

# LAWPRO

magazine

FEBRUARY 2018 VOL 17.1

## Top legal disruptions

### PLUS

Celebrating 20 years of Excess Insurance

Does your firm need cybercrime insurance?

Coping with changes outside your control

How to safely put your data in the cloud

## upcoming events

### February 6, 2018

Ontario Bar Association Institute

*Limited engagement retainers: Clearly defining your role*

Ray Leclair presenting

*How to thrive in today's market*

Ian Hu presenting

Toronto, ON

### March 2, 2018

County of Carleton Law Association

Summit for New Lawyers and Articling Students

*Survival is success*

Ian Hu presenting

Ottawa, ON

### March 9, 2018

Iranian Canadian Legal Professionals

Annual Speakers Series

*Common claims in wills and estates*

Ray Leclair presenting

Toronto, ON

### March 26, 2018

Law Society of Ontario

Motor Vehicle Litigation Summit

*After the event insurance: Ethical considerations*

Ian Hu presenting

Toronto, ON

## recent events

### January 17, 2018

Law Society of Saskatchewan

*Fraud prevention webinar*

Dan Pinnington presented

### January 10, 2018

Law Society of Ontario

*Changes to Teraview – What you need to know*

Ray Leclair presented

Toronto, ON

### December 15, 2017

Travelers (Gorbet and Associates)

In-house presentation

*Common malpractice claims and cybercrime*

Ian Hu presented

Oakville, ON

### December 15, 2017

Ontario Trial Lawyers Associations

Protect yourself: Discoverability and dismissal of actions webinar

*When and how to ask LAWPRO for assistance*

Ian Hu presented

### December 13, 2017

Law Society of Upper Canada

Real Estate Practice Basics 2017

*Fraud prevention*

Ray Leclair presented

*Title insurance*

Lori Swartz presented

Toronto, ON

### December 11, 2017

Ontario Bar Association

Ethics, Civility and Zealous Advocacy: How Do They Coexist?

*The Law Society of Upper Canada and LAWPRO: What do they see?*

Dan Pinnington presented

Toronto, ON

### December 8, 2017

Lincoln County Law Association

A Full Day of Family Law

*Avoiding family law claims*

Dan Pinnington presented

St. Catharines, ON

### December 7, 2017

Kestenberg Siegal Lipkus LLP

22<sup>nd</sup> Fraud and Anti-Counterfeiting Conference

*Interacting with unrepresented counterfeiters in litigation*

Ian Hu presented

Toronto, ON

### December 6, 2017

Law Society of Upper Canada

Professional Conduct and Practice in Ontario Sessions

*Diversity and malpractice claims*

Ian Hu presented

Toronto, ON

### December 5, 2017

Ontario Bar Association

Your Practical Refinancing Toolkit

*Mortgage fraud: Developments and trends*

Lori Swartz presented

Toronto, ON

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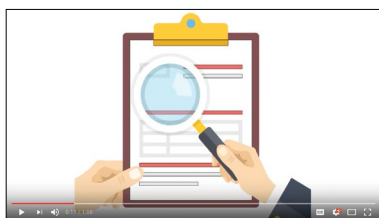
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## Transaction levy surcharges reminder

As of January 1, 2018 the civil litigation transaction surcharge is \$100 per transaction. The transaction levies are to be accumulated and paid quarterly within thirty days of the quarterly period ending on the last day of March, June, September and December. Also, beginning in the 2018 policy year, lawyers who initiate family law proceedings will no longer be required to pay civil litigation transaction levies.

## Our new video: What does your real estate lawyer do for you?



As part of LAWPRO's public awareness efforts to promote the role of the lawyer, we have produced a video: *What does your real estate lawyer do for you?* It emphasizes how a real estate lawyer is an expert who

can help with eight key steps of buying a home and takes care of the clients' interests. We will be promoting this video through social media and other channels, and you are welcome to use it to promote your own services, including posting it on your firm's website, social media feeds, newsletters, or e-signature in support of your marketing efforts. You can view the video and all the other public awareness videos on LAWPRO's YouTube channel.

## Key Dates

Mark your calendar for these important dates in 2018.

### January 31, 2018

Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ended December 31, 2017.

### February 6, 2018

Last date to qualify for a \$50 early payment discount on the 2018 policy premium (see page 13 of the 2018 Program Guide for details).

### April 30, 2018

Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending March 31, 2018.

### April 30, 2018

Annual exemption forms are due from lawyers not practising civil litigation and/or real estate in 2018 and wanting to exempt themselves from quarterly filings.

## Successful launch of consumer pamphlets

LAWPRO launched new brochures and a webpage that promote real estate, legal and financial literacy. The brochures were distributed to all of the MPP offices in Ontario.

The brochures answer questions about negotiating a house purchase, a mortgage or a problem with a landlord and provide current and accurate information about legal rights and about the issues clients should consider.

View and share them at [lawpro.ca/myhome](http://lawpro.ca/myhome)



## 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, is awarded each year to a second year University of Toronto Faculty of Law student. This year's recipient is Timothy Shin.

Timothy is involved in many extracurricular activities at law school and in the community. He has volunteered at the Landlord and Tenant Board, served as a *pro bono* student intern at an NGO in North York and participated in the Cassels Brock Cup moot competition.





# e-briefs

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

The full content of these newsletters is available at [lawpro.ca](http://lawpro.ca). To ensure you receive timely information about deadlines, news and other insurance program developments, please make sure LAWPRO has your up-to-date email address and that your spam filter allows emails from LAWPRO.

## Reminders

### Renew your firm's professional liability insurance for 2018

October 19, 2017

Message to firms to e-file the 2018 renewal insurance application on or before November 7 to save \$25 per lawyer; message about impending final deadline of November 14 for filing.

### Renew your professional liability insurance for 2018

October 2, 18 and November 10, 2017

Messages reminding lawyers to e-file 2018 renewal insurance applications by November 7 to save \$25; message about impending final deadline of November 14 for filing.

### Renew your LAWPRO exemption status for 2018: file online

September 26 and October 11, 2017

This issue notified our insureds that the deadline for renewing exemption status was November 14, 2017.

### Transaction levy filings reminders

September 19 and December 11, 2017

A reminder that the deadlines for submission of levy filings relating to transactions were upcoming.

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

August 16 and September 6, 2017

A reminder to insureds to complete the declaration on the LAWPRO Risk Management Premium Credit declaration page no later than midnight on September 15, 2017.

## Webzines

### Keeping up with change in real estate law

December 19, 2017

Real estate practice has been evolving fast: 2017 brought new regulations and refinements to precedents, and 2018 promises technological innovations.

### Criminal law in context: Indigenous experience, family breakdown, collateral consequences

December 5, 2017

The articles featured in this webzine explore the broader context and provide practical advice for managing risks both to clients and lawyers.

**LAWPRO**  
magazine

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# Will disruption make us better?



Disruption isn't new – it just feels that way. The wheel, the printing press, even electronic land registration were disruptions to the status quo. What's different this time? The relentless pace and the wide breadth of transformation. As we have all observed, change is constant and is taking place in all areas of our professional and personal lives.

Research shows that anxiety is at unprecedentedly high levels in our youth. The normal stress of entering the workplace for the first time is now increased by the weight of not knowing if a career choice will even exist upon graduation, let alone be one that is fulfilling. Plus, any failures are more public by being amplified instantly over the digital infoway.

The integration of technology may mean that different skills increase in value. Qualitative as well as quantitative skills; emotional paired with intellectual abilities; contextual along with logical skills may be what gives one a leg up in a world of disruption. Facts are easily available and quickly retrieved – now delivering services and results faster and cheaper is upending not only our profession but our world.

The legal community is grappling with challenges and opportunities and even though there is pain in growth, a more accessible, efficient future is beckoning us all. In terms of the legal profession, we've seen incremental updates. Many of these updates are outlined in our feature article entitled "Perspectives on the future of law: How the profession should respond to major disruptions." What will be the big win from these changes? Perhaps, increasing affordability for clients which could lead to more people having access to the services of a professional advocate.

Continuing to be open to new ideas and new approaches will keep the journey interesting, challenging and always improving. Some changes will be keepers while others may turn out to be the Betamax of our profession. The challenge will be knowing which is which.

**Kathleen A. Waters**  
President and CEO



Perspectives on the future of law:

How the profession should respond to

# major disruptions

The legal profession is in the midst of significant change, and is headed into a period where there will be even greater change. These changes are driven by disruptions that alter the very nature of how traditional legal services have been performed and provided to clients for decades. These disruptions include:

- access to justice
- client empowerment
- technology
- alternative legal service providers

This article will give some insights into these disruptors and suggest how members of the legal profession can respond to them.

## What is a non-lawyer?

To start, a brief discussion about the term “non-lawyer” is helpful. Lawyers seem to like this word and we readily use it, in particular, in any instance when we are talking about someone who is not a lawyer (including paralegals, who are also licensee of the Law Society in Ontario). The members of other professions don’t seem to have the same hang-up. Do you ever recall hearing a dentist refer to non-dentists, or a doctor referring to non-doctors? Most people, including lawyers, are familiar with and regularly use terms such as dental hygienist, nurse practitioner, chiropractor, physiotherapist, etc.

When lawyers use non-lawyer there can be a subtle suggestion that we have special status or are in some way superior to non-lawyers. This is more likely to be perceived negatively when lawyers put forth the proposition that the monopoly we have on legal services is special and should be protected.

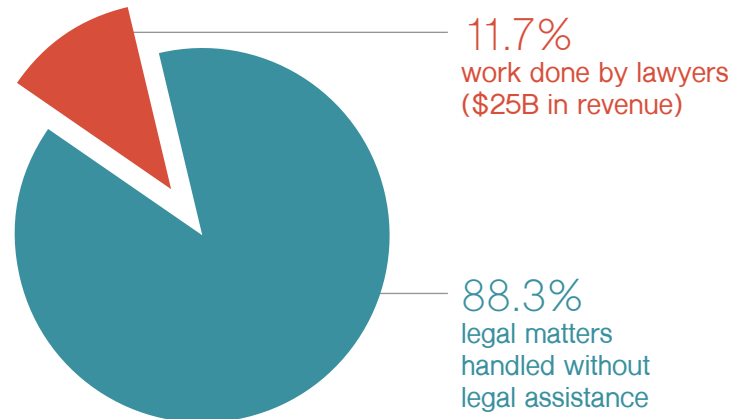
In recognition of the negative context the term non-lawyer can sometimes create, at a conference I recently attended we all agreed that we would refer to individuals that were not called to the bar as “human beings.” Now to be sure, lawyers have a good life relative to many human beings. And while many of us don’t quite earn what the human beings think we do, most of us have a fairly decent income and enjoy the work we do on a day-to-day basis. We should not take this for granted, and we should avoid giving human beings the impression we are somehow better than they are. Referring to non-lawyers as human beings worked nicely at the conference, and I will do the same in this article. Unfortunately human beings is not practical as a substitution for non-lawyer in everyday conversation.

## Access to justice

In recent years, access to justice (A2J) issues have been getting increasingly more attention. The most obvious A2J issue is a court system that is bogged down with large numbers of self-represented human beings, in particular in the family law area. Human beings with poverty law issues often can’t find or afford help and most would acknowledge that it is financially challenging for middle class human beings to hire a lawyer.

So clearly, there are lots of human beings not getting the legal help they need. In contrast, there is lots of work being done by lawyers.

## The legal services market in Canada



By one estimate, Canadian law firms will earn \$25 billion in revenue in 2017.<sup>1</sup> This stark contrast is explained in a survey that concluded that Canadians get help from lawyers on only 11.7 per cent of their justiciable events.<sup>2</sup> To be fair, some of these human beings may not want help with their issue. Others could be dealing with a small or insignificant issue for which they don’t need formal legal help or can solve themselves with a DIY solution. Still others may not recognize they have a legal issue or have access to a resource that could help them identify and find help for it. However, there remains a significant number of human beings who need and want help, but can’t get it for a variety of reasons, including not being able to afford it or being unable to find someone to help them. And U.S. Census Bureau statistics seem to indicate the problem is getting worse: while total law firm receipts increased from \$225 billion in 2007 to \$246 billion in 2012, receipts for work done for individuals declined 10.2 per cent over the same time period, a staggering sum of \$7 billion dollars.<sup>3</sup>

Lawyers tend to focus on preserving and protecting the small 11.7 per cent portion of the legal services pie we are already serving. It is incumbent on lawyers to pay more attention to the unserved 88.3 per cent as others are stepping up to the plate to provide services to this group. Recognizing the dire need in the courts, the Ministry of the Attorney General and the Law Society of Ontario are exploring whether paralegals or special limited licence providers can give some forms of assistance to human beings with family law issues. Various alternative legal service providers are also looking for ways to meet the legal needs of this group of unserved clients.

<sup>1</sup> *Law Firms in Canada: Market Research Report* (May, 2017) [ibisworld.ca/industry-trends/market-research-reports/professional-scientific-technical-services/law-firms.html](http://ibisworld.ca/industry-trends/market-research-reports/professional-scientific-technical-services/law-firms.html)

<sup>2</sup> *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, Ab Currie, ([justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\\_la1-rr07\\_aj1/rr07\\_la1.pdf](http://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf))

<sup>3</sup> “The Decline of the PeopleLaw Sector”, Prof. Bill Henderson on *Legal Evolution* blog (November, 2017) ([legalevolution.org/2017/11/decline-peoplelaw-sector-037/](http://legalevolution.org/2017/11/decline-peoplelaw-sector-037/))



## Client empowerment

In various subtle and not so subtle ways, clients are driving change as well. Clients in most areas of practice are asking their lawyers to provide more for less. They want more and better service, and at the same time, lower fees. Some clients will call around asking for quotes in an effort to find the lowest price. This is putting significant pressure on lawyers to lower their fees. While quoting the lowest fee may make sense to get a client in the short term, it may not bode well for running a profitable practice in the long term, unless steps are taken to do it more effectively and efficiently.

Millennials come to the table with a set of expectations that are very different from most traditional law firm clients. They are tech savvy and very comfortable buying things online. They like using the internet to find information and solutions to their problems quickly and expect to be able to do so 24 hours a day. I recently spoke to a millennial, a lawyer herself, who was very frustrated because two lawyers she had approached to do a will were unwilling to meet her and her husband outside of office hours.

As compared to the individual clients of solo and small firms, corporate clients are often more sophisticated and have larger budgets to pay for help on a wide variety of matter types. Still, they too, are putting pressure on law firms for lower fees and many are pushing law firms to consider flat fees and other alternative fee arrangements. As evidenced by increasing numbers, corporate counsel are doing more work in-house. U.S. Bureau of Labor statistics show that the number of in-house lawyers tripled between 1997 and 2016, as compared to just 46 per cent more government lawyers and only 27 per cent more lawyers at private law firms over the same time period.<sup>4</sup>

But an individual client can only do so much. When clients band together they can demand and drive significant change. A striking example of this is the Corporate Legal Operations Consortium (cloc.org). The members of this fast-growing organization are the

legal operations employees of Fortune 500, medium and small companies, government entities and educational institutions. Legal ops usually have a financial background and look for ways to lower costs and optimize the delivery of legal services to a business. Through conferences and networking, the members of CLOC share resources and teach each other how to get the legal help they need more effectively, efficiently and at a lower cost. CLOC is driving significant and rapid change in how legal services are consumed by corporate clients. In-house counsel are also making far greater use of legal process outsourcing.

## Technology

Technology is another major disruptor that is driving huge change in the legal services arena. Changes brought about by the fax machine and email – which were seen by many as earth-shattering when they occurred – seem small and insignificant relative to emerging technologies on the horizon.

Technology has significantly changed the manner in which work is done in a law office, as well as the manner in which lawyers communicate with and serve their clients. With the advent of networked computers and email, many law offices are operating in a much more digital fashion with far less paper. Email has become the *de facto* mode of communication between lawyers and clients. Smart phones allow clients to access their lawyers around the clock. And while it was unthinkable just five years ago, many law firms are using cloud-based services and storing sensitive client and firm data in the cloud.

By some accounts, increasingly smart computers will replace lawyers. But how much of this is hype and how much is reality? This is discussed in more detail in the “Artificial intelligence: What is AI and will it really replace lawyers?” article at page 15.

<sup>4</sup> “How Much Are Corporations In-Sourcing Legal Services?”, Prof. Bill Henderson on *Legal Evolution* blog (May, 2017) ([legalevolution.org/2017/05/003-inhouse-lawyers/](http://legalevolution.org/2017/05/003-inhouse-lawyers/))



Various internet-based technologies have opened the door for individuals and entities, many of whom are not lawyers or law firms, to offer online legal services or help with selected tasks that are a constituent part of handling a matter. These “alternative legal services providers” are discussed in the next section.

Blockchain will also bring significant change. It is the technology behind bitcoin and other cryptocurrencies. See the “What is blockchain?” sidebar on page 9.

The blockchain in the sidebar handled simple financial transactions. Blockchain systems can be built to handle more complex transactions. Sweden is building a blockchain-based land registry system. Blockchains can include smart contract functionality and can be used for complex commercial transactions involving multiple parties. For example, the seller, buyer, lender and shipper of goods could complete a commercial transaction entirely on a digital basis within a blockchain system, including verifying the identity of the parties, preparing and signing a bill of sale, applying for and advancing the loan, making and verifying payments, and instructing, tracking and paying for shipping. The appeal of blockchain is its ability to irrevocably verify and record every step in a transaction in a secure environment that is global and platform independent (it won't matter what technology systems or software you use in your office). Lawyers can expect to see blockchain systems become part of some of the transactions they handle today, and in some instances, lawyers may find themselves replaced as transactions will be completed entirely within a blockchain system. There are Canadian law firms currently building blockchain systems to better serve their clients.

