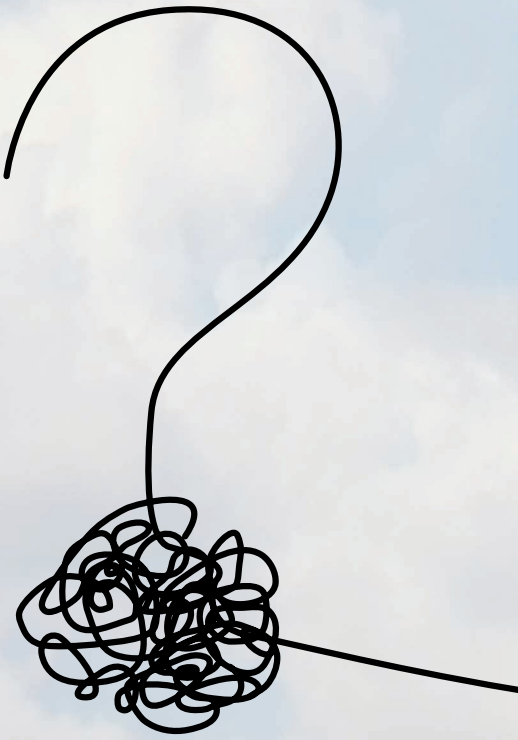
Does my LawPRO insurance cover assumed risks



There are different types of risks that can lead to claims against lawyers: those that develop from errors or omissions, those that arise through intentional wrongdoing, and those that lawyers willingly accept for themselves.

A lawyer's professional indemnity (E&O) policy is intended to respond to claims arising from a lawyer's error, omission or negligent act in the course of providing professional services. On the other hand, intentional harms (such as theft, fraud, dishonest conduct or malicious acts that lead to loss) are not the types of claims that would normally be covered by E&O policies. This brings us to a third category of liability: situations in which a lawyer's risk arises through a voluntary agreement to be liable. Lawyers are presented with requests to assume responsibility for losses on a regular basis and may not be aware of the risks attached to what they are agreeing to. This assumption of risk may cause the lawyer to have an uninsured exposure to claims.

Consider the common scenario where a lawyer is asked to give an undertaking. If the lawyer has the power to fulfill the undertaking, such as by agreeing to personally follow-up with enquiries following a certain date, the lawyer would normally have coverage if the lawyer's failure to follow-up led to a loss. However, assume the lawyer gives an undertaking with respect to someone else's performance of a task and the lawyer has no control over that party (e.g., giving an undertaking that a client will pay something within a certain time). While the lawyer had no responsibility to perform the task, by giving the undertaking she has assumed responsibility for the non-performance.

No one should ever give an undertaking that they cannot personally ensure is fulfilled. If responsibility for carrying out the action is outside of the lawyer's control, the undertaking provided is nothing more than an expression of wishful thinking. For this reason, the policy excludes coverage for these types of claims.

Another situation in which lawyers can be asked to assume liability is when they enter into contracts to receive or provide services. Some parties will include clauses in their contracts such as hold harmless or indemnity agreements. These contract terms can be more or less onerous for the counterparty and mean that the service provider or client is held harmless for any and all (direct or consequential) losses that occur as a result of the contract. These can even include intentional harms by the party seeking to stand behind the agreement. The wording of some of these agreements will mean the service provider or client is held harmless from all losses

except those caused by the party's gross negligence. What "gross negligence" is and whether that can be considered the sole cause of the loss can be a difficult (and expensive) thing to determine.

It is interesting to note that lawyers cannot enter into hold harmless or indemnity agreements with their clients that would shift liability from the lawyer to the client. Under s.22 of the *Solicitors Act*, R.S.O. 1990, c.S.15, any provision in an agreement that would render the solicitor not liable for negligence or relieves her of responsibility that she would otherwise be subject to is void.

How these hold harmless and indemnity agreements with service providers or clients may increase a lawyer's personal exposure and impact how the Law Society policy would respond to a claim may best be illustrated through a couple of examples.

Scenario A: You elect to sign a contract with a service provider that includes an indemnity agreement (the service provider is the indemnitee and you are the indemnitor). The service being provided is one typically used by law firms, such as document storage or shredding services, the provision of software for a specific area of practice, or the outsourcing of a law firm function. The service provider makes an error and your clients sue both you and the service provider. The clients, remember, are not parties to the agreement and are not bound by the contract. The service provider then looks to you to indemnify it. In this scenario, assuming you met the applicable standard of care and the only liability facing you as a lawyer arises from the indemnity agreement, there would typically be no coverage under the policy to defend any cross-claim from the service provider, or for any damages, costs awards or settlement amounts as the loss in this situation does not flow from the provision of professional services to a client and would be in any event expressly excluded under the policy.

Scenario B: Your firm has won a competitive bid to provide legal services to a large client. As part of the contract, you agree to hold the client harmless from any and all tort claims that may arise. In acting on a real estate transaction, your client provides measurements for a property being sold that prove to be wrong. The purchaser, who has learned of this after the closing, sues your client for misrepresentation and your client looks to you under the indemnity agreement. Coverage would not be expected to apply since the harm did not arise from your error, omission or negligent act, but that of your client and coverage does not extend to your clients. To make this even more clear, there is both an exclusion and a condition in the Law Society policy that would prevent the policy from applying or coverage being extended when lawyers voluntarily assume liability for another.

What are your options?

The costs of insuring certain risks and the commercial interest parties have in moving liability exposure from themselves to others means that hold harmless and indemnity agreements are going to be common features in many types of contracts, including client retainers and supplier agreements. This does not mean that lawyers should always agree to them. There are options available such as obtaining or confirming your firm has contractual liability insurance in place, entering into negotiations regarding these terms (with the understanding this may have financial or relationship implications), or contracting with a different party who has more favourable contract terms in this regard. ■

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