

LAWPRO

magazine

MAY 2017 VOL 16.2

2016 Annual Review

Financial Results Explained

- Financial Results
- E&O Program
- Repairs & Defends
- practicePRO Initiative
- FAQ
- TitlePLUS Program
- Corporate Social Responsibility



upcoming events

May 4, 2017

Law Society of Upper Canada
Professional Conduct and Practice in Ontario
Your LAWPRO policy
Michael Kortez presenting
Toronto, ON

May 7, 2017

Legal Education Society of Alberta
50th Annual Refresher
Risk mitigation in a world of risks
Ian Hu presenting
Lake Louise, AB

May 17, 2017

Law Society of Upper Canada
Coach and Advisors Webcast
Practice management
Dan Pinnington presenting
Toronto, ON

June 3, 2017

Lerners LLP
Lerners Retreat
Cybercrime and law firms
Ian Hu presenting
Minett, ON

June 8, 2017

Law Society of Upper Canada
Solo and Small Firm Conference 2017
Insurance policies for your law firm
Ian Hu presenting
Toronto, ON

June 9, 2017

Simcoe County Law Association
Family Law Conference
Cybercrime and law firms
Ian Hu presenting
Barrie, ON

June 9, 2017

Canadian Bar Association
CBA's Annual Immigration Law Conference
Cybercrime
Dan Pinnington presenting
Toronto, ON

July 21, 2017

Advocates' Society
Stress Free Litigation – A Myth?
Reducing your stress with proper time and practice management tools
Ian Hu presenting
Toronto, ON

July 30, 2017

Association for Continuing Legal Education
ACLEA's 53rd Annual Meeting
Is the substantive law focus of CLE all wrong?
Dan Pinnington presenting
Montréal, QC

March 30, 2017

Law Society of Upper Canada
The Oatley McLeish Guide to Motor Vehicle Litigation 2017
After the event costs insurance
Ian Hu panelist
Toronto, ON

March 30, 2017

Ontario Bar Association
Professionalism in Workplace Safety and Insurance Law
Client relationship and practice management panels
Ian Hu panelist
Toronto, ON

March 31, 2017

Law Society of Upper Canada
The Oatley McLeish Guide to Motor Vehicle Litigation 2017
The most common malpractice claims and how to avoid them
Dan Pinnington presented
Toronto, ON

March 31, 2017

Georgian College Law Clerks Program
Introduction to LAWPRO and risk management for law firm staff
Nora Rock presented
Barrie, ON

April 3, 2017

Law Society of Upper Canada
14th Annual Real Estate Law Summit
Key covered risks which you should be aware of
Ray Leclair presented
Toronto, ON

April 19, 2017

Barrie Real Estate Law Association
Luncheon
File retention best practices
Ray Leclair presented
Barrie, ON

April 26, 2017

Wilderboer Delelce LLP
Cybercrime and law firms
Cyber dangers for lawyers
Ray Leclair presented
Toronto, ON

recent events

March 8, 2017

Ontario Bar Association
OBA Citizenship and Immigration Law Section
Ethical issues in immigration law
Ian Hu panelist
Toronto, ON

March 22, 2017

Ontario Bar Association
Real Property Section
Overview of fraud in real estate
Ray Leclair presented
Toronto, ON

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e-briefs

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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 you have added service@lawpro.ca to your contacts.

Alerts

Provincial land transfer tax changes effective April 24, 2017

April 19-24, 2017

Four alerts were sent to encourage all lawyers who handle real estate transactions in Ontario to be aware of changes to the land transfer tax system. These changes apply to applicable purchases and acquisitions starting April 24, 2017.

Webzine



Can neuroscience predict claims?

February 16, 2017

This issue of *LAWPRO Magazine* explored the potential for neuroscience and evolutionary psychology to inform the practice of law. Neuroscience offers insights into how lawyers can improve relationships with their clients, avoid malpractice risks, and even predict the outcome of others' decision-making

processes. Also in this issue: How lawyers can make happier choices; keys to managing online distractions; and keeping up with the rolling deadlines under the new Rule 48.

Key Dates

April 30, 2017

Real estate and civil litigation transaction levies and forms are due for the quarter ended March 31, 2017.

April 30, 2017

Exemption forms from lawyers not practising civil litigation or real estate and wanting to exempt themselves from quarterly filings are due.

July 31, 2017

Real estate and civil litigation transaction levies and forms are due for the quarter ended June 30, 2017.

September 15, 2017

File your LAWPRO Risk Management Declaration by this date to qualify for the \$50 premium discount on your 2018 premium for each LAWPRO-approved CPD program (to a maximum of \$100) completed by this date.

Insurance News

Transaction Levy Filings Overdue

March 9, 2017

Reminder to lawyers about overdue transaction levy filings.



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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

Weaving solutions to complex problems



Each thread in a fabric makes the others stronger and in the fabric that is LAWPRO, each employee is a vital strand that strengthens the weave.

Our customer service department guides underwriting and applications, our claims department works to contain the standard of care and defend our insureds, our information services protect your data, and so on. We all come together to strengthen the whole in an effort to provide protection and assistance.

There were a few opportunities that were of special focus for us in 2016. These included helping you understand the risks you face, offering stable and responsive premiums, supporting innovative initiatives, defending you in court when necessary, and helping repair mistakes.

Assisting lawyers and their staff understand the implications of the changes to Rule 48 was a key priority. We have yet to see the full consequences, but at this time, we can say that every effort has been made to inform, educate, and promote resources to help Ontario lawyers minimize their risk in this area.

We continue to look for ways to give back to our insureds, and, as you know, after careful analysis the base premium was reduced for the 2017 year to \$2,950. In 2016, our base premium remained consistent and we were able to reduce the Real Estate Practice Coverage to \$100 and keep our program on solid footing.

Our support of the real estate bar is brought to life, in part, through our TitlePLUS program. Celebrating its 20th anniversary in 2017 gives us the opportunity to highlight the work it has done to communicate the importance of solicitors to access to justice.

We are pleased to have added two initiatives to our slate of LAWPRO approved *pro bono* programs in 2016. In other efforts to find innovative solutions, we extended the protection of run-off coverage for lawyers on exemption who are acting as mentors. Mentoring promotes the dissemination of knowledge from experienced lawyers to those with less experience. LAWPRO recognises that lawyers are sometimes the best resource for each other.

As is customary in our Year in Review edition of *LAWPRO Magazine*, we share our annual summary of cases that in some way informed our program and helped clarify expectations and responsibilities of lawyers. I want to emphasize the work we do in this area as I recently read an article that suggested that the duty of care of lawyers had expanded over the last 20 years. I looked back at our record since we started operating the Law Society's primary insurance program in 1995 and saw how hard we have worked to contain the lawyers' standard of care.

Our commitment to stand behind the work of lawyers serving clients is fulfilled in part through not only defending our insureds in court but helping resolve problems before they reach that stage. Repairs help keep your premiums stable, so reporting errors as soon as you discover them helps you and your clients (as well as ensuring compliance with the *Rules of Professional Conduct*).

As one year closes and another starts, I am heartened by the strength of the fabric we have created and see that we are prepared to tackle what lies ahead. I hope you will find this issue of *LAWPRO Magazine* informative and a useful overview of the insurance company that stands behind you each day of the year. ■

Kathleen A. Waters
President and CEO

Financial results explained

Income Statements

A Net premiums: \$115.8 million

LAWPRO net earned premiums in 2016 were \$115.8 million. Premiums from the mandatory insurance program were lower than in 2015, though still higher than budgeted. The E&O Fund did not make a premium contribution to LAWPRO in 2016 as it did in 2015. And although the number of practising lawyer full-time-equivalents (FTEs) was slightly lower than expected, a robust real estate market lifted transaction levy income \$3 million over budget.

