

insurance matters



professional liability insurance for

**in-house  
corporate counsel**



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NOTE: Throughout this booklet, certain words have been capitalized to indicate a specific meaning, as defined on page 28 of this booklet and in the 2010 LAWPRO POLICY.



# your exposure to claims: an ongoing issue

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Liability insurance is an important element of every LAWYER'S practice — including that of in-house corporate counsel.

Although you may believe you are immune to the risk of a claim, the opposite is in fact true. A lawsuit against you can arise from many quarters — including your employer, company directors, officers, employees, shareholders and others who rely or have relied on your work and advice.

As well, you are well advised to carefully consider your exposure, both past and present. PROFESSIONAL SERVICES which you or your former partners or associates provided in the past may come back to haunt you in the future, and the basic Run-Off Coverage, which is provided free of charge to corporate counsel who qualify for an exemption, may not be sufficient to cover the cost of claims that may be made against you.

Consider the following facts, based on an analysis of LAWPRO's® claims statistics over the past six years:

- 1 in about 50 claims exceeds the \$250,000 coverage limit generally in place for LAWYERS not in private practice;
- 1 in 100 claims exceeds \$500,000;
- because it takes on average two to three years for a claim to surface, and sometimes much longer, you continue to be exposed to the likelihood of a claim, even if you are no longer in private practice.

## You may not be eligible for exemption

Furthermore, not all corporate counsel qualify for an exemption from ongoing practice coverage and having to pay the corresponding LAWPRO insurance premium. Depending on the nature of the services you provide and the nature of your employer/employee relationship, you could in fact be providing services to third parties and thus are considered to be in private practice. If this is the case, you do not qualify for an exemption and must purchase the ongoing practice coverage.

This booklet will help you determine if you qualify for an exemption or if you are required to pay the liability insurance premium.

It also reviews the many options available to you to increase your insurance coverage protection, both if you are an exempt LAWYER and if you are required to pay the premium. And it explains the importance of applying now for increased coverage protection, to avoid any gaps in insurance coverage.



# are you eligible for exemption?

## By-Law 6 of the *Law Society Act*

By-Law 6 of the *Law Society Act* requires that every **LAWYER** who engages in the practice of law in Ontario and is not “otherwise exempted” must pay the insurance premium each year.

The available reasons for exemption are set out in Appendix I on page 24.

## In-House Corporate Counsel

The exemption criteria that apply specifically to in-house corporate counsel are as follows:

9.(1) The following are eligible to apply for exemption from payment of insurance premium levies:

4. Any licensee\* who, during the course of the year for which a levy is payable,
  - i. will be employed by a single employer;
  - ii. will engage in the practice of law only for and on behalf of the employer as,
    - A. counsel or solicitor to the Government of Canada or the Government of Ontario,
    - B. a Crown Attorney,
    - C. counsel to a corporation other than a law corporation, or
    - D. a city solicitor, and
  - iii. will not engage in the practice of law in Ontario other than for and on behalf of the employer.

This exemption is referred to as eligibility rule (e) employed **LAWYER** – employed as in-house corporate counsel, in the **LAWPRO** exemption form. In this regard, the By-Law provides:

### Interpretation: “employer”

(5) In paragraph 4 of subsection (1), “employer” includes a corporation, any affiliated, controlled and subsidiary company of the corporation and any other entity employing the licensee.

### Interpretation: “affiliated”, “controlled” and “subsidiary”

(6) In subsection (5), “affiliated”, “controlled”, and “subsidiary” have the same meanings given them in the *Securities Act*.

\* “Licensee” means a licensee who holds a Class LI licence.

## Interpreting the exemption

The exemption criteria make it clear that, to qualify for the exemption, in-house corporate counsel can only be engaged in the practice of law for their employer, as defined under the exemption. You cannot be providing PROFESSIONAL SERVICES in private practice; for example, you would not be able to advise one of your employer's clients about a will or estate matter, undertake litigation for a family friend, or provide real estate-related services to anyone but your own employer.

If, as part of the terms of your employment, you are required to also provide PROFESSIONAL SERVICES to your employer's customers or clients, or to organizations outside the "employer group," you are deemed to be providing these services in private practice and are no longer exempt from paying the premium.

As well, performing PROFESSIONAL SERVICES for family, friends or associates, even if on a *pro bono* basis, would preclude you from qualifying for an exemption.

**Appendix 3 – Case Studies: Applying the LawPRO Insurance Coverage** provides additional definitions, information and examples of how this exemption is applied in different situations.

If you qualify for exemption but also plan to act as an estate trustee, a trustee for an *inter vivos* trust, or an attorney for property, you will want to consider the practice implications discussed in the following section.

## LAWYERS acting as estate trustee, trustee for *inter vivos* trust, or attorney for property

Although you may decide to leave active private practice, it may be that you are named or act as estate trustee, trustee for *inter vivos* trust or attorney for property, even though the rest of your practice is being wound down or turned over to one or more LAWYERS who remain in private practice.

If so, you can expect to have certain obligations to the Law Society, even though you may not be required to pay the Law Society's annual fee, including:

- having to declare to the Law Society such trusteeships or powers of attorney when you change to a non-practising status; and
- having to file the appropriate exemption forms each year with LAWPRO to confirm that you continue to be exempt from the payment of insurance premium levies.

The exemption criteria are set out in Appendix I on pages 24 to 27. The criteria under which a LAWYER not in active private practice who continues to act as an estate trustee, a trustee for an *inter vivos* trust or an attorney for property, can apply for exemption from payment of insurance premiums and levies under By-Law 6, are as follows:

- 9.(1) The following are eligible to apply for exemption from payment of insurance premium levies:
7. Any licensee\* who, during the course of the year for which a levy is payable, will act in the capacity of an estate trustee, a trustee for an *inter vivos* trust or an attorney for property in respect of an estate, a trust or a property of a person other than a related person of the licensee of which the licensee was named as estate trustee, trustee or attorney while the licensee was engaged in the practice of law in Ontario, and
    - i. and will not otherwise engage in the practice of law in Ontario, or
    - ii. who otherwise qualifies for exemption from payment of insurance premiums levies under paragraph 4, 5 or 6, and will not engage in the practice of law in Ontario other than as provided for under this paragraph or paragraph 4, 5 or 6.

This exemption is referred to as eligibility rule (h) estate trustee, trustee for *inter vivos* trust, attorney for property in the LAWPRO exemption form.

\* "Licensee" means a licensee who holds a Class LI licence.

## Interpreting the exemption

This eligibility rule applies to LAWYERS who otherwise qualify for exemption under eligibility rule (e) employed LAWYER – employed as in-house corporate counsel, who are entitled to engage in the practice of law in Ontario to the extent provided for under that eligibility rule.

This exemption is also available to you, regardless of whether you are acting on a single trusteeship or power of attorney, or a number of trusteeships or powers of attorney.

However, this exemption may not apply to every instance in which you may act as an estate trustee, a trustee for an *inter vivos* trust, and/or an attorney for property.

For example, your role as estate trustee, trustee for *inter vivos* trust, or attorney for property, must be residual work from your past practice in Ontario, which would not be the case where you have been named as estate trustee, trustee for *inter vivos* trust or attorney for property, only after leaving private practice.

