OWNING UP TO ERROR OR OVERSIGHT

Philip Jackson SC

What are my obligations and what should I do if I become aware of oversight or error that might cause loss or prejudice to my client?

And how do those obligations sit with the 'no admissions' clause in my professional indemnity policy?

Overview

The focus of this article is significant error or oversight, with potentially prejudicial consequences for the client that occurs and comes to light during the course of a current matter.

A correct response in terms of ethics alone should not be shaped to any extent by the contractual obligation imposed by the Policy[1] not to admit liability in respect of a claim.

As a general proposition you cannot subordinate your duties to your client to your own interests or those of your insurer. It necessarily follows that if adherence to your contractual obligation to the insurer might necessitate doing less than your duty to your client requires then you plainly have a conflict.

But from a practical point of view there need not necessarily be any conflict between the proper way to respond to an error that might potentially produce loss to the client resulting in a claim and the 'no admissions' condition in the policy.

Further, when you become aware that an error has occurred, and even if you have not yet received any formal claim or demand, if the potential for a claim seems more than fanciful consideration should be given to at least informally apprising the claims manager of the Professional Indemnity Insurance Scheme of the relevant circumstances.

The "No Admissions" Condition

It is important to understand exactly what the "no admissions" clause in the Policy actually means.

Clause 6(a)(i) provides:

> The Insured shall not admit liability for, or settle any Claim or incur any costs or expenses in connection therewith without the consent of the Insurer.

Clause 1(m) includes this important definition:

> "Claim" or "Claims" means
>
> [i] any writ, statement of claim, summons, application or other originating legal or arbitral process, cross claim, counterclaim or third party notice issued against or served upon the Insured;
>
> or
>
> [ii] the receipt by the Insured of any written notice of demand for compensation made by a third party against the Insured.

"Demand" is not defined in the policy but the authors of Sutton explain that:

> "'Demand" means a claim, a challenging, the ousting of anything with authority, or a calling upon a person for anything due. There must be a clear indication that payment is required to constitute a demand; nothing more is necessary and the word 'demand' need not be used. However, a demand must be something more than asking: it is a requisition in the shape of forcing or has a tone of latent compulsion."[2]

What are its Limits?

I believe the wording of the 'no admissions' clause and various authorities provide these general principles:[3]

- Admissions that are forbidden by the condition are limited to those in connection with a claim as that term is defined in the policy, not with the occurrence that gave rise to or might result in a claim. The prohibition is on admitting "liability for ... any claim"
- There is a real differnce between the statement of a factual account of an incident and an admission that thereby there is liability. The former does not necessarily imply an admission of liability.
- It follows that you are free to tell the client precisely what has happened and what the consequences might be for the matter you are handling for that client.
- But in doing so, even if you have not yet received a "claim" as defined in the policy you should avoid any statement of, or that might later tend to prove, your liability in the event that a claim is made and which might be used by the claimant for the purpose of imposing liability on you.
- What is forbidden by the condition is admission of liability - that is, legal liability, not acknowledgment of fault. It has been said that an admission of liability has not been made unless it is an admission, in express terms, of liability to pay damages or an admission of facts from which such a liability follows as a necessary consequence.

That does not mean that you should rush into acknowledgment of fault but it does mean that you can be frank with the client, providing a simple statement to the effect that you have made an error and explaining what it is; and with the client's agreement if necessary take reasonable steps to rectify the situation without being taken to have made an admission of liability within the meaning of the condition if a claim eventuates.

That might include reassuring the client that the client will not have to bear any cost of work that is necessary in order to put things right.

Despite all of that, caution needs to

be exercised in saying too much about what has gone wrong. An unnecessarily detailed explanation of what has happened and how and why it came about might later come back to bite you (and the insurer) by providing useful evidence to assist a client to establish where the fault for oversight or error lies.

In short, care should be exercised in offering your client any unequivocal acknowledgment of fault or making any statement to your client that might later be open to interpretation as an acceptance of legal liability to make good any loss the client might suffer.

When Oversight or Error Occurs?

Everyone makes mistakes.

Not every mistake involves actionable breach of the retainer or negligence.

Not every oversight or error will necessarily result in harm to a client (or indeed to a non-client to whom you might owe a relevant duty of care – some might argue that the class of potential plaintiffs is expanding[4]).

