

# New Rule 48.14



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## (Administrative Dismissals) Transition Toolkit

Effective January 1, 2015, a new Rule 48.14 brought significant changes to the administrative dismissal regime in Ontario. After several hundred claims and almost \$10 million in claims costs in just three and a half years, LAWPRO was happy to see old Rules 48.14 and 48.15 revoked.

While LAWPRO believes the new rule may stem the tide of administrative dismissal-related claims under the old rules, the changed deadlines, processes and transition provisions introduce new claims risks that may trap the unwary lawyer. Remember, **under the new rule courts will automatically dismiss any action not set down for trial five years after commencement, without sending notices of any type** to parties or their lawyers. Your tickler systems must remind you of relevant dismissal deadlines.

LAWPRO encourages all lawyers to familiarize themselves with the requirements under the new Rule 48.14 and make all necessary changes to internal firm systems and processes. While claims may happen for reasons beyond your control, many of the claims risks under Rule 48.14 can be significantly reduced or eliminated with some proactive claims prevention efforts.

This Toolkit provides advice and tools lawyers and law firms can use to lessen the risk of a claim under the new rule. For ease of reading, all references to Rule 48.14 in this Toolkit are to the new rule, unless noted.



### Critical dates under the new Rule 48.14

- New Rule 48.14 is effective **January 1, 2015**
- Actions commenced on or after **January 1, 2012** will automatically be dismissed without notice 5 years after commencement
- Actions commenced before **January 1, 2012**, will be automatically dismissed **January 1, 2017**
- Transition provisions impact whether a status hearing will occur for **pre-January 1, 2015** actions (see page 2 for details)

There are four tools in this Toolkit:

- 1 A **Firm Transition Checklist** containing a list of the steps firms should take to update ticklers and other firm systems and processes to ensure Rule 48 requirements are met on all files.
- 2 An **Individual File Checklist** containing a list of the steps to be taken and ticklers to be updated for an individual file.
- 3 A **File Progress Plan** that can be used to help actively manage and monitor the status and progress of work on an individual file.
- 4 A **Rule 48 Transition Training PowerPoint®** to help train law firm lawyers and staff on Rule 48 and file management best practices (available at [practicepro.ca/Rule48](http://practicepro.ca/Rule48)).

An electronic version of this Toolkit and LAWPRO's Rule 48 Transition Training PowerPoint are available at [practicePRO.ca/Rule48](http://practicePRO.ca/Rule48)

### The worst case scenario: When lawyers drop the ball on all their files

A very dangerous scenario arises when a lawyer takes an unexpected hiatus from legal practice (for example, due to illness, substance abuse or family emergency) or is still in the office but overwhelmed and "not present," which leads to the ball being dropped on several files, or even his or her entire practice. This triggers a "cluster" of administrative dismissals and it is a scenario that LAWPRO sees all too frequently, even at law firms that should have systems to prevent this from happening. When we see these clusters it appears that the departed lawyer's active files were not being monitored by a staff person or transferred to a colleague.

Lawyers and law firms should be prepared for unexpected work interruptions. Consider the possibility that an illness, injury or other contingency could cause someone to struggle with keeping up, or even leave practice for a significant amount of time. Ask yourself: does your firm have systems that will recognize and be prepared to handle these situations? Who will handle urgent client matters in these circumstances? Will the lawyer taking over a file be able to review files to identify matters requiring prompt action? Consider how you would improve your firm's systems to address these situations.



# Summary of significant changes under Rule 48.14

The significant changes under Rule 48.14, effective January 1, 2015, are summarized in the following points:

