LawPRO magazine

INSURANCE ISSUE OCTOBER 2012 VOL 11.4

Holding the course

on premiums for 2013, with an uneasy eye on claims

Quick summary:

- Base premium for 2013: $3,350 (unchanged from 2012)
- Minimum premium period (for the purpose of mid-year status changes) reduced to 30 days from 60 days
- Claims management: Pure claims-made approach reaffirmed
- 2013 policy addresses lawyer/paralegal partnerships

LawPRO holds course on $3,350 premium, but keeps close watch as claims reach $100 million territory

For 2013, the third consecutive year, LawPRO will hold the base premium for the mandatory insurance program at $3,350.

In recent years, LawPRO has worked to support lawyers practising in a challenging economic climate by maintaining reasonable stability in its premium. A premium adjustment in 2011 placed the program on a solid financial footing, and cost-effective management has permitted the company to hold the premium steady for 2013.

However, as explained in greater detail on page 2, claims costs have increased dramatically in recent years compared to earlier in this century. Projected claims costs for 2012 are expected to be in the neighbourhood of $100 million once internal claims handling costs are taken into account.

The message? Claims in the $100 million range put pressure on premiums, regardless of our efforts to control our administrative expenses.

Minimum premium period now 30 days

Insured lawyers who begin or leave the practice of law part way through the year are eligible to pay a pro-rated premium, subject to a minimum premium adjustment. Starting in 2013, this adjustment will be reduced to a minimum premium based on 30 days' coverage, down from 60 days. This change is being made to support lawyers who undertake brief periods of practice, for example, those who provide temporary or *locum* legal services.

LawPRO claims administered on a "pure claims-made" basis

For 2013, the program policy has been refined to ensure greater clarity in underwriting intention regarding the "pure claims-made" rather than "claims-made and reported" form of policy for the purpose of notice of claim. As always, lawyers should promptly provide LawPRO with notice of any claim or circumstances that may reasonably be expected to give rise to a claim, as provided for in the policy and the Law Society's *Rules of Professional Conduct*.

CPD premium credit renamed LawPRO Risk Management Credit

The premium credit program known up until now as the "LawPRO CPD Premium Credit" has been renamed the "LawPRO Risk Management Credit" effective September 16, 2012. Please see page 8 for further details.

Policy adapts to lawyer/paralegal partnership structure

With lawyers and paralegals now entering into partnership together, the program policy has been updated to better reflect this. Paralegal partners in such firms may purchase their insurance from LawPRO or other insurers meeting the paralegal insurance requirements under the Law Society by-laws, while lawyers continue to buy their insurance from LawPRO under the Law Society program, in accordance with Endorsement No. 12.

Claims costs climb into $100 million territory

Our readers will by now be familiar with the news that total claims costs (including internal handling costs) for each of the 2011 and 2012 policy years are expected to be in the $100 million ballpark.

Our ongoing actuarial analysis makes it clear that claims costs of $80 million and more (before internal adjusting expense) are now the norm, not the exception. This is a very significant development when compared to the trend for the earlier part of the last decade, during which annual claims costs came in consistently within a $50 million to $65 million range.

In the August 2012 issue of *LawPRO Magazine*, President and CEO Kathleen Waters' editorial "Top 10 reasons we're in a $100 million world" summarized our analysis of the causes of the growth in claims costs, which include:

- more claims (and more expensive claims) being reported;
- claims driven by communication problems and/or inadequate investigation or discovery of facts;
- more claims being reported in the litigation stage (instead of earlier, when they would be less expensive to resolve);
- more class action claims and more "cluster" claims;
- more claims by self-represented litigants and more claims by vexatious litigants; and
- economic factors, including growth in property values and the introduction of HST on defence costs.

Nevertheless, despite the elevated level of claims costs, the base premium for 2013 will remain at $3,350 per insured lawyer – the same as it was for 2011 and 2012.

Why isn't the base premium going up if claims are so bad?

While many factors go into the premium-setting decision, the most important test is whether LawPRO is expected to emerge from the policy year with an acceptable solvency test result. Sound program management, including the 2011 premium increase, careful investment choices in a tough market and efforts to contain administrative costs, have kept the program on a sound financial footing.

