratio was 19 per cent, whereas the small insurance company benchmark (for those companies that do not pay commissions to insurance brokers) was 27 per cent. That is savings in the pocket of our primary program insureds which we work incredibly hard to deliver.

Our 20 year story demonstrates the progress we've made, the risks we've conquered and yes, how we've surpassed expectations. Thanks from all past and present LawPRO board members, officers and staff for letting us share a great 20 years.

Kathleen A. Waters
President & CEO

From crisis to innovation:

20 years of LawPRO professional liability insurance

20 YEARS

Twenty years ago, an investigative task force appointed by the Law Society of Upper Canada[1] made a sobering discovery: the fund established to pay for professional indemnity claims against Ontario lawyers was underfunded by over $200 million dollars. The resulting crisis presented the bar in Ontario with one of the most serious challenges in its history. It also prompted the delegation of the primary professional liability program to the organization you have come to know as LawPRO, a highly specialized, innovative, and solvent licensed insurance company owned by the Law Society.

As of the fall of 2014, LawPRO insured about 25,000 Ontario lawyers, managed over $600 million in cash and investments, and had shareholder's equity of $200 million. Out of the insurance crisis of the 1990s has arisen a professional liability powerhouse, committed to values of professionalism, innovation, integrity, service and leadership. And its main business (90 per cent of its gross revenue) continues to be providing the Ontario private practice bar with its primary layer of professional liability insurance protection. The timeline on the next page highlights some of the major innovations LawPRO has delivered to the profession over the last 20 years.

Early approaches

Compulsory professional indemnity insurance has a 40 year history in the province. Since 1972, Ontario lawyers have been required, as a condition of licensing, to maintain coverage for malpractice claims. The *Law Society Act* empowers the Law Society of Upper Canada to "make arrangements" for professional indemnity coverage for its members and to own shares in a provider company.[2]

Early "arrangements" included the negotiation of coverage from Gestas Corporation Limited, then American Home, and then Lloyd's.[3] Adjusting services were provided by Maltman's International. In 1990, the Law Society first arranged its own E&O policy through Lawyers' Professional Indemnity Company (then known as LPIC) and began handling the administration and funding of coverage for smaller claims. LPIC was useful to enable the reinsurance of larger claims. Though separately incorporated, LPIC was not operationally separate from the Law Society. Via a "layering" structure common to many insurance programs, the Law Society (through a group deductible), LPIC, and the chosen reinsurers bore responsibility for respective "layers" of claims losses.

[1] "Report to Convocation of the Insurance Task Force and the Insurance Committee," the Law Society of Upper Canada, October 28, 1994 (amended November 15, 1994).

[2] Section 61 of the *Law Society of Upper Canada Act*, R.S.O. 1990 c. L.8 permits the Law Society to make insurance arrangements, and section 5(4) permits it to own shares in a provider company.

[3] *Supra* note 1 at page 83, para. 265

The funding crisis

In the spring of 1994, evidence began to emerge that the value of the insurance fund managed by the Law Society was at least $122 million short of estimated claims liabilities. The Law Society appointed actuary Brian Pelly of Eckler Partners Ltd. and accounting specialist David Ross of Deloitte & Touche to investigate further. They determined that the convergence of multiple factors – including a misunderstanding about capital requirements, inaccurate estimation of deductible receivables, and computer and other errors – had led, by June 30, 1994, to a deficit of $154 million.[4]

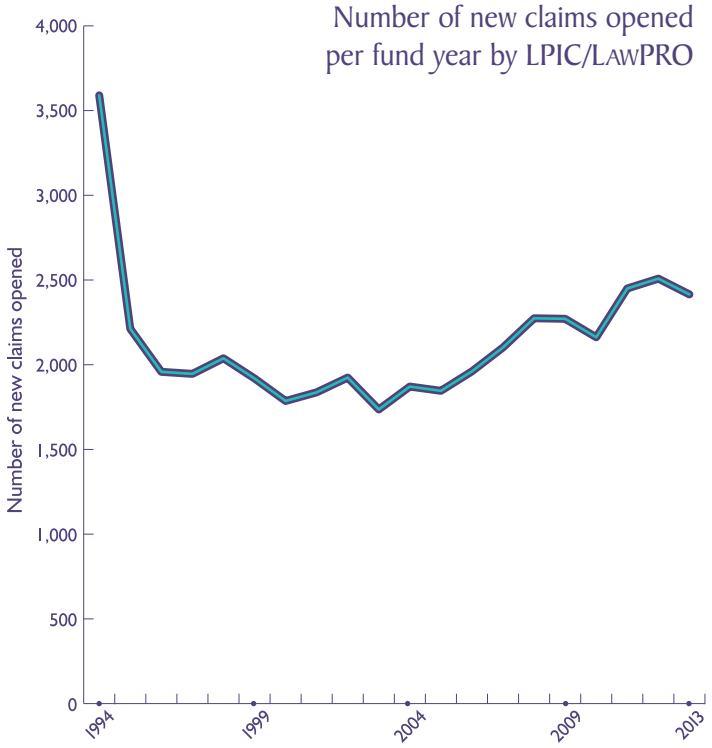
Because of the time value of money, and because the Law Society was also required by regulators to raise an additional $50 million to capitalize LPIC, the amount required to retire the deficit and place LPIC in a position to continue to offer insurance was estimated, in October 1994, at $240 million over the course of four years (1995-1998).[5]

The Task Force

This discovery sent a shockwave of panic through the bar. To come to terms with the monumental challenge before it, the Insurance Committee of the Law Society acted quickly to appoint members of an Insurance Task Force. Established by Convocation on June 27, 1994, the Task Force, chaired by Harvey Strosberg, was comprised of Thomas Bastedo, Susan Elliott, Abraham Feinstein, Neil Finkelstein, and Ross Murray. With the assistance of a team of experts including Brian Pelly and David Ross, the Task Force members spent the summer and early fall of 1994 grappling with the deficit's implications for the future of lawyers' professional indemnity coverage in Ontario.

On October 28, 1994, the Insurance Task Force and the Insurance Committee (hereafter Task Force) released a report recommending that the requirement that Ontario lawyers carry professional indemnity insurance be maintained, but that significant changes be made to the terms and administration of that coverage. In particular, the Task Force recommended that the insurance fund be operated in a commercially reasonable manner, that risk-rating be employed, and that coverage not be extended on a no-fault basis – and some lawyers could be denied coverage in certain circumstances. (See the box on page 7 for the principles underlying the Task Force's recommendations.)

Number of new claims opened per fund year by LPIC/LawPRO



The Task Force report made it clear, however, that LPIC as it was being operated in 1994 was poorly positioned to put these recommendations into action. At that time, LPIC did not collect the data necessary for risk rating[6], did not keep its own records, did not track its own denial of coverage statistics or reasons[7], had no guidelines for the expenditure of legal fees[8], and outsourced key functions (such as the development of coverage opinions) that, if managed internally, would have provided the information needed to risk-rate premiums and accurately set levies. The management structure of the company was also a barrier to success: there were "no identifiable channels for decision-making and no clear lines of authority."[9]

To overcome these barriers, the Task Force recommended that LPIC immediately put in place a dedicated CEO/President responsible for the company's operations, including underwriting; that an active and informed board of directors be appointed; and that the company hire a vice-president of claims, a vice-president of finance, and a vice-president of operations.

[4] Ibid., at page 2, para. 4
[5] Ibid., at page 21, para. 65
[6] Ibid., at page 84, para. 271
[7] Ibid., at page 85, para. 275
[8] Ibid., at page 98, para. 319
[9] Ibid., at page 84, para. 269

Risk Management Credit launched

Program expanded to include multi-disciplinary partnerships (MDPs)

2002

Addition of provisions to facilitate lawyer mobility in Canada

Addition of defence cost protection for certain statutory penalties

2003

Addition of real estate practice coverage option (REPCO)

2008

Program amended to address *locum* work

Addition of limited trust account protection for counterfeit certified cheques/bank drafts

2009

Increase in discounts for part-time, new and restricted area of practice lawyers

2012

Sublimit coverage for eligible cybercrime losses

Policy adapts to lawyer/paralegal partnership structure

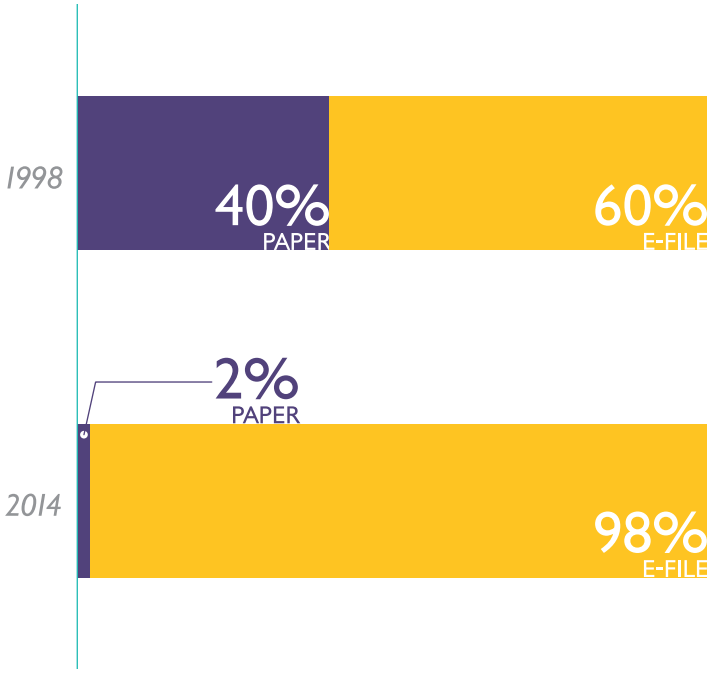
Policy amended to provide for mobility with Quebec

2014

The result: an independent insurance company

Malcolm Heins was the company's first CEO and he had a clear vision for what the company could become. He was a lawyer with a background in professional indemnity insurance and 12 years of experience as a senior insurance company executive. When asked about LPIC's toughest challenge, he references not just its finances, but communications: "we knew we needed to create a real understanding by Ontario's lawyers as to what caused their claims. We needed to encourage them to make changes in their law practices." Educating lawyers about claims prevention remains a key priority for the company today.

Michelle Strom, President and CEO at LawPRO from 2001 to 2008, joined the company in January 1995 as Chief Financial Officer, and remembers the very practical challenges of the company's first several months: "Something people tend to forget is that when LPIC separated itself from the Law Society in 1995, the new company had no separate computer systems. We started building them right away, but the company's operations had to go on while that was happening. We sent out about 16,000 insurance applications that year – on paper – and each one had to be reviewed and the data manually entered. Everyone who could review applications did. This allowed us to develop what ultimately became a very robust set of data to better manage the program, but that first year, from a data perspective, we were in the dark, building everything from scratch." (For some perspective on how times have changed, 98 per cent now e-file.)



