

the inside “scoop” advice from lawyers with claims

When it comes to claims, no one is in a better position to comment about what happened and how that claim could have been avoided than the lawyer faced with the claim.

That's why at the resolution of every LawPRO claim file, we canvass lawyers who have reported a claim, or potential claim, through a formal survey process.

This process, which we began in 1995, asks lawyers to evaluate and comment on various aspects of the handling of the claim by LawPRO staff and on the work of the defence counsel assigned to the file. Survey results, which are reported each year in our annual report and in 2004 will be reported back to counsel, provide us with a quantitative benchmark against which we can measure our performance from year to year. In 2003, for example, about 1,000 insureds (more than 47 per cent of lawyers whose claims files were closed in that year) took the time to complete the four-page survey – a response rate that is considered excellent in research circles.

But more telling – and often quite compelling – are the comments that these lawyers make on the “Risk Management and Comments” section of the survey. We ask lawyers to suggest what issue or development may have prompted the claim, and how other practitioners might avoid similar situations. The quality and quantity of their responses have been a pleasant surprise – especially given the time pressures most lawyers face and the very human desire to put the claim behind them. Those responses have also proven to be invaluable in helping us establish strategies that meet insureds' needs, and in designing elements of our practicePRO risk management program.

What's also surprising is the consistency in both the causes of claims and in insureds' suggestions for what they would have done differently to avoid the claim in the first place. This article examines the most common causes cited by lawyers, and provides suggestions for what others can learn from their experiences. We also provide you with some practical tips on how to avoid the types



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of claims listed below, and point you in the direction of additional risk management resources that you might find helpful if any of the comments from lawyers below strikes a chord with you.

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The difficult client

Difficult clients can be grouped into several recognizable categories. For more information on how to recognize and deal with the various types of difficult clients, see Carole Curtis's paper at www.practicepro.ca/difficultclients.

Three of the five principal causes of claims cited by lawyers can be grouped under the broad category of "The Difficult Client." The survey responses make it clear that in many cases lawyers today deal with demanding clients who would have been dissatisfied regardless of outcome.

A. "EMOTIONAL INSTABILITY OF CLIENT MADE IT DIFFICULT TO RESOLVE CASE."

The cause:

"Client has several personal and/or psychological problems."

"Mental health problems experienced by client."

"An idiot client."

"I believe this entire claim has been driven by the obsessive and somewhat delusional mindset of the client. He has convinced himself that he is a victim of the system."

The advice:

"It is not always possible (to avoid a claim) in such circumstances."

"It's a risk you take with troubled clients."

"(Provide) better written correspondence with client."

"Screen out the goofballs."

"Don't take crazy clients – since this is not always an option, I don't know."

"I was the third lawyer the client had retained, and I had an uncomfortable feeling about him from my first meeting. **I should have trusted my instincts and simply refused his file.**"

B. SPECIAL RELATIONSHIPS THAT PROMPT THE LAWYER TO TREAT THE CLIENT DIFFERENTLY

The cause:

The clients may be difficult because of the special relationship that they have with the lawyer. Problems arise when the lawyers act for someone who is a friend or family member and they do not treat that person as they would any other client.

"I allowed myself to repeatedly give free cursory advice to a difficult client who could not pay, without protecting myself with a written retainer agreement. I was also required to deal with this difficult client by myself without supervision barely one month after being called to the bar in an area where I had no prior experience."

"Helping family pro bono and not treating file as real client."

"The client was someone whom I would meet socially, and as a result I did not want to throw him out of my office when he failed to cooperate, and I relied on oral admonishments to him prior to trial, rather than getting off the record when he failed to help prepare for trial."

"Several years ago I became too close to client's business affairs."

"I believe this type of client created the situation. Unfortunately I had represented him before and felt he had legitimate grievances."

The advice:

Many of the suggestions for avoiding this type of claim are similar: Be consistent and treat all clients as clients, even though you have a personal relationship with them.

"Avoid acting for friends."

"Antenna must go up when family or friends seek assistance."

"Do not allow social relationships to interfere with professional need to protect oneself."

"Try to remain somewhat distant and objective."

"Don't ever give free advice and don't fail to properly supervise brand new lawyers in areas of law (that) the principals know are complex and are new to the junior."