B Net claims: \$100.7 million

Incurred claims and adjustment expenses for 2016 were \$100.7 million. This increase of \$20 million over 2015 reflects a higher number of claims as compared to 2015 and a smaller net reduction to reserves due to favourable development of prior fund years' loss experience.

The discount rate used to value claims liabilities increased, at December 31, 2016, to 2.40 per cent; up from 2.18 per cent at December 31 of the previous year. In other words, given there was an increase in investment yields, reserves could be lowered as more investment income will be earned between collection of premiums and payment of claims.

C General expenses: \$19 million

LAWPRO's general expenses of \$19 million in 2016 were in-line with budget. Carefully managing general expenses is a key value we offer our insureds. Our expense ratio of 20 per cent is below the 28 per cent industry average for similar small insurance companies that don't pay commissions.

Statement of Profit or Loss		2016	
Stated in Thousands of Canadian dollars		Annual Report	
Lawyers' Professional Indemnity Company			
FOR THE YEAR ENDED DECEMBER 31		2016	2015
Income			
Gross written premiums	\$	123,329	127,842
Premiums ceded to reinsurers (note 11)		(7,386)	(7,081)
Net written premiums		115,943	120,761
(Increase) decrease in unearned premiums (note 10)		(167)	(91)
A Net premiums earned		115,776	120,670
D Net investment income (note 5)		17,409	18,541
Ceded commissions		1,721	1,828
	\$	134,906	141,039
Expenses			
Gross claims and adjustment expenses (note 9)	\$	101,707	80,372
Reinsurers' share of claims and adjustment expenses (note 9)		(995)	373
B Net claims and adjustment expenses		100,712	80,745
C Operating expenses (note 15)		19,015	17,999
Premium taxes		3,701	3,836
		123,428	102,580
Profit (loss) before income taxes	\$	11,478	38,459
Income tax expense (recovery) (note 14)			
Current		2,852	10,027
Deferred		(13)	(12)
		2,839	10,015
E Profit (loss)	\$	8,639	28,444

Accompanying notes are an integral part of the financial statements.

D Investment income: \$17.4 million

Investment income in 2016 was \$17.4 million, \$1.1 million less than in 2015, as rising market investment yields caused bonds to decline in value.

E Net income: \$8.6 million

LAWPRO experienced total net income of \$8.6 million in 2016, nearly \$20 million less than our net income of \$28.4 million in 2015, but still above budget for the year. (Income results for 2015 were exceptional, due to a number of factors, including the implementation of updated actuarial assumptions that allowed for a reduction in reserves retained for future years.)

Statement of Comprehensive Income		2016 Annual Report	
Stated in thousands of Canadian dollars		Lawyers' Professional Indemnity Company	
FOR THE YEAR ENDED DECEMBER 31		2016	2015
Profit (loss)		\$ 8,639	28,444
Other comprehensive income (loss), net of income tax:			
Items that will not be reclassified subsequently to profit or loss:			
Remeasurements of defined benefit obligation, net of income tax expense (recovery) of \$36 [2015: (\$190)] (note 13)		99	(326)
Items that may be reclassified subsequently to profit or loss:			
Available-for-sale assets			
Net changes unrealized gains (losses), net of income tax expense (recovery) of \$3,834 (2015: \$1,054)		10,632	2,923
Reclassification adjustment for (gains) losses recognized in profit or loss, net of income tax (expense) recovery of (\$1,663) [2015: (\$1,489)]		(4,612)	(4,129)
Reclassification adjustment for impairments, recognized in profit or loss, net of income tax expense of \$236 (2015: \$979) (note 5)		655	2,716
F Other comprehensive income (loss)		\$ 6,774	984
Comprehensive income		\$ 15,413	29,428

Accompanying notes are an integral part of the financial statements.

F Other comprehensive income: **\$6.8 million (after tax amounts quoted)**

In the category of other comprehensive income, LAWPRO earned \$6.8 million in 2016, \$5.8 million more than in 2015, due to robust returns in the equities markets.

After including \$8.6 million in net income (see E for details), shareholder’s equity was \$253.4 million at the end of 2016, up from \$238 million at the end of 2015 – for a year-over-year increase of \$15.4 million.

LAWPRO expects that its MCT score may continue to decrease in coming years as steps are taken to bring its score into the 215-240 per cent range.

Minimum Capital Test: On track in 2016

The Minimum Capital Test (MCT) is designed to ensure that a financial institution’s assets are sufficient to meet its present and future obligations.

For the MCT calculated at December 31, 2016, LAWPRO’s score is 253 per cent – down from 268 per cent on December 31, 2015, but still well above the 215-240 per cent range for which the company aims.

2016 was the second year of a three year phase-in to new MCT requirements. Without the benefit of the phase-in, the MCT would have been 242 per cent. LAWPRO expects that its MCT score may continue to decrease in coming years as steps are taken to bring its score into the 215-240 per cent range. ■

Claims report

Administrative dismissal of actions: Was 2016 the calm before the storm?

Claims trends in 2016 seemed to follow now-familiar patterns – certain types of claims increased, others abated, and overall claims costs continue to hover around the \$100 million mark. However, in the final months of the year, LAWPRO claims personnel saw an increase in claims due to administrative dismissals under the new Rule 48 of the Rules of Civil Procedure, a trend that we expect will continue in 2017.

Claims count and frequency

As of February 28, 2017, there were 2616 claims reported or reopened in 2016 – the highest number in the past ten years, but only slightly – a 4 per cent increase over the previous year. The high count of reported claims resulted in a claims frequency – the ratio between the number of practising lawyers and the number of claims – of 100.5 claims per 1,000 lawyers. This rate is similar to 2015. The chart [below] shows the trend in both claims reported and claims frequency.

