

What To Do When Things Go Wrong

(Lecture P1195 – 14.05 minutes)

Previous webinars have looked at highlighting common causes of claims, highlighting why risk management is important, identifying common causes of claims, which can quickly be put right and how to reduce the chances of things going wrong, looking at systems and processes to minimise the chances of things going wrong within a professional's practice. This is the final webinar in a series of four and looks at what to do when things do go wrong, focusing on two aspects, preventing policy problems and dealing with the problem itself.

It's a sad fact of life that Claimants are becoming increasingly litigious so, a claim might arise (meritorious or not) at some point, so it is important to know how to prevent policy problems and how to deal with the problem itself.

Preventing Policy Problems

It is it a complaint or a claim? It is important to understand the difference between the two, because how you deal with them will depend on whether the issue is a complaint or a claim.

A complaint is where a client complains about the level of service, they are not necessarily saying that they want money back, they are saying that you haven't met your professional standards. For example, they may say that you breached client confidentiality, but you haven't cost them anything as a result. A claim is a client saying "You've done this, you've cost me money, I want some money back".

If a client makes a complaint, you have to follow your firm's complaints procedure and those of your professional body. If a client makes a claim, or it is a circumstance which could give rise to a claim (which I will deal with in a moment), you have to notify it to your insurers.

So what is a circumstance, and what is a claim?

A claim is easier to identify. A client has told you that you have made a mistake, you've cost them money and they want compensation.

A circumstance is something that could give rise to a claim. You have to notify both of those to your insurers, usually within a very short timescale, depending on the terms of your policy. Problems arise where you don't notify your insurers. You have to be alive to circumstances and notify them promptly.

So what is a circumstance? It might be that you have identified a mistake that you've made in your client's work, but the client isn't yet aware. You have to tell the client, as you have a duty to do so (although see "dealing with the problem"). When you tell the client, the client is likely to make a claim because the mistake is likely to cause loss. That is a circumstance and has to be notified to the insurer, even though the client is not yet aware.

What about when a client for whom you've acted for a number of years, ceases to instruct you? Is that a circumstance? Well it might be. It might be that your firm's fees have gone up and the client has chosen to instruct a cheaper firm. It might be that the client has moved areas and has chosen to instruct a more local firm. It might be that the client's needs have become more sophisticated and they have chosen to instruct a bigger firm that can meet its more demanding needs, none of these would necessarily amount to a circumstance. But it might be that the client is unhappy with the level of service and has chosen to instruct a new firm because of its dissatisfaction.

So you have to look at the bigger picture when deciding if something is a circumstance that might need notifying. The best advice is, if you're unsure, speak to your insurance broker and they can assist you in deciding whether or not to make a notification.

Some clients are getting quite clever and can use complaints to obtain information which they can then use in making a claim.

Where that happens, we try and deal with the complaint first, and the claim afterwards, but that's not always possible. It's important that claims are notified to insurers promptly, because there may be a policy point if you don't notify promptly. Professional indemnity policies are claims made policies, so the policy that responds to the claim is the policy that is in force when the claim is made or the circumstance notified. So if a claim is made in one policy year, but not notified to insurers until the second policy year, there may be a policy point, particularly if the firm has changed insurers between policy year 1 and policy year 2.

If you become aware of a claim in policy year 1 and notify it in policy year 2, the insurer to whom you have notified, may not accept the claim, because it was made in policy year 1. The insurer in policy year 1 may not accept the claim because it wasn't notified to them in their year. You may find yourself uninsured. You will certainly have a battle with the insurers as to who should accept the claim.

There may be prejudice. If a claim is notified or you become aware of a circumstance, but you delay in telling the insurers and as a result of that delay, the opportunity to put things right is lost, and costs arise or the value of the claim increases substantially, the insurer may only agree to cover the claim to the extent that it would have been had it been notified promptly. Your firm would then have to bear the additional cost arising as a result of the delay in notification.

I mention surveying the firm. It's important to survey the firm, the whole firm, before you renew your policy, to make sure that any circumstances and claims are identified and notified to insurers before the end of the policy period, to avoid any policy issues arising. Many firms send out the questionnaire asking all staff if they are aware of any circumstances and claims, but what some firms don't do, is to make sure that they get all responses back. It's the people who don't send back the responses who usually have the problems.

So those are the policy issues. You don't really want to have a policy issue when you have got a claim, you want the solicitor appointed by your insurer to get on with dealing with the actual claim against you.

Dealing with the problem. These are the common questions and points that arise when dealing with a claim itself.

The first question that we often get asked is, what can I tell the client? There is a problem. What are you allowed to tell the client? You can tell the client the basic facts. But can you admit your mistake? Well, yes you can, but only with your insurers' consent. All too often I see cases where the professional has admitted to the client that they have made a mistake, but what the admission might do is to go further than the basic facts and that can cause insurance problems, because the admission may be wider than intended and may cause your insurers to take a policy point. So basic facts can be admitted, but no more, and get insurers' consent before making that admission.

Release of papers – clients often ask for their papers and they are entitled to certain papers, but not all. They are not entitled, as of right, to their working papers, for example. It may be difficult for you to work out what papers they are and are not entitled to. If you are going to release papers, then keep a copy and only release beyond that with insurers' consent. That's another good reason to get insurers involved, because the panel solicitor appointed can assist in determining what papers the client is and is not entitled to.

I mention on the slide, email and computer searches. It's not just paper documents that a client may be entitled to. If the claim is pursued, the client will be entitled to emails and documents held on your computer. There is a need to retain those documents and further detailed searches might need to be made.

So, when a claim is made, or is likely to be made, you need to ensure that your document retention system and your document destruction system are looked at so that documents are retained or not destroyed automatically, so that the documents that are relevant to the case are retained.

You will be required to retain the documents that relate to the claim so that the solicitors can see them, so that if the case goes to litigation, they haven't been destroyed.

All too often I've had cases where there has been a change of computer system and the old hard drive has been destroyed. If there is likely to be a claim, that will have to be retained.

You will need to give evidence to Court as to what documents have been retained and what searches you have made, you will need to search the computer systems, your emails, as well as your paper documents, so you will need to liaise with your internal systems about destruction of documents as soon as a claim appears likely.

Not mentioned on the slide, but also, if a member of staff worked on the file, and is leaving or has left, you will need to retain their contact details, so that they can be contacted.

I mention the need to act quickly. The professional negligence pre-action protocol requires you to acknowledge a notice of claim within a short period and there is then about three months to respond to the Letter of Claim. That might sound like a long time, but by the time you have received the letter, put it on the "too difficult" pile and then by the time you have got round to dealing with it, and eventually tell your broker, notify your insurers, a panel solicitor is appointed, quite a lot of time has passed. The panel solicitor then needs to obtain the documents from you, investigate it, ask questions, further information will usually be needed, and a lot of that three months has passed. The Claimant may well have become entrenched and hostile in that period. If more time is needed, it will be difficult to obtain. The sooner you deal with it, the sooner the solicitors are involved, the sooner they can pick up the phone and say "Hi, I'm here to

help you", the less likely there is to be a policy problem, the more likely it is that we will be able to deal with the Claimant, the less likely the Claimant is to become entrenched and hostile and the easier the claim will be to deal with.

I hope that helps you get an idea of how to deal with policy issues and problems when a claim does arise. Hopefully, if you have followed the guidance in the first three webinars, these issues will not be relevant, but hopefully you now have a good idea of what to do if the worst happens and a claim is made against your firm.

Contributed by Karen Eckstein (Professional negligence solicitor and a CTA)