

This is not a claim, but...

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At LAWPRO we often get explanations from insureds as to why they feel their matter is not reportable to LAWPRO. Commonly we hear the following: “There is no claim against me. No one has commenced an action, there is no litigation. So, there is no claim”.

In this article I will explain common misunderstandings about reporting to LAWPRO. In particular, I will focus on de-bunking the following myths:

1. being sued is the only time an insured needs to report,
2. there is no claim so an insured does not need to report, and
3. the allegation has no merit, so there is no need to report.

In fact, the duty to give notice to LAWPRO is as broad as it is so that LAWPRO can proactively assess, and possibly, repair a matter. While the idea of contacting LAWPRO can feel stressful, it should not be confusing. I want to de-bunk common myths we hear when processing Claim Notice Reports.

Myths about reporting to LAWPRO

Myth #1: I have not been sued and/or there is no action against me, so I do not need to report

It is important to understand that the commencement of litigation and/or any proceeding against an insured is not the defining factor in submitting a Claim Notice Report. While an action being commenced is one reason for reporting to LAWPRO it is not the only instance when a matter ought to be reported. LAWPRO does not take the word “claim” to mean only a civil suit or other proceeding.

There are many Claim Notice Reports that are investigated and proactively handled that do not involve litigation or threatened litigation against an insured. These matters are reported due to the potential for allegations or assertions being made against insureds.

Myth #2: This is not a claim under the Policy, so I don’t need to report this matter

The term/word claim is often misunderstood.

LAWPRO encourages insureds to report even if they are unsure their situation falls under the definition of claim or CIRCUMSTANCE(S). A lawyer’s deductible and levy surcharge history is not triggered by reporting a claim and/or CIRCUMSTANCE(S) itself.

LAWPRO has defined the word CIRCUMSTANCE(S) to assist insured’s with understanding their reporting requirements. We will now review some of the policy wording.

The Policy:

In the 2020 Policy, the term CIRCUMSTANCE(S) is defined as:

(c) CIRCUMSTANCE(S) means any circumstances of an alleged, actual, or possible error, omission, or negligent act of which the INSURED becomes aware, which from the perspective of a reasonable LAWYER or LAW FIRM could potentially give rise to a claim hereunder.

General Condition E, sets out how notice of a CLAIM is required to be provided (*"If during the POLICY PERIOD the INSURED first becomes aware of any claim or CIRCUMSTANCE(S), such INSURED shall immediately give written notice thereof or cause written notice to....."*).

CLAIM is defined in Part V of the Policy as:

(e) CLAIM(S) means:

(i) a written or oral demand for money or services; or

(ii) a written or oral allegation of breach in the rendering of PROFESSIONAL SERVICES; received by the INSURED and resulting from a single error, omission or negligent act or RELATED ERROR(S), OMISSION(S) OR NEGLIGENT ACT(S) in the performance of PROFESSIONAL SERVICES for others.

All CLAIMS which arise from a single error, omission, or negligent act or RELATED ERROR(S), OMISSION(S), OR NEGLIGENT ACT(S) shall be deemed a single CLAIM regardless of the number of INSUREDS or the number of persons or organizations making a claim or the time or times the error(s), omission(s), negligent act(s) or claim(s) took place.

As well, Section 7.8-2 of the Law Society of Ontario's Rules of Professional Conduct requires lawyers to "give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced."

There are endless situations where claims and CIRCUMSTANCE(S) can arise. LAWPRO cannot put them into neat, defined categories.

Under General Condition (G), found on pages 6-7 of the Policy, insureds are required to assist and cooperate with LAWPRO in its handling of a matter on behalf of the insured. This includes:

- Not voluntarily assuming any liability or settling a claim (other than with respect to a Prescribed Penalty);
- Cooperating with LAWPRO in the investigation, defence and repair of any claim;
- Not interfering in any negotiations or settlement of any claim;
- Whenever requested by LAWPRO, aiding in securing information and evidence and the attendance of any witnesses;
- Cooperating with LAWPRO in enforcing any right of contribution or indemnity against any person or organization (other than the insured's employees who acted within the scope of their employment), and enforcing any entitlement to costs.

A lawyer may lose their coverage if *inter alia* they settle a claim without LAWPRO's involvement, refuse to help with their defence, interfere in negotiations etc.

