

LAWPRO

magazine

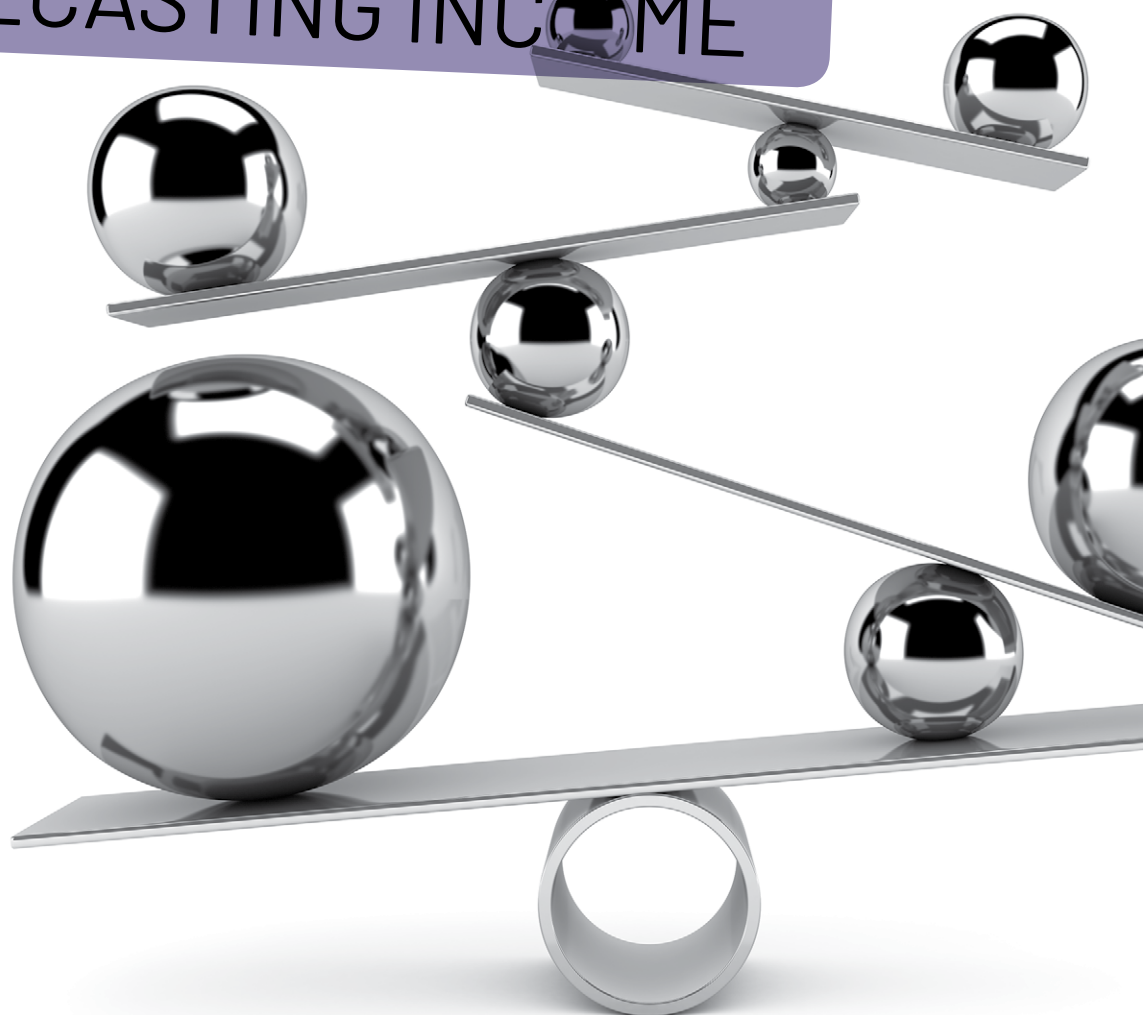
MAY 2019 VOL 18.1

THE BALANCE OF MANAGING CLAIMS AND FORECASTING INCOME

2018
Annual
Review

Financial
Results
Explained

practicePRO celebrates
Claims report
How we defended lawyers



recent events

May 29, 2019

Essex Law Association
CPD event

Cyber risks for lawyers and law firms & working group on lawyers and real estate

Ray Leclair presented
Windsor, ON

May 6, 2019

Middlesex Law Association
The Fourteenth Annual Straight from the Bench Conference

The future of the legal industry

Ray Leclair presented
London, ON

April 30, 2019

Hamilton Law Association
The Hamilton Law Association's 33rd Annual Joint Insurance Seminar

After the event insurance – adverse costs insurance – ethical considerations and errors and omissions possibilities

Ian Hu presented
Hamilton, ON

May 10, 2019

Federation of Ontario Law Associations
FOLA Plenary
LAWPRO briefing
Dan Pinnington presented
Toronto, ON

May 4, 2019

Carleton County Law Association
East Region Solicitors Conference
Common sources of claims

Ian Hu presented
Montebello, QC

April 29, 2019

Ontario Bar Association Insurance Law Program
Anatomy of a Trial:
A Deeper Dive Into Jury Trials
Professionalism concerns: Avoiding solicitor negligence
Jennifer Ip presented
Toronto, ON

May 7, 2019

ezCPD.ca
Webinar
Cyber dangers for legal professionals
Ray Leclair presented

May 1, 2019

Aird & Berlis CPD
Cyber risks for lawyers and law firms
Ray Leclair presented
Toronto, ON

April 25, 2019

Durham Region Law Association
Annual General Meeting
Time and task management for lawyers
Ian Hu presented
Oshawa, ON

LAWPRO and the practicePRO and TitlePLUS programs welcome invitations to speak about professional liability insurance, risk management, title insurance and other topics within our expertise. Interested in arranging for a speaker? Please contact us at practicepro@lawpro.ca, or call us at 416-596-4623.

LAWPRO
magazine



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LAWPRO Magazine is published by Lawyers' Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO's activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LAWPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

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2018 Annual Review

Financial Results Explained

2018 Annual Review

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e-briefs

Don't miss out – have you seen our recent emails?

To ensure you receive timely information about deadlines, news and other insurance program developments, please make sure LAWPRO has your up-to-date email address and that you have added service@lawpro.ca to your contacts.

LAWPRO Webzines

Corporate/commercial webzine: Measure twice, advise once

February 2019

It's all too easy for small things to slip through the cracks. This webzine outlined changes, deadlines, and new commercial opportunities in the corporate/commercial space. The best advice is the same as ever: don't rush and don't cut corners.

Division Court allows appeal in Milne Estate (Re) decision

January 2019

This webzine reported that the Divisional Court allowed the appeal and set aside the orders of the Application Judge in the Milne Estate (Re) decision.

The Divisional Court did not in any way criticize the use of the allocation clause and in fact noted that "the use of allocation clauses is a common estate planning technique" (paragraph 22). However, the Divisional Court did NOT find that all allocation clauses, in all circumstances, will be and are valid. It would thus appear, as was the case before the original Re Milne decision, that care is still required by will drafters to ensure that multiple wills are drafted in a manner that avoids possible invalidity.

Key Dates

April 30, 2019

Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending March 31, 2019.

April 30, 2019

Annual exemption forms are due from lawyers not practising civil litigation and/or real estate in 2019 and wanting to exempt themselves from quarterly filings.

July 31, 2019

Real estate and civil litigation transaction levy filings and payment (if any) are due for the quarter ending June 30, 2019.

September 15, 2019

File your LAWPRO Risk Management Credit Declaration by this date at lawpro.ca to qualify for the \$50 premium discount on your 2020 insurance premium for each LAWPRO-approved CPD program (to a maximum of \$100) completed by September 15, 2019.

Has your firm grown?
Are you taking on
more risk?

LAWPRO
eXcessTM
Insurance



It may be time to consider Excess insurance. Learn more at lawpro.ca/excess or call us at 1-800-410-1013

A CAREFUL BALANCE



My first year as CEO has flown by. It seems like just yesterday that I was writing remarks as the incoming President & CEO for the 2017 Year in Review issue

of *LAWPRO Magazine*. I believe it was a successful year of transition, for both me and the company, and I would like to thank the LAWPRO Board and staff for their help and support through the year.

The work we've done to respond to the changing nature of legal services while attempting to match premiums to risk and keeping the insurance program financially healthy and fair continues to be a focus for the company.

