



“PRACTICE PROTECTION”

Jon Barclay, Partner

GSCCA Lunchtime Presentation

Les Cotils, Guernsey

29 September 2010

Litigation Culture



"Better to have litigated and lost, then never to have litigated at all."

Litigation Culture

High Court claims filed against accountants, lawyers and estate agents increased from 147 to 332 – a rise of 125% - mainly from investors and lenders who have suffered loss resulting from the recession . . . In 2009, there were 13 major professional negligence claims against accountancy firms in the High Court, compared with none in 2008. In fact, over the previous 5 years (2004 to 2008) there were only four in total.

(Accountancy Magazine, 23 August 2010)

Litigation Culture

“We operate in a highly litigious environment where the balance of risk and reward has driven us to a world of caveats. Any corporate failure or financial loss invariably carries with it the risk of suing the auditor.”

(Bill Michael, UK Head of Financial Services, KPMG
Reported in The Telegraph, 14 July 2010)

Litigation Culture

Key Drivers (UK/Abroad)

- “Consumer Society”
- Alternative Funding Arrangements
- Class Actions
- Deep Pockets
- Last Man Standing
- Economic Circumstances

Principles of Civil Liability for Accountants: in Outline

Sources of Civil Liability

- Contract
- Tort
- Fiduciary Duties
- Statute

Principles of Civil Liability for Accountants: Liability to the Client

(1) Contract

Retainer

- Express/Implied Terms
- Breach
- Loss and Causation
- Time Limit: 6 years from date of breach

Principles of Civil Liability for Accountants: Liability to the Client

(2) Tort

- Negligent Act or Omission
- Loss and Causation
- Time Limit: 6 years from date of loss

Principles of Civil Liability for Accountants: Liability to Third Parties

Negligent Misstatement

- “Special Relationship”
- Actual or Constructive Knowledge that Statement will be Relied upon
- Actual or Constructive Knowledge Third Party Might Suffer Loss

Principles of Civil Liability for Accountants: General Features

- Possibility of Concurrent Liability
- Contribution between Tortfeasors
- Contributory Negligence

Some Risk Management Techniques

- (1) Professional Indemnity Insurance
- (2) Review Letters of Engagement
- (3) Supervision and Training
- (4) Paper Trails
- (5) Avoid Difficult Clients
- (6) Manage Client Expectations
- (7) Business Structure
- (8) Security of Client Data
- (9) Avoid Conflicts of Interest
- (10) Have a Complaints Procedure



Risk Management Techniques

(1) Professional Indemnity Insurance

- Minimum Requirements
- Review Conditions and Cover
- Internal Responsibility for PI Issues
- Disclose all Material Facts on Renewal
 - Keep an accurate complaints ledger

Risk Management Techniques

(2) Letters of Engagement

- Professional Guidelines / Requirements
- Scope of Retainer
 - Minimise Scope for Misunderstandings
- Charging Basis
- Limitation of Liability?
 - Professional Rules?
 - Fair and Reasonable

Risk Management Techniques

(3) Supervision and Training

- Review Internal Arrangements
- Implement Training Programmes
- Promote Current Awareness
- Regular File Reviews
- Red Flags
- Internal Procedures for Raising Concerns

Risk Management Techniques

(4) Paper Trails

- Files and Filing Procedures
- Contemporaneous Notes
- Basis of Advice and Caveats
- Internal Documents are Potentially Discloseable
- Document Retention Periods

Risk Management Techniques

(5) Avoid Difficult Clients

Red Flags

- Poor Payer
- Selective with Information
- Frequent Changes in Instructions
- Unusual Demands on Management Time
- etc

Risk Management Techniques

(6) Manage Client Expectations

- Be Realistic
- Regular Updates
- Pre-empt Billing Issues
- Review Marketing and Publicity Materials

Risk Management Techniques

(7) Business Structure

- Corporate
- Partnership
 - Review Partnership Deed
- Guernsey LLPs: Watch this Space