- For actions commenced on or after January 1, 2012, automatic dismissal will occur for cases not set down for trial, without notice to parties or their counsel, five years after the commencement of the action, unless the court orders otherwise. [Rule 48.14(1)]
- Any action struck from the trial list after January 1, 2015, and not restored by the second anniversary of being struck off, will be dismissed on that date, without notice to parties or their counsel, unless the court orders otherwise. [Rule 48.14(1)]
- New actions must include the following warning in the preamble of the Statement of Claim and/or Notice of Action, above the registrar's issuance date and signature: "TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court."
- The registrar must serve 48.14 dismissal orders (Form 48D) on all parties [Rule 48.14(2)] and any lawyer served with such an order must promptly give a copy to his or her client. [Rule 48.14(3)]
- A dismissal can be avoided if a party, with the consent of all other parties, files a timetable and draft order, at least 30 days prior to the relevant dismissal deadline. The timetable and draft order must set out the dates by which outstanding steps necessary for set-down will be completed and a date (no more than two years after the automatic dismissal deadline for the action) by which the action will be set down or restored to the trial list. [Rule 48.14(4)]
- Where the parties do not consent to a timetable, one party can bring a motion for a status hearing. At that hearing, the plaintiff must show cause why the matter should not be dismissed for delay. The court can dismiss the matter, adjourn the matter, make a Rule 77 case management order, or set deadlines for completion of the steps necessary prior to set-down and/or impose a deadline for set-down for trial (or restoration to the trial list). [Rule 48.14 (5-7)]
- The dismissal of an action under Rule 48.14 may be set aside under Rule 37.14. [Rule 48.14 (10)]

## Transition provisions

The transition provisions provide the following:

- Any action commenced before January 1, 2012 that has not been dismissed or scheduled for a status hearing by January 1, 2015 will be dismissed January 1, 2017 without notice to parties or their counsel. [Rule 48.14(1)]
- Any action struck from the trial list before January 1, 2015 that has not been restored by January 1, 2017 will be dismissed on that date, without notice to parties or their counsel. [Rule 48.14(1)]
- Any status hearings scheduled, but not held, before January 1, 2015, will proceed under the old Rule 48.14. [Rule 48.14(12)]
- Old Rule 48.14 and 48.15 status notices received by parties prior to January 1, 2015 will cease to have effect on that date, unless a status hearing has already been scheduled or the action has already been dismissed. [48.14(11) and (13)]

For more information on Rule 48-related claims and risk management contact:  
Dan Pinnington  
Vice President, Claims Prevention & Stakeholder Relations  
dan.pinnington@lawpro.ca  
416-598-5863

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### Call LAWPRO if you have a show cause hearing or think there might be a claim

If you are required to attend a contested show cause hearing there is the potential for a claim and you should contact LAWPRO and your excess insurer(s), if any, immediately so you can get help dealing with it. The same goes if, for any other reason, you think you might be facing an administrative dismissal-related claim. Often these types of claims can be repaired when early notice is provided. This permits LAWPRO counsel every opportunity to have the proceeding reinstated and to avoid the application of the \$10,000 increase in deductible (see page 4).

# Why lawyers let files stall and how to prevent dismissals

Administrative dismissals occur over and over again when a plaintiff's lawyer does not take timely steps and loses sight of litigation deadlines. Typical reasons for stalled files – and tips to prevent them – appear below. The first three are the most common and costly for LAWPRO:

- **The file has languished because damages are minimal and/or there are difficult issues of liability:** This typically results from a poor evaluation of a file at the time of retainer, or because a re-evaluation didn't occur when circumstances changed as the matter progressed. Proper screening at the time of retainer, and as a file proceeds, can help you avoid investing in a file with limited prospects for success.
- **A lawyer's personal crisis or unexpected hiatus from legal practice leads to the ball being dropped on multiple files, triggering a "cluster" of administrative dismissals:** See page 1, *The worst case scenario: When lawyers drop the ball on all their files.*
- **A junior lawyer is overwhelmed:** This occurs when a senior lawyer assigns responsibility for a file to a junior who is overwhelmed with the workload and is too embarrassed or intimidated to speak up. Senior lawyers may be ultimately responsible for work they delegate to juniors under their supervision.
- **The lawyer is waiting to take prescribed procedural steps in an action pending completion of medical reports, discoveries, or settlement negotiations:** Instead of relying on an opponent's informal or implied waiver, either meet litigation deadlines, or obtain a written agreement from all parties or court order to extend the timeline. While you should diarize a minimum of 30 days before the dismissal date to bring a motion to extend timelines, such a motion is best brought earlier.
- **The lawyer doesn't know or is uncomfortable with his or her knowledge of relevant law:** This is easy to fix – seek help from another lawyer who knows the area of law in question, or refer the matter to new counsel.
- **The lawyer is too busy on other files:** This may be true, but sometimes serves as an excuse to cover one of the other reasons in this list. Make time for stalled files by scheduling a block of time in your calendar.
- **The matter or a step in it may seem too big to tackle:** This reason sometimes goes hand-in-hand with the previous one. Break the work that needs to be done into smaller steps and tackle them one at a time.
- **Opposing counsel is difficult or uncooperative:** Talk to another lawyer for advice and perspective on how to best handle these situations. If opposing counsel is holding up litigation, consider bringing a motion to impose a timetable.
- **The client is very demanding or difficult:** Take control and deal with the client. For help on how to do this, refer to LAWPRO's difficult client resources ([practicePRO.ca/difficultclients](http://practicePRO.ca/difficultclients)). If the relationship is truly broken, terminate the retainer.
- **The client won't give instructions:** The clock continues to tick, even when the client and opposing parties are content to let the matter slide. This is also a situation for terminating the retainer.
- **There are unpaid accounts on the matter:** While it makes sense to stop work on a matter you aren't being paid on, the clock is still ticking on the administrative dismissal. If you can't collect the outstanding accounts, terminate the retainer.

## Proper termination of a retainer

In any case where you terminate a retainer, you must comply with the *Rules of Professional Conduct*. This means you must ensure time-sensitive steps are taken before termination, and that it is done without prejudicing the client. If a motion to remove yourself as lawyer of record is necessary, do not disclose privileged information.

The most frustrating thing for LAWPRO is that all too often claims arise when there are no systems in place to track a file's progress and the key deadlines that must be met. Without a consistent system or process, files are maintained on a haphazard basis, and no one responds when a lawyer has dropped the ball or has not taken timely steps. These types of claims are easily avoidable. Implement active file management processes (e.g., a file progress plan – see page 7) and good tickler systems to prevent files from stalling for the reasons listed. Consider implementing a practice where the responsible lawyer and – in case the lawyer misses it – a second person do a monthly review of a report on inactive files (i.e., no activity in last 90 days).

# Updating firm systems and processes

While tasks and deadlines must be handled on an individual file basis, firm systems and processes are critical to ensuring deadlines are not missed and that files are kept moving. Firms can take many steps to lessen the risk of an administrative dismissal claim. These are discussed in more detail below and are highlighted in the Firm Checklist for Rule 48.14 Transition (see next page).

First and foremost, firms should update the dates in all tickler systems (electronic and/or paper) to reflect the administrative dismissal and set down deadlines under the new Rule 48 for all open files. Remember, the courts will dismiss actions without sending notices of any type to parties or their lawyers – your tickler systems must remind you of relevant dismissal deadlines.

Have a succession plan and build systems so you can easily respond to any situation where a lawyer unexpectedly leaves practice for an extended period of time (See page 1, *The worst case scenario: When lawyers drop the ball on all their files*).

## Use our Rule 48 Transition Training PowerPoint presentation

We have created a PowerPoint presentation that you can use to train your lawyers and staff on the new Rule 48 and other best practices for managing files. Download a copy at [practicePRO.ca/Rule48](http://practicePRO.ca/Rule48)

### Tips for building more robust firm systems:

- Ensure your tickler system is effective, is populated properly, and staff is well-trained in the use of the system.
- Ensure that the ticklers are sent to at least two individuals at the firm (e.g., lawyer with carriage and an assistant).
- As a best practice, go beyond just entering relevant dismissal deadlines in your tickler systems. Establish a timetable for each matter and tickle start and finish reminders for each step in the litigation (e.g., file defence, file affidavit of documents, complete discoveries, answer undertakings, etc.). Some accounting and practice management products allow you to automatically create a standard series of tickler dates.
- Most firm accounting and practice management programs can generate a report of files that have had no activity on them for a particular period of time. Consider generating these reports monthly and review any files that have had no activity for 90 days.
- Make sure junior lawyers are appropriately supervised and understand the operation of Rule 48. Pay attention to signs that suggest they are overwhelmed and at risk of missing deadlines.
- Build a culture of openness so that lawyers and staff are comfortable seeking answers to questions and asking for help on problems.
- To help ensure the work on individual files is more actively managed and monitored, consider creating file progress plans for all open files. See page 7 for information on these plans and how to create and use them.

