LAWPRO®

Toronto Lawyers ASSOCIATION TLA

Thursday Tips with LAWPRO and TLA: Tips for Corporate Commercial Lawyers

November 3, 2022

Program materials

Risks and tips for corporate commercial lawyers

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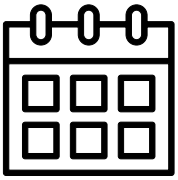
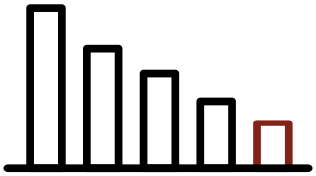
LawPRO® CORPORATE/ COMMERCIAL CLAIMS FACT SHEET

 # 3 claims area by cost

- average total cost $10.1 million per year



Average 180 claims per year



 # 5 claims area by count

RISK MANAGEMENT TIPS

Carefully document instructions, advice and steps taken

Taking detailed notes and documenting client conversations can minimize misunderstandings. Claims often involve a dispute over what was said and done, or not said and done, or confusion over who was to look after which tasks. LAWPRO's Checklist for Commercial Transactions has a detailed list of matters to consider when communicating with clients.

Follow the firm's conflict checking system and take action on conflicts

Most law firms have rigorous conflicts checking systems that do a good job of catching potential conflicts. The problem is that these warnings are often ignored. Listen to your instincts and ask yourself "who is my client"? You can't always objectively judge your own conflicts, so get the opinion of someone outside the matter. Send clients for ILA when appropriate. Keep in mind that conflicts can unexpectedly arise in the middle of a matter. If there's a real or potential conflict, decline or terminate the retainer, even if it means turning down work for a good client or turning down substantial fees.

Take time to catch and consider all the details

Whether it is misreading (or not reading) information on a corporate document, not doing a title search on a corporate lease matter, or failing to ensure that two merged corporations don't lose a 'grandfathered' exemption, rushing or taking shortcuts can come back to haut you. Take the time to do the job right, even if it takes a bit longer or involves coming back on another day. Make sure clients understand the risks if they instruct you to take shortcuts (usually to reduce fees), and that those discussions are documented. Do not be pushed into taking shortcuts that make you uncomfortable.

Do not dabble in areas outside your expertise

Corporate/commercial law is complex and diverse, so don't stray outside your area of expertise. If necessary, recommend your client retain the services of an expert in specialized areas like tax, IP or franchise law if you don't have a thorough knowledge of those fields.

COMMON MALPRACTICE ERRORS

Communication - 40%

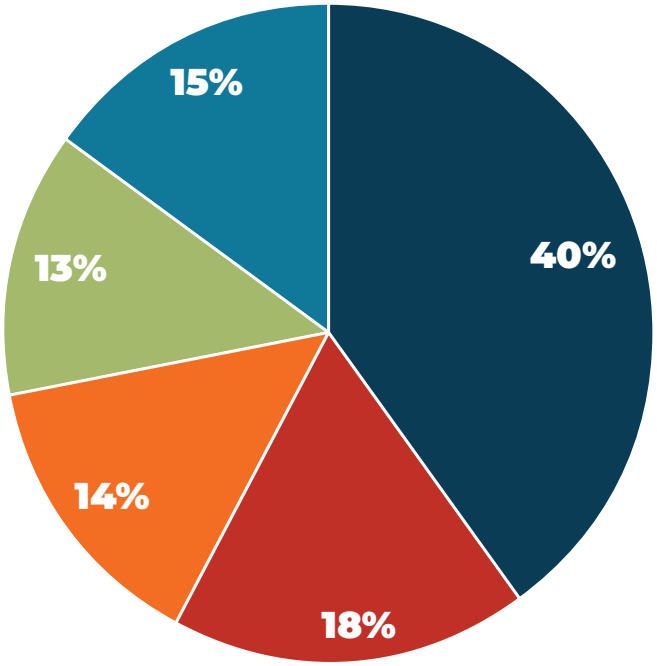
- Failing to follow client's instructions to file articles of amendment or articles of amalgamation.
- Failing to specify the limits of the retainer in writing, including which services the lawyer will perform and which actions the client or third-party (e.g., an accountant) will take.
- Contents of document (e.g., a lease or shareholder agreement) do not reflect the client's instructions (or those of outside expert, e.g., an accountant).
- Failing to document in writing that a client instructed you to take a course of action on a transaction that was different from the one you 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).
- Minute book not kept up-to-date.
- Failing to inform a franchisor client about the disclosure requirements under the Arthur Wishart Act.
- Failing to explain to a client the consequences of a personal guarantee in a commercial lease, mortgage or other transaction involving security.

Inadequate investigation - 18%

- Provisions in lease and sublease(s) are not coordinated.
- Not doing a title search on a commercial lease matter.
- Misreading (or not reading) information on a corporate document or search result.

Errors of law - 14%

- Taking on a complex corporate transaction that the lawyer is not capable of handling, or failing to obtain specialist advice for specialized issues (e.g., tax or IP issues).
- Failing to properly protect a security interest or priority status under the Personal Property Security Act.



Conflict of interest - 13%

- Acting simultaneously for members of the same family and their business or corporate entities.
- Not sending client for ILA when appropriate.
- Acting for a corporate client and providing legal services on the side to an employee of the client.

Other - 15%

Visit **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**

*All claim figures from 2008-2018. All cost figures are incurred costs as of January 2019

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INVESTIGATION TIPS

We often see claims related to lawyers who have not uncovered all the facts or developed a sufficient understanding of a client's matter. Here are tips to ensure a thorough understanding of the file.

1. MAKE INQUIRIES TO KNOW YOUR CLIENT

- Ask about clients' circumstances to ensure your advice takes everything into account. For example, a client's immigration status can be a key consideration when representing a person in criminal law; learning a client's family tree, including previous marriages, is vital to preparing a will.
- Consider whether any title, corporate, or litigation searches may be necessary to develop a complete understanding of the file.

2. ASK FOR DOCUMENTATION AND USE PROBING QUESTIONS

- Some lawyers do not request client documents or ask the questions that could uncover material facts. Not knowing key information can cause significant problems in how you serve your client.
- To reduce this risk, ask open-ended questions during client intake and throughout the retainer.
- Inform your client what documents you will need from them. Follow-up with them with further questions. Ask, ask, ask. And then do a reporting letter to confirm your understanding of the facts and to confirm your instructions for next steps.

3. TAKE TIME TO CATCH AND CONSIDER ALL THE DETAILS

- Whether it is misreading (or not reading) information on a document, not conducting a search or not researching thoroughly, rushing or taking shortcuts can come back to haunt you. Make sure clients understand the risks if they instruct you to take shortcuts (usually to reduce fees), and that those discussions are documented. Do not be pushed into taking shortcuts that make you uncomfortable.

4. IF YOU ARE GOING TO OFFER LIMITED SCOPE RETAINER SERVICES, DO IT RIGHT

- Learn about unbundled legal services best practices, sample retainers and other resources on the practicePRO Limited Scope Representation Resources page.
- Recognize that unbundled legal services are not always appropriate.
- A limited scope retainer does not mean less competent or lower quality legal services.
- Identify the discrete tasks that can be undertaken competently, confirm the scope of the retainer in writing and stick to it.

5. MAKE USE OF CHECKLISTS AND REPORTING LETTERS

- A final reporting letter detailing what you did and the advice you gave can be a great help if a claim occurs, which may arise long after you've forgotten the details of a particular file.

LEARN MORE INVESTIATION TIPS AND MANAGING YOUR RISKS:
See the "**Malpractice Claims Fact Sheets**" and the **practicePRO inadequate investigation webpage.**

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CONFLICT OF INTEREST TIPS

A conflict of interest happens when there is a substantial risk that a lawyer's duties to a client will be compromised by the lawyer's own interest or the lawyer's duties to another client, former client, or another third person.

1. DEVELOP AND FOLLOW A CONFLICT CHECKING SYSTEM

- Every new client means new potential conflicts. Implement and follow a rigorous conflicts-checking system that applies to every new client and new file. Also, make sure there are not conflicts with other lawyers at the firm, or with your own business interests. You can't always objectively judge your own conflicts, so it may be a good idea to get the opinion of someone outside the matter.

2. KNOW WHO YOUR CLIENT IS

- Ask yourself "who is my client"? Some family or business disputes find lawyers taking instructions from multiple individuals. Ensure you know which natural or corporate persons you represent in all circumstances. Send clients for ILA when appropriate Remember that conflicts can unexpectedly arise in the middle of a matter.

3. DON'T ACT FOR FAMILY MEMBERS OR FRIENDS

- It's best not to act for family or friends. They are too close to you. It increases the risk that you may have an interest in the matter, be unable to remain objective or manage your client's expectations. We see claims where lawyers don't make proper enquiries or proper documentation because they assumed they knew their family or friends' personal circumstances or didn't treat their friend or family member's matter as they would normally. It's best not to act for them, but if you must, treat them as if they were strangers.

4. DON'T BE AFRAID TO WALK AWAY

- When a real or potential conflict of interest situation arises, it is critical that a lawyer immediately informs the client, and either withdraws, or proceeds with the client's consent where this is permitted.

5. SEEK FURTHER GUIDANCE WHERE NECESSARY

- For further guidance, consult the Law Society of Ontario's Steps for Dealing with Conflicts of Interest Rules resource, the Canadian Bar Association Conflicts of Interest toolkit and our Managing Conflict of Interest Situations booklet.

