

LAWPRO

magazine

SEPTEMBER 2016 VOL 15.3

Unlocking

Access to Justice



PLUS:
Rule 48 Countdown
Assess Your Risk Questionnaire
Wellness Technology Tips

upcoming events

recent events

September 7, 2016

Toronto Lawyers Association
TLA Articling Headstart Program
Student to lawyer: Making the transition
Ian Hu presenting
Toronto, ON

September 15, 2016

Cunningham Swan Carty Little & Bonham LLP
Common sources of claims
Ray Leclair presenting
Kingston, ON

September 15, 2016

College of Law Practice Management
2016 Futures Conference
Dan Pinnington chair
Kansas City, MO

September 16, 2016

Frontenac Law Association
1000 Islands Legal Conference
Rule 48 dangers
Ray Leclair presenting
Ganonoque, ON

September 23, 2016

Osgoode Professional Development
12th Annual Update:
Personal Injury Law and Practice
Solicitor's negligence claims in personal injury cases
Cynthia Miller and Ian Hu presenting
Toronto, ON

September 28, 2016

Koskie Minsky LLP
Lunch and Learn
Rule 48
Dan Pinnington presenting
Toronto, ON

June 3, 2016

Law Society of Upper Canada
Professional Conduct & Practice
Managing risk, recognizing cultural diversity
Lorne Shelson presented
Toronto, ON

June 6, 2016

Ontario Bar Association
The Enterprising Lawyer: Taking Care of Business
Running a productive practice
Ray Leclair presented
Toronto, ON

June 8, 2016

Ontario Superior Court of Justice
Judicial Law Clerks Presentation
*From law clerk to lawyer:
Practical tips & common claims*
Ian Hu presented
Toronto, ON

June 9, 2016

Law Society of Upper Canada
Solo & Small Firm Conference 2016:
Strategies for Success
Clear and effective communication
Ian Hu presented
Toronto, ON

June 10, 2016

Simcoe County Law Association
Simcoe County Family Law Conference
Limited scope retainers in family law
Ian Hu presented
Orillia, ON

June 15, 2016

Law Society of Upper Canada
Law Society's staff "Munch 'n Crunch"
presentation
Frauds targeting lawyers
Dan Pinnington presented
Toronto, ON

June 16, 2016

Donald A. Wilson Secondary School
Grade 10 Civics and Careers program
LAWPRO Corporate Writer (and other alternative legal careers)
Nora Rock presented
Whitby, ON

June 16, 2016

AUM Law
CPD Program
Common causes of claims
Ian Hu presented
Toronto, ON

June 20, 2016

Dickinson Wright
Lunch & Learn
LAWPRO and claims prevention
Martine Morin presented
Toronto, ON

June 23, 2016

Thunder Bay Law Association
CPD program
Rule 48
Ian Hu presented
Thunder Bay, ON

July 6, 2016

Advocates' Society
Navigating Costs Assessments
Ian Hu presented
Toronto, ON

July 13, 2016

American Bar Association
Law Practice Webinar
Future of law and how to future proof your firms
Dan Pinnington presented

August 13, 2016

Canadian Bar Association
CBA Legal Conference
Wellness and technology tips for happier, healthier lawyers
Dan Pinnington presented
Ottawa, ON

Contents

September 2016

Volume 15
Issue 3

E&O | EXCESS | PRACTICE TIP | WELLNESS | TITLEPLUS | BOOK REVIEW | SOCIAL MEDIA

Unlocking

Access to Justice

Unlocking Access to Justice

- 5 What's my coverage when working *pro bono*?
- 11 So you want to start an A2J initiative?
- 14 Artificial intelligence and the "self-driving" lawyer
- 17 Limited scope representation: With the right safeguards, possibilities abound
- 20 Alternative fee arrangements in litigation

Departments

- 2 In the news
- 4 Editorial
Being part of the collaboration
- 21 E&O
Lawyers: (Safely) make your own dent in the affordability barrier
- 23 Excess
Does your firm need to consider excess insurance?
- 28 TitlePLUS
A conversation with our consultants
- 33 Social media
AvoidAClaim.com: Risk management news with a fresh look
Profile: Jordan S. Halpern

In practice

- 24 Practice tip
The clock is ticking: Pre-2012 matters not set down will be automatically dismissed January 1, 2017
- 30 Book review
The future of the professions: How technology will transform the work of human experts
- 32 Wellness
Let technology be your path to wellness

Publications Mail Agreement No. 40026252

Return undeliverable Canadian addresses to:
LAWPRO
250 Yonge Street
Suite 3101, P.O. Box 3
Toronto, ON M5B 2L7

LAWPRO® (Lawyers' Professional Indemnity Company)

Trademarks

* LAWPRO, TitlePLUS, practicePRO and their logos are registered trademarks and the Excess logo is a trademark of Lawyers' Professional Indemnity Company; other trademarks are the property of their respective owners.

Copyright

© 2016 Lawyers' Professional Indemnity Company, except certain portions which are copyright in favour of external authors.



LAWPRO sponsors *Relay for Life*

As outlined in our Corporate Social Responsibility statement, LAWPRO is committed to being a responsible, involved and accountable citizen of the many communities in which we hold membership. As part of the Toronto insurance community, LAWPRO is a proud sponsor of the Women in Insurance Cancer Crusade's (WICC) *Relay for Life*.

Relay for Life is a community fundraising event where Canadians across the country join together in the fight against cancer. Relay participants walk or run together around a track or path at a local school, park or fairground, passing a baton to their fellow participants and working together toward one common goal – the fight against cancer.

On June 17, 2016, insurance industry professionals came together at Downsview Park in Toronto to raise more than \$350,000 as part of the Canadian Cancer Society's *Relay For Life*.

LAWPRO receives “A” rating from A.M. Best Rating Services

16 consecutive “A” ratings recognizes stable history

A.M. Best Co. awarded LAWPRO a financial strength rating of “A” and an issuer credit rating of “a” for the sixteenth consecutive time. In addition, A.M. Best Co. gave LAWPRO a “stable” outlook for the fifth year in a row.

In establishing its rating, A.M. Best cited LAWPRO's strong capitalization, commanding market profile, and improving operating results. LAWPRO's results reflect a conscious decision to provide low and stable premiums to its insureds.

Kathleen A. Waters received OBA Award of Excellence in Real Estate

On June 22nd, the Ontario Bar Association presented LAWPRO President and CEO Kathleen A. Waters with the Award of Excellence in Real Estate.

In the OBA's announcement, Real Estate Section Chair Timothy Kennedy described Ms. Waters as a long-serving and passionate volunteer with the section, and noted that she “has worked to promote the value real estate lawyers provide to the public and improve the knowledge of what it is that we do.”

The most tangible result of that tireless promotion was the establishment, nearly 20 years ago, of the TitlePLUS® title insurance program. In 1997, working with then section chair Maurizio Romanin, Ms. Waters studied the growing title insurance phenomenon and developed an innovative Canadian vision for title insurance.

Key Dates

September 15, 2016

File your LAWPRO Risk Management Declaration by this date to qualify for the \$50 premium discount on your 2017 premium for each LAWPRO-approved CPD program (to a maximum of \$100) completed by this date.

On or about October 3, 2016

LAWPRO online filing of Professional Liability Insurance renewal applications for 2017 is expected to begin. If you wish to file a paper application instead of filing online, please note that paper renewal applications will not be automatically mailed out, but it is expected that you will be able to download a 2017 pre-populated paper renewal application from our website starting on or about October 3, 2016 (subject to approval from Convocation).

October 31, 2016

Real estate and civil litigation transaction levies and forms are due for the quarter ended September 30, 2016.

November 3, 2016

E-filing deadline: Renewal applications filed online on or before November 3 qualify for a \$25 per lawyer e-filing discount applied to the 2017 insurance premium (subject to approval from Convocation).

November 10, 2016

Renewal Application filing deadline: 2017 LAWPRO renewal applications filed after this date will be subject to a surcharge equal to 30 per cent of the base premium (subject to approval from Convocation).

Moving from private practice to LAWPRO, Ms. Waters pioneered the inclusion of a legal services coverage component into title insurance and designed a product that supplements real estate lawyers' expert advice and guidance. TitlePLUS title insurance and LAWPRO continue to support real estate lawyers' efforts to remain quarterbacks of the real estate transaction.



Malcolm Heins, then President and CEO of LAWPRO, credits Ms. Waters with both enhancing the title security available to the public and solidifying “the lawyer as integral to a real estate transaction.”

We congratulate Kathleen A. Waters on this prestigious award.

e-briefs Don't miss out – have you seen our recent emails?

The full content of these newsletters is available at practicepro.ca/enews. To ensure you receive timely information about deadlines, news and other insurance program developments, **please make sure LAWPRO has your up-to-date email address and that your spam filter allows emails from LAWPRO.**

Webzines/Magazines



Organized for real estate season

June 9, 2016

Real estate practice is both highly competitive, and relatively risky (from a claims perspective). Lawyers eager to thrive in real estate will

benefit from strategies that streamline their file management while making it easy to adhere to the Law Society of Upper Canada's Residential Real Estate Transactions Practice Guidelines.



2015 Year in Review

May 5, 2016

This issue looks back at our financial and claims management performance in 2015.

Now that we are well into 2016, we are more

closely focused on the challenges that lie ahead of us (including the looming January 1, 2017 deadline for administrative dismissal of actions).

Insurance Reminders/News

Apply for your LAWPRO Risk Management Credit by September 15

August 24, 2016

A reminder that up to \$100 can be saved on your 2017 LAWPRO premium by completing the online Risk Management Premium declaration form no later than midnight, September 15, 2016.

Verify your LAWPRO exemption status

June 14, 2016

A reminder for lawyers who are currently exempt from the payment of insurance premium levies under the Law Society of Upper Canada's insurance program to verify their status for professional liability insurance purposes for the coming year.

Transaction levy filings overdue

May 20, 2016

A reminder that the deadline for submission of levy filings relating to transactions completed between January 1, 2016 and March 31, 2016 was April 30 of this year.

■ FAQ

I am currently in private practice and have insurance with LAWPRO.

Do I need to renew the coverage under the mandatory program each year?

Yes. Lawyers who currently carry the mandatory practice insurance must renew their coverage for the following policy year in October/November each year. Lawyers can renew online on an individual lawyer basis or one filing can be completed on behalf of all the lawyers in the firm.

We anticipate that for the 2017 policy year, lawyers will be able to file their renewal application beginning on or about October 3, 2016. If a lawyer successfully files online (receiving a confirmation number that begins with the letter "P") on or before November 3, 2016, a \$25 e-filing discount will be applicable to their 2017 premiums. Lawyers who do not renew their insurance by Thursday, November 10, 2016 will be subject to a surcharge for non-filing equal to 30 per cent of the base premium.

Correction

In the May, 2016 edition of *LAWPRO Magazine*, we reported on page 14 that a successful application in the Court of Appeal to restore an action to the trial list – *Cariocac's Import & Export Inc. v. Canadian Pacific Railway Limited*, 2013 ONCA 361, 115 O.R. (3d) 713 – was achieved by LAWPRO counsel. Successful counsel were in fact Robin B. Cumine, Q.C. and Kirryn G. Hashmi.

Being part of the collaboration



To quote The Action Group on Access to Justice (“TAG”), “The justice system is inaccessible to far too many. We must find better, more affordable and timely ways for people to manage and resolve their legal problems. No single organization has the answers. Collaboration, innovation and broad participation is required.”¹

How can we help while not increasing the risk for lawyers? This issue of *LAWPRO Magazine* investigates current approaches to facilitating better access as well as how the insurance program is designed to facilitate certain access to justice initiatives.

For years LAWPRO-approved Pro Bono Ontario (PBO) programs have had special status under the primary insurance program. LAWPRO and PBO worked together to develop guiding principles to help manage our relationship and smooth the way for efficient and timely approval of programs. Details of the process are described in Nora Rock’s article, “Lawyers: (Safely) make your own dent in the affordability barrier.”

In addition to *pro bono* work, many lawyers assist Ontarians to access justice by practising in an unbundled fashion, also known as accepting limited scope retainers. There is nothing in the insurance program policy that penalizes or that should otherwise discourage lawyers from this approach to helping clients. LAWPRO’s only concern is that lawyers structure the retainer appropriately and ensure that the client understands the implications of the lawyer doing only part of the work. Ian Hu’s article on page 17 gives many examples about how this is being accomplished in the field.

