

E&O and R&R: Insurance planning for retirement



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When looking forward to your retirement it's important to have an idea of what liabilities and activities from your practice will follow you. It's false comfort to think that just because a claim wasn't brought prior to retirement means one won't appear in the future or that you can rely on the coverage that was in place while in practice to respond to future claims. The Law Society Program coverage you have in place when the claim is made against you (or when you became aware of circumstances that would reasonably be expected to give rise to a claim) is what will respond, not the policy you had in place when the error occurred. Research indicates that it takes an average of two to three years after legal services are rendered for a claim to surface and up to ten per cent of claims are not reported until five years after the services are provided. Claims can continue to be brought years after you retire, but there are steps you can take to reduce the

likelihood of having coverage issues if a claim arises.

"SEMI-RETIREMENT" also known as "NOT RETIRED AT ALL"

Lawyers will sometimes refer to themselves as being "semi-retired" when they mean they have reduced their workload or are taking time away from practice. You are required to maintain your LAWPRO coverage while

you continue to do some legal work or wrap up your practice. When lawyers apply for exemption under the Law Society insurance program they receive limited run-off coverage that, with

only two exceptions, provides no coverage for legal services provided while on exemption. The cost of paying the annual premium versus the prospect of no insurance for a claim arising out of legal services (beyond the permitted exceptions) provided while on exemption, is a small price to pay.

There's never enough time to do all the nothing you want.

*- Bill Watterson
(Calvin and Hobbes)*

If you want to continue to do wills for friends and family, act for one or two old clients, or give legal advice to a condo board, your LAWPRO coverage is mandatory. Being a lawyer can be a hard habit to break, but there is relief generally available for lawyers whose practice of law (including the provision of free legal advice) in the previous fiscal year and continuing forward is limited to not more than 20 hours per week on average for each week actually worked and 750 hours per year, and gross billings of up to \$75,000 per year. If you qualify for this part-time practice option you'll enjoy the same claims limit that you had while in full-time practice, but your premium will be based on just half of the base premium.

If you need time away but intend to return to practice in the future, a temporary leave of absence under Exemption (c) of the Law Society program may be the answer. This isn't, however, a way for lawyers to test "semi-retirement". When applying under Exemption (c), and for as long as you are on the temporary leave of absence, you must refrain from practice but have the intention to return to active practice within the time limits set out in the Rules for Exemption Eligibility.

Some work you do as part of your practice might be continued into "semi-retirement" and still allow you to apply for exemption. If as part of your practice you were named to act as an estate trustee, trustee or attorney for property for a non-family member, you may be eligible under Exemption (h) for relief from the LAWPRO premium if your work as a trustee (for example) will be the only ongoing aspect of your practice. While the standard run-off protection would not cover such services provided by you after retirement, you may apply for increased run-off coverage that could cover such work as an estate trustee, etc. during retirement.

Retirement is wonderful. It's doing nothing without worrying about getting caught at it.

- Gene Perret

TAKING THE PLUNGE

If you decide to cease practising law, you must notify both the Law Society and LAWPRO of your pending change in status.

Upon applying under Exemption (a) (not practicing in Ontario) or Exemption (h) (estate trustee, etc.), LAWPRO provides \$250,000 standard run-off coverage to cover the defence costs, indemnity payments and costs of repairs for claims that arise after retirement out of services provided while in practice or out of certain *pro bono* legal services that you are permitted to perform while on exemption. This is provided to retiring lawyers at no charge.

For many retired lawyers the \$250,000 limit may not be enough when considering the risks of future claims. The standard run-off coverage is not renewable, so if even one claim is made against you it could wipe out the \$250,000 limit and, unless other insurance is in place, you would be left uninsured for the balance of your retirement. To meet this need LAWPRO offers Increased Run-off Coverage with a selection of limits and terms. Particularly if you are going to continue to act as a trustee/attorney and apply under Exemption (h), you may want to consider purchasing the Increased Run-off as it can cover the work done as trustee *after* you retire. On expiry of the original term (being between two and five years) you may either apply for a further term or revert to just the \$250,000 standard run-off coverage (as reduced by prior claims). If you are interested in this option you should plan to apply at least 60 days before the start of retirement to minimize the likelihood of a gap in coverage, as Increased Run-off Coverage is individually underwritten.

If a claim triggers run-off protection, a \$5,000 deductible applies and you are bound by all of the same obligations to assist in the defence as a lawyer in active practice. This includes the obligation to promptly provide notice of a claim, provide access to the relevant files, assist in the defence and to otherwise abide by the terms and conditions of the policy.

