REPORT TO

CONVOCATION

SEPTEMBER 2019

Contents

LAWYERS' PROFESSIONAL INDEMNITY COMPANY ("LAWPRO")

REPORT TO CONVOCATION – SEPTEMBER 2019

INTRODUCTION

1. LAWPRO provides the mandatory professional liability insurance coverage (the "Primary Program") for the more than 27,500 Ontario lawyers in private practice. Each September, LAWPRO's Board of Directors reports to Convocation on changes to the Program for the following calendar year. The timing of this Report is necessitated by the logistics of renewing over 27,500 policies effective January 1, and the need to negotiate and place related or corollary reinsurance treaties.

2. For 2020, LAWPRO Management has conducted its annual review of the Primary Program and offers improvements, details of which can be found on page 15 of this Report.

3. Based on LAWPRO's mandate from Convocation, careful consideration of affordability, coverage needs and potential risks, the LAWPRO Board recommends that Convocation accept this Primary Program of Insurance for 2020 so that it can be implemented by January 1, 2020.

BACKGROUND

4. LAWPRO was created in response to the "insurance crisis" of the early 1990s. At that time, it was common practice for lawyers to engage in mortgage brokering when acting on real estate matters. In the aftermath of a real estate crash, many clients sued their lawyers for the financial losses they suffered. Largely as a result, in 1994, the Law Society's insurance program was underfunded by more than $200 million.

5. The resulting crisis presented the Ontario Bar with one of the most serious challenges in its history: finding $200 million to cover the claims the Law Society's

insurance program faced, and deciding whether to continue to provide E&O coverage for Ontario lawyers or to withdraw from the insurance market entirely. Withdrawing completely would have meant that replacement insurance would be unavailable at the previous price point and may not have been available at all.[1] Either way, the Law Society determined that "Convocation can no longer attempt to deliver a Rolls Royce insurance policy at the cost of a Ford."[2]

6. To address the crisis, Convocation formed a Task Force which ultimately recommended the creation of a specialised, regulated insurance company with financial accountability. Convocation accepted this recommendation and the mandate given requires that the Law Society's insurance program:

- Operate independently from the Law Society;
- Operate in a commercially-reasonable manner;
- Offer premiums that generally reflect risk; and
- Settle claims fairly and quickly, though not on a "no-fault" basis.

7. LAWPRO was created further to this recommendation and for the last 25 years it has operated based on the mandate and principles laid out in the 1994 Task Force Report. It has its own Board of Directors, operates in a commercially-reasonable manner (i.e., revenues cover expenses), premiums are risk rated, and it settles claims fairly and expeditiously, but not on a no-fault basis.

2020 PROGRAM FEATURES

8. The following is a brief summary of the proposed 2020 Primary Program:

---

[1] This is the situation the Law Society of England and Wales has struggled to deal with for the last several years. See "*Aon unit in shock professional indemnity insurance exit*", Insurance Business UK, 23 Aug 2019.

[2] *Report to Convocation of the Insurance Task Force and the Insurance Committee*, October 28, 1994 (Amended November 15, 1994), paragraph 51 on page 15.

9. E&O insurance is required of all lawyer sole practitioners, lawyers practising in association or partnership, paralegals acting in partnership with lawyer(s), paralegals holding shares in professional corporations with lawyer(s) and lawyers practising in a law corporation, who are providing services in private practices. Exemption eligibility criteria from the Primary Program are available at lawpro.ca and include scenarios such as when lawyers engage in the practice of law only for and on behalf of a corporate or government employer, lawyers who only engage in the practice of law as an employee or volunteer in a clinic that is funded by Legal Aid Ontario and that meets certain criteria, lawyers on a temporary leave of absence, or lawyers otherwise not practising law.

Coverage Limits

- $1 million per claim/$2 million aggregate limit applicable to claim expenses, indemnity payments and/or cost of repairs together

Standard base premium

- $2,950 per insured lawyer

Transaction Premium Levy

- $65 per real estate transaction and $100 per civil litigation transaction

Deductible

- Standard deductible is $5,000 per claim
- LAWPRO offers deductible options from $0 to $25,000. Insureds can choose to have the deductible apply to both claim expenses and indemnity payments, or to indemnity payments only. Premiums will increase or decrease depending on the deductible option. Each lawyer practicing in a law partnership or law corporation must elect the same amount and type of deductible as all other lawyers in the firm.

Innocent Party Coverage

Innocent Party coverage protects members of the public – and lawyers – against the dishonest, fraudulent, criminal, or malicious acts or omissions of present or former partners, associates, employed lawyers and firm employees.

It is required for all insureds practising in association, partnership (including general, multi-discipline and/or combined licensee partnerships and LLP partnerships) or a law corporation with more than one lawyer. Sole practitioners who are not required to obtain the coverage can also apply for it on an optional basis. The premium is $125 per insured lawyer per policy period.

The mandatory innocent party coverage limit is $250,000 per claim/in the aggregate and additional coverage can be purchased increase limits as follows.

Increase coverage to:	**Additional annual premium:**
$500,000 per claim/aggregate	$75 per insured lawyer
$1 million per claim/aggregate	$125 per insured lawyer

PREMIUM DISCOUNTS[3]

For those who file online

- $25 discount for renewal applications filed online on or before November 1, 2019

For those who take approved risk management courses

- $50 discount per approved course, subject to a $100 maximum

For new lawyers

- less than 1 full year in practice: 50 per cent discount
- less than 2 years in practice: 40 per cent discount
- less than 3 years in practice 30 per cent discount
- less than 4 years in practice: 20 per cent discount

For those who limit their practice to criminal[4] and/or immigration law

- 50 per cent discount

For those who work part-time

[3] For examples of how premiums are calculated, please see **Appendix "F"**of this Report

[4] Criminal law is considered to be legal services provided in connection with the actual or potential prosecution of individuals, municipalities and government for alleged breaches of federal or provincial statutes or municipal by-laws, generally viewed as criminal or quasi-criminal.

- 50 per cent discount is available to practitioners who in both their current and prior fiscal year, restrict their law practice to 20 hours per week on average for each week worked, up to 750 hours per year (including time for undocketed work), and have gross billings of $90,000 per year or less

For those employed at a Designated Agency[5]

- 75 per cent discount in recognition of low risk and enhanced access to justice

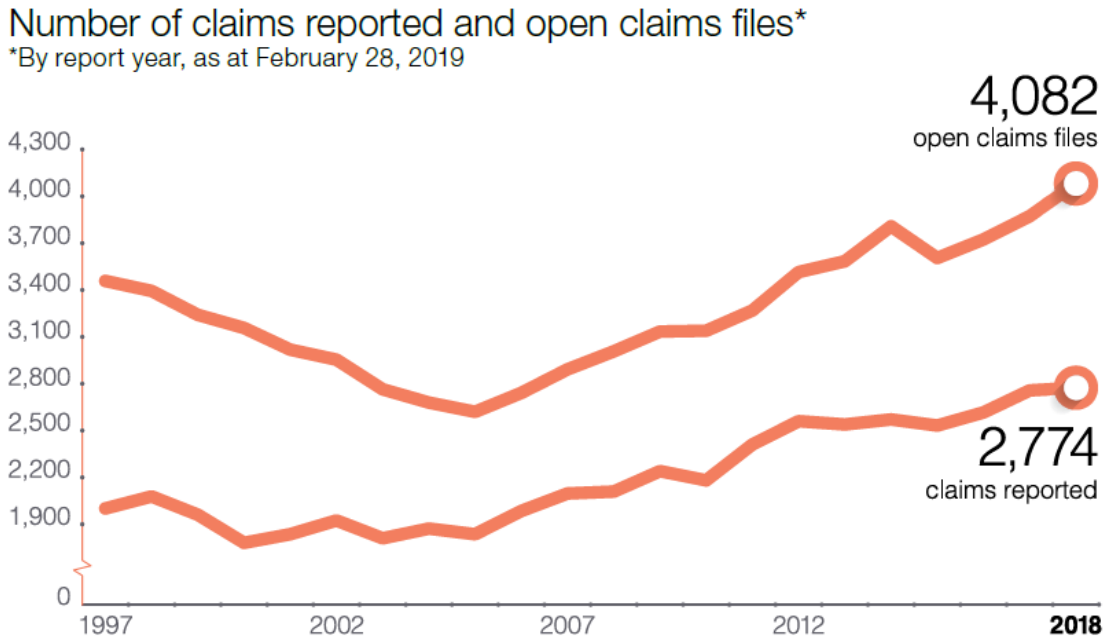
10. For examples of premiums which would be charged to members depending on the nature of their practice, see **Appendix "F"** of this Report.

CLAIMS TRENDS

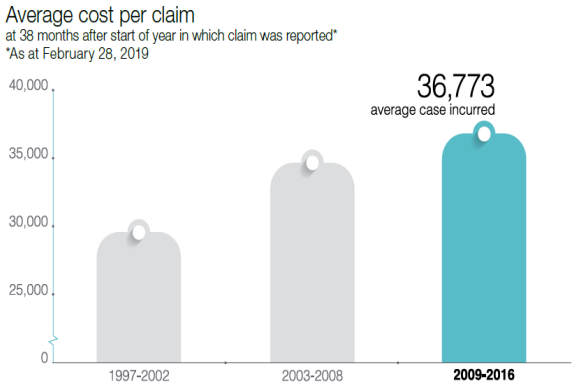
11. LAWPRO's long term experience is that claims come to light on average 2-3 years after the work on a matter was done. In the real estate, family, and wills and estates matters claims can arise decades after work.[6]

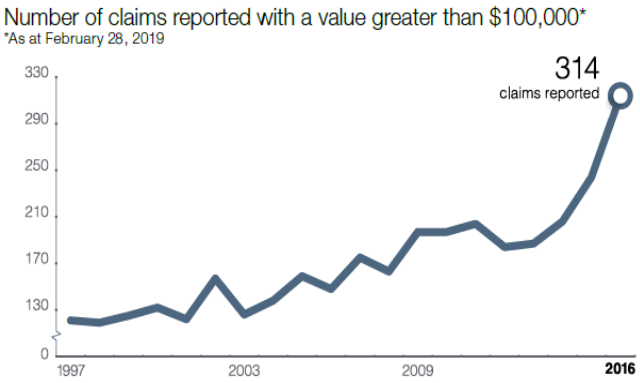
12. The 2018 claim figures reflect steadily increasing claims counts. The number of claims reported to LAWPRO during 2018 reached 2,774, continuing an upward trend that started in 2006. The reduction in the high number of open claims in 1997 and following years reflects the Primary Program's recovery following the insurance crisis of the mid-1990s.