FIGURE 1

Number of claims reported and frequency*

* By report year, as at February 28, 2017

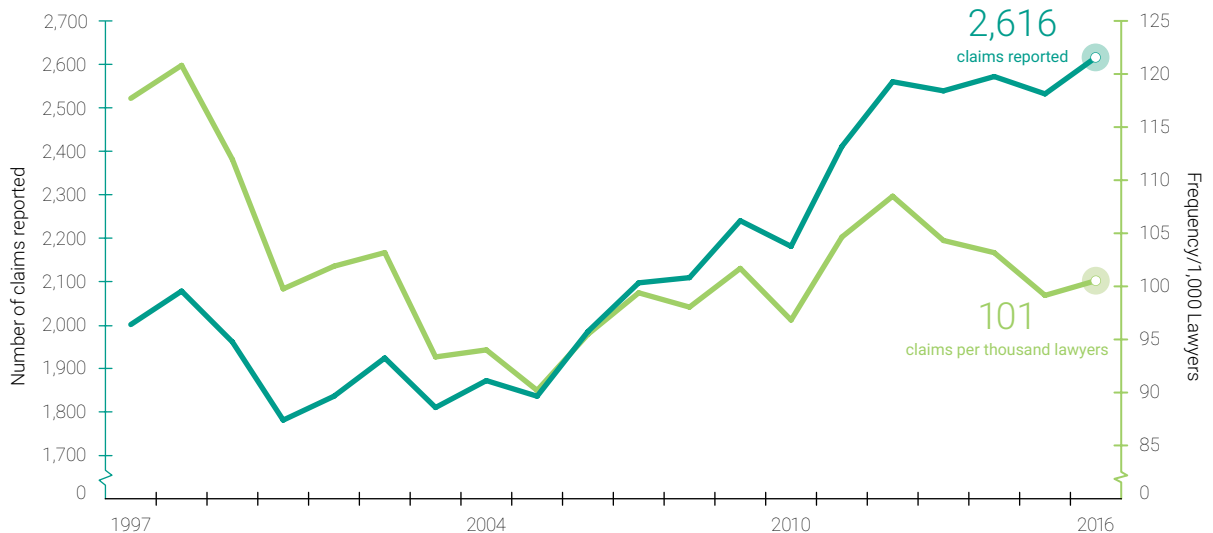
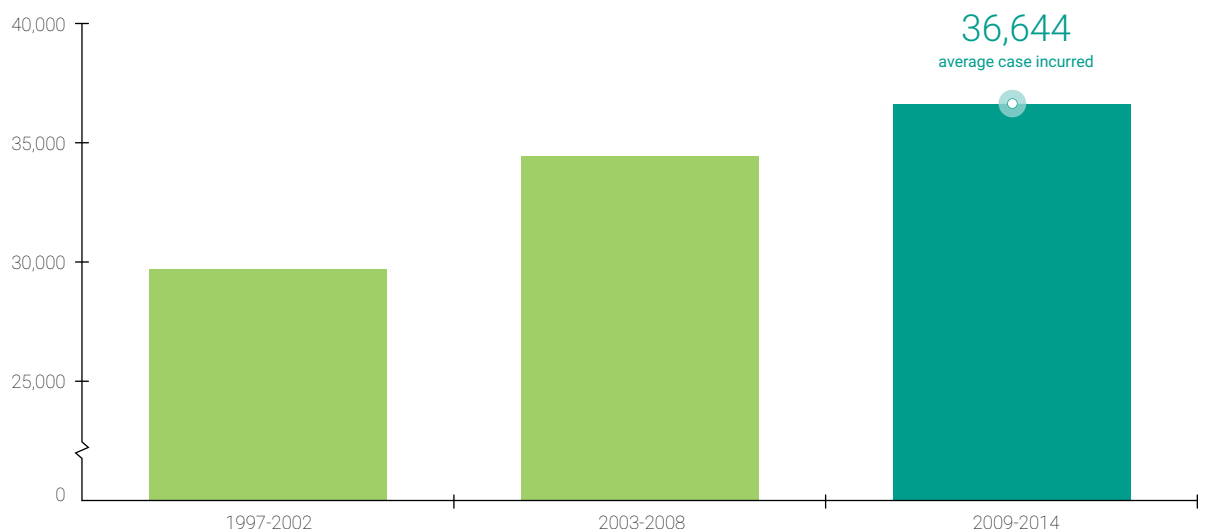


FIGURE 2

Average cost per claim at 38 months after start of year in which claim was reported*

* As at February 28, 2017



Claims by cause of loss

Because the investigation of newly-reported claims takes time, it takes a year or more for the causes of newly reported claims to come into focus. The figure below reports cause of loss trends to the end of fund year 2015, based on the information that was available at February 29, 2017.

Communications mistakes

Problems with lawyer-client communication remain the most important cause of claims, accounting for 28 per cent of claims in 2015. In addition, certain other causes, notably inadequate investigation and time management errors continue to show an upward trend. In an environment where clients expect more in less time, it continues to be a challenge to always listen carefully, ask deep questions, and take the time to carefully understand all reasonable scenarios.

Rule 48 transition

LAWPRO underwriters are predicting an increase in the number of claims attributed to time management as courts begin to dismiss claims under Rule 48. In the closing months of 2016, LAWPRO counsel began to receive calls from insureds who were having difficulty obtaining adverse parties' consent to timetables under Rule 48.14(4) – an important means of avoiding a dismissal order. LAWPRO has already received notice of a few dozen such potential claims, and we anticipate an increase in the number of such claims in 2017 as court offices across the province begin sending out communications about claims that have been dismissed under the new rule.

FIGURE 3

Reported claim count by cause of loss by fund year*

* As at February 28, 2017

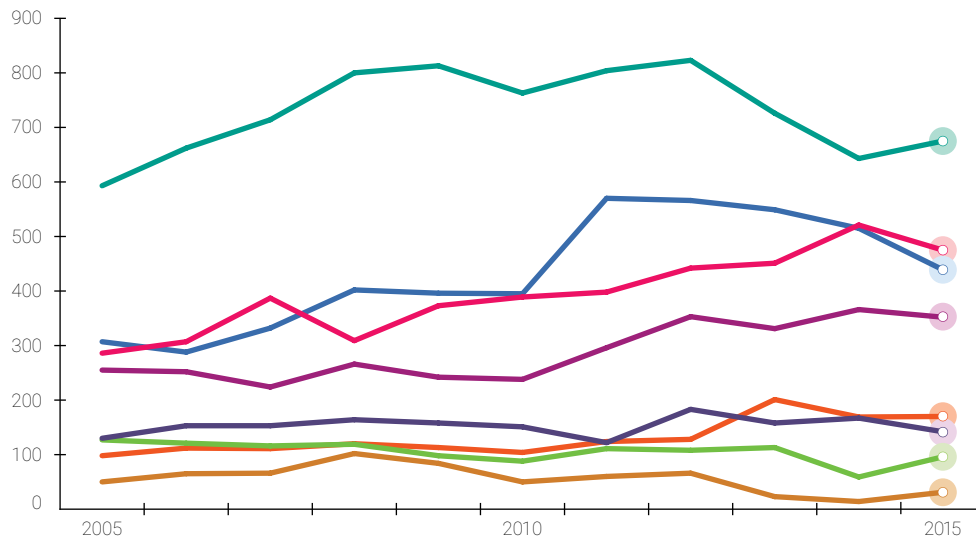
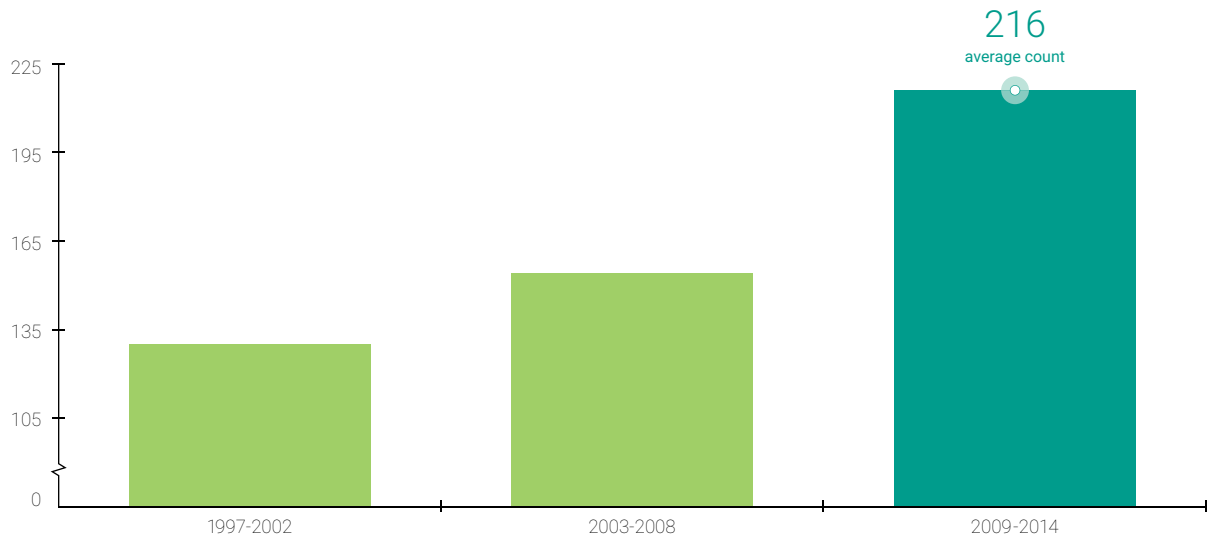


