

LAWPRO

magazine

JANUARY 2020 VOL 19.1

Finding your way

Coping with health
and wellness issues

PLUS

Why it's important for firms to be proactive about mental health

How it feels to make a mistake

Getting help from the Member Assistance Plan and other resources

upcoming events

January 31, 2020

The Advocates' Society
Tricks of the Trade 2020
The bench speaks: recent rules changes
Juda Strawczynski, panelist
Toronto, ON

February 6, 2020

Ontario Bar Association
Ontario Bar Association's Institute
Overview of the errors and omissions liability policy
Juda Strawczynski, presenting
Toronto, ON

February 7, 2020

Ontario Bar Association
Ontario Bar Association's Institute
New and emerging threats to your practice
Yvonne Bernstein, presenting
Toronto, ON

February 28, 2020

Ontario Trial Lawyers Association
Medical Malpractice Conference
Best practices for medical malpractice lawyers
Michael Kortes, panelist
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recent events

January 23, 2020

Law Society of Ontario
Estate Accounting 2020
Insurance coverage for lawyers acting as trustees
Juda Strawczynski, presented
Toronto, ON

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Ontario Bar Association
Simplified Procedure (Rule 76) Actions: Brave New World of Changes
Practice tips for the new simplified procedure
Juda Strawczynski, panelist
Toronto, ON

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Ontario Bar Association and Roundtable of Diversity Associations
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Innovative technology solutions for sole and small firms
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December 6, 2019

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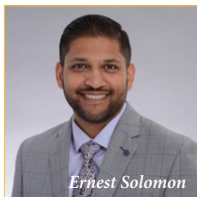
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New appointments at LAWPRO



Ernest Solomon

Our new CIO is **Ernest Solomon** who brings nearly two decades of experience directing technology services and business management plans for the financial services, insurance, and healthcare industries. He is a member of the CIO Advisory Board and participates actively in sharing challenges, ideas and strategies to help enhance collaboration among IT executives across industries.



Juda Strawczynski

We are pleased to welcome **Juda Strawczynski** as the new Director of the practicePRO program. Prior to joining LAWPRO, Juda served as a Policy Counsel at the Law Society of Ontario, where he provided strategic counsel with respect to key issues facing the legal profession, including access to justice, professional regulation, governance and legislative issues. He has practised litigation, and served as a Fellow at Physicians for Human Rights in Cambridge, MA, as President of Canadian Lawyers for International Human Rights (CLAIHR) and as a Director of the Canada Millennium Scholarship Foundation.

Welcome Juda and Ernest!

Has your firm grown?
Are you taking on
more risk?



Excess insurance from LAWPRO can increase your coverage limit to \$10 million. If you have the potential for a claim over \$1 million, consider Excess insurance. Learn more at lawpro.ca/excess or call us at 1-800-410-1013.

Correction: In the October 2019 issue VOL 18.2 Robert Adourian's name was misspelled and Julia Shin Doi was erroneously reported to have received her JD from the University of Toronto. Ms. Shin Doi obtained a JD and LL.M. from Osgoode Hall Law School.

Reilly Jones found not guilty at middle school mock trial

The 2018 OBA Law Day at Cosburn Middle School had 60 students enthralled in a mock trial led by LAWPRO's Victoria Crewe-Nelson. The trial of Reilly Jones, who was accused of unlawful assembly and rioting following a sit-in (this is what happens when a school cuts their lunch hour to 30 minutes!) was an eye-opener for the students and teachers alike. Jones was found not guilty on all charges. Everyone, from the clerks and bailiff, lawyers, jury and witnesses, did a fantastic job.

Law Day is a national event celebrating the signing of Canada's Charter of Rights and Freedoms. Originated by the Canadian Bar Association and first held in Canada in 1983, Law Day is aimed at educating and informing the public about the role and importance of the law and the justice system. Law Day enhances the public's understanding of the law, the role of lawyers and judges and empowers the public at large.



LAWPRO sponsors *Relay for Life*

As outlined in our Corporate Social Responsibility statement, LAWPRO is committed to being a responsible, involved and accountable citizen of the many communities in which we hold membership. As part of the Toronto insurance community, LAWPRO is a proud sponsor of the Women in Insurance Cancer Crusade's (WICC) *Relay for Life*.

Relay for Life is a community fundraising event where Canadians across the country join together in the fight against cancer. Relay participants walk or run together around a track or path at a local school, park or fairground, passing a baton to their fellow participants and working together toward one common goal – the fight against cancer.

LAWPRO
magazine

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LAWPRO Magazine is published by Lawyers' Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

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



At one time or another, most lawyers and paralegals will have seen a family member, a friend, or a colleague struggling with health or addiction issues. Undoubtedly, a good number of those reading this column will have themselves struggled with health issues at some point during the course of their career.

Historically, the profession has largely ignored mental health issues but thankfully, in recent years greater attention is being paid to them. This new attention is good news for those who have suffered in silence without help, and it is also good news for LAWPRO.

While we don't have hard statistics, anecdotally it is clear to us that mental health issues can contribute to malpractice claims, sometimes in a small way, sometimes in a major way. All too often, we see a large group of claims occur when someone has had issues serious enough to cause them to drop the ball on multiple files. These clusters of claims are frequently very expensive for us. But even more frustrating is the fact that friends or colleagues of the lawyer often missed or ignored the warning signs.

When claims are first reported to us, or throughout the initial stages of dealing with them, there are usually few, if any, indicators that mental health issues are a contributing cause.

As work proceeds on the claim, our claims professionals or defence counsel may see something that hints that a mental health issue is a driver of the claim. It is fairly uncommon for LAWPRO insureds to acknowledge that their struggle with a personal or health issue caused the claim.

The articles in this issue of *LAWPRO Magazine* will help you better appreciate when you or a colleague can benefit from getting some


help to deal with a personal issue. They will also give you an appreciation of the many resources that are available to help lawyers dealing with personal issues.

LAWPRO believes lawyers can take proactive steps to help them avoid claims, and this is no less the case when it comes to dealing with personal or health issues. For this reason, LAWPRO is a supporter of the law society's Member Assistance Program (MAP). On an annual basis LAWPRO contributes roughly half the cost of operating the program.

It is gratifying to see that more lawyers and paralegals are making use of the resources provided by the MAP. I'm very pleased to support the MAP and the resources and assistance it offers to Ontario lawyers and paralegals. I am particularly excited about the new, user-friendly online portal that provides a large library of health and wellness assessments and self-directed learning resources. Take the time to make yourself familiar with the resources that the MAP offers by visiting myassistplan.com. If you see someone that you think might be struggling with a personal issue, gently reach out to them and see if you can help them get help. If you find yourself dealing with personal issues at some point, please reach out for help from one of the many resources that are now available or talk to a trusted friend or colleague if you need help reaching out for help.

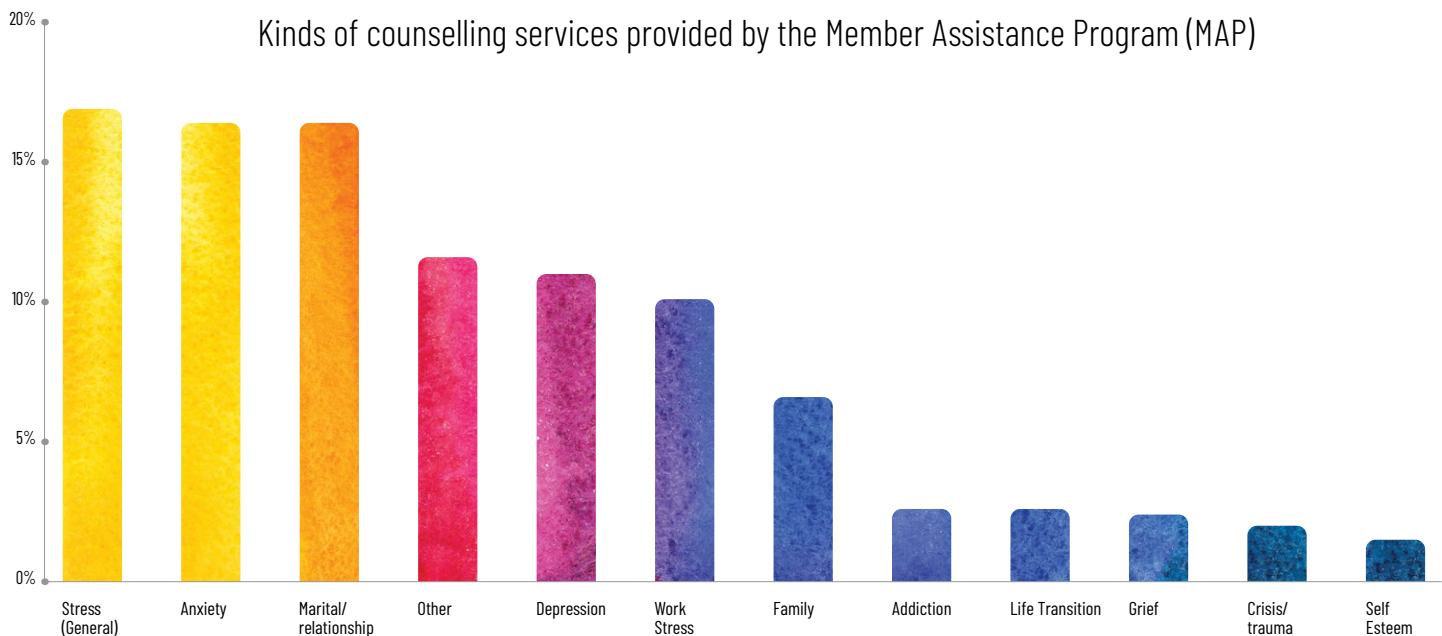
While it may be hard for them – or you – to see a way out of a dreadful circumstance, help is available and in most cases a full recovery is possible.

