

LITIGATION CLAIMS

EXCEED REAL ESTATE CLAIMS.

LAWYER CONDUCT

IS DETERIORATING.

ALL PRACTITIONERS

SHOULD BE ALARMED.

SUMMER 2000



THE LITIGATION TIDAL WAVE: THE THREAT IS REAL

It's an accepted fact: Lawyers today practise in an increasingly complex world – a world of new demands, new challenges and new opportunities.

One area of law that's particularly vulnerable to this new world order is the practice of litigation. Forces such as increased consumerism, globalization, ADR and technology are fundamentally changing the face of litigation practice. Some of these same forces are also contributing to a heightened interest in the standard to which lawyers are expected to practise – and a marked increase in claims against litigation lawyers.

In this special report, we examine the impact of some of the key forces that are driving change in litigation practice. We review the types of errors that underlie claims against litigators, from both the statistical and the claims file perspectives, canvassing leading practitioners for their "view from the trenches."

As well, we provide some practical practice management tips which, if followed, can significantly reduce your exposure to a claim and better prepare you for the evolving marketplace.

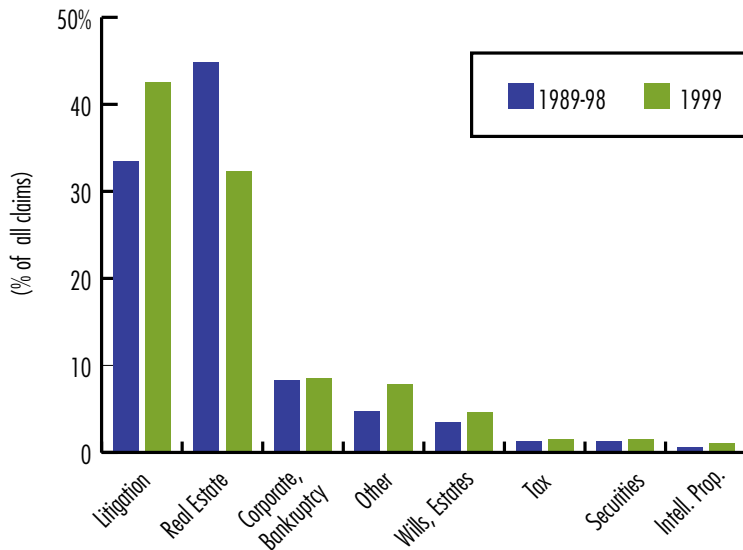
STATISTICS TELL THE STORY

The first indication of what's happening on the claims front comes from an analysis of statistics. LPIC's rich claims database, which reaches back more than a decade, provides an accurate accounting of past claims activity, both in terms of number of claims reported and claims costs. By slicing that database a number of different ways, we get a compelling picture of what's happening to claims generally, and to specific areas of practice in particular; additional analysis enables us to also identify the type of mistake that led to the claim (e.g. failure to apply a deadline vs. poor communication).

These analyses, coupled with our claims examiners' experiences and anecdotal evidence, also help LPIC identify evolving trends – such as the marked increase in litigation claims over the last few years – and serve as an early warning system that enables LPIC to alert the profession to developing trouble spots. More importantly, it lets us help the profession be proactive in controlling or avoiding claims-prone activities.

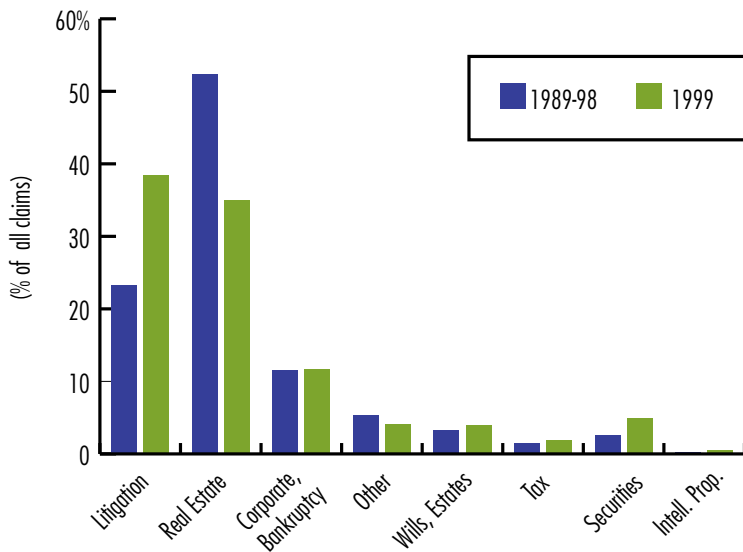
THE HARD FACTS: LITIGATION CLAIMS EXCEED REAL ESTATE CLAIMS

Distribution of Claims by Area of Practice: % of Claims Count



(practitioners' primary area of practice)

Distribution of Claims by Area of Practice: % of Gross Claims Costs



(practitioners' primary area of practice)

In the late 1980s and throughout the 1990s, real estate claims significantly outpaced claims generated by any other area of practice, both in terms of number of claims reported and claims costs. However, the past two years have seen a significant shift in the area of practice that generates the highest claims count and claims costs, from real estate to litigation. In fact, in 1999, litigation practice represented more risk than did real estate practice.

- For the period from 1989-98, real estate accounted for 44.9 per cent of LPIC's claims while litigation practice accounted for 35 per cent of LPIC's claims count. In 1999, that trend reversed, with litigation accounting for 43 per cent of all claims reported, while real estate practice accounted for only 32 per cent.
- A similar trend exists when examining claims costs. For the period from 1989-98, real estate claims outpaced litigation claims more than two to one, accounting for 52 per cent of claims costs compared to 23 per cent for litigation practice. By 1999, that relationship had reversed, with litigation practice accounting for 38 per cent of claims costs compared to 34 per cent for real estate practice.

