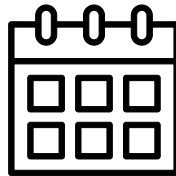
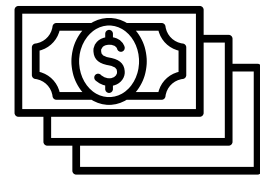




Average total cost  
\$1.4 million per year



Average 9 claims per year



\$148,000 average cost  
per claim

## RISK MANAGEMENT TIPS



### Familiarize yourself with the *Arthur Wishart Act* disclosure requirements

Lawyers acting for franchisors or franchisees should ensure that their clients are aware of the disclosure obligations which the *Act* (and the courts) place on franchisors. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to receive extensive damages.



### Do not dabble in franchise law

Franchise law is a complex area of law. Lawyers doing work in this area should have sufficient expertise to handle that work, and if not, they should refer the matter to someone who has franchise law expertise. The client should also retain a chartered accountant familiar with franchises. The detailed financial disclosure requirements can be beyond the scope of a lawyer's expertise.



### Beware of 'franchises in disguise'

A lawyer might fail to identify a commercial transaction as a franchise arrangement when dealing with a new franchise – when the party behaving as a franchisor is not yet fully aware that they are creating a franchise. This goes back to the point about not dabbling – as anyone knowledgeable in the area would immediately recognize a franchise agreement, regardless of what it's called.



### Avoid limited retainers

Limited retainers, even if they are reduced to writing, tend to be ineffective in franchise cases. In the context of a franchisee to franchisee purchase in particular, lawyers who think they are just acting on the "closing" may not deal with the franchise aspects of the case, which can lead to disaster. You can't treat a franchise like a typical asset purchase.



### Carefully document instructions and advice

Many of LAWPRO's larger franchise claims have involved allegations that a lawyer failed to advise the franchisor or franchisee regarding proper disclosure. Regrettably, lawyers' files often have little or no documentation that the statutory provisions of the *Act* and the consequences of non-compliance were explained to the client. As a result, liability is often a foregone conclusion or turns on a credibility contest, which commonly favours the client.

# COMMON MALPRACTICE ERRORS

## Communication - 49%

- Failing to inform a franchisor client about the disclosure requirements under the *Arthur Wishart Act*, and the severe consequences of inadequate disclosure.
- Failing to document in writing that a client instructed the lawyer to take a course of action that was different from the one the lawyer recommended.
- Retainer did not clearly specify work that was to be done by the lawyer and/or outside expert (e.g., accountant or tax expert).

## Inadequate investigation - 21%

- Failing to adequately review a disclosure document.
- Failing to do due diligence that might discover encumbrances, liens or outstanding debts.
- Overlooking or failing to advise clients properly as to their rights of rescission.

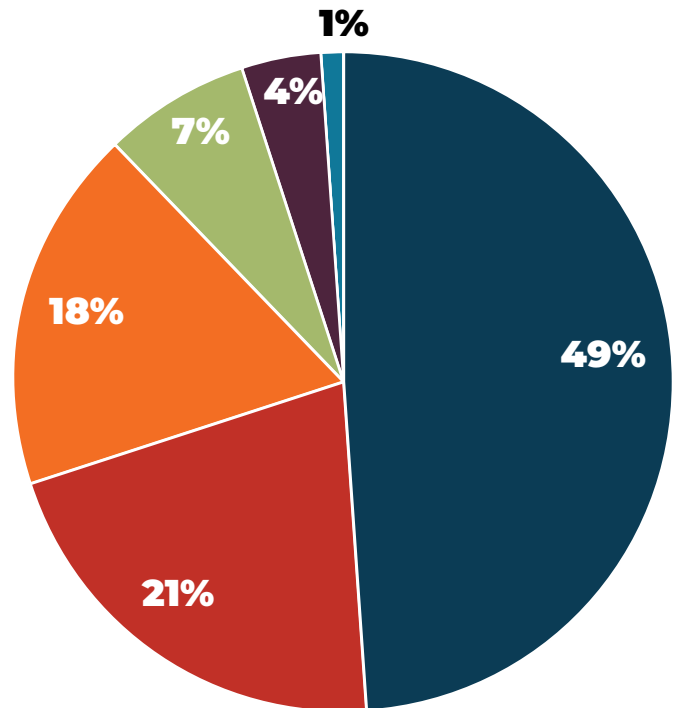
## Errors of law - 18%

- Failing to provide proper advice to the franchisee with regards to the information disclosed by the franchisor pursuant to the requirements under the *Arthur Wishart Act*.
- Failing to be sufficiently aware of the disclosure requirements under the *Arthur Wishart Act*.

## Conflict of interest - 7%

## Time management - 4%

## Other - 1%



Visit [practicepro.ca](http://practicepro.ca) for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

We can provide knowledgeable speakers who can address claims prevention topics.

Email [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca)

## Consider Excess insurance



Given the potentially significant damages involved in a franchise claim, lawyers who practice in this area should seriously consider carrying excess insurance. Find out more at [lawpro.ca/excess](http://lawpro.ca/excess).

\*All claim figures from 2009-2019. All cost figures are incurred costs as of April 2020

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