

When you do legal work involving foreign law or lawyers: **Are you covered?**

Lawyers and their clients are more mobile than ever before. With the Internet, easy international travel and a global economy, relationships and business transactions – and legal matters and disputes – frequently cross international borders. Handling matters that involve foreign law can increase the risk that you will face a malpractice claim, and can have important malpractice insurance implications that you should keep in mind.

This article highlights activities and situations involving dealings with foreign lawyers and foreign law that can lead to situations that will likely not be covered under the LAWPRO policy.

E&O issues

Remember that the LAWPRO policy provides protection for claims that are the result of your error, omission or negligent act in the performance or failure to perform “professional services” for others involving the practice of the law of Canada, its provinces and territories. What will, or will not, be covered can be very fact-specific, but you should expect that you are not covered for work involving non-Canadian law. Moreover, in our experience, claims involving foreign law tend to be very expensive and are frequently for amounts in excess of the LAWPRO program limits. These claims also often involve some type of joint venture arrangements that are sophisticated frauds or are intended to dupe the lawyer and/or client.

In addition to raising insurance issues, giving advice with respect to foreign law in a jurisdiction where you are not admitted could expose you to an unauthorized practice of law prosecution, even assuming you have sufficient knowledge of the foreign law in question.

Don't overlook or take shortcuts on basic file-opening procedures when handling matters involving foreign law, even where the client also directly retains foreign

counsel. Client ID and conflicts checks are necessary to ensure you identify any issues they raise with respect to clients involved with other matters at your firm.

As much as you may want to help a client, don't be tempted to give even the most basic advice with respect to foreign law, even if you know for certain that the information is correct. Just telling a client about a foreign law deadline or commenting on a few words in an agreement governed by foreign law fully exposes you to a claim.

And, don't give foreign advice and try to pretend you are not doing so. LAWPRO sees this scenario when lawyers write long opinion or reporting letters providing information and advice on foreign law, but also include a disclaimer with respect that information and advice at the end of the letter. Of course, the disclaimer states that the information in the letter is not to be relied on and that the client should get a foreign lawyer. Despite the disclaimer, you are potentially in trouble if a client relies on the information in the letter.

Tricky scenarios

There are some common scenarios where foreign law issues can sneak up on you. For example: What country does that tiny little governing-law clause at the end of the contract specify – Canada or another country?

Consider as well if there are local law requirements that might frustrate what you are trying to accomplish. This can arise if you are drafting a will gifting real property located in another country. A will that is otherwise valid under Ontario law, may not be valid and cause the gift to fail under the law of the country where the property is located due to non-compliance with local execution or attestation requirements. There can also be local requirements involving taxes, bookkeeping or records when there are transfers of money, securities or real property.

You will likely be dealing with a foreign counsel if your client needs assistance on a matter in a foreign jurisdiction where you are not admitted and insured. LAWPRO strongly advises you to consider having the client retain the foreign counsel directly. This will give the client a direct relationship with foreign counsel, rather than a relationship that flows through you. Although not a guarantee, this can help insulate you from a malpractice claim by your client for the work done by the foreign counsel. For a case study on this very situation, see the sidebar article, “Cross-border selection of lawyers: Issues to consider.”

Clearly document the advice given to your client with respect to the requirement for advice from a foreign law qualified counsel. Ideally, your retainer should also explicitly provide that your advice will solely be respect to the laws of Canada.

Beware of the potential for a “right-hand left-hand” disconnect when dealing with foreign counsel. This can easily happen where there are language barriers or time pressures due to a pending closing date on very complex corporate transactions in which the client has local and foreign entities involving multiple lawyers in different countries. LAWPRO sees claims in these situations when changes in plans or revisions to draft documents are not communicated to all who need to see them.

Malpractice coverage: Is there any?

When dealing with foreign law and lawyers, ask your clients if they expect a certain minimum level of malpractice coverage. Client expectations and requirements can vary. Also ask if the foreign counsel has legal professional liability insurance. Don't assume this is the case! In most jurisdictions lawyers are not required to have malpractice insurance, and even if they do, the coverage can be substantially less than LAWPRO's standard

coverage or \$1 million per claim, \$2 million in the aggregate.

Ask foreign counsel how much coverage they have. What is covered and what is excluded? Are there limits in the policy or by agreement with the client? Although Ontario law forbids any agreements between lawyer and client that would limit a lawyer's liability, such limitations are common practice in some other jurisdictions. Get a copy of the foreign lawyer's professional liability policy and review it to determine if there are other provisions that cause concern. Consider as well the obligation to maintain insurance in case a claim arises many years after the work was done.

If you are dealing with a situation where there is foreign malpractice insurance, ask yourself these additional questions:

- What are the foreign malpractice insurance requirements?
 - Does the foreign jurisdiction have minimum requirements?
 - Minimum limits?
 - Required coverage through the local Law Society or Bar?
 - And if your firm has coverage for foreign legal work in place, are foreign carriers allowed to provide any or all of the insurance that you require?

- If coverage is required, what levels of insurance are available in the foreign jurisdiction?
- Consider how to structure your insurance coverage to avoid any gaps.

Other considerations involving foreign jurisdictions

And while not directly insurance-related, consider the other often complex requirements that can come into play if you are working on matters in a foreign jurisdiction, and in particular if you are physically doing work there.

These can include:

- finances, banking and retainer arrangements and records
- entity structure
- professional regulation and licensing
- corporate and business regulation
- criminal and civil regulation
- taxation
- immigration and employment regulation
- insurance
- client expectations and needs
- national culture.

For a much more detailed outline of issues to consider, see the ethical

requirements document for "registered foreign lawyers" or RFS's that the Solicitor Regulation Authority in the United Kingdom has published.

Handling legal matters that touch on foreign law and issues are becoming more commonplace for many lawyers. Exciting and rewarding as these matters may be, they need to be handled with caution and care, as coverage for these types of matters generally will not fall within the scope of LAWPRO coverage. Recognizing this, lawyers are well advised to structure their retainers to ensure the client understands that the Ontario-based lawyer will only handle that part of the matter that is the practice of Canadian law, and that the client may need to retain other counsel for work involving the law of non-Canadian jurisdictions.

If one of your lawyers is properly admitted in a foreign jurisdiction and doing work involving the laws of that jurisdiction, arrange your own coverage for that work, as it will not be covered under the LAWPRO policy.

Dan Pinnington is director of practicePRO, LAWPRO's risk and practice management program. He can be reached at dan.pinnington@lawpro.ca

practice tip

Cross-border selection of lawyers: Issues to consider

When you shop for a contractor for a home renovation, you are often reminded about the need to ensure your contractor has third party liability insurance and workers' compensation insurance – just in case.

Do you ask that same question when you shop for a lawyer outside of Ontario? Do you remember to ask if the foreign lawyer carries professional liability insurance? And do you know what his/her coverage is?

Imagine this. A 40-year-old client's husband dies in a plane crash in the United States, the result of alleged negligence by air traffic controllers who fail to identify a storm and instruct the pilot to fly into an extreme thunderstorm. All on board are killed. The client is left a widow with two young children.

Because the widow resides in Ontario, she comes to you – an Ontario lawyer – for help.

You find out that liability is not an issue as another individual in the United States successfully filed a claim through the Federal Aviation Administration (FAA) for negligence against the air traffic controllers. Clearly the case needs to be commenced in Michigan; but because you are not licensed to practise in Michigan, you cannot act for your client as it would be a breach of the Rules of Professional