

# LEAVING PRACTICE: INSURANCE CONSIDERATIONS

## 15<sup>th</sup> ANNUAL ESTATES & TRUSTS SEMINAR

presented by:

The Hamilton Law Association

February 9, 2017

*Prepared by:*

**Victoria Crewe-Nelson and Rahim Andani**

Lawyers' Professional Indemnity Company

3101 – 250 Yonge Street, Toronto, Ontario

416-598-5899 or 1-800-410-1013

[victoria.crewe-nelson@lawpro.ca](mailto:victoria.crewe-nelson@lawpro.ca)

[www.lawpro.ca](http://www.lawpro.ca)

**LAWPRO<sup>®</sup>**

Lawyers' Professional Indemnity Company  
Assurance LawPRO<sup>®</sup>

**Contents**

INTRODUCTION ..... 1

- 1. Lawyers’ Roles (Generally)..... 2
- 2. Types of “Retirement” ..... 2
- 3. Financial and Other Considerations..... 3

NARROWING THE SCOPE OF WORK ..... 3

- 4. Part-Time Practice ..... 4
- 5. Temporary Leave of Absence [Exemption Rule (c)]..... 4
- 6. Mentoring..... 5
- 7. *Pro Bono* ..... 6
- 8. Acting as Trustee or Under a Power of Attorney [Exemption Rule (h)]..... 6

EXPOSURE TO CLAIMS AFTER RETIREMENT ..... 7

- 9. Limitation Periods..... 7
- 10. Continuing Activities ..... 10

ADDRESSING RISK ..... 11

- 11. Automatic Run-Off Coverage ..... 11
- 12. (Optional) Increased Run-Off Coverage ..... 11
- 13. (Optional) Excess Coverage..... 12
- 14. Creating a Plan ..... 14
  - a. Appointing Substitute Decision Makers..... 14
  - b. Other Forms of Insurance ..... 15

CONCLUSION..... 16

---

**INTRODUCTION**

---

The Law Society of Upper Canada mandatory insurance, provided by LAWPRO, is offered to practising Ontario lawyers. When lawyers are no longer in private practice they are not required to maintain the \$1 million per claim/\$2 million in the aggregate<sup>1</sup> practice coverage limits and may be eligible to claim exemption and cease having to pay the annual premium levies. Insurance coverage available following exemption and factors that should be considered when planning for retirement are discussed below.

---

<sup>1</sup> “Aggregate limits” are the limits for all claims made during the term of the policy.

## 1. Lawyers' Roles (Generally)

When planning for retirement, lawyers should consider the services they provided while in practice and the potential claims that may flow from them. For many lawyers, the services provided to clients did not begin and end with legal advice. Some real estate lawyers may manage private mortgages. Others act as directors on their clients' boards. Lawyers can be trained in both law and another profession, such as an intellectual property agent. For many estate lawyers, they are appointed as primary or alternate estate trustees or attorneys for personal care and property for their clients. Outside of their paid duties, lawyers will often volunteer their time on not-for-profit boards, such as condo boards or charities, or provide *pro bono* assistance to those facing difficulty acquiring access to justice.

When considering plans for exiting a law practice, lawyers should take stock of all the services they provide in the course of their practice. Lawyers should also consider which activities they may wish to continue to provide following "retirement". These factors will play an important role in determining the lawyer's insurance needs going forward.

## 2. Types of "Retirement"

To determine the levels and types of malpractice insurance retired lawyers need, the first question is: What kind of retirement do lawyers want? A recent US survey indicates that around one third of 200 lawyers polled plan to work in some capacity after retirement.<sup>2</sup> For lawyers in private practice, the structure of their firm may shape their retirement plans. As an example, the timing of when a lawyer retires may be dictated by a partnership agreement and mandatory retirement age. Other firms may have a set age where partners are repaid their capital investment and afterwards can continue working as

