LEGAL PRACTITIONERS' LIABILITY COMMITTEE

CPD review response

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Outcomes

LPLC congratulates the LSBC for undertaking this review of continuing professional development (CPD). It is a chance to:

- reset the mindset of many practitioners to see CPD as an opportunity for continual improvement in professional practice and an investment in themselves rather than a regulatory burden and a tick box activity
- raise the standard of legal CPD across the profession.

LPLC supports any move to a more comprehensive model of competency-based, outcome focused CPD training.

Claims data - Reasons for claims

Our claims data and our reviews of firms and enquiries from practitioners show us that there is both a firm wide and an individual component to competent legal practice

1. Law firm responsibility

Firms with significant strategic and systemic problems have professional indemnity claims because they do work:

- outside their legal expertise
- without appropriate systems, precedents and processes in place

CPD for individual practitioners in these firms will have limited effect on the outcomes for clients if they are asked to work across a broad array of legal areas where it will not be feasible to keep up to date in those areas and the firm doesn't invest in systems, precedents and processes. As well-meaning and competent as an individual lawyer may be, it will be very hard, especially for younger employee lawyers, to do enough CPD to achieve appropriate competency across a range of practice areas. This is particularly so in the current legal environment that is more complex and changing than ever before.

Practice management CPD for principals is most relevant to improve their firm's strategies and systems.

2. Individual practitioners

Mistakes made by individual practitioners are currently coded by LPLC according to the following categories of underlying cause:

Underlying cause category	Details	2018-19 number of claims	2018-19 Cost of claims
Failure to manage the legal issues	This category relates to lawyers not knowing the relevant, specific legal issues as well as broader strategic issues. They	38%	44%

Underlying cause category	Details	2018-19 number of claims	2018-19 Cost of claims
	may have applied the law to the wrong facts or given advice on non-legal issues. This would encompass a lack of understanding on ethical issues.		
Poor engagement management	This category relates to the failure by lawyers to adequately identify who their client is, what the scope of the retainer is, what and when the retainer has been varied and when and how to terminate the retainer.	27%	24%
Poor or no use of good systems	The mistakes relating to this cause can sometimes be considered a simple oversight but on further analysis it is really that the lawyer failed to implement appropriate systems to avoid the oversight such as checklists, proofreading, properly using a practice management system, diary entries for crucial dates, appropriate policies in the office for proper processes etc.	14%	8%
Poor communication	This category encompasses both poor communication with clients and staff. It can mean the lawyer didn't listen, ask enough questions or adequately explain something to someone.	7%	5%
Poor documentation	The mistakes here are about failing to keep adequate records of what was said and done and failing to provide the client with appropriate written confirmation of advice purportedly given.	2%	1%
Dishonesty and reckless indifference	This category relates to practitioners who behave dishonestly or with significant disregard for the rule of law.	2%	9%
Non-attributable	The are some notifications and claims that suggest the practitioner did nothing to cause the claim. These matters often have a disgruntled non-party or in some cases client who could not be managed despite the practitioner's best endeavours.	11%	9%

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These categories are very broad and we are currently looking to better refine them. The failure to manage the legal issues category in particular is more nuanced than lawyers not knowing the law but can also be about collecting sufficient facts in order to apply the law to those facts and appreciating where their role boundaries are. In general however, the four CPD areas would fit the categories as follows.

Underlying cause category	CPD categories	2018-19 number of claims	2018-19 Cost of claims
Failure to manage the legal issues	Substantive law Ethics and professional responsibility	38%	44%
Poor engagement management	Practice management and business skills Professional skills	27%	24%
Poor or no use of good systems	Practice management and business skills Professional skills	14%	8%
Poor communication	Professional skills Practice management and business skills	7%	5%
Poor documentation	Practice management and business skills	2%	1%
Dishonesty and reckless indifference	Ethics and professional responsibility	2%	9%
Non-attributable		11%	9%

We believe the four CPD categories are relevant to a practitioner's professional development and safe practice today.

Focus on professional development

We agree with proposition that CPD is an important part of the continuum of learning for lawyers as professionals.

1. University law degree
2. Professional legal training
3. Post admission supervised legal practice
4. Learning from experience and interaction with others
5. Continuing professional development

The purpose of CPD activity is to enhance and improve practitioners' professional development with the ultimate aim of improving the quality of the legal advice and service for consumers. In our current rapidly changing and increasingly complex world this is more important than ever.

