



# Are individuals acting as general counsel to their law firms required to have LAWPRO insurance?

While general counsel have been commonplace in corporate settings for years, it is now becoming more common for law firms to have someone working in a “general counsel” capacity. There is a wide variety in the types of work done by law firm general counsel. Among other things, it can involve advice on human resources issues, decisions on conflicts of interest, negotiation of leases, or direction on regulatory matters. Some lawyers will wear the general counsel hat on a part-time basis as they continue to practise, and others may do general counsel work without having a formal general counsel role or title. These different scenarios raise the question of whether law firm general counsel are required to have LAWPRO insurance in place, and what that insurance will cover. This article reviews the common general counsel employment scenarios and discusses the insurance implications of those scenarios.

As a starting proposition, Ontario lawyers that engage in the practice of law (i.e., giving legal advice respecting the laws of Ontario or Canada, or providing the professional services of a barrister or solicitor to others) are required to have LAWPRO insurance in place. (There are a few exceptions.<sup>1</sup>) This is a matter of public policy based on the desire to protect the consumers of legal services. As the Law Society's insurance program, LAWPRO coverage is in place, subject to the terms and conditions of the policy<sup>2</sup>, to help protect clients in the event that they suffer damages due to an error by their lawyer. At the same time, LAWPRO coverage may protect lawyers from personal liability for their errors.

### General counsel at a traditional law firm

Anyone working as a general counsel at a law firm that is a partnership, limited liability partnership, MDP, or group of lawyers in association (see next section for professional corporations) is required to have LAWPRO insurance as they are using their legal knowledge, judgement and skills with respect to their work for the firm. The LAWPRO policy could also protect a general counsel in the event they were vicariously liable for an error of one of the firm's partners.

Why is the purchase of LAWPRO insurance required in this setting? A law firm as described above is entitled to practice law on behalf of clients, as is the general counsel who works there, in theory. Therefore, the general counsel is at greater risk of being sued by

a client who misunderstands the general counsel's position and/or of actually being directed to do client work. Furthermore, the general counsel is not, in this case, the employee of a corporation and the ability to argue that a client dealt with a distinctly separate corporate entity, is not available.

### General counsel at a professional corporation

For the tax deferral and other benefits they confer, many Ontario lawyers have incorporated a professional corporation<sup>3</sup> ("PC"), which effectively become the lawyer's employer and the entity providing legal services. In a similar fashion to those working as general counsels at a traditional firm, general counsels working for a PC are required to have LAWPRO insurance as they are using their legal knowledge, judgment and skills with respect to their work for the PC.

Keep in mind that many of the traditional protections regarding personal liability associated with working in a corporate entity do not exist in the case of a professional corporation, and that the Law Society can lift the veil of a PC and hold the shareholders accountable for their actions.

Once again, the professional corporation is entitled to practise law, bringing to its general counsel more risk of exposure to clients and/or being directed to do client work.

<sup>1</sup> See lawpro.ca for details on exemption eligibility.

<sup>2</sup> Copies of the current and past LAWPRO policies are available at lawpro.ca.

<sup>3</sup> Note, by definition, professional corporations are called "law corporations" in the LAWPRO policy, and are referenced the same way in the Law Society's bylaws.

## General counsel to a law firm management company

A contrasting situation occurs for general counsel that are completely and only employees of a law firm's management company. They are exempt from the insurance requirement provided they limit their work to services for or on behalf of the management company (e.g., employment of staff, supplier contracts, firm leases, etc.).<sup>4</sup> As the management company will not be licensed to provide legal services, a lawyer in this situation cannot and should not directly or indirectly provide advice or professional services to clients of the firm. Thus, a general counsel in this setting is protected as a corporate employee and one more step removed from exposure because his/her employer (the management company) cannot practice law.

## Corporate in-house counsel

The situation of in-house counsel in a corporate setting (other than a professional corporation – see previous page) is fairly simple and straightforward. Provided an in-house lawyer limits his/her work to services for or on behalf of his/her corporate employer, they are exempt from the insurance requirement.<sup>5</sup> In this case, there is no member of the public to protect (since a typical corporation cannot practise law), and the master/servant relationship insulates the lawyer from liability to others for the work they do for their employer. If they choose to maintain their

practice coverage there is limited defence cost coverage for claims brought against corporate counsel by their employer.<sup>6</sup>

The situation is different for the relatively small number of corporate in-house counsel that also provide legal services to individuals or entities other than their employer. Lawyers practising in this circumstance are required to have LAWPRO insurance in place. Care should be taken to assess the insurance requirement when advice is being provided to affiliates and subsidiaries in complex corporate structures. The existence of trusts or partnerships within a corporate structure will trigger the insurance requirement.<sup>7</sup> In-house general counsel that do limited work for third parties other than their employer can reduce their LAWPRO premium if they qualify for the Part-time Practice Option.<sup>8</sup>

Note that the exemption for corporate in-house counsel does not apply to insured lawyers that are under secondment from a law firm.

## Assess your particular situation

As noted at the start of the article, the employment arrangements and type of work done by general counsel vary widely. General counsel are encouraged to carefully consider their employment arrangements and the type of work they do to assess whether they need LAWPRO insurance in place. Please contact LAWPRO Customer Service if you have questions about LAWPRO coverage and how it would apply in your particular circumstances. ■

<sup>4</sup> Exemption (e) under the LAWPRO policy.

<sup>5</sup> Exemption (e) under the LAWPRO policy.

<sup>6</sup> See Endorsement No. 11 of the LAWPRO policy.

<sup>7</sup> See the LAWPRO policy for further details.

<sup>8</sup> See the LAWPRO website for Part-time Practice Option eligibility requirements.

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