For instance, as part of our commitment to access to justice, and thanks to groundwork done with the Law Society in 2019, we began offering a 75 per cent premium reduction to lawyers working exclusively for Civil Society

Organizations. This discount is just one of the ways LAWPRO remains committed to offering fair coverage at an affordable premium as we offer a number of premium discounts, credits (see a list of them at page 8), and risk based transaction levies. In 2018, we became even more granular in our levies by eliminating the transaction levy for family litigation, which sees fewer claims on average, while increasing the civil litigation levy for non-family litigation, which sees a comparatively greater number of claims and higher claims costs.

In 2018, we were successful in six out of seven matters that went to trial and for which a decision was rendered, including on appeal. We argued 29 summary judgment motions at first instance and won 23 of them. 2,774 new claims were reported in 2018 and our customer service department handled more than 56,000 calls and emails. These interactions tell us that Ontario lawyers continue to face a wide variety of issues and challenges as they handle files and manage their practices.

The practicePRO program, which is recognized across North America as a leading risk management service, celebrated 20 years of providing helpful resources and information through *LAWPRO Magazine*, electronic newsletters, the *AvoidAClaim.com* blog, social media, and live presentations. Almost 100 such presentations were delivered to lawyers throughout the province last year to bring attention to common risk areas and claims prevention tactics.

As I start my second year as CEO, I remain committed to helping Ontario lawyers avoid claims and adapt to a changing practice climate. While we have always been a leader in using technology – an amazing 97 per cent of our insureds completed their 2019 renewals online – we are exploring how existing and new technologies can better support our service to insureds and core business functions. There will be challenges and opportunities ahead for us all and I look forward to meeting them together.

Daniel E. Pinnington
President & CEO

FINANCIAL RESULTS

EXPLAINED

Statement of Profit or Loss

Stated in thousands of Canadian dollars

A

D

B

C

E

FOR THE YEAR ENDED DECEMBER 31

Income

	2018	2017
Gross written premiums	\$ 114,784	115,655
Premiums ceded to reinsurers (note 11)	(7,202)	(7,150)
Net written premiums	107,582	108,505
(Increase) decrease in unearned premiums (note 10)	(43)	(41)
Net premiums earned	107,539	108,464
Net investment income (note 5)	19,711	20,470
Ceded commissions	1,862	1,543
	\$ 129,112	130,477

Expenses

Gross claims and adjustment expenses (note 9)	\$ 84,767	102,080
Reinsurers' share of claims and adjustment expenses (note 9)	(3,775)	4,090
Net claims and adjustment expenses	80,992	106,170
Operating expenses (note 15)	22,138	20,315
Premium taxes	3,445	3,471
	106,575	129,956
Profit (loss) before income taxes	\$ 22,537	521
Income tax expense (recovery) (note 14)		
Current	5,598	230
Deferred	87	(325)
	5,685	(95)
Profit (loss)	\$ 16,852	616

Accompanying notes are an integral part of the financial statements.

A Net premiums: \$107.5 million

We kept our base premium unchanged this year, and that consistency is reflected in 2018's net earned premiums of \$107.5 million being only slightly below last year's result. Since the number of practising lawyer full-time-equivalents (FTEs) is a solid 27,323, which is slightly higher than expected, the small reduction in net earned premiums is primarily due to fewer real estate transaction levies caused by a cooling real estate market in Ontario.

B Net claims: \$80.9 million

Total claims expenses of \$80.9 million came in significantly below expectations and more than \$25 million below last year's

claims. This was not caused by a reduction in reported claims, which remained substantially unchanged from last year. Instead, the reduced expenses are primarily due to an acceleration of the favourable severity trend recognition, which resulted from an updated blend of loss valuation models used in the reserving process by the actuaries.

C General expenses: \$22.1 million

Thanks to prudent management, our general expenses of \$22.1 million once again came in slightly below budget. Our continued success in maintaining a favourable expense ratio compared to the industry average for similar insurance companies has put us in a strong financial position moving forward.

Statement of Comprehensive Income

Stated in thousands of Canadian dollars

FOR THE YEAR ENDED DECEMBER 31

	2018	2017
Profit (loss)	\$ 16,852	616
Other comprehensive income (loss), net of income tax:		
<u>Items that will not be reclassified subsequently to profit or loss:</u>		
Remeasurements of defined benefit obligation, net of income tax expense (recovery) of (\$143) [2017: \$44] (note 13)	(397)	(122)
<u>Items that may be reclassified subsequently to profit or loss:</u>		
<u>Available-for-sale assets</u>		
Net changes unrealized gains (losses), net of income tax expense (recovery) of (\$4,836) (2017: \$1,693)	(13,417)	4,694
Reclassification adjustment for (gains) losses recognized in profit or loss, net of income tax (expense) recovery of (\$2,027) [2017: (\$2,256)]	(5,622)	(6,256)
Reclassification adjustment for impairments, recognized in profit or loss, net of income tax expense of \$853 (2017: \$461) (note 5)	2,368	1,280
Other comprehensive income (loss)	\$ (17,068)	(404)
Comprehensive income (loss)	\$ (216)	212

F

Accompanying notes are an integral part of the financial statements.

D Investment income: \$19.7 million

Volatile market conditions in 2018 did not substantially compromise our investment income, as it is \$1.3 million above budget at \$19.7 million. The market downturn at year end did lead to a \$3.2 million write down on impaired securities, but this was mostly offset by a lower change in unrealized losses compared with last year.

E Profit: \$16.9 million

Our after-tax net income of \$16.9 million was above both expectations and last year's results, primarily due to the year-over-year reduction in claims expenses. The substantial portion of this net income was attributable to our investments, with before-tax underwriting income contributing \$2.8 million, reflecting our successful balancing of claims with underwriting.

F Other comprehensive loss: (\$17.07 million)

The volatile market conditions experienced during the latter portion of 2018 negatively impacted the value of securities at year end. These poor market conditions contributed to our comparatively high unrealized investment losses. However, favourable market trends in the first two months of 2019 have largely reversed these losses as of February 28, 2019.

At the end of 2018, LAWPRO shareholders equity remained largely unchanged at \$253.5 million, compared with \$253.7 million at the end of 2017.

Minimum capital test: Right on target

Between 2015-2017, LAWPRO phased in new Minimum Capital Test (MCT) calculation requirements. The MCT is intended to ensure that a financial institution's assets are sufficient to meet its present and future obligations. The MCT ratio is influenced by credit risks (investments and receivables) and liability risks (both in terms of unpaid claims as well as unearned premiums).

As of December 31, 2018, our MCT is 237 per cent, exactly the same as year-end 2017. This is once again within the preferred operating range of 215 per cent to 240 per cent established by the Board.

Another year, another strong financial rating

This year, LAWPRO was pleased to receive its 18th consecutive "A" rating for financial strength and "a" issuer credit rating from A.M. Best Co. This independent rating is provided to companies that have an "excellent" ability to meet ongoing insurance obligations and reflects our long-term financial stability. ■

E&O PROGRAM REVIEW

CLAIMS REPORT:

RISK IN THE BALANCE

When it comes to long-term trends in the quantity and causes of malpractice claims, slow and steady are positive descriptors. While many things in the legal profession could stand to move at a faster pace, predictable changes to potential risks allow LAWPRO to adequately plan for future costs and outlays by balancing them against premiums, levies, and investment income. It's good news, then, to report that there was little in the way of surprises in 2018 when it comes to the quantity and causes of claims.

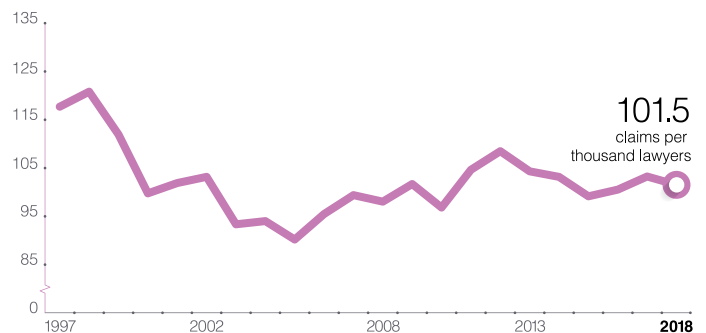
The rate and severity of claims

The number of claims per lawyer has remained relatively consistent since 2011: slightly more than 1 claim for every 10 lawyers. There were 2,774 claims reported in 2018—substantially equivalent to the 2,757 claims seen in 2017 over the same period. With more lawyers come more claims in the aggregate, but we believe efforts on the part of LAWPRO and the Ontario bar to prevent claims through continuing education and best practices have successfully contained the rate of claims on a per-insured basis.

