



Assurance
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Barreau



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Prevention

- Make sure to establish and apply preventive measures;
- Inform the members of your team—the firm's lawyers and staff—as well as clients to beware of any e-mail requesting a funds transfer or modifying payment instructions;
- Establish a policy that requires all requests to be carefully reviewed and verified directly with the person making the request;
- Check behind the sender's displayed e-mail address (there is a good chance you will see an unknown e-mail address);
- Check the origin of the funds transfer request;
- Contact the person making the request and ensure the person you are speaking

*The most difficult thing is the decision to act,
the rest is merely tenacity.*

Amelia Earhart

LAWYERS ARE BEING TARGETED BY SCAMMERS

Lawyers and their staff are still being targeted by scammers in connection with funds transfers. You may think you are safe from these types of scams, but fraudsters use sophisticated means.

They employ a variety of strategies, such as claiming to be a lawyer or staff member who is out of the office, or a client, and sending you an e-mail asking for help in carrying out a transaction. They then ask you to urgently transfer funds to a bank account abroad and tell you they have chosen you specifically because they have full trust in you and the transaction is of vital importance. Of course, they are counting on your discretion, because the transaction is confidential. They then give you the necessary details and instructions for the transfer or provide you with revised payment instructions.

Even though the lawyer's name appears as the sender in the "From" line of the email, the e-mail address is fake (the real address is hidden behind the displayed name). You think you are communicating with your colleague when, in fact, you are communicating with the scammer.

The scammer may also present himself as an auditor working for the Barreau who is trying to access your trust account. In fact, this is a new scam being perpetrated against lawyers outside Québec. You should know that if you are randomly selected for a professional inspection visit by the Barreau du Québec involving, among other things, your accounting, including your trust account, you will be informed directly by the Barreau by means of an official letter containing the appropriate information and a telephone number you can check.

with is indeed the lawyer in question (compare the telephone number you were given to the one in your files or ask questions that only the real lawyer will be able to answer);

- Ask appropriate questions to determine whether or not the request is legitimate;
- Validate everything twice instead of once, with enhanced internal controls (another firm member or employee must review and approve the transaction by checking the client's instructions); and finally
- Do not answer the scammer's e-mails. ☂

THE TOUR CONTINUES...

Keep an eye out in the upcoming **December** edition of the *Praeventio* bulletin for the winter 2018 schedule of **free training activities** offered by the *Professional Liability Insurance Fund of the Barreau du Québec*. New dates and regions will be offered. In the meantime, there are a few remaining spaces for the **free training activities** offered this fall:

Date	Location	Time	Recognized duration
NON-RESPECT DES DÉLAIS : SURVIE PRATIQUE POUR LIMITER LES RISQUES!			
November 17, 2017	Gatineau (Sheraton Four Points)	9 a.m. – 12 p.m.	3 hours
December 7, 2017	Laval (Palace Centre de congrès)	9 a.m. – 12 p.m.	3 hours
December 8, 2017	Longueuil (Université de Sherbrooke – Longueuil Campus)	9 a.m. – 12 p.m.	3 hours
MAÎTRES EN AFFAIRES! (Business Law)			
November 24, 2017 (morning)	Québec City (Château Laurier Hotel)	9 a.m. – 12 p.m.	3 hours
MAÎTRES EN MÉMOIRE! (Criminal Law & Family Law)			
November 3, 2017	Longueuil (Université de Sherbrooke – Longueuil Campus)	9 a.m. – 12 p.m.	3 hours
November 10, 2017	Laval (Sheraton Hotel)	1:30 p.m. – 4:30 p.m.	3 hours
November 24, 2017 (afternoon)	Québec City (Château Laurier Hotel)	1:30 p.m. – 4:30 p.m.	3 hours

To register, go to the website of the Barreau du Québec at www.barreau.qc.ca under **Formation continue / Formations offertes par le Barreau / Cours en salle / NON-RESPECT DES DÉLAIS : SURVIE PRATIQUE POUR LIMITER LES RISQUES! AND/OR MAÎTRES EN AFFAIRES! AND/OR MAÎTRES EN MÉMOIRE!** (in alphabetical order) and choose the appropriate date and location, or go directly to the following link:

NON-RESPECT DES DÉLAIS : SURVIE PRATIQUE POUR LIMITER LES RISQUES!

