

What to do if you find you've made a mistake

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What should you do if you discover during a current matter that you've made a significant mistake, potentially prejudicing your client's position? Solicitors can discover their own mistakes in a variety of circumstances.

Some errors are minor and of no real consequence. Some are discovered years after a transaction has been finalised and closed. But the most difficult issue to manage is where a solicitor discovers a significant error, with potentially prejudicial consequences to the client, during the course of a current matter.

Claims also raise questions about the competence of the solicitor involved and about the efficacy of the service provided by the entire firm in all areas. They lower morale and dent confidence. What should you do if, despite your risk management systems, a claim is made or threatened against your firm?

What should the lawyer do?

The first step is simple. Notify LawCover (and, potentially, your top-up/excess insurers). The next steps are more complicated. One option is to inform the client that you can no longer act in the matter or transaction, and refer the client to another solicitor. This is, by far, the simplest and cleanest option, and in very many cases it will

be the most appropriate way to proceed. However, there will particular circumstances in which the client may prefer to continue to retain you to complete the matter or transaction.

In this event, how should you proceed?

Competing considerations

This is a difficult circumstance and involves consideration of (at least) three factors.

The starting point is recognising that, where a solicitor has made a negligent error, potentially generating loss to their client, the client may well have a negligence claim against the solicitor. This prospect would generate a personal interest of the solicitor in the proceedings or transaction.

This factor, in turn, engages the fiduciary principles of conflict of interest and duty. Practitioners will be well aware of these principles: "A practitioner must not continue to act for a person ... when the practitioner is, or becomes, aware that the person's interest in the proceedings or transactions is, or would be, in conflict with the practitioner's own interest."¹

Riley Solicitors Manual notes: "While the strict approach represents sound practice, it is not an absolute prohibition ..."²

It then sets out that the lawyer must, if they are to continue to act, obtain from the client fully informed consent; that is, the lawyer must, "with full candour and disclosure to the client, (take) steps to ensure that the client has given a fully informed consent ... The lawyer bears the heavy onus

of proving full disclosure and informed consent ..."³

The second factor is to recognise that, in the context of a continuing retainer in an ongoing matter or transaction, a solicitor has an ongoing duty of care to their client to provide them with proper and fulsome advice about the matter or transaction. This extends to advice on all material aspects - including advice that the solicitor has done, or omitted to do, particular things - which might potentially prejudice the client's position.⁴

The third factor is that the solicitor's professional indemnity policy is likely to include a provision prohibiting the solicitor from doing things which might constitute an admission of liability - at least without the insurer's consent.⁵ So how does the lawyer manage these competing considerations?

Continuing to act

Obviously, the task is not easy. If circumstances are such that the client's overall best interests are likely to be served by the solicitor continuing to act, and that is what the client wants, the solicitor should consider writing to the client:

- informing the client of the factual circumstances;
- telling them that (without admissions) the circumstances are such that the client may believe that they have a claim against the solicitor;
- recommending that the client obtain independent advice (there will be some circumstances in which the solicitor must insist that the client actually obtain independent advice);⁶ and
- requesting the client's written instructions on how

the client wishes to proceed with the matter.

Before embarking on this course, the solicitor should consult with LawCover and obtain its advice and consent.

A word of caution - in the majority of cases it will be necessary and appropriate for the lawyer to cease acting. In the above analysis, we have recognised that there will, on occasions, be circumstances in which the client wishes to continue to retain the solicitor, and - weighing up all of the client's interests - it might be beneficial for the client to continue to do so. These circumstances generate difficult considerations and place a heavy burden on the solicitor. They also require a number of important considerations and steps.

LawCover's own claims solicitors have extensive experience in managing these types of issues. Obviously, LawCover's consent is necessary - but they are also able to provide experienced expert advice.

ENDNOTES

1. See Rules 10.1.1 and 10.2 of the Revised Professional Conduct and Practice Rules 1995 (NSW).
2. Riley Solicitors Manual para 6010.20.
3. Riley Solicitors Manual para 6010.20.
4. See the Court of Appeal's decision in *Walmsley v Cosentino* [2001] NSWCA 403 at 41.
5. For example, see clause 15 of the LawCover policy.
6. There may be circumstances in which a solicitor needs to go further. In *Walmsley v Cosentino* the Court of Appeal said the solicitor was obliged to tell his client that, in the circumstances of the case, the only way there could be a proper outcome was for the client to bring proceedings against the solicitor; and the solicitor should have advised the client of the limitation period for bringing such an action.