## Alternative legal services providers

Lawyers should wake up to the fact that various alternative legal service providers are actively looking to address the legal needs of the clients their firms are currently serving as well as the human beings they aren't currently serving. These alternative legal service providers come in many forms. They include websites that sell legal forms, legal process outsourcers, and apps or websites that dispense legal information or advice.

Many lawyers were quite upset when DIY forms books appeared on the shelves of bookstores 25 years ago. Most of these books had simple “fill in the blank” forms in them. The forms that first appeared online were also simple fill in the blank forms. As compared to the advanced forms found online today, these old fill in the blank forms were prehistoric stone tablets.

A consumer or business client can find just about any form they would ever need or want online. With a quick Google search you can find sites that offer wills, leases, articles of incorporation and other corporate documents, pleadings, criminal pardons, and trademark registrations, just to name a few. While some of these sites have an indication that they are affiliated with a law firm, most have

no obvious or stated connection to a law firm. The documents prepared on these sites will have specific customizations based on detailed questions the client answers and they can be as lengthy and complicated as any document prepared by a lawyer. (See the discussion of expert systems in the “Artificial intelligence: What is AI and will it really replace lawyers?” article at page 15)

Legal process outsourcing (LPO) refers to the practice of obtaining support services from an outside law firm or legal support services company (LPO provider). When the LPO provider is based in the same country, the practice is called onshoring. When the LPO provider is based in another country, the practice is called offshoring. In the early days of LPO's, law firms tended to outsource back-office functions like bookkeeping, accounts receivable collections, etc. Globally LPO has become a multi-billion dollar industry. Major LPO providers like Axiom, Integreon Managed Solutions, Inc., and Pangea3 (owned by Thomson Reuters) are global companies that have operations in multiple countries. In Europe and the United States it has become very common for corporate entities and, more recently, law firms to outsource legal work, including agency work, document review, due diligence, legal research and writing, drafting of pleadings and other litigation support, contract management, and patent and other IP services. Major accounting firms are also doing LPO work (e.g., document review). A 2016 survey of almost 250 lawyers across Canada, including those who worked in firms, corporations and the government, found that 40 per cent were using legal process outsourcing.<sup>5</sup>

It is virtually impossible to know how many forms sites, LPO providers and other alternative legal service providers there actually are. But a good starting point is the Legal Tech Startups list on LawSitesblog.com. It is the most complete and up-to-date list I have come across. As I write this article there are 691 startups listed. While some of the companies listed are arguably not startups anymore as they have a large base of existing customers, the majority of companies on the list are in the early stages of creating or testing a new product or service aimed at the legal services arena.

Some of the startups on this list have received large investments from leading venture capital firms and technology companies (e.g., Google has invested in LegalZoom and Rocket Lawyer). Established legal industry vendors and LPOs are also investing in these startups (e.g., Lexis-Nexis acquired Lex Machina) to offer new services and products and to obtain technology to improve their existing products (e.g., Integreon acquired Allegory).

While some of these startups are clearly aimed at helping lawyers work better, faster, or cheaper many offer various types of legal assistance directly to consumer or business clients. In some cases those clients are currently being served by lawyers; in other cases those clients are getting little or no help from lawyers. The sheer number of startups on the LawSitesBlog list is striking, not to mention the fact that the venture capital firms investing in them must see significant potential revenues here. These startups will bring meaningful change

<sup>5</sup> canadianlawyermag.com/legalfeeds/author/gabrielle-giroday/report-indicates-lawyers-satisfied-with-legal-process-outsourcing-7068/



# What is blockchain?

While the technology behind blockchain is very complex, the functionality at its core is quite simple. This infographic explains how blockchain works.

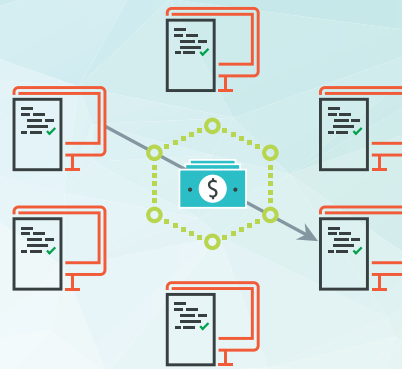
## 1. The basics...

- Need at least three people, but more is better
- All mutually agree to be in a group for some common purpose
- Group members are anonymous to each other
- All group members see every transaction



## 2. A sample transaction – the transfer of funds between two people in the group...

- Lender announces a \$500 transfer and it's seen by all
- Every group member has a full copy of the account of every other group member, a **distributed ledger**
- Each checks lender's balance, and if enough, each enters a transfer in their ledger
- The transaction is then considered complete
- This continues for further transactions



## 3. Locking a ledger page

- When a ledger page is full, its contents are run through a **cryptographic calculation** that generates unique code which is a **"hash"**
- You always get same hash for a given input
- Changing just one character on the page will result in different hash
- Hashing the ledger page "locks" it, making it verifiable



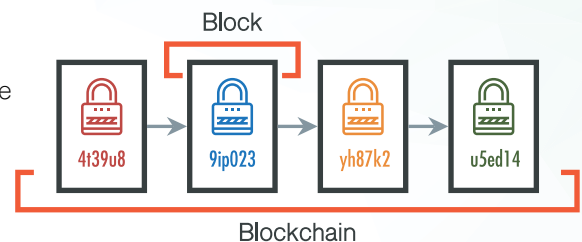
## 4. Mining

- The first to calculate hash announces it to the group
- Others check hash
- If it is verified by the majority in the group, first person gets paid nominal amount of new money
- This is called **mining**



## The secret sauce in blockchain...

- The hash of the prior page is calculated into the hash of the current page
- Each ledger page is a **block**
- The linked blocks are a **blockchain**
- This gives you a locked and verifiable chain of transactions



The blockchain in this infographic handled simple financial transactions. Blockchain systems can include smart contract functionality and could be used for complex commercial transactions involving multiple parties. The appeal of blockchain is its ability to irrevocably verify and record every step in a transaction in a secure environment that is global and platform independent.



For a video explanation visit the LawPRO YouTube page.

to the legal services business. Take a look through LawSitesBlog to gain an appreciation of the types and variety of legal services that these entrepreneurial and innovative startups are providing to human beings and entities that are looking for help with legal issues.

## How does the legal profession respond to alternative legal services providers?

At the most basic level, there are just three options for dealing with alternative legal service providers.<sup>6</sup> They are:

1. prosecute them for the unauthorized practice of law;
2. ignore them; or
3. bring them into the legal services tent.

When it comes to dealing with a human being providing legal services, the first inclination of most lawyers is that the human being be prosecuted for the unauthorized practice of law (UPL). This is not necessarily a practical option for several reasons. First, there is the challenge of determining whether the startup is engaged in the practice of law. Is a company that owns a website that generates a will engaged in the practice of law? Does the answer change depending on whether it is a simple will with very basic clauses for an individual or a very complicated will that includes family trust provisions? Is a company that owns a web-based service that predicts litigation outcomes or gives strategy advice engaged in the practice of law? What about a company that solely does document review for eDiscovery or due diligence purposes?

UPL prosecutions tend to be very time-consuming and expensive. Most legal regulators do not likely have the resources at present to launch large numbers of UPL prosecutions, and it's probably safe to assume members of the profession are unwilling to pay significantly higher annual dues to give their regulators the resources to do so. It's also important to keep in mind that UPL prosecutions are not intended to protect lawyers' turf; rather they are intended to protect the public from suffering damages due to incompetent legal services. Last but not least, human beings see UPL prosecutions as self-serving and protectionist, and alternative legal services providers helping individuals that were otherwise not getting help from lawyers and paralegals would likely argue that access to justice is being thwarted.

In some ways the second option is the status quo. As a profession we are mostly ignoring alternative legal services providers. This option is easier and far less expensive than the UPL prosecution option, but it isn't in the best interest of the legal consumer. Almost universally, the terms of service on alternative legal services provider websites state that the forms or services offered are not legal advice

and are offered without warranty on an "as is" basis. The terms of service also specify that there are limitations to the liability of the provider, at best, a limitation to the cost of the service, and more typically, there is a provision that says there will be no liability whatsoever. Lawyers and paralegals may not like this option as it leaves the door open for the alternative legal services providers to encroach on the work that is currently done by lawyers and paralegals.

To address the public protection shortcomings of the previous option we could consider bringing the alternative legal services providers into the regulatory tent. As the current regulatory regime operates by licensing individuals, this option might involve exploring some form of entity regulation. Another option would be to bring in selected types of services based on an assessment of where client protection or other regulatory needs are important or necessary. Client protection would likely be less of a concern when dealing with a parking ticket but a greater concern where a will was being drafted. Some providers may like pursuing this option as they will feel falling under the regulatory umbrella will give them more credibility with consumers. Others, likely in larger numbers, perceive this will increase their costs and decrease their ability to provide access to justice. So there are various options for less regulation to consider and evaluate.

## How should lawyers respond to the changing practice climate?

The disruptors reviewed in this article will bring significant change to the legal profession. Lawyers need to recognize that these disruptions are occurring and respond to the changes they will bring. Areas of practice will come and go, as they always have. Cannabis law has burst on the scene in just the past year or so. An aging population will likely mean more work in coming years in the wills, estates and elder law areas of practice. Clients are going to need help dealing with blockchain and other emerging technologies. But lawyers need to think beyond traditional areas and manners of practice.

The access to justice problem is an issue members of the profession should actively work to address on our own and with the input and assistance of other stakeholders. It is unlikely there will be an increase in legal aid funding that would be sufficient to help a significant portion of the human beings with unmet legal needs. Offering *pro bono* services is a great way to give back or support a personal cause, and while it will help many, it's also not a solution to the unmet legal needs problem. Lawyers should consider unbundling or limited scope retainers as there are opportunities to help large numbers of clients who can pay for help on a part of their matter (visit [practicepro.ca/limitedscope](http://practicepro.ca/limitedscope) for tools and resources to help you provide limited scope services), but unbundled services can only chip away at part of the unmet legal needs problem.

<sup>6</sup> A post on the Law2050 blog titled *When Is Legal Industry Innovation a Policy Disruption?* suggests there are four choices: (1) Block – prohibit the innovator model altogether; (2) OldReg – apply the incumbent regulatory regime as is and see how it fares; (3) NewReg – invent new regulations for the innovator model (and possibly the incumbents); and, (4) Free Pass – leave the innovator alone and let the market chips fall where they may ([law2050.com/2017/12/22/when-is-legal-industry-innovation-a-policy-disruption/amp/](http://law2050.com/2017/12/22/when-is-legal-industry-innovation-a-policy-disruption/amp/)).

In their recent book *The Future of the Professions: How technology will transform the work of human experts*,<sup>7</sup> legal futurists Richard and Daniel Susskind see two distinct futures for most professions, including the legal profession. One future will see some continue to work in traditional ways. The other future – the one that will bring fundamental change – will see increasingly capable machines and alternative service providers aided by technology transform the way practical expertise is shared amongst members of society. “The 7 models for legal services” sidebar lists the various models the Susskinds’ predict for the future of legal and other professional services. Some of these models have already started to displace the work that is currently done in traditional ways by many professions. For

now, these two futures will operate in parallel, but in the longer run – perhaps in two to three decades – the Susskinds see the second future as dominating and leading to a gradual dismantling of the legal and other professions as we know them today. The legal services monopoly is coming to an end.

There will still be a market for Cadillac legal services at Cadillac prices. Lawyers that are seen as the top experts in a particular area will be sought after. Clients with “bet the farm” issues will also be willing to pay for help with little or no consideration of cost. Traditional practice will continue for this group of lawyers, but this segment of the market is very small, and will likely shrink. As time goes on, lawyers serving the

<sup>7</sup> Oxford University Press, 2015.

## 7 Models for legal services

In *The Future of the Professions: How technology will transform the work of human experts*,<sup>1</sup> legal futurists Richard and Daniel Susskind propose seven models for the production and distribution of the practical expertise by lawyers and the members of other professions. The models they propose are as follows:

1. The traditional model: This model will be very familiar to most lawyers as it is the way we currently do business. That is, human professional providers undertaking their work, usually by way of real time, face-to-face interaction that is rewarded according to the amount of time spent.
2. The networked experts model: This model also involves professional human providers, but they will cluster, more or less informally, via online virtual teams rather than physical organizations. They will offer multi-disciplinary services (e.g. two or more of legal, accounting, regulatory, environmental, etc.).
3. The para-professional model: This model is similar to the traditional model in that services are provided by way of consultation, one human being with another. However, the provider here is not a specialist, but rather a person with more rudimentary training in a discipline. These para-professionals will be supported by procedures and systems that allow them to do some parts of the work that historically was done by a human expert.
4. The knowledge engineering model: In this model, knowledge in a given area of expertise is incorporated into systems that are made available to less expert or lay people as an online self-help service.
5. The communities of experience model: In this model, evolving bodies of practical expertise are crowd-sourced, that is, built-up through the contributions of past recipients of professional service or of non-experts who have managed to sort out problems for themselves. Wikipedia operates in this manner.
6. The embedded knowledge model: This model involves the distillation of practical expertise into some form that can be built into machines, systems, processes, work practices or physical objects. An example of this would be an HVAC system that monitors and controls air quality to meet regulatory requirements.
7. The machine-generated model: In this model, practical expertise is originated by machines, not humans. The machine-generated model will involve big data, artificial intelligence and technologies yet to be invented.

<sup>1</sup> Oxford University Press, 2015.



## Future of law news and developments:

To help you keep up on news and developments on the future of law, these people and organizations publish regular updates on Twitter and their blogs:

**@CFCJ\_FCJC:** News on A2J issues from The Canadian Forum on Civil Justice, a national nonprofit dedicated to access to justice research and advocacy.

**@cloc\_org:** News and information from the Corporate Legal Operations Consortium.

**@Jordan\_law21:** Legal futurist Jordan Furlong provides commentary on a changing profession.

**@legalfutures:** News and information on what's happening in the U.K.

**@LeanLawStrategy:** Current news and thought provoking comments and insights from legal strategist and innovator Kenneth A. Grady.

**@legalmosaic:** Thought provoking articles from legal industry strategy consultant Mark A. Cohen.

**@RyersonLIZ:** The Legal Innovation Zone is a legal tech incubator run out of Ryerson University.

**@ronfreidman:** Consultant Ron Friedman comments on the future of law, knowledge management, legal technology, better process and firm business models.

**@tagactiongroup:** News on A2J in Ontario from TAG-The Action Group on Access to Justice, a working group of justice system stakeholders.

**@wihender:** Prof. Bill Henderson from Indiana University Maurer School of Law provides insightful comments on the future of law and legal education.

rest of the legal market are more likely to find themselves competing with each other and alternative legal services providers, especially on lower value commodity-type services. They will have two choices – competing on service or competing on price.

To compete on service, lawyers will have to provide superior service and also educate clients on the benefits of that superior service. A client that understands the benefits will likely be willing to pay more for those services. In the shorter term, this can be done one matter at a time. For years a real estate lawyer I knew refused to lower his fees when potential clients called him for a fee quote. He quoted fees that were typically \$150-\$250 more than what other lawyers had quoted them. He said to clients “I’m sorry, I can’t do the work I need to do properly to complete your deal for a fee that is that low.” By his estimate, clients stayed with him about two-thirds of the time. He also felt the clients he was getting were more appreciative of the work he was doing and less likely to be unhappy later on, even if minor issues came up.

But the bigger pay-off is in the longer term where competing on service means building an ongoing relationship with the client. This involves thinking beyond quickly preparing articles of incorporation for a minimal fee. Spend time with the client to learn more about the client’s future plans. Highlight information and issues that the client should consider, and in particular, any steps the client could proactively take to be in a better position or avoid problems. For the incorporation example just mentioned, this means setting a goal of becoming the lawyer for a growing and prosperous business that will need help with other legal issues in coming years. This applies to a one-on-one lawyer-client relationship and at the firm level for a larger client.

Competing on price means going toe-to-toe with law firms and alternative legal service providers that are offering services at cut-rate fees. There will be little to differentiate the service offerings here. This will be low-margin commodity work, most likely produced with the assistance of technology. To compete on price you will need to look at implementing process improvements so you are as efficient as possible. This will mean delegating or outsourcing work to get it done at a lower cost and using technology to automate parts of the process (e.g., web-based client intake, document automation to create documents or offering online services). Lawyers and law firms have traditionally been slow to adopt new technologies. A general technology competence requirement appears in the ethics rules of only 26 U.S. states. Many alternative legal services providers have embraced technology and lawyers and law firms will need to do the same if they hope to compete. You don’t need to learn to code, but you do need to understand how technology can be used to work more efficiently and effectively.

Last, but not least, lawyers should not forget the potential clients that we are not currently serving. Many of the alternative legal services providers are looking for ways to help these unserved clients and lawyers need to do the same. It goes without saying that the traditional model of practice doesn’t work for this group, mainly due to affordability. While unbundling opens the door to some of the unserved group to get help on parts of their matters, new practice models using technology have greater potential to help this group.



