

The evolving face of risk management



The next 15 years

Dan Pinnington joined LAWPRO in January of 2001 as director of the practicePRO program. Over the last 13 years he worked to expand the offerings and reach of this critical undertaking. It has become an internationally recognized risk management and claims prevention initiative. In this interview, Dan reflects on how risks and risk management have evolved over his time at LAWPRO, and where they will go in the future.

From what you have seen in your time at LAWPRO, how do you evaluate the impact of the practicePRO program on claims prevention?

There is direct evidence that our practicePRO efforts are paying off. Every year my LAWPRO colleagues and I get personal comments or emails stating that the information or resources we provided helped lawyers recognize they were in a situation that could lead to a claim and that they took steps to avoid it. These comments are along the lines of "I heard you speak on abc at a CPD program and it helped me avoid a claim..." or "I read the article in *LAWPRO Magazine* about xyz and took steps to avoid that danger..." And in a recent example, the articles we have published on avoiding administrative dismissals claims over the last two years have prompted dozens of calls to our claims department. While some of these situations ended up as costly claims, we were able to take steps to avoid claims in many instances as well.

I also think we are helping lawyers better appreciate where and why claims happen as at CPD programs and law firm presentations we hear comments like "What you said really resonated with me with respect to a matter I currently am handling..." or "The comments you made highlighted a risk I didn't appreciate and I will take steps to avoid that risk..."

From telephone calls through our customer service department, our Fraud Response Team members have directly confirmed for many Ontario lawyers that the matter they were handling was in fact a bad cheque fraud. And on a daily basis, lawyers from all over the world

are finding helpful information on the AvoidAClaim blog when they search the names of potential clients who may be fraudsters. Some of these lawyers are posting very thankful comments on the blog acknowledging that we helped them avoid being the victim of a bad cheque fraud.

Unfortunately, it is impossible to get an actual total number of prevented claims for several reasons, including lack of data. In addition, proving a negative (i.e., that a claim didn't happen) is always more difficult than proving a positive (i.e., a claim occurred). Ontario lawyers could really assist by letting us know when our efforts helped them avoid a claim. That allows us to gauge which communication methods are preferred by lawyers and ultimately, most effective in claims prevention.

Where do you think the practicePRO initiative has had the biggest impact?

I think the biggest impact of the program has been making Ontario lawyers more aware of where and why claims happen, and how they can be avoided. This has come about as a result of our extensive education efforts on claims and claims prevention. I don't think there are any other jurisdictions where lawyers are exposed to as much claims prevention education. Our education efforts include the content in *LAWPRO Magazine*, in our webzines, in our CPD and law firm presentations, and the other print and online resources and checklists we have created for the bar. The LAWPRO Risk Management Credit is another big part of our education efforts and has also had a huge impact.

I also think we have really helped the profession practise better and smarter with the practical and “how to” information and resources we provide lawyers. Take our biggest area of claims – lawyer/client communications – as an example. The Rules of Professional Conduct say we need to communicate with clients, and intuitively, I think most lawyers see and appreciate the need for good client communication. However, some practical application of the theory takes it one step further. By talking about real-world scenarios and examples of claims, we give lawyers a better understanding of where communications with clients can break down or be a problem. This practical information helps lawyers better recognize and avoid these situations.

From the feedback and comments I have received over the years, it is also clear Ontario lawyers have really appreciated receiving the information we have provided about using legal technology and avoiding the dangers associated with it.

Can you tell us more about how you think the LAWPRO Risk Management Credit has had an impact?

The concept of obtaining a premium credit for studying risk management content was first introduced in 2001 when Ontario lawyers could claim a \$50 credit for completing three modules of our innovative Online Coaching Centre. It grew from there when we gave a premium credit for attendance at continuing legal education or CLE programs (as they were then called) that provided substantial risk management advice. In 2003 there were just 2,237 attendees at 12 approved programs. From that small start it has grown substantially. There were over 58,000 attendees at the 240 qualifying programs offered between September 16, 2012 and September 15, 2013. Of course, in the last two years, the Law Society’s implementation of the Continuing Professional Development Requirement has helped boost the number of lawyers attending LAWPRO Risk Management Credit approved programs.

But the growth in the numbers claiming the credit is only part of the story. In its various forms the LAWPRO Risk Management Credit has changed the face of Continuing Professional Development (CPD) in Ontario. Traditionally, CPD programs focused solely on substantive law. Due to the credit, a large number of CPD programs now include a significant amount of risk management and claims prevention content. This is one of our best channels for getting our risk management message to Ontario lawyers.

What are the biggest claims risks?

Most lawyers are surprised to learn that claims coded “failure to know or apply substantive law” account for a relatively small portion of LAWPRO claims. Over the last 10 years, law-related errors were only 12 per cent of LAWPRO’s claims by count (15 per cent by cost).