[5] A "Designated Agency" can include a Civil Society Organization that has been approved for the general premium discount.
[6] "Don't let claims follow you into retirement", LAWPRO Magazine Vol. 16.3 (February 2017).

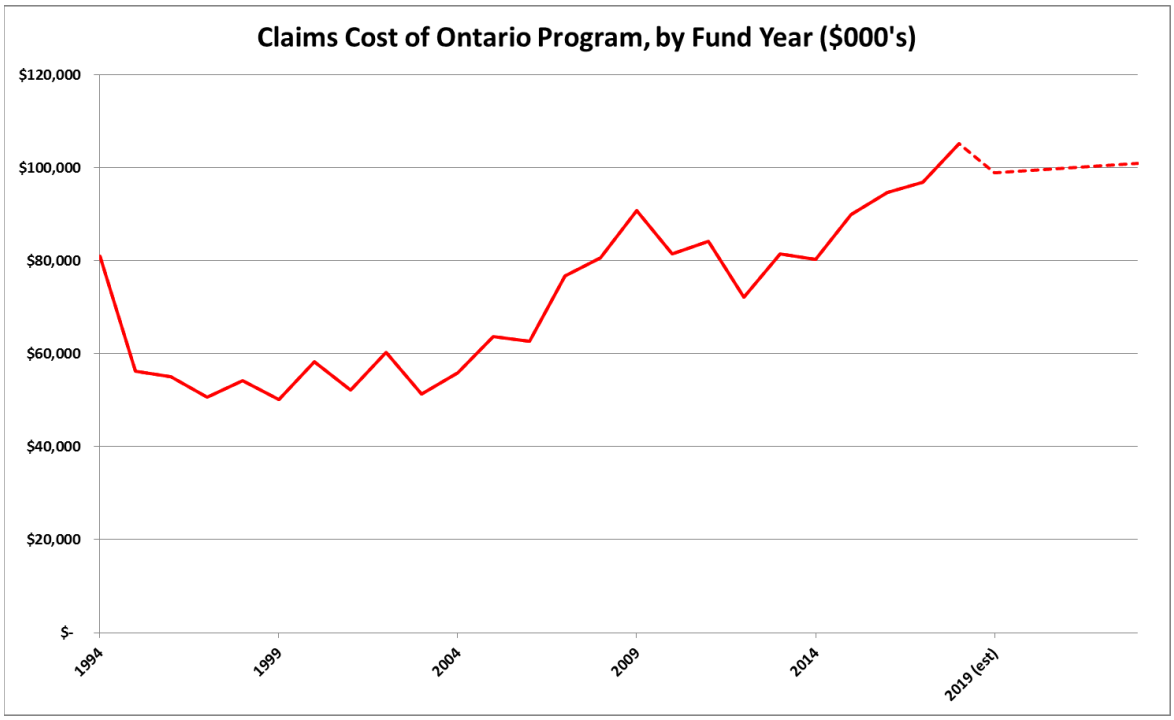


13. In addition to the increasing number of claims, each claim is costing LAWPRO more, on average. The average cost per claim in recent years continues to grow, reaching $36,773 from $30,000 we saw at the beginning of the millennium. Also, the number of claims reported with a value greater than $100,000 has climbed to 314 by 2016.





14. For 2020, LAWPRO expects direct claims costs alone to be $95.5 million, a level which has also stabilized somewhat in recent years. LAWPRO estimates total Primary Program funds (that is, claims costs plus general expenses) required for 2020 to be $130.0 million. This estimate is slightly above the current forecast of total Primary Program funds needed for 2019, which is approximately $128.0 million.


Claims Cost of Ontario Program, by Fund Year ($000's)
$120,000
$100,000
$80,000
$60,000
$40,000
$20,000
$-
1994
1999
2004
2009
2014
2019 (est)

Where are claims happening?

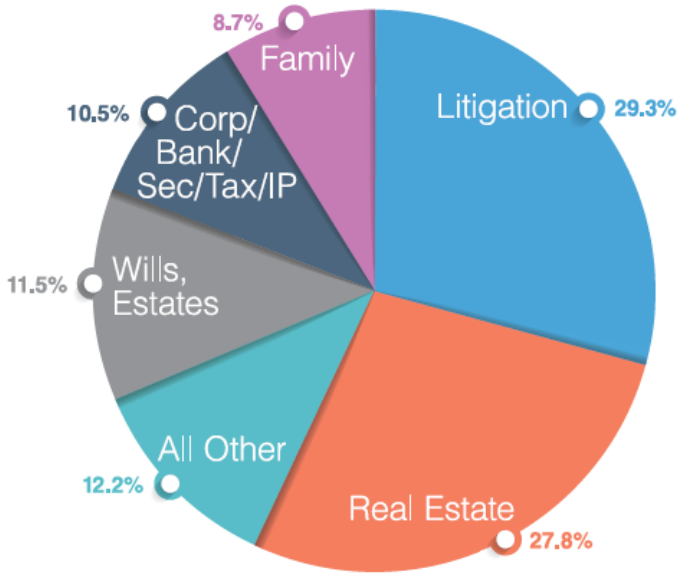
15. LAWPRO has prepared fact sheets to highlight the most common causes of malpractice claims for major areas of practice. They can be viewed at: practicepro.ca/factsheets.

16. LAWPRO's present risk analysis reaffirms the results of previous Reports to Convocation indicating that the practice of real estate and civil litigation represent a disproportionate risk when compared to other areas of practice. These two areas of practice represent 69 per cent of the claims reported and 57 per cent of the claims costs under the Primary Program in 2018. In particular,

a) Real estate claims costs have trended upwards since 2001, with real estate accounting for an average of 26 per cent of costs in those years. Since 2004, claims costs in this area of practice have increased almost 96 per cent;

b) Since 2011, the exposure relating to the practice of civil litigation has been substantially more than that traditionally seen, with civil litigation accounting for 30 per cent of the claims reported and 36 per cent of the claims costs under the Primary Program in 2018. This was in large part due to an increase of administrative dismissal related claims (see discussion in the next paragraph);

2018 Distribution of claims by area of practice* (% of gross claims costs)
*As at February 28, 2019



c) In 2018, the nature of claims against civil litigators was also reaffirmed, with time management claims (which includes missed limitation periods, administrative dismissals, and procrastination) accounting for almost 37 per cent of litigation claims, whereas lawyer/client communications issues, inadequate investigation, failures to know or apply the law, clerical errors and conflicts of interest accounted for about 63 per cent of these claims; and

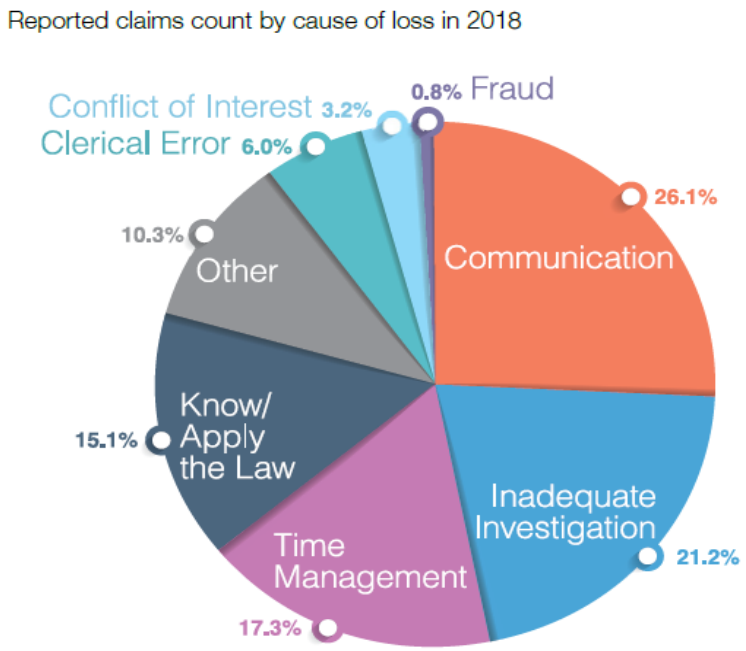
d) Lawyers with a prior claims history continue to have a considerably greater propensity for claims than other practising lawyers. Lawyers with claims in the prior 10 years were over three times more likely to report a claim during the past year than those with no claims in the prior 10 years.

17. LAWPRO has been watching the civil litigation area of law carefully for the past several years. Despite steps taken by LAWPRO such as articles, presentations, the "Rule 48 Toolkit" and the mandatory increased deductible for certain administrative dismissal claims, the reality is that in recent years the growth in civil litigation claims has outstripped the overall growth in claims. For example, from 2006 through 2010 LAWPRO received an average of 709 civil litigation claims each year, and during 2011 through 2017, the average increased to 925 each year. This growth of 30 per cent

vastly exceeded the 9 per cent total growth of claims for all other areas of law over the same time period. In addition, costs of civil litigation claims have remained resiliently high. During 2007 through 2017, the average cost of these claims was $5,900 per civil litigation practitioner, an amount that exceeds what was collected in premiums (including civil litigation transaction levies) from this demographic.

18. In 2018, it was concluded that the $50 transaction levy was insufficient to perform its risk rating function, as the costs associated with civil litigation, as compared to other areas of practice, now substantially outweigh the revenue generated by the transaction levy and base levy premiums of these lawyers. As a result, the civil litigation transaction levy was raised to $100 effective for all files opened after January 1, 2018. For more information on risk rating, see the discussion beginning at paragraph 57 of this Report.