As well, this exemption would not apply to any trusteeship or attorney for property, where you have been named or are acting in respect of a member of your own family. So, for instance, this exemption would not apply to a LAWYER who has never been in practice and acts as estate trustee for a family member. For this purpose, members of the LAWYER'S own family means “related persons” as defined under section 251(2) of the *Income Tax Act (Canada)*.

If these are the only types of occasions in which you have been named or act as an estate trustee, a trustee for *inter vivos* trust or an attorney for property in relation to your work as in-house corporate counsel, you would not elect exemption on the basis of eligibility rule (h). Instead, as in-house corporate counsel, you would simply look to apply for exemption on the basis of exemption eligibility rule (e) as described earlier.

### are you eligible for exemption?

Yes – Turn to page 6

No – Turn to page 20

# insurance coverage for exempt in-house corporate counsel

## Run-Off insurance coverage

All LAWYERS who are not in active private practice and qualify for an exemption\* are provided with only basic Run-Off Coverage, at no charge. The standard Run-Off Coverage provides you with limited protection.

### Features of Standard Run-Off Coverage

Its features are as follows:

- The coverage limit of \$250,000 per claim and in the aggregate (in total) is a one-time limit, and is not re-instated annually. So, you are covered to a maximum of \$250,000 for all of the claims made against you while exempt,\* including the year you leave active private practice, past years in which you were exempt,\* and all future years while exempt.\*
- This \$250,000 per claim/in the aggregate limit is applicable to claim expenses, costs of repairs, pre-judgment interest and indemnity payments for each claim made against you. All such amounts incurred to resolve a claim reduce the funds available under the policy limit to respond to all other claims made against you.
- The coverage limit is subject to a \$5,000/claim deductible, applicable to claim expenses, indemnity payments and/or costs of repairs together.
- For in-house counsel who have not opted to pay the insurance premium in the past, Run-Off Coverage applies only to claims arising out of services provided while you were in private practice, except as otherwise noted on page 7.
- For counsel who have paid the insurance premium in the past but have subsequently opted for exemption,\* Run-Off Coverage applies to claims arising out of services provided while they were in private practice as well as to services provided in the years in which they were eligible for exemption\* but instead paid the insurance premium.

\* For reasons other than mobility or a temporary leave of absence.

- Run-Off Coverage **does not** provide coverage for claims arising out of PROFESSIONAL SERVICES that you provide while you are exempt from paying the insurance premium. In other words, **you are not covered for PROFESSIONAL SERVICES you currently provide**, unless you buy the standard insurance program coverage. The only exceptions to this are with respect to PRO BONO SERVICES provided through an approved *pro bono* PROFESSIONAL SERVICES program associated with Pro Bono Law Ontario, and where you have 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. Details concerning these exceptions are more fully described on pages 9 and 18, respectively.
- Run-Off Coverage **does not** provide coverage for claims brought against you by a corporate employer. Defence-cost coverage for employer claims is provided only to counsel who buy the standard insurance program coverage (for details, please refer to Appendix 4).
- You are provided with this Run-Off Coverage only for as long as the Law Society maintains insurance coverage with LAWPRO.

## Innocent Partner Coverage

As part of the \$250,000 Run-Off Coverage that you receive free of charge, you are provided with run-off protection against innocent partner claims.

This means that if claims are made against you for the dishonest, malicious, criminal or fraudulent acts of a former partner or associate, your Run-Off Coverage provides you with sublimit coverage of up to \$250,000 per claim and in the aggregate for claim expenses and indemnity payments, including repair costs. This is subject, however, to any erosion in this limit as a result of all other claims reported by you under your Run-Off Coverage.

## mobility within Canada

As in-house corporate counsel, you may find yourself in a position of practising law in more than one Canadian jurisdiction, including Ontario, as part of your duties for your corporate employer. Realizing this, the Law Society of Upper Canada and a number of other law societies in other Canadian jurisdictions have entered into mobility agreements, which make it easier for in-house corporate counsel and other LAWYERS in these reciprocating jurisdictions\* to practice law in these jurisdictions.

Reciprocating law societies make inter-jurisdictional practice easier by:

- adopting a concept of temporary practice in their jurisdiction, which is available to most LAWYERS in other reciprocating jurisdictions;
- simplifying the process of being admitted to the bar in a reciprocating jurisdiction; and
- creating a new exemption for LAWYERS called in more than one reciprocating jurisdiction, ensuring that there is coverage for their activities in these jurisdictions while paying for insurance coverage under only one reciprocating jurisdiction's law society's policy.

Accordingly, Law Society of Upper Canada LAWYERS who are also called in other reciprocating jurisdictions may generally apply for exemption in those reciprocating jurisdictions in which they are called and not resident. So, if you are called in Ontario, but are also called and resident in another reciprocating jurisdiction, you may wish to apply for exemption (g) under the Ontario program.

If you do choose to apply for exemption (g) and a claim subsequently arises from that legal practice, the reciprocating jurisdiction's policy in which you are resident and paying the premium will generally apply to the claim. However, if your practice was previously located in another reciprocating jurisdiction, or in Ontario, and a claim arises out of your earlier legal practice, the insurance policy of that earlier reciprocating jurisdiction will apply.

For a complete list of Canadian jurisdictions reciprocating in the mobility agreements, and the effective date of their participation, please visit our website at [www.lawpro.ca](http://www.lawpro.ca) or contact our Customer Service Department at (416) 598-5899 or 1-800-410-1013, or by e-mail to [service@lawpro.ca](mailto:service@lawpro.ca).

\* As defined on page 26 of this booklet.

# pro bono PROFESSIONAL SERVICES

LAWYERS providing *pro bono* PROFESSIONAL SERVICES on behalf of a non-profit organization can apply in advance to LAWPRO, so that providing these services do not disqualify them from claiming exemption under the insurance program.

The insurance program also encourages the provision of *pro bono* PROFESSIONAL SERVICES, through programs associated with Pro Bono Law Ontario as follows.

## Qualifying legal services

The provisions described below apply specifically to *pro bono* PROFESSIONAL SERVICES provided by LAWYERS after January 1, 2003, through approved programs associated with Pro Bono Law Ontario, and will not include PROFESSIONAL SERVICES beyond:

- (a) those rendered to low income persons in civil matters or in criminal matters for which there is no government obligation to provide counsel;
- (b) services that simplify the legal process for, or increase the availability and quality of these services to persons of limited means; and/or
- (c) those rendered to charitable, non-profit and public interest organizations with respect to matters or projects to address the needs of low-income and disadvantaged individuals.

## Coverage for exempt LAWYERS

LAWYERS who claim an exemption, and also provide approved PRO BONO SERVICES through a LAWPRO-approved *pro bono* PROFESSIONAL SERVICES program associated with Pro Bono Law Ontario, will have insurance coverage as follows:

- They will be provided with the standard Run-Off Insurance Coverage of \$250,000 per claim/in the aggregate for their approved *pro bono* PROFESSIONAL SERVICES, even though the services are provided while exempt under the program; and
- They will NOT be required to pay any deductible amount for claims relating solely to such services.

LAWYERS otherwise are not insured under the program for any other *pro bono* PROFESSIONAL SERVICES provided while claiming exemption under the program on the basis of eligibility rule (e) employed LAWYER — employed as in-house corporate counsel.