To avoid 'tick box' attitudes to CPD compliance, we think there needs to be:

- an education campaign from the regulator focusing on:
- the purpose of CPD as professional development
- how practitioners can prepare development plans that align with their business strategy that will lead to personal improvement in the way they and their firm practice law
- how to reflect on what they have learnt from their CPD activities.
- a focus on assessing the CPD compliance beyond hourage and in terms of the wording of rule 7.1.3 as an activity that "extends the solicitor's knowledge and skills in areas that are relevant to the solicitor's practice needs or professional development".

Competency framework and learning activities

Lawyers often don't know what they don't know and therefore don't know where they need to develop. There appears to be a false belief by many lawyers that all they need to know about is changes in legislation and case law. They fail to appreciate there are many more reasons why mistakes happen, and the range of skills and knowledge required to produce good quality legal work.

Developing a competency framework for professional practice will help practitioners understand what and where they need to develop and focus their development activities. The competency framework should address the issues raised earlier about the underlying reasons for claims in terms of knowledge, skills and attitudes across different seniority levels that might be described as **Formative** for new lawyers, **Developing** for mid-level lawyers, **Established** for senior lawyers and new principals, and **Advanced** for specialists and senior principals. Separate frameworks should be developed for specific practice areas and the generic areas of practice management, professional skills and ethics.

LPLC would be very pleased to assist the Legal Services Board in detailed work associated with the development of competency frameworks insofar as these can be help to improve the practice of law by reducing the incidence of negligence claims.

With a competency framework you arguably don't need a set of compulsory areas of CPD but we recognise that removal of those mandatory areas of CPD will require a change to the rules.

Levels of experience

We believe more senior people should not be permitted to do less CPD. There are many and often overlapping reasons for claims and years of experience are not necessarily a guide to avoiding claims. Our claims statistics suggest that principals of firms are responsible for more claims than younger employee lawyers. This is however open to interpretation as in some cases there is question as to whether

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the mistake was a failure to adequately supervise a junior practitioner or the actual error by the junior practitioner.

It is also clear that the legal environment is continually changing, and senior people need to know about those changes as much as younger practitioners. More senior people are also responsible for more staff, systems and processes within firms and so need to keep up to date. We recognise that senior practitioners may focus their development on different things to younger practitioners as they move into more management and leadership roles. There is always more to learn.

Entity / employer role

The culture of the firm and structures within the firm play important roles in the quality of work produced. Accrediting firms to self-audit could create a culture where professional development is valued and done well.

We think there would need to be training for people responsible for CPD auditing within the firm and periodic or random audits of the auditing function in the firm.

Quality CPD

Guidelines

We agree that the quality of CPD offered for lawyers varies greatly from well run programs with appropriately qualified and capable presenters/facilitators to inexpert, inexperienced speakers reading their papers at dinner events where it appears that few people are paying attention. It would be appropriate and useful for the LSBC to develop guidelines for quality CPD programs. In particular, we refer to the experiential learning cycle theory of David Kolb[1] and the concepts of adult reflective learning.

Not only will it help to improve the quality of CPD offered it will serve to educate practitioners on what is expected of them in undertaking CPD especially with the proliferation of online learning options now developing.

Accreditation

We agree that the accreditation of CPD providers and firms could increase the quality of CPD available for practitioners but note that it may also increase the cost of CPD and make it more difficult to some practitioners to access CPD. We query the mechanics of how it would work. Would organisations be accredited or individual presenters? On what basis would accreditation be granted?

We recommend starting with voluntary guidelines or accreditation that organisations could advertise as having met.

[1] David Kolb (2015). *Experiential Learning: Experience as the Source of Learning and Development* (2nd. Ed.). New Jersey, Pearson Education.

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Record keeping and auditing

In order for this CPD requirements to be taken seriously and appropriate time allocated to fulfilling the requirements when there are many competing demands on practitioners there needs to be oversight by the regulator. We appreciate the need for the regulator's activities to be efficient and effective and suggest that the Law Society of British Columbia's system of recording CPD online in the regulators portal helps achieve those aims.

Requiring practitioners to record their CPD plan and CPD activities on a portal controlled by the regulator would elevate the importance of completing and recording CPD activities when it is controlled and managed by the regulator.

