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## **Risk Management in Solicitors' Professional Negligence Claims**

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Claims against solicitors are estimated to cost around £250 million pounds each year. This does not include the associated costs of defending court proceedings and it is the cost of claims against solicitors only – not legal executives, barristers or licensed conveyancers, all of whom have separate insurance. This figure was more or less constant over the period from 1990 to 2000, and is likely to have increased with inflation and the higher value of claims.

The most common source of claims is in property law, chiefly because this is the single largest area of legal work. More property transactions take place every year than any other sort of legal transaction. The most expensive claims however are in commercial work, because of the high value of the matters involved.

Perhaps the most surprising fact about professional negligence claims against solicitors is that very few of them arise from lack of legal knowledge. Lawyers sometimes give advice that is simply incorrect, usually because they are acting in an area of law in which they have insufficient experience and knowledge. More commonly, they give advice which is correct but which is inappropriate in the particular case, because they have not obtained clear instructions from the client or asked the right questions. The most likely area for a solicitor to get the law wrong is in giving tax advice, and this often arises from a combination of the two factors above.

Only a small percentage of claims against solicitor arise from incorrect or inappropriate legal advice however. Around 90% - of all claims arise from an underlying administrative error. Often these errors are not committed by solicitors themselves, but by others working in the practice. It may be a secretary or a member of reception staff who makes a mistake, but the partners will bear the final responsibility, and the cost of any claim, and it is their responsibility to set up procedures and systems to reduce risk.

Administrative errors include using out-of-date forms, sending documents to the wrong address or missing a time limit. Sending a letter to the wrong address might sound trivial, but every year claims arise because court papers or pre-action documents have been sent to the wrong address or not served effectively. This could just cause delay, but in many cases it is fatal to the cause of action because by the time the error has been corrected a key limitation period has expired.

Clerical errors – typing, e-mails, faxes and filing – are another source of claims. Again, these can seem unimportant matters but the consequences can be dramatic.

- Drafting errors are a major problem. Sometimes documents are worded incorrectly because the author has not thought through the effect of the clauses – for example rent review clauses that take no account of the term of years of the lease, or a will which

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makes no provision for what is to happen to a gift if the beneficiary dies before the testator

- Documents may be drafted carefully but fail to have their intended effect, because they have been inaccurately typed. Additional clauses from a precedent may be left in by mistake, or figures inserted incorrectly, or an early draft may be used instead of a later one. These errors are often not spotted until years after the document has been executed, especially in the case of leases, wills and property transfers
- Filing errors – lost documents or deeds, or entire files which cannot be found. Failure to keep detailed and accurate notes, to keep the client informed, or to follow up all instructions; these can lead to claims as well as to delay and missed time limits.

An area which is becoming more important to insurers and solicitors is client selection or 'client vetting'. Traditionally, a new client would telephone or call in at the practice, ask to see a solicitor and it would be down to the receptionist to decide who was the most suitable person for them to see – often the one with least in their diary. Taking on the 'wrong' clients or having the 'wrong' people acting for them is a major cause of risk.

Before taking on any new client, solicitors should make a number of checks:

- Is there any conflict of interest – actual or potential – between this client and another client, or between this client and any member of the practice?
- Is there any cause to suspect fraud or money-laundering issues?
- Does the client match the firm's profile or objectives?
- Does the fee-earner have enough skill, experience and time to act in this matter?
- Will the client pay our bill?
- Is there any reason to feel that this client will cause problems?
- Are there positive reasons to take on this client and this matter?

Inexperienced fee-earners are likely to take on matters that are outside their range of skills, or sometimes to take on matters that are simply unviable. It can be very hard to say 'no' to a distressed or demanding client.

### **What goes wrong**

The biggest single problem underlying all the above causes of claims is lack of time. Most if not all lawyers are under immense pressure to turn over work rapidly in order to be able to deliver bills – this is particularly true of residential conveyancing, but applies to all areas of work.

There are also increasing compliance pressures – not only do solicitors have to give correct legal advice and keep control of administrative issues, but they also have to satisfy stringent professional requirements, comply with protocols and court rules, and meet internal quality standards.

Traditionally, solicitors' practices were small businesses run by a few partners, with a very hierarchical structure. An articled clerk would expect to cover most areas of law, during their training, and would then progress upwards becoming an assistant solicitor, then a salaried partner and then an equity partner. Many solicitors would stay with the same firm throughout their working life. The longest-serving partner would eventually

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become the senior partner, who would also manage the firm and make policy decisions – with or without the other partners. After qualification, ongoing training was minimal.

Over the last thirty years or so areas of work have changed substantially, with an increase in commercial work and a reduction in the number of firms offering publicly funded ('Legal Aid) services. The tendency is for solicitors to specialize from a very early stage, even before qualification in some city firms, and there is much more movement between firms. The pace of business life has also speeded up with the use of faxes and e-mail. However the traditional structure still remains in many firms, despite the fact that it may no longer be suited to modern practice. The senior partner is not necessarily the one best suited to management, and partners may struggle to devote sufficient time to administrative work whilst also keeping the level of their fee income high.

Ideally, the fee-earning and administrative functions of the practice would be separated, with non-fee earning (and probably non-solicitor) staff dealing with HR, marketing, IT, training and risk management. More and more firms are adopting this sort of model, either employing staff with accountancy or banking backgrounds, or permitting partners to move away from fee-earning work in order to devote time to management. Many firms report that the initial cost of salaries for non-income producing staff has been offset in the first year by the cost savings and by freeing up partners to earn fees.