As I see new lawyers coming out of law school, I often wonder what the next 20 to 30 years of their working lives has in store for them. How different will it be from my experience? Wholly different, I imagine. Dan Pinnington discusses a few new and upcoming technologies that might bring those differences about in his article, “Artificial intelligence and the ‘self-driving’ lawyer: Better access to justice and lower claims?” Seeing the profession evolve and expand is an exciting adventure for all of us.

LAWPRO is participating in a dialogue about A2J, the risks thereunder, and lawyer concerns. The most important goal for us is to ensure insurance issues are considered at an early stage. That way, collaboration truly can be the name of the game.

Kathleen A. Waters
President and CEO

¹ [lsuc.on.ca/uploadedFiles/targeted-legal-services-handout.pdf](https://www.lsuc.on.ca/uploadedFiles/targeted-legal-services-handout.pdf)

LAWPRO
magazine



President & CEO:	Kathleen A. Waters	
Editor-in-chief:	Dan Pinnington	dan.pinnington@lawpro.ca
Editors:	Naomi Dummett Nora Rock	naomi.dummett@lawpro.ca nora.rock@lawpro.ca
Design & Production:	Freeman Communications	studio@freemancomm.com
Photography:	Rick Chard	rickchard@bmts.com

LAWPRO Magazine is published by Lawyers’ Professional Indemnity Company (LAWPRO) to update practitioners about LAWPRO’s activities and insurance programs, and to provide practical advice on ways lawyers can minimize their exposure to malpractice claims. The material presented does not establish, report, or create the standard of care for lawyers. The material is not a complete analysis of any of the topics covered, and readers should conduct their own appropriate legal research.

The comments in this publication are intended as a general description of the insurance and services available to qualified customers through LAWPRO. Your policy is the contract that specifically and fully describes your coverage and nothing stated here revises or amends the policy.

lawpro.ca
Tel: 416-598-5800 or 1-800-410-1013 Fax: 416-599-8341 or 1-800-286-7639



What's my coverage

when working
pro bono?



In Ontario there is a pressing need for legal services that can be accessed by low-income and disadvantaged persons. Many lawyers are stepping up and trying to address this gap through free services, discounted fees, or providing legal education to members of the public.

Whenever legal services are being provided to the public, however, it is important that you consider and know the risks you're facing: no matter how well-intentioned parties are, things can always go wrong. Knowing how your primary professional liability insurance is expected to respond should give you direction and peace of mind when giving back to your community.

The availability and terms of professional indemnity coverage for *pro bono* services vary depending on whether a lawyer is insured

by LAWPRO or not (i.e., whether he or she is in private practice or is exempt), on the context in which those services are provided (through Pro Bono Ontario or not), and finally, on the nature of those services (whether or not they fall within the LAWPRO definition of professional services). This article and the accompanying chart were prepared to help you understand your coverage status so that you can make informed choices about risk management when offering *pro bono* services.

Insured (non-exempt) lawyers working *pro bono*

The mandatory program of professional indemnity insurance coverage from LAWPRO applies to the delivery of professional services to clients regardless of how much those clients pay for the services. This means that if you are a lawyer in private practice currently insured by LAWPRO, you are free to offer *pro bono* services to clients, and as long as you are within the terms of your coverage and comply with the policy conditions, you can expect to be covered for errors and omissions up to the limits of your coverage.

Insured lawyers are free to serve *pro bono* clients in any context they wish. However, in the interest of supporting *pro bono* work, LAWPRO has included certain special terms in its policy that apply to the delivery of *pro bono* services through Pro Bono Ontario (PBO – formerly *Pro Bono Law Ontario*) programs that have been approved by LAWPRO.

Special policy terms for services under PBO programs

PBO is a central and expert provider of *pro bono* legal services in Ontario, with sophisticated training, structure, risk-management protocols and technical support that reduces barriers for lawyers wishing to volunteer. These features of PBO programs mean that, after reviewing and approving a program for the purpose of our special policy terms, LAWPRO has confidence that claims risks associated with work done under the program are appropriately managed. This confidence, in turn, allows us to offer the following special policy terms for professional services offered under the program by insured lawyers:

- In the event of a claim flowing from services delivered under a LAWPRO-approved PBO program, LAWPRO waives the deductible that would otherwise be applied according to the terms of the lawyer's policy.
- Claims experience based on services delivered under such a program will not trigger a claims history levy surcharge.
- Where the lawyer is eligible for the part-time practice discount, professional legal services offered *pro bono* under such a program will not count toward the lawyer's annual practice hours (i.e., *pro bono* services will not put a lawyer "over" the part-time practice cut-off).

See the chart on page 8 for a summary of these terms.

The E&O article at page 21 of this magazine – "Lawyers: (Safely) make your own dent in the affordability barrier" has a detailed discussion of how LAWPRO and PBO work together. For a list of the LAWPRO-approved programs, please see lawpro.ca/PBolist.

Standard policy terms apply for non-PBO programs

LAWPRO recognizes that not all worthwhile opportunities to offer free or discounted services arise under programs that have obtained PBO support; however, it is beyond the reach of our program to individually risk-rate proposals to work *pro bono*. For that reason, lawyers who offer *pro bono* services outside the PBO umbrella of programs are subject to the standard terms of the policy. That means that in the event of a claim your insurance will respond in exactly the same way for a *pro bono* matter as for a full-fee paying client. For practising lawyers, this means that the deductible and claims history levy surcharge would still be expected to apply.

These same standard policy terms apply when you provide professional services through a clinic within the meaning of the *Legal Services Act, 1998*, a student legal aid society, or an Aboriginal legal services corporation funded by Legal Aid Ontario. In these contexts, however, you may have the benefit of additional coverage under a policy maintained by the organization – ask your supervisor for details of that coverage.

Want to take advantage of LAWPRO's special *pro bono* policy terms for insured lawyers? Consider helping obtain PBO status for the program in which you are working.

Impact of *pro bono* work on discounts for restrictions on practice

Under the Law Society program lawyers can choose to restrict their practise areas and enjoy certain premium discounts. Lawyers who don't practise real estate law don't have to pay the Real Estate Practice Coverage Option (REPCO) premium surcharge or the Real Estate Transaction Levies, for example. Lawyers in firms which restrict their practise to only criminal and/or immigration law can qualify for a premium discount equal to 50 per cent of the base premium under the Restricted Area of Practice (RAOP) option. Lawyers on the RAOP discount may want to help people in their communities, but have concerns that the work done may fall outside the technical definition of "criminal" or "immigration" law and that they will lose their premium discount. This is a serious issue for consideration before you embark on *pro bono* work that will cause you to lose a beneficial premium status under the LAWPRO insurance program.

LAWPRO receives questions about this, and it often has to do with representing people before administrative tribunals, such as licensing boards and for disciplinary hearings. Depending on the sanctions that may be imposed against the client, this may still qualify as "quasi-criminal." In these circumstances, we ask that you contact us about your plans. If LAWPRO confirms you can act, you can represent your client outside of a traditional criminal-law setting and still maintain your RAOP discount.

Exempt, and want to work *pro bono*?

As a lawyer exempt from the payment of LAWPRO premiums, you are likely aware that you do not have coverage for the delivery of professional services. While you may provide these services to an employer (including the government), or use your legal skills in a non-practising context (like education), you cannot carry on the private practice of law.

Increasingly, however, exempt lawyers are looking for ways to serve their communities by supporting access to justice. LAWPRO supports those efforts by offering limited coverage for exemptions who do *pro bono* work through LAWPRO-approved PBO programs.

Exempt lawyers who volunteer through PBO

These are the terms of coverage for exempt lawyers delivering professional services through a LAWPRO-approved PBO program:

- Offering legal services through such a program will NOT jeopardize your exempt status.
- Because you are not required to pay a premium, you will not be subject to a claims history levy surcharge.
- You pay no deductible in the event of a claim.
- You will enjoy coverage under the LAWPRO Run-off coverage program, up to the limits of that coverage (an all-time limit of \$250,000, unless you apply and pay for increased coverage limits).

See a summary of these terms in the chart on page 9.

Run-off coverage was designed to cover claims arising out of an exempt lawyer's past private practice activities, and not services offered while exempt; however, *pro bono* services are the exception – services delivered *after* the lawyer has applied for and become eligible for exemption are covered. While this special coverage, available without payment of premiums, entails some risk for LAWPRO, that risk is reduced by the safeguards available through the PBO system. By offering coverage within the framework of our agreement with PBO, LAWPRO is able to balance support for access to justice with fairness to the insured lawyers who fund our program.

Exempts delivering *pro bono* services – but not through PBO

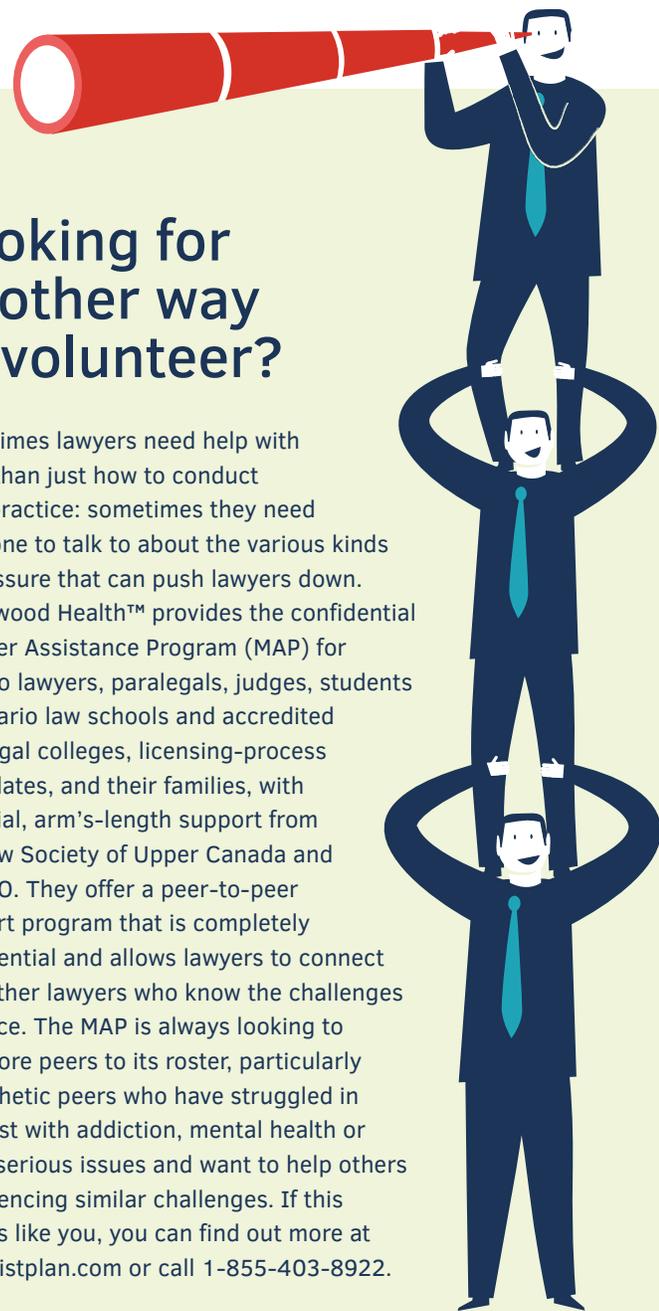
No professional legal services can normally be provided by lawyers on exemption to the public without paying for practice coverage. So, in general, you can't provide these types of services, even for free, unless you are either paying for practice coverage or providing them through an approved PBO program.

There is an exception possible for *pro bono* services for certain non-profit organizations themselves (i.e., as opposed to any members, clients, etc. thereof). If you receive LAWPRO's approval beforehand,

you can provide professional services to these non-profit organizations, but there will be no coverage under the Law Society insurance program in the event of a claim. This is a risk for lawyers (and clients) to consider. See the chart on page 9 for details of your exposure to uninsured claims.

Looking for another way to volunteer?

Sometimes lawyers need help with more than just how to conduct their practice: sometimes they need someone to talk to about the various kinds of pressure that can push lawyers down. Homewood Health™ provides the confidential Member Assistance Program (MAP) for Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, licensing-process candidates, and their families, with financial, arm's-length support from the Law Society of Upper Canada and LAWPRO. They offer a peer-to-peer support program that is completely confidential and allows lawyers to connect with other lawyers who know the challenges you face. The MAP is always looking to add more peers to its roster, particularly empathetic peers who have struggled in the past with addiction, mental health or other serious issues and want to help others experiencing similar challenges. If this sounds like you, you can find out more at myassistplan.com or call 1-855-403-8922.



LAWPRO *pro bono* coverage summary charts

Coverage for *pro bono* “professional services” (as defined in the LAWPRO insurance policy¹) depends on your current insurance status as well as on the type of *pro bono* professional services you provide. Please refer to lawpro.ca/probono for additional information.

