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Solicitors' Claims Review 2022

Practical guidance on risk controls to guard against common errors

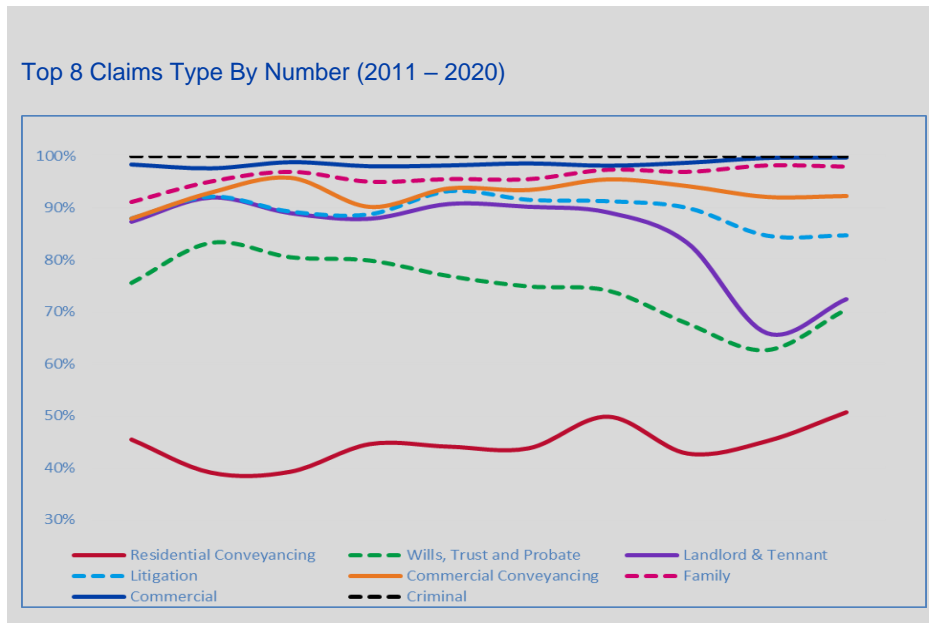
Solicitors' Claims Review 2022

Lloyd's has flagged Professional Indemnity (PI) insurance as one of its worst performing classes in recent years, with Solicitors' sub-class closely followed by construction. For several years over the last decade, Solicitors' PI claims have significantly exceeded premiums for many market insurers. The result is that Solicitors' PI remains a high-risk sector for insurers.

Most firms experience claims from time to time. When this happens, it's essential that you have protection from a PI insurer that has invested in the support infrastructure to help you through what can be a very challenging experience.

While investigating a claim, we will learn lessons from the circumstances of the loss and assist you in implementing new or updated control measures to mitigate reoccurrence from the type of work in question. The new controls and working practices developed might overlap with other types of work performed, but they're unlikely to provide a comprehensive risk management solution for your overall mix of work types. We have developed our Solicitor's Claims Review using the experience from insuring Solicitors' PI longer than almost any other insurer in the open market. Our review provides straightforward and practical guidance to guard against common errors and to help you develop risk and operational management controls across all areas of your work.

The types of work where claims are most commonplace have not changed significantly, and firms of all types and sizes are susceptible to incurring PI losses. General practices are likely to provide a mix of services for private individuals. For High-Street firms, the emphasis remains on residential property, followed by litigation and private client work. Large 'top 100' firms typically focus on commercial property, commercial litigation, and corporate work. Corporate work tends to produce relatively few claims by number, but some of the largest individual claims have arisen from large-scale commercial / corporate deals.



The top five types of 'error' leading to claims also reflect many familiar themes: client and matter management issues produce the vast majority of claims, but fraud is a high and growing risk for the profession. Our risk controls are based on:

- 1 Failure to advise the client
 - 2 Client instructions not followed
 - 3 Delay
 - 4 Failure to register deeds / charges
 - 5 Drafting errors
- Fraud claims

Preventing 'Failure to Advise' Claims

Allegations regarding a failure to advise a client are usually the result of an oversight at the scoping stage, communication failure during the transaction, or in complex matters where other lawyers are involved (other teams in your practice, or external parties appointed by you or the client), advice and/or records of advice fall through the cracks in between the boundaries of responsibility.

Doing clients 'a favour' by assisting them informally on additional matters that did not form part of the original scope can also lead to allegations of a failure to advise. Regardless of the goodwill with which the additional work was undertaken, and whether charged or not, clients may still hold you responsible for anything that goes wrong.