While the rate of claims has remained relatively constant, the value of the claims we see has been gradually increasing. In the past seven years, the number of claims valued between \$100,000 and \$249,000 has been creeping up. However, our actuarial projections show a gradual pull-back of reserves in this dollar range, and we currently see no concern in terms of ultimate severity.

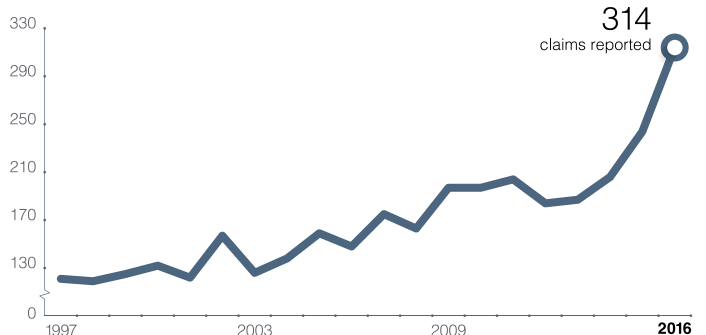
Claims per 1,000 lawyers*

*As at February 28, 2019



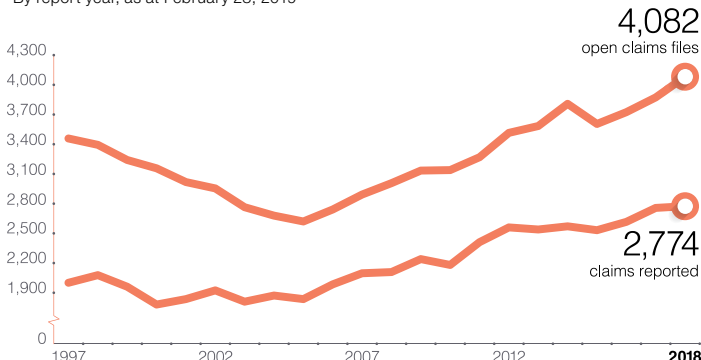
Number of claims reported with a value greater than \$100,000*

*As at February 28, 2019



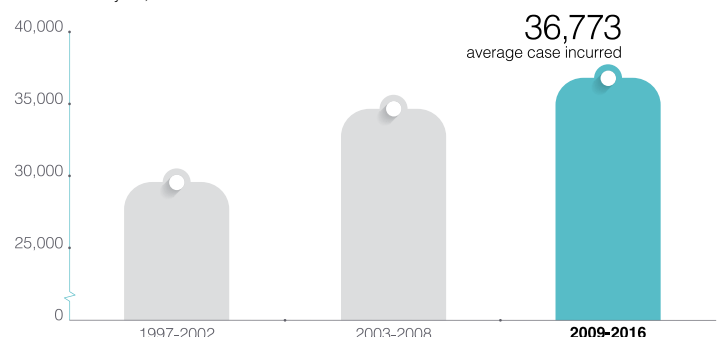
Number of claims reported and open claims files*

*By report year, as at February 28, 2019



Average cost per claim

at 38 months after start of year in which claim was reported*
*As at February 28, 2019



Those old familiar areas of loss

For more than 20 years now, litigation and real estate have been the areas of law that see the most claims. 2018 was no exception to this trend, with these areas accounting for more than half of the claims we see. Civil litigation, specifically, led to approximately 29 per cent of claims last year, with real estate practices the source of approximately 28 per cent.

Earlier in the decade, we began to see a trend toward more claims and increased costs arising out of civil litigation. This increase was largely due to an increased effort by the courts to administratively dismiss inactive matters using Rule 48 of the *Rules of Civil Procedure*. Discussions with the courts and other stakeholders were undertaken and the resultant changes to Rule 48 have reversed this trend. LAWPRO is making ongoing efforts to educate lawyers on the changes to Rule 48 and the steps they can take to reduce their exposure to administrative dismissals.

As a counterpoint to the relative stability in the number of claims arising out of civil litigation and real estate, we have measured real growth in the proportion of claims arising out of family law and wills and estates. Growth in these areas may be caused by Canada's aging population, or dramatic changes in the value of real estate. Whatever the cause, these areas will continue to be closely monitored by LAWPRO in the future.

Causes of loss: What we have here is a failure to communicate

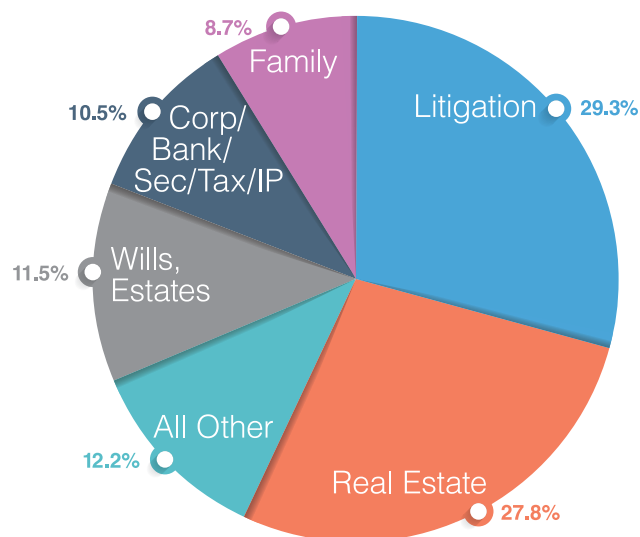
Communication errors between lawyer and client continued to be the most common cause of loss in 2018, with inadequate investigation, time management, and errors of law following in sequence. But we continue to see broad changes in the respective occurrences over the last decade. In 2008, for example, there were almost more claims caused by communication errors than time management, inadequate investigation, and errors of law combined. Today, the gap between communication errors and other causes is narrower. As the number of claims caused by communication errors has gradually decreased, claims caused by errors of law and inadequate investigation have increased.

The investigation and assessment of claims can take up to a year or more after an initial report. Trends among the most common sources of claims can therefore be illusory over the short term. However, our data continues to show consistent long-term trends that Ontario lawyers should be aware of.

Time management-related errors have gradually decreased from a high of 570 in 2011 to 438 in 2018. Like the slight reduction in litigation-related claims, this appears to be related to the amendments to Rule 48 of the *Rules of Civil Procedure*. While at the same time, inadequate investigation has gradually climbed to become the second most common source of claims. LAWPRO will continue to take steps to prevent claims in these areas through the provision of practice management and claims prevention materials to licensees.

2018 Distribution of claims by area of practice* (% of gross claims costs)

*As at February 28, 2019

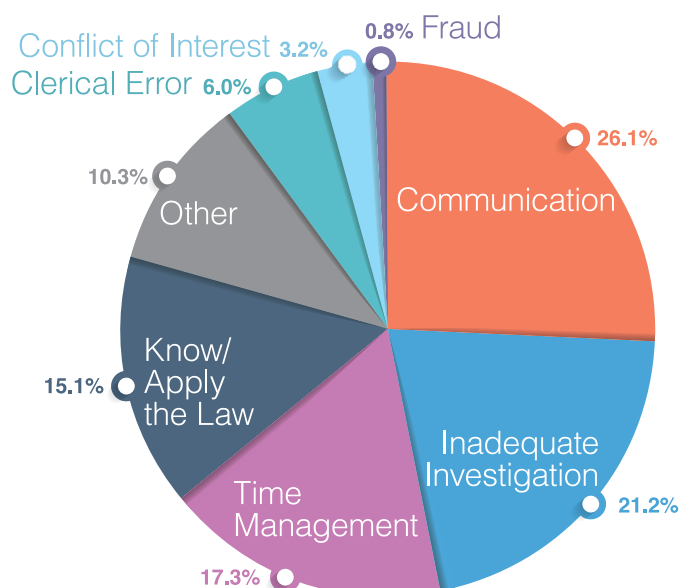


Summary of litigation results in 2018

LAWPRO won

- 6 of 7 matters that the company took to trial and on which a decision was rendered
- 23 of 29 summary judgment applications
- 7 of 10 summary judgment appeal decisions

Reported claims count by cause of loss in 2018



COVERAGE REPORT:

KEEPING COSTS DOWN = KEEPING PREMIUMS DOWN



In 2018, LAWPRO once again successfully managed projected claims costs through claims management and cost containment efforts, together with investment income.

