LawPRO™
A publication to help lawyers
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taking the guesswork out of client communication

The inside "scoop" from lawyers with claims

Dealing with difficult clients

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2003 annual report highlights

Fraud alert:
Fraud reports on the rise

*Since LawPRO first reported on real estate related fraud (**Special Report on Fraud**, Summer 2001), the incidence of reported fraud has continued to increase. Earlier this year, one title insurer reported that more than 25 per cent of all fraud claims it has received over the last decade were reported in the month of January 2004 alone. The Canadian Institute of Mortgage Brokers and Lenders, reported that total industry exposure to mortgage fraud was between $150 and $300 million in 2001, compared to $73 to $75 million the previous two years.*

Moreover, no lawyer today is sheltered from exposure to fraud. No matter if you practise in a major metropolitan area or are a rural practitioner, whether you work with a major law firm or on your own – you are equally a potential target for a fraudster.

What kind of fraud should you be on the lookout for?

The following are brief descriptions of the principal types of fraud that lawyers should be aware of:

Identity fraud:

The ease with which fraudsters can steal someone's identity has been well documented in the general media. SIN numbers, drivers' licences, health cards, passports and other visual identification records are relatively easy to obtain – if you are so inclined. Moreover, impersonators today are not only stealing another's property, they are also stealing that individual's credit rating, making it that much easier to perpetrate the mortgage fraud. Similarly, the incidence in which forged documents are used to discharge old and assume new mortgages is on the rise.

A variation on this theme is corporate identity fraud – that is where the fraudster takes control of a company's corporate records (for example, appointing him/herself to a position as signing officer) and then proceeds to act on behalf of the corporation, for his or her own benefit.

Value fraud:

In this situation a lender is persuaded to loan more against a property than its true value. Properties are often "flipped" from one buyer to another in a short period of time; typically lawyers are dealing with clients who appear to buy and sell numerous properties and/or who appear to have sums of cash at their disposal with which to purchase properties. These may also be clients who the lawyer has not acted for in the past, or who are in a rush to close the transaction. The mortgage may have been arranged through a mortgage broker.

How can you protect yourself against being a victim of fraud?

1. Be diligent in all aspects of your practice: Obtain photo identification of borrowers/purchasers and keep a copy of that identification in your files.
2. Also, be on the lookout for new requirements in lender instructions: As lenders implement new measures to combat value fraud, you may be required: to review the stated property value in past transfers; or to be on the lookout for specific numbers or types of transactions affecting the property; or to provide a list of inactive instruments.
3. Familiarize yourself with the warning signs of value and identity frauds, as first reported in LawPRO's Special Report on Fraud. The report is available on our Web site at http://www.lawpro.ca/fraudreport or in hard copy from practicePRO at 1-416-598-4623, or e-mail susan.carter@lawpro.ca.
4. **Finally, remember the old adage: If it seems too good to be true, it likely is.** Use your common sense and listen to your instincts. Ask detailed questions. If you don't like the answers, decline the retainer or take the time to investigate more thoroughly. Beware of the rush retainer offering fees above your normal rate.

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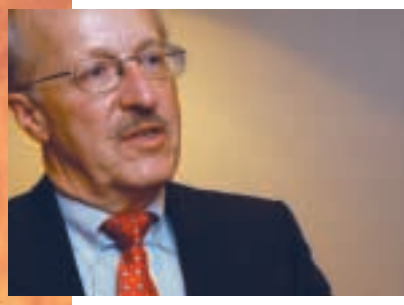


COVER:

FEATURES

DEPARTMENTS

the inside "scoop"

advice from lawyers with claims

Caron Wishart

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 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.

Caron Wishart is Vice-President, Claims at LawPRO.

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/relationshipsbooklet. 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."