The data about how practitioners are engaging with CPD, would provide:

- a basis for assessing the value of CPD and its purported aim of improving professionalism and consumer protection particularly in instances of complaints or prosecutions
- more efficient, accurate and targeted auditing as the regulator would be able to see those who 'skid up to the line' or don't reach the minimum standard
- an opportunity to educate, encourage and remind practitioners to prioritise CPD through automated reminders to practitioners who have not completed their CPD activity.

We agree that auditing when firms or practitioners otherwise come to the attention of the regulator is a good strategy as poor performing firms often need assistance in practice management education as well as other areas.

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Appendix 1- Underlying cause claims examples

Failure to manage the legal issues

Not knowing the law

A claim described in a blog here https://lplc.com.au/blog/beware-of-time-limits-in-forfeiture-matters/ sets out how a practitioner misunderstood how the Confiscation Act operated.

A common example in conveyancing is the practitioner does not understand that if a purchaser lodges a planning application before nominating a new purchaser then double duty is payable.

Failed legal strategy

A failed legal strategy is not about the lack of knowledge about the law so much as not applying the right facts to the right law. It often occurs in litigation where the wrong defendant is joined to a proceeding because insufficient information has been considered to determine who the correct defendant is. In one example a close scrutiny of the documentation and the invoices would have shown the supplier of the defective goods was a different corporate entity to the one sued.

Other strategic mistakes can be more complex. For example, a client was not advised that to bring a worker's compensation claim for an injury that occurred during an altercation at work would prevent the client from bringing a common law personal injury claim against the assailant personally.

A failed legal strategy in property would include failing to appreciate the importance of including water information certificates in a section 32 statement. See our article here about that issue.

Lack of ethical understanding

Lack of understanding about how or when a conflict may arise and when to stop acting is described in our blog *Do I have a conflict?* which can be found here.

Substantive law training would make a difference in these claims but also business strategy education so the firm was only taking on work it could do well and practice management training so the practitioner was doing work efficiently and not too busy to pick up the relevant issues.

Poor engagement management

Good examples of engagement management are set out in the following video scenarios and accompanying workbooks:

- *The New Normal*. It outlines how firms don't manage the scope of their retainer and the client's expectations about what the lawyers will deliver.

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- *Mind the Gap* It relates to a limited retainer overseeing a complex joint venture where the scope of the firm's role and who they were acting for became blurred.

In another very expensive example, the firm gave five minutes of advice on a large commercial agreement to a sophisticated client who, it seemed, only wanted high level overview advice. The client later alleged they should have been specifically advised about the effect of a particular clause. The firm had not clearly described the scope of the advice they were giving the client.

Sometimes there is a combination of lack of legal knowledge and poor engagement management. In a litigation matter a practitioner was retained by the family of a man who died as a result of injuries received in a brawl. The practitioner, who was an experienced lawyer practising mainly in the criminal area, acted for them at the coronial inquest and in a claim for compensation to the Victims of Crime Assistance Tribunal.

At the conclusion of the coronial inquest the practitioner was then retained by members of the man's family to act in potential nervous shock claims arising out of the man's death. He agreed to act despite not having expertise in personal injury litigation. The practitioner was also alleged to have been retained to act for the man's child in a potential dependency claim.

Although the practitioner briefed counsel and obtained advice at different times, the personal injury claims were not handled in an organised manner. Instructions and the retainers were not properly documented, and it was impossible to tell from the file what the practitioner was specifically retained to do in the personal injury claims, for which members of the family and when. There was a lack of file notes to support the practitioner's recollection of what he said as well as no evidence the practitioner properly understood and documented the applicable time limits.

There were also delays in obtaining advice from counsel, identifying the correct defendants as well as issuing and serving proceedings. The proceedings were not drawn by counsel. The proceedings were ultimately dismissed when they were held to be out of time under the Limitation of Actions Act 1958 (Vic). The claimants then sued the practitioner for the lost chance of obtaining damages.

These claims could be avoided if practitioners had training in a range of areas including: communications skills, documenting what was agreed, business strategy and project management skills.

Poor or no use of good systems

We regularly see claims where firms fail to set up a diary system to track the limitation dates, particularly in personal injury litigation, and therefore allow time limits to pass without taking the necessary steps.

