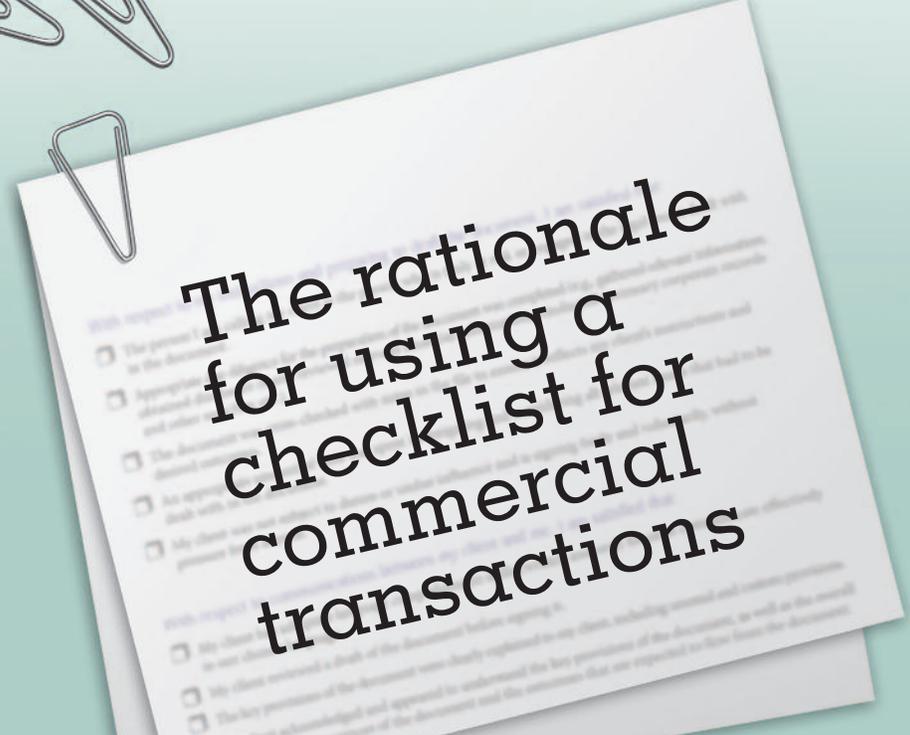


Getting the final document correct:



Many commercial matters involve the preparation of one or more documents. These documents are drafted based on communications between the parties to the document and/or their respective lawyers, the specific circumstances of the matter and applicable substantive law.

While the majority of commercial deals in Ontario are concluded without difficulties, all too often LAWPRO sees claims arising due to various real – or alleged – problems with the documents that lawyers have prepared for clients on commercial matters. These problems frequently arise due to communications problems between the lawyer and client.

In fact, lawyer/client communication issues are the most common cause of claims in the commercial area. The communications problems that lead to claims in this area involve failures by the lawyer to: follow the client's instructions; obtain the client's consent; inform the client of the implications of decisions/actions to be taken; or clearly communicate with the client.

Of the 3,085 claims arising out of commercial law practice (including bankruptcy, securities and tax) reported to LAWPRO between 2000 and 2010, 1,205 – or close to 40 per cent – involved communications issues.

The cost of resolving communications-related claims will be approximately \$57 million (\$169 million for all commercial claims). The oldest communications-related commercial claim LAWPRO has ever seen was reported 24 years after the work was done (the oldest commercial claim was reported 44 years after the work was done) – proof positive that in this area of law it can take a long time for past events to catch up with the lawyer involved.

Sometimes there is a real communications mistake and a legitimate claim due to an incomplete or improperly drafted document or other mistake by the lawyer. For example, a mistake is made as to the specific details of the matter and what is to be included in contracts or other agreements.

However, on many communication-related claims the lawyer and client will have a very different recollection about what was said and done or not said and not done. Communications can be incomplete (perhaps due to a language barrier or because the matter was rushed), or there's confusion about who is to look after tasks before or after the matter is concluded. Credibility plays a large part in resolving these claims and LAWPRO finds these matters difficult to successfully defend if the lawyer has not documented the instructions with sufficient notes or other documentation in the file.

Practically speaking, you can't document every communication and every step taken on every matter. You also can't anticipate and address every possible outcome, especially for things that may come up after the retainer is over.

But equipped with an understanding of where the most common communication errors occur, you can take steps to significantly reduce your risk of a malpractice claim. These steps can also put you in a much better position to successfully defend yourself in the event an allegation of negligence is made.