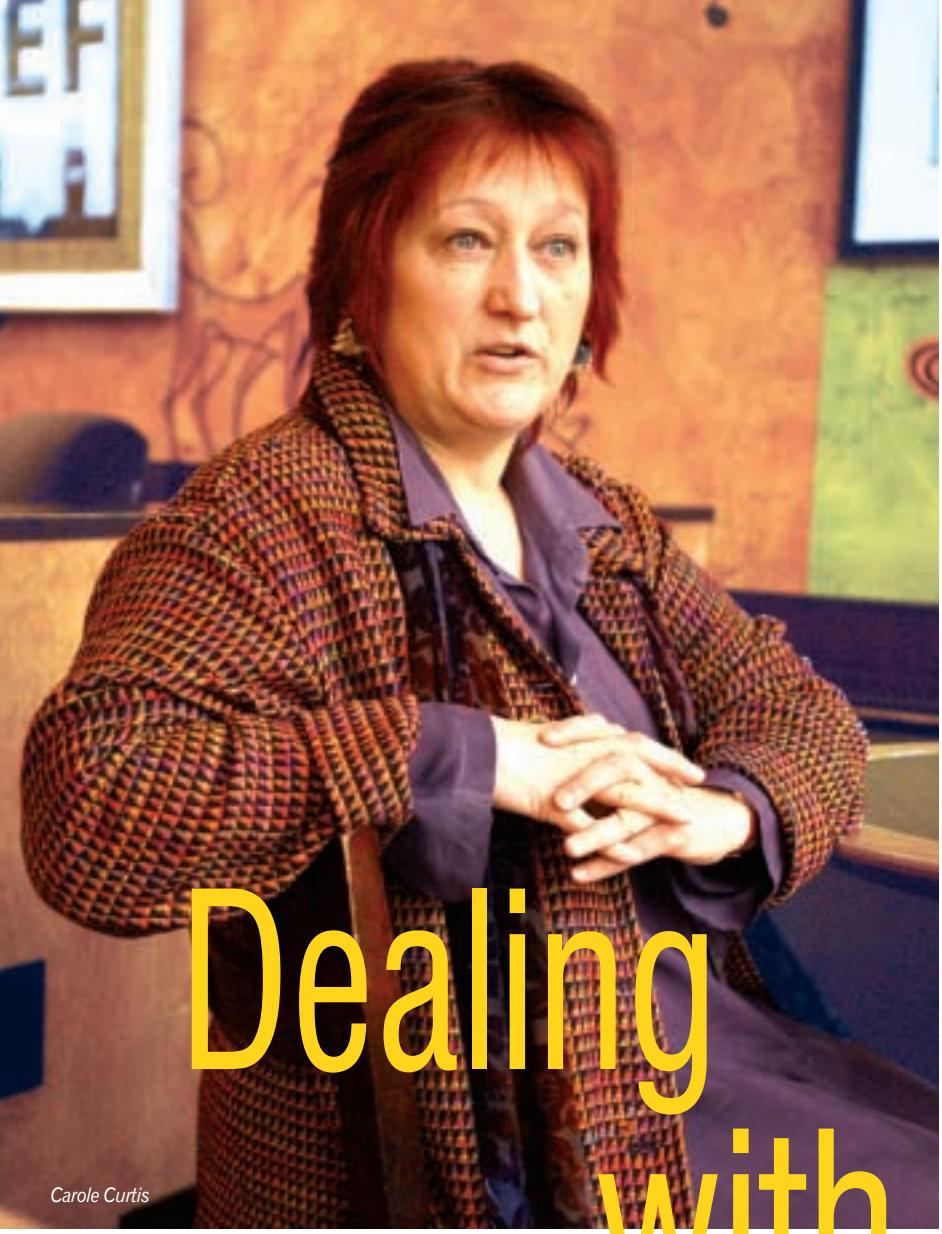
"Always write after consultation and clarify your retainer. Put obligations on client to instruct you in writing."

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/letters for retainer precedents for several areas of practice.



Carole Curtis

Dealing with difficult clients

The following is excerpted from a paper "Dealing with the difficult client" prepared by Toronto lawyer Carole Curtis, B.A., LL.B.

The full text of this paper, as well as a copy of the ***Client Billing and Administrative Information*** *documents used in Ms. Curtis's law practice are available on the practicePRO Web site www.practicepro.ca/difficultclients.*

How to deal with the difficult client during the retainer: Five tips to stay sane and stay in practice

1. Understand your role

Your role as lawyer is usually pretty straightforward, but may appear to be less clear with a difficult client. Your role is to analyze a given situation and offer a solution to the problem presented, or a means of achieving the goal the client has presented. Sometimes, there are several possible solutions or means, all of which should be offered to the client. Don't forget that "do nothing" is always a possible solution (although that solution may have outcomes that are unacceptable to the client). The lawyer's role then is to advise on the consequences of the different courses

of action. It is the client's job to make decisions about which course of action to follow, not the lawyer's. After all, it is the client's life, or the client's business, or the client's estate, or the client's litigation.