Currently **insured** for practice by LAWPRO

Type of <i>pro bono</i> work – Professional Services:	Coverage	Deductible	Claims history levy surcharge	Implications for part-time status
Through Pro Bono Ontario program approved by LAWPRO ²	Yes	No	No	These hours &/or past claims related thereto don't affect part-time eligibility
For Not-for-profit organization itself ³ (not through Pro Bono Ontario)	Yes	Yes	Yes	These hours and past claims related thereto will affect part-time eligibility
Exclusively through clinic within meaning of <i>Legal Services Act, 1998</i> , student legal aid society or Aboriginal legal services corp. funded by Legal Aid Ontario ⁴	Yes, but also subject to coverage under non-LAWPRO policy coverage	Yes, but also subject to coverage under non-LAWPRO policy coverage	Yes, but also subject to coverage under non-LAWPRO policy coverage	These hours and past claims related thereto will affect part-time eligibility

¹ Your LAWPRO policy is the contract that specifically and fully describes your coverage. In contrast, the description in this document gives a broad overview of coverages and programs and does not revise or amend a policy or program.

² In order for LAWPRO to approve a PBO program, and for your work to be covered, it must involve only legal work: (a) rendered to low income persons in civil matters or in criminal matters for which there is no government obligation to provide counsel; (b) that simplifies

the legal process for, or increases the availability and quality of services to, persons of limited means; and/or (c) rendered to charitable, non-profit and public interest organizations with respect to matters or projects to address the needs of low-income and disadvantaged individuals.

³ The services must be provided specifically for the organization itself, not for individuals within the organization or its clients. The organization benefiting from the services must be a not-for-profit organization.

Exempt status



Type of <i>pro bono</i> work – Professional Services:	Implications for Exempt Status	Coverage	Deductible
Through Pro Bono Ontario program approved by LAWPRO ²	None	Part of \$250K ⁵ per claim/ aggregate run-off	No
For Not-for-profit organization itself ³ (not through Pro Bono Ontario)	Obtain pre-approval from LAWPRO to maintain exempt status ⁶	None despite LAWPRO pre-approval	N/A
Exclusively through clinic within meaning of <i>Legal Services Act, 1998</i> , student legal aid society or Aboriginal legal services corp. funded by Legal Aid Ontario ⁴	None	None from LAWRO, but subject to coverage under non-LAWRO policy coverage (see footnote 6)	N/A

⁴ Only applies where the lawyer is NOT directly employed by Legal Aid Ontario, does not engage in the practice of law in Ontario other than for the individuals or communities served by the clinic, student legal aid services society or Aboriginal legal services corporation, and demonstrates proof of coverage under a policy of insurance as described in para. 6 of s. 9(1) of By-law 6 of the Law Society of Upper Canada.

⁵ The \$250,000 Standard Run-Off Coverage limit is a one-time limit and is not re-instated annually. Increased run-off coverage protection may be available for eligible lawyers who apply to LAWPRO. Lawyers under a temporary leave of absence are provided with the standard practice policy coverage limits.

⁶ In the alternative, you may choose to purchase coverage from LAWPRO under the primary insurance program, in which case the normal terms of the policy will apply in terms of deductible, claims history levy surcharges and part time status eligibility.

Other forms of volunteering and your coverage

Whether or not you are exempt from paying LAWPRO premiums, you should be aware that you might find yourself exposed to losses flowing from volunteer activities that fall outside the LAWPRO policy. Remember, lawyers' professional indemnity insurance covers you for the risks inherent in providing professional services as defined by the LAWPRO policy. Volunteer assistance that is other than practising law is not covered; if you are concerned about the risk of being sued over the volunteer work you do, you should ask the organization through which you are volunteering about their insurance coverage and whether it protects you, or take other steps to minimize your risk.

Examples of activities that fall outside the LAWPRO policy include: providing financial or investment advice; depositing client money into your firm's trust fund for reasons unconnected with your legal services; teaching (including teaching law); providing volunteer director services (distinct from legal services) on a corporate board; and speaking to the media on behalf of a client (see practicepro.ca/speakingtomedial for more information). One must remember that LAWPRO is licensed to provide professional liability insurance, not education or media liability insurance.

So, another type of activity to be considered is the provision of free legal information. For many people in Ontario, the legal system seems confusing and hostile to non-licensees. By educating members of the public on practical ways the law intersects in their lives (landlord and tenant issues, wills and estates, family law, small business, etc.) and by providing basic legal information, lawyers can help individuals equip themselves with enough knowledge to be confident in approaching licensees for help, or to act for themselves in a legal matter.

But for the most part, legal seminars and education sessions don't require lawyers to provide any professional services and therefore, are not typically covered by the LAWPRO policy. There is usually no client, and the lawyer is providing only general information. However in rare circumstances, a member of the public may interpret the information provided as being individual legal services from the insured lawyer speaker. These situations are known as "phantom client" scenarios, and claims flowing from them may, depending on the facts, come within LAWPRO coverage.

"Phantom clients" and your coverage

While very rare, "phantom clients" can show up following a lawyer's public speaking engagement. These are people who may believe they have entered into a solicitor-client relationship without the lawyer being aware it was happening. They can be audience members who ask specific questions about their own circumstances and the lawyer uses legal knowledge and skill to give an answer that goes beyond legal information and is really legal advice. In this type of phantom client scenario, if a claim develops there could, depending on the circumstances, be coverage under an insured lawyer's program policy, with relevant terms regarding deductibles, claims history levy surcharges, and so forth potentially applying.

If you have any questions about whether there may be any insurance implications arising from your *pro bono* activities or the way in which you want to give people better access to justice, please contact a LAWPRO customer service representative at service@lawpro.ca, by phone at 416-598-5988/1-800-410-1013 or visit our website at lawpro.ca. We can answer your questions and will help you to help others. ■

Victoria Crewe-Nelson is Assistant Vice-President, Underwriting at LAWPRO.





So you want to start an A2J initiative?

Here's what you need to know about insurance

Lawyers are problem solvers at heart. While barriers to access to justice (hereafter A2J) remain formidable and complex, lawyers and others in Ontario continue to conceive and champion initiatives aimed at bringing justice into the public's reach. LAWPRO is committed to supporting that innovation, and is eager to participate in the A2J conversation. This article outlines our perspective.

Why an insurance perspective?

Crucial for many A2J initiatives is finding lawyers who want to be involved, whether as volunteers or paid participants, and many Ontario lawyers have expressed willingness to undertake *pro bono* work and/or participate as employees or otherwise in these initiatives.

Promoters of A2J initiatives may not focus heavily on participant insurance issues so long as enough lawyers are prepared to get involved. But Ontario lawyers (unless otherwise exempt) are required to obtain their primary professional liability insurance from LAWPRO and thus will often be concerned about LAWPRO's reaction to any initiative they are considering.

Lawyers may, however, focus on practical, legal and procedural issues at the outset of a project, turning their minds only later to risk management and insurance. This means that questions about coverage may not receive attention until planning is in advanced

stages. A last-minute scramble to make provision for coverage can delay or even derail a project. We hope to raise awareness of the insurance context among proponents of new programs so that risks and coverage are considered throughout the planning process.

Here's what we know

LAWPRO personnel receive frequent comments and questions from lawyers interested in *pro bono* work. Years of dialogue with lawyers have yielded the following conclusions:

- Many lawyers are willing to do *pro bono* work, or participate in A2J initiatives where compensation is modest;
- However, whether employed (and exempt from program insurance) or participating as an insured private practitioner, at least some are concerned about risk, and one of the ways they want to know their risk is moderated is through appropriate insurance;



- Where insured by LAWPRO, they do not want to be exposed to out-of-pocket costs like a deductible or a claims history levy surcharge (CHLS);
- There seems to be little appetite (at least, to date) for *pro bono* program organizers to provide indemnity and hold harmless agreements to protect lawyers, and organizers may in fact even want such protection in their favour from the participants;¹
- While for some initiatives wanting to make a real impact it may seem most cost effective to hire one or more lawyers as employees, as soon as those lawyers start providing legal advice or services to anyone other than the employer they do not fit under the standard “employed lawyer” exemption from purchasing insurance; and
- There is the potential for claims exposure (and on the flip side, lack of protection for the public) where uninsured lawyers undertake work for members of the public. This is especially true if the content of the retainer, necessary training, and appropriate tools to accomplish the work are not strictly controlled (such as through LAWPRO-approved PBO programs – see our E&O article on page 21 for more details).

Insurance issues for lawyers working *pro bono*

Unfortunately, insurance issues have been known to arise, often at the last minute before a new A2J initiative launches, that are not susceptible to easy answers under the current program structure. The following are examples that we have seen in recent years:



Example #1:

An initiative did not want to pay for program insurance for employed lawyers, although they did not appear to fit within the relevant “employed lawyer” exemption because they were serving the public, not simply the employer.

This issue arose in the context of an initiative designed to assist a specific cultural community. The initiative was hiring lawyers as employees intending them to provide services to members of the cultural community, not just to the employer. So, this issue involved lawyers being paid for their efforts, but not in a traditional private practice setting.

Example #2:

Some initiatives give rise to a number of issues. For services where they are only being paid what they perceive as a modest amount of compensation, insured lawyers report not wanting to be exposed to the risk of paying a deductible or CHLS under the program.

Also, in some A2J settings, lawyers may be exposed to risks other than for the provision of professional services, i.e., risks that the program will not cover. For example, what if a complaint is filed with the Law Society against the individual lawyer? What if it is alleged the lawyer breached the *Ontario Human Rights Code*?

Finally, if the proponent of an initiative insists on a full contractual indemnity and hold harmless provision from the participating lawyers, that agreement may go beyond what the LAWPRO program would cover, leaving lawyers personally exposed.

For all of the above, one can consider, as an example, an initiative that was launched within government to pay private practice lawyers a modest amount to do certain work on an occasional basis. The work involves interacting with members of the public and giving advice/opinions. This example involves private practice lawyers, who are already insured, undertaking paid work.



Example #3:

There is no coverage under the program policy for what is typically viewed in the insurance world as education liability or media liability.

A government wanted lawyers to participate in a program where they would provide education sessions to certain litigants. Another example would be lawyers providing written legal information content for broad dissemination to the public. Such initiatives could be paid or unpaid, and in the calls to LAWPRO have involved insured lawyers in private practice. Due to the limitations of our licence, the best LAWPRO can say is that the LAWPRO program would assist if a “phantom client” problem emerged due to an attendee or reader later claiming that the lawyer provided him or her with legal professional services as defined in the program policy.

¹ See our article “Indemnity and hold harmless provisions: A quest for reasonable or excessive protection?” for LAWPRO’s perspective on lawyers’ granting of hold harmless agreements.

There are no easy solutions to these problems. Some of the risks raised fall completely outside the scope of professional indemnity coverage for professional legal services, and perhaps outside the terms of our insurance licence. In other cases, the exposures complained of could not be covered without unfairness or undue expense to the practising bar as a whole.

Considering insurance issues throughout the A2J program development process can help program proponents understand the risks to which lawyers would be exposed, so that those risks can be properly communicated and, where possible, minimized through safeguards (for example, participant training, standard retainers) and careful program design.

What now?

At this time, LAWPRO hopes to continue to participate in a dialogue about A2J, claims risks, and lawyer concerns. In particular, we hope to raise awareness of the details of the program in the A2J community, and to discuss strategies for allaying lawyer concerns. Our most important goal is to avoid last minute crises when new initiatives reach the rollout stage without prior consideration of insurance issues and conflict arises with participating lawyers and/or the organizer of the initiative.

And unfortunately, the answer cannot be as simple as saying that the insurance program should cover “everything” and do so at no cost. The following must be borne in mind:

- There are limits to the LAWPRO insurance licence;
- Reserves must be held for the full breadth of risks undertaken (known as “IBNR” – funds to cover claims that are considered incurred but not reported), meaning that coverage has a cost even without claims being reported;
- The program must continue to make sense to our regulators, rating agency and reinsurers; and
- A2J work is not risk-free. Although individual A2J clients if dissatisfied may often find it challenging to pursue a malpractice claim against a lawyer, any broad-based program of services has a degree of class action risk, if a systemic weakness is identified after the fact. Furthermore, even an individual client of the program making an allegation of negligence, especially if self-represented, can result in significant defence costs being incurred before a matter is resolved.

So how can you launch an A2J initiative with the fewest insurance obstacles?