FIGURE 4

Number of claims reported with a value greater than \$100,000*

* As at February 28, 2017



Claims by area of practice

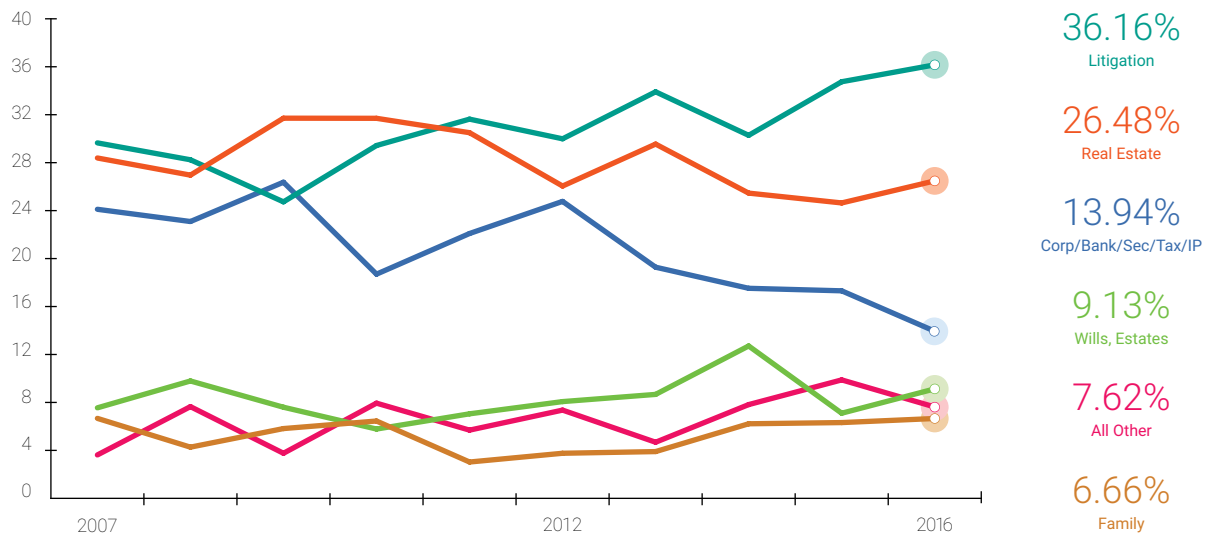
As has been the case for many years, litigation and real estate continue to be the areas of practice that generate the most claims. A recent upward trend in litigation-based claims levelled off somewhat in 2016, but as these claims are typically driven by deadline-related errors, we expect the number to increase again in 2017 as courts begin to dismiss five-year-old actions without prior notice to counsel.

LAWPRO continues to monitor the growth in family law and wills and estates claims. To some extent, growth in cost of claims in these areas reflects increases in the value of real estate, especially in urban centres.

FIGURE 5

Distribution of claims by area of practice* (% of gross claims costs)

* As at February 28, 2017



Our 2016 claims handling report card

In 2016, 97 per cent of insureds who completed a satisfaction survey reported that they were satisfied with our efforts in resolving the claims. LAWPRO defense counsel received high approval ratings, with approximately 90 per cent of insureds stating that they would have the same counsel represent them again. LAWPRO resolves claims through courteous and close collaboration between the insured, internal counsel and staff assigned to the file, and in cases where they are retained, external counsel.

The annual survey of LAWPRO E&O insureds with a closed claim indicated the following:

97% said that they were satisfied with how LAWPRO handled the claim.

87% said they would have the defence counsel firm represent them again.

90% said they were satisfied with our selection of counsel.

87% said LAWPRO received good value for defence monies spent.

Managing claims costs requires that LAWPRO counsel make strategic dispute resolution choices. While many claims are resolved through negotiation, mediation or arbitration, we go to trial where the circumstances warrant, typically in an effort to establish precedents that will support lawyers in the long term.

Here is a summary of our litigation results in 2016:

In 2016, we:



Succeeded in 9 out of 12 matters that went to trial and for which a decision was rendered



Succeeded in 3 out of 4 appeals argued*

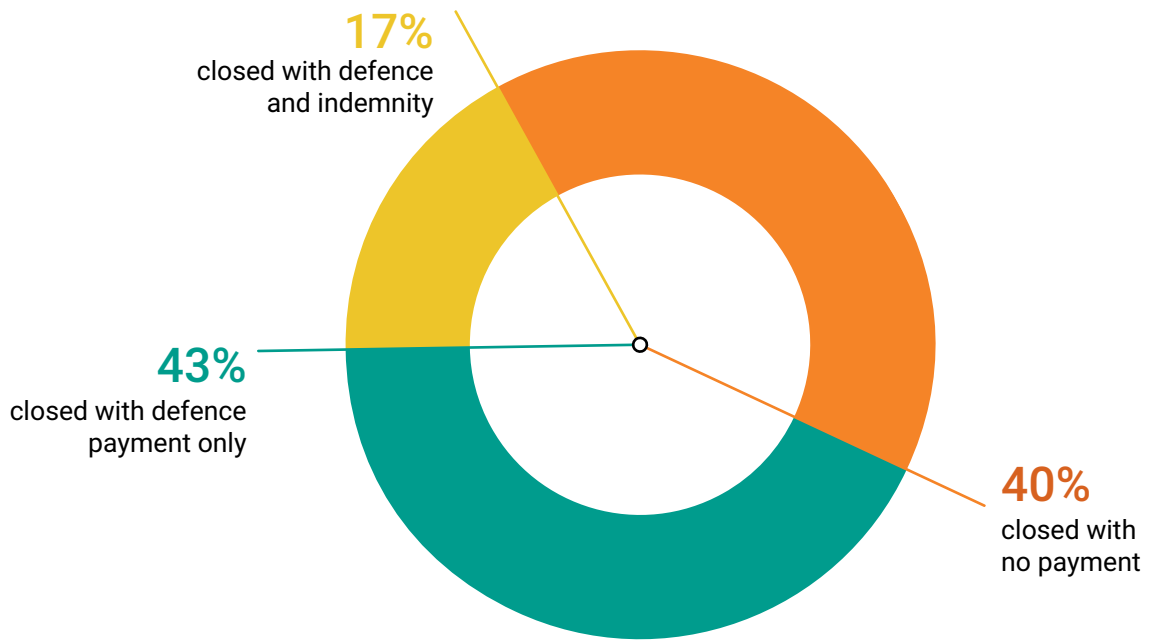


Won 31 out of 34 summary judgment motions completed*

See page 14 for highlights of some of the cases where we successfully defended lawyers in 2016.