Some categories of difficult clients (dependant clients, for example) are often totally unwilling to make decisions about their legal issues and want the lawyer to do that. DO NOT DO IT. Let some other influential person in their life help the client with the decision. Your job is to help the client understand the choices.

2. Protect yourself throughout

Document everything you possibly can, including telephone calls, voice mail messages and e-mail messages. The verb "document" means "to record in a document; to provide with citations or references to support statements made".[1] Confirm the client's instructions to you in writing, and confirm your instructions to the client in writing. It is also necessary to include, in writing, the possible consequences of various courses of action the client may be contemplating.

If you deal with this client or their work electronically, save messages and instructions in your usual way as part of the permanent record of the file (which may be electronic or on paper). The difficult client has a way of turning on the lawyer more often and with more damaging consequences than other clients.

Documenting (in this context) means recording sufficient details to assist you in a future disagreement. The record you make is not of any use if there are insufficient details to assist you. This means recording at least the following:

- the client's name,
- the file name,
- who the contact was with,
- the date of the contact,
- the nature of the contact (telephone call, meeting, voice mail, e-mail, etc.),
- how long the contact took,
- the details of the contact (who said what, including what the lawyer said), and
- any instructions given (by the client or by the lawyer) during the contact.

Practice management software programs can make this task less cumbersome and more reliable than scraps of paper the lawyer scribbles on.

It may also be wise to discuss the advice you give this client with a colleague, including discussing the fears you have about the client.

In notes of meetings or conversations with the client, be sure to record the information and advice you gave the client, not only the information the client gave you. Where there is a dispute between lawyer and client, this area may, in fact, be the biggest area of disagreement, and is also among the least documented. In litigation between the lawyer and the client, where there is disagreement about the information provided or the legal advice given to the client and that advice is not documented, courts have often preferred the evidence of the client on this issue.

Practice management software is undoubtedly the most powerful tool for keeping track of all the work that has to be done on a legal matter. The two most widely used practice management products – Amicus Attorney (www.amicusattorney.com) and TimeMatters (www.timematters.com) – are powerful law-office specific tools that allow you to collect and organize information around a single matter. These "practice management systems" contain, in one database, almost all the information you need to handle files and run a law practice. They provide functionality that was often found in separate, software programs, including time and billing, accounting, automated document generation, document management. When used properly, a practice management software unifies all the data about a client, potential client or matter into a single point of reference. You can instantly and easily see, in one place, every letter, e-mail, appointment, to do and so on.

– Dan Pinnington, Director, practicePRO

3. Be calm, be patient, be clear

Do not let the difficult client turn you into the difficult lawyer, or the unhappy lawyer, or the depressed lawyer (or worse, the yelling lawyer, the drinking lawyer or the swearing lawyer). It will require more patience than usual to deal with this client. If you find you are becoming the difficult lawyer, perhaps it is time to transfer the file to another lawyer.

Be explicit, and be very clear with the client, about everything. The more information given to the client in writing, the less likely there will be misunderstandings. It is also advisable to give the client this information early on in the retainer. Included are examples of information given to clients early on, to help avoid conflict in the retainer (see schedules attached, Administrative Information for New Clients and Billing information for New Clients, which clients are asked to read in the reception area before they meet with lawyers in this law firm).

Be clear with the client about the expectations you have of the client regarding the client's treatment of you and treatment of your staff.

Be sure the client understands whom to deal with on which issues (for example, who to call to get certain information, when they need to speak to the lawyer, when they can deal with staff).

[1] Katherine Barber, ed., *The Canadian Oxford Dictionary*, Toronto: Oxford University Press, 1998, p. 409.

Many difficult clients want to deal only with lawyers, which is expensive, not very efficient and not often necessary (see Managing Expectations, below).

4. Include your staff in the plan for the client

Make sure the staff understands the risks of acting for a difficult client, so they can behave in ways that minimize those risks. Usually, the staff will easily be able to identify the difficult client. The staff may have identified this client as a difficult client before the lawyer. Make sure the staff is dealing with this client the same way that the lawyer is, especially in terms of documenting contacts, instructions or information.

