Prompt claims reporting:

A key ingredient in the risk management mix

How can you defuse the potential anxiety – or even stress – that comes with discovering you may have made an error – or worse still, are about to be sued?

Report the matter, without delay, to LawPRO.

Prompt reporting of a claim, or potential claim, is a requirement under the LawPRO insurance policy. And failure to do so could result in a denial of coverage if the delay has prejudiced our position as your insurer.

But prompt reporting is also an important risk management tool that not only relieves you of that burden of worry, but also can lead to a more successful resolution than you had imagined possible. Prompt reporting gives you access to the expertise and experience of our claims counsel and examiners and, in many cases, defence counsel. In some cases, repairs are possible and the claim can be avoided altogether; many potential claims situations are resolved with no costs. In virtually all situations, you are better served working with the claims team to resolve the matter, than if you try to go it alone.

Consider these examples from our claims files:

Several years after Lawyer A had successfully acted on the purchase of his property, a client returned to ask the lawyer to now act on the sale of that same property. Lawyer B, acting for the new purchaser, sent a letter of requisitions, and indicated that there was a problem with title to the property. Lawyer B alleged that the vendor did not have proper title because the transfer violated the sub-division control provisions of the Planning Act.

Had Lawyer A immediately notified LawPRO of a potential claim, he would have learned from us that there was an easy fix to the issue: There was a statutory or case law exception to this issue, and the case could have been resolved without delay.

Lawyer A however opted to negotiate an extension of the closing date, and undertook a severance consent application. Fortunately, for him, this application was successful. But had he reported the matter to LawPRO, the closing could have proceeded without delay and the additional costs associated with the application could have been avoided.

Another recent example involves a lawyer who opted not to report a matter involving a missed limitation period. He undertook a repair motion on his own, as is often done in civil litigation matters when a time limit has been missed, but made the mistake of anticipating that the motion would be unopposed. He prepared the materials in a perfunctory way, the matter was opposed at the last minute and the motion for relief was not granted because the materials were inadequate. A claim resulted.

The issue for the lawyer then is further complicated because the issue of prejudice arises. If the matter had been reported, our claims counsel and/or defence counsel would have had an opportunity to ensure that the motion materials were better drafted, and the claim might have been avoided. Afterall, four eyes are better than two.

Clearly, promptly notifying LawPRO about a claim – or a situation in which you have made an error or are alleged to have made an error – is in your best interests (as well as an obligation under the insurance policy).

What specifically are your obligations to report under the LawPRO policy?

As soon as you become aware of a claim, or a circumstance of an error, omission or negligent act that could result in a claim, you must report this claim or potential claim to LawPRO. The policy also requires that you provide LawPRO with all information on the claim that is in your possession or that you know of, and that you immediately forward to LawPRO every demand or originating process that you receive or have received. The Law Society *Rules of Professional Conduct* have corresponding requirements in respect of reporting to LawPRO (Rule 6.09[2] and [3].

How does one report a claim?

Claims must be reported in writing – by e-mail, fax, ordinary letter correspondence or by using our online claims reporting form at www.lawpro.ca.

You'll need to provide the following information:

- your name, the name of your firm, full mailing address, fax number and e-mail address;

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- name of your client;
- brief description of your retainer stating when you were retained, why you were retained and the nature of the claim;
- the manner and date on which you became aware of the potential claim;
- any relevant documentation, such as a demand or notice letter, or a copy of the Statement of Claim if litigation has been commenced. One way to include this is by including a PDF attachment to an e-mail;
- the amount of potential damages; and
- a chronology of events.

As your insurer, we accept claim reports only from you or from your appointed representatives (such as counsel, partners or associates, executors or personal representatives, or trustees in bankruptcy). As well, we accept reports of claims from the Law Society where it has been appointed trustee of an insured's practice by court order, or from the Law Society itself, in its capacity as Named Insured under the LawPRO policy, where that discretion has been duly exercised. We do not accept claim reports from third parties or their representatives.

What happens after the claim is received by LawPRO?

Our new claims coordinator records all new claims reports, noting the relevant date of error, date on which you received notice of the claim, and when you gave notice to LawPRO. A claims file is opened and the claim is assigned to a claims counsel who will contact you to discuss the matter further.

Depending on the circumstances, we may allow you or someone in your firm to handle the repair under our supervision, or we may retain outside counsel to do it. It is often best to retain external counsel because it can be quite awkward for you to have to appear before a judge to seek relief arising out of your own error.

If an allegation of negligence has been made against you that we believe is either unfounded or has not caused any damages, we can help you draft a denial letter or, if appropriate, send a denial letter ourselves.

Our philosophy is to make a reasoned assessment of liability and damages. If it is clear that you are liable for a matter that cannot be repaired, and if the amount of damages is proven and is causally connected to the error, we will try to negotiate a settlement at an early stage. But if, in our view, there is no liability and/or no damages, then we will not offer to make any indemnity payment. We do not make economic settlements.

What are the risks of not reporting a claim?

Ignoring a claim will not make it go away. It may come back to haunt you months or years later. Depending on the facts, coverage might be denied if the delay in reporting has prejudiced our position. You do not want to run that risk.

Handling it yourself, either by denying liability or trying to negotiate a nominal settlement, also comes with its own risks: If your attempts are unsuccessful and you then report to us, again, depending upon the facts, coverage might be denied if LawPRO's position has been prejudiced. For example, you might have inadvertently admitted liability, contrary to the terms of your policy. That's another risk that you do not want to run.

You may think that the amount of the claim is so small that it is within or close to your deductible, and so you can deal with it yourself. Consider that both your insurance policy and the *Rules of Professional Conduct* obligate lawyers to report any claim to the insurer. You do not want to risk running afoul of the Law Society.

Lawyers often say they do not want to report a claim for fear that it will trigger their deductible. Rest assured that the mere reporting of a claim does not trigger the deductible.

If you opted for a deductible applicable to both defence and indemnity, 50 per cent of the deductible is triggered by filing a Statement of Defence, and the other 50 per cent by examinations for discovery. If a claim does not reach those stages, an indemnity payment or costs incurred to effect a repair will trigger the deductible.

Should one report as a precaution?

When in doubt, the safe course is to report a claim even if it is on a precautionary basis. It costs you nothing to report a claim to LawPRO – deductibles and Claims History Levy Surcharges are not triggered by the mere reporting of a potential claim. As well, close to 50 per cent of claims reported to LawPRO close without any impact to the insured lawyer.

Moreover, you'll sleep better at night: More than one lawyer has discovered, after reporting a potential claim to us, that no error was made, that the matter was easily repaired or that there were no damages.

This article was prepared with contributions from various members of the LawPRO claims department.

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