FIGURE 6

Claims by disposition (outcome)



* Updated May 1, 2017.

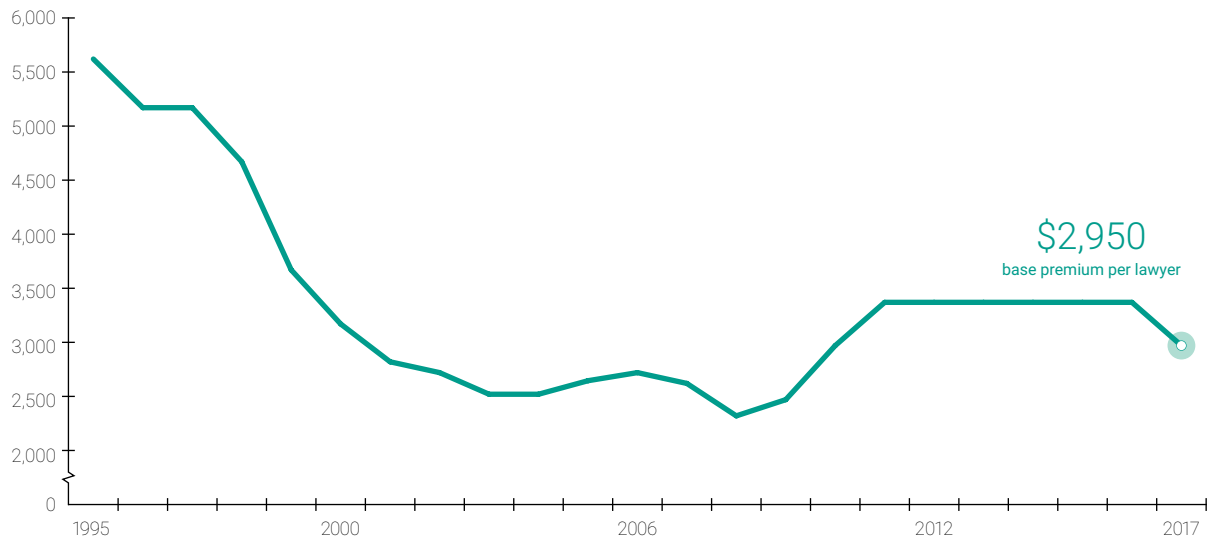
Coverage

Premium remains stable in 2016

The year 2016 marked the sixth year in which most insured lawyers paid a base premium of \$3,350 for their professional indemnity insurance. As rents and property values continue to climb, and as technology becomes obsolete at an ever-increasing rate, we were proud to be among the few practice expenses NOT growing in 2016. LAWPRO is well positioned to lower the base premium to \$2,950 for the 2017 program.

FIGURE 7

Base premium per lawyer



REPCO reduced again

Real estate lawyers benefited, in 2016, from a new reduction in the premium for the Real Estate Practice Coverage Option (REPCO). In 2016, the REPCO premium was \$100, down from \$250 the previous year. Introduced in 2010 at a premium of \$500, REPCO was established to support changes to the protection for the registration of interests in land in Ontario.

Other changes

There were two other changes to the policy for 2016. First, in recognition of the willingness of lawyers not in private practice to make a contribution to newer entrants to the profession, run-off coverage was made available for mentoring activities by exempt lawyers.

Second, to harmonize coverage as between lawyers and paralegal shareholders in combined-licensee professional law corporations, coverage was introduced for those paralegal shareholders. By the end of 2016, all paralegal shareholders in combined licensee firms were required to be covered under the LAWPRO program.

The LAWPRO program premium is customized to respond to a variety of practice circumstances. New lawyers, part-time practitioners, and lawyers who restrict their practice to criminal and/or immigration law pay reduced premiums, while lawyers exposed to additional risks, or who have stopped practising but want enhanced run-off protection can tailor their coverage accordingly. Figure 8 provides an overview of lawyer participation in various coverage options in 2016:

FIGURE 8

Participation rates for discounts and coverage options

New call discount

20 to 50 per cent base premium discount for those called in the last one to four years



Part-time practice

50 per cent base premium discount for eligible lawyers



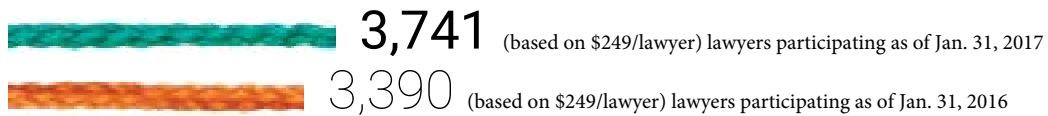
Restricted area of practice option

50 per cent base premium discount for immigration/criminal law practitioners



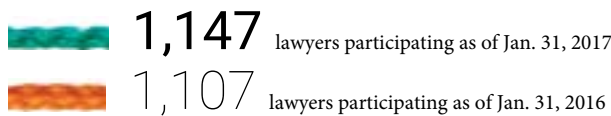
Innocent Party buy-up

Increase in Innocent Party sublimits up to as much as \$1 million per claim/aggregate



Run-Off buy-up

Increase limits for past services from \$250,000 per claim/aggregate to as much as \$1 million per claim/\$2 million aggregate



Real Estate Practice Coverage

Required for all lawyers practising real estate law in Ontario. Sublimit coverage of \$250,000 per claim/\$1 million aggregate



Service

Answering your complex coverage questions

LAWPRO's Underwriting & Customer Service (UCS) Department handles applications and renewals for the primary professional indemnity insurance program, which provided coverage to over 26,000 lawyers in 2016. New accounts are established as lawyers are first licensed, existing accounts are amended as lawyers change practice setting or type, and all accounts are renewed each fall.

For lawyers, ensuring that the right kind of coverage is in place is not always obvious, especially on entering practice or moving in or out of exemption. LAWPRO's UCS Department made or received over 43,000 calls to support the placement of coverage in 2016.

When not on the phone, Program Coordinators handle written inquiries. In 2016, that meant reviewing – and acting on – 22,657 pieces of mail.

Service initiatives in 2016

A number of initiatives in 2016 were introduced to provide better service to lawyers and law firms, and to ensure that LAWPRO fully meets its obligations in relation to the Law Society Program. In 2016, we:

- Improved the process for providing estimates for Optional Excess insurance to law firms that meet LAWPRO's underwriting guidelines.
- Made it possible for lawyers and firms to name multiple excess insurers when filing the primary Law Society application online.
- Reminded lawyers who applied for exemption from the payment of premiums about Run-off protection.

Coverage questions becoming more complex

Responding to insureds about coverage questions involves more than reviewing what kind of law they practise or how many hours they bill each year. The legal profession is undergoing significant changes, and many of those changes have insurance implications.

In 2016, more than 100 individualized responses were provided to lawyers requesting information on topics such as: lawyer mobility (across Canada and outside Canada); how coverage applies where lawyers enter into indemnity agreements with third parties; coverage for firm general counsel; and whether coverage is available for document review work or other non-traditional services, such as those provided by individuals working as workplace investigators, mediators, arbitrators, trustees/executors, or escrow agents.

The complexity of these questions requires careful underwriting analysis. Our Program Coordinators receive regular training about emerging underwriting issues so that they, in turn, can provide timely and accurate information to Ontario lawyers. ■

Repairing errors to head off claims

Timely efforts by LAWPRO to “repair” errors committed by lawyers save the Ontario bar millions of dollars every year. To preserve these repair opportunities, lawyers should contact us as soon as it becomes clear that a mistake may have been made on a file.