Also, difficult clients are often much more difficult with the staff then they are with the lawyers. Trust your staff and believe them when they describe the client's behaviour. Deal directly and promptly with the client about bad or inappropriate treatment of the staff, to ensure that the client understands what the staff's role is in their retainer, and more importantly, to ensure that the behaviour is not repeated. Never let the difficult client treat your staff poorly or abusively. No client is more important than your staff. Institute a zero tolerance policy on abusive behaviour towards staff.

5. The lawyer's job is managing expectations

Often clients are difficult for lawyers to deal with, at least in part, because they have unrealistic expectations about the services you will provide, or the outcomes you can achieve for them. Some clients' expectations or goals are totally outside the realm of what legal services could ever achieve. It is important to identify, as early as possible, what the client's expectations are in retaining a lawyer to deal with this particular issue. Consider asking the client to reduce their expectations to writing, or at least, have a frank, early discussion with the client about their expectations.

Clients' unrealistic expectations take many forms, but fall into the following general categories:

- expectations about service;
- expectations about time to conclude;
- expectations about result;
- expectations about cost.

Many difficult clients have very high service expectations. If the client has service expectations which are impossible to meet (e.g., phone calls always returned by the lawyer within 15 minutes, or performing all of the work for free) be clear from the outset that you cannot provide that level of service or that kind of service, and that perhaps the client should find a lawyer who can (good luck to them). If the client has service expectations which are unrealistic, or very expensive (dealing only with the lawyer, or having all work done only by the most senior lawyer) be clear with the client as to whether or not you can meet that expectation, or whether another kind of service will be provided. It is especially important to bill clients with high service expectations frequently and regularly, so they can understand the cost of those expectations.

Clients who are unlikely to be successful in achieving their goals need to be told that clearly and explicitly from the start of the retainer, or at the earliest possible moment in the retainer. It is far more important to be honest with the client who cannot achieve their goal, than it is with the client who can.

Clients are far more interested in honest and clear information about the cost of legal services that at any time in the past. The introduction of technology to the billing process has also changed clients' expectations and their tolerance. The difficult client is also a client who is likely to be unhappy about fees. Again, it is advantageous to ensure this client is billed frequently and regularly, and is provided with as much detail as possible.

Dealing with the difficult client: Topics covered

Other topics covered in this paper and available in full on the practicePRO Web site at www.practicepro.ca/difficultclients are:

- Why should the lawyer be concerned about the difficult client?
- The basic three steps of your involvement with the difficult client:
  a. Whether or not to act for the difficult client
  b. How to deal with the difficult client during the retainer (this section is reproduced in its entirety in this issue of LAWPRO Magazine)
  c. Know when to fold – Ending your relationship with the difficult client
- Categories of difficult clients
  a. Angry/hostile
  b. Vengeful/with a mission
  c. Over-involved/obsessive
  d. Dependant
  e. Secretive/deceitful/dishonest
  f. Depressed
  g. Mentally ill
  h. The difficult client with the difficult case
  i. The client who is unwilling to accept/follow/believe any of the lawyer's advice

Preventing Will drafting errors

Ian Hull

There is little doubt that, with the onset of the significant transfer of wealth in Canada, we will see an increase in the number of negligence claims against lawyers doing Wills and Estates work.

That trend is already making itself felt: Wills and Estates claims now represent a significantly larger proportion of claims received by LawPRO than in the past. In 2003, for example, Wills and Estates claims accounted for seven per cent of all claims reported, compared to less than three per cent in 2002. Approximately 22 per cent of all claims received by LawPRO relate to circumstances where the solicitor fails to follow instructions from his or her client. Furthermore, poor communication on the part of lawyers results in approximately seven per cent of LawPRO's claims. Interestingly, only six per cent of claims result from the failure of a solicitor to know or apply the law.

Fundamental to any failure to follow instructions is the timely completion of the client's instructions. Approximately 40 per cent of all claims received by LawPRO relate to issues directly linked to alleged procrastination on the part of the lawyer handling the matter.