This sound management has allowed us to provide the bar with three consecutive years of premium stability. We're holding the line for now… but we're very concerned about the growth in claims costs. We'd like the bar to understand and share our concern: Expect to hear more from us in 2013 about how all lawyers can help reduce claims costs by taking steps to avoid malpractice errors.

Why you don't (but should) think about Excess insurance

If you are relying on only the coverage offered under LawPRO's mandatory insurance program to satisfy claims that may be made against you, you may be at financial risk. The coverage limits under the mandatory program are $1 million per claim and $2 million in the aggregate. The cost of resolving claims is growing every year, and the monetary value at risk in the cases you are handling may be growing as well. Consider the myths and realities below before making your decision about Excess coverage.

"I've been practising for years without a claim. Even if I get sued it won't exceed the mandatory insurance limits."

Lawyers are more likely to be sued in the tenth year of practice than in the first. Over time lawyers assume more responsibility for files, acquire more clients and take on larger and more complicated matters. Claims will also often take years to mature, so an error that occurred in the second year of practice may not be identified until some years later. A single claim can seriously erode a lawyer's coverage limits under the mandatory program through defence costs alone, reducing the amount left to settle the claim or pay any judgment, while the cost of defending and settling claims continues to rise in Ontario.

"The new firm I'm going to carries a lot of Excess insurance, so I don't have anything to worry about."

The mandatory program is a "claims-made" policy, so the policy that responds is the one in place when a claim (as defined in the applicable policy) is made against a lawyer for the first time, no matter when the actual or alleged error, omission or negligent act took place. This applies so long as the lawyer did not know or ought not to have known of the claim or circumstance giving rise to the claim prior to the policy period. What triggers coverage can differ, even among "claims-made" Excess policies, so it is important to consider consistency in trigger provisions as well as other provisions involving coverage, to minimize the possibility of gaps in coverage when changes occur.

In considering your prior firm exposures, you cannot assume that because your new firm carries Excess insurance that this will protect you against claims arising out of work at your former firm. Although some Excess insurers may, or do as a matter of course, extend protection to include work at one or more predecessor firms to the existing firm, the protection afforded, if any, needs to be verified in each instance; lateral transfers between firms generally go unprotected. So, when moving from one firm to join another, it is important that you satisfy yourself that adequate Excess insurance continues to be purchased by your former firm, that the coverage extends to you as a former firm member and that details of ongoing Excess insurance in place remain available to you.

"As an associate I don't get to make the decisions about Excess insurance anyway, so I'm just counting on the partners to do what's right."

It's important to educate yourself on your firm's Excess insurance: Once coverage limits are exhausted you could be personally liable for a claim made against you. Whether you are an employee or a partner/shareholder in the firm, a written agreement (such as a partnership, shareholders or employment agreement) can address such insurance issues as who is responsible for payment of deductibles and premiums, and what will happen if the lawyer leaves the firm, the partnership dissolves or the firm undergoes a significant change in management.

If the firm is to continue in a different form (e.g., become a limited liability partnership or law corporation) or a successor firm is to be created, Excess coverage may be available for the predecessor firm through the new firm's Excess insurance. Otherwise, the existing firm's Excess policy in place before transition may provide for (the purchase of) an extended reporting period if conditions are met, and the availability of separate tail coverage for this firm can be explored. Failure to ensure that adequate Excess coverage is in place for predecessor and prior firm work can be a very costly mistake.

"As a partner with the firm, I made sure we had sufficient insurance in place that took into account the size of our firm, the nature of the practice and our likely exposure in the event of claims."

As firms change over time, so too should your insurance be updated to reflect current needs. Changes in the nature of the files, clients, types of transactions and the claims history of the firm members can impact a firm's insurance needs and the ability to maintain or obtain appropriate levels of insurance.

One type of change that may occur is the addition of new lawyers to a firm. As part of the interview process, firms should enquire into the claims history of new hires to see if the lawyer's track record for claims is likely to subsequently impact the underwriting and rating of the present firm's Excess insurance. Another type of change may be more files or transactions involving larger amounts that are not adequately covered anymore.