The most common malpractice errors in our claims portfolio, constituting more than one-half of LAWPRO’s claims in most areas of practice, involve (i) basic lawyer/client communication and

relationship issues (more than one third of LAWPRO’s claims), and (ii) time/deadline management or procrastination issues (18 per cent of LAWPRO’s claims by count). For more information on the most common malpractice errors see the adjacent sidebar.

What are the current and upcoming challenges for risk management and claims prevention and where do you see the practicePRO program going in the next 15 years?

That’s an interesting and tough question. Looking back at this point, I don’t think I had any idea when I started at LAWPRO in 2001 of where things were going to be 15 years on. Perhaps I can make predictions that are a bit more informed this time.

The basic premise of the practicePRO initiative is that claims can be reduced by helping lawyers to better appreciate where and why malpractice claims happen, and to know the proactive steps that can be taken to avoid or reduce the likelihood of malpractice claims occurring. This premise drives everything the program does and I don’t see this changing. While the premise won’t change, the deliverable will.

The recent rise in the numbers of claims we are seeing (both in raw numbers and in the rate of claims) and in the overall cost of claims is a concern. And when we look at the breakdown of those claims, unfortunately, despite our best efforts, the most common errors and biggest malpractice risks really haven’t changed over the last 10 years. While we would like to see that change, our past experience suggests this is unlikely. When you take a more detailed look at claims, you can see some changes over time by area of law and error type. In the last two years we have had a huge spike in claims driven by administrative dismissal claims. We are working hard to bring these under control. Anecdotally, dabblers seem to be a greater problem. We expect to see wills and estates claims rise given the bulge of baby boomers that will finalize their estate plans and then pass away over the next couple of decades.

Carrying on with that theme, I see us providing content that is more focused on different segments of the bar as it becomes far less homogenous than it was 15 years ago. There are fewer general practitioners and most lawyers are becoming more specialized. Thus, we will need to target different areas of law, as well as lawyers at different stages of practice.

Checklists are one of the best ways to make sure all necessary steps and communications occur on every matter. We have provided the bar with a number of checklists over the years, and I expect we will provide updated and new ones in the future. The same goes for our “how to” resources.

LAWPRO and its practicePRO program have a huge presence on the web and we are very active on social media. I see this growing even more and as we all become more wired and connected, I think the

web will offer other new and interesting ways for practicePRO staff to reach out, communicate and collaborate with members of the profession. We plan to offer multi-media content on our website and perhaps even a YouTube channel.

And, while I am excited about all the new ways we are connecting with Ontario lawyers and other legal professional stakeholders online, I also think direct contact with people will continue to be very important. My colleagues and I will continue to participate in CPD programs, law firm presentations and other events. And in the very near term, I am pleased to say we expect to add a new lawyer to my department of LAWPRO, claims prevention and stakeholder relations, to assist our practicePRO outreach and content creation efforts.

As mobility and globalization increase, I also think we will be working more closely with our Law Society and the law societies and insurers in the other provinces and territories in Canada on insurance and risk management issues. And as is discussed in more detail in the Future of Law article (see page 25), the profession is on the threshold of some huge changes. No doubt, these changes will bring new risks and claims exposures, and in a broader context, new and interesting policy and coverage options and issues for the LAWPRO program.

More information on the most common errors and malpractice claims

The following articles have more information on the common areas of claims, including specific claims scenarios for the different types of errors and specific areas of practice:

- “The Biggest Malpractice Risks”
practicepro.ca/biggestrisks
- “Real Estate Claims Trends”
practicepro.ca/realestateclaims
- “Litigation Claims Trends: Errors & Insights”
practicepro.ca/litigationclaims
- “Corporate Law Claims trends”
practicepro.ca/corporatecommercialclaims
- “Family Law: Increasingly a Risky Business”
practicepro.ca/familyclaims
- “Wills and Estates Claims Causes”
practicepro.ca/willsestatesclaims

The most common malpractice errors

In almost all areas of practice the most common errors and the biggest causes of claims are problems with **lawyer/client communication** and relationship issues. Communications-related claims occur when important aspects of a matter are not handled properly due to miscommunication, poor communication or no communication at all. These claims occur because there is not enough time or effort spent on setting and controlling client expectations on the nature and scope of the retainer; explaining how the matter will proceed and how long it will take; outlining what strategies or options exist and what the potential outcomes of the matter will be.