---

<sup>2</sup>"For many lawyers, retirement plan is to keep working", *ABA Journal*, February 22, 2016 <[http://www.abajournal.com/news/article/for\\_many\\_lawyers\\_retirement\\_plan\\_is\\_to\\_keep\\_working](http://www.abajournal.com/news/article/for_many_lawyers_retirement_plan_is_to_keep_working)>. Also see, *Lawyer Retirement: An Altman Weil Flash Survey*, online: Altman Weil Inc. <<http://www.altmanweil.com/LawyerRetirement/>> and *Cornell Retirement and Well Being Study*, online: Cornell Gerontology Research Institute <[http://worlddatabaseofhappiness.eur.nl/hap\\_bib/freetexts/moen\\_p\\_2000.pdf](http://worlddatabaseofhappiness.eur.nl/hap_bib/freetexts/moen_p_2000.pdf)>.

“counsel”. For sole practitioners and lawyers in small firms, retirement might depend on effective succession planning. Market forces can have an impact on whether retirement age lawyers can sell or find another lawyer to take over a practice.

### **3. Financial and Other Considerations**

Lawyers’ retirement plans can be strongly impacted by financial factors. There are many ways to fund retirement: RRSPs, TFSAs, employer pension plans, real estate investments (including a principal residence), business investments, CPP, Old Age Security, etc. In particular, sole practitioners may hold significant assets in a professional corporation. Increasing costs associated with practising (higher rent, any claims history levies on the Law Society insurance program, the costs for replacing aging office equipment) can motivate a lawyer on the brink of retirement to take the plunge.

Retirement plans may also be affected by circumstances related or unrelated to a lawyer’s own practice. Everything from marriage breakdown, increasing life expectancy, a key clerk or assistant retiring, a desire to travel and lower interest rates may influence when and how a lawyer retires. On the other hand, for many lawyers, work is stimulating and enjoyable. It provides a routine and a sense of purpose that retirement may not replace. The point is, the idea of a set retirement age where lawyers completely exit from practice, may be a relic of the past. As a result, lawyers should consider timing and their plans to continue providing any legal services when making their plans for life post-retirement.

---

## **NARROWING THE SCOPE OF WORK**

---

When preparing to leave practice most lawyers will have a plan for transition. This may involve reducing the number of clients they see and transferring open files to other lawyers. It can include reducing the number of hours worked each week over a period of time. Even after a lawyer has stopped attending at the office on a regular basis, the lawyer may still provide limited legal services. How the lawyer transitions from practice and what activities will continue to be provided after the lawyer

considers retirement to have begun, will have an impact on the lawyer's insurance requirements and options.

#### **4. Part-Time Practice**

Instead of “fully retiring”, some lawyers may want to just “slow-down”. This means working fewer hours, reducing one's workload, or taking time off when desired. Some lawyers who want to fully retire may go through a transition period during which clients are shifted to new counsel. During this period of reduced hours and/or billings lawyers are still required to maintain their LAWPRO coverage while they continue to do legal work or wrap up their practice.

“Semi-retired” lawyers may be eligible under the Law Society's insurance program for the Part-Time Practice Option<sup>3</sup>. This option is available to part-time practitioners, who in the current (2017) and previous (2016) fiscal year will restrict their law practice hours<sup>4</sup> and billings<sup>5</sup> and have not had a claim reported under the mandatory insurance program with a repair and/or indemnity payment in the last five years.

Under the Part-Time Practice Option, the premium is one-half of the base premium (which for 2017 would represent a \$1,475 discount on the \$2,950 base premium). As a result, part-time lawyers carry less overhead expense. This option can be a good solution for lawyers who want to continue to provide occasional legal services, such as preparing wills for family and friends or giving legal advice to a condo board. The Part-Time Practice Option is a practical solution for lawyers who want to “semi-retire”.

#### **5. Temporary Leave of Absence [Exemption Rule (c)]**

Lawyers may intend to leave practice on a temporary basis due to planned or unplanned reasons. This may include taking time off to raise children, care for an ailing family member or enjoy a sabbatical spent

---

<sup>3</sup> For more on this, visit the LAWPRO website, <[https://www.lawpro.ca/insurance/practice\\_type/part\\_time\\_practice.asp](https://www.lawpro.ca/insurance/practice_type/part_time_practice.asp)>

<sup>4</sup> This is restricted to 20 hours per week on average for each week actually worked and 750 hours per year, of professional time in private practice (including time for undocketed work). Professional time does not include time spent on continuing education courses, or as a board director, or time devoted to business development or social time with clients.