Even if the existing Excess insurance has limits that appear to meet your firm's needs, gaps in coverage may still arise. For example, this can result from a failure to buy-up or increase sublimits (i.e., special lower limits) that exist under the mandatory program and may apply to your situation, such as Optional Innocent Party protection or Run-Off Coverage options, or if the aggregate limit for all claims in a fund year has been exhausted. If additional coverage under the mandatory program has not been purchased to address this, or if the Excess insurance fails to "drop down" below $1 million to the lower sublimit in order to address the gap created by the sublimit, there may be a large uninsured exposure between the limits available under the mandatory program and the point where Excess insurance would begin to respond.

"I've scaled back my practice. In fact, to keep my expenses down I share an office with lawyers and other professionals and operate as a sole practitioner. It wouldn't be worth it for me to purchase Excess insurance."

Exposure to claims can come from many sources. Informal associations with other lawyers and professionals can leave you open to liability if someone reasonably believes you are in practice together or you are otherwise, at least in part, responsible for the services provided by others. This may include work done by employees, co-tenants, "of counsel" lawyers shown on the letterhead, *locums*, or other persons who appear to be affiliated with the lawyer's practice. As well, your past can come back to haunt you and work done prior to scaling back your practice can ultimately give rise to a claim that exceeds the apparent dollar value of the file when you worked on it.

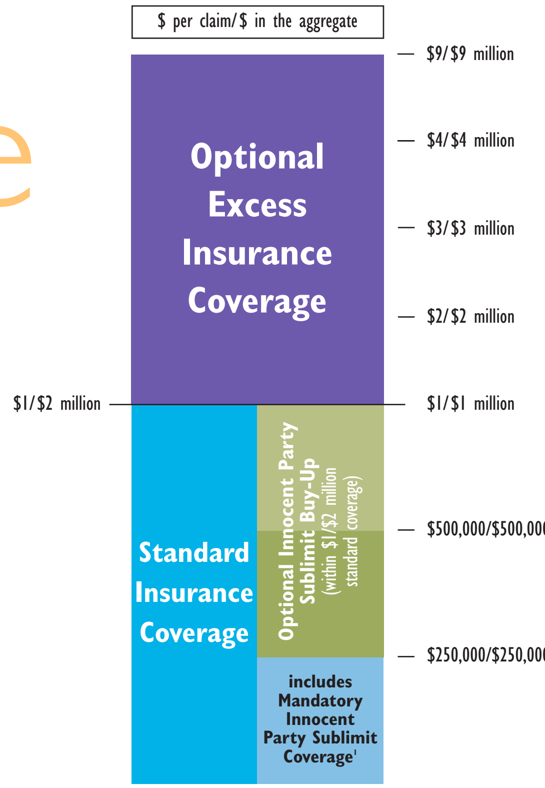
Be alert to your insurance needs and take action to control your personal exposure. For more information on the LAWPRO Excess Insurance program, contact LAWPRO Customer Service at (416) 598-5899 or 1-800-410-1013 and request a no-obligation premium estimate for your firm. After reviewing the premium estimate you can now apply on-line at the secure section of our website (**MY LAWPRO** at www.lawpro.ca).

Victoria Crewe-Nelson is assistant vice president, underwriting at LAWPRO.

2013 insurance coverage

for lawyers in private practice

Sole practitioners and lawyers in association or partnership



Standard Insurance Coverage

The base program

Eligibility:
Required of all lawyers providing services in private practice.[2]

Coverage limit:
$1 million per claim/$2 million in the aggregate (i.e., for all claims reported in 2013), applicable to claim expenses, indemnity payments and/or costs of repairs together.

Standard deductible:
$5,000 per claim, applicable to claim expenses, indemnity payments and/or costs of repairs together.

Base premium:
$3,350 per insured lawyer (plus PST).

Mandatory Innocent Party Sublimit Coverage[3]

Eligibility:
Required of all lawyers practising in association or partnership (including general, MDP and LLP partnerships), law corporations (with more than one lawyer) and sole practitioners practising with employed lawyers.

Coverage sublimits:
$250,000 per claim/in the aggregate, applicable to claim expenses, indemnity payments and/or costs of repairs together.

Premium:
$250 per lawyer (plus PST).

Mandatory Real Estate Practice Coverage (for real estate practitioners)

Eligibility:
Required of all lawyers practising real estate law in Ontario in 2013.

