

# INSURANCE ISSUES: *Risk Management*

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## Baby boomer blues: The practice risks of aging

**A**s every boomer knows, there ain't no cure for the summertime blues.\* Happily, there's more than one cure for the practice risks that the boomer generation of lawyers now face. Clearly, this generation brings a wealth of experience and wisdom that helps reduce a number of risks. However, new ones do emerge as lawyers age in a world that is also aging and changing. In this article, we set the stage with some statistics, then move into the various risks that expose boomers to claims.

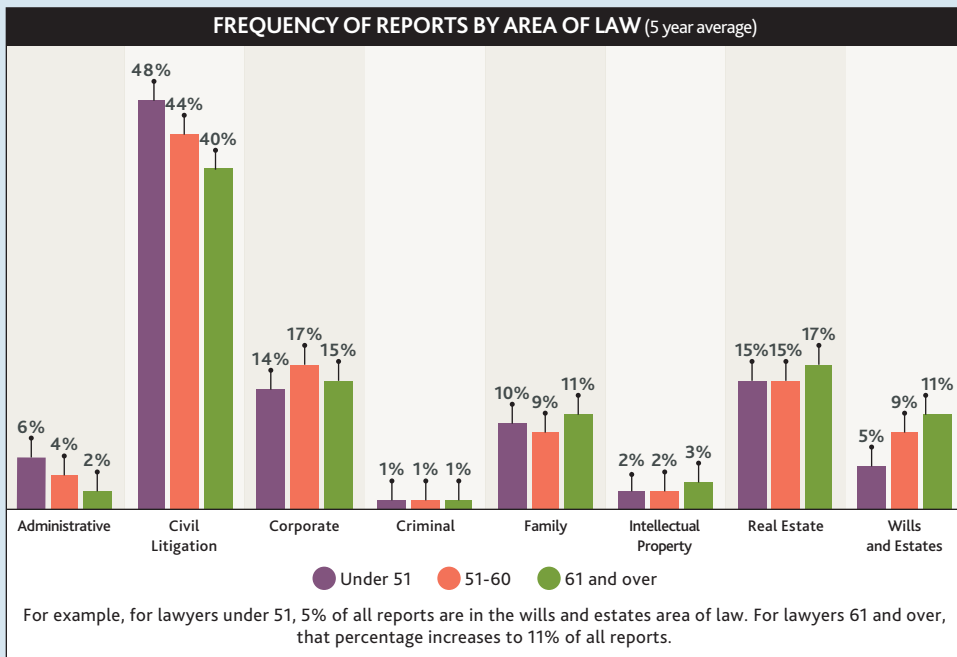
And for the cure? We've developed a number of tips that will help you manage those risks, including a list of resources dedicated to the issues of lack of capacity or vulnerability to undue influence, as outlined under "aging clients," below. You can find them all on [this web page](#). For convenience, the web page also includes the details of each risk as set out in this article.

\* Eddie Cochrane, 1958: "Summertime Blues"



## The boomer generation of BC lawyers: Demographic and claims statistics

If you're a lawyer born between 1946 and 1965, you're part of the post-Second World War baby boom in Canada. With those babies now between the ages of 52 and 71, the boomer generation accounts for the aging of the profession. In 2006, for instance, only 11 per cent of insured lawyers were over 61. Ten years later, that figure had doubled to 22 per cent. And as you age, the areas of law in which you report claims and potential claims shifts, as seen in the chart on the right. With that backdrop, let's look at some of the specific risks that emerge as we age.



### Risk: Delegating work and transferring files

Seniority brings an increased ability to delegate work on files you continue to handle, or to transfer a file entirely. This creates risk for you – it also creates risk for the lawyer to whom you're delegating, as reflected by comments we've received from lawyers (see sidebar: "Some reasons for claim reports," p. 3).

### Risk: The worst happens

Hope for the best: prepare for the worst. Aging may bring medical or other crises that lead to short- or long-term work leaves and, yes, we will all die someday. Protect your clients, your firm, and your family against the possibility of your sudden absence causing problems. And when you do leave practice, for whatever reason, take comfort in LIF's [free insurance coverage](#) for past mistakes. Also consider the importance of keeping good notes (see sidebar: "A noteworthy claim story," p. 3).

### Risk: A constantly shifting technological landscape

Failing to learn and adapt to the new landscape that continuously transforms the practice of law creates real risk for lawyers. As consumer demand for cost-effective so-

lutions, which are often met through technology, peaks, the standard of care may change. Ten years ago, we could defend a lawyer who missed a deadline relying on a courier instead of e-filing in the LTO. Today, that's not even an option.

### Risk: A constantly shifting legal landscape

One lawyer described this risk as "failing to update myself in an area of law I once practised in extensively. I assumed too much from prior experience too long ago." Another explained, "The law changed and I was unaware of the change."

