

Common causes of negligence claims (Lecture B1179 – 10.20 minutes)

This article considers why risk management is important and considers the impact that failing to have a good risk management culture and processes can have upon a firm. It will consider what can go wrong within a firm, look at common pitfalls and then takes a quick look ahead at futures articles that will consider what more can be done to minimise claims and their impact.

The costs of a claim

The cost of a claim is not just the excess that is payable. It also includes the lost fee earning time that is spent investigating the claim, talking to others within the firm and the lawyers handling the claim. This can be a substantial cost to the firm. As a result of a claim, premiums are also likely to be impacted

Don't discount the potential for losing clients. A combination of dissatisfied clients talking publically about their feelings and bad publicity created where a case goes through litigation can have an adverse affect on other clients and their desire to remain with the firm.

Additional work will be required involving significant amounts of senior management and partner time dealing with the claim but also time will be needed to meet with other clients and disaffected staff as well as the time involved in implementing new procedures that may be required.

Not all bad news

It is important to treat any claim as a learning opportunity by identifying what went wrong and then use that event to put things right. Putting things right quickly can strengthen relationships with clients. "Near misses" where something goes wrong but serious problems were averted can be invaluable in this respect.

What can go wrong?

There are a number of areas where issues can arise:

- Technical Issues involves getting the law wrong and is usually managed by technical training and awareness;
- People Issues would normally be managed by recruitment and HR processes like appraisals and ongoing training;
- IT Issues are managed by good processes and systems being in place;

However, 80 to 85% of professional negligence claims are caused by common pitfalls that are discussed in this session as well as retainer issues that will be discussed in a future article covering engagement letters and the like.

Common pitfalls

Most people get the difficult, technical tax aspects right so what is it that goes wrong that subsequently results in a negligence claim?

Deadlines – Missing deadlines can be very costly. A lot of the work that we do is deadline based. Diary systems need to be clear. It is no good setting deadlines in personal diaries only. What happens if that individual is unavailable? Deadlines need to be in a firm-wide diary, accessible by all. There is no point putting a deadline in a diary for a complex piece of work to be completed by a certain date, if the deadline is put in on that date and that date alone. There needs to be a reminder, sufficiently in advance, so that the work can be done in time.

File Notes - A lot of claims arise as a result of a file note being missing, poorly filed, or poorly prepared. Filing needs to be kept up to date. If you have more than one person working on the file, if the information is not on the file, how can the other person know what has happened. Any advice given to the client needs to record the assumptions and facts upon which the advice is based. Tell the client that, if those assumptions are wrong, the client needs to advise you, because otherwise the advice cannot be relied upon. File notes are as important as any emails or letters to the client, particularly where more than one person is acting on the file.

Emails - The problem with emails is their immediacy. The thinking time has gone. The informality of emails can lead to ambiguity. If substantial advice is included in an email, time should be spent in preparing the email, reviewing it and, perhaps, peer reviewing it, before it is sent. Double-check the address to which the email is being sent. Ensure you have not sent "reply all" unless you really mean to. Check the email chain, do you mean to send the chain to the client?

Supervision - You may have a post signing policy whereby letters are reviewed by a senior member of staff before being sent out, but what about emails? Firms must have a policy in relation to emails. Some firms have a policy where junior staff can't send out emails; others have a "holding pen" where emails are reviewed before they are sent out. Others have a policy where junior staff have to get emails approved before they are sent, and then check emails after the event. Think carefully about what system you need in your firm.

The Rising Star –These individuals are vulnerable. They do not have enough experience to know what they do not know. They may make a mistake that is not picked up because they are not adequately supervised. A claim will follow and a potentially talented individual's future can be blighted. Even rising stars need careful supervision.

Communication - We are all encouraged to cross-sell. The Courts will expect information that comes into the firm to be known across the firm. You need to have systems to ensure that knowledge is imputed across the firm. Even small firms are vulnerable. How do you ensure that information imparted to department A is made available to department B? Perhaps have general client files and alerts when new information is recorded? A no blame culture is also important – people have to feel able to speak up when things go wrong or problems arise.

Looking ahead

This is the first in a series of four articles looking at professional negligence. Subsequent articles will cover:

- engagement letters, retainer issues – who am I acting for, what am I doing, what am I not doing? Fee issues and liability caps;
- how to reduce the chances of things going wrong, what processes and systems can be put in place to minimise the risk of a common pitfall arising;
- what to do when things do go wrong, identifying a complaint, a circumstance and a claim, how to deal with a problem and how to minimise the chance of a problem with your insurer.

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