Daniel E. Pinnington
President & CEO



Understanding mental health in the legal profession

Herman Melville wrote that the legal profession is one where “misery hides aloof, so we deem that misery there is none.” In Melville’s story of *Bartleby, the Scrivener*, a solicitor watches this silent misery slowly consume and destroy his copyist, Bartleby. Although Melville wrote his tragedy about depression in the legal profession in 1853, it is a story that is still all-too familiar.



The mental health challenges of a career in law have been ignored for many years. Unaddressed, they can affect both quality of life for the lawyer and quality of legal service received by clients. These challenges can be a contributing cause of malpractice claims. But recent efforts to shine attention on wellness and mental health bring the promise of positive change in the future.

According to the Mental Health Commission of Canada, in any given year, one in five Canadians will struggle with mental illnesses such as depression, severe anxiety, or stress disorders. While elevated wealth or status ordinarily decreases the risk of mental illness, the opposite is observed in the legal profession. The American Bar Association (ABA) found that almost a third of practising lawyers in the United States were struggling with some level of depression, and between 21 and 36 per cent qualified as problem drinkers. According to a recent study conducted at the University of Toronto, not only are lawyers in Canada and the United States more likely to suffer from mental illness than the public at large, but, paradoxically, lawyers with higher paying and higher status jobs are more likely to self-report depression and poor health than lawyers with lower-status positions.¹

These consequences often manifest early in a legal career. The Member Assistance Program (MAP), which provides mental health services to Ontario legal professionals, sees demand highest from those in their 20s and 30s. As shown in the pie chart on the next page, the successful up-and-comer is often the one struggling with many of these issues.

There's evidence that the elevated income associated with a legal career only partially mitigates the deleterious health consequences of being overworked, overstressed, and burdened with the sometimes substantial work-life conflict that comes with it. The health consequences are wide-ranging and often serious. The MAP sees demand in the legal profession for counselling services relating to a variety of psychological issues, as the bar chart above illustrates.

The severity of these mental health afflictions can range from manageable to life-threatening, but a lawyer does not need to be in crisis before their mental health can have a serious negative impact on their life.

Bringing lawyers' mental health into the light

In 2016, the Law Society of Ontario (LSO) adopted a new Mental Health Strategy intended to address the importance of mental health to the ability of lawyers to meet their professional responsibilities. The report prescribed a comprehensive communication strategy for addressing issues of stigma related to mental illness and addictions and the possible systemic causes of such within the legal profession. Similarly, the Canadian Bar Association recently partnered with Bell's "Let's Talk" public awareness program in an effort to address the harmful negative culture associated with mental health issues, particularly in the legal profession. It's these efforts to normalize treatments directed at mental illness that are seen as key to addressing health problems in the legal profession.

¹ Jonathan Koltai et al, "The Status-Health Paradox: Organizational Context Stress Exposure, and Well-being in the Legal Profession," *Journal of Health and Social Behavior*, 2017

The LSO, the ABA, and other similar organizations now explicitly acknowledge that self-care and wellness are part of a lawyer's obligation to provide competent services to the public. But entrenched cultural norms, embarrassment, and fear of discrimination often hold lawyers back from taking steps to treat mental illnesses before they get out of hand. Usage statistics from the MAP suggest that legal professionals in Ontario currently seek mental health assistance at a rate that is approximately *half* that of other professions. This has serious consequences. A report prepared for the New York State Lawyer Assistance Trust estimated that 40 to 70 per cent of attorney discipline proceedings and malpractice actions are linked to alcohol abuse or a mental illness.

Allowing oneself or others to suffer in silence is not acceptable from either a humane or professional perspective. The legal profession has matured slowly but substantially since the days of Melville and Bartleby, and today more lawyers recognize that mental health problems can and do affect a substantial number of their colleagues, and potentially themselves. It is not uncommon, it is not shameful, but it is serious. And it is necessary to address these problems with self-care and treatment through resources like the MAP.

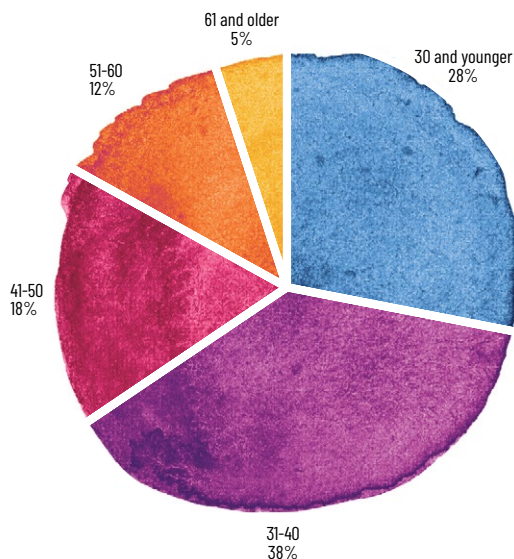
The benefits of asking for help

Although some may act invincible, lawyers are still human. Yet despite the substantial educational pre-requisites to practise law, most lawyers have little or no education in managing self-care and mental wellness. Acknowledging that help may be needed is simply acknowledging that one is not an expert in mental health. Too many lawyers neglect self-care and allow their quality-of-life and practice to suffer.

Doron Gold, a senior clinician who has been with the MAP since its creation in 2013 suggests the following self-reflection: "You are your own best judge of whether your life is going as you want—whether you feel like your life is on a good track and is in control. And if there's a deviation from that, if you're finding that you're not performing as well at work, or you're finding it hard to get out of bed or get your work done, maybe you shouldn't have to put up with that."

He hopes that lawyers realize that "they are one of a few tens of thousands in the profession, all of whom struggle at a given time and sometimes need help." The fact is, "if you can reach out for help and not worry that somehow it will reflect badly on you, there's a very good chance that you're going to heal, get back to fully functioning, and get some relief." ■

Use of MAP resources by age range in 2018



Using the MAP to find a healthier way

Although compromised mental health within the legal profession has historically been a widespread and deeply rooted problem, increasing awareness and new resources are building a healthier, more resilient, and stronger profession. That's where myassistplan.com from the Member Assistance Program (MAP) comes in.

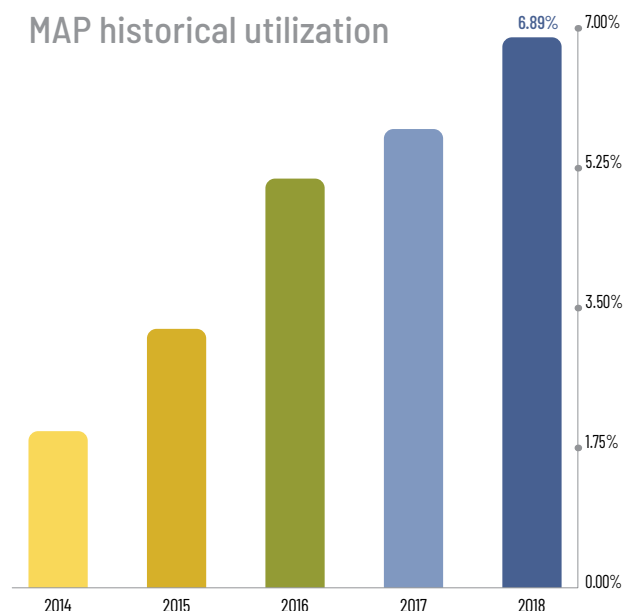


The MAP provides Ontario lawyers, paralegals, law students, judges, and family members, with free and confidential counselling, coaching, online resources, and peer volunteer assistance directed at issues related to career, family, finances, addiction, mental or physical health, and other fundamental aspects of their lives.

Operated by Homewood Health, an independent program provider, it is co-funded by the LSO and LAWPRO for the purpose of increasing lawyer wellness, productivity, job performance, and career satisfaction, and decreasing health-related practice disruptions and errors. In 2018, the MAP was recognized with the Employee Assistance Society of North America's *Corporate Award of Excellence*.

Registering online allows you to access the MAP's health library, including articles and interactive e-learning courses; receive lifestyle coaching on nutrition, smoking cessation, career planning, finance, retirement; or, schedule confidential counselling or peer-to-peer support sessions that can be held in-person, by phone, or online. See sidebar on page 11 for an overview of the resources the MAP offers.

MAP historical utilization

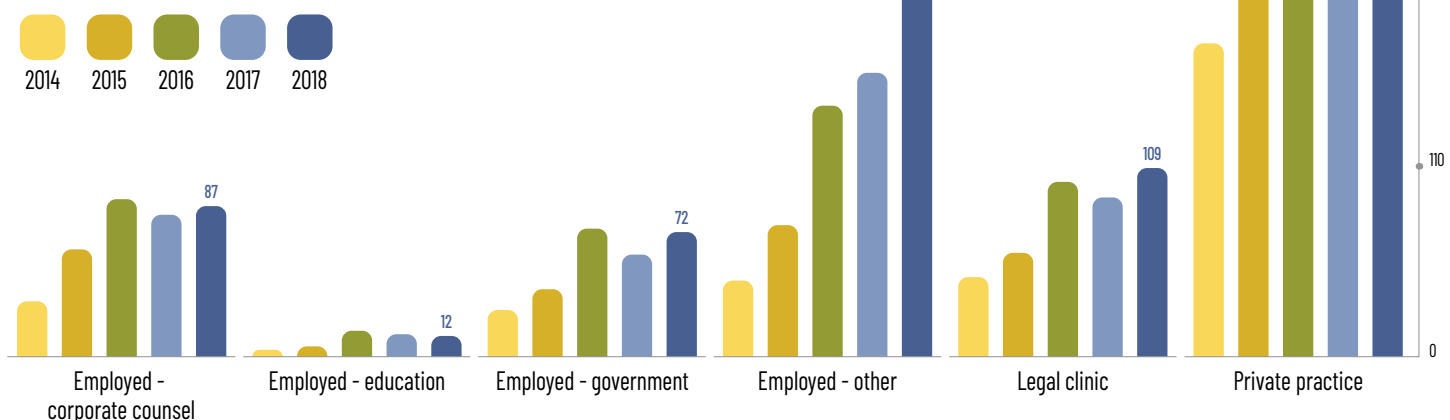


Growth and impact of the MAP

The true measure of success for the MAP and its resources is the increase in its use by the profession. In the five years it has been in operation, use of the program has more than tripled from approximately two per cent to almost seven per cent of lawyers, paralegals, and students in Ontario (see the graph on MAP historical utilization, to the right).