In the area of Wills and Estates and Will drafting, the above-noted trends hold true. In my experience defending lawyers, perhaps the most significant source of solicitor's negligence claims results from slip-ups between the time the client leaves the office and the time the Will is executed. The notes a lawyer makes are usually accurate and comprehensive; but something happens along the path to executing the Will and mistakes are made. It may be as simple as the solicitor making a note, at the initial meeting with the client, that the family cottage is to be divided among "my children 'A', 'B' and 'C'" and the Will ends up being signed to include a gift of the cottage to "A" and "C". Omitting "B" was not done purposely; when the Will was executed by the client, everyone in the drafting process, including the client, missed the fact that "B" was not included. But the mistake was made, and the consequences could be significant.

Many of the drafting errors that I have seen could have been avoided if the drafting solicitor simply used the notes made when receiving instructions, and then incorporated an extra checking mechanism along the path to signing a correctly drafted Will.

Practical suggestions

We are all familiar with the numerous helpful client information checklists that exist in regard to taking instructions for Will

drafting. However, these information gathering checklists are not always used and it is almost always the case that handwritten notes are made at the time that instructions are received from the client.

In my view, there are practical drafting steps that can be incorporated in the process of receiving instructions, reviewing the Will document, and attending to its execution.

While one always needs to be mindful of the economics of drafting Wills, the following is a summary of practical steps that may assist in ensuring that your handwritten Will notes make it onto the typewritten pages of the final Will.

1. Initial Meeting with Client and Legible Note Taking

When we receive instructions for a Will, we are expected to take careful notes. Throughout the Will drafting process the notes that you make at this first interview need to be referred to time and time again. As such, it is essential that the notes are accurate, neat and as comprehensive as would be expected in the circumstances. For example, if you are drafting mirror Wills for a husband and wife with a gift-over to their children, your notes will be much less comprehensive than if you are meeting with an elderly client who wants to write one of her children out of her Will.

At the initial meeting with your client, it is often useful to work from an existing information checklist that you are most comfortable with, and to use it as your starting point when reviewing the various estate planning issues and the wishes of the client.

However, as an additional check, at the end of the meeting, I take five minutes with the client to review my notes taken during the meeting, to ensure that I have understood the instructions clearly. Furthermore, this gives me an opportunity to review my notes with the view to ensuring that they are both complete and readable for both my staff and I in the upcoming drafting process.

The next step in the Will drafting process is to meet with my assistant to review the instructions, and guide that individual through the actual drafting process. Once the Will is drafted, I check it over and send a draft copy of the Will to the client for careful review.

In my cover letter I include a short summary of the client's general instructions, including an overview as to the proposed disposition of the assets on death. I also include a glossary of terms so that the client can better understand the terminology in the review process. The glossary terms I use can be found in the Bar Admissions materials. After the client has reviewed the Will, if there are further changes, they are incorporated into the Will, and then I proceed to have my assistant arrange for a meeting at my office to review the Will with the client and have it executed.

2. Will signing date

Before the final meeting with the client, I always have my assistant set aside 15 minutes prior to the meeting for me to take one more look at the Will document. I then meet with the client and take the opportunity to work from my original handwritten notes to ensure that I have followed the client's instructions. I take the opportunity to review the Will document in some detail to ensure that the client understands the Will provisions and that I have correctly identified and spelled the names of the beneficiaries, guardians and executors.

I also pull out my copy of the glossary of terms I have provided and ask if the client has any questions regarding the terms used in the Will.

It is at this stage that I have another opportunity to go back to my notes to ensure that what I wrote down at the initial meeting has indeed ended up in the Will itself.

I then attend to the execution of the Will and, to ensure that the formal validity of the document is preserved, I have my assistant (the second witness) remain in the room at all times with me during the execution ceremony so that there is no doubt as to the propriety of the execution. I use the same procedure of execution each time I have a Will signed. I complete the meeting by attending to the signing of the Affidavit of Execution.

3. Reporting letter

After the Will has been executed and it has been determined as to whether or not my client wishes me to keep the original or take it with him or her, I prepare a comprehensive reporting letter.

In my reporting letter I review the issues discussed and the instructions received.

The Complex Will

In situations where the Will is more complex, I add a few steps along the drafting path.

After the initial instructions are obtained, I have my assistant review my notes and double-check with me that she understands the instructions received. When I send the Will to the client for initial review I set out in detail the instructions received and invite the client to advise me, at this review stage, if I have misunderstood the instructions.

