

Episode 4: Summary

Episode name: Risky Business: Handling Professional Responsibility Complaints and Claims

Guest(s): Jennifer McMillan

What area(s) of law does this episode consider?

Risk management for lawyers: this episode considers the most common claims against lawyers and provides practical tips for reducing the risk of a claim.

Why is this topic relevant?

Many lawyers will be exposed to a professional negligence claim during their career. This can cause stress and anxiety for the lawyer(s) involved; often this is borne from an absence of knowledge about how to respond to a potential claim. This episode: provides a summary of the most common claims against lawyers, describes a couple of unusual claims (where you can't help but feel sympathy for the lawyers involved), explains how a LawCover policy operates and provides practical guidance on how to mitigate claims.

What legislation is considered in this episode?

Legal Profession Uniform Law (NSW)

Australian Solicitors' Conduct Rules 2015

What cases are considered in this episode?

The Law Society of New South Wales v Gathercole [2016] NSWCATOD 27: This case concerns disciplinary proceedings against a solicitor who was approached by an existing client (the husband) to witness the signature of another (the wife, whom he had never met) on mortgage documents and sign legal advice certificates. The wife's signature had been forged and the solicitor was ultimately found guilty of professional misconduct. In this case, indemnity was denied on the basis of fraud, not by the fraudster, but by the solicitor.

Zakka v Elias [2013] NSWCA 119: This is an appeal commenced by Mr Zakka about the dismissal of a claim made against Mr Elias (sole practitioner who traded as Cadmus Lawyers) regarding advice provided by Ms Rahe (a solicitor employed by Mr Elias). While holding an unrestricted practising certificate, Ms Rahe provided advice to Mr Zakka, a relative who was lending money to third parties. She concealed her actions from her employer. Issues arose and Mr Zakka sued Ms Rahe; one of the issues on appeal which Jennifer refers to is whether Mr Elias was vicariously liable for Ms Rose's negligence. The Court found that this was "a clear case of a solicitor engaging in a frolic of her own or at her own whim.... It is an act Ms Rahe was not authorised to take as an employed solicitor of the firm. There was not, in my opinion, a sufficient connection between that unauthorised conduct and Ms Rahe's employment to bring this within the scope of the doctrine of vicarious liability..." at [142].

Legal Services Commissioner v Michael Vincent Baker [2005] LPT 002

What are the main points?

- Around 26% of claims are conveyancing related. The next biggest area is litigation which could include issues around limitation periods and claims around settlement offers. The latter being a very tricky area; sometimes clients will settle a claim and experience "settlement regret" and seek to improve their position by suing their lawyer.

- Of conveyancing claims, those made against lawyers acting for the purchaser often include a failure to advise on easements. In a falling market, claims against the solicitor acting for vendors usually relate to an omission of prescribed documents to the contract. Other causes include drafting errors, document control issues and a failure to manage systems, such as managing calendars correctly (which result in missed deadlines).
- The most common underlying cause of claims is a lack of communication; this can include where instructions were not followed, or an omission of advice or failing to clarify the extent of the retainer.
- The LawCover policy excludes instances where a solicitor has acted fraudulently and/or dishonestly.
- The LawCover policy does not cover solicitors who are subject to disciplinary proceedings for:
 - "Unsatisfactory professional conduct" as defined in section 296 of the Legal Profession Uniform Law (conduct of a lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer)¹; and/or
 - "Professional misconduct" is defined in section 297 of the Legal Profession Uniform Law (including unsatisfactory professional conduct where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and conduct whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice²,

but may in some stances respond to claims for compensation.

- Lawyers must be supervised in their first two years of practice, a failure to adequately supervise will increase the risk of a claim. The stand of supervision required is set out in Rule 37 of the *Australian Solicitors' Conduct Rules 2015* which provides: *'[a] solicitor with designated responsibility for a matter must exercise **reasonable supervision** over solicitors and all other employees engaged in the provision of the legal services for that matter.'* The legislation does not define 'reasonable supervision'. In *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002 at [42] it was held: *"The supervision required however varies according to the employee's experience, qualifications and role and with the type and complexity of the work"*.

What are the practical takeaways?

- **Take file notes!** It's the best way for a lawyer to document the advice that has been given. For some, COVID-19 has challenged the common practice of taking file notes; as people are working remotely in different environments often providing more advice over the phone or by video conference and using technology more

¹ According to the Office of the Legal Services Commission this includes threatening or abusive behaviour, failing to comply with an undertaking, non-disclosure of costs and poor advice and representation.

² According to the Office of the Legal Services Commission this includes gross overcharging, acting contrary to instructions, misleading and deceptive conduct in or outside court, and misappropriation of trust money.

than they even have, the hand written (or even typed) file note can be forgotten.

- **How does a Law Cover policy work?** The policy covers the firm, employees and employees of a service company related to that firm. The base level of cover is \$2m per claim. Claims cover civil liability including:
 - Contract, breach of retainer
 - Breach of duty of care
 - Misleading and deceptive conduct
 - Claims for compensation
 - Personal costs orders
- **Can I be the subject of a claim where there is no retainer and no payment for services?** Yes, if sued in tort, you can be the subject of a claim. Remember the example of advice given off-hand at a dinner party? The provision of any legal advice, however and wherever provided, can result in a claim in negligence.
- **What's the first thing a lawyer should do if they think there *may be* a claim?** Call LawCover and speak to an experienced claims solicitor; they can assist in explaining the next steps, some of which may be difficult such as speaking to the client to explain the mistake, as well as sharing strategies on how to mitigate the risks of a claim. A majority of notifications to LawCover don't go anywhere, so don't be afraid to pick up the phone and speak to a claims solicitor.
- **How do you explain a mistake to a client?** It is recommended that you be frank, but also conscious of the fact that a LawCover policy will include a clause that precludes lawyers from admitting liability without LawCover's consent. Another reason why you should consult with a claim's officer who can provide guidance on this communication. When informing the client of a mistake, it is recommended that you inform the client that they should seek independent legal advice.

[Show notes](#)

[Law Society – Fidelity Fund – Current Notices](#)

[The Law Society of New South Wales v Gathercole \[2016\] NSWCATOD 27](#)

[Zakka v Elias \[2013\] NSWCA 119](#)

[Legal Services Commissioner v Michael Vincent Baker \[2005\] LPT 002](#)