Not every mistake you make will result in a claim. Relative to the mistakes that undoubtedly occur in everyday practice I suspect the number of claims is small.

Most importantly of all I believe that in the majority of cases an error or an omission identified early and dealt with properly is likely to be capable of being rectified and the situation saved.

Your ethical position involves two fundamental obligations:

- An obligation to keep the client informed and to deal openly and honestly with the client.

  Apart from the common law, r. 10(2) of the *Rules of Practice* 1994 provides:

  > "A practitioner must inform a client of all significant developments in that client's matter unless the client has instructed otherwise."

- Your obligation to avoid conflict between your interests and the interests of the client.

  As a general proposition a practitioner must not continue to act for a client if the practitioner becomes aware of circumstances that bring or might bring the client's interests in the matter that is the subject of the retainer into conflict with the practitioner's own interests.

  Again, apart from the common law r. 11(2) of the Rules of Practice provides:

  "A practitioner must disclose to a client –

  a. any interest that the practitioner has in any transaction in which he or she is acting for that client; and

  b. any matter which may reasonably be regarded as a conflict of interest on the part of the practitioner."

  The Australian Solicitors' Conduct Rules, yet to be adopted in this jurisdiction, provide (r. 12.1):

  > "A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule."

The 'no admissions' condition does not and should not inhibit compliance with those obligations.

What you should do depends on a number of matters:

- What the error is and what the possible consequences might be.
- What if anything can be done to rectify it.
- What has happened since the error occurred.
- Whether or not the error has yet resulted in any indication of a potential claim.

Timely and careful consideration of all of those factors should inform your response.

What do you not do?

- Panic.
- Bury your head in the sand and hope the matter will pass, rectify itself, or not be noticed. Put aside immediately any sense of embarrassment and any inclination to hide from what has happened.
- Attempt to hide from the client what has happened. Do not keep silent and hope the client never discovers it; or lie to the client in order to cover it up. Do not attempt to offer false excuses for what has happened or shift the blame for it.

  An honest explanation of things that might or might not have been within your control can reassure and inspire in your client confidence that things can be rectified if that is the case.
- Attempt to hide from your partners or employers what has happened. They may well be your best source of help in dealing with the matter.

Dealing with the error or oversight should be a priority.

The longer the problem is unaddressed the more likely it is that it will grow into something much more serious and/or something that cannot be fixed.

In some cases you may not even get to the point of telling or needing to tell the client what has happened if the situation is or is plainly capable of being immediately rectified without cost to the client or prejudice to the client's interests.

But generally speaking you should not make that decision alone. Seek prompt guidance and advice to ensure objectivity.

But at the other end of the spectrum there will be cases where you will immediately or very quickly be in a position where your only correct course is to tell the client that he/she should retain someone else to investigate the matter and do whatever can be done to correct the situation.

Do not isolate yourself. In all of this you should quickly and openly consult with:

- Other principals.
- Employers.
- Other senior practitioners (e.g., those on the Law Society's senior practitioners list).

It goes without saying that for example the missing of a limitation period for the filing of a writ is a significant development in the client's matter (Rule 10(2) of the Rules of Practice).

Failure to meet a deadline imposed by an interlocutory order for taking some procedural step might not be if as often happens agreement is quickly obtained to an extension of the time without sanction of any kind.

An application to strike out the client's claim or defence for more serious default of that kind probably is, no matter how confident you might be that you can successfully resist or negotiate your way out of it.

Given the duty to disclose to the client in most cases that some oversight or error has occurred, it is ethically not required in my opinion and inadvisable in many cases that you disclose more than the basic facts followed by an explanation of what might and where appropriate will be done to rectify the situation.

That said, you must always be careful to identify if and when the line is about to be crossed into conflict between your interests and those of the client; and when the point is reached, as it often quickly will be reached, where you should identify that you can no longer act for the client.

Potential for conflict is almost always present when a practitioner becomes aware that error or oversight has occurred that might result in loss to the client if not rectified or its consequences somehow obviated because there then exists the risk even if only the latent risk that the practitioner might act (even if only subconsciously) to protect his/her interests to the prejudice of the client's interests.