LEARN MORE ABOUT AVOIDING CONFLICTS AND MANAGING YOUR RISKS:
See the "**Malpractice Claims Fact Sheets**" and the praticePRO **conflicts of interest webpage.**

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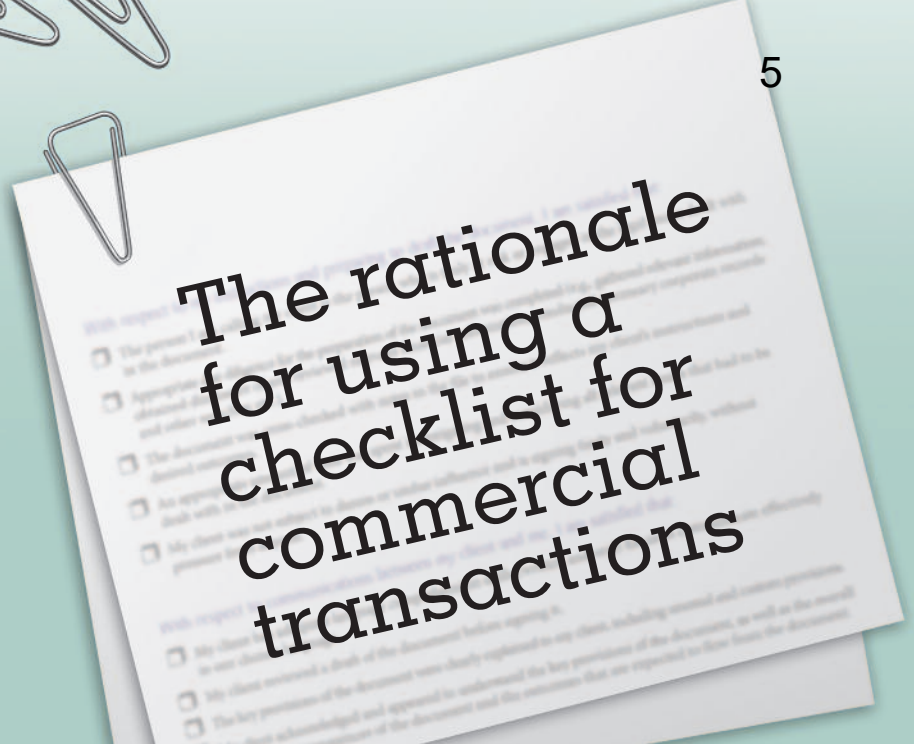
Getting the final document correct:



Many commercial matters involve the preparation of one or more documents. These documents are drafted based on communications between the parties to the document and/or their respective lawyers, the specific circumstances of the matter and applicable substantive law.

While the majority of commercial deals in Ontario are concluded without difficulties, all too often LawPRO sees claims arising due to various real – or alleged – problems with the documents that lawyers have prepared for clients on commercial matters. These problems frequently arise due to communications problems between the lawyer and client.

In fact, lawyer/client communication issues are the most common cause of claims in the commercial area. The communications problems that lead to claims in this area involve failures by the lawyer to: follow the client's instructions; obtain the client's consent; inform the client of the implications of decisions/actions to be taken; or clearly communicate with the client.

Of the 3,085 claims arising out of commercial law practice (including bankruptcy, securities and tax) reported to LawPRO between 2000 and 2010, 1,205 – or close to 40 per cent – involved communications issues.

The cost of resolving communications-related claims will be approximately $57 million ($169 million for all commercial claims). The oldest communications-related commercial claim LawPRO has ever seen was reported 24 years after the work was done (the oldest commercial claim was reported 44 years after the work was done) – proof positive that in this area of law it can take a long time for past events to catch up with the lawyer involved.

Sometimes there is a real communications mistake and a legitimate claim due to an incomplete or improperly drafted document or other mistake by the lawyer. For example, a mistake is made as to the specific details of the matter and what is to be included in contracts or other agreements.

However, on many communication-related claims the lawyer and client will have a very different recollection about what was said and done or not said and not done. Communications can be incomplete (perhaps due to a language barrier or because the matter was rushed), or there's confusion about who is to look after tasks before or after the matter is concluded. Credibility plays a large part in resolving these claims and LawPRO finds these matters difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.

Practically speaking, you can't document every communication and every step taken on every matter. You also can't anticipate and address every possible outcome, especially for things that may come up after the retainer is over.

But equipped with an understanding of where the most common communication errors occur, you can take steps to significantly reduce your risk of a malpractice claim. These steps can also put you in a much better position to successfully defend yourself in the event an allegation of negligence is made.

The checklist on the next page 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. By following the steps in this checklist, you will be taking steps to proactively manage your file and address the areas where communication problems most commonly occur. You will also be creating a paper trail that could be invaluable in the event your client sues you for negligence.

Most lawyers will want to avoid a claim at all costs. Dealing with an allegation of negligence where there was none can be just as distressing as dealing with a claim where you made a mistake. To stay out of trouble consider reviewing this checklist next time you are drafting a document for a client. ■

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Getting the final document correct

FILE NUMBER: DATE CHECKLIST COMPLETED:

CLIENT/MATTER NAME:

This checklist assumes there is a single client, with a few exceptions. If there are multiple clients, each of the items in the checklist should be read as applying to all clients.

With respect to my instructions and preparing to draft the document, I am satisfied that:

- ❒ The person I am calling my client is the person who is truly at risk or engaged in the legal issues dealt with in the document.
- ❒ Appropriate due diligence for the preparation of the document was completed (e.g., gathered relevant information; obtained disclosure of and reviewed relevant financial information; conducted necessary corporate records and other searches; etc.).
- ❒ The document was cross-checked with notes in the file to ensure it reflects my client's instructions and desired outcomes.
- ❒ An appropriate amount of time was spent investigating and considering all relevant issues that had to be dealt with in the document.
- ❒ My client was not subject to duress or undue influence and is signing freely and voluntarily, without pressure from anyone.

With respect to communications between my client and me, I am satisfied that:

- ❒ My client has adequate language comprehension skills (written and oral) for us to communicate effectively in our chosen language.
- ❒ My client reviewed a draft of the document before signing it.
- ❒ The key provisions of the document were clearly explained to my client, including unusual and custom provisions.
- ❒ My client acknowledged and appeared to understand the key provisions of the document, as well as the overall nature and consequences of the document and the outcomes that are expected to flow from the document.
- ❒ I explained the possible negative outcomes that could flow from the document, if any.
- ❒ My client understands the final and legally binding nature of the obligations being undertaken and that there are no (or limited) opportunities to withdraw after signing.
- ❒ I have told the client about areas where I am not able to give advice and the client should consider retaining another appropriate expert (e.g., accountant, business advisor, etc.).
- ❒ I answered all questions that my client asked to my client's satisfaction.
- ❒ The client clearly confirmed that the document reflects and is consistent with his/her instructions.
- ❒ All required follow-up steps to be undertaken by my client are noted in the document and/or a reporting letter.

Download a copy of this and other helpful checklists at www.practicepro.ca

cont'd on next page

With respect to the drafting of the document and the use of precedents, I am satisfied that:

- ❒ The document is sufficiently well-drafted to accomplish my client's objectives.
- ❒ All required clauses are in the document, including all required standard boilerplate clauses.
- ❒ There are no ambiguities or inconsistencies as between the clauses in the document.
- ❒ The terms of the agreement are both certain and enforceable.

With respect to real and potential conflicts of interest, I am satisfied that:

- ❒ My work for this client will not impair the duties of performance that I and other lawyers at my firm have to our other clients.
- ❒ My work for this client will not affect the relationships that I and other lawyers at my firm have with our other clients.
- ❒ Neither my personal interests nor the interests of my firm will affect my handling of this matter.
- ❒ There is no risk of me having and disclosing the confidential information of one client to another, and if necessary, confidentiality screens have been put in place.
- ❒ Where there are multiple clients, there are no conflicts of interest as between the various clients I am acting for on this matter.
- ❒ ILA was not required on this matter or my client required and received appropriate ILA.
- ❒ There are no conflicts of interest as between my client and past clients I have had.
- ❒ Where there are real or potential conflicts, appropriate waivers have been obtained from the affected clients.

With respect to legal issues relating to matters dealt with in the document, I am satisfied that:

- ❒ I have sufficient knowledge of the relevant areas of substantive law necessary for the preparation of this document.
- ❒ All relevant substantive law issues have been considered and appropriately dealt with in the document.
- ❒ There are no tax issues raised by the document or all appropriate tax issues have been properly considered and addressed, with (if necessary) the help of expert tax advice.

With respect to file management steps taken on this matter:

- ❒ I opened a file.
- ❒ I completed a conflicts check for all clients and others connected with the matter.
- ❒ I took notes of my meeting(s) with my client and retained these in the file.
- ❒ I docketed the time spent in the initial and subsequent meetings and phone calls with my client on this matter.
- ❒ I docketed the time spent drafting the document.
- ❒ I docketed the time spent reviewing the document with the client when it was signed.
- ❒ I placed this form, various draft versions of the document and a copy of the final version in the file.
- ❒ I sent a reporting letter outlining the terms of the document, resulting outcomes and obligations assumed together with my final account.

