



LOSS PREVENTION BULLETIN

ISSUE NO. 54

SUMMER 2012

CANADIAN
LAWYERS
INSURANCE
ASSOCIATION
ASSOCIATION
D'ASSURANCE
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■ **Bulletin # 208**
Malpractice Avoidance - Some Friendly Reminders

At the spring 2012 American Bar Association Standing Committee on Lawyers' Professional Liability National Legal Malpractice Conference, Ronald C. Minkoff, Laura Frankel, Richard A. Simpson and Robert H. Moses presented a session on professional liability claims arising out of a family law practice. Their presentation included a Top Ten list of reasons why family lawyers are sued. As you review the list, I'm sure you'll agree that most are equally applicable to lawyers in many other areas of litigation practice.

Their top 10 reasons (in no particular order) are:

1. Client emotion

Clients who are emotionally invested in the issues under litigation are more likely to be dissatisfied with the results achieved by their counsel, regardless whether or not, objectively, a win was achieved. Being alert to your client's degree of emotional involvement in the matter and taking proactive steps to help your client resolve or otherwise deal with those issues may help to prevent or avoid claims made by unhappy, blame-shifting clients.

2. Failure to undertake adequate or appropriate pre-trial processes and investigations

Complex legal and factual issues demand that lawyers are thorough and diligent in requesting and obtaining financial information, in undertaking discovery processes and protecting a client's assets and position. Always ensure you have taken all necessary steps to gather evidence within the scope of your client's budget and your instructions are clear if your client has declined to follow your advice in this regard.

3. Client's perception that settlement is inadequate

This is related to the first point. Where there is emotional investment in the issues and the outcomes, achieving a settlement that the client perceives as satisfactory, especially with the benefit of hindsight, is particularly difficult. For this reason, settlement discussions with your client should be well-documented and instructions obtained or confirmed in writing.

4. Failure to retain necessary experts

This is a strategic decision but may include budgetary considerations. If expert evidence is needed to make your case, make sure that you have fully discussed this with your client and have clear and well-documented instructions as to whether or not to retain any experts required.

5. Fee disputes

Fee disputes are frequently a precursor to a malpractice claim. Get the terms of your retainer in writing. Bill regularly so there are no surprises when the file closes. Keep the lines of communication open with your client

on fee issues. And think twice before suing for unpaid fees, as a malpractice claim is frequently filed as a counter-claim.

6. Client confusion regarding fee-shifting issues

In domestic files in particular, the parties may have reached agreement as to who is responsible for payment of legal fees and/or disbursements. In any file, such agreements need to be clearly documented so as to avoid confusion about who is responsible to pay what. Essentially, this is a communications issue and therefore, easily avoided.

7. Withdrawal of services

This is an issue that arises where it may be unclear when the retainer ends or where a lawyer seeks to withdraw because of some conduct of the client, or a client's failure to meet obligations under the retainer agreement. To avoid this scenario, scope of services to be provided should be clearly set out in a written retainer agreement. Withdrawal of counsel in the course of litigation is subject to provisions of the applicable Professional Code of Conduct, as well as the direction of the Court, in many cases. While there are circumstances where it will be necessary to withdraw services, where possible, other options should be considered.

8. Failure to properly draft prenuptial, separation and other key agreements

Malpractice claims based on poorly drafted agreements can occur in any area of practice. These may be the result of a lack of knowledge of the subject area, over-reliance on precedents, poor editing or any number of factors. These are claims based upon errors made by lawyers or their staff and stress the need for a diligent approach to document preparation and review.

9. Multi-jurisdictional issues/choice of law

As clients and legal practices become increasingly mobile, jurisdictional issues become more common. If you're exercising your mobility rights within Canada, ensure you are aware of the relevant law and procedure in any jurisdiction where you don't normally practice. Consider seeking the assistance and advice of a local agent. If the parties to your transaction or claim are in different provinces or countries, ensure you've addressed your mind to issues of jurisdiction and choice of law whether in terms of determining where to bring a claim or enforce a judgment or settle a dispute should it arise in the future.

10. Poor communication

Many of the risk factors noted above relate in some way to this one. Poor communication is one of the most frequent bases for complaints to law societies about lawyer conduct, and similarly, is frequently the root cause for malpractice claims. Though most lawyers view themselves as skilled communicators, clients often disagree. Communication issues can include failure to



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respond to emails or phone messages, failing to properly explain legal terms and opinions and failing to document (and follow) client instructions.

