



Out of Practice - The Risks of Straying Outside Your Usual Area of Work

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Presentation Structure

- Background
- Practice then
- The move towards specialisation
- Practice now
- The duty of competence
- The pressures to stray
- The risks and consequences of doing so
- Case studies
- Lessons learnt

Background

- Analysis of claims
 - Panel solicitor's estimate
- Prevalence of claims from straying
 - One out of three arising from alleged incompetence
- Need for risks to be highlighted

Practice then

- Limited areas of specialised practice
 - *Criminal law*
 - *Family law*
 - *Commercial law and conveyancing*
 - *Litigation*
- No computerisation
- Limited range of communications
 - *Telephone / mail / telegram / telex / delivery*
- Smaller economy
- Comparatively unsophisticated business practices and structures
- Locally based, small legal practices
- Limited options for specialised study
- Limited legal and research resources

The Move towards Specialisation

- The product of
 - Increasing government regulation
 - Growth of technology
 - Greater sophistication in the nature and conduct of business
 - Growing economy and wealth
 - Greater sophistication in the nature and conduct of personal affairs
 - Growth of law firms
 - Increase in law firms' resources and sophistication
 - Development of practice groups within firms
 - National and then international law firms
 - Exponential growth in resources of large firms
 - The need to differentiate
 - More specialised legal resources
 - More specialised post-graduate studies
 - Creation of specialised professional bodies and accreditation

Practice now

- Practice now
 - Large multi-jurisdictional firms
 - High levels of specialisation
 - Highly qualified lawyers
 - Geographically diverse small, local practices
 - Greatly expanded profession
 - Disruptive intruders into legal work
 - Complex laws (e.g. tax, superannuation, corporations, trade practices)
 - Vast quantities of information
 - Instantaneous 24/7 communication
 - Highly pressurised environment
 - The impossibility of covering the field
 - Areas of specialisation within other areas of specialisation

The Duty of Competence

- Legal Profession Conduct Rules 2010 (WA)
 - *Delivery of legal services competently: Rule 6(1)(c)*
 - *Proscription on accepting engagement beyond competence: Rule 7(f)*
 - *Duty of supervision: Rule 16(4), Rule 17(3), Rule 17(4)*
 - *Duty of diligence: Rule 6(1)(c), Rule 7(e)*
 - *Duty of efficiency: Rule 17(2)(a)*
- What do you need to know in a specialised area (e.g. family law) to be competent?

The Pressure to Stray

- The demanding client
- The risk of losing the existing client
- The new, potentially large client
- The instructions received during quiet times
- The need to keep the employees busy
- Helping the friend or relative
- The instructions that draw you into other, unfamiliar areas
- The desire to expand the practice / skill set
- The instructions raising unfamiliar issues in a familiar area

The risks and consequences of straying

- Professional indemnity claims
 - Excess
 - Claims loading
 - Uninsured liabilities (repayment of costs, personal costs orders, damages exceeding limit of liability and other exclusions)
 - Disciplinary complaints
 - Reputational damage
 - Stress and medical consequences

Case Study #1 – The good client and friend

- Lawyer's usual practice areas
 - commercial / conveyancing suburban practice
- Previous instructions from client
 - property, wills and probate
- Request for advice on pre-nups
- Instructions to prepare BFA
 - 15+ years ago
- Getting the precedent
- Negotiating the agreement
- Marriage breakdown
- Calculation of damages
 - property settlement + spousal maintenance v BFA
- What went wrong

Case Study #2 – The claim from Case Study #1

- Claim made
- Family Court proceedings commenced
- Lawyer joined as a party
- Panel lawyer appointed
- Panel lawyer's usual practice area
 - *professional negligence claims*
- Panel lawyer assumes conduct
- Briefing family law counsel
 - *areas of expertise required*
- Settlement
- What could have gone wrong

Case Study #3 – From the familiar to the unfamiliar

- Lawyer's usual practice area
 - *family law*
- Marriage breakdown
 - *initial parenting / spousal maintenance issues*
- Property settlement
 - *complex tax and corporate structures*
- Terms of settlement
- Documentation of settlement
 - *liabilities not understood or accounted for*
- Calculation of damages
- What went wrong

Case Study #4 – Broadening the skill set

- Lawyer's usual practice areas
 - *probate and general commercial*
- New, remunerative work administering estates
- Preparation of Will
- Obtaining probate
- Skills required for administration
- Sorting out the tax
- Insuring the property
- Tax penalties
- The fire
- Calculations of damages
- What went wrong
- Is lawyer insured?

Case Study #5 – Doing a favour

- Lawyer's usual practice area
 - *litigation*
- Long standing client develops dementia
- Enduring power of attorney
- Attending to the mundane
- Disaffected relatives
- Allegations of mismanagement
- Claim
- What went wrong
- Is lawyer insured?

Case Study #6 – Termination day

- Lawyer's usual area of practice
 - *litigation*
- Complexities of worker's compensation claims
 - *termination day and the limitation period*
 - *expiry of the termination day (within limitation period)*
- Claim
- Calculation of damages
- What went wrong

Case Study #7 – The desire to expand the practice

- Lawyer's usual practice area
 - *litigation and family law*
- Clients / friends propose joint property development
- Lawyer to look after legal issues (conveyancing) / provide capital
- Clients / friends to look after property development / provide capital
- Lawyer incorporates company and oversees corporate governance / administration
- Property development fails and company / investors sustain large losses
- Claim by clients that lawyer failed to warn of risks
- What went wrong
- Is lawyer insured?

Lessons Learnt

- Conduct risk / reward analysis
- Good way to lose a friend / client
- Obtain expert / experienced assistance
- Have adequate research tools
- Acquire skills incrementally
- Don't oversell your skills / experience
- Consider whether activities are insured
- Avoid areas of high risk
 - *default notices*
 - *complex areas such as tax and corporations*
 - *highly specialised areas such as family law and worker's compensation*
 - *precedents you don't understand*
 - *activities you are not familiar with*

Thank you

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