

2020

LAWPRO®
Lawyers' Professional Indemnity Company

Year in Review



2020

About LAWPRO

LAWPRO provides primary errors and omissions insurance coverage for Ontario lawyers, Excess insurance for law firms and TitlePLUS title insurance across Canada.

Our mission

to provide insurance products and services that enhance the viability and competitive position of the legal profession through the values of

Professionalism
Innovation
Integrity
Service
Leadership

LAWPRO survey results

The annual survey of LAWPRO E&O insureds with a closed claim indicated the following:

97%

said that they were satisfied with how LAWPRO handled the claim

87%

said they would have the defence counsel firm represent them again

87%

said they were satisfied with our process of selecting defence counsel

88%

said LAWPRO received good value for defence monies spent

In 2020 LAWPRO provided:

LIABILITY INSURANCE:

almost
29,000

members of the
Law Society of Ontario

EXCESS INSURANCE:

1,558

law firms

TITLEPLUS:

over
20,000

title insurance policies



Remarks of the Chair

2020 was a year like no other in living memory, but the business of law managed to continue, even if the way we accomplished it felt completely unfamiliar.

Likewise, LAWPRO continued to operate, even though the pandemic impacted us in many ways including closed courts and a real estate market that sprung back to life quickly after a short-lived lull in the spring. As expected, we saw a decline in the number of claims and transaction levies. However, some of what we saw was unexpected such as an increase in the number of lawyers we insure by 2% from the previous year.

Gross written premiums were slightly lower in 2020: \$113.9 million, compared to the \$114.7 million seen in 2019. Net claims expenses of \$100.9 million were above last year's total of \$99.4 million. Even as LAWPRO transitioned to work from home and adapted to new processes, we were able to cut general expenses to 10% under budget and 3% below 2019. LAWPRO had sufficient capital available to cover requirements as demonstrated by the Minimum Capital Test (MCT) of 229% at year end, within our preferred range of 210% to 240%.

As the financial statements in the following pages demonstrate, LAWPRO continues to fulfill the mandate given by Convocation more than two decades ago. To do so we navigate a careful balancing act: keeping revenues (i.e., premiums, levies, and investment returns) high enough to be commercially viable and satisfy regulators that the company is financially healthy, while handling claims and carefully controlling premiums to maintain affordability and properly reflect the cost of risk. In doing so, we effectively operate as a not-for-profit entity, while being regulated as a for profit insurance company.

Even with the changes and challenges brought on by the COVID-19 pandemic, we remain financially healthy as we plan for scenarios similar to what we are now experiencing as part of our corporate governance processes and risk management strategies put in place by our Board. As a measure of our success, I am pleased, that for the 20th consecutive year, insurance rating agency AM Best Co. issued LAWPRO an "A" rating for financial strength and "a" issuer credit rating in November of 2020. This independent rating is provided to companies that have an "excellent" ability to meet ongoing insurance obligations and reflects our long-term financial stability.

LAWPRO is steady and secure and we remain ready to pay claims and help our insureds, even in and after the exceptional circumstances we experienced in 2020.

LAWPRO emerged as a separate, commercially run, regulated insurance company out of the legal professional liability insurance crisis that occurred in the late 1980's and early 1990's. At that time, the liability indemnity program was run in-house in the Law Society and the lawyers of Ontario were faced with a \$200 million dollar liability shortfall.

In response to this crisis, the Law Society set up the Lawyers' Professional Indemnity Company (now LAWPRO) as a fully regulated insurance company in order to prevent similar circumstances from happening again.

LAWPRO has been remarkably successful in achieving the mandate the Law Society gave it in 1994. It is a success the Benchers who made the decision to set up LAWPRO in the early 1990's can justifiably be proud of. Today, because of their foresight, and the prudent and skilled management of LAWPRO's executive leadership and the thoughtful and accomplished oversight of its largely independent Board of Directors, LAWPRO offers many advantages to the bar including:

- Guaranteed availability of affordable insurance to all lawyer licensees;
- Consistent coverage, terms, and conditions for all;
- Claims prevention efforts and resources;
- Automatic, free Run-off coverage; and
- Company stability.

LAWPRO will continue to serve and support Ontario lawyers in 2021 and beyond as together we tackle the challenges of the COVID-19 pandemic. Good claims service and financial stability not only protects Ontario lawyers, but also indirectly, the public.

Andrew J. Spurgeon

Andrew J. Spurgeon
Chair



Remarks of the President & CEO

My remarks for last year's annual report were written in late March, just a few weeks after the pandemic started. The "incredible events and changes" of those first few weeks (as I then described them) did little to foreshadow the countless ways the COVID-19 pandemic upended our personal and professional lives through the rest of 2020.

Needless to say, the pandemic led to major transformations at LAWPRO. While many activities slowed or stopped in 2020, they did not do so in the world of malpractice claims. We saw some significant impacts on the claims portfolio, some of which we expect will carry into future years in ways we are still trying to understand. For the first time in a long time, LAWPRO saw the number of new claims decrease with 2,768 reported claims, down 11.3% from the 3,121 reported in 2019. Along with the courts being closed we attribute this decrease to less economic activity and work for law firms. But, despite seeing fewer reported claims, total claims costs only decreased by 2.7% (from \$76.7m to \$74.6m). Interestingly, 2021 Q1 claims reports appear higher than last year. Perhaps we are seeing some catch-up. Only time will tell.

At December 31, we had 46 claims that were directly attributed to COVID-19 related circumstances. While some of these claims saw clients seeking recompense for economic losses they suffered (something we typically see in economic downturns), the majority of pandemic related claims now being reported involve limitation periods and procrastination. Many of these claims are from confusion about the emergency suspension of limitations during the pandemic. We also saw more claims involving the inadequate investigation or discovery of the client's circumstances and more clerical errors. These claims are likely a symptom of virtual client meetings and remote work.

While only one or two of our pandemic related claims have an obvious mental health or wellness aspect to them, we know that many lawyers and firm staff are struggling with the stresses and isolation of remote work. LAWPRO continues to provide major financial support to the Members Assistance Program and I am very proud of the mental health and wellness focused issue of *LAWPRO Magazine* that we published in early 2020. In the coming months and beyond, we all need to continue to focus on supporting the mental health and wellness of lawyers, law firm staff and their family members.

I am proud to report that LAWPRO continued its commitment to the profession, our communities, employee wellness, and the environment in 2020 – despite impacts of the pandemic. On top of the multiple resources and updates related to the COVID-19 pandemic that we provided to lawyers, LAWPRO became an accredited CPD

provider in Ontario and we provided multiple free Continuing Professional Development programs on risks associated with COVID-19, cultural competency, real estate fraud, cybersecurity, and common claims, to name a few.

As we emerge from this pandemic, I expect that many of the changes forced upon us will stay in one form or another, including work from home and the broader use of technology. There is a lesson to be learned here: the legal profession can change and be resilient. Lawyers continued to serve their clients through a once in lifetime upheaval. Necessity was the catalyst for significant change, much of which had been resisted in the past. As we leave the pandemic behind, many of these changes are harbingers of the future of legal services. LAWPRO is working to fully understand how these changes are affecting our insureds and their claims exposures.