The Insurance Task Force principles

The Insurance Task Force and the Law Society's Insurance Committee expressed the following principles as the foundation of the recommendations contained in their October 28, 1994 Report to Convocation:

a) that the [Law] Society intends to continue the E&O program;

b) that LPIC will be operated in a commercially reasonable manner;

c) that LPIC will not be operated on a "no-fault" compensation basis;

d) that LPIC must limit some coverage and eliminate other coverage;

e) that LPIC will move toward a system in which the cost of insurance generally reflects risks;

f) that LPIC's mandate will be to settle claims fairly and expeditiously;

g) that LPIC may deny coverage in appropriate circumstances or cancel coverage if deductibles, surcharges, premiums or levies are not paid; and

h) that some solicitors who have been repeatedly negligent may not be able to afford to practise because they will not be able to afford the cost of insurance.

Convocation accepted the Task Force's recommendations, and acted quickly to appoint Malcolm Heins as the CEO of LPIC. "Having those detailed guidelines and a specific mandate from the Task Force was key to moving forward," said Heins. Under his direction, changes to the company's management structure were implemented within a few months of his arrival. (For governance details, see "What does operational and board independence look like?" on page 9.) "In addition," noted Heins, "we had to persuade the reinsurance market to provide financial support, but before going out to the reinsurers, we needed to redesign and clarify the insurance coverage and be able to demonstrate to reinsurers that we had the ability to make the insurance program financially sustainable." Heins rewrote the policy and put on a road show in early 1995 for all of the reinsurers who could potentially support LPIC. The result: the reinsurers got on board and LPIC was ready for operation as an independent insurance company, governed by commercial insurance industry principles, within six months of Convocation's acceptance of the Task Force's report.

The primary insurance program is planned each year to generate only those profits required for present and future compliance with regulatory requirements and prudent solvency planning. The company's focus for the program remains consistent with the Task Force's vision of a commercially responsible insurance initiative: premiums charged in a particular policy year are intended to match, to the closest extent possible, the projected defence, indemnity and administrative costs, plus meeting regulatory capital requirements. (For details about what it means to operate the primary insurance program in a commercially reasonable manner, see the sidebar on page 10.)

A well-defined scope of coverage

As recommended by the Task Force, LawPRO takes a principled approach to defining the appropriate scope of coverage for the mandatory professional indemnity policy. For example, the LawPRO policy covers lawyer errors and omissions, but does NOT generally cover criminal acts or fraud (other than through its specifically defined and priced innocent party coverage) – compensation for losses related to these is more commonly available from the Law Society's victim compensation fund.

The primary program policy also does not cover losses that are remote from the delivery of professional legal services. Where a lawyer offers non-legal services (for example, by acting as a real estate broker or a financial advisor), there is no coverage for claims that result. Coverage of losses related to trust account overdrafts resulting from counterfeit cheques and instruments is available only in circumstances where the lawyer has taken steps required by LawPRO to verify the validity of instruments. Finally, in 2014 LawPRO introduced a sublimit of coverage for losses related to cybercrime, recognizing that prevention of these losses is more closely dependent on the appropriate use of information technology, and not on the application of legal skill.

Board committees then and now

LPIC

board committees in 1995

Audit Committee

Executive Committee

Investment Committee

LawPRO®

board committees in 2014

Audit Committee

Executive Committee

Investment Committee

Conduct Review Committee

Governance Committee

Risk Committee

What does operational and board independence look like?

Prior to the release of the Task Force report, LPIC, although separately incorporated, remained integrated with the Law Society. The company shared both elements of its management structure and operating systems (such as data management) with the Law Society. The primary insurance program was effectively being run as a department of the Law Society.

Re-designing the primary program on a commercially reasonable basis required some profound changes in structure and operations. As recommended by the Task Force, the company moved quickly in the final months of 1994 to establish an independent governance structure for LPIC. Malcolm Heins took on the role of CEO, and within a few months, the Law Society as shareholder appointed to the board a number of directors with insurance and/or financial industry backgrounds: William Holbrook would serve on the board from 1995 to 2009, and Robert McCormick until 2004. Directors Douglas Cutbush, Ian Croft, and Rita Hoff (who was appointed in 1996) remain members of LawPRO's board today.

LawPRO's governance separation from the Law Society, its sole shareholder, is evidenced by the following:

- While the current chair of LawPRO's board, Susan T. McGrath, is a Law Society bencher, the majority of the board members are neither benchers nor Law Society employees, and many of them have backgrounds in the financial services and insurance industries. None of the committee chairs are benchers of the Law Society.
- LawPRO management is completely separate from the Law Society. The board appoints the CEO, and the CEO staffs and manages the company.
- LawPRO maintains records separate from those of the Law Society and performs its own data analysis. Financial management of the company is also separate.
- LawPRO does not have the power to pay dividends to the Law Society; instead, any profit is reinvested into LawPRO itself.

Explains Strom: "Our success can be traced back to the creation of that first executive team. Everyone brought a unique perspective, everyone was working very hard, but we had a common goal. We were building the framework that would allow the company to succeed."

In the months and years that followed, LPIC – and then LawPRO – implemented safeguards and created the policies required of a regulated financial institution. The obligation to keep up with evolving regulatory compliance requirements continues to shape the way LawPRO governs itself, makes decisions, and does business. Here are a few of the characteristics of an Ontario licensed insurance company:

- There are limits on the permissible numbers of (Law Society) "affiliated" directors on the board and/or on certain board committees.
- Directors and officers are subject to rules under insurance legislation with respect to solvency requirements and market conduct (including appropriate claims handling). Failure to comply can result in prosecution, fines, and, depending on the allegation, civil liability on a personal basis. In some areas, there are self-reporting obligations.
- LawPRO is subject to the "related party" rules of the Ontario insurance regulation regime. Strict rules govern transactions with a parent organization, and apply to LawPRO's annual sale of the primary professional liability program to the Law Society. LawPRO General Counsel is charged with ensuring compliance with the related party regime. As a safeguard, the General Counsel meets four times annually with the board's Conduct Review Committee.

The benefits for lawyers:
Operational and governance separation from the Law Society ensures that the insurance company is more able to set its own priorities for the provision of a secure and appropriately priced professional liability program, without being unduly influenced by the issues, goals, and agenda of the bar's regulator. While LawPRO maintains an intimate understanding of the role of and challenges faced by the bar, separation from the Law Society's management allows it to focus more directly on the broader insurance industry issues affecting the primary program, including solvency and effective claims management.

The evolution of today's LawPRO: expertise prompts innovation

The story has a very happy ending: not only did the reorganized LPIC succeed in retiring the 1994 deficit, it did so slightly ahead of schedule. Credit for this achievement must be shared with the bar, who paid levies to the Law Society to permit it to fund the higher LPIC capital requirement, and to insured lawyers who paid higher levies in 1995-1998.[10]

Lawyers' willingness to accept responsibility for the deficit and for the creation of an independent, solvent insurance program was an important show of faith in what the company could achieve. Says Michelle Strom, "in 2002, we changed the company's name to LawPRO to reflect our emergence as a *pro*fessional and *pro*active insurance company. Re-launching and rebranding the company was our way of saying that, while the problems of LPIC had shaped the program, LawPRO represented the future and all that it has become."

We hope lawyers licensed in 2015 and beyond who aren't familiar with the insurance crisis will not take for granted the result of these efforts: an innovative, legally compliant, and financially stable primary professional liability insurance program that offers coverage carefully tailored to claims risk. (For more on risk-rating, see the sidebar on page 12.) Today's LawPRO is celebrating five years of premium stability in the primary program despite annual claims costs of approximately $100 million, once internal claims handling costs are considered.

Operating in a commercially reasonable manner

Perhaps the most fundamental of the Insurance Task Force's recommendations was that LPIC and the primary program be operated "in a commercially reasonable manner." What does this mean in practical terms?

A company that operates in a commercially reasonable manner strives to earn at least enough income to cover its expenses, taking into account contingencies and the time value of money. Because financial industry regulation requires companies to pass solvency tests like the Minimum Capital Test (MCT)[11], corporations in the industry must also acquire and maintain assets sufficient to satisfy these tests. This means LawPRO must strive to earn a modest margin of profit on the primary program, which it then reinvests in itself, as a hedge against contingencies (such as an unexpected increase in claims costs). Because LawPRO purchases reinsurance for a small portion of the risks it covers[12], the company must also demonstrate that it is financially stable enough to be offered this reinsurance at an acceptable cost.

Maintaining stability and solvency means making prudent investments, accurately forecasting expenses, controlling operating costs, and carefully managing claims. To achieve these ends, LawPRO relies on the expertise of professional investment managers and advisors. Internally, the company employs a controller, auditor and actuary. Its results are also subject to review by external auditor Deloitte, LLP and external actuary Eckler Ltd. Eckler actuary Brian Pelly conducted the review that formed the basis of the findings in the 1994 Task Force report and is still providing actuarial services to the company today.

To assess whether or not the company is achieving its goal of commercially reasonable operation, our experts compare LawPRO's general expenses, return on equity (ROE), and return on investments (ROI) to industry benchmarks. When planning the primary program each year, LawPRO's Audit Committee is intensely aware of the possible impact on the MCT. LawPRO has a track record of lower operating expenses compared to the industry average, and the company's success in achieving a modest profit as measured by ROE allows it to maintain solvency while charging a lower premium today than in 1994.

The benefits for lawyers:
Operating with a view to minimizing costs means offering a base premium for the primary program that reflects the greatest possible savings that the size of the premium pool and solvency requirements will permit.

[10] The premiums were set to pay the then-current operating and claims expenses, and the levies (volume, real estate and civil litigation) went to retire the deficit. Once the deficit was retired, the real estate and civil litigation levies were then used as a source of premium which allowed the base premiums to decrease after 1998.

[11] More information about the MCT test as it relates to LawPRO can be found in: "MCT + IFRS: More than the sum of its parts" from the January 2012 issue of *LawPRO Magazine*; and "Insurance Biz 101: Why profit is not always a bad word" from the September 2010 issue of *LawPRO Magazine*.

[12] When LPIC was first created, the company reinsured a substantial proportion of the risks it covered in the primary program. Today, because of improved capitalization and greater experience with claims management, LawPRO purchases reinsurance to protect the primary program only for a narrow category of risk: "one or more large aggregations of multiple claims arising from the same proximate cause," (large cluster claims).