<sup>5</sup> Maximum gross billings would be \$75,000 per year.

traveling or studying. Exemption (c) of the Primary Professional Liability Program offers a way for lawyers to maintain the same limits offered to practising lawyers (\$1 million per claim/ \$2 million in the aggregate) if the practice cessation is intended to only be temporary. This coverage is available if lawyers intend to return to practice within 5 years, if taken for reasons of family or illness, and not more than 2 years, if taken for other reasons. This exemption is not available to lawyers who have taken alternative employment or who have been required to cease practice by the Law Society. Lawyers exempt from paying insurance premiums under Exemption (c) are provided with the standard policy coverage limits of \$1 million per claim and \$2 million in the aggregate. Exemption (c) is not for lawyers who want to retire or semi-retire as they must have the intention to return to practice after the leave of absence.<sup>6</sup>

## **6. Mentoring**

Retired lawyers may want to mentor younger lawyers. Mentoring helps lawyers pass on their institutional knowledge, wisdom and skills to the next generation. Retired lawyers often enjoy mentoring because they can help others, form connections with younger lawyers, and have their own talents recognized. Retired lawyers may feel they owe a debt to the profession, perhaps from the benefits they received from their own mentors. LAWPRO encourages lawyers to act as mentors, including retired lawyers. Accordingly, lawyers exempt from payment of the premium levies can maintain their exempt status, have coverage for mentoring services provided after beginning exemption, and have their deductible (and claims levy surcharge if they return to practice) waived on any claim made against a lawyer-mentor arising out of a mentoring relationship, provided that:

- a) The mentor and mentee agree to a formal mentoring relationship, as evidenced by a written document of some kind;
  - b) The mentor has no contact with the mentee's client that would create a solicitor-client relationship;
- and

---

<sup>6</sup> For more information on the Rules for Exemption Eligibility, lawyers can review the current application for exemption, <[https://www.lawpro.ca/file\\_online/PDF/exemption\\_form\\_NEW.pdf](https://www.lawpro.ca/file_online/PDF/exemption_form_NEW.pdf)>, or pages 21-23 of the 2017 Professional Liability Insurance for Lawyers and Related Insureds Program Guide, <[https://www.lawpro.ca/file\\_online/PDF/A2Booklet\\_Prim\\_Prog.pdf](https://www.lawpro.ca/file_online/PDF/A2Booklet_Prim_Prog.pdf)>.

- c) The mentee understands that the mentee is responsible for individually and independently being satisfied of the soundness of any suggestions, recommendations or advice-like comments made by the mentor.

Provided the lawyer/mentor meets the criteria, LAWPRO's standard run-off coverage of \$250,000 in the aggregate applies to claims against an exempt lawyer arising out of a mentoring relationship<sup>7</sup>.

## **7. *Pro Bono***

There may be retired lawyers who wish to continue practicing law, but not for financial benefit. Beyond improving access to justice and providing an essential public service, lawyers will sometimes provide *pro bono* legal services to keep their legal skills honed and to maintain a routine. LAWPRO has a general exclusion for lawyers on exemption performing any legal services. However, there is an exception for lawyers who provide professional services through LAWPRO approved *pro bono* programs associated with Pro Bono Ontario (PBO). LAWPRO's standard run-off coverage covers work done for these programs even after the lawyer has gone on exemption. No deductible applies in the event a claim is made against the lawyer for legal services provided through approved PBO programs<sup>8</sup>. If a lawyer wants to provide services for a not-for-profit organization that isn't associated with PBO, he or she can maintain their exemption by applying to LAWPRO and getting pre-approved. However, in these circumstances LAWPRO's standard run-off coverage will not cover the legal services provided by the lawyer, and in the absence of an indemnity agreement or insurance coverage being arranged by the organization, the lawyer may have exposure in the event of a claim.