The bottom line, after a year of ups and downs and many unexpected challenges, the plans and preparations LAWPRO made for adverse financial scenarios worked as intended. Although the common shares held in our investment portfolio were down \$50 million at the end of March, we recovered slightly more than half of that by year end. As well, the majority of our investments are held in relatively stable fixed income products that increased in value over the year. LAWPRO remains financially healthy and continues to meet all regulatory requirements. I thank everyone on the LAWPRO team for stepping up and responding to everything we faced in 2020. I also acknowledge the extra engagement and support that LAWPRO's Board of Directors provided as we navigated the financial and operational changes the company faced.

As we patiently wait for everyone to get vaccinated, we will continue to provide the same level of service we always have. LAWPRO will support lawyers and protect the public through the remainder of the pandemic as we prepare to operate in a post pandemic world.

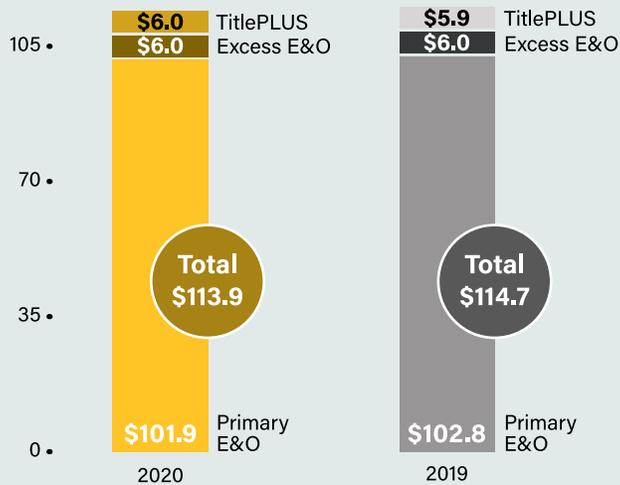
Daniel E. Pinnington

Daniel E. Pinnington
President & CEO

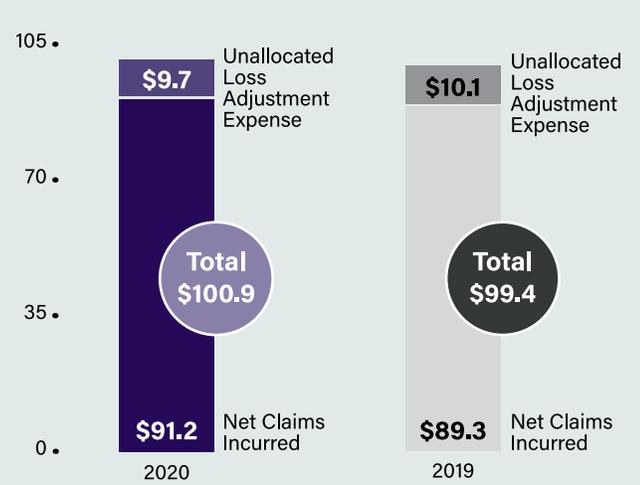
2020 Highlights

All numbers stated in millions of Canadian Dollars.

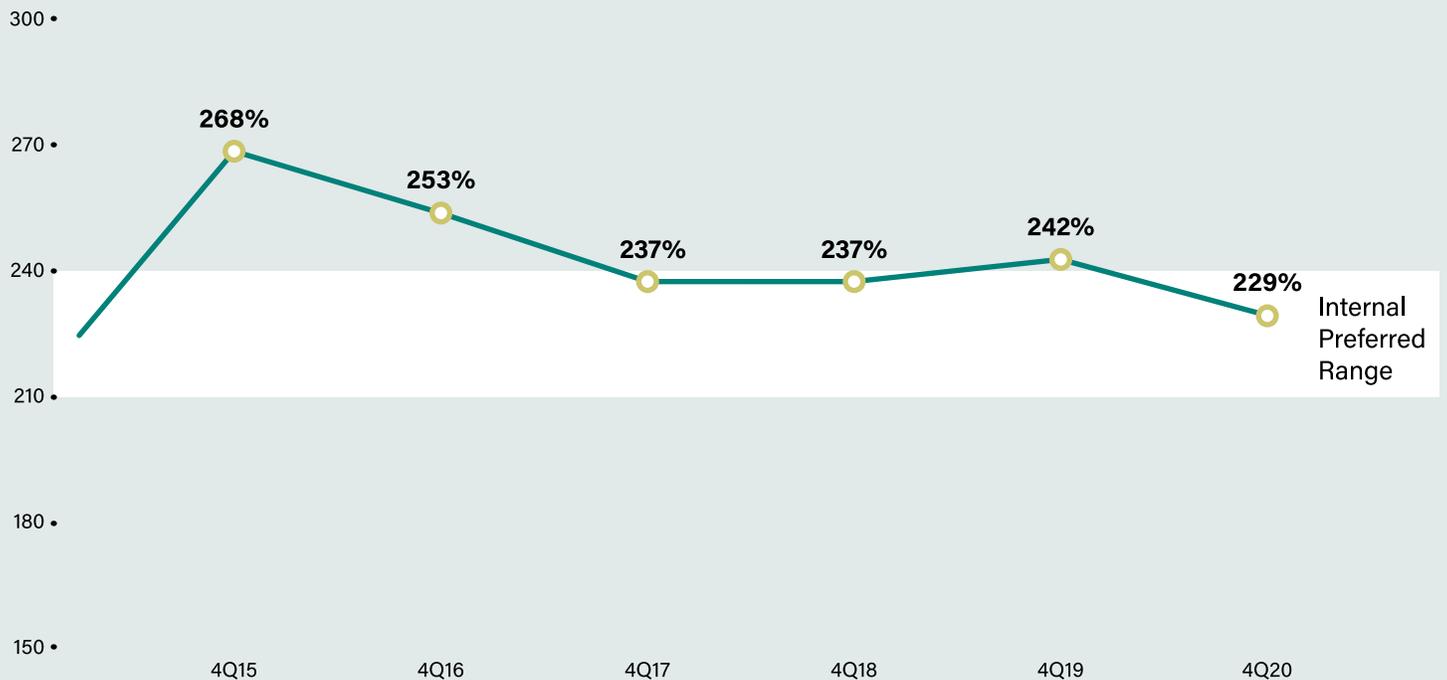
Gross Written Premium



Net Claims Incurred



Minimum Capital Test



The Minimum Capital Test is designed to ensure that an insurance company's assets are sufficient to meet its present and future obligations. The MCT ratio is impacted by insurance risk, market risk, credit risk, and operational risk.

The MCT ratio at December 31, 2020 of 229% is within the Company's preferred operating range of 210% to 240%.

