

Risk management strategies

to reduce your risk of a claim under the new Rule 48.14 (Administrative Dismissals)

Effective January 1, 2015, a new Rule 48.14 brought significant changes to the administrative dismissal regime in Ontario. After several hundred claims and more than \$7 million in claims costs over the last three years, LAWPRO was happy to see old Rules 48.14 and 48.15 revoked.

However, while LAWPRO believes the new rule will stem the tide of administrative dismissal-related claims under the old rules, there is no doubt that the changed deadlines, processes and transition provisions under the new Rule 48.14 introduce new claims risks that may trap the unwary lawyer. This article provides direction on the steps lawyers and law firms can take to lessen their risks of claim under the new rule. For ease of reading, all references to Rule 48.14 in this article are to the new rule, unless noted.

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

- For actions commenced on or after January 1, 2012, automatic dismissal will

occur, 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)]
- 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 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)]

Risk management steps

LAWPRO strongly encourages all lawyers to take steps to familiarize themselves with the changed requirements under the new Rule 48.14, and in particular, the transition provisions. Firms should update the dates in tickler systems to reflect the new administrative dismissal and ultimate set down

Critical dates



- New Rule 48.14 is effective January 1, 2015
- New automatic “5 year from date of commencement dismissal” applies to actions commenced on or after January 1, 2012
- 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 article for details)

deadlines for all open files. Remember, the courts will be dismissing actions without sending notices of any type to parties or their lawyers – your tickler systems must remind you of relevant dismissal deadlines. On the upside, the rules are simpler and lawyers will not be subject to the vagaries of a notice system that varied across different counties.

As a best practice, go beyond just entering relevant dismissal deadlines in your tickler systems. Establish a timetable for each matter and enter start and finish reminders for each stage into your tickler (e.g., file defence, file affidavit of documents, complete discoveries, answer undertakings, etc.). Some accounting and practice management products allow you to automatically enter a standard series of tickler dates.

Who knows what the reaction of the courts may be when you have had five years instead of two to move an action along and are still seeking to avoid a dismissal? You really don't want to put yourself in the dangerous position of missing a dismissal or not having enough time to complete necessary steps in an action that is coming up to a dismissal deadline. Prevent this from happening by setting a realistic timetable with milestone reminders to help you keep your file moving along.



Why files stall

Every matter is unique and there are many reasons why the work may proceed at different rates. However, when it

comes to the reasons for a file to become stalled, LAWPRO sees the same causes over and over again. This list highlights the most common reasons why work on files stops, and how to get back on track:

- **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 that knows the area of law in question.
- **The lawyer is too busy on other files:** This might actually be true, but sometimes serves as an excuse to cover one of the

other reasons in this list. If the former, make time to deal with it 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 time.
- **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. Take steps to collect the outstanding accounts and to replenish your retainer. If these two things don't happen, terminate the retainer and comply with the *Rules of Professional Conduct* when doing so.
- **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). If the lawyer/client relationship is truly broken, you should terminate the retainer. Comply with your obligations under the *Rules of Professional Conduct* and don't wait until the eve of trial to do so.
- **Opposing counsel is difficult:** Talk to another lawyer for some advice and perspective on how to best handle this situation.
- **No one knows the action is stalled:** This reason warrants a discussion of its own – see the next paragraph.

From time-to-time lawyers have serious difficulties (e.g., personal, health or substance abuse issues) that result in them no longer actively working on one or more of their files. LAWPRO has seen several clusters of claims where a lawyer has stopped coming to the office for an extended period of time and no one at the firm stepped in to take over the absent lawyer's files. To prevent this scenario from happening make sure your firm's staff and tickler systems will catch when work on a matter has stopped or is stalled.

Call LAWPRO if you have a show cause hearing

Lastly, remember that if you are required to attend a contested show cause hearing there is the potential for a claim and you should contact LAWPRO immediately so you can get help with dealing with it.

Summary

LAWPRO encourages all lawyers to familiarize themselves with the requirements under the new Rule 48.14, and to make all necessary changes to internal firm systems and processes to deal with the requirements under the new rule. While claims will always 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. Keep your matters moving along so you are never in the awkward and dangerous position of having to explain an inordinate delay to a judge. ■

The major changes under the new Rule 48.14:

- Actions will be dismissed for delay if not set down for trial 5 years after commencement
- Any action struck from trial list, and not restored by second anniversary of being struck, will be dismissed on that date
- These dismissals happen:
 - Without notice to parties or their counsel
 - Unless the court orders otherwise after filing of consent timetable or a status hearing

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