

PRAEVENTIO

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Assurance
responsabilité
professionnelle

Barreau



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*Always bear in mind that your own resolution to succeed
is more important than any other.*

Abraham Lincoln

REDUCTION OF THE INSURANCE PREMIUM

By **M^e Maria De Michele**,
Executive Director

We are pleased to announce a new reduction of the insurance premium as of April 1, 2019.

The Board of Directors of the Quebec Bar has accepted the recommendations of the Insurance Fund and the Sections Council to reduce the premium to **\$850** per insured for the period of April 1, 2019 to April 1, 2020. This represents a reduction of \$100 compared to last year's premium.

The Insurance Fund continues to offer to lawyers who practise in Quebec an insurance guarantee of \$10 M without any deductible in consideration of a premium that is lower than that payable by all our colleagues across Canada.

Indeed, elsewhere in Canada, the base premium ranges between \$1,093 and \$4,230 for coverage of \$1 M and, with the exception of one other province, insureds must assume a \$5,000 deductible.

The Insurance Fund is proud to continue its mission to provide long-term, not-for-profit, professional liability insurance to the members of the Quebec Bar. ☂

Best Wishes for 2019

*All of us at the Professional Liability Insurance Fund wish you
an exceptional 2019 filled with successful and fulfilling activities.*

*And may we all remember that insurance is synonymous
with vigilance!*

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SEEKING A LITIGATION LAWYER

The Insurance Fund is seeking a lawyer for its Legal Department.

Litigation lawyers of the Legal Department represent the Insurance Fund and its insureds against malpractice proceedings.

Applicants must be members in good standing of the Barreau du Québec and have been a member for at least the past 15 years. They must practice litigation law, ideally in the fields of insurance and professional liability.

Applicants must distinguish themselves by their professionalism, rigour, concern

for excellence, capacity for analysis and synthesis, autonomy, versatility and team spirit.

They must be bilingual both orally and in writing.

Interested persons are invited to send their curriculum vitae by e-mail to:

M^e Marie-Josée Bélainsky

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Only candidates selected for an interview will be contacted. ☂

choose the date and location you want, or click directly on the following link: <http://www.barreau.qc.ca/formation/activite.jsp?noActiv=2536&namePage=activite.jsp&Langue=fr>

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

Hurry, because space is limited! ☂

SOME RESOLUTIONS FOR 2019

A new year has begun. Why not make a few resolutions in your professional life to start off 2019 on the right foot—resolutions that could help you reduce the risk of facing malpractice claims?

To inspire you, here are a few suggestions gleaned from among the claims presented to us:

- ☒ I will confirm, in writing, the nature and scope of the mandate entrusted to me, as well as the instructions received;
- ☒ I will turn down mandates I don't have the time to handle;
- ☒ I will monitor my files properly and in a timely fashion so that none of them is overlooked;
- ☒ I will promptly return my clients' phone calls;
- ☒ I will record every time limit, prescription date and deadline in my agenda, at least a few days before the expiry date;
- ☒ I will send my clients a detailed statement of fees on a regular basis;
- ☒ I will take the time for training activities (in passing, the training activities presented by the Insurance Fund are generally offered free of charge);

FREE TRAINING • FREE TRAINING • FREE TRAINING • FREE

FREE TRAINING ACTIVITY

You have barely two months left to complete your hours of compulsory professional development, so don't wait any longer! There are only a few places left in **Montreal, Sherbrooke and Québec City** to register for the **free training activity offered** by the *Insurance Fund* entitled ***Non-respect des délais : Survie pratique pour limiter les risques!***

Regardless of your practice area, this activity is for you, because prevention comes first and foremost. Remember: Given the many inconveniences of a lawsuit, it's not enough to not be liable—it's better to not have to prove it.

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

Date	Location	Time	Recognized duration
February 22, 2019	Montreal (Holiday Inn Montreal Centreville Downtown)	9 a.m. – 12 p.m.	3 hours
February 28, 2019	Sherbrooke (Grand Times Hotel)	9 a.m. – 12 p.m.	3 hours
March 8, 2019	Québec City (Hotel Château Laurier)	9 a.m. – 12 p.m.	3 hours

To register, go to the website of the Barreau du Québec at www.barreau.qc.ca.

On the home page, in the section entitled Ressources utiles, select **Formation continue / Les formations du Barreau / Accédez au catalogue complet / Développement et pratique professionnels**, then scroll down in alphabetical order and

- ☑ I will keep a full copy of my clients' files when my mandates are completed;
- ☑ I will try to strike a balance between my personal life and my professional life by resting, spending time with family and friends and participating in my favourite activities so that I can be at my best at work.

If each lawyer insured with the Fund were to make at least one of these resolutions and stick to it, the number of claims would most certainly decrease! ☂

SETTLEMENT DISCUSSIONS DON'T STOP THE CLOCK FROM TICKING

You are just about to arrive at a settlement. The only thing left to do is to send the last expert report so you can come to a definitive agreement on the amount of the damages sustained by your client. In a subsequent conversation with the opposing party, the latter informs you that it has no intention of indemnifying your client and that, furthermore, the recourse is now prescribed.