Increased usage of MAP resources since 2014 can be seen among all practice types, as shown in the graph below. Homewood Health expects usage to continue growing, eventually reaching approximately 10 per cent, which would be consistent with benchmarks from other industries and professions.

Distribution of lawyers using the MAP



PROFILE IN PEER SUPPORT

The MAP's peer support program pairs volunteer lawyers and paralegals with individuals calling for support. It can be scheduled in addition to or in substitution for traditional counselling services. Like every other aspect of the MAP, the peer support program is entirely confidential.

Distinct from the LSO's Coach and Advisor Network, which provides lawyers and paralegals with access to advice on substantive or procedural questions in their careers, the MAP's peer support program is aimed at guiding members through mental health struggles and the emotional impact of a legal career.

The purpose of the peer support program is to provide every struggling lawyer, paralegal, or student with a volunteer from the profession who can model recovery while providing empathy and understanding. These volunteers have also lived with mental health and wellness issues in the past and have continued to maintain successful and fulfilling careers.

One such volunteer is Beth Beattie, senior counsel with the Ministry of Health. Beth has been a peer volunteer since 2017, and she says the program is invaluable: "It truly is beneficial to be able to talk to a sympathetic ear, an ear that is experienced and can give perspective."

Beth's experience is twofold. First, as a lawyer with 24 years of experience in private practice and with the Government, and second as a woman with 15 years of experience dealing with a diagnosed mental illness.

"I have bipolar disorder, and I was closeted about it for 14 years. I didn't have a role model. I didn't know anyone else who had bipolar disorder. I just thought it would be so damaging to my career if word got out. So I kept it quiet for 14 years."

For Beth, the MAP's peer support program is an opportunity to provide hope and confidence to others struggling in the profession: "If I had a role model 15 years ago, I would not have lived so many years in angst, because I would have realized that people can have very successful outcomes despite having a major mental illness."

There are over 40 peers like Beth volunteering with the program. Members seeking assistance are matched to volunteers who have personal experience with subjects like substance abuse, depression, anxiety, or other mood disorders. Attributes like gender, age, race, and other criteria are taken into account when finding a peer with similar experience and with whom a member can identify, confide, and seek advice.

Once matched, the relationships are ongoing and indefinite. Beth speaks by phone with those she is matched with once every two weeks. "I was on the phone with a mentee for an hour and half yesterday," she says. "You cover a lot of ground. It's very practical things like putting together a to-do list, or things like office dynamics, or just general health. We talk about things like exercise and diet and medication—I really encourage them to do all of that."

Beth says she sees the benefit that the peer program provides: "When they're young, lawyers can get caught up in minutia—like 'oh my god, I didn't get that letter out as quickly as I was supposed to' or 'I missed that filing deadline'—and I'm able to say 'look, 95 per cent of things can be fixed. You're going to be able to fix this.' You put things in perspective. And I know that it helps them."

Beth sees positive changes being made in the legal profession when it comes to addressing mental health, but feels that much more work needs to be done: "As a profession, it's important for us to talk in our workplaces about mental health: how to get it, how to maintain it, where to go for help, and getting assistance from peers and colleagues. The most effective way to combat stigma is for people in the profession with mental illness to speak out."

"It truly is beneficial to be able to talk to a sympathetic ear, an ear that is experienced and can give perspective."

The importance of strict confidentiality

While use of the program continues to grow, one of the biggest barriers to accessing assistance for many members is their concerns about confidentiality. Doron Gold, a senior clinician with the MAP, takes these concerns very seriously. His response to hesitant lawyers worried that information provided to the MAP could be passed on to the Law Society, LAWPRO, or a third party is simple: “That simply does not happen.” Stigma, embarrassment, and concerns about confidentiality are all reasons given by members not to call the MAP. For Gold, these are reasons why he and his team “reiterate, and reiterate, and reiterate the sacrosanct nature of client confidentiality.”

Confidentiality is built into the structure of the MAP since there is no direct interaction between Homewood Health and the LSO or LAWPRO. All MAP-related communications occur through a third-party broker, and the only information provided to the LSO or LAWPRO by MAP administrators are aggregated and anonymized statistics. All personal information and records remain the property of Homewood Health and will not be released absent permission from the member, a court order, or a threat of harm to the member or others. ■

OVERVIEW OF MAP RESOURCES

The MAP offers a wide variety of online free resources available at myassistplan.com, along with in-person professional assistance.

Short and longer-term counselling

Confidential short-term and crisis counselling is available in-person, online, or over the phone from experienced therapists who specialize in issues such as stress, anxiety, substance abuse, depression, burnout, and other personal and mental health issues.

The MAP provides secure and private online counselling sessions, either through private and confidential message exchange, where a counsellor will respond to a private message within two business days, or through real-time interaction in a private chatroom environment via a secure web board, where all communications are confidential and private.

Longer-term counselling – up to 20 sessions – is available for members seeking treatment for depression or trauma related issues.

Peer-to-peer support

Designed specifically for members of the Ontario legal profession, the MAP's peer-to-peer support service connects members with a peer who has experienced and overcome the same issues they may be experiencing. For more information on the peer support program, see the sidebar titled “A profile in peer support” on page 10.

Lifestyle coaching

The MAP's “Life Smart” resources provide coaching on a variety of subjects such as childcare and parenting, elder and family care,

financial and legal issues, nutrition and smoking cessation, as well as career, retirement, and workplace issues.

Self-directed e-Learning courses

A large online library of health and wellness assessments and self-directed learning resources, including videos, articles, podcasts and e-courses designed to improve personal health and well-being are available at myassistplan.com. Resources can be accessed on any desktop or through the mobile app.

Homewood offers licensees the ability to create an individual profile and receive guided, personalized content and recommendations, including a self-paced online cognitive behavioural program called “i-Volve.” Members can easily access articles on subjects such as anxiety, PTSD, grief and loss, mindfulness and meditation, understanding and treating depression, and myriad other topics, or take online courses that can be completed in a single sitting aimed at taking control of anger, career, stress, and other aspects of their lives.

12weekstowellness.com

Homewood also provides an online, goal-oriented wellness resource under the banner of “12 weeks to wellness.” Individuals set their own goals regarding lifestyle habits, weight, peace of mind, self-esteem, and other wellness aspects, and receive coaching while tracking their progress through assessments and a personal profile.





Why it's important for lawyers and firms to be proactive about mental health

When lawyers ignore their mental health and fail to act on warning signs, they not only harm their quality-of-life and job satisfaction, they leave themselves open to a claim, or even a cluster of malpractice claims.

It's 10:00 p.m. Do you know where your associates are?

A lawyer's life can be a lonely one. Long hours spent in an office — reviewing documents, drafting letters, researching obscure points of law — can create a sense of isolation, even for lawyers practising in firms. This isolation can be harmful to a lawyer's mental health, and it can also prevent colleagues from realizing a problem exists and stepping in when a lawyer becomes overwhelmed.

Too often, a lawyer overwhelmed with professional and personal stress is left alone while files suffer, tasks remain unaddressed, deadlines are missed, and errors are made. In some cases, the overwhelmed lawyer's health suffers to the point of needing to step away.

When firms discover large clusters of claims

Martine Morin, Unit Director & Counsel with LAWPRO, has encountered situations where firms are forced to report clusters of claims after an overwhelmed colleague has stepped away from the files. She says this often appears to be the result of firms not responding to the needs of their associates. Overwork and lack of support from colleagues can create a snowball effect, where small problems start to multiply and grow, causing anxiety or stress, which in turn causes files to be left unattended.

Morin says that while these clusters of claims do arise in medium and large firms, they occur most often in smaller firms, where lawyers usually work alone on a particular file and therefore are not required to update colleagues on a regular basis. She stresses that firm partners need to remember that they may be responsible for the liability of their associates, and that a lack of oversight can create substantial costs down the road, including deductibles, claim surcharges, and levies.

Morin's advice is to ensure that lawyers are checking-in on each other. Partners, associates, and staff should be prepared to recognize red flags that suggest a lawyer has taken on too much or is otherwise struggling, and offer assistance or take steps to mitigate the stress on the colleague. Red flags can include: regularly failing to return phone calls or emails; leaving files to linger over long periods of time; "freezing" and being unable or unwilling to complete small and simple tasks; regular and unexplained absences; and, changes in personality or mood. Colleagues displaying these sorts of warning signs are often in need of assistance and may need encouragement to seek out wellness resources and speak to outside parties such as Ontario's Member Assistance Program ("MAP").

The dangers of not talking about mental health

One thing that prevents struggling lawyers from seeking assistance or notifying colleagues of problems as they develop is the stigma

surrounding mental illness within the legal profession. Many lawyers will refrain from seeking assistance or even acknowledging a problem because they are concerned about negative repercussions and potential judgment from co-workers and management.

Not just talking the talk

Some firms have made great strides in building a healthy and resilient environment. Many are now encouraging their employees and lawyers to take advantage of services like those offered by the MAP, the LSO, or other organizations (see page 15 for more details).

According to Doron Gold, a senior clinician who has been with the MAP since its creation in 2013, those positive changes need to come from the top: “Once I did a webinar for the Law Society, and one of the questions was from a young lawyer who said ‘our firm has a yoga room, and I’m afraid to use it.’ The question was, ‘so what can the firm do to help with that?’ I said, ‘the managing partner needs to take up yoga.’ You need to have the buy-in from the highest

levels, demonstrating tangibly that it’s not just lip-service—they mean it.”