Understanding claims terminology

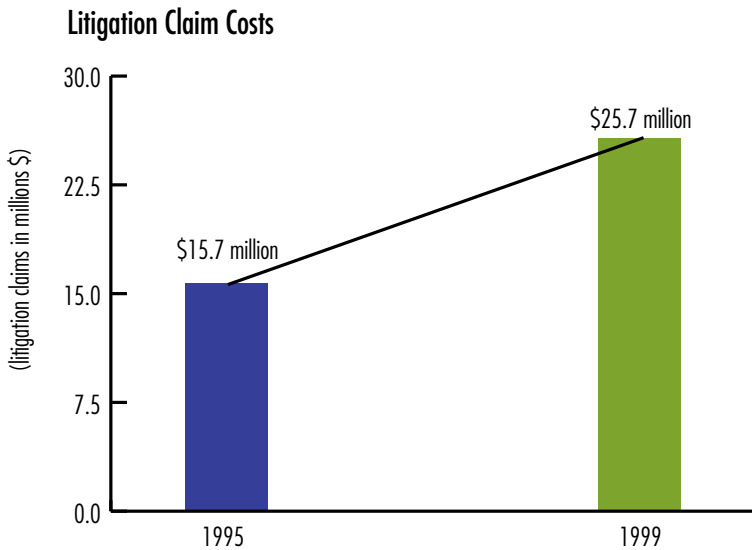
CLAIMS COUNT: Claims Count refers to the number of new claims reported to LPIC in a period, either in total or in a specific area of practice. In each of the last three years, the total claims count has held steady at around 2,000 new claims reported each year.

CLAIMS COSTS: Claims Costs refers to the gross costs of resolving claims reported to LPIC. Gross claims costs includes any payments made by LPIC to repair and/or resolve the claim, including any defence, investigation and adjuster costs incurred, and any indemnity payments made on a claim.

LITIGATION CLAIMS: In examining litigation trends, LPIC has defined litigation claims as claims arising from the litigation activities of the following areas of practice: civil litigation (plaintiff litigation and defense litigation); family law; and criminal law.

LITIGATION CLAIMS IN DETAIL

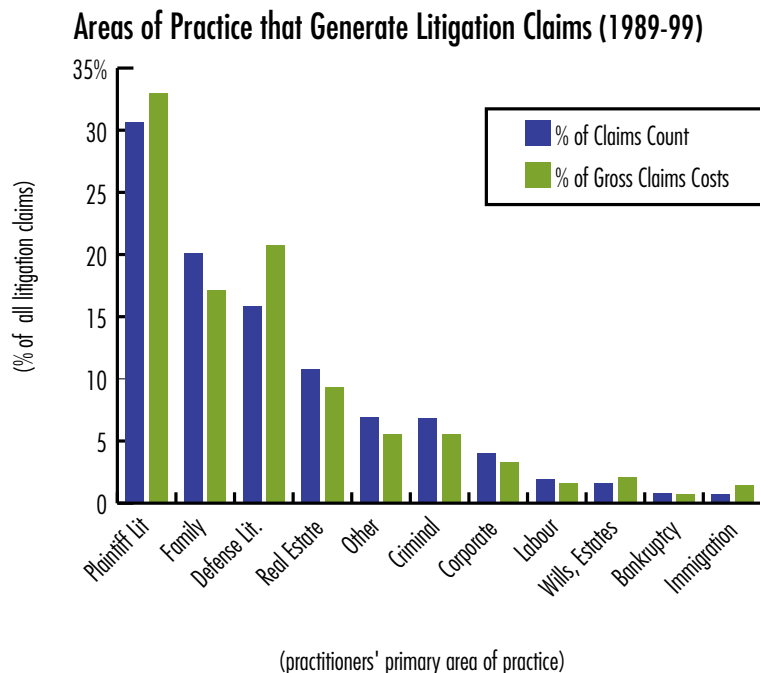
Litigation claims costs rise while overall claims costs fall



The claims experience of litigation practice has deteriorated over the past five years, while the overall claims statistics have improved.

- Between 1995 and 1999, claims costs in all practice areas generally have fallen about 20 per cent from \$75 million to about \$60 million, and the number of claims reported each year has held steady at around 2,000.
- However, in that same period, litigation claims costs increased 63 per cent to \$25.7 million from \$15.7 million, while the claims count grew eight per cent to 830 claims in 1999 from 769 claims in 1995.

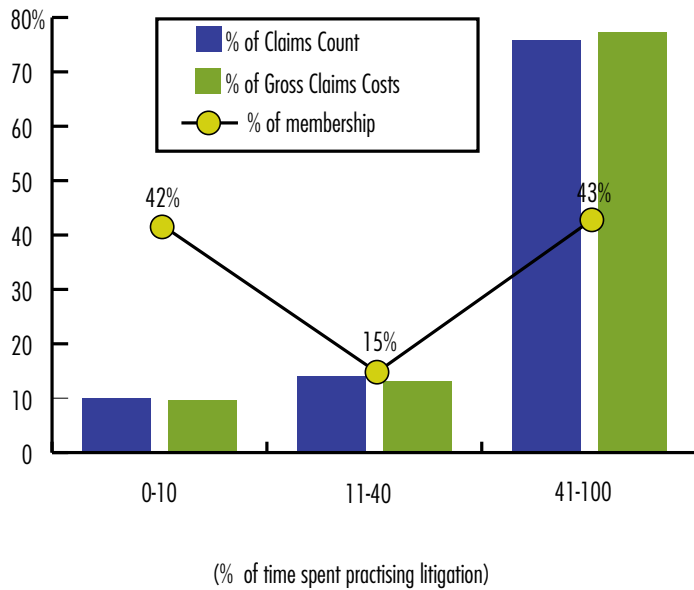
Litigators generate majority of litigation claims



As this chart indicates, more than 60 per cent of litigation claims arise from litigation-related practice.

- Lawyers who say plaintiff litigation is their primary area of practice account for 31 per cent of litigation claims reported and 33 per cent of claims costs.
- Lawyers who give defence litigation as their primary area of practice report 16 per cent of the litigation claims count and 21 per cent of claims costs.
- Those who practise primarily family law account for 20 per cent of litigation claims reported and 17 per cent of claims costs.

Specialists – not dabblers – cause the most claims



Based on information provided by lawyers on their 2000 LPIC Liability Insurance Application, we can conclude that those who say they practise primarily litigation generate the majority of litigation claims. On the other hand, lawyers who say they only occasionally engage in litigation practice generate disproportionately fewer claims than one might expect.

- 43 per cent of lawyers say they spend between 41 and 100 per cent of their time in litigation practice. However, this same group of lawyers generates 76 per cent of the litigation claims reported and 77 per cent of claims costs.
- At the other extreme, the 42 per cent of lawyers who say they spend 10 per cent or less of their time in litigation-related practice account for only 10 per cent of litigation claims reported and claims costs.