Beginning in 2016, LAWPRO began to see an abatement in what had been an upward trend in claims growth. This reduction in projected costs was an opportunity to reduce premiums paid by licensees in order to maintain an effective balance between revenue and costs. Accordingly, in the 2017 renewal year, LAWPRO introduced a \$2,950 base premium, a \$400 reduction from the 2016 premium. This lowered premium was maintained through the 2018 renewal year as well. As expected, despite the reduction in the base premium, LAWPRO has been able to meet its claims obligations on a roughly “break-even” basis. LAWPRO’s ongoing success in controlling growth in claims and other costs means that the \$2,950 base premium was continued once again through the 2019 insurance renewal.

Levies meeting long-term needs

Last year, the civil litigation levy was raised to address the long term trend of increasing costs in this area. Despite recent stability in litigation-related claims, civil litigation continues to be the most expensive area of law for LAWPRO.

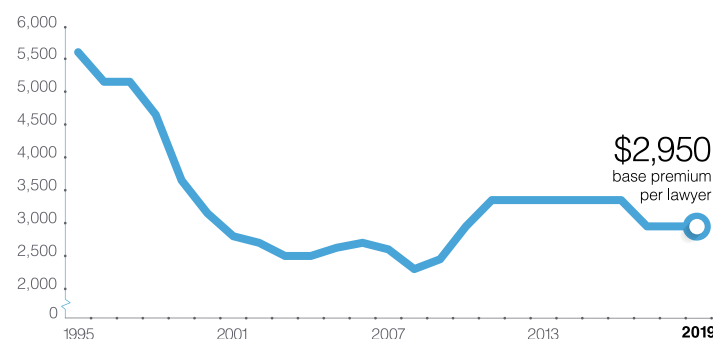
The current litigation levy aligns the cost of insurance with its associated risks and pursues a fair balance among Ontario lawyers in private practice. Although the rate of civil litigation and real estate claims remains high compared to the base premiums received from practitioners in these areas, the current transaction levies of \$100 for civil litigation transactions and \$65 for real estate transactions are adequately addressing this asymmetry. LAWPRO acts carefully on risk-rating decisions, and our analysis will continue over the long term to continue to gain perspective and determine long-term implications.

Coverage for new lawyers

New lawyers present lower claims risks than those with more experience. This may be partly due to new calls often having less responsibility over various files than their senior colleagues. LAWPRO responds to the reduced risk inherent in new calls by providing premium discounts to new lawyers with less than four years of practice. This discount ranges from 50 per cent of base premium (for lawyers with less than one full year in practice) to 20 per cent of base premium (for lawyers with between three and four years in practice). Years of experience as a licensed lawyer in practice in any jurisdiction is taken into account when considering eligibility for this discount.

Since new lawyers can be called throughout the year, LAWPRO clarified in 2018 that a “full year” of experience is deemed to be at least 200 days in practice. New lawyers who practise for less than 200 days in their first year will be eligible for a “first year” discount in both their first and second years of practice.

Base premium per lawyer



COVERAGE OPTION	NO. OF LAWYERS PARTICIPATING AS OF JAN. 31, 2019
New Lawyer Discount 20 to 50 per cent base premium discount for those called in the last one to four years	5,295
Part-Time Practice 50 per cent base premium discount for eligible lawyers	2,142
Restricted Area of Practice Option 50 per cent base premium discount for immigration/criminal law practitioners	1,708
Innocent Party Buy-Up Increase in Innocent Party sublimits up to as much as \$1 million per claim/aggregate	3,722
Run-Off Buy-Up Increase limits for past services from \$250,000 per claim/aggregate to as much as \$1 million per claim/\$2 million aggregate	1,412
Real Estate Practice Coverage Option Required for all lawyers practising real estate law in Ontario. Sublimit coverage of \$250,000 per claim/\$1 million aggregate	8,489

SERVICE REPORT:

ENSURING GOOD SERVICES WITH GOOD SERVICE

LAWPRO's Underwriting & Customer Service department supports the primary program at LAWPRO, just like a sales department and customer help-line in a typical insurance company. A new record is established soon after a lawyer is called to the Ontario bar, and existing records are adjusted as lawyers move their practice, or move out of private practice entirely. Renewal occurs each year following the Law Society of Ontario's convocation.

LAWPRO takes its commitment to customer service seriously. LAWPRO receives approximately 31,000 phone calls a year, along with approximately 25,000 pieces of correspondence. Every call and email is important to us, with many insureds seeking specific direction on coverage options, needs, and eligibility.

Over the past two years, LAWPRO has seen an increased volume of correspondence in its customer service department, with received correspondence increasing by almost nine per cent since 2016. In response, our team has adopted new approaches aimed at managing the heavier workload.

One way in which LAWPRO has taken steps to improve the customer experience is through our recent redesign of lawpro.ca. The redesigned website was updated with a new look and navigation to improve the user-experience and availability of policy information.

Aligning LAWPRO procedures with the Law Society of Ontario

To better meet lawyers' expectations and achieve greater consistency, LAWPRO took additional steps in 2018 to align its administrative practises with those of the Law Society of Ontario. In recent years,

the Law Society of Ontario reduced its default period for certain administrative matters such as failure to complete filings and pay fees and levies to 60 days. Accordingly, for LAWPRO matters, the default period was reduced to match the period set by the Law Society.

Aligned policies between the Law Society of Ontario and LAWPRO reduces confusion and inconsistencies between the different contact points for Ontario lawyers.

Expertise comes from experience

In 2018, LAWPRO saw some significant leadership changes. Dan Pinnington was appointed President & CEO, Domenic Bellacicco was appointed Vice President for Claims, and Stephen Freedman took on the position of Executive Vice President following the retirement of Duncan Gosnell after 23 years with LAWPRO. Our customer service department also received new leadership as Victoria Crewe-Nelson was appointed Vice President for Underwriting & Customer Service at the end of 2018. LAWPRO relies on the knowledge and experience of its superlative team to ensure effective insurance for licensees. ■

THE ANNUAL SURVEY OF LAWPRO E&O INSURED'S WITH A CLOSED CLAIM INDICATED THE FOLLOWING:

97 per cent

said that they were satisfied with how LAWPRO handled the claim

90 per cent

said they would have the defence counsel firm represent them again

86 per cent

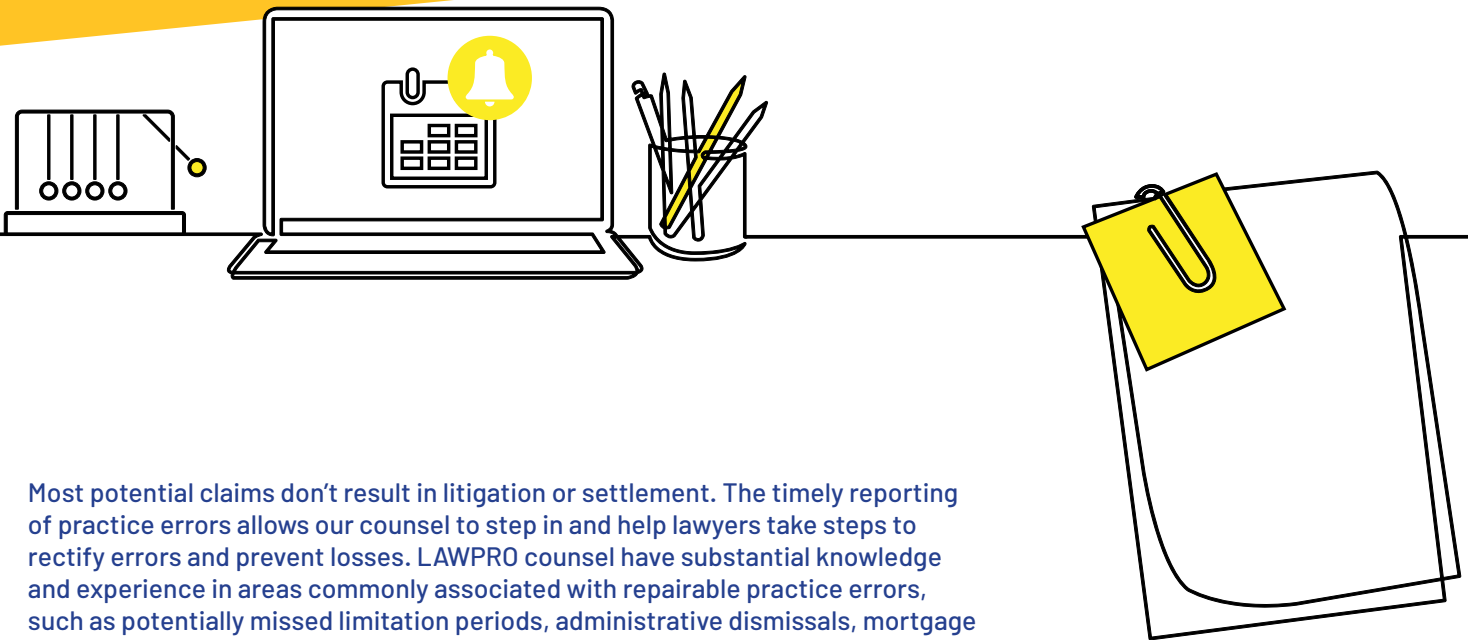
said they were satisfied with our process of selecting defence counsel