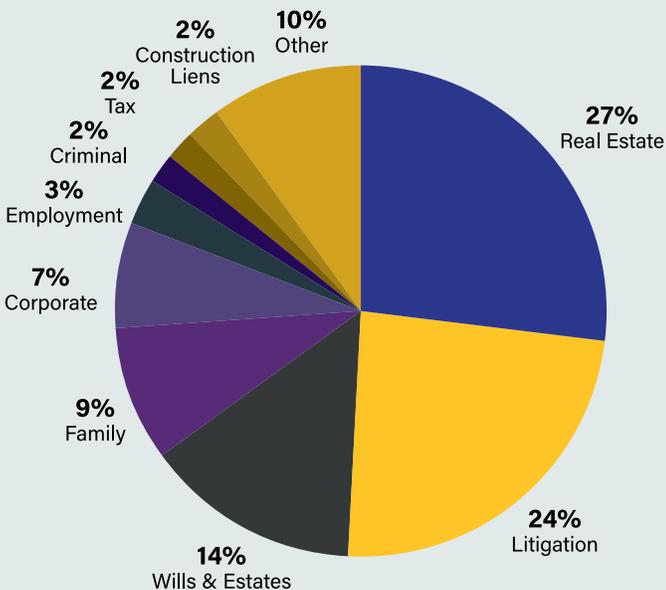
2020 Highlights

Claims per 1,000 Lawyers



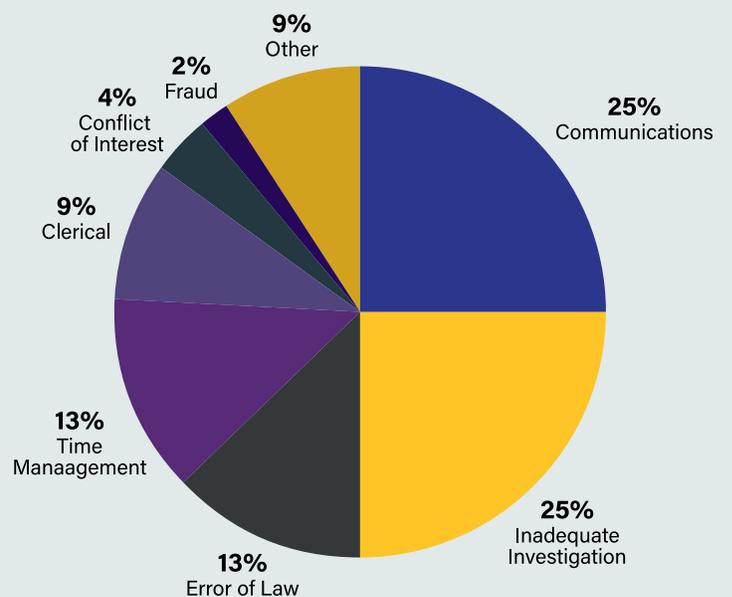
Claims Count by Area of Law

(Fund Year 2020*)

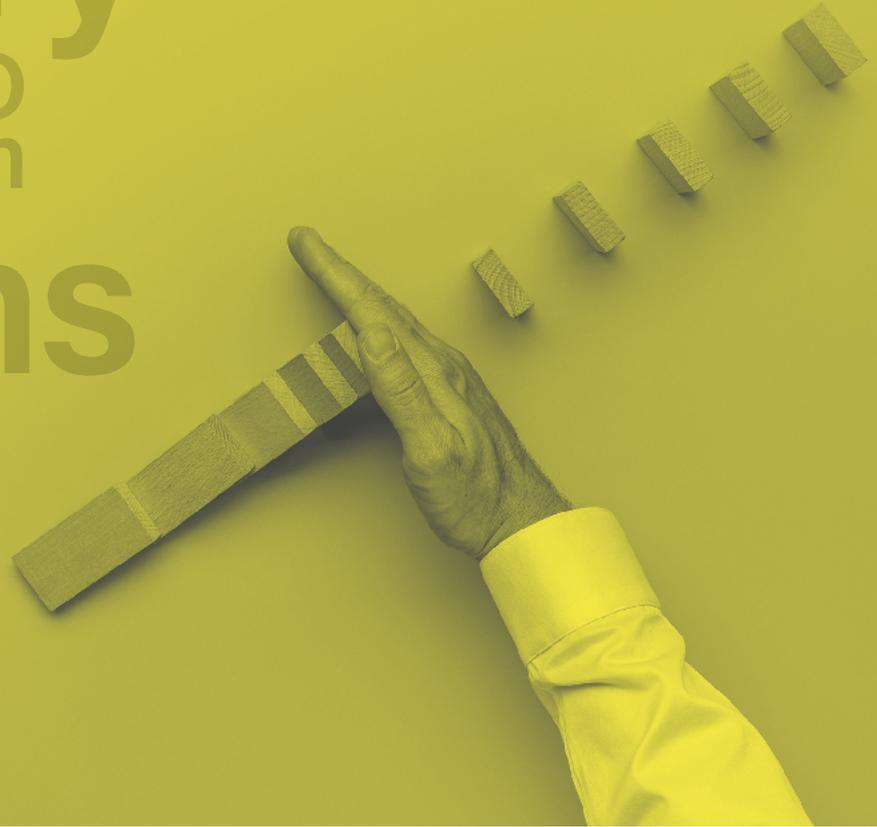


Claims Count by Description of Law

(Fund Year 2020*)



Primary E&O Program Claims



Insurance can be a source of stability and calm in a storm and a foundation from which to rebuild after a storm has passed.

2020 was an alarming year in an unpredictable world. It often seemed to be a year on pause.

But the legal profession did not stop. The number of insured lawyers in Ontario continued to grow at a steady pace. In 2020, the number of full premium equivalent (FPE) lawyers insured under the LAWPRO primary E&O program increased by over 2% to just over 28,600 FPE lawyers, up from about 27,900 in 2019.

These lawyers found innovative ways to work and advocate for their clients during a global pandemic and LAWPRO continued alongside them to provide the stability and security they expect.

Fewer claims, but likely not for long

For the first time in recent years, the number of new claims decreased slightly in 2020. Widespread and long-lasting health and safety restrictions led to reduced economic activity and, for many, a reduction in legal activity. Less legal work meant fewer claims.

In 2020, LAWPRO dealt with 2,768 reported claims, a decrease of 11.3% from the 3,121 reported in 2019. Claims frequency was down slightly to 93 claims per thousand lawyers, as compared to 106 claims per thousand lawyers last year.

Litigation-related claims showed a particularly substantial decline, largely due to the temporary court closures and delays associated with implementing virtual court access.

However, with the increase in technological availability and competency, along with the gradual re-opening of Ontario's economy and in-person legal proceedings, LAWPRO expects this temporary decrease in claims to reverse. LAWPRO anticipates deferred activity and claims from 2020 to show up in subsequent years.

Despite seeing approximately 11.3% fewer claims in 2020, total claims costs only decreased by 2.7% (from \$76.7m to \$74.6m). Coupled with a reduction in premiums and levies in 2020, this led to financial impacts discussed further below.

The types of claims we saw, and didn't see

As in past years, the largest percentage of reported claims were related to real estate (27%) and litigation (24%). However, the number of real estate-related claims decreased to 609 in 2020, from 648 the previous year. Litigation-related claims had an even larger decrease to 549 in 2020, from 822 the previous year.

This reduction in litigation and real estate-related claims (two areas particularly affected by closures due to the pandemic) account for most of the decline in new claims for 2020. Claims in the family and criminal areas were also down, while labour/employment and wills/estates claims were up.