Download a copy of this and other helpful checklists at www.practicepro.ca

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This is not a claim, but…

Katie James, Claims Counsel

At LAWPRO we often get explanations from insureds as to why they feel their matter is not reportable to LAWPRO. Commonly we hear the following: “There is no claim against me. No one has commenced an action, there is no litigation. So, there is no claim”.

In this article I will explain common misunderstandings about reporting to LAWPRO. In particular, I will focus on de-bunking the following myths:

1. being sued is the only time an insured needs to report,
2. there is no claim so an insured does not need to report, and
3. the allegation has no merit, so there is no need to report.

In fact, the duty to give notice to LAWPRO is as broad as it is so that LAWPRO can proactively assess, and possibly, repair a matter. While the idea of contacting LAWPRO can feel stressful, it should not be confusing. I want to de-bunk common myths we hear when processing Claim Notice Reports.

Myths about reporting to LAWPRO

Myth #1: I have not been sued and/or there is no action against me, so I do not need to report

It is important to understand that the commencement of litigation and/or any proceeding against an insured is not the defining factor in submitting a Claim Notice Report. While an action being commenced is one reason for reporting to LAWPRO it is not the only instance when a matter ought to be reported. LAWPRO does not take the word “claim” to mean only a civil suit or other proceeding.

There are many Claim Notice Reports that are investigated and proactively handled that do not involve litigation or threatened litigation against an insured. These matters are reported due to the potential for allegations or assertions being made against insureds.

Myth #2: This is not a claim under the Policy, so I don’t need to report this matter

The term/word claim is often misunderstood.

LAWPRO encourages insureds to report even if they are unsure their situation falls under the definition of claim or CIRMCUMSTANCE(S). A lawyer’s deductible and levy surcharge history is not triggered by reporting a claim and/or CIRCUMSTANCE(S) itself.

LAWPRO has defined the word CIRCUMSTANCE(S) to assist insured’s with understanding their reporting requirements. We will now review some of the policy wording.

The Policy:

In the 2020 Policy, the term CIRCUMSTANCE(S) is defined as:
(c) CIRCUMSTANCE(S) means any circumstances of an alleged, actual, or possible error, omission, or negligent act of which the INSURED becomes aware, which from the perspective of a reasonable LAWYER or LAW FIRM could potentially give rise to a claim hereunder.

General Condition E, sets out how notice of a CLAIM is required to be provided (*"If during the POLICY PERIOD the INSURED first becomes aware of any claim or CIRCUMSTANCE(S), such INSURED shall immediately give written notice thereof or cause written notice to……"*).

> CLAIM is defined in Part V of the Policy as:
> (e) CLAIM(S) means:
> (i) a written or oral demand for money or services; or
> (ii) a written or oral allegation of breach in the rendering of PROFESSIONAL SERVICES; received by the INSURED and resulting from a single error, omission or negligent act or RELATED ERROR(S), OMISSION(S) OR NEGLIGENT ACT(S) in the performance of PROFESSIONAL SERVICES for others.
>
> All CLAIMS which arise from a single error, omission, or negligent act or RELATED ERROR(S), OMISSION(S), OR NEGLIGENT ACT(S) shall be deemed a single CLAIM regardless of the number of INSUREDS or the number of persons or organizations making a claim or the time or times the error(s), omission(s), negligent act(s) or claim(s) took place.

As well, Section 7.8-2 of the Law Society of Ontario's Rules of Professional Conduct requires lawyers to "give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced."

There are endless situations where claims and CIRCUMSTANCE(S) can arise. LAWPRO cannot put them into neat, defined categories.

Under General Condition (G), found on pages 6-7 of the Policy, insureds are required to assist and cooperate with LAWPRO in its handling of a matter on behalf of the insured. This includes:

- Not voluntarily assuming any liability or settling a claim (other than with respect to a Prescribed Penalty);
- Cooperating with LAWPRO in the investigation, defence and repair of any claim;
- Not interfering in any negotiations or settlement of any claim;
- Whenever requested by LAWPRO, aiding in securing information and evidence and the attendance of any witnesses;
- Cooperating with LAWPRO in enforcing any right of contribution or indemnity against any person or organization (other than the insured's employees who acted within the scope of their employment), and enforcing any entitlement to costs.

A lawyer may lose their coverage if *inter alia* they settle a claim without LAWPRO's involvement, refuse to help with their defence, interfere in negotiations etc.

Late Notice:

Late notice often allows small problems to become big ones, and they can jeopardize coverage. Do not allow a potential claim/circumstance(s) to fester. Early notice gives us the best chance to help put things right.

It cannot be stressed enough how important it is to provide immediate notice of any claim or circumstance(s) that could give rise to a solicitor negligence claim. To avoid coverage issues that can result from late reporting of a claim or circumstance(s), don't find yourself in a position where it is too late for LAWPRO to effectively investigate, defend or repair a matter. If adverse findings of fact are made in a disciplinary, administrative tribunal process, appeal or Judicial Review, this could impair LAWPRO's ability to defend a later civil suit.

The consequences of not cooperating, or failing to provide notice of a claim can lead to the Law Society of Ontario being asked to step in to the insured's shoes (which would be at the Law Society's discretion to decline to do), and/or LAWPRO can rely on any such breach by the insured to deny coverage. This would be an unsatisfactory result, from the perspective of both the insured and the complainant if damages are owed.

Myth #3: The allegations are without merit, so I don't need to report

LAWPRO understands that a common sentiment in the legal community is: "There is no merit to the allegation so I am not reporting." This is not a good idea. LAWPRO encourages and requires insureds to provide notice of real or possible mistakes immediately. Whether or not a matter is meritorious is not a factor in reporting a claim or circumstances. In addition, the Law Society Rules commentary states that a duty to report arises whether or not the lawyer considers the claim to have merit.

What Happens When You Report

Once a matter is reported a Claims Counsel will contact you to discuss the report as well as obtain more information and determine a strategy.

As a risk management initiative, LAWPRO will often investigate, monitor or assist on an ex gratia basis. This usually involves LAWPRO retaining investigation counsel, who often becomes involved in responding to the allegations. If necessary, LAWPRO counsel will attend at cross-examinations with you provided LAWPRO is given timely notice of the allegations of ineffective assistance of counsel by an insured. If a matter is reported late, i.e. the insured takes steps to self-repair including but not limited to responding to the appellant or new counsel by responding to the investigation inquiries, swears an affidavit, goes to cross examinations without prior notice to LAWPRO, then LAWPRO cannot guarantee assistance as the matter is potentially a late report.

LAWPRO has experienced high success rates with having ineffective assistance of counsel allegations dismissed or dropped. This reduces the likelihood of a former client commencing a solicitor's negligence claim and their chance of success if they do. In several instances, LAWPRO has succeeded in dissuading the appellant's counsel from maintaining the issue in its Notice of Appeal and/or Judicial Review, thereby extricating its insured lawyer immediately.

Immigration and Criminal Specific Claims and Circumstances(s)

In recent years, LAWPRO has seen a steady increase in allegations of various types of claims and circumstance(s) pertaining to the immigration and criminal bar. Ineffective assistance of counsel is an example of a common type of claim. LAWPRO requires its insured to report any such allegations immediately and before the formal protocol is engaged. Therefore, if an appeal counsel or your client's new counsel writes or calls you to 'investigate' or talk about steps taken by you previously for the client, whether at trial or some other proceeding, LAWPRO requests the matter is reported at that time. This allows us to engage at an earlier stage.

Claimants/clients who are considering allegations of incompetent representation often also file a complaint to the Law Society of Ontario. This can be a precursor to the client alleging ineffective assistance of counsel and insureds ought to report this. In addition, the client may commence a fee assessment. While the LAWPRO Policy would not on the face of it apply to a matter that is solely for the return of fees paid (such as a fee assessment), or a disciplinary process where the penalty would be a fine or similar penalty, these types of proceedings are often the precursor to civil suits that fall squarely within the coverage grant.

Other examples of possible claims/circumstance(s) can be: missed deadlines, failure to submit documentation or wrong documentation submitted, missed emails resulting in missed deadline (went into SPAM), miscommunication with client, allegation process was not explained properly, misinformed plea or application process taken, alleged failure to keep client updated, clerical errors and applications to strike pleas, failure to understand or advise the client of the law, election process (judge alone). This is just a sample of the types of claim notifications that LAWPRO receives and is not meant to be inclusive. As stated earlier, if you are unsure, the best step is to report.

The comments in this article speak only to the general availability of coverage under the LAWPRO Policy. Coverage is determine on an individual case basis, subject to the specific circumstances of the particular claim/circumstance(s), allegations made and applicable Policy provisions.

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GETTING STARTED ON INVESTING IN TECH
Use these 5 key questions to guide you

Juda Strawczynski

The law changes, and so do the tools and technologies we use to provide legal services. For lawyers whose training is steeped in precedent and in identifying risks, there can be understandable hesitation and concern about moving to a new process or technology. This article addresses the key concerns that lawyers, paralegals and legal professionals should consider when investing in new technology. It provides three tips to get started, and five key questions to consider as you embark on your tech journey.

TIPS FOR GETTING STARTED

TIP 1: RECOGNIZE POTENTIAL RESISTANCE TO CHANGE AND RISKS IN YOUR CURRENT PRACTICE

Many lawyers and law firms are slow to invest in technology. Consider these fears:

- The systems work (or at least are good enough). Why change them?
- Where will I find the time and money for a new system?
- What if I build something worse?

