



Minimise your risks

RISK IS A PART OF EVERY LEGAL PRACTICE. PRACTITIONERS SHOULD BE AWARE OF THE COMMON UNDERLYING CAUSES OF NEGLIGENCE CLAIMS AGAINST LAW FIRMS, AS WELL AS THE PRACTICE MANAGEMENT STEPS THAT CAN REDUCE RISK. BY STEPHEN BUBB AND HEATHER HIBBERD

SNAPSHOT

- Every legal practice carries risk but those risks can be reduced.
- Practice management failures are the underlying cause of many professional indemnity claims.
- To minimise risk, practitioners need to spend time managing staff effectively, focusing on the areas of law they know well, and developing good policies, precedents and work flow systems.

Every job is an opportunity to earn fees, do fulfilling work and enhance your reputation, but every engagement carries risk. You have a high duty of care to every client on every job. The duty applies regardless of the fee charged, your level of experience or personal circumstances at that time. Even simple legal matters can go wrong.

There is both a personal and financial cost when things go wrong and a client brings a negligence claim against you. Being sued for negligence can be very distressing and time consuming. You need to review your file and respond to the allegations. If the matter proceeds you may be required to give evidence and be cross examined on what you did or didn't do on a client matter five

or more years ago. Apart from lost time, you may have to pay an insurance excess and face an increase in premiums.

Underlying causes of claims

To manage the risks in any matter and reduce the likelihood of receiving a claim, you need to understand what mistakes can happen and why.

Eighty-two per cent of claims in the last five years had the following underlying causes:¹

- failure to manage the legal issues
- a lack of a useable trail
- poor communication
- failure to manage the engagement
- simple oversights.



Each of these causes can be directly attributed in part or wholly to a failure of practice management within the firm.

Failure to manage the legal issues

These claims sometimes involve a lack of legal knowledge but often a failure to obtain all the relevant facts to identify the right legal strategy. This can occur because:

- someone in the firm is acting outside their area of expertise – this directly relates to the firm's lack of policies or enforcement of policies on what work the firm will take
- there is a lack of appropriate checklists and workflows for collection of information from clients at the start
- staff are not being supervised properly or are delegated work that is not appropriate for their level of knowledge.

Lack of a useable trail

These claims involve failing to keep adequate file notes or write letters of advice and, in some cases, failing to open a file. This can be attributed to the firm not having a clear policy or procedure for keeping proper written records or not supervising or auditing files to ensure any policy they have is complied with.

Poor communication

These claims involve failing to listen, ask or explain either between practitioner and client or within the legal team. This can be caused by the firm not having clear precedents and systems for adequately communicating essential information to the client. It may also be a lack of training to ensure practitioners listen to their clients and communicate in a way that the client will hear and understand.

Failing to manage the engagement

These claims involve failing to properly set up, vary or terminate a retainer with the client. This can be due to:

- the firm not having adequate policies about who it will act for and who is responsible for accepting new matters and clients
- not obtaining all relevant facts at the start and not completing a detailed scoping of the work to be done
- a lack of training on how to scope the retainer properly
- no or inadequate retainer letter precedents
- a lack of proper supervision to ensure the work is done within the agreed scope and the scope has not changed.

Simple oversights

These claims result from a lack of systems to ensure things are not missed. A common example is the lack of a robust system to ensure time limits are met.

Risk management

Risk management is about understanding the causes of claims and putting in place strategies to minimise the risk of a claim. Done well, it also results in delivering high quality legal services efficiently and effectively.

This article cannot cover all the ways to manage your risks and provide high quality legal services to your clients but the following suggestions are a good place to start.

Management is real work

Whether you are the principal or an employee solicitor you must allocate time and effort to managing the inherent risks in your work. Not every minute of your working life

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should be allocated to billable work for clients. Part of being a professional is to invest in your own skills, keep your knowledge updated and adapt to the changing environment to provide quality service to your clients. This is real work. It takes time, effort and focus.

Different roles require different levels of management. Principals must accept that much more of their time needs to be taken up managing the firm and staff than when they were an employee staff member.

Be disciplined and allocate an appropriate amount of time each week to management. Doing this at the front end will save you the cost of rectifying problems, often years later, at the back end.

Define and narrow your work areas

The best way to avoid making legal errors and to provide efficient, high quality work is to define and narrow your area of practice.

Write down in detail the work you will do and do not be tempted to accept work outside that scope.

Saying no to work can be difficult, especially if the work is offered by an existing or previous client, but it is an essential skill you must learn. Practitioners often feel they are letting the client down by rejecting the work. There is actual or perceived pressure to accept the instructions, but if it is not in your defined work area you are not the best person to take the job. You are not acting in the client's best interests.

The law is complex and continually changing. Getting most of the work right does not protect you from a claim as close enough is not good enough. You need to understand the law in the areas in which you accept instructions. Limit those areas and focus your study to fully understand the law in your area of practice.

Systems, process and records

Firms with a narrow work offering can do it well because they focus on the production system with checklists, precedents, workflows and other processes to assist and support the production of quality work.

No matter how simple you think your legal work is, when you add in a large volume of work and or work done at high speed, the risk of errors increases exponentially. The reality is all legal work has a level of complexity to it that requires systems, tools and an orderly approach to do it safely. It is high risk to think you can remember all the issues and steps required to manage multiple matters. Systems create efficiency, capture details, identify critical dates and draw your attention to issues you must consider.

Claims often arise when practitioners are under pressure from, for example, excessive work volume, support staff on leave or personal issues. This is when the systems are most beneficial and critical to prevent omissions and oversights that can result in future claims.

A work processing system should include:

- a client intake checklist to identify engagement issues and qualify the client before you take the job
- an instruction checklist to capture relevant information and raise possible issues

- a workflow plan or specific matter plan for each matter
- a diary system to record critical dates and follow up actions
- precedent letters to provide general advice and raise issues
- precedent letters to confirm specific instructions and advice
- precedent documents (including cost disclosure and agreement)
- mandatory notes of all client contacts
- a matter closing checklist.

A good system not only focuses you on the essential processes, it produces the records and a useable trail to evidence your work and prevent or defend problems.

Tips

- Develop a work flow system for all work you accept.²
- Train all staff on the importance and necessary details in file notes.
- Test that every client file tells the full story of all work completed from engagement to completion. Consider peer review.³
- Use technology and dedicated legal practice software for efficient client records.

People management

Claims arise from poor people management including undefined roles, poor delegation, insufficient training and inadequate supervision. Commit to actively manage your people to reduce your risks, build efficiency and improve client service.⁴

Tips

- Develop clear job descriptions and defined authority levels for all staff (including principals).
- Conduct regular meetings (weekly or fortnightly) to review work and provide input and direction.
- Take notes or minutes of meetings.
- Keep an open door for assistance as required (this does not replace scheduled meetings).
- Identify areas for training and development for all staff.
- Remember that all delegation includes the four fundamentals of clarity, context, expectation and review. ■

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1. The first analyses of underlying of causes of claims against lawyers in Australia was done by Ronwyn North and Peter North of Streeton Consulting.
2. See the LPLC checklists at www.lplc.com.au/category/checklists/.
3. See LPLC's Risk management audit checklist at www.lplc.com.au/category/checklists/.
4. See Key risk checklist: Tips for effective supervision and Key risk checklist: Delegation/supervision instruction sheet at www.lplc.com.au/category/checklists/.