LAWPRO®

Toronto Lawyers ASSOCIATION TLA

Thursday Tips with LAWPRO and TLA: Top Tips for Advocates (2023)

June 22, 2023

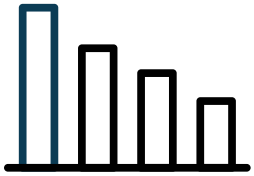
Program materials

lawpro.ca
Tel: 416-598-5800 or 1-800-410-1013
Fax: 416-599-8341 or 1-800-286-7639
Email: practicepro@lawpro.ca

LITIGATION CLAIMS FACT SHEET

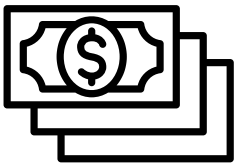
 # 1 claims area by cost

- average total cost $22.7 million per year



 # 1 claims area by count

- average 744 claims per year



$30,400 average cost per claim

RISK MANAGEMENT TIPS

Familiarize yourself with Limitations and Notice Periods

We continue to see claims related to lawyers' unfamiliarity with the limitations rules and notice periods. In addition to issuing a claim within the applicable limitation period, lawyers need to know notice provisions that apply in certain cases (ex: Crown and municipal liability, construction lien matters). Take the time to review limitations and notice periods on the practicePRO Limitation Period Resources page.

Keep your files moving using practice management tools

Consider the key deadlines and the steps you will need to take to move your client's matter forward. Identify the appropriate limitations periods and diarize them. Use practice management software and tickler systems to alert you to approaching deadlines and to keep your files moving. For more time management tips, visit practicepro.ca/timemanagement.

Avoid administrative dismissals

Under Rule 48.14 of the *Rules of Civil Procedure*, matters commenced after January 1, 2012 will be dismissed on a rolling basis five years after commencement. These dismissals will happen without notice to the parties. Use the Rule 48 Transition Toolkit to help you avoid administrative dismissal claims.

Talk to clients more often. Don't rely solely on email

Lawyers are increasingly using emails to communicate with clients, and this is resulting in misunderstandings. Clients and lawyers read things into emails that aren't there, miss the meaning of what is said, or read between the lines and make assumptions. During a long litigation matter, arrange some face-to-face meetings, or at least a phone or video call if distance is an issue.

Have written confirmation of instructions and advice

As in all areas of law, this is crucial to helping LAWPRO defend you in the event of a claim as you may have no recollection of the details years later. Take notes on your conversations with the client, and document in writing things like the details of settlement offers, the scope of your retainer (especially in limited retainer cases), your advice on accepting offers, and the likelihood of winning or losing a case and the costs involved.

COMMON MALPRACTICE ERRORS

Time management - 46%

- Failing to issue a claim prior to the expiration of the applicable limitation period when a claimant knew or ought to have known that he/she had a cause of action/claim
- Failing to diarize for key steps in the litigation
- Failing to prosecute an action in a timely fashion, leading to admin dismissal of the action for delay

Communication - 18%

- Failing to manage client expectations, specifically: failing to clearly explain the risks and cost implications of litigation; failing to realistically explain the chances of success in proposed litigation; encouraging false hopes and unrealistically high expectations
- Failing to ensure that the client understands your advice and recommendations, and you understand your client's instructions
- Failing to provide client with a breakdown of settlement monies when obtaining instructions to settle, including "take home" amount for how much the client will receive, and how much will be paid to lawyer as costs, disbursements, and HST

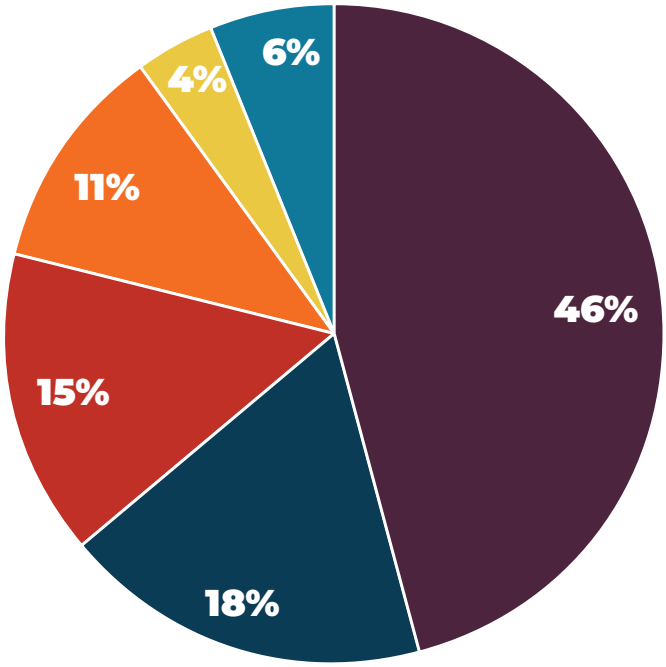
Inadequate investigation - 15%

- Failing to name proper defendants due to improper review or lack of corporate searches, property searches, motor vehicle accident reports, and police investigation files
- Failing to name proper insurer as defendant due to an unidentified, uninsured or underinsured claim
- Failing to name all proper plaintiffs such as corporate entities and *Family Law Act* claimants
- Failing to assess the file properly due to lack of expert reports, medical reports, and investigation reports

Errors of law - 11%

Clerical and delegation - 4%

Other - 6%



Check out the **Rule 48 Transition Toolkit** and **Limited Scope Representation Resources** page

For more practice management tips for litigation, visit **practicepro.ca/litigation**

Visit **practicepro.ca** for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

We can provide knowledgeable speakers who can address claims prevention topics. Email **practicepro@lawpro.ca**

*All claim figures from 2009-2019. All cost figures are incurred costs as of May 2020

CRIMINAL CLAIMS FACT SHEET

Average total cost $1.1 million per year

Average 62 claims per year

$24,000 average cost per claim

RISK MANAGEMENT TIPS

Ensure the client understands your recommendations

Failing to effectively communicate with the client is the biggest claims pitfall in the criminal law area. A lawyer may not realize that the client doesn't understand all the implications of choices proposed. A lawyer should provide detailed recommendations based on a full analysis of the case, including a reminder that the plea decision is the client's alone. Documenting these communications (using a checklist and taking notes provides a valuable record of your efforts in the event you are faced with a claim).

Ensure you have all the facts

Lawyers should enquire about clients' circumstances - for instance, immigration status or Indigenous identity - to ensure that advice takes these details into account. Clients whose immigration status may be at risk should be advised to consult an immigration lawyer, and that advice should be documented.

Discuss potential consequences

We frequently see claims involving a failure by the lawyer to communicate the potential ramifications of guilty pleas and custodial sentences on employment or immigration status. For instance, a truck driver convicted of a DWI may become unemployed as a result. A non-Canadian sentenced to six months or more may lose the right to apply for permanent residency. We have also seen claims alleging lack of communication about defence choices, such as a decision not to call the accused as a witness, or failure to apply for participation in an ignition interlock program.

Promptly notify LAWPRO of potential claims

Early reporting of client complaints offers the best opportunity for claims repair. Lawyers are encouraged to report allegations immediately, even where they arise during trial, so that LAWPRO counsel can provide risk management advice. In an appeal alleging ineffective assistance of counsel, the Crown may ask the trial lawyer to sign an affidavit supporting this ground of appeal. If asked to do so, you should call LAWPRO right away so that we can advise whether preparing an affidavit is necessary, and if so, how it can be done so that privilege is maintained and there is no admission of negligence.

COMMON MALPRACTICE ERRORS

Errors of law - 43%

- Overlooking viable defences when advising a client to plead guilty
- Overlooking sentence consequences (for example, license suspension)
- Failing to understand consequences of advising a guilty plea in light of Immigration and Refugee Protection Act

Communication - 33%

- Failing to ensure the client understands or agrees with the strategy to be taken in court, or the of potential consequences of pleading guilty often resulting in claims of "ineffective assistance of counsel"
- Dispute over whether client's instructions were followed regarding a plea to a charge or reduced charge
- Failing to clarify court dates, with consequences for client if lawyer or client doesn't show up

Inadequate investigation - 6%

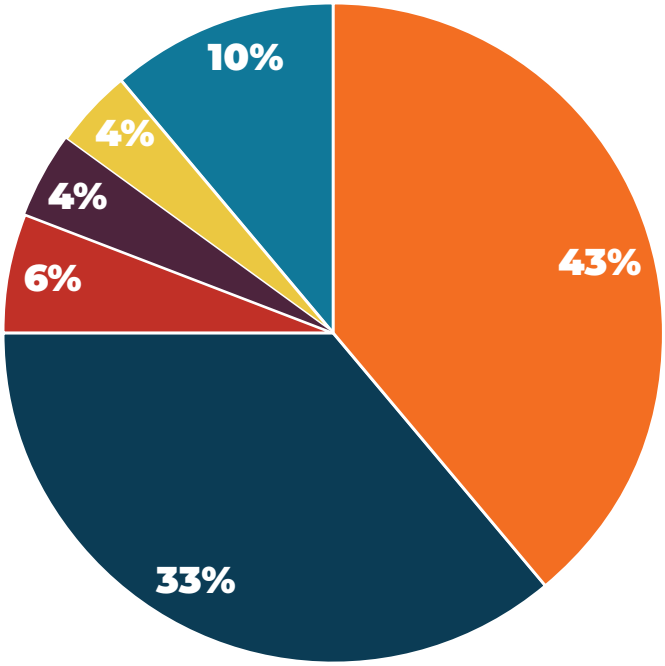
- Failing to obtain evidence or information that could assist the client at trial
- Failing to properly determine whether the client is required to attend at court
- Failing to consider whether client is fit to stand trial

Time management - 4%

- Failing to properly calendar a court date
- Failing to proceed with an appeal in the allowed time
- Missed limitations for civil actions relating to the criminal matter, such as suing for malicious prosecution or appealing forfeiture of property

Clerical and delegation - 4%

Other - 10%



Visit **practicepro.ca** for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

We can provide knowledgeable speakers who can address claims prevention topics.
Email **practicepro@lawpro.ca**

*All claim figures from 2011-2021. All cost figures are incurred costs as of April 2022

LawPRO® EMPLOYMENT LAW CLAIMS FACT SHEET

Longest time before reported claim: 16 years

Average 49 claims per year

$18,000 average cost per claim

RISK MANAGEMENT TIPS

Maintain written confirmation of instructions and advice

As in all areas of law, documentation is crucial to helping LAWPRO defend you in the event of a claim where you may have no recollection of the details years later. Take notes on your conversations with the client and the details of settlement offers, the scope of your retainer (especially in limited retainer cases), your advice on accepting offers, the likelihood of winning or losing a case and the costs involved.