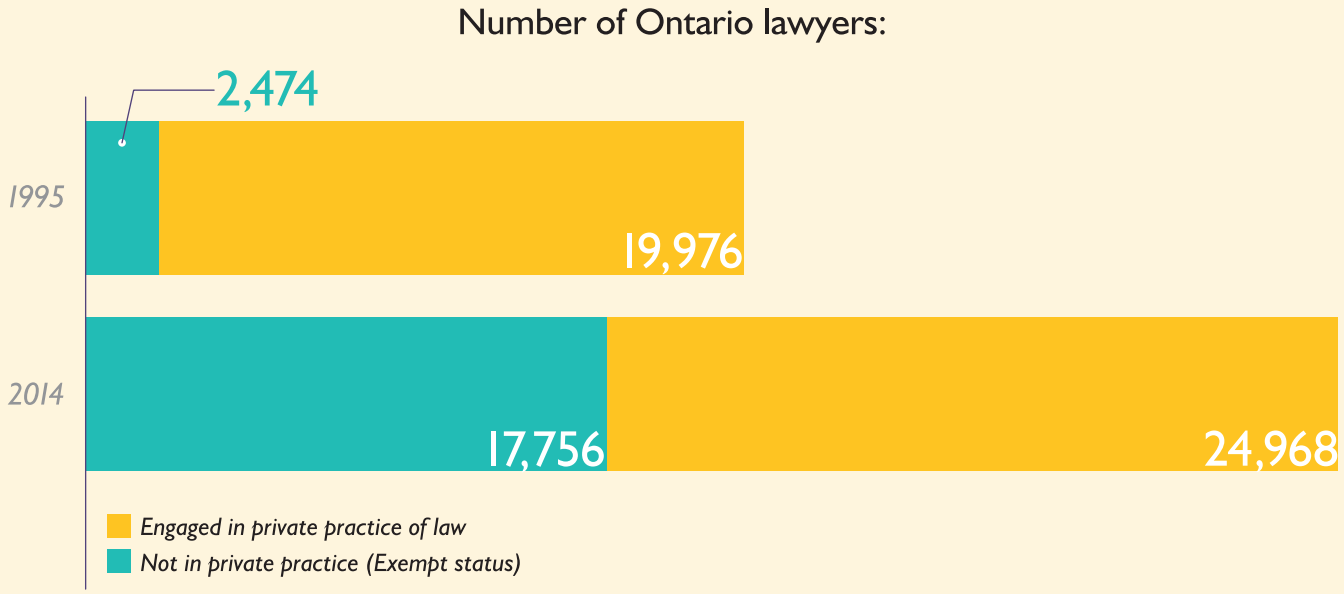
The chart below illustrates both the growth in the number of lawyers in private practice and the reduction in the proportion of lawyers who chose to go into private practice in the last 20 years. Despite these demographic shifts, LawPRO has stabilized premiums – the 2015 premium of $3,350 represents a 40 per cent decrease from the premium charged in 1995.

With each passing year, the company develops a deeper understanding of claims trends, and is well positioned to identify and cope with emerging risks including sophisticated mortgage frauds and cybercrime. (See page 13 for an overview of our claims handling successes.) "Today's LawPRO," notes Heins, "provides one of the best– if not the best – professional indemnity programs for lawyers in the world. Ontario lawyers need only observe what's happening in other jurisdictions to see that they enjoy a more favourable insurance market than their peers."

Just how innovative is LawPRO's primary professional indemnity program?

The Law Society of Upper Canada's mandatory professional indemnity program, underwritten by LawPRO, is the largest of its kind in Canada. While professional indemnity insurance for lawyers is mandatory across the country, the Ontario program is distinctive in being offered by a licensed insurance company with such a long history of operational and governance independence.

Moving from 1995 to 2014



Ontario lawyers have seen a 40% decrease in premiums in the same time period:

1995 **$5,600** – **$2,250** = 2015 **$3,350**

40%↓

In base premium from 1995-2015 (ignoring inflation)
About $2,300 in 1995 dollars

Because malpractice insurance for lawyers is not mandatory in the U.S. (except in the state of Oregon), LawPRO has been at the forefront of research into coverage models, claims trend analysis, premium setting, and many other aspects of insurance administration. For a more in-depth look into how LawPRO determines coverage and sets premiums, you may want to explore these resources:

- "A desire for deluxe services at a compact price: What is LawPRO to do?" (*LawPRO Magazine* May 2013)
- "InsuranceBiz: Why the LawPRO base premium is only part of the story" (*LawPRO Magazine* May 2013)
- "Balancing risk and fairness: How LawPRO considers new insurance program coverages" (*LawPRO Magazine* Fall 2011)
- "Insurance Biz 101: Why profit is not always a bad word" (*LawPRO Magazine* September 2010)

For insight into the LawPRO program in a global context, see:

- "Malpractice insurance in foreign jurisdictions: An update" (*LawPRO Magazine* June 2014)
- "Mandatory professional liability and a mandatory insurer: A global perspective" (*LawPRO Magazine* Fall 2011) ■

Kathleen Waters is President & CEO at LawPRO.

What is risk rating, and how does LawPRO accomplish it?

If you ever had to pay for car insurance as a teenage driver, you've seen risk rating at work. The reality, in insurance, is that the individuals who make up a pool of insureds are not all at equal risk of a claim. When it comes to car insurance, for example, insurers have long since learned from claims patterns that teenage drivers have more accidents than adults.

Professional indemnity claims follow patterns as well: claims are higher in certain areas of law, at certain stages in a lawyer's career, and under certain other circumstances (for example, the more claims a lawyer has had in the past, the more likely he or she will have claims in the future).

Fairness and commercial reasonableness demand that lawyers at greater risk of a claim (based either on their own individual history or on general claims patterns, or both) ought to bear a greater responsibility for supporting the premium pool than lawyers at low risk of a claim. In its 1994 report, the Insurance Task Force recommended that LPIC/LawPRO should employ risk-rating in the primary program, and that some practitioners who have been repeatedly negligent may not be able to afford to practise because they will not be able to afford the cost of insurance.

Every year LawPRO reports to Convocation on its risk-rating analysis, including the following factors: area of practice, geographic region, firm size, years since call to the bar, and part-time status. After 20 years of collecting data, LawPRO has a wealth of knowledge about what makes a lawyer's practice more or less risky. Today's policy employs a wide range of risk-rating customizations, including:

- Declining discounts for lawyers in their first four years of practice – because the claims rate for new lawyers is low, and increases with each year; the discounts also help new practitioners get "on their feet" financially;
- A discount for lawyers who practise law part-time;
- A discount for lawyers who practise exclusively criminal and/or immigration law – areas of low claims risk;
- Per-transaction levies for real estate transfers and commencement of litigation, (because these are areas of high claims risk); and
- Claims history surcharges for lawyers who have had a claim that required a payment as defined by endorsement.[13]

While risk rating promotes fairness and helps to protect the primary program from the impact of the highest-risk practitioners, it can never be exact. LawPRO recognizes that serving the profession means balancing affordability concerns with the goal of insuring lawyers in the broader public interest.

The benefits for lawyers:
Risk rating promotes fairness by allocating premium responsibility based on risk, and deters claims by apportioning higher costs to riskier practitioners.

[13] See Endorsement 4 of the 2015 LawPRO policy.

Efficient and fair claims handling

In its 1994 report, the Insurance Task Force expressed concerns about pre-1995 LPIC's lack of control over claims resolution costs. The company was spending thousands of dollars on coverage opinions, but had not established an "opinion bank" to avoid duplicating opinions. While the Task Force found that fees being charged by outside counsel were fair and results were good, LPIC had few procedures in place to manage litigation costs. Individual claim budgeting was not being done, and there was no procedure in place to audit the value of legal services as compared to results.

The Task Force also made it clear that if LPIC was to be responsible to the public by acting in good faith to settle claims fairly and expeditiously, then lawyers should be required to act with good faith in their dealings with LPIC; for example, by complying with policy conditions – like the requirement to report potential claims promptly and to provide full disclosure of claims circumstances. LPIC ought, the Task Force held, to be allowed to deny coverage in appropriate circumstances, because "financial realities" would not permit the company to continue to try to offer "a Rolls Royce insurance policy for the price of a Ford." In other words, LPIC was not to operate the primary program on a "no fault" compensation basis.

Today's LawPRO carefully manages claims:

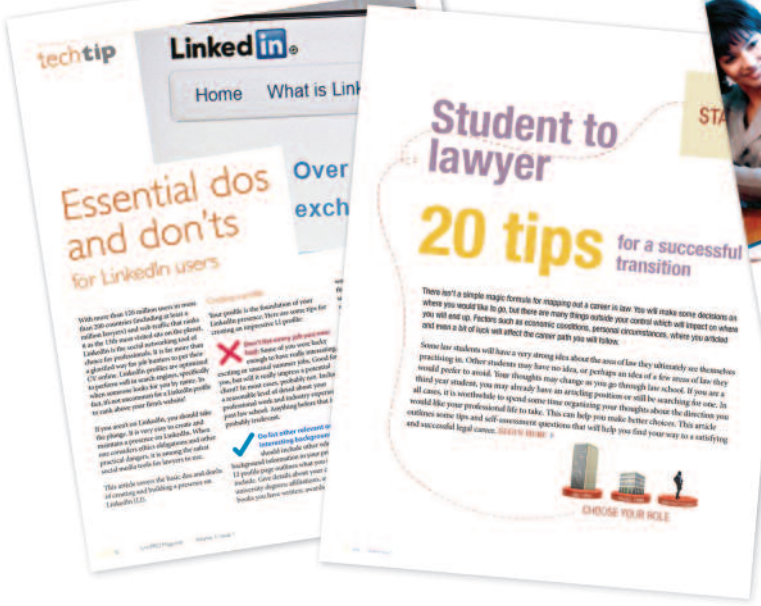
85 per cent of files closed without indemnity payment
In 2013, 44 per cent of files were closed with no payment required; 41 per cent required payment of defence costs only; and just 15 per cent required defence costs and an indemnity payment.

Highly satisfied insureds
Annual surveys of insureds who have had claims handled by LawPRO typically reveal a high degree of satisfaction. In 2013, 97 per cent of LawPRO insureds reported being satisfied with how their claims were handled, 92 per cent were satisfied with the counsel assigned, 89 per cent said they would have the same defence counsel firm represent them again, and 87 per cent said LawPRO received good value for money spent on defence.

Experienced internal counsel
LawPRO employs more than 30 internal counsel who together provide an impressive range of practice experience. Several members of the claims departments have decades of practice experience, and a few have been with LPIC/LawPRO since inception. In 2013, LawPRO internal counsel managed over 3,000 open claims files in the primary program. Not all of those claims are ultimately assigned to external counsel; in many cases, the file is closed after resolution by internal counsel, or in some cases the insured is encouraged to resolve the claim himself or herself with LawPRO's support. LawPRO counsel also handle most of the company's efforts to recover costs from third parties.