Consider the following early in the planning process:

For *pro bono* A2J initiatives:

- Will PBO adopt the program and then seek LAWPRO approval, such that insured lawyers may become eligible for waivers of deductibles and CHLS, and exempt lawyers can rely on their run-off coverage (to the extent an individual lawyer has run-off coverage available) for some protection?

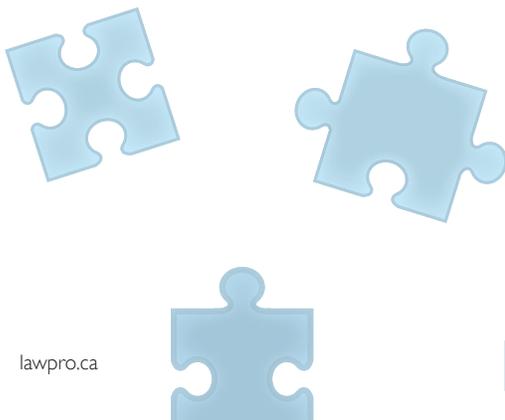
For A2J initiatives where lawyers are paid as employees of the project:

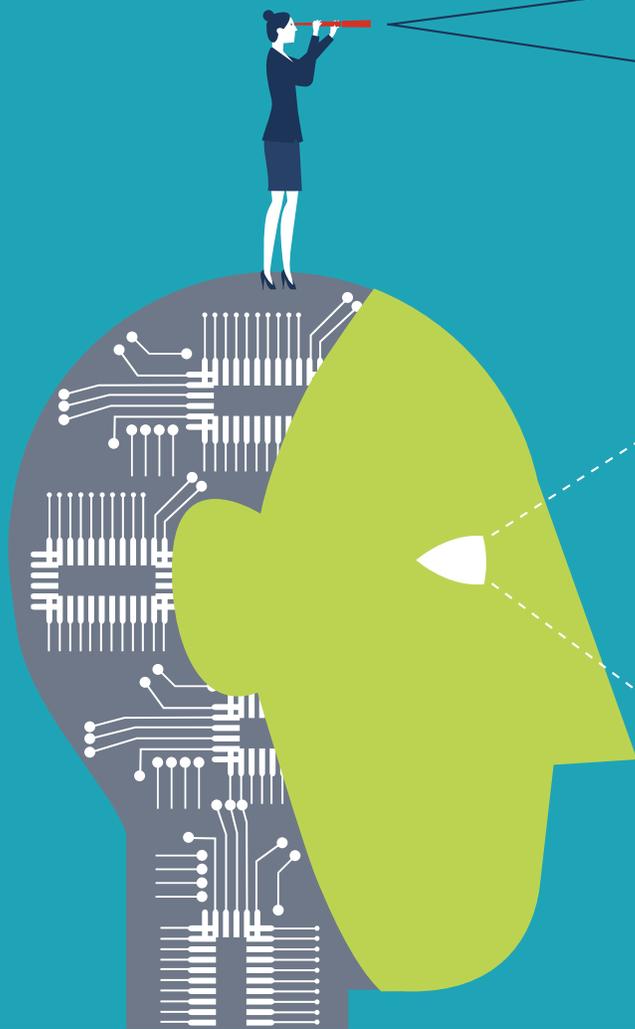
- Is there a way to structure the work such that only some of the lawyers are doing legal work for which program coverage must be purchased?
- Consider how much time the legal work will take, in comparison to other work the lawyers will do. Maybe the lawyers will be eligible for part-time coverage, which is currently a 50 per cent savings in premium costs.

For all A2J initiatives:

- What types of insurance are being carried by the promoter of the initiative? Are they appropriate for the type of work being undertaken (e.g., education liability, media liability, general professional liability for non-lawyer work)? Do they also cover other risks the participants may encounter, such as theft of personal property, slips and falls, personal injury resulting from violent clients or allegations of breaching the *Human Rights Code*, to name a few risks which may be relevant depending on the circumstances?
- Is indemnity and hold harmless protection being offered by the promoter? That may give additional comfort to the participating lawyers, depending on the promoter’s assets.
- At the other end of the spectrum, is the promoter requesting such indemnification and hold harmless protection from the lawyer participants? If so, the earlier LAWPRO underwriting staff can review the terms of the arrangement, the better. Some such agreements can fall within the terms of the program policy (i.e., protecting the lawyer if he or she were ever sued under the indemnity), but others would not.
- Will the target group of participating lawyers lose their entitlement to premium discounts under the program, either because they no longer qualify for a restricted area of practice (criminal and/or immigration law) or a part-time practice discount?

Have questions? We encourage you to call LAWPRO – we are here to help navigate risks and work towards identifying the best solution. ■





Artificial intelligence and the “self-driving” lawyer

Better access to justice and lower claims?

We all look forward to the day when we can jump in a vehicle that will drive itself to our desired destination. And while self-driving vehicles have been in our imaginations for many decades, vehicles from Tesla and others with driving-assistance technology suggest fully autonomous self-driving cars will be a reality in the not too distant future. Machines are starting to talk to humans, just like we’ve seen in science fiction movies for decades.

The Industrial Revolution occurred when machines started doing the work of humans. We are at the start of a second Industrial Revolution, one that will see machines with artificial intelligence (“AI”) start to think like humans. These smart machines will touch, and in some cases profoundly transform, many aspects of our daily lives at work, home, and play.

You are likely already using AI-based technology, and may not even realize you are doing so. AI is often invisible to the end user. Common and widely used devices using AI include Siri on your iPhone, the GPS in your car, your smart home devices and the autopilot on airplanes. The fraud detection on your credit card and online accounts is primarily done by AI, which also sends the email or text warning that your account has been compromised. Online customer support and the writing of news stories is also frequently done by AI.

Over the next two decades, smart machines will also transform the legal profession and the world of legal services. This transformation has already started. AI is helping lawyers do traditional legal tasks like legal research, ediscovery, document drafting and contract review more efficiently. eBay's online dispute resolution service currently settles millions of disputes a year without lawyer involvement. AI will also help with the creation of new ways for lawyers, non-lawyers and machines to provide legal services to clients. These new types of services have the potential to help with the access to justice problem by assisting unrepresented or under-represented people get the legal help they need. And as you will see, smart machines have the potential to help lawyers make fewer errors, and in some cases, they can do the same tasks lawyers would, with fewer errors.

What is artificial intelligence?

Artificial intelligence is a complex topic and there are many definitions of what constitutes AI. To paraphrase them, AI is involved when computers or other machines have the cognitive ability or "intelligence" to think like humans to learn and solve problems and complete tasks.

You will likely recognize that humans think at many different levels. There are also many different levels or types of AI. This likely plays a part in the lack of a consensus on the definition. And just as they do in the human brain, two or more types of AI will frequently work together. Here is a list of the types of AI that will play a part in transforming how legal services are provided in the coming few decades:

- Vision: the ability to interpret and recognize elements in a picture. At a basic level it will be the ability to recognize what is in the picture (e.g., a plane, a tree or a forest) and at a more advanced level it could mean describing what is in the picture or even using facial recognition to identify people in a picture.
- Expert systems: the ability to emulate the decision-making of a human expert. Automated document generation systems are a widely used example of an expert system.
- Speech: the ability to convert text to speech or speech to text. This can be at a very simple level – a text reader that simply reads aloud the text on a webpage – or at a more complex level, for example, Dragon Dictate voice recognition software which looks at the context of the words it is transcribing and will recognize the difference between to, two and too by looking at the rest of the words in the sentence.
- Natural language processing: the ability to actually understand and interpret what a human is saying. Siri® is probably the best known and most widely implemented example of this kind of AI.
- Machine learning: an AI system that can look at data points for a task or process, analyze them to look for how to better do the task or process, then implement the identified improvements, and repeat the process again. This learning can happen with or without the supervision of humans.

How smart machines think and do work

Notwithstanding the current interest in learning to code, most lawyers will not have spent a lot of time thinking about AI and how smart machines think. Many will probably assume that a computer should think like a human when tackling a legal issue or completing a law related task. For some types of AI this is the case, but other types of AI think on their own and in a manner that is nothing like how a human can or would think.

Most current automated document generation systems think like humans would to draft a document. They will ask the same series of questions a human would to gather the information required to create a personalized document with the relevant clauses. But thinking like a human can be much more complicated than it might seem. Depending on the nature of the problem, the thought required can be fairly simple or surprisingly complex. It might take only a dozen questions to get the information necessary to complete a simple nondisclosure agreement. In contrast, you would need a complex decision tree with multiple branches and hundreds of questions to complete a typical will, separation agreement or commercial lease. Someone with the required legal knowledge has to help with the creation of a decision tree that will ask all appropriate questions to properly create a document based on particular circumstances. Some of the AI services use a graphical interface that make it easy for a lawyer to create a decision tree. The system should be able to recognize when a client's circumstances are not addressed.

Document automation usage is widespread and growing. Many firms are using it to streamline their workflows. Millions of unrepresented people in the U.S. have received help drafting court documents through Law Help Interactive, a platform created with HotDocs, and A2J Author from Chicago-Kent Law School.

For other types of AI, the computer will think like a computer, not like a human. This is the world of big data where AI will look to find patterns in a huge collection of data. Technology aided review ("TAR") or predictive coding is already widely used for ediscovery work. ROSS, based on IBM's Watson®, uses natural language processing and machine learning to assist with legal research and regulatory compliance issues. Demonstrations indicate it is fairly rudimentary at this stage (it won't replace your articling student yet), but it will evolve and when it is commercially released it will have the ability to tackle complex legal problems. LexMachina™ uses a large dataset of intellectual property cases to predict IP litigation outcomes. ComplianceHR, a joint venture of Littler Mendelson and Neota Logic, offers a suite of applications that assist human resources professionals to evaluate independent contractor status, overtime exemption and other employment law issues.

And while there are more vendors offering services and products using AI in the U.S., there are some Canadian examples, too. Loom Analytics is an online legal analytics system that uses a combination of machine learning and legal analysis to classify Canadian case law for statistical analysis. It will allow you to see how a particular judge has ruled on specific motions or at trial, the kinds of cases



that make it to court most frequently, the average decision turnaround time, and the average cost and damage awards broken down by case type. Beagle™, Clausehound® and Diligen are contract review tools. Legalswipe informs people of their rights during interactions with police.

AI benefits and dangers

By improving efficiencies of the daily tasks and processes that occur in law offices, AI can help with access to justice by bringing the cost of traditional legal services down, and by allowing more entrepreneurial firms to offer new types of services. AI will also help with the access to justice problem by enabling new types of legal services not currently provided by lawyers. Several of the new models of legal services predicted by Richard and Daniel Susskind in their book “The Future of the Professions” rely on AI, including online Q&A sites, self-help kiosk services and para-professionals supported by expert systems. See page 30 for a review of this book and more details on these models.

In the same way a checklist can ensure steps are not missed, an automated system that uses a decision tree to ask all the necessary questions will ask those questions every time – unlike a human – who might overlook a question or two on occasion. Studies¹ have shown that TAR is faster, cheaper and more accurate at finding relevant or privileged documents than humans doing the same review work.

But while high-volume automated systems have the benefit of creating far more documents on a cheaper basis for many more clients, they also have the potential to make the same error over and over again for all those clients. This type of scenario could result in a large and costly class action suit.

Hacking the human-technology interface

Failure to know or apply the law is the fourth most common cause of malpractice claims, representing only 13 per cent of LAWPRO’s claims between 2005 and 2015. With an appropriate level of attention, building legal smarts into an AI app or service should be fairly easy. In contrast, 31 per cent of LAWPRO’s claims over that same time period involve lawyer/client communication issues, and 17 per cent involve inadequate discovery or investigation (i.e., the lawyer didn’t recognize or obtain all the relevant information to handle the client’s matter).

These claims statistics suggest that the human/computer interface will be a challenge for AI-based legal services. Will the automated document generation system ask all the necessary questions to generate a document, or recognize it is dealing with a circumstance that is not contemplated? Will a client answering questions for an online Q&A site understand those questions and provide correct and relevant information? Will language, age or culture impact a client’s ability to enter information into a self-help kiosk?

That is not to say that using a human/computer interface could not also have positive implications in some circumstances. A smartphone app could provide easier access to legal information or advice for someone that did not otherwise have easy access to a computer.

Some lawyers will be replaced by computers

To some, the notion that a computer program or smart phone app could replace a lawyer will seem far-fetched, or even impossible. But as this article highlights, smart machines are already doing legal tasks that were once the sole domain of lawyers, and they will take an even greater role in the provision of legal services. Lawyers and law firms must adapt and evolve. AI won’t cause a sudden mass extinction of legal jobs, rather there will be incremental changes. The timing will vary for different areas of practice, and by the type of work done within those areas of practice. Ultimately, there will probably be fewer traditional legal jobs, but new types of legal jobs will be created. The need for better access to justice by the large proportion of the population that can’t afford legal services will help drive wider adoption of AI-based legal services. ■

Dan Pinnington is Vice-President, Claims Prevention and Stakeholder Relations at LAWPRO.