## **8. Acting as Trustee or Under a Power of Attorney [Exemption Rule (h)]**

As part of their practice, many solicitors are named to act as estate trustees or attorneys for property for non-family members. In these cases lawyers may be eligible under Exemption (h) for relief from

---

<sup>7</sup> For more on mentoring, visit <[https://www.lawpro.ca/insurance/Practice\\_Type/mentor.asp](https://www.lawpro.ca/insurance/Practice_Type/mentor.asp)>

<sup>8</sup> For more information on *pro bono* coverage, visit <[http://www.lawpro.ca/insurance/Practice\\_type/probono.asp](http://www.lawpro.ca/insurance/Practice_type/probono.asp)>. For a list of approved PBO programs, visit <[http://www.lawpro.ca/insurance/pdf/LawPRO\\_approved\\_ProBonoProjects.pdf](http://www.lawpro.ca/insurance/pdf/LawPRO_approved_ProBonoProjects.pdf)>.

LAWPRO premiums. Lawyers can apply to LAWPRO under exemption rule (h) to have increased run-off coverage apply to the services provided by the lawyer following exemption as estate trustee, *inter vivos* trustee or attorney for property provided such appointment arose in the course of the lawyer's practice. Lawyers can choose \$250,000, \$500,000 or \$1,000,000 aggregate limits under this option.

---

## **EXPOSURE TO CLAIMS AFTER RETIREMENT**

---

The practice of law invites different types of claims. While some types of claims may be discoverable shortly after services are rendered, some have a "longer tail". Examples of long-tail exposure include acting on real estate purchases, domestic contracts and wills. Depending on the types of services provided and when a lawyer ceases to provide services, insurance needs after a lawyer has ceased regular practice may vary. Two important factors to consider are applicable limitation periods and whether a lawyer continues to provide any services after a notional retirement date has passed.

### **9. Limitation Periods**

In Ontario, the primary statute governing the limitation of actions is the *Limitations Act, 2002* ("the Act")<sup>9</sup>. A "catch-all" statute, the Act applies to all claims in court proceedings unless they are expressly exempted from its application.<sup>10</sup> This can be particularly relevant for lawyers acting as estate trustees as they may be subject to other limitation periods, in particular s. 38 of the *Trustee Act*<sup>11</sup>. Other regimes, such as federal limitation periods, may also impact potential claims, but this paper will focus on the *Limitations Act*.

The Act includes a general 2-year limitation period, which starts to run from the day a claim is "discovered"<sup>12</sup>. Section 15 of the Act sets a 15-year ultimate limitation period from the day the act or omission on which the claim is based took place, regardless of when the claim was discovered. Under the transition rules set out in s. 24 of the Act, if a claim was not discovered before January 1, 2004 (for either

---

<sup>9</sup> *Limitations Act, 2002*, SO 2002, c 24, Sch B ["*Limitations Act*"].

<sup>10</sup> Debra Rolph, "The *Limitations Act, 2002* is a 'Catch-All' Statute", LAWPRO Magazine 9:2 (September 2010) 26.

<sup>11</sup> *Trustee Act*, RSO 1990, c T 23 at s 38.

<sup>12</sup> See sections 4 and 5 of the *Limitations Act*.



claims that would have had a limitation period apply before this Act, or wouldn't have had a limitation period until this Act) then January 1, 2004 is the deemed date the act or omission took place. For s. 15 to apply to those types of claims, therefore, January 1, 2019 would be the ultimate limitation period. Obviously, because of this, the Courts haven't tested the application of s. 15 just yet.

Section 16 of the Act includes various types of claims for which no limitation period applies. Practically speaking, it would be difficult to see how a claim for professional negligence could be founded in any of its enumerated wrongs<sup>13</sup>.

There are exceptions to the 15 year limitation under s. 15 that may extend a lawyer's exposure to claims.