The checklist on the next page contains a series of questions lawyers should ask themselves to help ensure that the commercial documents they are drafting correctly reflect the client's instructions and expected results. By following the steps in this checklist, you will be taking steps to proactively manage your file and address the areas where communication problems most commonly occur. You will also be creating a paper trail that could be invaluable in the event your client sues you for negligence.

Most lawyers will want to avoid a claim at all costs. Dealing with an allegation of negligence where there was none can be just as distressing as dealing with a claim where you made a mistake. To stay out of trouble consider reviewing this checklist next time you are drafting a document for a client. ■

Getting the final document correct

FILE NUMBER: _____

DATE CHECKLIST COMPLETED: _____

CLIENT/MATTER NAME: _____

This checklist assumes there is a single client, with a few exceptions. If there are multiple clients, each of the items in the checklist should be read as applying to all clients.

With respect to my instructions and preparing to draft the document, I am satisfied that:

- The person I am calling my client is the person who is truly at risk or engaged in the legal issues dealt with in the document.
- Appropriate due diligence for the preparation of the document was completed (e.g., gathered relevant information; obtained disclosure of and reviewed relevant financial information; conducted necessary corporate records and other searches; etc.).
- The document was cross-checked with notes in the file to ensure it reflects my client's instructions and desired outcomes.
- An appropriate amount of time was spent investigating and considering all relevant issues that had to be dealt with in the document.
- My client was not subject to duress or undue influence and is signing freely and voluntarily, without pressure from anyone.

With respect to communications between my client and me, I am satisfied that:

- My client has adequate language comprehension skills (written and oral) for us to communicate effectively in our chosen language.
- My client reviewed a draft of the document before signing it.
- The key provisions of the document were clearly explained to my client, including unusual and custom provisions.
- My client acknowledged and appeared to understand the key provisions of the document, as well as the overall nature and consequences of the document and the outcomes that are expected to flow from the document.
- I explained the possible negative outcomes that could flow from the document, if any.
- My client understands the final and legally binding nature of the obligations being undertaken and that there are no (or limited) opportunities to withdraw after signing.
- I have told the client about areas where I am not able to give advice and the client should consider retaining another appropriate expert (e.g., accountant, business advisor, etc.).
- I answered all questions that my client asked to my client's satisfaction.
- The client clearly confirmed that the document reflects and is consistent with his/her instructions.
- All required follow-up steps to be undertaken by my client are noted in the document and/or a reporting letter.

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cont'd on next page

With respect to the drafting of the document and the use of precedents, I am satisfied that:

- The document is sufficiently well-drafted to accomplish my client's objectives.
- All required clauses are in the document, including all required standard boilerplate clauses.
- There are no ambiguities or inconsistencies as between the clauses in the document.
- The terms of the agreement are both certain and enforceable.

With respect to real and potential conflicts of interest, I am satisfied that:

- My work for this client will not impair the duties of performance that I and other lawyers at my firm have to our other clients.
- My work for this client will not affect the relationships that I and other lawyers at my firm have with our other clients.
- Neither my personal interests nor the interests of my firm will affect my handling of this matter.
- There is no risk of me having and disclosing the confidential information of one client to another, and if necessary, confidentiality screens have been put in place.
- Where there are multiple clients, there are no conflicts of interest as between the various clients I am acting for on this matter.
- ILA was not required on this matter or my client required and received appropriate ILA.
- There are no conflicts of interest as between my client and past clients I have had.
- Where there are real or potential conflicts, appropriate waivers have been obtained from the affected clients.

With respect to legal issues relating to matters dealt with in the document, I am satisfied that:

- I have sufficient knowledge of the relevant areas of substantive law necessary for the preparation of this document.
- All relevant substantive law issues have been considered and appropriately dealt with in the document.
- There are no tax issues raised by the document or all appropriate tax issues have been properly considered and addressed, with (if necessary) the help of expert tax advice.

With respect to file management steps taken on this matter:

- I opened a file.
- I completed a conflicts check for all clients and others connected with the matter.
- I took notes of my meeting(s) with my client and retained these in the file.
- I docketed the time spent in the initial and subsequent meetings and phone calls with my client on this matter.
- I docketed the time spent drafting the document.
- I docketed the time spent reviewing the document with the client when it was signed.
- I placed this form, various draft versions of the document and a copy of the final version in the file.
- I sent a reporting letter outlining the terms of the document, resulting outcomes and obligations assumed together with my final account.

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Disclaimer: This checklist includes techniques which are designed to minimize the likelihood of being sued for professional liability. 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.