Meeting challenges, closing claims

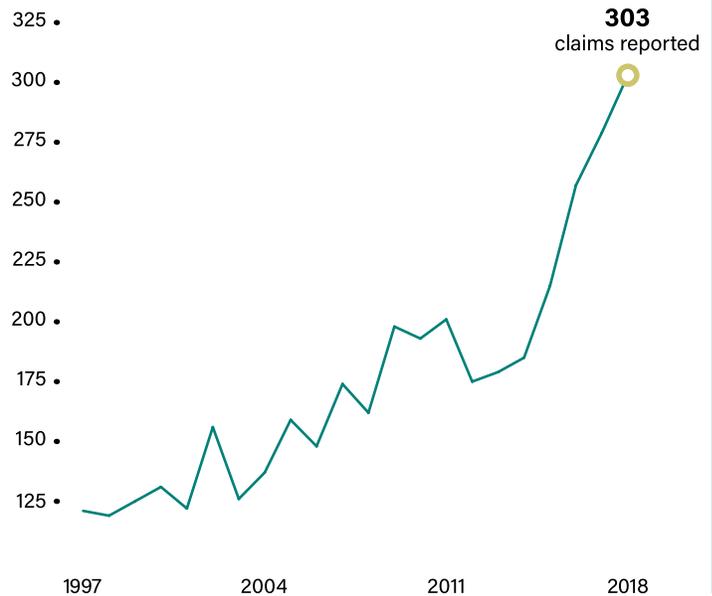
Like others, LAWPRO's operations were disrupted by the pandemic. But LAWPRO's staff and counsel quickly rose to these challenges. Despite the restrictions imposed throughout much of the year by stay-at-home orders and other health and safety requirements, LAWPRO closed 3% more files in 2020 than in 2019. Of these files, 88% of claims were closed without any indemnity payment, an increase from 86% in 2019.

LAWPRO's claims management philosophy is to resolve claims quickly in situations where there is liability, defend vigorously if the claim has no merit, and avoid economic settlements.

In 2020, LAWPRO won two of four matters brought to trial and in which a decision was rendered, succeeded in the one appeal we argued, and won 7 of 13 summary judgment motions at first instance.

FIGURE 1
Number of claims reported with a value greater than \$100,000*

*As at December 31, 2020



Causes of loss

The investigation of claims can take up to a year or more after an initial report. For this reason, LAWPRO is cautious when interpreting short term fluctuations in the cause-of-loss data. This is particularly important for a year as anomalous as 2020.

In 2020, inadequate investigation and communications errors tied – at 609 each – for the cause of the highest number of claims followed by time management and errors of law.

There were 609 communication-related claims in 2020, a decrease from 724 the previous year. Similarly, there were 309 time management-related claims in 2020 compared with 494 the previous year. The reduction in time management-related claims was a direct result of the closing of the courts and follows the long-term trends we have observed since 2011, when 570 time management-related errors were reported. The previous highs and subsequent reduction in time management errors were caused by the introduction of Rule 48, which led to a temporary increase in administrative dismissals and a corresponding temporary increase in time management claims.

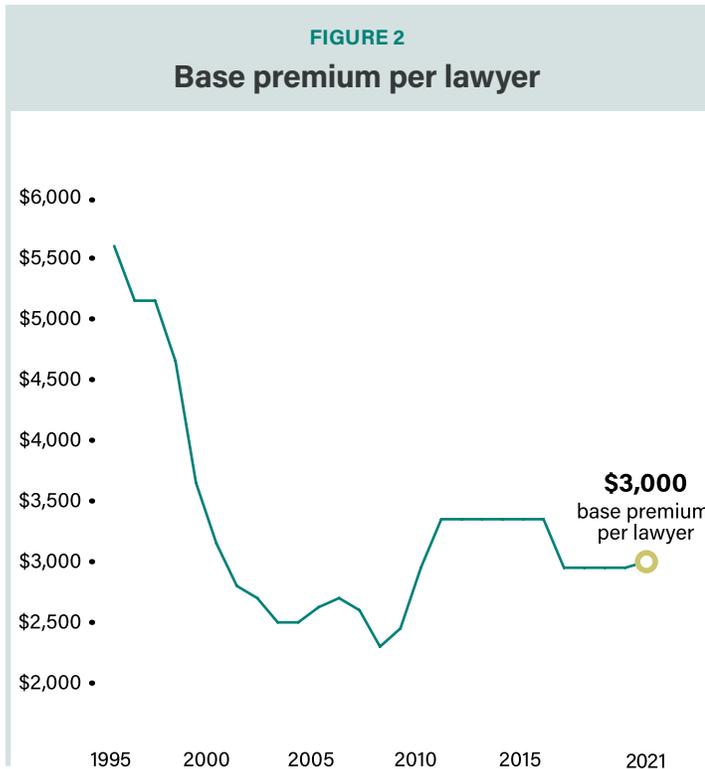
Coverage and Insurance Options

Putting insureds first

In 2020, LAWPRO maintained a base premium of \$2,950. Because of extraordinary circumstances, LAWPRO offered premium deferrals for part of the year.

Cost-cutting measures, including a wage and hiring freeze and a reduction in operational expenses, were implemented in order to prudently respond to budgetary pressures.

One of the hallmarks of the LAWPRO E&O insurance program is its flexibility. Lawyers have a number of options to tailor their insurance coverage to their specific needs – often with the added benefit of reducing the actual premium payable below the base premium level. The number of lawyers availing themselves of these options continues to increase, as indicated in Figure 3.



Policy changes

To reflect changing events and the evolving understanding of claims and lawyer practices, the primary policy is updated annually. For 2020, changes included a refinement of the definitions under the policy for “spouse,” “dishonest conduct,” and the “circumstances” in which notice of a claim or potential claim must be provided.

Starting in the 2021 policy year, Innocent Party coverage will be included in the base coverage and required for all insureds. Accordingly, the base premium for 2021 is \$3,000. The inclusion of Innocent Party coverage will reduce the total premiums paid by more than 70% of Ontario lawyers by \$75. Roughly 30% of Ontario lawyers will see their annual premium increase by \$25 or \$50 because of this change.