Create detailed docket notes

Like the tip above, detailed docket notes offer the benefit of helping protect you in the event of a claim. “Conference with client re risks and costs of litigation” is much better than just “conference with client re lawsuit.”

Do not dabble in employment law

A lawyer should either be an expert in employment law or refer his or her client to an employment law specialist. We see a number of claims in this area resulting from a lawyer not being aware of the correct forum to bring a client’s matter (Superior Court, Federal Court, Ontario Labour Relations Board, etc.) or not being aware of the related deadlines and limitations periods.

Be prepared for nuisance claims

The emotional toll of a job loss and resulting legal fight can leave lawyers in this area more likely to have claims made against them for ‘civil rights violations’ or ‘malicious prosecution’, alleging wrongdoing, bias or colluding against the client. These often coincide with Law Society complaints or Human Rights Tribunal claims against a former employer (and the insured who represented them), and in several cases are brought by self-represented or vexatious litigants. LAWPRO has yet to pay an indemnity on this type of claim, but they cost on average $20,000 to resolve. While they may be difficult to guard against, taking the above advice to keep detailed notes documenting instructions, as well as maintaining high standards of professionalism in heated disputes will help ward off these accusations.

COMMON MALPRACTICE ERRORS

Communication - 29%

- Failing to adequately explain or advise clients on settlement offers
- Accepting or failing to accept settlement offers against the instructions of a client
- Unclear retainer agreements resulting in claims that lawyer failed to perform certain services

Errors of law - 20%

- Not being aware of the correct procedural forum in which to pursue the client's case
- Drafting an employment contract that does not comply with the *Employment Standards Act*

Time management - 17%

- Missing the limitations period to file a wrongful dismissal suit
- Failing to be aware of deadlines for WSIB appeals, arbitration under collective agreements, judicial reviews, and other time sensitive actions
- Administrative dismissal of client's actions

Inadequate investigation - 8%

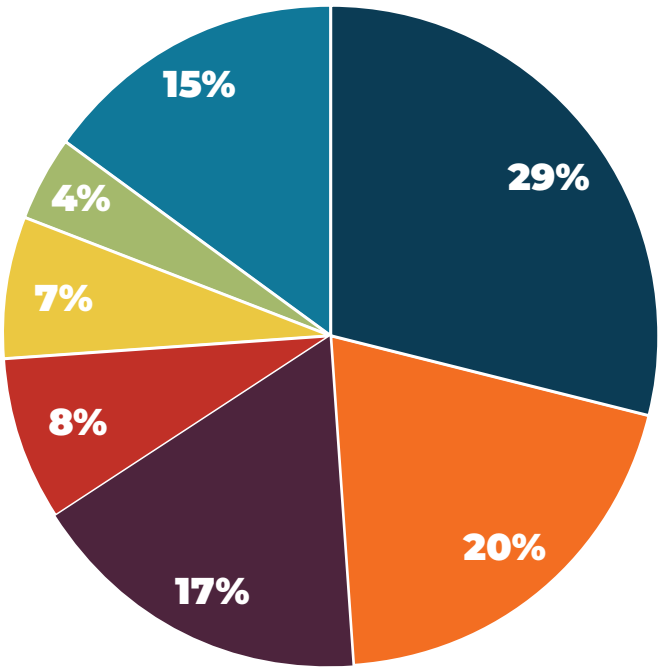
- Failing to consider pension loss, long term disability benefits, vacation pay or other financial issues when advising on a settlement offer
- Misidentifying the end date of employment, leading to missed limitations period

Clerical and delegation - 7%

- Typos in settlement agreement (e.g. incorrect termination pay amount), that prove detrimental to employee or employer
- Emails or faxes containing privileged information accidently sent to opposing side

Conflict of interest - 4%

Other - 15%

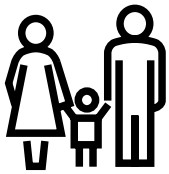


Visit **practicepro.ca** for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

We can provide knowledgeable speakers who can address claims prevention topics. Email **practicepro@lawpro.ca**

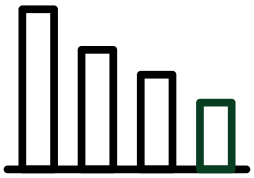
*All claim figures from 2008-2018. All cost figures are incurred costs as of June 2022

LawPRO® FAMILY LAW CLAIMS FACT SHEET



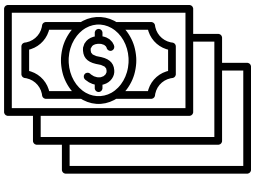
 # 5 claims area by cost

- average total cost $4.2 million per year



 # 4 claims area by count

- average 222 claims per year



$18,700 average cost per claim

RISK MANAGEMENT TIPS

Proactively direct and control client expectations

Family law clients can be emotional and difficult to manage. They may also have changing and unrealistic expectations. This makes it especially important that you manage their expectations from the very start of the retainer. Helping clients avoid disappointment and surprises will significantly lower your claims exposure.

Carefully explain agreement terms to clients

Carefully explain domestic contracts or settlement agreements so that clients cannot later allege that they did not understand the contents of these agreements.

Be aware of the limitations of your legal knowledge

Family law is one of the most complex practice areas, with federal and provincial statutes and voluminous case law. No lawyer can hope to be an expert in all aspects of this field, so it's important to know when to seek advice from more specialized counsel (e.g. for estate planning) or third party experts (e.g. tax advisors, accountants, appraisers or actuaries).

Make better use of checklists and reporting letters

LAWPRO's Domestic Contract Matter Toolkit has checklists and forms that contain issues lawyers should consider as they conduct the interview on a domestic contract matter and when they meet with the client to review and sign the document. A final reporting letter detailing what you did and what advice you gave can be a great help in the event of a claim, which may arise long after you've forgotten the details of a particular file.

Don't lower your standards for limited scope matters

A limited scope retainer does not mean less competent or lower quality legal services. Identify the discrete collection of tasks that can be undertaken on a competent basis and confirm the scope of the retainer in writing. Clearly document all work and communications. Recognize that unbundled legal services are not appropriate for all lawyers, all clients, or all legal problems. Sample retainers and checklists can be found on the Limited Scope Representation Resources page at practicepro.ca/limitedscope.

COMMON MALPRACTICE ERRORS

Communication - 38%

- Failing to ensure the client understands the potential consequences of excluding certain property from an equalization calculation in a marriage contract
- Failing to adequately explain the terms of a separation agreement, minutes of settlement, or that a settlement is final before the client is asked to sign
- In a limited-scope retainer, not communicating clearly what you are retained to do and what you are not going to do

Errors of law - 22%

- Errors as to entitlement, amount or duration of spousal support
- Not complying with Federal Child Support Guidelines when arrangements are made for child support
- Unanticipated and unintended tax obligations

Time management - 10%

- Claim for spousal support is not made for a lengthy period of time, and ultimately an amount of support is lost because the court will not make a retroactive order
- Missed deadline for an equalization claim

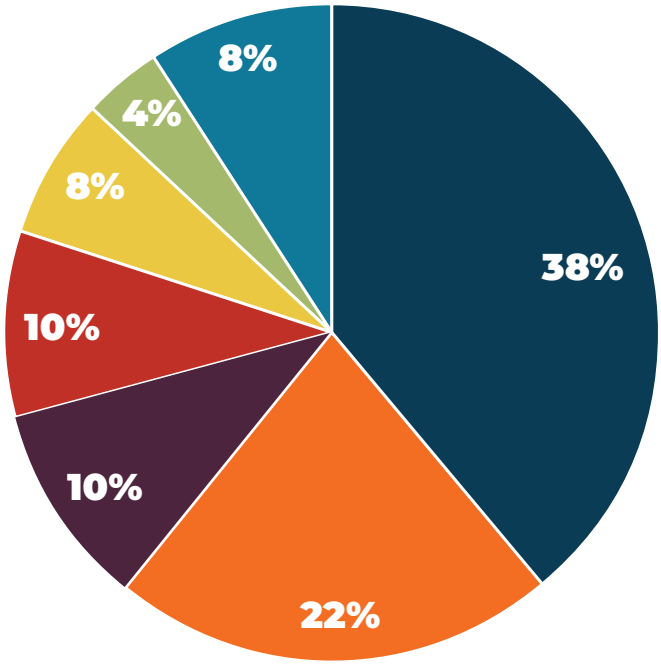
Inadequate investigation - 10%

- Failing to properly identify all assets and liabilities for the purposes of preparing financial statements and making net family property calculations
- Failing to explore full facts and circumstances of a client's marriage so as to appreciate issues that need to be dealt with in a separation agreement or litigation

Clerical and delegation - 8%

Conflict of interest - 4%

Other - 8%



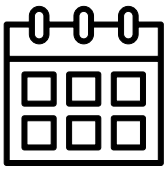
Visit **practicepro.ca** for resources including the Domestic Contracts Toolkit, the Limited Scope Retainers Resources page, LAWPRO Magazine articles and other checklists, precedents, practice aids

We can provide knowledgeable speakers who can address claims prevention topics. Email **practicepro@lawpro.ca**

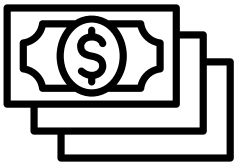
*All claim figures from 2011-2021. All cost figures are incurred costs as of June 2022

IMMIGRATION CLAIMS FACT SHEET

Longest claim reporting time
15 years



Average 31 claims per year

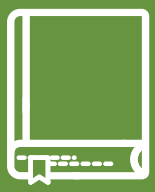


Average total cost
$488,000 per year

RISK MANAGEMENT TIPS

Don't overpromise, and keep your client informed

Claims against immigration lawyers are often prompted by a client's disappointment about the outcome of a residency application or refugee claim. Manage client expectations by fully explaining admissibility criteria, requirements and the need to have documents provided in a timely manner to comply with deadlines. Keep clients up-to-date on the status of their applications. An unhappy client who feels neglected or ignored will likely take steps to challenge your representation. Keep good notes on communications with clients which can later go into a reporting letter or follow-up letter.