Supporting mental health supports lawyers’ practices

Encouraging an honest and open approach to communicating about mental health is not just good for peace-of-mind, it’s good for client satisfaction. A positive and supportive working environment that avoids mental health stigma will flag potential health problems before they become file problems and may even prevent health problems from arising in the first place.

If you see a colleague or friend struggling with stress, anxiety, depression, or other mental health problems, it’s important to reach out. The first step to creating a healthier environment for everyone is dismantling the stigma and barriers that entrench isolation and prevent healing. ■

Three things you or your firm can do to help prevent large clusters of claims

1

Encourage positive communication about warning signs

Colleagues and support staff may be best situated to know if certain files are being left to linger or a lawyer is not responding to calls or important correspondence. Building a positive culture that responds to stress and mental health problems without judgment can prevent dangerous silence as claims pile up unbeknownst to colleagues.

2

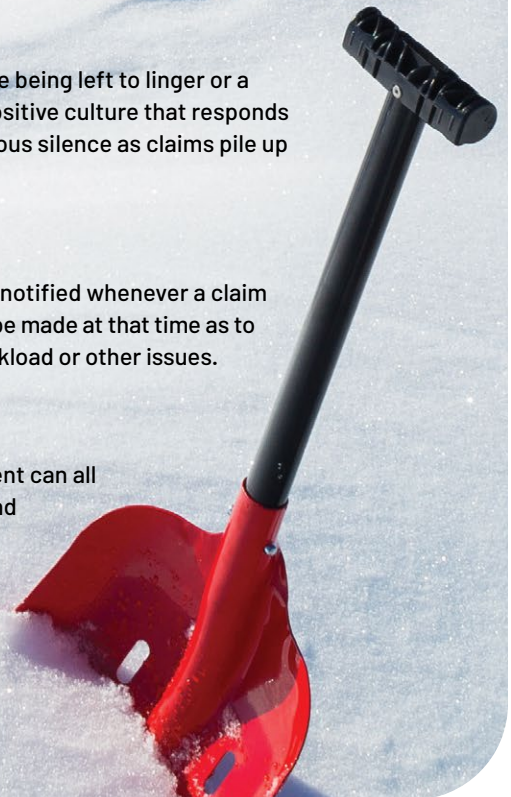
Implement a claims notification policy

In both smaller and larger firms, management can put a policy in place to be notified whenever a claim is made against an associate or a potential claim is discovered. Inquiries can be made at that time as to whether this claim is symptomatic of larger problems, such as excessive workload or other issues.

3

Promote mental health resources for lawyers

Building a healthy workplace is a team effort. Lawyers, staff, and management can all choose to be open about the importance of mental health. Senior lawyers and management can set an example by taking advantage of lifestyle or health benefits offered by the firm. Even if a firm doesn’t subsidize lifestyle expenses or offer health benefits, lawyers can encourage one another to take advantage of the confidential assistance provided to all Ontario lawyers through the Member Assistance Program. For additional online resources available to Ontario lawyers, see page 15.



Online non-MAP wellness resources for lawyers

Mental Health and Wellness in the Legal Profession: **cba.org/CBA-Wellness/Home**

An online self-learning program created for lawyers, judges, and law students through a partnership among the Canadian Bar Association, the Mood Disorders Society of Canada, and Bell Let's Talk. It is designed to educate professionals on symptoms, treatment options, and prevention strategies for depression, anxiety, addiction, stress, and other mood disorders. It is accredited in all Canadian jurisdictions for CPD Ethics/Professionalism hours.

Well-Being Toolkit for Lawyers and Legal Employers: **americanbar.org**

A collection of information and resources compiled by the American Bar Association directed at promoting the well-being and health of lawyers, including an 8-step action plan for legal employers in developing and pursuing a wellness initiative.

Other Law Society of Ontario resources

The Law Society of Ontario provides members with additional assistance and aid that can complement the resources offered by the MAP. For lawyers seeking assistance, the following services are available:

Law Society of Ontario's Coach and Advisor Network (CAN): **lsuc.on.ca/coachandadvisor**

A mentorship program available to Ontario lawyers and paralegals that addresses short term substantive and procedural legal questions. Members are encouraged to contact the CAN for guidance and advice on resolving issues that arise in their practice. If a lawyer or paralegal is struggling with one or more problem files, the practice advice accessible through the CAN is complementary to the mental health and wellness support accessible through the MAP's peer-support program [see page 10 for more information on the peer support program].

Law Society of Ontario's Discrimination and Harassment Counsel

A confidential service that offers advice and support in circumstances where a lawyer has experienced or witnessed discrimination or harassment on human rights grounds. Support can include reviewing the available legal options or mediating

a resolution. Discrimination violates the Ontario *Human Rights Code*, the Law Society's *Rules of Professional Conduct*, and the Paralegal *Rules of Conduct*, and the Discrimination and Harassment Counsel provides assistance in filing complaints with the Law Society of Ontario or with the Ontario Human Rights Tribunal.

Discrimination includes unwelcome comments or actions that relate to a person's personal characteristics, such as race, gender, sexual orientation, and age. Harassment is a form of discrimination and includes unwelcome comments or behaviour when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to another person. Typical examples include name calling, racial slurs and jokes, demands for sexual favours, sexual suggestive comments or gestures, and sexist jokes.

The Discrimination and Harassment Counsel may be reached on a confidential basis at 1-877-790-2200, or email: **assistance@dhcounsel.on.ca**



Putting the fire out:

Dealing with the stress of a malpractice claim

There is simply no doubt about it: making an error or having an action commenced against you is stressful, even for the most successful lawyers. And because almost half of Ontario lawyers in private practice will face a malpractice claim at least once in their career, at some point this stress will be a reality for many lawyers.

From my years of handling professional negligence claims, I have seen lawyers react to this situation in different ways including fear, anxiety, embarrassment, and even anger.

The initial call with a lawyer is one of the most rewarding parts of my job. I am often meeting someone for the first time, learning about their practice, their firm, their clients and their current issue. For my part, I try to assess whether there is a problem that can be fixed or made to go away quickly. For the insured's part, once they get over their initial fear and anxiety and realize they will be helped through the claim and defended as appropriate, they usually feel more comfortable.

Embarrassment

Many insureds experience anxiety over the potential of people finding out about the error or alleged error at issue. This can be tough, for example, in a major litigation file where the insured's error (or potential error) might be discussed in an endorsement or reasons. Worries over losing the client, unsupportive partners, or judgmental peers can be hard to balance with the ongoing practice of law – all while being named a defendant in a negligence action.

If it is some consolation... remember, almost everyone makes an error at some point. Given the statistics, insureds who are willing to confide in colleagues will likely find that they are not alone in having a claim.

Anger

Some insureds are angry that they have been sued or that there is a suggestion that they have made an error. This is especially the case in situations where, in fact, no error has been made. Most insureds get over this anger fairly quickly, but some remain intensely angry throughout the life of the claim. This makes, not only the initial call, but all subsequent calls, challenging. The relationship with the insured usually balances out once they realize that the matter is moving to a resolution and, angry or not, we will assist them.

However, this kind of reaction to a claim emphasizes why it is so important to report a claim or potential claim to LAWPRO. Anger can lead to bad decision making such as retaliatory steps or aggressive letters that might actually undermine the insured's position. Reporting the potential claim and allowing another professional to deal with the situation enables the insured to step back and take a break from the confrontation. Keep in mind that having a claim made against you does not mean it is a *valid* claim. In fact, almost 40 per cent of claim files are closed with no payment at all (including defence costs).

Fear

I have also worked with insureds who are so overwhelmed by the situation that they can barely relay the facts. Take Carol (name has been changed), for example. She negotiated the settlement of her client's divorce proceedings which included each spouse retaining equal share of their holdings in a company they owned together with another party. Only after the final Order was signed did Carol learn that, because the class of her client's shares was different than that of her husband's, there would be an unequal tax effect of \$750,000 each year going forward. Carol had \$2 million in insurance coverage, including excess insurance – far less than the many millions in potential damages. I could barely hear Carol at the end of our initial call when she whispered, “I am going to lose my house.”

Carol was often in my thoughts over the next few weeks. I wondered whether she was getting any sleep at all, and whether she had someone to confide in. In the end, there was good news: the matter was repaired and the file closed without any damages having to be paid and without Carol losing her house. That is another rewarding part of my job: telling an insured that their matter has been resolved.

Denial/Avoidance

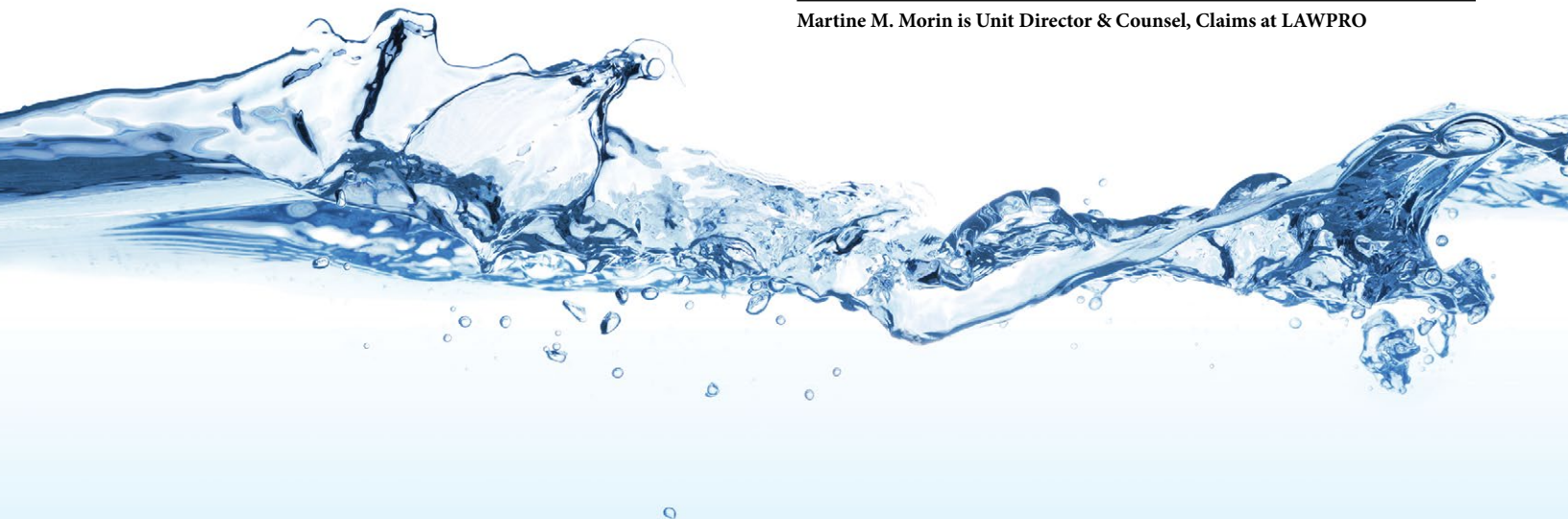
All too often, I see cases in which insureds are so stressed about an error, that they can't bring themselves to report it at all or have waited a significant period of time before doing so. These insureds simply cannot deal with the situation. Once a report is made, some of these insureds avoid dealing with the matter and will not return our phone calls or correspondence. This, of course, makes an already difficult situation worse. The delay in reporting may result in circumstances where it is too late for LAWPRO to repair an error or defend an action. Failing to cooperate may also result in a breach of the insured's obligations under the Policy. Both situations can result in a denial of coverage.