Other insurance may respond to claims made after retirement, including the excess E&O policies maintained by your former firm and partners. However, if you are relying on your

former firm to have adequate coverage in place to respond to a claim made against you during retirement, you may be in for an unpleasant surprise. Problems that arise include (but are in no way limited to):

- *The firm doesn't carry excess insurance.* Maybe it once did, but let it lapse. Maybe it never had excess insurance. Unless you have an agreement in place that places an obligation on your former firm to continue to carry this coverage, you can't compel your former firm to maintain excess coverage.
- *The firm has excess insurance, but it doesn't extend to you.* Perhaps the firm changed excess insurers and the new policy doesn't extend to former members of the firm. Maybe the structure of the firm has changed and the policy doesn't include members of the old firm. Once you leave a firm you may not know what changes are taking place that could adversely affect you.
- *The wording of the excess policy has changed and the claim is no longer covered.* Changes in limits, terms, conditions or exclusions may all have an impact on what coverage is available to you in the event a claim is made.
- *Other claims exhaust the firm's limits.* Claims made against the other members of the firm (current members and former ones like you) can erode the limits available leaving you personally exposed.
- *The claim doesn't relate to services performed on behalf of your former firm.* The claim may relate to services provided to an earlier unrelated firm that you worked for, or to legal advice or services that you provided outside of your work for the firm, such as for friends, community groups, or family members. If the work wasn't done on behalf of the former firm, that firm's coverage may not apply.
- *You don't have access to your former firm's insurance policies.* Without having a copy of the policy and knowing who the insurer is, you will not know what (if any) coverage is provided to you, what conditions have to be met, how notice of claim is to be given, or what you need to do to avoid a possible denial of coverage.

What seemed like sufficient insurance coverage at the start of retirement may disappear over time. A gap or lapse in coverage for former members of firms can happen through inadvertence and without any ill-will on the part of new management. Wherever possible you should strive to safeguard your own interests and be cautious of relying on third parties to maintain coverage for your benefit.

In retirement, I look for days off from my days off.

- Mason Cooley

There are risk factors listed on the LAWPRO website (“Assess your insurance needs”) that can help you determine whether increased run-off protection is right for you. Depending on the nature of your practice, your exposure for other people’s work, the number of files you had and the monetary value of transactions you worked on, the standard coverage may not match your level of risk.

RETURNING TO PRACTICE

What happens if you’ve entered retirement only to discover that you’re not ready to quit the practice of law? If what you miss is applying your knowledge and helping others, and the financial benefit of being a lawyer is not what is drawing you back, consider providing *pro bono* legal services for a LAWPRO approved program. This can both benefit society and the retired lawyer who needs to keep active. While the LAWPRO policy has a general exclusion for exempt lawyers performing any legal services, an exception is made for lawyers who provide professional services through LAWPRO approved *pro bono* programs associated with Pro Bono Law Ontario (PBLO). LAWPRO’s standard run-off coverage extends to cover the work done for these programs even after the lawyer has otherwise gone on exemption and no deductible applies in the event a claim is made against the lawyer for professional services provided through the PBLO program. If you want to provide *pro bono* services for a not-for-profit organization that isn’t associated with PBLO, you can still maintain your exemption if you apply

for and are pre-approved by LAWPRO, but your run-off coverage will not cover the legal services you provide in that case.

If you decide you want to resume your practice and provide services that don’t fall within the two permitted exceptions, you will want to contact the Law Society in regard to your practice status and LAWPRO in regard to your insurance coverage, *before* you start providing professional services again.

If you take care of the small things, the big things take care of themselves.

- Emily Dickinson

If you are a lawyer planning to retire within the next few years, don’t wait until your retirement party to start thinking about liability insurance.

All lawyers make mistakes during their practice, but a failure to plan for retirement shouldn’t be one of them. ■

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A guide to LAWPRO exemption categories

There are many exemption codes applicable to the LAWPRO primary insurance program, a number of which may be relevant to prospective retirees:

Exemption (a): “Any LAWYER who during the course of the year(s), will not engage in the practice of law in Ontario.”

Exemption (c): “Any LAWYER on a temporary leave of absence from practice, provided that the temporary leave of absence is not more than 5 years if taken for reasons of family or illness, or not more than 2 years if taken for other reasons; this exemption shall not be available to a LAWYER who has taken alternative employment.”

Exemption (h): “Any LAWYER who during the course of the year(s) will act in the capacity of an estate trustee, a trustee for *inter vivos* trust, or an attorney for property in respect of an estate, a trust or a property of a person other than a related person of the LAWYER of which the LAWYER was named as estate trustee, trustee or attorney while the LAWYER was engaged in the practice of law in Ontario, and

- (i) will not otherwise engage in the practice of law in Ontario, or
- (ii) who otherwise qualifies for exemption under:
 - eligibility rule (d) employed LAWYER – employed in government or education,
 - eligibility rule (e) employed LAWYER – employed as in-house corporate counsel, or
 - eligibility rule (f) employed or volunteer LAWYER – legal aid clinic,

and will not engage in the practice of law in Ontario other than as provided for herein or under eligibility rule (d), (e) or (f) for which the LAWYER would otherwise qualify.”