Here today, gone tomorrow:

Insurance implications of lawyer transfers & practice structures

Lawyer mobility is now taken for granted: The days of spending one's whole career in a single practice setting are long gone. Consider these scenarios:

Scenario one: A lawyer previously in practice elsewhere joins a new firm. A claim is made based on work completed at the previous firm, but received only after the lawyer has joined the new firm. Does the new firm have any responsibility for the claim?

Scenario two: A firm is notified of a claim related to the work of a lawyer who once worked at the firm but whose whereabouts are unknown. What is the liability of the firm and its individual partners if the lawyer was a partner? What if the lawyer was an associate?

These scenarios raise several questions:

- When a lawyer departs from or arrives at a firm, do his or her claims exposures follow in lockstep?
- Could former – or new – partners or employers be exposed?
- What happens when a claim is based on the error (or wrongdoing) of a lawyer, and liability exceeds the limit of his or her coverage?
- Are the firm assets exposed to this excess liability?
- And to what extent are other partners in the firm exposed?

The answer to all of these questions is, "it depends."

Scenario one

In scenario one, a relevant issue is the nature of the LawPRO policy: claims-made-and-reported (for more on this topic see page 23). This means that coverage will be sought under the insured's current-year policy, unless the lawyer had knowledge of the circumstances potentially giving rise to the claim prior to his/her joining the new firm. In this latter case, the claim will engage a previous policy. It's also important to remember that LawPRO's policy (issued under the Law Society of Upper Canada's insurance program) provides coverage to lawyers on an individual, not a firm, basis.

Either way, if the claim is covered and the amount falls within the amount of coverage available to the subject lawyer under his/her policy, neither the new nor old firm should be directly affected (subject to any arrangements of either firm with the lawyer related to payment of deductibles and claims history levy surcharges). Of course, indirect effects could include having to report the fact of the claim the next time excess insurance is being purchased (typically done on a firm-wide basis), but that is a topic for another day.

But if the claim amount exceeds the policy limits, it is a different story for at least one of the two firms. In this case, liability based on supervision, vicarious liability or agency law will be determined by reference to the working relationships of the lawyer at the time the legal services were performed, which means that the lawyer's current employer – or partners – should not be exposed. (For example, the

outcome would be different if the new firm assumed in some way the liabilities of the prior firm).

As for excess insurance – if any – in this scenario (acknowledging there is no standard form of excess insurance policy and assuming the lawyer's former and new firms are unrelated), it would generally be expected that the current excess insurance policy of the prior firm, if one exists, would be triggered. The second firm's current excess insurance policy – if the firm has one – would generally not apply because the services giving rise to the claim were not performed for/on behalf of that firm.

Does an LLP avoid liability concerns?

The "shield" provided by an LLP firm structure is an imperfect one. The Ontario *Partnerships Act* (R.S.O. 1990, c. P.5) provides:

> 10(3) Subsection (2) [the provision establishing the limited liability of LLPs] does not relieve a partner in a limited liability partnership from liability for,
>
> (a) the partner's own negligent or wrongful act or omission;
>
> (b) the negligent or wrongful act or omission of a person under the partner's direct supervision; or
>
> (c) the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision, if,
>
> (i) the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or
>
> (ii) the partner knew or ought to have known of the act or omission and did not take the actions that a reasonable person would have taken to prevent it.

In other words, where one partner supervised another in doing the work that gave rise to a claim, or knew of the circumstances that led to the claim without acting to prevent the claim, that partner will be liable as though the partnership were a traditional one.

Lawyers practising in an LLP, therefore, are required to carry innocent party coverage. Finally, because the firm assets are not protected from claims (regardless of firm structure), an excess insurance policy is a wise investment.

