Better protection

General Features | Professional standards

01 March 2017

Karen Eckstein and *Charlotte Ali* look at what can go wrong with professional indemnity insurance, and what you can do to protect yourself

Key Points

What is the issue?

The majority of PII claims arise as a result of getting the basics wrong – like failing to meet deadlines, not managing emails properly, or a silo mentality within the

company.

What does it mean to me?

PII policies are not a ‘catch all’ and many tax advisers find themselves woefully under-protected thinking their professional indemnity insurance is for all aspects of their practices when in fact there are instances where separate cover is required.

What can I take away?

There are simple ways to ensure that you are better protected against claims – for example, a good engagement letter to clients can help clarify the situation for them, and ensuring that your company maintains a ‘no blame’ culture, so that staff at all levels feel able to talk to each other and to their seniors when something goes wrong.

What can go wrong?

Although many claims arise as a result of tax advisers acting outside their areas of expertise (it is often tempting to agree to act in a new and exciting area), the majority of claims arise as a result of getting the basics wrong. Although precise data is not available, anecdotal evidence is that the majority (say 75%) of claims arise out of common pitfalls which we address now.

Failing to meet deadlines

A lot of tax advisers’ work is deadline based. Tax Returns have to be filed by a certain date, accounts have to be submitted by a certain time, claims for relief have to be made by a certain time. An individual may make diary entries in his own personal diary. If, however, he is not available for any reason, then is another individual in the firm going to be able to access his diary? Diary systems should be firm wide, and available to all. Diary notes should be legible. We have seen claims arise where diary notes have been illegible and inaccessible.

Deadlines should be noted far enough in advance so that the work can be undertaken in sufficient time to meet the deadline. It is no good marking that a complex claim for relief needs to be submitted by a certain date, on that date. There

is insufficient time to undertake the work to complete the task within the timescale, the tax adviser is just setting himself up to fail.

File Notes

It is all very well giving the client advice, but if there is no evidence of that advice on the file, then a claim is almost bound to succeed. If you can't prove that a client was given advice of a risk, then a client may well forget that he was given that advice and, when the claim comes to Court, it will be the client's word against the tax adviser. File notes must contain sufficient detail to support the advice given. All too often, when file notes do exist, they just say 'usual advice given'. That is insufficient to show that the client was warned of the risk that exists, and that the client was given sufficient information to make an informed decision as to the steps that he wants to take and the risks he is prepared to accept. File notes must also exist but must also be placed on the file. In this age of cross department working, file notes are extremely important. It is very important that each department knows what is happening in other departments, so that all relevant information is on the file (whether it is a paper or electronic file) as quickly as possible.

Emails

Although many firms have a post signing policy, whereby all outgoing post is signed and approved by a senior, email is a more difficult process to manage. Junior staff may well have access to external email, but how is that access managed and monitored? Should junior staff ensure that all emails to external clients be approved by a senior before it is sent out? A policy that is right and appropriate for the firm should be considered and put in place, and then supervised. Some firms have a 'pyramid' process, whereby junior staff's emails go into a 'holding pen' and are approved by a senior before they are sent out. That, of course, causes delay. Other firms have a policy whereby junior staff take it upon themselves to obtain approval before emails are sent out and are then sent out by the junior.

All firms should decide what is appropriate for their own practice, but thought needs to be given to what is appropriate and monitoring should be undertaken on an ad hoc basis to ensure that there is no 'breach' of the rules being undertaken and to ensure inappropriate emails are not inadvertently sent out.

The problem with emails is that they are immediate, and appear to be informal and are open to misinterpretation. In the ‘good old days’ a letter would come in via the post, it would be considered, a response would be dictated, it would go off to the typing pool, it would come back from the typing pool in paper form, it would be amended, go back to the typing pool, come back from the typing pool again and then be signed off and sent out. That time lag gave plenty of time for any inconsistencies and anomalies to be picked up and was invaluable in ensuring that the letter that was sent out conveyed the correct message. A junior may think he is being helpful by sending a quick, friendly response to a client. However, that may give a very different message to the client from the one that is intended, and may cause claims.

Supervision

How do you supervise staff with increased technological advances and when so many staff work remotely? Although remote working is a great advance, it does lead to less personal contact, and a greater risk of maverick employees, employees having less personal guidance and less ‘learning on the job’. Supervision doesn’t just mean keeping an eye on the formal output from an employee, so much training comes from just being with a senior member of staff and learning how they deal with clients, on the phone and how they run their files. That personal contact is invaluable and needs to be maintained and systems need to be put in place to ensure that it is maintained.

Beware the rising star!