These are all fair concerns. But the counterpoint that lawyers and firms should also recognize is there are risks in *not* proactively upgrading and investing in systems and technology.

There are also risks to maintaining the *status quo*. Let's start with an example: converting a practice from paper-based to paperless. Lawyers are often concerned about moving to paperless practice, and the risks related to cloud storage and online systems. But, there are risks in maintaining paper records.

    - Paper isn't perfect.
        - Ask any clerk about that time that a client needed something urgent, but the file was in offsite storage. Or when an important paper document went missing, requiring searching in file systems and on staff desks to find it.
        - We've also seen cases where a lawyer or staff person has simply lost track of a paper document. In some cases, the lawyer has given incorrect legal advice because a key paper document was missing.
        - Paper records have been damaged and destroyed. In 2011, for example, the Goderich courthouse sustained significant damage due to a tornado. LAWPRO has seen law offices sustain water damage due to flooding, smoke and fire damage. These incidents have affected both small and large firms.

- There are risks in becoming less competitive as client needs shift.

- Some clients may prefer working with online documents. They may prefer online systems as they have grown accustomed to working with other professionals online and using online tools to assist in their lives.
- Failing to innovate may lead to missed opportunities for your practice.

There is a risk in assuming that the *status quo* has no risks and assuming new systems are too risky – this is known as anchoring bias. But any system has risks. The key is to recognize them, and determine how they can be managed. For example, LAWPRO has written about *how to safely put your data in the cloud*.)

Ultimately, legal professionals need to invest in technology – whether in hardware upgrades (such as new computers, monitors, cell phones etc.) or software (such as word processing software, dictation software, and practice management software).

Below are five key questions to ask that can universally apply to tech investments.

TIP 2: BE CURIOUS

You don't have to have a technology background to work through your legal technology needs. You need curiosity. There are lots of different tech products out there.

Thankfully, there are helpful places where you can learn about them. Ask friends and colleagues what they are using. Lawyers are usually happy to tell you what technology they use to support their practices.

You can also learn about the different legal technologies by visiting www.practicepro.ca/technology. For many, two helpful starting points are the practicePRO article "Work from Home Technology Tips" and Technology Products for Lawyers and Law Firms (or the version at practicePRO developed for paralegals).

TIP 3: GO PLAY

You may have heard about a new computer, software or highly recommended technology. What works for someone else, even a trusted colleague, may not work for you. The best way to determine whether something will work for you is to go play! Whether that's spending some time testing a keyboard, laptop or monitor at a store, or trying a demo of a new software system before subscribing, there are lots of ways to try before you buy. Each end user should be encouraged to play.

Spending some time playing with different technology options can be fun (at least for some)! If you don't enjoy this experimentation, just know that by road testing your options, time spent testing different tech streams will save you hours of pain and frustration that can be incurred by simply diving head first into a new system without first having checked it and others out.

QUESTIONS TO ASK ON YOUR TECHNOLOGY JOURNEY

1. IS IT GOING TO BE HELPFUL?

Think about what you need and whatyour team needs. Ask your clients what they'd like to see. These questions will help you determine the must-have versus nice-to-have technology investments. Start with tech that will actually help your practice.

2. IS IT GOING TO BE USER-FRIENDLY?

Again, considering the pros and cons of multiple potential tech solutions can help. The key issue is whether you, your team and your clients will be comfortable with your new technology solution.

- Will the technology work well for you and other users? Is it easy to use?
- Will onboarding be manageable? Is there sufficient training and support available to help you get going?
- Will it work well with your existing technologies?

3. IS IT SAFE AND SECURE?

Technology needs to be safe and secure. In law office environments, client information also needs to be protected to maintain solicitor-client privilege and confidentiality.

Ask yourself whether, *with proper training and settings,* the technology will be safe and secure. Ask vendors, IT professionals and colleagues using technology about how they maintain safe and secure systems.

Often, the users need to make sure they are maintaining best practices to keep their technology safe and secure. For example, lawyers and firms need to keep software updated to avoid potential risks around security and functionality. Lawyers and law firm staff need to maintain healthy password hygeine. Remote work VPN systems should have two-factor authentication to avoid being hacked. Law firms should never send funds out of their accounts by wire without first calling to reconfirm wire instructions.

Technology has its security risks, but *can also enhance* client security. Consider client portals, for example. A client portal can be created with relative ease, using Google or Microsoft systems to enable cloud storage and documents sharing. Uploading documents directly to law firm systems can reduce the use of email for sensitive documents, thereby lessening the risk of security breaches should an email system be hacked.

4. IS IT RELIABLE (AND WHAT'S THE BACKUP)?

Technology needs to be reliable. There have been troubles with technologies since the use of the quill. Think of photocopy jams, the fax that may or may not have sent properly, dial-up internet connections that would drop, and the common fix we have all employed: turning a computer off and on again.

Consider how much use you will get out of your tech before you need to upgrade. When exploring servers, ask about reliability and backups. For software as a service, ask about its uptime versus downtime. System maintenance may be required, but should not significantly interrupt your practice. To make the point by exaggeration, if you have the greatest practice management software system in the world, but it only works on Friday afternoons, you will have issues.

For any technology, it's important to have a backup. Consider what that might be for whatever technology you're using. For example, for a laptop, that might be a spare older laptop. For cloud storage, knowing where and how documents are stored, and what backups are built in will asisst you in making informed decisions.

5. IS IT COST-EFFECTIVE?

Regardless of the kind of technology you're looking into, determine the cost benefit analysis.

What to consider:

- Technology *does* come at a cost, but it need not break the bank
- Do your homework. For many technology investments, there are different cost structures available. For both hardware and software, monthly plans may be available. Regardless of the payment structure, know your costs.
- Factor in potential one-time costs when getting started. There may be one-time costs incurred when investing in software systems, such as data migration and onboarding costs.
- Know the potential costs / penalities for early cancellation.

Check whether the product or service is protected by a warranty or insurance, and if so, at what cost.

Investigate what happens if there is a dispute (ex: method of dispute resolution such as arbitration / jurisdiction / choice of law / etc.)

Finally, any cost-benefit analysis should include the cost of *not* investing in the technology. At the outset, risks to inaction should also be considered when deciding whether to invest in new processes and technologies.

BONUS QUESTION: WHAT DO YOUR PEOPLE THINK?

Any tech journey starts with people. Keep them engaged throughout. Ask them where the pain points are at the outset, what they think of the different solutions being considered, and what kind of training and support they need. Keep exploring and innovating as a team, and if you're rowing together you'll get farther.

See also our Technology Product Assessment Worksheet

Best of luck on your next steps, and reach out anytime!

FRAUD FACT SHEET

CYBERCRIME AND BAD CHEQUE SCAMS

Cybercrime and bad cheque scams are some of the most common, significant and costly problems for lawyers and LawPRO®. Fraudsters are successfully duping lawyers, paralegals and law clerks.

Don't be complacent and think you will never be fooled

These frauds are very sophisticated. The matters will look legitimate, the fraudsters will be very convincing and the client ID and other documents you get will look real. Fake cheques are printed on real cheque stock. Phishing emails will appear to come from your bank and other legitimate companies. Fraudsters will email you posing as colleagues and clients, and corporate records may be altered. Two or more people can collaborate on both sides of a transaction to make the scenario more convincing. Some may come to your office in person, or follow up with you over the phone.

If you aren't completely sure a matter is legitimate, terminate the retainer. Don't be sucked in by your emotions or a strong desire to help. Don't let the lure of a generous fee cause you to ignore your concerns as to the legitimacy of a matter. If you've been asked to do something that seems irregular, ask questions. If it looks too easy or sounds too good to be true, it probably is.

What to do if you have a suspicious matter?

Proceed with caution if you have even the slightest suspicion that the matter you are handling isn't legitimate.

1. Look for the red flags of a fraud. See the lists on the following pages.
2. Ask questions and dig deeper, especially if the facts don't add up or are inconsistent. See the next page for a list of things you can do.

Visit the **AvoidAClaim.com** blog to search names and email addresses from the frauds reported to LawPRO. Click on "All Fraud Warnings" to see a full listing of names of confirmed fraudster clients. If you still aren't sure the matter is legitimate, call LawPRO at 1-800-410-1013. Our experience with multiple frauds can help determine if you are being duped. If the matter turns out to be a fraud and there is a potential claim, we will work with you to prevent the fraud, if possible, and to minimize potential claims costs.

Report obvious frauds to LawPRO

Help us help other lawyers by sending obviously fraudulent messages, scans of identification and other documents provided to you to **fraudinfo@lawpro.ca**

Get fraud warnings & updates from AvoidAClaim.com blog

Wondering if you've been duped or your potential client is a fraudster? For regular updates on fraud and claims prevention, subscribe to the email updates from LawPRO's AvoidAClaim.com blog.

Do you practice in real estate? See the Real Estate Fraud Fact Sheet at practicepro.ca for common types of real estate fraud, red flags, and tips on how to protect your law firm and you.

Bad cheque scams

Fraudsters retain the firm on a contrived legal matter so that they can run a counterfeit cheque or bank draft through the firm trust account and walk away with real money. These contrived matters will look real. The fraudster will provide extensive and very real looking ID and documents. When the bad cheque or draft bounces, there will be a shortfall in the trust account.