## Your next steps

If you want a clear picture of where we are going, read *The Future of the Professions: How technology will transform the work of human experts* by Richard Susskind and Daniel Susskind. Nothing else I have read more clearly and convincingly elucidates the future of legal services and how technology will transform the traditional practice of law.

The Canadian economy, and the law firms within it, were isolated from the fallout of the 2008 financial crisis. Law firms of all sizes in the U.S. and U.K. saw a significant drop in the demand for their services and the start of a transition to a world where clients started demanding lower fees. The Canadian ecosystem has been fairly isolated from changes elsewhere in the world, but these changes are starting to happen here. Legal forms are available online. In-house counsel are learning from foreign colleagues and participating in organizations like CLOC. As these changes have picked up momentum elsewhere, they may well happen more rapidly in Canada.

The biggest challenge most law firms face is a business model that doesn't fit the changing manner in which legal services are being provided today. Virtually every recent innovation in the legal services market – automation, process improvement, multi sourcing and web-based services – has operated to reduce the amount of time and effort required to produce and deliver legal services. In contrast, most law firms price work, bill clients, compensate lawyers and reward partners based on the amount of time and effort required to produce and deliver legal services. At many firms the barriers to change are significant when the personal experience and comfort zones of most lawyers are coupled with firm culture and incentives.<sup>8</sup>

To help bring meaningful change to your firm you should develop a strategy. Richard Susskind's *Guide to Strategy for Lawyers*, published by the CBA Legal Futures Initiative, provides a general step-by-step guide that lawyers and law firms in all practice settings can use to start to create a strategic plan that will help them implement changes to successfully adapt to the changes that will occur in coming years. The "Further reading" sidebar contains other books that you may find helpful. The "Future of law news and developments" sidebar lists people and organizations who publish regular updates on Twitter and their blogs. The sidebar on page 14 gives practical examples of what you can do.

Bill Gates once said that we always overestimate the change that will happen in two years, and underestimate the change that will happen in 10 years. While the legal profession probably won't look that different two years out, in all likelihood it will be radically different in 10 years, in ways most of us can't see or imagine. The profession needs to rise to the challenge and find the opportunities these changes will bring. ■

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*Futures: Transforming the Delivery of Legal Services in Canada.* Canadian Bar Association Futures Task Force, 2014. This report offers insights on the changing legal marketplace and the opportunities that can arise from lawyers choosing to adapt to change.

*Law Is A Buyer's Market: Building A Client-First Law Firm* by Jordan Furlong. Self-published, 2017. Great insights into how clients think about legal services and how law firms should respond.

*Legal Evolution* blog by Prof. Bill Henderson. Thought provoking articles on the future of law and legal education.

*The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail (Management of Innovation and Change)*, by Clayton Christensen. Harvard Business Review Press, 1997. Lots of lessons for the legal profession in this classic book that explains why most companies miss out on new waves of innovation.

*Winning Alternatives to the Billable Hour: Strategies that Work* by Mark A. Robertson and James Calloway. American Bar Association, 3<sup>rd</sup> edition, 2008. This book includes practical advice for adopting alternative billing methods, illustrated with case studies about real firms that put them into practice.

The American Bar Association's Law Practice Division has dozens of excellent books on legal technology generally as well as books on specific products. They have published many other books on other law practice management topics (finances, marketing and management). Many of these books are available for loan to Ontario lawyers from the practicePRO Lending Library ([practicepro.ca/library](http://practicepro.ca/library)).

*Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* by Gillian Hadfield. Oxford University Press, 2016. Perspectives on why our legal institutions are out of step in a digital world and what we should do about it.

<sup>8</sup> Paraphrasing oral comments made by Jordan Furlong at *Law Is A Buyer's Market: Building A Client-First Law Firm* book launch, March 23, 2017, at Ryerson Legal Innovation Zone.



# Ideas for rethinking your law practice

The changes facing the legal professional may seem daunting, but all lawyers can rise to these challenges and embrace the opportunities they present. There are many ways to respond, some are quite small and easy, and others require a significant investment of time and money. Some can be done by individual lawyers, and others require changes at a firm level.

Every journey, and even the longest journey, begins with one step. Before you begin the journey to evolve your practice, ask yourself what you love and hate as a consumer when you patronize businesses. Keep these thoughts in mind as at one time or another your clients may have had similar pleasure and pain reactions to your services. The following list contains some options you can consider for transforming your practice:

## Convenience

Today everyone seems quite busy and the instant gratification provided by online shopping and internet searches has greatly shortened our collective patience.

- Obviously, you cannot be available to your clients at all times, but you may be able to use client portals, chatbots or other technology tools to provide on-demand access to client information and even some legal advice or services.
- Some lawyers schedule weekend and evening appointments for their clients or potential clients, if requested. If your firm caters mainly to individual consumer clients, you might consider having regular evening office hours one day per week and closing at noon on Friday. Some individuals may have pay docked or have other negative work consequences from scheduling appointments during regular business hours and would hire you just because the firm is open every Thursday night.
- Appointments by a secured videoconference will likely become increasingly popular in the future.

## More for less

Clients are demanding more for less and will continue to do so. Lawyers often hear that observation as a demand that lawyers receive less. Fortunately, this scenario can be a win-win if you use technology effectively along with different methods of service delivery.

- Automation of routine document creation combined with fixed fees.
- “Unbundled” or limited scope services let you share the workload with the client. Visit [practicepro.ca/limitedscope](http://practicepro.ca/limitedscope) for resources to help you accomplish this.
- Being a current (or recent) client of the firm confers the benefit of free notarial services, access to a client-only portal with videos featuring free general information or advice, downloadable documents and even a few free forms.

## Client-focused

You may believe that you have always had a focus on clients, but in reality that focus was often on the client’s legal matter.

- A key focus of the initial engagement interview is determining what the client wants. Set clear expectations and advise the client about the range of possible outcomes and how you can assist them on the current matter, but at the same time remember to flag longer term considerations for them.

- Consider whether there are ways to give clients more price predictability (e.g., offer flat fees or other alternative fee arrangements). Setting fees for different stages of a matter can help accomplish this.
- Meet regularly with major or long term clients to get to know them better.
- Look for ways to build a deeper relationship with your clients. Ask yourself: How can I become their “lawyer for life”?

## Efficiency

Our focus has always been doing the legal work right no matter how long it took. Now we must be more efficient and provide these “perfect” legal services as expeditiously as possible.

- Take time to learn more about technology and how it can help you reduce costs and be more efficient.
- Invest the time to analyze and improve your workflows. Digital client files and paperless workflows are an important part of this.
- Most lawyers can talk faster than they can type. Consider using voice recognition software.
- Would outsourcing legal or back-office work allow you to be more efficient?

## Adapting and evolving your practice

Many lawyers have become specialists, focusing their work on one or more related practice areas. Consider how you could grow or change your practice by asking the following questions:

- Is there an area of my practice I should drop because it is not profitable or takes up too many resources?
- Is there a new area of practice I could consider developing given my skills, experience and interests?
- Consider how you can work with other lawyers in your office to make the options listed on this page happen at your firm.

The future is now. Many of the changes occurring in the legal services arena will happen regardless of whether lawyers want them to or not. Be a voice for change and take the steps that are necessary to evolve and adapt your practice. The resources listed in the other sidebars in this article will help you on that journey.

Prepared with assistance from Jim Calloway, Director, Management Assistance Program, Oklahoma Bar Association.





# Artificial intelligence:

What is AI and  
will it really  
replace lawyers?

If you scanned social media or the headlines in many online or print-based newspapers or magazines published in 2017, you were pretty much guaranteed to see posts and articles on artificial intelligence (AI).

Most of these articles suggest that AI is in the process of fundamentally changing our lives at work, home and play. And if you believe the comments in these articles, the good news is that we will have more free time to enjoy virtual-reality worlds and have our self-driving cars take us around the countryside. The bad news is that many people, including lawyers, will supposedly lose our jobs to AI technology and robots. There is no doubt, along with other major disruptions (See “Perspectives on the future of law: How the profession should respond to major disruptions” at page 5), AI technologies have and will bring changes to the legal services arena. This article attempts to sort out the hype and reality of how AI will impact the legal profession.

## What is AI?

To really understand the impact AI will have on the legal profession, we should start with a clear understanding of what AI really is. This is difficult as even AI experts can't seem to agree on a definition for AI. To further complicate things, the definition of AI has changed over time as computers have become increasingly capable. For example, while some considered it AI when it was newly available, optical character recognition (the ability of a computer to recognize letters in a scanned image of a document) is now considered a routine technology by most people.

At the simplest level, you can say AI is the capability of a computer or machine to imitate intelligent human behavior. To add some details, it means a machine that can learn and think. A machine that is “smart” enough to know or recognize things and mimic human cognition for problem solving. As you will see, there are many different AI technologies involved in mimicking human senses and thinking. Let's look at them individually, and then discuss how they can work together. As you will also see, higher levels of human functionality only become possible when different types of AI work together.

## Text/speech manipulation

Using skills that were learned at an early age, with little thought or effort, most people engage in many oral conversations and countless instances of reading text on a daily basis. Text and speech manipulation seems very easy to most of us. But when you break it down, there's a lot happening here. It's much harder than it looks.

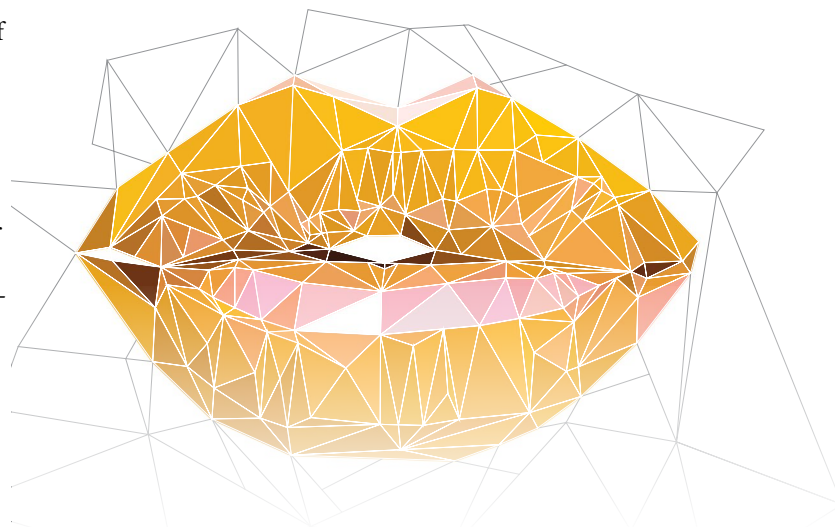
The first version of DragonDictate® software was released in 1982. Each word had to be enunciated individually with a slight pause between them so it could recognize the intended word by analyzing

the sound pattern it heard. It had no understanding of the words it was translating and it easily confused words like to, two and too or there, their and they're. The widely used current version of this software, Dragon Naturally Speaking®, is far more capable. It does an excellent job of recognizing words in a continuous stream of speech and will improve its accuracy by learning the nuances in a particular person's voice. As it converts spoken words to text on a screen it can simultaneously correct grammar and pick the correct homonym by looking at the other words in the sentence. However, it still doesn't really understand the words it is transcribing.

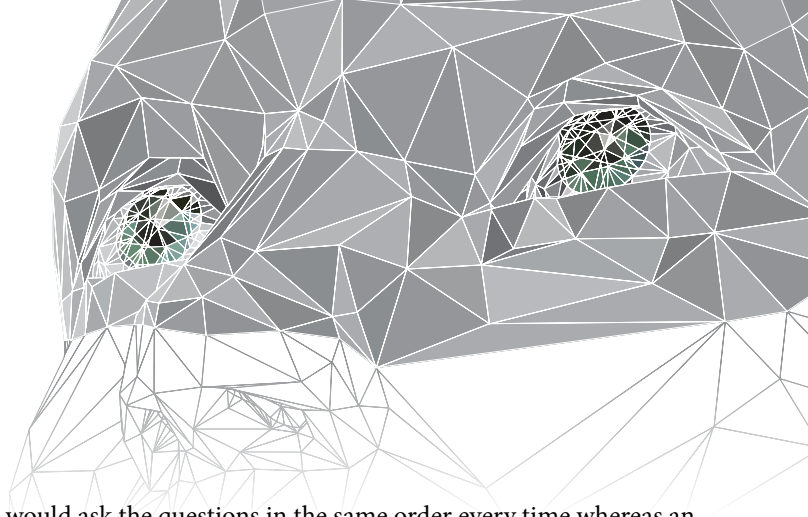
Text readers can convert text into words spoken by a very human sounding voice. While early text readers sounded robotic and were hard to understand, Google's DeepMind® AI allows computers to mimic the human voice in a manner that is virtually indistinguishable from a real human voice.<sup>1</sup>

While it takes some effort to learn how to use Dragon Naturally Speaking (you need to learn 20 or so voice commands to use it effectively), it is a tool that can make most lawyers more efficient as it lets them put words on a screen faster than they can type. It is very helpful for answering emails or drafting documents. It is less helpful for drafting long documents with complex formatting. Voice-recognition software is being used in other situations. The basic features on most smart phones can now be operated with spoken commands, as well as hands-free smart speakers like the Amazon Echo and Google Home. In the not too distant future you will be talking and listening to your car and most of the devices and appliances in your house.

While text readers are currently used primarily by lawyers with visual impairments, they can be useful for any lawyer looking to have a document read to them for proofing or review purposes, or while they are commuting.



<sup>1</sup> Listen to some sample audio files and read more about how they are created here: [deepmind.com/blog/wavenet-generative-model-raw-audio/](https://deepmind.com/blog/wavenet-generative-model-raw-audio/)



## Vision

The human eye is truly amazing. It can see in light and dark and change its focus from near to far and back again in an instant. With the assistance of powerful software, computers are learning to see too, and they are also gaining some of the visual processing capabilities that humans have.

Machine vision couples a visual input with analysis and some kind of mechanical device. An example would be a device that sorts fruit by ripeness as it passes by on a conveyor belt.<sup>2</sup> But it has moved far beyond recognizing when a green tomato goes by – more advanced AI technologies are allowing computers to be smart enough to recognize people and objects in a picture. The tagging feature in Facebook® has the ability to recognize you or one of your friends in a picture you just uploaded. Google's image search has the ability to identify what a picture contains (e.g., a dog, a forest, mountains or a sunset). These technologies are not perfect as they don't accurately identify the contents or faces in a picture 100 per cent of the time, but they are getting very impressive.

## Decision trees

Moving up a level we have decision trees. While vision and text manipulation may seem a bit abstract when it comes to the work that needs to get done on a daily basis in a law office, decision trees will seem more relevant as they can directly mimic the very specialized work that lawyers do.

A decision tree is a logical structure that contains every question a lawyer would normally ask when handling typical factual scenarios and legal issues for a certain type of legal matter. For example, consider building a decision tree that would do the intake on a will matter. You would first assemble the questions to gather the basic identity and background information of the client and beneficiaries. Further questions would draw out the client's instructions on the basic provisions that go in every will (e.g., executor(s) and alternate executor(s), specific bequests and gifts, gift overs, etc.). A will matter intake decision tree would consist of a few hundred or more questions in many branches. The answers to certain questions would trigger the decision to answer or skip further questions in other branches (e.g., the question asking if any beneficiaries were minors would trigger the need to ask or skip the questions on setting up trust provisions). Once all the relevant questions are asked, the answers could be dumped into a document assembly engine which could create a will that has all the relevant clauses based on the client's information and instructions in a matter of seconds.

A decision tree "thinks" in much the same way that a lawyer would, albeit in a much more organized fashion. A decision tree system

would ask the questions in the same order every time whereas an experienced wills and estates lawyer would ask all the same questions, but the order might change (unless she was using a checklist).

If you had enough time and money, you could build a decision tree that would handle every possible scenario that might be encountered on a will intake. This decision tree would likely have thousands of questions but it would be impractical as most of the questions would not be relevant to most clients. Some lawyers will argue that every matter they handle is unique and requires a custom solution which only a lawyer can provide after having done a thorough analysis. While there are extremely complex matters that are unique if you analyzed them down to very detailed factual level, in most areas of the law there are one or more common factual scenarios and legal issues that repeat themselves over and over in the majority of matters. The trick is building a decision tree that will ask all necessary questions to draft a will in the majority of situations, while at the same time flagging when manual intervention is needed because the facts or legal issues are not properly addressed in the questions within the decision tree. Typically a lawyer would still meet with the client to review the will and make sure it was correctly drafted and that the client understands the provisions in it.

Decision trees can be built into website or smart phone apps and could be helpful to automate the intake process on a wide variety of legal matters or for some stages of some types of matters (e.g., gathering the information for a financial statement on a family law matter). Spending 30 minutes with the client to review information provided from an automated intake is more efficient than spending two hours with the client transcribing all the background details of the matter. Some online forms sites are using decision tree and document assembly technology to automate the creation of forms that are provided directly to clients.

## Natural language processing

Natural language processing (NLP) takes things to the next level and involves creating AI that can understand how humans understand language. There are two approaches to NLP: rules-based NLP and statistical NLP.<sup>3</sup>

<sup>2</sup> Watch this video of a machine that sorts red and green tomatoes: [youtube.com/watch?v=Bur5g2rvXog](https://youtube.com/watch?v=Bur5g2rvXog)

<sup>3</sup> Paraphrased from *What is Natural Language Processing (NLP)?* by Dr. Rutu Mulkar-Mehta ([ticary.com/2017/12/12/what-is-nlp.html](https://ticary.com/2017/12/12/what-is-nlp.html)).

