



# LAWPRO's best claims prevention tools and resources

LAWPRO sees the same errors time and time again. Lawyer/client communication problems, inadequate investigation or discovery of fact, missed deadlines and procrastination are the most common causes of claims.



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

**1 Start out on the right foot with a formal file opening procedure and a written retainer:** With every new client you should go through a standard file opening procedure that includes client/matter screening and a conflicts check.

If you are going to act, you should prepare a retainer letter or agreement that sets the key terms of engagement for the matter. It should clearly identify who the client is and what you are retained to do and any limitations on the scope of the retainer. Consider including a provision that describes your firm's policy on disbursing money from your trust account. To protect yourself against counterfeit cheque fraud: Put the client on notice that you reserve the right to hold funds for a specific time period or until you are sure they have cleared.

**2 Don't dabble or handle a matter you are uncomfortable with:** If you are unsure or hesitant about handling the matter for any reason, get appropriate help or refer it to another lawyer.

Send the matter away if you are unfamiliar with the area of law, a real or potential conflict exists, the matter is for a relative or friend and you are not able to be objective, or the client is uncomfortably challenging.

**3 Get the money up front at every stage of a matter:** At the time you are retained, get a retainer that is sufficient to cover all work that needs to be done on the initial stage of the matter. Replenish retainer funds before they are exhausted and on the start of each stage of a matter or file. Configure your accounting system to remind you when the amount in trust is getting low relative to the WIP on the file or when the accounts have not been paid within 30 days. Stop work if the retainer is not replenished or accounts are not paid on a timely basis.

Working on credit with a growing A/R greatly increases the likelihood you will not get paid and the potential for a malpractice claim (see #13). This is especially important for plaintiff litigation, where you could find yourself in the middle of a malpractice claim due to an administrative dismissal of the action. If the retainer is not replenished, get off the record in a timely fashion.

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

**5 Document (almost) everything:** It is just not practical to document everything on every matter, but strive to document as much as you can in some contemporaneous manner. Formal letters are fine, but emails, detailed time entries or marginal notes on documents can be equally effective. In particular, record advice or instructions that involve significant issues or outcomes, as well as major client instructions or decisions (especially with respect to settlements).

Documentation takes on a greater importance when dealing with challenging or emotional clients. Memorialized communications are invaluable to confirm what was said to, or done for, the client in the event of a malpractice claim. Refrain from making nasty or embarrassing comments (which may end up in client files or records).

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

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

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

**9 Do not allow yourself to become a pawn:** Do not allow loyalty to a client, pressure by a client, or other motivations get in the way of your professional duties and ethics. Do not cut corners, cover up irregularities,

or forgo investigative steps at the urging of a client. Doing any of these things will come back to haunt you.

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

Implement standards or practices that govern your client communications, such as phone calls will be returned within 48 hours (not same day) and, describe them in the initial retainer letter (see #1).

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

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

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

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

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

## Top technology articles and resources

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

1 Perspective on the future of law

2 How to safely put your data in the cloud

3 *LAWPRO Magazine* – December 2013: Cybercrime and law firms

4 Keeping your passwords strong and secure

5 Don't take the bait on a spear phishing attack

6 Danger: When a hacker emails you instructions in the name of your client

7 Fifteen tips for preventing identity theft and online fraud

8 Does your firm need cybercrime insurance?

9 Technology and stress: Good tool, bad tool

10 Docketing dos and don'ts

11 Artificial intelligence and the self-driving lawyer

12 Backup best practices and strategies

13 Outsourcing your law firm's cyber security

14 Artificial intelligence: What is AI and will it really replace lawyers?

15 Essential dos and don'ts for LinkedIn users

All available at [practicepro.ca](http://practicepro.ca)



## 15 of our most practical and helpful checklists, precedents and resources available at [practicepro.ca](http://practicepro.ca)

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

**2 Limitations period charts:** The *Limitations Act, 2002* represented a huge reform of the existing law of limitations. We continue to see claims related to lawyers' unfamiliarity with the limitations rules or failing to consider a possible action until it's too late. Take the time to review these charts and avoid a claim related to a missed deadline.

**3 Annual legal health checkup:** This is a list of common legal issues that may arise in a client's personal or business life. By giving it to your clients, you can encourage them to consider their potential legal needs and be aware that you can help them address issues before there is a crisis.

**4 Post-matter Client Service Survey:** What did your clients think of your service? Use this post-matter client service survey to find out.

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

**6 Domestic Contract Matter Toolkit:** This toolkit helps lawyers systematically

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

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

**8 Fraud Fact Sheet:** These pamphlets describe cybercrime and bad cheque fraud scams, and frauds targeting real estate lawyers. They list the "red flags" that indicate that an otherwise legitimate looking matter is actually a fraud. Share this with your staff too!

**9 Rule 48 Transition Toolkit:** As of January 1, 2017, matters are being automatically dismissed without notice, five years after they were commenced unless there is an order otherwise or the plaintiff is under disability. Move your files along and comply with the requirements of the new Rule 48.14 of the *Rules of Civil Procedure* with help from this toolkit.

**10 Client trial preparation checklist:** Prepare your client for the ups and downs of trial with this customizable checklist, which covers topics to discuss with your client, including process, timing, outcomes, risks and costs. From managing emotions to the day-

to-day workings of a trial, the checklist covers important topics to discuss with your client in preparation for trial.

**11 Real estate file management checklist:** Even the most routine real estate transaction has many steps and the details may seem obvious but it is easy to let one or two slip through the cracks. This checklist can be a valuable risk management tool.

**12 Using title insurance safely checklist:** Title insurance plays an important role in real estate transactions. Each transaction presents a different set of circumstances and risks. This checklist keeps you on top of the issues to consider when you are obtaining a title insurance policy for your client.

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

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

**15 Limited Scope Representation Resources:** These resources will help you understand some of the risks inherent in providing limited scope legal services, and how you can reduce your exposure to a claim when working for a client on an unbundled basis.



### What are the risks in your area of law?

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

Litigation, Wills & Estates, Criminal, Family, Real Estate, Corporate, Franchise, IP, Employment, Immigration



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

**1 The biggest malpractice claims risks:** Lawyers may be surprised to learn that failure to know or apply substantive law account for a relatively small portion of LAWPRO claims. Find out the biggest causes of claims in this article.

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

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

**4 Tips for navigating the new Simplified Procedure:** The new Simplified Procedure seeks to provide a more streamlined process to resolve claims up to \$200,000. Lawyers need to adapt to the faster environment and manage clients, experts, and costs effectively.

**5 Manage malpractice risk by recognizing cultural diversity:** In the context of legal services, cross-cultural misunderstandings and other culture-related factors can occasionally lead to malpractice claims against lawyers. Understand more from this article.

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

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

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

**9 Don't let claims follow you into retirement:** While it's impossible to be certain whether you'll be "home free" from claims after you retire, you can take steps to limit the potential for claims to derail your financial plans. This article provides an overview of insurance considerations for lawyers making the transition out of traditional practice.

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

**11 Landmines for lawyers when drafting wills:** This article outlines some of the areas of greatest malpractice danger for wills practitioners.

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

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

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

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

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