

QBE European Operations

Professional practices update

Top 10 most common causes of claims against law firms



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Across the various legal areas in which lawyers practice there are a number of common mistakes that lead to claims against a firm. In this checklist we explore what, in our experience, are the top ten most common causes of claims against solicitors, including some examples of where such claims might arise and risk management suggestions.

It should be noted that most if not all of the mistakes below will also comprise breaches of the SRA Code of Conduct, although this briefing focuses on the possibility of negligence claims.

1. Failure to identify the client

- If a solicitor does not properly identify the individual or individuals to whom duties are owed then it follows that the duties to those individuals are vulnerable to being breached, as the solicitor will not have even had them in contemplation
- Example situations where this question may arise include: whether the solicitor is acting for an individual, his company, or the shareholders of the company; for a husband and/or a wife; for a lender and/or a borrower or for pension fund trustees or the employer company
- Problems can also arise, for example if the solicitor does not verify that the individual from whom instructions are being taken has authority to give them, and so might be in breach of warranty of authority.

Risk management

- Ensure that the identity of the client is set out clearly in the retainer letter. It may also be prudent to set out who is not the client, eg to state "we will be advising company X Ltd of which you are a director, we will not be advising you in your capacity as shareholder".

2. Inadvertently advising third parties

- There is a well established line of authority supporting the proposition that a solicitor can take on a duty to a third party who is not his client
- The Court will consider three tests: whether the solicitor has assumed a duty to that third party; that it would be fair, just and reasonable to impose a duty; or that imposition of a duty of care would be analogous to or incremental to previous developments in the law
- In these cases the usual difficulty for the court will be deciding whether to impose liability on a solicitor to the third party when he was not retained by the third party and was probably acting for someone else. The principal issue is likely to be whether the solicitor assumed responsibility and in particular whether it was reasonable for the claimant to rely on the defendant and whether expressly or by conduct the solicitor led the third party to believe he could do so



- This is likely to occur where a solicitor steps outside of his role, e.g. if there are direct discussions or communications between the solicitor and third party. However, direct communications are not necessary to found a duty
- Relevant factors in deciding whether the solicitor owes a duty of care to a third party are likely to include: whether the solicitor knows about the third party and how much he knows, whether the interests of the third party coincide with the client's interests and the relationship between them, the nature and purpose of the advice given by the solicitor and the use made of it by the third party, whether the third party had his own solicitor, and any disclaimer in respect of liability
- Possible situations where a claim might arise may include where a solicitor has provided a due diligence report to a buyer on an acquisition and the buyer provides a copy to the lender with the solicitor's knowledge. In *Dean v Allin & Watts* (2001) a solicitor instructed by a borrower to ensure that there was security for a loan was also held to owe a duty to the lender to ensure that the security was effective. (Although in that case the lender was an unsophisticated individual who was unrepresented).

Risk management

- Fee earners should be made aware of the risks of inadvertently assuming duties to third parties and the circumstances in which this might occur
- It may be prudent to include in your retainer letter or terms of business, or perhaps in some cases in a particular piece of advice itself (such as a due diligence report) a disclaimer indicating that advice may not be relied upon by third parties and/or to indicate that a letter of advice may not be shown to third parties
- Despite the above, in the economic downturn we have seen examples of clients requiring solicitors to assume greater risks for less reward and so to agree that advice can be passed on to third parties such as lenders.

3. Failure to define scope of retainer

- Failing to issue an engagement letter means that the scope of the solicitor's duties in contract and tort may be unclear (or at least it gives greater scope for a claimant to argue that they are unclear). It also means that an opportunity to limit liability may be missed
- As well as the express terms set out in the retainer document, the solicitor may also owe implied duties to the client, and will also owe duties in tort. The following points are worth bearing in mind:
 - The solicitor owes a duty to point out and explain terms or provisions that the client cannot be expected to understand (*Pickersgill v Riley* (2004))
 - The solicitor will also be under a duty to pass on information he learns during the course of the retainer which may be relevant to the client (*Credit Lyonnais SA v Russell Jones & Walker* (2002))
 - The solicitor does not, however, owe an implied duty to give commercial advice (*Football League Ltd v Edge Ellison* (2006))
 - Difficulties might come where it is not clear exactly where matters fall and whether something is commercial or legal advice can be very fact sensitive (*Stone Heritage Developments Ltd v Davis Blank Furniss* (2007))

Risk management

- It is very important to send out a retainer letter and in view of the SRA Code of Conduct requirements (particularly those in Chapter 1) no doubt all firms have in place systems and policies to ensure fee earners do send out such letters at the start of the engagement
- Systematic file reviews can help pick up fee earners who are not sending out engagement letters
- Once again, it can be just as important in the letter not just to set out what work the solicitor will be carrying out, but anything he will not be advising on *Hurlingham Estates Ltd v Wilde & Partners* (1997). In some circumstances, it can also be useful to send out a letter at the end of the instruction, making it clear that the particular retainer is at an end so that there is no room for confusion
- A common issue that arises is that although an initial retainer letter is sent out, as the retainer continues, further work is carried out which is not covered by the retainer. It is important that fee earners avoid the dangers of such mission creep. Such work may not be covered by the limitations set out in the initial retainer (such as a limitation of liability) and lead to scope for the client and the solicitor to disagree about, for example, the scope of the additional instructions.