Failure of lawyer/client relationship is a major factor in increased claims

Types of errors that result in litigation claims

35%	Administrative errors re calendaring & procrastination
27%	Breakdown in lawyer/client relationship
23%	Failure to know/apply law/deadline
9%	Inadequate discovery of facts & other substantive errors
3%	Conflicts of interest
2%	Intentional wrongs
1%	Other

Statistics show that lawyers engaged in litigation practice continue to make many of the same errors made in the past.

Limitation period issues because of poor calendaring; procrastination; and failure to know and/or apply a deadline, account for the majority of errors that lead to litigation-related claims.

But coming in second, and gaining ground according to both our claims examiners and lawyers in the trenches, are claims that arise from the broad category of a breakdown in the lawyer/client relationship.

Underlying these kinds of claims are issues such as:

- Failure to follow instructions;
- Poor communication with the client; and
- Overall dissatisfaction on the part of the client with the relationship.



AGGRESSIVE BEHAVIOUR, POOR COMMUNICATION PROMPT CLAIMS

THE VIEW FROM THE TRENCHES

Revealing as they are, the facts however only tell part of the story. In the case of the increased claims arising out of litigation practice, the facts clearly point to a new trend: an increase in claims that arise from failures of the lawyer/client relationship. When we examine these claims more closely, we see another pattern emerge: The conduct of the lawyer is often the root cause of the claim.

To get a better handle on what is happening in litigation practice and why, we interviewed five veteran litigators who are regarded by the profession as experts in their respective areas of practice.

As they point out in the following **View from the Trenches** interviews, the conduct of lawyers today has changed fundamentally and not necessarily for the better.

Lawyers today, they say, are more aggressive, emotional, self-motivated, impulsive and poorer communicators than in the past. The result: dissatisfied clients, disgruntled counsel and irate third parties – and a spate of new claims prompted by deteriorating lawyer behaviour.

In the following pages, our interviewees comment on three specific types of claims that LPIC has identified as the bell-weather of what's happening in litigation practice:

- claims made by both individual and institutional clients because of a lawyer's oversight or inability to manage client expectations;
- libel and slander claims arising from intemperate remarks and unskilled use of the media and public forums by lawyers;
- claims based on Rule 57.07 costs sanctions sought against lawyers personally.

We thank the following senior litigators for taking the time to share their insights on the changing nature of litigation practice:

David Scott, QC of Borden Ladner Gervais LLP

Wendell Wigle, QC of Hughes, Amys

Joyce Harris

Brian Brock, QC of Dutton, Brock, MacIntyre & Collier

Nancy Spies of Stockwood, Spies

MANAGE, DON'T FEED CLIENT EXPECTATIONS

THE LAWYER/CLIENT RELATIONSHIP

The scene is all too familiar: After two interminably long years, your client finally gets her day in court – only to find herself forced to talk settlement at a sum significantly below what she'd expected. When your bill then is much higher than anticipated and eats away most of the award, she takes revenge.

Or, the client sits in your office, face blank in response to your recommendation that he settle – now – for about one third of what you had suggested at the initial client meeting nine months earlier. The client leaves the office confused and frustrated, and you are relieved at being able to end the meeting. With the bloom faded from what seemed like a terrific case in the emotional first client meeting, you just want to get rid of this file rather than have to face the disappointment of your client and his “unrealistic” expectations as you see it.

Or, your client, a major financial institution, has just put the blame for a failed litigation squarely at your feet – even though the client representative had, you thought, bought into your suggested strategy and had even offered advice and instructions consistent with that strategy. The root problem: You've been lulled into a measure of complacency because of your long-standing relationship with that client which predisposes you to depend on verbal instructions and advice. But without that paper trail outlining your recommendations and the client's consent, you're an easy scapegoat for the instructing client representative.

The bottom line in all of these scenarios: The lawyer transforms from advisor to key player – as a defendant in a lawsuit refuting allegations of malpractice.

According to LPIC statistics, approximately 27 per cent of the claims filed against lawyers involve situations such as these in which a breakdown of the lawyer/client relationship on a litigation matter leads to a claim against the lawyer.

For seasoned practitioners such as David Scott of Borden Ladner Gervais in Ottawa, this failure on the part of the bar is of major concern: “In my experience, more than 90 per cent of circumstances in which clients are dissatisfied with their lawyers stem from this simple failure to manage client expectations.”

Lawyers feed clients' unrealistic expectations

Moreover, contends Scott, the lawyer is often an unwitting accomplice and contributor to the flawed decision-making process that encourages the client to litigate, based on unrealistic expectations.

“On the surface, the attitude of the lawyer and client may match. The client is angry, victimized, and has expectations that inevitably are faulty. The litigator, as problem solver, provides a safe haven for the client's emotions and nurtures them rather than sets them straight. As a result, clients' expectations are launched on the wrong foot, with lawyers practically setting themselves up for failure.

“What s/he should do is step back from the situation. Our job is to analyze the situation critically, diagnose the client's many pre-conceived notions and help guide the client through a more detached decision-making process,

**“Clients' expectations
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themselves up for failure.”**

the end result of which could be to proceed with litigation.”

At the heart of that decision-making process, says Scott, are three areas that lawyers should review with their clients – no matter how sophisticated or determined they are – to ensure expectations are realistic and reasonable, given the circumstances at hand: prospects for success, costs, and timing (see *Three Key Issues to Cover* on page 8).

But all too often, he adds, litigators fall into the litigation trap: “Both the nature of the service – which is fundamentally adversarial – and our nature

as service providers work against us. We want to litigate, we take on our clients' causes and then when both client and lawyer are good and mad, we proceed, without adequate communication, and without the lawyer or client having thought all things through.”

Lawyers may also subconsciously fear that a frank, realistic review of the case may prompt the client to have second thoughts. “There's a tendency on our part to want to go forward, to get on with it and confront the issues later.” When the lawyer involved is a relatively inexperienced practitioner, that fear may be even more critical. “They're worried that the many caveats they are raising could lead the client to think that the lawyer is not sufficiently experienced or confident to take on their case – when in fact, nothing could be further from the truth.

“The fact is, when we pay attention to communication, when we take the time to understand our clients' needs and engage them in an informed consent process, we're communicating that we do have skills, expertise, confidence.