The red flags of a bad cheque scam

- Initial contact email is generically addressed (e.g., "Dear attorney") and/or BCC'd to many people.
- The name and/or email address in the FROM line is different from the name and/or email address of the person you are asked to reply to in the body of the email.
- Client uses one or more email addresses from a free email service (e.g., Gmail™, MSN®, Yahoo!®), even when the matter is on behalf of a business entity.
- Domain name used in email address or website was recently registered (check at WhoIs.net).
- Email header indicates sender is not where he/she claims to be.
- Client raises issues of conflicts or payment of a retainer.
- Client is new to your firm.
- Client is in a distant jurisdiction.
- Client says he prefers email communication due to time zone differences.
- Client may sign retainer but never actually makes the payment.
- Client is in a rush and pressures you to "do the deal" quickly, before the cheque clears.
- Client shows up and wants the matter completed around or on banking holidays.
- Client is willing to pay higher-than-usual fees on a contingent basis from (bogus) funds you are to receive.
- Despite the client stating a lawyer is needed to help push for payment, the debtor pays without any hassle.
- Cheque or bank draft arrives at your office in a plain envelope and/or without a covering letter.
- Cheque is drawn from the account of an entity that appears to be unrelated (e.g., a spousal arrears payment from a business entity).
- Payment amounts are different than expected or change without explanation.
- Client instructs you to quickly wire the funds to an offshore bank account based on changed or urgent circumstances.
- Client and others involved don't seem concerned if shortcuts are taken.
- Some or all of the payment is going to third party who appears unrelated to the matters.

Due diligence on a suspected fraudster

Take these steps to cross-check and verify information provided to you by the client:

- Cross-check names, addresses, and phone numbers of the client and other people/entities involved in the matter on Google® and other search engines. (To find exact matches, enclose your search terms in double quotes.)
- Do reverse searches on phone numbers.
- Look up addresses using Street View™ in Google Maps™.
- Ask your bank or the issuing bank to confirm the branch transit number and cheque are legitimate.
- Call the entity making the payment or loan and ask if they are aware of the transaction.
- Contact the company to confirm it is expecting debtor's payment or business loan.
- Hold the funds until your bank confirms the funds are "good" by contacting the other bank, and have the bank confirm, in writing, that it is safe to withdraw from the deposit.

Common types of bad cheque fraud

Equipment/inventory purchase fraud

- Targets business lawyers.
- Fraudster will ask you to handle a purchase (e.g., a dredger).
- Purchase funds are coming from fake buyer.

Business loan or debt collection fraud

- Targets litigators.
- Fraudster will ask for help with a commercial debt or personal business loan collection.
- Debtor will pay up with little or no pushing.

Divorce settlement fraud

- Targets family lawyers.
- Fraudster will ask you to help with collection from ex-spouse, often further to a "collaborative settlement agreement."
- Ex-spouse will pay up with little or no pushing.

Real estate deposit fraud

- Targets real estate lawyers.
- Contacts realtors, who put fraudsters in touch with real estate lawyers.
- Overseas client sends lawyer a deposit cheque for a property they saw online.
- Fraudster then backs out of the deal, and asks lawyer to wire the deposit funds back (minus any fees and penalties).

Intellectual property rights fraud

- Targets IP lawyers.
- Fraudster seeks damages from a breach of a trademark or copyright agreement.
- The company in breach will pay up with little or no pushing.

Phishing scams

Phishing involves the use of an email, text message or phone call that appears to come from a trusted source or institution, vendor or company, but is actually from a third-party impostor. Phishing messages are intended to trick you into giving fraudsters your information by asking you to update or confirm personal or online account information. Personal information and identity theft and/or payment scams are the motives behind most phishing scams. Fraudsters cast a wide net and make thousands of phishing attempts – they only need one or two dupes to make it pay off.

Phishing is also becoming more sophisticated. Fraudsters can conduct research about you through the internet and other means to obtain information unique to you, including your practice area, your clients, and your personal life. A "spear" phishing attempt is a phishing message that is personally addressed to you, will appear to be from someone you already know (such as a senior partner at the same firm), and may include other detailed personalized information.

Fraudsters do their best to make phishing messages look official and legitimate. They will mimic real communications from the company or entity they are supposedly from by using the same layout, fonts, wording, message footers and copyright notices, etc. as official messages. They will often include corporate logos and even one or more links to the alleged sender's real website.

How to spot phishing messages

Phishing scams work because they are convincing and prey on your trust of the source. If you get a phishing message from a bank and you don't have an account there, you aren't likely to fall for the scam. However, if you have an account at that bank, the message may look legitimate to you and you are more likely to fall for the scam. Many phishing messages will include a link or attachment that you are asked to click so you can update your information. After doing so, the webpage or attachment you will see (which will also have text and logos to make it look official) will prompt you to enter your name, account number, password and other personal information – thereby giving it to fraudsters.

Red flags

- The link you are asked to visit is different from the company's usual website URL (place your mouse over the link and look at the taskbar in your window to see if the link matches. It should take you to the proper website).
- The main part of the sender's email address is not the same as the company's usual email address.
- Spelling and grammar mistakes.
- A sense of urgency – money has to be transferred quickly without the usual checks and balances.
- The promise of receiving money or another big prize.
- Anyone asking for money – even if you know them.

Some types of phishing

- An irregular salutation from someone you are familiar with, such as "Hello Mr. Smith," instead of "Hi Johnny."
- "…suspicious transaction," "…account outstanding": An alert to reset password or login to your account to review invoice or payment.
- "…your account has been hacked": A request to update your information and go to a website or attachment, then prompting you to enter your account number, password, and personal information.
- "…won a big prize," "…refund to you": A request to go to a website or open an attachment to claim monies.
- "…document I promised": Posing as someone you know who may send you documents, a request to open an attachment.
- A call from a fraudster claiming to be from a legitimate corporate or government entity saying that you owe money or face civil/criminal charges.
- Requesting payment in Bitcoin.

Don't take the bait

Never respond to phishing requests for personal information in the mail, over the phone or online. Most importantly – this is probably the most common way that personal information is stolen – never ever reply to unsolicited or suspicious emails, instant messages or web pages asking for your personal information (e.g., usernames, passwords, SIN number, bank account numbers, PINs, credit card numbers, mother's birth name or birthday), even if they appear to be from a known or trusted person or business. Legitimate businesses should never send you an email asking to send your username, password or other information to them in an email message. If in doubt, call the company yourself using a phone number from a trusted source. Don't use the number in the email – it could be fake too!

All staff can be targeted

Educate the lawyers and staff at your firm to make sure they will not fall for a spear phishing scam. Follow firm processes and procedures for the review and approval of financial transactions – and don't bypass them due to urgent circumstances. Never share confidential client or firm information without being sure it is appropriate to do so by getting confirmation from someone familiar with the file. Be on the lookout for and question any last minute changes on fund transfers or payments.

Inside job: Fraudsters in your law firm

Not all fraudsters are strangers. Even partners, associates, law clerks or other employees may turn to fraud because of financial pressures from a divorce, over-extended lifestyle, failed business venture, or other personal crisis.

Red flags

- Someone never takes vacation or sick leave, works overly long hours, or refuses to delegate work.
- A firm member undergoes a sudden change in lifestyle or temperament.
- The firm receives mail for a corporation for which no client file is opened or billed, or minute books are kept in the lawyer's office instead of with the corporate law clerk.
- Unusual patterns such as a sudden increase in payments to a person or entity, or complaints about slow payment from suppliers or clients, or an increase in written-off work in progress.
- Handwritten amendments on cheques returned from the bank.
- Double endorsed cheques which pay the fraudster personally. Look for names that are similar but not quite the same as existing clients and parties.
- For more information see "Fraud on the Inside: What to do when partners, associates or staff commit fraud" at lawpro.ca/magazine

Preventing insider fraud

- Conduct regular and random spot audits of lawyers and staff with access to law firm trust accounts.
- Keep an eye on lawyers and staff morale.
- Create a law firm culture which encourages mentorship and collegiality.
- Use unique passwords for anyone with access to law firm trust accounts.

When a fraudster emails you instructions in the name of the client, counsel, or staff

Beware of fraudsters who are hacking into email accounts of third parties including clients, lawyers and staff within your firm, opposing counsel, and opposing parties. The fraudster will monitor the emails of the hacked party, and figure out that there is a legal matter involving you. When the matter is completed and money is about to change hands, such as following a litigation settlement, real estate closing, or other transaction, the fraudster, posing as the legitimate party awaiting the funds, will send an email to you redirecting where the funds should go. If you follow through, the money will go to the fraudster.

A simple prevention tip when money is requested is to always call your client directly to confirm instructions, especially when instructions change at the last minute.

Red flags

- Funds requested are to be sent to an account or address that is not associated with the client/lawyer/party.
- Writing style, grammar, or spelling mistakes.

Maintain good password hygiene

We all have more passwords than we can remember, which can make it easy to be lazy. We may use obvious and easy-to-remember passwords – even the word "password" itself. Or worse: we don't use them at all. Bad password habits are often one of the weakest links in data security schemes. Cyber criminals know and exploit this fact. For this reason it is critical that all lawyers and staff in a law office use passwords, and use them properly.

Password tips

- Never ever tell anyone your passwords.
- Never write down your passwords, especially on your monitor.
- Don't save passwords on your computer hard drive.
- Use biometric scanners like fingerprint, voiceprint, facial, and eye scanners.
- Don't use the same password for everything.
- Change passwords on important accounts on a regular basis.
- If you suspect you've been hacked, change your password immediately.
- Don't use the "remember password" feature in your browser and in other applications.
- Create a password using four unrelated words.