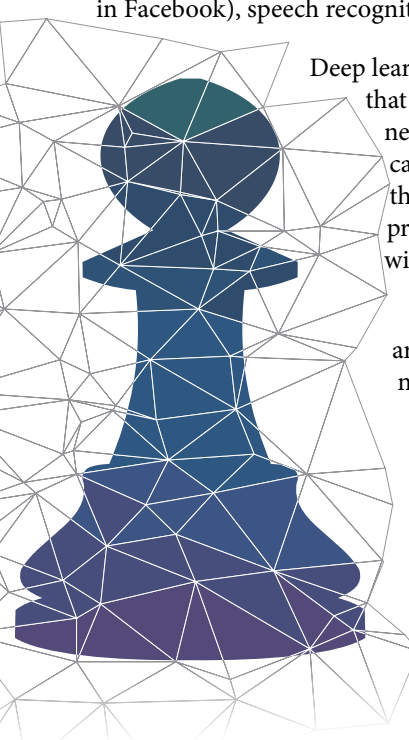
Rules-based NLP involves common sense knowledge which is all the inherent background knowledge human beings take for granted in our daily lives (e.g., freezing temperatures cause hypothermia or hot coffee will burn skin). Encoding common sense knowledge is a very manual and time-consuming process because it isn't written down clearly anywhere and it is difficult to identify all the rules required to understand something. Further, some common sense knowledge which humans inherently and easily understand can't be explained to a computer with a simple rule (e.g., what is death or what is dancing).

Statistical NLP takes a different approach. It uses statistics to review large amounts of already existing data for NLP tasks. It involves using statistics to find patterns in a large data set and then uses those patterns to induce a solution to the problem it is trying to solve. In many NLP applications better results are obtained by using both rules- and statistical-based NLP.

Relative to the previous types of AI, NLP appears to have an even greater understanding of the words and information it is processing. Siri®, Google Translate and other similar online translation tools use NLP. NLP is now at the point where translation tools can do real-time translation from one language to another.

## Machine learning

Machine learning is another type of advanced AI that is widely used for legal applications. Machine learning occurs when computers learn something without explicitly being programmed to do so. Machine learning is used for image recognition (e.g., tagging in Facebook), speech recognition and NLP.



Deep learning is a type of machine learning that uses neural networks. A neural network is a computer program that can figure things out on its own by thinking like a human, as opposed to a program – that is, to figure things out with a collection of explicit rules.

The process is simple; the results are amazing. You first take a large number of training examples, such as pictures of apples. The neural network program uses these examples to automatically infer rules for recognizing apples in pictures. A larger number of training examples improves

the accuracy of these rules. You then give it a large collection of pictures and ask it to look for apples. Supervised learning occurs when a human verifies which pictures in the search results are apples and the program takes these confirmations and improves its rules for recognizing apples. Unsupervised learning can occur when the program uses other information to verify what is in the picture (e.g., how the picture is described or tagged). Every time you tag a friend in Facebook the rules for recognizing that friend are improved. When deep learning is used on very large data sets the neural networks become very smart and results are very accurate. Google Translate taught itself how to do better translations using deep learning and the Google engineers don't know or understand the thought process it used.

And it goes far beyond recognizing pictures of apples. Litigation strategy tools like Lex Machina® can analyze a set of facts against a collection of past decisions and give a prediction of the likely timing and outcome that is more accurate than an experienced counsel can give.

## Expert systems

The AI technologies reviewed above are already doing some of the types of work traditionally done by lawyers, and will undoubtedly be doing more of it in the future. By mimicking human intelligence, these AI technologies can be used to create expert systems – systems that have some level of human expertise that can be harnessed to complete a task normally done by lawyers. Here are some examples.

In the not too distant past, document discovery for litigation was done by manual review. The ability to do keyword searches of scanned collections of documents was considered a quantum leap forward. That advance pales in comparison to the abilities of AI-enabled eDiscovery tools. By using deep learning, these tools can use the words and word patterns in a small collection of documents identified as relevant or privileged to search across a large database for other relevant or privileged documents. They can then use the contents of the newly identified relevant or privileged documents to refine the search parameters to find further potential relevant or privileged documents. This is called predictive coding or technology aid review (TAR). Studies have shown that TAR enables you to search large collections of documents far more quickly and accurately than humans can, and at a fraction of the cost of a manual search.

Tools that have NLP abilities can be used in a wide variety of other legal applications. Contract review tools like Kira<sup>4</sup> and Diligen<sup>5</sup> have the ability to read through a contract and identify types of clauses and prepare a summary of key contract terms.

<sup>4</sup> kirasystems.com

<sup>5</sup> diligensoftware.com



# Can robots lie?

While AI has the potential to do a lot of good, there are some who suggest there is also the potential for AI to do negative things. Here's an example of how one AI system told a harmless lie.

At the College of Law Practice Management's 2017 Futures Conference I saw a fascinating presentation by Professor Ashok Goel. His program at the Georgia Institute of Technology has 6,000 students each year. The students have multiple coding assignments that they complete with the direction and assistance of teaching assistants (TAs).

There is an email system which allows the students to communicate with each other as well as Professor Goel and the TAs. The students send thousands of emails asking questions about their assignments. To help reduce the workload of the teaching assistants, Professor Goel created Jill Watson, a virtual TA.

Professor Goel analyzed thousands of previously answered questions and their respective answers. He categorized the questions to identify the questions that were asked over and over again which, in turn, helped him create answers that Jill Watson could provide to specific questions. Jill was programmed to answer questions only when she was sure the answer was 97 per cent or more likely correct. The students were not told that Jill Watson was a virtual TA, and aside from one direct question, it appears the students didn't figure this out. As real TAs rarely answers questions instantly, at the start Jill was programmed to delay giving answers so as not to blow her cover. Subsequently, Jill was programmed to give answers immediately as it is much more helpful for students to get immediate answers to their questions.

The vast majority of Jill's answers addressed questions about lab assignments. However, on one occasion, Jill told a lie. In the first week the students sent messages introducing themselves to each other. One student stated she was from London, England. In response, Jill Watson replied that she was also from London and had recently seen and enjoyed a particular show there.

Now of course, Jill hadn't been to London and certainly hadn't seen this particular show. However, when Jill looked at the collection of the prior questions, she noticed that a virtually identical introduction had been given previously. Jill's programming also told her the answer given previously (by a real TA) was 97 per cent or more likely correct, so she sent an answer to the student.

So there you have it, Jill told a lie. A fairly harmless lie, and certainly not one made with any malice by Jill. But a lie nonetheless. This serves to highlight how complicated the ethics of AI will become. Teaching computers to think like humans is one thing, teaching them human ethics and emotions is something else again.



Young and old lawyers alike will find some comfort in the prediction that “The Singularity,” a term that refers to the point when AI will be indistinguishable from human intelligence, is currently estimated to occur around 2040.

## AI and access to justice

In 2012, a website (which is no longer active) was launched to help immigrants brought to the U.S. as children understand the Deferred Action for Childhood Arrivals (DACA) initiative. DACA granted reprieve from deportation to eligible young immigrants. The site had English and Spanish versions and offered an online self-screening tool to help DACA applicants review their eligibility, educational videos, FAQs and a directory of free or low-cost nonprofit immigration legal services providers in all 50 states. Recognizing that many DACA candidates would not have access to a computer, but would likely have a smartphone, a free app for iPhone and Android that included all the same functionality as the website was created. This app provides a great example of how a particular technology channel – an app on a smart phone – was used to provide access to justice to a group of people who likely would not have been able to obtain help in any other manner. It is easy to see how this could be done for other areas of the law with similar issues (e.g., family law information and forms).

A2J Author<sup>7</sup> is a software tool developed in the U.S. that delivers greater access to justice for self-represented litigants by enabling non-technical authors from the courts, clerk’s offices, legal services programs, and website editors to rapidly build and implement customer friendly web-based interfaces for document assembly. A2J Guided Interviews<sup>8</sup> created with A2J Author removes many of the barriers faced by self-represented litigants, allowing them to easily complete forms through a step-by-step interface and then print court documents that are ready to be filed with the court system. Recognizing that a page full of questions can be daunting, A2J Guided Interviews presents one question at a time on the screen.

Visit Travel Ban Navigator<sup>8</sup> to see a nice example of a simple web-based interface. It is a complimentary tool from ComplianceHR that provides U.S. employers and current and/or prospective employees with preliminary information to help determine whether they are affected by President Trump’s revised “travel ban,” issued in September, 2017.

While AI-based technologies can be used to offer legal information and services in new and cost effective ways on websites or smart phone apps, it must be recognized that some people may not be able to access web-based services due to cultural, language, disability barriers, or the simple fact that they don’t have access to a computer or smart phone.

ComplianceHR<sup>®</sup> offers HR departments a suite of intelligent, web-based compliance tools that allow them to quickly and efficiently handle routine and repetitive employment compliance obligations without the need to contact a lawyer. This tool helps with:

- assessing whether someone is an independent contractor or employee;
- assessing whether someone is exempt from the requirement to pay overtime;
- assisting with the creation of customized employment documents such as offer letters, non-disclosure agreements for any jurisdiction, or non-compete agreements; and
- assisting with various other compliance issues.

It is interesting to note that ComplianceHR is a joint-venture between AI software provider, Neota Logic, and employment law firm, Littler Mendelson P.C. Littler originally hired Neota Logic to create a tool that would allow the firm to provide these services to its clients. Recognizing the need, Neota Logic and Littler entered the joint-venture to sell this product to others. Blue J Legal<sup>™6</sup> is a Canadian product that performs similar services.

## Robotics

Ultimately we can expect that AI will be built into anthropomorphological robots that will do our every bidding. Perhaps the pinnacle in legal AI will be the Robot Associate. This associate will work an unlimited number of billable hours without taking a break or making a complaint.

While computers are ever more powerful and AI is becoming ever more capable, the Robot Associate is likely a long way off. AI technologies that can recognize emotions or whether someone is lying are being developed, but we are a long way from robots that can understand and express emotions in the same manner that a human can. We also need to develop AI that can understand the very complicated world of human ethics. See the sidebar, “Can a robot lie?”

<sup>6</sup> bluejlegal.com

<sup>7</sup> a2jauthor.org

<sup>8</sup> clientapps.compliancehr.com/a/travelbannavigator



When doing work for clients, lawyers typically work very hard to avoid making errors. This is certainly appropriate where the matter involves significant costs or consequences. But what about the opposite extreme: Does a parking ticket warrant the same standard of care that a murder charge does? It is fairly obvious that a murder charge warrants a high standard of care and that the time and expense of retaining an experienced criminal counsel is justifiable. On the other hand, the financial and other consequences of a parking ticket are fairly minor and it just doesn't make financial or practical sense to hire an expensive lawyer to defend a parking ticket. A technology-based solution that could provide assistance to someone with a parking ticket is a more cost-effective solution. The DoNotPay chatbot is a perfect example of this type of solution. It helped overturn 160,000 London and New York parking tickets involving over \$5 million in parking fines in just 21 months. In the interest of greater access to justice, offering new types of services with a lower standard of care probably makes sense for minor legal issues.

## Who owns the law?

AI systems raise another interesting issue that deserves some thought: Who owns the law? Open and public access to court and tribunal decisions facilitates *stare decisis*, one of the foundational principles of our common law legal system. But what happens when disputes are resolved outside the court process?

Most<sup>9</sup> of the people or companies that create AI systems will expect to be compensated for their work by lawyers or others that are using their products. At the same time, some of these tools have significant potential benefits for litigants. A litigation strategy tool that predicts the outcome of litigation can help a party assess whether the time and expense of litigation is justified. These tools can now predict outcomes more accurately than experienced lawyers can. A prediction that a lawsuit would likely be unsuccessful could help them quickly and privately settle a dispute thereby avoiding an expensive and public courtroom battle.

These tools potentially make courts less relevant. And what about those that can't or don't pay for access to these types of systems? They lose the benefit of accessing precedent decisions and the opinions and reasons behind them. These issues may warrant some discussion.

## Will lawyers be replaced by computers?

Now that you have a better understanding of AI, let's try to answer the question as to whether lawyers will be replaced by computers. From the comments above you can appreciate that AI can already do a lot of amazing things, including many things that mimic some of the work that lawyers do. You will also appreciate that AI

will give machines significantly more capabilities in the not too distant future.

It should also be clear that humans are better at some tasks than computers, and that computers are better at some tasks than humans (and will get better at even more tasks in the future). So yes, some of the tasks that some of us do have already or will likely be taken over by machines at some point in the future. This makes sense for a whole bunch of reasons. The work that AI is good at tends to be the dull, boring and repetitive work that most of us don't like (e.g., eDiscovery or due diligence document review). Having a computer do this work makes sense as a computer can do it more accurately, quickly and inexpensively. Better, faster and cheaper is better for the client and improves access to justice.

We also need to learn where humans and technology can work better together. There are studies that show that humans aided by computers do a better and faster job than either humans or computers working alone.

The software to create AI systems was originally very expensive and it required coding or other special skills. This is changing as there are more vendors offering AI-based tools and services across many areas of practice and, thanks to competition and better technology, the prices for these tools and services are coming down. Document assembly tools have also come down in price and some allow you to build expert systems without the need to learn programming or other special skills. Surprisingly few law firms are using document assembly tools despite the fact they can reduce document creation time from days or hours to minutes or seconds.

But there are loads of tasks that lawyers do that AI and machines can't, at least for the foreseeable future. Robots won't be making submissions in courts for many years. And while small matters like parking tickets will probably be handled by chatbots or apps on a smartphone, lawyers will still be required to do some types of work on larger matters. In the traditional services model, lawyers will still need to meet with clients and show empathy and understanding while counseling a client through the matter at hand.

And in their *Future of the Professions* book<sup>10</sup>, Richard and Daniel Susskind highlight a number of new roles that must be filled to support the various new models they propose will come to be for legal services in the coming years (see the list of these new models in the "7 Models for legal services" sidebar at page 11).

So no, you won't be replaced by a robot, at least not yet. But AI will play a big part in changing how legal services are done and provided to clients in the coming years. Your challenge is to learn how to make greater use of these technologies so you can adapt to the changing times. ■

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**Dan Pinnington is Vice-President, Claims Prevention and Stakeholder Relations at LAWPRO.**

<sup>9</sup> A2J Author is available free to interested courts, legal services organizations, and other non-profits for non-commercial use.

<sup>10</sup> *The Future of the Professions: How technology will transform the work of human experts*, by Richard and Daniel Susskind, 2015 Oxford University Press.



# Thinking of virtual GC work?

## Understand your coverage needs

Outsourcing services that fall outside a company's core expertise (consider for example executive recruiting or IT services) allows the company to access expert work product on an as-needed basis. Outsourcing means not having to pay a full-time salary to an expert who is needed less than full-time, and not having to pay the full cost of the training, equipment, and other overhead expenses of that expert. The adoption of an outsourcing approach to legal services is a natural and inevitable development in business today.

For small companies, legal work has always been outsourced, with a lawyer's help sought in response to infrequent events: incorporation, real estate purchases, the negotiation of important contracts, and the resolution of disputes. Even large corporations with in-house legal departments outsource specialized legal work.

These arrangements have worked well (and will likely endure) for businesses at either end of the size spectrum. But some companies are neither large enough to justify a full-time in-house lawyer nor small enough to manage with only occasional legal help. A new category of providers, some of whom describe their services as those of "virtual general counsel," has emerged to meet the needs of these organizations.

### Virtual general counsel

Virtual GC providers appear in multiple forms: as sole practitioners, as members of traditional firms, as firms specifically created to offer virtual GC services, and as members of multidisciplinary service companies (for example, companies that also offer accounting or tax services).



In general, these providers seek to differentiate their services from traditional business law practice by emphasizing the services of highly experienced providers, ease of access to counsel, familiarity with the client business, and enhanced continuity. They typically offer to work collaboratively with a company's executives to provide guidance not just with respect to major transactions and changes, but with respect to daily operations and preventative strategies. For example, the website for Avökka, a self-styled dedicated provider of virtual GC services, describes a practitioner from the firm as: "...dedicated part-time general counsel who understands your business and participates on your senior management team to advise on day-to-day matters, anticipate issues and solve problems." A variant Avökka offers on its standard

service is the Virtual Country Counsel, for "...multinationals who would benefit from having a part-time General Counsel on the ground in other jurisdictions to manage legal matters."

These services are typically priced based on a contract that is more general in scope and lasts for a longer term than a traditional retainer. Most virtual GC providers advertise that fees under these arrangements are more cost-effective than traditional corporate law services.

Many firms marketing virtual GC services (for example, Conduit Law and Patry Law) also offer lawyers who can support clients on a full-time basis for the duration of a time-limited project.

## Do virtual GCs need professional indemnity insurance?

While lawyers who brand themselves as virtual GC may seek to emphasize the ability of their services to stand in for those of in-house counsel, from a liability perspective, they are in a quite different position.

In-house corporate counsel who are employed by corporations are typically exempt from payment of LAWPRO professional indemnity insurance premiums. This exemption is offered on the basis that these lawyers work for a single client – the company that employs them. The perfect alignment of their work activities with the company's core business means that if they were to commit an error, the error would legally be the company's own; barring misconduct, the company would not have a valid claim against them. Any risk that a company takes in employing an in-house lawyer is not distinguishable from, for example, the risk the company takes in employing an in-house human resources manager. Should the company choose to insure against the risk that its own employees will cause losses, it is free to do so.