19. Lawyer/client communication problems and poor practice management are the biggest causes of malpractice claims, eclipsing by far failures to know or apply the law. These proportions are consistent in most areas of law (see details for specific areas of law at practicepro.ca/factsheets), and across most sizes of law firms. More detailed descriptions of these causes of errors are available in **Appendix "D"**.



RISK MANAGEMENT INITIATIVES

20. A principal mandate of LAWPRO is to help the legal profession reduce claims by helping them manage the risks associated with practice. As Professor Richard Susskind said: "*We like to build a fence around the top of a cliff, rather than station an Ambulance at the bottom.*" This is accomplished through the practicePRO program; the TitlePLUS title insurance program, and support of the Member Assistance Plan ("MAP") from Homewood Health. LAWPRO contributes almost one-half the cost of operating the MAP.

- **practicePRO® Program:** LAWPRO's successful risk management and claims prevention initiative is a recognized source of high-quality risk management tools and resources that help lawyers avoid malpractice claims. All practicePRO resources are made available to all Ontario lawyers and paralegals at no charge. These include articles in *LAWPRO Magazine* and other law-related publications, information on the practicePRO website and AvoidAClaim blog, social media, and live presentations. The practicePRO website features LAWPRO's claims prevention resources that are of particularly valuable to solos and small firms. In 2018 the top 20 most downloaded resources were:

Ranking	Article or Item	Downloads
1	Perspectives on the Future of Law	5,803
2	Cybercrime & Bad Cheque Fraud Fact Sheet	5,392
3	General Retainer Letter	3,695
4	Checklists page	3,426
5	The Future of the Professions (book review)	3,135
6	Limited Scope Representation Resources	2,671
7	Managing the Finances of Your Practice booklet	2,043
8	Managing the Lawyer/Client Relationship	2,032

Ranking	Article or Item	Downloads
9	Tendering Correctly: Preserve Your Client's Rights (And Avoid a Claim!)	1,899
10	Essential LinkedIn Dos and Don'ts	1,809
11	Short General Retainer Letter	1,522
12	The Biggest Malpractice Claims Risks	1,404
13	Employee Departure Checklist	1,395
14	Artificial Intelligence: What is AI and Will it Really Replace Lawyers?	1,365
15	Landmines for Lawyers When Drafting Wills	1,290
16	Amendments to Rule 48 bring major changes to administrative dismissals	1,218
17	Personal Injury Retainer Letter	1,051
18	Managing a Mentoring Relationship booklet	1,145
19	ILA for Domestic Contracts Checklist	1,142
20	Managing a Better Professional Services Firm booklet	1,139

- **Helping lawyers avoid fraud:** Thanks to LAWPRO's efforts fraud-related claims are down, but lawyers are still being victimized and fraud-related claims continue to be an ongoing and significant concern for LAWPRO. Currently wire frauds are the most common with a handful of lawyers being victimized in a typical year (i.e., lawyer wires funds from a trust account after being duped with a fake cheque). Insureds can call LAWPRO in the event they are targeted by a suspected fraudster. Working within confidentiality obligations imposed by the *Rules of Professional Conduct*, one of our Fraud Team members will go through the common fraud scenarios to help spot red flags that may indicate the lawyer is being duped and help determine if the matter is legitimate or not. In the event the matter is a fraud and there is a potential claim, we will work with the lawyer to

try to prevent the fraud and minimize potential claims costs. By visiting the AvoidAClaim.com blog and typing in names or scenarios, lawyers can see confirmed frauds reported to us. Our Cyber Fraud Fact Sheet and Real Estate Fraud Fact Sheet, available at practicepro.ca/fraud, are a good reminder on key ways to identify possible dangerous situations. It is clear that LAWPRO's efforts to help insureds avoid frauds have reduced the number of fraud-related claims.

- **The LAWPRO Risk Management Credit:** This premium credit, available since 2001, is a significant LAWPRO risk management initiative. To be eligible for a credit ($50 each up to a maximum of $100) on premiums for 2020, lawyers (and paralegal insureds in combined licensee firms) must have participated in LAWPRO-approved CPD programs or Homewood Health e-Learning courses between September 16, 2018 and September 15, 2019. Over 300 programs qualified for the credit during this period. During the course of the year, these programs had approximately 50,000-55,000 attendees. The approval process is handled by LAWPRO (we look for programs that include content on where claims happen, why they happen, and the steps that can be taken to lessen the likelihood of a claim) and is distinct from the Law Society's CPD accreditation process.

- **TitlePLUS® Program:** TitlePLUS insurance is a competitive title insurance product that makes a positive difference in the Ontario real estate market. It expands the title insurance choices offered to consumers and lawyers and has helped broaden coverage while keeping title insurance premiums down. In addition, the TitlePLUS program regularly catches fraud due to automated, proprietary, and secret flags built into its underwriting that contributes to saving money – for consumers and the mandatory insurance program.

- **Member Assistance Program:** Lawyers are exposed to high levels of stress on a daily basis and long term stress can drive people to use, misuse or even become addicted to alcohol or legal/illegal drugs, or to experience challenges to physical or mental health. While it can be difficult to identify the reasons underlying why errors occur and claims develop, stress, addictions, and other

untreated wellness issues are often found or suspected to be contributing factors in many LAWPRO claims. To help support lawyers in private practice, LAWPRO contributes approximately one-half the annual cost of the Member Assistance Plan. It provides confidential assistance to Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, licensing-process candidates, and their families.

CHANGES TO THE PRIMARY PROGRAM FOR 2020

21. In developing the details of the 2020 Primary Program, LAWPRO has considered the changing environment in which lawyers practise and comments received from the profession during the previous year. The general structure of the current Primary Program appears in most ways to meet the needs and practice realities of the profession for 2020 and there are no substantive recommendations for changes. For the 2020 Primary Program only minor modifications in the form and substance of the policy are contemplated, as detailed below.

Date of Claim:

22. The Primary Program Policy is a "claims-made" policy, which means that coverage is triggered under the policy in place when a claim is made against a lawyer (or other insured), regardless of when the actual error, omission or negligent act took place. This is contrasted with an occurrence-based policy which responds to claims arising from events that took place during the policy period, even if the claim is submitted long after the policy is no longer in effect (e.g., auto insurance).

23. Part II, Special Provision B ("Policy Period") sets out the claims-made aspect of the LAWPRO policy.

24. When is a claim "made" it is not always obvious to insureds, which contributes to late reports and even failures to report under the LAWPRO policy. Under the 2019 policy, it essentially is described as when an insured first becomes aware of the claim or potential claim (subject to certain conditions). When there are related claims, or

multiple insureds who are involved with a claim, but those with knowledge of the claim fail to give notice, this can make it difficult to know when the date of claim actually was.

25. To address this, the Policy Period provision will be amended to provide greater clarity in these circumstances, so insureds will have more certainty as to which policy year will apply to a given claim.

26. **Accordingly, the Primary Program's Policy Period Special Provision will be amended to provide more clarity with respect to the applicable date of claim.**

New Definitions:

27. Where the same word or phrase appears repeatedly in an insurance policy, a definition can be a useful way to provide more concise wording and clarity.

28. An example of this in the Primary Program policy is wording around what would be considered "potential" claims that do not yet meet the definition of what is a "Claim", but which LAWPRO should be notified of in order to assist with claims prevention efforts. To provide greater clarity of what falls short of a "Claim", but should still be reported to LAWPRO will now be defined as "Circumstances". This should help both LAWPRO and its insureds reduce the negative consequences of late reporting of claims – something LAWPRO sees more than it should.

29. Another reason to include a new definition is where there could be ambiguity about a commonly used word. In the existing Policy the word "spouse" is used, but not defined. To provide greater clarity as to what is meant by "spouse", a new definition is being introduced which refers to s. 29 of the *Family Law Act,* R.S.O. 1990, c.F.3 which defines spouse as:

> *"spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,*
>
> *(a) continuously for a period of not less than three years, or*
>
> *(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the* Children's Law Reform Act.

30. **Accordingly, the Primary Program's Policy definitions section will now include definitions for "CIRCUMSTANCES" and "SPOUSE(S)".**

Refinement of Definitions:

31. In 2012 the Policy introduced a definition for "Dishonest" and in 2017 a definition for "Related Errors, Omissions, or Negligent Acts" was created. With the passage of time, LAWPRO has had the opportunity to see where lawyers may have questions about the wording, and what can be done to ensure that underwriting intention is as clear as possible. For the 2020 Policy, LAWPRO looked at these two definitions and will revise them to ensure they provide greater clarity.

32. Accordingly, the Primary Program's Policy definitions of "Dishonest" and "Related definitions section will now include definitions for "CIRCUMSTANCES" and "SPOUSE(S)".

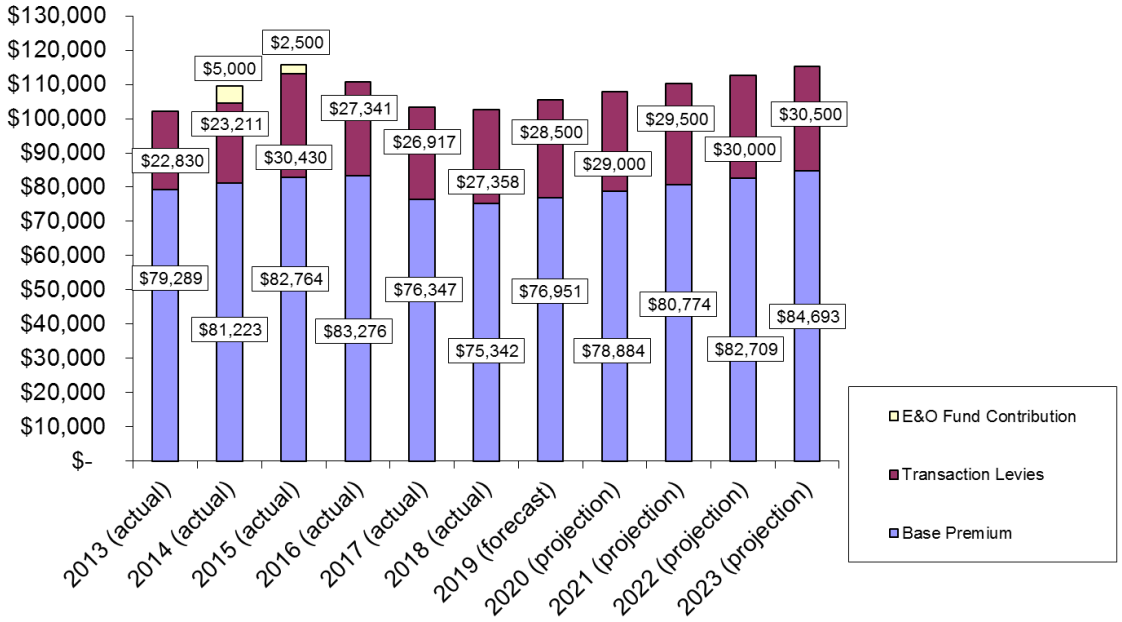
REVENUES

33. To meet the total expected Primary Program claims and operating expenses for 2020, LAWPRO evaluates its likely investment income, and then considers premiums[7] and levy surcharges.

