



# LIANSWERS

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## **CLIA VOLUNTARY EXCESS PROGRAM: 2021/2022 EXCESS INSURANCE RENEWAL**

With the approach of the July 1<sup>st</sup> VEP renewal date, this is an opportunity for you to review your risk portfolio and determine if you have sufficient coverage.

It is important that you renew your coverage before the end of the policy year (June 30<sup>th</sup>) to avoid gaps in coverage that may leave you unnecessarily exposed to the risk of uninsured liability.

The online application process is open to ensure that you have time to complete the application and submit premium payments prior to July 1<sup>st</sup>. CLIA will also be sending a reminder to its current insureds in early June.

As in the past, firms login by using their email address and password from past online applications. If necessary, there is an option to reset your password.

New firms and new retirees are required to register for user access before they can complete the application online.

The renewal period will be open until July 31<sup>st</sup> and applications submitted after that date will have coverage pro-rated.

Briefly set out below, [this note from CLIA](#) sets out the 2021/2022 premium and changes to the program.

Please review the [Excess Insurance page on the LIANS website](#) for more information about the upcoming 2021/2022 program.

As always, should you have any questions feel free to contact LIANS' Director of Insurance, [Lawrence Rubin](#) or CLIA directly at [service@clia.ca](mailto:service@clia.ca). As well, you can contact:

**Renewals:** Please contact Emma [epink@lians.ca](mailto:epink@lians.ca) 902 423 1300

**New applicants:** Contact the CLIA office online at [info@clia.ca](mailto:info@clia.ca) or by phone at (306) 347-3057 (Cindy) and (306) 347-3055 (Sheila).

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## **FRAUD ALERT: RECENT CYBER ATTACK ON NS LAWYER**

Earlier this year a Nova Scotia sole practitioner received, in her email inbox, a note attaching confidential client information, threatening her and demanding a \$50,000 ransom. Though there was a favourable outcome in the end, getting there took time. That process sheds light on how this preventable cyber attack occurred.

The start was the lawyer's email system. A professional marketing company was hired to set it up. But it turns out they were not experts in cyber security and the lawyer did not make inquiries as to what safeguards should be in place. Trust was placed in the reputable contractor. But we now know that what the lawyer received, unbeknownst to her at the time, lacked enhanced security licences.

The hacker accessed the email system through Microsoft Exchange and created folders for itself. The lawyer's was called "Archive" so it looked proper. In addition, the hacker put rules into place such as if the message included the word "payment" in the subject or body, the message would automatically be marked as read and moved to that Archive folder. The result was, unbeknownst to the lawyer, that all incoming emails with the word "payment" were diverted from the inbox and placed into the hacker's folder. Another rule diverted email from a specific lawyer from whom the firm was waiting for a significant settlement meaning that the hacker was reading these specific emails in the Archive folder.



In addition, the hacker sent messages from the lawyer's account. One instructed her assistant to advise all clients that the lawyer was no longer accepting cheques as payment and that all future payments were to be made through wire transfer to an account. However, even this did not lead to discovery as though the assistant thought it was odd and replied to the email for clarification, the response confirming came from the hacker. Fortunately – there is always a lucky event - the assistant also mentioned it to the lawyer in person. Finally, the hack was discovered.

Actually, it was not. They searched for the cheque email but the hacker had deleted it from the sent folder. There was no record in the outbox or trash. Thus, they just thought it was a scam and moved on. The hacker immediately deleted the sent messages and, from the rules, the assistant's reply went to the Archive folder and was also promptly deleted.

But at this time, the lawyer did take correct action. Though confident that this was a scam, out of an abundance of caution, all staff changed their passwords on the email and client management programs. This knocked the hacker out. And three days later the blackmail email arrived with two draft client wills attached and a first name reference to the assistant.

Immediately on receiving the blackmail note, the lawyer contacted the police cyber crime unit to file a report. Then she contacted us and we provided information on our cyber coverage and where to send notice of the claim.

Concurrently and independently of our coverage, the lawyer also contacted a local cyber security expert who was able to determine how the hack occurred and increase her security protocols going forward. He was able to generate a report on what information was available to the hacker

and how long they had access and provided the report to the insurer. In addition, he put a “dark web” notification into place in the event any information obtained from the hack goes to market. The lawyer has since arranged CPD programs on cyber security and enrolled the firm in a cyber security program that tests their cyber security on a random basis.

This lawyer was lucky. What if the assistant had not questioned the email in person? What if they did not change their passwords? What if the hacker was able to spend more time in their system?

Just because your software is from, or is set up by, a reputable source does not mean it is fool proof. Enhanced security is needed.