## Coverage for LAWYERS who buy the standard insurance program coverage

LAWYERS who opt to purchase the standard insurance program coverage (as detailed on pages 20 to 21) will qualify for the following program enhancements with respect to the approved PRO BONO SERVICES provided through a LAWPRO-approved *pro bono* PROFESSIONAL SERVICES program associated with Pro Bono Law Ontario as follows:

- They will NOT be required to pay any deductible amount or claims history levy surcharge for claims relating solely to such services;
- Those applying for the part-time practice option will NOT be required to consider any hours of professional time or past claims relating solely to these services in their application for this part-time practice option.

# increasing your insurance protection

## Why consider increasing your insurance protection?

To answer this question, you need to assess the claims potential of your past practice and consider carefully the implications of LAWPRO's claims-made-and-reported insurance policy.

### Claims may exceed your basic Run-Off Coverage limits

Statistics tell us that claims regularly exceed the \$250,000 mark. For example:

- 1 in 50 claims exceeds the \$250,000 mark; and
- 1 in about 100 claims tops the \$500,000 mark.

Yet as a LAWYER claiming an exemption, you have only \$250,000 in coverage\* for all of the claims made against you now and in the future. A single claim, or a number of smaller claims, could easily exceed your Run-Off Coverage threshold, leaving you personally liable for any additional costs.

### A claims-made-and-reported policy focuses on today, not yesterday

A claims-made-and-reported policy provides coverage under the present policy for claims that arise out of past and present services. With a claims-made-and-reported policy, two developments together trigger coverage:

- a claim is made against you; and
- you report the matter to the insurer (LAWPRO) as a claim.

The focus is on when the claim is made against you and reported by you, not the year in which services are provided and the alleged error or omission is said to have occurred. Thus, if a claim is made against you and reported by you this year for services which you provided in 1998, the policy that responds is this year's LAWPRO policy, under which you have only basic Run-Off Coverage that provides coverage to a maximum of \$250,000 per claim and in the aggregate.\*

### Claims take time to develop

Research indicates that it takes an average of two to three years after you have provided PROFESSIONAL SERVICES for a claim to surface. Moreover, up to 10 per cent of claims are not reported until five years after the service was provided. In some areas of practice, such as wills, estates, and real estate, it can take even longer before claims surface.

In other words, LAWYERS must carefully assess the exposure of their past, present and future practice, and that of their partners, associates, employed LAWYERS and any others for whom the LAWYER can be held accountable, including in relation to LOCUM work, when determining their insurance coverage needs.

\* Those claiming the mobility (g) exemption are provided with coverage as explained on page 8.

## Your past can come back to haunt you

Because of the circumstances in which most exempt LAWYERS provide services, their exposure to claims lies largely out of their past practice. You need to carefully assess the risk of claims associated with PROFESSIONAL SERVICES that you provide while in private practice, and those of any partner or associate with whom you have practised.

In this context, consider the changes made to limitations periods with the introduction of the *Limitations Act, 2002* (and transition rules). This legislation establishes a basic limitation period of two years and an ultimate limitation period of fifteen years. This ultimate limitation period runs from the day on which the act or omission on which the claim is based takes place, and applies irrespective of when the claim is discovered.

Of course, these limitation periods may not always apply. Consider, for example:

- proceedings that may be commenced outside of Ontario;
- PROFESSIONAL SERVICES that do not pertain to the laws of Ontario;
- a person with a claim while a minor or during a period of incapacity;
- a person with a claim who was or may have been misled or had essential facts concealed;
- the excluded types of proceedings and scheduled statutes whose limitation periods continue to apply; and
- the discovery date of the claim, whereby former limitation periods or no limitation period may apply.

## Your ongoing activities may expose you to claims

As an exempt LAWYER, your ongoing activities may expose you to claims.

An example: You elect to exempt yourself from the payment of premiums on the basis that you will continue to act in your capacity as an estate trustee, a trustee for an *inter vivos* trust or an attorney for property, once your practice is wound down or turned over to others remaining in private practice. Under the standard \$250,000 Run-Off Coverage, you do not have any protection for these on-going activities. However, you could apply for and purchase expanded protection for activities of this type, as outlined on page 16.

As well, if you provide approved PRO BONO SERVICES through a LawPRO-approved *pro bono* PROFESSIONAL SERVICES program associated with Pro Bono Law Ontario, you may have an exposure for these on-going services. However, you would have limited insurance protection for these services under the standard \$250,000 Run-Off Coverage.

Beyond this, the LawPRO insurance program does not provide or make available any protection for PROFESSIONAL SERVICES that you provide while exempt from paying insurance premium levies.



## Former partners' current Law Society coverage may not protect you

Don't count on the fact that past partners are still in practice and still have the full \$1 million per claim/\$2 million in the aggregate insurance coverage as a security blanket. If a claim is made against you, it could happen that your former firm or partners are not named in the proceedings; the claim may concern activities unrelated to the firm; or there may be a coverage issue (such as late reporting or failure to report) involving the practising former partner's(s') coverage. In all of these cases, you could discover that your \$250,000 basic Run-Off Coverage is inadequate, leaving you personally exposed.

As well, the growing number of Limited Liability Partnerships (LLPs) in Ontario further limits your ability to depend on the full practice coverage provided to former partners in the event of a claim. The LLP provisions of the *Partnership Act* provide LAWYERS who are practising in partnership with an opportunity to substantially reduce their vicarious exposure for the acts of their partners by becoming an LLP. Thus, former LLP partners who remain in practice, along with their insurer, may well find protection under the LLP provisions of the *Act* which would not be available to you, leaving you exposed to the claim alone. This would be particularly so for claims arising out of services provided by you, or under your direct supervision, on behalf of the LLP.

Although the *Act* is changing, as a partner in an LLP you remain fully exposed to liability for the wrongful acts or omissions of another partner or an employee of the partnership not under your direct supervision if the act or omission was criminal or constituted fraud, even if there was no criminal act or omission, or if you knew of the act or omission and did not take the actions that a reasonable person would have taken to prevent it. Innocent Party Coverage helps fill this gap, as well as offering protection against exposures associated with partners and associates prior to the creation of the LLP.

We strongly encourage you to purchase insurance directly for your liability exposures.

**Assess your insurance needs** below reviews some questions you may want to ask yourself to determine your potential exposure to claims and the need to broaden your insurance coverage.

## How much is enough? Assess your insurance needs

The following are some of the questions you may want to ask yourself to help assess whether or not you should increase your Run-Off Coverage protection and/or secure Excess Insurance Coverage.

When reviewing these questions and assessing your exposure, remember to factor in both potential defence costs and interest payments, as well as actual damages. Depending on how long it takes to discover an error and resolve the claim, and the impact of costs, the value of the claim could be inflated by 50 to 100 per cent, or more.

### **Does the work of my former partners, associates and employees, expose me to claims now and in the future?**

- How well informed was I about their practices, procedures and communications — including file in-take procedures, documenting retainers, reviewing opinions, docket control and diary systems, completeness of documentation, and file retention and storage?
- Did they practise in areas such as litigation, corporate, commercial, real estate, tax, securities, or patents and trademarks, that can easily create exposures well above my insurance limits?
- If they have been involved in more claims-prone areas of practice, was the work focused either in the hands of a few with the right expertise, or with others under the appropriate supervision or guidance?
- Are there any non-traditional or other exposures to consider? Consider non-traditional law practices or client arrangements, and the activities of non-lawyer employees, or multi-discipline practice exposures.
- Where are my former partners and associates now and what insurance coverage, if any, do they have? You may find that you are exposed to claims for their past services, particularly where they do not maintain adequate insurance coverage today. Are their existing limits likely to have been eroded by claims already reported?
- Do I know what limitation periods are likely to apply to these various types of claims? Is the clock continuing to run? Would I be in a position to defend these and other claims should they arise?