Based on materials presented in the session "Til Death Do Us Part: Representing an Attorney in a Matrimonial Matter", April 19, 2012, American Bar Association National Legal Malpractice Conference

■ **Bulletin # 209**

Book Review: *Avoiding Extinction: Reimagining Legal Services for the 21st Century* by Mitchell Kowalski

Inspired by *The End of Lawyers?*, Richard Susskind's 2008 challenge to the legal profession, Mitchell Kowalski (writer for the National Post's Legal Post blog) has followed up with an engaging and thought-provoking narrative tale about fictional law firm, Bowen, Fong and Chandri, PC ("BFC").

BFC delivers its services in a manner foreign to most traditional law firms, and more akin to a corporate legal department. The firm's mantra is: BFC performs legal services that differ from those of our rival or similar legal services, but in a very different way.

The same might be said of Kowalski's style in writing this book. He delivers a message you may have heard before if you pay attention to legal thinkers and writers like "Susskind or Jordan Furlong," but shines a light on the concepts in a way that brings them to life and makes you want to jump ship to work at BFC.

Kowalski describes a new model of practice that requires firms to question what value they provide and clearly define that value for the client. Files are "skinnied" by lawyers helping their clients to make choices about what steps are necessary, incentives are built-in for both efficiency and quality performance, and risk is shared.

He points out that the traditional model of legal partnerships is flawed as it creates disincentives to long term strategizing, breeds a lack of loyalty, wrongly assumes that past successes are predictive of future success thru reliance on doing things the way they've always been done, and creates instability through self-interested individual lawyers and legal departments.

Fictional firm BFC effectively relies upon both lean processes and legal project management techniques to manage risks and define the scope of each engagement, a loss prevention technique that "eliminates any 'I thought you were, or were not, going to do that' comments" from clients at the close of the engagement. In doing so, BFC uses value-based billing techniques, tailored to the specific client and the mandate for which they are retained. There are no timesheets, billable targets or disbursements for overhead expenses.

Though published by the American Bar Association, this is story is clearly written by a Canadian author speaking to Canadian law firms and legal departments. Kowalski even pays homage to the Timothy Eaton sculpture formerly at home in Winnipeg's downtown Eaton's store and now exhibited at the MTS Centre.

If you're a lawyer in private practice, a managing partner or a member of a corporate legal department and you've ever thought,

there has to be a better way to practice law, this book is for you.

Avoiding Extinction: Reimagining Legal Services for the 21st Century (2012) by Mitchell Kowalski is published by and available for purchase through the American Bar Association at: <http://apps.americanbar.org/abastore/index.cfm?section=main&m=Product.AddToCart&pid=1620492>

■ **Bulletin # 210**

Data Protection Tips

News stories about data breaches are becoming almost common place. Most recently, LinkedIn, the popular professional networking site reported that they had been hacked and password information was stolen.

Even if you don't have an IT department or contractor at your disposal, there are steps you can take to protect your information. Here are some practical tips you can implement right now to enhance the security of your firm and client data:

Strengthening Passwords - individual associate, partner and employee passwords should be 8 to 16 characters and include numbers, letters and symbols. Don't use personal information to compose a password. For example, you may wish to consider using a familiar phrase or saying - "Ask not for whom the bell tolls, it tolls for thee 50" becomes ANfwTBTITFT50. (But, please don't use this one!)

Encrypting data. Data encryption is an easy and simple step and provides an effective means of protecting sensitive material. There are a number of software programs that offer to encrypt your data both in storage and during transmission. For a list of encryption resources, read FYI: *Playing it Safe with Encryption* published by the ABA's Legal Technology Resource Centre and available online at: www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/FYI_Playing_it_safe.html

Controlling access. Not everyone needs to access everything. Employees should only have access to the data needed to do their job. A quick Google search for "file access controls" will give you easy to follow steps to limit access on specific documents.

Monitoring. Activate logging on your internal systems to capture when someone logs in and out, changes a file, etc. Again - a quick Google search for "enabling logging for Windows XP" (or whatever your operating system is) will yield instructions on how to activate monitoring.

Employee training. Make this a function of the training process for all new hires, and offer a refresher course for already hired employees. Most of us likely offer staff training when we upgrade our software - ensure that data security measures are part of that training.

And finally - have **written policies and procedures**. No matter how big or small your firm this is an important step from an operational standpoint.