



LAWPRO's best claims prevention tools and resources

Nobody wants to deal with a malpractice claim – but 4 out of 5 Ontario lawyers will have at least one claim made against them in their careers. When a claim occurs, it is nice for the lawyer and client to have the LAWPRO insurance program in place, especially when claims arise out of honest mistakes or for reasons beyond the lawyer's control. However, the majority of claims are preventable.

LAWPRO sees the same errors time and time again. Lawyer/client communications problems are the most common cause of claims for law firms of every size and in almost every area of practice. Missed deadlines and procrastination are the second largest cause of claims. Inadequate investigation or discovery of fact is the third largest cause of claims.

Over the last 19 years, the practicePRO program has produced a large collection of tools and resources aimed at helping lawyers avoid claims. This brochure has LAWPRO's best claims prevention content. We strongly encourage all Ontario lawyers to review and use these tools and resources in their practices.

For an electronic version of this brochure with links to these resources, visit practicepro.ca/topresources



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

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

1 Start out on the right foot with a formal file opening procedure and a written retainer: With every new client you should go through a standard file opening procedure that includes client/matter screening and a conflicts check. If you are going to act you should prepare a retainer letter or agreement that sets the key terms of engagement for the matter. It should clearly identify who the client is and what you are retained to do, and in particular, any limitations on the scope of the retainer. Consider including a provision that describes your firm's policy on disbursing money from your trust account, in order to protect yourself against counterfeit cheque fraud: Put the client on notice that you reserve the right to hold funds for a specific time period or until you are sure they have "cleared."

2 Don't dabble or handle a matter you are uncomfortable with: If you are unsure or hesitant about handling the matter for any reason, get appropriate help or refer it to another lawyer. Send the matter away if you are unfamiliar with the area of law, a real or potential conflict exists, the matter is for a relative or friend and you are not able to be objective, or the client is very demanding and difficult.

3 Get the money up front at every stage of a matter: At the time you are retained, get a retainer that is sufficient to cover all work that needs to be done on the initial stage of the matter. Replenish retainer funds before they are exhausted and on the start of each stage of a matter or file. Configure your accounting system to remind you when

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

4 Control client expectations with good communications at all times: Clearly and accurately communicate to your clients the available courses of action and

possible outcomes, all the implications of any decisions or actions, how long things will take, and the expected fees and disbursements. Immediately advise them if changed circumstances affect any aspect of your initial advice to them.

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

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

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

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

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

10 Don't do any of the things that most annoy clients: These are all the things that would equally annoy you. They include not returning phone calls or emails, long periods of inactivity, and surprising a client with bad news or a large account. Implement standards or practices that govern your client communications, such as phone calls will be

returned within 48 hours (not same day) and, describe them in the initial retainer letter (see #1).

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

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

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

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

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

Top technology articles and resources

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

- 1 LAWPRO Magazine – December 2013: Cybercrime and law firms
- 2 Keeping your passwords strong and secure
- 3 Don't take the bait on a spear phishing attack
- 4 10 Tips to managing your inbox
- 5 Danger: When a hacker emails you instructions in the name of your client
- 6 Fifteen tips for preventing identity theft and online fraud
- 7 Technology and stress: Good tool, bad tool
- 8 Docketing dos and don'ts
- 9 Technology in trying times: How and why you should use technology in your practice
- 10 Backup best practices and strategies
- 11 Be smart about spam: Use whitelisting so you don't miss key messages
- 12 Danger signs: Five activities not covered by your LAWPRO policy
- 13 Social media pitfalls to avoid
- 14 Essential dos and don'ts for LinkedIn users
- 15 Employee departure checklist