Notable reduction in levies collected

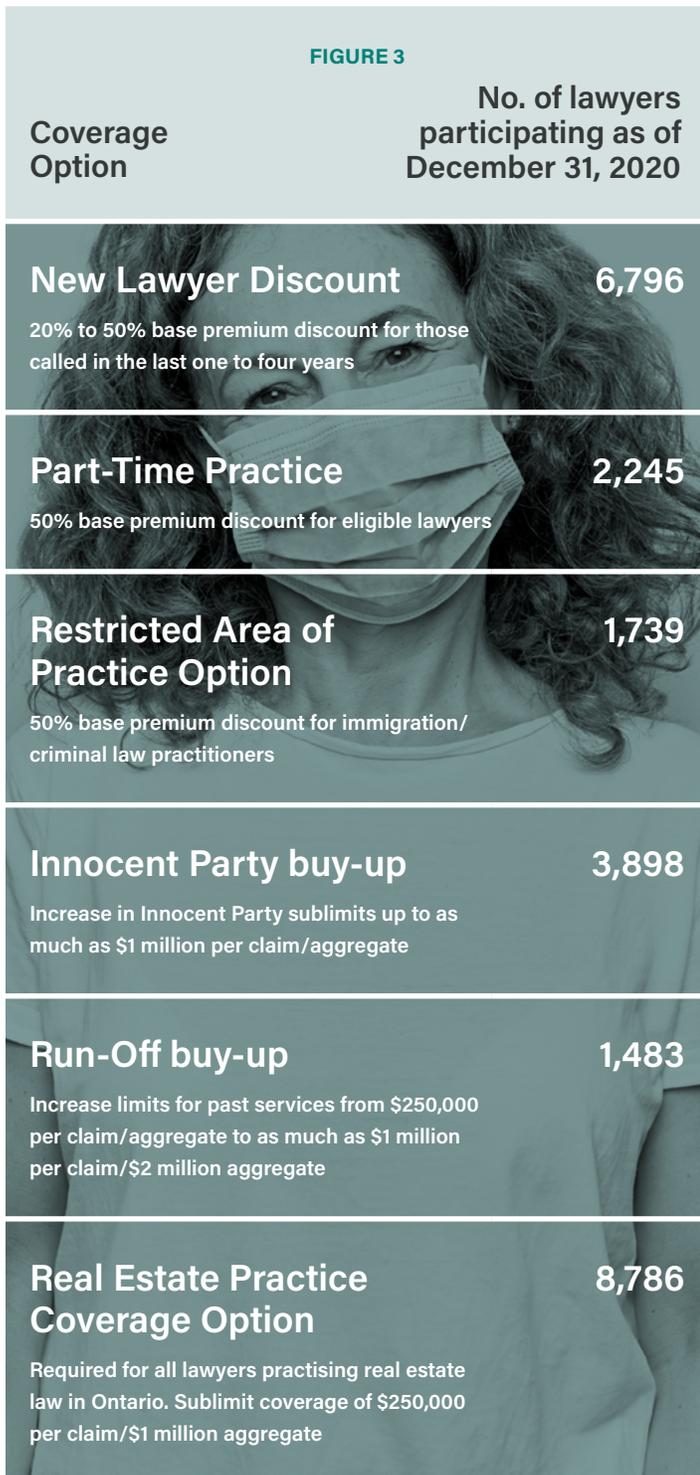
In addition to the modest reduction in premiums collected in 2020, there was a more notable reduction in transaction levies, which are particularly vulnerable to market forces. These levies reflect the higher risk of claims associated with real estate and civil litigation and impose per-transaction surcharges in those areas. The reduction in activity within these areas led to a substantial reduction in collected levies and a budgetary shortfall for LAWPRO.

Real estate and litigation continue to be the costliest areas of law with respect to claims. The use of levies to impose a fair distribution of claims costs among the profession helps LAWPRO to use risk-rating levers to benefit the program and insureds.

Coverage for new lawyers and those retiring

For new or retiring lawyers, LAWPRO offers reduced premiums to address their reduced risk profiles. New lawyers see fewer claims than those with more experience, which may be partly due to new calls often having less responsibility over various files than their senior colleagues. LAWPRO responds to the reduced risk inherent in new calls by providing premium discounts to new lawyers with

FIGURE 3



less than four years of practice. This discount ranges from 50% of base premium (for lawyers with less than one full year in practice) to 20% of base premium (for lawyers with between three and four years in practice).

For lawyers that are retiring or leaving private practice and provide notice of such, LAWPRO offers Run-Off coverage of \$250,000 per claim and in the aggregate, at no charge. Additional coverage options are available for lawyers who need more protection beyond that amount.

Excess Insurance

Since it was established in 1997, LAWPRO's optional Excess insurance program has posted consistent annual growth in revenues and numbers of law firms (and lawyers) insured under the program. An impressive 1,557 firms received their excess insurance from LAWPRO as at the end of 2020, 211 of which chose the maximum \$9 million limit option.

With 121 new firms opting to buy excess coverage from LAWPRO, our client base saw approximately 12% growth from the previous year. The Company's retention rate on excess business of 92% is evidence that this program meets the needs of the small and medium-sized firms of fewer than 50 lawyers that it is designed to serve.

LAWPRO's Excess program insures approximately 15% of the lawyers employed in firms of 50 or fewer lawyers. Prudent underwriting and solid claims management have helped ensure that the Excess program is a successful line of business for LAWPRO.

The TitlePLUS Program

The TitlePLUS program is the only wholly Canadian-owned title insurance program available in Canada. It is underwritten by LAWPRO and protects not only Canadian homeowners and lenders, but also lawyers through included legal services coverage which covers errors and omissions made by the lawyer for the entire transaction, excluding properties in Quebec and OwnerEXPRESS policies.

Service

Working from home; working for insureds

LAWPRO's Underwriting & Customer Service department is the point of contact for licensees seeking to renew, change, or inquire about their insurance options, including the primary policy. A new account is established soon after a lawyer is called to the Ontario bar, and existing accounts are adjusted as lawyers move their practice or move out of private practice entirely.

This year, customer service saw a 4% increase in correspondence volume. At the same time, health and safety restrictions meant this correspondence, and most company operations, had to be carried out

remotely. Like much of the Ontario workforce, many staff members had to adapt to more flexible work hours to accommodate care-giving responsibilities.

Nevertheless, the customer service team adapted quickly and was able to sustain response times and meet client needs, delivering service levels throughout the year that were on par with previous years.

LAWPRO takes its commitment to customer service seriously. Consisting of approximately 25 team members, the department is responsible for maintaining accurate records for all insureds; policy drafting; creation of program guides, forms, and other explanatory materials; underwriting optional coverages; processing filings; and, answering questions from licensees.

In 2020

correspondence & most company operations

carried out remotely



LAWPRO

successfully
repairs



When LAWPRO is quickly alerted to potential claims, we are often able to rectify the problem and prevent loss and further lawsuits from arising. Our counsel know how to best address issues such as failure to comply with strict notice requirements, failure to discover unknown defendants within the limitation period, and the threat of dismissal on account of delay.

Here are a few examples of cases where LAWPRO successfully repaired potential losses in 2020.

1. The fast and the curious: Delayed discoverability of defendants

It's hard to sue someone when you don't know they exist. Unfortunately, the discoverability doctrine sometimes requires lawyers to not only dig a little deeper and ask whether there may be additional defendants in a given action, but do it fast before potential limitation periods expire.

In this case, the Plaintiff had been struck by the First Defendant's vehicle while using a crosswalk.

The Plaintiff retained a Lawyer and filed a cause of action one month before the expiration of the relevant limitation period. However, upon receiving the First Defendant's pleadings, the Plaintiff and their Lawyer became aware that the First Defendant claimed that a second vehicle, driven by a Second Defendant, had stopped in the middle of the intersection at the time of the accident, causing the First Defendant to swerve into the Plaintiff.

The Plaintiff and their Lawyer had previously been unaware of the existence of this Second Defendant. The redacted police report initially made available to them had not made this clear, although an unredacted report would later confirm the involvement of the Second Defendant.

The Plaintiff moved to have the Second Defendant added to the proceedings.

However, the Second Defendant claimed they could no longer be added to the proceedings as the limitation period had expired. The Second Defendant took the position that their own potential liability was reasonably discoverable by the Plaintiff more than two years prior.