Scenario two

In scenario two (the lawyer who has moved on and cannot be located), the responding coverage at first instance would be the current policy coverage in place for the departed lawyer. Depending on the circumstances, that may be the full practice policy coverage (that is, if the lawyer has kept his or her standard policy in force) or run-off coverage only. The latter is $250,000 of coverage for all future claims in total, unless the lawyer arranges to buy a higher level of coverage. In the case where a lawyer's policy is "in run-off", the supervising partner's policy would generally become engaged if the damages exceeded the limits of the run-off policy coverage.

The liability of the firm or partners **does not depend** on whether the departed lawyer was a partner or an associate. It depends on the firm's structure. If the firm is a traditional general partnership, the firm and its partners are responsible for all activities of other partners, employees or agents. In other words, there is joint and several liability for claims, regardless of whether the claim flows from negligence or from an excluded act (see below regarding lawyer conduct). This is so regardless of whether the "innocent" partners supervised the lawyer whose work gave rise to a claim, and regardless of whether they had knowledge of the facts.

For that reason, lawyers working in traditional partnerships are strongly encouraged to apply to buy-up their innocent party coverage (as described on page 23) to the maximum level, and to purchase an excess insurance policy for the firm. In fact, some firms will arrange to pay for additional run-off coverage for lawyers leaving practice, when negotiating that lawyer's exit from the firm, just to avoid the type of problem highlighted by scenario two.

If the firm is an LLP, the firm itself will be liable for the acts or omissions of all its members. Individual partners' status is different. (See Sidebar, "Does an LLP avoid liability concerns?")

Partners in an LLP are fully liable for their own acts or omissions and for those of others under their direct supervision, regardless of the latter being partners or employees. Partners in an LLP are not liable for errors and omissions of other partners or employees, unless those errors or omissions were criminal or constituted fraud, or they knew or ought to have known of the errors and omissions and did not take reasonable steps to prevent them. However, as the partnership itself remains fully liable, the limited liability partners' assets in the firm will be at risk.

What type of lawyer conduct often leads to law firm exposure?

As a lawyer vetting a prospective partner or employee, what should your main concern be in terms of exposure for the activities of the newcomer? Is it the quality of their legal knowledge, the excellence of their practice systems, or is it something else?

The "something else" alluded to is the possibility of dishonest or criminal conduct.

A key determinant both of coverage provided by the LawPRO policy under the Law Society's insurance program, and of whether liability could spread beyond the individual lawyer-policyholder, is the nature of the error or omission giving rise to a claim.

An LLP business structure may shelter partners from each others' negligent errors or omissions, but not from each others' criminal or fraudulent acts.

What's more, LawPRO's policy excludes from coverage "… any CLAIM in any way relating to or arising out of any dishonest, fraudulent, criminal or malicious act or omission of an INSURED"(Part III (a) of the LawPRO policy).

So, dishonesty and/or criminal conduct clearly pose a higher risk for the firm as a whole than do negligent errors or omissions.

All lawyers who practise in association or partnership with other lawyers (in other words, all lawyers other than true sole practitioners) are required to purchase innocent party coverage as described in LawPRO's Endorsement No.5. to the policy, which has the effect of limiting the impact of the Part III (a) exclusion.

The innocent party endorsement serves to extend coverage to certain otherwise excluded acts. The coverage does this by treating a "dishonest, fraudulent, criminal or malicious" act of either the insured or of others for whose actions the insured might be liable (for example, under the doctrine of vicarious liability) as an "error, omission or negligent act" as described in the policy.

However, the extent of coverage provided under Endorsement No. 5 is subject to a sublimit (a special limit within, and counting towards, the general limit of liability) of $250,000 per claim and in the aggregate. Considering the quantum of modern fraud schemes, it is easy to imagine a situation in which a claim would exceed this sublimit.

As a result, in addition to the firm vetting carefully any prospective practitioners, LawPRO invariably recommends that lawyers working in association or partnership with others apply to buy-up their innocent party coverage to the maximum permitted, and purchase excess insurance coverage on top of that.

What is a claims-made-and-reported policy?