In similar situations, many lawyers forget that prescription continues to run, even if settlement negotiations are underway. This omission is even more frequent when the client did not initially give instructions to institute proceedings.

In such circumstances, it is important to obtain an express waiver of the prescription acquired by the other party or, if the situation involves a deadline that can be postponed, to agree on a new deadline. Since a waiver is not presumed, the agreement must be clear and unambiguous.

It is also important to remember the provisions of article 7 of the new *Code of Civil Procedure*:

Participation in a private dispute prevention and resolution process other than arbitration does not entail a waiver of the right to act before the courts. However, the parties may undertake not to exercise that right in connection with the dispute in the course of the process, unless it proves necessary for the preservation of their rights.

They may also agree to waive prescription already acquired and the benefit of time elapsed for prescription purposes or agree, in a signed document, to suspend prescription for the duration of the process. Prescription cannot, however, be suspended for more than six months.

Thus, when negotiating a settlement, which deadline should you consider?

■ If the recourse has not yet been instituted:

When negotiating a settlement, **pay attention to the prescription period** for instituting the recourse, **as well as any deadline for giving a prior notice**.

■ If the recourse has already been instituted:

When negotiating a settlement, **pay attention to the deadline for setting down for trial and judgment**.

We have seen situations in which there was a failure to inscribe the case within the 6-month time limit because of a transaction between the parties who subsequently reconsidered the agreement reached between them. Therefore, if the parties arrive at a settlement, be sure it is well documented.

By implementing these preventive measures, your daily practice will be more relaxed and you will be protecting your professional interests against the potential problems arising from a failure to respect deadlines. ☂

ABUSE OF PROCEDURE AND A LAWYER'S DUTY TO ADVISE

Review of Rulings for 2018

The notion of abuse of procedure was introduced into the former Québec *Code of Civil Procedure* (articles 54.1 and following) in 2014, representing a codification of the principles set down by the Québec Court of Appeal in *Viel v. Entreprises immobilières du terroir* 2002 CanLII 41120 (QC CA). This notion is now found in articles 51 to 54 of the new *Code of Civil Procedure*.

As a result, the courts have the power to punish abuse of procedure at any time, a power they are increasingly exercising, whether upon an application made by a party or on their own initiative. This power includes the power to award damages to the injured party, such as the reimbursement of extrajudicial fees and

By Me Karine Boily,
Gilbert Simard Tremblay, S.E.N.C.R.L.
With the contribution of Sara Bennani,
articling student

disbursements, as well as punitive damages and even the power to reject a pleading that is considered abusive (articles 53 and 54 C.C.P.).

It should be noted that in the case of a legal person, the directors and officers may be liable to pay damages if they have participated in the abusive decision (article 56 C.C.P.).

In the year 2018 alone, more than thirty judgments at all levels and in a variety of areas were rendered. Whether dealing with issues of commercial law, family law, or civil or professional liability, judges, although they are exercising prudence, are now more willing to award a reimbursement of extrajudicial fees if the record shows that the conduct of one of the parties caused the other party to incur unnecessary expenses. The purpose of such an order is, to paraphrase the Court of Appeal's ruling in *El-Hachem c. Decary* (2012 QCCA 2017), to punish blameworthy conduct in the exercise of a recourse. Reckless, careless or negligent conduct may be considered blameworthy, even in the absence of bad faith or an intention to harm, given that article 51 C.C.P. is based on the rules of liability for faulty conduct.

The following are some examples of behaviour that led to a finding of abuse of procedure, whether at the procedural level or based on the plaintiff's or defendant's position on the merits:

At the procedural level

- Withholding evidence in one's possession or filing it late;
- Ignoring the rules of proportionality or the duty to cooperate;
- Taking steps intended solely to buy time or cause the other party to incur unnecessary expenses;
- Unjustifiably complicating the file;
- Multiplying dilatory or futile procedures;
- Failing to comply with the court's orders.

Based on the plaintiff's or defendant's position on the merits

- Making an improbable application or exercising a recourse that in all likelihood has no chance of success considering the available evidence;

- Instituting a recourse or making an allegation that is legally or factually unfounded;
- Presenting evidence knowing it to be false;
- Ultimately admitting liability or a debt (in whole or in part) that has steadfastly been denied.

It is therefore clear that within the scope of their professional practice, lawyers have the duty to inform their clients of the risks they face if they stubbornly maintain a position they clearly know to be unfounded, whether in order to psychologically or financially exhaust their adversary or because of mere relentlessness. While court orders for abuse of procedure apply to the parties, lawyers could face malpractice proceedings from their clients to recover sums the clients have been ordered to pay to the other party.

Moreover, despite a client's instructions, lawyers are still officers of the court. Therefore, they cannot institute or continue abusive proceedings. Nor can they play along with their client or blindly do what their client requests, notwithstanding any warnings they have given the client. In such a case, it would be best for them to cease representing the client.

All those involved in a file must act prudently both when establishing the case strategy and when managing the case. ☂

Service de prévention

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This Loss Prevention Bulletin is published by the Professional Liability Insurance Fund of the Barreau du Québec.