Password managers can help. A password manager generates unique randomly generated passwords and stores them in a single place. You need to remember only one password to access the application. While using a password manager is not foolproof, it may be safer than not using one.

Use two-step authentication where available. When offered and enabled, this means you will need two ways to access an account. Typically this means using a password in conjunction with a code texted to your cell phone that is generated at the time you are seeking access.

This information bulletin is published by LawPRO to provide lawyers and law firm employees with an overview of some common types of fraud, and to provide practical advice on ways to minimize their exposure to fraud-related claims. The material presented does not establish, report or create the standard of care for lawyers. The material is not a complete analysis of the topics covered, and readers are encouraged to conduct their own appropriate legal research. The comments in this publication are intended as a general description of the insurance and services assailable 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.

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CYBERSECURITY AND FRAUD PREVENTION TIPS

Phishing attacks and other forms of cyberfraud are an increasingly common source of loss for lawyers. Our constantly changing technology, and the changing tactics used by fraudsters, require constant vigilance and adaptation. Here are a few tips to keep your and your clients' information secure and prevent fraud.

1. IMPLEMENT ROBUST COMPUTER AND PHONE SECURITY PRACTICES

- Ensure that you have robust password protocols, including training your staff to use complex alphanumeric passwords along with two-factor authentication.
- Make sure computers have adequate anti-virus protection and are regularly updated. Use end-to-end encryption when transmitting data over the internet.
- Implement regular data back-ups to a secure server or storage to prevent fraudsters from holding your data hostage following a ransomware attack.
- Consider trying penetration testing tools to assess network vulnerabilities.

2. PROVIDE STAFF TRAINING ON IDENTIFYING BAD CHEQUES AND PHISHING MESSAGES

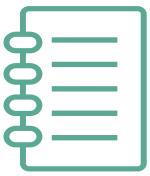
- Train yourself and your staff to notice red flags associated with bad cheques and phishing attacks.
- Visit the practicePRO fraud prevention webpage for the LAWPRO Fraud Fact Sheets and tips for identifying fraud

3. VERIFY INSTRUCTIONS RECEIVED BY EMAIL

- Spear-phishing attacks will often involve email instructions that appear to have originated from a client, law firm on the other side of a transaction or other trusted party, but are deceptions by fraudsters. Before following requests that come by email, particularly involving the transfer of funds, call the party providing those instructions on the phone to confirm their accuracy.

4. ENSURE YOU HAVE SUFFICIENT CYBER INSURANCE

- Malpractice insurance only protects certain cyber risks and firms should not assume their general liability insurance will cover all cyber risks. Consider whether a policy directly addressing the costs associated with cyberattacks is appropriate for your practice.



5. MAKE OR UPDATE YOUR INCIDENT RESPONSE PLAN

- Because a cyberattack can cause significant harm, law firms should be prepared to take action immediately. An Incident Response Plan addresses the steps for the detection, containment, and eradication of a cyber breach, recovery of normal operations, and follow-up analysis. LAWPRO's resources on incident response plans can help you get started.

LEARN MORE ABOUT CYBERSECURITY AND FRAUD PREVENTION TIPS:
See the practicePRO fraud prevention webpage and the **cyber dangers webpage**.

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You transferred funds to the wrong account what now?

Fraudsters try to trick lawyers into wiring funds to an account that the fraudster controls. Sometimes, they succeed, and the funds get into the hands of criminals. What do you do then?

Below are some examples that have been reported to us:

1. A lawyer's office received a last-minute redirection of monies payable on the sale of a property, which was a spoofed email from fraudsters.

   Without verifying the legitimacy of the redirection (other than by email with the fraudsters through the firm's law clerk), the funds were wired to the account of the fraudsters.

   It was later determined that the email account of the law clerk had been compromised (likely by guessing an easy password or the clerk responded to a phishing email.) It was by hacking into the law clerk's email account that the fraudsters learned about the transaction and were able to read and send genuine emails in furtherance of the fraud. The rules of the email account were re-written so that these emails were sent to folders other than the Inbox and Sent folders so the clerk wouldn't catch on.

2. A lawyer acted for the seller on a non- real estate transaction. The purchaser's lawyer attempted to cc them in an email, but sent the correspondence to an address that was one letter off from the real email address. In response, the purchaser's lawyer received instructions from this fraudulent email address with new trust account information and payment instructions.

   The purchaser's lawyer thought this was suspicious, and called the seller's lawyer, who was able to confirm that the instructions were fraudulent. Independent verification saved the day.

   It is unclear how the email hack occurred in the first place.

Three simple things you can do

1) Call before you click

If you receive instructions from a client, colleague, or other lawyer that involves a change in wire transfer account numbers or relates to a transfer of funds, always pick up the phone and call the individual to verbally confirm those instructions.

2) Train your lawyers and staff

Make sure all the lawyers and support staff in your firm are aware of the likelihood of spear-phishing attacks and the need to verbally confirm any changes to wire-transfer instructions received by email.

3) Warn your clients

Alert your clients of the dangers associated with wire fraud and advise them to verbally confirm with your firm any bank account details received by email.

What should you do if this happens to you?

What to do immediately

Contact the bank

The person who initiated the wiring of funds should immediately report the diversion to the bank from where the wire was initiated, requesting that they stop the wire. This is not always possible as wires are usually instantaneously dispatched and irrevocable, however, they may get caught in the financial institution's suspicious transaction filters and be pending.

Also, request that they contact the bank they sent the wire to and so on until the trail disappears or the money is found and frozen.

Report to LAWPRO

File a claim (lawpro.ca/claim) with LAWPRO as soon as possible. Provide all the relevant documents in your possession.

Alert your client

Notify your client of the diversion fraud immediately and request that they consider whether their systems have been compromised and they should seek the assistance of IT professionals.

The systems of third parties with knowledge of the transaction (e.g., in the email thread) may have also been compromised. Speak with your client about similarly alerting such third parties to the fraud, with your client's permission. If no system was hacked, consider if this was an inside job.

What to do next

Notify the authorities

Report the matter to your local police as a fraud, and the Canadian Anti-Fraud Centre.

Review your other insurance policies

Consider filing a claim under other policies you may have intended to respond to this type of risk, including but not limited to professional liability excess coverage, cyber insurance, commercial general liability, crime, computer fraud, and fidelity insurance. It is important that you obtain complete copies of all your insurance policies, including the declarations, policy wordings, and endorsements, for purposes of analyzing the potential coverages available to you. Your insurance broker may be of great assistance to you in this regard.

Seek IT help

Obtain the assistance of an IT specialist if it appears that your systems were hacked. Even if you received a spoofed email from a fraudster, the fraudster may have hacked into your systems to determine when to make the request for the wire transfer and which client representative to impersonate.

Be prepared to act quickly and work closely with your insurer(s) and other professionals retained. Cooperation between the parties is vitally important in these types of situations. ■

Tips to avoid being a victim:

Review our article Wire Fraud Scams on the Rise: 5 Tips to Reduce Your Risk

Verify instructions independently: Anytime you receive instructions to wire money to a bank account and especially if the instructions are changing previous instructions, contact the payee directly by an independent method (not replying to the email sending the instructions) to verify the instructions received and the accuracy of the bank routing information.

Confirm instructions before a transfer: Advise your clients, or anyone you expect funds from, of the potential for a diversion attempt and to confirm the instructions before initiating the wire transfer.

Double check email addresses to see if they are fake: Fraudsters will spoof an email address by creating a very similar looking address by adding an extra letter/number or changing a character(s). Having hacked into one account, they may spoof other email addresses that were in the email thread to increase your confidence that it is a proper message. It is important to carefully look at all the email addresses in the message. And remember, if the client's email account is compromised, it could be the fraudster sending you emails that look like they are coming from your client.

Regular training: Train staff in what to look out for and have regular discussions and to reinforce the cyber security message. Someone from the office may see information or indications of fraud that others may not.

Stay up to date: For general cyber prevention tips, review our Cybersecurity and Fraud Prevention Tips, and subscribe to AvoidAClaim.com for fraud alerts.

// tech tip

Wire fraud scams on the rise:

5 tips to reduce your risk

LAWPRO is seeing an increase in phishing attacks against lawyers trying to trick them into wiring funds out of their trust accounts to the fraudster.

There are different ways that fraudsters are trying to direct lawyers and law firms to wire money to them. Fraudsters have pretended to be:

- A lawyer in the firm, to direct staff to wire funds to a client or to complete a transaction
- A lawyer or staff at a firm acting for a seller in a transaction, to direct the other side to wire funds
- A financial institution, to direct wire payment to it
- A client, to seek payment of funds by wire

It starts with a hacked email system or impersonation using lookalike fake email address. We have seen cases where the fraudster has hacked into a lawyer or law firm email system, the client's email, or the email system of others related to the transaction. In these situations, fraudsters monitor the emails and send wire transfer instructions from legitimate email addresses to send out wire payment instructions.

Follow the tips below to reduce your risk of falling victim to these increasingly sophisticated fraud scams.

Tip 1: Don't be spoofed: check the email address

Lawyers should use spam filters and check email addresses to reduce the risks posed by fraudsters impersonating lawyers, law firm staff, clients, financial institutions and others. For more tips to avoid spoof email addresses, see our article "Paying attention to the fraud behind the curtain."

