

# INDEMNITY ISSUES:

## *Risk Management*

A publication of the Law Society of British Columbia



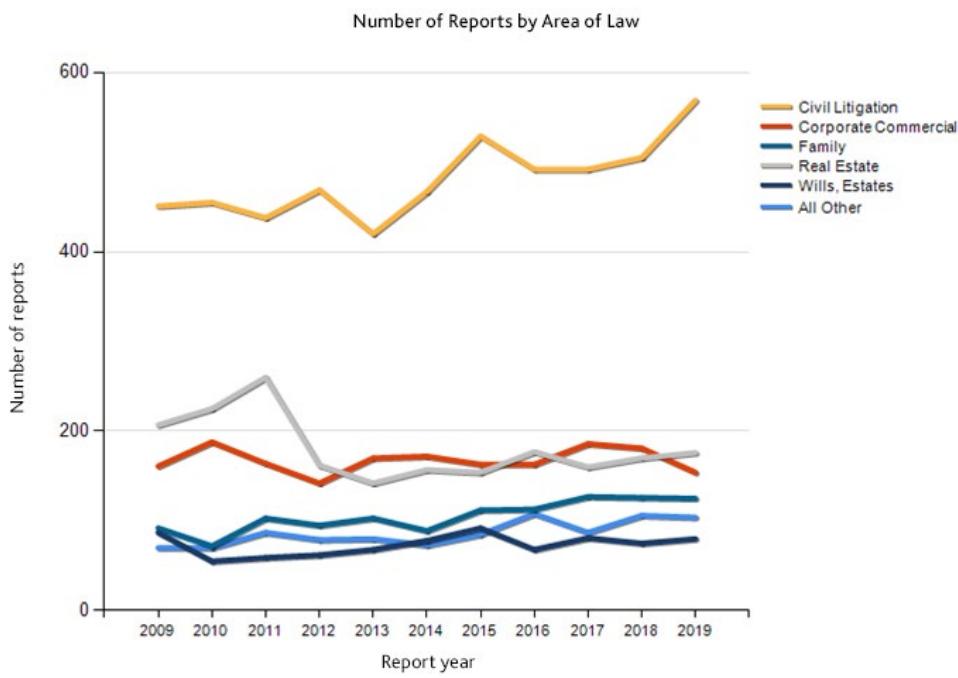
Lawyers  
Indemnity  
Fund

## Civil litigation claims: under the microscope

**Six thousand seven hundred thirty.** That's the number of lawyers who reported litigation claims and potential claims to the Lawyers Indemnity Fund (LIF) in the last 15 years. Not only does litigation consistently generate the largest number of reports to LIF, the growth in civil litigation in recent years has outpaced every other practice area in the legal profession. In addition, the cost of civil litigation claims continues to account for the second highest dollar amounts paid by LIF.

The graph, *Number of Reports by Area of Law*, shows the frequency of reports received by LIF by practice area, with civil litigation clearly leading the way.

This *Indemnity Issues: Risk Management* highlights the top three causes of civil litigation claims and provides simple and effective practice management tips to avoid claims. The videos provide real-life examples of each of these top three causes and demonstrate how these claims arise.



## Watch our videos



Missed limitation – with the best diary system in the world!