Remember, no good will come from a delay in reporting a claim. Reporting a claim as soon as possible allows LAWPRO to provide early intervention and your best defence.

Making it through

The good news is that 83 per cent of LAWPRO's claims are closed with no finding of liability or indemnity payment. While dealing with a claim is stressful, we are here to help. If you are feeling overwhelmed by an error or a claim against you, consider taking the time to check in with a trusted friend or colleague. If you do not feel comfortable sharing your situation with someone you know, the Member Assistance Program provides confidential peer counselling. ■

Martine M. Morin is Unit Director & Counsel, Claims at LAWPRO





Q. What are my insurance options if I need to take a temporary leave of absence from practice?

A. You can apply for Exemption 'C' under the LAWPRO Program if you are taking a temporary leave of absence from practice. The leave may be up to five years for family reasons or illness and two years for other reasons. This exemption is for a temporary leave of absence only, meaning you must intend to return to practice. It is not available if you wish to pursue alternative employment and there is no coverage for professional services provided during your period of exemption except for the following:

- pro bono services provided through an approved pro bono project associated with Pro Bono Ontario;
- certain mentoring services; and
- certain services as estate trustee, trustee for *inter vivos* trust, or attorney for property, provided you have completed an application

How does my coverage change?

If you apply part way through a policy year, you keep the coverage options (including deductible) you have in place and then revert to the standard coverage at the outset of the next policy year if you remain on exemption. Lawyers who apply at the outset of the policy year are provided with the full coverage of \$1 million per claim/\$2 million in the aggregate and the standard deductible of \$5,000.

Protecting yourself from a claim while on leave

LAWPRO claims statistics show that lawyers taking extended leaves of absence face increased vulnerability to claims as a result of inadequate file supervision, transfer

procedures, and missed deadlines. Litigators should be mindful of the 5-year deadline to set matters down for trial under Rule 48. Files left unattended can trigger a “cluster” of administrative dismissals and is a scenario that LAWPRO sees all too frequently. In various areas of practice, claims have arisen when the departed lawyer has failed to ensure active files are being monitored by staff or transferred to a colleague.

Here are some tips to avoid the files you leave behind becoming a malpractice claim:

Develop and follow procedures for seamless transfer of files

Failing to follow firm file transfer procedures can lead to unnecessary confusion. A file may have languished because damages are

minimal and/or there are difficult issues of liability. When going on leave, make sure to be frank with the successor lawyer or the lawyer who will be assigning the files as to why the matter is in the state that it's in, and what steps need to be taken.

Write detailed file transfer memos

Disorganized files can result in details being missed. A good practice is to include a detailed file transfer memo for each file.

Ensure employees are appropriately supervised

Lawyers should not be relying solely on staff to handle files in their absence: at the end of the day it is the lawyer who will be facing a malpractice claim. ■

A leave of absence checklist

- ☐ Draft detailed file transfer memos that explain upcoming closing dates, limitation dates, administrative dismissal deadlines, or other important dates and any steps that must be taken before those dates.
- ☐ Communicate with your clients about your absence in advance and tell them who will be handling their file while you are away. Put this conversation in writing in a letter to the client and detailed notes to file.
- ☐ Ensure your tickler system is effective, populated properly, and staff have been trained in the use of the system.
- ☐ Ensure junior lawyers, clerks and staff are appropriately supervised and pay attention to signs that suggest they are overwhelmed and at risk of missing deadlines.
- ☐ Keep your office and files organized so that lawyers taking over your files will be able to locate the information they need and understand what work remains to be done.
- ☐ Diarize in your tickler system any upcoming or regular filing deadlines that apply to your clients, such as annual corporate filings, licence renewals, IP renewals, requirements for passing of accounts.
- ☐ For litigators, diarize timelines in your tickler system including the 5-year deadline to set matters down for trial under Rule 48, meet outstanding orders, and to ensure your files stay on track.
- ☐ Be prepared for leaves by already having an action plan in place for unexpected work interruptions or emergencies.
- ☐ Confirm your firm's excess insurance coverage will extend to you during your leave.
- ☐ If an error is made or a potential malpractice claim is discovered, LAWPRO should be notified immediately.



Do your firm's marketing practices expose you to vicarious liability?

While “law firm” once conjured an image either of a sole practitioner with a small storefront office or a multi-generational law firm with clearly defined partners and associates, many other firm structures now exist as lawyers opt to work from their homes, from virtual offices, and from shared accommodations. The work lawyers choose to do varies as well: instead of traditional practice, many choose to work on temporary contracts, as *locums*, or as *ad hoc* in-house or project-based counsel. With these new arrangements come new decisions about how to advertise one's services to the public. Some of those decisions can lead to unexpected liability.

Consider a group of lawyers who share space, a receptionist, and office equipment, but who consider themselves to be individual legal practices. A sign out front advertising “Main Street Law Offices” may mean one thing to the space-sharing lawyers and another entirely to the public, who may interpret the arrangement as a law firm. An honest misunderstanding about a lawyer's connection to other lawyers has the potential to lead to vicarious liability.

The risk of liability increases if lawyers' marketing materials (for example, letterhead, business cards, or a website) acknowledge a connection – even if that connection is qualified in some way. For example, a general practice might list a criminal lawyer on its website as “practising in association with the firm.” While to lawyers this might be a clear indication that the partnership will not be jointly liable for claims against the associated lawyer, the public may not understand the implications. What if the associated lawyer engaged in dishonest behaviour that caused a client to suffer a loss? Could a court find that the law firm created the opportunity – and therefore took the risk – that the associated lawyer could commit a dishonest act in its name?

Your first line of defence in avoiding these situations is the elimination of ambiguity in your connections with others. If your firm is not in a position to oversee and detect problems in another lawyer's practice, then you should not be allowing your firm name to be associated with that lawyer.

For protection from vicarious liability involving the malfeasance of a lawyer, you should also take the important step of obtaining innocent party insurance coverage.

Innocent party coverage protects against vicarious liability

LAWPRO innocent party coverage protects lawyers and their clients against the dishonest, fraudulent, criminal, or malicious acts or omissions of present or former partners, associates, and employed lawyers.¹ In other words, this coverage extends, in certain circumstances, to acts and omissions that would otherwise be excluded² from coverage because of elements of criminality, malice, or fraud.

Innocent party coverage is required for all lawyers practising in association, partnership

(including general, multi-discipline and/or combined licensee partnerships and LLP partnerships) or a law corporation with more than one lawyer. The basic Innocent Party coverage (with a premium of \$125 per lawyer) is subject to a sublimit of \$250,000 per claim/in the aggregate applicable to claim expenses, indemnity payments and/or costs of repairs. This coverage can be increased to either \$500,000 per claim/in the aggregate or \$1 million per claim/in the aggregate.

Consider whether your excess insurer covers this liability

Lawyers who increase their Innocent Party coverage to the \$1 million/\$1 million level can be confident in knowing that they have done what they can to minimize the potential coverage gap between their primary and excess coverage if faced with significant vicarious liability for a lawyer malfeasance claim. Law firms should consider making excess coverage part of their vicarious liability risk management strategy, particularly when the firm handles high-dollar-value matters. LAWPRO offers excess coverage limits from \$1 million per claim and in the aggregate all the way up to \$9 million per claim/in the aggregate.³ ■

¹ For the specific terms of Innocent Party coverage under the Policy, see Endorsement No. 5 “Innocent Party Coverage & Levy Surcharge.”

² The exclusion for dishonest, fraudulent, criminal or malicious acts or omissions is described in Part III, Exclusion (a) of the Policy.

³ Excess coverage and limit levels are individually underwritten and subject to approval.



Navigating the LAT Regime – Traps for unfamiliar lawyers

Even when a case falls into an area of law in which a lawyer is experienced, a new or unfamiliar administrative regime can present risks for lawyers not prepared for the particular statutory framework. Importantly, missing key details and requirements can lead to malpractice claims from inadequate investigation or communication failures with clients.

The following example involves Ontario statutory accident benefits (“SABs”), now under the jurisdiction of the Licence Appeal Tribunal (“LAT”). It provides cogent examples of errors that could happen to any lawyer operating in an unfamiliar statutory regime.