Lawyers not eligible for the Real Estate Practice Coverage are:

- Those who are in bankruptcy;
- Those who have been convicted or disciplined in connection with real estate fraud;
- Those under investigation, where the Law Society obtains: An interlocutory suspension order or a restriction on the lawyer's practice prohibiting the lawyer from practising real estate; or an undertaking not to practise real estate.

Coverage limit:
$250,000 per claim/$1 million in the aggregate, applicable to claim expenses, indemnity payments and/or costs of repairs together.

A "repair" is work done by LAWPRO internal or external counsel to avoid or minimize consequences of an error. For examples of our repair work, see: "How remedial action by LAWPRO saves the bar millions", from Volume 11.2 of LAWPRO Magazine *(www.practicepro.ca/remedial-action).*

Premium:
$250 per lawyer (plus PST).

Optional Insurance Coverages

Innocent Party Sublimit Buy-Up[4]

Eligibility
Optional for all lawyers practising in association or partnership (including MDPs, licensee firms, and LLPs), law corporations (with more than one lawyer) and sole practitioners practising with employed lawyers.

Coverage sublimits & premiums:
Innocent Party Sublimit Coverage can be increased as follows:

- to $500,000 per claim/aggregate for an additional $150 per lawyer ($400 total Innocent Party premium); or
- to $1 million per claim/aggregate for an additional $249 per lawyer ($499 total Innocent Party premium).

Optional Innocent Party Sublimit Coverage[4]

Eligibility:
Optional for sole practitioners, licensee firms with only one lawyer, and lawyers practising alone in a law corporation. Provides protection for ongoing liability that these practitioners can have in situations such as the following:

- if you've acted as back-up counsel or had others act as back-up counsel for you;
- if you've taken a temporary leave of absence from your practice and have delegated your work to others;
- if you've practised as a partner or associate in the past;
- if your practice once included employee lawyers;
- if you've practised in any situation in which you could be seen as lending your name to others;
- as an assurance to others if involved in electronic registration and escrow closings;
- if acting as a *locum*, you must carry at least the same amount of innocent party sublimit coverage as is carried by lawyers in the firm that has hired you.

Innocent party coverage can help protect lawyers who've changed firms or practice arrangements. For more information, see: "Here today, gone tomorrow: Insurance implications of lawyer transfers & practice structures" from LAWPRO Magazine *Volume 11.1 (www.practicepro.ca/transfer-implications).*

Coverage sublimits:
LAWPRO offers Optional Innocent Party sublimits of:

- $250,000 per claim/aggregate;
- $500,000 per claim/aggregate;
- $1 million per claim/aggregate.

Premiums:
Underwritten on an individual basis, based on a risk assessment of information provided in the Innocent Party Sublimit Buy-Up application.

Excess Insurance Coverage

Eligibility:
Available to lawyers in private practice, and to lawyers with Run-Off Coverage protection, bought up to the $1 million/$2 million level.

Coverage limits:
The following Excess limits are above the $1 million per claim/ $2 million in the aggregate limits of the primary program. Coverage is provided on a firm basis (i.e., for all firm lawyers for services on behalf of the firm):

- $1 million per claim/$1 million in the aggregate;
- $2 million per claim/$2 million in the aggregate;
- $3 million per claim/$3 million in the aggregate;
- $4 million per claim/$4 million in the aggregate;
- $9 million per claim/$9 million in the aggregate.

Do you need Excess coverage? Read the articles on page 2 of this issue to be sure. To learn more about the growth we've been seeing in claims costs, see: "Top 10 reasons we're in a $100 million world" from LAWPRO Magazine *Volume 11.4 (www.practicepro.ca/reasons-100M-claims-world).*

Premiums:
Underwritten on a firm basis, based on a risk assessment of information provided in the Excess Insurance application.

