Professional negligence and insurance are topics looming over every lawyer’s head, for as long as he or she holds the licence, but which we prefer not to talk about in polite company. Get over it. Although most lawyers will be blessed with a career without a lawsuit against them, keeping it that way requires constant vigilance. For the personal injury practitioner, clients have a bad habit of calling the office for a consultation just before the limitation period expires. An ambiguously explained cloud on title suddenly becomes a big issue when the purchaser client wants to flip the property, a month later. The failure to bring a charter challenge to evidence obtained on a search without a warrant. A calculation error on a spousal support calculation.

The moment after the error gets noticed, the instinctive response may be to repair the situation by yourself. One of the most famous accounts of bungled self-help was that of a former Law Society Treasurer who was reprimanded for an affair with a family law client without first sending the client out for independent legal advice. In the case, the lawyer asked the client mid-relationship to sign a waiver stating their professional relationship had not suffered, without allowing the client an opportunity to obtain independent legal advice. You would think the head of the Law Society would have known to do that. Although this was a discipline matter, in many such instances damages claims come in tandem with complaints to the regulator.

This paper will help you identify the sources of potential claims, and introduce the nature of insurance coverage which may respond.
Some E&O Claims are More Viable than Others

Whatever preconceptions the public may harbour, some aspects of legal practice are more prone to claims than others.

In the English Common Law, solicitors were subject to the law of negligence and barristers could not be sued for courtroom errors. In Canada, where the bar combined the two professional designations, lawyers could be sued for falling below the expected standard of care. The Ontario Court of Appeal decision in *Wong v. Thomson, Rogers* (1994), 48 A.C.W.S. (3d) 868 (Ont. C.A.), in which I appeared for the law firm, a Canadian appellate court accepted for the first time the portion of the trial judgment in *Demarco v. Ungaro* (1979), 95 D.L.R. (3d) 385 (Ont HCJ) which conferred a wide range of discretion to litigation counsel for the tactical decisions they make in court and court procedures.

It is actually hard to sue a litigation lawyer for any step requiring an exercise of professional judgment during a hearing or trial. It is like suing a surgeon for using one procedure as opposed to another, both of which are acceptable. Unfortunately, the fear of being sued for exercise of judgment leads to defensive practices which are not always in the client’s interests. Some examples of good practices which are watered down or undermined by defensive litigation:

- cutting short a cross-examination at a good moment can have maximum impact with a jury; but counsel are afraid they will be criticized for failing to ask every possible question
- choosing the best legal arguments and addressing them in priority; but counsel worry about their client’s pet arguments, some fanciful, which they have instructed counsel to advance
• admitting non-contested documents, to allow the court to focus on their contents, not their admissibility; but counsel fear their clients perceive concessions of any kind are signs of weakness

In contrast, the transactional lawyer’s job is to pore over paper documents to ensure clients receive the maximum protection of the law. Whether it is a real estate transaction, a business agreement, or a regulatory application, the client is paying for the completeness of work, not necessarily for persuasion of a judicial or administrative panel. If litigation arises from a dispute, it will be over the meaning of one, or at most a handful, of words. Or it will be the failure to do something on time. The view that a lawyer’s use of the word “and” instead of “or” to express the parties’ contracting intentions is a classic example of the need for a lawyer to have a clear understanding of the client’s instructions. Other problems, such as drafting style or the choice of terms to define or not to define, require judgment and expertise which are less readily criticized.

In both litigation and transactional work, there is a simmering expectation on the part of clients that lawyers engage in “strategic” practices or exercise “project management” skills. This trend can impact your avoidance of errors and omissions in two critical ways:

• Excessive caution, such as following rules or precedents to the letter in instances where good judgment would have called for a curtailment from exact compliance, can come back to haunt the more experienced practitioner, who commands a higher hourly rate to make tough determinations.
• Although lawyers are not expected to predict the future, we are increasingly called on to describe a range of likely outcomes. Failure to qualify the limits of predictive analysis can lead to unmet expectations, if the actual outcome is “off the radar.”
Lawyers are called on more and more to push the envelope of acceptable practice. Clients expect absolute loyalty, whereas the rules of conduct provide for competing loyalties among the lawyer’s relationships with various stakeholders. The *LSUC v. Groia* matter showed the dilemma of choosing between a winning tactic and complying with the rules of the profession regarding advocacy.

Recognition of the boundaries of good practice is a matter of continuous vigilance. That is the difference between being a technician and being a professional. You must also protect yourself, your law partners and those depending on you. Making sure the activities of your law practice are covered by insurance is also a priority. The balance of this paper provides an overview of significant topics relating to lawyers’ professional liability insurance.

