

LAWPRO[®]

Toronto Lawyers ASSOCIATION 

Litigation Pressure Points: Dismissals,
Settlements, Releases, and File Transfers

April 16, 2026

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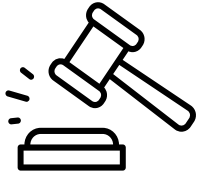
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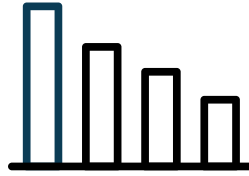


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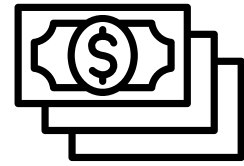
1 claims area by cost

- average total cost \$26.6 million per year



1 claims area by count

- average 916 claims per year



\$30,000 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 that have not been set down for trial or resolved within 5 years of the action being commenced or, have been struck off a trial list and have not been restored within 2 years of being struck, are subject to being administratively dismissed by the court without notice.

As of May 13, 2024, the courts have resumed the administrative dismissal process after a COVID pause. In order to avoid a dismissal and a possible claim, the parties are encouraged to consult LAWPRO's updated notice.



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 - 39%

- 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

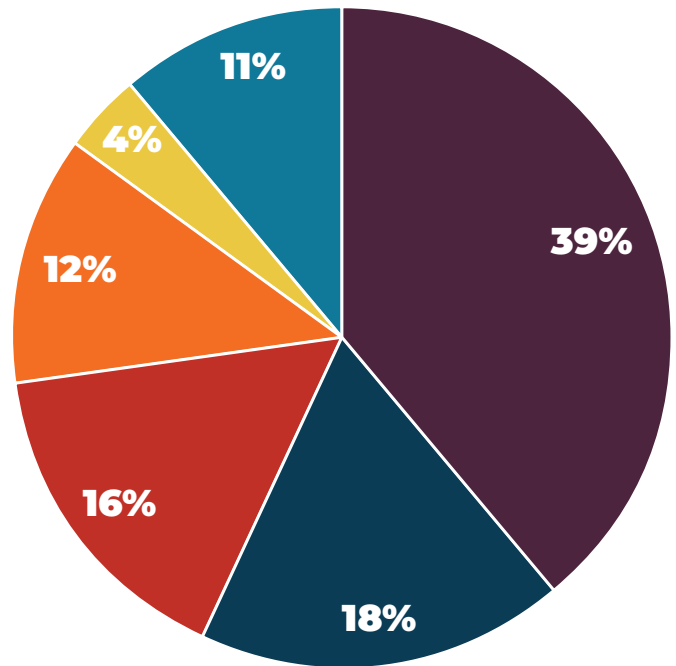
Inadequate investigation - 16%

- 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 - 12%

Clerical and delegation - 4%

Other - 11%



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 2013-2023. All cost figures are incurred costs as of October 2024

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Why lawyers let files stall and how to prevent dismissals

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

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

Proper termination of a retainer

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

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

Managing the progress of a file

Using a file progress plan

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

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

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

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

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

Tips for working with a file progress plan:

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

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

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



File Progress Plan

Name of file: _____ File No.: _____

Responsible lawyer(s) & staff: _____

Last updated (date): _____ To be updated next (date): _____

Date of loss: _____ Dismissal date: _____

Theory of liability & strength of case: _____

Theory of damages: _____ Estimated quantum: _____

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

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](#).



The Dangers of Rule 49 of the *Rules of Civil Procedure*

Jordan Nichols, Unit Director & Counsel at LAWPRO

Consider the following scenario: You act for a plaintiff in a Superior Court matter. On your client's instructions, you send the opposing counsel an informal email in which you offer to settle the litigation for \$100,000. You do not include an expiry date for the offer. The opposing counsel promptly rejects the offer by email and makes an unacceptable counteroffer. A month later, you obtain new evidence that establishes that your client's claim is worth far more than previously realized. You immediately phone the opposing counsel to advise of the situation and you indicate that your client is no longer willing to settle for \$100,000. Ten minutes after you hang up the phone, you receive an email from opposing counsel purporting to accept the old \$100,000 offer.

Was the \$100,000 offer still available to be accepted notwithstanding that the opposing counsel had rejected the offer in writing and made a counteroffer and notwithstanding that you advised the opposing counsel over the phone that your client was no longer willing to settle for \$100,000? Believe it or not, due to the application of Rule 49 of the *Rules of Civil Procedure*, the answer could possibly be yes.