Don't skip the details

One case¹ shows why familiarizing oneself with the specific evidentiary and procedural requirements of the LAT is so important.² In this case, the applicant was injured in a motor vehicle accident on December 13, 2014. He received a non-earner benefit from Aviva Insurance under the Statutory Accident Benefit Schedule. Aviva ultimately stopped paying that benefit in May of 2016 on the basis that the applicant did not suffer a complete inability to carry on a normal life as a result of the accident. The applicant appealed Aviva's benefits stoppage to the LAT.

The LAT adjudicator dismissed the applicant's claim. In reaching his decision, the adjudicator commented that he considered the evidence in three inter-related parts:

1. Life before the accident;
2. The impairment sustained as a result of the accident;
3. Life after the accident.

The applicant was 28 years old at the time of the motor vehicle accident and was completing a program at Centennial College. He lived with his mother. He had three

children, all of whom did not live with him. The applicant's priorities prior to the accident were his children, playing sports, and pursuing his studies. The applicant swore in an affidavit that his daily activities prior to the accident included:

- Housekeeping and home maintenance;
- Care for his three children;
- Sports (basketball, soccer and weight training);
- Attending college;
- Grocery shopping;
- Volunteer work; and
- Social outings, such as movies and parties.

In his written reasons for dismissing the application, the adjudicator cited a failure on the part of the applicant to provide sufficient evidence and detail as to the various pre-accident activities alleged to be impaired. With respect to time commitments, the applicant “did not provide information about how much time each of [the pre-accident] activities occupied during a typical day, week or month prior to the accident.” The adjudicator drew specific attention to the lack of details on how much time the applicant spent pre-accident on childcare activities like “toileting, grooming, bathing, spending time with the children and taking them to outings.” The adjudicator stressed that the amount of time invested in these activities could only be partially inferred, and this

was inadequate for the purposes of assessing whether the applicant was now prevented from engaging in substantially all of the pre-accident activities in which he ordinarily engaged.³

Without information and evidence as to the amount of time spent on specific activities, the adjudicator was unable to determine how much less time he was able to dedicate to them after the accident. The primary takeaway from this case is that lawyers should be careful to conduct adequate investigation and provide sufficient information and evidence to the tribunal with respect to their client's pre-accident activities in order to substantiate their claims at the LAT. One way this can be done is by collecting detailed attestations from family members and friends as to the applicant's participation in pre-accident activities, such as childcare or hobbies.

The adjudicator in this case also commented on certain procedural errors made by counsel for the parties, which is a reminder that lawyers must keep in mind all the procedural requirements and rules of the LAT.


Hopefully, all lawyers will take specific note of the requirements and rules of the LAT when preparing for future applications. Doing so may help counsel avoid criticism, but, much more importantly, will ensure their client's application is presented in the most effective manner. ■

Yvonne A. Diedrick is Claims Counsel at LAWPRO

¹ 2017 CanLII 46352 [Aviva]

² This case and other important accident benefit cases were reviewed by Mary Nicole Corriero as part of the Osgoode Hall Law School's Professional Development Program, “Accident Benefits 2018: What's New, What's Important,” attended by the author.

³ See *Aviva* at paras. 13, 17.



Run-Off insurance:

The coverage you have after you leave practice

When lawyers retire, get appointed to the bench, go in-house or otherwise claim exemption from maintaining LAWPRO insurance, they commonly ask LAWPRO two questions:

1. Do they still need to pay for insurance?
2. What sort of services are they still allowed to perform?

When you leave private practice you are not “off the hook” for any claims that may be made against you. On the contrary, you continue to be liable for the professional services that you, or your former partners or associates, provided in the past. Because LAWPRO operates as a “claims-made” policy (i.e., the coverage you have in place when you first know about a potential claim responds to a claim, not the coverage you had in place when you did the work) you will continue to need coverage.

What is “Run-Off” coverage?

LAWPRO’s Run-Off coverage is insurance with a limit of \$250,000 per claim and in the aggregate that is provided for free to those who leave private practice. The deductible is \$5,000. The coverage amount is different for lawyers taking a temporary leave of absence, and lawyers on permanent mobility, see page 18 for more.

In addition, as part of the \$250,000 Run-Off coverage you are provided with protection

against innocent partner claims. This means that if claims are made against you for the dishonest, malicious, criminal or fraudulent acts of a former partner or associate, your Run-Off coverage can be exercised up to the 250,000 limit.

Is this Run-Off coverage enough?

While a quarter million dollars of coverage, premium-free provides a certain amount

of peace of mind, there are some facts to consider:

- The \$250,000 is a lifetime amount. It doesn't renew, and it can be eaten away by claims costs
- One in about 40 claims exceeds the \$250,000 coverage limit
- One in 100 claims exceeds \$500,000

A large single claim, or a number of smaller claims, could easily exceed your Run-Off coverage threshold, leaving you personally liable for any additional costs. And remember, this coverage does not renew. Once the \$250,000 is gone you have no coverage for any future claims.

For this reason, we encourage lawyers to consider increasing their Run-Off coverage to \$500,000 or \$1,000,000 on a 2 to 5 year basis. Innocent Partner coverage can also be increased to those limits. To apply, complete an application form at lawpro.ca

How much you should buy up your coverage and for how long will depend on your own practice circumstances. LAWPRO claims data show that it takes an average of two to three years after you have engaged in the practice of law for a claim to surface. Moreover, up to 10 per cent of claims are not made until five years after the service was provided. In some areas of practice, such as wills, estates, and real estate, it can take even longer before claims surface. For more information on how long claims can take to appear, and how limitation periods are also a factor to consider, see the article "How long should you keep your closed files?" on practicepro.ca

What sort of work can you do after you leave practice?

There is no coverage for professional services provided during any period of exemption. In other words, you cannot engage in the private practice of law in Ontario, unless you fall into one of the exceptions below.

If you provide professional services to family, friends or associates, even if on a pro bono basis, you are considered to be providing

professional services in private practice and are required to pay the LAWPRO insurance premium.

As well, in situations where you are retired as a lawyer but are acting as a mediator, arbitrator, immigration consultant or are otherwise providing services that are often but not exclusively provided by lawyers, it should be absolutely clear to clients and others that you are not providing these services as a lawyer. If you do provide these services in your capacity as a lawyer, you are considered to be providing professional services in private practice and must pay the insurance premium.

Exceptions to "no coverage for professional services"

1. Pro bono services provided through an approved pro bono professional services program associated with Pro Bono Ontario.

Your Run-Off coverage covers you for pro bono services as long as they are LAWPRO approved projects associated with Pro Bono Ontario. You will not be required to pay any deductible amount for any claims relating solely to such professional services. Claims history levy surcharge is waived.

2. Certain services as estate trustee, trustee for an *inter vivos* trust, or attorney for property

As you wind down your private law practice, it may be that you are named or act as estate trustee, trustee for *inter vivos* trust or attorney for property, even though the rest of your practice is being wound down or turned over to one or more lawyers who remain in practice.

Your role must be residual work from your past practice in Ontario, which would not be the case where you have only been named in retirement.

As well, this exemption would not apply to any trusteeship or attorney for property, where you have been named or are acting

in respect of a member of your own family (as defined under section 251(2) of the *Income Tax Act (Canada)*).

The full criteria under which a retiring lawyer who continues to act as estate trustee, trustee for an *inter vivos* trust or attorney for property, can apply for exemption are fully set out in the exemption eligibility section of the Application for Exemption. You will need to have information about your activities available when you apply for the exemption.

3. Mentoring

LAWPRO encourages retired lawyers to be mentors. You can maintain your exempt status while having coverage for mentoring services, and have your deductible (and claims levy surcharge if you return to practice) waived on any claim made against you arising out of a mentoring relationship provided that:

- you and your mentee enter into a formal mentoring relationship, evidenced by a written document of some kind;
- you have no contact with the mentee's client that would create a solicitor/client relationship; and
- the mentee understands that they are responsible for individually and independently satisfying themselves of the soundness of any suggestions, recommendations or advice-like comments made by you.

If you are interested in serving as a mentor, consider contacting the Law Society's Coach and Advisor Network (CAN), see page 15 of this issue for more information. It provides lawyers and paralegals with access to shorter-term, outcome-oriented relationships with coaches and advisors drawn from the profession. Coaches support the implementation of best practices and advisors assist with substantive and procedural law inquiries on client files. ■

Tim Lemieux is Claims Prevention & Stakeholder Relations and Claims Analyst at LAWPRO

Did you know that some title insurers include exceptions to fraud coverage for private lender transactions where the mortgage funds are not paid to acceptable parties?

Title insurance for private mortgage lender clients: don't get caught on a technicality

In light of the commonly held view that real estate is a safe investment, many individuals use mortgage investments to supplement income or as a means of saving for retirement. Unfortunately, a reality of the current real estate landscape is that private lenders are often the target of identity frauds.

A title insurance policy generally includes coverage for identity fraud and although most real estate lawyers are familiar with the standard exclusions, title insurers often include transaction-specific “exceptions” to coverage. It is a lawyer’s failure to identify and consider these “exceptions” which have been a source of E&O claims for LAWPRO. It is important to review the exclusions and exceptions with your private lender client before advancing mortgage funds.

Some title insurers, but not TitlePLUS, routinely include exceptions to fraud coverage for private lender transactions **where the mortgage funds are not paid to acceptable parties**. With this exception, if the funds are paid to the borrower’s lawyer in trust or to any third party (other than those specifically set out in the exception), the title insurer may deny coverage for fraud.

This exception goes against the standard practice of the lender’s lawyer disbursing payments to the borrower’s lawyer in trust (where the borrower is represented by separate counsel). The requirement imposed by the wording of the exception, that payment be made directly to the “registered title holders,” is inherently challenging since the lender’s lawyer would not generally deal with the borrower directly.

As a result of the changing nature of title insurance underwriting in relation to private mortgages – when acting for a private lender – it is imperative to carefully review the coverage details to determine whether specific steps need to be taken, which might not otherwise be standard practice, and to obtain the client’s instructions. Warn the client of the risks associated with waiving the requirements set out in the exception, and document the discussion and client’s instructions. This will protect you in the event that issues are discovered after closing.

