

# Tackling the root causes of claims

## MILLS & REEVE

In previous editions of ABACUS we have considered the professional indemnity claims landscape and provided guidance on what firms can do in order to avoid or mitigate the effects of claims if they are made. In this edition, David Gooding (Partner) and Alexa Jones (Senior Associate) from Mills & Reeve LLP explore the root causes of negligence claims in professional services firms and what both individuals and firms can do to minimise their exposure to risk.

### Simple mistakes breed claims

Many professionals will be surprised to read that the chain of events which leads to a claim often starts with something very simple going wrong, such as fee-earners forgetting to record advice in writing or missing important information buried in an email copied to them. Essentially, negligence claims arise when people make mistakes or fall short in providing competent advice. Whilst the larger accountancy practices have embraced risk management principles over the last 15 years, the accountancy profession is still not keeping pace with the dramatic changes in our working environment since 2000 and especially since the 2008 recession. In our view this is an endemic problem across professional services firms.

### The root causes of claims - why do people make mistakes?

#### Electronic communication - hindrance or help?

Technological advances mean that around 80% of all communications both internally and externally are now sent by email - this is compared to less than 10% fifteen years ago. In many ways, the e-mail communication revolution helped professionals to work more quickly, proactively and cost effectively. However, modern email-culture has also become a catalyst for mistakes and negligence. First, there has been a dramatic reduction in partner led oversight. Email has radically changed how we communicate. Gone are the days when partners could assess all incoming and outgoing letters by reading and signing post at the beginning and end of the day. Instead, fee-earners provide advice in a stream of rapid emails at all times of the day (and night) often without the benefit of careful thought or oversight. This leads to recipients and third parties generating their own stream of emails which require responses. We have become averse to having oral conversations or sending considered letters dealing with the whole picture. The problem is the expectation of an instant response to an email and the potential for error is huge.

We see claims arising out of fee-earners sending emails to the wrong address or inadvertently giving advice to a client in a

“reply to all” in a way they would never do so by letter. At best such mistakes might cause embarrassment at worst serious brand and reputational damage and a claim.

Equally worrying, we see Claimants arguing they have not received advice on information buried in emails which have been Cc'd or Bcc'd to advisers. Do you read each and every email that finds its way into your inbox, even when it is not directly addressed to you? Does everyone working on a file and copied into the email know who is doing what? Who should respond? Has a response already been sent? Large chains of emails with multiple recipients can be a minefield to navigate in the context of a negligence claim.

Second, email has become a victim of its own success. The sheer volume of emails passing between clients and advisers can at times be overwhelming for professionals who struggle to concentrate with any one matter at a time and spend days simply attacking their inbox. All this reduces efficiency and the quality of service delivery.

Finally and ironically, emails can also be the cause of communication breaking down internally in professional service firms. Email dialogue (especially the notorious Cc to anyone who might have an interest) has replaced 'old-fashioned' internal meetings and informal catch-ups between staff where problems on matters are identified and more often than not, quickly resolved through discussion. Emails can also be easily misinterpreted and create barriers between senior and junior members of teams. If junior staff feel unable to approach their supervisors about issues on a file then this in turn creates an area of risk where problems can be buried and ignored. This can result in simple mistakes (which could have been avoided or rectified at an early stage) maturing into complaints or claims.

### Working flexibly and advice on the move

Another area of risk is the rise of flexible working - something which if managed well is extremely valuable to firms and clients. Staff in 2016 expect to be able to work on the move and remotely as part of modern life. To recruit and retain talented staff, firms must be flexible. This means that the 'normal working day' is fast becoming a thing of the past. Many clients also expect instant responses and results 24/7.

Whilst the rise of electronic communication has helped to facilitate this, it has in turn created further complications for firms to manage in terms of risk. For example, the use of handheld devices contributes to inbox clutter with short messages and emails fired off with ease. Mobile devices can also be the cause of errors, when the user is working 'on the move' or outside of normal working hours, perhaps even in the middle of the night.

The pressure on professionals to respond to emails at all hours can also mean that communications are sent without due consideration or proper supervision.

## Protecting client information

Mobile phones also carry their own 'risk factor'. They often contain confidential client data (or access to it) but can be easily be left behind on a train or on a table in a café, unlike a cumbersome paper file from the days of old. The consequences of losing confidential and often commercially sensitive information can be very serious and costly.