4. Failure to distinguish role from that of other professionals

- It is common for other professionals to be involved in the same transaction as the solicitor, for example accountants may also be involved in a corporate transaction, or surveyors may also be instructed in relation to a property transaction
- A common field in which roles can become blurred is that of pensions advice, as often the client can be advised by lawyers, pensions consultants and actuaries. It can be easy for each professional to think that the other is responsible for a particular area such as implementing changes to pensions deeds and scheme rules
- Another area where we have seen mistakes arise is in relation to tax advice. Where solicitors and accountants are each involved in a matter, the solicitors may assume that if the client has accountants that the accountants will be advising on the tax aspects of the transaction
- Each professional must understand what the other is doing so that the responsibility for advice for a particular area does not fall between the gaps
- There is a significant risk that a judge will find that the solicitor was playing the lead role amongst the professionals, as it is the solicitor who is responsible for communication with the other side, and therefore the solicitor may be more likely to be found in breach of duty
- Solicitors are however, entitled to rely on specialist counsel properly instructed, but must exercise independent judgment and reject the advice if he or she thinks that the advice is glaringly wrong. The more specialised the advice the more reasonable it will be for a solicitor to accept it. (*Ridehalgh v Horsefield* (1994)). However, if the solicitor is

a specialist him or herself then this expertise must inform the judgment as to whether counsel is glaringly wrong (*Langsam v Beachcroft LLP* (2011)).

Risk management

- As above, the key is setting out in writing the extent of the solicitor's role and which areas advice will and will not be provided on. It may be worth making this clear not just to the client but also in writing to the other professionals, if appropriate.

5. Failure to record instructions and advice in attendance notes or correspondence

- Clear oral advice to the client may be sufficient (dependant on the circumstances) and it is not necessary to give advice in writing (*Harwood v Taylor Vintners* (2003))
- Obviously in some areas of practice, attendance notes are much more common than in others. Attendance notes are usually made as a matter of course in litigation, but in transactional matters drafts of documents on the file may be relied upon as evidencing what the client asked for rather than the fee earner making a separate attendance note of instructions (particularly if the lawyer is under time pressure)
- This may lead to evidential difficulties, as the client may well have a much better recollection of the matter than the solicitor, particularly if a claim is brought just within the limitation period (ie almost six years after the advice was given or in some cases even longer). In the example given above, it may well be that if the client disputes that instructions were given to make a particular drafting amendment, by the time of the claim the solicitor can no longer do much more than say they would not have made the amendment if the client had not asked for it
- Lack of attendance notes might also make it more difficult for another fee earner to pick up a file whilst the main fee earner is out of the office, leading to a greater chance of a mistake.

Risk management

- Time recording systems might assist with the problem to some degree if full records are made of conversations in time sheets and can be utilised in any claim (although obviously this doesn't do away with the need for attendance notes)
- Whilst it might be difficult to change the culture in particular areas, the importance of attendance notes should be emphasised. A regular file review process might demonstrate the extent to which lawyers are complying with a policy to keep attendance notes.

6. Advising outside solicitor's area of expertise

- If a firm or solicitor is held out as possessing specialist expertise in an area then he/she will be judged by the standard of a reasonably competent solicitor with experience in those fields. (*Matrix Securities v Theodore Goddard* (1998)). Further, if the firm holds itself out as having specialist

expertise, then it will not matter that the particular individual dealing with the case is not specialised in that area

- Claims can arise in any field. However some common areas include difficult areas of law such as tax, areas where technical requirements are complex such as collective enfranchisement applications by tenants which contain a web of filing deadlines, or areas where deadlines are simply different to what the solicitor is used to, for example a litigator with no experience of defamation might miss the one-year limitation period
- Claims in this area may become more common following the recession where the demand for certain types of work might have dipped perhaps leading to individuals taking on work in areas in which they are less experienced.

Risk management

- It is important to turn down work where the firm really does not have the ability to resource it. A resulting claim is likely to cost the firm more than the lost fee income
- Although some partners can be tempted to hoard work, to meet their targets or to keep to themselves a client relationship, it is important that partners pass work on to the appropriate department where it would be better carried out elsewhere. It is important to ensure that a firm has the right culture and reward systems to ensure this takes place.

7. Missing time limits/failure of diary system

- Simply missing something is a much more common source of claims against solicitors than getting something wrong
- There are numerous examples of potential claims in this area such as a litigator missing a date for filing court documents leading to limitation problems or strike out of the case, a property lawyer missing a date for the exercise of a break option in a lease, a late payment of tax incurring a penalty, or a failure to register a legal charge within the time limit meaning another charge takes priority
- Reasons for the failure can be myriad such as a failure to note the deadline, problems with the firm's diary systems, unfamiliarity with the area of law, or time pressure
- Technology can be a problem, for example it is relatively easy to enter a deadline into a calendar system on the wrong day
- Such problems might also arise where a fee earner is away from the office, or a new fee earner takes over a file
- A simple failure to take appropriate steps by a deadline is likely to be a straight forward breach of the duty to exercise reasonable skill and care, unless there is any argument for example that taking the step was outside the scope of the solicitor's retainer. However, in that case there might still be a duty to advise or remind the clients to take a step themselves by the relevant date (*Littlewood v Radford (2009)*).

