

Defending Your Position Before It Happens

Managing Professional Risks Seminars 2012

Seminar notes



Four horizontal teal bars stacked vertically. The bottom bar contains the text "Insurance for your reputation".



www.m-f-l.co.uk

MFL Professional Barlow House Minshull Street Manchester M1 3DZ
Telephone 0161 236 2532 Fax 0161 236 2583 Email info@m-f-l.co.uk

A round up of the presentations from the first of MFL Professional's (MFL) Managing Professional Risks seminars, 'Defending Your Position Before It Happens.'

Some may say 'where there's blame, there's a claim'. However, MFL believes in the management of professional risk, so there's no-one to blame in the first place.

The importance of preventing potentially costly and reputation-damaging legal action was brought to the attention of some of the professions' top executives at MFL's first event of 2012.

A captive audience of managing directors, partners, managers and owners took part in the interactive breakfast seminar, where it was highlighted how easily claims can occur without appropriate risk management procedures in place and similarly, how simple it is for businesses to take steps to improve the risk of maintaining an unblemished record.

The event, held in association with solicitors Robin Simon LLP, was headed up by MFL directors Mark Philmore, Jon Leese and Colin Bradley. Mark Jenkyn-Jones, a partner at professional liability and insurance specialist lawyers Robin Simon, joined them to speak about risk management from a PI Insurer's perspective.

The delegates spoke about why they were attending and many of their reasons had one thing in common: appreciation of the significance of risk management combined with the urgency to learn more.

Janet Lalor, Practice Manager at Farnworth Rose solicitors' said: "I recognise there's a lot more I need to know and understand about risk management."

Phil Pearson, Bailey Smaites solicitors' Practice Manager, added he wasn't there just to enhance his own knowledge but to instil a positive attitude in his staff: "I find that some people don't understand the importance of risk management.

"I'd like to learn new ideas and listen to

what other people have to say."

Mark Jenkyn-Jones had stories to share about claims resulting from poor risk management.

He spoke about the 'culture of pretending everything is OK' when errors have in fact been made, drawing upon a claim against a chartered accountant he had dealt with. A member of staff had manipulated information about a former client to cover up a mistake.

Years later another member of staff reopened up the files of the client, who had now passed away. Once the mistake had been uncovered, the now escalated issue cost the company £350,000. The original issue would have set the company back just £600.

He said: "When something goes wrong, it is often salvageable. There's also an issue of trust, allowing partners to carry on with no supervision or questions. Speak to partners. Find out what they're doing."

The seminar highlighted several aspects of risk management and how to implement them. These were:

- Scope Of Retainer
- Know Your Client
- Dissolution and M&A
- Archiving & File Retention
- Office Systems/Procedures & Supervision
- Sub-consultant Management.

Following are some useful tips and pointers from each section:

Scope Of Retainer

- Ensure all parties have a clear understanding of what's expected by writing a clear letter of engagement or contract.
- Abide by regulatory requirements.
- Correctly identify your client. Are you acting for their spouse, partner or next of kin? For a director or the company itself? This also helps to identify the need for parties to take independent advice. You then avoid inadvertently assuming duties to advise third parties.

- Think about what the client wants you to do. This gives you the opportunity to consider whether you're advising outside your area of expertise.
- Distinguish your role from other professionals involved. For example: in a commercial transaction, who deals with the tax? The lawyer or the accountant? If you're a construction professional, are you there to supervise or merely monitor?
- Keep the letter of engagement handy. Read it and read it again. Keep reviewing whether your retainer has changed and whether this should be recorded.

Know Your Client

- Do you want this client?
- What is their level of understanding and can this be proved?
- Is there more than one component member of your client? Who do you communicate with? Is there enough to discharge your duties to the rest?
- What is the likelihood of a problem? Are you communicating with them in the right way?

Dissolution

Jon Leese spoke about the significant impact of dissolutions, mergers and acquisitions of businesses on risk management and Professional Indemnity Insurance (PII) issues.

- Address the risk management and PII issues as part of the 'due diligence'. PII implications are often left until the last minute but are just as important.
- The process of disclosure of material facts to insurers will start all over again when there is a proposed sale or purchase transaction.
- Determine who will be responsible for the past liabilities of the target practice. Whichever firm is responsible, they will need to insure the "run-off" exposure, owing to the "claims made" nature of PII policies.
- A minimum of 6 years' run-off is usually required or recommended by professional

bodies, since this is the standard limitation period for a client to bring a claim against a professional firm under contract. However, longer periods of run-off may be more appropriate if there is a chance of a claim occurring outside this time limit under the law of tort or under the terms of contracts under seal. There may also be specific regulatory requirements of your professional body to take into account.

- Send a draft copy of the SPA to your PII broker as soon as possible and ask for advice on the PII implications of the agreement.
- As soon as the deal has been completed, both parties will need to tell their PII broker/insurers in order to give immediate effect to the legal agreement and to protect the appropriate interests.
- If you are a sole practitioner or a partnership, you remain personally liable for the acts of a firm long after it has ceased to trade.
- If a solicitors' practice changes its ownership or is dissolved, the SRA offers two choices for the purchase of run-off cover; it either can be assimilated under the ongoing PII arrangements of a "successor practice", or six years run-off cover can be purchased for a one-off premium under the practice's existing PII policy.
- When the "successor practice" is taking on the run-off, it is required to disclose all the material facts about the ceased practice's PII exposures to its insurers, enabling them to assess the terms for adding this cover to the policy.