# \$10,000 increase in deductible

## for certain administrative dismissal claims

Where an administrative dismissal is not set aside despite any steps that may have been taken by or under the direction of LAWPRO, the deductible for the resulting claim will be deemed to apply to claim expenses, indemnity payments and/or repair costs and will be \$10,000 more than the deductible chosen by the insured and/or listed on the declarations page of the policy. (There is an exception to this, for claims arising out of certain *pro bono* work.)

This increased deductible started with the 2014 policy year and was a response to escalating claims costs on administrative dismissal claims, despite extensive efforts by LAWPRO to educate the bar on how to avoid these easily preventable claims. It is our hope that this increased deductible will have an influence on lawyers' practice habits similar to that of the "double deductible" on conflicts claims after it was introduced. Administrative dismissal claims can often be repaired if early notice is provided, so we urge lawyers to report actual and potential claims as soon as they are discovered to permit LAWPRO counsel every opportunity to have the proceeding reinstated and to avoid the application of the increased deductible.



# Firm Checklist

For Rule 48.14 Transition

Person responsible for completing: \_\_\_\_\_

Date completed: \_\_\_\_\_

- Update ticklers to reflect timelines in any existing orders
- Update ticklers to reflect assignment court dates or trial dates, if already set
- Update ticklers for new dismissal dates (where there is no assignment court or trial date):

Status of action:	Set ticklers as follows:	Updated? (Circle)	
Action has not been set down	Set dismissal date ticklers to later of <b>5 years</b> from issue date or <b>January 1, 2017</b>	Yes	No
Action was set down but struck from the trial list	Prudent to set task to <b>immediately</b> bring motion to restore action to trial list, well before <b>30 day</b> deadline prior to dismissal date, AND  Set dismissal date ticklers to later of <b>2 years</b> from date action was struck or <b>January 1, 2017</b>	Yes	No
All files	Set ticklers to <b>30 days</b> prior to dismissal date to file consent timetable, or bring motion for status hearing/restore to trial list	Yes	No
If...	Then...	Updated?	
Status hearing is scheduled	Set ticklers to status hearing date	Yes	No
Plaintiff will be under disability on <b>January 1, 2017</b>	Set ticklers to appropriate date to review disability status and, if applicable, when plaintiff will reach age of majority	Yes	No

- Train lawyers and staff on changes to Rule 48
- Use LAWPRO's Rule 48 Transition Training Powerpoint ([practicepro.ca/Rule48](http://practicepro.ca/Rule48))
- Create file progress plans for all open files
- Use cascading ticklers feature within your practice management programs to automatically create deadlines for major steps on each file
- Ensure your tickler system is effective and is being populated properly
- Train lawyers and staff on how to use the firm's tickler system
- Remind lawyers and staff to contact LAWPRO when you might be facing an administrative dismissal-related claim
- Create a policy and set reminders for a monthly review of inactive file reports (e.g., no activity in last 90 days)
- Implement a process to allow files to be transferred in the event the responsible lawyer becomes unable to carry files
- Implement a culture that ensures appropriate supervision of junior lawyers and staff