<http://www.barreau.qc.ca/formation/activite.jsp?noActiv=2536&namePage=activite.jsp&Langue=fr>

MAÎTRES EN AFFAIRES!

<http://www.barreau.qc.ca/formation/activite.jsp?noActiv=2024&namePage=activite.jsp&Langue=fr>

MAÎTRES EN MÉMOIRE!

<http://www.barreau.qc.ca/formation/activite.jsp?noActiv=2387&namePage=activite.jsp&Langue=fr>

If you have any questions, please contact Me Guylaine LeBrun at 514 954-3452.

Free training activities: One more reason to choose the training activities offered by the Insurance Fund in order to fulfil your continuing education requirements! ☂

CLAIMS FOR LAWYERS' PROFESSIONAL FEES: WHEN DOES PRESCRIPTION BEGIN TO RUN?

By Me Marie-Eve Charbonneau-Trudel,
Legal Department

You would be surprised by the number of professional liability claims that arise when lawyers try to collect their fees. In 2016, 24.2% of claims made to the Insurance Fund were the result of a counterclaim following an action on account for unpaid fees.

You should therefore think twice before instituting this ultimate recourse. If a client is taking a long time to pay your invoice, "[t]ackle the problem without delay: As soon as a client is unduly late in paying your fees, contact him in order to find out why. Try to come to an arrangement—for example, by agreeing on payment terms—before the arrears

get out of hand. Provide the client with details on the work performed and answer all his questions promptly.”¹

If you nevertheless have to institute an action to collect your fees, first, be aware that you risk becoming the target of professional malpractice proceedings by way of a counterclaim and, second, watch out for the prescription period.

Pellerin Savitz LLP v. Guindon, 2017 SCC 29

On June 9, 2017, the Supreme Court of Canada rendered a judgment in a case dealing with a claim for a lawyer’s professional fees.² While the parties acknowledged that the applicable prescription period was three years in the case at hand (art. 2925 C.C.Q.), the Court had to establish when the prescription period began to run.

Contrary to the submissions made by the appellant’s lawyer, the Court refused to find that there was a general rule. Instead, it ruled that the starting point of prescription depends on the date when the right of action arose (art. 2880, para. 2 C.C.Q.).

The Court pointed out that the moment when the right of action arises and the determination of the starting date of the prescription period are highly factual questions that vary from case to case depending on the circumstances.

“[20] (...) an approach based on a factual determination — a determination that varies from case to case depending on the circumstances — of the time when the right of action arose as provided for in art. 2880 para. 2 C.C.Q. gives the parties the necessary flexibility to agree when payments will be exigible. For example, they

could decide that nothing will be exigible before the termination of the contract, regardless of any interim accounts that might be sent, in which case prescription would not begin to run until the time of termination. Where, however, a lawyer sends his or her client invoices for which payment is exigible in accordance with an agreement they have entered into, the lawyer cannot rely on the ‘termination of the mandate’ as a basis for delaying the beginning of the prescription period.”³

In the case at bar, the client retained the lawyer’s services in September 2011 and a fee agreement was entered into. The agreement provided, among other things that “[e]very invoice shall be payable within thirty (30) days [and that] after that time, interest shall be computed and charged at an annual rate of 15%.”⁴ The client then gave the lawyer a \$400 advance. In October 2011, the lawyer sent an initial invoice to his client, from which he deducted the amount previously paid by the client. The lawyer sent four other invoices, each marked “payable on receipt”. The last invoice was dated March 1, 2012. On March 5, 2012, the client gave the lawyer a last partial payment, because he informed the lawyer on March 21, 2012 that he was terminating the contract. The lawyer instituted the action on account on March 12, 2015.

The client argued that prescription began to run with each invoice sent, while the lawyer argued that prescription only began to run at the end of the mandate.

“[14] In this case, the parties’ fee agreement established when the respondent’s obligation to pay was to become exigible. It provided that [TRANSLATION] ‘[e]very invoice shall be payable within thirty (30) days’. As a result of that suspensive term, each payment did not become exigible, and the prescription period therefore (sic) did not begin, until the 31st day after the invoice had been sent.”⁵

The lawyer’s recourse was therefore prescribed, except for the invoice dated March 1, 2012.