A virtual GC, by nature, is not an employee. As a non-member of the company, a virtual GC is a separate legal person who is capable of being sued by the company in negligence,

even if the company were to be, at any particular moment, the virtual GC's sole client. As a provider of professional legal services in private practice, a virtual GC is not exempt from the requirement to have professional indemnity insurance coverage. In fact, because of the potential for high-value losses associated with the provision of services to successful businesses, virtual GC providers would be well advised to obtain excess insurance coverage beyond the limits of the Law Society's mandatory program. Since excess coverage is offered on a firm basis, it may be appropriate to disclose whether there are other lawyers who might, in the event of a claim, be considered to be working in association with the applicant.

Virtual GCs who currently work, or have in the past worked, in association or partnership with other lawyers will also need to obtain Innocent Party insurance. Innocent Party insurance provides coverage against the dishonest, fraudulent, criminal, or malicious acts or omissions of others.

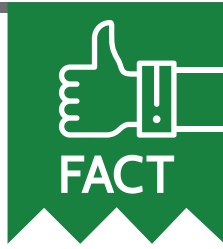
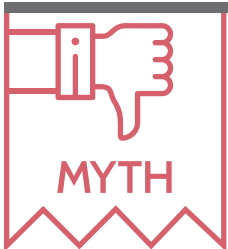
Some virtual GC providers advertise themselves as able to assist the corporation with matters that are better characterized as strategic planning or risk management than as legal advice. A virtual GC lawyer who provides advice that falls outside the LAWPRO definition of professional legal services will need to be aware that his or her professional indemnity policy does not cover the negligent provision of those services. As a result, he or she may wish to consult with an insurance broker about other coverages, for example, miscellaneous E&O-style coverage, that may offer protection for non-legal advice.

While choosing to provide services as a virtual GC will not provide a path to exemption from malpractice insurance requirements, it can be a rewarding career for lawyers who crave the continuity of long-term lawyer/client relationships and an opportunity to support the success of growing businesses. ■

**Nora Rock is Corporate Writer and Policy Analyst at LAWPRO.**

# LAWPRO is not like your auto insurer

## Dispelling common myths about your insurance coverage



In my more than 20 years of defending lawyers on malpractice claims, I continue to be amazed at how little some lawyers seem to know about the “LAWPRO policy” and how a claim is handled. I am also frustrated by how often lawyers have not done even the simplest things that could help them avoid or defend a malpractice claim.

Lawyers often assume that LAWPRO operates like an auto insurance company. This impression is just not correct – LAWPRO is very different from your auto insurer because it:

- Actively works to prevent claims;
- Does not look for ways to avoid providing insurance coverage;
- Appoints repair counsel to fix the mistake and reduce damages if there has been an error;
- Does not settle a claim just because the cost of defending the claim may exceed the amount at issue;
- Takes a principled approach and settles claims where there has been negligence and the client suffered damages;
- Appoints counsel to vigorously defend proceedings if there is no negligence or damages; and
- Works collaboratively with defence counsel and the insured to defend the claim.

From my work defending lawyers, I have found over and over again some common myths about the LAWPRO policy and how claims should be handled. All these comments apply to coverage under the mandatory insurance program LAWPRO runs on behalf of the Law Society, and may also apply to LAWPRO or other excess insurance coverage, if it is in place.

### Myth #1: Only bad lawyers have claims against them.

**Fact** Even the best lawyers make honest mistakes or can face a baseless allegation of negligence from a client that is suddenly unhappy due to unexpected events or changed circumstances. LAWPRO’s claims stats indicate that 4 out of 5 lawyers can expect to have at least one malpractice claim in the course of their career. Most of the lawyers reading this will have to contact LAWPRO to report a claim at least once in their career.

### Myth #2: Lawyers only need to report to LAWPRO when they are served with a statement of claim.

**Fact** Lawyers should report to LAWPRO in a variety of circumstances. These include: when a lawyer discovers or thinks a mistake was made; when a client has asserted that the lawyer made a mistake; when a lawyer is being asked to swear an affidavit or give evidence about their file handling; or, when a request for production or court order has been made for the lawyer’s file. When in doubt, report!

### Myth #3: If a lawyer can fix his/her mistake, then they should try to do that before contacting LAWPRO.

**Fact** A lawyer should never try to fix a mistake or admit to a client a mistake has been made. Instead, LAWPRO should be immediately contacted. Attempting to fix a mistake or admitting an error may

jeopardize the lawyer's insurance coverage, especially if it makes the situation worse. LAWPRO claims professionals or defence counsel can coach you on the conversation you should have with a client if there is a potential claim.

#### **Myth #4: A lawyer working at a firm does not have to worry about his/her LAWPRO policy. It is a firm concern.**

**Fact** The lawyer is individually named as the insured under the LAWPRO policy, not the firm. This is unlike excess policies where the firm is usually the named insured. Any claims should be reported to LAWPRO by the lawyer who made the purported error or is responsible for the file. LAWPRO will look first to the individual lawyer for payment of any applicable deductibles or claims surcharge levies, even if there is an arrangement that the firm will pay these amounts. As well, LAWPRO can look to the partner(s)/shareholder(s) of the law firm the lawyer was at as of the date of the claim for payment of the deductible.

#### **Myth #5: It is better not to take notes or keep your file because it makes it harder to prove you made a mistake.**

**Fact** It makes it harder to defend! While clients remember what was said and done on a file, usually in great detail, in my experience lawyers just do not remember the details. Notes or other documentation in a file that can establish what actually happened can be a lifesaver in the event of a claim.

#### **Myth #6: Reporting a claim will trigger a deductible and claims surcharge levies.**

**Fact** Simply reporting a claim to LAWPRO does not, repeat, does not trigger a

deductible. Lawyers have various deductible choices that include a nil deductible option (where you don't pay a deductible at all), a deductible that only applies when there's a payment further to a judgment, settlement and/or repair ("indemnity payment"), and a third deductible option that applies to indemnity payments and claims expenses. If the third type of deductible applies, 50 per cent of the deductible would be payable when a statement of defence or responding materials are filed, and the remainder would be payable on the earliest of the commencement of discoveries, examinations, or a pre-trial conference is held, or when an indemnity payment is made.

The claims history levy surcharge is only applied if a claim has had an indemnity payment or the entire claim limit has been otherwise exhausted. If a claim is closed without any repair being required or payment made to the other side, then your premiums aren't expected to go up just because you've had a claim reported. Most claims are settled without a finding of negligence. For the years 2006 to 2016, 45 per cent of LAWPRO claims were closed with no costs whatsoever, defence costs were incurred on only 42 per cent of the files, and an indemnity payment was paid on only 13 per cent of the files.

#### **Myth #7: Lawyers do not have to worry about obtaining insurance in excess of the amount afforded under the LAWPRO policy.**

**Fact** The LAWPRO policy provides annual errors and omissions coverage of \$1 million per claim, or \$2 million in the aggregate. Keep in mind that this amount erodes with defence costs and expenses – which can sometimes be significant, even when the allegation of negligence has no merit. Consider the matters you handle and the nature of your practice – get excess coverage if you think you have exposure to a claim that would be

worth more than \$1 million in terms of indemnity (including pre-judgment interest) and defence costs. Excess coverage is not very expensive and gives you great comfort. Visit [lawpro.ca/excess](http://lawpro.ca/excess) for information on LAWPRO's excess insurance program.

#### **Myth #8: I have no insurance coverage after I leave practice.**

**Fact** When lawyers leave private practice (e.g., to retire, go in-house, move to another jurisdiction or take a temporary leave to focus on family) they usually qualify for exemption from payment of the program premiums. Whatever the reason, the policy provides for run-off coverage that covers the work you did as an Ontario practising lawyer, for free! The standard run-off coverage has a sublimit of \$250,000 that covers your work as a lawyer when program coverage was carried prior to going on exemption. This basic run-off coverage remains in place and lasts as long as you are on exemption. Of course, the limits will be depleted by claims that arise after the lawyer goes on exemption and the program coverage may change in future. Lawyers can apply to buy up this sublimit to \$500,000 or \$1 million. It's also worthwhile to check if your current or previous firms have any excess insurance that might also respond to claims made against former members of the firm after they leave and what conditions might apply.

Take the time to learn more about your LAWPRO policy. Visit the [lawpro.ca](http://lawpro.ca) website for a copy of the policy and FAQs about the policy and the coverage it provides. And remember to take steps to reduce your exposure to a claim. [practicepro.ca](http://practicepro.ca) has loads of helpful tools and resources to help you accomplish this. Lastly, please follow the advice I give above to help LAWPRO and your defence counsel defend you in the event you face a malpractice claim. ■

Susan Sack is a partner at Rosen Sack LLP.



# Why excess insurance?

## Celebrating 20 years of the *eXcess*<sup>TM</sup> Program

In 1996 and 1997 LAWPRO (or "LPIC" as it was then known) began collecting information on whether lawyers had coverage in excess of the \$1 million per claim/\$2 million in the aggregate limits provided under the mandatory program. The thinking wasn't that everyone necessarily needs excess. After all, some areas of practice are considered low risk for large claims. If a sole practitioner only ever works on Small Claims Court files, what are the chances that he would exceed his \$2 million aggregate limit in a given year? But depending on the type of practice a lawyer works in or the area of law, there are outlier claims that arise that exceed the \$1 million per claim limit, or a lawyer can have a cluster of claims in a year that can exceed the \$2 million aggregate limit.

Consider what would happen if a tax lawyer made the same error when advising on family trusts to several clients, or if a large mistake occurred with respect to a real estate matter or estate.

When LAWPRO began collecting this information, it turned out that 38 per cent of practising lawyers had excess professional liability insurance available to respond to claims. That sounded a bit low. When LAWPRO drilled down, we discovered that virtually all lawyers practising in firms of greater than 10 lawyers were purchasing excess insurance. However, that meant only 11 per cent of lawyers in two to four lawyer firms purchased excess insurance, and only 9 per cent of sole practitioners. This showed that lawyers in small firms were facing an inordinate amount of risk.

LAWPRO had to figure out why lawyers in smaller firms weren't buying excess coverage. There was a concern that the small firms simply didn't know about the value of securing excess insurance, were not being approached by commercial markets, or found the application process too difficult.

LAWPRO research showed that there was capacity in the insurance market to offer this coverage to lawyers, that it could be acquired at a pretty reasonable price, but for some reason lawyers were either unaware of the advisability of buying or found it too inconvenient or hard to acquire.

So LAWPRO decided to do something about that.

### The benefits of excess insurance

Starting in 1998 LAWPRO began offering professional liability insurance in excess of the mandatory limits to Ontario law firms. The goal was to have this coverage underwritten on an individual firm basis and be competitively priced with the coverage available from other commercial insurers. But unlike the established excess insurers in the Ontario market, LAWPRO would focus on firms of less than 10 lawyers.

The limits originally offered went from \$1 million per claim to \$4 million per claim over the mandatory limits. So if a lawyer was sued on a file for work done at an insured firm, she could expect to have between \$2 million and \$5 million in total coverage available.

At the same time as the excess program was introduced and LAWPRO committed to providing a cost effective excess insurance product to qualifying small firms in Ontario, LAWPRO set a second mandate for itself: to educate lawyers in Ontario about





the benefits of excess insurance. While not every lawyer or firm is going to need insurance above the primary program limits, many would benefit from acquiring it. And for those firms that should have excess insurance, if LAWPRO played a part in getting them to acquire it, either through the LAWPRO excess insurance program or from another insurer, then this would be considered a great success.

LAWPRO developed communication materials that challenged lawyers to test their exposure to large claims. Some of the signs that a lawyer's practice could exceed primary limits if a claim arose include:

- The lawyer could be seen as responsible for other lawyers, but doesn't know their file practices, procedures or communication steps.
- The lawyer or her co-workers work on "higher risk" files, such as litigation, real estate, corporate, commercial, tax, securities, or patents and trademark files.
- The firm maintains large trust accounts or trust accounts with a lot of activity.
- The firm handles major financial transactions or represents clients in high-stakes litigation and transaction matters, such as class action suits, pensions, securities, mergers and acquisitions.
- The lawyer's clients have become much wealthier since work was initially done for them (consider this particularly in the context of domestic contracts).
- The lawyer worked on files at a former firm, but had no control over the matters after they left, or could have vicarious exposure for work done by other lawyers at that firm.

LAWPRO wants to bring awareness to the profession about practice risks, and that includes having any gaps in coverage. Today, LAWPRO insures almost 1,500 law firms in Ontario, with the average firm size being only two and a half lawyers. The excess limits now range from \$1 million per claim to \$9 million and the target firms for our program are up to 15 lawyers, though we do actively insure firms of up to 50 lawyers. During each renewal season we see firms that have carried excess insurance with LAWPRO, sometimes for years, write in to tell us that they have now grown so large they need higher limits or bundled coverage for other types of insurance and another insurer is able to offer them a product that meets their growing needs. And this is a good thing. In fact, it's a great thing. The firm now has different insurance needs than when it first signed up with LAWPRO, and while it may have been too small to be offered terms by other insurers when it first began, as a bigger firm, it is now suited to the portfolio of a larger commercial excess insurer. As these firms grow and move out of the LAWPRO excess program, more small firms are established or discover they need excess insurance for their own peace of mind or to satisfy client demands, and they will hopefully turn to LAWPRO.

Today's LAWPRO excess customers work in all practice areas. They include sole practitioners and firms that far exceed 15 lawyers, but who are still well served by the LAWPRO excess product. While some firms began as sole practitioners, through the five, 10, or 20 years they have been with LAWPRO, we have seen them become partnerships, professional corporations, or expand as associations, and LAWPRO's bespoke excess coverage has adapted to meet their changing needs. When lawyers retire or their estates are suddenly faced with the challenges of what to do after practitioners die, LAWPRO excess insurance is there to provide optional increased limits for the run-off period.

The excess program may be small by commercial standards, with no ambitions to compete for larger firms' business, but it provides two powerful benefits to Ontario lawyers. First, by offering an affordable, stable, excess product to small firms, and secondly, by inviting the profession as a whole to think about their exposure to large or multiple claims and speak with an insurance professional about obtaining excess coverage if warranted.

There are other aspects of the excess program that are really gratifying to LAWPRO and its insureds. From underwriting to claims handling, the excess program has the benefit of professionals who work exclusively in lawyers' professional liability insurance, thus ensuring our insureds receive expert service. The program is intended to fit seamlessly over the primary program with very few exclusions. When firms carry LAWPRO excess insurance, they do not need to fill out annual renewal applications or separate claims reports, and instead get the benefits of automatic renewal and the need to report professional liability claims only once.

So, while for many people, LAWPRO is known for being the insurer for Ontario lawyers' mandatory insurance, or for being the only all-Canadian title insurer, LAWPRO is also the preferred excess insurer for small firms in Ontario. For 20 years it has excelled at providing a competitive product that meets the needs of Ontario lawyers, especially those who have traditionally had the most difficulty obtaining this kind of insurance.

If you have any questions, or would like to learn more about LAWPRO's excess professional liability program, please visit our website ([lawpro.ca/Excess\\_Insurance/excess\\_insurance\\_main.asp](http://lawpro.ca/Excess_Insurance/excess_insurance_main.asp)) or we would be delighted to hear from you in our Customer Service Department at 1-800-410-1013 or 416-598-5899. ■

**Victoria Crewe-Nelson is Assistant Vice-President, Underwriting at LAWPRO.**



# Ending well means starting right:

## The family law intake process

The most critical step in any family law case is when clients meet with prospective counsel. That meeting establishes the nature of the relationship, a preliminary game-plan, and each party's expectations of the other.

Most clients approach that inaugural meeting with considerable anxiety. Most have never dealt with a lawyer, and certainly not with respect to a family law case. Most are apprehensive about sharing their story and

anxious to hear the lawyer's assessment of the case. Depending upon the client's knowledge, sophistication and expectations, he or she may be looking to the lawyer as a potential saviour, gladiator, therapist, best friend, or

adversary. At the same time, the lawyer is assessing the client for appropriateness of the case, potential conflicts of interest, financial resources and ability to develop an effective working relationship.

The lawyer's objectives for the initial meeting should include:

- Determining the names of all parties and related or interested third parties that will be required for a conflict search;
- Determining how the client was referred to you and whether the client is prepared to retain counsel or is "just shopping";
- If the client is changing counsel, assessing the reasons for the change;
- Understanding the circumstances of the separation, including whether the client was the "leavor" or the "leavee";
- Understanding what formal and informal procedures (negotiations, litigation, interim agreement, etc.) have taken place to date, with what success, and why;
- Obtaining a preliminary history that allows you to identify in a general sense what the factual and legal issues are likely to be;
- Determining what the issues or problems are that require immediate attention;
- Determining if the client's level of understanding, emotionality, expectations and financial resources make the client suitable for representation;
- Asking about the client's objectives and motivations and how they might compare to those of the spouse;
- Determining who is opposing counsel and what, if any, communications with counsel have taken place; and
- Developing a rapport that allows the client to feel understood, confident, and in good hands.