### **Do I share exposure for the work of others outside the firm?**

- Consider the law practices of others, including those of former associates, co-tenants, and others with whom you may have shared space or resources. Also consider, subcontracted or supervisory counsel, any previous counsel or co-counsel on files, 'of counsel' and backup counsel for your practice, as well as those who are or have been otherwise affiliated with your practice or services.

- Am I satisfied that the letterhead, office signage, reception and telephone, fax, website, advertisement and promotional materials, of both my practice and any practice that is or has been affiliated with it, consistently and clearly communicated the nature of the relationship of my practice to that of others?
- Did my retainer agreements, invoicing and billing arrangements with clients consistently and clearly communicate the nature of the relationship of my practice to that of others?
- Did I consider LOCUM work, whether by me or others in my firm or former firm on behalf of others, or by others on my behalf or firm members' behalf? Was it clear to clients and others that the work was being done as LOCUM work? What type of file work was involved? Are these files available in the event of a claim?

### **Do or did I handle matters which potentially exposed me to a claim for damages that could exceed my existing insurance coverage limits?**

- Are others relying on my PROFESSIONAL SERVICES? Although the policy will not respond to claims brought against you by your government or corporate employer, others may also be relying on your PROFESSIONAL SERVICES. Consider, for example, any of your legal opinions that may be shared with third parties, the reliance of others on your substantive work, and any work you do directly for those other than your employer.
- Did I or those in my former firms handle major financial transactions, or represent clients in transactions where the stakes are high? Will I be involved in these types of transactions in the future, as in-house corporate counsel? Consider for example, securities dealings, commercial business, international transactions, pension dealings, corporate litigation, tax advice, intellectual property services and class action suits.
- Did I or those in my former firms represent clients where the stakes were significant? Consider pension work, patents and trademarks, environmental-related services, or class action suits.
- Did I or those in my former firms represent clients who are more apt to bring claims? Consider changes in client ownership or management, as well as the jurisdiction in which the client or its parent is likely to bring a claim.
- Have my past individual and corporate clients grown in wealth? Do I know the extent of my clients' reliance on my past advice? Have the stakes continued to grow? Consider the drafting of prenuptial agreements and wills, as well as advice and services for start-up companies, 'dot-com' clients, and growing businesses.
- What limitation periods are likely to apply to such claims? How long will I continue to be exposed?

## What checks and balances were in place for trust accounts?

- Did my former firms maintain large trust accounts or trust accounts with lots of activity?
- Have they had careful controls in place throughout governing the activities in these accounts? Were the trust accounts overseen by more than one LAWYER? Were two signatures required for each cheque or withdrawal?

## Do I have multiple file or client exposures?

- Did I or those in my former firm(s) act on matters for more than one client who, if they sued collectively, could expose me to claims for damages that exceed my insurance coverage limits?
- Has much of my former firm's work involved the same outside participants that might lead to similar or related claims? Consider, for example, the possible impact of a common error or fraud by others involved in these files (like an appraiser, expert or individual involved in repair or remedial work).
- Did I have multiple files relying on the same research or opinion that could compound my exposure? It is not unusual for a LAWYER to be providing opinions to different clients by relying on the same research or general or past opinion. If there is an error in the underlying research or opinion (whether your own, or that of other firm members, or that subcontracted to outside counsel), the cumulative costs of claims could easily exceed your insurance coverage limits.

## What would be the commercial impact of an error in the matters I handled?

Remember the impact of damages could stretch over many years, and exceed the apparent dollar value of the file that you handled. Consider the LAWYER who neglected to renew a lease in a rising market. Damages? Over \$8 million.

## Am I concerned about my personal exposure if a claim or claims exceed my present coverage limits?

Remember that once your coverage limits have been exhausted, you could be personally liable for any claim awards made against you.

## Am I covered under my former firm's excess policy?

Your former firm(s) may have arranged coverage which is applicable to you and your activities while a member of the firm. You should review the terms and conditions of these policies carefully as the coverage may not be sufficient; there may be gaps in protection, there may be no coverage for your practice while with other firms, or there may be no coverage for services that you provided outside of your firm practice. You should determine whether or not these policies are being maintained, what coverage and limit protection is being provided, and how you would go about reporting a claim.

## Options to increase your insurance coverage/obtain coverage for your ongoing PROFESSIONAL SERVICES

### **Option A: Buy the standard insurance program coverage**

LAWYERS who are eligible for exemption from paying the premium but who opt to pay the premium generally may be eligible for the 40 per cent premium discount provided to part-time practitioners.

Key features of the standard insurance program include:

- **More extensive coverage**

The standard insurance program provides significantly more comprehensive insurance protection:

- It provides coverage for the current PROFESSIONAL SERVICES you provide to parties other than your corporate employer.
- It provides defence-cost coverage for employer claims (as detailed later and in Appendix 4 on page 32).
- It provides greater limits of protection, with coverage of \$1 million per claim/\$2 million in the aggregate for your PROFESSIONAL SERVICES, rather than only \$250,000 per claim/in the aggregate\* coverage provided by Run-Off Coverage (This is the maximum coverage available to you under the Law Society program for all claims made in the past, present and future.)

- Your aggregate (total) coverage is renewed annually.

- **Defence cost coverage for employer claims**

In-house corporate counsel who pay the insurance premium are provided with defence cost coverage for claims brought against them by their corporate employers. Thus, you would have coverage for investigation and defence costs for claims brought against you by your corporate employer, to a sublimit maximum of \$250,000 per claim and in the aggregate. Note that this additional coverage applies only to services provided by counsel after January 1, 1997, and that some restrictions apply.

For details of the coverage for corporate employer claims provided under the LAWPRO Professional Liability Insurance Policy please refer to Appendix 4 on page 32: Endorsement to the LAWPRO Insurance Policy.

- **A reduced premium**

Even though you are working full time, you may well be eligible for the 40 per cent premium discount available to those who meet the part-time practice criteria, provided you meet the criteria in respect of the services that you provide to third parties other than your employer. For details please see pages 20 and 21 of this booklet.

- **A choice of deductible types and amounts**

As in-house counsel, you can choose a deductible of \$5,000, \$2,500 or a \$Nil deductible. You can also choose to have the deductible apply to both claim expenses and indemnity payments, or to indemnity payments only, with a corresponding increase in the premium payable.

\* Those claiming the mobility (g) exemption are provided with coverage as explained on page 8.

## Option B: Increase Run-Off Coverage protection

Increasing your Run-Off Coverage protection limits is an option you may want to consider if, for example:

- you are more concerned with the risk of a claim arising out of past legal activities when you were in private practice than you are about claims that might arise out of legal services you provide now or could be providing in the future; and
- you are concerned that the total value of claims which may be made against you could exceed the \$250,000 Run-Off Coverage limit cap.\*

As well, if you are electing exemption on the basis that are named or act as an estate trustee, a trustee for an *inter vivos* trust or an attorney for property even though the rest of your practice is being wound down, you may wish to apply for and purchase protection for these activities.