These include:

- The limitation period does not run during any time during which the person having the claim is under a disability and is not represented by a litigation guardian with relation to the claim (s. 15(4)(a));
- The limitation period does not run during any time during which the person having the claim is a minor and is not represented by a litigation guardian with relation to the claim (s.15(4)(b)).
- The limitation period does not run for the period during which the defendant wilfully conceals the claim from the person who has it (s.15(4)(c)(i)); and
- The limitation period does not run during the period during which the defendant misleads the person having the claim about the appropriateness of bringing an action (s.15(4)(c)(ii)).

---

<sup>13</sup> There may, in fact, be situations in which s. 16 is very relevant to claims against solicitors for professional negligence. In her paper, "*Limitation Periods in Ontario and Claims by Beneficiaries*" (paper delivered at the Annual Estates and Trusts Summit, November 6, 2007), Anne Werker questioned whether s. 16 of the Act could mean that no limitation period applies in respect of wills that have not been probated. She noted that section 16(1)(a) of the Act states that there is no limitation period in respect of "a proceeding for a declaration if no consequential relief is sought."<sup>13</sup> Werker reasoned that probate was a declaration by the court that a will is valid, and that "mere delay in questioning the will is not enough to prevent the court from entering into an investigation by requiring proof in solemn form."

Another type of exposure that may survive beyond the ultimate 15 year ultimate limitation period would be a claim for contribution and indemnity. For more on this, see s. 18(1) of the Act<sup>14</sup>.

Case law has shown that discoverability is applied contextually, especially in solicitor's negligence claims. As a result, it is tough for lawyers to know for certain when a claim against them was "discovered." One leading case is *Ferrara v. Lorenzetti* ("*Ferrara*")<sup>15</sup>. The facts involve a client relying on advice provided by a long-standing lawyer which resulted in the client being sued. The solicitor continued to act for and advise the client, although other counsel was retained to defend the action. A trial took place three years later. The court found in favour of the plaintiff, effectively determining that the solicitor's advice, relied on by the client, was wrong. The client sued the lawyer within two years of the judgment. The lawyer successfully argued at first instance that the error was discoverable when the plaintiff first indicated it had a potential claim against the client. This was reversed on appeal due to the nature of the relationship between the lawyer and client and the assurances made by the lawyer throughout the course of the litigation that the advice was correct.

*Ferrara* demonstrates that courts are reluctant to find that the limitation period begins to run while the client is still under the influence of the lawyer who committed the error. This is especially so when the relationship is a long standing one. For retired lawyers, *Ferrara* shows that determining limitation periods is not a quick back-of-the-envelope calculation and it is important to note that continuing interaction between a "retired" lawyer and former client may result in a limitation period being extended.

Looking specifically at wills and estates lawyers, the applicable limitation periods can be difficult to predict. By the very nature of their work, these lawyers are expected to prepare documents that benefit people under disability or who have not yet been born, and are often prepared on behalf of people who are

---

<sup>14</sup> Using an example: A purchaser discovers a Claim against her solicitor 14.5 years after the legal services were rendered. She commences legal proceedings immediately before the 15 year limitation period. Her solicitor is served a few months later (after the 15 years have passed). The purchaser's solicitor, after a year, serves a claim for contribution and indemnity on the vendor's solicitor. Despite it being well over 16 years since the vendor's solicitor provided any legal services associated with this Claim, it appears that the Claim would still be timely. The vendor's solicitor's negligent acts would be deemed to have taken place on the day the purchaser's solicitor was served with the statement of claim, not on the date of rendering legal services.

<sup>15</sup> *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851, 113 OR (3d) 401 [*"Ferrara"*].

ill or elderly<sup>16</sup>. Accordingly, the factors that could extend the 15 year limitation period under s. 15 of the Act are particularly relevant to members of the estates bar.

Practically speaking, while Claims brought more than 15 years after Professional Services are rendered represent a minority of Claims handled by LAWPRO, it is still a significant number. These Claims are often more difficult to defend as records are lost or damaged, memories are not fresh, relevant parties may have died, become incapable or moved away, and the standard of care has to be analyzed with a historical perspective specific to the time during which the Professional Services were rendered. Many of these Claims relate to real estate transactions where the error is not discovered until a property is set to be sold many years later, or incorrectly drafted wills are only found to contain an error when the testator has died. The good news for practitioners is that it is expected that most of these types of Claims will have the ultimate limitation period apply to them. As has been described above, however, not all potential Claims will necessarily be caught by the ultimate limitation period.