Another traditional feature of legal practice has been that individual lawyers tend to work on their own, despite being employees or partners in the firm. They have often developed idiosyncratic systems for filing and keeping documents and recording client meetings. There is a fine distinction between freedom to manage one's own workload, and lack of supervision, and the fear of being seen to be intrusive or interfering with someone who has a professional qualification and skill can sometimes overwhelm the common-sense approach to managing risk.

The 'maverick' fee-earner – often a partner – who works in a disorganized way and does not conform, but who is left to their own devices because they produce so much work, is someone who may carry substantial risk. Without supervision or review, they may be developing unsafe working practices or cutting corners – or they may be struggling with their workload but reluctant to admit that there is a problem.

It may also be difficult to insist on others obeying procedures or following systems, if the partners are not doing so. Leadership must come from the front, and partners should be the ones to set an example of good working practice. Allowing anyone in the firm, however talented, to disregard the firm's procedures is likely to cause dissent and sedition amongst other staff, and suggests that risk management is not important.

Another problem traditionally has been lack of formal training. Historically, once admitted as a solicitor there was no requirement to undergo further training and it was assumed that one would learn by informal guidance from more experienced colleagues. The Law Society then introduced a formal structure whereby solicitors are required to undergo a minimum number of hours' training every year, and this was gradually

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introduced to cover all solicitors no matter how experienced. There are still gaps in the system however – it is possible to attend irrelevant or inappropriate courses, and there is rarely any follow-up or monitoring to see whether anything has been learned.

In the best firms, all training is co-coordinated by one person who can ensure that courses chosen are relevant, and not duplicated. After attending a course, fee-earners are invited to give a summary of the course to their peers, or to circulate the notes with an outline of any important points. Training should also be extended to all those in the firm, not just those required to obtain CPD points, and should cover ‘soft’ skills such as management training, self and time management, IT applications and even letter-writing or interviewing.

### **Major causes of claims**

The single largest cause of claims against solicitors is the missed time limit, and approximately 30% of all negligence claims arise from this. For litigation, the figure is higher still – almost 60% of claims are caused by missing a key date.

Examples of missed time limits include

- Missing the limitation date for bringing a claim
- Filing notice of a charge at Companies House
- Failing to register the new owner and mortgagee of a property within the time limit, thereby allowing another charge to take priority
- Late payment of tax, incurring a penalty charge
- Failure to register an option under a lease, rendering it ineffective

Most of these time limits are well-known ones, although there are sometimes more exceptional cases where a foreign jurisdiction or unfamiliar legislation imposes a limitation period of which the lawyer was simply not aware. The problem is either that the time limit is not identified clearly, or that it is not noted down – or not reacted to.

The second biggest underlying cause of claims, and often a contributory factor in missed time limits, is delay. This is also a major cause of complaints against solicitors. The problem can arise because of lack of time – matters that need time spent on drafting or research often get put off while simpler work is done. Delay can also occur because of a ‘mental block’ problem, where the fee-earner is unsure of what to do next, anxious about making a mistake, or where the solicitor-client relationship has deteriorated.

Delay not only leads to poor client relations, but it is likely to result in hurried or unprepared work and missed dates. Files which have remained dormant for some weeks or even months can require even more attention than when they first became delayed, and often any action is driven by a complaint from the client, a court date or an enquiry from the solicitor acting for another party which suddenly makes the matter urgent. None of this is conducive to careful preparation and proofreading.

The other major difficulty underlying many claims is that of poor communication, whether with clients, with other professionals or with colleagues in the same firm.

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Professionals who deal with the law on a daily basis can tend to forget that their clients may be unfamiliar with legal terminology, and clients are sometimes too anxious or embarrassed to ask questions. There is a risk of the solicitor either assuming that the client has understood and not bothering to explain in detail, or of assuming that they will not be able to understand even if the matter is explained to them.

### **Simple solutions**

As most risk arises from administrative error, the solutions and techniques for risk avoidance can be very straightforward. Whilst computer systems can reduce risk in some areas, there is no substitute for increased risk awareness and the use of simple procedures to manage files, clients and dates.

The best way to avoid missed time limits is to set up an effective diary system, train all staff to use it and then monitor it regularly to ensure that it is being used – and that it works. Individual diaries should be kept in a format that means others can access them in the firm, and that entries are easily understood, but there should also be a central or back-up diary for every team or department, where key dates are recorded. Not only does this provide cover if an individual diary is lost or destroyed, but it also ensures a public record of important dates and enables supervisors to check that they are being complied with.

Key dates should also be recorded very clearly on the file, in a prominent place where anyone picking up the file will see it – again, this will assist in the unexpected absence of a fee-earner, and will also help with supervision and monitoring issues.

The best way to combat delay is to have regular file reviews, and this should be done both by the fee-earner and by their supervisors. Fee-earners should review all their files at least once a month, or perhaps more often depending on the type of work and number of files. This can either be done as one task, or on the basis of one section a week, for example and the purpose of the review is to check for dormant or delayed matters, or files where a response is awaited and has not been received.

Supervision should incorporate both random file audits, and a review of matter listings. Most IT systems will enable exception reports to be printed, which identify files where no time has been recorded or no bills have been delivered, for example. There is no good reason for a file to remain open if it is not active, and all staff should be encouraged to either move these files forward or close them.

While there are many sides to the problem of client communication, one of the single biggest safety measures that any professional can take is to make adequate file notes. Very often the lack of a file note can create a claim, as there is no proof that good and adequate advice was given; the presence of a file note can defeat an unfounded claim very quickly. These need not be verbatim notes, but should record the essential points of any client meeting or telephone call. Obviously, sending a copy of the note to the client or recording its contents in a letter is better still, as it reduces the risk of the client later alleging that they were not informed of the position.