I also add an additional internal review step before the client comes in to execute the Will. After the client has reviewed the Will document and arrangements have been made for a meeting to have the Will signed, I ask a colleague to read through the Will and I always provide him or her with a copy of my notes. This "second set of eyes" is a useful step in the review process and has produced great results in the past when errors are found prior to the client attending.

In summary, the first thing that a lawyer instinctively should do is to begin the whole Will drafting process with the taking of notes. Careful review of well-prepared, legible notes is the cornerstone to the Will drafting process.

Applying the new Limitations Act, 2002

Tim Bates

When the new *Limitations Act, 2002* came into force on January 1, 2004, it fundamentally changed the "the rules of the game." This article reviews some key features to note about the Act, and provides provide you with information that will help you to assist your clients in dealing with the *Act*.

If you have not already done so, read the *Act* (available on the government of Ontario Web site at www.e-laws.gov.on.ca). Then review your open litigation files to understand how the new Act, and particularly the new transition provisions, apply to you and your law practice. The best guide to the transition provisions is a chart prepared for a June 11, 2003, Law Society/Ontario Bar Association/Advocates' Society program and available at www.practicepro.ca/limitations.

You should note at the outset that Part 1 of the original *Limitations Act*, the Part dealing with real property, remains in force but is renamed the *Real Property Limitations Act*.

Important features of the legislation include:

(a) a common two-year period (Section 4) from the date of discovery of the injury, loss or damage;

(b) an ultimate limitation period of 15 years (Section 15), regardless of discoverability, with certain exceptions;

(c) retention of some specialty limitation periods that are listed in a schedule to the *Act*;

(d) a prohibition (Section 22) on contracting out of the *Act*;

(e) transition rules (Section 24) for acts or omissions which took place before January 1, 2004.

You will be obliged to determine what is the limitation period for causes of action, for which no proceeding was commenced before January 1, 2004.

The best advice that can be offered is, if there is any doubt as to what is the applicable limitation period, a proceeding should be commenced within two years of the date that the act or omission took place, subject to discoverability.

You should be aware that almost all of the frequently asserted causes of action have different limitation periods for causes of action that arise after January 1, 2004.

- Occupier's liability is now two years from the incident, instead of the previous six years.
- Actions for non-repair of municipal and provincial roads and highways is two years, instead of three months. The short notice provisions in the *Municipal Act* and the *Public Transportation and Highway Improvement Act* remain, however, they are softened by enactment of savings provisions that allow a judge to excuse failure to give timely notice if the road authority is not prejudiced.
- Actions against public authorities must now be commenced within two years. The limitation period of six months under the *Public Authorities Protection Act* has been repealed.

Advise clients, educate staff

Once you have concluded what action should be taken, you should follow up in writing with clients to advise them the impact of the *Act*.

As part of the process of determining the application of the new *Act*, you should share with your staff what you have learned.

This is of particular concern to staff members who administer your diary or tickler systems. For instance, causes of action such as breach of fiduciary duty for which there was no limitation period under the prior legislation are now governed by a two-year period, subject to discoverability.

Different entries may be required in your Firm's tickler systems.

Commercial transactions

Practitioners handling commercial transactions should consider especially the application of Section 22. It states:

> "A limitation period under this *Act* applies despite any agreement to vary or exclude it."

The impact of Section 22 on commercial transactions is under discussion. The new *Limitations Act* will neither shorten nor lengthen contractual obligations. A one-year service contract would not be extended to two years. A five-year supply contract would not be cut back to two years.

Questions have arisen concerning the representations and warranties which are frequently included in commercial transactions. Would a warranty surviving for one year or for five years be interpreted as an attempt to vary the limitation period? Not likely. Warranties are simply another type of contract. The discovery of a breach of warranty within the contractually agreed upon terms of the obligation would commence the running of a limitation period.

Spread the word

In circumstances where you have been consulted but not retained on a matter, and where the new *Act* would have implications, you should write a letter to the party notifying them of the possible application of the new *Act*, so that you are not confronted later with an assertion that the potential client did not know about the change in the law.

Finally, once you are conversant with the new *Limitations Act*, consider spreading the word by sending out a news bulletin to your clients and potential clients advising them of the significant changes enacted by the *Limitations Act*.

Tim Bates is partner with Borden Ladner Gervais, LLP and a frequent speaker on the implications of the Limitations Act, 2002.

