

Oops, I did it again

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Sometimes, you can be lucky. Take the case of Ms Valerie Wilson, who makes sandwiches at a New York Deli. Ms Wilson won \$1 million from a state lottery game four years ago. Last month she won another \$1 million from a scratchie.

The chances of the lucky Ms Wilson winning first time round were about 1 in 5.2 million. In winning from a scratchie ticket, Ms Wilson beat odds of 1 in 705,600. Her chances of winning both were about 1 in 3,669,120,000,000.

For the rest of us, there is hard work. For lawyers “luck” may mean that our mistakes may not prove to be as costly as first thought.

The odds are pretty good that a practitioner, sometime in their professional life, will be caught out in a matter which requires them to report to their professional indemnity insurer. It might be the failure to issue or file a writ in time, the omission of a crucial clause in a contract, not including a particular property or asset in a matrimonial property claim, or any number of things. It may simply be a dissatisfied client who, having failed to fully appreciate your legal skills or the precariousness of their case, prepares to sue because “you” lost the case.

WHAT TO DO?

First things first

There really is no way around it. You have to tell the client. If the mistake is “fixable” then offer the client to remedy any error, without cost. The client may not necessarily be happy but they will respect you for the honesty and may prefer to give you the opportunity to fix the problem rather than take the file elsewhere.

If the situation cannot be redeemed then you will have to refer the client to another practitioner. Whilst your PI insurance requires that you make no admissions you still have an obligation to advise your client in sufficient terms to enable them to understand why you have terminated the retainer.

REPORTING THE CLAIM

Your policy requires immediate notification, even if you have been given the opportunity to redeem the situation. The quicker the claim is reported the better chance of ameliorating any loss.

The notification must be in writing. It may however

be useful to make personal contact with your case handler once notification has been made. Your insurer may be able to offer assistance in how to remedy the error. That after all is a cheaper option for them than funding your defence in a negligence action or paying out large damages.

The notification should contain the following information:

1. name and contact details of the client,
2. a brief description of the retainer ie the date you were engaged and the nature of the client’s matter,
3. the date on which you became aware of the potential claim,
4. the nature of the potential claim,
5. relevant documentation,
6. the amount of potential damages,
7. what steps if any you have taken to mitigate the potential loss.

Reporting may in fact be a precautionary measure only if you have determined the threat is not valid. Failure to report may be a breach of your policy and in any event you will probably have lower stress levels if you take immediate action. The mere reporting of a potential claim does not trigger the policy excess which is payable only on a payout of the claim, by either settlement or judgment.

AND THEN WHAT HAPPENS?

The insurer determines the conduct of any claim. As in any legal matter an assessment will be made as to the likely merits and costs of the potential claim. If the allegation of negligence appears without merit, or has not resulted in any loss to the client, the insurer may assist you to draft a letter of denial, if you have not already done so.

If the potential claim is assessed as minor ie less than the excess, it may be more appropriate to resolve the matter in house.

If the claim proceeds then the practitioner is essen-

Continued page 17...

Oops, I did it again cont...

tially a witness in the case. This does not prevent you from having some input into the way the case is handled.

NEGLIGENCE VS CONDUCT ISSUE

There may be some overlap between the alleged negligence and a conduct issue sufficient to warrant the attention of the Law Society eg failure to follow the client's instructions, failure to pursue the client's interests with honesty and diligence.

Whilst the insurer and the Law Society do not work together on the claim or complaint, what happens in one jurisdiction may have an impact on the other. Practitioners should note that Professional Conduct Rule 32 requires the practitioner to be open and frank in their dealings with the Law Society and provide a full and accurate account of the his or her conduct in the matter.

THERE'S MORE?

Whilst an undoubted and unpleasant and stressful experience, a complaint alleging negligence or unsatisfactory conduct should be turned in to an opportunity to review and hopefully improve the practice.

What went wrong? Why? How can systems be either implemented or improved to prevent re-occurrence?

No one is perfect but the better our management systems the better the odds that the client won't suffer the consequences of our imperfection.



Volunteer Lawyers

Volunteer lawyers are needed for the 2006 free Legal Advice Sessions run by Darwin Community Legal Service:

- * Monday in Palmerston 6.30-7.30pm
- * Thursday in Darwin 5.30-7pm
- * Saturday at Casuarina library 10-11.45am

Lawyers usually commit to monthly or bi-monthly sessions

Support the community that supports you.
Please contact DCLS on 8982-1111.

A step too far: the Justice Amendment Act (Group Criminal Activities) cont...

tion04.pdf '... [since the passing of the legislation] many of our clients have been subject to non-association or place restriction conditions on bail. Although these powers existed (and were used by police and courts) before the introduction of the Act, it appears to us that their use has increased since the commencement of the Act...''

18. In particular, police appear to have increased their use of place restriction conditions when setting bail, and many magistrates willingly continue such conditions when the matter reaches court...''
19. Ibid.
20. <http://notes.nt.gov.au/dcm/legislat/Acts.nsf/5504d78eee675d6e6925649e001bb652/25c4914c279280a8692571da00059293?OpenDocument>
21. Ibid.
22. Ibid.
23. See <http://www.abc.net.au/am/content/2006/s1681309.htm>, <http://www.abc.net.au/news/australia/nt/summer/200607/s1692510.htm>
24. See <http://notes.nt.gov.au/dcm/legislat/Acts.nsf/5504d78eee675d6e6925649e001bb652/25c4914c279280a8692571da00059293?OpenDocument>
25. For an excellent article see Beth Bjerregaard, 'Antigang Legislation and its potential impact: The Promises and the Pitfalls', *Criminal Justice Policy Review*, Volume 14, Number 2, June 2003 Pp. 171-92.
26. For an insight into events in Wadeye see: Ferguson, Sarah 'Wadeye riots'. In Sunday, Channel Nine. Australia: ninemsn. Yaxley, Louise. 2006. 'Communication between Government and Wadeye community'. In *The World Today*. Australia: ABC Radio.
27. This misunderstanding has been fuelled by media reports depicting this as "classic" gang violence. See for example <http://www.theage.com.au/news/national/hate-stalks-streets-of-wadeye/2006/05/22/1148150187659.html>
28. Thomas J (20427487), Queen and Jonathan Nilco SCC 20601721 2nd August 2006 http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2006/08/20060802nilco.html
29. Ibid.
30. Ibid.
31. See also http://sunday.ninemsn.com.au/sunday/cover_stories/article_2034.asp
32. Ibid.
33. Ibid.
34. Ibid.
35. Ibid.
36. See Heather Strang and John Braithwaite 'Restorative Justice and Family violence', 2003.
37. Ibid
38. Ibid.
39. Ibid.
40. Justice Legislation Amendment (Non-association and Place Restriction) Act No, 2001.
41. Ibid.