Michelle Strom notes that special mention should be made of Caron Wishart, who led the claims department until her death in 2010:

> *"Caron was the face of the claims department. She held herself and the claims counsel to the highest of standards. She was firm, but she had a way of seeing individual strengths and of getting the best out of counsel."*



Readership Survey

gives *LawPRO Magazine* high marks

At LawPRO we are committed to helping our insureds minimize their exposure to malpractice claims and fraud. One of the main ways we have done this over the years is by reaching out through various communication channels (in person, electronic and print) to educate lawyers and law office staff on where claims happen, why they happen, and most importantly, the steps they can take to lessen their risk of a claim.

We are always looking for ways we can improve our claims prevention efforts, and last February we sought feedback on the effectiveness of our communications through a readership survey. The feedback was very positive and we received some strong direction on what you like and would like to see in the future.

This article focuses on *LawPRO Magazine* feedback. We will address the feedback we received on our electronic communications efforts in our upcoming 2014 Year in Review issue.

The results

More than 450 people responded to our survey and they reflected a cross section of the profession by firm size, area of law, geography and year of call.

Two thirds or more indicated they had read or looked through recent issues of *LawPRO Magazine*, with 81.4 per cent indicating they had read or looked through our December 2013 Cybercrime and Law Firms issue. 57.9 per cent indicated they typically read or looked through one half or more of each issue.

81.4%

read or looked through

Cybercrime and Law Firms issue

We were pleased to see a large proportion of the respondents indicated that *LawPRO Magazine* is a trusted source of insurance and practice information and that it contains practical information they can use in their work. Almost a quarter of our readers report sharing their copy of *LawPRO Magazine* with others in the office – something we encourage our readers to consider doing. Roughly 90 per cent said the the length of the articles and level of expertise in the articles was about right.

Prompting action and results

Creating a magazine with content that people like to read is only the first step – we also want to have our insureds act on the content we have presented to them. The adjacent graph shows that large numbers of our readers are taking action based on the content they are reading in *LawPRO Magazine*.

When asked which actions they took as a result of reading articles in *LawPRO Magazine*, we found that 67.6 per cent of the responses indicated they "learned information to avoid a possible claim" and 3 out of 5 indicated they "gained knowledge to improve client services." Needless to say, we were really pleased with these results; especially the acknowledgement of improving client service, as this directly addresses one of our biggest areas of claims – lawyer/client communication issues.

‹ PREVIOUS NEXT ›

Readers want more on these topics:

- Practice tips
- Technology tips
- Current trends and issues
- Malpractice prevention
- New online resources

More of what our readers want

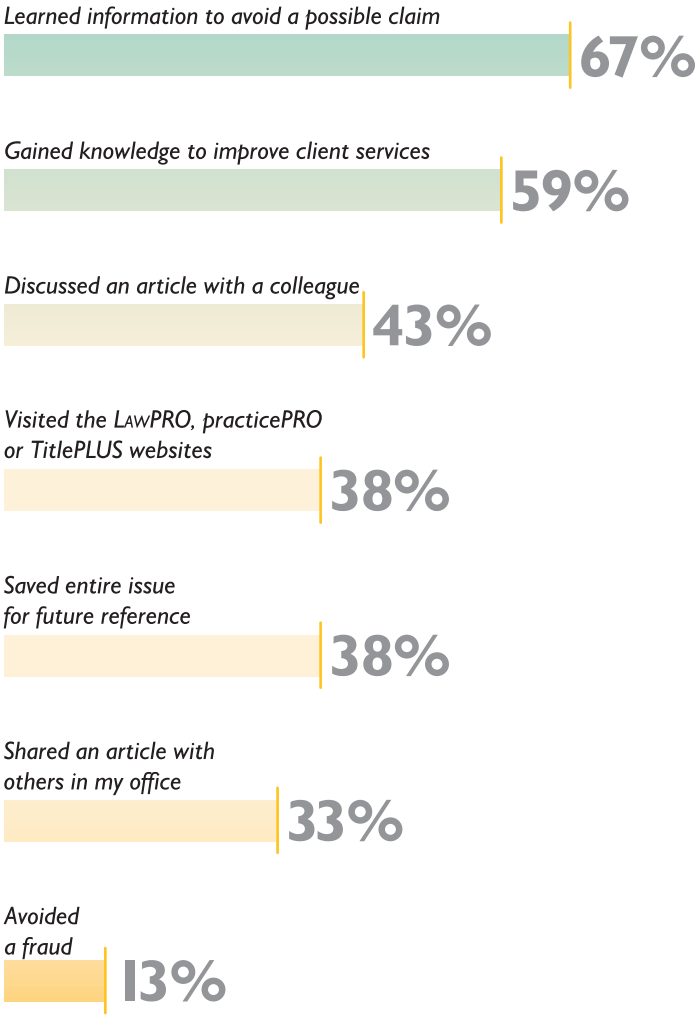
While the overall feedback was very positive, we also received some helpful direction on what our readers want more of in the pages of *LawPRO Magazine*. The top five general topics people want more of are practice tips, technology tips, commentary on current trends/issues, malpractice prevention and new online resources. The top four specific topics readers want more of are fraud prevention, legal technology, communicating with clients and time/deadline management. This was very helpful feedback for us and we will respond with more articles and resources on these topics.

Delivery mode

More than two thirds of respondents said they want to receive a hard copy of *LawPRO Magazine* and just over one-half indicated they want to receive an electronic copy (more than one response to this question was acceptable). This is consistent with past feedback on this question. We will continue to deliver *LawPRO Magazine* in both paper and digital form, although insureds can opt out of receiving a paper copy if they wish. Email communications@lawpro.ca to indicate your preference.

Thank you to everyone who completed the survey. We appreciate you taking the time to help us help you. We will be including more of the content you have asked for in future issues of *LawPRO Magazine* and in our other resources.

Lastly, please remember that all individual articles and full copies of all past issues of *LawPRO Magazine* are available on the *LawPRO Magazine* archives page (practicepro.ca/LAWPROMag) ■



Victoria Caruso is Communications Coordinator at LawPRO.

20 YEARS OF LAWPRO'S LEADING CASES

While Ontario lawyers will appreciate that LAWPRO defends them on legal malpractice claims, they may not appreciate the breadth of legal issues that come up in those claims. This article highlights leading or significant cases that LAWPRO litigated over the past 20 years, some of which dealt with legal issues and principles that are relevant far beyond the professional liability issues that arose in the individual claim.

Unfortunately, we may not have achieved the desired outcome in every file, but on balance, we have done our best to "ring fence" the standard of care for lawyers and develop useful legal "tools" for resolving solicitor negligence claims.

For instance, LAWPRO went to the Supreme Court of Canada in *Friedmann Equity Developments Inc. v. Final Note Ltd.*[1] to help uphold the ancient "sealed contract" rule – that is, where a contract is executed under seal, an undisclosed principal (investor) can neither sue nor be sued upon it. Had that rule been overturned, many investors in corporations which had executed debt instruments under seal might have become personally liable for the corporations' debts, and would have blamed their solicitors for failing to protect them from that risk.

The Supreme Court of Canada's judgment in *Beals v. Saldanha*[2] arose from a solicitor's mistaken advice that his clients need not defend an action in Florida. The Court held that foreign judgments will be enforceable in Canada provided the foreign court had a "substantial connection" with the subject matter of the lawsuit unless the judgment was obtained by fraud, or there was a failure of natural justice, or enforcing the judgment would be contrary to domestic policy.

Wong v. 407527 Ontario Ltd. et al[3] is invaluable in stymying attempts by unhappy clients to shift the consequences of their own bad bargains to their solicitors. The plaintiffs alleged that the solicitor should have attempted to negotiate for additional security from the vendor, even though the agreement was fully executed before he was retained. The Court of Appeal said that attempting to renegotiate an executed contract was a "counsel of perfection." The vendor would have refused to give additional security in any event.

In Hall v. Frederick[4] the Court of Appeal held that the solicitor was correct in declining to prepare a will. Simply because the testator was able to give several instructions concerning his assets during lucid moments as he drifted in and out of consciousness, it did not follow that he had testamentary capacity.

Litigation counsel no longer enjoy the benefit of the "egregious error" standard of care. Rather, as the Court of Appeal held in *Folland v. Reardon*[5] they must adhere to the standard of a reasonably competent lawyer. As long as that standard is met, counsel's duty to the client is discharged, even if the outcome of the litigation is disastrous.

The Court of Appeal found in *Harris v. Levine*[6] that the plaintiff's suit against his former criminal defence counsel was an abuse of process because in order to succeed, the plaintiff would have had to prove that but for the solicitor's negligence, he would not have been convicted. This would inevitably result in re-litigation of the criminal charges, and would potentially impeach the integrity of the adjudicative process.

In *Kingsland v. Merritt*,[7] the plaintiffs invested money with Lopez, the defendant solicitor's client. Lopez had the plaintiffs prepare a bank draft, payable to the solicitor in trust. The solicitor received the money, and disbursed it as Lopez instructed. Lopez never repaid it. Belobaba J. found that the solicitor owed the plaintiffs no duty of care. The plaintiffs were not the solicitor's clients, had no contact whatsoever with him, and gave him no instructions about the disposition of the money.

1 [2000] 1 SCR 842, 2000 SCC 34
2 [2003] 3 SCR 416, 2003 SCC 72
3 (1999), 26 R.P.R. (3d) 262 (Ont.C.A.) revg (1996),1 R.P.R. (3d) 245 (Ont.Ct.Gen.Div.)
4 (2003), 64 O.R. (3d) 191 (C.A.), revg [2001] O.J. No. 5092
5 (2005), 74 O.R. (3d) 688 (C.A.), revg [2004] O.J. No. 434
6 2014 ONSC 1300, aff'd 2014 ONCA 608
7 2013 ONCA 628

The Court of Appeal held in *Galganov v. Russell (Township)*[8] that Rule 57.07 is not intended to allow the frustration of the opposing party's counsel to be taken out against counsel personally. Special caution is warranted in awarding costs under Rule 57.07 where the client declines to waive solicitor client privilege.

The Court of Appeal squelched an attempt to hold plaintiffs' counsel liable for a defendant's costs on the basis of breach of warranty of authority. In *Attis v. Attorney General*,[9] Cullity, J. held that where class plaintiffs' counsel supposedly failed to explain their potential costs exposure to them, the solicitor acted without authority in commencing the action. The Court of Appeal disagreed. If the plaintiffs' solicitor failed to properly advise them about their costs exposure, their remedy was a negligence action.

In *Gentra Canada Investments v. Lipson*,[10] the Ontario Court of Appeal held that in the appropriate circumstances, a cause of action against a solicitor for negligence may be assigned from the client to a third party.