34. The projected revenues from premiums and levies are as follows:

[7] "Base premiums" includes base premiums with applied discount or charges, as well as innocent party and REPCO premiums.

Premium Revenues, by Source ($000s)



a) Investment Income

35. LAWPRO takes full advantage of the time between the collection of premiums and the payment of claim costs by investing any available funds into a well-diversified portfolio of fixed income and equity securities. LAWPRO uses the resulting investment income to help pay operating and claims expenses, thereby reducing the amount of funds that must come from premium sources.

36. LAWPRO provides further stability to the Primary Program, with the assistance of two professional fund managers, by segregating sufficient money into a separate portfolio (the liability-matched portfolio) to pay anticipated future claims costs, and any surplus capital is held in a different portfolio. The securities in the liability-matched portfolio consist of high-quality government and corporate fixed income securities, with the future cash inflows to LAWPRO arranged to coincide with the expected payout patterns of the future claim costs. The surplus portfolio consists of a prudent mix of fixed income and equity securities.

37. Since 2008, investment returns have weakened due to fallout from the worldwide credit crunch. In particular, with central banks such as the Bank of Canada lowering their overnight interest rates to rock-bottom levels, the rates of return on fixed income securities have also dropped significantly. For LAWPRO, the downward pressure on returns is exacerbated as fixed income securities mature and need to be reinvested at these low rates. A prolonged "low for long" environment would place continued pressure on fixed income yields, while the eventual rise in central bank rates could result in a shock to fixed income security prices. As a result of these risks, LAWPRO has maintained a prudent investing philosophy to protect this portfolio, with its expected return set at a modest 2.85 per cent.

38. LAWPRO's prudent investing philosophy includes a conservative, well-diversified equity portfolio. Of note, this portfolio's annualized return from before the 2008 market crash up until June 30, 2018 has been very respectable, at over five per cent. Overall, LAWPRO's portfolio is well-positioned for both capital preservation and steady growth.

Levy Surcharges

39. The Ontario real estate market has been quite resilient in the last few years, but there are indications that the market will be varied in the near term. The 2019 Housing Market Information Portal (Ontario Edition) published by Canada Mortgage and Housing Corporation[8] notes deteriorating metrics, such as new home starts, which suggests that the real estate market is likely to continue to face pressure in the near to medium term.

40. As part of its commitment to operating the Primary Program in a commercially-reasonable manner and better ensuring that premiums reflect the general practice risks of insureds, LAWPRO utilizes levy surcharges.

[8] https://www03.cmhc-schl.gc.ca/hmip-pimh/en#TableMapChart/35/2/Ontario and https://www03.cmhc-schl.gc.ca/hmiportal#Profile/35/2/Ontario

41. At present, the levy surcharges include a $100 civil litigation transaction levy and a $65 real estate transaction levy, as well as a claims history levy surcharge. Revenues from these levy surcharges are applied as premiums, to supplement the base levy.

42. The claims history levy surcharge ranges from $2,500 for a lawyer with one claim paid in the last five years in practice, to $25,000 for a lawyer with five claims paid in the last five years in practice (an additional $10,000 is levied for each additional claim paid in excess of five).

43. Civil litigation and claims history levy surcharge revenues have been quite stable over time, while the revenue from real estate transaction levies declined by approximately 50 per cent between 1999 and 2009 (prior to the increase in the real estate transaction levy for the 2010 Primary Program).

44. With respect to the real estate transaction levy, the increased use of title insurance is considered to be largely responsible for a reduction in the count of these levies since 1999. Lawyers acting for those obtaining an interest or charge in the land, in many instances, are not required to pay a transaction levy, where the interests of all parties obtaining an interest or charge in the property are title-insured, and the acting lawyer or lawyers are provided with the appropriate release and indemnity protection by the title insurer, based on a standard form agreement entered into between the title insurer and the Law Society on behalf of Ontario lawyers. It is estimated that more than 90 per cent of residential real estate transactions in Ontario are title-insured (LAWPRO makes this estimate based on the correlation between real estate sales data and transaction levy fillings). In recent years, the number of real estate transaction levies collected has moved in tandem with residential real estate sales. This indicates a maturity or saturation of this market for title insurance.

45. More recently, the number of transaction levies has moderated slightly as a result of the softening Ontario real estate sales. As of June 2019, transaction levy revenues are below expectations, at $0.8 million under budget.

46. To account for ongoing uncertainties in the real estate market and the prospect of a shortfall, a conservative approach has been taken in estimating revenues from levy surcharges for 2020.

47. The use of transaction levies ensures an element of risk rating in the Primary Program, as both real estate and civil litigation continue to represent a disproportionate risk when compared to other areas of legal practice. The use of levies also avoids the substantial dislocation which would likely occur if the base premiums were increased to reflect the risk, and reflects the consensus reached with the affected sectors of the bar and others in the profession as the most equitable way to achieve risk rating when first introduced in 1995. For more information on risk rating, see the discussion beginning at paragraph 57 of this Report.

48. For 2020, LAWPRO estimates transaction levy revenues at $29.0 million.

Real Estate Practice Coverage Option (REPCO)

49. Real Estate Practice Coverage Option: By 2006, title fraud had begun to spiral in Ontario. Organized crime was involved in the theft of titles from innocent homeowners in increasing numbers and a Court of Appeal decision in late 2005 affirmed that a fraudulently signed mortgage was valid and enforceable against an innocent homeowner[9]. The government took action with a series of fraud-prevention reforms. These included new eligibility criteria for those registering documents through the electronic land registry system. The new criteria included a prescribed form of insurance coverage that would respond in the event of fraud relating to the registration of fraudulent documents.

50. Now, all lawyers who practise real estate law in Ontario must purchase the Primary Program's Real Estate Practice Coverage Option. This coverage provides insurance protection to ensure that members of the public, and Land Titles Assurance

[9] For more on this, see Bob Aaron's Toronto Star article of December 30, 2006: "In 2006, title fraud top real estate story".

Fund, are protected against the registration of fraudulent instruments under the Land Titles Act. The coverage limit is $250,000 per claim/$1 million in the aggregate per policy period, applicable to claim expenses, indemnity payments and/or costs of repairs together. The premium is $100 annually per insured lawyer.

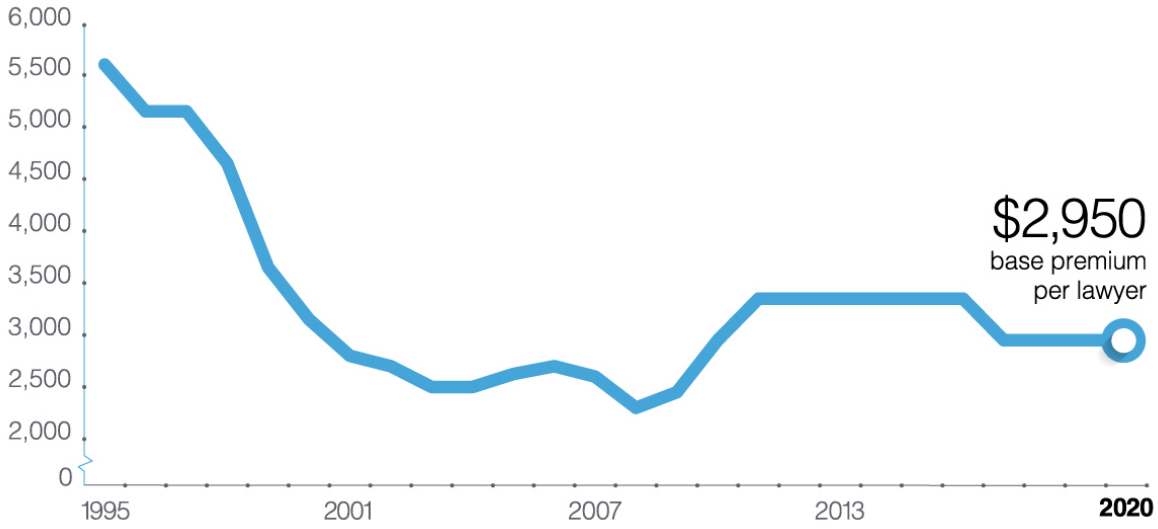
Base Premiums

51. Based on the Primary Program costs, sources of revenue and capital needs, the base premium will again be $2,950 per member. With 28,622 practising insured lawyers (full-time equivalents):

- $130.0 million in anticipated total Primary Program costs
- $29.0 million in budgeted transaction levy revenues
- 2.85 per cent return on investment

52. At this time, the Board is satisfied that this base premium rate appropriately recognizes the inherent uncertainties in emerging claims experience and economic conditions, and allows the Primary Program to continue to operate on a self-sustaining basis while protecting LAWPRO's overall financial position. The approach taken is consistent with information provided in the Report to Convocation in recent years. It should be noted that a base premium of $2,950 per lawyer in 2020 is significantly lower than premiums charged at some points in the past (e.g., $5,600 per year just after the insurance crisis). In fact, if inflation were removed, this premium would be the equivalent to about $1,835 in 1995 dollars.