LAWPRO successfully argues for rectification of a will provision

A multi-million dollar claim was averted when the Ontario Superior Court ordered that a will be rectified to properly reflect the instructions a testator gave to a LAWPRO insured.¹

The insured made a drafting error, misstating the number and type of shares in the testator’s company that the estate trustee was directed to sell. The insured unequivocally admitted his mistake, and the testator’s accountant confirmed the insured’s evidence. The insured and the accountant provided evidence about the intended number and type of shares. The court accepted that the error was an accidental slip, and granted rectification.

Successful appeal gets matter returned to trial list because prejudice not established

After suffering an injury in 2008 on premises controlled by the Border Services Agency, a plaintiff brought an action against Border Services and an additional defendant who had control over conditions at the accident location. Border Services cross-claimed against the second defendant. After the suit was filed, the plaintiff learned that the second defendant was subject to an order under the *Companies’ Creditors Arrangement Act*, and that the plaintiff’s action against it was automatically stayed. The action languished for some time, in large part because the plaintiffs’ solicitor had difficulty in resolving how to deal with the claim against the second defendant. Plaintiffs’ counsel received a status notice in March 2012. His staff inadvertently failed to request a status hearing. The action was dismissed.

Upon hearing of the dismissal the plaintiff’s counsel advised Border Services of its intent to bring a motion to set aside the dismissal order. Border Services agreed not to oppose the motion. However, by the time the motion was heard in March of 2015, Border Services had changed its mind and argued against setting aside the dismissal order. The Superior Court of Justice dismissed the plaintiff’s motion.

LAWPRO appealed,² arguing that alleged prejudice caused by the plaintiffs was not established, and that the delay was caused by the

difficulties the plaintiffs faced in dealing with the insolvency of Border Services’ co-defendant. The appeal was allowed, reinforcing the liberal “set aside” cases decided by the Court of Appeal in the past several years.

Lack of due diligence a factor, but not determinative, in analysis of claim discovery delays

In overturning a lower court’s dismissal of a motor vehicle accident claim as statute-barred, the Court of Appeal reviewed the use of evidence of due diligence (or lack thereof) to establish undue delay in the discovery of claims.³ The court acknowledged that due diligence is relevant when applying s. 5(1)(b) of the *Limitations Act, 2002*; however, “whether a party acts with due diligence is a relevant consideration, but it is not a separate basis for determining whether a limitation period has expired.”

This ruling has proven useful, in subsequent cases, in establishing that the claims were not statute-barred, even where the plaintiffs and their solicitors were not diligent in investigating potential claims.

Plaintiffs need not demand information from adverse parties ahead of discovery process

The Court of Appeal affirmed⁴ a lower court judgment that stated “it would not be in the interests of justice to encourage an overly muscular development of the concept of pre-discovery due diligence.”

The plaintiff in the case fell from an elevated dance floor in a nightclub. The plaintiff sued the tenant who operated the nightclub. The tenant did not suggest that the landlord was involved in constructing the elevated dance floor until its examination for discovery. The Court of Appeal affirmed that the plaintiff was not obliged to seek information from adverse parties prior to documentary and oral discovery, in circumstances where those adverse parties have no legal obligation to provide the information. This case is likely to be useful in future motions to add defendants after a limitation period has ostensibly passed. ■

¹ 2016 ONSC 8150

² 2016 ONCA 187

³ 2016 ONCA 249

⁴ 2016 ONCA 585, affirming 2015 ONSC 6177, 127 O.R. (3d) 260



Standing up for lawyers

The great majority of claims reported to LAWPRO are either abandoned, settled, or resolved through mediation or arbitration. But if we hope to preserve reasonable and fair limits on the scope of lawyers' responsibilities, we must occasionally go to court. Our litigation track record is proof of our sound judgment about when to go to trial, pursue an appeal, or bring a summary judgment motion. As indicated on page 9, we win the majority of cases we take to trial. Our commitment to all of our insureds is at the heart of each decision to go to court on behalf of one of them.

Advice is for the client, not others

A large Toronto law firm was retained by the promoters of a natural resource project to provide a preliminary, limited scope tax opinion. The opinion correctly stated that investors could get a tax deduction for expenditures actually made in developing the project. The law firm stipulated that the opinion was for the benefits of the promoters only.

The promoters, who turned out to be fraudsters, falsely represented to investors that a large Toronto firm had opined that retractable promissory notes were legitimate expenditures and were tax deductible. The investors lost their investments and their tax deductions, and sued the promoters and the law firm.¹ They obtained judgment against the promoters, but their claim against the firm was dismissed. The Saskatchewan Court of Queen's Bench held that the firm owed a duty to the client promoters only, not

the investors, and in any event, nothing that the firm did caused the investors' losses. The investors had relied on what the promoters told them, not on the legal opinion.

Obtaining credit report is not intrusion upon seclusion

After being threatened, and having clients threatened, with litigation, members of a firm ran an Equifax® credit check on a married couple. The couple sued the firm,² alleging that the firm had invaded their privacy and thereby committed the tort of intrusion upon seclusion.

The Ontario Superior Court dismissed the claim. To the extent the credit report disclosed the existence of formal collection proceedings pursued by third parties against the plaintiffs, and/

¹ 2016 SKQB 380

² 2016 ONSC 3577

or judgments obtained by third parties against the plaintiffs, these were a matter of public record. Even if the Equifax report contained information properly characterized as information about the plaintiffs' "private affairs and concerns," which was "invaded" by the firm's obtaining the report, the firm had lawful justification for doing so.

Defending the limits of lawyers' responsibility

An estate beneficiary brought an action alleging breach of trust, breach of fiduciary duty, and negligence (along with other torts) against multiple parties including the estate trustee, financial advisors and a LAWPRO insured lawyer who had been retained by the estate trustee.³ The suit was based on several allegations, the most important of which was that the estate trustee had sold shares in a family business without authority to a relative of the deceased who had been a part owner in the business prior to the sale. The plaintiff alleged that the lawyer was negligent in advising the estate trustee with respect to the sale, had colluded with her, and had allowed her to abdicate her decision-making authority to the lawyer, such that the lawyer became liable as a *trustee de son tort* for her actions.

However, upon analysis, the Ontario Superior Court found that the plaintiff suffered no loss related to the actions of the lawyer. The estate trustee neither committed fraud or dishonesty nor abdicated her authority to the lawyer, so there was no basis for liability as a *trustee de son tort*. Finally, the court noted that the lawyer owed a duty of care to the trustee. It is only in unusual circumstances that a lawyer for an estate trustee owes a duty of care to a disappointed beneficiary, and these were not such circumstances.

Law firm not liable for lawyer practising "in association, not partnership"

A plaintiff brought a defamation case against a lawyer. The plaintiff also alleged that the law firm with which the lawyer shared work space was vicariously liable for her actions.

The defamation allegations were based on letters sent to a variety of recipients, including lawyers, a member of Parliament, indigenous leaders, and a web blogger. The blogger is alleged to have published some portions of the communications. The letterhead on which the letters was printed described the insured as "practising in association, not in partnership" with the firm. The space-sharing arrangement between the lawyer and the law firm provided for the lawyer to share a mailing address, phone and fax lines, office equipment and a receptionist with the firm. The lawyer practiced an area of law not practiced by the firm, and had her own separate

document management software to which the lawyers of the firm did not have access.