Risk Management Techniques

(8) Security of Client Data

- Secure Storage
- Back up Electronic Records
- Clear Desk Policy

(9) Avoid Conflicts

- Review Procedures
- Use Technology

Risk Management Techniques

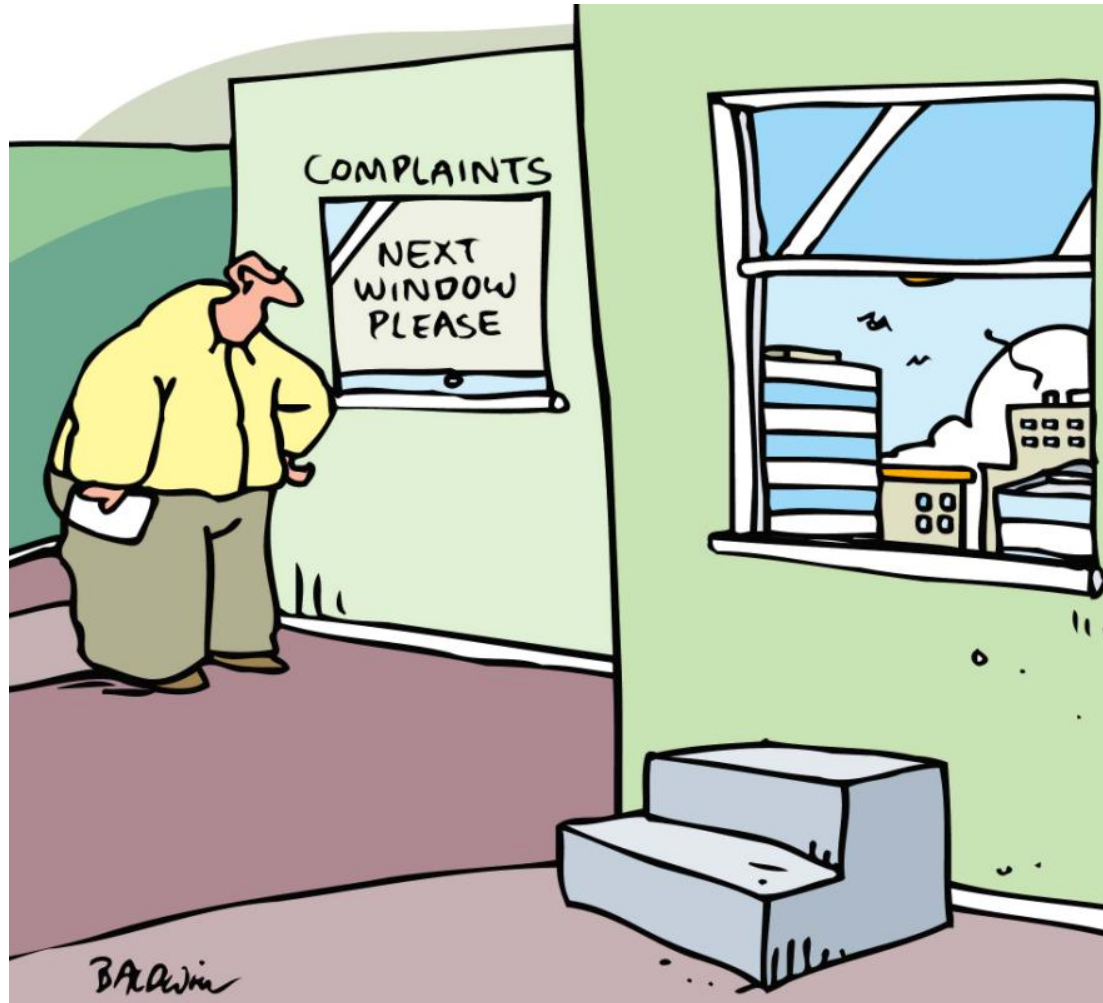
(1) Have a Complaints Procedure

- Help Identify Areas of Concern
- Client Care Partner
- Develop and Distribute Internal Policy
- Make Clients Aware

Complaints Procedure – Suggested Features

- Differentiate Between Complaints
 - High-Level
 - Low-Level
- Record All Complaints and Steps Taken
- Consider PII Notifications
- Fair Investigation
 - File Review
 - Interview Staff
 - Discuss with Client
- Remedies
- Client Feedback

What to do “When Things Go Wrong”



When Things Go Wrong . . .

(1) Implement Complaints Policy

(2) Notify Insurers

- Obligation Depends on Terms of Policy
- If in Doubt, Discuss with Broker
- Internal Concerns can be Sufficient to Trigger Requirement
- Beware Blanket Notifications
- Be Clear and Unambiguous

When Things Go Wrong . . .

Other Steps

- Identify and Collate all Relevant Files
- Liaise with Insurers / Lawyers
- Thou Shalt Not Prejudice Thy Insurer!



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