2003 LawPRO annual report

ahead of the curve

- *A decrease in claims paid, claims reported and the number of open claims files.*
- *Record TitlePLUS sales and growth in its subscriber base.*
- *A new willingness on the part of lawyers to adopt technology solutions – as witnessed by a record e-filing season, increased traffic to LawPRO Web sites and strong growth in lawyer use of TitlePLUS online.*

These are some of the highlights of the past as documented in LawPRO's 2003 annual report – *Staying Ahead of the Curve*.

The report, to be published later this spring, reviews some of LawPRO's major milestones of the past nine years – milestones which reflect our ability to develop innovative programs and approaches that benefit the profession and help ensure its competitive position.

The following are some of the company's major accomplishments as highlighted in the 2003 LawPRO annual report:

Company-wide

- LawPRO was awarded an "A" (Excellent) rating from A.M. Best for the 4th consecutive year.
  - A.M. Best commented on "LawPRO's strong operating performance, excellent capitalization, and its historically favorable loss reserve development."
  - For 2003, LawPRO had more than $400 million in assets, $96 million in equity and after-tax profit of $7.5 million.
- We implemented the infrastructure needed to ensure LawPRO complies with new federal privacy legislation) and adapted our insurance materials to advise lawyers of privacy requirements.

- We revamped our corporate business continuity plan.
- We mined our databases and provided data and analysis for the Law Society's Sole Practitioner and Small Firm Task Force.
- Our employees supported community charitable events at record levels:
  - They contributed $26,000 to five charities selected by staff for financial support.
  - They provided 100 home-cooked casserole meals to a centre for Toronto's homeless.
  - They donated 70 toys to the Salvation Army Christmas Toy Drive.
  - Close to 90 staff and family members participated in the annual CIBC Run for the Cure, raising $3,500 for cancer research.

Underwriting/Customer Service

- We insured 19,846 practising lawyers.
- E-filing: a record 81 per cent of lawyers filed applications on LawPRO's Web site.
- Call volumes: Customer Service handled 47,200 inbound and outbound calls (compared to 46,650 in 2002):
  - We responded to 93 per cent of calls within the first 20 seconds.
- Correspondence: Customer Service responded to 18,300 letters and e-mails, up 22 per cent from 2002.
- The insurance program was modified to clarify and/or enhance coverage for legal aid lawyers and those doing *pro bono* work; to provide limited defence cost coverage against penalties assessed under the *Income Tax Act* and/or *Excise Tax Act*; to support the inter-jurisdictional mobility of lawyers; and to extend full limit coverage to lawyers' estates for the first 90 days after a practising lawyer's death.
- We implemented an internal technology initiative – Technology Over Paper (TOP) project that streamlines insurance renewals, making it simpler and faster for lawyers to renew primary and excess insurance coverage for 2004.

Excess insurance

- We grew our Excess business by 11 per cent for 2004:
  - LawPRO insured 120 additional firms, 41 of which had used other insurers for their excess coverage in the past.
  - We insured 1,140 firms representing 2,956 lawyers (1,050 firms and 2,687 lawyers in 2003).
  - We kept premium increases to 10 per cent on average – significantly less than other excess insurers.

Claims & risk management

- The number of open files stands at a new record low of 2,798 (2,954 in 2002).
- The number of new claims reported in 2003 was down to 1,810 compared to 1,947 in 2002.
- Claims payments made were down $6.8 million to $61.6 million ($68.3 million in 2002).
- We maintained our excellent record at trial:
  - We won 11 of 17 matters that went to trial; five are under reserve.
  - We won 6 of 9 appeals.
- We launched a multi-part technology-based initiative to streamline communications with our defence counsel, including a special Extranet Web site

practicePRO

practicePRO continued to build its reputation as a leading risk management program that is being emulated by other jurisdictions across North America:

- We published "*Managing the Finances of Your Practice*," the sixth in a series of booklets providing practical tips and advice on practice-related issues.
- We expanded the CLE-credit program to 63 approved programs attended by 8,800 lawyers.
- We made 28 presentations to firms, associations, CLE programs, and exhibitions, and chaired LegalTech 2003.
- We contributed risk management and technology content to publications in Canada and U.S.
- We delivered most practicePRO materials over the Web:
  - An average of 105 visitors daily.
  - 9,700 downloads of practicePRO materials.