Although firms are often quick to identify those who struggle to develop the skills necessary for their role, and put extra support and training in place, less support is given to those who seem to find the job easy and develop a practice very quickly. However, the ‘rising star’ is extremely vulnerable. They are often given work beyond their years of experience, often given exposure to clients very early on in their career. However, the rising star ‘does not know what he does not know’. He is often put on a pedestal within the firm and can be seen to be doing no wrong. His lack of experience leaves him exposed. He may have an arrogance, because he has not been told that he has any weaknesses. The inevitable happens, a client asks him a question, he doesn’t realise that he doesn’t have sufficient knowledge and experience to answer the question, he tries to help the client, misses an obvious

trap for the unwary (acting outside his area of expertise), and a claim follows. Not only does the firm face a claim, probably losing the client as a result, but that rising star's career is blighted.

Silo mentality

It is very important that one department doing a piece of work for a client knows what another department is doing. It may well impact significantly on the work undertaken for the client and the advice that is given. We are all encouraged to cross-sell. It is much easier to get more work out of an existing client, than to go and find a new one. However, the risks increase, because the more work you do for a client, the greater the risk of failing to pass on information relevant to that client. A client may tell one department something relevant (he may tell the property department that he is moving abroad for example), however, if that information is not passed on to another department (to the tax department for example), then a significant claim may arise as a result. Relevant client information needs to be flagged up and passed on as a matter of urgency, in order that claims do not arise as a result of information being passed into the firm, but not passed around the firm. A good practice is to have client care files, where all information relevant to the client is deposited and for alerts to be passed around those acting for that client, so that those acting for the client are kept updated.

How can you reduce the chances of things going wrong?

We mentioned above a few things that can go wrong and a few ideas on how to prevent them going wrong:

- One very sensible way of minimising things going wrong is to have a good engagement letter that clarifies the extent of your retainer. This can clarify who you are acting for, what you are doing, what you are not doing (this is even more important in some respects), and can also include an effective liability cap.
- A system should be in place for the issuing of engagement letters and the following up of any engagement letters. It is all very well having an engagement letter on the file, but if it has not been sent out, then it's no use at all!

- A system should be in place for ensuring that the appropriate liability cap is placed in the engagement letter and drawn to the client's attention.
- You should also ensure that you inform your clients of any deadlines and the time it will take you to do the work to meet those deadlines. If a client is late sending you information, a deadline is missed and the client is subsequently fined, you need to be able to show that you did all you could to avoid that happening.
- When acting for consumers, appropriate systems should be in place for identifying whether or not any distance selling letters need to be issued.
- Systems should be in place for regular file reviews, both inter-departmental and cross departmental.
- Appropriate systems should be in place for supervision, both at junior and peer review level.
- Encourage a 'no blame' culture, so staff at all levels feel able to talk to each other and to their seniors when something goes wrong. The old adage 'a stitch in time saves nine' has never been truer.
- The firm that communicates easily and without fear across all levels, is a firm that will survive.

What should you do when things do go wrong?

We live in an increasingly litigious age and it is a sad fact of professional life that claims are increasingly made, even where, say a decade ago, no claim would have been made. Clients are increasingly aware of their rights, and have increasingly unrealistic expectations. When one adds to that the stance taken by HMRC, the increase in the retrospective nature of many changes in tax legislation, and the increase in commercial pressures on clients, it often seems that the professional indemnity policy held by a tax adviser is an obvious 'source of recourse' to pursue. A tax adviser faced with a claim needs therefore to deal with the problem, but also prevent problems with his professional indemnity insurer arising.

How do you prevent a problem with your insurer? The first thing you need to consider is whether or not a complaint/comment from the client is a claim or a circumstance that might give rise to a claim. Professional indemnity policies require their insureds to notify claims to their insurers within a very short period of time. It is always a good idea to read the precise terms of the policies, because they vary, but it is usually easy to identify what a claim is. Usually the client says something to the

effect that, ‘you have not carried out your job properly, you have caused me loss, and I want recompense’. That must be notified to insurers as soon as reasonably practicable. Take particular care in notifying promptly, especially when the policy is due to expire and even more so if you are going to change insurers. Many people get confused between the identity of their insurer and their broker. Make sure you know who your broker and insurer are so that you notify the correct one.

