

insurance**biz**

Balancing risk & fairness: How LAWPRO considers new insurance program coverages



When was the last time you stepped back and examined the specific risks you are exposed to in relation to your law practice and the insurance you have in place to address those many – and often disparate – risks?

It's that time again.

Autumn is risk assessment time for Ontario lawyers who are renewing their primary professional liability coverage with LAWPRO and (hopefully) considering what other coverages they may need given their own risk assessment. Watch for details on the 2012 insurance program in early October.

Similarly, LAWPRO undertakes its own regular risk assessment as it considers the components of the primary insurance program for the coming year. Included in that "prep work" are a detailed review of the program's results (claims experience), an analysis of where costs (and risks) are headed based on actuarial models and, when appropriate, discussions with members of the profession about evolving practice issues and potential related insurance program changes.

This detailed review – which starts in the spring and extends into late summer – culminates in our annual offer for the coming year's insurance program at the Law Society of Upper Canada's September convocation.

The insurance program requires the Law Society's approval because the program – and indirectly LAWPRO itself, as insurer – exist by virtue of the power given to the Law Society to operate the program in ss. 5(4) of the *Law Society Act*.¹

LAWPRO CEO Kathleen Waters notes that when the Law Society Insurance Task Force first introduced the LAWPRO errors and omissions program, the task force members

concluded that a continued program of mandatory insurance for lawyers was desirable because "...a program with broad coverage [i]s in the best interests of the public and in the best interests of the members of the profession."²

The task force also recommended, however, that the coverage be provided not by the Law Society directly, but by an insurance company managed according to generally accepted insurance principles. This recommendation led to the creation of LAWPRO (or LPIC as it was then known) as an independent, fully operational insurance company with its own management structure and board of directors. The majority of LAWPRO's directors are neither benchers nor Law Society employees.

The LAWPRO mandate

While LAWPRO is indeed an insurance company and not simply a bar-annexed indemnity fund, the Law Society is its principal shareholder and LAWPRO strives to operate in a manner consistent with the Law Society's mandate as set out in the Act.

This means that LAWPRO has a focus and philosophy quite different from that of most commercial insurers. Whereas commercial insurers' obligation to shareholders requires that their claims management and scope of coverage decisions focus on the financial bottom line, LAWPRO commonly approaches a claim by considering how coverage can be found, as opposed to denied.

Our mandate is clear: subject to the terms of the annual policy, we defend and indemnify lawyers against the risk that they – in the process of providing professional services (as defined under the policy) to a client – commit an error, omission or negligent act that results in a loss to the client, and which in

turn leads to a claim for compensation for damages by the client.

This unique focus does not, however, release us from the obligation to observe generally-accepted insurance principles. Among the mandate and principles of operation derived from the task force report are that LAWPRO be operated in a commercially reasonable manner, and that LAWPRO move to a system where the cost of insurance reflects the risks of claims. Moreover, as a regulated insurer LAWPRO is required to provide proof of its ability to meet our financial obligations and satisfy solvency tests. And balanced against all of these obligations is the expectation of members of the bar that LAWPRO will make every reasonable effort to control premiums.

The Task Force Report clearly recognized that this would not be a "no fault" system of compensation for clients, that some coverages would be limited or eliminated, and that coverage might be denied in appropriate circumstances.

Scope of coverage considerations

Individual lawyers can be endlessly creative in the services they provide and in the activities in which they engage; however, we must consider carefully each year, when preparing the offer for the next year's program, whether our terms of coverage should expand to cover the risks associated with new services and activities.

When faced with a request to expand our scope of coverage on a go-forward basis, some of the questions we ask ourselves are:

- Does the activity undertaken by the lawyer occur within a lawyer-client relationship? In other words, is there a client to be protected?

- Did the activity involve the provision of legal advice or other legal services that fall within the scope of a lawyer's practice as defined by ss. 1(5)-(7) of the *Law Society Act*?

Some examples may help to demonstrate the type of analysis LAWPRO undertakes when a lawyer contacts us to say, "Why doesn't your policy cover...? Can you change that for next year?"