Late Notice:

Late notice often allows small problems to become big ones, and they can jeopardize coverage. Do not allow a potential claim/circumstance(s) to fester. Early notice gives us the best chance to help put things right.

It cannot be stressed enough how important it is to provide immediate notice of any claim or circumstance(s) that could give rise to a solicitor negligence claim. To avoid coverage issues that can result from late reporting of a claim or circumstance(s), don't find yourself in a position where it is too late for LAWPRO to effectively investigate, defend or repair a matter. If adverse findings of fact are made in a disciplinary, administrative tribunal process, appeal or Judicial Review, this could impair LAWPRO's ability to defend a later civil suit.

The consequences of not cooperating, or failing to provide notice of a claim can lead to the Law Society of Ontario being asked to step in to the insured's shoes (which would be at the Law Society's discretion to decline to do), and/or LAWPRO can rely on any such breach by the insured to deny coverage. This would be an unsatisfactory result, from the perspective of both the insured and the complainant if damages are owed.

Myth #3: The allegations are without merit, so I don't need to report

LAWPRO understands that a common sentiment in the legal community is: "There is no merit to the allegation so I am not reporting." This is not a good idea. LAWPRO encourages and requires insureds to provide notice of real or possible mistakes immediately. Whether or not a matter is meritorious is not a factor in reporting a claim or circumstances. In addition, the Law Society Rules commentary states that a duty to report arises whether or not the lawyer considers the claim to have merit.

What Happens When You Report

Once a matter is reported a Claims Counsel will contact you to discuss the report as well as obtain more information and determine a strategy.

As a risk management initiative, LAWPRO will often investigate, monitor or assist on an ex gratia basis. This usually involves LAWPRO retaining investigation counsel, who often becomes involved in responding to the allegations. If necessary, LAWPRO counsel will attend at cross-examinations with you provided LAWPRO is given timely notice of the allegations of ineffective assistance of counsel by an insured. If a matter is reported late, i.e. the insured takes steps to self-repair including but not limited to responding to the appellant or new counsel by responding to the investigation inquiries, swears an affidavit, goes to cross examinations without prior notice to LAWPRO, then LAWPRO cannot guarantee assistance as the matter is potentially a late report.

LAWPRO has experienced high success rates with having ineffective assistance of counsel allegations dismissed or dropped. This reduces the likelihood of a former client commencing a solicitor's negligence claim and their chance of success if they do. In several instances, LAWPRO has succeeded in dissuading the appellant's counsel from maintaining the issue in its Notice of Appeal and/or Judicial Review, thereby extricating its insured lawyer immediately.

Immigration and Criminal Specific Claims and Circumstances(s)

In recent years, LAWPRO has seen a steady increase in allegations of various types of claims and circumstance(s) pertaining to the immigration and criminal bar. Ineffective assistance of counsel is an example of a common type of claim. LAWPRO requires its insured to report any such allegations immediately and before the formal protocol is engaged. Therefore, if an appeal counsel or your client's new counsel writes or calls you to 'investigate' or talk about steps taken by you previously for the client, whether at trial or some other proceeding, LAWPRO requests the matter is reported at that time. This allows us to engage at an earlier stage.

Claimants/clients who are considering allegations of incompetent representation often also file a complaint to the Law Society of Ontario. This can be a precursor to the client alleging ineffective assistance of counsel and insureds ought to report this. In addition, the client may commence a fee assessment. While the LAWPRO Policy would not on the face of it apply to a matter that is solely for the return of fees paid (such as a fee assessment), or a disciplinary process where the penalty would be a fine or similar penalty, these types of proceedings are often the precursor to civil suits that fall squarely within the coverage grant.

Other examples of possible claims/circumstance(s) can be: missed deadlines, failure to submit documentation or wrong documentation submitted, missed emails resulting in missed deadline (went into SPAM), miscommunication with client, allegation process was not explained properly, misinformed plea or application process taken, alleged failure to keep client updated, clerical errors and applications to strike pleas, failure to understand or advise the client of the law, election process (judge alone). This is just a sample of the types of claim notifications that LAWPRO receives and is not meant to be inclusive. As stated earlier, if you are unsure, the best step is to report.

The comments in this article speak only to the general availability of coverage under the LAWPRO Policy. Coverage is determine on an individual case basis, subject to the specific circumstances of the particular claim/circumstance(s), allegations made and applicable Policy provisions.

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