Risk management

- It is important that the firm has and enforces appropriate diary systems for recording deadlines on a file (and systems and controls for managing risk are required by the Code of Conduct). A double-diary system may be appropriate (for example the fee earner records key deadlines not just in

their own calendar but in a central team calendar). A system whereby important deadlines must be recorded at the front of the file might also be appropriate.

8. Lack of Supervision

- A solicitor may delegate tasks where appropriate (unless the client has specified otherwise) (*Arbiter Group v Gill Jennings & Every (1999)*)
- The standard of care expected of a junior or non-legally qualified member of staff will depend on factors such as the nature of the task, the level of skill required and whether it is necessary for a solicitor to perform it. However, it is likely that there will be a breach of duty of care if the task is not adequately supervised. One practical example involved allegations that solicitors had been negligent in preparation of an appeal by not arranging a consultation with counsel until it was too late in the day. Although the defence of the case was successful, the Judge did comment that the problem had arisen as a young and inexperienced lawyer had felt overwhelmed by the assignment and the clients, and had required greater levels of supervision
- During the recession, if the firm is facing pressure on fees from clients, then it might be tempting to give the work to more junior staff, and certain types of work can become commoditised. In addition there is increasing pressure for clients to provide additional services, such as free hotlines, which might be resourced by junior staff.

Risk management

- The Code of Conduct (Outcome 7.8) requires that firms have a system for supervising client matters. It goes without saying but where work is highly commoditised and use is made by very junior staff, such as trainees, of precedent documents, that those precedent documents must be very carefully drafted and reviewed. Otherwise, an error in one document may lead to a large number of claims
- The correct level of supervision is key, and equally important are appropriate arrangements to cover where the usual supervisor is absent. It is not uncommon to see claims where the partner in charge of the matter was on holiday at the key time and a junior lawyer has made the wrong decision on a case in their absence.

9. Time pressure

- The court may take into account time pressures in deciding whether advice has fallen below the standard of care of a reasonable practitioner. For example it may be that advice given on settlement at the door of the court, where the urgency is not of the solicitor's own making, will not be held to the same standard as advice given in less pressurised circumstances (*Moy v Pettman Smith (2005)*). Although if a solicitor is asked to carry out work on an inadequate timescale then there may be a duty to warn the client of the risks
- However, there can be other sorts of time pressures which the court is unlikely to take into account. For example, technology can put pressure on solicitors to respond quickly to clients. The expectation that an email will be answered straight away at any time from a blackberry can

lead to human error. If fee earners are too busy because the firm is under-resourced that is also something that would not be taken into account

- Another common issue we have seen is where a file is handed over when a fee earner leaves or goes on holiday, and the urgency of something has been lost in translation.

Risk management

- It is important that fee earners are not overloaded with work, and that appropriate supervision to identify if work is not being done on time is in place.

10. Failure to identify and properly deal with conflicts of interest

- A solicitor owes a duty of confidentiality to a client and a duty not to act where the interests of different clients conflict or where there is a conflict between the interests of the solicitor and a client, which arise from the solicitor's fiduciary obligations towards the client
- Conflict issues can be difficult to deal with when they arise, assuming that they are identified in the first place. They can occur where the solicitor does not consider whether all clients have the same interest in the matter e.g. where advising directors or partners in relation to restructuring of the business
- There can also be problems where a firm acts for two clients initially with a common interest (such as a lender and a borrower) and conflicts later emerge between the clients, for example if confidential information about one client is learned which is material to the other (such as where the solicitor receives information from the borrower that might affect the decision to lend)
- It is clear that solicitors need to be constantly reviewing whether the information they know places them in a situation of conflict (*Hilton v Barker Booth & Eastwood* (2005)). A court will not have sympathy if a firm places itself in a position of conflict, and a solicitor cannot rely on the defence of a potential breach of duty to one client as a defence to performance of an obligation to another.

Risk management

- The importance of appropriate conflicts checking procedures goes without saying and they are a requirement of Chapter 3 of the Code of Conduct. Firms will also need to have thought through issues such as whether an escalation procedure is needed allowing conflicts issues and disputes between partners in a firm to be escalated, perhaps to a Committee for an independent decision. A firm must also consider whether multi-jurisdictional work throws up any issues where conflicts rules are different and how the differences will be handled
- It is also important that those in charge of risk at the firm ensure that junior fee earners have adequate training to allow them to identify when a conflict between two clients they are working for arises on an ongoing matter; conflicts can arise at any time during the course of the retainer, not just at the beginning.

Further advice should be taken before relying on the contents of this summary.

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