Know the changes in the law and program criteria

Over the past few years the *Immigration and Refugee Protection Act* has been amended several times. Ensure you refrain from an "assembly line" approach to processing applications. Citizenship, refugee, residency, work permits etc. all have time sensitive deadlines and the programs and criteria change frequently.

Discuss potential consequences of criminal matters

We frequently see claims involving a failure by the lawyer to communicate the potential ramifications of guilty pleas and custodial sentences on immigration status. A non Canadian sentenced to six months or more may lose the right to apply for permanent residency. When meeting with a new immigration client, be sure to ask about criminal convictions and charges. If a client is facing a criminal charge, advise them to retain competent criminal counsel.

Make clients aware of deadline and documentation requirements

Make sure the client is made aware (in writing) of all deadlines for submitting documents to you and knows the consequences of a delay or failure to provide documents. Give the client a response date that allows for follow-up (i.e. outside the response date imposed by the government entity).

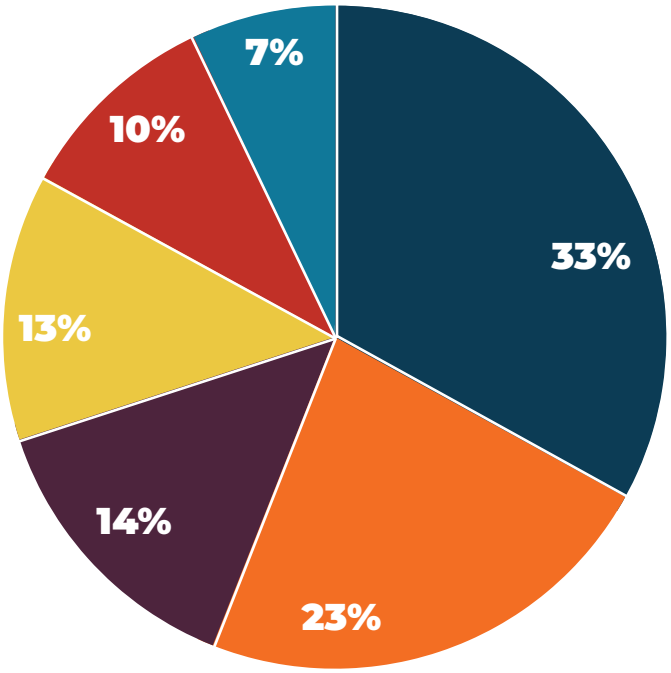
Promptly notify LAWPRO of potential claims

Early reporting of client complaints, missed deadlines etc. offers the best opportunity for claims repair. Allegations of ineffective assistance of counsel should be reported immediately. Early reporting allows LAWPRO to investigate, ensure the protocol is met and that there is no admission of negligence.

COMMON MALPRACTICE ERRORS

Communication - 33%

- Making promises to a client (for example, about likelihood of being granted residency under a particular program) that the lawyer cannot fulfill
- Failing to explain which tasks are the lawyer's responsibility and which are the client's, such that tasks are not completed and opportunities are lost
- Not keeping clients informed about the status of their matters/applications



Errors of law - 23%

- Not understanding the consequences of guilty pleas and convictions for clients, or giving inaccurate advice with respect to criminal matters
- Failing to fully research and understand the range of options, programs and administrative procedures available to a client, or the deadlines for taking important steps
- Having an inaccurate or out-of-date understanding of the criteria associated with programs or rules

Time management - 14%

- Delays in completing applications such that intervening criteria changes lead to lost opportunities
- Failure to update client details (for example, employment or marital status) promptly on active applications

Clerical and delegation - 13%

- Forms or applications that are incomplete, such that they are not considered
- Inaccurate documentation due to errors or confusion related to translation of information
- Failure to have clients review documents for submission

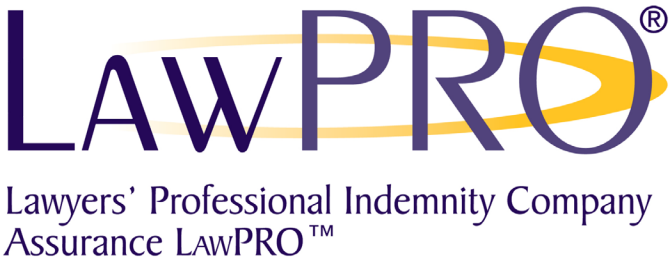
Inadequate investigation - 10%

Other - 7%

Visit **practicepro.ca** for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more

We can provide knowledgeable speakers who can address claims prevention topics. Email **practicepro@lawpro.ca**

*All claim figures from 2012-2022. All cost figures are incurred costs as of April 2023.



Common Limitation Period Pitfalls and How to Avoid Them

Jordan Nichols
Unit Director & Counsel[1]

[1] This article was originally drafted and published in April 2017 and then updated in March 2019. Thank you to Tova Cranford and Chantelle Dallas for assisting with editing and noting up the case law.

It is one of a lawyer's worst nightmares: missing a limitation period. It can be a very easy mistake to make and yet the consequences can be enormous.

There are numerous "pitfalls" that can lead to missed limitation periods and other limitation period problems. Some of these pitfalls are relatively easy to avoid whereas others can trip up even the most skilled and careful of lawyers.

The following is an overview of some of the more common limitation period pitfalls that lawyers encounter and some tips on how to avoid these pitfalls. Some of these pitfalls should be fairly obvious (but still need to be mentioned) whereas others may not be so obvious. While this article is primarily intended for litigators, some of the pitfalls that are discussed can be encountered by non-litigators.

a) Overlooking Less Common Limitation Periods

When considering that most claims are subject to the 2-year limitation period set out in the *Limitations Act, 2002*,[2] Lawyers can become overly focused on this 2 year limitation period and can lose track of other potentially relevant limitation periods.

While the *Limitations Act, 2002* applies to most Ontario causes of action, it is but one of over 40 Ontario statutes that impose limitation periods. Most of these statutes (and the applicable provisions with these statutes are listed in the schedule to the *Limitations Act, 2002*. Litigators should familiarize themselves with this schedule. Significantly, the schedule does not include limitation periods imposed pursuant to federal statutes and also does not include limitation periods arising from the statutes that are referred to in section 2(1) of the *Limitations Act, 2002*.[3]

Some of the more frequently overlooked (and therefore dangerous) limitation periods include: i) the limitation period set out in section 38(3) of the *Trustee Act*,[4] which applies to certain claims brought by or against the estate of a deceased person; ii) the 6 month limitation period for dependent's relief claims that is set out in section 61 of the *Succession Law Reform Act;*[5] and iii) the one year limitation period set out in section 259.1 of the *Insurance Act*,[6] which applies to "a proceeding against an insurer under a contract in respect of loss or damage to an automobile or its contents".

Lawyers are also now starting to miss the 15 year ultimate limitation period that is set out in section 15 of the *Limitations Act, 2002*.[7] This limitation period has only recently become an issue since the earliest date it could expire was January 1, 2019.[8] So far, the

---

[2] SO 2002, c. 24, Schedule B, s 4.
[3] *Ibid*, s 2(1).
[4] RSO 1990, c. T.23.
[5] RSO 1990, c. S.26.
[6] RSO 1990, c. I.8.
[7] *Limitations Act, 2002, supra* note 2, s 15.
[8] See *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 OR (3d) 414 (CA), where the Court of Appeal effectively held that the earliest date that the ultimate limitation period could start to run was January 1, 2004 (the date that the *Limitations Act, 2002* came into effect).

cases in which the ultimate limitation period has potentially expired seem to mainly involve claims against professionals (presumably since claims against professionals can sometimes take many years to discover).

Lawyers also need to watch out for limitation periods imposed by contracts.[9] Such limitation periods tend to be fairly prevalent in standard form contracts including insurance policies and retainer agreements used by some professional firms (ie: large accounting firms). Contractually imposed limitation periods are also common in arbitration agreements.

b) Inappropriately relying on discoverability

It can be dangerous for lawyers to rely on discoverability when determining when to commence litigation. Discoverability is a deceptively complicated concept that is not always treated consistently by the courts. There are often multiple valid arguments that can be made regarding when a claim was discovered or ought to have been discovered, and not all of these arguments may be immediately apparent. Moreover, lawyers may not always have a good enough understanding of the facts to be able to properly assess discoverability.

Significantly, there are some limitation periods that are not subject to discoverability. Two of the most notable examples of this are: a) the 15 year ultimate limitation under the *Limitations Act, 2002;* and b) section 38(3) of the *Trustee Act,* which runs from the date of death of the relevant deceased person, regardless of discoverability.[10] Discoverability may also not apply to some contractually imposed limitation periods, depending on how they are worded.