Not all insurance policies work the same way. One factor that differs is how a policy that is renewed annually "matches" claims to policy years.

A policy that matches claims to the policy in force when the facts giving rise to the claim occurred is sometimes called an "occurrence" based policy.

LawPRO's standard policy, by contrast, is a "claims-made-and-reported" policy.

A claims-made-and-reported policy provides coverage under the present policy for claims that arise out of past and present services. With this type of policy, two developments together trigger coverage:

1. a claim is made against an insured; AND
2. the insured reports the matter to the insurer (LawPRO) as a claim.

The focus is on when the claim is made and reported, not the year in which services are provided and the alleged error or omission is said to have occurred. If a claim is made against an insured this year for services provided in 2008, the policy that responds is this year's policy. If the insured had similar coverage in 2008 as he or she has in 2012, it may not make much difference from a coverage perspective.

However, it is possible to have quite different coverage in different years:

- The insured may have retired since 2008 and now have only basic run-off insurance that provides coverage of $250,000 per claim and in the aggregate;
- The insured may have been practising real estate law in 2008, and would have had specialized coverage under the Real Estate Practice Coverage Option at the time, but discontinued the practice of real estate between 2008 and 2012;
- The insured may have been practising in a firm in 2008 and have had the benefit of innocent party coverage and excess insurance coverage, but is now a sole practitioner without either (or vice versa – the insured may have moved from sole practice in 2008 to a firm in 2012); or
- There may be general changes to the policy provisions, terms and conditions, and the scope of coverage expanded or reduced between the time the services were provided and the time a claim is made and received.

Clearly, changes in coverage between the year in which the error was made (and when factors leading to the possible liability of other parties are relevant) and the year in which the claim is made and reported can have significant coverage implications. The LawPRO policy is available at www.lawpro.ca/standardpolicies.

Lawyers and paralegals: Working productively (and safely) together


Cathy Corsetti

The paralegal profession is in the midst of a significant evolution. In May 2007, the Law Society of Upper Canada undertook the regulation of Ontario independent paralegals. With that mandate came standards for the accreditation of paralegal education programs, a code of professional conduct for the profession, and changes to the permitted scope of paralegal practice.

Even before paralegal regulation, some Ontario lawyers maintained ongoing working relationships with paralegals. In some cases, paralegals worked in-house (whether in law firms or other organizations) and as such were not the "independent paralegals" now regulated by the Law Society. But in other cases, lawyers maintained referral-style relationships with independent paralegals. A good example of these are the relationships that continue to exist between paralegals who represent clients in provincial court on highway traffic matters and the lawyers to whom they refer those cases that exceed their jurisdiction (for example, certain impaired driving charges).

Cathy Corsetti, an independent paralegal and chair of the Law Society's Paralegal Standing Committee, explains that although she rarely refers individuals to lawyers, she does receive some referral business flowing in the other direction, typically from real estate lawyers, or lawyers who work with property management companies.

Corsetti believes that the future of legal services will include more – not less – collaboration between the two professions, pointing out she has worked with one lawyer for 33 years.

"We won't necessarily be working side-by-side," she says. But she does expect that each profession will develop an increased respect for the other's areas of expertise, and will view each other as support, rather than competition. Self-regulation, she believes, can only assist in fostering this relationship: "Lawyers now realize that we can't do whatever we want: we have essentially the same rules of professional conduct that they do, we have to carry insurance… we have to stand behind the work we're doing, and we have to protect our reputation."

Collaboration between lawyers and paralegals – even on a referral basis – has the potential to engage the agency or vicarious liability issues raised in other articles in this magazine. While the lawyer/paralegal pair may view their relationship as referral-based and not collaborative, the public may not have so clear an understanding. This is especially true in cases where there are indicia between the parties that have been associated with "holding out" a more collaborative association. A common practice that might be interpreted as holding-out is sharing office space or resources (for example, a waiting room, reception services, or equipment) with a paralegal.