There will be some circumstances in which the solicitor must insist that the client actually obtain independent advice and in those circumstances your contractual duty to your client, apart from any question of ethics, might require that you give additional advice: *Walmsely v Cosentino* [2001] NSWCA 403 at [56]

In that case the NSW Court of Appeal held that a solicitor who negligently allowed a personal injuries claim to become statute-barred was under a duty not only to advise the client of the possible existence of a cause of action against him and that he should obtain independent legal advice, but was also under a duty to advise the client of the limitation period that would apply to any proceedings the client might choose to bring against him.

To do that, expressing it carefully, would involve no admission of liability contrary to the 'no admissions' clause in the Policy.

Should You Continue To Act For The Client?

On occasions the client will want you to continue to act for them and weighing up all of the client's interests in the particular circumstances it might be beneficial for the client that you continue to do so.

But such circumstances place a heavy burden on a practitioner.

If the client insists that he/she wants you to continue to act then you should only entertain the idea of doing so after taking your own independent advice; and on the basis of very clear written instructions that identify the issue that has arisen, the client's understanding of the position and the fact that he/she has been advised to take the matter elsewhere or at least to obtain independent advice about it.

You must be completely satisfied that if ever called on to do so you can demonstrate that the client gave you fully informed instructions to continue in the face of unambiguous advice.

Sometimes you will simply have to insist that you cannot continue to act.

I may be accused of over-caution but my personal view is that a client who you know is likely to have acquired a viable cause of action against you, even if that is contingent on the outcome of steps taken to rectify or avoid the consequences of your error or oversight, is a client you should immediately cease to act for no matter that there exists a chance that your potential liability may yet be avoided by a successful outcome in the matter.

At first instance in *Walmsley* Garling DCJ described the situation of the solicitor who continued to act for the client as follows:

> "In fairness he should have declined to further act for the plaintiff as no matter what his good intentions may have been he did always have a conflict, that is, he obviously wanted to see the matter settle and to do the best he could for the plaintiff, but he was doing it with one hand tied behind his back, that is with the knowledge that he could never have commenced an action in a third party matter as it was statute barred."

You must be careful not to take steps to attempt to rectify a matter that have the potential to impose liability for costs on your client or result in some disadvantage to your client without proper instructions and without first offering your client the option to have someone else take those steps for them.

For example, and there should really be no need to state the obvious – if judgment has gone by default against your client as the result of error or oversight on your part then the client must be told – and the cost of rectifying a situation of that kind should never be visited on the client.

There is nothing wrong in that sort of situation with first making prompt enquiry as to whether your opposition will agree to setting it aside but if a positive response is not almost immediately forthcoming you have no option but to tell the client what has happened and what might be done to try to rectify it.

I qualify that last observation by saying I am aware that there are others who will say that in those circumstances you should not offer advice but leave it to someone else to do that. I think it rather depends on the precise circumstances but there is merit in the proposition that in circumstances where some of your objectivity and judgment might be clouded by the obvious interest you have in avoiding potential consequences of your error it might be wise not to take the risk of compounding the error that has already occurred by further error in the advice that you give.

It follows that in my opinion in most cases disclosure should at least include advice that the client might need to or want to retain someone else to investigate the matter and do whatever can be done to correct the situation and in many cases the client will need to be told that they must go elsewhere for that purpose.

Responding To Complaints

What about the situation in which the client makes a complaint to the Legal Profession Board?

Similar considerations apply. However, whilst you can maintain control over what you say to the Board if you choose to make submissions in response to a complaint[5] a response to a requirement under s. 572 of the *Legal Profession Act* to provide information might prove to be more problematic.

Section 587 prescribes what are permitted disclosures in respect of information obtained in the course of investigation of a complaint. Disclosure to the complainant client is a permitted disclosure (s. 587(1)(g)) and there is probably not much you can do about that.

PHILIP JACKSON SC
Barrister
Malthouse Chambers
philip.jackson@tasmanianbar.com.au

1. That is, the policy wording contained in the Certificate of Insurance that provides insurance under the Master Policy obtained by the Law Society for the purposes of the Professional Indemnity Insurance Scheme.
2. *Enright & Merkin*: Sutton on *Insurance Law*, 4th edn.., Vol. 2, par. [23.290] (footnotes omitted).
3. See generally: *Derrington & Ashton: Law of Liability Insurance*, 3rd edn, Vol. 2, par. [9-191] and footnotes.
4. *Calvert v Badenach* [2015] TASFC 8
5. *Legal Profession Act* 2007, s. 431