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

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

- 1 Retainer agreement precedents:** One of the best ways to reduce the risk of a claim is a retainer agreement that clearly identifies the client and the scope of work to be done. We have a variety of retainer agreement precedents for different types of matters which you can adapt for your practice.
- 2 Client administrative information and billing information letter precedents:** These helpful letters tell a client everything they need to know about dealing with you and your staff and how legal fees will be dealt with.
- 3 The Canadian Bar Association's Conflicts of Interest Toolkit:** A great collection of practical checklists and precedents that will help you recognize and avoid conflict of interest claims.
- 4 Post-matter Client Service Survey:** What did your clients think of your service? Use this post-matter client service survey to find out.
- 5 Independent legal advice (ILA) checklist:** A hasty \$150 ILA consult can easily lead to a claim and a \$5,000 deductible. Use this ILA checklist to make sure you cover all the bases when giving independent legal advice.
- 6 Domestic Contract Matter Toolkit:** This toolkit helps lawyers systematically consider and discuss all relevant information at the initial interview and signing of a domestic contract. It includes an intake form, an intake checklist, a post-meeting client assignment form, and a review and signing checklist.
- 7 Commercial Transaction Checklist:** This checklist contains a series of questions lawyers should ask themselves to help ensure that the commercial documents they are drafting correctly reflect the client's instructions and expected results. It helps ensure that your communication with the client has been thorough, too.
- 8 Fraud Fact Sheet:** This pamphlet describes the bad cheque and real estate frauds that most commonly target lawyers and lists the "red flags" that can indicate that an otherwise legitimate looking matter is actually a fraud. Share this with your staff too!
- 9 Rule 48 Transition Toolkit:** As of January 1, 2017, matters will be automatically dismissed without notice, five years after they were commenced unless there is an order otherwise or the plaintiff is under disability. Move your files along and comply with the requirements of the new Rule 48.14 with help from this toolkit.
- 10 Managing a mentoring relationship booklet:** Practical advice on how mentors and mentees can build mentoring relationships that are productive and successful.
- 11 Managing a better professional services firm booklet:** Loads of advice on how you can improve client communication and service at your firm.
- 12 Managing the finances of your practice booklet:** Details of the steps you can take to better manage and improve the finances of your practice.
- 13 Business plan outline:** Looking to grow your practice or to borrow some money from the bank? This business plan outline will help you set some long-term goals for the finances, management and marketing of your practice.
- 14 Sample budget spreadsheet:** This detailed 12 month budget spreadsheet will help give you detailed insights into your practice revenues and expenses.
- 15 Limited Scope Representation Resources:** These resources will help you understand some of the risks inherent in providing limited scope legal services, and how you can reduce your exposure to a claim when working for a client on an unbundled basis.

lawpro.ca

Everything you need to know about LAWPRO's insurance program

practicepro.ca

Practical resources, precedents and checklists for risk management, claims prevention and law practice management

AvoidAClaim.com

Daily updates on practice advice, claims prevention and alerts to the latest frauds



What are the risks in your area of law?

Our malpractice claims fact sheets include claims statistics, causes of claims against lawyers, and tips for avoiding claims for the following areas of law:

Litigation, Wills & Estates, Criminal, Family, Real Estate, Corporate



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

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

- 1 The biggest malpractice claims risks:** Lawyers may be surprised to learn that failures to know or apply substantive law account for a relatively small portion of LAWPRO claims. Find out the biggest causes of claims in this article.
- 2 New Year's resolutions for a healthier law practice and a new you:** If you are going to read one article this is it – 15 pages of practical tips for reducing risk and avoiding claims and stress.
- 3 Inadequate investigation/discovery now #1 cause of claims:** Lawyers in many areas of law are not taking the time to get all the information they need to give proper and complete advice to their clients. Read this article to learn how to dig deeper, spot relevant issues and ask all appropriate questions of a client.
- 4 Avoiding administrative dismissals:** Rule 48 Transition Toolkit provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule.
- 5 Manage malpractice risk by recognizing cultural diversity:** In the context of legal services, cross-cultural misunderstandings and other culture-related factors can occasionally lead to malpractice claims against lawyers. Understand more from this article.
- 6 Litigation claims trends: errors & insights:** This fact sheet examines the most common civil litigation-related errors that LAWPRO sees, and the steps you can take to reduce the likelihood of a litigation claim.
- 7 Self-represented litigants: A survival guide:** Having a self-represented litigant on the other side of a matter can be very frustrating for you and your client. This article will help lessen those frustrations.
- 8 Real estate claims trends:** A detailed review of where and why real estate claims happen – and what can be done to avoid them.
- 9 Six things I hate to read in a real estate claim file:** LAWPRO President & CEO Kathleen Waters runs through the unfortunate explanations we see on all too many real estate claims files.
- 10 Unbundled legal services: Pitfalls to avoid:** “Unbundled” or limited scope legal services are here to stay; but providing these services creates risks that must be managed. Read this article to understand and avoid those risks.
- 11 Landmines for lawyers when drafting wills:** LAWPRO claims counsel Pauline Sheps outlines some of the areas of greatest malpractice danger for wills practitioners.
- 12 Diversify without dabbling:** Before expanding your practice, expand your competence. Dabblers – lawyers working outside their usual area of practice – cause a significant number of claims. Read this to understand why.
- 13 Wondering when to report that claim or potential claim? Do it now:** Late reporting of a claim can have severe consequences. Read this article so it doesn't happen to you.
- 14 The morning after mediation:** Settling a matter can require lots of give and take and some compromise, with the result that clients may have second thoughts about what they agreed to the day before. Avoid this predicament with the advice in this article.
- 15 A checklist for avoiding conflicts on lateral transfers:** Lateral transfers need to be a good fit and having the right credentials is important, but so is avoiding conflicts of interest. Get the advice to do it right here.

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