The perils of litigation without a roadmap



Settler's Remorse

## Oversights

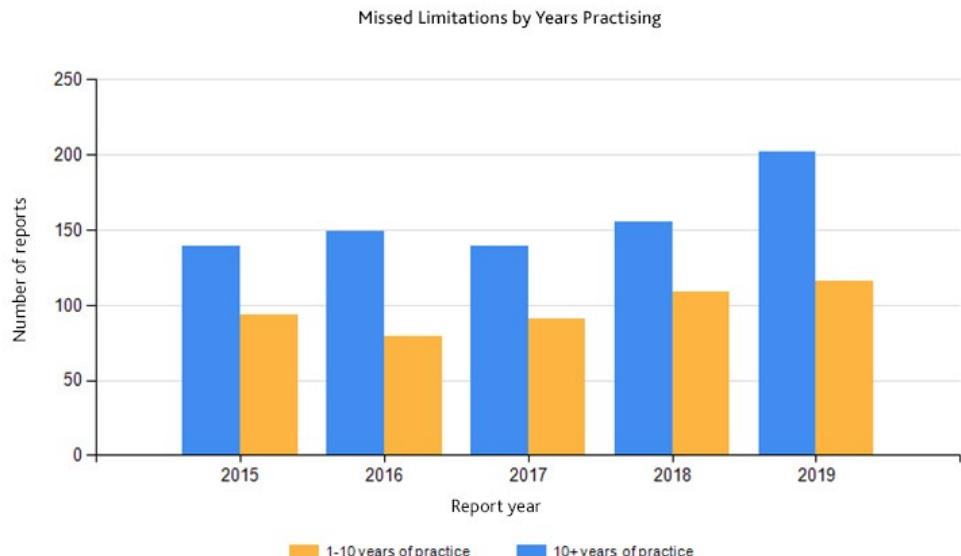
Year after year, lawyers from every area of practice — big firms and small firms, senior lawyers and new calls — fall victim to the same errors. In fact, one in every four reports is triggered by a missed limitation or deadline. And over half of all missed deadlines and limitations are caused by simple oversights that could be avoided using basic practice management techniques (see Risk Management Tips below).

Contrary to what many may believe, the level of experience of a lawyer has little correlation to the frequency of claims LIF receives for missed limitation periods.

Here are four examples of the most common oversights resulting in missed limitation periods:

### Failing to diarize

- A lawyer retained in a medical malpractice claim knew that additional parties were required but did not enter any dates into the diary system after having filed an action. He subsequently failed to join all appropriate parties within the limitation period.
- A lawyer retained in a products liability action failed to serve the defendant manufacturer within one year of filing of the action because the service deadline was not entered into the firm's diary system.



### Failing to properly use diary systems

- In entering the limitation date, the lawyer erred by one month and the limitation date was missed.

### Procrastination

- A lawyer waited until the last minute to file the NOCC for a client who suffered personal injuries in a motor vehicle accident. Due to problems with the registry agent, the NOCC was filed one day past the limitation period.

### Failing to review the transferred file

- A lawyer inherited a personal injury file. Assuming all was in order, he did not review the file thoroughly at the outset so he did not see the draft consent order to add the parties was not signed. Unfortunately, by the time the order was discovered, it was too late to add the parties and that part of the claim was lost.

## Risk management tips – Oversights

### 1. Diarize, diarize, diarize

*"Upon filing the NOCC, either serve it immediately or insert the limitation for service in your calendar with several reminders ahead of the limitation date. Also, arrange software on your computer calendar to send an email of important dates."* – Lawyer who failed to serve an action

*"Diarize on the side of caution despite existing practice."* – Lawyer who missed an administrative tribunal deadline



Establish a central firm diary system and

use it. Designate a specific person to be responsible for immediate entry of all limitation dates into the diary system and have an alternate during their absence.

In addition to the firm diary system, you will need to catch other deadlines in your personal diary system, such as dates for service of expert reports. See [Beat the clock – Timely Lessons from 1600 Lawyers](#) for more tips for your firm diary system.

### 2. Don't procrastinate – think early and file early

*"Don't fail to diarize the 'ultimate' limitation*

*period of 10 years on a judgment in addition to the two-year requirement to preserve priority."* – Lawyer who missed a limitation period



When opening a file, think through and diarize all the limitation issues.

*"Ensure close attention is paid to limitations; this requires thinking, not just going through the motions."* – Lawyer who failed to join parties within the limitation period



Never leave filing the NOCC until the last

possible day. In addition, ensure you have diaryized service of the NOCC.

### 3. Take the time to train and educate about limitation deadlines

*"Properly train staff to understand the significance of separate limitation periods for separate accidents."* – Lawyer who failed to train his staff

Make sure that everyone understands that diary system entries are critical.

### 4. Recognize practice and personal danger points

*"We have now changed our system to*

*incorporate reminders one week, two days and one day before the final limitation period expires."* – Lawyer who missed a limitation period by three days due to staff changes

That lawyer suggested more back-up on last-minute limitations. Periods of extreme vulnerability include: staff departures; arrival of new staff without proper training on the firm's limitation system; and lawyer or staff absences due to holidays or illness. Transfer of files is the source of many claims as lawyers don't thoroughly review the file, assuming everything has been done.