It is not always clear whether a particular limitation period is subject to discoverability. If a limitation period provision provides that the limitation period starts running when the cause of action or damages occurred, or specifically refers to discoverability, then discoverability may well apply whereas if the provision provides that the limitation period starts to run at some other point such as the date of a death, discoverability may not apply.[11]

Being that discoverability is a complicated concept, and that some limitation periods are not subject to discoverability, the safest course of action is to issue lawsuits early enough that there is no need to rely on discoverability.

---

[9] It is worth noting that the validity of contractual limitation periods can often be challenged on the basis that they violate section 22 of the *Limitations Act, 2002.* Section 22 of the Act effectively prohibits contractual limitation periods that were made between January 1, 2004 and October 19, 2006. Moreover, it provides that limitation periods can only be shortened by contracts made after October 19, 2006 if the contract in question is a "business agreement", which is defined by the Act as "an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*".

[10] *Waschkowski v. Hopkinson Estate,* (2000) 47 OR (3d) 370 (Ont CA).

[11] *Ryan v. Moore*, 2005 SCC 38.

c) Assuming that the limitation period for a wrongful dismissal claim starts running as of the date that the employment ended

In *Jones v. Friedman,*[12] the Ontario Court of Appeal considered the limitation period for wrongful dismissal claims. This case involved an employee who had been notified on December 12, 1994 that his employment would be terminated as of January 31, 1995. The Court of Appeal held that the limitation period started to run when the employee received the notice of termination (December 12, 1994) and not as of the date that the employee's employment ended (January 31, 1995).

Jones v. Friedman has tripped up many lawyers, as some lawyers assume that the limitation period does not start to run until the effective date of the termination rather than on the date that notice of termination was given. Fortunately, this problematic assumption may not always be fatal. Rather, *Jones* (which was decided under the former *Limitations Act)* may be distinguishable in some cases in light of *Webster v. Almore Trading & Manufacturing Co*,[13] where Justice Pitt held:

> Wrongful dismissal, in my view, raises a particularly difficult issue in the limitation context since it is not a dismissal per se that is actionable but rather dismissal without reasonable notice or salary in lieu of such notice, that is actionable. Accordingly, the limitation period for an action for wrongful dismissal does not necessarily run from the date of actual dismissal. It is activated when the cause of action is discovered – that is, the date that the terminated employee knew or ought to have known that he was discharged without cause and without notice or pay in lieu of notice and that a proceeding would be an appropriate way to get redress. The date of discovery may be later than the date of dismissal.[14]

The decision *Webster* was referred to approvingly in *Ng v. Bank of Montreal*,[15] where Justice D.M. Brown held:

> In wrongful dismissal claims the cause of action usually arises when the contract was breached – i.e. when the employer dismissed the employee without reasonable notice: *Jones v. Friedman*, 2006 CanLII 580 (ON CA), 2006 CanLII 580 (ON C.A.), paras. 3 and 4. Facts unique to a case may call into question that general principle and point to a later date as the one on which the claim was discovered: *Webster v. Almore Trading & Manufacturing Company Ltd.*, 2010 ONSC 3854 (CanLII).[16]

Accordingly, there is at least an argument that the limitation period for wrongful dismissal claims may not start to run until the employee discovers or ought to have

---

[12] 2006 CanLII 580 (hereinafter "*Jones*")..
[13] 2010 ONSC 3854 (hereinafter "*Webster*").
[14] *Ibid* at para. 12.
[15] 2010 ONSC 5692 (hereinafter "*Ng*").
[16] *Ibid* at para. 18.

discovered that he or she had not received adequate notice of termination or pay in lieu of notice. In most cases, the employee would arguably need to consult with a lawyer to be able to discover this.

Being that the law regarding limitation periods for wrongful dismissal claims is unsettled, lawyers should of course ensure that wrongful dismissal claims are brought within two years of notice of termination. Lawyers should not put themselves into a position in which they must attempt to rely on the *Webster* and *Ng* decisions if this can be avoided.

d) Assuming that the limitation period for claims against insurers runs from the date that the insurer denied coverage

Lawyers sometimes assume that the limitation period for claims against insurers for coverage begins to run when the insurer clearly denies coverage. Unfortunately, this can be a dangerous assumption as the relevant case law is conflicting. On one hand, the Ontario Court of Appeal's decision in *Kassburg v. Sun Life Assurance Co. of Canada*,[17] supports the proposition that the limitation period for a claim for coverage against an insurer does not start to run until the insurer clearly denies coverage. On the other hand, the Court of Appeal's decisions in *Schmitz v. Lombard General Insurance Company of Canada*[18] and *Nasr Hospitality Services Inc. v. Intact Insurance*[19] support the proposition that the limitation period starts to run the day after the insured requests coverage.[20]

Notably, in *Kassburg,* which involved a claim for long term disability, the court was not specifically asked to decide whether the limitation period started to run when the claim was clearly denied (even the defendant insurer seemed to accept that it ran from the date of the denial). Rather, the court was asked, in the context of a motion for summary judgment, to consider whether the insurer's denial letter constituted a clear denial or whether the limitation period only began to run after the insurer's internal appeal procedure was exhausted. The motions judge in *Kassburg* found that the latter was the case. On appeal by the insurer, the Court of Appeal found that it was open to the motions judge to make this finding and dismissed the appeal.

It is significant that the decision in *Kassburg* makes no reference to the earlier decision in *Schmitz.* Moreover, the decision in *Nasr* makes no reference to the earlier decision in *Kassburg*. It is also significant that while the majority in *Nasr* held that the limitation period ran from when coverage was requested, Justice Feldman delivered a strong dissent.

---

[17] 2014 ONCA 922 (hereinafter "*Kassburg"*).
[18] 2014 ONCA 88 at para 26 (hereinafter "*Schmitz"*).
[19] 2018 ONCA 725 at paras 41-42 (hereinafter "*Nasr*"*).*
[20] See also: *Markel Insurance Company of Canada v. ING Insurance Company of Canada* (2012), 109 O.R. (3d) 652 (C.A.).

e) Failing to warn about the limitation period in non-retainer situations or where a client fails to provide timely instructions to commence litigation

Can lawyers have liability exposure to potential clients that they do not end up acting for? There is at least a risk that this can happen if a lawyer (or the lawyer's firm) is in communication with the potential client but fails to warn the potential client about an applicable limitation period.

In order to protect against possible liability exposure to non-clients, a lawyer or law firm should take the following steps in writing (and ideally also verbally) any time they consult with potential clients but have not been retained: a) confirm that they have not been retained; b) warn that the potential client's claim is subject to a limitation period (and a notice period, if applicable) and that it is imperative that any lawsuit be commenced prior to the expiry of the limitation period; c) advise the potential client that the lawyer/firm is not in a position to advise as to when the limitation period expires (alternatively, lawyers can advise the potential client of when the limitation likely expires, but it would be prudent to also indicate that the potential client should not rely on this as the matter has not been fully assessed); d) advise that in light of the limitation period, the client should consult with alternative counsel without delay if the client is still interested in pursuing litigation; and e) confirm that the client was provided with a verbal warning regarding the limitation period in addition to the written warning (if applicable).

Similarly, it is prudent for lawyers to warn existing clients in writing (and ideally also verbally) about limitation periods where: a) the client has a potential claim against a third party but has failed to provide timely instructions to commence litigation; or b) the lawyer's retainer ends before the client's lawsuit is commenced. Such a warning should ideally be given even if the lawyer believes that the client's potential lawsuit lacks merit and is therefore not worth pursuing.

Written warnings regarding limitation periods should ideally be delivered by hand or sent using a trackable delivery method such as registered mail or courier. Clients and potential clients can easily deny having received warnings sent by regular mail.

It should be noted that a failure to warn clients and potential clients in the above-noted situations may not necessarily constitute a breach of the applicable standard of care. However, even if it does not result in a breach of the standard of care, failure to take these steps could still result in a claim by the client or potential client against the lawyer.

f) Failing to warn about the limitation period for related claims

Clients often have more than one potential claim arising from the same set of facts. For example, a client who is involved in a motor vehicle accident may have, among other things, a resulting accident benefits claim, tort claim, road authority claim, disability claim or even an employment law claim. While lawyers may limit their retainers to only some of a client's potential claims, lawyers who do this could still have an obligation to alert the client to the fact that the other claims exist and to warn that such claims are

subject to limitation periods.[21] Accordingly, lawyers should give thought to what potential claims a client may have beyond the claims that they are being retained to handle and should advise the client in writing of these potential claims, the fact that the client will need to retain other counsel to pursue them, and the fact that the claims are subject to a limitation period (and a notice period, if applicable).

g) Failing to be alert to the limitation period while attempting to negotiate a settlement

Lawyers sometimes overlook limitation periods while settlement discussions are taking place. This mistake is sometimes made by non-litigators in circumstances in which the non-litigator tries to resolve a dispute that unexpectedly arose out of a non-litigation retainer without seeking the assistance of litigation counsel.

There is authority for the proposition that settlement discussions do not generally stop the limitation period clock from running[22] except where: a) the parties had agreed to have a neutral third party such as a mediator facilitate the negotiations;[23] b) estoppel and/or waiver can be established (establishing estoppel and/or waiver in these situations is difficult); or c) the parties have entered into a tolling agreement.

Lawyers who run into limitation period problems while in the course of settlement discussions sometimes ask whether they can attack the limitation period defence on the basis that the opposing parties were not prejudiced by the delay in commencing litigation (since the opposing parties were always aware that a claim was being asserted). Unfortunately, the issue of prejudice is generally irrelevant to whether a limitation period has expired (except in rare cases where the specific limitation period provision in question provides that prejudice may be considered).

In circumstances where a potentially litigious dispute arises from a real estate or corporate transaction (or other non-litigation matter), clients will occasionally refuse to retain litigation counsel despite being urged to do so by their non-litigator counsel. In these circumstances, non-litigators need to do more than simply recommend in writing that the client see a litigator. They need to also warn the client in writing that there may be an applicable limitation period that could expire at any time and that they are unable to opine as to when the limitation period expires or take steps to prevent it from expiring because they are not litigators.