The Dangers of Rule 49

Rule 49 is probably best known for being the Rule that provides incentives for making strong settlement offers. Specifically, under sub-rule 49.10, plaintiffs who beat (or tie) their settlement offers at trial can be rewarded with costs on a substantial indemnity basis (rather than on a partial indemnity basis) from the time that the settlement award was served. Conversely, where a plaintiff obtains judgement at trial that is as favourable or less favourable than the terms of a settlement offer made by the defendant, the defendant can be awarded with partial indemnity costs from the time that the offer was served. In order for sub-rule 49.10 to apply, certain requirements set out under Rule 49 must be met including that the offer must be made at least seven days before the commencement of trial and cannot be withdrawn or expire before the commencement of trial. Significantly, sub-rule 49.02(2) provides that Rule 49 (including Rule 49.10) applies to motions with necessary modifications.

The cost implications set out in sub-rule 49.10 can occasionally trip up lawyers. For example, claims can arise due to allegations that a lawyer: a) failed to adequately advise clients of the importance of making reasonable settlement offers; b) failed to adequately advise of the consequences of failing to accept a reasonable offer; c) failed to make a settlement offer on a timely basis after having been instructed to do so; or d) failed to ensure that a settlement offer was structured in a way that would trigger the cost consequences set out in sub-rule 49.10.

Unfortunately, sub-rule 49.10 is not the only sub-rule that trips up lawyers and may not even be the most dangerous sub-rule. Rather, some of the most dangerous Rule 49 pitfalls are caused by some of the other, lesser known sub-rules. Specifically:

- Sub-rule 49.04(1) provides that "An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the

offer was made.” This sub-rule has been interpreted as providing that settlement offers can only been withdrawn in writing (See: Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc., [2018 ONCA 839 \(CanLII\)](#); York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd. (C.A.), [1989 CanLII 4375 \(ON CA\)](#)).

- Sub-rule 49.07(2) provides that a settlement offer remains open for acceptance even if the opposing party rejects the offer or makes a counteroffer.
- Sub-rule 49.07(5) provides that where a settlement offer is silent about costs, the plaintiff is entitled to have its costs assessed (either up to the date that the offer was served or the date the offer was accepted, depending on whether the offer was made by the defendant or the plaintiff). Accordingly, if a defendant offers to agree to a dismissal of a meritless claim for \$0 or in exchange for an economic settlement but the offer makes no mention of costs, a plaintiff who accepts the offer can rely on sub-rule 49.07(5) to try to argue that it is entitled to its costs.

All of these sub-rules have resulted in claims against lawyers. These sub-rules are dangerous because they alter very basic principles of contract law that lawyers tend to rely on almost instinctively.

But Doesn't Rule 49 Only Apply to Formal Settlement Offers?

Some lawyers assume that the Rule 49 only applies to formal settlement offers made in the offer form provided in the Rules (Form 49C). This assumption runs contrary to the case law. Specifically, the courts have held that it is presumed that the parties in question intended for Rule 49 to apply even if Form 49C was not used and even if the offer was made through correspondence, unless, perhaps, the party making the offer made it clear at the time of the offer that the offer was not intended to be subject to Rule 49 (see: *Magnotta et al. v. Yu et al.*, [2020 ONSC 1049 \(CanLII\)](#); *Miller v. Parkway Rental Ltd.*, [1997] O.J. No. 3108 (Div. Ct.)).

Getting Tripped Up by Rule 49 is Not Always Fatal

Lawyers who get tripped up by Rule 49 have a potential escape hatch: they can seek to have a judge apply his or her discretion to not enforce the settlement in question. This discretion is reflected in the use of the word “may” in Rule 49.09 which provides (emphasis added):

FAILURE TO COMPLY WITH ACCEPTED OFFER

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge **may** grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle.

While judges have discretion to not enforce a settlement, the courts have made it clear that this discretion should be reserved for rare cases where compelling circumstances establish that the enforcement of the settlement is not in the interests of justice (ie: cases involving fraud or unconscionability) (See, for example, *Srebot v. Srebot Farms Ltd.*, [2013 ONCA 84 \(CanLII\)](#)).

LAWPRO has had some success convincing judges to apply their discretion to not enforce a settlement. However, LAWPRO has not been successful in all cases.

Keeping Out of Trouble

Fortunately, errors arising from Rule 49 tend to be avoidable provided that lawyers adopt good practices.

As a starting point, lawyers involved in litigation retainers should regularly consider whether settlement offers ought to be made, withdrawn or amended. It is a good practice for lawyers to advise clients at an early stage regarding the costs implications of settlement offers and warn clients if at any point it seems unlikely that the client will be able to beat the opposing party's offer at trial. All significant discussions with clients regarding settlement should ideally be confirmed in writing.

When making a settlement offer, a lawyer should consider advising the client (and confirming in writing) that: a) the offer will remain open for acceptance until it expires or is withdrawn; and b) if the client's views regarding settlement change at any point, it is imperative that the client promptly advise the lawyer.