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In areas like conveyancing mistakes happen where there is no system to ensure the client is given the right advice. In one claim the client bought an off the plan apartment that was much smaller than the initial plans suggested. The firm had failed to advise the client of the risk the property could be smaller and that they should check measure the property prior to settlement. The clerk handling the matter had not given the advice and the firm did not have a precedent letter that outlined this advice for each client. There was also no systematic supervision of the work being done.

Failing to use a checklist to ensure all the steps in a matter are completed occurs regularly. A common example is in financial transactions where mortgages or charges are negotiated and signed but then no one ensures the mortgage or PPS charges are registered. More recently we see firms that have not set up systems to ensure that bank account details sent by email are independently verified before EFT payments are made (leading to a risk of being exposed to claims from email compromised email accounts).

A focus in the competency framework on the importance of file management and use of technology would make a difference in these claims.

Poor communication

In many ways poor communication permeates or contributes to the other underlying causes.

Examples of poor communication within firms occur in complex commercial matters where specialist tax advice is sought from the firm's tax specialist but all the relevant facts are not given to the tax practitioner and so the advice provided is not accurate. In some cases the facts change before the transaction is finalised and the tax practitioner is not asked to revisit their advice.

In the litigation context failing to ask the client the right questions and explore the facts and circumstances sufficiently with the client can lead to unexpected information being elicited in cross examination. The following is a good example of failed communication between lawyer and client.

The clients alleged they had been induced to enter into a retail lease on the faith of false representations made by the owners and agents about the property. Proceedings were issued by the tenant to set aside the lease and seek damages. During the trial the client gave evidence under cross-examination that contradicted his evidence in chief and was otherwise an unimpressive witness. As a result, the proceedings were settled before the end of the trial.

The plaintiff's solicitor was owed over $100,000 in costs and issued County Court proceedings to recover them. The client issued proceedings in the Costs Court. What was instructive about his matter was the letter written by the client.

- He recounted that the lawyer had said the cost estimate would be $150,000 but that would be paid by the other side when you win or at least 60% of it if

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you go to court. The client said he would not have started the matter if he had known the full cost would be $300,000

- The lawyer had kept the client up to date with the costs and so the client knew when the costs were approaching the estimate and exceeding it. The client said there had been discussions about minimising costs by, for example, using barristers more carefully but he didn't think that this had been done.
- Various offers were made by the other side but not accepted because the client said the lawyer had told him the other side had no case against him.
- The lawyer kept telling the client things like "**the other side is scared to face the music**", '**we know they don't have a case**"

The lawyer's version was a little different.

- He said he had told the client that one of the main issues of the case involved whether or not certain oral representations were made.
- He specifically told the client it would depend on how the witnesses performed in the witness box and therefore there was a risk as to who the court would believe.
- Even though the lawyer had tried to obviously keep the client up to date on cost matters the lawyer did say in relation to the original estimate that he was asked on the street for the estimate. He apparently told the client if the other side concede at mediation (after discovery) it could cost somewhere in the vicinity of $150,000 to $200,000.
- The client was told VCAT was a no cost jurisdiction but because it was a Fair Trading Act matter they might get 50-60% of costs back.
- Considerable time and effort went into preparing witness statements and never had the client said the things that he conceded in court.

Two very different versions of events.

Improved communication skills and an understanding as to why clients are hearing what is being said would make a difference for these claims.

Poor record keeping

The typical examples we see in this category is the failure by practitioners to keep contemporaneous file notes of advice they gave their clients. It often occurs in the giving of advice about mortgage and guarantee documents or family law financial agreements. The practitioner says they gave appropriate advice about the documents but cannot recall exactly what was said. The client alleges they did not receive any advice or at least not adequate advice about a relevant issue. Without the contemporaneous file note or a letter confirming the advice

given it becomes a matter of whose evidence a judge will believe. This scenario is most obviously where poor communication and poor record keeping overlap. Confirming the oral advice in writing would provide a record and another means of communicating the message to the client.

At the extreme end of poor record keeping is the failure by a firm to open a file or retain any documents for the period of time they may be needed. In cases like will instructions and family law financial agreements this may be well beyond the required seven years.

A competency framework that addressed record keeping and use of technology to assist this would be helpful to direct attention and CPD activities to improving these skills and avoiding the types of claims above.