Although the standard \$250,000 Run-Off Coverage does not provide protection for these on-going activities, you may apply for and purchase expanded coverage for activities of this type. This expanded protection may be included under the \$250,000 Run-Off Coverage limit, or increased Run-Off Coverage protection discussed below. Through a deeming provision, services of this type that have yet to be performed may be included under the Run-Off Coverage protection provided to you.

### 4 ways to tailor your Run-Off Coverage protection

When you apply to increase your Run-Off Coverage, you can select a number of options:

- *A choice of coverage limits*

You can apply to increase your coverage limits to:

- \$500,000 per claim and in the aggregate; OR
- \$1 million per claim and \$2 million in the aggregate.

In choosing which Increased Run-Off Coverage should apply, you are deciding how much limit protection would be needed to protect against one or more large claims that may exceed the standard \$250,000 per claim and aggregate Run-Off limit. \*\*

- *A choice of coverage terms*

You can specify the length of time during which you can report claims and during which the Increased Run-Off Coverage protection applies. Coverage terms range from two to five years.

In selecting the term, you are deciding the period of time during which you will have protection against claims that together may exceed the standard \$250,000 aggregate Run-Off Coverage protection. You are also establishing the exposure to claims that the increased aggregate limit under the Increased Run-Off Coverage is likely to have.

\* Those claiming the mobility (g) exemption are provided with coverage as explained on page 8.

\*\* Except for those claiming the mobility (g) exemption, as explained on page 8.

Once your additional limit term has expired, you can apply for further term policy coverage at that time. If you choose not to re-apply to buy up your Run-Off Coverage at that point, your coverage limits would return to the base \$250,000 per claim and in the aggregate limit\*\*, subject to any claims already reported while on exemption. This includes claims reported while any Run-Off Coverage was in force, since Increased Run-Off Coverage provides increased limit protection only and does not replace the standard Run-Off Coverage.

- *Increase Innocent Partner Coverage limits*

You can also apply to have your Increased Run-Off Coverage protection made applicable to innocent partner claims. This is an option you may want to consider if you want greater assurance that no criminal, malicious, dishonest or fraudulent act of a former partner, associate and employed LAWYER of the firm is likely to expose you to claims that exceed \$250,000 in the past, today and in the future.

You can apply to increase your Innocent Partner Sublimit Coverage to:

- \$500,000 per claim/in the aggregate; OR
  - \$1 million per claim/in the aggregate.
- *Cover certain services as estate trustee, trustee for inter vivos trust or power of attorney*
- You can also apply to increase your Run-Off Coverage protection to include protection for services as an estate trustee, a trustee for an *inter vivos* trust or an attorney for property, if you have elected exemption on the basis of eligibility rule (h) estate trustee, trustee for *inter vivos* trust, attorney for property.

With regard to this expanded protection:

- your role as trustee or attorney for property must be residual work from your past practice in Ontario, and not where you have only been named after you left active private practice;
- coverage may apply in respect of a single trusteeship or power of attorney, or in respect of a number of trusteeships and/or powers of attorney;
- coverage would not apply in the case of a trusteeship, or attorney for property of one of your own family members;
- coverage would not apply in respect of any dishonest, fraudulent, criminal or malicious act(s) or omission(s);
- availability and conditions may apply, based on individual underwriting.

### Premium costs

The premium cost to increase your Run-Off Coverage protection will vary from applicant to applicant. In underwriting the coverage, LawPRO considers a number of factors, including the number of years

you practised law, the area(s) of law in which you practised, and how long it has been since you were in private practice. The cost of this coverage starts at about \$220 per annum to increase the Run-Off Coverage limit to \$500,000 per claim and in the aggregate for the lowest risk-rated LAWYERS.

The additional premium cost to have your Increased Run-Off Coverage protection made applicable to innocent partner claims is calculated as a percentage of the premium to increase your Run-Off Coverage protection. You can choose to increase your Innocent Partner Sublimit Coverage to:

- \$500,000 per claim and in the aggregate for a five per cent additional premium; OR
- \$1 million per claim and in the aggregate for an eight per cent additional premium.

Avoid any chance of a gap in coverage. Apply today!

If you intend to increase and/or broaden your Run-Off Coverage protection, you should ensure that LAWPRO has received your completed application **at least 60 days before the coverage is to be in place**, to ensure there is no gap in coverage and your higher coverage limits are in place on the day that you are no longer in private practice. If you opt to apply later, the full limit protection may not be available to you should a claim be reported.

Note that just because you have applied to increase your Run-Off Coverage protection you are not obligated to purchase this additional coverage. You can always opt to maintain only the basic Run-Off Coverage described earlier.

## Option C: Purchase Excess Insurance Coverage

As its name suggests, excess insurance is a “peace of mind” insurance coverage that provides you with an additional layer of protection.

*Why buy excess coverage?*

Buying additional excess insurance coverage is an option you may want to consider if:

- you have already opted to increase your Run-Off Coverage protection to the maximum \$1 million per claim/\$2 million in the aggregate (or have this limit coverage under the law society policy of a reciprocating jurisdiction, as per the mobility protocol); and
- you are still concerned that the cost of claims made against you could exceed the \$1 million/\$2 million limits you have secured.

*How much excess coverage is enough?*

Although liability issues vary from one LAWYER to another, there are some general questions you may want to ask yourself to help assess the potential exposure to claims arising out of PROFESSIONAL SERVICES you provided while in private practice.

## LOCUMS and the need for Excess Liability Insurance

If you acted as a LOCUM you were standing in for another LAWYER to cover or run his/her law practice while away.

LAWPRO's optional Excess program automatically extends coverage to LOCUMS and LOCUM work under the Excess policy issued to the CONTRACTING FIRM. But not all excess insurers may do so.

Firms purchasing excess insurance from other insurers are **strongly encouraged** to obtain written confirmation from their excess insurer that the LOCUM and CONTRACTING FIRM are **both** insureds under any excess policy issued, and that coverage is fully afforded in relation to LOCUM work that has or may be done.

**Assess your insurance needs** on pages 13 to 15 reviews some of the questions you should be asking yourself in assessing your potential exposure to a claim.

## Premium costs

LAWPRO's Excess Insurance program offers competitive rates for limits ranging from \$1 million per claim/\$2 million in the aggregate to \$9 million per claim/\$9 million in the aggregate *above the \$1 million per claim/\$2 million in the aggregate* coverage limits you may have in place. Rates are set each year.

Note that there is no protection under the LAWPRO insurance program for any PROFESSIONAL SERVICES you provide while on exemption, unless specifically endorsed.

**Assess your insurance needs** on pages 13 to 15 reviews some questions you may want to ask yourself to help determine your potential exposure to claims and the need to buy additional insurance coverage.

## For information and application forms for any of these optional coverages,

Visit the LAWPRO website at [www.lawpro.ca](http://www.lawpro.ca), or contact the LAWPRO Customer Service Department at 1-800-410-1013 or (416) 598-5899; fax (416) 599-8341 or 1-800-286-7639; or via e-mail to [service@lawpro.ca](mailto:service@lawpro.ca).