A defamation action against a law firm was dismissed by the Divisional Court in *1522491 Ontario v. Stewart Esten*.[11] The alleged defamatory communications were contained in a letter to a town planner, which had a draft statement of claim attached to it. The statement of claim was issued the following day. The communications were made on an occasion of absolute privilege. The alleged impropriety of the solicitor's motives was irrelevant.

Motions to set aside administrative dismissal by registrars have been staple items on Courts' motions lists in recent years. The Court of Appeal's judgment, *Aguas v. Rivard Estate*[12] reiterated the four-part test set out in *Reid v. Dow Corning Corp.*[13] and *Scaini v. Prochnicki*[14] for setting aside a Registrar's administrative dismissal of an action for delay under the former Rule 48.14. The Court of Appeal set aside the dismissal where the plaintiff continued to move the action along, participated in examinations for discovery before and after the action was dismissed, and actions taken by the defendants' counsel did not support actual prejudice or reliance on finality.

The test for resisting motions to dismiss actions for delay at a "show cause" status hearing and for restoring actions to the trial list is tougher than the test for setting aside registrars' administrative dismissals.

In *Faris v. Eflimovski*,[15] the Court of Appeal affirmed its earlier judgment in *1196158 Ontario Inc. v. 6274013 Canada Limited*[16] where it held that the plaintiff bears a stringent burden at a status hearing pursuant to the former Rule 48.14(13). Even where the plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if allowing the action to continue would prejudice the defendant. Conversely, where the plaintiff is unable to provide a satisfactory explanation for the delay, it is open to the court to dismiss the action, even absent proof of actual prejudice to the defendant. The test is conjunctive, not disjunctive.

The test for restoring an action to the trial list is the same as for "showing cause" at a status hearing. The Court of Appeal refused to restore an action where there was no acceptable explanation for the seven-year delay in moving to restore the action to the trial list, and the defendant was prejudiced by the delay: *Nissar v. Toronto Transit Commission*.[17]

Rectification must sometimes be sought to cure solicitors' errors. The Court of Appeal affirmed that a conveyance may be set aside, and the parcel registered rectified, where a transfer was made in error and the transferee was not a bona fide purchaser for value: *719083 Ontario Limited v. 2174112 Ontario Ltd.*[18]

An Ontario court ordered the rectification of the testatrix's secondary will to eliminate duplicate bequests and to insert a residue clause. The solicitor's error created a document that did not reflect her wishes: *McLaughlin v. McLaughlin*.[19]

Claims involving limitations issues are well represented in LawPRO's portfolio. In *Landrie v. Congregation of the Most Holy Redeemer*[20] it was held that where a plaintiff was heavily sedated following a severe ankle fracture, the plaintiff's incapacity extended the limitation period.

Matheson, J. used "special circumstances" to allow FLA claimants to add the true owner of the at fault motor vehicle, more than two years after the death of the accident victim. Plaintiffs injured in the accident were given the same relief, based on discoverability. The Court of Appeal affirmed this order: *Patterson v. Ontario (Transportation)*.[21]

The ten-year limitation period found in s. 4 of the *Real Property Limitations Act* governs a claim for a remedial constructive trust over real property: *McConnell v. Huxtable*.[22]

In *Schmitz v. Lombard*,[23] the Court of Appeal found that the limitation period for the plaintiff's claim on his underinsured motorist coverage was governed by the *Limitations Act, 2002*, not the 12 month limitation period set out in para 17 of the OPCF 44R change form. The two year limitation period runs from the day after the insured requested payment from the OPCF 44R insurer.

Changes in the law and legal professional liability issues keep our work defending Ontario lawyers interesting and challenging. The cases highlighted above illustrate the diversity of cases litigated by LawPRO in the interests of the profession. ■

Debra Rolph is Director of Research at LawPRO.

8 2012 ONCA 410, revg 2011 ONSC 3065 and 2011 ONSC 5609

9 2011 ONCA 675

10 2011 ONCA 331

11 (2010), 100 O.R. (3d) 596; revg 2008 CanLII 63198 (ON.SC.)

12 (2011), 107 O.R. (3d) 142, revg 2010 Carswell 10849

13 [2002] O.J. No. 3414, (Div. Ct.), revg [2001] O.J. No. 2365,

14 2007 ONCA 63

15 2013 ONCA 360

16 (2012), 112 O.R. (3d) 67

17 2013 ONCA 361

18 2013 ONCA 11, (2013) 28 R.P.R. (5th) 1 (C.A.)

19 2014 ONSC 3162

20 (2014), 120 O.R. (3d) 768 (SCJ)

21 2014 ONCA 487, affg 2013 ONSC 6666 (SCJ)

22 (2014), 118 O.R. (3d) 627 (C.A.), affg (2013), 113 O.R. (3d) 727

23 (2014), 118 O.R. (3d) 694 (C.A.), 2014 ONCA 88, affg 2013 ONSC 4298 and 2013 ONSC 7140; leave to appeal to SCC refused 2014 CanLII 46943 (SCC)

20 WAYS TO IMPROVE THE FINANCES OF YOUR PRACTICE

The demands of individual files can make it a challenge to give your practice's finances the time and attention they need. Here are 20 ways you can make or save more money in your day-to-day work. Most are relatively simple and can be implemented at little or no cost. Some are new habits you develop when dealing with clients and billing, and some are new technologies you can incorporate into your practice. While not every item on the list will apply to every practice, we expect you will find at least a few ideas that will help improve your bottom line.

1 To save time and properly manage your trust account(s) you should use accounting software specifically designed for a law office (e.g., PCLaw®, ESILAW or Amicus® Accounting). Keeping trust records in generic accounting software will take you longer and make your records more prone to mistakes.

2 For more accurate and complete time dockets, use an electronic docketing program or app and enter your own time. Paper timesheets are error-prone and inefficient because they require double entry.

3 Enter your time dockets contemporaneously as you complete tasks throughout the day. Trying to create time entries for work done earlier in the day or in the more distant past will take more time and will likely not be very accurate or complete.

4 You are likely underestimating the time you spend on some tasks. Use the electronic stopwatch feature found in most billing programs to more accurately track the time you spend on individual tasks. Task-tracking apps or software (e.g., Chrometa) will monitor and capture the tasks you undertake on a smartphone or laptop and give you a summary of them that you can use to create time dockets.

5 At the end of each day spend a few minutes reviewing your dockets and make any necessary corrections or additions while things are still fresh in your mind. Update your to do list at the same time.

6 Many accounting and practice management software products can give you detailed reports that break down your time and billings by file, client, matter type, practice area, etc. Review these reports to better understand where your time is going and how profitable different areas of your practice are.

7 On the practicePRO website you can find a sample law firm budget spreadsheet. Use it to better understand and manage your firm's expenses.

8 Don't do accidental *pro bono* work. Make sure you get an adequate retainer agreement up front, replenish it when needed, and stop work if you aren't being paid (subject to meeting the requirements of the *Rules of Professional Conduct*). Some lawyers highlight in retainers or engagement letters the fact they will end the representation if fees are not being paid.

9 Keep the client informed of the ongoing costs of the work you are doing for them with regular billings. Consider billing monthly, and always send reporting letters and accounts when milestones are reached to report how the matter is progressing.

10 Stick to your fees. You deserve to be paid for the hard work you do. It is better to not do work and not get paid than to do work and not get paid. To encourage fewer write-downs and improve docketing habits, implement a process that a committee must review all WIP write-downs over $500.

11 To encourage faster payment on your accounts, give clients an automatic discount if they pay their bill within a certain short period of time after they receive it.

12 Most lawyers will have at least one client who is extremely demanding, and on some occasions, very difficult to deal with, for both you and your staff. This client will never be entirely happy with the work you do, and will often bicker about paying their fees. Often the extra time required to deal with them will be unbillable, and it will take away from the time you need to deal with other clients. Consider ending your relationship with this client (while complying with the *Rules of Professional Conduct*). You aren't collecting fees for all the time it takes to deal with them, and that time could be better spent serving other clients who will be more appreciative of your work.

13 Take advantage of one of the benefits of being a member of your local law association: legal research can be done for free by library staff.

14 Consider hiring freelance or virtual law clerks or assistants for short-term matters when you need help. By paying on an hourly or project basis you can get the help you need and avoid the long term cost and commitment of a permanent hire (but remember to consider conflicts, confidentiality and supervision issues).

15 Avoid long distance charges for yourself and your clients by making long distance calls using programs such as Skype™ or Google Voice™ from your tablet, desktop or smartphone.

16 While face-to-face meetings are appropriate for some things, you can reduce the time and expense of travel by having virtual meetings using tools such as WebEx®, GoToMeeting™ or FaceTime®. In addition to seeing and/or talking to other attendees on your tablet or desktop, these tools also let you share and even edit documents that all attendees can see on their own devices.

17 When booking flights, hotels, or car rentals, use meta-search websites like KAYAK™ or TripAdvisor™. They simultaneously search across multiple sites and can help you find less expensive options. Avoid problems and bad places to stay by looking at the reviews and comments these sites have from other travellers.

18 Consider implementing practice management software and/or taking your office paperless. Doing either or both of these things will require some work, an investment in technology and some changes to your internal processes. However, the cost of the technology for doing these things has never been cheaper (especially if you go with a cloud-based practice management solution) and the cost savings will be significant due to reduced technology expenditures and increased efficiencies. You will be able to work remotely and will likely have a far more robust and reliable backup of your firm data.

19 Considering making bigger changes as part of your long term goals? On the practicePRO website there is an outline of a business plan for a law firm. It includes a general description of the firm, a financial plan, a management plan, and a marketing plan. A business plan is your roadmap to the future – you can show it to banks, suppliers or others you may deal with when expanding or changing your firm.

20 Consider borrowing one of the many books on financial topics from the practicePRO Lending Library. These books are available for free loan to Ontario lawyers (see details online). Popular titles include *How to Draft Bills Clients Rush to Pay*, *Collecting Your Fee: Getting Paid from Intake to Invoice*, and *Winning Alternatives to the Billable Hour*. ■

Dan Pinnington is Vice President, Claims Prevention and Stakeholder Relations and Tim Lemieux is Claims Prevention and Stakeholder Relations Coordinator at LawPRO.

Demystifying condominium purchases with better communication

Condominium ownership has a unique set of rules and responsibilities. Helping your clients understand what they are getting into can reduce your risk of a malpractice claim. Start off on the right foot at the beginning of your relationship by sending a detailed retainer letter setting out what you will or will not be doing and what the client is responsible for.

Beyond being your professional responsibility, reviewing condominium documents with your client and explaining the nuances of condominium ownership will help ensure your clients understand everything they should about their condo purchases. Some of the issues you can highlight for your clients for resale condominium purchases appear below.