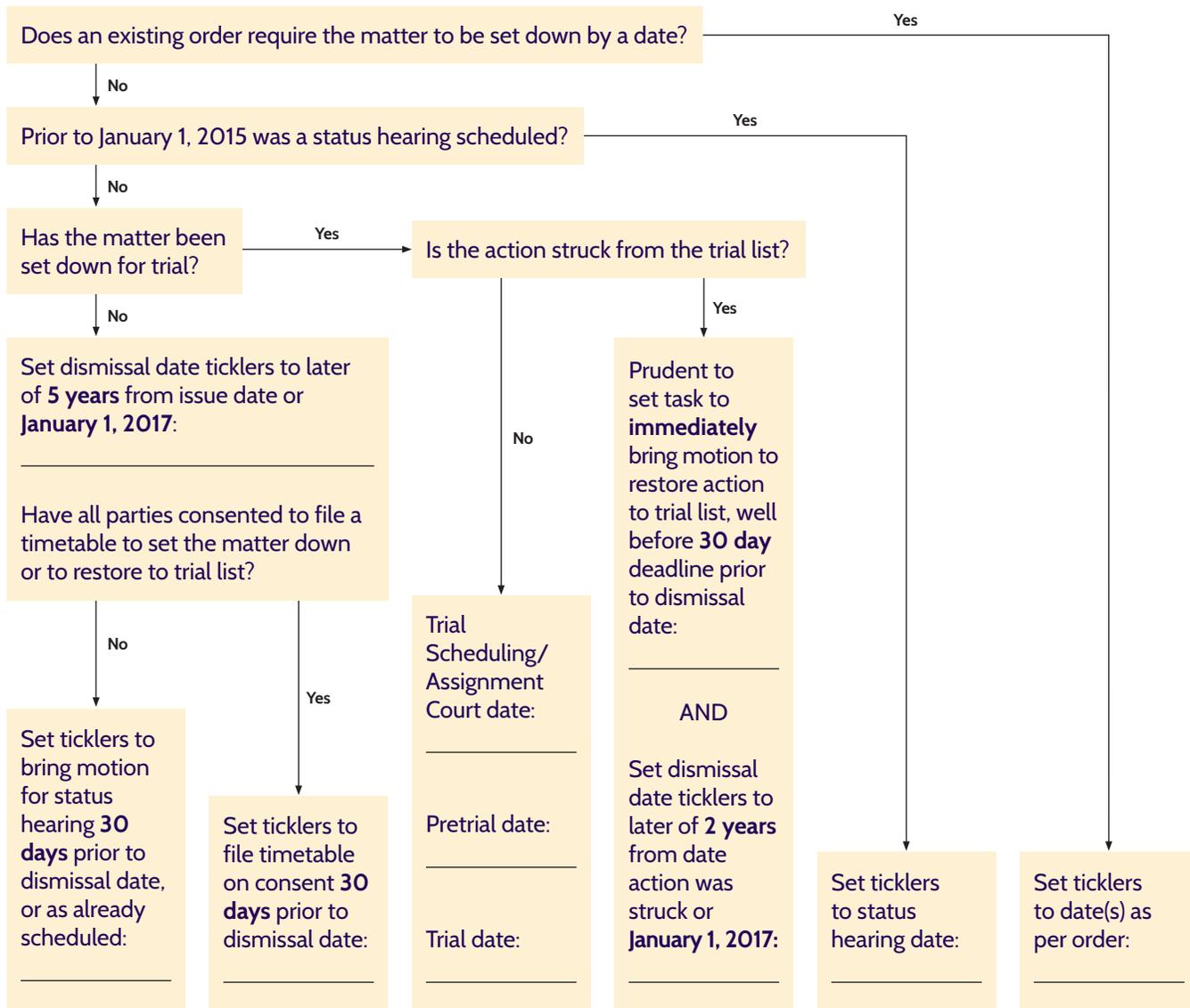


# Rule 48.14 Individual File Checklist

Name of file: \_\_\_\_\_ File No.: \_\_\_\_\_

Completed by: \_\_\_\_\_ Dated: \_\_\_\_\_

Determine dismissal date and other key dates using this flow chart



NOTE: If plaintiff is under disability on dismissal date, set ticklers to appropriate date to review disability status: \_\_\_\_\_ and, if applicable, when plaintiff reaches age of majority: \_\_\_\_\_.

- Electronic ticklers updated
- Paper ticklers updated
- File progress plan created and updated (see sample plan in LAWPRO's Rule 48 Transition Toolkit)

# Managing the progress of a file

## Using a file progress plan

Litigation matters proceed at different rates, and the scheduling and timing of the various steps are fluid. As many hands will touch a file, a file progress plan can serve as a one-stop resource to help anyone know what stage the litigation is at, what has been done, and what needs doing.