“What we misconstrue as a negative is, in fact, a positive. By guiding clients through the decision-making process, we're telling them we are professional, responsible, skilled individuals.”
(continued on page 8)

Current climate exacerbates flaws

These fundamental failures on the part of lawyers to communicate, analyze and ensure that clients understand the litigation process and its likely outcomes are exacerbated in the current practice climate, says Scott.

“Today’s clients are more knowledgeable and demanding, and less reticent to take on a professional such as a doctor or lawyer. As self-perceived victims, they’re also more willing to complain and seek justice,” he explains.

Specifically, he singles out three factors for contributing to the increase in litigation claims:

- *A more sophisticated client*

Films and television have helped demystify legal practice. Easy access to information through the internet and global publications, and the related increase in the self-help movement all have made clients more knowledgeable and more critical of both performance and results, says Scott.

“Clients’ expectations are higher, and when those expectations are not met, they’re more willing to act out in an aggressive manner against the service provider.”

- *The changing litigation process*

Changes in the litigation process over the past decade have lengthened the amount of time it takes to litigate a matter, which in turn has escalated the quantum of costs involved. The lengthy interlocutory process combined with a decline in the number of trials, points out Scott, are both “bad news” for clients when it comes to time and costs.

“The initial enthusiasm of seeking justice on the part of a client gives way to a numbing, time-consuming process which inevitably is very costly.”

And now that litigation practice has a foot in two camps – mediation and conventional litigation – “clients find themselves engaged in a process

that does not appear to be very productive, which inevitably requires compromise and often leaves the client disappointed.”

THE THREE KEY ISSUES TO COVER

Managing Client Expectations

At the heart of a successful lawyer/client relationship, says Ottawa’s David Scott, is a lawyer’s ability to manage client expectations throughout the many stages of the relationship in three critical areas:

1. Prospects for Success

Whether or not your client asks for it, make sure you have thoroughly analyzed and explained what you and your client can realistically achieve on this matter through the litigation process.

“The onus is on you, the expert in this situation, to do the analysis and provide your client with an honest opinion of the anticipated results.” And just because a client appears to have asked the question does not mean she’s really listening to your answer: It’s incumbent on you to ensure the client is listening, then send him/her away to do some critical thinking on the matter. As you move through the litigation, revisit your analysis and revise it if necessary, keeping your client in the loop at all times.

2. Anticipated costs

All too often the failure to be up front with the client about the costs of litigation leads to fee disputes; that dispute can prompt a defensive reaction on the part of the client, alleging malpractice by way of a counter claim. Scott advises lawyers to review all aspects of costs with their client: total costs, cash flow

(i.e. the cost over time of the litigation), as well as exit strategies and at what level of cost the client may want to abandon litigation in favour of a settlement.

“As lawyers we skirt around the issue of costs because it makes us uncomfortable, and clients rarely demand that information. But setting realistic expectations surrounding this issue of costs is critical.”

3. Timing

This is one area, says Scott, that most often disappoints clients. Lawyers tend to be reluctant to talk about timelines because they feel they have little or no control over the process; their enthusiasm may get in the way of a realistic estimate, or they may not even turn their mind to the issue.

How long will it likely take? What are the milestones? What are the time frames of the court process, and how will it run? How does mediation fit into the picture? These all are issues we should address with clients, says Scott, to ensure the client fully understands the factors affecting timelines and what lies ahead before making a decision to proceed with litigation.

THE CHANGING PRACTICE ENVIRONMENT

What accounts for this untenable change in the way lawyers conduct themselves and their relationships with their clients? As noted by Professor Neil Gold, former Dean of Law at the University of Windsor, in his 1997 report to LPIC on the underlying causes of claims, numerous external factors have coloured the practice climate. The forces described on the following pages have made legal practice more complicated, less predictable, and

often more risky as rising expectations of the clients and the courts have often outpaced the profession’s efforts to adapt.

Globalization

Globalization has put tremendous pressure on us all to be better informed of events and relationships well beyond our immediate area of interest and concern. Issues have become more complex

- *Escalating litigation costs*

Litigation costs, says Scott, have escalated exponentially in recent years so that resolving even the simplest cases can cost tens of thousands of dollars. This is partially the product of the changing litigation process, but more significantly because of the lack of change in the process, says Scott. He points out that the trial process today is more cumbersome, elaborate and costly than it has ever been.

“We’re like a house framer who knows only one way to frame a house. We have not focused on obvious opportunities to control and reduce costs, to shorten time frames, to streamline and fundamentally reform the whole process so that the client is better served.”

The institutional client: The only difference is the price tag

The issues and outcomes are the same among large corporate clients who are well schooled in the litigation process, says Scott. When the “institutional client,” as we call it, comes along, so do a bevy of claims against lawyers, again based on mismanaged expectations.

In the case of the institutional client, says Wendell Wigle of Hughes Amys, the client is typically quite sophisticated about the legal aspects of business matters. The institutional client looks to the bottom line when assessing every decision and typically has significant experience in the litigation process. That experience sees huge sums spent every year on legal fees. But with pressure continuing to be exerted to function with greatly reduced legal fee budgets, lawyers are being

asked to do a lot more for a lot less, or to work under more rigid rules governing the process.

Technology

The impact of technology on all aspects of law practice is fundamental and far-reaching. It affects, for example:

- how we communicate with our clients and colleagues (anywhere, any time and very quickly);

GETTING IT RIGHT BY ...

Managing Client Expectations Effectively

- 1) Determine your client’s expectations by
 - a) listening to your client;
 - b) identifying the emotions involved that will impact their instructions;
 - c) assessing whether their expectations are unreasonable; and
 - d) reviewing what is reasonable for them to expect.
- 2) Create a plan to achieve their reasonable expectations by identifying the
 - a) objectives to be achieved;
 - b) prospects for success;
 - c) role of the client in the process;
 - d) costs to completion, including interim payments for fees and disbursements; and
 - e) timing for completion.
- 3) Communicate with your client by
 - a) updating and revising the plan as required;
 - b) asking your client whether you are meeting their expectations;
 - c) being flexible, sensitive and responsive to how your client feels; and
 - d) honing your emotional intelligence – the “soft skills”.

asked to do a lot more for a lot less, or to work under more rigid rules governing the process.