The law firm brought a motion⁴ in the Ontario Superior Court of Justice for summary judgment, requesting that the action against it be dismissed.

The court found that there was no holding out of partnership. The plaintiff asked the court to find, as a matter of public policy, that for policy reasons, the lawyer should nevertheless be treated as either a partner or employee of the firm, because lawyers "practising in association" should be treated as part of a "collective identity." After considering the details of the space sharing arrangement and in particular the written and online marketing communications by the firm, the court rejected that argument. Not only were the communications clear, but, given the arrangement between them, the firm could not reasonably be expected to supervise the lawyer, who ran her own independent practice. The court granted summary judgment and dismissed the action against the law firm.

Arguing for limitation defences

Notwithstanding our commitment to protecting our insureds from liability where appropriate, two judgments from the Court of Appeal will make it more difficult in future to establish limitation defences in solicitors' negligence cases.

In the first case, the Court of Appeal set aside a motions judge's decision that a claim against the plaintiff's ex-solicitor was statute-barred.⁵ The defendant solicitor had originally acted for the plaintiff. Another solicitor subsequently took over the plaintiff's claim. When the second solicitor issued the statement of claim, the tortfeasor pleaded that the action was statute-barred. The Court of Appeal found that the claim against the first solicitor did not arise until the tortfeasor actually pleaded a limitations defence, not when the second solicitor was retained.

The second case involved a claim based on the allegedly improvident settlement of a personal injury matter. The plaintiff filed her claim in negligence against the insured nearly six years after the date of the settlement. Over the course of those six years, the plaintiff suffered serious lingering effects from the accident. Upon consulting another lawyer, the plaintiff was advised that she might have a claim against the insured.

The insured brought a motion for summary judgment on the basis that the malpractice claim was statute-barred. The motions judge agreed. The plaintiff appealed,⁶ and the Court of Appeal granted the appeal, finding that the limitation period did not begin to run until the plaintiff retained new counsel and obtained an expert report. ■

³ 2016 ONSC 1496; 2016 ONSC 3532 (Costs)

⁴ 2016 ONSC 7964

⁵ 2016 ONCA 223, allowing appeal from 2015 ONSC 1162

⁶ 2016 ONCA 327, allowing appeal from 2014 ONSC 166

A year in the life of the

January



Published the “Serving the Indigenous Client” issue of *LAWPRO Magazine*. In the year following the publication of the Truth & Reconciliation Commission Report, LAWPRO highlighted the increasing importance of being able to serve indigenous clients in Ontario. Articles featured interviews with indigenous lawyers who explained their perspectives on and experiences with Canadian law.

February

HOW-TO
PRACTICEPRO.CA/VIDEO

Posted our social media sharing resource. This resource offers simple instructions to get the most out of LAWPRO videos. Share them on your website, Facebook page, or newsletter to explain your services and help educate clients on legal issues that may affect them. Better educated clients are less likely to have a miscommunication with their lawyer – the #1 cause of claims.

May



The AvoidA CLAIM blog was refreshed with a modern look and layout, and an improved interface for sharing posts on social media. The cleaner look puts more emphasis on risk management and claims prevention content, while continuing to provide the fraud warnings that have helped thousands of lawyers avoid being duped.

June



YOUTUBE
VIDEO

Released “Cottage ownership: Know what you’re buying” video on YouTube. This video seeks to raise awareness about title and other issues of particular relevance to cottages, such as shoreline allowances and seasonal access restrictions. This is a great time of year to share it with your clients who may be considering purchasing a cottage.

September



Addressed Access to Justice in the September issue of *LAWPRO Magazine*. The possibilities of artificial intelligence in the provision of legal services, how LAWPRO coverage works with *pro bono* services, the use of alternative fee arrangements, and how lawyers can practise safely when providing limited scope representation were highlighted in this timely issue.

October

4,300 FRAUD
FACT SHEET
DOWNLOADS

Minimized fraud and cybercrime whenever possible. LAWPRO speakers included fraud and cybercrime prevention in nearly all standard LAWPRO presentations to firm lawyers and staff throughout the year.

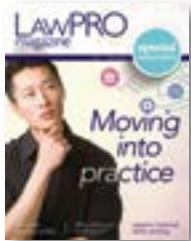


TOP 10 DOWNLOADED RESOURCES IN 2016

- General Retainer Letter Precedent
- LAWPRO Fraud Fact Sheet
- Managing the Lawyer/Client Relationship Booklet
- Protecting Yourself from Cybercrime Dangers: The Steps You Need to Take
- Judith Wahl article on Capacity and Capacity Assessment

practicePRO initiative

March



Distributed the **LAWPRO Student Magazine – Moving Into Practice**. Do you know someone who is beginning a legal career? This Magazine features popular articles like “What Do Law Firms Look For?” and “20 Tips for a Smooth Transition from Student to Lawyer,” as well as an interview with current LAWPRO articling students in “What I Wish I Knew in Law School.” Send a link to your favourite mentee.

April

3,200 VISITS

Published key **Limited Scope Representation Resources**. Better access to justice sometimes means offering limited scope representation. Learn how to best avoid claims arising from unbundled legal services with a number of tools available on the practicePRO website. The page contains a best practices tip sheet, sample retainer precedents, a checklist of services and handouts for clients.

July

1,000,000 VISITS!

Hit **1 million visits to the AvoidaClaim blog!** In the six years it took to reach this milestone, 1,600 risk management articles and fraud prevention warnings were posted on the blog. In 2016, AvoidaClaim.com was inducted into the Clawbies Hall of Fame which recognizes excellence in Canadian law blogs.

August

265 APPROVED PROGRAMS

50,000 ATTENDEES

Presented risk management information throughout the province. August is the last full month to claim a LAWPRO Risk Management Credit for the next year.

November

THE FACTS

3,500 DOWNLOADS

Published the **corporate/commercial law malpractice claims fact sheet**. Find quick claims facts, the main causes of claims against corporate-law lawyers, hot topics, tips for avoiding claims, and links to practicePRO resources. LAWPRO Claims fact sheets are available for many areas of law. If you are organizing a continuing professional development session, this is great program material and can be used as a program insert.

December

DISMISSED

Keeping the litigation bar alert to **deadlines for Rule 48**. December was the culmination of several years of effort to educate lawyers and reduce claims resulting from Rule 48.14. Resources are available at practicepro.ca/rule48 and include *LAWPRO Magazine* articles, blog posts, e-alerts and the creation of the Rule 48 Transition Toolkit.

- Amendments to Rule 48 Bring Major Changes to Administrative Dismissal
- Employee Departure Checklist

- Managing Conflicts of Interest Booklet
- Independent Legal Advice Checklist
- Sample Budget Spreadsheet



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

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

As a starting proposition, Ontario lawyers that engage in the practice of law (i.e., giving legal advice respecting the laws of Ontario or Canada, or providing the professional services of a barrister or solicitor to others) are required to have LAWPRO insurance in place. (There are a few exceptions.¹) This is a matter of public policy based on the desire to protect the consumers of legal services. As the Law Society's insurance program, LAWPRO coverage is in place, subject to the terms and conditions of the policy², to help protect clients in the event that they suffer damages due to an error by their lawyer. At the same time, LAWPRO coverage may protect lawyers from personal liability for their errors.