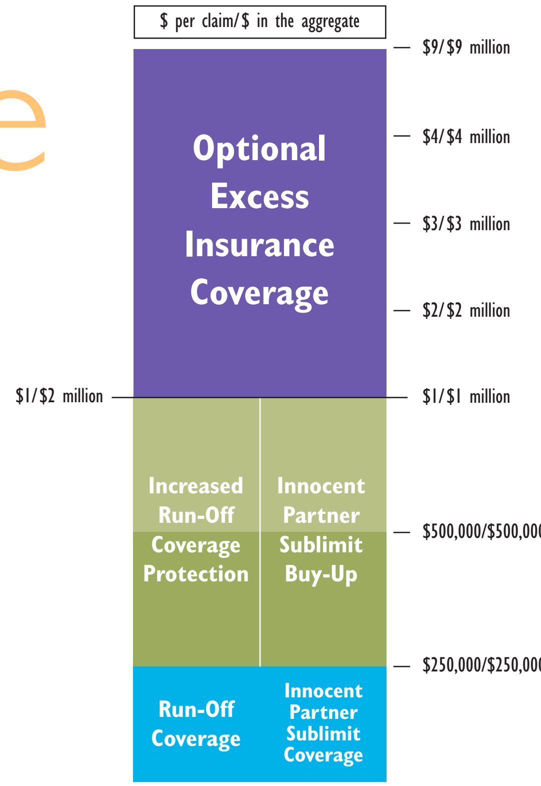
For information

For detailed information on the insurance programs and insurance options, or for application forms, please visit the LAWPRO website at www.lawpro.ca.

Information is also available from the LAWPRO Customer Service Department at (416) 598-5899 or 1-800-410-1013 or via e-mail: service@lawpro.ca.

1 Optional for sole practitioners.
2 Lawyers who are on temporary leave and qualify for exemption (c) are provided with the full limit coverage of $1 million per claim/$2 million in the aggregate provided under the base program.
3 Coverage for dishonest (as defined), fraudulent, criminal or malicious acts or omissions.
4 LAWPRO strongly recommends that lawyers increase their optional coverage protection to the maximum sublimit offered, to avoid gaps in coverage.

2013 insurance coverage



for exempt lawyers

- In-house corporate counsel
- Government lawyers, educators and others not in active private practice
- Retired lawyers, estate trustees, emeritus lawyers, judges and others no longer practising law
- Legal aid clinic lawyers (not directly employed by Legal Aid Ontario)
- Lawyers who engage in only occasional practice in Ontario and are resident in a Canadian jurisdiction other than Ontario

The standard Run-Off Coverage

Eligiblity:
Provided at no charge to all lawyer members of the Law Society who are not in active private practice who qualify for exemption[1] from payment of insurance premiums and levies.

Coverage limits:
$250,000 per claim/in the aggregate, not re-instated annually, subject to the following:

- applies to claims arising out of services provided while the lawyer was in private practice or otherwise maintained the full ongoing practice coverage;
- does not provide coverage for claims arising out of any services a lawyer provides while exempt from paying the insurance premium. The only exceptions to this are with respect to *pro bono* legal services provided through an approved *pro bono* legal services program associated with Pro Bono Law Ontario, or where the lawyer has applied for and purchased additional coverage specifically for certain services yet to be performed as estate trustee, trustee for *inter vivos* trust, or attorney for property, as described further;
- applies to claims expenses, indemnity payments and/or costs of repairs together;
- includes a sublimit coverage of up to $250,000 per claim/in the aggregate for Innocent Partner claims.

Wondering about the coverage status of your pro bono work? See "Are your pro bono *legal services covered by LAWPRO?" (www.practicepro.ca/information/probono.asp)*

Premium:
None for standard Run-Off Coverage.

Optional Insurance Coverages

Increased Run-Off Coverage protection

Eligibility:
- Optional for lawyers with only the basic Run-Off Coverage who are concerned that claims now and in the future may exceed $250,000 per claim/aggregate; or

- Optional for lawyers named or acting as estate trustee, trustee for *inter vivos* trust, or attorney for property as residual work from their former law practice who wish to purchase expanded coverage for these services yet to be performed.

Coverage limits:
Exempt lawyers can apply to increase Run-Off Coverage limits to:

- $500,000 per claim/aggregate; or
- $1 million per claim/$2 million in the aggregate;

for terms ranging from two to five years.

Lawyers acting as estate trustee, trustee for *inter vivos* trust, or attorney for property
Exempt lawyers can apply to increase Run-Off Coverage protection to include protection for services yet to be performed as estate trustee, trustee for *inter vivos* trust, or attorney for property, as follows:

- apply for and purchase expanded protection for these services within the standard $250,000 Run-Off Coverage limit; and/or
- apply for and purchase expanded protection for these services within the Increased Run-Off Coverage limits, as described above.