Tip 2: Check documents to make sure they haven't been manipulated

When sending documents electronically, on receipt back, double check to make sure that key information, such as wire direction instructions, have not been manipulated. If you send out a document with wire instructions or other key financial information, you can check the document on receipt back that this information has not been changed.

Tip 3: Implement independent verification on all wire payments

Verify all directions to wire funds out of trust by confirming the instructions using a different medium than they were first received. This step can help reduce the risks posed by email hacks and cases where documents have been intercepted and manipulated.

Here are a few examples of independent verification in action:

- **Internal verification**: The law firm partner purportedly emails from the firm address or a personal email address instructing you to wire money out of trust. Walk down the hall to the partner's office to ask if the partner sent the instructions. If the partner is out of the office, rather than replying to the email to confirm the direction (which will not help if the lawyer's email account has been compromised), call or text the lawyer.

- **Before wiring funds to another firm:** If a lawyer at Firm A emails wire instructions to a lawyer at Firm B, the lawyer or staff from Firm B can call Firm A to confirm the wire instructions. The same process can apply on receiving wire instructions from a financial institution or any other request for payment by wire transfer.
- **Before wiring funds to a client:** As another example, a client may email you to instruct you to wire payments to an account. You can consider calling the client to verify that the client's instructions are valid, and that the client's account has not been hacked.

Firms that have implemented independent verification protocols have successfully foiled fraud attempts. A quick call to verify written wire payments might save you from being a victim of fraud.

Tip 4: Make fighting fraud part of your firm culture

Continue to train yourself and train your staff about fraud risk.

- For related CPD programming on fraud prevention, see our watch-anytime CPD programs on real estate fraud, bad cheque and cyber fraud. These programs are free for you, your colleagues and staff to view, and are eligible for LAWPRO's Risk Management Credit.
- Subscribe to avoidaclaim.com for fraud warning updates.

Try incorporating these tips into your practice to help reduce the risk of fraud.

Tip 5: Stay on constant alert

Fraud prevention is not a one and done task. You and your staff need to be constantly vigilant. A few of the fraud scenarios we have recently seen include:

The fake instruction to wire funds

The fraudster sends instructions directing the wiring of funds to a particular account that the fraudster has set up or can access. In recent cases reported to LAWPRO, a fraudster infiltrated a law firm email system, intercepted correspondence regarding a transaction, and then sent wiring instructions from a law clerk's email address. Since they were being sent from legitimate law firm email addresses, there was nothing to suggest anything fraudulent from the email itself. Since the fraudster could see incoming emails, as described further below, only a separate means of verifying the instructions could stop the fraud.

Fake documents may strengthen the credibility of the direction to wire funds

We have seen instances where fraudsters have manipulated documents to alter wire payment instructions. We have even seen "secure" electronic documents prepared by a law firm intercepted, manipulated to provide new account information for wiring funds, and then sent back to the firm.

Last minute changes are a red flag, but aren't the only flag

Often, the fraud may include a last-minute direction to wire funds to a new account. Any late change in payment instructions should be treated with caution, as this is a red flag of fraud. However, we have also seen cases where the fraudster has sent out the wire fund instructions early in the transaction.

Bottom line – there are all sorts of ways that fraudsters try to trick lawyers and their staff to wire funds to them. Lawyers and their staff should be on constant alert for these frauds and can adopt proactive measures to reduce the risk of these attacks. ■

Juda Strawczynski is Director of practicePRO

Three simple things you can do

Call before you click

Always independently verify wire instructions.

Train your lawyers and staff

Make sure all the lawyers and support staff in your firm are aware of the likelihood of spear-phishing attacks and the need to verbally confirm any changes to wire-transfer instructions received by email.

Warn your clients

Alert your clients of the dangers associated with wire fraud and advise them to verbally confirm with your firm any bank account details received by email.

Watch for real estate frauds involving private mortgages

In a hot real estate market fraudsters are even more motivated than usual – there is a lot of money to be had and lawyers are common targets. LAWPRO is seeing a significant increase in the number of real estate frauds involving private mortgages. The Toronto Police Service recently issued a news release about ongoing mortgage frauds targeting law firms.

The frauds we are seeing are incredibly sophisticated. In some cases, multiple fraudsters are in cahoots with each other participating as different parties to a transaction – i.e., the vendor, the buyer, the mortgage broker and/or the lender could be in on the fraud. Regardless of their role, the fraudsters will have very convincing fake versions of all the usual documentation that someone in their role would typically have.

On real estate deals involving private lenders, our experience is that the following circumstances should be considered red flags indicating a possible fraud. While every real estate deal is unique and may have unusual aspects to it, proceed with caution if you see transactions involving one or more of these red flags:

1. Large numbers of referrals from a new source: After having someone approach you saying they were referred by a friend, that person then sends you a lot of business right away. Keep in mind, fraudsters will frequently take steps to make it appear they are coming from a trusted referral source, and they may also be familiar to you as they were a party in another transaction you were involved in.

2. Many similar transactions over a short timeframe: Within a few weeks you are asked by the new referral source to do the same type of transaction repeatedly, after never having seen these types of transactions before. If anything, the value of the mortgages seem to grow with each transaction you work on.

3. "Rush" transactions: A strong push to close from your client, and in particular the referral source, is a red flag that should not be ignored.

4. No funds go through a law firm trust account: The parties insist on transferring the funds between themselves.

5. All of the funds are transferred outside of Canada.

6. It appears that the homeowner didn't actually receive funds or that no funds were advanced at all.

7. The lender doesn't require post-dated cheques or pre-authorized payments or you have the sense that there is some informality to the deals, perhaps because the borrowers and lenders know each other.

8. The mortgage agent or broker isn't licensed with FSRA: A licensing search can be done here.

9. The client does not want title insurance, despite the size of the loan: This is a strong indication of a fraud because fraudsters are trying to avoid the scrutiny that a title insurer will raise.

10. You receive or are instructed to write a "direction re funds" that has names you've never seen before with no apparent connection to the transaction or the property: If this happens shortly before closing it is almost certainly a fraud.

11. The current mortgage is being used to pay off one or more private mortgages that were recently registered, often for large amounts: If a borrower goes to another lawyer to act on a new mortgage and a new lender is involved, this has all the earmarks of being a "fake mortgage" fraud where the first mortgage is a fiction designed to induce the next lender to advance real funds.

12. ID and documents that don't look quite right: With the pandemic it's more likely that you will meet clients virtually and sign documents remotely. As noted above, fraudster clients will have government ID, property tax statements, corporate documents and everything else you would normally expect them to have. However, as these documents are fakes there may be something that doesn't look quite right with them. Perhaps the signature line isn't exactly where it would normally be. Perhaps the signature on the ID looks fine, but you notice that it isn't exactly the same as the signature on the documents you've asked the client to sign. Consider doing a driver's license check with the Ministry of Transportation.

Please share this information with your clerks as they are involved in parts of transactions you may not see and are ideally situated to identify red flags of potential fraud.
If you are an Ontario lawyer acting on a matter that you suspect might be a fraud, call LAWPRO at 1-800-410-1013 or 416-598-5899 or email practicepro@lawpro.ca. One of our Fraud Team members will talk you through the common fraud scenarios we are seeing and help you spot red flags that may indicate you are being duped. This will help you ask appropriate questions of your client to determine if the matter is legitimate or not. If the matter you are acting on turns out to be a fraud, we will work with you to prevent the fraud and minimize potential losses and claims costs.

What's wrong with this picture? Be on alert for fake IDs issued by different authorities or different times with identical photos

LAWPRO continues to see high levels of real estate fraud activity. Lawyers and real estate clerks should be on high alert for mortgage frauds.

In some instances, fraudsters appear to have used photo ID, issued by different authorities, or issued years apart, but where the documents used the same picture. In these cases, it's clear that a fraudulent ID is being used.

Also, as of 2012, Citizenship and Immigration Canada retired the Citizenship Card and replaced it with the Citizenship Certificate. You can find examples from the Government of Canada of both Canadian citizenship certificates and citizenship cards here. If your client is using a citizenship card as ID, proceed with caution. Note that a re-laminated card is not valid as proof of citizenship, as it blurs the security features of the original and makes it difficult to detect fake cards.

Easy tips for verifying ID

- Is the person smiling? Smiling isn't allowed in government ID.
- Compare the images on the different pieces of ID – They shouldn't be the exact same image
- Verify the date on the IDs. Does the person look like they've aged if the ID was from some time ago? If two pieces of ID are many years apart but the image doesn't reflect whether the person has aged, ask questions.
- Does the minister on the ID match who was in office at the time the ID was issued?
- Is the signature similar to your client's?

And lawyers may also find it useful to review the Alcohol and Gaming Commission's tip sheet on how to ensure IDs are legitimate.

Be on alert for these and other red flags of fake IDs. To learn more about real estate fraud prevention, visit practicePRO's Fraud Prevention page.

