



The facts on overdraft protection

Our plan was to have this column focus on social media and its applicability to law practices. And although this column now will tackle a very different subject, I encourage you to spend some time over the coming holidays with this issue of LAWPRO magazine, and consider how social media could be put to work for your practice.

Certainly we at LAWPRO are walking the talk: On pages 15 to 16 you'll learn about our new Avoid A Claims blog, our e-newsletters, and our Twitter presence. You'll hear more on how to use social media to improve your practice through a new social media column that we'll be launching in 2010.

This column focuses instead on an issue that is of concern to many of you and consequently to us – the expanded protection against counterfeit bank instruments that we announced in October. From your calls and emails, it is clear that some clarification is needed.

1. This is an enhanced protection

As is explained in the E&O coverage article on page 26, the Law Society **insurance program has generally provided protection in situations where funds of legitimate clients were inadvertently paid out to fraudsters** prior to the lawyer discovering that he or she was dealing with a fraudulent instrument. **This protection for innocent clients will not change – and you do not need to make any changes to your practice for this protection to be in effect.**

However, in situations where the shortfall was strictly between the lawyer and the bank – i.e. no legitimate client funds were affected – there was no coverage under the program in LAWPRO's view. This approach is consistent with the intent of a professional liability policy, simply stated: To provide a defence and/or indemnify a lawyer where a client brings a claim for negligence.

LAWPRO's commitment to stand behind client funds, as described above, may exceed the coverage generally provided by professional liability programs; in other words, some programs would not necessarily cover the loss of client funds from a trust account when a fraudulent instrument is reversed.

But in keeping with our commitment to be responsive to the concerns of lawyers and the evolving nature of the legal landscape, we are now going one step further: As of January 1, 2010, in specified circumstances lawyers will have certain coverage in situations where the lawyer is liable at law under his or her contract with the bank due to an overdraft caused by reversal of a fraudulent instrument.

2. Responsible underwriting requires "best practice" conditions on this enhanced coverage

Coverage enhancements do not exist in a vacuum: They potentially increase claims costs – which generally are passed on to insureds through increased premiums. Lawyers are already feeling the strains of a weakened economy, and the Law Society program base premium needed to be increased by \$500 per lawyer to address other cost pressures. So, we at LAWPRO felt we had to do the best we

could to expand coverage without creating the need for a further immediate premium increase, from an actuarial perspective.

We are mandated by the Law Society to operate in a commercially reasonable manner and to risk rate the program. Responsible underwriting is part of that equation: The "best practice" limitations that are attached to this enhanced protection moderate the risk to which the program is exposed and strive to equalize the likely impact on the insurance program arising from the different practice areas of the bar. What the best practices do not do is equalize fraud risk for lawyers as business people across all different practice areas and types of retainers. That would likely require specific risk-rating of the coverage per area of law and/or law firm.

3. It may not be possible to do "business as usual"

Some lawyers tell us that the limitations put on the enhanced overdraft coverage (the eight-day wait before drawing on funds, or verification from the drawee or lawyer's own financial institution, confirmed in writing, that the instrument is valid) are impractical or unmanageable. Again we reiterate that these limitations apply only to those wanting to avail themselves of the enhanced coverage.

We also recognize that, for those wanting to limit their exposure to certain forms of fraud, certain practice realities may need to change. One risk mitigation strategy we encourage lawyers to consider is wire transfers through the Large Value Transfer System (LVTS) which provide a real value assurance according to the by-laws of the Canadian Payments Association. You may also want to lay the foundation for a new approach to funds handling in your retainer letters by, for example, requiring that your client wire you funds for the cash portion of the transaction and give you notice of who the lender is some time before closing, so you can satisfy yourself as to how funds will be delivered by the lender.

LAWPRO will, over the coming weeks, continue to work with practitioners to address these and other concerns. Look for further practice tips and ideas in our December LAWPRO Webzine (our new web-based newsletter). The fight against fraud is a journey that will continue throughout our professional lives. Failing to adopt strategies to fight fraud is saying to the fraudsters, "please, take our money", whether you hand it over directly or via LAWPRO indemnifying you. Remember that every \$1 million in costs for LAWPRO equals another \$50, more or less, on the base premium. It doesn't take many frauds to hit \$1 million of loss these days.

In the magazine last winter, I hoped for a new year with fewer challenges. I am not sure any of us got that in our work lives during 2009. But on a personal note, I wish you and yours the very best of the coming holiday season, with an opportunity to re-charge and re-connect with what matters most to you.


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