Where lawyers are attempting to trigger the costs implications set out in sub-rule 49.10, lawyers should try to ensure that the settlement offer is structured in a way that will allow the trial judge to later assess whether the offer was beaten at trial. If the court is unable to make an "apples to apples" comparison between the terms of the offer and the relief granted at trial, the court may decline to impose the cost implications set out in sub-rule 49.10. It can therefore be problematic to make offers that include non-monetary consideration (beyond the exchange of basic releases) if the court would be unlikely to award comparable non-monetary relief at trial.

Lawyers should give thought to the issue of costs any time a settlement offer is made or accepted. If the intention is for there to be no costs, this should be clearly stipulated.

Lawyers should also ensure that all settlement offers have expiry dates unless there is a very good reason not to include one. If an offer is intended to trigger the costs implications set out in sub-rule 49.10, then the offer should not normally expire until the commencement of trial.

Lawyers should be aware that settlement offers will normally remain open for acceptance even if they have been rejected or a counteroffer has been made and that if an offer needs to be withdrawn, the withdrawal should be done in writing.

Lawyers should ideally have a system in place for keeping track of open settlement offers. Any time a lawyer transfers a file within a firm or externally, the transferring lawyer should ideally advise the new lawyer about any open settlement offers. If the transferring lawyer does not do this, the new lawyer should ideally make appropriate inquiries. While failure to do this may not necessarily constitute negligence, it is nonetheless a good practice.

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Resources and CPD for Lawyers

LAWPRO's Practice Management Resources	
UPDATE: Administrative dismissals of SCJ civil, family and Small Claims Court matters resume May 13	<p>This article provides and update on administrative dismissals which resumed in the courts on May 13, 2024 (after the end of the COVID suspension period). The article specifically addresses Superior Court civil actions.</p>
Rule 48: Set your matter down for trial	<p>This article provides a general overview of Rule 48 and strategic tips on how to approach matters that are subject to Rule 48.</p>
Limitation Period Resources	<p>PraticePRO's collection of practice management resources for navigating limitations and notice periods.</p>
CPD: Top Tips for Advocates (2023)	<p>In this pre-recorded program presented by LAWPRO in partnership with Toronto Lawyers Association, leading lawyers discuss recent developments in areas such as limitation periods, ineffective assistance of counsel, establishing the legal status of clients, and more.</p>
Additional Resources	
LSO: Leaving a law or legal services firm	<p>Guidance on what to consider when a lawyer or paralegal leaves a law firm, including links to:</p> <ul style="list-style-type: none"> • Sample client request for file, funds, or other property • Sample direction to transfer client files, funds, or other property • Sample client acknowledgement of receipt of files, funds, or other property
LSO: Withdrawal from representation	<p>Guidance on when and how to withdraw from representation in a lawyer client relationship.</p>

SPEAKER BIOS

David Silver



David joined Koskie Minsky LLP in 2012 after practicing at a leading civil litigation boutique for several years.

David is a Partner in the Litigation and Employment Group. He has experience in a broad range of commercial and insurance litigation matters, with a focus on defending professional negligence claims. David also handles a wide variety of civil litigation matters involving shareholder and partnership disputes, civil fraud, tort claims, conspiracy, real

property and leasing disputes, franchise disputes, debt and mortgage enforcement for entrepreneurs, medium sized businesses, and large financial institutions.

David regularly represents employers and employees in employment matters involving wrongful and constructive dismissals, executive employment, disability and coverage claims, and restrictive covenants.

David has significant experience and success in various levels of court in Ontario including the Ontario Superior Court of Justice, the Commercial List, and the Ontario Court of Appeal.

David prides himself on providing pragmatic advice to clients and aggressively defending and prosecuting litigation to advance the client's interests and rights.

*practising through a Professional Corporation

Jillian Van Allen



Jillian's insurance defence practice focuses on professional errors and omissions, including repairing and defending matters on behalf of lawyers. She has also acted on behalf of property/casualty insurers in the defence of tort and accident benefits claims, including acting on behalf of accident benefits insurers in loss transfer and priority disputes between insurers. She has many appearances and reported decisions in the Superior Court of Justice, Divisional Court and Court of Appeal.

Jillian obtained her Diploma in Honours Standing in political science from the University of Western Ontario in 2000. She obtained her LL.B from the University of New Brunswick in 2003. She was called to the Bar in 2004. She completed the LL.M program specializing in Civil Litigation and Dispute Resolution at York University's Osgoode Hall in 2009.

Kathryn Shani



Kathryn is a Claims Counsel at LAWPRO, where she deals with professional negligence claims brought against lawyers practicing civil litigation, real estate, trusts and estates, and other areas.

Prior to joining LAWPRO, Kathryn practiced civil litigation, with a focus on insurance law, municipal and police liability, product liability and class action litigation. Kathryn has litigated matters before all levels of Ontario Courts.