What to do:

Title insurers who use the private mortgage fraud exception may permit the lender’s lawyer to pay the borrower’s lawyer in trust **as long as the borrower’s lawyer provides a personal undertaking** that they will pay the balance of funds to acceptable parties (after payment of property taxes and prior registered encumbrances).

“It is important to review the exclusions and exceptions with your lender client before advancing mortgage funds.”

Identity fraud and mortgages

An identity fraud occurs when a fraudster uses fake identification to assume the identity of an existing property owner (or director/officer of a corporate owner) for the purpose of granting a mortgage. The fraudster then absconds with the mortgage funds (after perhaps making a few mortgage payments) and the true property owner usually learns about the fraudulent mortgage upon receiving correspondence regarding the default.

In these situations, the true property owner may pursue a court proceeding to have the mortgage discharged without payment. Alternatively, the Director of Titles may hold a hearing, pursuant to subsection 57(16) of the *Land Titles Act*, R.S.O. 1990, to rectify the register by deleting the mortgage if it is found to be a fraudulent instrument. This process is usually known as a “Caution Hearing.” In either case, the lender is left with an outstanding

loan with no security and, in many cases, authorities are not able (or do not have the resources) to track down the fraudsters. Often a private lender’s only meaningful avenue of recourse is to submit a claim through title insurance. ■

Nadia Dalimonte is Manager, TitlePLUS Claims and Counsel



Paying attention to the

fraud behind the curtain:

Don't get fooled by spoofed email addresses

We have previously written about the dangers associated with email spoofing and phishing schemes, where fraudsters will send fabricated emails purporting to be from a trusted colleague or third party in an effort to trick a lawyer or staff member into clicking on a dangerous link or downloading a dangerous attachment. These fraudulent schemes continue to evolve as lawyers and firms become aware of various red flags and danger signs. Here are recent examples of cyber-fraud and practical advice on how to avoid similar attempts in the future.

One firm's close call during an attempted fraud

It began with multiple members of the firm – staff and lawyers – receiving an email, ostensibly from the firm's receptionist. The address of the sender, as contained in the "From" line of the email, was an exact duplication of the receptionist's work address – it contained no misspellings or other obvious signs of being a spoof. The body of the email simply said "please see attached

invoice," and contained an attachment labeled "invoice."

One of the recipients of this email was the firm's bookkeeper, who, in the habit of receiving invoices from the staff and lawyers at the firm, opened the attachment. Upon doing so, and unbeknownst to the bookkeeper, spyware was downloaded onto their computer. The spyware gave the fraudsters access to, among other things, the bookkeeper's email history.

Later that day, the bookkeeper attempted to log into the firm's online-banking service and found that they were unable to do so. Soon after making that discovery, the bookkeeper received a telephone call from an individual claiming to be an employee of the firm's bank. In reality, the individual on the phone was the fraudster. The fraudster gained the bookkeeper's trust during their conversation by referencing details gleaned from the bookkeeper's email history as to the firm's banking relationship, including

referencing the firm's account manager at the bank by name.

Once the fraudster gained the bookkeeper's trust, the fraudster "explained" that the bookkeeper's online banking credentials would need to be resubmitted.

Doing so required not only a username and password, but also the use of two separate token-generated, one-time-use codes (these are numerical codes generated by a key-fob device possessed by the staff and lawyers at the firm, which are valid for a limited time and cannot be reverse-engineered by outside parties – for example, an RSA SecurID mechanism).

When the bookkeeper entered the required credentials, including the token-generated codes, the fraudster was able to surreptitiously acquire the information being entered into the bookkeeper's computer and simultaneously use those credentials to access the firm's online-banking account from the fraudster's location. The fraudster then initiated a transfer of a large amount of money from the firm's trust account into an account controlled by the fraudster.

Luckily, the bookkeeper noticed the unauthorized transfer soon after it occurred. The firm's bank was immediately notified of the fraud attempt, and the bank was able to halt and reverse the transfer before the fraudsters were able to remove the funds to a place where they could no longer be retrieved.

Although this story had a happy ending, not every firm targeted by a phishing scheme will be so lucky. Even though the firm had taken steps to ensure cybersecurity – such as using two-factor authentication with token-generated, one-time-use codes – these steps were circumvented through clever deception on the part of the fraudster.

What's clear is that, in this case, the unfortunate course of events was put in motion by the bookkeeper's failure to realize that the initial "invoice" email was a spoof. Had

that mistake been avoided, the attempted fraud would have been unsuccessful.

Tips on how to avoid falling for spoofed email addresses

Most lawyers are now aware that fraudsters may send fraudulent email that erroneously appears to be from a colleague or trusted third party. Sometimes these phony emails are sent from an email address that can be identified as phony upon closer inspection (such as when the domain of the address is slightly misspelled, e.g. lawyer@lawwpro.ca). However, many otherwise tech-savvy lawyers are unaware that a sender's email address appearing in the "From" line can be identically spoofed. That is, a fraudster can send an email to an individual or individuals from the fraudster's server, but the email will appear to be from a trusted party, with no way to distinguish the phony email from one actually sent by the trusted party by reviewing only the sender's address as it appears in the "From" line.

However, there are a few relatively simple things that can be done to reduce the chance of being fooled by spoofed emails in these circumstances.



Don't immediately click on any links or open any attachments that you are not specifically expecting to receive

Lawyers and staff deal with voluminous amounts of email every day, and it may not be reasonable to take additional steps to ensure the validity of every single email received and reviewed. However, if you receive a link or attachment that you were not specifically expecting, even if it appears to be from a trusted third party or is something you would regularly receive in the ordinary course of business (such as an invoice being received by a bookkeeper), it is always best to take additional steps to confirm the identity of the sender. If the sender is a colleague or someone that can be easily reached by phone, a quick call to the apparent sender can provide assurances as to the email's authenticity.



Check the “return-path” address in addition to the “From” line

Every email is received with two “from” addresses. The first is the address that appears in the “From” line, this is also known as a “header from.” It is what we normally think of when we identify the sender of the email. However, the email is also tagged with a “return-path” address, also known as an “envelope from” address, which tells the recipient’s server where to send replies. Both the “From” line and the “return path” can be spoofed by fraudsters. However, sometimes the fraudster uses a different address for the return path to ensure that any replies will actually be sent to the fraudster and not the actual trustworthy party whose email is being spoofed.

Although the return path address is not immediately visible to the recipient of the email, it can be identified by bringing up the delivery details and full “header” properties of the email. This can usually be done from a drop-down menu, depending on the email application being used.



Check the geographic origin of the email through the sender’s IP address

If a suspicious email originated from an unexpected location – for example, one appearing to be sent from an Ontario-based client, but with an originating IP address located on another continent – this can be a useful warning sign that the email may not be what it appears.

It is possible to trace the geographic origin of some, but not all, emails through the sender’s IP address as contained in the email’s full “header” properties. Emails sent from domains with public IP addresses can usually be traced to their city of origin by entering the sender’s IP address into any of the IP lookup tools available for free online.

Unfortunately, this technique cannot always provide the true geographic origin of the sender. Like the “From” line and “return-path” information, IP addresses contained in the full header can be spoofed by a fraudster, making it extremely difficult to deduce the true originating source. As well, some email

domains, like Google’s Gmail for example, omit the true sender’s IP address from all headers, and instead only provide Gmail’s central mail server’s information.



Authenticate emails sent from your firm’s domain

One of the most common phishing techniques in the legal profession is to send a target an email that appears to be from a colleague at the same firm or office, using an address with a domain that is owned by the firm. Often it is the address of a colleague that is temporarily away from the office and is unavailable to immediately confirm the email’s authenticity. This danger can be avoided by implementing email authentication protocols for your firm’s internet

A brief explainer of the SPF and DKIM email authentication protocols

SPF: SPF allows the owner of a domain to specify which IP addresses are authorized to send email on behalf of that domain. Essentially, the owner of the domain (the firm) will publish in their Domain Name System (DNS) a record of all IP addresses authorized to send email from that domain. This is done by contacting the DNS provider that handles your firm’s email domain. Your email application can then be told to do an SPF-record check on incoming messages. The email application will then check the message’s “envelope from” address against the authorized IP address published in the DNS. If the email was actually sent from an unauthorized address (essentially, anyone outside the company), it will be flagged by your email provider as potentially fraudulent.

DKIM: DKIM is a process of cryptographically authenticating the content of an email as originating from an authorized sender. In summary, the legitimate emails sent under your firm’s domain would be signed with a code (or “hash”) that corresponds to the content of the email. That hash is then encrypted using a private encryption key. A corresponding public key is then published in the DNS, much like the SPF record. When your or anyone else’s email provider then receives an email with a DKIM signature, ostensibly from your domain, it will apply the public key to decrypt the signature and recover the original hash string. The process will only work, and the email will therefore only be verified, if the actual sender of the email used the correct private key when “signing” the email. This process assures other members of the same firm or office that the actual sender of an email appearing to be from a colleague is trustworthy.

domain. Two authentication protocols to be aware of are the SPF (Sender Policy Framework) and the DKIM (Domain Key Identified Mail). These protocols can be implemented relatively easily at no cost. If your firm does not already have access to IT assistance, many user-friendly guides on how to implement these protocols are available online.

While no security procedure provides complete safety from continually evolving fraud threats, these techniques will provide additional confidence to you and your firm that an email claiming to be from a colleague is trustworthy and not part of a fraudulent scheme. ■

Shawn Erker is Legal Writer and Content Manager at LAWPRO

Tools for a strong foundation:

Resources every real estate lawyer should know about

A successful real estate practice needs a variety of tools and resources.

Here are four great resources that are a good starting place to find the right tool for whatever issues come to your practice.



Real estate file management checklist

Real estate continues to be LAWPRO's second largest claims area by count and cost, and communication breakdowns between lawyers and

their clients are the most common cause of those real estate claims. At the same time, even routine real estate transactions involve a number of steps and details that can easily be missed and slip through the cracks.