88 per cent

said LAWPRO received good value for defence monies spent

REPAIRS:

The best defence
is ensuring a defence isn't needed



Most potential claims don't result in litigation or settlement. The timely reporting of practice errors allows our counsel to step in and help lawyers take steps to rectify errors and prevent losses. LAWPRO counsel have substantial knowledge and experience in areas commonly associated with repairable practice errors, such as potentially missed limitation periods, administrative dismissals, mortgage and construction lien filings, and other common issues. Many mistakes can be fixed, and repair efforts reduce the impact of a potential claim to lawyers as well as their clients. In 2018, 36 per cent of all reported claims were closed without any defence or indemnity costs being incurred.

Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2018.

Limiting claims from limitation periods

Potentially missed limitation periods are a common source of malpractice claims, but are also often repairable. In one 2018 example of such a repair, LAWPRO successfully assisted a licensee in opposing an application for summary judgment brought by defendants on the basis that the licensee's client's claim was brought out of time and was statute barred.¹

This case involved allegedly negligent financial advice provided by financial planners (the defendants) regarding the validity of an Individual Pension Plan (IPP) scheme. The plaintiff was advised by the defendants that transferring her pension to a particular IPP would allow an earlier retirement while still being acceptable to the CRA. In reliance on this advice, the plaintiff transferred her pension from her employer's plan to the recommended IPP in November 2008.

¹ 2018 ONSC 4489

In early 2009, the plaintiff was advised by multiple persons unaffiliated with the defendants that the IPP may not comply with requirements for registration by the CRA, and may have its registration revoked. At that time, the plaintiff retained counsel, who wrote to the defendants seeking confirmation that the IPP complied with relevant legal requirements. The defendants confirmed at that time that the IPP was legally valid.

In September 2011, the CRA notified the plaintiff that her IPP did not, in fact comply with the regulations and would be deregistered. The plaintiff issued a Statement of Claim against the defendants in June, 2012.

The defendants sought summary judgment on the basis that the plaintiff should have known she had a claim against the defendant in 2009, when she was advised by multiple parties that the IPP was invalid. The plaintiff argued in response that the her claim was uncertain and didn't accrue until the CRA informed her that the IPP was invalid. Before that, despite the plaintiff's concerns, damages had not crystalized. This uncertainty was exacerbated by the defendants continued assurances through 2011 that the plan was valid.

The judge agreed with the plaintiff that her limitation period did not begin until the CRA informed the plaintiff in 2011 that her IPP would be deregistered. Therefore, the limitation period had not expired before the Statement of Claim was issued and the plaintiff's claim was not statute barred. Since the plaintiff's lawsuit was permitted to continue, any potential claim against the plaintiff's lawyer for failing to comply with the applicable limitation period was eliminated.

In 2016, the plaintiff sought leave to add the third parties as additional defendants. The third parties opposed the application for leave on the basis that the limitation period against them had already expired.

The plaintiff successfully argued that the claim was not discovered and could not have been reasonably discovered prior to the filing of the defendant's third party claim in 2014. The plaintiffs' motion to add defendants was therefore filed within the limitation period and was not statute barred.

Now and then, we can validate service *now for then*

Limitation periods are often unforgiving. Properly diarizing deadlines for the filing of claims and other key steps in the litigation process is an integral element of a well-managed litigation practice. Missing a deadline, as we often emphasize, can have serious repercussions for a client and can lead to malpractice claims.

But mistakes happen, and sometimes, with the assistance of LAWPRO counsel, damage from an inadvertently missed deadline can be fixed.

One such example arose this year in the context of a missed deadline for serving a Notice of Claim.³ The case involved a property insurance claim for water damage to the plaintiff's place of business. The plaintiff held an insurance policy offered by the defendant, which contained a one-year limitation period for claims made under the policy.

The property damage in question occurred in the summer of 2015. In accordance with the policy, the plaintiff immediately notified the defendant of the loss and provided relevant documents over the following five months. The defendant provided a proof of loss for certain elements of the plaintiff's insurance claim, but other portions of the plaintiff's claim remained outstanding at the one-year point.

Shortly before the expiration of the limitation period, the plaintiff issued a Notice of Action against the defendant on the unsettled portions of the insurance claim. However, at that time, the plaintiff and defendant were still engaged in settlement negotiations, which the plaintiff was optimistic could be resolved without litigation. In an effort to not upset the status of those negotiations, the plaintiff refrained from immediately serving the Notice of Action.

Adding parties... fashionably late

Even when there are no questions as to whether a statement of claim has been issued within the relevant limitation period, problems can still arise if new parties need to be added down the road.

In another 2018 case, LAWPRO assisted a plaintiff and his counsel in successfully adding additional defendants to an action when the defendants claimed the relevant limitation period had already expired.²

This case involved a medical malpractice claim against a chiropractor for treatment that allegedly caused serious injury to the plaintiff in 2011. The action was commenced against the chiropractor in 2013, within the limitation period. In 2014, the defendant added third parties to the suit: the plaintiff's family doctor, a massage therapist, and a nurse who provided medical care subsequent to the allegedly tortious 2011 chiropractic treatment.

² 2018 ONCA 979

³ 2018 ONSC 3402

The procedural rules required service on the defendant within six months after filing a Notice of Action, and, unfortunately, the plaintiff's lawyer forgot to diarize that deadline. By the time it came to the lawyer's attention that he had neglected to serve the defendants with the Notice of Claim, it was two months late.

LAWPRO stepped in to assist the plaintiff's lawyer in repairing the error, and a motion to extend the time period for service *nunc pro tunc* was filed. Fortunately, although the defendant had not been properly served within the relevant period, the Notice of Action had been brought to the defendant's attention shortly after it was filed. As well, all the relevant evidence had already been provided to the defendant insurer shortly after the initial property damage in accordance with the plaintiff's insurance policy. This meant the missed deadline had caused no actual prejudice to the defendant.

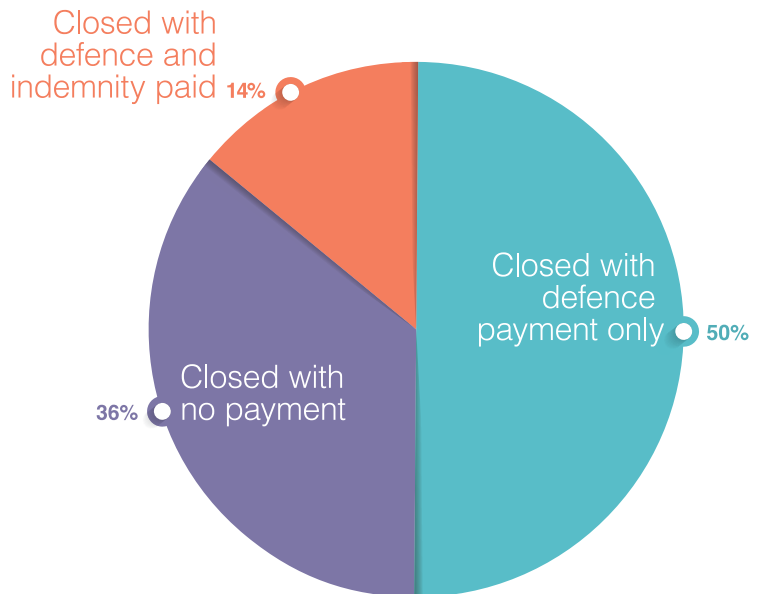
The judge determined that the plaintiff did not intentionally fail to serve the Notice within the time period stipulated by the rules, and plaintiff counsel's failure to do so was mere inadvertence. Since no actual prejudice was created, the order validating service on the defendant was granted, the plaintiff's insurance claim was not struck, and the plaintiff's lawyer was spared from an unfortunate potential malpractice claim.