# insurance coverage for non-exempt in-house corporate counsel

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## The standard insurance program coverage

### Comprehensive insurance protection

The standard insurance program provides the following insurance protection:

- coverage for your current PROFESSIONAL SERVICES that you provide in private practice, that is to third parties outside the employer group;
- defence cost coverage for claims brought by the employer;
- coverage of \$1 million per claim/\$2 million in the aggregate for your professional services;
- your aggregate (total) coverage is renewed annually.

### Defence cost coverage for employer claims

In-house corporate counsel who pay the insurance premium are provided with defence cost coverage for claims brought against them by their corporate employers. Thus, you have coverage for investigation and defence costs for claims brought against you by your corporate employer, to a maximum of \$250,000 per claim and in the aggregate. Note that this additional coverage applies only to services you have provided since January 1, 1997, and that some restrictions apply.

For additional details of the coverage for corporate employer claims provided under the LAWPRO Professional Liability Insurance Policy, please refer to Appendix 4: Endorsement to the LAWPRO Insurance Policy, on page 32.

### A reduced premium

In many cases, in-house counsel may qualify for the 40 per cent premium discount provided to part-time practitioners under the LAWPRO insurance program even though they are working full time.

To qualify for this reduced premium, counsel must meet the following criteria:

- The amount of PROFESSIONAL SERVICES provided to third parties **outside** the employer group in the **last and the current** fiscal year is limited to 20 hours per week on average for each week actually worked and 750 hours per year of professional time in private practice, docketed and undocketed; (note: this criterion is pro-rated as required for those whose practice status changes part way through the year); **and**
- Your gross billings to third parties outside the employer group, in the **past** fiscal year **and** in the **current** year, did/do not exceed \$75,000 (again pro-rated for LAWYERS whose practice status changes part way through the year); **and**
- Counsel cannot have reported a claim under the LAWPRO program with an indemnity or repair payment made within the last five years.

## **A choice of deductible types and amounts**

As in-house counsel, you can choose a deductible of \$5,000, \$2,500 or a \$Nil deductible. You can also choose to have the deductible apply to both claim expenses and indemnity payments, or to indemnity payments only, with a corresponding increase in the premium payable.

## **Option to increase insurance coverage**

### **Purchase Excess Insurance Coverage**

Buying excess insurance coverage is an option you may want to consider if you are concerned that your exposure — past and present — could result in claims that exceed the \$1 million/\$2 million policy limits of the standard insurance program.

Excess insurance coverage is available in the commercial market as well as from LAWPRO. LAWPRO's Excess Insurance program offers competitive rates for excess limits ranging from \$1 million per claim/\$2 million in the aggregate to \$9 million per claim/\$9 million in the aggregate on a firm basis *above the \$1 million per claim/\$2 million in the aggregate coverage limits provided by the standard insurance program*. Rates are set each year.

**Assess your insurance needs** on pages 12 to 15 reviews some questions you may want to ask yourself to help determine your exposure to claims and your need for additional insurance coverage.

## **For information and application forms for any of these optional coverages,**

Visit the LAWPRO website at [www.lawpro.ca](http://www.lawpro.ca), or contact the LAWPRO Customer Service Department at 1-800-410-1013 or (416) 598-5899; fax (416) 599-8341 or 1-800-286-7639; or via e-mail to [service@lawpro.ca](mailto:service@lawpro.ca).



# **appendices**

# appendix I

## Rules for exemption eligibility

Section 9 of By-Law 6, under Section 62 of the *Law Society Act*, deals with the rules for exemption eligibility under the program and provides as follows:

9.(1) The following are eligible to apply for exemption from payment of insurance premium levies:

1. Any licensee\* who, during the course of the year for which a levy is payable, will not engage in the practice of law in Ontario.
2. Any licensee who, during the course of the year for which the levy is payable,
  - i. will be resident in a Canadian jurisdiction other than Ontario,
  - ii. will engage in the practice of law in Ontario on an occasional basis only, and
  - iii. demonstrates proof of coverage for the licensee's practice of law in Ontario under the mandatory professional liability insurance program of another Canadian jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.
3. Any licensee who, during the course of the year for which the levy is payable,
  - i. will be resident in a reciprocating jurisdiction, and
  - ii. demonstrates proof of coverage for the licensee's practice in Ontario under the mandatory professional liability insurance program of the reciprocating jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.
4. Any licensee who, during the course of the year for which the levy is payable,
  - i. will be employed by a single employer;
  - ii. will engage in the practice of law only for and on behalf of the employer as,
    - A. counsel or solicitor to the Government of Canada or the Government of Ontario,
    - B. a Crown Attorney,
    - C. counsel to a corporation other than a law corporation, or
    - D. a city solicitor, and
  - iii. will not engage in the practice of law in Ontario other than for and on behalf of the employer.

\* "Licensee" means a licensee who holds a Class LI licence.

5. Any licensee employed as a law teacher who, during the course of the year for which a levy is payable, will not engage in the practice of law in Ontario other than teaching.
6. Any licensee who, during the course of the year for which a levy is payable,
  - i. will be employed or volunteer in a clinic within the meaning of the *Legal Aid Services Act, 1998*, a student legal aid services society or an Aboriginal legal services corporation, that is funded by Legal Aid Ontario, but will not be directly employed by Legal Aid Ontario,
  - ii. will engage in the practice of law through the clinic, student legal aid services society or Aboriginal legal services corporation to individuals in communities served by the clinic, student legal aid services society or Aboriginal legal services corporation and will not otherwise engage in the practice of law in Ontario, and
  - iii. demonstrates proof of coverage for such practice of law under a professional liability insurance policy issued by a licensed insurer in Canada, such coverage to be at least equivalent to that required under the Society's insurance plan.
7. Any licensee who, during the course of the year for which a levy is payable, will act in the capacity of an estate trustee, a trustee for an *inter vivos* trust or an attorney for property in respect of an estate, a trust or property of a person other than a related person of the licensee of which the licensee was named as estate trustee, trustee or attorney while the licensee was engaged in the practice of law in Ontario, and
  - i. and will not otherwise engage in the practice of law in Ontario, or
  - ii. who otherwise qualifies for exemption from payment of insurance premiums levies under paragraph 4, 5 or 6 and will not engage in the practice of law in Ontario other than as provided for under this paragraph or paragraph 4, 5 or 6.

**Interpretation: occasional practice of law**

(3) For the purposes of paragraph 2 of subsection (1), in any year, a licensee engages in the practice of law on an occasional basis if, during that year, the LAWYER,

- (a) engages in the practice of law in respect of not more than ten matters; and
- (b) engages in the practice of law for not more than twenty days in total.

**Interpretation: “reciprocating jurisdiction”**

- (4) In subsection (1), “reciprocating jurisdiction” means a Canadian jurisdiction other than Ontario,
- (a) which is a signatory to,
    - (i) the National Mobility Agreement originally entered into in December 2002 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Nova Scotia Barristers’ Society and the Law Society of Newfoundland; or
    - (ii) until December 31, 2011, the Territorial Mobility Agreement originally entered into in November 2006 by the Society, the Law Society of Yukon, the Law Society of Northwest Territories, the Law Society of Nunavut, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Law Society of New Brunswick, the Nova Scotia Barristers’ Society, the Law Society of Prince Edward Island and the Law Society of Newfoundland;
  - (b) in which a licensee is authorized to engage in the practice of law; and
  - (c) which would exempt the licensee from its mandatory professional liability insurance program if the licensee were resident in Ontario and demonstrated proof of coverage for the licensee’s practice of law in the jurisdiction under the Society’s insurance plan which was reasonably comparable in coverage and limits to the professional liability insurance that would otherwise be required of the licensee by the jurisdiction.

