

Avoiding claims in changing times

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What's changing?

- Information explosion (client access to information).
- Informed clients with high expectations.
- Over-supply of lawyers (between 14,000 and 15,000 graduate lawyers each year - for a total profession of 66,000).
- Work is captured and distributed by non-legal marketers (aggregators).
- Price pressure.
- Client loyalty.
- Outsourcing tasks.
- Other changes.

Technology has:

- removed geographic advantage
- increased accessibility (anytime – anywhere)
- increased work flexibility
- streamlined production.

New delivery models

- **LawPath**, a part of Norton Rose Fulbright, provide fixed fee online packages of documents with access to a lawyer for advice or amendments.
- **Legal Au** answer legal questions on line, 24 hours and 365 days.
- Lawyer matching services (**Lexoo, Crowd & Co, Lawyers on Demand**). These online platforms match clients with individual practitioners for specific transaction or tasks.



- Large firms such as Minter Ellison (**Flex**), Allen & Overy (**Peerpoint**) and Corrs Chambers Westgarth (**Orbit**) have set up and provide lawyer-renting platforms that provide lawyers to clients for short and long term projects.

Exercise 1 – How are these changes affecting you?

Write down three changes that have impacted on your legal practice in the last five years and how they have either increased or decreased your risk of a claim from a dissatisfied client.

1. _____

2. _____

3. _____

What has not changed

As a professional **you have a duty of care to every client on every engagement** you take on. This obligation has not changed and clients are likely to claim compensation if they believe you have caused loss or failed to fulfil the high duty of care imposed upon you.

The duty applies regardless of the fee you charge, your innovative service delivery or your personal circumstances such as health or family issues.

Claims

We have approximately 450 notifications per year.

The 10-year average is \$30-34m (this includes compensation and defence costs).

Claims are generally constant in number and amount (year end 30 June 2016 was a bit higher at \$35m).

Risks for increased claims

- Large number of new/inexperienced practitioners.
- Downturn in property market.
- Practitioners who find the pace of change difficult.
- Financial pressure on profession.
- Pressure to do more work in less time.
- Outsourcing risk.
- Cyber and data protection risks.

Fundamental causes of claims

1. Failure to define and manage the retainer

- Who is your client?
- What are you engaged to do and not do?
- When does your engagement start and finish?
- Has the retainer changed and have you managed the change?

2. Failure to implement systems and quality control

- Claims are reduced by work systems including checklists, action lists, precedent letters and file reviews.
- Quality checks are an essential part of the process.
- File reviews.

3. Communication (with clients)

- Claims arise when client expectations are not met.
- Good communication helps to manage client expectations.
- Writing creates clarity – always confirm in writing.
- Avoid aversion or failure to deliver bad news.

4. Communication (internal)

- Claims arise from poor delegation (clarity, context and timeframe are essential in all delegation).
- Inaccurate or failure to record client instructions.

5. Legal errors

- Not knowing all the relevant law (jack of all trades – master of none).
- Not knowing time frames practice and procedure.
- Not getting all relevant facts.
- Not identifying an issue.

6. Failure to create a record and useable trail

- No records make it difficult (or impossible) to defend a claim.
- Can a third party, such as a judge, pick up your file and follow the instructions, advice and outcome.

Exercise two

Background

A practitioner was retained by the family of a man who died as a result of injuries received in a brawl. The practitioner, who was an experienced lawyer practising mainly in the criminal area, acted for them at the subsequent coronial inquest as well as in a claim for compensation to the Victims of Crime Assistance Tribunal (VOCAT).

At the conclusion of the coronial inquest three years after the man's death, the coroner found that a particular individual punched the deceased. This resulted in the man falling and hitting his head, which is what killed him. The coroner's conclusion was speculative, as he noted many witnesses gave conflicting statements and it was difficult to reconcile their accounts.

The practitioner was then retained by members of the man's family to act in potential nervous shock claims arising out of the man's death. He agreed to act despite not having expertise in personal injury litigation. The practitioner was also alleged to have been retained to act for the man's child in a potential dependency claim.

Although the practitioner briefed counsel and obtained advice at different times, the personal injury claims were not handled in an organised manner. Instructions and the retainers were not properly documented and it was impossible to tell from the file what the practitioner was specifically retained to do in the personal injury claims, for which members of the family and when. There was a lack of file notes to support the practitioner's recollection of what he said as well as no evidence the practitioner properly understood and documented the applicable time limits.

There were also delays in obtaining advice from counsel, identifying the correct defendants as well as issuing and serving proceedings. The proceedings were not drawn by counsel.

Subsequently, the proceedings were dismissed when they were held to be out of time under the *Limitation of Actions Act 1958* (Vic). The claimants then sued the practitioner for the lost chance of obtaining damages.

These were difficult claims that needed to be handled by a practitioner experienced in the personal injury area.

Your actions to avoid this claim

Write down four risk reduction actions you could implement to avoid this claim.

1. _____

2. _____

3. _____

4. _____

Tips

- Define your area of practice and stick to it (write down what you will do and won't do).
- Don't dabble (even with the support of a barrister).
- Learn how to say 'no'.
- Develop referral networks for work you do not do.
- Develop expertise – learn all the relevant law.
- CPD is a start - good practitioners do more (learning networks).
- Use aids such as checklists, workflows and precedents for systemised support (set up the system before you take the work).
- Manage your retainer from start to finish.
- Step back and think.

What trends are we seeing?

Sue for costs and receive a counterclaim for negligence

- Get your costs right from the start.
- Bill regularly.
- Do what you say you do.

Dabbling with the use of a barrister

- By taking the engagement you have a duty to the client and are expected to understand the area of law in which you act.

Personal costs orders

- The courts are prepared to make personal cost orders against practitioners who are not prepared, cause delay or prosecute cases with no realistic prospect of success.

Unrealistic client expectations

- Maintain your role as an independent advisor.
- Communication (confirmed in writing) to clarify expectations are critical to avoid both complaints and claims.

Cyber risks

- Fraudsters impersonate clients to obtain client's funds.
- Fraudsters can deceive you and your accounts department into making false funds transfers or paying false invoices.
- Hackers get into and use your system or lock it down and demand a ransom.

How serious are you about cyber security?

The weakest link in the cyber security chain is each one of us. Here are three things you can do to strengthen your firm's cyber security.

- **Read and think carefully before you click on links or open attachments.** Especially emails from unknown senders or emails that look strange even if you know the sender. If you are suspicious contact IT immediately.
- **Verify email instructions that involve handling money.** Contact the client or staff member by telephone to authenticate the instructions.
- **Use strong, unique passwords for each device, change them at least every 12 months and keep them secure.** Use a minimum of eight characters containing uppercase and lowercase letters, numbers and symbols.

For more information on how to manage cyber risk see <https://lplc.com.au/risk-management/cyber-security-2/>



Conclusion

- The environment in which you practice law is changing.
- Your duty to the client has not changed.
- The fundamental causes of claims have not changed.
- **Your challenge is to find a way to deliver the basics and discharge your duty to the client in the changing environment in which you practice.**