

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.

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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

Conduct. As well you would not have E&O coverage under your LAWPRO policy, pursuant to the territoriality exclusion.

Recognizing the importance of proportionality and professionalism by taking into consideration the complexity of the matter and significant damages claim (about \$7 million), this case would justify that you assist the client as legal advisor. Your client instructs you to find the best possible Michigan lawyer to carry out the litigation on her behalf; you are to assist her in liaising with that lawyer. A thorough search leads you to a lawyer who will take the case on a contingency arrangement, with you and the lawyer taking a share of the proceeds of any settlement or judgment.

Initially things move smoothly – until the day the lawyer informs you the limitation period was missed to file a notice to the FAA regarding the claim against it. Your client's lawsuit is now one in negligence against the lawyer in Michigan for missing the limitation period – but discover his errors and omission insurance only provides coverage with diminishing insurance limits of \$250,000 – nowhere close to covering your client's \$7 million claim.

A claim for negligent referral

While the concept of negligent referral has received minimal consideration in Canada, the topic has been widely discussed in the United States and recognized as an issue by the courts in the United States. Generally, the U.S. courts have been reluctant to impose liability on a referring counsel for the negligence of a recipient lawyer if the referring counsel has taken minimal care in his/her selection. There are policy reasons for this. We live in a world of

legal complexity, and it is ethically responsible (and a lawyers' obligation under our Rules of Professional Conduct) for a lawyer to seek out specialists and refer clients to the appropriate counsel,¹ particularly in a foreign jurisdiction.

However, the factors examined in the discussion of whether a referring lawyer should be found responsible for the negligence of the recipient lawyer include the following:

- the due diligence of the referring lawyer in selecting the recipient lawyer including investigating the background of the receiving lawyer²;
- the fee arrangement, if any, in place for the referring lawyer³;
- whether the referring lawyer maintained a joint responsibility with the recipient lawyer such that the referring lawyer was in a "general counsel" or supervisory role⁴;
- whether an indemnity agreement was in place⁵; and
- whether there were any conflicts of interest arising because of some relationship between the referring lawyer with the recipient lawyer⁶.

While the courts in the United States generally swing in favor of the referring lawyer, referring lawyers are not immune to the claims made against them for negligent referral and at least one court, in Florida, has imposed liability on a referring lawyer⁷.

One factor that can tip the scales against a referring lawyer is whether the innocent lay victim will be compensated for the damages to which he or she is entitled. In

other words, did the recipient lawyer have professional liability insurance to cover the damages sustained by the client?

This consideration is especially important to practising lawyers in jurisdictions such as Ontario that have a mandatory error and omission insurance program with minimum limits. Many countries require practising lawyers to carry E&O insurance, but the limits vary from one jurisdiction to the next. In the United States, only Oregon has a mandatory errors and omissions program. Some jurisdictions in the United States may have a mandatory requirement to be insured if lawyers work in a large corporation. It's therefore important for Ontario lawyers to ask if lawyers in foreign jurisdictions have professional liability insurance with sufficient coverage for their client's case.

A referring lawyer may not be able to avoid a claim simply because he does have insurance coverage and the recipient lawyer does not or has only limited insurance coverage. If you're in a situation where you are selecting counsel in a foreign jurisdiction – do your due diligence: Evaluate the foreign lawyer's credentials diligently. And make sure the recipient lawyer carries up-to-date errors and omissions insurance with limits sufficient for the client's case.

Ed. note: See the practicePRO website for a table comparing the professional liability insurance requirements of various jurisdictions around the world.

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1 Barry Temkin, "Can Negligent Referral to Another Attorney Constitute Legal Malpractice" (2001) 17 *Touro Law Review* at 639

2 *Wildermann v. Wachtell*, 149 Misc. 623, 267 N.Y.S. 840 (S.Ct. New York Co. 1933) aff'd, 241 A.D. 812, 271 N.Y.S. 954 (1st Dep't 1934) at 624-25, 267 N.Y.S. 2d at 842; *Tormo v. Yormark*, 398 F. Supp. 1159 (DNJ 1975); *ibid*

3 *Norris v. Silver*, 701 So. 2d at 1238 (Fla. Dist. Ct. App. 1997); *Supra* note 1

4 *Broadway Maintenance v. Tunstead & Schechter*, 110 A.D. 2d 587, 487 N.Y.S. 2d 799 (1st Dep't 1985); *Supra* note 1; Rachel Bosworth, Is the Model Rule Outdated? Texas Carries Referral Fee Responsibility into the Limited Liability Era, 84 *Texas Law Review*, December 1, 2005, 509 at 514

5 *Supra* note 1

6 Erin Coe, "5 Ways to Avoid Referral Mishaps" (22 September 2010), online: [Portfolio Media Inc.](#)

7 *Supra* note 3 at 1239