**Interpretation: “employer”**

- (5) In paragraph 4 of subsection (1), “employer” includes a corporation, any affiliated, controlled and subsidiary company of the corporation and any other entity employing the licensee.

**Interpretation: “affiliated”, “controlled” and “subsidiary”**

(6) In subsection (5), “affiliated”, “controlled” and “subsidiary” have the same meanings given them in the *Securities Act*.

**Interpretation: “resident”**

(7) In subsection (1), “resident” has the same meaning given it for the purposes of the *Income Tax Act* (Canada).

**Interpretation: Legal Aid Services**

To qualify for this exemption, you can only be providing PROFESSIONAL SERVICES through the clinic, student legal aid services society, or Aboriginal legal services corporation, to individuals served by such. Any PROFESSIONAL SERVICES you provide to parties outside the scope of your employment or volunteer work with such are considered to be services provided in private practice; in this case, you would not qualify for the exemption and would be required to pay the LAWPRO insurance premium, as required by the Law Society.

However, if you provide *pro bono* PROFESSIONAL SERVICES through an approved program associated with Pro Bono Law Ontario, you would continue to be eligible for exemption, and would receive insurance coverage as explained on page 9 of this booklet. As well, LAWYERS who provide *pro bono* PROFESSIONAL SERVICES for non-profit organizations (not associated with Pro Bono Law Ontario) may continue to qualify for exemption. For details, please contact the LAWPRO Customer Service Department.

## appendix 2

### Policy definitions (Part V)

**CLAIM(S)** means:

- (i) a written or oral demand for money or services; or
- (ii) a written or oral allegation of breach in the rendering or failure to render **PROFESSIONAL SERVICES**; received by the **INSURED** and resulting from a single or related error(s), omission(s) or negligent act(s) in the performance of or failure to perform **PROFESSIONAL SERVICES**.

All **CLAIMS**, or circumstances of an error, omission or negligent act which any reasonable person or **LAW FIRM** would expect to subsequently give rise to a **CLAIM**, which arise from a single or related error(s), omission(s) or negligent act(s), shall be considered a single **CLAIM** regardless of the number of **INSUREDS** or the number of persons or organizations making a **CLAIM** or the time or times the error(s), omission(s) or negligent act(s) took place.

**EMPLOYEE(S)** shall include a person who provides services for another under either a contract of service or contract for services on a full-time basis.

**LAWYER(S)** means each person who holds a Class LI licence pursuant to the by-laws of the *Law Society Act, R.S.O. 1990, C.L.8*.

**LOCUM** means a **PRACTISING LAWYER** who substitutes for another, on a temporary basis, in the performance of **PROFESSIONAL SERVICES** for the clients of the other **PRACTISING LAWYER** or his or her **LAW FIRM**. For the purposes of such work, the **LOCUM** is deemed to be a member of the **LAW FIRM** to which the other **PRACTISING LAWYER** belongs.

**PRACTISING LAWYER(S)** means a **LAWYER** who is engaged in the practice of law and is not exempt from the payment of insurance premium levies pursuant to the by-laws of the *Law Society Act, R.S.O. 1990, C.L.8*.

**PRO BONO SERVICE(S)** means approved *pro bono* **PROFESSIONAL SERVICES** provided by the **INSURED** after January 1, 2003, through an approved *pro bono* **PROFESSIONAL SERVICES** program, where the approved *pro bono* **PROFESSIONAL SERVICES** and **PROFESSIONAL SERVICES** program are approved by the **INSURER** in advance in writing.

**PROFESSIONAL SERVICES** means the practice of the Law of Canada, its provinces and territories, and specifically, those services performed, or which ought to have been performed, by or on behalf of an **INSURED** in such **INSURED'S** capacity as a **LAWYER** or member of the law society of a **RECIPROCATING JURISDICTION** . . . and shall include, without restricting the generality of the foregoing, those services for which the **INSURED** is responsible as a **LAWYER** arising out of such **INSURED'S** activity as a trustee, administrator, executor, arbitrator, mediator, patent or trademark agent.

## appendix 3

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### Case studies: Applying the LAWPRO insurance coverage

Case A: Drafting wills, advising corporate directors and employees

*Susan B. works as counsel for trust company XYZ and occasionally drafts wills for her employer's customers. She feels that these services are provided on behalf of her employer and that she qualifies for an exemption. Does she have to pay the insurance premium? What about advice she may provide to her employer's directors and employees?*

LAWPRO's view:

Susan is providing services to third parties, even though these parties are her employer's customers. There is a reasonable assumption that the customers for whom she drafts wills see her as a solicitor who is providing them with a service they might otherwise have to pay for. When it comes to providing wills or other PROFESSIONAL SERVICES to customers, Susan is in effect in private practice and must buy the standard LAWPRO insurance program coverage.

Susan, however, could provide legal advice to the trust company's directors or employees, provided that this advice was provided in the course of her employment and related to employer issues. In other words, liability insurance coverage is not required if advice is provided to directors or employees in respect of their obligations, duties, and liabilities in the interests of the employer.

On the other hand, if Susan provided these same individuals with advice of a personal nature (e.g. closing a personal real estate transaction), she would again be seen to be working for a third party and would have to buy insurance coverage.

Case B: Handling claims for the employer

*John S. is employed as a lawyer for a property/casualty insurance firm. Occasionally, he acts as defence counsel on claims files that are submitted to his employer. In this regard, he enters defences in the names of the insured. Is he exempt from paying the insurance premium?*

LAWPRO's view:

When John acts as defence counsel on claim files, he is in fact entering into a solicitor-client relationship with the insured. In the course of providing PROFESSIONAL SERVICES to this third party, he faces the potential of a claim. John therefore does not qualify for an exemption and must apply for and buy the standard insurance coverage provided by LAWPRO.

Counsel acting on claims solely on behalf of the employer, as in the case in coverage disputes, could remain eligible for an exemption.

LAWYERS working as claims examiners in the same insurance company would be exempt, so long as they do not defend the insureds on claims or otherwise provide PROFESSIONAL SERVICES to the insureds.

#### Case C: Franchiser-franchisee relationships

*As part of his responsibilities as an employee of a franchiser, Larry G. is required to also do legal work for some of the franchisees, and is now trying to decide if he is exempt or if he should buy the standard LAWPRO insurance program coverage.*

LAWPRO's view:

That would depend on the exact nature of the ownership situation between the franchiser and franchisees. The critical issue is whether or not the franchisees fall within the definition of "employer" (i.e. are they affiliates of the franchiser as defined in the *Securities Act*?).

If the franchisees qualify as "controlled," "affiliated" or "subsidiary" companies of the franchiser, under the definitions set out in the *Securities Act*, then any legal advice or services that Larry provides to the franchisees would be seen as services provided to his employer. He would qualify for an exemption.