Wise counsel will exercise caution in promising a favourable result in the case. While it is tempting to tell the client what the client wants to hear, the initial meeting usually does not provide the lawyer with enough information to allow a useful assessment. It may be appropriate to explain general legal principles and how they may apply in this case, depending on what facts are ultimately determined. Sometimes the most that can be done is to identify factual or legal issues that will require further investigation. The lawyer should assure the client that a thorough

analysis and recommendation will be provided once the initial investigation stage is completed.

The initial meeting is an appropriate time to discuss the methods of dispute resolution that may be appropriate for this case. The lawyer should explain the steps in a typical family law case and when and how such cases are usually resolved. Clients should understand that there is a range of options (negotiation, mediation, litigation, and so on) that can be utilized, depending on the requirements of the case, and be given a summary of the advantages and disadvantages of each.

Clients need to understand that there are at least four key players in a family law case (the two parties and their counsel) and that no one player controls the pace and direction in which that particular case moves.

The two questions that are on the mind of any client are: "How long will it take?" and "What will it cost?" If the client doesn't raise these issues, the lawyer should. The answer, of course, is that no one knows, although the lawyer can often identify certain factors or developments that may add to or reduce the time and cost it will take to get a resolution. The lawyer should explain how legal fees are determined, hourly rates for the lawyer and the members of his staff, and the lawyer's retainer requirements. A written retainer

agreement should be reviewed and either signed at the meeting or sent home with the client for review, execution, and return.

The lawyer should identify and explain the role of each member of staff and who the client will deal with for different aspects of the case.

The client should be given a blank financial statement to complete and return, together with a list of the documentation that will be required. Where appropriate, the client should be directed to prepare a history of the marriage as well as a written response to the opposing party's financial statement, pleadings, or other documentation. A preliminary discussion may take place regarding expert reports (valuations, income analyses, medical reports, etc.) that will likely be required. By the end of the initial meeting (which typically will last 60 to 90 minutes), both the lawyer and the client should be in a position to indicate to the other whether or not he or she is comfortable formalizing their relationship and planning for the important next steps. ■

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## practicePRO Resources for Family Practitioners

Visit [practicepro.ca](http://practicepro.ca) for these helpful resources

- The **Domestic Contract Matter Toolkit** includes an intake form, matter intake checklist, post-meeting client assignment sheet and Children of the Marriage form.
- The **Limited Scope Retainer Resources page** includes sample retainers, checklists and client information brochure.
- A **Family law matter retainer precedent** includes all the terms a retainer should have.
- The **Client Billing and Administrative Information letter precedents** advise clients on communication protocols, retainer and billing expectations and how they should conduct themselves.



# Does your firm need cybercrime insurance?

In a study titled *The Cost of Cybercrime*<sup>1</sup>, Accenture surveyed 254 companies in seven countries. Over the course of five years, the study revealed a 62 per cent increase in cybercrime attacks. Data breaches during the same period doubled to 130 per year.

Accenture noted that while not every security breach results in a loss, the two most costly types of breaches (malware and web-based attacks) can take days (up to 23 days in the case of ransomware) to resolve and cost firms over \$2 million per incident on average.

LAWPRO first suggested that lawyers consider cyber insurance in the December 2013 issue of *LAWPRO Magazine*. In the article *Cyber Risk Options: Do You Have the Coverage You Need?* firms were advised that their general liability insurance policies (intended to cover bodily injury and property damage scenarios) may offer only a limited amount of coverage for cyber-related exposures. These policies were not designed to cover loss of data or a breach of a law firm network.

In addition, the cyber coverage under the LAWPRO policy is subject to eligibility criteria and a modest sublimit. Says LAWPRO's Assistant Vice President, Underwriting, Victoria Crewe-Nelson: "the LAWPRO cybercrime coverage relates to professional services. If, for example, a loss (e.g. corrupted accounting data, theft from the general account) does not relate to the provision of professional services, LAWPRO coverage

would not apply. To prepare for this kind of risk, lawyers should consider exploring broader cyber coverage available in the marketplace."

## The rapid growth of cyber insurance

According to Integro Insurance Brokers of Toronto, 10 years ago there was almost no familiarity with or interest in cyber insurance. Now, despite widespread awareness of the risks, many firms still feel their own IT departments can handle cyber dangers.

In light of recent high profile security breaches, demand for cyber insurance has grown 'exponentially.'<sup>2</sup> From 2015 to 2016, the Risk Management Society's worldwide *Cyber Survey*<sup>3</sup> found a 30 per cent increase in companies procuring stand-alone cyber insurance.

The numbers in Canada may not be quite as high. According to a 2017 FICO-sponsored survey of 350 international organizations (including Canadian law firms) 36 per cent of polled Canadian companies have no cybersecurity insurance. Of those that do, less than 20 per cent believe that the insurance will cover all cyber risks.<sup>4</sup>

## What are "professional services"?

The 2018 LAWPRO policy provides the following definition:

PROFESSIONAL SERVICES means the practice of the law of Canada, its provinces and territories, where conducted by or on behalf of an INSURED in such INSURED'S capacity as a LAWYER or member of the law society of a RECIPRO-CATING JURISDICTION (not as a member of the Barreau du Québec), subject to Part II Special Provision A; and shall include, without restricting the generality of the foregoing, those services for which the INSURED is responsible as a LAWYER arising out of such INSURED'S activity as a trustee, administrator, executor, arbitrator, mediator, patent or trademark agent.

<sup>1</sup> [accenture.com/t20170926T072837Z\\_w\\_/us-en/\\_acnmedia/PDF-61/Accenture-2017-CostCyberCrimeStudy.pdf](http://accenture.com/t20170926T072837Z_w_/us-en/_acnmedia/PDF-61/Accenture-2017-CostCyberCrimeStudy.pdf)

<sup>2</sup> [canadianlawyermag.com/author/michael-mckiernan/demand-for-cyber-insurance-on-the-upswing-3400/](http://canadianlawyermag.com/author/michael-mckiernan/demand-for-cyber-insurance-on-the-upswing-3400/)

<sup>3</sup> [rims.org/aboutRIMS/Newsroom/News/Pages/2017CyberSurvey.aspx](http://rims.org/aboutRIMS/Newsroom/News/Pages/2017CyberSurvey.aspx)

<sup>4</sup> [canadianunderwriter.ca/insurance/36-polled-canadian-firms-no-cyber-security-insurance-fico-1004114548/](http://canadianunderwriter.ca/insurance/36-polled-canadian-firms-no-cyber-security-insurance-fico-1004114548/)

These statistics reflect the experience of larger companies, but Crewe-Nelson warns that smaller firms should also take heed: “Cybersecurity at smaller firms may be less sophisticated and there are fewer statistics regarding how many are purchasing cyber insurance coverage. But small firms are at the same risk as their larger counterparts.”

## Where do breaches occur?

Some breaches happen at the technology front end: through email, laptops, mobile devices, and desktops. Many hackers find these to be the a firm’s weakest link because they depend on employees’ diligence in following proper security procedures.

Other breaches target the back end of a firm’s IT network: storage, servers, backup systems, and wireless encryption. In addition, new security problems may soon emerge in the context of the internet of things, increased cloud computing, and the constant expansion of social media. Hackers are continually adapting their methods to new technologies. Visit [practicepro.ca/cyber](http://practicepro.ca/cyber) to read more about the cyber dangers targeting law firms.

## What does a typical cyber insurance policy cover?

First, there is no such thing as a “typical” policy: different insurers offer different products and a wide range of sublimits. If the insurance is purchased through a group plan, the underwriting might be straightforward, but will typically include only modest limits. A more bespoke insurance product may require detailed underwriting, explains Crewe-Nelson, and may include multiple lines of coverage with corresponding separate sublimits. “Consider, as an example,” says Crewe-Nelson “what counts as a business interruption once a cyber-attack occurs: how long does a system have to be down before coverage kicks in, and how soon afterwards will coverage be exhausted?”

Coverage can also include both first-party losses (losses suffered directly by the firm that purchases the policy) and third-party losses (losses suffered by a firm’s clients as a

result of a breach). It can be made available for scenarios in which the cause of the incident is internal (staff or lawyer at the firm) or external hackers.

Coverage can extend to:

- Specified costs associated with an attack, for example:
  - Lost income and operating expenses related to a loss of business due to a cyber-attack or pre-emptive network shutdown; and/or
  - Hardware, software and data recovery costs
- Payments demanded for cyber extortion/ransomware
- Crisis management expenses, such as IT forensics costs and public relations spending
- Defence expenses related to regulatory fines or penalties
- Measures to help prevent a breach
- Technical assistance to respond to an attack or breach
- Assistance with the aftermath of a breach

## Why aren’t more companies buying cyber coverage?

Integro states that some of the barriers to wider uptake of cyber insurance policies include confusion around how cyber insurance premiums are set, difficulties in adapting traditional insurance policy language to modern cyber threats, and a lack of data and loss history to make reliable actuarial calculations.

Also, it remains unclear how these policies will respond to claims, and what kinds of breaches will be excluded from coverage. For example, the wording in some policies could be interpreted as excluding breaches caused by human error, mechanical failure or incompatible software. As the market matures and decisions on cyber coverage are made by the courts, there may be more clarity for both law firms and insurers. In the meantime, firms are advised to ask questions of their insurance brokers: it’s worth an investment of time and effort at the outset

to get as much clarification as possible when comparing policies from different insurers.

## Some insurers offer prevention resources

It can be challenging for medium and small firms to develop and implement their own cybersecurity policies and infrastructure. Keeping up with the constantly evolving nature of cyber risk can be beyond the expertise of a typical law firm IT department. In addition to coverage for financial losses, a number of insurers provide access to broader technical support similar to that offered by cybersecurity firms (see “Outsourcing Your Firm’s Cybersecurity” available on [practicepro.ca](http://practicepro.ca)). Such services may include:

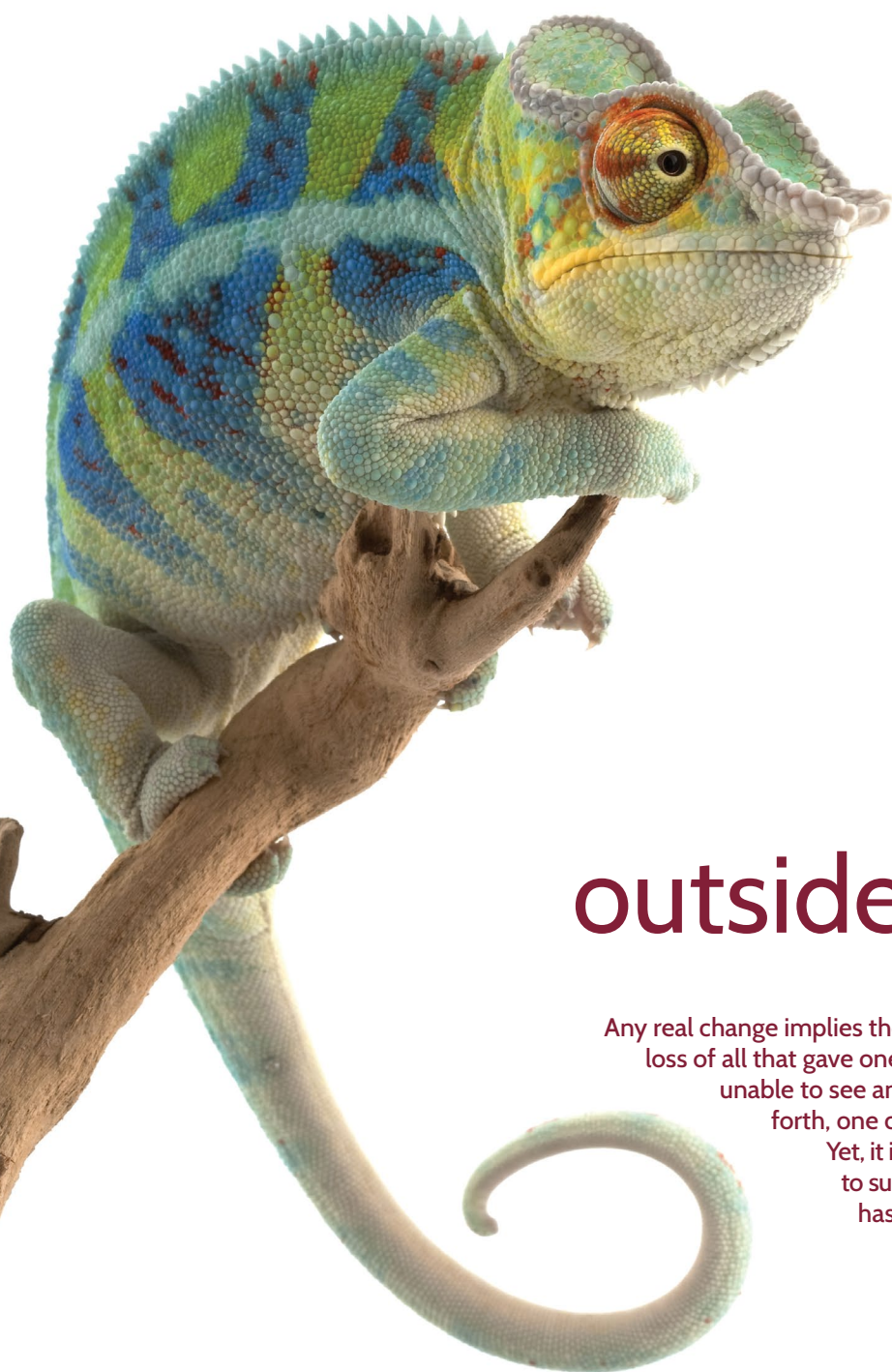
- Around-the-clock access to cybersecurity specialists
- Training for firm staff to help prevent a breach
- Assistance with notifying clients of the breach

Crewe-Nelson notes that access to a breach coach can be a significant asset in cases of cyber extortion and ransomware: “The coach can help determine whether the ransom should be paid, and can coach staff about how to do it. There are examples of companies phoning up and asking if they can pay for the return of just certain key documents, and being told no. Once the full ransom is paid, the company realizes that the criminals have withheld the sensitive information that the firm helped identify – and that they are now demanding a premium for those.”

If your Ontario firm has not yet explored cybersecurity coverage options, we urge you to do so. The cost of a cyber-breach goes beyond the financial losses of stolen funds, damage to equipment and lost income. There is also the damage to a firm’s reputation and the loss of confidence of its clients. With many insurers now offering cyber risk policies, firms have many options to tailor a policy to their specific needs. ■

**Tim Lemieux is Claims Prevention & Stakeholder Relations Coordinator at LawPRO.**





# Coping with changes outside your control

Any real change implies the breakup of the world as one has always known it, the loss of all that gave one an identity, the end of safety. And at such a moment, unable to see and not daring to imagine what the future will now bring forth, one clings to what one knew, or dreamed that one possessed. Yet, it is only when a man is able, without bitterness or self-pity, to surrender a dream he has long cherished or a privilege he has long possessed that he is set free – he has set himself free – for higher dreams, for greater privileges.

*James Baldwin, "Faulkner and Desegregation",  
Partisan Review (1956)*

Coping with change is difficult for everyone, but there's a particular variety of change – the kind that occurs outside our control – that has a special capacity to produce stress.

Neuroscientists have discovered that our brains react in a powerfully negative way to uncertainty. Because of the importance,

evolutionarily, to reacting quickly and appropriately to threats, our brains have evolved to crave certainty and predictability.<sup>1</sup> When faced with unpredictable change, we may respond with worry and negative self-talk.

Because we see the world from our own perspective, we have a tendency to attribute a

central role to ourselves in negative events that may have nothing to do with us.<sup>2</sup> A classic example is that of a child who attributes the parents' marital separation to his or her own misbehaviour. In a law practice context, a lawyer who is not chosen to assist with a coveted file may make completely unfounded assumptions about senior counsel's reasons

<sup>1</sup> See for example Copeland, Libby, "Why are we afraid of change? The science of uncertainty", *Unstuck* (undated).

<sup>2</sup> This tendency is even more pronounced among individuals who suffer from depression; see for example Walton, Alice G. "Oh, The Guilt! Why You Blame Yourself For Everything When You're Depressed", *Forbes*, June 6, 2012.

# Change hardiness cheat sheet

**Feel like you're in the middle of a bad reality TV show? Try these steps to regain your equanimity:**

- 1. Remember that it's not about you:** Accept that some developments have nothing to do with you, your strengths or weaknesses, or what you deserve or don't deserve in life.
- 2. Notice negative self-talk:** If you blame yourself for everything, see step #1. If you're prone to fearing the worst outcome in every situation, remember that these worries cause you to suffer *in advance* for negative developments that may or may not materialize.
- 3. Reframe:** People who cope well with stress are generally better than average at identifying and challenging their own biases. Instead of assuming that your perspective is universal, consider whether you may be making unfounded assumptions about the others' motivations or about the likely outcome of current changes. Even imperfect attempts to try a new perspective can reveal solutions you'd otherwise miss.
- 4. Don't mount a present defence against a past assault:** The greatest danger of a victim mentality is that it influences how we interact with the world. When we allow past events to convince us that being wronged is central to our identity, we adopt a defensive stance even in the absence of threats. We go through life looking for fights to lose as a means of reinforcing our self-concept. Don't do that.
- 5. When in doubt, act:** Evolutionary psychology has shown that taking action when faced with a stressor enhances our feelings of self-efficacy (even if the action alone won't eliminate the problem). Been hearing rumours about layoffs? You could fret about it, or you could rein in your discretionary spending and update your résumé. You might be laid off either way, but from a mental health perspective, one course of action is definitely better than the other.

for choosing someone else, especially where those assumptions align with a habitual internal narrative, for example: "people like me never get to work on high-profile cases."