It is not always easy to identify a circumstance which might give rise to a claim. Policies require you to notify circumstances as well as claims. Failure to notify a circumstance could be extremely costly. An insurer may well take issue if a circumstance is not notified and it subsequently becomes a claim. This is even more costly if the circumstance arises in one policy year, and the claim is made/notified in a subsequent policy year. It is even more complicated if you have changed insurers in the intervening period. The delay may be prejudicial to insurers. It may be, that when the circumstance arose, steps could be taken to put things right but, by the time the matter becomes a claim and is notified, it is too late to put things right. Insurers could take the ‘prejudice point’, meaning that you are uninsured to the extent of that prejudice. That could be extremely costly, particularly if the Claimants have issued Court proceedings in the intervening period. You could become liable personally for the cost of those proceedings if insurers reasonably hold that those proceedings could have been avoided had the circumstance been notified at the correct time.

It is always important to consider when a complaint is made against the firm, whether a professional negligence claim could be lurking as part of that complaint and, if so, notifying the matter to your insurers. It is also worth thinking, when a matter is small, and falls within the extent of your excess, whether or not the matter should be notified to your insurers in any event. Even if the matter does fall within your excess, is there the potential for the matter to escalate. If there is any risk to your firm at all, it should be notified.

It is always a good idea to survey the firm as a whole, perhaps twice a year, to identify whether any circumstances exist within the firm, of which you may not personally be aware, but of which individuals within the firm may be aware, so that those circumstances can be notified to the insurer. In that way, you minimise the prospect of causing a problem with your insurers. The other point to bear in mind is, don’t delay. Every day that you don’t deal with the problem, is a delay when your insurer can’t help you, and when the risk of policy points arising, increases. The

sooner you notify, the sooner the insurer and the solicitors appointed by the insurers can help you. Delay can only make things worse.

So how do you deal with the problem? The first question is, what can you tell the client? Great care has to be taken as to the extent to which the client is advised of the mistake and the issues relating thereto. Factual points can be confirmed, but admissions cannot be made without Insurers' prior approval. Clients may request the papers – all too often when panel solicitors get instructed, the adviser has sent his file off to the client, following their request and not even kept a copy! The client is entitled to some papers, but not all. It is always worth taking advice before releasing papers.

It is important to retain documents. There is a legal obligation to preserve relevant evidence, not only physical documents, but also email documentation. Searches should be made as soon as a claim or circumstance is known about, not only of any physical papers that will be retained but also computers, laptops, etc. If you are going to change your computer/hard-drives, make sure you retain the old ones. There needs to be some joined up communication within the firm. All too often, when panel solicitors get instructed, the hard-drives or computer systems have been changed and the old documents are no longer available. The most important thing to do, however, is to act quickly, notify the matter to the Insurers so that the solicitors appointed can assist.

An important thing to do is don't take it personally. Claims are a fact of professional life, preserve the relevant evidence, obtain a statement from those who dealt with the case at the time, notify the matter and work with the solicitors appointed by the insurers as they are there to help resolve the problem. Time spent at the start is time well spent.

Am I covered?

Many professionals may think that they need an employer's liability policy to cover their duty to their employees; a public liability policy to cover their duty to third parties attending on their premises; a property policy to cover their physical assets, and a professional indemnity to 'cover everything else'. However, professional indemnity policies are not a 'catch all' and many tax advisers find themselves woefully under-protected thinking their professional indemnity insurance is for all aspects of their practices when in fact there are instances where separate cover is

required.

This is where speaking to a good broker can be invaluable. For example, do you have sufficient cover in the event of cyber risk? Not all professional indemnity policies will cover you in the event of a cyber claim such as loss or theft of client data. What about a claim that would fall within the directors and officers policy (a claim that a Partner/Director has acted fraudulently, a claim which may fall outside the terms of a professional indemnity policy)? What about fidelity claims, such as for dishonest employees? It is not uncommon for tax advisers to occasionally get help from other tax advisers. You may agree to take responsibility for the subcontractor's work. Be sure to disclose to your insurers if you use sub-contractors and ensure that cover is offered in the way you were expecting it to be, and explain to your sub-contractors the basis of the cover.

What if you merge with another practice? The acquiring practice will need to consider the impact on its ongoing professional indemnity insurance – different practices have different histories and premiums can vary widely. Run off professional indemnity insurance for any practice areas that are being discontinued can be expensive and may also need to be considered.

Professional indemnity policies have to adhere to the minimum terms provided for by the Institute/Association. Those cover members for all civil claims. However, claims may be brought for fraud and criminal actions. No matter how unmeritorious those claims are, they may fall outside the terms of the professional indemnity policy. Complaints to the TDB may also incur substantial costs and may not be covered under the terms of the professional indemnity policy. Speaking to a broker who understands both the terms of the professional indemnity policy wording and the risks that a member faces will be invaluable in ensuring that complete cover is afforded to the member.