Base Premium History



THE ERRORS & OMISSIONS INSURANCE FUND

53. LAWPRO provides services to the Law Society with respect to the Errors & Omissions Fund of the Law Society, which is currently in run-off mode. The Errors & Omissions Fund was responsible for the Law Society's insurance program prior to 1990 and for a group deductible of up to $250,000 per claim prior to 1995.

54. In recent years the Errors & Omissions Fund has been in run-off mode as its resources have been utilized to settle outstanding claims (for policies it had in place between July 1, 1989 and December 31, 1994. As of June 30, 2019, the Errors & Omissions Fund had no outstanding claims liabilities, as all files for 1994 and prior years are closed. With Convocation's approval of the LAWPRO Insurance Program, over the last 10 years, the Law Society has agreed to restrict $15 million of its Errors & Omissions Fund balance to backstop the potential of significant deterioration in the loss experience in the Primary Program.

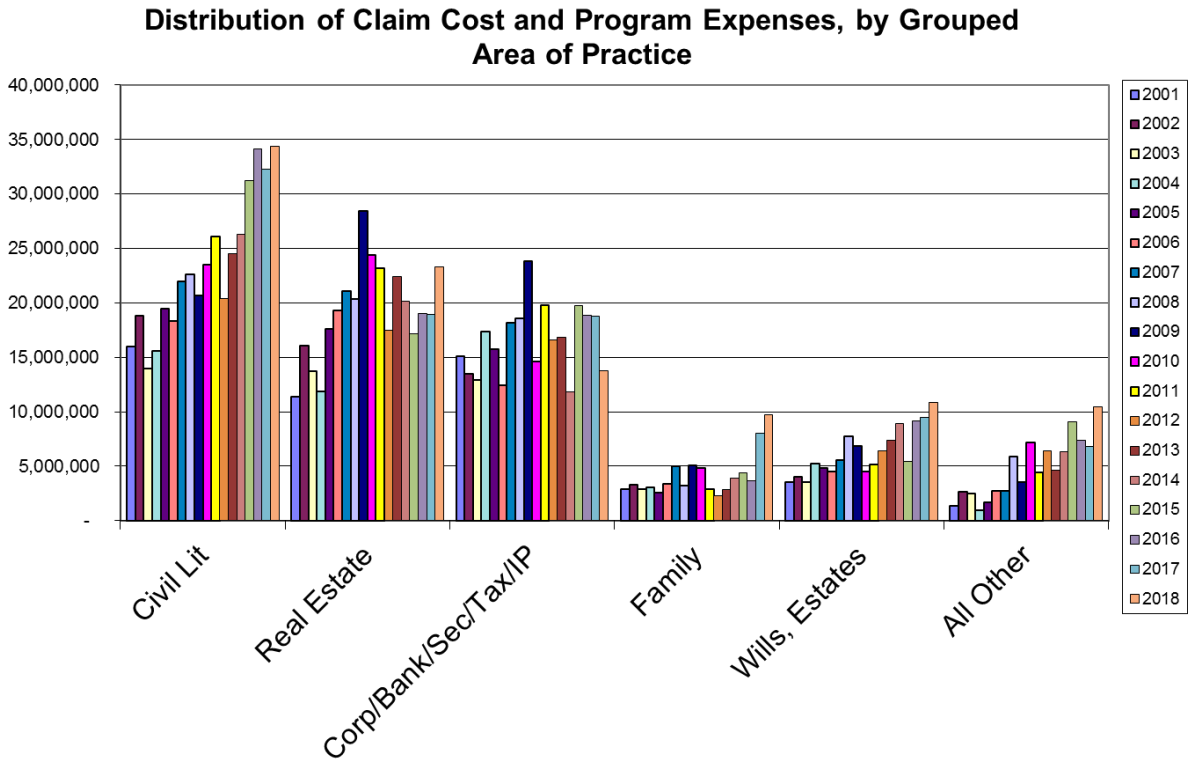
55. The Law Society has requested that LAWPRO agree to release it from this backstop arrangement so that the Law Society may consider using the $15 million currently held by the Errors & Omissions Fund for its general purposes. This change would not impact LAWPRO's financial statements, and is not expected to significantly

impact third parties such as LAWPRO's regulators, reinsurance counterparts or rating agencies.

56. Accordingly, LAWPRO agrees with the Law Society discontinuing the $15 million backstop effective with the 2020 insurance program year.

RISK RATING

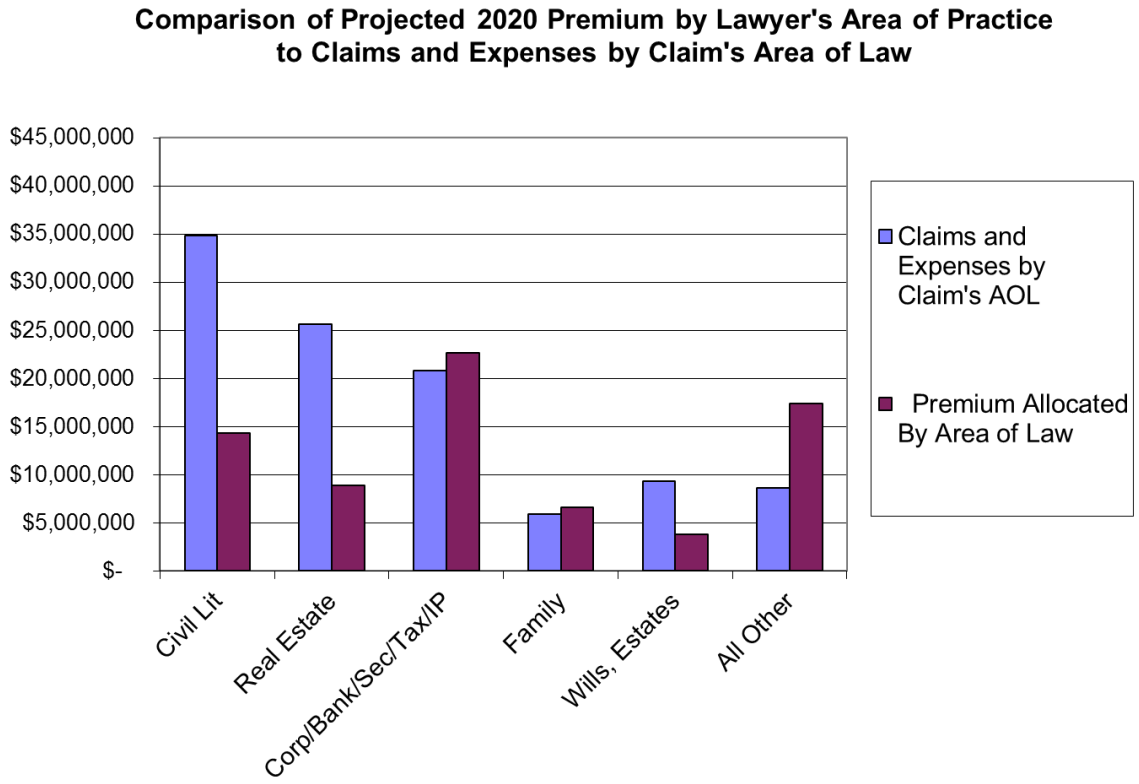
57. Risk rating, a concept raised throughout this Report, promotes fairness by allocating premium responsibility based on risk and deters claims by apportioning higher costs to riskier practitioners. The following chart shows the distribution of ultimate expected claims costs by detailed area of practice.



58. Apparent from this chart are the significant claims costs in certain practice areas and the fact that real estate and litigation continue to be higher risk on a consistent basis over a multi-year period. At the same time, the fact that few lawyers practice

exclusively in one area provides a compelling reason to group together common or related areas of practice.

59. To ensure that risk rating is being achieved, the Primary Program's anticipated losses and related costs must be compared to the premiums. Based on the most recent loss experience under the Primary Program (including that seen under the Primary Program up to December 31, 2018), the following chart compares the anticipated losses and costs distributed by area of law to the proposed base premiums by primary area of practice. The premiums in this chart include the proposed base premiums with real estate practice coverage, innocent party and base premium adjustments, but exclude transaction levies and claims history surcharges.



60. The shortfall between the anticipated claims costs and expenses to base premiums is particularly significant for the areas of real estate law and civil litigation.