## **10. Continuing Activities**

If, after a notional retirement date, a lawyer continues to provide legal services, mentor, act as a mediator or arbitrator, trustee or attorney, new risks for claims will continue to arise. As discussed above, simply keeping in touch with former clients and repeating legal advice provided while still in active practice could extend a limitation period based on discoverability. When considering insurance needs following a departure from private practice, lawyers must consider what activities will be continued after “retirement” and the potential risks associated with these actions. Some of these activities may require the lawyer to maintain practice coverage despite the services only being provided on a very occasional basis<sup>17</sup>. Other activities, such as acting as attorney for an immediate family member, may not invite coverage under the

---

<sup>16</sup> In Anne Werker’s “*Limitation Periods in Ontario and Claims by Beneficiaries*” (paper delivered at the Annual Estates and Trusts Summit, November 6, 2007), she raised the impact that gift-overs to grandchildren or persons not yet born can have on limitation periods. As an example, if around the time of the testator’s death a potential beneficiary with an undiscovered claim is born, the Act would give the child up to 15 years after attaining the age of majority to bring a claim. This could result in a claim being brought against the solicitor almost 33 years after the death of the testator.

<sup>17</sup> Lawyers who apply for or renew their coverage and later cancel it should be aware that under Condition N of the current policy while the premium is adjusted *pro rata* to the date of exemption, there is a minimum premium or adjustment equal to 30 days’ premium applicable to each period of practice or exemption.

policy, even if the lawyer continues to pay the premium levy. Accordingly, lawyers should consider all risks when determining whether to continue to provide legal or other services after the planned date of retirement.

---

## **ADDRESSING RISK**

---

### **11. Automatic Run-Off Coverage**

When lawyers retire LAWPRO's standard run-off coverage takes effect upon their application for exemption. Standard run-off coverage is limited to \$250,000 and is described more fully in Endorsement No. 9 of the current policy. This covers not only indemnity payments, but also defence costs, costs of repairs, pre-judgement interest, etc. The coverage limit is an aggregate limit. It does not renew every year and is eroded by all claims made while on exemption. If a lawyer goes on exemption, returns to practice, and again goes on exemption, claims made against the insured during both (all) periods of exemption will erode the single \$250,000 sublimit. Even one claim could wipe out the entire \$250,000 of coverage, and leave lawyers uninsured for the balance of their retirement. \$250,000 of coverage may not be enough for some lawyers. Approximately 1 in 40 claims exceed the \$250,000 mark, while 1 in 100 claims exceed the \$500,000 mark.<sup>18</sup> Also, claims are reported on average two to three years after the alleged error is made (nearly half of wills and estates claims take at least five years to develop)<sup>19</sup>. Therefore, lawyers may face claims well into retirement.

### **12. (Optional) Increased Run-Off Coverage**

To help retired lawyers meet their insurance needs, LAWPRO offers increased run-off coverage with a selection of limits and terms. It can be purchased for terms between two and five years. Afterwards, lawyers can apply for a further term or revert back to the \$250,000 of standard run-off coverage (as reduced by prior claims). The level of run-off coverage can be increased to \$500,000 per claim/in the

---

<sup>18</sup> *Insurance Matters Booklet for Retired Lawyers*, online: LAWPRO <[https://www.lawpro.ca/insurance/pdf/Retired\\_Lawyers\\_Policy.pdf](https://www.lawpro.ca/insurance/pdf/Retired_Lawyers_Policy.pdf)> at pg 1.