All too often, solicitors forget that members of the public do not understand the legal process and may well not be aware of risks that may seem obvious to the lawyer. Commercial clients may be more astute, but many at least argue ignorance of an issue, which in the absence of information to the contrary, is likely to place their solicitor in a weak position insofar as a claim is concerned.

Detailed, Accurate Scoping

- Do lawyers have some form of checklist, template or workflow that helps ensure key questions are asked and issues identified up-front?

Meaningful Engagement Letters

- Is your engagement letter template annotated to prompt lawyers to consider and define both scope and limitations of the instructions?
- Does your engagement letter template include a section on exclusions from advice?
- Are engagement letters subject to regular review, updated as needed, and all previous versions removed or otherwise prevented from use?
- To address any changes to scope, are engagement letters reviewed at key stages during a transaction, and revised as needed?

Unbundled' Services

- Do you avoid providing restricted discrete elements of advice on a transaction (often sought by clients seeking to save money)?

- Where you do offer such services, are they categorised as 'higher risk' and therefore subject to stricter oversight?
- Have lawyers been trained that, even where you are not advising on a matter, it is likely to still be incumbent on the firm to advise the client that a risk exists on which they should obtain advice?

Meeting Notes & Follow-up Emails / Letters to Clients

- Are meetings (both virtual and in person) and calls routinely followed up by written communications with the client summarising key issues discussed, and options and implications of each, decisions made, action points, and deadlines?
- Do trainees or junior lawyers attend relevant meetings to take notes and learn in the process?
- Do you have reference lists template reports and documents which include a list of potential issues to flag to clients?

Plain English Guides for Clients

- Do you produce any summary guides for clients that explain the process and key issues relevant to all relevant transaction types?
- Do your summary guides specifically aim to address the risk of mistaken assumptions on the part of clients?
- Are summary guides sent out or otherwise provided to clients as part of the engagement process?
- Where the risk of fraud is a feature of the transaction, do you have a guide for your clients to advise on risk controls that need to be followed to avoid becoming a victim of fraud?

Checklists and Aides Memoire

- Do lawyers have access to and use checklists and/or aide-memoires?
- Do they encourage a 'tick box mentality' or do they ask questions that encourage lawyers to identify key risks and controls?

Preventing 'Failure to Follow Client Instructions' Claims

Allegations of a failure to execute instructions given can arise either through a failure to remember an instruction, or a lack of clear understanding between you and your client. The problem will still arise when clients allege that they have instructed you in relation to a matter, and it will always be difficult to prove a negative. Having multiple parties involved can also exacerbate the problem. A comprehensive, clear file will remain your best defence, as the absence of a record of any sort in an otherwise exemplary file is more likely to suggest that your explanation of events is the correct one. Nonetheless, remember that it can be more pragmatic to settle a matter amicably with a client, particularly a good client, than let the matter progress as far as a formal claim, whether you are 'right' or not!

Confirming Instructions

- Are lawyers trained to consider possible changes in scope, risk profile, cost and time when receiving client instructions during a transaction?
- Is there a strict practice of taking notes during meetings and keeping these as evidence for the file?
- Is there a strict practice for client instructions received verbally to be confirmed in writing?

Engagement Letters

- Do you make it clear to clients that they cannot assume an email instruction has been received or read and that urgent instructions should be followed up by a telephone call to the lawyer in question?

Handover / Multiple Parties Involved

- Do you have clear criteria for which lawyers should 'double up' on transactions to both reduce risk generally, and improve continuity in event of absence?
- Where multiple departments are involved in a matter, is there a single main point of contact for the client?
- Does that individual lead on reviewing original Heads of Terms and any / all subsequent variations, to ensure overall objectives are fulfilled?
- Are there clear channels of communication between the client and the firm, and between departments within the firm?
- Where the client has more than one lawyer on a matter, is the engagement letter and file generally very clear concerning who is responsible for addressing particular aspects of the transaction?

Supervision

- Do the firm's systems help identify matters that may not be progressing as they should (e.g., inactive file reports)?
- Is there effective supervision of ongoing files that helps prevent key actions being forgotten or critically delayed?
- Do checklists or process workflows define critical stages that should be followed on process-led matters?

Preventing Delay Claims

Delay claims can be either 'perceived delay' or 'actual delay'. The former category is best addressed through improved client communication, better scoping and drafting of engagement letters, and ensuring your client genuinely understands the process.

Actual delay claims can arise for several reasons but are best addressed through improved processes, although capacity and capability shortages and/or planning generally may be a feature of delay issues and claims.