LAWPRO assisted the Plaintiff in successfully arguing that the redacted police report was not sufficiently clear and could not have alerted the Plaintiff to the existence of a Second Defendant. The redacted report was, in parts, illegible, and in other parts, confusingly drafted. There was no additional evidence suggesting the involvement of the Second Defendant available to the Plaintiff, and it was therefore not reasonable to have expected the Plaintiff to discover the Second Defendant prior to receiving the pleadings of the First Defendant.

The limitation period had not expired, and the claim against both Defendants was allowed to proceed.

2. The fairest claim of all: Mirror claims and unreasonable delay

Unreasonable delay or abandonment of a cause of action will generally lead to an order for dismissal. But dismissing a claim while allowing a mirror-like counterclaim to proceed can have unfair consequences.

That was the circumstance in this case where the Plaintiff entered into an Agreement of Purchase and Sale involving a \$50,000 deposit. The Agreement required the Plaintiff to obtain financing. When they were unable to do so, the Plaintiff terminated the Agreement.

The Plaintiff then commenced a proceeding for recovery of the deposit and additional damages. In response, the Defendant counterclaimed for damages and breach of contract. Then, no action was taken on either side for an extended period of time.

Four years later, the Plaintiff acquired new counsel. One year after that, the Defendant acquired new counsel and the Plaintiff filed a motion in the proceeding to prevent an administrative dismissal. At that time, a Master ordered that the case not be dismissed, a litigation timetable be set, and a trial be scheduled within approximately one year.

Again, no immediate action was taken by the Plaintiff. The following year, the Defendant sought to have the Plaintiff's claim dismissed for delay or, in the alternative for summary judgment to be rendered.

The motion judge found that the action satisfied all the relevant *Reid* criteria and dismissed the Plaintiff's action for delay. However, the motion judge did not address the Defendant's Counterclaim and, therefore, the Counterclaim continued.

The Plaintiff appealed on the grounds that the motion judge should not have dismissed the claim for delay, but should have instead resolved the claims summarily on the merits. Further, the Plaintiff claimed it was unjust for the motion judge to dismiss their Claim while the Defendant's mirror Counterclaim continued.

LAWPRO successfully assisted the Plaintiff in appealing the dismissal of the action. The appeal court agreed that, although the motion judge correctly applied the test, and their decision would normally be subject to deference, this particular context led to an unjust result. Since the Counterclaim dealt with the same facts and issues as the Claim, allowing one to continue and not the other did not save judicial time or resources and was not in the interests of justice. The matter was remitted to the Superior Court for determination.

3. Authority issues: Keeping courts in the loop

Lawyers act as officers of the court and are obligated to present an accurate account of relevant law to the presiding judge. But does this mean a lawyer is obligated to provide continuing updates on new case law developments after a hearing ends?

That question arose in this case where the Lawyer acted for an Applicant seeking summary judgment in an estates dispute. After the motion was heard, but before judgment was rendered, new, on-point authority was rendered by the Court of Appeal that undermined the Lawyer's position in the motion. The Lawyer did not bring this new authority to the court's attention while judgment was under reserve.

The court found that the Lawyer's failure to immediately bring new relevant authority to their attention while the judgment was under reserve breached the Lawyer's duty to the court, and therefore awarded substantial indemnity costs against the Lawyer's client. This led to the Client refusing to pay the Lawyer's fees, for which the Lawyer sued.

Meanwhile, the underlying matter for which the costs judgment was awarded was settled by the parties, making an appeal of the summary judgment application moot. Nevertheless, the Lawyer sought leave to intervene in the matter and have an appeal heard despite its mootness. It was the Lawyer's position that the costs award was wrongly decided and had an adverse impact on the Lawyer's reputation as well as the standards expected of the rest of the profession.

LAWPRO supported the Lawyer in their intervention and application for leave to appeal, and arranged for an *amicus curiae* to argue against the Lawyer's position in the absence of other interested parties.

The court found that this was an appropriate circumstance to depart from the doctrine of mootness and grant leave to appeal. The Lawyer had a meaningful interest in the outcome of the appeal, as their fee dispute with their client relied substantially on whether the Lawyer's alleged error warranted the adverse costs award. The appeal was allowed.

4. Notionally "notable" notices: Complying with notification requirements

Combining distinct statutory obligations into a single document, when not expressly authorized, can lead to avoidable frustrations and disputes. This happened to a Lawyer whose franchisee client encountered financial problems and defaulted on a bank loan made for the acquisition of the franchise.

The franchisee issued a Third Party Notice to the franchisor, claiming damages and rescission of the franchise agreement. The *Arthur Wishart Act (Franchise Disclosure)*, required notice of such a rescission of the franchise agreement to be delivered in writing. However, the franchisee's Lawyer opted to provide such notice within the pleadings of the *Third Party Notice*, rather than as a separate written notice.

The franchisor claimed that using the *Third Party Notice* to also satisfy the rescission notice requirements did not comply with the *Act*, and therefore notice was not provided within the time period allotted. As such, rescission could not be claimed under the *Act*.

The franchisee then brought their Lawyer into the proceedings in the Lawyer's personal capacity as an additional third party potentially liable for negligence for failing to comply with the terms of the *Act*. With both the franchisor and franchisee claiming that the *Third Party Notice* did not meet the requirements under the *Act*.

The motion judge found that a pleading could not constitute notice under the *Act*, and therefore the rescission claim could not proceed. The Lawyer appealed.

The appeal court found that, although the use of a *Third Party Notice* to satisfy the rescission notice requirements of the *Arthur Wishart Act* was irregular and not ideal, the express language of the *Act* only required the notice to be in writing and delivered within a certain period. The *Third Party Notice* satisfied these requirements. Therefore, the rescission claim could proceed and there was no potential claim for negligence against the Lawyer.

5. Overruling the rule in *Medhurst*: Notice requirements in condo disputes

Requiring strict adherence to statutory provisions can sometimes have unintended outcomes that undermine the purpose of those very provisions. When binding precedent leads to such perverse outcomes, it's sometimes necessary to seek the overturning of that precedent.

In this case, a condominium Corporation issued a notice of claim against various Defendants allegedly responsible for defects in the construction of the condominium. The *Condominium Act* required that notice of such an action be provided to the corporation's owners prior to commencing the action.

In this case, the condominium Corporation provided notice to the owners after the notice of action was issued but before filing the statement of claim. The Defendants, relying on the binding ONCA authority of *Medhurst*, argued that this failed to comply with the *Act's* notice requirements and the action was therefore a nullity.

The Corporation argued that the notice provided did comply with the statutory requirements, or, in the further alternative, failure of providing such notice did not render the action a nullity.

A summary judge found in favour of the Corporation on the basis that sufficient notice was provided or, in the alternative, notice was not required in these circumstances.

The Defendants appealed.

LAWPRO assisted the condominium Corporation in seeking a five-judge panel at the Court of Appeal and successfully argued that *Medhurst* should be overturned. The Court found that Supreme Court of Canada jurisprudence released subsequent to *Medhurst* attenuated the result of that case and, further, that the decision in *Medhurst* resulted in unjust consequences, as it allowed defendants to undermine the interests of the Corporation's owners by relying on a provision that was intended to protect those owners.