¹ For example, Cormack & Grossman, Evaluation of Machine Learning Protocols (wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23339.14.pdf).



Limited scope representation

With the right safeguards, possibilities abound

A self-represented family law litigant anxiously prepares for a hearing, which can resolve months, if not years, of anxiety, and determine the litigant's financial and family affairs in the near future. Retaining a lawyer from cradle to grave is out of budget for this litigant. What to do? Relief is around the corner – a lawyer steps in to help solely with the hearing, the result is fair, and the cost is affordable.

Success stories like this are playing out across the profession. The unbundling of legal services, also commonly called limited scope representation or a limited scope retainer, is expanding the legal market and at the same time one of the cornerstones of access to justice. Lawyers “unbundle” the full service package to provide a particular legal service, be it consultation, ghostwriting, or appearing in court, and leave the rest to the client. Clients that may otherwise be unable to afford a lawyer for full representation can now meet the legal system halfway with the assistance of a lawyer.

“In the last several years limited scope retainers and single consultations have increased dramatically. A lot of people come to me for a consultation and simply seek information and directions about what the legal procedures are, and also about alternative dispute resolution,” says Sonya Jain, a lawyer and mediator at HGR Graham Partners LLP in Simcoe County and Family Law Committee Chair of the Federation of Ontario Law Associations (FOLA). Family law is ripe for exploration consultations. “We (family lawyers) are

able to offer many solutions to our client's issues. As a family lawyer, I see myself as a problem solver and a peacemaker because I want to lower conflict for families and children, and this includes providing more options and pointing clients to community resources.”

Benjamin Arkin, an estates litigator at Arkin Estate Law, also finds clients may approach him for just one service, “a beneficiary or a potential beneficiary may need to know what all the options are. What are the risks and possible outcomes? With a consultation, I can help my client answer the biggest questions – including whether going to court is the best route. We can agree about the scope of the work I will do for them from there.”

While perhaps most popular among family law practitioners, limited scope retainers are making headway in many areas of law, including administrative law, corporate law, and civil litigation. An entrepreneur buying a small business may approach a lawyer to scrutinize an already-negotiated contract. A recently fired employee can consult a



lawyer to get information on what constitutes an acceptable range for a severance package, then work out the details with the employer alone. A “small” transactional dispute over the quality and quantity of widgets can be canvassed with a lawyer before digging in. The list of possibilities is long, and much of the market may yet be untapped.

Justin Jakubiak, a partner at Fogler Rubinoff LLP specializing in litigation and dealership law, says that large companies are also looking at retaining lawyers on a limited scope. “In-house counsel can look to a Bay Street lawyer to write a demand letter to demonstrate a higher level engagement. A limited scope retainer gives the corporate client more control and understanding of the process. While the corporation typically has the skills, abilities, and resources to take on a legal project, it may want to get someone else to do the heavy lifting. Satisfaction rate is high – the client has what it went to the lawyer for – and it’s clear what the client is paying for.”

Clients, opposing counsel, judges and adjudicators report that, for the most part, they are happy with limited scope retainers. The clients are satisfied because they get help; judges and adjudicators deal with better-informed self-represented parties; and opposing counsel is happier dealing with a self-represented person who has had the benefit of a lawyer’s input.

Draw the lines clearly and follow them

While there are clearly benefits to limited scope representation, what about the risks for lawyers? There are two major risks.

First, communication-related claims, which are the highest source of claims in virtually all areas of law, are equally if not more likely to occur under limited scope representation. This typically happens when there is a disagreement between what the lawyer and client have agreed to do. Was work promised but not done? Did the lawyer take steps to which the client never consented? A limited scope retainer that fails to draw the lines clearly – or fails to follow the lines drawn – can lead to a malpractice claim.

Second, limited scope representation presents a risk that lawyers may not dig deep enough and ask appropriate questions on a matter. The failure to undertake adequate investigation is another leading cause of claims. In the context where only some legal work is provided, it may be tempting to cut short a client interview once the paid-for time has run out. If the lawyer discovers any impending deadlines or limitation periods, they should be disclosed and, preferably, confirmed in writing. The interview with the client must be done as carefully as it would be for a client with full representation. If not, remember that lawyers who fail to warn their clients of material legal issues or claims, even where they were not part of the limited scope retainer, have been held liable for malpractice.

Discuss the risks and disadvantages of limited scope representation

Rule 3.2-1A of the *Rules of Professional Conduct* “Legal Services Under a Limited Scope Retainer” imposes new obligations for lawyers acting under a limited scope representation. The lawyer must advise the client about the extent and scope of the proposed services, and whether they can be provided within the financial means of the client. The client must be fully informed of the risks and disadvantages of limiting the scope of the representation. If the client is unfamiliar with the legal system, extra care should be taken to ensure the client truly understands the limits and the risks.

The claims experience in the U.S., where limited scope representation has been more common, indicates that dissatisfied clients will allege negligence. Examples include alleging the lawyer was authorized to undertake certain steps but failed to do so, the fees were unreasonable given the limited scope, the litigation result should have been better, or that one or other aspect of the matter was not handled properly. The bottom line: A higher likelihood for malpractice claims and ethics complaints when the risks and disadvantages are not discussed.

Limited scope representation does not mean less adequate representation

Taken in conjunction with “Competence” commentary [7A] to Rule 3.1-2, the lawyer must carefully assess whether it is possible to render legal services in a competent manner. Simply providing a limited legal service on the basis that the client can only pay a certain amount poses a risk if it means the lawyer is unable to provide competent services. Is it competent service to shrink a consultation requiring three hours into only one hour because that is all the client can afford? Is it competent service to attend a court hearing without the benefit of a factum because the client cannot afford to pay for a factum? The risk of a malpractice claim increases when the lawyer is unable to spend the time necessary to provide adequate service.

Dealing with opposing counsel and the courts

Be careful with communications when opposing counsel is acting on a limited scope representation. Is opposing counsel on the record? If so, you must communicate through counsel. Otherwise, clarify whether you are to deal with the client or the lawyer, depending on the issue. Consider the circumstances in which you should deal with opposing counsel. It can help opposing counsel if you provide written notice clarifying the extent to which you are acting and what aspects of the matter opposing counsel should communicate with you on, versus those aspects being handled by the client.

Similarly, if you are acting on a limited scope retainer and a tribunal is confused about your role, do not mislead the tribunal, and consider whether the circumstances and rules of practice require you to disclose the scope of your retainer.

When limited scope representation is not appropriate

Commentary [5.2] to Rule 3.2-1A.1 states that a lawyer must carefully consider and assess whether it is possible to provide competent services to a client with diminished capacity. A client who is a minor, mentally disabled, or otherwise impaired, may not be capable of understanding the risks and disadvantages of a limited scope retainer. Take care when considering a limited scope representation with such clients.

“Another red flag is when a potential client comes in on an emergency basis with a big retainer,” says Justin Jakubiak, “The client can pay, but is there enough time to digest the case and put together a theory? I have to ensure I can get adequate information to proceed, and that’s hard to do on a tight timeline. The client may say ‘these are the facts you need to know’ – but chances are there’s more to it. If I can’t give adequate representation, I decline.”

Steps to take to minimize risk

If you choose to offer limited scope representation, there are steps you can take to minimize risk. Work out the discrete legal steps

the client needs to achieve. Confirm the steps that are within your wheelhouse. Advise the client about the risks and disadvantages of the limited scope. And control the client’s expectations from the start of the matter.

Next, it’s time to put it all in writing. Rule 3.2-1A.1 requires the lawyer to confirm the services in writing and to provide a copy to the client when practicable. LAWPRO has a limited scope representation resources page at practicepro.ca/limitedscope on the practicePRO website. The resources include tips and checklists to help you, handouts for your client, and sample limited scope retainers and clauses. At practicepro.ca/retainers, you will find updated precedent retainers. The retainer should identify the discrete collection of tasks to be undertaken, and who is responsible for which tasks.

Once you’ve begun work on a limited scope representation file, document every step of the matter. Keep a record of all communications, especially information and instructions provided by the client, and advice you have given. When a step has been completed, confirm that the work was done at each step.

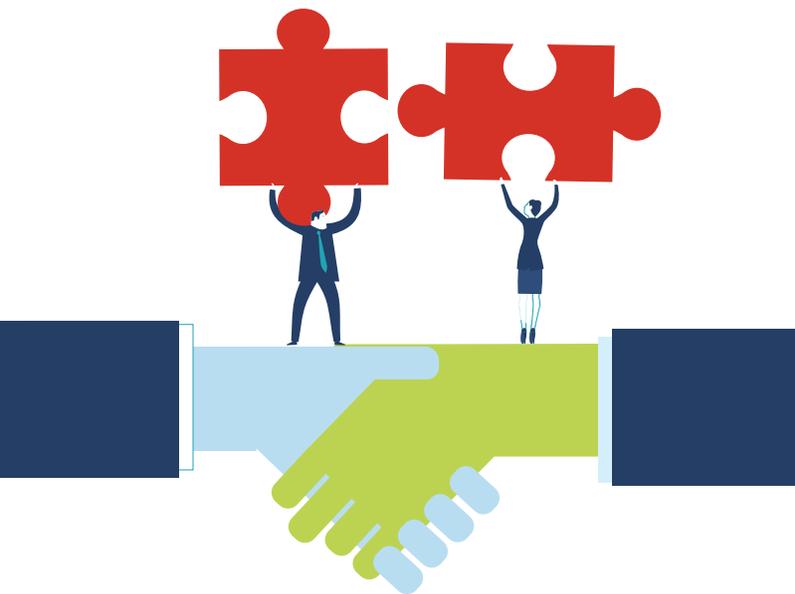
When you have completed work on a limited scope representation, there is a chance the client will return to you with more questions or steps that need to be done. If this occurs, make sure you have a new retainer in place. This may be hard to do as the inclination is to want to step in and help. However, should you skip obtaining a new retainer, you may have difficulty collecting payment for the extra work, and you will lose the protection that comes with documenting the steps.

Conclusion

Limited scope representation is part of a solution to the complex issue of access to justice. Grace Vaccarelli, counsel at Human Rights Legal Support Centre says, “We get 25,000 inquiries every year. Limited scope retainers allow us to provide effective and focused representation at each stage of the process – whether assessing merit, reviewing pleadings, engaging in party-to-party settlement negotiations or, most commonly, attending a mediation or a hearing. Self-represented claimants can often very effectively articulate the impact of the discrimination – we’re here to help them with the specifics of the legal process.”

Be aware of the risks of limited scope representation. Protect yourself by only providing limited scope representation in circumstances where you can do so competently. Clearly set client expectations from the beginning on what you will do. Use a written retainer. Document the file. And don’t do work after the retainer is terminated, unless you create a new retainer agreement. These basic steps can help reduce your exposure to a malpractice claim, and help you defend a claim if an allegation of negligence is made. ■

Ian Hu is Counsel, Claims Prevention and practicePRO.



Alternative fee arrangements in litigation

In recent years more focus has turned to alternative fee arrangements as a way to offer clients more predictable costs and affordable legal services. Hughes Amys LLP, based out of Hamilton and Toronto, offers alternative fee arrangements which have proven successful for them. Here is a look at how they've done it.

"We've been doing alternative fee arrangements for over 20 years," says managing partner William (Bill) S. Chalmers. "In the early days it was a blended rate, where the client would pay one hourly rate regardless of who worked on the file. Then clients wanted to pay a fixed rate until a certain stage of litigation." The problem was there was little information as to whether the rate made sense on either side. A complex file requiring work from the senior partners could mean the firm was less adequately compensated, and conversely a simpler file would potentially be overcompensated.

There had to be a "better way. One which provided both cost certainty and a price at a reasonable level," says Bill. "We started to dig down into our statistics using practice management software. We gathered data reports including the average shelf life of a certain kind of file from opening to closing. Take a lower level personal injury file – we could look at hundreds of files and tell you, on average, the defence costs, the time it took to resolve, and how much was paid out. And we can do this down to the last dollar."

With the data in tow, the firm was able to calculate the average fee that was charged per month per file based on a number of categories such as reserve limits. "We show the client the data. They know exactly how much a certain file cost over the span of hundreds of files and decades of experience. We then charge them a flat fee per month for a file of a certain type that is in line with the average data."