A file progress plan will help you set a realistic schedule for the required steps at the start of a matter, and will help ensure those steps are completed as a matter proceeds. It will also help make sure that all necessary steps are completed by required limitation periods or deadlines, and that nothing falls through the cracks.

The File Progress Plan in this Toolkit is a template you can adapt for use in your firm. Add or change the order of the steps to match what typically happens on your matters. In some cases you will want to adapt it for steps that will occur on an individual file. Ideally, keep the file progress plan in an electronic form so it can be easily updated and accessible to everyone in the firm. It will also work as a paper document that is stapled on the inside front cover of a file.

The following steps will help you effectively create and use a file progress plan:

- 1 Create the plan as part of the procedure to open any file. Fill out the header information including the current date under “Last updated (date).” Briefly set out the theory of the case for liability and damages. Do this in a meeting with everyone involved in the file.
- 2 For each step you want to take on the file, assign the task and the expected completion date to the appropriate person and mark it down in the plan. If you are the one carrying out the task, place your own initials in the “Who” box.
- 3 Keep the plan updated by scheduling a follow up meeting in your calendar. This is the most important step. The idea behind the plan is that time is always set aside in your calendar to review each file with everyone involved, minimizing the chance of a file falling through the cracks.
- 4 Repeat steps 2 and 3. When the time comes to review the file again, the meeting you scheduled will show up in your calendar. At that point, update the plan and revise the theory of liability and damages as necessary. Review the file, ensure tasks have been completed, assign new tasks, and schedule another meeting.

### Tips for working with a file progress plan:

- **Estimate how long the tasks will take.** If, for example, you have just opened a file and want to request and review a number of records before you commence the Statement of Claim, setting a meeting three months into the future may make sense. At that point you expect you will have received the records and can review them. If, on the other hand, the limitation period is coming up in a month, you will want to meet on the file in a week or two to ensure the proper steps have been taken.
- **The number of people involved in the meeting is flexible.** On bigger files you may involve a team of law clerks, associate lawyers, paralegals, and other staff. On smaller files you may just set a meeting “with yourself” to ensure the ball doesn’t get dropped. The key is to make sure everyone responsible for executing tasks attends the meetings.
- **Keeping track of disbursements.** Disbursements can add up quickly so you may also want to keep track of disbursements in the header so that they can be easily monitored.

### Don’t litigate a case that shouldn’t be litigated

All too often LAWPRO sees claims where a file has languished because damages are minimal and/or there are difficult issues of liability. These types of files almost always lead to unhappy clients, which primes them for a malpractice claim, especially if the weaknesses of the case were not discussed with the client. At the time of retainer, carefully assess the matter. Are there significant holes in the theory of liability? What’s the damages estimate? Is the file truly one that should proceed? And remember to re-assess the file if anything changes as it progresses.



# File Progress Plan

Name of file: \_\_\_\_\_ File No.: \_\_\_\_\_

Responsible lawyer(s) & staff: \_\_\_\_\_

Last updated (date): \_\_\_\_\_ To be updated next (date): \_\_\_\_\_

Date of loss: \_\_\_\_\_ Dismissal date: \_\_\_\_\_

Theory of liability & strength of case: \_\_\_\_\_

Theory of damages: \_\_\_\_\_ Estimated quantum: \_\_\_\_\_

Step (Modify steps below as necessary)	Date to be completed	Actual date completed	Who	Notes
Obtain authorizations and directions				
Request 3 <sup>rd</sup> party documents (e.g., OHIP summary)				
Diarize limitation periods, dismissal date, and 30 day deadline to bring status hearing motion				
Investigate claim (order searches, order records, retain experts)				
Identify all defendants				
Serve notice letters				
Issue Statement of Claim				
Statement of Claim properly served				
Statement(s) of Defence received (or defendants noted in default)				
Discovery plan				
Affidavit of documents				
Discoveries				
Answer undertakings				
Motions				
Client meeting				
Retain further experts				
Mediation & prep				
Set action down for trial				
Trial & prep				