Failure to comply with the notice requirements under the *Act* was found to *not* automatically render the action a nullity, and the appeal was dismissed.

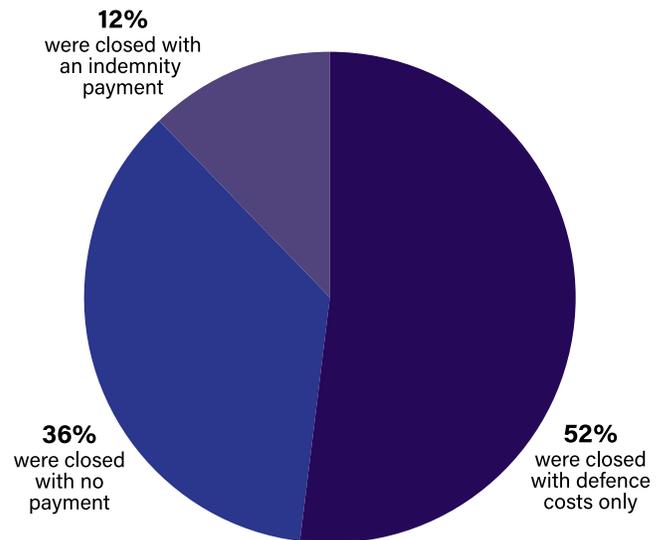
Small fixes now prevent big problems later

Every year, LAWPRO resolves potential claims before they become actual claims. In 2019, 86% of claims were closed without any indemnity payment, and 35% of claims were closed without any defence costs whatsoever.

Immediately notifying LAWPRO of potential errors or omissions means steps can be taken to resolve the situation before it develops into a malpractice claim. If you make an error, or believe you could be accused of making an error down the road, don't try to resolve the problem on your own. A call to LAWPRO means we can provide expedient and experienced advice and assistance.

FIGURE 4

Claims by outcome



Defending lawyers in court



Despite any attempts to resolve claims without litigation, sometimes court is inevitable. Every year, LAWPRO steps in to defend licensees from unwarranted lawsuits and accusations.

Here are a few examples of defences successfully advanced by LAWPRO in 2020 on behalf of insureds.

Contract law – Claims against alleged partners of debtors

Partners in a legal firm can be held liable for the business debts incurred by other partners as part of the partnership. In some circumstances, it may be unclear whether lawyers are practising in partnership, or as sole practitioners in “association” with one another.

That was the situation in this case, where a solicitor Debtor had practised in association with a Litigation Firm for many years, sharing things like office space and holiday parties, and whose name was included in the name of the litigation firm.

The Debtor, however, kept separate finances and files and was not included in the Litigation Firm’s partnership agreement.

The Debtor incurred a substantial amount of business debt from multiple parties and eventually defaulted on it. The Creditors

sought judgment against the Litigation Firm and its Partners as being liable for the amounts owing by the Debtor.

The Partners argued that the Debtor was not part of their firm, as the Debtor kept separate finances with a different banking institution, did not work with the Litigation Firm on business matters, and was not included in the Partnership Agreement, which expressly stated that the Debtor was *not* defined as a founding partner of the Litigation Firm.

The Creditors argued that the Debtor's name was included in the name of the Litigation Firm, that the Debtor was listed as a partner and member of the Litigation Firm in multiple online summaries of the Litigation Firm, and the Debtor was held out as a partner either explicitly or implicitly on multiple occasions. In the alternative, the Creditors argued that the Partners were responsible for the debts pursuant to the *Partnership Act*, since the Debtor was held out as a Partner and the Creditors relied on that representation when advancing loans to the Debtor.

The court found that the Debtor was not a partner in the Litigation Firm, as the parties practised independently and the Debtor was not included in the Partnership Agreement. Further, even if the Debtor was held out as a Partner, the Creditors could not prove that they relied on that alleged relationship when advancing funds to the Debtor, and therefore the Litigation Firm and its Partners could not be held liable for the unpaid debts. The claim against the Litigation Firm and its Partners was dismissed.

Criminal law – Ineffective representation and collateral attacks

When alleging that counsel's negligence led to a criminal conviction, the appropriate forum for litigating such a claim is an appeal of the conviction itself. Pursuing a separate claim of negligence after losing an appeal case is a collateral attack on the conviction and is impermissible.

In this case, Lawyers represented the Plaintiffs in defending a proceeding before the Ontario Securities Commission. The defence was unsuccessful, and the OSC found the Plaintiffs guilty of securities fraud.

The Plaintiffs appealed the OSC's decision, alleging ineffective representation by counsel. The Lawyers were granted intervenor status and provided evidence in the appeal to dispute the Plaintiffs' arguments about ineffective representation. The appeal was dismissed.

Before the appeal was even argued, however, the Plaintiffs commenced this civil action against the Lawyers for professional negligence. After the appeal was dismissed, the Lawyers moved to also have the civil action dismissed as a collateral attack on the conviction.

The motion judge dismissed the Plaintiffs' claims against the Lawyers, as the negligence allegations were *res judicata*. The Plaintiffs appealed.

LAWPRO successfully assisted the Lawyers in having the appeal dismissed. The appeal court agreed that the civil claim was as a collateral attack on the conviction. The proper forum for arguing ineffective representation is an appeal of the conviction itself, which the Plaintiffs had already unsuccessfully pursued. A civil claim was therefore inappropriate.

Corporate law – Conflicts of interest

Circumstances will sometimes arise where lawyers find themselves asked to represent multiple sides in a transaction; or, alternatively, representing one side before later representing another. These situations place the lawyer in a conflict of interest and should be avoided unless all parties agree to the situation and all ethical rules are complied with.

This case involved the sale of a medical equipment distribution business. The Plaintiff owned both the distribution business and a manufacturing counterpart for many years before selling the distribution arm to an American corporation. The Plaintiff maintained ownership of the manufacturing arm and entered into a supply agreement with the American Purchaser. The Plaintiff's In-House Lawyer represented the Plaintiff in this transaction.

After the transaction was completed, the Plaintiff's In-House Lawyer took a position with the American Purchaser.

The supply agreement was unsuccessful, as the Purchaser failed to satisfy many of the terms of the Agreement, including minimum purchase amounts. The Plaintiff sued the Purchaser in response. This claim was brought to arbitration, where the Plaintiff was represented by the Defendant Law Firm. In this arbitration, the In-House Lawyer was part of the Purchaser's legal team.

The arbitration was settled, and a new supply agreement was made between the Plaintiff and the Purchaser. Unfortunately, this new agreement led to further struggles for the Plaintiff's business, and the Plaintiff was eventually forced to wind down the business.

By this point, the former In-House Lawyer was no longer working with the American Purchaser, but was now practising with the Defendant Law Firm. This put both the Defendant Law Firm and the former In-House Lawyer in a conflict of interest with respect to the ongoing dispute between the Plaintiff and the Purchaser, as the former In-House Lawyer had formerly worked with both parties on matters central to their dispute. The Plaintiff had never provided informed consent to the Defendant Law Firm with respect to this conflict of interest.

