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The top 5 professional negligence risks (and how to future-proof your firm)

With professional indemnity claims forecast to rise in a COVID-19-afflicted world, Annette Beashel identifies the key risks facing law firms and outlines strategies that firms can implement to safeguard their practice.

Professional indemnity insurers around the world are concerned that there will be a rise in PI claims as a result of the pandemic.

Three principal reasons contribute to this fear. First, there is a likelihood of professional negligence risks being compounded by rapid changes which were made during the pandemic in the way lawyers work. Second, it is difficult to keep on top of constantly changing legal obligations due to government-imposed measures in response to COVID-19. Third, there is an expectation of a general increase in claims which is typically seen after a downturn in the economy.

Given this background, and in the face of a hardening insurance market, managing PI risk is more important than ever. To ensure your firm is adequately prepared to avoid such risks, it pays to learn from the mistakes other firms make and think about the anticipated risks that may arise. When it comes to renewal time, your insurers will want to know how you are addressing the following risks.

The 5 big risks

By understanding current claims trends you can check that you have adequate risk-management strategies to avoid these known risks. According to Lawcover's 2020 Annual Review, the top causes of PI claims were:

1. **Poor communication with clients (at 32 per cent)** – The American Bar Association notes that every PI claim starts with a dissatisfied client, and poor client communication is one of the top-10 reasons for malpractice claims in the United States (see ABA Guidance, Malpractice Prevention: The Top-10 Malpractice Claims and How to Avoid Them). This includes failure to obtain client consent, poor file-management practices, failing to either obtain or update an engagement agreement, or derogatory written statements against clients (see the Ames & Gough 2020 Annual Survey of 11 leading lawyers' professional responsibility insurers).
2. **Document problems** – These may be the most frustrating cases, as they are usually avoidable through proper supervision and review of documents before they are sent out or settled.
3. **System problems** – This includes missing deadlines or sending emails to the wrong recipients.
4. **Not knowing the law adequately** – This can include 'dabbling' in areas outside your expertise. For example, advising on tax issues, which is a highly complex area. This could increase with respect to future PI claims related to COVID-19, given the many changes made to state and federal regulations in areas such as employment, corporate and tax laws (see Ames & Gough 2020 Annual Survey).
5. **No negligence, but can't prove it** – This is a new category identified by Lawcover. This may indicate the increasingly litigious culture in Australia and the willingness of clients to allege negligence in response to claims for unpaid fees or as a litigation tactic.

Of course, you should also review your own claims profile for the past two to three years to identify if there are specific reasons for claims arising in your firm or practice, or if any of the above issues listed are more prevalent than others.

Emerging PI risks to avoid (and how to protect yourself)

Below are some of the predicted future claims trends which you should keep an eye on, as well as suggested mitigation strategies.

- **Increasing cyber risk** – The combination of more people working from home and an uptick in cyber attacks since the start of the pandemic means that there is a greater risk of your firm falling victim to a cyber or phishing attack. In addition, remote access to systems from home may lead to greater vulnerability. Recently, PI insurers have made it clear that cyber losses will not be covered by PI cover (see article, Navigating 2021 Renewals: Law Firm Professional Indemnity Insurance, Marsh). Therefore, ensure you have separate cyber insurance in place, that your staff receive training on how to spot phishing emails and how to report them, and that your remote working practices are up to scratch.

- **Changed working practices** – All firms have had to move to working remotely at some point in the past 12 months. This brings with it risks around light-touch supervision, the possibility of confidentiality breaches and difficulty in reaching people, or technology failures which mean work is not delivered on time. Ensure that guidance is given on hybrid and remote supervision, and that policies are in place around protecting confidential information, including where information is stored, and safeguarding information when working from home. It is important, too, that practice-management processes have been adapted for home working (e.g. how deadlines are tracked).
- **Allegations of conflicts** – Increasingly, conflict of interests is being attached to negligence claims or being used as the basis of a claim. The Ames & Gough survey found that in the US the leading cause of PI claims is conflicts of interest, with seven of the 11 insurers surveyed ranking it the first or second cause. It is likely that this trend may extend to Australia. It has already started to come through in UK claims. Make sure your new business acceptance procedures are robust.
- **Taking on riskier clients and accepting mission creep** – Lawyers may be tempted to take on clients or work which they wouldn't normally take on or which is outside their areas of expertise in the face of challenging economic times. See strategies below for how to manage this risk generally.

Strategies to reduce the risk and severity of a PI claim

- **Scope and then re-scope some more** – Ensure that engagement letters are tightly scoped (including what you are not doing for the client) and any changes in scope are documented, with agreement from the client in order to avoid mission creep or disagreement on what services are to be delivered.
- **Communicate, talk to and email your client** – Do not presume a client is aware of the current state of the matter, nor that just because they don't seek updates that they are happy for you to just run with things. Ensure you diarise updating the client on a regular basis so that there are no surprises along the way and the client cannot allege that you did not keep them informed.
- **"I knew that client was going to cause issues"** – Listen to your gut and identify 'problem clients' early. Have they had unexplained successive changes in legal representation before coming to you? Do they have realistic expectations about the outcome of their matter?
Put strategies in place to ensure they stay happy (e.g. seek their instructions in writing, agree on milestones and review stages for the matter). Or consider at the outset whether it's the type of client and work you want to take on. Institutionalised and centralised client onboarding practices can often identify these clients early and

strategic intake policies will ensure internal consultation is undertaken before taking on such clients so that informed decisions are made.

- **How risky are you?** – Understand if your area of practice is considered high risk and ensure your team has appropriate processes and procedures to manage the higher risk (e.g. peer review of advices). The Lawcover 2020 Annual Review indicated that conveyancing, litigation and trusts and estates were the top three practice areas where claims arose.
- **It's everyone's responsibility** – Proper supervision, especially in hybrid working conditions (where the team works from home and the office), is the key to ensuring standards are maintained, including deadlines not being missed and documents being properly reviewed before going out. Ensure lawyers in the law practice understand that they need to escalate any potential claims early, including having a policy and escalation procedure in place. All staff should attend regular risk-management training on best-practice management protocols and how to deal with potential claims. The earlier that an issue is identified and addressed, the less the damage caused.
- **Recovery of unpaid fees may come back to bite you** – Make sure you review your files closely to confirm there is no suggestion of negligence or client dissatisfaction which could lead to a claim, if you are going to start action against a client to recover unpaid fees. It's a common tactic for a counter claim of negligence to be made.
- **Use your insurer as a sounding board** – Involve your insurers early and seek their advice on how to proceed even if there is no claim yet. They will help you focus on damage control before it becomes a claim.
- **Do you have a conflict?** – Upon discovering a mistake, consider if you need to cease acting for the client, and recommend that they obtain independent legal advice on the matter. Depending on the nature of the issue, you may no longer be able to act in the best interests of the client nor remain independent because of your vested interest in avoiding a claim. Continuing to act may in fact put you in breach of your professional conduct rules or provide further grounds for the client to bring a claim against you.

Turn that mistake into a life lesson

Once the issue is resolved, ensure that there has been a proper investigation into what went wrong and that any gaps in process are resolved. Incorporate these real-life experiences into learning opportunities so that they are avoided in future, including in regular risk-management training for staff and discussing these issues in team meetings so that everyone learns from the experience. All of this helps to promote an open culture of talking



about mistakes and raising issues when they arise, which is crucial to minimise the impact of PI claims.

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