**Mandatory E&O Coverage: Some Need-to-Know Topics**

1. **Claims-Made not Occurrence**

   In Ontario, the mandatory LawPro lawyers’ errors and omissions (E&O) policy is a “Claims-Made” policy. This means that it responds to claims not when the error or omission occurred, but when the demand or allegation is made against you. This makes the policy different from, say, liability provisions in most homeowner, automobile and business insurance packages, which are “occurrence” policies insuring against events that take place during the policy period. This distinction ordinarily does not affect lawyers, because it is a condition of our licence to carry at least $1,000,000 in E&O insurance.

   However, where the difference becomes important is the instance where a lawyer retires or changes from private practice to take up an employee lawyer position in a company or in public service. For example, an error committed by a lawyer in her
last year of private practice may not give rise to a claim until several years after he or she quits to take an in-house position. There could be no coverage. A good practice to follow for those who are about to change jobs from private practice to in-house, is to go through every file you are handing over to another lawyer, and ensuring there is nothing to report to LawPro. If you do find an error or omission, let LawPro know about it. Under Part II, section B of the LawPro policy, the report itself is sufficient to bring future claims into your last policy term, thus affording you coverage.

Further, if during the POLICY PERIOD, the INSURED first becomes aware of and first reports to the INSURER a CLAIM or circumstances of an error, omission or negligent act which any reasonable LAWYER or LAW FIRM would expect to subsequently give rise to a CLAIM, the INSURER shall deem these a CLAIM made against the INSURED during this POLICY PERIOD, even if a CLAIM is only advanced as against the INSURED after the POLICY PERIOD, and even if a related CLAIM or related circumstances of an error(s), omission(s) or negligent act(s) are reported after the POLICY PERIOD.

(b) When to give notice of a claim

It is always best practice to report to LawPro any time you have even an inclination that you might have committed an error or omission. Don’t worry about what anyone else may think. It’s your assets and reputation on the line. If you are an associate or junior partner in a law firm, reporting to your superiors and to LawPro will usually be appreciated. The worst thing you can do is to try to ignore or hide the problem.

Under Part IV (General Conditions), section E, of the standard LawPro policy, you must immediately give LawPro notice, not only of any E&O claim made against you, but also any “circumstances of an error, omission or negligent act which any reasonable person or Law Firm would expect to subsequently give rise to a claim hereunder.” The
most important aspect of this coverage condition is that you cannot make an error which might get you sued and ignore it, hoping your client will not notice or that the client will not suffer any adverse consequences. If you were to do that, a host of problems will start compounding against you, including:

- breach of subrule 6.09(1) of the LSUC Rules of Professional Conduct, for failing to alert a client of a serious error or omission, leading to disciplinary action
- breach of subrule 6.09(2) of same, for failure to notify the insurer, also with possible disciplinary sanctions
- you carry the burden of a claim for as long as 15 years (the long-tail limitation period), until the client’s discovery of the claim starts the two-year limitation period under the *Limitations Act, 2002*
- you risk breaching the insurance policy condition and losing coverage under the policy, putting your personal assets at peril
- you will almost certainly lose a valued client, most of whom will value your honesty and integrity and stay with you, provided the potential harm can be averted or minimized
- you may not collect a fee for valuable work you have done, and are liable to have all of the accounts you have rendered assessed based on a negligent service argument

The insurance rationale is simple: the insurer would like as much lead-time as possible, to see if any error can be “repaired” or mitigated.

The “reasonable person or Law Firm” part of the standard by which circumstances of error must be reported does not mean lawyers or law firms are not reasonable people (we tend to be!). Rather, the word “reasonable” describes both persons and law firms. The second part of the phrase ensures that the lawyer is not only to report what clients might consider errors, but what fellow lawyers might consider errors. That is a rather
high standard, given that we are a self-critical profession, all of whom are taught to reach for exacting standards. If you have any doubt whether you have committed a self-reportable error or omission, contact the Law Society’s confidential Practice Management Hotline (416-947-3315 or 1-800-668-7380 extension 3315), or call another lawyer whom you respect, on a confidential basis. In either case, keep a separate file for potential claims, and make a written record of your discussion. That way, if the decision is made not to self-report, you can go back to the discussion to prove you made an effort to determine what a reasonable law firm might or might not do.

Also, as stated earlier, reporting circumstances out of which claims might arise, as immediately as possible, can also save you from an uncovered claim, should you terminate insurance upon taking up an employed in-house lawyer position or wish to retire.

(c) How (not) to pick your defence counsel

You will have a say in the selection of defence counsel and will be provided an opportunity to request one who will best serve your needs. Given that your reputation and your future premium levels are at stake, you will want more than a ‘hired gun.’ You will want someone whom you can trust to understand the nature of your practice so as to minimize the impact of a claim, whatever its merits.