The Plaintiff sued the Defendant Law Firm and the former In-House Lawyer for breach of fiduciary duty. The Plaintiff alleged that had they known about the former In-House Lawyer's conflict, they never would have agreed to the arbitration settlement and would have avoided subsequent business losses.

The court found that both the Defendant Law Firm and the former In-House Lawyer had breached their fiduciary duties to the Plaintiff, as the actions of the former In-House Lawyer constituted a conflict of interest to which the Plaintiff never provided consent.

However, the court also found that this breach of duty was not causative of the business failure, nor could the Plaintiff connect any actual business losses to this breach. Therefore, the court only awarded nominal damages to the Plaintiff in the amount of \$2,000.

Tort law – Negligent representation

Unsuccessful clients can sometimes direct follow-up lawsuits to their former counsel, regardless of the merits of such claims.

In this case, the Plaintiffs had been sued by their former employer, who alleged the Plaintiffs had stolen confidential and proprietary information. In response, the Plaintiffs retained the Defendant Lawyers and pursued an aggressive litigation strategy in hopes of motivating their former employer to settle. The strategy was unsuccessful, and the Plaintiffs were found liable to their former employer.

The Plaintiffs then retained new counsel and sued the Defendant Lawyers, alleging professional negligence in the conduct of their unsuccessful litigation strategy.

The trial judge found in favour of the Defendant Lawyers and dismissed the claim. The Plaintiffs appealed.

LAWPRO successfully assisted the Defendant Lawyers in defending the appeal. The court agreed that the Defendant Lawyers took steps to communicate all relevant information and advice to the Plaintiffs, who considered the information and provided instructions to the Defendant Lawyers to pursue a specific course of action. The Plaintiffs were advised of the risks associated with the litigation, and the Defendant Lawyers were not professionally negligent.

Real estate law – No duty of care to opposing parties

This case arose in the context of a failed real estate transaction. The Plaintiff agreed to purchase a particular property from the Vendors. After signing the Agreement of Purchase and Sale, the Plaintiff assigned their rights in the Agreement to the Defendant Purchaser. The Vendors then failed to close the transaction and subsequently sold the property to alternate buyers. The Defendant Purchaser responded with an action against the Vendors for specific performance.

The Plaintiff then sued the Defendant Purchaser as well as the Defendant Purchaser's Lawyer for failing to inform the Plaintiff of the failure to close the transaction. Specifically, the Plaintiff alleged that the Lawyer was negligent in allowing the Defendant Purchaser to breach the assignment agreement.

The Lawyer sought a dismissal of the Plaintiff's claims against them as disclosing no cause of action.

LAWPRO successfully assisted the Lawyer in having the claim against them dismissed. The court agreed that the Plaintiff was always adverse in interest to the Lawyer's client, both before and after signing the Assignment Agreement. As well, the Plaintiff did not allege that it placed any reliance on the Lawyer.

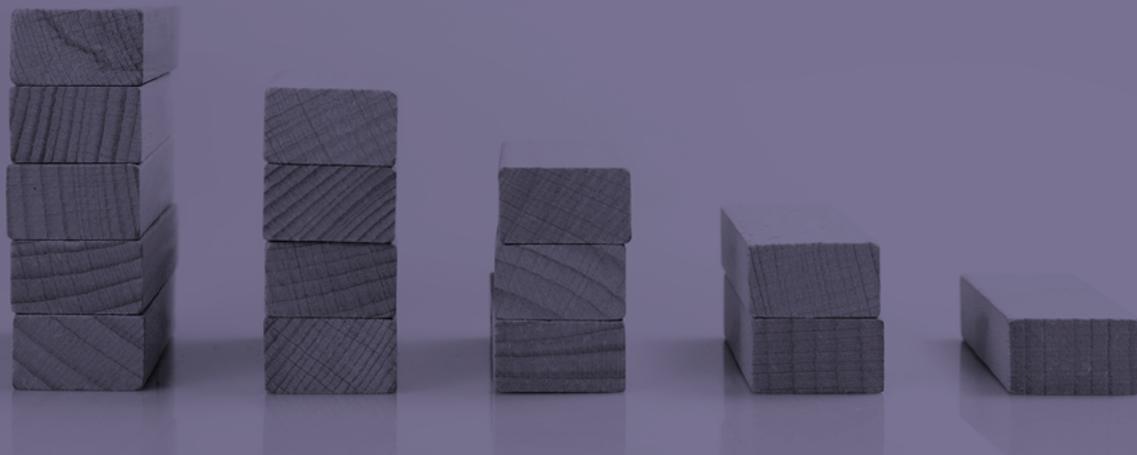
Further, the only evidence of negligence advanced by the Plaintiff was that the Lawyer had made a false statement in pleadings filed in other proceedings against the Vendors. The court found that this could not be used against the Lawyer as the statement was subject to the doctrine of absolute immunity.

Therefore, the Lawyer had no duty of care to the Plaintiff, there was no evidence of negligence or misconduct, and the claim was dismissed as disclosing no cause of action and an abuse of process.

Lawyers for lawyers

A malpractice claim doesn't necessarily mean a lawyer made a mistake, but a defence still needs to be raised. LAWPRO provides effective assistance and prides itself on defending licensees.

practicePRO Initiatives



Top 2020 initiatives to help lawyers succeed

An important focus for LAWPRO is to help lawyers avoid claims before they happen. LAWPRO's practicePRO risk management initiative is a widely-recognized and well-respected provider of tools and resources to help members of the practising bar identify practice risks and take steps to minimize their claims exposure. A few examples of our 2020 resources are highlighted here.



Practice Tip Sheets

While earlier tip sheets focused on specific areas of law, the new series of tip sheets provided advice on avoiding the top common claims causes generally such as, properly understanding a client's matter, managing deadlines, keeping up with the law, better communications, and avoiding conflicts of interest.



COVID-19 Articles and Resources

The disruptions resulting from the COVID-19 virus caused uncertainty for many lawyers as they attempted to run their practices remotely while continuing to provide professional services to their clients. This new page on practicepro.ca offered help with virtual meetings, understanding e-signatures, working from home tech tips, and cyber security advice.

Lawyers, particularly litigators, had to keep up with emergency changes to court rules and limitation periods. Articles and alerts kept lawyers informed of changes to Ontario and federal limitation periods and court procedures, and an article with tips for calculating limitation periods helped ensure new deadlines would not be missed. For real estate lawyers, the *Planning Act* emergency period suspension calculator helped navigate the new timelines for *Planning Act* matters. Wills and estates lawyers were advised on how to reduce the risk of claims when virtually witnessing wills and powers of attorney.



Free Video CPD Programs

Ten new videos were created that can be viewed for both the LAWPRO Risk Management Credit and Law Society of Ontario professionalism hours. Topics include common claims and how to avoid them, navigating the second wave of COVID-19, fraud and cybersecurity (in English and French), cultural competence, and tips for delivering pro bono services.



Technology Products for Lawyers and Law Firms

A comprehensive overview of software and services available for tasks such as document signing, note taking, firm management, dictation, social media, and video conferencing, as well as programs tailored to specific areas of law like litigation, family law and wills & estates are available.