Clients appreciate the open approach. "We can generate these reports based on virtually any set of criteria, and clients are confident the number is accurate. And potential clients love that we can quote them a fee based on hard data. Our fee isn't just an approximation or a guess about how much a file is worth. It's based on precisely what files have cost in the past and what they're costing now."

The firm also solved a problem inherent with fixed fee per month per file. This approach incentivizes law firms to keep a file open longer to make it more profitable. "Average shelf life can creep upward. We prevent this by updating the stats on every file every quarter. We keep track of lawyers and see how they are performing. Is one lawyer keeping files for longer than expected? Are certain files more likely to stay open longer? We can take action where necessary."

The fee arrangement requires trust on both sides. "It only works if the client does not change the way it typically provides instructions. If the client says 'it's a fixed fee, so now we want the law firm to do extra motions,' then the law firm is undercompensated. At the same time the law firm cannot say 'it's a fixed fee, so now we're going to do less'. It's a reciprocal relationship. This only works when you trust each other and have an ongoing relationship. We also build loyalty by being open with our data. No one can take advantage of the other when the numbers are shared."

In recent years, some clients have hired third party billing administrators to review a lawyer's account. "So much time is spent figuring out how a lawyer docketed, reducing the account, and going through appeal processes. The whole process takes a lot of time and energy from all parties and is inefficient. It's based on a system of distrust, where nobody trusts the other is doing their job right. Everybody's unhappy. Flat fee billing arrangements like ours present a huge opportunity for both law firms and clients to move completely away from the hourly rate system and its associated problems. Flat fee billing is just a happier and more efficient way to practise."

Sharing the data and providing alternative fee arrangements have given the firm an edge, says Bill. "We now have a much better handle on what we can do to lower shelf life or be more efficient. We can learn where we can cut and where we can't. We've learned that if you don't measure it, it doesn't exist. We've become a more agile law firm." ■

Ian Hu is Counsel, Claims Prevention and practicePRO.



Lawyers: (Safely) make your own dent in the affordability barrier

Removing the barriers that stand between ordinary Ontarians and legal remedies will be a complex, long-term exercise. However, setting aside a few hours to do *pro bono* work is one way for lawyers to make a meaningful individual contribution to the bigger picture. LAWPRO eases the decision to offer uncompensated services by offering lawyers special terms within their professional indemnity coverage for *pro bono* work completed in support of a Pro Bono Ontario (PBO) initiative for which LAWPRO has granted special approval. For a summary of those terms, please see the chart on pages 8 and 9 of this issue.

What is PBO?

Founded as a charitable organization in 2001, PBO was created to provide opportunities for lawyers to assist Ontarians who cannot afford legal services and have a legal problem not covered by government funding. PBO is governed by a board comprised of leading members of the judiciary and legal profession. It is funded jointly by the Law Foundation of Ontario and Legal Aid Ontario.

PBO creates and manages volunteer programs that connect lawyers with over 14,000 clients each year, either directly or via partnerships with other charitable organizations.

In 2002, PBO entered into a different kind of partnership, this time with LAWPRO, which provides the program of primary professional indemnity insurance mandated by the Law Society of Upper Canada.

Coverage for *pro bono* supports lawyers' generosity

Regardless of how generous a lawyer's motivations for *pro bono* work might be,

it is just as possible to make errors while working on a charitable basis as it is while charging a fee in the normal course. By offering coverage for risk-aware *pro bono* work, LAWPRO has made it safer for lawyers to dedicate time to supporting access to justice.

Why LAWPRO and PBO?

While LAWPRO is committed to supporting lawyers in working *pro bono*, we must be responsible to the profession as a whole in doing so. There are costs involved in offering malpractice coverage – not only claims costs, but also costs associated with administration and risk-rating. Also, since LAWPRO waives deductibles and claims history levy surcharges for certain claims flowing from *pro bono* work (more on this below), these coverage costs are absorbed by the program and must be monitored carefully. As a licensed insurance company subject to financial industry regulation, LAWPRO is mandated to operate in a commercially reasonable manner. Commercially reasonable operation means we extend coverage only in circumstances

1

PBO at SickKids:

PBO at SickKids' is a program that helps families coping with a child's illness to address related legal issues. The program offers referrals to *pro bono* lawyers, in appropriate cases, to provide advice on a diverse range of issues, including immigration, employment, and education law matters.



2

519 LGBTQ Advice Clinic:

The 519 describes itself as 'a safe, queer-positive, non-judgmental, anti-oppressive, inclusive and accessible space'. The PBO-sponsored legal clinic located there offers summary legal advice and referrals for clients in a wide range of practice areas, including immigration, landlord/tenant, employment, family, criminal, and health law.



where we can assess and manage risk. Since it would be prohibitively time-consuming for our underwriters to investigate and risk-rate individual *pro bono* files taken on by lawyers, we must limit our coverage to *pro bono* initiatives that incorporate demonstrable risk-management procedures that meet our standards.

The LAWPRO approved programs supported by PBO include quality-control and risk-management strategies – for example: a best practices manual, a computerized case management system, continuing legal education for service providers, and a *pro bono*-specific training curriculum. These features reduce the malpractice risks associated with PBO-sponsored initiatives, and give those programs a risk-managed status, from LAWPRO's perspective, that justifies the establishment of a special relationship between LAWPRO and PBO.

What kinds of *pro bono* work can lawyers do with PBO?

Under the terms of the relationship, LAWPRO has worked with PBO to establish a list of more than 50 approved programs that assist lawyers in addressing the legal needs of low income and disadvantaged individuals. (A list of active projects that qualify as approved *pro bono* programs in accordance with the insurance program policy definition is posted at lawpro.ca/PBolist. A few examples

are highlighted in this article). The list of approved PBO programs has been designed to provide support to a broad cross-section of individuals and groups in need.

What are the terms of the LAWPRO *pro bono* coverage?

LAWPRO-insured, non-exempt lawyers who do *pro bono* work as part of a PBO program approved by LAWPRO have coverage, to the extent of their policy limits, for claims that arise in the course of that work. Where there would normally be a deductible under their policies for claims costs, the deductible is waived for the *pro bono*-related claims, and the claims will not result in a claims history levy surcharge for the insured. The work done under the program will also not count toward the lawyer's working hours for the purpose of part-time eligibility.

Lawyers who have applied for and been granted exemption from the payment of premiums and who are entitled to run-off coverage¹ are covered, to the extent of the run-off limits, for *pro bono* work as part of a PBO program approved by LAWPRO.

Go to lawpro.ca/probono for further details about how LAWPRO coverage and *pro bono* work together. ■

Nora Rock is Corporate Writer & Policy Analyst at LAWPRO.

3

Law Help Ontario at Small Claims Court:

Law Help Ontario receives PBO funding to operate centres in Toronto and Ottawa that offer brief services (including in person legal advice and periodic representation in court) to self-represented litigants with civil non-family matters.



¹ For details of Run-off coverage, please see lawpro.ca/run-off

Does your firm need to consider Excess insurance?

Test your exposure by checking each statement that is true for you or your firm:

- I am unsure of the file practices, procedures, and communications, in-take procedures, documenting retainers, reviewing opinions, docket controls, diary systems, completeness of documentation and file retention of all tenants, associated law practices, co-counsel, back-up or previous counsel I have worked with.
- I am unsure whether the letterhead, office signage, reception and telephone, website, blog, advertisement, and promotional materials, as well as retainers and billing arrangements of my practice and others affiliated with me, consistently and clearly communicate the nature of the relationship of my practice to that of others.
- I regularly or sometimes practise in litigation, real estate, corporate, commercial, tax, securities or patents and trademarks law.
- My past and/or present partners, associates, employees or others for whom I may be held responsible, practise in the above areas.
- I am unsure whether work completed in claims-prone areas of practice has been entrusted to those with the right expertise or under appropriate supervision.
- Our firm maintains large trust accounts or trust accounts with a lot of activity.
- Our firm regularly or sometimes handles major financial transactions or represents clients where the stakes are high, such as class action suits, pensions, securities, tax or patents and trademarks.
- We have clients whose wealth has grown substantially since we did work for them.
- My colleagues and I rely on the same research or general or past opinion when we provide opinions to different clients.
- I do not know what insurance my former firm(s) have to ensure that they continue to maintain excess insurance that may cover me or advise me if they fail to do so.

TOTAL SCORE:

Understanding your score:

7-10 points: Your exposure to claims that may exceed your primary coverage is very likely significant.

1-6 points: You have potential exposure to large or frequent claims. A careful assessment of your and your firm's practice is appropriate. Call 1-800-410-1013 to get a more detailed assessment by one of our staff.

0 points: You are at a lower risk of having claims that will go beyond your primary limits. However, claims often arise from the least-expected quarters and Excess insurance could provide you with that peace of mind that comes with knowing you have sufficient liability insurance coverage in place. It is good practice to revisit these questions regularly.

Has your firm grown?
Are you taking on
more risk?

LawPRO
eXcessTM
Insurance



It may be time to consider Excess insurance. Learn more at lawpro.ca/excess or call us at 1-800-410-1013



The clock is ticking less than three months left...

Pre-2012 matters not set down will be automatically dismissed January 1, 2017

As we move through September, LAWPRO urges lawyers to review their litigation files and make sure they are proceeding as appropriate. The clock is ticking and time is running out! Remember, under the new Rule 48.14 of the *Rules of Civil Procedure*, matters commenced before January 1, 2012 will be automatically dismissed – without notice to you – on January 1, 2017, if the action is not set down for trial.

Take immediate action to ensure your pre-2012 files will either resolve or be set down for trial by the end of this year. If you anticipate you cannot do so, obtain consent from all parties to file a timetable and a draft order with the court by December 1, 2016.

Rule 48.14(4) requires this happen 30 or more days before the dismissal date. As courts may be busy and it may be difficult to get a court date, you are encouraged to immediately take all steps necessary to deal with matters that face dismissal.

See the Rule 48 Dismissal FAQs on the opposite page for the answers to the most common questions we are hearing from Ontario lawyers.

If you cannot resolve, set down, or file a consent timetable on a pre-2012 file, then you will need to bring a motion for a status hearing before the dismissal deadline. However, if you anticipate or know that

the status hearing will be contested, please contact LAWPRO as you have a potential claim. Early notice will hopefully allow the opportunity to repair potential claims – and avoid the \$10,000 increase in deductible that will apply if a dismissal is not set aside (see page 27).

Remember that as of January 1, 2017, matters will be automatically dismissed five years after they were commenced. Please be proactive and keep your files moving along. Consider using LAWPRO's Rule 48 Transition Toolkit (practicepro.ca/Rule48), which provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule (see Toolkit sidebar). ■

Rule 48 dismissal FAQs

In the last year we have received inquiries regarding the new Rule 48. Here are the questions we most frequently hear:

1

The main action is administratively dismissed under Rule 48. What happens to related counterclaims, crossclaims and third party claims?

Counterclaims, crossclaims, and third party claims are dealt with under Rule 48.14(9), which refers to Rules 24.03 to 24.05. This requires us to cross-reference Rules 24.03 to 24.05. When the main action is administratively dismissed under Rule 48 (remember to set appropriate tickler dates):

- A defendant's counterclaim to the main action will be dismissed without costs within 30 days absent a notice of election to proceed (Rule 24.03);
- A defendant's (to the main action) crossclaim or third party claim is deemed to be dismissed (Rule 24.04(1)); and
- A defendant to the crossclaim can have the crossclaim deemed to be dismissed by sending a copy of the dismissal order to the crossclaimant (Rule 24.02(1.1)).

2

My case is approaching the Rule 48 dismissal date and I have not set the matter down for trial. I have consent of all parties to a new dismissal date. Can I simply file a new timetable with the registrar or must I bring a motion for a status hearing?

You can file a consent timetable with the registrar, but must do so at least 30 days before the dismissal date. The timetable must identify the steps needed to set the matter down for trial, sets the deadlines for each step, AND set a dismissal date no more than two years from the current dismissal date. Remember to attach a draft order. See Rule 48.14(4).

If the conditions above cannot be met, you must bring a motion for a status hearing. If the status hearing will not go on consent, notify LAWPRO as this is now a potential claim.

3

What are the cost consequences when an action is administratively dismissed under Rule 48?

While Rule 48 does not address costs, a Rule 48 administrative dismissal is an action dismissed for delay. Under Rule 24.05.1, if an action is dismissed for delay, any party may, within 30 days of the dismissal, make a motion respecting the costs of the action (Rule 24.05.1).

UPDATE: See AvoidAClaim post on Daniels v. Grizzell, 2016 ONSC 7351 endorsement.