LAWPRO was notified of the situation and assisted the licensee in setting aside the default judgment. In doing so, the court confirmed that the *Family Law Rules* allow for a "principled, flexible approach" to setting aside default judgments, similar to the approach used under the standard rules of procedure.

A stitch in time

Immediately notifying LAWPRO of potential errors or omissions means steps can be taken to resolve the situation before it develops into a malpractice claim. If you are aware of a real or potential claim, don't try to resolve the problem on your own. A call to LAWPRO means we can provide expedient and experienced advice and assistance. ■

Claims by disposition (outcome)



Fixing defaults so no one's held at fault

Judges are generally loathe to provide a party with relief or remedy absent submissions from the opposing party. As such, it is sometimes possible to set aside default judgments if expedient steps to do so are taken and there is a reasonable explanation for the failure to file a defence.

The test for setting aside a default judgment under the rules of practice is well-established. But the availability of equivalent relief under the *Family Law Rules* used to be less clear. LAWPRO's assistance brought clarity to that issue in another 2018 decision.⁴

The case involved divorce proceedings between a man and a woman where the distribution of family assets was at issue. The man's father owned property in Florida through a holding company managed by his lawyer. The woman sought a declaration in the Ontario divorce proceedings that the Florida property was held in trust for her and her husband and was therefore family property.

The man's father's lawyer was served in Florida with notice of the motion brought by the woman. He retained counsel in Ontario (the licensee), who notified the woman's lawyer that they would not be filing an immediate response in order to avoid attorning to the Ontario jurisdiction. Unfortunately, the woman still proceeded to obtain the declaration sought by way of default judgment.

⁴ 2018 ONSC 5964

DEFENCES:

Standing up and
stepping in for licensees



Sometimes a client's accusations can't be resolved without litigation. When a licensee has a viable defence to malpractice accusations, and the claim cannot be resolved out of court, LAWPRO steps in to provide lawyers with an effective legal defence.

LAWPRO's claims management philosophy is aimed at quick resolutions in situations where there is liability, defend vigorously if the claim has no merit, and avoid economic settlements. In 2018, LAWPRO won six of the seven matters that the company took to trial and on which a decision was rendered, was successful on the one appeal the company argued, won 23 of 29 summary judgment applications, and won seven of 10 summary judgment appeal decisions.

Here are a few examples of defences successfully advanced by LAWPRO in 2018 on behalf of licensees.

Family law

Even when a lawyer provides excellent legal services, things don't always go the client's way. A client disappointed with results may seek to place the blame on ineffective counsel, even when the lawyer

does everything in their power to advance their client's cause. In such situations, LAWPRO defends the choices and actions taken by the licensee.

For example, in a recent child protection matter,¹ two sisters were declared wards of the Crown after their parents were convicted of manslaughter in the death of the family's third child. The parents then appealed the child-protection order, partially on the basis of allegedly ineffective assistance of counsel. Because the licensee was accused of negligence, LAWPRO stepped in to defend the licensee's interests on the appeal.

The parents alleged on the appeal that their lawyer prevented them from testifying, despite their wishes to the contrary; did not call key witnesses; did not put forward a chosen cousin as a proposed alternate placement option; did not permit the parents to dispute certain facts respecting the circumstances of the death of their third child; and was incompetent due to inexperience in child protection law.

LAWPRO counsel successfully assisted the licensee in arguing that there were no acts or omissions on the part of the lawyer that amounted to incompetence, and the parents could not demonstrate any ineffective representation that impugned the fairness of the trial. The appeal judge rejected all of the allegations put forward by the parents, including the allegations of ineffective legal representation.

Tax law

While LAWPRO makes efforts to assist licensees in repairing potential losses from missed limitation periods when there is an accusation of error on the part of the lawyer, it's important to remember that limitation periods are intended to protect defendants from the unfairness inherent in delayed lawsuits. This protection extends to licensees facing stale malpractice suits.

One such example from 2018 involved a claim against tax lawyers by former clients alleging negligent advice regarding legal strategy in a tax appeal.² The plaintiffs retained the defendant lawyers to provide advice on the tax matter in question in 2008. The plaintiffs claimed that they pursued an expensive tax appeal on the initial advice of the defendants, who allegedly led the plaintiffs to believe the appeal was likely to succeed. The plaintiffs claimed that this advice changed in 2010, when the defendants allegedly altered their position to state that the appeal was, in fact, very weak. The plaintiffs retained new counsel at that point, but continued with the tax appeal.

The plaintiffs claimed they would not have commenced the appeal in 2008 if the defendants had told them at that time that the appeal was weak. However, the plaintiffs continued to pursue the appeal through 2014, to both the Tax Court of Canada and the Federal Court of Appeal, where it was eventually dismissed. The plaintiffs commenced their action against the defendants for negligent advice in November 2012.

LAWPRO assisted the defendants in successfully arguing that the claim was statute barred, as the defendants themselves informed the plaintiffs that they were unlikely to succeed on their appeal in 2010—more than two years before the plaintiffs commenced their action. The claim against the licensees was therefore dismissed.

Real estate law

Lawyers need to be careful about providing legal advice to multiple parties involved in a single matter. Conflicts of interest can arise if a lawyer appears to provide advice to parties that are not explicitly clients, or when multiple clients have conflicting interest. Advising non-clients to seek out and obtain independent legal advice is always good practice management.

However, unreasonable accusations sometimes arise from non-clients claiming to be impacted by a lawyer's legal advice. One such situation arose in a recent case³ involving alleged fraud in the context of a private mortgage, where a claim of negligence was advanced by the *lender* against the *borrower's* lawyers.

The transaction involved a second mortgage on real property in Ontario. The deal was brought to the lender by the lender's lawyer—a separate individual from the borrower's lawyers—who also represented the lender in the transaction.

After the mortgage agreement was completed, the lender discovered that the information provided to it by its own lawyer regarding the transaction was inaccurate, and documents provided to the lender affecting the property and mortgage transaction had been forged.

The lender commenced litigation in response to the misrepresentation. But, in addition to suing their own lawyer and the borrower, the lender sued the borrower's lawyers in negligence, alleging that the borrower's lawyers owed a duty of care to the lender. LAWPRO stepped in and successfully argued that the claim against the borrower's lawyers disclosed no reasonable cause of action, as the borrower's lawyers did not owe a duty of care to the lender. The judge agreed that a lawyer owes an undivided duty to their own client, not to an already represented opposing party.

¹ 2018 ONSC 1589

² 2018 ONSC 4804

³ 2018 ONSC 3254

Personal injury litigation

When a client regrets agreeing to a proposed settlement or resolution to a dispute, second thoughts can sometimes lead to second lawsuits—against their former lawyer. One recent example involved an allegation that a licensee had pressured his former client into agreeing to an improvident settlement in a personal injury claim flowing from a motor vehicle accident.⁴

There were notable elements of weakness within the plaintiff's original personal injury case. For one, multiple assessors, including a psychiatrist, two neurologists, two orthopedic specialists, and a kinesiologist, determined that the motor vehicle accident did not cause any of the plaintiff's alleged impairments. Additionally, the plaintiff had continued working after the accident, and only stopped working because of a conflict with her employer. This reduced the potential damages available.

The licensee represented the plaintiff at a pre-trial conference, where the defendant agreed to increase the size of their settlement from \$40,000 to \$125,000. The judge presiding over the pre-trial conference recommended to the plaintiff that she accept the settlement offer. The licensee even offered to reduce his fees to increase the share of the settlement that would be received by the plaintiff.