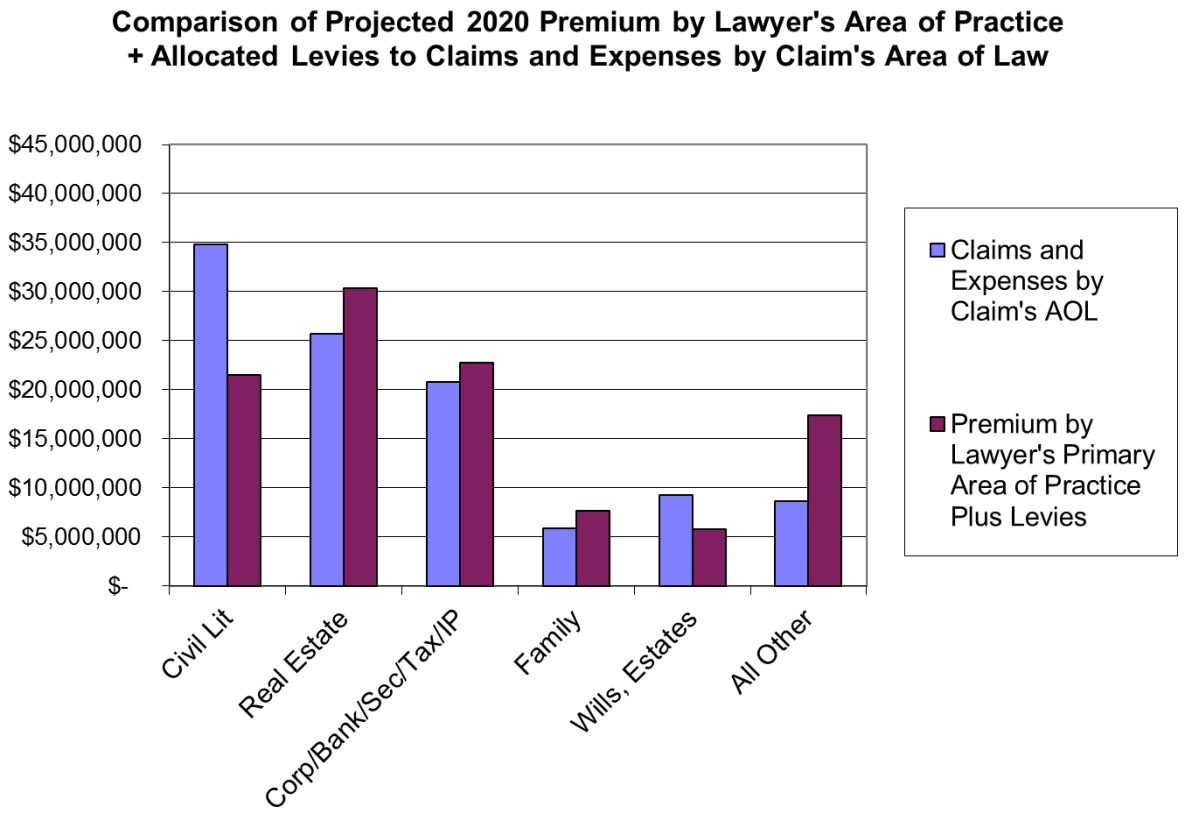
61. The latest Primary Program statistics indicate that without the benefit of the transaction and claims history levy revenues, the 2019 base premium would be about

$7,850 for those whose primary area of practice is real estate. For those whose primary area of practice is civil litigation, it would be about $5,600 calculated on the same basis (once again, higher than base premium).

62. Past Reports to Convocation have discussed the importance of using the transaction and claims history surcharge levies as premiums, to avoid any substantial dislocation among the bar in the higher areas of practice which would otherwise occur with risk rating.[10] By including the transaction and claims history surcharge levies in most recent years, a shortfall for real estate and civil litigation claims costs is typically overcome. While this trend is still applicable to real estate, the same cannot be said for civil litigation. After factoring in transaction levies, the premiums relating to this area of law fall short of the related loss costs.

63. The following chart compares the anticipated premiums sorted by the lawyer's primary area of practice (plus the claims history surcharge, Real Estate Practice Coverage Option ("REPCO") premium and transaction levies) to the anticipated claims costs and expenses for each area of law.

[10] 1999 LAWPRO Report to Convocation, pp. 18-22; 1998 LAWPRO Report to Convocation, pp. 37-37; and 1996 LAWPRO Report to Convocation, pp.32-36.



64. This comparison indicates that, with the benefit of the transaction and claims history surcharge levies, and including the REPCO premium, there is a more acceptable correlation between revenues and claims for the major practice areas. Although we are seeing some moderation in civil litigation claims costs with the recent changes in Rule 48, the relationship between civil litigation costs and premium revenue by lawyers' primary area of practice will need to be monitored to determine whether any further action should be taken on this category in future years.

65. The graph does indicate some subsidy by area of practice, especially by the practitioners in the "All Other" category. This subsidy changes somewhat over time and may vary considerably from year to year for the smaller practice areas, if they were broken down in greater detail.

66. The area of wills and estates has experienced an increase in claim costs over the past decade. Given the relatively small number of practitioners in this area, a few large

claims often skew the results. LAWPRO will continue to monitor these results and propose any action, if appropriate, at a future date.

67. Despite family law claims trending upwards over time, the revenues collected from family law practitioners continue to both cover the associated losses and support the exemption of this work from civil litigation levies.

68. Appreciating the foregoing variables and possibilities of comparison by area of practice, it appears that the Primary Program with the proposed changes will substantially meet its objectives of risk rating. Although some subsidy may exist for certain areas of practice, when taking into account operating costs and commercial realities, the cost of insurance under the Primary Program is considered to be generally reflective of the risk. Notably, the Task Force Report acknowledged that "…no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."[11]

69. Other aspects reviewed in the analysis included the exposure based on the size of the firm, year of call, geographic location and prior claims history. The overall results of this analysis reaffirm the premium discounts already in place, including the surcharge applied to practitioners with a prior claims history. The results of this analysis are reproduced in select graphs in **Appendices "A", "B", and "C"**.

70. Although the volume (size) of practice may not be wholly determinative of risk, the transaction levies do reflect the volume of business transacted in a practice, as well as the higher risk associated with real estate conveyancing and civil litigation.

71. Accordingly, the LAWPRO Board is satisfied with the continued use of transaction and claims history levy revenues as premium, with the result that the cost of insurance under the Primary Program continues to generally reflect the risk.

---

[11] 1994 Insurance Committee Task Force Report, at page 17.

72. Various examples of premiums which would be charged to members depending on the nature of their practice are summarized in **Appendix "F"** of this Report.

REINSURANCE AND CAPITAL PRESERVATION

73. LAWPRO annually assesses its need for reinsurance based on its capital position and its claims results and volatility.

74. In its early years, LAWPRO purchased Primary Program-wide quota share reinsurance[12]. A stronger financial position and more stable claims experience enabled LAWPRO to cease reinsuring the Primary Program with quota share reinsurance starting in 2003. In addition to relying on LAWPRO's own capital, the resources of the Errors & Omissions Fund up to a $15 million cap were effectively relied on starting in 2003.

75. As indicated in paragraph 56 of this Report, the $15 million backstop will be discontinued effective the 2020 Program.

76. LAWPRO is in a position to rely on its own resources and will therefore not need to pursue the expensive course of purchasing reinsurance on a Primary Program-wide basis.

77. For 2020, LAWPRO will again look to purchase reinsurance protection against the possibility of multiple losses arising out of a common event or nexus, as it has since 2005 (the "Clash Excess of Loss Reinsurance"[13]). This protection against aggregated losses extends across both the Primary Program and TitlePLUS initiative, and offers

---

[12] "Quota share" reinsurance is an arrangement where an insurer (like LAWPRO) will cede or give a portion of its premiums and claims risk to another insurer (a "reinsurer") at a fixed percentage. This allows the insurer to retain such risks and premiums as it is comfortable with, while passing on the rest to the reinsurer(s).

[13] "Excess of loss" reinsurance is an arrangement where a reinsurer will indemnify an insurer for losses that exceed a specified limit. The insurer and reinsurer can negotiate the amount of risk the insurer retains before the reinsurance responds, the upper limit of the reinsurance coverage, and the premium (which is typically calculated based on the insurer's annual premiums, subject to a minimum premium amount).

some measure of protection against a series of claims, such as fraud-related claims where the fraudster targets more than one lawyer, or a single defect in the title affecting an entire condominium project.

78. Accordingly, 100 per cent of the premiums and losses for the Primary Program will again be retained by LAWPRO in 2020, subject to reinsurance protecting the Primary Program from multiple losses arising out of a common event or nexus.

CAPITAL REQUIREMENTS

79. As LAWPRO has worked through some quite challenging times, its prudent and conservative approach to the issues of the day has stood it in good stead. LAWPRO has maintained a solid capital base, as well as a robust asset/liability matching program to ensure that the funds are available to satisfy the claims obligations undertaken to date. Also, LAWPRO has received a consistent "A" (Excellent) rating from A.M. Best Co. each year since 2000, and since 2012 has retained its "stable" outlook based on its commanding market profile and recent improvement in operating and underwriting results. (An "outlook", which looks more to the future, is different from a "rating".)

80. As a final consideration before determining the base premium, LAWPRO must consider its capital needs. Canadian regulators use the Minimum Capital Test ("MCT") in order to assess capital adequacy of a property and casualty insurer. The MCT is a risk-based ratio calculation which compares the insurer's capital or net assets available to the "capital required". Through the capital required component of the test, regulators prescribe certain additional capital or margins that must be held based on the various types of assets and liabilities on the insurer's balance sheet.

81. A significant margin requirement relates to the approximate 25 per cent additional capital that must be held for all the net claims liabilities on the books that relate to commercial liability (which includes professional liability coverage). Given the steady historical growth of LAWPRO's net claims liabilities over the last decade or so, even a positive net income result can often be accompanied by a decline in LAWPRO's

MCT ratio. As a very general rule of thumb, LAWPRO annually requires approximately $5 million of either net income or increased after-tax net unrealized gains on its surplus portfolio[14] to maintain a flat to slightly increasing MCT ratio.

82. The determination of a specific insurer's "ideal" MCT ratio is difficult, as historic industry approaches were primarily designed simply to identify levels that are too low. Canadian regulators require that insurers do not fall below various MCT levels, such as the 100 per cent minimum and 150 per cent supervisory levels (meaning the regulator could come in to take over management and operation if an insurer falls below this level). In 2016, LAWPRO completed its first capital assessment pursuant to the Autorité des Marchés Financiers' *Guidance on Capital Adequacy Requirements*, and the Office of the Superintendent of Financial Institutions' *Guideline E-19 Own Risk and Solvency Assessment*, resulting in LAWPRO's internal target ratio being lowered from 180 per cent to 170 per cent. This result has been reaffirmed in 2017, 2018 and again in 2019.

83. In addition, as part of the above exercise and reconfirmed this year, the Board set LAWPRO's long-term preferred operating range at 210 to 240 per cent based on LAWPRO's risk profile and its unique ability to set premiums and raise capital, which differs significantly from those of other commercial insurers in Canada. An MCT result in this range would allow LAWPRO some capacity to absorb unexpected losses or changes in market conditions, and have time to implement a strategy to restore capital levels to the desired range.

84. LAWPRO's MCT of 237 per cent as of December 2018 is within the Board's preferred operating range of 210 per cent to 240 per cent, indicating that a phase of capital replenishment is not currently required. An MCT in this range represents an appropriate buffer, allowing the Company to withstand adverse scenarios such as a sudden influx of large claims, higher than expected inflation, or investment deterioration, and still remain above the various regulatory thresholds.