Example No. 1: Lawyer online activities

One of the contexts in which we have considered these questions lately is with respect to lawyer adoption of the Internet for various purposes. In some instances, the answers are quite clear. Where a lawyer writes a blog for a law firm website as part of its marketing program and is sued for defamation over the blog's contents by a non-client, it can be expected that the claim arises outside any lawyer-client relationship and is therefore not covered by the insurance policy. And there is no imperative on the part of LAWPRO to amend the policy for future years to cover lawyer marketing activity in itself. There is no client who has been accepted by the firm and receiving legal services to be protected in a purely marketing setting. As a result, some firms have talked to their insurance brokers about media coverage, which is quite different from a lawyer's professional liability coverage as provided by LAWPRO.

What about lawyers who choose to use their legal knowledge to design products and sell them on the web, for example, "do-it-yourself" documents? A small number of firms offer access to forms or precedents for use by random website visitors who never obtain advice or enter into a traditional lawyer-client relationship with any of the firm's lawyers. To the extent that these forms or precedents could be viewed as "products" of the firm, the lawyers offering them are at potential risk of product-liability style claims by an unlimited number of end users who may feel that they used the "products" to their detriment.

For LAWPRO, a duty to indemnify lawyers under these circumstances goes beyond the contemplation of the mandatory policy as it is currently conceived and funded. The distribution of self-service "products" to a wide (in fact, unlimited) audience is fundamentally different, in terms of risk exposure,

from the delivery of professional services to a limited number of known clients.

Hypothetically speaking, if an amendment to coverage was proposed to take on these kinds of claims, LAWPRO would likely be forced to increase policy funding – an expense borne by the entire profession in the form of an increase in premiums. In deciding whether or not to create coverage for these kinds of claims in future policy years, we would need to consider whether lawyers who do not engage in or benefit from these kinds of business activities would be willing, if asked, to pay to protect those who do, especially where there is no client who has received legal advice, or entered a solicitor-client relationship, to bring forward a claim.

Also, product liability insurance is available in the commercial marketplace; it is underwritten and priced quite differently from professional liability insurance for legal practitioners.

Example No. 2: Lawyer activities beyond Canadian law practised in Ontario

Another key issue when thinking about scope of coverage relates to jurisdiction. The Law Society regulates Ontario lawyers for the protection of the public. Given that the *Law Society Act* is a statute of the Ontario government, one assumes that the legislature had the interests of the Ontario public top of mind.

We at LAWPRO, in thinking about the future, are mindful of the risks associated with extending the primary program into other jurisdictions (especially outside Canada) where it may be more logical and appropriate for other providers to bear the risks, or where we have little control over how legal services are delivered.

For this reason, while we facilitate access to justice through reciprocal agreements with other Canadian jurisdictions, we do not cover Ontario lawyers who practise foreign law, or who conduct much of their practice of Canadian law in a foreign jurisdiction. To provide affordable and sustainable E&O protection to Ontario lawyers – while also generally supporting the broader public protection mandate of the Law Society – LAWPRO must put some limitations on coverage.

This jurisdictional restriction means some Ontario practitioners must look elsewhere for coverage for their activities relating to foreign jurisdictions. The commercial insurance markets operating in the other jurisdictions, or internationally, have specialist underwriters to address these risks.

A standard policy that seeks broad-based fairness

Like the lawyers in the Internet services example, lawyers who practise foreign law may argue that the full range of their commercial activity is not covered under the program policy. It's important to remember, however, that we are talking here about a mandatory policy for which the cost is spread across the entire private practice bar. As LAWPRO Executive Vice-President Duncan Gosnell explains, when designing the mandatory coverage we must focus on providing "a standard policy that works for – and is fair to – the bar as a whole."

Most lawyers would agree that, in the interests of affordability and sustainability, a mandatory policy should be a standard, base level policy that is well-suited to most Ontario law practices. The focus is on indemnifying lawyers for claims from clients for professional services. The policy does NOT protect lawyers against the full range of possible claims that might arise from all forms of business activity, or business risks, that those lawyers might undertake.

If you provide services or engage in activities that fall outside the practice of law as defined by the *Law Society Act* and the protection provided by the LAWPRO program, you may want to take the time to assess both your risk exposure and the adequacy of the coverage provided under all of your insurance policies. Many other interesting and potentially helpful insurance products exist that LAWPRO encourages lawyers to review with their insurance brokers on a regular basis. ■

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¹ Subsection 5(4) of the *Law Society Act* states, "The Society may own shares of or hold a membership interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to licensees and to persons qualified to practise law outside Ontario in Canada"

² *Report to Convocation of the Insurance Task Force and the Insurance Committee*, October 28, 1994 (amended November 15, 1994), para. 16