There may be an ongoing business relationship built over several years with one or more of the corporation’s representatives. Here, the lawyer may operate under a very general retainer. The client expects that the lawyer is up to date about the client’s industry and its place in it. The client also expects that the lawyer will protect all of its interests. And if something is missed, the lawyer’s abilities are called

into question.

Also, the lawyer may fall into the trap of a less formal mode of communication, with little written record or explanation of advice or instructions. The lawyer may assume that what he or she is communicating, often verbally, to the instructing individual will be passed on to the management of the institutional client. Yet, perhaps because of self-interest or other corporate objectives on the part of the client, the lawyer’s advice is not
(continued on page 10)

- our ability to access and manage large amounts of information about our clients, their industries, their competition and their problems
- clients’ access to information; and
- our ability – and a client’s expectation, to process our work more quickly and efficiently.

It’s no longer unusual to be faced with a judge who operates a computer in the trial or motions court or a counsel who trots his or her laptop around to discoveries and meetings to record or access information about the case.

communicated up through the ranks in the client's organization.

Or, as is more often the case, the instructing representative of an institutional client may retain a significant amount of control over how the lawyer participates in the litigation process. This approach developed about ten years ago in an attempt to manage significant reductions in the institutional clients' legal expense budgets.

Wigle suggests that the challenge is to balance the need to be cost-effective with the need to be an independent advisor. Simply put, the lawyer must not fall prey to being used as a tool. Rather, he or she must serve the interests of the client, i.e. the corporation, not the self-interest of the instructing individual.

"Whether asked or not, the lawyer must look at the big picture of the

institutional client when proffering advice so that s/he can better understand and plan for possible consequences or impacts on other aspects of the client's business," points out Wigle. It's a common sense approach that's fundamental to law practice, he adds, no matter how large or small the client and no matter how simple or complex the matter at hand.

SPEAK OUT & YOU MAY EAT YOUR WORDS **LIBEL AND SLANDER SUITS**

Like other segments of society, lawyers are increasingly on the receiving end of libel and slander cases. Although such cases may be difficult to both prove and plead, that technicality is not proving to be much of a deterrent. Lawyers today are more willing to speak out, both publicly through the media and privately through often ill-conceived written missives. And those on the receiving end of the practitioner's intemperate comments are more willing than ever to try to make the lawyer pay.

In fact, says Joyce Harris, the "mystique" surrounding this area of law could be contributing to the increase in these types of malpractice claims.

"As lawyers, ours is a fine balancing act: We're paid to speak out on behalf of clients, to brandish our tongues, especially in today's competitive, media-savvy society. But the line between representing your client and defaming the opposing party can be a fine one, and is proving to be more difficult for us to walk these days."

The need to walk that fine line, says Harris, a veteran of libel and slander practice for both plaintiffs and lawyers, applies to any communication we undertake, be it a simple letter, an aside to opposing counsel, or a public speaking opportunity.

When the pen is mightier than the sword

All too often, practitioners keen to be seen as warriors and curry favour with

"The line between representing your client and defaming the opposing party . . . is proving to be more difficult for us to walk."

their clients issue a strongly worded demand letter. Although that letter in itself may not constitute defamation,

when it gets copied to a third party such as a bank manager, real estate agent or other individual not directly involved in the action and the opposing party takes offence, a lawsuit often results.

The courts in these kinds of matters are very much swayed by a number of factors says Harris:

- the use of temperate or intemperate language;
- whether or not you were acting appropriately to safeguard your client's interests or simply casting aspersions far and wide;
- the number of parties to whom the correspondence was sent and whether or not sending it to each of them was justifiable;
- and, of course, whether or not the litigation had commenced.

But the bottom line, she adds, is that when you put pen to paper in the heat of the moment, your exposure is there for all to see.

The technology advantage that once accrued to the larger firms is now commonplace, and a real equalizer for the smaller firm practitioner. Everyone – clients, courts, agencies and adversaries alike – expects you to be using technology. And use technology you must, if you're to meet demand for detailed information and the shorter time frames that clients now expect you to work in to meet their expectations.

Consumerism

Increased consumerism has brought us a much more sophisticated client base who expect timely, service-oriented responses from lawyers like never before. These clients are not shy about demanding quality advice at low cost and are prepared to second-guess every step of the way. So being vigilant about identifying and managing a client's expectations, regardless of their sophistication, is essential to a productive relationship and ultimately, a healthy practice.

Today's highly competitive, technology-intensive and time-driven environment makes judicious use of the written word all that more difficult, admits Harris.

"Technology has imposed an expectation of immediacy on all parties – lawyers and clients alike. We're expected to respond immediately, we no longer take the time to reflect on that poison pen letter, to sleep on that turn of phrase, to give ourselves a cooling off period, a moment of sober second thought."

Her solution: Sleep on it, no matter what you've said, no matter who's pressing you to respond, "because chances are you'll see the whole matter in a different light by next day."

"Free" speech – at a steep price tag

Gone too, says Harris, are the days when "the art of the insult" was something a lawyer had to master. Today, we're less articulate, less well-versed in the art of using language – the end result of which is that litigation is becoming ruder and more prone to defamation actions, says Harris.

Equally important is for lawyers to consider carefully the forum in which they speak out. She points to the example of the lawyer who, after examination for discoveries had adjourned, spoke his mind to opposing counsel in front of the client and the reporter – forgetting perhaps that his qualified privilege no longer applied. His "off the record" remarks became the subject of a costly legal suit.

"We need to constantly remind ourselves when and where the notion of privilege applies," points out Harris. "If we're speaking out outside the court room, we may be on the hook for any-

thing we say. We need to appreciate this very real exposure in public settings."

The media minefield: Tread carefully

In today's media-oriented society, it's tempting for lawyers to use the media to further their client's causes, admits Harris. "Many of the cases that we take on have social and political overtones, and as advocates for our clients, we sometimes look for opportunities to give voice to those who have no voice, to see ourselves as saviours."

But in the arena of public opinion, warns Harris, it's easier than in most places to cross the fine line between

advocating for the client and risking a libel or slander suit. The lawyer who uses public forums, press conferences, or public meetings to ferret out other potential parties to an action, "drum up business" or even launch an action is particularly vulnerable.

LPIC has been forced recently to defend numerous lawyers who have crossed that line – at costs that often approach the limits provided by the insurance program, partly because defamation cost awards can be significant and partly because defending this type of claim is a costly exercise.