---

[14] Increases in net unrealized gains relating to the liability-matched portfolio, as well as realized gains, are included in net income.

CONCLUSION

85. The LAWPRO Board considers the Primary Program changes outlined above to be appropriate and consistent with LAWPRO's mandate as set out in the 1994 Insurance Committee Task Force Report. The LAWPRO Board offers this Primary Program of Insurance for 2020 and asks for Convocation's acceptance of this Report at the September Convocation, so that the 2020 Primary Program can be implemented by January 1, 2020.

86. ALL OF WHICH LAWPRO'S BOARD OF DIRECTORS RESPECTFULLY SUBMITS TO CONVOCATION.

September 2019

Andrew Spurgeon

Chairperson of the Board

Lawyers' Professional Indemnity Company

Malcolm L. Heins

Vice-Chairperson of the Board

Lawyers' Professional Indemnity Company

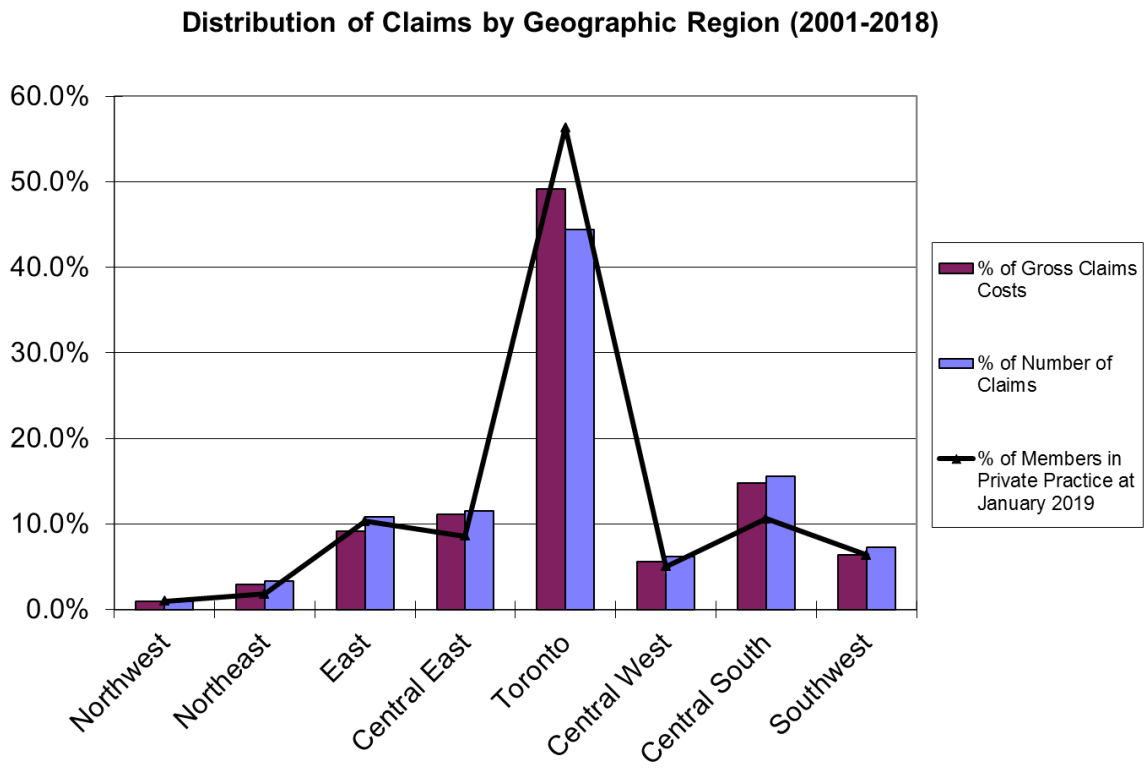
Daniel E. Pinnington

President & CEO

Lawyers' Professional Indemnity Company

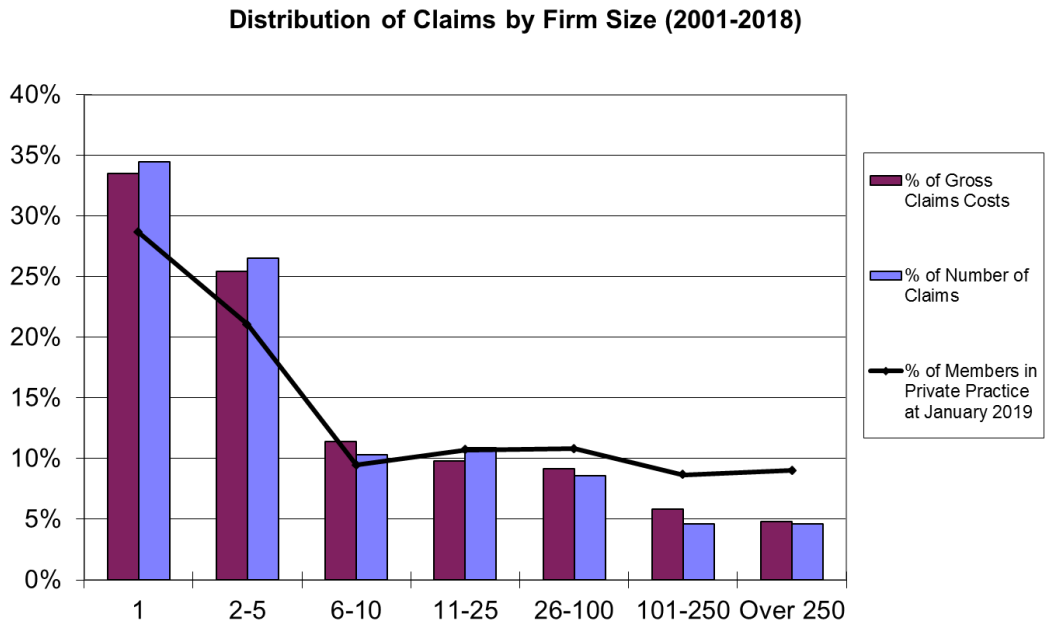
Appendix "A"

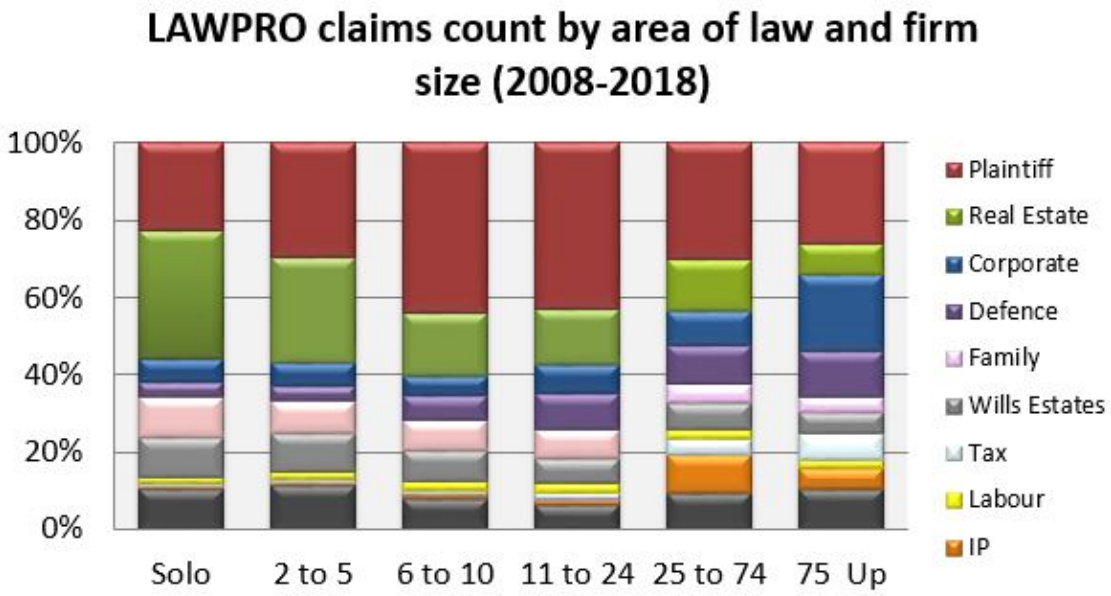
Distribution of Claims by Geographic Region



Appendix "B"

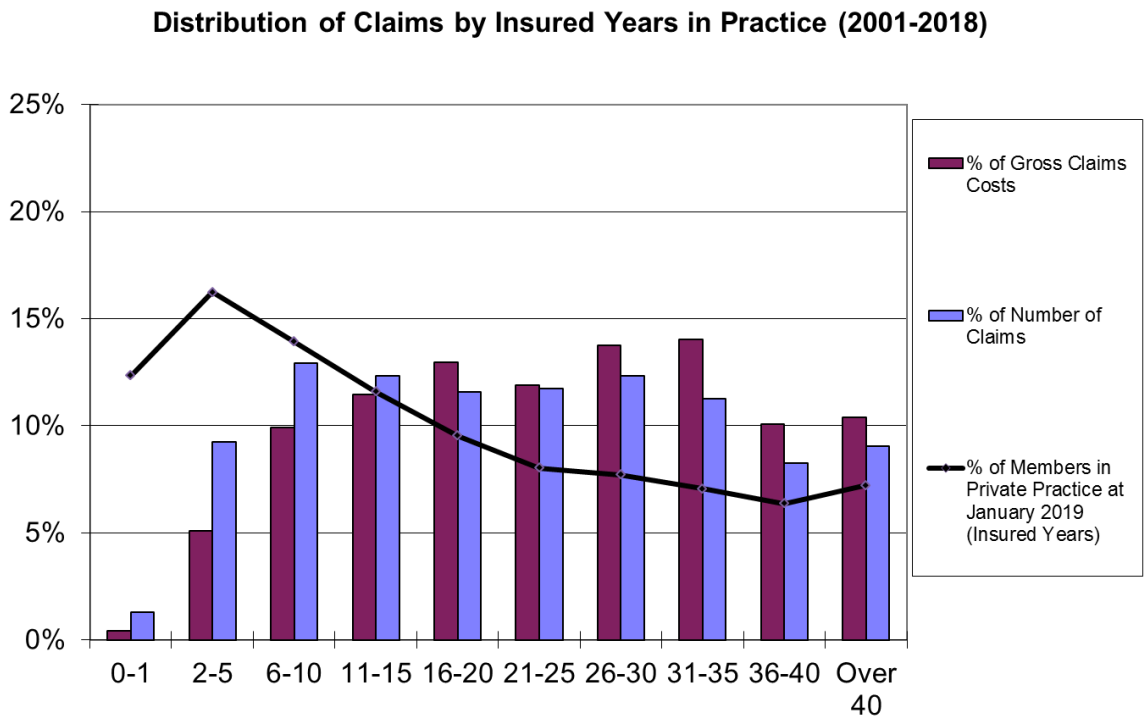
Distribution of Claims by Firm Size





Appendix "C"

Distribution of Claims by Years in Practice



Appendix "D"

Detailed Descriptions of Causes of Loss

Communications: Communication-related errors (including poor communication, not keeping clients informed or failing to obtain client consent) are the biggest causes of claims in all areas of law (except litigation, where it is the #2 cause) and in firms of all sizes. While the most numerous claims, they are at the same time the most easily prevented. Lawyers can reduce their exposure to these types of claims by controlling client expectations, actively communicating with the client at all stages of a matter, documenting advice and instructions, and confirming in writing what work was done on a matter at each step along the way.

