

# Four things that can lead to a denial of coverage under your LAWPRO policy



Insurance is different from other types of contracts. Besides the ongoing obligations (as described in the policy's terms and conditions) that exist between the insurer and insured, there is also a duty of utmost good faith (*uberrimae fidei*, for you Latin fans). Just as an insurance carrier can't act in bad faith in denying a claim, a purchaser of insurance coverage is required to deal honestly and fairly with the insurer.

Most Ontario lawyers insured under the LAWPRO policy seem to keep these contractual and good faith obligations in mind. However, there are four common scenarios that lead us to coverage denials (and, sometimes, even have ethical implications for lawyers). It is worth discussing them in more detail.

## 1 Late notice of a real or potential claim

*"If during the POLICY PERIOD the INSURED first becomes aware of any CLAIM or circumstances of an error, omission or negligent act which any reasonable LAWYER or LAW FIRM would expect to subsequently give rise to a CLAIM [the] INSURED shall immediately give written notice thereof or cause written notice to be given..."*

– Condition E of the LawPRO Policy no. 2016-001 (the "Policy")

Any delay in giving notice can make it harder for LAWPRO to investigate and defend or effect a repair. There are a number of

recurring reasons why lawyers don't give immediate notice of a claim: they worry it will cost them (e.g. a deductible or claims history levy surcharge – simply reporting a claims costs nothing), or it will negatively impact their eligibility for certain options (such as a nil deductible), or they don't think the circumstances are serious enough to merit giving notice or they just find it embarrassing.

Some people may delay providing notice because they want to improve their coverage terms by first applying for increased sublimits or waiting until policy limits are reinstated annually (for claims-made policies like the Law Society program, this doesn't work).

Weigh any of these considerations against potentially breaching the *Rules of Professional Conduct* (see Rule 7.8-2) and having no coverage in place for a claim that winds up costing a lot.

The choice is clear: always provide immediate notice to *all* applicable insurers, including your excess insurer(s).

## 2 Attempting a self-repair

*"The INSURED shall not interfere in the investigation and defence of any CLAIM..."*

- Condition G of the Policy

On many occasions we see lawyers attempting self-repairs where the error appears small and easy to rectify, and as such, lawyers seem to think that it isn't necessary to give notice. However, if a self-repair goes badly, and the lawyer didn't give notice to LAWPRO beforehand, there may not be any coverage, particularly if the lawyer's actions hindered LAWPRO's ability to defend or repair the matter. Even if the LAWPRO policy does

respond, negative consequences such as an increased deductible or claim history levy surcharge could be avoided if LAWPRO had been involved and repaired the claim.

## 3 Acknowledging liability and failing to cooperate

*"The INSURED shall not voluntarily assume any liability or settle any CLAIM, other than in regard to [Prescribed Penalty expenses]"*

- Condition G of the Policy

Notwithstanding Ontario's *Apology Act*, there are instances where apologizing *will* still constitute an admission of liability (for more on this, see Yvonne Diedrick's judicially cited article, *The Apology Act 2009: A new dispute resolution tool* on [practicepro.ca](http://practicepro.ca)). To safeguard a relationship with an ongoing client, lawyers will sometimes say things to accept blame for errors and losses, or do things to try and help the client (e.g., act as a witness on behalf of the client). Other times, lawyers may have findings of negligence made against them in fees assessment proceedings. In these circumstances, if the client later sues the lawyer, LAWPRO may end up fighting an uphill battle because of the incriminating statements and findings. By not giving notice to LAWPRO at the start of all of this, the lawyer may have severely prejudiced LAWPRO's ability to defend the claim.

Other common ways that lawyers make it difficult to defend them include failing to provide relevant documents to LAWPRO, destroying records after receiving notice of a claim, and not responding to LAWPRO requests, calls and correspondence. Like the general duty to give notice of claims, this is contrary to the obligations imposed under Rule 7.8-3 of the *Rules of Professional Conduct*.

## 4 Failing to advise LAWPRO of a risk or material change

*"The keeping back [of information in an insured's knowledge relevant to risk] is a fraud, and therefore, the policy is void. Although the suppression should happen through mistake, without any fraudulent intention: yet still the under-writer is deceived and the policy is void; because the [risk] run is really different from the [risk] understood and intended to be run at the time of the agreement."*

- Per Lord Mansfield in *Carter v. Boehm* (1776), 97 E.R. 1162 at 1164

Appropriate disclosure of a LAWPRO insured's circumstances is important for our underwriters because it ensures that the premiums we charge reflect risks we are insuring. It is important to be frank when applying for any kind of insurance and when requesting any changes in coverage. If lawyers fail to disclose something relevant to their risk rating (e.g., they do real estate and should be carrying the Real Estate Practice Option Coverage), this failure to act in good faith may mean there is no coverage available in the event of a claim.

This duty to disclose is an on-going obligation: if a material change occurs during the course of the year that may impact risk, lawyers should notify LAWPRO (and any excess insurers). Examples of what may constitute a material change include: no longer qualifying for premium discounts under the part-time practice or restricted area of practice options; or requiring innocent party coverage because the lawyer has assumed vicarious responsibility for others.

The coverage provided to you by the LAWPRO policy is there for your benefit and the indirect benefit of your clients. Please protect that coverage by avoiding the above scenarios. If you are ever in doubt about what to do about a real or potential claim, or your obligations under the policy, please contact LAWPRO's Customer Service at 416-598-5899/1-800-410-1013 or [service@lawpro.ca](mailto:service@lawpro.ca). ■