(continued on page 12)

GETTING IT RIGHT BY ...

Limiting Your Exposure to Libel and Slander Claims

- 1) Take time to be reflective in your communications by
 - a) choosing your words carefully;
 - b) considering who you copy on correspondence; and
 - c) leaving aside your emotions when advocating on behalf of your client.
- 2) Remain the capable advisor that you are by
 - a) staying independent;
 - b) staying true to your client's objectives rather than your own; and
 - c) exercising judgment with respect to using the litigation process as your platform.
- 3) Before speaking to the media
 - a) recognize that the media have their own set of objectives, rules and ethics that will likely see your words and comments massaged beyond your belief;
 - b) obtain your client's consent; and
 - c) prepare and review what it is that you are going to say or write.

Self-help services

That same "more sophisticated" client knows more – and is willing to learn more – about the legal system, legal services and the law generally than in the past. As well, litigators today have to be prepared to deal with their clients' self-help mindset – fostered in part by the proliferation of self-help services such as internet and phone-in legal advice, and pre-packaged forms etc. and/or software for doing wills, estate planning, real estate, separation and even custody agreements and more.

Competition

Competition from a number of sources, including paralegals, accountants, consultants and other professionals, is chipping away at many services that have been regarded as the sole domain of the litigation practitioner – opinions, strategy plans, representation and advocacy and risk management.

As well, many clients, especially in the business world, are turning to a more collaborative approach. In fact, their in-house

What lawyers in these types of situations fail to realize (or appreciate) is that they are potentially on the hook for any allegations or injudicious remarks made in a public forum – no matter who makes them. By simply being present, the lawyer is implicated; the more active a role the lawyer plays, the more significant the potential consequences.

Moreover, points out Harris, the press conference is a minefield that few lawyers are trained to navigate. And when confronted with a particularly aggressive reporter or less-than-scrupulous scribe, a lawyer's best-laid plans can easily go awry.

It may be hard, admits Harris, to resist pressure from clients, who've witnessed the media's ability to drive decisions in class actions and the like. Lawyers often fall victim to the bright lights, enticed to offer off-the-cuff comments on the courtroom steps, perhaps to clarify the client's position, perhaps to ensure the story that gets out is, in the lawyer's view, accurate and fair. Harris' advice: Measure carefully the temptation to "go on the record."

"Many lawyers do not know how to handle the media, who to trust, who is responsible and who is not; reporters have their own set of rules and ethics,

and if you don't know them, it's a trap for the unwary," warns Harris, herself a veteran of the quotable media quote.

And even if a defamation suit against a lawyer is ultimately dismissed, the costs for the lawyer are significant, adds Harris who has acted as defence counsel in many such situations.

The personal toll of a claim, the costs of the deductible which may have to be called on, the reputation management issues, are all considerations that practitioners should weigh carefully as they balance their role as advocates against the fine line of defamation.

YOUR LIABILITY FOR COSTS

RULE 57.07

No matter how you slice it, Rule 57.07 is very much a double-edged sword that comes at a significant cost, financially, personally, and through increased risk to lawyers individually and collectively.

Although it's been on the books for 15 years, the Rule has only become an issue for litigators in the last two or three years.

Dutton, Brock's Brian Brock, a veteran of litigation practice, suggests two possible explanations for this increase in Rule 57.07 claims:

- a more aggressive, uncivil practice style among some litigators which has those on the receiving end of multiple and unnecessary motions seeking revenge by moving under the Rule to impose a costs award against opposing counsel personally; and
- recent liberal interpretations of the Rule, which itself is broadly worded.

That broad wording, suggest both Brock and Nancy Spies, a senior liti-

gator at Stockwood, Spies, is itself a double-edged sword. Although designed to help reign in lawyer conduct, it presents an exposure to claims where many lawyers thought there was none.

"This type of claim exacts a huge personal price that . . . leaves lawyers quite shaken."

All conduct at risk

Moreover, says Spies, lawyers need to understand that the Rule applies not only to counsel's conduct at trials, but also to every aspect of the way a lawyer handles a case: "The way you conduct yourself, your conduct towards the court and other lawyers, your conduct at out-of-court examinations and

on motions, all potentially expose you to a Rule 57.07 claim."

A few court rulings which, in Brock's view, wrongly interpreted the Rule's wording away from the traditional context of requiring a finding of a serious and important breach of conduct to a standard of ordinary negligence have the potential to exacerbate the problem.

"The expectation was – and should be – that behaviour must be egregious or outrageous, more akin to what would normally result in a ruling of contempt of court for the Rule to apply," explains Brock.

Rulings in which Rule 57.07 was interpreted to apply in a broad range of circumstances could be offset by more recent decisions in which the courts took a more narrow view of the Rule, suggests Spies – but both agree the jury is out on which view will prevail. And until such time, both Brock and Spies suggest lawyers be wary – not only because of their real expo-

resolution programs and risk management strategies, which focus on a preventative approach, avoid the use of a litigator altogether.

Alternative Dispute Resolution

The widespread use of ADR is largely a client-driven development, the result of discontent with the laborious timeframes and prohibitive costs involved in the court process. But with new

forums for resolution comes a need for resolution of cases within new abbreviated time frames as well as a new application of our planning and advocacy skills.

The dollar-drive

A recent issue of CBA's *The National* magazines highlighted some of the root causes behind the profession's disenchantment with

sure under the Rule, but also because the tables could be turned on the lawyer bringing the motion.

Tables turned, moving lawyer can be assessed costs

“If the test under which the Rule applies becomes stricter, those who seek to impose a cost award under the Rule and are found to be wasting the court’s time could find themselves having to pay solicitor/client costs, along the lines of failing to prove an allegation of fraud,” points out Spies. And that, she suggests, opens the door to clients seeking costs or the courts disallowing costs between the lawyer and client.

Lawyers considering the Rule should also take note that although the claims are numerous, few claims for costs sanctions actually succeed. Many such claims, suggests Brock, are in fact frivolous, revengeful and otherwise unsupportable – again opening the moving lawyer to the possibility of having solicitor/client costs awarded against them. And even where they are substantiated, claims for costs sanctions generally have not stood up to the test of being serious and unequivocal.

Win or lose, Rule 57.07 claims come at a cost

No matter how frivolous or valid the claim and no matter what the outcome, claims brought under Rule 57.07 exact a price. The costs to the insurance program to administer and defend these claims get passed along to the whole of the bar – through insurance premiums.