### 5. Audit your files

*"Despite bring-forward systems and other safeguard measures, we are human after all. Conduct regular reviews of all files (perhaps every six months) on an in-depth basis. Have service of NOCC step to be checked off by two different people."* – Lawyer who missed service of the NOCC

Diary systems are not infallible. Firms should require lawyers or staff to physically review their own files on a regular basis for any possible errors in diaryizing limitation dates and deadlines. Regular file audits serve as a quality control measure.

## Legal issue failures

A number of claims arise as a result of lawyers dabbling in areas of the law they don't know as well as they need to in order to provide proper advice. However, for the majority of these claims, the lawyers know the law, but don't fully think through all of the legal issues or strategies required to achieve the client's goal.

The following are some common examples of legal issue failures from our claim files:

### Not knowing the law

- A lawyer failed to commence an infant's ICBC Part 7 action within two years of an accident. The lawyer erroneously believed that the Part 7 action

was postponed until the age of majority, in the same manner as the infant's tort claim.

- A lawyer missed a wills variation limitation action because he thought it was a six-month limitation period rather than 180 days.
- A lawyer failed to include an expiry date on a formal offer prior to trial. This resulted in the offer being unexpectedly accepted after the start of trial, much to the client's dismay.

### Not thinking through the legal issues

- The failure to provide a municipality

with notice of a potential claim within two months can be fatal to an action. A lawyer acting for a client involved in an accident with a municipal police vehicle failed to turn his mind to this requirement until after the notice period had passed.

• A lawyer offered to accept a recreational property in a creative settlement of a commercial litigation claim, but did not think to stipulate that it had to be free of encumbrances. The other side accepted, and took the position that the settlement required the lawyer's client to take the property with the encumbrances.

## Risk management tips – Legal issue failures

### 1. Don't dabble

*"Stick to areas you know or, if venturing into a new area, consult someone with more experience."* – Lawyer who got caught dabbling in bankruptcy proceedings

Seriously, don't do it — dabbling can be

dangerous. Lawyers acting outside their usual practice area are more likely to make mistakes.

### 2. Look at the big picture

*"She didn't ask me to do that."*

*"He didn't instruct me on that."*

*"They didn't retain me to advise them of the ramifications."*

– Lawyers who failed to be proactive

Many lawyers get into trouble because they take a restricted view of the retainer. The problem is, clients don't always know

what to ask, but a competent lawyer should. Clients pay a lot of money for legal services. They expect you to think for them, to advise them of risks, ramifications and rights, beyond their limited instructions to you.

### 3. Go the extra mile and do it right

*"Use a checklist of required orders during the chambers hearing and later when drafting and checking the order."* – Senior lawyer who failed to obtain critical orders in a chambers application

Don't shirk or take shortcuts. Slow down and clearly consider all of the required

steps to achieve what your client wants. There is no substitute for careful and comprehensive research and analysis. See the Law Society's Practice Checklists.

### 4. Seek help

*"Do not jump the gun. If in doubt, ask."* – Lawyer who failed to ask for help

If you are uncertain about a legal issue or how to proceed, seek help from a senior colleague. It is so easy to let the wealth of experiences of others in this profession make you feel inept. Do not be intimidated — ask for help.

### 5. Take your lemons and make lemonade

*"Use your mistakes as opportunities for improvement"* – Lawyer who failed to implement the best strategy

It's guaranteed that if you practise law long enough, you will make mistakes and suffer defeats. You'll lose a case or fail to implement the best legal strategy, or your client will drop you for another lawyer. And while they certainly look like defeats, when viewed from a different angle they take on a new meaning. They become opportunities for growth, improvement and learning.

## Engagement management failures

The relationship between lawyer and client is the most important aspect of any retainer. Unfortunately, lawyers often ignore this, focusing instead on the legal work product. Clients who feel that their

lawyer truly cares and has used their best efforts, will be more understanding and willing to forgive if a mistake is made. Dissatisfied clients often complain that their lawyer never explained the legal process, did not listen to them or obtain their informed instructions, did not return phone calls and did not attend to their case in a timely manner. Unhappy clients, feeling neglected or unimportant, are most likely to blame their lawyer when their case does not turn out as they hoped. It is expensive, stressful and time-consuming to defend a negligence claim, even if it has no merit.