### Risk: The generation gap

There is still a generation gap, but this time you're on the other side. You're no longer surrounded by other boomers or traditionalists (born 1925-1945), but now deal with colleagues, clients and opposing counsel who are generation Xers (born 1965-1980) and millennials (born after 1980), and who may have different attitudes, values and priorities from you. The differences can be acute, leading to misunderstandings, communication breakdowns, and unnecessary conflict. You risk jumping to the wrong conclusion if you make assumptions about anyone based



## Some reasons for claim reports from lawyers left behind

Here are some of the comments we received from lawyers who reported claims arising out of matters delegated or transferred to them by departing lawyers:

*"I took over a file from a former member who had been appointed to the bench. It came with a potential missed limitation period."*

*"The reason for my mistake was the transfer of an active file from a departing lawyer in too casual a manner."*

*"This claim arose because of junior counsel being left without supervision by senior counsel who didn't pay enough attention to the file."*

*"It was a matter of a busy office, inexperienced counsel, and instructions that were less than perfectly clear from a senior lawyer."*

*"This was prompted by lawyers of too junior a call having full conduct of our client's file without a senior lawyer assisting. This can be common in large firms because of the pressure to bring in your own clients and be compensated for that. And the fact that senior lawyers' fees are so high, it is difficult to have their time show up on files for clients just starting a business."*

on how you or someone of your generation would act.

### Risk: Great (but unrealistic) expectations

Age can make us overly confident, and that can make us sloppy. We also have long-term relationships with clients, and this can lead to assumptions that later prove to be wrong, as one lawyer discovered who made a bad assumption because of *"the long-term and casual relationship with my client."* He thought the client knew that he was only acting on one part of a matter, not the whole thing. Those long-term relationships can be problematic in a small town. As one lawyer told us, *"Acting in the same community for 30 years ultimately creates difficulties for small firms as every client is connected to every other client."* Age can also lead to higher expectations on the part of our clients. If we're senior, we ought to know everything, right?

### Risk: Aging clients

As lawyers age, so do their long-standing clients. Fortunately, long-standing relationships can mitigate against risk. For in-

stance, one lawyer who had acted for an executor and found himself the target of a disgruntled relative who thought she ought to have benefited more from the estate, told us, *"My personal and professional relationship with the testator over the years was what 'saved' the situation, and the matter was settled by payment of a relatively small portion of the estate going to the claimant."* Unfortunately, however, other risks, such as those described below, may emerge.

- Forgetfulness or confusion: Both have triggered reports from lawyers. Examples include the client who couldn't correctly recall the lawyer's advice, the client who omitted to tell the lawyer about a material fact because she forgot, and the client whose confusion about dates and times meant that he consulted the lawyer perilously close to a limitation period.
- An illness that unexpectedly becomes life threatening: In these situations, lawyers have found themselves unable to finish a will, or finishing a will in a panic. As one lawyer told us, *"It's pretty hard to resist a family in extreme distress when your client is dying and he is asking for help. All could have been*

## A noteworthy claim story

Notes may turn out to be a lifesaver. Lawyers dealing with claims that were made years after the legal matter concluded tell us they had little memory of what had happened. They urge others to keep adequate notes – particularly of issues that cannot be easily reconstructed, such as your client's instructions. In one file, a lawyer acted for a father and son buying vacant land. The father built a house on the property. Years later, they decided to subdivide so that the son could build his own home. The property was not zoned for subdivision, and they claimed that the lawyer assured them that it was. The lawyer died, leaving no note to contradict the client's story, but leaving her estate and former partners at risk of a lawsuit and liable for the deductible.

*avoided if he'd done the estate planning I had tried to get him to do for years."*

- Lack of capacity or vulnerability to undue influence: A wealthy older generation means that unscrupulous 'friends' or relatives may seek to benefit at an older person's expense. Lawyers who act for elderly clients to either witness a signature on a real property transfer form, power of attorney, deed of gift or any other document with legal consequences, or provide them with independent legal advice, are at risk when the matter later unravels and claims of undue influence, or lack of understanding or capacity, surface.
- Changing legal needs: You may be at risk of finding yourself wading into legal waters that can sink you quickly, as the scope of legal issues for aging clients widens. Do you have the knowledge and skills necessary to provide wills and estate planning services, or corporate services and tax advice to transfer a family business to the next generation? Are you prepared to enter the world of greying divorce with a client who decides that life's too short to stay any longer in an unhappy relation-



### *Reminder to lawyers*

*If a mistake is made in spite of the efforts of you and your assistants to practise safely, remember that you must report it to us immediately. That's because you are obliged to give us immediate written notice if you become aware of a mistake or someone suggests you made one, or you face any circumstance that could reasonably be expected to lead to a claim, however unmeritorious.*

*Report a claim or potential claim.*

ship, or assist a client who needs a retirement home or long-term care housing? Elder-law issues are becoming increasingly challenging, and a complex legislative environment makes many areas even more complicated.

### **Risk: An aging professional world**

As you age, so do others in your professional world. That creates risk. One lawyer, for example, found that the one-year limitation for starting a lien claim was missed due, in part, to “*the long-term disability of a long-time legal assistant.*” Another, acting for an infant on a motor vehicle accident claim, didn’t start the tort action within two years of the client’s nineteenth birthday because his reliable senior assistant made a sudden decision to retire, and the diary prompt wasn’t brought to his attention.

And it’s not just your staff who may be aging. One lawyer created unintended tax consequences in transferring shares from a father to his son’s company, without transferring them first to the son personally. He told us that his mistake was caused, in part, by “*assuming that the retired CA on whom I relied possessed the necessary tax expertise.*”

### **Risk: Acting as an executor**

As a trusted, experienced advisor of clients who are also aging, you are more likely to find yourself acting as an executor. This role brings unique risks, which are heightened if you also act as lawyer for the estate.

### **Risk management tips**

As mentioned earlier, you can find all of our tips to help you manage these risks, as well as the details of each risk as set out in this article, [on our website](#).