## Delivering more for less and stress

These issues all sit against the backdrop of the reaction of firms and their clients to the 2008 recession through efficiencies in order to increase profitability. This has resulted in reduced headcount at firms with work being delegated down to less qualified staff, off-shoring, mergers and increased targets for those left manning the ship. Everyone is under pressure to deliver more for less.

The mental health of professionals is an issue which we touched on in our last article and remains the elephant in the room for many firms. Modern day working is progressing at a pace at which many struggle to keep up with. The line between work and personal life for professionals has become blurred. Tired and stressed employees will make mistakes. The key is identifying and changing working practices which exacerbate these factors but crucially it is also about colleagues and managers spotting behavioural red flags before they lead to mistakes.

## What can firms do to minimise these risk factors?

Mistakes will always happen but in today's fast moving and competitive world, firms can still employ some simple steps to minimise risk.

## Slow down on the emails

Emails should be treated like letters, drafted with due care and consideration and passed by a supervisor for sign off where appropriate. It is important that teams have discussions around: (i) who is responsible for what; (ii) when emails need to be approved; and (iii) how the work on a file is to be carried out and by who.

## Facetime

Delegation is not only an effective tool in delivering efficiencies but it also helps to train up junior members of staff to be the partners of tomorrow. However, this should not be at the expense of proper supervision.

Staff should be encouraged to have regular meetings with their supervisors and an open-door policy should be in operation. Managers should get to know their staff and make sure that they are not being overstretched and recognise when someone may be struggling.

Firms should not expect employees to routinely respond to emails out of hours and client relationships need to be managed so that round-the-clock working is not treated as the norm.

## Looking more widely?

Professional service firms need to better understand their staff and diversity is key.

## Do the Boomers work well with the Millennials? Are Generation X understanding Generation Y?

Every generation has a different outlook, personality and set of values. Firms need to understand how to motivate and effectively manage their staff from each generation. Recent research has shown that Boomers are confident of self, not authority; Generation X has a low level of trust toward authority whilst Millennials have a high level of trust toward authority but not individual people. In terms of managing a supervision structure, these factors need to be borne in mind. A carrot might work better than a stick...

Another generational consideration is staff retention. High staff turnover creates risk and training up staff is expensive and time-consuming. Millennials want career mobility, they do not fear it like previous generations. Firms need to work hard to retain their staff.

Diversity is also a key factor to a happier workplace with recent research indicating that firms with a more diverse workforce experience better team collaboration and commitment to the firm. Diversity also gives firms a commercial edge in terms of being able to reflect their client base and effectively communicate with and relate to clients. Understanding what the client wants and clear communication is the gateway to avoiding complaints and claims as well as a stronger working relationship.

As professional indemnity lawyers, we don't have all the answers or we would be out of a job. However, we think it's clear that those firms which adopt collaborative cultures and robust supervision structures will be the long term winners. Ultimately, fee-earners are the life blood of firms. It follows that those employees who are properly supervised, trained and motivated to work together, are less likely to make mistakes and more likely to be a success.



### Alexa Jones, Senior Associate

Alexa is a Senior Associate in the Professional Risks team at Mills & Reeve. Alexa is based in Mills & Reeve's Birmingham office where the professional risks team is ranked by legal directories as being the top team in the region.

Alexa joined Mills & Reeve in 2005 and is a member of the firm's national Financial Claims team. Alexa specialises in defending professional negligence claims made against accountants, lawyers and their insurers. Alexa also advises professionals and insurers in respect of policy coverage issues.



### David Gooding, Partner

David is a partner in the market leading insurance practice at Mills & Reeve LLP and based in the Birmingham office. The firm's professional risks team in Birmingham is rated by the legal directories as the no 1 team in the West Midlands. David has been defending professionals and their insurers for over 15 years and his practice is focussed on defending accountants, IFAs and lawyers. He is head of the firm's regional financial claims team. David also advises insurers on policy coverage disputes and especially dishonesty investigations as lead partner the firm's Policy Advice & Disputes team.

David is recommended as a leading professional risks practitioner in Legal 500 and Chambers & Partners