---

[21] See *Meehan v. Good*, 2017 ONCA 103.
[22] *Toronto Standard Condominium Corporation No. 1789 v. Tip Top Lofts*, 2011 ONSC 7181 at paras 16-18; and *Chang v. Boulet*, 2012 ONSC 6382. See also: *Markel Insurance Company of Canada v. ING Insurance Company of Canada,* 2012 ONCA 218 and *Presidential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325 at paras 45-48.
[23] *Limitations Act, 2002, supra* note 2, s 11.

h) Failing to adequately investigate the facts

It is dangerous to rely too heavily on clients to advise of material facts and relevant dates relating to a claim. Clients are often unreliable – especially with respect to dates. In some cases, readily available documents and information will contain facts that are inconsistent with the information provided by the client.

The fact that a limitation period may have been missed due to inaccurate information provided by a client does not necessarily absolve the lawyer. Rather, a lawyer can possibly have liability exposure if: a) the lawyer is unable to prove that the client was the source of the incorrect information; b) the lawyer should have been able to obtain the correct factual information from documents or other sources, or by asking the client the right questions; and/or c) the lawyer failed to adequately warn the client of the importance of ensuring that the information provided by the client was accurate.

When lawyers ultimately learn that they have been relying on incorrect facts, it is not uncommon for them to learn this from the client. Often, they learn about this while preparing the client for an examination or at the actual examination. The fact that this often happens suggests that lawyers can minimize the risk of this limitation period pitfall by more thoroughly reviewing the facts with their clients at the outset of the retainer and referring the clients to relevant documents, photographs and maps in an effort to jog their memories and assist them with articulating their version of events (the use of maps and/or aerial photos is particularly helpful in circumstances where it is important to be certain as to where an injury or event occurred).

Other steps that lawyers should take in an attempt to avoid this limitation period pitfall include: a) promptly obtaining and reviewing relevant documents/information upon being retained; b) using corporate searches, title searches and various other potential searches to confirm information provided by clients; c) taking good notes with respect to discussions with clients regarding the background facts; e) commencing litigation promptly; and f) where possible, proceeding to examinations for discovery prior to the expiry of any possible limitation periods

i) Failing to name "John Doe" defendants where appropriate

It is not always clear who should be named as a defendant at the outset of a litigation matter. In these circumstances, it is often prudent to name one or more John Doe defendants as place holders.

The purpose of pleading a John Doe defendant is to protect the plaintiff and the plaintiff's lawyer from circumstances in which it is later argued that they ought to have known the identity of the defendant in question, and that the limitation period was therefore missed. By naming a John Doe defendant, a plaintiff can usually avoid limitation period problems by substituting the John Doe defendant with the correct defendant upon learning of the identity of the correct defendant.[24]

[24] See *Limitations Act,* 2002, *supra* note 2, s 21(2).

It is important to plead the material facts that support the claim against the John Doe defendant. That said, it is equally important to avoid making the pleading so specific that it might not accurately describe the defendant that is ultimately identified.

For example, in a slip and fall matter where it is not clear whether there was a potentially responsible maintenance company, it would be appropriate to name a John Doe defendant and then plead that John Doe was responsible pursuant to a contract or otherwise for maintaining the premises but that John Doe failed to do so. On the other hand, it might not be advisable to go so far as to specifically plead that John Doe had a maintenance contract *with the owner of the property in question* since it is possible that it had instead contracted with another party, such as a tenant.

j) Confusion during file transfers

Limitation periods are often missed during or shortly after a litigation file is transferred between lawyers. In these circumstances, both the lawyer who is transferring out the file and the new lawyer can potentially be exposed to a claim. To avoid such situations, the following steps should be considered whenever files are being transferred between lawyers/firms: a) it is a good practice for a lawyer who is transferring out the file to advise the new lawyer, in writing, of any time sensitive issues including upcoming limitation period deadlines; b) it is a good practice for the lawyer receiving the file (the new lawyer) to request this same information in writing to the extent that it is not immediately provided; c) the new lawyer should consider making it clear in writing to the client and the original lawyer that he or she will not be accepting the retainer until he or she receives the file from the old lawyer; and d) the new lawyer should promptly review the file upon receiving it.

k) Waiting until the last possible moment to issue a claim

Some lawyers seem to routinely wait until the last possible moment (or almost the last possible moment) to issue claims. Many limitation period problems arise out of situations where lawyers have done this.

Holding off on issuing a claim for an extended period of time is in most cases a bad practice. Unless there is a good reason to hold off on issuing a claim, lawyers should aim to issue claims quickly.

There are numerous problems that can arise from holding off on issuing a claim, even if the expiry date for the limitation period may seem clear and obvious. For example, what if the relevant dates provided by a client (or that are set out in key documents) turn out to be wrong? What if an error is made in diarizing the limitation period? What if the defendant is dead unbeknownst to the lawyer and section 38(3) of the *Trustee Act* therefore applies? What if a contractual limitation period was overlooked? What if you become ill just before the limitation period is about to expire? What if an administrative

slip up occurs that causes the issuance of the claim to be delayed? What if the court staff reject the claim for some technical reason?

Issuing a lawsuit at the last possible moment can result in limitation period problems even where it turns out that the lawsuit was issued within the limitation period. For example, if it becomes apparent from the defendant's Statement of Defence or otherwise that a notice requirement was missed (such as the notice requirement under the *Proceedings Against the Crown Act*[25]), it may be possible to cure this by giving notice and issuing a new claim, but only if the limitation period has not yet expired. Moreover, if it becomes apparent from information that comes out after issuing a lawsuit that the pleadings need to be amended or that new parties need to be added to the litigation, it may not be possible to do this if the limitation period deadline has passed.

Ideally, lawyers should issue actions as soon as they reasonably can and should try to leave themselves sufficient time to complete examinations for discovery prior to the expiry of any limitation period. This will help to ensure that new claims can be pleaded without a limitation period issue if the need to do so becomes apparent as a result of the discoveries.

If there is a legitimate reason for holding off on pursuing a claim, it is normally a better practice to issue a claim but temporarily hold off on serving the originating process than to hold off on issuing it altogether. While efforts should be taken to ensure that the deadline for service is not missed, if it is missed, this is usually repairable by way of a motion to extend service or validate service[26] whereas a missed limitation period is normally fatal.

l) Failing to plead discoverability

If a defendant has pleaded that a clam is statute barred and the plaintiff intends to try to get around the limitation period by relying on discoverability, the plaintiff needs to plead the facts that support the discoverability argument in a Reply or otherwise.[27] Failure to do this could conceivably preclude the plaintiff from being able to assert discoverability at trial or on a motion (notably, the decision in *Collins v. Cortez*[28] suggests that failure to plead discoverability will not be fatal on a motion for summary judgment, as distinct from a motion to strike or other pleadings motion).

m) Failing to take appropriate steps upon learning that a necessary party was left out of a claim

What do you do if you realize many years into a litigation matter that an incorrect party was named as a defendant or plaintiff or that that you failed to name a necessary party. It is often possible to correct these problems notwithstanding the applicable limitation

---

[25] RSO 1990, c P.27.
[26] See *Chiarelli v. Weins* (2000), 46 OR (3d) 780 (C.A.).
[27] *Collins v. Cortez*, 2014 ONCA 685.
[28] *Ibid.*

period by relying on one or more of the following: i) discoverability; ii) sections 6, 7, 11 and 16 of the *Limitations Act, 2002,* which set out various circumstances in which the limitation period may not run or apply; iii) section 21(2) of the *Limitations Act, 2002,* which permits the misnaming or misdescription of a party to be corrected after a limitation period has expired; iv) the doctrine of special circumstances (this doctrine is only available with respect to some limitation periods);[29] v) setoff[30]; and/or vi) in some rare cases, Rule 2.01 of the *Rules of Civil Procedure.*[31]

In these circumstances, some lawyers opt to issue a separate new lawsuit against the desired party rather than bringing a motion to add the desired party to the existing litigation. The benefit of this approach is that it avoids the need for a potentially contested motion. However, this approach comes with some risk in light of the decision in *Maynes v. Allen-Vanguard Technologies Inc.*,[32] in which the Ontario Court of Appeal found that issuing a separate lawsuit can constitute an abuse of process. While the *Maynes* decision was subsequently distinguished by the Ontario Court of Appeal in *Abarca v. Vargas*,[33] the law regarding whether it is permissible to issue a separate lawsuit in these circumstances remains in flux, and therefore issuing a separate lawsuit rather than bringing a motion may often (but perhaps not always) be unadvisable.

In situations where section 21(2) of the *Limitations Act, 2002* is being relied on, it is normally important that the new party be substituted for an existing party to the litigation. That said, the courts have indicated that it may be possible in certain limited circumstances to rely on section 21(2) of the *Limitations Act, 2002* to add a new party to litigation rather than substitute a party.[34]

Unfortunately, lawyers sometimes "freeze up" upon learning that an appropriate party was left out of a litigation matter, perhaps because they do not know how to fix the problem or assume that it is too late to fix the problem. This can be the worst thing that a lawyer can do in these situations, as delays in bringing a motion or issuing a new lawsuit to fix these problems can be fatal.[35] Notably, in situations where a motion is brought to add a new party, the limitation period clock stops running as soon as the motion is served.[36]

---

[29] In *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, the Ontario Court of Appeal held that the doctrine of special circumstances does not apply with respect to limitations periods under the *Limitations Act, 2002.* However, it still potentially applies with respect to other limitation periods.
[30] As setoff is a defence, it is not subject to a limitation period. Significantly, section 111(3) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, provides, "Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance." Section 111 only applies to legal setoff and not equitable setoff.
[31] See e.g. *Hastings v. Halton Condominium Corp to 324*, 2013 ONSC 175.
[32] 2011 ONCA 125 (hereinafter "*Maynes*").
[33] 2015 ONCA 4.
[34] See e.g. *Stekel v. Toyota Canada Inc.*, 2011 ONSC 6507.
[35] In *O'Sullivan v. Hamilton Health Sciences Corporation (Hamilton General Hospital Division)*, 2011 ONCA 507, the Court of Appeal held that a delay in bringing a misnomer motion was fatal.
[36] *Philippine v. Portugal*, 2010 ONSC 956 (Div Ct).