4

I have a court order setting a date by which I have to set the matter down for trial. Which dismissal date applies to my case, the 5-year dismissal date under Rule 48, or the date set by the court order?

The date set by the court order (see Rule 48.14(1)).

New Rule 48.14
(Administrative Dismissals) Transition Toolkit

Effective January 1, 2015, a new Rule 48.14 brought significant changes to the administrative dismissal regime in Ontario. After several hundred claims and almost \$10 million in claims costs to just three and a half years, LawPRO was happy to see old Rules 48.14 and 48.15 revised.

While LawPRO believes the new rule may stem the tide of administrative dismissal related claims under the old rules, the changed deadlines, procedural transition provisions introduce new claims risks that may trip the unwary lawyer. Remember, under the new rule events will automatically dismiss any action not set down for trial five years after commencement, without sending notices of any type to parties or their lawyers. Your tickler systems must remind you of relevant dismissal deadlines.

LawPRO encourages all lawyers to familiarize themselves with the requirements under the new Rule 48.14 and make all necessary changes to internal firm systems and processes. While claims may happen for reasons beyond your control, many of the claims risks under Rule 48.14 can be significantly reduced or eliminated with some proactive claims prevention efforts.

The Toolkit provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule. For easy of reading, all references to Rule 48.14 in this Toolkit are to the new rule unless noted.

There are four tools in this Toolkit:

1. A Firm Transition Checklist containing a list of the steps firms should take to update ticklers and other firm systems and processes to ensure Rule 48 requirements are met on all files.
2. An Individual File Checklist containing a list of the steps to be taken and ticklers to be updated for an individual file.
3. A File Progress Plan that can be used to help actively manage and monitor the status and progress of work on an individual file.
4. A Rule 48 Transition Training PowerPoint to help train lawyers and staff on Rule 48 and file management best practices.

An electronic version of the Toolkit and LawPRO's Rule 48 Transition Training PowerPoint are available at practicepro.ca/Rule48.

The worst case scenario: When lawyers drop the ball on all their files

A very dangerous scenario arises when a lawyer takes an unexpected hiatus from legal practice (for example, due to illness, substance abuse or family emergency) or is still in the office but overwhelmed and "not present," which leads to the ball being deposited several files or even the entire practice. This triggers a "tsunami" of administrative dismissals and it is a scenario that LawPRO sees all too frequently, even at law firms that should have systems to prevent this from happening. When we see these claims, it appears that the departed lawyer's active files were not being monitored by a staff person or transferred to a colleague.

Lawyers and law firms should be prepared for unexpected work interruptions. Consider the possibility that an illness, injury or other contingency could leave someone to struggle with keeping up or even leave practice for a significant amount of time. Ask yourself: does your tickler system that will recognize and be prepared to handle these situations? Who will be the lawyer's client matters in those circumstances? Will the lawyer taking over a file be able to review files to identify matters requiring prompt action? Consider how you would improve your firm's systems to address these questions.

Rule 48 Transition Toolkit

There are four tools in the toolkit:

1. A Firm Transition Checklist containing a list of the steps firms should take to update ticklers and other firm systems and processes to ensure Rule 48 requirements are met on all files.
2. An Individual File Checklist containing a list of the steps to be taken and ticklers to be updated for an individual file.
3. A File Progress Plan that can be used to help actively manage and monitor the status and progress of work on an individual file.
4. A Rule 48 Transition Training PowerPoint to help train lawyers and staff on Rule 48 and file management best practices.

Available at practicepro.ca/Rule48

5

I have settled a case which has not been set down for trial. Should one of the parties bring a motion to dismiss the action, or can we wait for the case to be administratively dismissed under Rule 48.14?

While it is possible to let an action that has settled sit dormant until it is administratively dismissed under Rule 48.14, there is a risk that one of the parties may renege on the settlement and suddenly take steps in the action. This may occur, for example, if one of the parties has “buyer’s remorse” or if the settlement is not executed properly or in a timely manner. Typically, when an action is settled, one of the parties brings a motion to dismiss the action to help achieve closure.

(As with any settlement, remember that if it involves a party under disability, the settlement must be approved by a judge under Rule 7.08.)

6

Does Rule 48 apply to a family law action?

Rule 48 of the *Rules of Civil Procedure* applies to civil proceedings in the Court of Appeal and in the Superior Court of Justice. Under Rule 1.02, the *Rules of Civil Procedure*, including Rule 48, do not apply to proceedings governed by Ontario Regulation 114/99 *Family Law Rules*, except as provided. If there is a combined proceeding where both the *Rules of Civil Procedure* and the *Family Law Rules* may apply, the parties may agree, or obtain a court order, that the *Family Law Rules* apply to a part or all of the combined proceeding – in this circumstance parties may consider whether Rule 48 should apply to the combined proceeding or not, and take appropriate steps.

Remember, under the *Family Law Rules*, Rules 39, 40 and 41 provide for the dismissal of actions by the clerk, after service of a notice of approaching dismissal if no case conference or settlement conference is arranged before the 365th day after the date the case was started. ■

\$10,000 increase in deductible for certain administrative dismissal claims

In our efforts to control escalating claims costs for administrative dismissals (more than \$10 million in the last four and a half years) LAWPRO has circulated repeated warnings and resources about the risk of having a claim dismissed for delay or by reason of abandonment under Rule 48 of the *Rules of Civil Procedure*. Since 2009, we have written numerous articles in legal publications, educated the bar by giving presentations, speeches, and CPD programming, and released the Rule 48 Transition Toolkit.

Nevertheless, these highly preventable claims continue to occur, and are becoming more challenging than ever to defend. Starting with the 2014 policy year, where an administrative dismissal is not set aside through steps taken by or under the direction of LAWPRO, in regard to a resulting claim, the

deductible for that claim will be deemed to apply to claim expenses, indemnity payments and/or repair costs and be \$10,000 more than the deductible chosen by the insured and/or listed on the declarations page of the policy. (There is an exception to this, for claims arising out of certain *pro bono* work.)

Often these types of claims can be repaired if early notice is provided, so we urge lawyers to continue to report actual and potential claims as soon as they are discovered to permit LAWPRO counsel every opportunity to have the proceeding reinstated and to avoid the application of the increased deductible. For this reason the increased deductible will apply only to claims resulting from administrative dismissals that are not set aside.

A conversation with our consultants



Some of us got together recently to talk about the questions we're hearing most often. When we are out and about talking to people we hear about what matters to real estate lawyers.

Mortgages

Jamie Smith oversees parts of Western Ontario. He says, "Mortgages are usually part of the real estate deal, so clients expect them to be included in the policy price." He lets lawyers know that TitlePLUS purchase policies also insure all mortgages in the transaction (where the same lawyer is acting for the purchasers and lenders) – at no additional cost.



Jamie Smith

TitlePLUS purchase policies also insure all mortgages in the transaction (where the same lawyer is acting for the purchasers and lenders).

Pre-underwritten programs

Marilyn Nelson primarily covers the Greater Toronto Area. "Lately, lawyers are asking me about our popular bulk underwritten residential programs," she said. "They like that they can save time and reduce their clients' disbursement costs."

Under the TitlePLUS New Home Program and New Condo Select, underwriting is arranged for an entire subdivision or condominium project on a centralized basis, for developments with properties priced at up to \$5 million. The lawyer completing the deal is

not required to search or review title and does not prepare requisitions, prepare or review clearance letters or confirm occupancy.



Marilyn Nelson

They like that they can save time and reduce their clients' disbursement costs.

Law firms can access all selected developments on titleplus.lawyerdoneadeal.com or RealtiWeb®. By following online prompts, they complete the application with basic transaction information and the underwriting prepopulates in the application. "It's really simple and quick. I'm always hearing positive comments about it," says Marilyn.

It's more than just houses

"We're getting asked more and more about commercial transactions," says Dexter. Dexter Jao also covers the Greater Toronto Area, in addition to some western regions. "I let people know that commercial policies can easily be ordered. It's a little different than a residential policy, in that you fill out the form and either send or phone in the information." An important and differentiating fact Dexter always points out: "just like residential policies, there is coverage for losses resulting from the lawyer's negligence. That's peace of mind."



Dexter Jao

Just like residential policies, there is coverage for losses resulting from the lawyer's negligence. That's peace of mind.

Coverage for negligence

Shawna Ramsay covers Eastern Ontario. She often gets asked how much it costs to add legal services coverage to a policy. Shawna always gets a positive reaction when she tells lawyers, "TitlePLUS purchase and mortgage policies have built in legal services coverage¹ and there is no extra charge for this coverage." She also reminds lawyers that legal service coverage under a TitlePLUS policy is more comprehensive than other title insurers in that it covers losses resulting from the lawyer's negligence, regardless of whether the loss falls under one of the covered title or compliance risks.



Shawna Ramsay

Shawna often gets asked how much it costs to add legal services coverage to a policy.

To speak with TitlePLUS consultants or to schedule an in office visit please contact us at titleplus@lawpro.ca or 1-800-410-1013. ■

¹ Excluding Québec policies. See policy for full terms and conditions.

RealtiWeb is a registered trademark of LawyerDoneDeal Corp. and is used under licence.



We're listening...



We know you want great coverage for a great price.

That's why TitlePLUS® residential resale purchase policies include legal service coverage and all inclusive pricing.¹ *Plain and Simple.*



Ontario pricing:²

House

\$285.85

House price from \$200,000.01-\$500,000

Condo

\$180.55

Condos from \$200,000.01-\$500,000

Plain and Simple pricing includes:

Premium, processing fees and taxes

All mortgages insured under the same policy

Legal service coverage

Simplify your practice today and offer the title insurance developed with the support of the members of the real estate bar.



titleplus.ca

¹ TitlePLUS policies issued with respect to properties in Québec and OwnerEXPRESS® policies do not include legal services coverage. Amounts shown include processing fee and applicable taxes, breakdown available upon request; some restrictions may apply; please refer to the policy for full details, including actual terms and conditions. The TitlePLUS Policy is underwritten by Lawyers' Professional Indemnity Company (LawPRO®). The processing fee and related taxes are collected by LawPRO as agent on behalf of LawyerDoneDeal Corp. Prices are subject to change without notice.

² Premium is calculated based on purchase price. The policy pricing above applies to the following types of residential properties: houses, condominiums, cottages, rural properties, vacant land (some restrictions may apply), and residential rentals (up to six units). Please call for pricing for (a) residential properties under New Home Direct, New Home Program and New Condo Select; (b) residential properties with 7 or more dwelling units, farm, leasehold or commercial properties; (c) transactions up to \$200,000; or (d) transactions over \$500,000, up to a maximum of \$2 million.

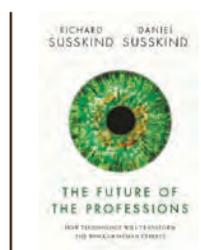


The Future of the Professions:

How technology will transform the work of human experts

By Richard Susskind and Daniel Susskind
Oxford University Press, 2015

For more than 30 years Richard Susskind has been a thought leader on the future of the legal profession.



This is despite the Law Society of England and Wales saying he did not understand confidentiality and was bringing the legal profession into disrepute by suggesting that email

would become the predominant way lawyers and their clients would communicate in his 1996 book, *The Future of Law*.

Susskind's most recent book, *The Future of the Professions: How technology will transform the work of human experts*, is a must read for anyone who wants to gain insights into where the legal profession is going. The book was co-written with his son, Daniel Susskind, an economics professor at Oxford. Nothing else I have read more clearly and convincingly elucidates the future of legal services and how technology will transform the traditional practice of law.

The idea for the book came from the Susskinds' observations that most professions are experiencing significant changes and challenges very similar to those the legal profession is facing. To investigate this notion they looked at eight professions in detail, conducted over 100 interviews and reviewed more than 800 sources. This led them to a very basic question: Why do we have the professions?

The answer is simple. As individuals in a print-based industrial society we have limited expertise on many topics. Professionals step in when required to provide, what the Susskinds call, "practical expertise" – the knowledge, experience, and know-how the majority of humankind doesn't have. This

is part of a "grand bargain" wherein each profession exclusively provides a specific expertise to members of the public. In return for that exclusivity, society expects that the professions will make their practical expertise available in a manner that is affordable, accessible and reliable.

But times are changing. We are moving from a print-based industrial society to an internet and technology-based society. Specialized information has become much more widely available. And many professions, including the legal profession, aren't holding up their part of the grand bargain. Many people can't access the professional services they need because they are unaffordable, inaccessible, or just not available. These problems beg the next question the Susskinds ask: Are there new ways to organize the professions to better share the expertise we all need access to? Their answer is a resounding, "yes."