However, if the franchisees operate without sufficient cross ownership with the franchiser to qualify as part of the employer group, then any services Larry provides to the franchisees would be seen as being provided to an outside third party. In this case, he would have to buy the standard LAWPRO insurance coverage.

#### Case D: Providing legal advice on a contract basis

*Linda M. provides PROFESSIONAL SERVICES to the RST Corporation on a fee-for-service basis. She is not on the company payroll, is paid only when she files her billings and works a flexible work week. Does she qualify for an exemption from the LAWPRO insurance premium?*

LAWPRO's view:

The test in this instance is whether or not Linda qualifies as an “employee” of the RST Corporation.

Due to the variety of employment relationships that exists today, LAWPRO considers a number of criteria to determine if a LAWYER is an “employee” qualifying for the exemption. Some of the criteria that LAWPRO considers include the following:

- Is there a written contract for PROFESSIONAL SERVICES setting out the details of the employment relationship and what does it say?
- Are PROFESSIONAL SERVICES provided to entities or individuals other than the employer?
- What is the nature and type of PROFESSIONAL SERVICES provided?
- How long is the contract for, and is the LAWYER required to work a fixed number of hours per day, week or month?
- Is compensation on a fee-for-service or fixed amount (salary) basis?
- How often and by what method is the LAWYER paid (i.e. bi-weekly or as billed) and what are the details of any invoicing?
- How does the company treat the payment for PROFESSIONAL SERVICES? Are taxes deducted at source? Are benefits provided? Are PST and/or GST applied to the bill?
- Does the LAWYER receive a retainer for PROFESSIONAL SERVICES rendered?
- Does the LAWYER work out of the company's office?
- Who provides the LAWYER with support staff, and who pays the support staff?
- Does the LAWYER have personalized letterhead?

Generally, employees who work on a fee-for-service or retainer basis, and who work irregular hours are not eligible for exemption. However, each application for exemption that LAWPRO receives is considered on its own merits, taking into consideration the criteria itemized above. Linda therefore likely would not be eligible for an exemption.

## appendix 4

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### Endorsement to the LawPRO insurance policy: CLAIMS by CORPORATE EMPLOYERS

#### CLAIMS brought by CORPORATE EMPLOYERS

This endorsement shall apply where indicated in ITEM 8 of the INSURED'S Declarations, and then only to those INSUREDS who are NAMED LAWYER pursuant to Part V Definition (h)(i) or (h)(ii) of the POLICY and provided those INSUREDS work as IN-HOUSE CORPORATE COUNSEL during the POLICY PERIOD.

#### A. Modifications to coverage:

Notwithstanding Part III Exclusion b(ii) but subject to all other terms and conditions of the POLICY for those INSUREDS to whom this endorsement applies, coverage in accordance with Part I Coverage B of the POLICY is hereby provided for CLAIMS brought by a CORPORATE EMPLOYER against any present or former INSURED EMPLOYEE with respect to PROFESSIONAL SERVICES provided by that INSURED as an EMPLOYEE of the CORPORATE EMPLOYER on or after January 1, 1997.

The additional coverage provided by this endorsement however shall not apply:

- (i) to any CLAIM directly or indirectly made by the INSURED and/or the INSURED'S spouse or immediate family, or any business enterprise or corporation in which the INSURED and/or the INSURED'S spouse or immediate family have or had beneficial ownership in an amount greater than ten per cent (10%);
- (ii) to any CLAIM in any way relating to or arising out of the failure or omission to provide, effect or maintain any insurance or bond;
- (iii) to any CLAIM in any way relating to or arising out of the INSURED acting in his or her capacity as a director or officer of the CORPORATE EMPLOYER, except to the extent that the CLAIM is for PROFESSIONAL SERVICES on behalf of the CORPORATE EMPLOYER;

- (iv) to any CLAIM in any way relating to or arising out of any personal profit or advantage to which the INSURED is not legally entitled;
- (v) to any CLAIM in any way relating to or arising out of the bankruptcy or insolvency of the INSURED or CORPORATE EMPLOYER;
- (vi) to any CLAIM in any way relating to or arising out of any invasion of privacy, wrongful entry, eviction, loss of consortium or wrongful termination of employment.

Nothing, however, in this endorsement shall be interpreted as providing or expanding the coverage provided to any INSURED under the POLICY pursuant to Part I Coverage A or C.

All coverage provided pursuant to this endorsement is subject to a SUB-LIMIT OF LIABILITY of \$250,000 per CLAIM and in the AGGREGATE per POLICY PERIOD for the INSURED.

#### **B. Definitions:**

For the purposes of this endorsement only, the following definitions shall apply:

**IN-HOUSE CORPORATE COUNSEL** means those INSUREDS who are EMPLOYEES of a single CORPORATE EMPLOYER, and who provide legal services for and on behalf of the CORPORATE EMPLOYER as counsel to the CORPORATE EMPLOYER, which is other than a LAW CORPORATION; and

**CORPORATE EMPLOYER** means a corporation as well as affiliated, controlled and subsidiary companies of the corporation or other entity of which the INSURED is an EMPLOYEE, where “affiliated,” “controlled,” and “subsidiary” are as defined under the *Securities Act R.S.O. 1990, c. S.5.*

## appendix 5

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### Tools and resources from practicePRO

practicePRO provides LAWYERS with a variety of tools and resources, in both print and electronic formats, designed to help their practice grow and thrive.

#### **AvoidAClaim.com**

A blog that provides immediate and practical information to help lawyers avoid legal malpractice claims.

#### **The “managing” series of booklets**

These booklets provide insights and checklists to help LAWYERS better manage the risk associated with specific practice issues. Titles include: *managing the lawyer/client relationship*; *managing conflicts of interest*; *managing the practice of investing in clients*; *managing a mentoring relationship*; *managing practice interruptions*; *managing the finances of your practice*; *managing the security and privacy of data in a law office*; and *managing a better professional services firm*.

#### **LAWPRO Magazine**

LAWPRO Magazine is published quarterly and mailed to all LAWYERS in private practice in Ontario. More than 100 articles from past issues are available in PDF format in the LAWPRO Magazine archives ([www.lawpro.ca/magazinearchives](http://www.lawpro.ca/magazinearchives)).

#### **Practice aids**

On the practicePRO site you can find many helpful practice aids, including: general and area of law specific retainer precedents; a transition provisions and summary table of limitation periods for The *Limitations Act, 2002*; an independent legal advice checklist, and a sample law office privacy policy.

#### **The Online Coaching Centre (OCC)**

The OCC is an online, self-coaching tool, comprising more than 150 modules, to help LAWYERS become more productive and effective in their professional and personal lives. Topics covered include: communicating powerfully; managing stress; overcoming procrastination; managing practice more efficiently; developing new business opportunities; and capitalizing on emotional intelligence.

#### **Wellness resources**

The practicePRO website provides links to assessment tools, guides and resources to help LAWYERS address wellness and balance issues.

#### **Technology resources**

practicePRO helps LAWYERS integrate technology into their practices through a variety of technology resources and articles.

For more information on how you can put practicePRO to work for you, contact us at 416-596-4623 or 1-800-410-1013; by e-mail to or [practicePRO@lawpro.ca](mailto:practicePRO@lawpro.ca); or visit our website at [www.practicepro.ca](http://www.practicepro.ca).



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