Status certificate

The status certificate is one of the most important documents in a condominium transaction. Most offers are conditional upon review of a status certificate and it is critical to review it with your clients to their satisfaction. If the status certificate is unsatisfactory and the offer is conditional on its review – point out the option of terminating the deal. If it is not current (e.g., more than 30 days old), it may be missing up-to-date information and should be updated before closing. Insurance documents for the condominium, copies of the declaration, rules and by-laws, the budget for the current year and other documents respecting the condominium should be delivered with the status certificate.

Some key status certificate issues include:

- whether the dwelling unit, parking and/or locker(s) match the agreement of purchase and sale;
- arrears or contemplated increases in common expenses;
- existing or contemplated special assessments against the unit;
- litigation involving the condominium corporation;
- insurance maintained by the condominium corporation;
- amount in the reserve fund;
- the reserve fund study and its possible impact on the reserve fund; and
- auditors' comments on the financial statements.

Condominium declaration, rules and by-laws

These documents make up the condominium constitution and often cause the most confusion.

Before closing, it is good practice to review the condominium plans with your client to confirm the location and elevation of the unit meet the client's expectations. Review the location of the parking and locker spaces to ensure the numbers posted in the parking garage correspond with the condominium plan and/or agreement of purchase and sale. Determine whether the parking/lockers are units or exclusive use common elements. Discuss the boundaries between the unit and common elements and advise clients of their maintenance and repair obligations pertaining to each. Also draw their attention to the costs that are included in common expenses versus those they must pay directly (e.g., utilities, cable, etc.).

An opportunity to provide value added services

- Highlight lifestyle or use restrictions (e.g., pets, use of the unit for business, or the ability to sell/lease parking/lockers separately from residential unit);
- Recommend that your clients obtain insurance for personal effects and liability as well as for upgrades and improvements to the unit;
- As owners, your clients have a say in decisions of the condominium corporation through voting. To be able to vote, they must be on record and the property manager for the condominium corporation needs to be notified of the change of ownership;
- Any changes to the common elements, including exclusive use common elements such as balconies or yards, require approval from the board of directors. If the unit being purchased has been upgraded, enquire whether the changes were approved;
- Elevator bookings and move-ins need to be arranged in advance; and
- Recommend title insurance with a condominium endorsement, and ensure that the policy includes the correct legal descriptions for the dwelling unit, parking and lockers.

Send a reporting letter after the transaction has been completed and set out any specific discussions you had with your client. On top of giving your clients a summary of the work you did for them, a reporting letter can be your best defence in the event of a claim.

Attending to these details may seem obvious but it is easy to let one or two slip through the cracks. A checklist can be a valuable risk management tool to enable effective communications with clients, and to create a record of those communications. The Working Group on Lawyers and Real Estate has developed various draft documents, including a Master Chart to help document client discussions about resale condominium purchase transactions. Visit lawyersworkinggroup.com to see the documents and provide input. ■

Mahwash Khan is Communications Specialist at LawPRO.

Announcing
New Condo Select:

good news for you and your clients

Is your client buying a new residential condo? We have good news!

We are introducing New Condo Select (NCS), as an addition to our New Home Program (NHP). Selected new condo developments will be available under NCS and will qualify for a streamlined title insurance application process.

How it works:

It's simple.

- Access all NCS and NHP developments in one convenient spot
- Underwriting information is prepopulated in the application

It's less work.

- Searching is streamlined
- Follow the prompts on the website to complete the application
- More developments are now available

It saves money.

- Your clients will benefit from savings on disbursement costs
- TitlePLUS premium for new homes purchased from builders applies
- There is automatic coverage for the buyer and lender under the same policy at no additional cost
- A TitlePLUS policy[1] covers the title-related aspects of the deal plus Legal Service Coverage[2] for the lawyer closing the transaction

For more information contact the TitlePLUS Customer Service Centre via email at titleplus@lawpro.ca or call 1-800-410-1013.

[1] Underwritten by Lawyers' Profession Indemnity Company.
[2] Except for OwnerEXPRESS policies and Quebec policies.

TitlePLUS application process streamlined with TD Canada Trust mortgages

We're pleased to announce TD Canada Trust has selected LDD WebDocument Retrieval™ as its newest solution for electronic mortgage processing.

Trusted by more than 6,500 lawyers and their staff across Canada, LDD simplifies the entire mortgage application process, providing streamlined interaction between you and TD Canada Trust.

This portal for TD Canada Trust mortgages will be rolled out across the country in the spring of 2015.

Enjoy even more benefits with RealtiWeb® and TitlePLUS® title insurance:

- Mortgage instructions will appear in your RealtiWeb inbox, allowing you to easily integrate the data for your entire conveyancing file
- Streamline your title insurance process with built-in integration to TitlePLUS title insurance

If you have any questions, please contact LawyerDoneDeal® at sales@ldd.com or 1-800-363-2253.

E&O claims exposure when mortgage advance goes to fraudulent third party

On October 7, after becoming aware of a new exception to coverage in certain title insurance policies, LawPRO sent an email alert warning real estate practitioners about potential exposure to claims from their private lender clients where a mortgage advance goes to a third party. We have already seen seven E&O claims against lawyers involving residential lender policies from three different title insurers active in Ontario. Given the value of the mortgages involved, these claims carry an exposure of almost $2 million. See the AvoidAClaim blog post "Warning re: Claims exposure where private mortgage advance goes to third party" for more details (including the actual exception clauses).

These exceptions highlight a key obligation placed on all real estate lawyers: as your client's trusted legal advisor, you need to understand and clearly communicate what is and is not covered under the title insurance policy you recommend. Each transaction is unique and requires an analysis to recommend the title insurance that ensures your client has adequate protection. Title insurance policies are not all the same. Knowing the differences of each title insurance policy (including the exclusions and exceptions) can help protect you and your clients.

TitlePLUS title insurance policies **do not** contain this type of exception, as a matter of course. To help you avoid becoming a victim of fraud, the TitlePLUS application has built-in fraud prevention measures to ensure you ask the right questions of your client.

LawPRO encourages all lawyers to make title insurance recommendations after a consideration of the specific circumstances of the transaction and a review of the provisions of the title insurance policy.

If you have any questions about the TitlePLUS policy and underwriting requirements, contact the TitlePLUS Customer Service Centre via email at titleplus@lawpro.ca or call 1-800-410-1013. ■

Would you get caught in a trust vs. gift dispute when handling purchase funds?

It can be uncomfortable to talk about money. When handling real estate purchases and domestic contracts, however, lawyers can't afford to accept purchase funds on a "no questions asked" basis.

Why not? Because if purchase funds come from somebody other than the prospective owner, the doctrine of resulting trust presumes that, regardless of who is on title, the owner holds the property in trust for whoever advanced the funds.

Purchase money resulting trust alive and well: *Nishi*

The doctrine of purchase money resulting trust was reaffirmed by the Supreme Court of Canada in its June 2013 decision in *Nishi v. Rascal Trucking Ltd.*([2013] 2 SCR 438, 2013 SCC 33 (CanLII)). The case facts are complicated. In a nutshell, when Nishi purchased a property on which Rascal had previously run a topsoil business, Rascal transferred $110,000 to Nishi. The property was subject at the time to tax arrears of $110,000, which included the cost of the municipality's cleanup of the topsoil operation after it was ordered to cease operation. A few years later, Rascal sued Nishi for a part share of the property, relying on an alleged purchase money resulting trust.

The trial judge ruled against Rascal, who later won on appeal. At the Supreme Court, Nishi urged the court to abandon the doctrine of resulting trust and to decide the case based on unjust enrichment which, Nishi argued, had not occurred. Instead, the court reaffirmed the doctrine of resulting trust, finding that where a party provides funds for another party's purchase of real estate, there is a presumption that the purchaser holds the property in trust for the funder (to the extent of his/her contribution). On the facts, however, there was sufficient evidence that the Rascal funds were intended as reimbursement of the remediation costs, and therefore, while not a "gift," the transfer was made without expectation of obtaining an interest in the property – which was enough to rebut the presumption of a trust in favour of Rascal.

What are the implications for real estate lawyers? The decision in *Nishi* means that when a party other than the title holder is contributing funds, intentions matter a great deal; and that a lawyer who fails to document those intentions is at risk of a claim.

The nuts and bolts

There is a significant body of law with respect to resulting trusts, not only in the context of real estate, but also in other commercial contexts and in family and estates law. Here are some of the particulars.

Does the parties' relationship matter?

Not very much.

The presumption of trust creation arises regardless of the relationship between the parties, except in the case of a parent who advances money to a minor child. Where a parent contributes to a property purchased by an adult child – even where the child is

economically needy – the law presumes a trust unless there is evidence of an intention to make a gift (see *Pecore v. Pecore* [2007] 1 SCR 795, 2007 SCC 17 (CanLII)).

The same goes for transfers between spouses, although in that scenario, there are wrinkles: where spouses take title as joint tenants (or put money into a joint bank account), s. 14 of the Ontario *Family Law Act* (FLA) provides that shared ownership is intended. And where a party contributes to what becomes a matrimonial home, the property division rules of the FLA will apply – but only to married spouses. Real estate lawyers should be aware, however, that not all homes purchased by couples are matrimonial homes; and, of course, that not all couples are married.

Other complications in the family law context arise from the application of alternative analyses, like the concept of "joint family venture" and "unjust enrichment" (see for example the decision in *Kerr v. Baranow* ([2011] 1 SCR 269, 2011 SCC 10 (CanLII)). Indeed, in some cases, courts have relied on unjust enrichment evidence to insert flexibility into resulting trust remedies (see for example *Lazier v. Mackey* 2012 ONSC 3812 (CanLII)).

Whose intentions prevail?

In a much older line of cases under family law that includes the decision in *Murdoch v. Murdoch* (1973 CanLII 193 (SCC), [1975] 1 S.C.R. 423), courts talked about the influence of evidence of the parties' "common intention" on the determination of ownership of an asset. However, in deciding *Nishi*, the Supreme Court made it clear that the intention that is determinative is that of the person providing the funds. This guidance likely simplifies the resolution of these cases, because presumably, it's the very denial of (or disagreement about) a common intention that lands parties in litigation. Instead of requiring each party to provide evidence about both his/her own intention and the other party's agreement, it is simpler to require the funder to provide evidence in support of the presumption, and the owner to provide rebuttal (gift) evidence.

Although the *Nishi* decision suggests that it's the funder's intention that "matters," the more challenging evidentiary burden is on the legal owner – so when handling this kind of purchase transaction, a lawyer needs to document his/her client's intention regardless of whether the client is the funder or the prospective title holder.

Lawyers need to be nosy about recipients, too!

Asking questions about *recipients* of funds is also important. For one thing, it helps protect against fraud. But did you know that releasing mortgage funds to a third party (someone other than the title holder or other specified types of payees) can trigger a denial of coverage for the lender under some insurers' title insurance policies? For more on this see the "E&O claims exposure when mortgage advance goes to fraudulent third party" article at page 21 of this magazine.