Remember that it is a claim made against you. Sometimes lawyers requiring defence counsel will want to appoint their friend or a colleague from a local bar association. Almost invariably, this is the worst thing you can do. Acting for personal friends or long-time acquaintances poses conflict of interest issues because the practice compromises defence counsel’s objectivity – a pillar of good and aggressive defence representation.
Another frequent no-no is for lawyers in specialized areas wanting defence counsel from the same area, for fear that a generalist defence litigator may not understand the nuances. It is an offshoot of the classic phrase, “A lawyer who represents himself in court has a fool for a client.” The classic is a real estate lawyer seeking to retain another real estate lawyer as defence counsel. The problem with that is that defending a professional against civil liability is not real estate law but tort and contract law. A defence lawyer needs to know how to craft pleadings, competently conduct discoveries, and know her or his way around the courtroom. A fellow specialist could be considered to be an expert witness as to the standard of care, and should not be the lawyer representing the real estate lawyer on an error or omission. (The exception to this might be in matters of repair, where a fellow real estate lawyer or other solicitor might be retained to make right or to mitigate any damages suffered by the client.) If doctors and dentists entrust lawyers to defend them in court on malpractice claims, so can lawyers.

Finally on this point, appointing a friend or long-time colleague to act as an expert witness on your behalf is even worse than hiring such a person as your defence counsel. Rule 53.03 of the Ontario Rules of Civil Procedure require expert witnesses to execute an acknowledgment of his or her duty to be impartial. If you or your counsel insist on retaining the best man or maid of honour from your wedding as an expert witness, you can count on the former client’s lawyer to find out about it and cross-examine the expert on impartiality, holding a picture from the wedding that a friend or relative posted on Twitter. Juries already arrive at court suspecting lawyers and their expert witnesses to be friends. Why not dispel the myth by retaining an expert with whom you’ve had no prior social interaction?

**(d) Claims History Levy surcharge (Endorsement 4 of the Standard LawPro Policy)**

Depending on the number of claims paid, a premium surcharge is imposed for any past “claims paid” over a period of five years, starting with $2,500 for the first
“claim paid.” The definition of a “claim paid” is a payment made by LawPro “pursuant to a judgment, or by way of repair or settlement of a claim” or “… for CLAIM(S) reported on or after January 1, 2004, where payment is made in respect of a CLAIM resulting in the LIMIT OF LIABILITY per CLAIM under the POLICY being exhausted, even though no payment has been made on the INSURED’S behalf under the POLICY pursuant to a judgment, repair or settlement, unless the INSURED can establish that no final judgment has as yet been made against the INSURED, and no payment has as yet been made on the INSURED’S behalf outside of the POLICY pursuant to a judgment, repair or settlement.” For the purposes of the present discussion, I focus on the definition which includes payment to repair or settle a claim.

It does not matter whether the claim paid was for a few thousand dollars, or a few million. At six claims paid per five year period, the surcharge is as high as $35,000 per annum, and there is potentially a limitless surcharge of $10,000 per claim paid, above six. The fact that LawPro has the right and discretion to settle claims, it also has a duty to you, the Ontario lawyer, to do so in good faith. LawPro will honour that commitment. However, it is also important for you to understand the consequences of various settlement opportunities, as well as those of defending the claim to trial.

Most senior lawyers, but not many new ones, appreciate what this means. For example, if you had been acting for a client on a small business matter were subsequently sued after the deal falls through, the issue of settlement will come up. The former client, taking advice that the chances of success are not good, might offer to settle out for a modest fraction of the claim. By usual standards these days, a settlement of $5,000 would be considered a nuisance settlement and a win for the defence. But if the $5,000 settlement made by LawPro results in a Claims History Levy Surcharge totalling more than that amount over the ensuing five years, you may as well have paid the $5,000 yourself. (Note that this feature of the policy refers to “claims paid.” There are no penalties for the number of times you report yourself in respect of
potential claims, provided they do not result in payments, except for the limited circumstances in the second definition of “claims paid.”

Is it Law?

Lawyers are covered against professional negligence
Lee is a lawyer
Lee is covered against professional negligence.

This flawed version of the famous “Socrates is mortal” syllogism\(^1\) illustrates a common pitfall. The fact that Lee is a lawyer does not mean that he is practicing law when he commits negligence. For example, when Lee sat as a board member of the Canadian Bar Association, he would not have been covered by the LawPro E&O policy and would have had to rely on the corporation’s Directors and Officers’ coverage. The reason for this distinction in coverage arises from the wording of Part I, clause A of the standard LawPro policy is the so-called “insuring agreement,” the part where the insurer agrees to pay. It reads that the insurer agrees:

To pay on behalf of the INSURED all sums which the INSURED shall become legally obligated to pay as DAMAGES arising out of a CLAIM, provided the liability of the INSURED is the result of an error, omission or negligent act in the performance of or the failure to perform PROFESSIONAL SERVICES for others.

