



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. ■