How to manage the risks

How can lawyers reduce the risk of a claim related to a trust vs. gift dispute? Here are some simple tips:

- Always ask where/who purchase money is coming from (and whether it's from an account held jointly with anyone else) when handling a purchase of real estate.
- If purchase money is coming from a third party – e.g. purchaser's parent – avoid future complications by encouraging the parties to put their intentions in writing. If your client is the prospective owner and asserts that the money is a gift, request a written acknowledgement stating this from the funder. If the money is a loan but the parties do not intend the funding party to gain an interest in land thereby – put this in writing.
- If your client is a person advancing purchase funds to a non-spouse, ask whether he/she intends that the purchaser hold the property in trust, and put the answer in writing.
- If you are retained jointly by a funder who is not going on title and a purchaser who is going on title but not contributing funds (and they are not parent and minor child), have one of the parties receive independent legal advice.
- If you are retained by a couple – particularly a non-married couple – and purchase funds are coming from only one of the two parties out of an account not held jointly between them, advise one of the parties to obtain independent legal advice. Explain the implications of putting the title in the non-funder's name, and/or of taking title as joint tenants.
- Be alert to situations in which the property to be purchased seems to exceed the apparent means of the purchaser. Ask about the source of the funds. For one thing, this scenario is a red flag for fraud. Even if there is no fraud, parties may arrange for a person not advancing the funds to take title to avoid capital gains tax for the funder; but if the relationship breaks down, a trust vs. gift dispute may ensue (see, for example, 2014 ONSC 5258 (CanLII)).
- When handling domestic contracts (for example, a cohabitation agreement for unmarried parties or a prenuptial agreement) always require that the parties have independent legal advice, and discuss the implications of resulting trusts – not just with respect to purchase money, but also with respect to contributions to value – with your client.
- When advising unmarried spouses about domestic agreements and property, be sure to explain that regardless of their expectations, rights on separation may be determined based on trust, unjust enrichment, and/or "joint family venture" analyses. Explain the implications of merging (or not merging) finances and buying property separately or jointly. ■

Lisa Weinstein is Director, National Underwriting Policy and Nora Rock is Corporate Writer and Policy Analyst at LawPRO.

Risk management strategies

to reduce your risk of a claim under the new Rule 48.14 (Administrative Dismissals)

Effective January 1, 2015, a new Rule 48.14 brought significant changes to the administrative dismissal regime in Ontario. After several hundred claims and more than $7 million in claims costs over the last three years, LawPRO was happy to see old Rules 48.14 and 48.15 revoked.

However, while LawPRO believes the new rule will stem the tide of administrative dismissal-related claims under the old rules, there is no doubt that the changed deadlines, processes and transition provisions under the new Rule 48.14 introduce new claims risks that may trap the unwary lawyer. This article provides direction on the steps lawyers and law firms can take to lessen their risks of claim under the new rule. For ease of reading, all references to Rule 48.14 in this article are to the new rule, unless noted.

The significant changes under Rule 48.14, which was effective January 1, 2015, are summarized in the following points:

- For actions commenced on or after January 1, 2012, automatic dismissal will occur, without notice to parties or their counsel, five years after the commencement of the action, unless the court orders otherwise. [Rule 48.14(1)]
- Any action struck from the trial list after January 1, 2015, and not restored by the second anniversary of being struck off, will be dismissed on that date, without notice to parties or their counsel, unless the court orders otherwise. [Rule 48.14(1)]
- The registrar must serve 48.14 dismissal orders (Form 48D) on all parties [Rule 48.14(2)] and any lawyer served with such an order must promptly give a copy to his or her client. [Rule 48.14(3)]
- A dismissal can be avoided if a party, with the consent of all other parties, files a timetable and draft order, at least 30 days prior to the relevant dismissal deadline. The timetable and draft order must set out the dates by which outstanding steps necessary for set-down will be completed and a date (no more than two years after the automatic dismissal deadline for the action) by which the action will be set down or restored to the trial list. [Rule 48.14(4)]
- Where the parties do not consent to a timetable, one party can bring a motion for a status hearing. At that hearing, the plaintiff must show cause why the matter should not be dismissed for delay. The court can dismiss the matter, adjourn the matter, make a Rule 77 case management order, or set deadlines for completion of the steps necessary prior to set-down and a deadline for set-down for trial (or restoration to the trial list). [Rule 48.14 (5-7)]
- The dismissal of an action under Rule 48.14 may be set aside under Rule 37.14. [Rule 48.14 (10)]

Critical dates

- New Rule 48.14 is effective January 1, 2015
- New automatic "5 year from date of commencement dismissal" applies to actions commenced on or after January 1, 2012
- Actions commenced before January 1, 2012, will be automatically dismissed January 1, 2017
- Transition provisions impact whether a status hearing will occur for pre-January 1, 2015 actions (see article for details)

Transition provisions

The transition provisions provide the following:

- Any action commenced before January 1, 2012 that has not been dismissed or scheduled for a status hearing by January 1, 2015 will be dismissed January 1, 2017 without notice to parties or their counsel. [Rule 48.14(1)]
- Any action struck from the trial list before January 1, 2015 that has not been restored by January 1, 2017 will be dismissed on that date, without notice to parties or their counsel. [Rule 48.14(1)]
- Any status hearings scheduled, but not held, before January 1, 2015, will proceed under the old Rule 48.14. [Rule 48.14(12)]
- Old Rule 48.14 and 48.15 status notices received by parties prior to January 1, 2015 will cease to have effect on that date, unless a status hearing has already been scheduled or the action has already been dismissed. [48.14(11) and (13)]

Risk management steps

LawPRO strongly encourages all lawyers to take steps to familiarize themselves with the changed requirements under the new Rule 48.14, and in particular, the transition provisions. Firms should update the dates in tickler systems to reflect the new administrative dismissal and ultimate set down

deadlines for all open files. Remember, the courts will be dismissing actions without sending notices of any type to parties or their lawyers – your tickler systems must remind you of relevant dismissal deadlines. On the upside, the rules are simpler and lawyers will not be subject to the vagaries of a notice system that varied across different counties.

As a best practice, go beyond just entering relevant dismissal deadlines in your tickler systems. Establish a timetable for each matter and enter start and finish reminders for each stage into your tickler (e.g., file defence, file affidavit of documents, complete discoveries, answer undertakings, etc.). Some accounting and practice management products allow you to automatically enter a standard series of tickler dates.

Who knows what the reaction of the courts may be when you have had five years instead of two to move an action along and are still seeking to avoid a dismissal? You really don't want to put yourself in the dangerous position of missing a dismissal or not having enough time to complete necessary steps in an action that is coming up to a dismissal deadline. Prevent this from happening by setting a realistic timetable with milestone reminders to help you keep your file moving along.

Why files stall

Every matter is unique and there are many reasons why the work may proceed at different rates. However, when it comes to the reasons for a file to become stalled, LawPRO sees the same causes over and over again. This list highlights the most common reasons why work on files stops, and how to get back on track:

- **The lawyer doesn't know or is uncomfortable with his or her knowledge of relevant law:** This is easy to fix: seek help from another lawyer that knows the area of law in question.
- **The lawyer is too busy on other files:** This might actually be true, but sometimes serves as an excuse to cover one of the other reasons in this list. If the former, make time to deal with it by scheduling a block of time in your calendar.
- **The matter or a step in it may seem too big to tackle:** This reason sometimes goes hand-in-hand with the previous one. Break the work that needs to be done into smaller steps and tackle them one at time.
- **There are unpaid accounts on the matter:** While it makes sense to stop work on a matter you aren't being paid on, the clock is still ticking on the administrative dismissal. Take steps to collect the outstanding accounts and to replenish your retainer. If these two things don't happen, terminate the retainer and comply with the *Rules of Professional Conduct* when doing so.
- **The client is very demanding or difficult:** Take control and deal with the client. For help on how to do this, refer to LawPRO's difficult client resources (practicePRO.ca/difficultclients). If the lawyer/client relationship is truly broken, you should terminate the retainer. Comply with your obligations under the *Rules of Professional Conduct* and don't wait until the eve of trial to do so.
- **Opposing counsel is difficult:** Talk to another lawyer for some advice and perspective on how to best handle this situation.
- **No one knows the action is stalled:** This reason warrants a discussion of its own – see the next paragraph.

From time-to-time lawyers have serious difficulties (e.g., personal, health or substance abuse issues) that result in them no longer actively working on one or more of their files. LawPRO has seen several clusters of claims where a lawyer has stopped coming to the office for an extended period of time and no one at the firm stepped in to take over the absent lawyer's files. To prevent this scenario from happening make sure your firm's staff and tickler systems will catch when work on a matter has stopped or is stalled.

Call LawPRO if you have a show cause hearing

Lastly, remember that if you are required to attend a contested show cause hearing there is the potential for a claim and you should contact LawPRO immediately so you can get help with dealing with it.

Summary

LawPRO encourages all lawyers to familiarize themselves with the requirements under the new Rule 48.14, and to make all necessary changes to internal firm systems and processes to deal with the requirements under the new rule. While claims will always happen for reasons beyond your control, many of the claims risks under Rule 48.14 can be significantly reduced or eliminated with some proactive claims prevention efforts. Keep your matters moving along so you are never in the awkward and dangerous position of having to explain an inordinate delay to a judge. ■

The major changes under the new Rule 48.14:

- Actions will be dismissed for delay if not set down for trial 5 years after commencement
- Any action struck from trial list, and not restored by second anniversary of being struck, will be dismissed on that date
- These dismissals happen:
  - Without notice to parties or their counsel
  - Unless the court orders otherwise after filing of consent timetable or a status hearing

Dan Pinnington is Vice President, Claims Prevention and Stakeholder Relations at LawPRO.

How simple mistakes can lead to large claims

It's easy to think that, at least in *your* office, a major claim couldn't possibly happen. But LawPRO's experience shows that errors, innocent oversights and gaffes in any type of practice can lead to big problems. And if you or your firm don't have adequate insurance in place to address the claim, you could be facing personal exposure. The number of LawPRO claims with values that exceed $100,000 has risen sharply in recent years and often the mistakes that lead to such claims result from very simple errors. Below are scenarios drawn from reported cases of alleged lawyer-negligence that show how easily large claims can develop.