In circumstances where a lawyer may be at fault for having failed to initially name a party in a lawsuit and the limitation period may have expired, the lawyer in question should promptly report the situation to LAWPRO.

n) Failing to have appropriate procedures in place to ensure that limitation periods are not missed

Lawyers should ideally consider limitation period issues (and notice requirements) as soon as they accept a new retainer (or even upon contemplating a new retainer). Lawyers should avoid arrangements in which they accept retainers automatically or where non-lawyers accept retainers for them, as such arrangements create circumstances where limitations periods can be missed before the lawyer even knows that he or she has been retained.

Limitation period deadlines should be promptly diarized. A lawyer's diary system should ideally be set up so that it can withstand multiple errors (for example, it could be designed to require the dates to be diarized by more than one person in more than one place). The system should also be set up to ensure that even if the lawyer who was handing a particular file becomes ill or leaves the firm, that another lawyer will be notified on a timely basis of the deadlines.

Firms should be alert to the fact that limitation periods can be an issue even when acting for defendants, since Counterclaims, Crossclaims and Third Party Claims also have limitation periods. The limitation periods for these types of claims also need to be diarized.

Firms should ensure that every file is assigned to a lawyer at any given time, and that there is a written record as regarding which file is assigned to which lawyer (to avoid confusion). When a lawyer leaves the firm, the lawyer should normally be asked to prepare a transfer memo and the transfer memo should always address any limitation period deadlines that may exist.

o) Taking on too many files

This should be obvious but it nonetheless needs to be said: taking on too many files undoubtedly increases the possibility of errors including missed limitation periods.

Conclusion

Although the above-mentioned list of pitfalls is by no means exhaustive, it covers many of the situations that lead to missed limitation periods. Accordingly, lawyers who successfully avoid the above-mentioned pitfalls (perhaps easier said than done) stand a good chance of avoiding limitation period problems altogether.

Ineffective Assistance of Counsel Claims – LAWPRO is here to help

Katie James, Claims Counsel

The appeal ground of ineffective assistance by trial counsel is steadily on the rise, as most recently demonstrated by the Ontario Court of Appeal case *R. v. Trought*, 2021 ONCA 379. Lawyers need to know how to best protect themselves while complying with their ethical responsibilities to their former clients. The first step is to contact LAWPRO. Without LAWPRO's help at an early stage, you may find you have taken a misstep that can have significant consequences to your standing, your insurance coverage, and your personal exposure to a later civil suit.

In responding to allegations of ineffective assistance or other allegations, LAWPRO retains experienced, respected and highly effective criminal defence lawyers. LAWPRO assists with issues of waiver of privilege and ensures that a lawyer has the full benefit of the Court of Appeal's Practice Direction Concerning Criminal Appeals and Superior Court Protocol addressing allegations of ineffective assistance of counsel so that the lawyer's reputation/conduct is not tarnished unfairly or without an opportunity to respond.

If LAWPRO is unaware of a matter, it cannot help. Moreover, not reporting a matter to LAWPRO can heighten risk to both personal reputation and of a potential future civil claim. Failing to report an ineffective assistance appeal or reporting late can cause a denial of insurance coverage should there later be a civil claim in which the lawyer becomes a defendant in an action for damages. And it is no longer just criminal bar lawyers who face the risk of claims from "ineffective counsel" appeals. Members of the immigration bar are seeing this issue raised with increasing frequency. LAWPRO counsel are experienced in assisting both criminal and immigration bar lawyers through the risks that these appeals/allegations can mean for them.

When to Report

A lawyer who has a policy with LAWPRO should report the matter to LAWPRO as soon as they are placed on notice that allegations of ineffective assistance have been raised in any circumstance or are being investigated or considered. Ideally an Insured should report if they suspect an allegation might be forthcoming. It is a term of a lawyer's insurance policy with LAWPRO. Condition E of the Policy states:

> **E. Providing notice of CLAIM:**
>
> If during the POLICY PERIOD the INSURED first becomes aware of any CLAIM or CIRCUMSTANCE(S), such INSURED shall immediately give written notice thereof or cause written notice to be given to: Lawyers' Professional Indemnity Company (LAWPRO)
> The INSURED shall furnish promptly thereafter to the INSURER all information on the CLAIM or CIRCUMSTANCE(S) which is in the INSURED'S possession or knowledge.
> If a CLAIM is made against an INSURED, such INSURED shall immediately forward to the INSURER every demand or originating process received by such INSURED.

Examples of points in time when a lawyer should report a claim to LAWPRO include:

- A former client's new appeal counsel writes or calls you and asks to receive a copy of your file, advising of their intent to investigate allegations of ineffective assistance (or similar wording).
- Crown counsel contacts you and asks for your cooperation with an affidavit to respond to an appeal.
- You yourself decide or think your conduct fell below the standard of care or there might be an issue on a file you handled, and you intend or think you should alert your client to this.
- You learn a former client is seeking to set aside a guilty plea and alleges they received improper or incomplete advice from you.

On the other side of the equation, if you are counsel on an appeal or have been retained by a client to investigate allegations of ineffective assistance against your client's former lawyer you can write a letter to the former lawyer and request that they report the matter to LAWPRO.

The takeaway is that LAWPRO has a strong success rate in responding to allegations of ineffective assistance of counsel and other allegations against the criminal bar, but LAWPRO cannot assist if it does not know about them. These allegations should be reported to LAWPRO as soon as possible. When in doubt – report it to us.

lawpro.ca
Tel: 416-598-5800 or 1-800-410-1013
Fax: 416-599-8341 or 1-800-286-7639
Email: practicepro@lawpro.ca

Administrative Dismissals are Coming: What to Do When the Deadline to Set an Action Down for Trial is Approaching or Has Passed

We are all aware of the March 20, 2020 Emergency Order where the Ontario government suspended the running of most provincial limitation periods and procedural time periods retroactively to March 16, 2020 due to the COVID-19 pandemic.

One of the effects of this suspension period is that Ontario courts ceased issuing administrative dismissals of actions even if the action had not been set down for trial by the fifth anniversary of the action's commencement.

At this point, we do not know when or how Ontario courts will begin to administratively dismiss actions once again.

It is best practice to look at your files to see whether the 5-year deadline to set the action down for trial is coming up or has already passed, as there may be ways to prevent the action from being administratively dismissed.

5-year Deadline Approaching

If you find yourself with at least 30 days before the dismissal deadline, under Rule 48.14(4), a timetable for next steps and a draft order can be filed with the court, with the consent of all parties. This will prevent the action from being administratively dismissed.

If all parties do not consent to a timetable, a motion for a status hearing should be brought as soon as possible before the dismissal deadline (Rule 48.14 (5-7). If there are any remaining steps that must occur before the action is set down, the action should not be set down for trial in leu of a status hearing.

The actual status hearing motion need not be heard before the dismissal deadline. As long as a Notice of Motion for a status hearing is served and filed before the dismissal deadline, it is less likely that the court will administratively dismiss the action.

5-year Deadline Passed

First off, determine whether you have the benefit of the extra 26 weeks provided by the suspension period. If so, it may be that your 5-year deadline has not yet passed and you can avail yourself of the options outlined in the previous section. However, it is best practice to not rely on the extra time provided by the suspension period and react as if the pre-suspension period 5-year deadline applies.

If the 5-year deadline has passed, it is still best practice to bring a motion for a status hearing/to extend the deadline to set the matter down as soon as possible. The court is less likely to administratively dismiss the matter where there is a pending motion.

Resources

Download the practicePRO Rule 48.14 checklist and File Progress Plan to help avoid facing a dismissal.

Please contact LAWPRO as soon as you are aware of a dismissal deadline having passed or if it is clear that there will be a contested status hearing.

Putting the fire out:

Dealing with the stress of a malpractice claim

There is simply no doubt about it: making an error or having an action commenced against you is stressful, even for the most successful lawyers. And because almost half of Ontario lawyers in private practice will face a malpractice claim at least once in their career, at some point this stress will be a reality for many lawyers.

From my years of handling professional negligence claims, I have seen lawyers react to this situation in different ways including fear, anxiety, embarrassment, and even anger.

The initial call with a lawyer is one of the most rewarding parts of my job. I am often meeting someone for the first time, learning about their practice, their firm, their clients and their current issue. For my part, I try to assess whether there is a problem that can be fixed or made to go away quickly. For the insured's part, once they get over their initial fear and anxiety and realize they will be helped through the claim and defended as appropriate, they usually feel more comfortable.

Embarrassment

Many insureds experience anxiety over the potential of people finding out about the error or alleged error at issue. This can be tough, for example, in a major litigation file where the insured's error (or potential error) might be discussed in an endorsement or reasons. Worries over losing the client, unsupportive partners, or judgmental peers can be hard to balance with the ongoing practice of law – all while being named a defendant in a negligence action.

If it is some consolation… remember, almost everyone makes an error at some point. Given the statistics, insureds who are willing to confide in colleagues will likely find that they are not alone in having a claim.

Anger

Some insureds are angry that they have been sued or that there is a suggestion that they have made an error. This is especially the case in situations where, in fact, no error has been made. Most insureds get over this anger fairly quickly, but some remain intensely angry throughout the life of the claim. This makes, not only the initial call, but all subsequent calls, challenging. The relationship with the insured usually balances out once they realize that the matter is moving to a resolution and, angry or not, we will assist them.