To avoid something like this from happening to you, some tips from the lawyer herself:

- Hire a cyber security consultant to review your systems;

- Be aware of your email folders, check them regularly and delete any you do not need or use;

- Purchase enhanced security measures and accept minor inconvenience for necessary security;

- Learn your programs and know how to check for rules and generate security reports (and review them regularly);

- TALK to your staff and encourage them to talk to you (i.e., not through email) about any cyber concerns;

- Occasionally check resources on cyber security including those available on LIANS' website;

- Use dual authentication in all your programs;

- Have a separate “admin” licence/profile to do the admin procedures in your system rather than give admin authority to a user with an active email; and

- Do not send unsecured documents through email attachments, use a program with a password or utilize a client portal in your client management program.

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## INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS – ALLEGATIONS IN CRIMINAL REPRESENTATION



From *R. v. Trought*, 2021 ONCA 379, decision released June 3, 2021:

*[76] In concluding this ground of appeal, I wish to comment on trial counsel's failure to obtain written instructions from the appellant about the decision to testify. In R. v. W.E.B.,...this court recognized that the failure to obtain written instructions is a question of professional prudence, not*

*incompetence, but noted that the failure to do so is “ill-advised and contrary to counsel’s best interests”...*

*[77] The lawyer who fails to obtain written instructions risks exposure to unfounded allegations of unprofessionalism... And although not indicative of ineffectiveness itself, the failure to obtain instructions may undercut trial counsel’s attempts to defend against claims of ineffectiveness.*

*[78] The failure to obtain written instructions also makes it more difficult for an appellate court to adjudicate claims such as the one advanced on this appeal... Written instructions may resolve competing claims on appeal. In R. v. Archer...Doherty J.A. observed, at para. 143, “The largest hurdle faced by the appellant in trying to convince the court that the decision to testify was made by trial counsel is the direction signed by the appellant during the trial.”...*

*[79] I would allow the appeal, set aside the conviction, and order a new trial.*

We often speak about the importance of file notes, reporting letters and written instructions that document your decisions and client interactions. This applies not just to civil and transactional matters but criminal matters as well.

Because we see criminal law ineffective assistance of counsel claims, we are in the unique position of seeing the various allegations raised. Not surprisingly, there is a lot of consistency in the allegations from one claim to the next.

What follows, in no particular order, are the more common ineffective assistance allegations we see, many claims alleging several:

1. poor communication, lack of client meetings
2. failure to call or assess the potential evidence of witnesses the client believes have relevant information
3. failure to review, present or challenge evidence or appreciate and explain to the client the uses physical and oral evidence can be put by a judge or jury
4. failure to fully consider the impact of the client testifying
5. failure to obtain appropriate expert reports
6. failure to advise on the effects of an agreed statement of facts
7. failure to advise on potential outcomes
8. not raising potential charter issues
9. failure to advise on the potential for lesser or included offences
10. failure to advise on the process for, and effect of, pleading guilty
11. failure to advise on the court’s ability not to agree with a joint sentencing recommendation or on the range of sentencing for the offence

It is not our intention to make the handling of criminal matters more onerous for you. And the fact is that most claims are resolved in our insured’s favour.

But you should be aware that ineffective assistance of counsel claims are increasing in frequency (in 2016 they accounted for 6% of our claims, 11% last year) and like any claim, your file forms the



basis of your response. The nature of your retainer (i.e. legal aid staff lawyer or private practitioner on a certificate or private retainer) should not affect the documentation you should have in your file, which means file notes, reporting letters and written instructions.

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## KNOW YOUR LIMITATIONS: VISIT LIANS' TABLE OF LIMITATION PERIODS

Stay up-to-date with the newest or amended limitation periods passed by the Nova Scotia Legislative Assembly, and view a PDF compiled chart of those previously passed.

[LIANS' Table of Limitation Periods](#)

**[Disclaimer:** You are responsible for ensuring that you are appropriately informed about any legislation or case law that could affect your advice and decisions. You assume responsibility and risk for your use of the information accessed through this website as well as for evaluating the accuracy, completeness and usefulness of the information provided herein. The Lawyers' Insurance Association of Nova Scotia ("LIANS") disclaims all liability of any kind whatsoever arising out of your use of, or reliance on, the information provided on or through this website.]

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## LIANS NEEDS MENTORS!

Do you have a minimum of nine years of experience and are interested in volunteering your time to provide support and guidance to another member? LIANS is currently seeking Mentors of all backgrounds for its Mentorship Program, including Family, Civil Litigation, and Wills & Estates.

Advantages of being a Mentor:

- renew and revitalize your own practice and strategies;
- stay current with issues and developments in the next generation of professionals;
- expand your own personal network.