Diary Systems

- Do you have a robust shared or central diary system, which is properly used by lawyers across the firm, and an effective forward planning / reminder system in place?
- Are critical dates in high value and other high-risk matters given a 'second pair of eyes' check at an early stage?
- Do you have guidance e.g., aide-memoires or work-type risk profiles that are used to assist the correct identification of critical dates in key departments such as litigation, employment, and personal injury?

Management Reports

- Are reports run on upcoming critical dates and used to prompt supervisory checks?
- Are reports run on inactive file and outstanding positive account balances, which might indicate incomplete work and delays?
- Are timelines built into any work-flow systems, where applicable?
- Are reports used to ensure the number of matters being handled by individuals are within acceptable norms?

Supervision and Review Meetings

- Are there routine or regular file review meetings, whereby supervisors review current files with an emphasis on high-risk matters and imminent / recently passed critical dates?
- Are holiday applications controlled to ensure adequate cover of both lawyers and supervisors at known pinch points such as around Bank Holidays?
- Is work proactively managed wherever possible to avoid critical dates during known absences and pre-holiday handovers undertaken, where appropriate, to flag actual and potential key dates that might arise and need to be addressed despite best efforts?
- Do managers role model effective time management and encourage individuals to prevent a 'last minute' culture from developing?

Preventing Failure to Register Deeds and Charges Claims

Failure to register deeds (or to do so timeously) was at one time the single most significant cause of property claims. While it no longer retains that 'top spot', it remains a persistent issue. Post-completion matters are often an aspect of matter management that solicitors struggle with, particularly as there is, more often than not, a backlog of pressing substantive matters on other files to focus on.

With e-registration in both the Companies and Land Register, it is often difficult to spot 'failures to register' simply from examining client account balances, as registration sums are paid at the moment of submitting the registration, regardless of whether registration is delayed or rejected. Remember too that a failure to initiate the registration process at the earliest opportunity increases the chances of a failure to register timeously, as rejections, including many on narrow technical grounds, are not uncommon. Given the relatively short timescales to 'timeously' register, it is therefore essential for firms to have some process for checking on post-completion administration, particularly in respect of registration of deeds and charges.

Post Completion Checks

- Do you have a post completion / file closure checklist that includes a substantive check on the effective registration of deeds and charges?

Diary and Case Management Systems

- Do lawyers enter registration deadlines in a central diary system?
- Do you have a case management system that flags the registration requirement and records the action once it is completed?
- Do you have a process for tracking registrations that have been rejected?

Post Completion Team

- Do you use a specialist post-completion team (e.g., paralegals / legal executives) to aid processing efficiency? *(We recognise that this may only be commercially viable once a critical mass in practice size is reached).*

Preventing Drafting Error Claims

Drafting errors can arise from poor or out-of-date precedents, the adaptation of documents from past transactions, 'dabbling' by lawyers in areas outside of their specialism, and failures to update a document following client instructions, as well as simple transposition errors, especially with numbers, and those errors where the drafting fails to achieve the intended effect.

Precedents

- Do you have a comprehensive and up-to-date precedent bank in all departments that is subject to regular review and update?
- Is access to particular precedents restricted to lawyers in the relevant department?
- Do you prevent / disallow the download and saving of documents onto local computer drives, whereby out of date versions might be used?
- Do your practice management systems ensure that lawyers work from original precedents only?

Version Control

- Does your document management system make it more difficult to use an old draft rather than the latest version?

Supervision

- Is there a strict process of independent checking on high-risk matters* and matters where one template document is going to be used across a wide range of matters (e.g., a lease template to be used across multiple properties)?
- *Are there clear, consistently applied criteria for what constitutes high-risk in respect of the values, potential cost of failure, or other relevant factors?

File Notes

- Are lawyers trained to use post-meeting emails / action trackers to record discussions and agree post-meeting actions (which include drafting updates)?
- Are these always made (even on final versions) and retained on file?
- Do lawyers keep annotated draft documents on (electronic) file archive to evidence discussions?

Preventing Fraud Claims

Fraud does not appear as its own category in our top 5 causes of claims, but since 2008 and the influx of property fraud claims, fraud has been a high and growing risk issue for the profession and is an underlying issue within many of the claims we see. Changes to how we work, and the way clients come to us all bring new fraud risks to the fore, and the Appeal Court decision in Dreamvar has further highlighted the risk for conveyancers in respect of identity fraud.