In order to come under this coverage, the claim must be for unintended consequences of legal services you perform for clients. There is an expansive body of

\(^1\) All men are mortal. Socrates is a man. Therefore, Socrates is mortal.
case law on the distinction between an “error, omission or negligent act” and an intentional act such as fraud or deceit. Much of this case law has focused on pleadings of former clients whose allegations can be construed as fraud, negligence, or perhaps both. Almost all of the case law deals with the duty to defend the law suit. The topic extends beyond the scope of this presentation, but it is important to note that this will be a threshold issue in most cases where the E&O insurance coverage is in doubt.

The next issue that frequently emerges arises from the definition of “professional services.”

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, subject to Part II Special Provision A; 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 trade mark agent.

The first line of the above provision makes it clear that you are only insured for services performed in respect of Canadian law. This means the coverage is determined, not by the physical location of your practice but rather the choice of law. This can be complicated, if you have an international practice. It means you are covered if you fly to another country to conduct an examination for discovery under the Ontario rules. It also means you are covered if you are conducting a deposition in Toronto in respect of a U.S. law suit under commission ordered by a Canadian court under the local rules, but you are not covered if you act as counsel or as agent in the U.S. law suit in the same deposition using U.S. deposition rules, without a Canadian court order. It means you are
covered if you are advising clients about immigrating to Canada, but not covered if you are advising clients about emigrating to another country.

The coverage for providing services pertaining to Canadian law is also subject to the condition either that such services occupy less than ten per cent of your docketed time or gross billings for professional services for the year; or that the claim or civil suit against you is brought in Canada, and the related issues, including liability and damages, are adjudicated on their merits in Canada pursuant to the laws of Canada, its provinces and territories, by a court in Canada. I would read the either/or to mean that the coverage applies to out-of-country services where the suit against you is launched in the foreign jurisdiction, provided you do not exceed the ten percent rule, and to suits launched in Canada, regardless of the ten per cent rule, provided they also meet the “Canadian law” requirement.

It can also arise in less jet-setting practices. What if your Snow Bird client comes to you about an auto accident in Florida? Unless you are also called to the Florida Bar and are licensed and insured to practice there, you can advise him or her that the Ontario law of conflicts of laws would likely choose Florida law for the substantive law, including any limitation periods for pursuing the other driver. If you were to look up the Florida law on the internet and get the limitation period wrong, you may very well not be covered for the mistake. The standard of care and insured course of action in that instance would be to consult a lawyer from the foreign jurisdiction and to report the advice as a matter of fact and not of law.

At first blush, the above coverage may also appear to cover various non-lawyer activities such as acting as a trustee for a relative’s estate. Note, however, that the activity can arise out of such non-law activities, but the services rendered to the estate or other body must be “as a lawyer.”
Excess Coverage

Excess insurance is relatively inexpensive, and well worth the peace of mind. Lawyers tend to be born insomniacs – you don’t need anything else keeping you up at night! Although it is not cheap, like any other cost of doing business you have to budget for it and build it into the overhead portion of your fees.

LawPro’s standard (mandatory) policy provides coverage with insurance limits of $1 million per claim and $2 million in the aggregate. This means there is $1 million in coverage for each claim, but no matter how many claims there are against you, the maximum payable for claims made during any policy year is $2 million.

I once ran into a lawyer who was practicing in residential real estate. Somehow the topic got on to excess insurance. He said he did not have any. This was at a time when the majority of houses in the Toronto area were creeping up above the $500,000 range, and any house in a prime neighbourhood started at over $1,000,000. I told him that even a purchase/sale deal worth $1,000,000 is in fact worth more, considering the transactional costs of the deal itself. I told him that he has to take stock of the highest value of any file in his practice, and get excess insurance to cover it plus any unexpected surprises, such as a claimant saying the property was increasing dramatically in value.

Similarly with litigation. If a claim comes in through the door for more than the limits of your existing excess liability coverage, phone your broker and get your excess insurance topped up. For example, your average sole practitioner or small firm involved in personal injury will occasionally see a motor vehicle accident case involving a catastrophic victim. The statutory accident claim itself could be worth upwards of $2 million, and these days tort awards into the high teens (millions) are not unheard of. A missed limitation period or a bad result at trial could lead to a claim, several millions of dollars above the standard LawPro limits. Why take the risk?