Although the plaintiff agreed to accept the settlement offer, she subsequently contacted the licensee to inform him that she felt pressured into taking the settlement and wanted to rescind the agreement. The licensee responded that he would not be able to represent her if she broke the settlement agreement. The plaintiff was referred to independent legal advice at that time. The plaintiff subsequently sued her lawyer for negligence and for pressuring her to accept an improvident settlement.

At trial, LAWPRO assisted the licensee in providing an expert report that confirmed the licensee had provided competent legal advice and the settlement, in fact, exceeded the expectations of all parties involved. The claim was dismissed, and the licensee was vindicated.

Criminal law

Accusations of undue pressure on the part of the licensee can also arise in the criminal law context. In one such recent example, the plaintiff alleged that his lawyer coerced him to plead guilty to criminal charges brought in the U.S.⁵ The plaintiff also alleged that his Canadian lawyer (the licensee) provided negligent advice on U.S. law, failed to obtain complete discovery from the

U.S. Government, and failed to consider concerns raised by one of the plaintiff's American attorneys with respect to the proposed guilty plea.

After pleading guilty, the plaintiff entered into a co-operation agreement with the U.S. prosecutors, and in exchange for that co-operation, the plaintiff's guilty plea was sealed and sentencing was delayed until after the co-operation period.

The co-operation period lasted for multiple years until 2012, when the plaintiff was scheduled to return to the U.S. for sentencing. The plaintiff sent a letter to his probation officer at that time, alleging ineffective counsel on the part of the licensee. The plaintiff then retained additional American attorneys who reached an agreement with the U.S. Government to withdraw the plaintiff's guilty plea. The charges against the plaintiff were subsequently dropped by the U.S. Government.

Following the dismissal of the charges, the plaintiff sued the licensee, alleging that his Canadian lawyer coerced him into pleading guilty and provided negligent legal assistance.

LAWPRO successfully represented the licensee in defending the allegations of negligence brought by the plaintiff. The judge found that the licensee was not responsible for providing advice on U.S. law, as the plaintiff had retained American lawyers that were already doing so. The judge also found that the licensee gave the concerns raised by one of the plaintiff's American attorneys regarding the guilty plea complete consideration, and discussed those concerns with the plaintiff's other American attorney. Finally, the judge rejected the plaintiff's allegations of negligence on the grounds that the plaintiff failed to provide any expert evidence proving the licensee had failed to meet the standard of care in the situation.

Lawyers for lawyers

LAWPRO's commitment to a strong defence has meant that 86 per cent of reported claims are closed without any indemnity paid. In our annual survey, 97 per cent of our insured were satisfied with the work done by our claims professionals, and almost nine in 10 felt that LAWPRO received good value for the dollars spent on their defence.

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence may still need to be raised. LAWPRO is there to provide effective assistance and defend our licensees. ■

⁴ 2018 ONSC 4803

⁵ 2018 ONSC 4483



20 YEARS OF THE PRACTICEPRO PROGRAM

20

2018 marked the 20th anniversary of the practicePRO program. So while this issue of *LAWPRO Magazine* looks at the past year, it's also a chance to look back at 20 years of helping lawyers avoid malpractice claims and providing them with the tools to best serve their clients and run a successful practice.

There have been many changes in the practice of law since the practicePRO program was launched in 1998, but the risk management needs identified by *LAWPRO* 20 years ago remain relevant.

Four pillars have guided the practicePRO program from the start:

- | | |
|------------------|-----------------------|
| 1. Information | 3. Education |
| 2. Practice Aids | 4. Wellness & Balance |

1. Information

Information about claims trends, changes in the law, and broader developments in the legal profession have enabled us to keep Ontario lawyers ready to deal with a wide variety of ongoing challenges.

THEN

The early 2000s were about helping lawyers better understand how to work with electronic documents, email, websites, and early social media.

Adobe Acrobat and PDF files – An essential part of your legal technology arsenal (March 2003)

Beware the dangers of metadata (June 2004)

Social media pitfalls to avoid (December 2009)

AvoidAClaim.com blog (2010) began posting fraud warnings based on information provided by lawyers. At the time, it had 300 visitors a day

Aging boomers (Winter 2007): Elder law and capacity issues, increasing wills & estate claims, and the implications of aging lawyers and an aging client base

Surviving the slide (Winter 2008/2009): Advice on what to do to ride out the financial crisis

Changing direction (July 2009): Rethinking how legal services are and can be delivered

NOW

Information and transactions are expected to be available anywhere, anytime via the cloud, blockchain and even through artificial intelligence.

How to safely put your data in the cloud (February 2018)

What is AI and will it really replace lawyers? (February 2018)

What is blockchain? infographic and YouTube video (February 2018)

Artificial intelligence and the self-driving lawyer (September 2016)

AvoidAClaim.com blog (2017) look and functionality and now it sees over 800 visitors a day

The changing face of the profession (September 2014): The idea of cultural competence is explored

Serving Indigenous clients (January 2016): Providing high quality service to indigenous clients

How the profession should respond to major disruptions (February 2018): Discussions on how technology and changing client demands are disrupting traditional legal service models, and how the profession can adapt

2. Practice Aids

Practice aids give lawyers practical help running their firms and dealing with clients. Checklists, templates, booklets and toolkits address high risk areas of practice as well as human errors such as poor communication, inadequate investigation and missed deadlines.

THEN

Managing booklets (1998-2006): Geared toward the practical side of running a law office, these booklets on managing, mentoring, conflict, practice interruptions, and business relationships served as a good starting point for setting up and running a practice.

Domestic Contract Matter Toolkit (2012): Still an incredibly useful suite of resources, this toolkit includes checklists and forms with questions lawyers should systematically consider as they conduct the initial interview on a domestic contract matter and when they meet with the client to review and sign the document.

NOW

Precedents, retainers and templates: These documents have always been an essential part of the practicePRO offerings, and they continue to be popular and updated to meet changing needs.

Rule 48 Transition Toolkit (2015): Time and deadlines – the bane of many lawyers. This toolkit provides easy to use advice, forms and checklists to stay on deadline and keep files moving.

Real Estate Fraud Fact sheet (2018): ID impersonations, property flips, value frauds and phishing scams are successfully duping lawyers and law clerks. Here's what you can do stay out of trouble.

Areas of law claims fact sheets (2015-2018): Whatever your area of law, these fact sheets highlight common claims scenarios and how you can lessen your risk.

3. Education

Education and claims prevention go hand in hand. That's why lawyers who participate in continuing professional development (CPD) programs approved for the LAWPRO Risk Management Credit get a discount on their insurance premium.

THEN

2003: 12 approved programs with close to 2,000 registrations

NOW

2018: 365 programs with over 61,000 registrations

4. Wellness & Balance

We know that the stresses of practising law can lead to physical or mental health crises which, if left unaddressed, can result in malpractice claims.

That's why LAWPRO funds half of the costs of the Member Assistance Program (MAP) provided by Homewood Health, and through the Wellness page on practicepro.ca encourages lawyers in distress to make use of the MAP.

THEN

Work and wellness (Summer 2006): How to balance life and work, the link between fitness and mental health, and how technology can be both a help and a harm.