<sup>19</sup> Martine M Morin, *Increased run-off insurance: A critical issue often overlooked in lawyers' estate planning*, online: PracticePro <<http://www.practicepro.ca/information/doc/Run-off-buy-up-to-protect-estates.pdf>> ["Run-Off"].

aggregate, or \$1 million per claim/\$2 million in the aggregate. Lawyers who are interested in increasing their run-off coverage should apply at least 60 days before the start of retirement, to minimize the likelihood of a gap in coverage. Increased run-off coverage protection is individually underwritten. The premium depends on several factors, including, the number of years the lawyer practiced, the areas of the law the lawyer practiced in, how long since the lawyer was in private practice, etc. If a claim triggers run-off protection, a \$5,000 deductible will generally apply. When on run-off, lawyers are bound by the same obligations to assist in their defence as a lawyer in private practice. These include promptly providing notice of a claim, providing access to relevant files, assisting in the defence, and otherwise abiding by the terms of the policy.

As discussed above, lawyers who continue to act as (estate) trustees and/or attorneys for property and qualify for exemption under rule (h) should consider which limits of run-off coverage should be purchased.

Purchasing increased run-off coverage may also help lawyers protect their estates.<sup>20</sup> In one case a lawyer passed away in 2010. When his wife reported his death to LAWPRO, she was advised of the option to purchase increased run-off insurance. She decided to increase coverage to \$1 million. Two years later, the lawyer's estate faced a claim for previous work done. LAWPRO is defending the action. Unfortunately, few lawyers instruct their spouses or estate trustees to purchase increased run-off insurance after they die. This risks leaving the estate and its beneficiaries vulnerable to future claims.

### **13. (Optional) Excess Coverage**

Unlike the Law Society (mandatory) program of insurance, excess lawyers' professional liability insurance is generally issued on a firm-wide basis, not on an individual lawyer basis. In the event a claim is made against an exempt lawyer for services provided while still in practice this distinction can have an important impact on coverage.

---

<sup>20</sup> *Ibid.*

It would be unusual in this day and age for lawyers to be expected to only have one employer or work at only one firm for the entire length of their practice. If a lawyer was with a firm that does not have excess insurance coverage in place - even for a short window - the lawyer may face underinsured exposure.

Consider if a lawyer was with the Smith Firm for the first year post-call and then with the Jones Firm for the balance of her practice. She knows that the Jones Firm carries ample excess insurance that happens to include coverage for services provided by former members while with the firm (as most, but not all excess policies do). The Smith Firm closed many years ago and she does not know what happened to any of its partners. If an error is discovered relating to her earlier work with the Smith Firm the lawyer may find she has no excess coverage in place. She would likely have to try to track down its former partners or their executors and see if she can get information from them relating to any insurance that has been maintained for the firm. Lawyers may also face the risk of underinsured exposure if a firm has changed name or insurers and there is no longer insurance in place for the services provided by former members. As well, even if a claim arises from services provided while a lawyer is with an insured firm, there may be coverage issues if the services were provided outside of his/her employment or if the services do not invite coverage under the excess policy. Examples may include providing legal advice to acquaintances in a social setting or not strictly legal roles a lawyer may assume, such as mediator, arbitrator, director or trustee.

As the basic run-off coverage has aggregate limits of \$250,000 that are depleted by each claim during any period of exemption for a lawyer, even if a lawyer has excess insurance available to respond to a claim, there may be a gap in coverage between the sublimit under the run-off coverage and the attachment point (which is often \$1 million) before excess will respond. If the excess policy limits won't "drop down" to the lower sublimit, the lawyer should look into increasing the run-off coverage sublimit to avoid a potential gap of \$750,000 or more (if the sublimit has been depleted) that the lawyer could be personally responsible for before the excess policy would respond.

It would be prudent to review the entire practice history of a lawyer when considering what professional liability insurance should be maintained. Lawyers should consider whether there are any possible limitation periods that have not passed with respect to services provided at a given law firm. If there is or will be for a period any continuing exposure to claims, the lawyer should look into confirming whether there is any excess insurance in place for the applicable firm that would respond to such claims on the lawyer's behalf. If not, the lawyer should look into acquiring coverage to address such risk.

If a practice is being wound down, lawyers should consider whether they will maintain excess insurance coverage for the legal services provided on behalf of the firm while it was still active, how long such insurance should be maintained, or, alternatively, whether an extended reporting period may be sufficient.