But more compelling is the personal cost of this type of claim, suggests Brock: “It strikes at the core of your being, because it’s your behaviour, your decisions, the way you acted, what you said that all are on trial. This type of claim exacts a huge personal price that, based on my experience, leaves lawyers quite shaken.”

Why then do lawyers nowadays resort to the Rule? One theory offered by Brock has to do with the nature of practice and the attitude of lawyers who litigate. Today’s litigators, he says, reflect today’s society. Everywhere we turn, people are more aggressive, self-interested, uncivil and impatient and that, along with changing values and a changing structure of law practice, translates into a decline in civility in the profession.

“The fact is, we often do say terrible things to each other, on the record. Instead of stepping back and focusing on moving the litigation forward, we get caught in the moment, in going face-to-face with opposing counsel,” he admits. “What we should be doing

is sit back, take a deep breath, and focus on the strategy – not the emotion of the moment.”

Spies agrees. “Increased pressures in practice, higher stress levels, less supervision of young lawyers, less opportunity for mentorship, more young lawyers out there on their own, aggressive lawyers enjoying success standing out as examples to follow – all are factors contributing to a decline in civility in legal practice.”

One solution: Make lawyers more aware of the Rules of Professional Conduct, their obligations to the courts and to each other, suggests Spies, as a first step in restoring some civility to litigation practice.

GETTING IT RIGHT BY ...

Avoiding Rule 57.07 Claims for Costs Personally

- 1) Abide by the Rules of Professional Conduct by
 - a) balancing your multiple duties as an officer of the court – to your client, to your colleagues and to the court;
 - b) employing patience and respect towards your adversary;
 - c) reigning in those emotions and hostilities and resisting the temptation to engage in verbal or written warfare; and
 - d) venting your frustration through a mentor or outside of work in exercise, hobbies or reflection.
- 2) Remain the capable advisor that you are by
 - a) staying independent;
 - b) staying true to the client’s objectives rather than your own; and
 - c) exercising judgment with respect to using the litigation process
- 3) Recognize that such claims are costly to you as a litigator whether you use the rule as a sword or must respond to the rule in terms of:
 - a) the cost to your insurance program overall;
 - b) the cost to your reputation if you face a motion for costs personally;
 - c) the cost to you if you bring a costs motion unsuccessfully; and
 - d) the cost to all of the clients involved who become entangled in this sideshow.

itself – and the reasons behind the falling esteem in which clients now hold lawyers.

Lawyers today, it argues are too often driven by the dollar rather than the dignity of their profession. As a result, they may be hard-pressed to turn down a fee-paying client; collegiality, civility and mutual trust are a rarity in the adversarial environment in which lawyers now practise; and this adversarial approach in

which lawyers see themselves as advocates for their client’s causes, has spawned a raft of aggressive litigation tactics which further undermine the profession’s calling as “counsellor.” The end result: A high calling is becoming an “increasingly unprincipled business.”*

* [“10 Steps to a Better Profession,” by Carl Horn; CBA National, March-April 2000, pp. 18-41].

Ride out the litigation tidal wave with

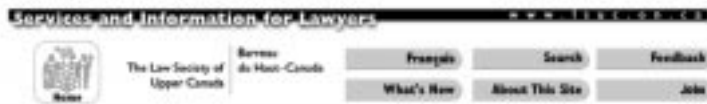
Once all of the statistical analyses and real time anecdotal evidence is digested it becomes clear that litigators must embrace change in a proactive manner – quickly, practically, and effectively. A challenge, yes; insurmountable, no.

On these two pages you will find eight basic strategies that reinforce how simple making change can be. Listed with each are accessible, inexpensive and often free tools and resources to help you implement these strategies. Some are tools we have built ourselves, others we recommend from the Law Society or other CLE providers.

But all are available at LPIC's risk and change management program, practicePRO, on LPIC's website at www.lpic.ca.

Read on and discover just how simple making change can be.

Boning Up on the Rules of Professional Conduct



Many lawyers forget about the Rules once they start to practice. A reminder of the many duties imposed on officers of the court is one way to bring some civility back into practice, tame the growing aggression between counsel, and better serve clients' interests.

Visit: http://www.lsuc.on.ca/services/services_rules_en.shtml

Tackling Some Age-Old Problems

- Limitations Period Chart

A favourite tool among practitioners that never suffers from overuse, visit <http://practicepro.lpic.ca/practice/limitation.asp>

- Independent Legal Advice Checklist

Another old standby for what is a serious type of advice, visit <http://practicepro.lpic.ca/practice/checklist.asp>

Managing Lawyer/Client Relationships

- Managing the Lawyer/Client Relationship Booklet



Clients come to you with a set of expectations at the start of your relationship. Meeting them is your challenge and the key to a solid client relationship. As you move through the many stages of your relationship, you have the opportunity to discuss and reset, if necessary, those expectations. This booklet provides a brief discussion of the many stages – client/case screening, non-engagement, engagement and disengagement – along with comprehensive checklists for working through these stages.

To download a copy, visit <http://practicepro.lpic.ca/practice/lawyerclient.asp>

To order a copy, visit http://www.lpic.ca/order_books_videos/default.asp

- Managing Conflict of Interest Situations Booklet



Client expectations also underlie a number of conflict of interest situations. Knowing how to spot and manage a conflict, either at the start of a relationship or mid-way through is crucial to relationship management. This booklet provides practical guidance on how to avoid as well as manage situations that turn into conflict of interest situations.

To download a copy, visit <http://practicepro.lpic.ca/practice/conflicts.asp>

To order a copy, visit http://www.lpic.ca/order_books_videos/default.asp

- online COACHING CENTRE



Client expectations are best understood and managed by using a well-developed set of soft skills – listening, guidance, flexibility, caring, initiative, planning, and dealing with procrastination as well as stress.

The online COACHING CENTRE (OCC) is an online, module-based program that offers skills enhancement in these areas.

The OCC is organized into six workshop topics – powerful communications, stress management, practice management (read leadership and team-building), business development, overcoming procrastination and emotional intelligence. The 150 bite-sized modules which make up the OCC take about 10 – 15 minutes each to complete; each serves as a mentor to help you enhance skills involved in building and maintaining relationships with clients, colleagues and adversaries.