NOW

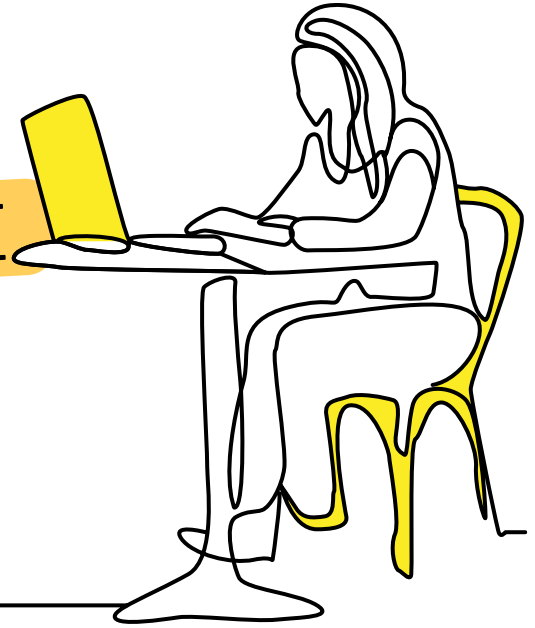
Finding your blue sky (Summer 2015): The unique challenges of being a lawyer, the signs of a colleague in distress, and how unhealthy lawyers affect client service. ■

Top Downloads in 2018

1	Perspectives on the Future of Law	5,803	11	Short General Retainer Letter	1,522
2	Cybercrime & Bad Cheque Fraud Fact Sheet	5,392	12	The Biggest Malpractice Claims Risks	1,404
3	General Retainer Letter	3,695	13	Employee Departure Checklist	1,395
4	Checklists page	3,426	14	Artificial Intelligence: What is AI and Will it Really Replace Lawyers?	1,365
5	The Future of the Professions (book review)	3,135	15	Landmines for Lawyers When Drafting Wills	1,290
6	Limited Scope Representation Resources	2,671	16	Amendments to Rule 48 bring major changes to administrative dismissals	1,218
7	Managing the Finances of Your Practice booklet	2,043	17	Personal Injury Retainer Letter	1,051
8	Managing the Lawyer/Client Relationship	2,032	18	Managing a Mentoring Relationship booklet	1,145
9	Tendering Correctly: Preserve Your Client's Rights (And Avoid a Claim!)	1,899	19	ILA for Domestic Contracts Checklist	1,142
10	LinkedIn Dos and Don'ts	1,809	20	Managing a Better Professional Services Firm booklet	1,139



THERE'S MORE TO THE TITLEPLUS PROGRAM THAN MEETS THE EYE



Making things easier for you is a motivation for us

With better clarity and ease of use being the focus of the program, 2018 saw a year of improvements to better meet the needs of our subscribers and their clients.

We streamlined underwriting requirements for mortgage transactions so you can offer better options to your clients, and increased automated underwriting limits for commercial properties saving you time and money.

We made revisions to consumer documents in light of changes to the *Construction Act* and we further clarified the definition of a “private lender” and coverage implications.

There's more to the TitlePLUS program than meets the eye

Maintaining healthy competition in the marketplace and ensuring fair pricing and claims handling is a matter of public policy and is in the consumer's best interest. This and keeping real estate lawyers an integral part of the real estate transaction has been the mission of the TitlePLUS program since its inception. As an option in the title insurance market, the TitlePLUS program helps to ensure reasonable premiums and broad coverage for consumers.

The TitlePLUS program also saves the primary E&O program thousands of dollars. This is largely due to the legal service coverage afforded under TitlePLUS policies, where in some cases, there is

coverage for losses that the E&O program would not cover (such as fraud). In this way, the loss (sometimes millions of dollars) is absorbed by the TitlePLUS program.

The fight to stop fraud

We participated in the fight against real estate fraud to the benefit of all who want a crime free real estate market, by declining over \$4 million in TitlePLUS policy coverage for potentially fraudulent transactions in 2018. We also either declined coverage or inserted a special exception to coverage for transactions involving properties with a history of use as illegal grow operations.

Claims update

Over the last number of years, the rate of claims for the program has remained relatively flat. Over 400 TitlePLUS claims files were closed in 2018.

Types of common claims we see in real estate transactions:

- A condominium purchase agreement lists a locker or parking unit as part of the purchase, but these units are not included in the Transfer, resulting in the failure of the client obtaining title to the locker or parking unit
- A property comprises of two or more PINs, but only one PIN is conveyed in the Transfer, resulting in the failure of the client receiving title to all of the property they contracted to purchase
- A waterfront property does not front on a nearby public roadway and access is across a private laneway with no registered right of way or easement and lack of confirmation of a legal right to access the private laneway, resulting in the client not having access to the waterfront property (via the laneway). ■

In a landscape of limited options,
the TitlePLUS program¹ remains committed
to keeping the lawyer involved
in the real estate transaction



for lawyers
by lawyers

To learn more,
call 1-800-410-1013
or visit titleplus.ca



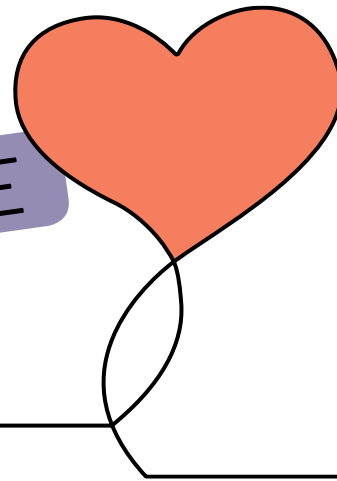
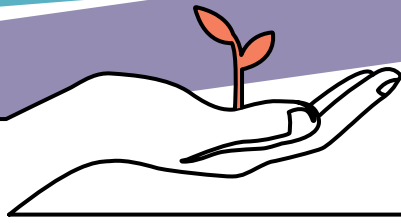
The only wholly Canadian owned
title insurance available in Canada



¹ The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LAWPRO). Please refer to the policy for full details including actual terms and conditions.

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BRINGING our corporate social responsibility TO LIFE



Over the years, our corporate social responsibility (CSR) program has intrinsically become a part of LAWPRO's culture and identity. Here are highlights of our contributions to the profession, charity and employee wellness in 2018.

- Green & Wellness Committee programming in 2018 included a lunchtime skate (in cooperation with the Social Committee) and three Wednesday Wellness bike rides.

Fostering the legal profession

- LAWPRO continued its efforts to reach students and new lawyers by participating at the Toronto Lawyers Association Articling Head Start program, making presentations to the French language common law program at the University of Ottawa, the English language Law Practice Program ("LPP") at Ryerson University, the French language LPP at the University of Ottawa, by delivering a CPD to new real estate lawyers, and making presentations to students in the Law Clerk/Legal Assistant programs at Durham College.
- In its seventh year, LAWPRO sponsorship of the annual award of the Caron Wishart Memorial Scholarship went to University of Toronto Faculty of Law student Aya Schechner. The scholarship, managed by the University of Toronto, was funded by donations from LAWPRO, Caron's family members, and members and organizations of the legal profession. The amount raised was matched by the Province of Ontario, to create a fully-endowed fund in excess of \$100,000.
- LAWPRO encourages employee involvement in a wide range of professional associations and groups that represent diverse segments of the legal profession. These activities help us gain insight into members' priorities and concerns and allow us to highlight how LAWPRO's efforts and activities are supporting the legal community.

Promoting wellness and balance

- LAWPRO promotes well-being by providing approximately half of the funding for the operation by Homewood Health of the Law Society's arm's-length Member Assistance Program (MAP). LAWPRO has promoted the program and the services it offers in presentations, print publications, online and through social media.
- In November 2018, LAWPRO's Human Resources department offered its annual flu shot clinic for employees.

Supporting the broader Canadian community

- Each year, LAWPRO staff nominate charities for inclusion in the company's Denim Friday charitable giving program and staff vote on the nominees. Employee donations are matched by the company. LAWPRO raised a total \$32,450 for its five chosen recipient charities in 2018, up from \$31,300 the previous year. Donations of \$6,490 went to each of Fanconi Canada, Ovarian Cancer Canada, the Toronto Humane Society, the Good Shepherd Refuge Social Ministries, and Food Allergy Canada.
- LAWPRO encourages employees to take a paid day off each year to volunteer their services in support of an eligible charity. In 2018, employees donated three days in support of their chosen charities. Charities that benefited from help by LAWPRO staff included International Justice Mission, Toronto Star Santa Claus Fund and St. Agnes Kouying Tsao Parish.
- LAWPRO was proud to be a sponsor of the 2018 Lawyers Feed the Hungry Bowl-a-Thon, Billiards with the Bar, and Courthouse Rocks to help raise funds to pay for the meals served to the needy. LAWPRO also participated as purchaser of tickets to the Ernestine Affair, a fundraiser for Ernestine's Women's Shelter, the LEAF (Women's Legal Education and Action Fund) annual fundraising dinner to commemorate Persons Day, and sponsored the Women in Insurance Cancer Crusade Relay for Life.
- A group of LAWPRO staff get together a few times a year to donate blood. As part of the "Partners for Life" program, group members pledge annually to donate a certain number of units. In 2018, LAWPRO staff donated 29 units of blood – enough to save up to 87 lives.
- In 2018, the Underwriting and Customer Service department opted to sponsor a family through the registered charity of Holiday Helpers. Through fundraising efforts and donations they were able to donate close to \$1,900 worth of donations including clothing, household items and gift cards. ■



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