Another example: is the lawyer listed on the paralegal firm website (or vice versa)? There are a few examples on the Internet of lawyer websites containing banner advertisements for paralegal firms. Although a lawyer may see a clear distinction between listing a paralegal in a banner ad at the top of a webpage and listing that paralegal's name in the firm letterhead, this distinction may be lost on unsophisticated clients.

There is little case law to predict the consequences of a claim in the context of a finding that a lawyer and paralegal have held themselves out as working in association (for comments about holding out as between lawyers, see page 25). However, it would be prudent practice to take steps to avoid such a finding. While independent paralegals are required to carry malpractice insurance, the limits of coverage are substantially lower than the standard LawPRO coverage for lawyers.

The bottom line: paralegal regulation is likely to both enhance and increase relations between lawyers and paralegals. It should also stimulate consideration of the liability and insurance implications of these relationships.

Structuring relationships with lawyer-colleagues: What are the claims exposure implications?

Understanding that there may be times when a firm will be exposed for claims beyond the limits of the individual lawyer's policy, what are the differences arising from different relationships? Should a firm consider this when planning an addition to its professional resources?

1. *Lawyer employee of a law firm:* The simplest scenario from the perspective of assessing excess liability is that of employer/employee. Regardless of the nature of the firm structure (whether traditional partnership or LLP), both the firm itself and any partner who directly supervises or controls the work of the employee likely will be liable in the event a claim against the employee exceeds the limits of the employee's coverage. For this reason, law firms that employ associates must purchase innocent party coverage (to ensure coverage for Part III(a) excluded acts), and are encouraged to buy-up that coverage to the maximum limit and to purchase excess insurance coverage as well.

2. *Referrals:* Some lawyers regularly refer work to professionals outside the firm (that is, sending work out instead of bringing that lawyer into the firm). For example, a family lawyer may refer an existing client to a criminal lawyer, who is given complete carriage of a criminal matter outside the family lawyer's area of practice. Other lawyers may refer matters to paralegals.

   While pure referrals involve no supervision or control of one professional by another, certain working relationships can muddy the waters. Consider, for example, arrangements through which sole practitioners share office space and other resources; or where lawyers not in partnership with others identify with those others (whether they be lawyers or paralegals) on their letterhead, on websites, or signage, or elsewhere.

   In *Tiago v. Meisels*, 2011 ONSC 5914, a client of one lawyer named three other lawyers as defendants in a negligence-based suit on the basis that, by having the four lawyers' names appear together on business cards, letterhead and a sign, the lawyers, who were sole practitioners sharing space, were holding themselves out as partners. The plaintiffs alleged that this holding-out created the erroneous view that the lawyers were "a firm of some depth."

   Stinson J. was not swayed by the defendants' reliance on the words "practising in association" on the firm letterhead, because he was not convinced that the clients understood this to mean the lawyers were not partners. The defendants lost their motion for summary judgment.

   The bottom line: Not having a certain lawyer join your firm may seem to be an effective way to limit risk. But when making referrals, lawyers should transfer carriage of the entire matter, and ensure that this is done with the client's knowledge and approval and that the client understands that the referring lawyer and referee are not collaborating. Also, be careful to avoid sharing resources or referrals in any way that might be interpreted as holding-out a partnership that doesn't exist.

3. *Partner:* Where the insured whose work gives rise to a claim is a partner, the potential for exposure to excess liability for his or her partners will depend on two additional analyses (as discussed above):

   - What is the firm structure – traditional partnership or LLP?
   - If the firm is an LLP, were there any factors present that would cause the limits on liability to be lost? For more on LLPs, see page 22.

Another scenario: Working with paralegals

Scenario three: A lawyer hears of a claim related to the work of a paralegal with whom the lawyer has worked. Might the lawyer be exposed to liability in excess of the paralegal's own coverage?

Not only lawyers move around: Paralegals do, too. They also can have similar insurance issues, in terms of which policy responds, the scope of coverage, the amount of coverage, and so forth.