General counsel at a traditional law firm

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

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

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

General counsel at a professional corporation

For the tax deferral and other benefits they confer, many Ontario lawyers have incorporated a professional corporation³ ("PC"), which effectively become the lawyer's employer and the entity providing legal services. In a similar fashion to those working as general counsels at a traditional firm, general counsels working for a PC are required to have LAWPRO insurance as they are using their legal knowledge, judgment and skills with respect to their work for the PC.

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

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

¹ See lawpro.ca for details on exemption eligibility.

² Copies of the current and past LAWPRO policies are available at lawpro.ca.

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

General counsel to a law firm management company

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

Corporate in-house counsel

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

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

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

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

Assess your particular situation

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

⁴ Exemption (e) under the LAWPRO policy.

⁵ Exemption (e) under the LAWPRO policy.

⁶ See Endorsement No. 11 of the LAWPRO policy.

⁷ See the LAWPRO policy for further details.

⁸ See the LAWPRO website for Part-time Practice Option eligibility requirements.

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* Please refer to the policy for full details, including actual terms and conditions. The TitlePLUS policy is underwritten by Lawyers' Professional Indemnity Company (LAWPRO). Contact LAWPRO for brokes in Manitoba, Alberta and Québec. TitlePLUS policies issued with respect to properties in Québec and OwnerEXPRESS® policies do not include legal services coverage.

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Let's



celebrate!

TitlePLUS program 20th anniversary

As the TitlePLUS program celebrates its 20th Anniversary, we pause to reflect on the past while looking forward to a strong and exciting future. From its inception, the TitlePLUS program has always been about more than just title insurance – it addresses the changing realities facing real estate lawyers and consumers and seeks to find solutions that maintain the role of the lawyer in the real estate transaction.

To celebrate this milestone anniversary and as a reminder of our commitment to the profession, we've listed 20 ways the program supports you.

1. All-Canadian

TitlePLUS title insurance is the only all-Canadian, bar-related title insurance product in the market today. As such, we uniquely understand the concerns and needs of real estate lawyers in Canada and remain deeply committed to protecting the role of the lawyer in the real estate transaction.

2. Legal service coverage

The *automatic* coverage in TitlePLUS residential and commercial policies means your E&O policy is not impacted should a claim occur.¹

3. Saving you time

With the New Home Program and New Condo Select, developments are pre-underwritten for a faster and simpler title insurance application process.

4. Competitive pricing

Our premiums provide a title insurance product with excellent protection for both you and your clients.

5. Educating the public about your role

Year-round educational initiatives inform consumers about the value of real estate lawyers in the real estate transaction, and how they can help consumers acquire and protect their property.

¹ Excluding OwnerEXPRESS[®] policies and Québec policies.

6. Advocacy

To maintain access to justice, we advocate to keep you central to the real estate transaction.

7. Fighting fraud

LAWPRO's AvoidAClaim blog and TitlePLUS communications provide fraud alerts and updates on recent developments to assist you in recognising and avoiding potential fraud.

8. Training

Our short videos on YouTube® help you quickly find answers about common policy application questions.

9. Innovative underwriting and policy coverage

By listening to your concerns about the changing industry, we continually refine coverages to better meet the needs of both you and your clients.

10. Keeping you informed

Through the @TitlePLUSCanada Twitter account, TitlePLUS Today for subscribing lawyers, and TitlePLUS Tips for law firm staff, relevant, timely information and resources are available to help you with common questions and problems.

11. Making the insurance process easier

By streamlining title insurance and mortgage processing through lender portals, time is saved and errors are reduced.

12. Options

Numerous policies and expanded property limits provide options for many types of transactions, whether they be for purchase, refinance or existing owners.

13. Interactive and fun

Our animated and easy-to-understand educational videos help consumers better understand the real estate transaction, title insurance, and the unique value you offer to them as their lawyer.

14. Advice and wellness

Regular newsletters offer policy information, tech tips, wellness resources and more.

15. Education and professional development

Our participation in continuing professional development programs helps you develop knowledge and skills to enhance your services and grow your practice.

16. Tools that build your business

We actively promote the Locate a Lawyer feature on titleplus.ca, making it easy for home buyers and others to contact you for services.

17. Marketing resources

Videos and articles are available at titleplus.ca/rsreg for you to download and share on your website.

18. Maximizing technology


Through the integrated TitlePLUS policy application and LawyerDoneDeal's RealtiWeb® program, information can be prepopulated to generate a TitlePLUS policy and multiple closing documents, without the need for double entry.

19. Communications

Client brochures and worksheets in easy-to-understand language assist you in educating about and discussing title insurance.

20. Mitigating risk

In 2016, TitlePLUS title insurance declined coverage or inserted a special exception to coverage for transactions totalling \$1.5 million that involved properties with a history of illegal use.

 **We are national:** Our residential policies are available for properties in all provinces and territories of Canada. ■



It's more than just business – Corporate social responsibility

LAWPRO's continued commitment to its Corporate Social Responsibility (CSR) program was reflected in contributions to the profession, to wellness, and to the community.

Fostering the legal profession and access to justice

- In May of 2016, LAWPRO personnel attended the Pro Bono Ontario awards gala to honour the contributions of lawyers, law firms, legal departments, law associations and governments who have demonstrated an outstanding commitment to access to justice. The LAWPRO approved Pro Bono Ontario programs include specific quality-control and risk management strategies that the programs follow. In 2016, LAWPRO added the Queen's Elder Law Clinic and Bank of Montreal/Mt. Sinai Powers of Attorney Project to its list of approved programs.
- In 2016, LAWPRO continued its efforts to reach and support new lawyers. LAWPRO reached numerous student groups (including the Ontario Bar Association Student Division, the Asian Canadian Law Students, the Toronto Lawyers Association Articling Headstart program) and published a special student issue of *LAWPRO Magazine*. We presented the fifth annual Caron Wishart Memorial Scholarship to University of Toronto Faculty of Law student Amanda Nash.





Promoting wellness and balance

- LAWPRO promoted lawyer well-being by providing approximately one-half of the funding for the Law Society’s arm’s-length Member Assistance Program (MAP) operated by Homewood Human Solutions. LAWPRO has promoted the program and the services it offers in presentations, print publications, online and through social media.
- In our offices, we organized a Fitbit® fitness challenge with healthy prizes for monthly winners; a presentation about the impact of blood donation from Canadian Blood Services (CBS); and a plant sale to encourage employees to bring a little oxygen and green décor to their desks.

“ Donations of \$5,992 went to each of Autism Speaks Canada, Fanconi Canada, Food Allergy Canada, Good Shepherd Refuge Social Ministries, and Toronto Humane Society. ”

Supporting the broader Canadian community

- LAWPRO raised a total \$29,963 through the company’s denim Friday charitable giving program and staff led events for its five chosen recipient charities in 2016. Donations of \$5,992 went to each of Autism Speaks Canada, Fanconi Canada, Food Allergy Canada, Good Shepherd Refuge Social Ministries, and Toronto Humane Society.
- In 2016, employees donated a total of 12 days as part of LAWPRO’s charity day program. Charities that benefited from help by LAWPRO staff included Kol Hope for Children, Rethink Breast Cancer, Children’s Wish Foundation, and the Daily Bread Food Bank.
- Other staff-led charitable initiatives included donations of frozen lasagna to the Good Shepherd Homeless Shelter (more than 4,500 servings of food), a “Secret Santa” toy drive for Toy Mountain and the sale of daffodil pins in support of cancer research. ■





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