Through a deeming provision, ongoing activities of this type may be included under the Run-Off Coverage protection provided to you.

Premiums:
Underwritten on an individual basis, depending on the years practised, areas of law practised, the amount of time since the applicant was in private practice, and other risk-based factors.

Do you provide non-traditional services? These may not be covered! See: "Danger signs: Five activities generally not covered by your LAWPRO policy" from LAWPRO Magazine *Volume 9.2 (www.practicepro.ca/activities-not-covered); "Avoiding claims when serving clients on a budget" from* LAWPRO Magazine *Volume 11.4 (www.practicepro.ca/clients-on-budget); and "Lawyers on client boards: Handle with care" published January 2012 in LAWPRO's corporate commercial webzine (www.practicepro.ca/lawyers-on-client-boards).*

Innocent Partner Sublimit Buy-Up[2]

Eligiblity:
Optional for exempt lawyers who have applied for Increased Run-Off Coverage and who may be concerned about their innocent partner exposure.

Coverage limits & premiums:
Innocent Partner Sublimit Coverage can be increased as follows:

- to $500,000 per claim/aggregate for an additional five per cent of the Increased Run-Off Coverage premium; or
- to $1 million per claim/aggregate for an additional eight per cent of the Increased Run-Off Coverage premium.

Excess Insurance

Eligibility:
Available to lawyers in private practice, and to lawyers with Run-Off Coverage protection.

Coverage limits:
The following Excess limits are above the $1 million per claim/ $2 million in the aggregate limits of the primary program. Coverage is provided on a firm basis (i.e., for all firm lawyers for services on behalf of the firm):

- $1 million per claim/$1 million in the aggregate;
- $2 million per claim/$2 million in the aggregate;
- $3 million per claim/$3 million in the aggregate;
- $4 million per claim/$4 million in the aggregate;
- $9 million per claim/$9 million in the aggregate.

Premiums:
Underwritten on a firm basis, based on a risk assessment of information provided in the Excess Insurance application.

[1] Lawyers who are on temporary leave and qualify for exemption (c) are provided with the full limit coverage of $1 million per claim/$2 million in the aggregate provided under the base program. Lawyers eligible for the "mobility" exemption have insurance coverage as described on the website at www.lawpro.ca.
[2] LAWPRO strongly recommends that lawyers increase their optional coverage protection to the maximum sublimit offered, to avoid gaps in coverage.

My LAWPRO:
Your all-purpose online portal

Since over 98 per cent of lawyers in private practice renewed their insurance coverage online for 2012, we know you're familiar with our "MY LAWPRO" secure portal… but did you know that MY LAWPRO is not just for policy renewals?

You can log into the secure, password-protected site at any time of the day or night, any day of the week to access the following services:

- update your contact information;
- choose or change your method of payment;
- apply for exemption from the mandatory insurance requirement;
- change your exemption status;
- apply for optional insurance coverages (excess insurance, increased run-off protection, innocent party coverage);
- file your transaction levy surcharge forms;
- access previous years' insurance documents and forms;
- view your personal account or e-filing history information, from the current or a previous year;
- provide notice of a claim;
- access policy documents, including invoice and policy declaration pages; or
- access information on excess coverage specific to your firm (available if logging in using your firm account number and password).

Access MY LAWPRO through the link at the top of each page on lawpro.ca; or use the sign-on box provided. To sign in, enter your Law Society number or firm account number, and confidential password.

LAWPRO CPD Premium Credit renamed

LAWPRO Risk Management Credit

To better represent LAWPRO's reasons for offering a premium credit, and to avoid confusion with the Law Society's CPD requirements, the LAWPRO CPD premium credit was renamed the LAWPRO Risk Management Credit effective September 16, 2012.

The new name reflects the aim of the premium credit: To encourage lawyers to attend CPD programs that contain significant risk management content that will help them avoid claims. The process by which lawyers can claim the credit will stay the same. For the 2012 policy year, over 200 CPD programs were approved for the premium credit, with a combined attendance of over 30,000.

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Publications Mail
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Return undeliverable Canadian addresses to:
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LAWPRO magazine

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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 potential claims.

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