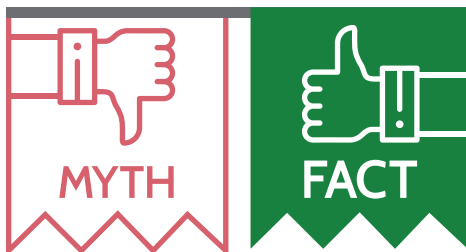


# LAWPRO is not like your auto insurer

## Dispelling common myths about your insurance coverage



In my more than 20 years of defending lawyers on malpractice claims, I continue to be amazed at how little some lawyers seem to know about the “LAWPRO policy” and how a claim is handled. I am also frustrated by how often lawyers have not done even the simplest things that could help them avoid or defend a malpractice claim.

Lawyers often assume that LAWPRO operates like an auto insurance company. This impression is just not correct – LAWPRO is very different from your auto insurer because it:

- Actively works to prevent claims;
- Does not look for ways to avoid providing insurance coverage;
- Appoints repair counsel to fix the mistake and reduce damages if there has been an error;
- Does not settle a claim just because the cost of defending the claim may exceed the amount at issue;
- Takes a principled approach and settles claims where there has been negligence and the client suffered damages;
- Appoints counsel to vigorously defend proceedings if there is no negligence or damages; and
- Works collaboratively with defence counsel and the insured to defend the claim.

From my work defending lawyers, I have found over and over again some common myths about the LAWPRO policy and how claims should be handled. All these comments apply to coverage under the mandatory insurance program LAWPRO runs on behalf of the Law Society, and may also apply to LAWPRO or other excess insurance coverage, if it is in place.

### Myth #1: Only bad lawyers have claims against them.

**Fact** Even the best lawyers make honest mistakes or can face a baseless allegation of negligence from a client that is suddenly unhappy due to unexpected events or changed circumstances. LAWPRO’s claims stats indicate that 4 out of 5 lawyers can expect to have at least one malpractice claim in the course of their career. Most of the lawyers reading this will have to contact LAWPRO to report a claim at least once in their career.

### Myth #2: Lawyers only need to report to LAWPRO when they are served with a statement of claim.

**Fact** Lawyers should report to LAWPRO in a variety of circumstances. These include: when a lawyer discovers or thinks a mistake was made; when a client has asserted that the lawyer made a mistake; when a lawyer is being asked to swear an affidavit or give evidence about their file handling; or, when a request for production or court order has been made for the lawyer’s file. When in doubt, report!

### Myth #3: If a lawyer can fix his/her mistake, then they should try to do that before contacting LAWPRO.

**Fact** A lawyer should never try to fix a mistake or admit to a client a mistake has been made. Instead, LAWPRO should be immediately contacted. Attempting to fix a mistake or admitting an error may

jeopardize the lawyer's insurance coverage, especially if it makes the situation worse. LAWPRO claims professionals or defence counsel can coach you on the conversation you should have with a client if there is a potential claim.

#### **Myth #4: A lawyer working at a firm does not have to worry about his/her LAWPRO policy. It is a firm concern.**

**Fact** The lawyer is individually named as the insured under the LAWPRO policy, not the firm. This is unlike excess policies where the firm is usually the named insured. Any claims should be reported to LAWPRO by the lawyer who made the purported error or is responsible for the file. LAWPRO will look first to the individual lawyer for payment of any applicable deductibles or claims surcharge levies, even if there is an arrangement that the firm will pay these amounts. As well, LAWPRO can look to the partner(s)/shareholder(s) of the law firm the lawyer was at as of the date of the claim for payment of the deductible.

#### **Myth #5: It is better not to take notes or keep your file because it makes it harder to prove you made a mistake.**

**Fact** It makes it harder to defend! While clients remember what was said and done on a file, usually in great detail, in my experience lawyers just do not remember the details. Notes or other documentation in a file that can establish what actually happened can be a lifesaver in the event of a claim.

#### **Myth #6: Reporting a claim will trigger a deductible and claims surcharge levies.**

**Fact** Simply reporting a claim to LAWPRO does not, repeat, does not trigger a

deductible. Lawyers have various deductible choices that include a nil deductible option (where you don't pay a deductible at all), a deductible that only applies when there's a payment further to a judgment, settlement and/or repair ("indemnity payment"), and a third deductible option that applies to indemnity payments and claims expenses. If the third type of deductible applies, 50 per cent of the deductible would be payable when a statement of defence or responding materials are filed, and the remainder would be payable on the earliest of the commencement of discoveries, examinations, or a pre-trial conference is held, or when an indemnity payment is made.

The claims history levy surcharge is only applied if a claim has had an indemnity payment or the entire claim limit has been otherwise exhausted. If a claim is closed without any repair being required or payment made to the other side, then your premiums aren't expected to go up just because you've had a claim reported. Most claims are settled without a finding of negligence. For the years 2006 to 2016, 45 per cent of LAWPRO claims were closed with no costs whatsoever, defence costs were incurred on only 42 per cent of the files, and an indemnity payment was paid on only 13 per cent of the files.

#### **Myth #7: Lawyers do not have to worry about obtaining insurance in excess of the amount afforded under the LAWPRO policy.**

**Fact** The LAWPRO policy provides annual errors and omissions coverage of \$1 million per claim, or \$2 million in the aggregate. Keep in mind that this amount erodes with defence costs and expenses – which can sometimes be significant, even when the allegation of negligence has no merit. Consider the matters you handle and the nature of your practice – get excess coverage if you think you have exposure to a claim that would be

worth more than \$1 million in terms of indemnity (including pre-judgment interest) and defence costs. Excess coverage is not very expensive and gives you great comfort. Visit [lawpro.ca/excess](http://lawpro.ca/excess) for information on LAWPRO's excess insurance program.

#### **Myth #8: I have no insurance coverage after I leave practice.**

**Fact** When lawyers leave private practice (e.g., to retire, go in-house, move to another jurisdiction or take a temporary leave to focus on family) they usually qualify for exemption from payment of the program premiums. Whatever the reason, the policy provides for run-off coverage that covers the work you did as an Ontario practising lawyer, for free! The standard run-off coverage has a sublimit of \$250,000 that covers your work as a lawyer when program coverage was carried prior to going on exemption. This basic run-off coverage remains in place and lasts as long as you are on exemption. Of course, the limits will be depleted by claims that arise after the lawyer goes on exemption and the program coverage may change in future. Lawyers can apply to buy up this sublimit to \$500,000 or \$1 million. It's also worthwhile to check if your current or previous firms have any excess insurance that might also respond to claims made against former members of the firm after they leave and what conditions might apply.

Take the time to learn more about your LAWPRO policy. Visit the [lawpro.ca](http://lawpro.ca) website for a copy of the policy and FAQs about the policy and the coverage it provides. And remember to take steps to reduce your exposure to a claim. [practicepro.ca](http://practicepro.ca) has loads of helpful tools and resources to help you accomplish this. Lastly, please follow the advice I give above to help LAWPRO and your defence counsel defend you in the event you face a malpractice claim. ■

Susan Sack is a partner at Rosen Sack LLP.