The Solicitors Regulation Authority (SRA) has published the results of its anti-money laundering visits 2019-2020. Their overall findings revealed the following issues and identified those areas needing more attention:

- Misunderstanding the requirement for an independent audit and failing to test the effectiveness of their AML regime. More than half (38, 51%) required follow up action in this area. Of those, 14 firms (19%) had never conducted an audit.
- Where firms were generally compliant with the requirement to screen employees on appointment, 21% failed to conduct ongoing checks.
- 29% of files had not had matter risk assessments carried out. This meant that the firms might have been unaware of high-risk matters passing through their hands.
- In 21% of matters, the source of funds had not been checked adequately or at all. Failing to check a client's source of funds is likely to mean a failure to properly understand the risks involved in the transaction. The source of wealth rather than just the funding route needs to be considered in this context.

From a claim perspective, effective identification of risk, allied with robust AML procedures (rather than a simple tick box exercise), is at the heart of both fraud prevention, and a wide variety of other claim types. Many claims show that the AML stage has been limited to purely client identity checks, with little consideration for the instructions themselves or warning flags arising later in the process. At QBE, we believe this a risk priority area for all firms and recommend the following risk mitigation steps:

Client and Transaction Vetting

- Do lawyers (not support staff) undertake risk assessments on clients and transactions as a whole (extending well beyond pure AML), before being able to start the substantive work on a new matter?
- Is there an effective process to ensure high risk matters are escalated to the MLRO or other senior manager for review and acceptance?
- Do lawyers conduct a final risk assessment to consider as a whole all 'red flags' arising from the outset and during the matter, prior to the transfer of funds?

Cyber Security

- Does your firm have 2 factor authentication ('2FA' or 'MFA', usually being a code sent to a mobile or other secondary device), applied to remote access to the firm's systems and all business-critical cloud-based systems used?
- Does your firm undertake simulated phishing testing at least annually and provide further training where vulnerable areas / individuals are identified?
- Does your firm ever undertake simulated vishing (telephone fraud) testing?
- Does your firm have, or is it working towards, Cyber Essentials (CE) or higher accreditation (CE+, ISO 27001 etc)?

Preventing Fraud Claims (continued)

Awareness Training

- Do you provide fraud and social engineering training for all staff at least annually?
- Does this training include a range of formats, include case-studies, and cover topical scams such as 'Friday Fraud', fake Authorities, email spoofing etc?

Accounts Controls

- Where payment is likely to be due to a client, do you set up (or at least obtain) their account details at the start of a transaction?
- Do you issue clients with written fraud prevention guidance to help them to avoid becoming victim to a fraud in their transaction with you?
- Do you train staff not to accept original or changed summary bank details by email, to always obtain documented evidence of the account details, or at the very least obtain confirmation of client account details by telephone, using an existing trusted contact number?
- Does your accounts team (or payment authoriser) independently verify payment details against documented evidence of the account details to minimise the risk of a fraudulent payment being made?

All Claims

The risk controls referred to in previous checklist are conducted at the operational level as individuals fulfil their day-to-day job roles and so take place at the 'first line of defence'. To embed these controls and ensure consistency of application in all areas by all individuals, a systematic programme of audits should be applied, and this then becomes your 'second line of defence' against errors, complaints and claims. Additional layers of defence can be added through management oversight, external review and an open culture of continuous improvement. The following questions should be asked:

All Claims Controls

- Are the previous risk controls which apply at a transactional level (such as AML checks, client communications etc.), included as a specific requirement in a file review process / checklist?
- Are the risk controls that are applied at process level (such as the supervision and management reporting elements), also subject to regular audit, at least annually?
- Are your risk controls subject to any form of external scrutiny, perhaps review by an independent consultant, or an ISO 9001 or Lexcel Assessor?
- Is there a culture of raising issues and ideas for improvement about risk controls, and are managers receptive and responsive to these?
- Is there oversight and genuine interest at senior level in information about these risk controls, as evidenced in management communications?

QBE Risk Solutions

QBE has a specialist Risk Solutions team available to assist your practice with a range of risk management issues. All insured practices have access to:

	QBE's own in-house risk advisers for ad hoc guidance and advice
	Our online risk management toolkits
	A wide range of guidance articles
	Pre-negotiated discounted access to a range of specialist providers

Contact Us for more information

Risk Management Advice: Via your broker, your usual QBE contact, or rs@uk.qbe.com

QBE Risk Solutions: Visit our [website](#)

QRisk Self-Assessments and Knowledge Centre: Support.Qrisk@uk.qbe.com (or use existing logins)

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