"If I had to do this again, I would have a strong retainer agreement, and demand complete disclosure from my client. I would probably not take the case, but if I did, I would spell out the conditions of my employment: a) monetary b) disclosure and c) that in the event that he/she did not comply (with) my recommendations for the conduct of the case, I would have the right to terminate my employment. Also if the fact turned out differently than represented by the client, I would have a right of termination. I would never have taken this case but for the fact but Mr. X was a previous client, and took the case only at his insistence, with what I believed to be a sufficient retainer."

C. UNREALISTIC CLIENT EXPECTATIONS

The cause:

"The client adopted a risky strategy. When it failed he tried to blame his counsel."

"A difficult client who did not follow her lawyer's advice and refused to accept responsibility for her own actions."

The advice:

"Be very clear in setting clients expectations in the very beginning. I attempted to do so, but in this case I should have been more emphatic."

C. UNREALISTIC CLIENT EXPECTATIONS (CON'T)

The cause:

"(The client had) unrealistic objectives."

"An aggrieved client who failed to take responsibility for any of his own actions, blaming his lawyers instead."

"The client appeared to expect us to resolve his case or issues in his case quicker than we could – or anyone could. (We) felt pressure to accept client's instructions without a sufficient analysis of the implications."

"The client made a difficult but informed decision (which he) later regretted and tried to sue everyone."

"This was a particularly difficult client who wanted to blame someone for his business failure and therefore chose his lawyer, even though his lawyer actually improved his situation."

"The plaintiff was unusually difficult to work with, did not follow through on her undertakings to me, and then seeks to blame me for the plaintiff's own irresponsible conduct. The plaintiff provided conflicting/irresponsible instructions to me."

The advice:

"Document and paper file all client communications no matter how insignificant they seem at the time."

"Write letters to (the) client and keep records of solicitor's opinion and recommendation to the client."

"Practise self-defense."

"Ask difficult clients more probing questions and document their answers."

"Keep client fully informed. Have client confirm instructions in writing and make contemporaneous notes."

"When dealing with a difficult client, keep supporting documentation as to advice provided to clients, good reporting letters, etc. Although difficult at times, spending a little extra time on the file may save a lot of time in court."

"Get off the record at an early stage when the client is difficult to work with and provides irresponsible instructions. I was too accommodating in hoping the client's behaviour would improve."

"Get a good crystal ball."

Risk management tips: checklist for effective communication

For ideas on how you can improve your relationships with clients by improving client-case screening and client communication, and by using better systems, trails and record keeping, see the *Managing the Lawyer/Client Relationship* booklet at www.practicepro.ca/relationships_booklet. At www.practicepro.ca/difficultclients is a precedent for a detailed client billing and administration information document. Reproduced below is one of the checklists you'll find in the lawyer/client booklet.

A client-centered approach

- Address the issue from the client's point of view.
- Show an interest in the client as a person.
- Do not be late for appointments and arrange some meetings at the client's office.

Active listening

- Observe the client while listening to assess his/her credibility and emotional state.
- Listen for what the client is not telling you.
- Do not assume that you know the problem.

Direct questioning

- Keep the client focused on the issues.
- Enquire about the client's affairs that may affect the issues in the case at hand.

Helpful explaining

- Use clear and simple language, be succinct and avoid legal jargon.
- Use headings in any lengthy report.

Keeping clients informed and involved

- Execute a clear engagement letter.

- Copy the client with work product and arrange for regular reporting.
- Return phone calls promptly.
- Do not proceed on any key matter without the client's consent.

Encouraging realistic expectations

- Avoid taking too sympathetic a view of the client's situation with the result that your opinion on the merits is compromised or diluted.
- Put your opinions and recommendations in writing from the outset.
- Instructions from an unrealistic client are generally difficult to obtain.

Dealing with unpleasant relationships

- Pay attention to what makes the relationship unpleasant and deal with those factors immediately.
- Consider terminating the relationship on the basis of a lack of confidence by the client. However, if you must continue the relationship, be sure to put your advice in writing in every instance.
- Involve another lawyer in the firm who may have a better relationship with the client.