The Susskinds explain how a fundamental transformation in patterns and trends (in particular, decomposition and routinization) are occurring in most professions. Complex work is being broken down into its composite parts. Even the most complex activities are usually comprised of many simpler steps. The parts that don't need to be hand-crafted can be routinized and done by non-professionals or even machines.

They then describe how technology is enabling these changes. There has been an exponential growth in processing power, storage and bandwidth. We have increasingly capable machines that are becoming more pervasive, smartphones and tablets are everywhere, and the "Internet of Things" will bring even more connections between devices and humans. Technology is enabling a shift from one-to-one service to one-to-many service in many professions.

The Susskinds highlight examples of where these changes can already be seen. Millions of people get educational content from Khan Academy and medical information

from WebMD®. The Huffington Post® has more readers than the New York Times. Sixty million disputes are resolved annually through Ebay®'s eMediation. Legalzoom® is probably the best known legal brand in the U.S. LexMachina™ uses a statistical analysis of more than one hundred thousand court cases to give more accurate predictions of success in patent litigation than any experienced lawyer can. IBM's Watson® has mastered Jeopardy!® and chess, and is working on its legal expertise. Self-driving cars will be very common within a decade or so. Computers can now detect human emotions.

Two futures and seven models ahead

The Susskinds see radical change coming and they outline two distinct futures for the professions. One future will see some continue to work in traditional ways. The other future – the one that will bring fundamental changes – will see increasingly capable machines transform the way practical expertise is shared amongst members of society. This will displace the work that is currently done in traditional ways by many professions. For now, these two futures will operate in parallel, but in the longer run – perhaps in two to three decades – the Susskinds see the second one as dominating and leading to a gradual dismantling of the traditional professions as we know them today.

The authors propose seven different models for the production and distribution of practical expertise. While their models map more neatly onto some professions than others, it doesn't take much imagination to see that these models will be taken up across many professions, including the legal profession. The models they propose are as follows:

1. The traditional model: This model will be very familiar to most lawyers as it is the way we currently do business. That is, human professional providers

undertaking their work, usually by way of real time, face-to-face interaction that is rewarded according to the amount of time spent. They will use technology for greater efficiencies to streamline and optimize traditional tasks and work.

2. The networked experts model: This model also involves professional human providers, but they will cluster, more or less informally, via online virtual teams rather than physical organizations. They will offer multi-disciplinary services (e.g. two or more of legal, accounting, regulatory, environmental, etc.).
3. The para-professional model: This model is similar to the traditional model in that services are provided by way of consultation, one human being with another. However, the provider here is not a specialist, but rather a person with more rudimentary training in a discipline. These para-professionals will be supported by procedures and systems that allow them to do some parts of the work that historically was done by a human expert.
4. The knowledge engineering model: In this model, knowledge in a given area of expertise is incorporated into systems that are made available to less expert or lay people as an online self-help service. Basic legal services and advice are already being offered this way in many jurisdictions.
5. The communities of experience model: In this model, evolving bodies of practical expertise are crowd-sourced, that is, built-up through the contributions of past recipients of professional service or of non-experts who have managed to sort out problems for themselves. Wikipedia operates in this manner.
6. The embedded knowledge model: The sixth model involves the distillation of practical expertise into some form that can be built into machines, systems, processes, work practices or physical objects. An example of this would be an HVAC system that monitors and controls air quality to meet regulatory requirements.
7. The machine-generated model: In this model, practical expertise is originated by machines, not humans. While the

machine-generated model will involve big data, artificial intelligence and technologies yet to be invented, it remains to be seen how this content will be used or distributed.

Can a machine really do my job?

No doubt some lawyers will find doom and gloom in the Susskinds' predictions. Indeed they devote an entire chapter to discussing the objections and anxieties that they have often heard from members of the professions. They argue the status quo can't continue because many professions are not upholding the grand bargain. And while the Susskinds see a steady decline in the demand for human professionals in the longer term, they think a great deal of work has to be done by humans in the near term. They see the 2020's as a decade of redeployment, not unemployment. While machines will take over some tasks, there will be new tasks to be done and the Susskinds specifically identify 12 new roles that humans will need to fulfil. The Susskinds feel there are many exciting opportunities to make legal services more accessible and affordable for people who need help. They remind lawyers to think about the future of the professions from the point of view of the recipients of professional work.

The Susskinds also directly address the skeptics who say there are some tasks that only humans can do. They say that routine tasks, even extremely complex ones, can be done by rules-based machines.

And while lawyers like to think otherwise, much of what lawyers do is actually fairly routine. On the human side, it is creativity, judgment and empathy that are involved in non-routine tasks. They suggest that it is a mistake to think non-routine tasks can't also be done by machines. We should not assume that people will always be the best options for completing the tasks that professionals currently perform. Indeed, Lex Machina is an example where machines can give answers to legal questions more quickly and accurately than humans can, and their logic or reasoning process may look completely different from how a human

would tackle a problem. The Susskinds caution us not to let our imaginations limit our thoughts as to what might come to be.

Moral questions

The Susskinds also discuss some of the moral questions arising from the fact that machines will be making decisions that once were the sole domain of humans. They ask if there are tasks that shouldn't be handled by a machine. Passing a life sentence? Turning off life support? They discuss some interesting and challenging ethics questions.

And in the really big picture, the Susskinds also raise the question of who should ultimately own and control tomorrow's practical expertise. Technology companies? They will want to be paid for it. Governments or charitable organizations? They will want it made available for free. They suggest that the practice expertise of the professions is so vital that it should really be part of an information commons held by and for the benefit of all humankind.

A must-read book

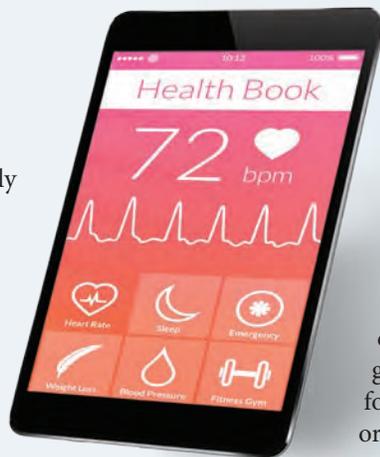
The Susskinds started out to write a book on the future of the professions. They ended up writing about the future of practice expertise and how to share it in society. Their ideas will challenge those who want to continue to do business the old way, and they make it clear we all must find ways to rise to the challenges and opportunities of providing legal services in new and innovative ways. *The Future of the Professions* is a must read for anyone seeking a clearer picture of the future of legal services. And if you are not inclined to read this book, I strongly suggest you visit YouTube and invest an hour of your time to watch the presentation the authors gave at Harvard Law School on November 4, 2015. I think it will serve to pique your interest in the future of the legal profession, and will convince you, you really do need to read the Susskinds' book. ■

Dan Pinnington is Vice-President, Claims Prevention and Stakeholder Relations at LawPRO.

Let technology be your path to wellness

Safety apps

People who travel alone, work with violent accused, or find themselves in other potentially dangerous situations may want to try out personal safety smartphone apps. These work in a variety of ways: they can allow loved ones to track you remotely via GPS; send out an alert to friends if you fail to check-in as having arrived home; or even initiate a call to first responders if you give your phone a vigorous shake. Try Kitestring, bSafe, Guardly, or one of the many others in this category.



Smartphone wellness apps

Applications like fitnet®, Pact, and Strava® can stand in for a workout buddy, personal trainer, or even your mother – reminding you to make time for wellness strategies and tracking your progress. Fitnet in particular is aimed at people with busy lives, prescribing specific workouts that take just 5-7 minutes.

Not a technology person?

Sometimes, nothing can replace support and wisdom from another human being who understands what you are going through. Homewood Health™ provides the confidential Member Assistance Program (MAP) for Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, licensing-process candidates, and their families, with financial, arm's-length support from the Law Society of Upper Canada and LAWPRO. To learn more about the MAP, please visit myassistplan.com or call 1-855-403-8922.



Online support communities

A wide range of online support communities – often set up as bulletin boards or chat rooms – exist to promote supportive community-building. For general encouragement, try Weight Watchers® or SparkPeople®. If you have a specific health concern such as childhood illnesses, allergies, chronic pain, or cancer, you can find a community of people who have gone through the same thing. There are even communities focused on mental health: see for example MentalEarth or PsychCentral.

Fitness wearables

Count steps and calories burned, measure your heart rate, and even track your sleep with wearable technologies like FITBIT®, Garmin®, and Withings®. These devices now exist for every budget, and come in various styles, including some that masquerade as traditional wristwatches.

What's next in wellness tech?

Wellness technologies are a huge growth area. Would you believe us if we told you that the following already exist?

- Glasses that can determine whether the wearer has sustained a concussion
- A pill bottle that tells you when you've missed a dose
- "Adult diapers" that diagnose urinary tract infections
- A t-shirt that warns the user about cardiac arrhythmias

These – and many other technologies – do exist, and new ones are being developed every year. It's fun to think about – as long as you protect your sense of work/life balance by refraining from thinking about the *legal* implications! ■



AvoidAClaim.com

Risk management news with a fresh look



After almost six years, 1,600 posts and nearly a million visits it was time to update the practicePRO initiative's AvoidAClaim blog. We invite you to take a look.

The new look has a modern design and layout, and an improved interface for sharing posts on social media.

Changes to the layout of the blog put more emphasis on the risk management and claims prevention content, while continuing to provide the fraud warnings that have helped thousands of lawyers avoid being duped. It is built on a platform that is mobile friendly. The risk management posts are now featured on the main page of the blog, and the fraud warnings and related information are now found under the tab All Fraud Warnings.

You can choose to subscribe (by email or RSS) to risk management posts, fraud warnings, or both.

Fraud Warnings are grouped into different types, and suspected frauds can be searched by word-search or alphabetically using the name of the suspected fraudster. Reporting a potential fraud to LAWPRO is simpler as well. Just look for the "Report a Fraud" button at the top of the page.

Each post has icons for Facebook, LinkedIn and Twitter that let you easily share posts to your social media feeds. You'll also find links to learn more about the authors and see their recent posts.

Under practicePRO Resources you'll find descriptions and links to the best of practicePRO's claims prevention tools found on practicepro.ca.

The AvoidAClaim blog was launched in 2009 with a mission to bring lawyers the latest risk and practice management news as well as warnings about active frauds. The blog has quickly grown in number of visits, subscribers and quantity of posts (especially since we started our fraud alerts). Many lawyers have avoided being duped by frauds thanks to posts on the blog. We look forward to continuing to bring you the best content to help you avoid claims and succeed in the practice of law. ■

Tim Lemieux is Co-ordinator, Claims Prevention and Stakeholder Relations at LAWPRO.

Social media profile: Jordan S. Halpern



Jordan S. Halpern
Claims Counsel



Time at LAWPRO: 2 years

Prior to joining LAWPRO, Jordan practiced as a litigator engaged in all forms of insurance defence litigation as well as matrimonial law. He also has a background in corporate/commercial law, human rights, employment and real estate. Jordan has been active on LinkedIn for several years. In addition to being Claims Counsel, Jordan also speaks at conferences, advising lawyers on how to avoid malpractice claims.

Target audience:

- Lawyers from all areas of practice
- Academics, universities and colleges
- Legal press and social media thought leaders
- All those interested in legal practice management and risk avoidance
- Stakeholders and others interested in issues impacting lawyers and the legal profession

Topics of interest:

- Legal practice and risk management
- Leadership and mentorship
- Wellness and mindfulness
- Innovation and best practices
- Claim trends
- Marketing
- Current events

When asked what benefits he gets from participating in social media, Jordan said:

“Social media is a great way to hear first-hand from leaders, innovators and others practising on the front lines from all over the world. Having access to the thoughts and experiences of those in your industry through social media allows for a broadening of one's knowledge base on a scale unlike anything that was previously possible. Social media provides a platform for an ongoing exchange of ideas, best practices and advice which can serve to improve our profession as a whole. It is also great to have a constant stream of news and events that I can absorb quickly to stay informed.”

LAWPRO[®]

Lawyers' Professional Indemnity Company

lawpro.ca



Risk management
practicepro.ca



Additional professional
liability insurance
lawpro.ca/excess



Title insurance
titleplus.ca



Return undeliverable Canadian addresses to:
LAWPRO • 250 Yonge Street • Suite 3101, P.O. Box 3 • Toronto, Ontario M5B 2L7



AvoidAClaim.com



LAWPRO



@LAWPRO
@practicePRO
@TitlePLUSCanada



LAWPRO insurance
TitlePLUS Home Buying
Guide – Canada



LAWPRO
TitlePLUS



Printed on recycled paper. This product can be recycled.