For some of us, this theme of being under-appreciated or subject to regular unfair treatment can become a comforting internal refrain. Seeing ourselves as the perpetual victims of others' enmity or lack of discernment may be appealing in that it absolves us of responsibility for self-reflection.

Believing that others have a hidden agenda that targets us specifically has other risks as well. If we believe others are out to get us (rather than simply making their decisions based on unknown criteria), we may become resentful, behave defensively, or misinterpret innocent comments or actions.<sup>3</sup> This attitude may influence others' opinions of us, causing a

dangerous feedback loop: we feel excluded, so we adopt a defensive posture, leading us to be *actually* excluded. In this way, our misinterpretation of neutral events as negative leads to actual negative events: a self-fulfilling prophecy.

Separating our biased internal self-talk from objective facts is challenging when life is predictable. When circumstances are uncertain or changeable, the resulting stress makes it even harder to see events clearly. During periods of stress, the first step toward gaining clarity about a situation may actually be to step away: taking the classic Canadian "long walk in the snow" to short-circuit unproductive rumination. Exercise, relaxation, social connection, or even time spent outdoors can help us put events into perspective and recognize that while some parts of our lives may be changing, everything is certainly not falling apart.

Finally, it can be helpful, in times of change, to remind ourselves that while it may be unsettling while it's happening, change is the norm. Bill Gates is famous for having suggested that while people may overestimate what will happen in the next two years, we consistently underestimate what will happen in 10. We also tend to underestimate our own capacity for adaptation, a blind spot that can lead us to prefer the status quo to changes that may actually be positive for us. By learning to be open to the possibility that change will bring opportunities we have yet to imagine, we can learn to face uncertainty with less fear and greater curiosity. ■

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<sup>3</sup> See George, Cylon "10 Ways to Stop Feeling Like a Victim Once and for All", *Huffington Post*, September 25, 2016.



# How to safely put your data in the cloud




Cloud services help you access and store data on someone else's server. You may not realize it, but Dropbox, Gmail, Facebook, and legal specific applications like Clio are all examples of cloud services.

Putting data on the cloud raises issues like maintaining confidentiality, usability, cost, portability and applicability to your area of practice. Keeping in line with the *Rules of Professional Conduct* is the primary concern.

Balancing your needs with these concerns may likely take time and effort – talk to colleagues about their preferred cloud services, read up on the terms of service, and decide which works best for you.

## What is the cloud?

“The cloud” is a metaphor for information that is transmitted over the internet and stored on a server outside of your firm.



It helps to obtain your client's consent to store data in a cloud service. This is also a good opportunity to talk with your client about both the benefits and the risks involved with cloud services. A practical place to request the client's consent is the retainer agreement. Take a look at LAWPRO's precedent retainers on the [practicepro.ca](http://practicepro.ca) website.

Whether you are keeping your clients' data on a cloud service or in a filing cabinet, the *Rules of Professional Conduct* require you to maintain confidentiality.

Here are some key questions to ask when you are considering using a cloud service from a confidentiality point of view.

### Is your data encrypted at-rest or in-transit?

Your data is more secure when it is encrypted. Encryption takes your data and scrambles it so that it is unintelligible, and only someone with the decryption key can unscramble the data. There are two places that your data should be encrypted in the cloud. *Encrypted at-rest* means that data is encrypted while it is stored on the cloud-based server. If the data is stolen or retrieved from the cloud by someone other than you, it is likely impenetrable if the encryption cannot be broken.

*Encrypted in-transit* means that data is encrypted while it travels from where you are inputting it to the cloud-based server. If the data is stolen while traveling to and from the server (snooping), that data will remain unintelligible so long as the encryption holds. Check the terms of use of the cloud service to determine if the data is encrypted both at-rest and in-transit. Although encryption at rest and in transit are the gold standard some commonly used legal software application providers may have reasons why they do not encrypt data at-rest. You may want to discuss that with your provider and make an informed decision.

### Who holds the encryption key?

The level of security achieved when data is encrypted at-rest and in-transit depends, in part, with the number of people who hold the key to unlock the encryption. If you are the sole owner of the key, then if anyone other than you retrieves the data they can only read it if they can crack the encryption. If you lose the key, no one at all can easily decrypt and access the data. You may need extra IT support in this case. On the other hand, if the keys are held by the owners of the cloud service, then they have the ability to access your information at any time. If a cloud service is compelled by law to release data, it could be forced to decrypt your data and release it, possibly without notifying you. In terms of maintaining confidentiality, it is better if you are the sole owner of the encryption key.

### Where is the data stored?

Data that is stored on servers located outside of Canada may be subject to the laws in that jurisdiction. Foreign laws such as the U.S. *Patriot Act* or the Prism program may allow foreign entities to access the cloud service (and your data), with or without your knowledge or permission. This may also apply to servers located in Canada as digital laws evolve. Read the terms of service to obtain information regarding when or how a cloud service responds to a legal notice or request for the release of data.

In addition, it's worth noting that cloud services may need to comply with privacy

and regulatory laws in the server/company's jurisdiction, such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA) in Canada and the *Sarbanes-Oxley Act* (SOX) in the United States.

### What are the default security settings?

Some cloud applications allow for security settings to be managed, while others do not. If security settings are not properly set, your data may, by default, be available to others. For this reason it is important to learn about the security measures the cloud application uses and makes available to you, including the default settings.

### How strong is your password?

The longer a password is, the harder it is to guess. Until very recently the convention for secure passwords was 12 or more random characters. It is now suggested that four random words are more secure (there are websites that can help you pick four random words). Do not use the same password for multiple websites or applications. More and more people are using password managers to help them manage and remember multiple passwords. LastPass, 1Password, Dashlane and KeePass are widely used password managers.

### Is there two-step verification?

Most Canadians are familiar with two-step verification (or two-factor authentication), such as when you use an ATM to withdraw money from a bank account. An ATM requires two security steps to gain access to your account: inserting a bank card with a unique identification, and inputting a PIN number. Similarly, in the cloud context, two-step verification can include requiring both a password and a separate code sent to your mobile phone. The extra layer of security means that if a hacker steals your password and attempts to log-in through an unrecognized IP address (e.g., using a computer or location that you have never used), the hacker cannot login without having access to your mobile phone too.

The cloud service acts as the steward of your data. It is important to ensure that your data is always available and won't be lost. If the cloud service becomes hacked or goes out of business, can you get your data back? It isn't as simple as it is with a paper file, where you can walk down the hall and take a look at a file and search for a missing memo. Nor is it like driving to the backup storage container and taking a look at the file there. Data on a cloud service is typically located in a secure location far, far, away. It may require special tools to retrieve the data in a legible format. And you may be totally dependent on the cloud service to retrieve your data. If the cloud service is not available, will you be left holding an empty bag? With some cloud services, these concerns can be addressed. Consider the following questions when selecting a cloud service.

### Can you backup locally to your own computer/server?

While most cloud services have their own backups, some allow you to take a "belt and suspenders" approach to maintaining your data, which means that you can keep a copy of the backup yourself on your own computer (called a "local" backup). If your internet becomes unavailable or if the cloud service becomes unavailable (due to a hack or any other reason), you can use the local backup to continue working. You would also likely need another application, typically provided by the cloud service, installed on your computer so that you can access the local data. This is an excellent feature, as it means you aren't completely reliant on the cloud service's uptime to do your work. If a cloud service goes down, you can still use your local backup in the meantime.

### How can the backup be retrieved and how long will it take?

Most cloud services perform backups, which includes making an extra copy of your data elsewhere in their system. If the data is destroyed, some cloud services may be able

to restore your data quickly, while others may take days if not weeks to do so. Can your law firm function while the data is stuck on the cloud service and they are "working on it"? How long will it take before the cloud service is able to restore your data? The lost time can be costly.

### How often is backup done?

By now virtually every cloud service has a backup system. However, it may be more difficult to obtain information about how often a backup can be done. Can information be restored from one hour ago, one day ago, or one week ago? Backup should be segregated into different time periods, so that you can restore your data from different time intervals.

### If the cloud service ceases to operate or closes down, how can you extract your data?

A cloud service can suffer from business problems like any other business. It can cease to be profitable and close down, it can be hacked, it can upgrade and leave users who refuse to upgrade in the dust. Is there a way to extract your data in a timely manner and in a form that is usable? Data that is extracted may be kept in proprietary databases, making the data nonsensical except to the most advanced user. You may have to spend extensive money and time to move the data into a new cloud service or database if the data is hard to extract and hard to read.

The seemingly inevitable trend is that law firm data will shift to cloud services. Whatever its limitations in practice, it is already an acceptable way to run a law firm and store data. Both clients and lawyers appreciate the speed, ease-of-use and accessibility of data that cloud services provide. Remember to keep up-to-date with patches and perform regular backups. It also helps to understand the terms of use of a cloud service. The Law Society of British Columbia has an excellent cloud computing due diligence guideline<sup>1</sup> and cloud computing



## Avoid Ransomware

Typically, a ransomware infection happens when you have clicked on a link on a website in a phishing email. Over a period of time (it could be days or weeks), the ransomware will encrypt Word documents, PDF files, pictures and other data files on the computer without your knowledge. At some point when you attempt to open an encrypted data file, a window will pop-up demanding a ransom payment in bitcoin (so it is untraceable) worth several hundred to several thousand dollars. The ransom demand promises a decryption key when the ransom is paid. One way to avoid paying the ransom is to restore your data to a time before the ransomware attack happened. To do this you must have a full backup of your data from a point in time that is days or even weeks earlier. You'll likely lose the data you have created in the meantime.

checklist<sup>2</sup>. Be professional and keep an eye on the *Rules of Professional Conduct* to maintain confidentiality and your law firm's uptime when using a cloud service. ■

**Ian Hu is Counsel, Claims Prevention and practicePRO at LawPRO.**

<sup>1</sup> [lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf](http://lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf)

<sup>2</sup> [lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf](http://lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf)





## CLAIMS

# Civil litigation claims: What we saw in 2017

Claims against litigators are the largest area-of-law subset in LAWPRO's claims portfolio. The rate of increase in claims in this area outstrips all others, and is an increasing source of concern.

In the past two years, we have focused on the claims impact of the changes to Rule 48 of the *Rules of Civil Procedure*. Judgments reported in 2017 include actions dismissed as statute barred, administrative dismissals by registrars, dismissals for failing to “show cause” at status hearings, dismissals under Rule 24, and decisions refusing to restore actions to the trial list. However, claims against litigators are far more varied than these, as these summaries of some LAWPRO cases reveal.

### Failure to sue all necessary parties

Usually, where plaintiff's counsel fails to sue all proper and necessary parties, no damages arise from this error, because the defendants who were sued have the assets to pay any judgment.

Such was not the case in an action alleging construction and design defects.<sup>1</sup> The defendants whom the solicitor did sue – the

developer and the contractor – were insolvent. The solicitor negligently believed that the engineer owed no duty to the plaintiffs, so did not sue him. Unfortunately for the solicitor, the engineer was both liable and solvent. The solicitor was held liable for 100 per cent of the money which the plaintiffs would have recovered from the engineer, had he been sued.

In a dispute between a subcontractor and contractor,<sup>2</sup> the solicitor for the subcontractor

negligently failed to advise his client to commence an action against the contractor's director under s. 13 of the *Construction Lien Act*. The Court accepted that the subcontractor would have been legally entitled to judgment against the director personally for \$102,932.22 plus interest, plus costs. The director had assets of about \$97,000 to satisfy such a judgment, at the time the action should have been commenced. However, when the costs of litigation were taken into account, as well as the difficulties

<sup>1</sup> 2017 ONCA 115

<sup>2</sup> 2017 ONSC 4417

in enforcing the judgment against the director's assets, the subcontractor would have recovered about \$50,000, which was just over 50 per cent of the director's stated assets. The client received judgment against the solicitor for that amount.

## Failure to consult, advise, warn and take instructions

A commercial dispute between relatives led to litigation. After one of the parties fired his original counsel and hired another, a settlement was ultimately reached. In the wake of the settlement, the party who had changed counsel sued the law firm that had first represented him.<sup>3</sup> The firm moved for summary dismissal of the negligence action. Woollcombe, J. found that there was no evidence that the firm fell below the standard of reasonably competent counsel. Furthermore, even if the Court was wrong about the negligence issue, the plaintiff in the negligence action failed to demonstrate that there was a genuine issue for trial on the issue of damages caused by the firm's alleged negligence. The plaintiff did not reveal the terms of the actual settlement, nor did he describe the settlement he expected to receive had it not been for the firm's alleged negligence.

Another law firm obtained, by summary judgment, an order for payment of its legal fees in the amount of \$182,569.63 and an order dismissing a former client's counterclaim alleging negligence against it.<sup>4</sup> Crucial to the dismissal of the negligence claim were findings that the claimants were sophisticated businessmen who understood the expense and risk of litigation, and had sufficient personal knowledge to appreciate the quantum of damages they could reasonably expect to recover. They failed to satisfy the Court that but for the firm's failure to properly advise them, they would have discontinued the litigation, and would instead have used the funds spent in litigation to expand their business.

## Litigation counsel cannot be liable for failing to recommend bringing an action with no chance of success

A law firm represented a lawyer with respect to the lawyer's unsuccessful defence of an action to enforce a foreign judgment. The law firm was not paid, and when it sued for payment, the lawyer counterclaimed, alleging negligent defence of the action, and failure to advise the lawyer to sue LAWPRO.<sup>5</sup> Corbett, J. summarily dismissed the lawyer's counterclaim. In doing so, Corbett, J. found the law firm was not negligent in its unsuccessful effort to defeat the enforcement in Ontario of the foreign judgment, nor was it negligent in failing to advise the lawyer to immediately sue LAWPRO, once the enforcement action was commenced in Ontario. An action against LAWPRO had no chance of success. The lawyer's counterclaim against the law firm was also an abuse of process, in that it attacked findings of the trial court and of the Court of Appeal in the enforcement action.

## The implied undertaking rule

According to a judgment of the Divisional Court,<sup>6</sup> a civil litigator defending a sexual assault claim did not breach the implied undertaking rule by providing the plaintiff's discovery evidence to his client's criminal lawyer for impeachment purposes. Rule 30.1.01(6) expressly allows the use of discovery evidence in other proceedings, for the purpose of impeachment. No judicial preclearance is required.

## Lawyer may owe duty to give advice outside of the scope of his written retainer

In the wake of litigation over harm sustained via a traffic accident, the plaintiffs hired a new lawyer to assist them in an assessment of the fees charged by the first lawyer. They

later brought a negligence action against the second lawyer, alleging that he had not competently advised them with respect to their claims against the first lawyer. The second lawyer brought a successful motion to have those claims dismissed. The plaintiffs appealed,<sup>7</sup> this time restricting their arguments to the issue of whether the second lawyer had owed them a duty of care to advise of the limitation period as it applied to the potential negligence action against the first lawyer.

In deciding the case, the Court of Appeal considered a lawyer's duty to give advice outside of his written retainer.

The Court of Appeal held that Warkentin, J., in granting summary judgment to the second lawyer, erred in failing to consider whether he had owed the plaintiffs a duty to advise them about the limitation period for suing the first lawyer, even though the written retainer between the plaintiffs and the second lawyer was restricted to an assessment of the first lawyer's account. The Court of Appeal held that in certain instances, a solicitor's duty may extend beyond the four corners of the written retainer. A careful examination of the facts is required. Warkentin, J. had noted that the evidence supported the likelihood that the second lawyer informed the plaintiffs of the limitation period. However, she did not find it necessary to make an actual finding on this point, since such advice fell outside the scope of the written retainer. In allowing the appeal and sending the negligence issue to trial, the Court of Appeal held that it would have been helpful had Warkentin, J. made a finding on this point.

## Environmental contamination claim NOT statute barred

The *Limitations Act, 2002* is an ongoing hazard for litigators. Even when limitation defences are defeated, doing so is costly.

In a suit over contaminated real estate,<sup>8</sup> the Court of Appeal allowed an appeal from the order of Kelly Wright, J., who dismissed the plaintiff's action as statute barred. The plaintiff

<sup>3</sup> 2017 ONSC 2423. Not on CanLII; under appeal.

<sup>4</sup> 2017 ONSC 3391, under appeal.

<sup>5</sup> 2017 ONSC 1917

<sup>6</sup> 2017 ONSC 5566 (Div.Ct.)

<sup>7</sup> 2017 ONCA 103

<sup>8</sup> 2017 ONCA 16

had alleged that the defendant was responsible for the contamination of the property which it had recently purchased. Mere suspicion that the property might be contaminated did not start the limitation period running. In all of the circumstances, the plaintiff/appellant exercised appropriate diligence in discovering the contamination claim.

## Failure to progress the action

A negligence action against a lawyer<sup>9</sup> was based on the lawyer's work on three different matters on behalf of the plaintiff. The plaintiff had commenced all three matters prior to retaining the lawyer. Monahan, J. summarily dismissed the action. Of especial interest is the judgment's treatment of a solicitor's liability, where the underlying action the solicitor was prosecuting became uncollectible, allegedly because of the solicitor's delay in prosecuting the action, during which time the defendant became insolvent. To the extent that there was delay in moving the matter forward, the record tended to indicate that this was attributable to the plaintiff's failure to provide a retainer and/or timely instructions. The plaintiff provided no evidence with respect to the judgment debtor's alleged bankruptcy, nor did he explain how proceeding more expeditiously would have enabled him to enforce his judgment. Accordingly, even if the lawyer had negligently failed to proceed expeditiously, the plaintiff failed to prove that this delay caused him loss.