Firm websites being impersonated by fraudsters

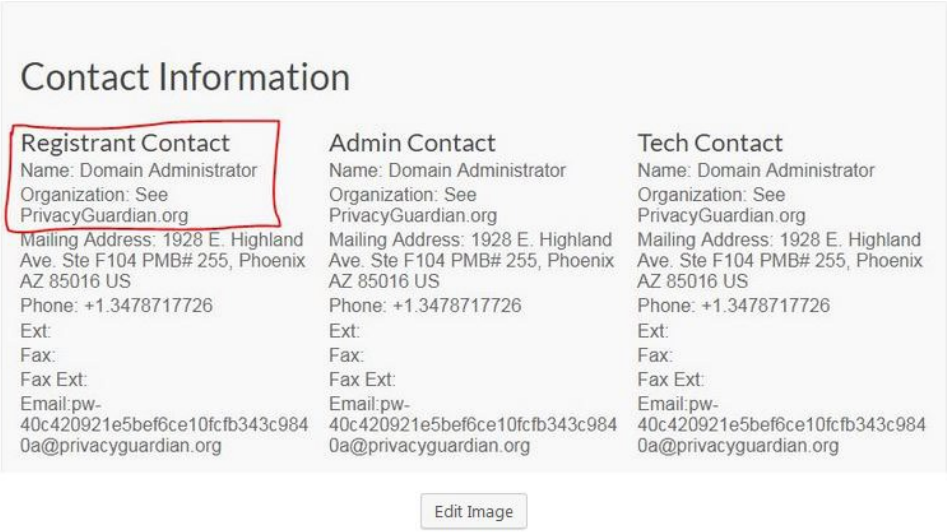
Raymond G. Leclair

LAWPRO has heard from a number of Ontario lawyers that their firm websites have been copied by fraudsters to further their schemes, such as the "inheritance from a long-lost relative" scam or immigration scams overseas. While we have seen these impersonation scams for over a year now, there seems to be another spike lately, perhaps related to fraudsters hoping to take advantage of Covid-19 confusion.

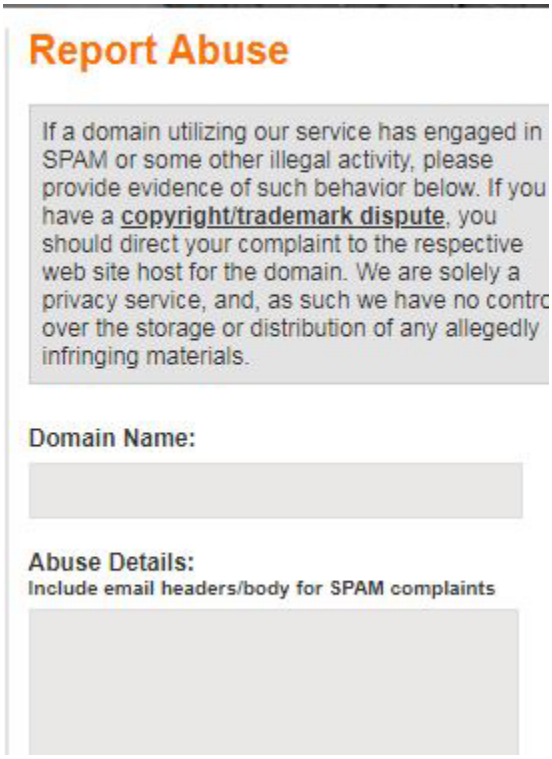
In these impersonations, the fraudsters often use the name of a real law firm in one jurisdiction, the web content from a firm in another jurisdiction, and the phone number or contact information from a third jurisdiction. As a result, the fraudster's site has an air of legitimacy to assist them in their illegal deeds. Firms may not even be aware they are being impersonated unless someone being targeted makes the effort to find the real firm information and contact them.

There is not much you can do to prevent this expropriation but you can try asking the service provider hosting the fraudulent website to take it down. To do this, query the fraudster's website name at a site like https://whois.icann.org/en, where you might be able to see who created the site and which provider is hosting. You can then advise the hosting provider of the expropriation and request action be taken.

Sometimes (see the image below), fraudsters will use a privacy screening service to shield their information. If the hosting provider cannot be determined, the privacy screening service itself should have a feature to report abuses and one would make the request of them. In the case of this fake site, the fraudsters have used a site called Privacy Guardian to hide the name of the domain host.



One would then have to contact Privacy Guardian itself to report that their service is being used for a fraudulent site, which is a breach of their terms and conditions.



You should monitor your website activity for any unwanted activity, especially after you learn that your site has been copied.

It might be prudent to also report the website content theft to the Law Society. Lawyers can contact the Complaints & Compliance Division at 1-800-268-7568 or 416-947-3310.

Resources and CPD for Lawyers

LAWPRO's Practice Management Resources	
LAWPRO's Practice Tips Sheets	Helpful tip sheets organized by type of practice error which provide ways to avoid common mistakes. Includes tips on delegation, managing deadlines, conflicts of interest, and other categories.
Table of Ontario Mentoring Programs	A helpful table of various mentoring programs offered by legal groups and associations for Ontario lawyers
Technology Products for Lawyers and Law Firms	A helpful table of software solutions for lawyers
Technology product assessment worksheet	A helpful worksheet to evaluate technology you are considering adopting
Additional fraud resources	
Canadian Anti-Fraud Centre	The Canadian Anti-Fraud Centre collects information on fraud and identity theft and provide information on past and current scams affecting Canadians.
LSO: Client identification and verification requirements	Law Society of Ontario bylaws and guidance regarding the identification and verification of clients.
Additional CPD for lawyers	
Avoiding the wire fraud nightmare – What you need to know to protect yourself and your clients	In this pre-recorded program from October 2021, learn tips you can easily implement in your practice to help prevent wire fraud and other cyber dangers.
Survival tips to prevent fraud	In this pre-recorded program from September 2022, learn about recent fraud efforts targeting lawyers, and receive practical tips to help manage these risks.
Claims risks for commercial lawyers acting on the purchase or sale of a business	In this pre-recorded program from December 2020, learn about: risks when acting on the purchase or sale of a business and how to proactively lower your risk.
Diversity, inclusion and cultural competence to reduce risk	In this pre-recorded program, learn about the importance of diversity, inclusion and cultural competence for the legal profession and malpractice claims where an issue related to a lack of cultural competency contributed to a claim

SPEAKER BIOS

Ray Leclair

Ray Leclair is Vice President, Public Affairs, responsible for government relations efforts at LAWPRO.

Formerly General Counsel for the Kanata Research Park Corporation, a development company and major commercial landlord in Ottawa, Ray has practised in both major national law firms and as a sole practitioner, and was a part-time professor at the University of Ottawa Law School and Cité Collégiale instructing the French language portion of the real estate law course. He also served for 15 years as the Ottawa senior instructor for the French and English Real Estate Sections of the Bar Admission Course and member of the Law Society of Upper Canada's Solicitor Advisory Group, Licensing Process.

Called to the bar in 1984, Ray is Past-Chair and remains an active participant of both the National Real Property Section of the Canadian Bar Association and of the Real Property Section of the Ontario Bar Association, past Co-Chair and remains a member of the Working Group on Lawyers & Real Estate, and President of the Ontario Real Estate Lawyers Association (ORELA). Member of the Ontario Bar Association Council, past executive member of CBA's National Sections Council, past member of its budget committee and formerly Vice President of the North American Bar-related® Title Insurers, past President of the Advisory Committee for the Cité Collégiale Legal Assistants Program. Ray is a member of the Board of Directors and President of a high-rise condominium corporation in Toronto and has volunteered as Manager of the fundraiser TOM* MensFashion4Hope and a VIP & Sponsor Relations Officer for semi-annual Toronto Men's Fashion Week (TOM*). Ray is and has been a frequent speaker/presenter, in French or English, in numerous programs on various real estate and other law related topics in Canada and the United States.

Anne E. Posno

Anne E. Posno is an experienced and successful trial lawyer who brings passion and commitment to each case. Anne has particular expertise in cases involving estates litigation, medical negligence, professional negligence and commercial disputes, especially in real estate, fraud and directors' and officers' liability. This diversity reflects Anne's ability to bring creativity and experience to bear. Her impressive track record demonstrates her solid judgment and her in-depth understanding of her client's needs. Anne regularly appears before the Ontario Superior Court of Justice, Toronto Estates Court, Toronto Commercial List, the Ontario Court of Appeal, the College of Physicians and Surgeons of Ontario, the Federal Court, private arbitrations, and the Human Rights Tribunal of Ontario. Anne is also a certified Associate Member of the Society of Trusts and Estates Practitioners (STEP).

David Rainsberry

David Rainsberry is counsel at LAWPRO. Prior to joining LAWPRO in 2013, David practiced as a commercial litigator at a major Toronto law firm. He has appeared as lead or co-counsel at the Ontario Court of Appeal, the Superior Court of Justice and several provincial tribunals. While in practice, David's clients included other lawyers, multinational corporations, national and international banks, financial services companies and court appointed receivers. David completed his Master of Laws degree (LL.M.) in June 2021 and now manages a complex portfolio of malpractice claims in related areas of practice. David remains an active member of the OBA, having served on the executive of the Civil Litigation Section in 2019-2020.

Juda Strawczynski

Juda Strawczynski manages and promotes practicePRO, LAWPRO's innovative claims and risk management initiative, including identifying emerging claims and risk, resource creation, and outreach to the profession.

Prior to joining LAWPRO, he 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. Prior to that, Juda 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) from 2013 to 2018, and as a Director of the Canada Millennium Scholarship Foundation. Juda has a Bachelor of Arts from McGill University in Humanistic Studies and International Development Studies, and a Juris Doctor from the University of Toronto.