The second biggest issue in most areas of practice is **missed deadlines and procrastination**. Deadline errors involve not knowing a limitation period, missing a limitation because it was not entered in a tickler system, or a failure to respond to a deadline that was in a tickler system. We are currently seeing a significant spike in claims due to the failure by lawyers to respond to Rule 48 status hearing notices. Procrastination claims occur because a lawyer did not do work as promised or on a timely basis. Lack of follow-up claims occur when draft documents or instructions are sent and there is no follow-up (e.g., the draft will is sent to a client but never signed).

The third most frequent error, **inadequate discovery of fact or investigation**, arises when lawyers do not pay attention to details or ask clients all the questions they should. Examples of this type of error include not: investigating details of an injury or physical limitations as a result of an injury; understanding the nature of a transaction and the intended outcomes; or investigating the extent of assets or liabilities on an estate planning or family matter.

Failure to know or apply substantive law is the fourth most common error. Unfortunately, lawyers don't always recognize when they are getting in over their heads and when this happens, making sure they take steps to seek help or refer the matter to a lawyer with appropriate knowledge. A good portion of the “law” errors arise from dabblers – people doing work outside their usual area of expertise (often with the good intention of helping a family member or friend).

Conflicts of interest errors are the next most common. These occur when lawyers act for more than one person or entity with a related interest (e.g., previous vs. current clients, family members and businesses, and/or company and directors/shareholders). They can also occur when a lawyer has a self-interest in a matter (e.g., when fees are owing or when the lawyer has invested in the client).

Clerical/delegation/supervision errors come next. These typically involve misfiled or lost documents, mistakes on filings or forms, or the failure to complete critical steps on a matter (e.g., issue a claim, file pleadings, serve a document). They can also involve a lack of supervision or poor delegation, usually when work is given to a non-lawyer employee and it is not checked.



and outside of Ontario. To easily find our best and most popular resources, I hope Ontario lawyers will use the practicePRO 15th Anniversary Pullout, which appears in the centrefold of this issue of *LAWPRO Magazine*.

By sheer number of visitors – currently more than 650 per day – the AvoidAClaim blog is one of our most popular resources. And we know the blog is helping lawyers avoid being duped by bad cheque frauds. However, at least a few times each year we hear from an Ontario lawyer who was successfully duped notwithstanding the exact name of the fraudster client and details of the fraud were posted on AvoidAClaim. This situation is one of my biggest frustrations as these frauds are so easily avoided by recognizing the red flags of fraud and/or a quick visit to the blog. The feelings of frustration are compounded by feeling badly for a lawyer who easily could have avoided being personally liable on a shortfall of tens or hundreds of thousands of dollars of overdraft in the firm trust account, depending on the circumstances. (See the “Could This Happen to You?” article on page 19.)

Our practicePRO Lending Library is probably one of our most under-utilized resources. To help lawyers improve their practices, this library has more than 120 books on various topics that Ontario lawyers can borrow for free. There are some fantastic books on practice management, firm finances and billing, legal technology, software programs, social media marketing, how to start and build a practice, selling and winding down a practice, and many other topics. Lawyers can go to practicepro.ca/library for a full list of books and borrowing instructions.

What is the most important risk management message you would like to leave lawyers with?

There will always be claims that come out of left field that no one could anticipate or avoid (and for this reason it is a huge comfort to have the LAWPRO insurance program standing behind you). But the errors that lead to the majority of LAWPRO’s claims, including many of the most common ones, are easily preventable. And with a bit of extra care in documenting a file, lawyers can put themselves in a far better position to defend a claim. I wish more lawyers appreciated these things – then maybe they would take steps to avoid or lessen the risk of a claim and be better prepared to help us defend a claim, or as LAWPRO CEO Kathleen Waters put it in her editorial, “drink the water” that the practicePRO program is offering. Please, everyone, read the Most Common Errors sidebar and take steps to avoid these types of claims.

Are there any practicePRO resources you wish more lawyers were using?

Judging from the feedback we get and the traffic and number of downloads on our websites and the AvoidAClaim blog, our resources are clearly very popular with members of the profession, both inside

Is there anything Ontario lawyers can do to assist practicePRO’s efforts in helping members of the profession avoid claims?

Yes, two things. Firstly, the feedback, questions and suggestions we get directly from Ontario lawyers help us better understand what lawyers are struggling with and where they need help. We use this information to decide the topics we will cover in *LAWPRO Magazine*, the risk management messaging we want to see addressed in programs we are approving for the Risk Management Credit, and the types of resources and checklists we will create. We can do a better job of reducing claims if the risk management messaging and resources that we are providing to the profession are addressing current issues and risks.

Secondly, as I stated at the start of the interview, we would love to know when our efforts helped someone avoid a claim. Needless to say, we would use this information to target or increase our efforts to do more of the same thing. We really appreciate any and all comments – they make our job easier and more enriched. ■

Dan Pinnington is vice president, claims prevention and stakeholder relations at LAWPRO.