The following are examples from our claim files:

### Settler's remorse

- A lawyer acted for a property owner in foreclosure proceedings, and hastily negotiated a settlement with the bank. After the order was spoken to in court, the client had second thoughts and suggested that he could have obtained a better settlement. He instructed the lawyer not to sign the order, creating a stressful situation for the lawyer.

### Failure to explain the risk and cost

- A lawyer failed to clearly explain the

risk and cost implications of complex construction litigation. She created unrealistically high expectations and, after the unsuccessful trial result, the client brought a negligence claim.

### Failure to clarify the scope of the engagement

- A lawyer acted for a client in an occupier's liability action and failed to advise the client that he would represent the client only in that matter and not in regard to his disability claim. After the disability claim became statute barred, the client commenced a negligence action.

### Good rapport may be your "best" protection

- A lawyer had made a clear error in a claim file that cost the client \$125,000. Instead of commencing an action, the client sent a letter acknowledging the error and his loss and went on to say: *"You've been my trusted advisor and friend; you and I go back a long way — almost 25 years. I've thought about the loss but also about all the times you've been there for me, and I'm not going to sue you."* That's what nurturing the relationship can do for you.

### Limitations and Deadlines Quick Reference list



The Limitations and Deadlines Quick Reference List has recently been updated.

It was created when a lawyer who missed a 10-day appeal period, believing

it was 30 days, suggested to LIF that we post notice of really short deadlines on the website. LIF took that suggestion to heart. The list is provided for reference only and should not replace regular review of the relevant legislation.

## Risk management tips – Engagement management failures

### 1. Choose your clients wisely.

*"See the warning signs and avoid these [high-risk] types of clients. I had a bad feeling about this client at the first meeting. I should have followed my gut instinct."* – Lawyer who failed to heed the warning signs



By declining to represent a high-risk client, you may be avoiding a potential claim in the future.

### 2. Put the terms of your retainer in writing

*"Need to always get a retainer signed, even with repeat clients when they want something done fast."* – Lawyer with long-standing client relationship



All too often lawyers agree to represent a client without documenting the terms of their retainer. This may lead to misunderstandings between the client and the lawyer as to who is doing what. Clarify what you will and will not do at the outset, and clearly pass the risk of what you won't do back to the client.

### 3. Put the terms of your non-retainer in writing, including pending limitation dates

*"Always use a non-engagement letter when*

*giving preliminary advice and waiting for prospective clients to take the next step. This protects against running limitation periods."* – Lawyer who failed to warn of pending limitation



If you withdraw from an ongoing legal matter, develop a standard practice of advising of any impending or future limitation date or deadlines and confirm you are not retained in the matter. If the matter is concluded, advise in writing of any future limitation dates or deadlines that must be met to preserve or protect the client's position. Pass the risk of diarizing dates back to the client.

### 4. Make a record of your conversations and instructions

*"An early face-to-face meeting would have helped. Also some aspects of my advice ought to have been better reflected in correspondence to the client rather than in my own notes."* – Lawyer who did not confirm advice



Document when you give your client recommendations and when you take instructions. LIF receives numerous claims each year where the client and lawyer have different recollections about either the scope of the retainer or the content of a

conversation. Written documentation is powerful evidence that can be used to resolve or defend negligence claims.

### 5. Talk to your clients more often and don't create unrealistic expectations

*"Document risks of refusing offers and the ramifications of a loss at trial (i.e. costs, needing to appeal to seek to overturn the result, etc.)"* – Lawyer whose client rejected a great offer and later lost at trial



Good client relations is about communicating effectively with your client and keeping your client informed. Send the client copies of meaningful correspondence, memoranda and pleadings. If a case is dormant, consider calling or sending the client a letter explaining why there has been no activity. When discussing the prospects of a case with your client, be careful not to create unrealistic expectations.

## Let us help you

Although reports must be in writing, lawyers can first call Claims Counsel for advice about a claim or potential claim. If you contact us early — even before a claim is made — we will be in the best position to

fix a problem or avoid a claim. Almost one in five reports received by LIF is successfully repaired. In a 15-year period, this amounted to 2,813 repairs. Do not attempt to fix the problem before you report, as your efforts

may result in a greater loss and put your coverage at risk. Reporting early enables us to gather and secure evidence, seek an advantageous settlement and assist you in optimally defending a claim.

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