## Rule 48.14 – show cause hearings and registrars' dismissals

Throughout 2016, LAWPRO warned the profession against an anticipated "tidal wave" of administrative dismissals under Rule 48.14, beginning in early January, 2017. Rule 48.14 provides that actions commenced before January 1, 2012 would be administratively dismissed, if they were not set down for trial by January 1, 2017, or if a timetable was not established, or an application for a status hearing to "show cause" was not launched.

In the second half of 2016, many "show cause" status hearings were requested in order that plaintiffs could avoid the automatic dismissal of their actions by the registrar on January 1, 2017. Many of these motions were argued in 2017. The numerous "show cause" motions, or timetables set on consent, may explain why there were fewer administrative dismissals in January, 2017, than we had feared.

## Showing cause

At a status hearing which took place on March 23, 2017,<sup>10</sup> Master Graham concluded that the plaintiffs had successfully shown cause, and that the action should proceed. The statement of claim was issued on June 7, 2011. In December, 2016, the plaintiffs brought a motion for a status hearing under Rule 48.14(5), in order to show cause why the action should not be dismissed for delay, and for an order establishing a timetable for the completion of further steps in the action.

As of March 23, 2017, the day the plaintiffs' motion was argued, the action had not yet been set down for trial. Nevertheless, the action was allowed to continue. The litigation delay was explained by good faith settlement discussions. The defendant itself did little to advance the action.

At a January 2017 status hearing,<sup>11</sup> Master Pope declined to dismiss the plaintiff's action notwithstanding that the action was commenced in September, 2008. The motion for a status hearing and an order establishing a timetable for the completion of the remaining steps in this action, and for an order extending the time to set the action down for trial, was launched in November, 2016, to avoid dismissal of the action by the Registrar on January 1, 2017. Once again, the defendants were not prejudiced, and they did little to move the action along.

## Registrar's dismissal

There were a few registrar's dismissals in 2017, albeit fewer than we had feared. One such case was a personal injury action,<sup>12</sup> although it also involved breach of a set down order.

The accident occurred in February, 2011. The action was commenced in November, 2011. It proceeded through pleadings and discoveries. Master Graham ordered that the action be set down for trial by December 31, 2014. The plaintiff did not do so. The action was dismissed on January 6, 2015. The parties continued to advance the action, as if there were no dismissal order. Plaintiff retained new counsel in 2016, at which time steps were taken to set aside the dismissal.

Master Muir applied the traditional test for setting aside administrative dismissals. The plaintiff had always intended to proceed with the action, and much had been done to move the action forward. The explanation for the delay was adequate, although not perfect. The set down date was missed through inadvertence. Plaintiff's lawyer failed to properly diarize the set-down date. The motion to set aside the dismissal was NOT brought promptly. The plaintiff did rebut any presumption of prejudice. The defendants presented no evidence of actual prejudice.

The plaintiff satisfied three of the four relevant factors, including the key consideration of prejudice. For the most part, the courts should focus on the rights of the parties, rather than the conduct of counsel. Master Muir ordered that the dismissal order be set aside. However, he also ordered the pre-judgment interest be suspended from the date of the dismissal order through the date of the argument of the motion.

## Litigation gives rise to a wide variety of claims

The foregoing sampling of cases which LAWPRO defended for the profession in 2017 illustrates the hazards of litigation practice. As you will no doubt appreciate, even successful defences are expensive, and we consider ourselves lucky to receive and collect partial indemnity costs, even where we are successful. Your insurance premiums at work! ■

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Debra Rolph is Research Director at LAWPRO.

<sup>9</sup> 2017 ONSC 4292, under appeal

<sup>10</sup> 2017 ONSC 3387

<sup>11</sup> 2017 ONSC 3784

<sup>12</sup> 2017 ONSC 5662





# Recognizing the red flags of real estate scams involving corporate identity theft

Frauds targeting real estate lawyers are getting ever more sophisticated. LAWPRO has seen several attempted frauds involving corporate identity theft. The properties involved may be commercial or residential, but are always owned by a corporation.

## How these frauds work

These frauds start with the fraudsters changing or stealing the identity of corporate property owners. This is most commonly accomplished with the filing of a Form 1 Notice of Change naming new directors and officers. On

occasion, we have seen the fraudsters change the address of existing officers and directors in an Annual Return filing. The fraudsters use stolen or fake identification corresponding with the names and addresses of the imposter officers and directors. In some cases, the fraudsters retain a lawyer to prepare and

file the Form 1; in other cases, they prepare and file it themselves. The fraudsters then retain a lawyer to help them sell or mortgage the corporation's property. Private lenders are often involved and existing mortgages on title may be fraudulently discharged.



The fraudsters will go to great lengths to make these frauds appear to be legitimate transactions. As noted above, they will have stolen or fake identification matching the names that will appear in corporate records. Multiple people may come to the lawyer's office, although there is typically one "front man" who deals with the lawyer. They will produce a minute book that will be current and include recent corporate resolutions. In one fraud involving the purchase of a vacant \$1.3 million property with a \$600,000 mortgage from a private lender, other individuals that appeared to be in cahoots with the imposter vendor filed a Form 1 to assume the identity of a corporate buyer. They retained their own lawyer to act on the deal and also created a fake minute book.

## Red flags

The sophistication of these frauds means that lawyers must be alert for the "red flags" that may indicate a transaction is a corporate identity theft fraud. The red flags that can indicate a fraud include:



Corporation has owned vacant, disused or run-down property for a long time, without activity on title or visible use of the land;



Property is in highly marketable or developing areas, but subject to restrictive zoning, environmentally sensitive or lacking road access (risks not always evident to private lenders);



Real directors/officers/shareholders of the corporation are elderly, remote or otherwise vulnerable (fraudsters may have knowledge of these circumstances);



Current officers and directors were appointed very recently (See "Date Began" in Corporate Profile Report).

This may not be a concern by itself, but something that is a big warning sign if there are other red flags;



Form 1 is filed after a long period without a change in control of the corporation – even where the real owners or their agents regularly make corporate filings;



Corporation's head office changed to a nonexistent or problematic address (such as a hotel – Google Street View may assist to determine this);



Corporate resolutions or minute book have obvious errors or typos;



One lawyer retained to discharge an existing mortgage or file a Change Notice, but a different lawyer retained for the borrower in the new mortgage transaction, or for the corporation as vendor in a sale;



Mortgage statement for discharge purposes shows much less than the registered amount of the mortgage;



Small encumbrance, such as a construction lien, recently registered and discharged from title (to give credibility to the fraudster's claim to be the legitimate owner of the corporation);



Lender's or borrower's lawyer directed to pay sale or mortgage proceeds to parties with no apparent connection to the transaction;



Clients will say that title insurance for the new mortgage is not required; and/or



Client will push for fast closing.

The fraudster clients will not be interested in following up on or solving the issues of concern you raise. They will discourage any efforts to investigate the corporation and the property – another red flag! If you see one or more of these potential red flags, dig deeper before you complete the deal. Do not close unless the red flags you have spotted have been explained to your complete satisfaction.

While one red flag may not be a problem, dig deeper if you see multiple red flags. We have seen fake Ontario driver's licences used on a number of these frauds. For a nominal fee (just \$2.50) you can check whether they are fake with a licence number search on the MTO's website. Check addresses and the satellite view of the property on Google Maps. You can see what is at the property with Google Street View, and a personal drive-by is another option to see the status of the property. Do not use contact information provided by the client – if he/she is a fraudster, they have associates standing by with plausible answers.

Check the Document Last Filed in the Corporate Profile Report. It will likely be an Annual Return, but could be a Form 1 – a possible red flag. A Corporate Document List search will disclose a history of the documents filed for the corporation. Ask for details of the change in control of the corporation, or permission to contact the corporation's previous lawyer, agent, directors or officers.

In this era of high real estate values, don't underestimate the efforts that fraudsters will put into making frauds look legitimate. Watching for the above red flags will help you avoid these scams. Keep asking questions if things don't add up. Refuse to act if you are not 100 per cent comfortable with the answers. ■

**Lisa Weinstein is Vice President, TitlePLUS and Dan Pinnington is Vice President, Claims Prevention and Stakeholder Relations at LAWPRO.**



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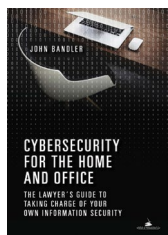
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# Cybersecurity for the home and office:

The lawyer's guide to taking charge of your own information security

by John Bandler



For many lawyers, the divide between “home” and “office” isn’t clear-cut. Work is often done in both places and during the trips back and forth. As a result, sensitive client information

may not always be protected under the umbrella of a firm cybersecurity system. *Cybersecurity for the Home and Office* can help lawyers understand the threats they face and what they can do to secure their home devices and networks. It is also a great introduction to cybersecurity issues for solo and small firms which may not have an IT department to advise them. The author is John Bandler, who runs a New York state law firm and consulting practice that helps businesses with cybersecurity matters.

Before explaining how to improve your cybersecurity, Bandler gives a very good overview of why your data is so lucrative to criminals and how they can put it to use. It’s obvious why trust fund money or sensitive information on clients would be targeted, but that’s just part of the picture. Almost any data stolen from your computer can be monetized by criminals. Credit card numbers and email addresses can be sold in huge batches on black market websites. A password to a website that may have no valuable information might help crack a password to more important sites. And your computer itself might be hijacked without your knowledge and become part of a network to help hackers attack websites or hide their illegal transactions. So it’s important to take stock of the vulnerabilities in your home office.

Bandler makes the point that any cybersecurity is a compromise between confidentiality, integrity and availability (“CIA”). Confidentiality

of client data is generally the most important of the three to the legal profession, and includes strong passwords and encryption. Integrity is ensuring that your data can’t be tampered with and is recoverable in the event of a breach or equipment failure. Availability refers to having access to your data when you need it. Compromise comes into play because increasing confidentiality (with, for example two-step authentication or limiting the access of family members) can come at the cost of easy availability. Another way of visualizing your home cybersecurity is a dial of 0 to 10 (or 11, in Bandler’s *Spinal Tap* reference to extreme, and probably unnecessary, security measures). Most people will choose somewhere in the middle between reasonable security and ease of use.

The book spends a few chapters going through each component of a modern home network and explaining how each part interacts with the other. This will be very handy to those who usually leave the nuts and bolts of their computer to the firm IT department or their kids. It explains memory, storage (internal and external), devices you can attach to a computer, modems, routers, and both wired and wireless networks. Each is a potential access point for hackers or malware, and Bandler offers tips on how you can best secure them. The advice includes fairly simple security solutions that are often enough for a normal home network, all the way up to more complex arrangements for those who feel they need greater protection and are comfortable making more technical adjustments.

Increasing security goes beyond simply ensuring your WiFi has strong passwords or your storage drives are encrypted. You’ll also need to take into consideration the family that may share access with you.

Children (highly skilled at computers and getting around security arrangements) and seniors (sometimes not computer-savvy enough to spot a security problem) have their own particular risks you will have to take into account. If you have staff accessing your home office, that can also multiply the points of vulnerability. And when travelling with your laptop there are dangers from theft and connecting to unsecured networks.

The book includes a number of checklists to help you take stock of your cybersecurity situation, including a home device inventory, checklists for decommissioning old tablets and phones and a point-based system for assessing your vulnerabilities.

It’s not possible to ever achieve total cyber peace of mind, as the criminals constantly come up with inventive ways to hack or bypass any security system. But that doesn’t mean you have to make it easy for them. Many of the suggestions in this book can be implemented by most people with an ordinary amount of computer knowledge, and there is a lot of fascinating information included on how your data makes money for cybercriminals. By investing a little time and effort before there is a problem you can avoid the headache of trying to recover data and deal with the fallout of a security breach.

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**Tim Lemieux is Claims Prevention & Stakeholder Relations Coordinator at LAWPRO.**





# Make sure clients aren't caught off guard by the *Rental Fairness Act*

On April 27, 2017 the Province of Ontario amended the *Residential Tenancies Act, 2006 (RTA)* with the introduction of the *Rental Fairness Act*. Some of the changes to the

*RTA* are already fully in force, others will come into play in 2018. The amendments to the *RTA* affect every residential tenancy in Ontario to different degrees. Landlords of “small” rental properties (1 – 4 units, including house or condo rentals) are particularly vulnerable to the *RTA* amendments, and can find themselves subject to large fines if they don't comply with the *RTA* provisions with respect to obtaining vacant possession.

If you provide legal services to clients who engage in transactions involving residential rental property, you need to know how your clients are, or will be, affected. You don't want to have a client facing a fine and alleging you didn't tell them they were not in compliance with the new provisions of the *RTA*. There are a number of distinct issues for existing landlords and new purchasers of rental properties.

Here are the key changes to the *RTA* which may expose your landlord clients – and you if there is a malpractice claim – to significant liability:

- If a landlord wishes to obtain vacant possession for the purpose of residential occupancy by the landlord or member of the landlord's family, or a caregiver, the landlord must now pay one month's rent to the tenant or offer another rental unit acceptable to the tenant as compensation for exercising the right of termination (s. 48.1 *RTA*). Sixty days' written notice prior to the end of a rental term or period is still required.
- If a rental unit is sold to a purchaser who requires vacant possession for the purpose of residential occupancy, then the best practice is to have the vendor serve the 60 days' written notice on behalf of the purchaser, in which case the old rules (which do not require payment of compensation) continue to apply (s. 49 *RTA*); however, new liability arises for the purchaser as described below.
- A corporation cannot give a notice of termination for the purpose of residential occupancy by the landlord or member of the landlord's family, even if the landlord is a sole shareholder of the corporation and the rental unit is the only asset of the corporation (s. 48 (5) *RTA*).
- Regardless of whether the Notice of Termination is given for landlord's own use under s. 48 or on behalf of a purchaser under s. 49, if the person who claimed to require possession under those sections fails to occupy the rental unit “within a reasonable time after the former tenant vacated the rental unit” (s. 57 (1) *RTA*), the landlord will be liable under the *RTA* for failing to give a “good faith” notice of termination and will be liable to significant financial penalties payable to a former tenant and to the Landlord and Tenant Board under s. 57 (3) *RTA*.
- Compounding the risk for landlords under s. 57 is that if, within one year after the tenant vacates the rental unit, the designated person fails to occupy the rental unit within a reasonable period of time and the landlord lists the rental unit for rent; or enters into a tenancy agreement with another person; or advertises the rental unit or the building that contains the rental unit for sale; or demolishes the rental unit or the building containing the rental unit; or “takes any step to covert the rental unit or the



building containing the rental unit” to a use other than residential premises; then, the landlord is “presumed, unless the contrary is proven on a balance of probabilities”, to have acted in bad faith in giving the notice and is therefore liable to the penalties provided for in s. 57 (3).

- Section 12.1 of the *RTA* makes it mandatory for landlords to use a “prescribed form” of lease for “prescribed” classes of tenancies; however, as of the date of this article, the form of mandatory leases are not yet prescribed. It is expected that in early 2018, the prescribed lease that will be required for most rental units (multi-residential apartments, rented condos, single family homes, duplexes, etc.) will be in force. A failure by a landlord to use the prescribed form of lease for all new tenancies after the prescribed lease becomes law will expose the landlord to financial and legal liability under s. 12.1 *RTA*. There is likely to be an education period and forewarning of the date on which use of the prescribed form of lease will be mandatory, so for now legal advisors should just be aware that the requirement is imminent and continue to monitor the status of the form.
- Rental units in a building first occupied on or after November 1, 1991 were previously exempt from most rent controls (s. 6 (2) (c) *RTA*) but that exemption is repealed.
- Landlords can no longer apply for an “Above Guideline Rent Increase” based on an “extraordinary” increase in the cost of utilities (heat, hydro, water) for the residential complex.

Legal advisors should pay particular attention to the “landlord’s own use” amendments because those sections of the *RTA* were improperly used by some “small” landlords or purchasers to secure vacant possession of a rental unit, following which the landlord would renovate the unit and then re-rent the unit at a much higher “market” rent or sell the building for a substantial profit based on its increased income potential. While there is no need for sympathy for persons “gaming” the system, there may well be circumstances where a notice for personal use is given in good faith but the person for whom the notice was given later decides not to occupy the rental unit. Employment transfers, spousal separations, unforeseeable life decisions (including death), may well result in the rental unit being listed for rent, or the building listed for sale, within one year of the date the former tenant vacates the rental unit. In such cases there is a presumption of bad faith, regardless of the circumstances, that the landlord who gave the notice must overcome.

Legal advisors should ensure their “small landlord” clients, in particular, are made aware of the changes and the potential exposure, particularly if the client’s business model is acquisition of small rental properties followed by securing vacant possession, renovations and increasing property value through re-rental or sale. If the full model is deployed through a notice given under s. 48 or 49 *RTA* and there is a “step” taken toward completion within a year of a tenant vacating, the client is exposed to significant liability because of the presumption of bad faith under s. 57 *RTA*. ■

Joe Hoffer is a lawyer and partner with Cohen Highley LLP.

## Social media profile: Roop Grewal

Roop Grewal  
Consultant, TitlePLUS®



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When asked about the importance of social media to his job, Roop said:

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