Time management: These kinds of claims including failing to ascertain a deadline, failing to calendar the deadline, and failing to react to the deadline even when it was known. These lapses often become claims when a limitation period ends up being missed or an action is administratively dismissed due to failing to move the litigation forward appropriately. There are also claims resulting from procrastination when a lawyer lets files that require work languish for extended periods of time. Time management claims are heavily concentrated in the litigation field, as it is so reliant on deadlines. Practice management software and tickler systems can help prevent these claims, as can lawyers building in more time cushions so that they are not adversely affected by unexpected delays.

Inadequate investigation: Modern technology and busy practices may be behind the tendency of lawyers to give quick legal advice without taking extra time to dig deeper or ask appropriate questions on a client's matter. In recent years, LAWPRO has seen a big increase in these types of claims in real estate, litigation and will/estates areas of law. High-volume real estate practice often means lawyers do not have enough time to ask the clients about their plans for the property, and as a result don't do the necessary searches or obtain the proper title insurance.

Failure to know/apply the law: These claims result from a lawyer not having sufficient or current knowledge of the relevant law on a matter in which he or she is working. Extensive federal and provincial legislation, as well as voluminous case law, help make

this the second-most-common type of claim in family law. This category also includes failing to know or appreciate the consequences of tax law in corporate/commercial matters. Lawyers can best avoid this type of claim by sticking to the law they know best and not “dabbling” in other areas.

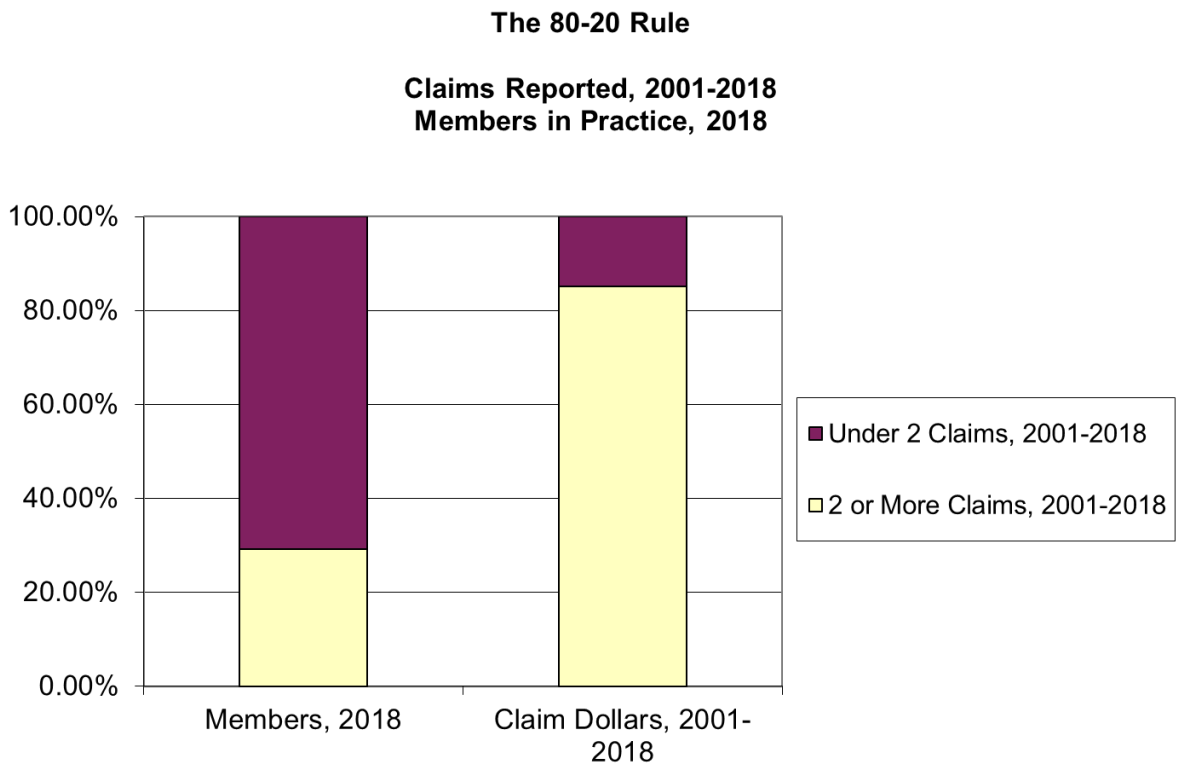
Conflict of interest: There are two types of conflict claims: the first arises when conflicts occur between multiple current or past clients represented by the same lawyer or firm. The second is a conflict that arises when a lawyer has a personal interest in the matter. As they regularly act for multiple clients/entities, real estate and corporate commercial lawyers experience proportionately more conflicts claims than other areas of law, while litigators have a relatively low rate of conflicts claims.

Clerical errors: These types of errors include things such as simple clerical mistakes, errors in mathematical calculation, work delegated to an employee or outsider that is not checked and failure to file documents. As important as delegation is to the efficient functioning of a law firm, lawyers need to take the time to review the work as they are ultimately responsible for it.

Fraud: Fraud continues to be a significant risk for LAWPRO, one which could cost the Primary Program significant claims dollars if not prevented. Lawyers are reporting attempted frauds to LAWPRO on a daily basis. Fraudsters on occasion still successfully dupe lawyers and law clerks, and it is not just real estate lawyers who are targeted. Litigation, business and family law lawyers are regular targets of bad cheque scams involving debt collections, spousal support payments and business loans. “Phishing” attempts and other cyber hacking methods are targeting lawyer trust accounts. Through our efforts, including publication of Fraud Fact sheets which are available at practicepro.ca/fraud, Ontario lawyers are clearly more aware of frauds, but ever more sophisticated frauds mean lawyers must continue to be vigilant.

Appendix "E"

The 80-20 Rule



Appendix "F"

Premium Rating Examples (In Dollars)

	1995♦	**2005♦♦**	**2015♦♦♦**	**2019♦♦♦♦**
Base premium	$5,600	$2,625	$3,350	**$2,950**
Examples:				
1. Sole Practitioner Practising Real Estate Law - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-filing of application	$5,600*	$2,228	$3,274	**$2,754**
2. Firm Practitioner Practising Real Estate Law - $25,000 defence & indemnity deductible - $250,000 Mandatory Innocent Party cover - early e-filing of application	$6,000*	$2,497	$3,406	**$2,781**
3. New Lawyer Practising in Association - first year in practice discount - $250,000 Mandatory Innocent Party cover - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-filing of application	$3,900*	$1,428	$1,599	**$1,304**
4. Criminal Lawyer (sole practitioner) - Restricted Areas of Practice discount - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-filing of application	$5,600*	$1,178	$1,349	**$1,179**
5. Part-time Lawyer (in association)	$6,000*▸	$1,877	$1,923	**$1,504**

	1995♦	2005♦♦	2015♦♦♦	2019♦♦♦♦
- Part-time Practitioner discount - $1,000,000 Optional Innocent Party cover - $10,000 defence & indemnity deductible				
6. Firm Practitioner with 1 Claim - claims history levy surcharge - $5,000 defence & indemnity deductible - $250,000 Mandatory Innocent Party cover	$8,500*	$5,375	$6,100	**$5,575**
7. Sole Practitioner with 2 Claims - claims history levy surcharge - $5,000 defence & indemnity deductible	$10,600*	$7,625	$8,350	**$7,950**
8. Designated Agency Lawyer - $5,000 defence & indemnity deductible - early e-filing application - Risk Management Credit (x 2)	$5,600	$2,500	$3,225	**$613**ɣ

* Subject to a $6,000 defence and indemnity deductible (adjusted to $7,500 in the case of an insured with one previous claim, or $8,500 in the case of two previous claims).

► Subject to $250,000 Innocent Party cover only, additional limits not available.

♦ Members are also required to pay a $25 levy for each civil litigation or real estate transaction not otherwise excluded.

♦♦ Members are also required to pay a $50 levy for each civil litigation or real estate transaction not otherwise excluded.

♦♦♦ $65 per real estate transaction and $50 per civil litigation transaction. Premium for the Real Estate Practice Coverage Option was also applied.

♦♦♦♦ $65 per real estate transaction, $100 per civil litigation transaction, and $100 Real Estate Practice Coverage Option applied.

ɣ If a lawyer is employed exclusively be one or more Designated Agencies and any civil litigation transaction is performed in the course of such employment, the Lawyer is not required to pay a civil litigation transaction levy surcharge.

Appendix "G"

LAWPRO Vision, Mission & Values and Corporate Social Responsibility are available for download at: https://www.lawpro.ca/about/vision-values/