For more information about mergers and acquisitions, please find the full article attached to this e-mail in a PDF format.

Archiving and File Retention

Mark Philmore and Mark Jenkyn-Jones spoke about the importance of contemporaneous notes and documents.

- In court, in the event of a dispute,

it is likely that those who are able to support their case with documents and file notes produced at the time would have a significant advantage over those who are providing evidence from memories and recollections.

- Electronic documents are usually OK if they are the only copies of documents available, which clearly provides a more cost effective way to keep documents.
- Archiving of e-mails is equally important albeit that keeping e-mails can create memory storage issues.
- The imperative is having an archiving system that is workable. Ensure that hard copy files are stored using a system that makes files easy to retrieve and that boxes are clearly marked with their contents.
- Test the system to see if you can retrieve files before making it your default system.
- File thinning is OK, providing you keep key documents such as letters of engagements and changes to the scope of work. If in doubt, retain the document.
- The question of how long to realistically keep copies of files and documents is largely driven by the Statute Of Limitations.
- The main limitation periods which may be applicable in professional negligence claims and are relevant to managing professional risks are displayed in the table on the next page.*
- In regard to electronic archiving, the British Standard BS 10008 should be used. You have to show that the information has not been/could not be manipulated.

Office System/Procedures and Supervision

Mark Jenkyn-Jones spoke about the legal implications involved in office procedures.

- It may be obvious but important things like diary systems and attendance notes should be kept. Attendance notes are important because in their absence, it's likely the layman's evidence will

be accepted if it conflicts with the professional's. Even handwritten notes will help.

- Supervision and awareness of partner and senior employees' activities are key.
- Be aware that e-mails, coming both in and out, are of a 'quick-fire' nature. The fact they are unsupervised, they lend themselves to a 'knee-jerk' response.
- The culture of the business must encourage openness from top to bottom.
- In most cases it's good to remember that a negligence claim is not a case of life or death. PII is there to help you when you most need it for your business.
- In the first instance, oral notification of a potential problem to management should be used. A memo or e-mail at this stage may become disclosable to the other side in due course.

Engaging Sub-Consultants

Mark Philmore's advice about sub-consultant management:

- Engaging with sub-consultants is a good way to expand the capabilities of your practice and bring additional skills to the table. It can also be a cost effective way of tapping into expertise without having the expense and hassle of carrying the same people on the payroll or that individual may be perfectly happy with their current role or status.
- Sub-consultants are common place as far as construction professionals are concerned, for example the interaction between architects, consulting engineers and contractors. Boutique legal firms that wish to remain fairly lean despite giving the outward impression of being able to deliver a full range of services are increasingly using the sub-consultants model.
- When using a sub-consultant there needs to be a due diligence process in their selection. How well do you really know them? Just because they pass a few things your way doesn't mean they are automatically capable of doing the job. How long have they traded? What's their experience? Have others that you

trust worked with them in the past without problems? Are they suited to this job? And importantly, in these economic times, are they likely to be here years down the line? Claims can take many years to come out of the woodwork. To appoint or not to appoint, that is the question!

- If you take the lead on some work, selecting and appointing others to work on your behalf, you are imposing a much greater potential liability on yourself. You are likely to be the one to have to take responsibility for their actions in the absence of a direct contractual link between your client and the sub-consultant.
- Your client could allege that you've breached your professional duty in selecting and/or supervising that sub-consultant.
- It may be preferable, dependent upon commercial realities, for your client to appoint the sub-consultants directly. Even then care should be taken in recommending the services of others.
- In terms of supervision, you need to make your role and responsibilities in the delivery of any work very clear. In reality, if you're employing a specialist because their skills are outside of yours, how can you be expected to supervise and monitor the work they are doing?

***The main limitation periods which may be applicable in professional negligence claims**

Actions	Limitation Period	Statutory Provision
Tort	6 years from the date on which the cause of action accrued	Section 2 Limitation Act 1980
Simple Contract (e.g signed under hand)	6 years from the date on which the cause of action accrued (breach of contract)	Section 5 Limitation Act 1980
Specialty (e.g Deed)	12 years from the date on which the cause of action accrued	Section 8(1) Limitation Act 1980
Latent damage not involving personal injuries	3 years from the date of knowledge required for bringing an action for damages	Section 14A Limitation Act 1980
	This is subject to a longstop period of 15 years from accrual of the cause of action	Section 14 B Limitation Act 1980



To discuss any aspect of your insurance arrangements in relation to risk management, contact the speakers directly:

Mark Philmore Jon Leese Colin Bradley
 E: markp@m-f-l.co.uk E: jonl@m-f-l.co.uk E: colinb@m-f-l.co.uk
 DD: 0113 366 2359 DD: 0161 237 7721 DD: 0161 237 7722

ROBINSIMONIS Mark Jenkyn-Jones,
 Partner,
 Robin Simon LLP
 E: mark.jenkyn-jones@robinsimonllp.com
 DD: 0333 010 6835



'Insurance For Your Reputation'

Don't forget, there are three more Managing Professional Risk events coming up:

18th April 2012:

Fraud, dishonesty and Corporate Crime

5th July 2012:

Data Security - Misuse, Abuse and Theft

18th October 2012:

Business Interruption and Continuity for Professional Firms