## **14. Creating a Plan**

### **a. Appointing Substitute Decision Makers**

Sole practitioners and lawyers in small firms with active practices should have contingency plans in case they cannot continue acting for clients. This may be due to death, serious illness or other causes which make the lawyer incapable of acting. The Law Society of Upper Canada has created *the Contingency Planning Guide for Lawyers*<sup>21</sup>. This free resource walks lawyers through creating a contingency plan. An important part of this process is selecting a qualified replacement lawyer who can take over the planning lawyer's practice. Selecting a qualified replacement lawyer will help prevent future claims against the planning lawyer or their estate. A good replacement lawyer will be able to take over files without causing any prejudice to clients. The planning lawyer can help facilitate the transition with effective planning. These include steps such as:

- Discussing the planning lawyer's goals with the replacement lawyer (e.g. wind up the practice or preserve and sell it)
- Deciding on the replacement lawyer's compensation

---

<sup>21</sup> *Contingency Planning for Lawyers*, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/ContingencyPlanningLawyers/>>.

- Inquiring about the bank(s)' requirements to ensure that the replacement lawyer can access trust and general accounts
- Granting a power of attorney for property to the replacement lawyer (and an alternate) in case of disability or an unexpected absence from practice
- Appointing the replacement lawyer as estate trustee for the planning lawyer's practice in their last will and testament.

### **b. Other Forms of Insurance**

Lawyers don't operate in a vacuum. They may also be business owners, landlords and employers. They may provide services that are not covered under run-off coverage for lawyers' professional services. As such, lawyers need sufficient insurance to protect themselves from the risks arising out of these roles.

Lawyers should consider and discuss with their insurance professional whether coverage should be maintained for the following types of risk:

- **Employment practices** – Employment Practices Liability (“EPL”) insurance protects against liability arising out of employment contracts, workplace discrimination, employment standards, wrongful dismissal, human rights, defence costs, etc. EPL insurance may be particularly useful for sole practitioners and small firms. Unlike larger firms, smaller firms may not have human resources departments who oversee and administer human resource policies. Dissolution of a firm can present particular human resource challenges, particularly if there has been a breach of employment standards surrounding termination of services. If this type of insurance has been maintained by the firm, the lawyer may wish to continue coverage for a period of time following the end of the practice, or enquire about extended reported periods.
- **Property and general liability for property the lawyer or partners still own** – If the lawyer will be continuing as a landlord for the premises where the law firm was located, care should be taken to ensure adequate insurance is in place to address risks to people or property.



- **Other forms of professional liability insurance** – If lawyers will be acting as estate trustees for family members, continuing as directors, or commencing/continuing a career in another profession, the lawyer should ensure there is adequate insurance in place, based on risk, for these various activities. This may include the purchase of dedicated executor’s insurance, directors’ and officers’ insurance (“D&O”), or another form of professional liability insurance.
- **Health and life insurance** – When leaving a law firm, a lawyer may be losing the benefit of a group policy for health benefits. Some insurance carriers will have the option for employees leaving to change their plans from a group plan to an individual plan. Particularly if the lawyer does not have other insurance available to respond (ex. through a previous employer’s continuing plan or a spouse’s plan) the loss of benefits can be a significant cost that should be considered when making a succession plan. Likewise, if a lawyer’s estate plan relied on life insurance provided through the law firm’s benefits’ provider, the lawyer should look into continuing the availability of such coverage or seek an alternative.

---

## CONCLUSION

---

For lawyers to have peace of mind and enjoy their retirement there are a host of insurance solutions available. Retirement planning starts with defining what retirement means to the individual lawyer. The Law Society insurance program includes options which enable lawyers who are retiring, beginning to wind down a practice or those going on temporary leave to enjoy premium discounts or exemption from payment of premium levies while continuing to work part-time, mentor, act as estate trustees, or do *pro bono* work. When considering insurance needs for the future, lawyers should look at their long-term exposure to claims, particularly in the context of the services they provided while in practice and in light of the current limitations regime in Ontario. Planning for the future requires consideration of exposures arising from all facets of a lawyer’s practice and the lawyer’s needs for the future. With proper planning, lawyers can put themselves on sound footing to enjoy their retirement.