Conveyancing:
Condominium conundrum

You act for the purchaser of a residential condominium unit. Unbeknownst to your client, and despite the way the condo appears at the time of sale, not all parts of the unit being used as living space were actually transferred to your client. The condominium corporation tells your client that parts of her unit are common elements and she has to stop occupying those sections. She sues you for failing to identify this prior to the purchase. In fact, she winds up suing a number of people associated with this transaction. What could this cost you? **In a case very similar to this, the lawyer and his firm were held to be responsible for $1.15 million. The legal costs were particularly substantial due to the number of parties involved and the complicated nature of the litigation.**[1]

Corporate/commercial:
All you want to do is help the transaction close

You're acting for someone purchasing a company. The vendor is unrepresented and won't get his own lawyer. You offer to prepare all of the necessary legal documents for the transfer for both parties, but you don't think it's necessary to confirm in writing that you won't be doing any additional filings for the other side, assuming it will be clear that person is not your client. The vendor doesn't file the documentation that confirms he is no longer a director of the company. A subsequent sale of securities by the business results in him being held liable by Canada Revenue for taxes owed by the company, and he looks to you to pay it. **By making the offer to do all the legal work involved in the transaction, the court held the lawyer in this case had a duty of care to the vendor that was breached. The judgment against the lawyer was just under $400,000.**[2]

Family law:
When meeting client's immediate needs conflicts with long-term goals

You act for the wife in a matrimonial dispute. The couple have done pretty well for themselves over the course of their marriage. You determine the husband could be a potential flight risk and originally intend to seek a preservation order. However, the wife could use financial help immediately, so instead you negotiate a deal to have the husband transfer assets to the wife which represent a lot, but not necessarily all, of the estimated equalization payment. When the husband suddenly

[1] 2012 ONSC 4919

[2] 1995 CanLII 2859 (PE SCTD)

disappears and the wife can't recover what's outstanding under the equalization payment, she sues you for **$6,000,000. Thankfully, at trial the court found the lawyer's actions did not cause the wife's loss.**[3]

Franchises:
When lawyers act as trustees

Your client acquires the exclusive right to set up franchise locations for a nation-wide restaurant chain in a specific province. You act for your client in setting up his business structure and the franchise documents. After he starts signing up investors for the franchises, it becomes apparent that there isn't as much interest as he expected. Because it's clear that not all units will be sold as originally set out in the documents, an amendment is made to the agreements that states your client will deliver the investors' funds to your firm after closing and you will hold it in trust until all units are sold. Your client receives the money from the investors, but never remits it to you. You later discover your client has used the funds to pay down his own business debts. Your client's business fails and the parties who invested in the franchises can't recover against him because he and his business are insolvent. The investors sue you. **The court found that the lawyer breached his fiduciary duty to the non-client investors by not holding the funds in trust as originally held out. The investors, who each invested $50,000, were entitled to seek recovery against the lawyer for the full amount lost.**[4]

Intellectual property:
Diarizing disaster

Your client holds several patents. You are to arrange payment of the necessary fees to a patent office, but through an oversight, payment is not made in time and the patents lapse. **More than $1 million in damages was awarded in a case like this.**[5]

Mortgages:
When trying to save money on an up-to-date search winds up costing a lot

You act for the mortgagee and mortgagor of a commercial property that's under construction. You register the mortgage on the subject property, but you skip the search to save money and end up missing a critical fact. It ends up the mortgage is unenforceable because a recent amalgamation of the borrower's companies means that the neighbouring properties, that used to be owned by separate but related companies, have now become joined as one. The mortgage was in contravention of section 50(3) of the *Planning Act*, R.S.O. 1990, c. P-13, since the borrower owned abutting lands. The borrower subsequently goes bankrupt and the mortgagee is found to be an unsecured creditor. **At trial more than $2 million in damages was awarded against the lawyer.**[6]

Personal injury:
Obtaining consent

You commence an action following a motor vehicle accident on behalf of the injured party and a compensation fund. You act on this file for six years. In consultation with both the injured person and the fund's lawyers, who both seem to give their approval, a settlement is reached that you think is fair. Later, a senior officer in the fund declares the settlement to be inadequate and says you didn't have proper consent to settle. At trial, the court finds that while you had in fact received consent, it wasn't informed consent, because you failed to properly investigate the adequacy of the settlement. The court found the total loss to be more than $800,000. **In 1990 the judgment, upheld on appeal and before adding costs, was for more than $344,000 against the defendant law firm.**[7]

Wills and estates:
Sometimes you think you've got all the information you need

Your client gives you very clear instructions on how he wants his estate to be distributed, including a gift of certain lands to his brother. You ask the client to provide a legal description of the land, and you prepare the will in accordance with his instructions. After your client's death you realize that the land was owned by your client's company, not your client directly, and the company passed to a different beneficiary. **The court found that there was both a duty of care to the intended beneficiary and, in the circumstances, the lawyer should have done a title search. The damages awarded against the lawyer were just under $500,000.**[8]

Summary

From an error in diarizing to not taking the time to send a reporting letter, even the smallest oversights can lead to large claims. No practice will be perfect, but a commitment by your firm to risk management best-practices will go a long way to avoiding these types of errors. The practicePRO website (practicepro.ca) has articles, tools and resources to help lawyers and firms identify and address practice risks. You can also go to the LawPRO website and take our quiz to assess your firm's exposure to claims that could exceed the limits under your Law Society primary insurance provided by LawPRO (lawpro.ca/insurance/pdf/Excess_Stress_Test.pdf). If you make an error, big or small, you will want to have the security of knowing you have the appropriate amount of insurance in place.

For more information on the Law Society primary program or LawPRO's program of excess insurance, please go to our website at lawpro.ca or contact our Customer Service Department at service@lawpro.ca or by phone at 1-800-410-1013 or 416-598-5899. ■

Victoria Crewe-Nelson is Assistant Vice President Underwriting at LawPRO.

[3] 2006 CanLII 12415 (ONCA) and 2004 CanLII 16074 (ONSC)
[4] 2000 CanLII 1782 (NS SC)
[5] 2010 ONSC 7141
[6] 2009 CanLII 55300 (ONSC)
[7] 1992 ABCA 263 (CANLII)
[8] 2012 ABQB 82

Don't get duped:

20 RED FLAGS of a bad cheque fraud you should recognize

Lawyers in all areas of practice continue to be the frequent targets of bad cheque scams. These scams involve debt collections, business loans, IP licensing disputes or spousal support payments. While it appears Ontario lawyers are increasingly aware of these frauds, occasionally some are being duped into disbursing funds on a bad cheque they have deposited in their trust accounts.

Don't be complacent and think you will never be fooled. These frauds are getting ever more sophisticated. The matters will look legitimate, the fraudsters will be very convincing and the client ID and other documents you receive will look real. The fake cheques will be printed on real cheque stock and in the past have fooled bank tellers and branch managers. There are often two or more people collaborating to make the scenario even more convincing (e.g., the lender and the debtor, the lender and the borrower, both ex-spouses, etc.). We have seen fake law firm websites created to make these frauds look more legitimate.

Listed below are 20 of the most common red flags of a bad cheque fraud. While some of these things may occur on legitimate matters or may be harmless, you should proceed with extreme caution if several of the items listed occur on a matter you are handling.

1 Initial contact email is BCC'd to many people (you may see "undisclosed recipients" in the To: field).

2 Initial contact email is generically addressed (e.g., "Dear attorney").

3 Client is new to your firm.

4 Client is in a distant jurisdiction.

5 Client says he prefers email communication due to long distances, time zone differences or a medical condition.

6 Client shows up and pushes for work to be done just before a holiday when banks will be closed.

7 The name and/or email address in the From: field is different from the name and/or email address of the person you are asked to reply to in the body of the email.

8 Client uses one or more email addresses from a free email service (e.g., Gmail™, MSN®, Yahoo!®) when the matter is on behalf of a business entity that you expect would have its own email address.

9 Information in the email header indicates sender is not where he/she claims to be.

10 The client signs a retainer and client promises to pay your retainer fee, but it never arrives and they then suggest you deduct your fee from the cheque you have received or will receive from the opposing party.

11 The fee offered is unusually high for the type and amount of work you have done and/or will do.

12 The fee is to be paid on a contingent basis from the (bogus) cheque you are to receive.

13 The client is in a rush and wants you to do the work very quickly.

14 The client or person on the other side doesn't seem to be concerned if shortcuts are taken.

15 Despite your client saying a lawyer is required, payment from the opposing party arrives at your office with you having done little or no work to get it.

16 Cheque or bank draft arrives at your office in a plain envelope and/or without a covering letter.

17 Cheque is drawn from the account of an entity that appears to be unrelated to the matter (e.g., a spousal arrears payment from a business entity).

18 Payment amounts are different than expected or change at the last minute without explanation.

19 Client instructs you to quickly wire the funds to an offshore bank account based on changed or urgent circumstances.

20 Some or all of the payment is going to a third party who appears unrelated to the matter.

If some of these red flags arise on a matter you are working on, take steps to protect yourself. Use Google® to verify identity and contact information for all parties involved in the transaction. Our AvoidAClaim.com blog lists names used by fraudsters.

Make sure you understand and are comfortable with all aspects of the transaction. Dig deeper and ask questions about anything you don't understand. One of our claims professionals would be pleased to talk you through assessing and dealing with a matter that is potentially a fraud. If you have been successfully duped, please immediately notify LawPRO as there may be a claim against you. Visit lawpro.ca for instructions on how to report a claim. ■

How much has communication changed in the legal profession in the past 20 years?

The landline rotary phone.

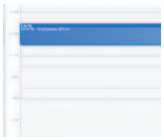
Now your phone fits in your pocket and isn't just a phone anymore.

Paper address book.

There are over one billion Facebook accounts, making it the biggest address book to help users put a face to a name.

Tickler systems were first implemented in the early 20th century taking up a lot of office real estate.

Now, calendar software literally "pings" to remind us when we're running late.



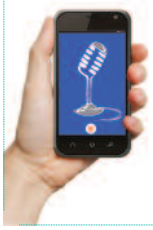
Computers of the 90s seemed like they couldn't get any better.

But they did…

The traditional paper file.

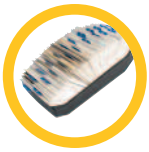
In a paperless office, your file is on a tablet.

Dictaphone – careful not to get those tapes tangled.



Digital apps make taking notes easy and accessible.

Rolodex® – sometimes a Rolodex was described as containing the most valuable information for a firm – their contacts.



Professional online networking sites drive business development, job opportunities, knowledge sharing and keeping up with colleagues and alumni.

Notes on the bulletin board helped people know what was going on in a firm.

Applications like Twitter share millions of news feeds everyday. Using hashtags, images and links, people can quickly find news about whatever they choose, no matter where they are.

American scientist Edwin Land invented the first Polaroid® camera in 1948. After taking a photo, it would instantly print and you could write a caption on it.

Now you can take photos, save them and upload them to friends and colleagues in seconds. Not only that but they can be catalogued, saved, edited and resized – no album, box or negatives required.

Remember having to watch something when the cable company said so?

Video on demand means the cable companies no longer set your calendar. Watch at your convenience and try not to lose a whole weekend binge watching.

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