Notion of “when work is completed” or “termination of the mandate”

The Court indicated that the contract between a lawyer and his client can be characterized as a contract for services, a mandate or a mixed contract, depending on the nature of the services rendered. However, it cannot be a contract of enterprise, which calls for the carrying out of a work. It is only in that context that the *Civil Code of Québec* refers to the notion of “when work is completed” (art. 2098 C.C.Q.) Therefore, the applicable rule is the general rule set out in article 2880, para. 2 C.C.Q.

“[31] In short, nothing in the Code or in the case law establishes an inflexible rule that prescription for claims for lawyers’ professional fees begins to run only upon termination of the mandate or the contract for services. Rather, the determination of the beginning of the prescription period is a factual question the answer to which varies from case to case depending on the circumstances and that turns on, among other things, the agreement between the parties and the terms of the invoices sent by the lawyer to his or her client.”⁶

3 – *Ibid*, para. 20.

4 – *Ibid*, para. 4.

5 – *Ibid*, para. 14.


6 – *Ibid*, para. 31.

1 – *Praeventio* Bulletin, December 2012: *Actions to collect fees. Know the risks!*

2 – *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29.

Impossibility in fact to act

The Court also rejected the lawyer's argument to the effect that it was impossible in fact for him to act against his client as long as he was representing him. While acknowledging the many ethical obligations of a lawyer towards his client and recognizing that a lawyer whose client has not yet paid an account that is due and exigible is placed in a difficult situation, the Court dismissed the argument.

"[35] However, this situation does not result in an impossibility in fact to act that suspends prescription. Rather, it forces the lawyer to make a choice: either let prescription run while continuing to act for the client despite the client's failure to pay, or go to court to claim the fees he or she is owed while ceasing to act for the client, as the Code of Professional Conduct of Lawyers allows (s. 48). As difficult as this choice may sometimes be, it is nonetheless available to the lawyer, as evidenced by the frequency with which motions are made in the practice chambers of Quebec courts by lawyers who wish to cease acting for clients because their fees have not been paid. An impossibility in fact to act cannot result from a rational choice that a creditor has and that he or she makes freely with full knowledge of the consequences. (...)."7 

THE IMPORTANCE OF THE NOTICE TO CEASE REPRESENTING A CLIENT

By M^e Jo-Annie Perron,
Legal Department

Any number of reasons may prompt you to cease representing a client. Regardless of those reasons, in addition to fulfilling your ethical obligations, make sure you take certain essential steps in order to properly close the file and protect yourself against a possible malpractice claim.


First, notify your client in writing that your mandate has ended. In your correspondence, state the reasons why you are withdrawing from the file or confirm your client's decision to take you off the case. You should also inform your client, in writing, about any upcoming deadlines in his case. For example, inform him of the date for requesting the setting down for trial and judgment, the prescription date, and the next steps or conservatory measures that should be taken in the near future.

7 – *Ibid*, para. 35.

Next, if you have filed an answer in the court record on behalf of your client, make sure to file a notice of your intention to cease representing your client or an application to cease representing your client, in accordance with article 194 of the *Code of Civil Procedure*. Indeed, as far as the court is concerned, the lawyer who represents a client continues to be in charge of the file as long as he has not formally ceased to represent the client.

Some of the cases submitted to the Professional Liability Insurance Fund of the Barreau du Québec involve lawyers who were no longer actually representing the client, but had never filed the required notice in the court record. All had good reasons for acting as they did: They were waiting for a substitution of lawyer that never occurred or they had a verbal agreement, which they thought was clear and unequivocal, with their client regarding the end of their mandate. Notwithstanding their good faith, the last lawyer mentioned in the court record remains potentially liable for missed deadlines or the failure to act in the case. By filing the notice, the situation is clear and no one can blame the lawyer who ceased representing the client for any subsequent negligence in the case.

Lastly, keep a copy of the file and provide your client with the original. Make sure to always get a signed receipt from the client confirming that his entire file has been provided to him.

By taking all of these steps, you will reduce the possibility of facing a legal malpractice claim or, at the very least, you will have the means to defend against such a claim. 

Service de prévention

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