The Mentorship Program offers the following advantages and opportunities:

- a semi-annual event (if permitted) where you can meet possible matches and learn more about the program
- matching based on the areas of interest and criteria identified by both mentor and mentee
- a mentorship plan created by you and your match, to identify your areas of focus and goals for the upcoming year

If you are interested in participating in the Mentorship Program, please visit: [http://www.lians.ca/rpm/mentorship\\_program/](http://www.lians.ca/rpm/mentorship_program/).

In order to participate, fill out the [Mentorship Program Application Form](#) online, or download the fillable [PDF form](#) and save to your desktop then forward to [Cynthia Nield](#), LIANS' Database and Information Officer.

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## LIANS' INSURANCE LEVY FOR 2021-2022

The 2021-2022 LIANS Insurance Levy was approved by LIANS' Board of Directors on April 20, 2021.

The net levy for the policy year commencing July 1, 2021 is \$1,944 for each full practising Member, \$972 for Nova Scotia Legal Aid lawyers and \$350 for Nova Scotia government lawyers. In the case of full practicing lawyers, this represents an 8.2% reduction from last year.

In addition, the Board of Directors has approved a further \$100 credit for eligible full practicing lawyers. To be eligible to receive this credit, the lawyer:

- (i) has to have been a Member of the Society at the start of the current insurance Policy Period (July 1, 2020) with either full practicing or non-practicing status at that time; **and**
- (ii) be either full practicing at the start of the upcoming renewal Policy Period commencing July 1, 2021 or, if non-practicing at that time, return to full time practice during the renewal policy period commencing July 1, 2021.

For those eligible to receive it, this additional credit will be reflected on your upcoming Society fee invoice.

Should you have any questions or comments for the Director of Insurance and/or the Board, please feel free to send them care of Lawrence Rubin at [lrubin@lians.ca](mailto:lrubin@lians.ca)

Sincerely,

Lawrence Rubin  
Director of Insurance

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## **NSLAP WELLNESS: MANAGING TEAMS REMOTELY**

*"We expect many things to go back to normal once the COVID-19 pandemic is truly over. However, some workplaces will continue to embrace the remote work model because they find that it works for them. Research finds that employees who occasionally work remotely are "more likely to feel engaged in their jobs than those who never work remotely." By working from home, some individuals have saved up to \$4,000 annually with optimal considerations, while the businesses that employ them save about \$11,000 per year for every employee they shift to remote work status. The immediate savings result from increased productivity and reduced turnover, but regardless, it's safe to say that more people will work remotely from now on.*

*This article will explore ways to optimize working conditions for individuals who find themselves working at home more often. We will use recent data to answer common questions about trust, productivity, engagement, and mental health for remote teams."*

On behalf of your Nova Scotia Lawyers Assistance Program (NSLAP) provider, Homewood Health™ is pleased to provide the following newsletter "[Managing Teams Remotely](#)" (May 2021)

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If you have wellness questions, or are looking for wellness information, visit the NSLAP website at [www.nslap.ca](http://www.nslap.ca). For more information and support, along with resources and counselling on

managing teams remotely, register with Homewood Health™ <https://homeweb.ca/>. Please note that NSLAP is your “company” name when you register.

Call in confidence, 24 hours a day: 1 866 299 1299 (within Nova Scotia) | (See the website for details about [calling from outside Nova Scotia](#)) | 1 866 398 9505 (en français) | 1 888 384 1152 (TTY).

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## REPORT ALL CLAIMS WITHIN THE POLICY YEAR BY JUNE 30, 2021

Your insurance policy requires that you report a claim (or potential claim) to LIANS as soon as practicable after learning of it or becoming aware of circumstances that might constitute an occurrence or give rise to a claim, however unmeritorious. Furthermore, you must report that claim (or potential claim) within the policy period in which you become aware of it. These are conditions of your policy. The current policy period ends June 30, 2021.

**Therefore, if you are currently aware of a claim or a potential claim, even if you believe the claim or potential claim to be without merit, you must report it by June 30, 2021.**

Furthermore, you should report to your insurer when:

You discover a mistake which has, or may cause, the client damage. This is true even if the client has no intention of advancing a claim against you as the client may advance a claim in the future. Early claim reporting allows investigation and possible mitigation of the problem before it becomes worse or more costly.

You receive any threat or communication of intention to sue from a client or his or her lawyer. You should not second-guess the client's intentions and wait for a clearer indication that the client is serious.

Your handling of a matter is criticized by a member of the judiciary or in a public document.



Another lawyer, on behalf of your former client, requests your file on a particular matter. This action should cause you to be cautious, especially if the former client’s lawyer does not give an explanation or expresses concerns about your handling of the matter.

A client expresses dissatisfaction with your handling of a particular matter and there is some indication the client believes he or she has suffered a loss or incurred damages.