TitlePLUS

- TitlePLUS recorded its best year ever, growing the business by more than 13 per cent.
  - We increased the subscriber/user base to 2,330 lawyers:
  - 370 lawyers issued TitlePLUS policies for the first time in 2003.
  - 335 new lawyers were addded to the subscriber base.
- TitlePLUS moved all TitlePLUS policies to a Web-based application process:
  - 1,804 lawyers are Web users - 613 more than in 2002.
- We expanded TitlePLUS across Canada:
  - We launched in B.C., and obtained our Saskatchewan licence, and issued our first policies in Prince Edward Island, Manitoba and Alberta.
  - TitlePLUS is now licensed to sell title insurance policies in all provinces except Quebec.
- We raised the TitlePLUS profile nationally:
  - 165 ads were placed in 30 publications and on TV.
  - TitlePLUS attended and/or sponsored 135 events/shows/presentations.
- TitlePLUS Call Centre handled 41,000 inbound and outbound calls.
- TitlePLUS played an active role in the OBA-CDLPA-ORELA Task Force on lender outsourcing:
  - We provided expertise and support to principal stakeholders and spokespeople.
  - We presented information on the TitlePLUS/virtual lender option at more than a dozen OBA-CDLPA presentations across Ontario (which are continuing in 2004).

Events calendar

2004

The following is a listing of events at which LawPRO representatives, including staff from TitlePLUS and practicePRO, will be presenting and/or participating in the coming months.

March 5
practicePRO Technology Breakfast

Online Legal Research using WestlaweCARSWELL

Learn how to maximize the efficiency and effectiveness of your legal research using WestlaweCARSWELL

Fred Glady, Carswell

LawPRO, Toronto

March 18
Queen's University Law School

TitlePLUS lecturing

Kingston

March 23
TitlePLUS at CMHC Housing Outlook

St. John's, Newfoundland

March 24
Nova Scotia Barristers Society Real Property Conference

TitlePLUS exhibiting

Lord Nelson Hotel, Halifax

March 25
ABA TechShow 2004

60 Technology Tips in 90 Minutes
Practice Management Face Off: Time Matters vs. Amicus Attorney
Dan Pinnington, practicePRO

Chicago, IL

April 13
TREB General Meeting and Trade Show

TitlePLUS exhibiting

Toronto Congress Centre, Toronto

April 19
Real Estate for Law Clerks

TitlePLUS attending

LSUC

April 30
practicePRO Technology Breakfast

Introduction to DIVORCEmate Software's Advanced Features

Come to this session and learn how to take your DIVORCEmate Software to the next level. Several advanced features of the Tools + Forms + Precedents + products will be covered.

Mark Harris, DIVORCEmate

LawPRO, Toronto

May 6
TitlePLUS Seminar

Metro Toronto Convention Centre, South Building, Rooms 716 A & B, and 717

Toronto

May 7-8
TitlePLUS at the Ottawa-Carleton Law Association

Chateau Montebello, Quebec

May 12-15
ILCO Conference

TitlePLUS sponsoring

Sheraton Parkway, Richmond Hill

May 14
practicePRO Technology Breakfast

LexisNexis – Due diligence made easy

Look to LexisNexis for national and international legal, news and business information. The session will highlight research tools that can be used for marketing and due diligence applications.

May 19
TitlePLUS Seminar

London Convention Centre, Salon A&B

London

June 2
TitlePLUS Seminar

Ramada Inn, Palladium Ballroom

Sudbury

June 4
practicePRO Technology Breakfast

Quicklaw – Not just for caselaw anymore!

This session will focus on how to get the most out of your Quicklaw service, including using current awareness sources, drill down indexes, textbooks and point-in-time statutes.

Christine Burchert, LexisNexis Canada Inc.

June 9-12
American Prepaid Legal Service Institute (API)

2004 Annual Conference

60 Tips in 60 Minutes
Dan Pinnington, practicePRO

Sheraton Centre Hotel, Toronto

June 17
TitlePLUS Seminar

Ottawa Congress Centre, Capital Hall 3B/4B/5B

Ottawa

For more information on practicePRO events, contact Susan Carter at 416-596-4623 or 1 800 410-1013, or by e-mail at susan.carter@lawpro.ca.

For more information on TitlePLUS events, contact Marcia Brokenshire at 416-598-5882 or e-mail marcia.brokenshire@lawpro.ca.

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