The answer to the question in this scenario depends on the nature of the working relationship between the two parties. If the paralegal was an employee of the firm, the firm (and likely the supervising lawyer) will be directly or vicariously liable. If the paralegal provided services to the firm on a contract basis, the firm and at least the supervising lawyer will likely be liable on the basis of agency law, possibly with a right of contribution/indemnity from the paralegal.

If the work that gave rise to the claim was referred completely to an independent paralegal (not an employee or working in association with the law firm) to be performed without the lawyer's ongoing supervision, with the client's knowledge and approval and with no indicia that might lead the client to believe that the paralegal and the lawyer were partners or employer/employee, liability for the claim would likely be the paralegal's alone.

The lesson in all of this?

The potential for personal liability beyond the available coverage, for the errors of present, past, or future colleagues, is highly unpredictable. A lawyer's best defence? A review, at least annually, of the full spectrum of risks facing the firm and the lawyers practising within it, and of the adequacy of coverage in place to address those risks. Also consider a special review whenever an addition to the firm or new working structure is being considered.

Need help with this analysis? Contact LawPRO's Customer Service Department at service@lawpro.ca, 1-800-410-1013 or 416-598-5899 to discuss your evolving insurance needs. For more on coverage under the LawPRO policy see our FAQs page (www.lawpro.ca/insurance/faqs/faqs.asp). ■

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The changing face of "of counsel" arrangements

Traditionally, the term "of counsel" was used when a firm wanted to list a distinguished lawyer who was acting as an advisor to the firm on its letterhead.

As times change the term has expanded to include a number of roles that may appeal to lawyers looking to alter the way they practise.

Some lawyers may wish to practise on a part-time basis. The lawyer benefits from having a relationship with a firm and being able to access its support and infrastructure, while the firm benefits from the lawyer's expertise. This arrangement may appeal to senior lawyers as an alternative to retirement, or to a young lawyer wishing to be affiliated with a firm while practising from home. Others may have non-practising backgrounds (having worked in business, academia, or public office) and want to explore a new career with a law firm. In other arrangements, the term "of counsel" may designate a probationary partner-to-be, or a lawyer who desires a senior role but is not interested in becoming a full partner.

With the term "of counsel" being so flexible, and the arrangements that fall under it so varied, it's difficult to provide definitive risk or practice management guidelines that support lawyers entering into such an arrangement. LawPRO suggests that lawyers and firms consider their exposure to potential claims arising out of the practices of lawyers they are affiliated with (which includes "of counsel" lawyers) when determining how much insurance coverage is appropriate.

Although LawPRO has not yet seen any significant claims trends relating to "of counsel" work specifically, there have been interesting developments and cases in the U.S. relating to conflicts of interest and issues of client consent and vicarious liability. Questions that have been dealt with by the courts include:

- Is the "of counsel" lawyer an employee of a firm or an "independent contractor"?
- Is there any contractual relationship between a client and an "of counsel" engaged by the retained firm without the client's consent?
- Can a client who didn't retain or meet with an "of counsel" lawyer seek compensation from that lawyer's liability insurance?
- What are the standards to be met when determining if an "of counsel" lawyer is in a conflict and he, she, or the firm must be disqualified? Is merely being 'affiliated' with a firm in conflict enough to also disqualify the "of counsel" lawyer?

Answers to these types of questions often come down to the specific facts of a particular case. For lawyers wishing to explore these matters in more detail, we recommend *The Of Counsel Agreement: A Guide for Law Firm and Practitioner* by Harold G. Wren and Beverly J. Glascock. This is an American Bar Association publication that is available in the practicePRO Lending Library. It explores the many permutations of "of counsel" working arrangements and suggests important issues to consider in each, as well as offering guidance in drafting agreements that will clearly define the lawyer's role and protect both the lawyer and the firm in terms of liability and conflicts. ■

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