Click here to [Report a Claim to LIANS](#)

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## RESOURCES FOR DRAFTING A LIMITED SCOPE RETAINER AGREEMENT

We are seeing more and more lawyers performing work on a limited scope retainer (LSR) or 'unbundled' basis – namely performing only a portion or specific aspects of the work on a larger legal matter. For example, an unbundled approach might see a lawyer reviewing a single document or providing only one piece of advice within a larger legal matter.

Unbundling your services for your clients can be risky. The approach can force clients to make decisions on legal matters with which they are unfamiliar. In addition, unbundling usually limit a lawyer's access to case information along with their general ability to guide the matter toward a successful conclusion on behalf of a client.

### What does the law say?

Rule 3.1-2 [7A] "Competence" of the Nova Scotia Barristers' Society *Code of Professional Conduct* (the Code) states: "When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services."



Lawyers providing unbundled legal services are held to the same obligations of competence, diligence, loyalty and confidentiality that are provided to full-service clients. Not only should you have an appropriate retainer agreement but you should also at the initial stages send a letter to the client setting out exactly what you are retained to do.

### **Room for disagreement**

Failing to establish a proper limited scope retainer with clients may cause them to dispute your fees or to file malpractice suits or bring an ethics-related complaint. Common causes of disputes include unauthorized time spent on a client matter as well as any subsequent fees, and with clients being unsatisfied with how a court has settled the matter.

### **Managing these risks**

Offering unbundled legal services is inappropriate in certain situations. Specifically, rule 3.2-9 (Clients with Diminished Capacity) of the Code states: “When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.”

In addition, you should assess whether your client’s expectations are realistic and if they readily adjust their expectations in response to new information. Should the answer to either of these questions be ‘no’, we suggest you consider the potential risks in accepting work on a limited retainer basis. Furthermore, if your client comes to you for further assistance after the first matter is settled, be sure to draft a new, appropriate, full or limited scope retainer as required.

A written retainer is required for unbundled services (see rule 3.2-1A of the Code). You should draft it in unambiguous language that clearly describes the scope of the work the client is hiring you to do, especially in those instances when the client declines one or more aspects of your service offering or undertaking to handle some aspects independently. Details of these arrangements should be reviewed both verbally and in writing with the client.



Finally, well-documented and clear client communication is the best way to reduce risk when working on a limited retainer basis. Take the time to properly communicate fees and costs, expected outcomes and unexpected contingencies – and to actively listen and ask your client questions. Follow these suggestions and you'll manage both your client's expectations and your own claim-related risk confidently and competently.

The following precedents may be copied and pasted into a Word document as a basis for modification for one's own use.

[Limited Scope Representation Agreement - Sample Form](#)

[Limited Scope Agreement - Sample Checklist](#)

[Limited Scope Retainer - Sample wording for inclusion in a Fee Agreement](#)

You may also wish to review Law Office Management Standard #7: [Limited Scope Retainers](#); Family Law Standard #11: [Scope of Representation](#); and Real Estate Standard 4.5: [Limited Scope Retainers](#) for further LSR-related resources.

### **Guide to Limited Scope Retainers from CBA-Alberta**

The following publication from the Canadian Bar Association-Alberta Branch provides resources and discussion regarding the opportunities and challenges presented by the LSR:

*“Many litigants are choosing to represent themselves, believing they either do not need, or cannot afford, full service legal representation by a lawyer. Self represented litigants may not earn enough to hire a lawyer, but earn too much to access Legal Aid.*

*Limited scope retainers, or unbundling, can help alleviate, not only the strain on families and individuals, but the strain on our justice system. They are a viable option for those who cannot afford full legal representation because a one-size-fits-all approach is not going to provide the best legal representation possible.”*

Read [“Limited Scope Retainers – CBA Alberta”](#)

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## SHINE A LIGHT: WHERE AND WHEN HAS YOUR DATA BEEN COMPROMISED

If you've used LinkedIn, Gmail, DropBox, Hotmail, and/or Adobe in recent years, you've been made to change your passwords for these sites – and for good reason. Almost everyone has been affected by a site/server breach, and any personal information captured on those sites (e.g. email or civic addresses, birthdate, etc.) can be released or used by hackers, and puts you at risk for a [Ransomware or Cyber Fraud attack](#).

Companies are generally quick to recognize a breach, recapture that data, and instruct all of its users to change their passwords after they've re-secured their site. How can you determine whether your credentials have been compromised? Visit "Have I Been Pwned" (<https://haveibeenpwned.com/>) and type in your email. Created and maintained by a Microsoft Security Developer, this site will let you know if your account has been compromised in a data breach, and there is a need to change the password for the indicated website. Law firms and businesses can also do a domain search, to track which email addresses using a certain domain name have been seized in any of the known data breaches.

Users can also register to receive free email notifications for if (or when) their account is compromised.

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