

Risk video bites – Drafting

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Drafting is an essentially part of legal practice. Unfortunately, our claims reveal that there is a myriad of ways drafting errors can occur.

Here are some steps you can take to manage drafting risk.

First, no matter who the client is, avoid assumptions about what they may want. Always ask your client enough questions to get all the details you need and record their answers and instructions in writing. Be especially careful when documenting a deal you did not negotiate. Asking the right questions could have avoided many of the claims from defective vendor disclosure statements. LPLC's checklist for sale of land can help you with these questions.

In some matters, you ought to conduct searches to confirm what your client has told you. For example, testator clients can be confused about whether they hold property as a joint tenant or tenant in common. We have had claims where the practitioner did not clarify the position before preparing a will.

Precedents are an invaluable tool for practitioners but it is important to be aware of their limitations and to make sure that the document you intend to use is suitable. If there isn't an appropriate precedent on hand, it is dangerous to use another as the 'closest fit', as tempting as it may be.

We have had claims where practitioners 'recycled' documents used in previous matters, effectively using them as pseudo precedents. This resulted in meaningless or even adverse wording remaining, or failing to include a necessary provision, because there was no prompt.

The best risk management is to avoid recycling documents by using standard precedents, whether published or ones you have developed. Ensure you have a reliable system to alert you to changes in the law that affect your precedents and update them in a timely manner.

It is important to make time to check that the documents you produce, and that they will give effect to the client's intentions.

- Road-test key provisions such as bequests and payment formulas.
- Explain unusual or complex provisions to your clients.
- Ensure last-minute amendments are consistent with the other provisions in the document.
- And always check cross-referencing.



Consider having a colleague look over any drafting that is complex or completed in a short timeframe. A second pair of eyes is helpful when you have been involved in lengthy negotiations with multiple amendments.

Because drafting documents is a core skill for lawyers, opportunities for mistakes are an occupational hazard. For more information, please refer to the drafting checklist on our website to help minimise the risks.