What the surveys say

LAWPRO and defence counsel are doing a very good job of managing claims and meeting the expectations of insureds caught in the claims process, according to the 1,000 lawyers who completed our survey in 2003.

- 93% were satisfied with the way their claim was handled;
- 86 were satisfied with the selection of counsel;
- 86 per cent would have the same firm represent them again.

KEEPING COMMENTS CONFIDENTIAL

Long before privacy legislation focused everyone's attention on the need to treat this type of information with the utmost sensitivity, we had in place a process that protected the anonymity and confidentiality of the respondents. When we receive a completed survey, the information is entered into a database as raw data, without any reference to a file number or the insured lawyer. The paper copy of the survey is destroyed once the comments are entered. All information is released in aggregate form only. Results will be provided to counsel in 2004, as aggregate scores only.

A challenging legal environment

The cause:

“Practice overload.”

“Contributing factors – work load. Short staffed. Working in area not completely proficient in at the time. Lack of supporting documentation.”

“Client in litigation not forthcoming.”

“Allowing client to handle aspects of file without lawyer involvement (to save costs).”

The advice:

“Do not overwork your practice.”

“Make complete notes of all meetings and calls.”

“Hard to say since clients want to keep costs down: Either insist on being involved or carefully document client’s wish for lawyer not to get involved.”

“Perhaps assume a more adversarial approach with clients. Don’t accept instructions just to satisfy difficult client.”

Suing for fees

The cause:

Often, a claim is prompted by an attempt to collect outstanding accounts.

“(He was a) disgruntled client – we should not have sued for our outstanding account – his claim followed our claim as surely as night follows day.”

“The client wished to raise any issue in an effort to avoid paying his legal fees.”

“The client used the threat to buttress his complaint about inability to pay his account one year after it went unpaid.”

“The only factor that prompted this claim against me was my attempt to get paid my outstanding legal accounts. Had I not been proactive in suing the claimant for recovery of monies owing, the claim would never have arisen.”

“This client only became disgruntled when pressed for payment (especially since he wasn’t successful at trial).”

The advice:

“That’s easy. Solicitors only need get paid up front and full on every file! (On a more serious note)... (But) given economic realities and the nature of ongoing solicitor client relationships, this is extremely unlikely to every occur.”

“Consider strongly the pros and cons (of suing on an outstanding account).”

“Get retainers more often.”

“Make sure payment is upfront.”

“Take the appropriate time to explain legal fees.”

Risk management tips: Document, Document, Document

Time and time again, the lawyers who have returned the surveys indicate that they might have been able to avoid the situation had their file been properly documented.

“While I believe it to be impossible all the time, my case proves you must diarize and record every piece of advice given, and try to confirm same in writing to client.”

“Define more clearly in writing at the outset the parameters of the retainer.”

“Obtain written instructions.”

“Be certain to have the client sign acknowledgements re: any issue which effects them.”

“Written clarification of scope of retainer has now been included on all retainer agreements issued by solicitor.”

“ Follow up all instructions that are sent verbally in writing.”

“Emphasis on reporting letters to clients.”

“Document decision making process.”

“Better written correspondence with client.”

“Always write after consultation and clarify your retainer. Put obligations on client to instruct you in writing.”

We should keep in mind when looking at this advice that of course many of the matters that are reported to LAWPRO do not result in any payment: 40 per cent of the files are closed without any expense or indemnity at all, and 75 to 80 per cent are closed without any indemnity payment. Careful documentation will not stop all claims from being made against lawyers, but certainly those lawyers who have reported claims, or potential claims, indicate that documentation is vital. As one said: “Just document everything.”

We give the final word to this lawyer who, although he avoided a claim, has some valuable advice for all:

“No claim was in fact made. I received a letter suggesting the possibility of a claim. On the advice of the LAWPRO examiner, I responded to the letter and heard nothing further. In the circumstances I do not have sufficient information to say what issue or development prompted the claim. I would however suggest that even the possibility of a claim might have been avoided if I had confirmed in writing advice I had given verbally. I would, indeed will, in future confirm all advice in writing. That is, and has been, my practice in most cases, with rare exceptions. This was an exception, one that will not occur again.”

See www.practicepro.ca/retainers for retainer precedents for several areas of practice.