However, this kind of reaction to a claim emphasizes why it is so important to report a claim or potential claim to LAWPRO. Anger can lead to bad decision making such as retaliatory steps or aggressive letters that might actually undermine the insured's position. Reporting the potential claim and allowing another professional to deal with the situation enables the insured to step back and take a break from the confrontation. Keep in mind that having a claim made against you does not mean it is a *valid* claim. In fact, almost 40 per cent of claim files are closed with no payment at all (including defence costs).

Fear

I have also worked with insureds who are so overwhelmed by the situation that they can barely relay the facts. Take Carol (name has been changed), for example. She negotiated the settlement of her client's divorce proceedings which included each spouse retaining equal share of their holdings in a company they owned together with another party. Only after the final Order was signed did Carol learn that, because the class of her client's shares was different than that of her husband's, there would be an unequal tax effect of $750,000 each year going forward. Carol had $2 million in insurance coverage, including excess insurance – far less than the many millions in potential damages. I could barely hear Carol at the end of our initial call when she whispered, "I am going to lose my house."

Carol was often in my thoughts over the next few weeks. I wondered whether she was getting any sleep at all, and whether she had someone to confide in. In the end, there was good news: the matter was repaired and the file closed without any damages having to be paid and without Carol losing her house. That is another rewarding part of my job: telling an insured that their matter has been resolved.

Denial/Avoidance

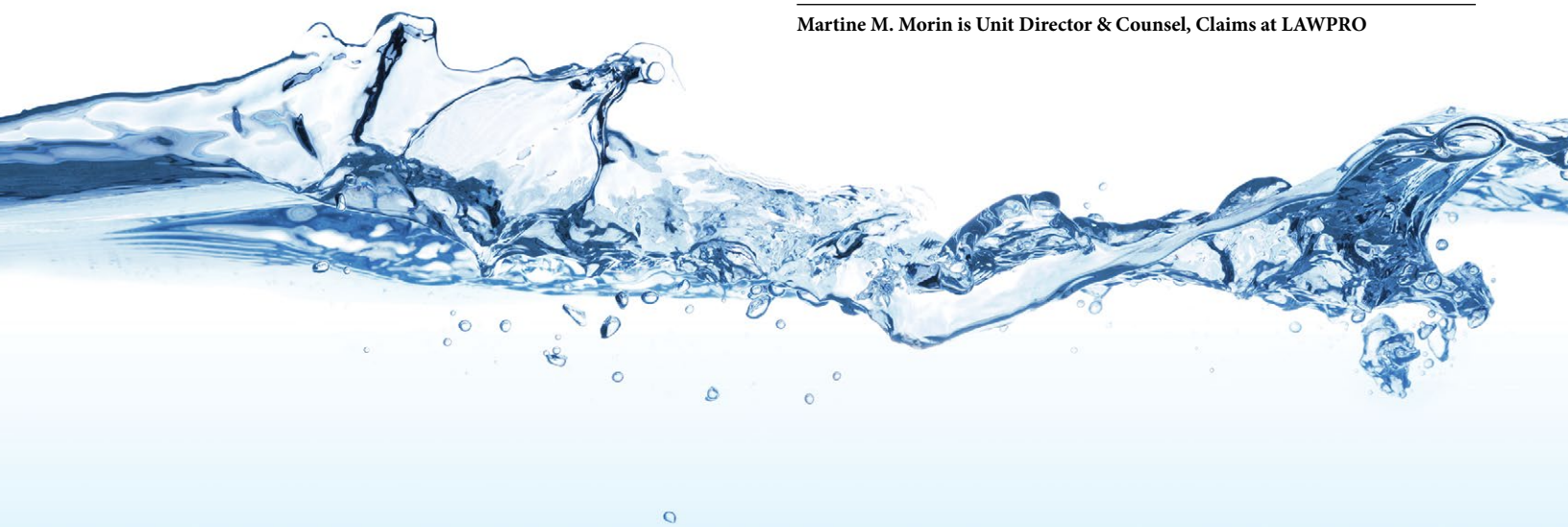
All too often, I see cases in which insureds are so stressed about an error, that they can't bring themselves to report it at all or have waited a significant period of time before doing so. These insureds simply cannot deal with the situation. Once a report is made, some of these insureds avoid dealing with the matter and will not return our phone calls or correspondence. This, of course, makes an already difficult situation worse. The delay in reporting may result in circumstances where it is too late for LAWPRO to repair an error or defend an action. Failing to cooperate may also result in a breach of the insured's obligations under the Policy. Both situations can result in a denial of coverage.

Remember, no good will come from a delay in reporting a claim. Reporting a claim as soon as possible allows LAWPRO to provide early intervention and your best defence.

Making it through

The good news is that 83 per cent of LAWPRO's claims are closed with no finding of liability or indemnity payment. While dealing with a claim is stressful, we are here to help. If you are feeling overwhelmed by an error or a claim against you, consider taking the time to check in with a trusted friend or colleague. If you do not feel comfortable sharing your situation with someone you know, the Member Assistance Program provides confidential peer counselling. ■

Martine M. Morin is Unit Director & Counsel, Claims at LAWPRO



This is not a claim, but…

Katie James, Claims Counsel

At LAWPRO we often get explanations from insureds as to why they feel their matter is not reportable to LAWPRO. Commonly we hear the following: "There is no claim against me. No one has commenced an action, there is no litigation. So, there is no claim".

In this article I will explain common misunderstandings about reporting to LAWPRO. In particular, I will focus on de-bunking the following myths:

1. being sued is the only time an insured needs to report,
2. there is no claim so an insured does not need to report, and
3. the allegation has no merit, so there is no need to report.

In fact, the duty to give notice to LAWPRO is as broad as it is so that LAWPRO can proactively assess, and possibly, repair a matter. While the idea of contacting LAWPRO can feel stressful, it should not be confusing. I want to de-bunk common myths we hear when processing Claim Notice Reports.

Myths about reporting to LAWPRO

Myth #1: I have not been sued and/or there is no action against me, so I do not need to report

It is important to understand that the commencement of litigation and/or any proceeding against an insured is not the defining factor in submitting a Claim Notice Report. While an action being commenced is one reason for reporting to LAWPRO it is not the only instance when a matter ought to be reported. LAWPRO does not take the word "claim" to mean only a civil suit or other proceeding.

There are many Claim Notice Reports that are investigated and proactively handled that do not involve litigation or threatened litigation against an insured. These matters are reported due to the potential for allegations or assertions being made against insureds.

Myth #2: This is not a claim under the Policy, so I don't need to report this matter

The term/word claim is often misunderstood.

LAWPRO encourages insureds to report even if they are unsure their situation falls under the definition of claim or CIRMCUMSTANCE(S). A lawyer's deductible and levy surcharge history is not triggered by reporting a claim and/or CIRCUMSTANCE(S) itself.

LAWPRO has defined the word CIRCUMSTANCE(S) to assist insured's with understanding their reporting requirements. We will now review some of the policy wording.

The Policy:

In the 2020 Policy, the term CIRCUMSTANCE(S) is defined as:
(c) CIRCUMSTANCE(S) means any circumstances of an alleged, actual, or possible error, omission, or negligent act of which the INSURED becomes aware, which from the perspective of a reasonable LAWYER or LAW FIRM could potentially give rise to a claim hereunder.

General Condition E, sets out how notice of a CLAIM is required to be provided (*"If during the POLICY PERIOD the INSURED first becomes aware of any claim or CIRCUMSTANCE(S), such INSURED shall immediately give written notice thereof or cause written notice to……"*).

> CLAIM is defined in Part V of the Policy as:
> (e) CLAIM(S) means:
> (i) a written or oral demand for money or services; or
> (ii) a written or oral allegation of breach in the rendering of PROFESSIONAL SERVICES; received by the INSURED and resulting from a single error, omission or negligent act or RELATED ERROR(S), OMISSION(S) OR NEGLIGENT ACT(S) in the performance of PROFESSIONAL SERVICES for others.
>
> All CLAIMS which arise from a single error, omission, or negligent act or RELATED ERROR(S), OMISSION(S), OR NEGLIGENT ACT(S) shall be deemed a single CLAIM regardless of the number of INSUREDS or the number of persons or organizations making a claim or the time or times the error(s), omission(s), negligent act(s) or claim(s) took place.

As well, Section 7.8-2 of the Law Society of Ontario's Rules of Professional Conduct requires lawyers to "give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced."

There are endless situations where claims and CIRCUMSTANCE(S) can arise. LAWPRO cannot put them into neat, defined categories.

Under General Condition (G), found on pages 6-7 of the Policy, insureds are required to assist and cooperate with LAWPRO in its handling of a matter on behalf of the insured. This includes:

- Not voluntarily assuming any liability or settling a claim (other than with respect to a Prescribed Penalty);
- Cooperating with LAWPRO in the investigation, defence and repair of any claim;
- Not interfering in any negotiations or settlement of any claim;
- Whenever requested by LAWPRO, aiding in securing information and evidence and the attendance of any witnesses;
- Cooperating with LAWPRO in enforcing any right of contribution or indemnity against any person or organization (other than the insured's employees who acted within the scope of their employment), and enforcing any entitlement to costs.

A lawyer may lose their coverage if *inter alia* they settle a claim without LAWPRO's involvement, refuse to help with their defence, interfere in negotiations etc.

Late Notice:

Late notice often allows small problems to become big ones, and they can jeopardize coverage. Do not allow a potential claim/circumstance(s) to fester. Early notice gives us the best chance to help put things right.

It cannot be stressed enough how important it is to provide immediate notice of any claim or circumstance(s) that could give rise to a solicitor negligence claim. To avoid coverage issues that can result from late reporting of a claim or circumstance(s), don't find yourself in a position where it is too late for LAWPRO to effectively investigate, defend or repair a matter. If adverse findings of fact are made in a disciplinary, administrative tribunal process, appeal or Judicial Review, this could impair LAWPRO's ability to defend a later civil suit.