To access the online COACHING CENTRE, visit <http://practicepro.lpic.ca/occ/default.asp>

For an introductory presentation for your firm, send an e-mail to practicepro@lpic.ca

tools and resources from practicePRO

Keeping Up to Date with the Trends



Distributed quarterly both online and in print, LPIC News offers regular updates on practice issues and trends, and on tools and resources.

Visit http://www.lpic.ca/news/LPIC_news.asp



Tips on practice habits that can result in litigation claims and how to avoid them, including Suing Your Client for Fees; Acting for Family and Friends; Speaking to the Media; Acting As Director for a Client Corporation.

Visit <http://practicepro.lpic.ca/information/danger.asp>



LPIC's analysis of the leading cases and legal updates concerning legal professional liability issues.

Visit <http://practicepro.lpic.ca/information/lpic.asp>



A gateway to online resources that help you manage the burgeoning information overload and the faster pace of practice.

Visit <http://practicepro.lpic.ca/information/techno.asp>

Presentations

Developed for law firms and law associations to develop awareness of trends and discuss many practice issues, including how to manage client relationships, conflicts, use of technology in practice, coaching and wellness.

To book a presentation, send an e-mail to practicepro@lpic.ca

Knowing Your Insurance Policy

Today, exposure to claims and the related need for liability insurance is simply a reality of practice. You are urged to spend some time familiarizing yourself with your insurance policy and the various options available to better protect yourself against any personal financial exposure for claims. Consider also:

- Excess Insurance Coverage for claims that might turn out to be bigger than you think;
- Innocent Party Coverage/Buy-up to protect you from what you don't know about your partners, past and present;
- Run-off Insurance Coverage to protect you when you leave private practice or retire.

Keeping Up with the Law Through CLE

A number of organizations provide continuing legal education programs throughout Ontario. In addition to the commercial providers, consider the offerings of the following organizations, all of which can be accessed by visiting <http://practicepro.lpic.ca/education/continuing.asp> or the CLE Calendar at <http://practicepro.lpic.ca/education/default.asp>.

- Law Society of Upper Canada CLE
- Canadian Bar Association-Ontario CLE and Section Meetings
- Advocates' Society CLE
- Ontario Centre for Advocacy Training
- County and District Law Association Events

Mentoring

Seeking out a mentor to bounce ideas around with or get an independent and practised viewpoint on matters of substantive law, practice management or just dealing with people is important. Mentoring helps maintain peace of mind and perspective.

If you do not have a relationship with a more experienced lawyer in your office or in the broader legal community, develop one. If you need some help, join an association and start meeting people.

As well, consider the following resources:

- **Lawyer-to-Lawyer Network at the CBAO**
A volunteer mentoring program for members of the Canadian Bar Association-Ontario, the Lawyer-to-Lawyer Network seeks lawyers interested in having a mentor or becoming one. For more information, call the CBAO's membership department at 1-800-668-8900.
- **Advisory Services at the Law Society**
The Advisory Services Department of the Law Society, formerly called Practice Advisory, does offer limited mentoring support by volunteer practitioners engaged in private practice. Once you have consulted with Advisory Services, they will determine whether it is appropriate to refer you to one of the volunteer mentors. For consultation with Advisory Services, call (416) 947-3369 or 1-800-668-7380.

Taking Care of Yourself

Resilience is the key to successful law practice today. This means taking care of your mind, your body, and your soul. So, take a break.

- Interact with family and friends – talk and listen.
- Take up a hobby, sport, or instrument – play a little.
- Volunteer in your community – do it with a buddy.
- Go on a holiday – even if it is a day off in town.
- Seek out professional help for stress, depression and addictions – these problems only get bigger when they are ignored.

Visit the practicePRO Wellness section at <http://practicepro.lpic.ca/wellness/default.asp>

Deadline for transaction filing around the corner

Real estate and civil litigation transaction levies for the second quarter, ending on June 30, 2000, will be due on July 31, 2000.

All firms must file a transaction levy surcharge form for each quarter, even if your firm does not have any transaction levy surcharges to report. The only exception is for firms who have earlier filed an exemption form, indicating that the firm will not undertake civil litigation or real estate transactions during the year.

Key date reminder:

July 15, 2000	If you are paying your insurance premium levies in quarterly instalments, the third quarterly insurance premium instalment is payable.
July 30, 2000	Real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2000.
October 15, 2000	Fourth and final quarterly insurance premium instalment is payable.
October 30, 2000	Real estate and civil litigation transaction levies and forms are due for the quarter ended September 30, 2000.

TitlePLUS NEWS

Myth: Getting a TitlePLUS policy is time-consuming, tedious and too much trouble.

Fact: Using TitlePLUS is as easy as picking up your telephone.

Now all lawyers can obtain TitlePLUS policies by phone, fax or via the TitlePLUS website (go to www.titleplus.ca, click on Lawyers). To use TitlePLUS, you DO NOT have to be a TitlePLUS subscriber, nor do you have to become one.

All you have to do is – call.

Need Title Insurance?
Just call.

  (416) 598-5899 or 1-800-410-1013

A Tale of Two Files: E&O vs TitlePLUS

How can TitlePLUS make a difference? That's the question often asked of TitlePLUS by real estate lawyers. To answer this question, here is an actual case from the LPIC insurance claims files that demonstrates how these situations could have been resolved more quickly and at less cost, especially to the lawyer involved, if TitlePLUS had been used.

The case:

A TitlePLUS solicitor acted on a purchase under a power of sale. Title revealed a second mortgage in favour of a gas company to secure a furnace lien (approximately \$3,500). The solicitor assumed that this was a second charge

and was therefore “cut out” by the power of sale. The solicitor failed to consider the effect of the PPSA, which gives priority to a conditional sales agreement where the security interest attaches prior to the chattel becoming a fixture.

The role TitlePLUS played:

This matter was covered under the TitlePLUS Legal Services coverage and a discharge was obtained at no cost to the insured purchaser or the solicitor. Had this matter not been a TitlePLUS transaction, the priority of the lien would have resulted in a claim against the solicitor's E&O coverage. Assuming the standard deductible of \$5,000, the indemnity to discharge the lien would have come completely from the solicitor's own funds.

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LPIC)



President: Malcolm Heins

LPIC news is published by the Lawyers' Professional Indemnity Company (LPIC) to update practitioners about LPIC's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to potential claims.

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