The **LAWPRO File Management Checklist** is a great resource that can help you stay organized during intake while enabling effective communication with clients and managing their expectations with a roadmap of the transaction at the outset of the retainer.

Download the real estate and other file management checklists for free at practicepro.ca/checklists



Fraud fact sheets

Real estate lawyers are a major target for fraudsters, with fraud schemes and techniques that can be difficult to avoid because they continue to evolve and change. That's why it's important to stay up-to-date on recent fraud

warnings and best practices with the practicePRO program's fraud resources. Our Real Estate Fraud Fact Sheet provides fraud scenarios and a list of red flags you need to be aware of.

You can find the fraud fact sheet and other important resources at practicepro.ca/fraud

CBA mortgage toolkit

Over the last few years, lenders have increasingly asked lawyers to give opinions on questions of fact and assume responsibility for matters beyond the scope of their legal services or expertise. Fulfilling these requests increases your risk of liability.



In response to growing concerns over unusual lender instructions, the **Canadian Bar Association's Real Property Law Section** prepared a **Mortgage Instructions Toolkit** with practical tips on how to respond to common lender requests.

Visit the Practice Tools section of the CBA website to see the list of issues and practical guidance.

Real estate precedents, guidance, and mentorship

Every lawyer needs simple and consistent precedents for their standard documents.

The Working Group on Lawyers and Real Estate created a set of standard closing documents that have been endorsed by the Federation of Ontario Law Associations. These documents have standardized wording, eliminate repetition, and remove statements and declarations that the vendor is not obligated to give under the terms of the Ontario Real Estate Association's standard Agreement of Purchase and Sale.



The Working Group also manages an initiative that circulates surveys on various aspects of the work done in real estate transactions to provide real estate practitioners with data on the routine steps and issues that commonly arise during real estate transactions.

Visit lawyersworkinggroup.com to see the Working Group's precedents and participate in the Mentoring Initiative. ■



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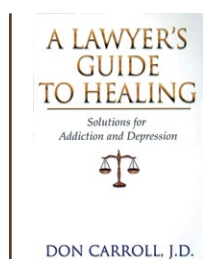
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A Lawyer's Guide to Healing: Solutions for Addiction and Depression

by Don Carroll, J.D.



"If I had to pick the most common malady affecting lawyers, it would be alcoholism." This is according to Don Carroll, former director of the North Carolina

Lawyer's Assistance Program and author of *A Lawyer's Guide to Healing: Solutions for Addiction and Depression*. In the book, he examines how addiction and depression manifest in the legal profession in different ways than in the general population, and treatment options best suited to lawyers. The main focus is on alcohol abuse, but the lessons can be applied to other addictions like drugs and gambling.

Carroll believes there are traits prevalent in a lawyer's personality that make them thrive in the work-heavy, adversarial environment of the law, but can also make lawyers more prone to addiction and depression. He sees two broad traits common in the legal profession: *the romantic idealist* and *the judge*.

The romantic idealist sees the world how it ought to be, and feels the weight of injustice. Frustration at not being able to always achieve that justice, if not handled in a healthy way, can cause some to turn to alcohol to numb these feelings.

The personality of the judge is detached and analytical, shutting off normal healthy feelings. They tend to be too judgmental of themselves. In this case, alcohol can become an appealing way to both loosen up and make it easier to ignore feelings of self-judgment. So drinking or drugs can seem to (temporarily) help deal with the

fear of losing a case, the bitterness when justice isn't seen to be done, and the need to feel in control despite drowning in workload.

These same personality characteristics that make an effective lawyer (e.g., idealism, perfectionism, and detachment) can make it difficult to admit there's a problem. A person whose identity is tied to achieving success can have a hard time admitting failure. Even when a lawyer knows there's a serious problem, shame and secrecy can prolong the situation as their practice spirals out of control.

The damage of addiction isn't limited to the addict. Family, friends, clients and colleagues of the lawyer suffer too. And the problem can span generations, both because of a biological component to addiction and growing up in a household dealing with an alcoholic parent. Carroll has worked with lawyers who grew up as the children of addicts, and they can display their own personality flaws developed as coping mechanisms: a need to please, an inability to engage emotionally or a fear of not being in control after growing up in a chaotic environment. All of this can negatively affect practice habits, even if they don't lead to addiction for themselves.

Just as there may be traits particular to the legal profession when it comes to addiction, Carroll believes there are treatment options best tailored to lawyers too. He advocates treating the mental and spiritual aspects of the problem, not just the physical. So, in addition to describing the physiological causes and treatments of addictions and clinical depression, he strongly believes counselling and peer supported programs like Alcoholics Anonymous are crucial to addressing other underlying issues.

Carroll's ideas on the spiritual or 'positive thinking' solutions may not appeal to all lawyers (particularly those with a preference for purely scientific answers to addiction problems). The later chapters of the book suggest that lawyers consider their emotional attitudes, take inventory of their motivations and feelings, and consider how they relate to colleagues and friends. The aim is to break the mental patterns that contributed to the addiction in the first place.

If you're a lawyer or know a lawyer who may be struggling with addiction, this book is a good starting point on the road to getting help. It gives a general overview of how addiction works on both a physical and mental level, and suggests a variety of ways to approach treatment. It is particularly useful in examining how addiction manifests in the legal profession differently than the general public.

More reading about lawyers, addiction and depression

The Addicted Lawyer: Tales of the Bar, Booze, Blow, and Redemption

by Brian Cuban

Brian Cuban was a successful lawyer also struggling with depression, alcohol and cocaine addictions. In this book, he takes an in-depth look at why there is such a high percentage of problematic alcohol use and other mental health issues in the legal profession. What types of therapies work? Are 12-step programs the only answer? Brian also includes interviews with experts as well as others in the profession who are now in recovery.

The Full Weight of the Law: How Legal Professionals Can Recognize and Rebound from Depression

by Jeffrey Fortgang & Shawn Healy

Law students and lawyers report having a significantly higher rate of depression than

the general population. When untreated, depression affects lawyers, their clients, families, friends, and colleagues. Unfortunately, for many struggling with depression, it is only when they reach their breaking point, or encounter unavoidable professional consequences, that they feel ready to reach out for assistance. Taking

steps to address problems could save a lawyer much hardship later on. These books are available for loan from the practicePRO lending library at: practicepro.ca/library ■

Tim Lemieux is Claims Prevention & Stakeholder Relations and Claims Analyst at LAWPRO

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

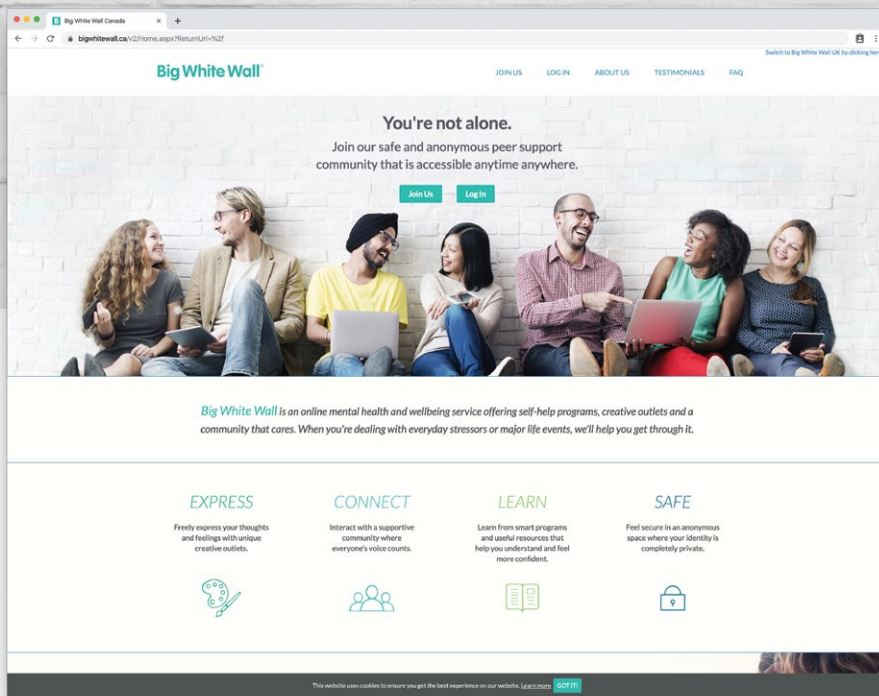
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Construction Act: Which one applies?

To accompany the AvoidAclaim.com article originally posted on September 16, entitled *Upcoming Changes to the Construction Act*, we are pleased to share a detailed flowchart from Glaholt LLP to help you determine which Act applies to your construction law matter.

Generally, the old Act will apply where a contract for the improvement was entered into before July 1, 2018 or a “procurement process” for the improvement was commenced before July 1, 2018 by the owner. If neither of these circumstances apply, the new lien modernization provisions will govern. But that’s not all there is to know! Visit the checklist page of practicepro.ca to use the flowchart to help determine which processes should be followed when lienning a project – but remember: there is no substitute for a comprehensive review and understanding of the new legislation.

bigwhitewall.ca



In 2018, Ontario Telemedicine Network (OTN) and Ontario's Ministry of Health and Long Term Care commissioned Big White Wall to provide digital mental health support, in line with the recommendations made in 'Changing Directions, Changing Lives: The Mental Health Strategy for Canada'. The partnership represents one of the biggest single deployments of mental health services online in the world.

Big White Wall offers Ontario residents the choice and flexibility to seek support early, without stigma and at a time convenient to them.

Discover a new approach towards wellbeing that is available anytime anywhere:

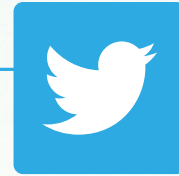
- Anonymous peer support
- 24/7 moderation by clinically trained 'Wall Guides'
- Self-guided courses
- Self-improvement tools and resources
- Safe space to express yourself without judgement ■

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