The consequences of not cooperating, or failing to provide notice of a claim can lead to the Law Society of Ontario being asked to step in to the insured's shoes (which would be at the Law Society's discretion to decline to do), and/or LAWPRO can rely on any such breach by the insured to deny coverage. This would be an unsatisfactory result, from the perspective of both the insured and the complainant if damages are owed.

Myth #3: The allegations are without merit, so I don't need to report

LAWPRO understands that a common sentiment in the legal community is: "There is no merit to the allegation so I am not reporting." This is not a good idea. LAWPRO encourages and requires insureds to provide notice of real or possible mistakes immediately. Whether or not a matter is meritorious is not a factor in reporting a claim or circumstances. In addition, the Law Society Rules commentary states that a duty to report arises whether or not the lawyer considers the claim to have merit.

What Happens When You Report

Once a matter is reported a Claims Counsel will contact you to discuss the report as well as obtain more information and determine a strategy.

As a risk management initiative, LAWPRO will often investigate, monitor or assist on an ex gratia basis. This usually involves LAWPRO retaining investigation counsel, who often becomes involved in responding to the allegations. If necessary, LAWPRO counsel will attend at cross-examinations with you provided LAWPRO is given timely notice of the allegations of ineffective assistance of counsel by an insured. If a matter is reported late, i.e. the insured takes steps to self-repair including but not limited to responding to the appellant or new counsel by responding to the investigation inquiries, swears an affidavit, goes to cross examinations without prior notice to LAWPRO, then LAWPRO cannot guarantee assistance as the matter is potentially a late report.

LAWPRO has experienced high success rates with having ineffective assistance of counsel allegations dismissed or dropped. This reduces the likelihood of a former client commencing a solicitor's negligence claim and their chance of success if they do. In several instances, LAWPRO has succeeded in dissuading the appellant's counsel from maintaining the issue in its Notice of Appeal and/or Judicial Review, thereby extricating its insured lawyer immediately.

Immigration and Criminal Specific Claims and Circumstances(s)

In recent years, LAWPRO has seen a steady increase in allegations of various types of claims and circumstance(s) pertaining to the immigration and criminal bar. Ineffective assistance of counsel is an example of a common type of claim. LAWPRO requires its insured to report any such allegations immediately and before the formal protocol is engaged. Therefore, if an appeal counsel or your client's new counsel writes or calls you to 'investigate' or talk about steps taken by you previously for the client, whether at trial or some other proceeding, LAWPRO requests the matter is reported at that time. This allows us to engage at an earlier stage.

Claimants/clients who are considering allegations of incompetent representation often also file a complaint to the Law Society of Ontario. This can be a precursor to the client alleging ineffective assistance of counsel and insureds ought to report this. In addition, the client may commence a fee assessment. While the LAWPRO Policy would not on the face of it apply to a matter that is solely for the return of fees paid (such as a fee assessment), or a disciplinary process where the penalty would be a fine or similar penalty, these types of proceedings are often the precursor to civil suits that fall squarely within the coverage grant.

Other examples of possible claims/circumstance(s) can be: missed deadlines, failure to submit documentation or wrong documentation submitted, missed emails resulting in missed deadline (went into SPAM), miscommunication with client, allegation process was not explained properly, misinformed plea or application process taken, alleged failure to keep client updated, clerical errors and applications to strike pleas, failure to understand or advise the client of the law, election process (judge alone). This is just a sample of the types of claim notifications that LAWPRO receives and is not meant to be inclusive. As stated earlier, if you are unsure, the best step is to report.

The comments in this article speak only to the general availability of coverage under the LAWPRO Policy. Coverage is determine on an individual case basis, subject to the specific circumstances of the particular claim/circumstance(s), allegations made and applicable Policy provisions.

lawpro.ca
Tel: 416-598-5800 or 1-800-410-1013
Fax: 416-599-8341 or 1-800-286-7639
Email: practicepro@lawpro.ca

TIPS FOR MANAGING DEADLINES

Missed deadlines are a major source of malpractice claims. Lawyers sometimes fail to determine the limitation period on a matter or fail to properly calendar it, miss other deadlines or fail to act when they arise. Here are tips to avoid these claims.

1. FAMILIARIZE YOURSELF WITH LIMITATION AND NOTICE PERIODS

- The most problematic limitation periods are the ones you don't know you don't know. Take time to educate yourself on limitation and notice periods and other deadlines.
- The practicePRO resource page provides helpful guides on limitation periods and notice periods in Ontario.

2. ADVISE CLIENTS OF DEADLINE AND DOCUMENTATION REQUIREMENTS

- Make sure the client is made aware (in writing) of all deadlines for submitting documents to you and knows the consequences of a delay or failure to provide documents.
- Give the client a response date that allows for follow-up (i.e. that allows you to review and request further documents or responses from your client before the final deadline).

3. KEEP YOUR FILES MOVING USING PRACTICE MANAGEMENT TOOLS

- Diarize key deadlines and the steps you need to take to move your client's matter forward.
- Use practice management software and tickler systems to alert you to these approaching deadlines.

4. DON'T LEAVE THINGS TO THE LAST MINUTE

- Get in the habit of completing tasks before actual deadlines. If there is an unexpected problem, the extra time will allow you to take corrective action before the deadline has passed.

5. CHECK AND DOUBLE-CHECK DATES

- Always take the time to double-check that correct dates are entered on all documents and diary systems, and instruct staff to do the same.

6. AVOID ADMINISTRATIVE DISMISSALS

- Under Rule 48.14 of the Rules of Civil Procedure, matters commenced now are dismissed on a rolling basis five years after commencement. These dismissals will happen without notice to the parties. LAWPRO's Rule 48 Toolkit can help you avoid such administrative dismissal claims.

LEARN MORE ABOUT EFFECTIVE TIME MANAGEMENT AND MANAGING YOUR RISKS:
See the "**Malpractice Claims Fact Sheets**" and the **practicePRO time management webpage**.

Additional Resources and CPD for Advocates

Practice Management Resources	
LAWPRO's Practice Tips Sheets	Helpful tip sheets organized by type of practice error which provide ways to avoid common mistakes. Includes tips on delegation, managing deadlines, conflicts of interest, and other categories.
Limitation Period Resources	PraticePRO's collection of practice management resources for navigating limitations and notice periods.
Table of Limitations and Notice Periods	PracticePRO's summary of limitation periods for the most common causes of action.
Table of Ontario Mentoring Programs	A helpful table of various mentoring programs offered by legal groups and associations for Ontario lawyers
Technology Products for Lawyers and Law Firms	A helpful table of software solutions for lawyers including resources targeted to Family Law practitioners.
Additional CPD for Advocates	
Protecting your firm against fraud	In this pre-recorded program from April 2023, hear from the experts about the latest wire scams against law firms and their clients and how to stay a step ahead. You will learn tips you can easily implement in your practice to help prevent wire fraud and other cyber dangers.
Tips for Advocates (2022)	In this pre-recorded program from May 2022, presented by LAWPRO in partnership with Toronto Lawyers Association, leading lawyers and experts share their top tips for advocates and summarize the most common claims from 2022.
Working together, remotely – Managing and leading through COVID and beyond	In this pre-recorded program from June 2021, presented by LAWPRO in partnership with Toronto Lawyers Association, leading lawyers and expert law practice advisors share lessons learned and tips to date from our rapid shift to virtual practice, with a focus on how we can make our practices work better for ourselves, our teams and our clients.

SPEAKER BIOS

Dan Zacks

Dan Zacks is an experienced and skilled advocate with a reputation for consummate professionalism.

Known as a leading expert on Canadian limitations law, Dan has co-authored *The Law of Limitations,* a legal textbook published by LexisNexis and cited extensively by the courts; *Halsbury's Limitation of Actions (2017 Reissue),* also published by LexisNexis; and *Under the Limit,* a blog reporting on developments in Canadian limitations jurisprudence (which is not quite as dry as it sounds). Dan speaks and writes frequently on limitations law and chairs Osgoode's Essential Guide to Limitation Periods in Ontario professional development programme.

When not in the office, Dan climbs the Niagara Escarpment, rides the Don Valley, and contemplates the next release (about ten years overdue) from Waxing Deep, his record label.

Edward (Ted) Marrocco

Ted Marrocco is a partner at Stockwoods in Toronto. His unique practice includes civil, commercial, and administrative litigation as well as inquests and public inquiries. He is a trusted advisor to insurance companies, regulators, governments, boards of directors, health institutions, and private clients. LAWPRO retains Ted regularly to help with investigations, repairs, and claims. He works on all types of cases for LAWPRO including everything from privacy breaches to ineffective assistance claims.

Katie James

Katie James is a Claims Counsel at LAWPRO in the Primary Professional Liability Department working within LAWPRO's New Claims Unit. Katie has also worked in the Specialty Claims Department at LAWPRO. In addition to her management of a professional negligence claims portfolio Katie enjoys speaking on topics of interest to the profession on risk prevention and in particular on immigration and criminal topics. Prior to joining LAWPRO, Katie was both a criminal and civil litigator.

Michael Kortes

Michael Kortes is Claims Counsel at LAWPRO in the Primary Professional Liability Department working within LAWPRO's New Claims Unit. In addition to his management of a professional negligence claims portfolio Michael enjoys speaking on topics of interest to the profession on risk prevention. Prior to joining LAWPRO Michael was a civil litigator and partner at Lerners LLP.

Shawn Erker

Shawn Erker is the Legal Writer and Content Manager in the Claims Prevention & Stakeholder Relations department at LAWPRO. Prior to joining LAWPRO, Shawn practised as a civil litigator in British Columbia in a full-service national firm after clerking at the British Columbia Court of Appeal.

He graduated from UBC Law where he served as Editor-in-Chief of the UBC Law Review.