TRAVELERS

Drafting errors

GUIDANCE NOTES FOR LEGAL PRACTICES

Drafting is a skill that lawyers have to learn and it's required in all fields of law, whether you are producing a lease, a commercial contract, a will or an agreement for division of the financial assets of a divorcing couple. Insurers know that, whatever the transaction, similar mistakes are likely to be made – they will just be more expensive in some cases than in others.

Our claims experience

Over the last six years, drafting errors have generated around one claim in eight. However, over the same period, these claims have accounted for almost a third of the total of settlement payments, making drafting for us the single most expensive cause of claims. Given that it is part of all legal work, drafting errors arise across legal practice. However, the bulk of claims occur in Company/Commercial, Commercial Property and Landlord & Tenant work - between them these areas account for 70% of claims by number and 80% by settlement cost.

Many of the errors we see are not mistakes made by the lawyer - instead they are simple typing errors which could and should have been corrected. Even fee-earners who type their own letters do not usually produce lengthy documents and, while it makes sense to let an expert do the typing, the more people involved in the production of a document means more risk.

Some potential triggers for drafting errors

Negligence claims do not happen in a vacuum - in our experience, drafting errors can often be triggered by one or a combination of underlying factors:

- Workloads not being managed
- Difficult and/or demanding clients
- Frequent/complex amendments to instructions, inadequately recorded, close to completion dates

Any or some or all of these can result in stress, distraction or ill-considered/hasty action and in turn result in a drafting error.

Some common causes

Typographical errors

These can be very simple - paragraphs incorrectly numbered, the wrong personal pronoun in wills (his/he instead of her/she) or misspelling of key names or addresses. Documents produced using precedents are open to new opportunities for error - the wrong paragraph is used or, more commonly, a new paragraph is cut-and-pasted into a document and the typist inadvertently pastes over and thereby deletes a paragraph that was meant to be retained.

Even more risky is the tendency for fee-earners to produce their own documents - whilst most lawyers will have a computer screen and keyboard on their desks, very few have had formal training in either typing or document production.

Good drafting, poor thinking

Another way to get a document wrong is by having the right clauses but the wrong content – a lease may be absolutely perfect, but if the property described in it is not the one intended then it will be ineffective. For example –

A firm drafted a commercial sale agreement and were entirely happy that they had covered all the issues that were needed – and so they had. Unfortunately the contract was produced in the name of the subsidiary and not the parent company, who actually owned the property concerned. It was ineffective as the subsidiary had no title to the property that it was purporting to transfer. As so often happens, this only came to light when the purchaser company went into administration, and the firm's client wanted to enforce the agreement but was unable to do so.

Perhaps more depressing both for lawyers and insurers are the claims which arise where it's clear that the fee earners concerned had done their utmost to try and meet the client's needs but then failed to check that it actually met them. One of the simplest – and most often ignored – risk management tips is to work through any clause and see what happens. A classic example –

The tenancy agreement which read 'any increase in rent will be made on the first Thursday of April each year'. It went on to say 'we will not increase your rent less than one year after any previous increase'. The hapless lawyer who had gone to great trouble to render this in crystal-clear language had simply not got out a calendar and checked that it worked. If she or he had done so, then they would have realised that 'the first Thursday of April' each year is one calendar day earlier than the previous year. The two clauses were totally incompatible.

Wills are particularly problematic – both the testator and the drafter generally envisage a likely course of events, and often both will fail to take into account the possibility that a younger beneficiary will die before the testator and thus their gift may fall into residue.

Failing to read over the document

Avoiding drafting errors is not difficult, but it is boring and time-consuming and fee-earners under pressure to complete the next bit of work are always going to find it difficult to devote enough time to reviewing something they wrote last week.

Part of the problem in spotting drafting errors is down to the way in which the brain processes information. Our brains are very energy-intensive organs and have evolved ways of making the most efficient use of their processing power. One result is that we do not tend to read every word in a document – our brains tend to skim, assuming the presence of a word from its first few letters and the context of the document in which it appears. As a result we can "see" words which we expect to see but which are not there. We can also miss errors in a document if what we are looking for appears too infrequently – the brain trades off using less processing power against the likelihood of spotting an error. So the more infrequently errors are seen, the less the brain concentrates on finding them and errors are more likely to be missed.

There is no substitute for careful checking and re-checking of detail. All too often the error is not discovered until one or other of the companies has become insolvent and a debt is being claimed. Of course it is not just corporate clients where this can arise, but it is a particular problem with registered addresses and multiple identities.

Relying on technology ...

Spell checkers may pick up obvious anomalies, but they will not identify words used in the wrong place such as 'there' and 'their', nor will they identify the will where the word 'husband' has been incorrectly used instead of 'wife'. They certainly won't pick up the lease which does not provide for maintenance of the common parts of the building, or the missing clause.

or precedents

If you use a precedent, it is easy to insert or delete clauses in error, or to forget that subsequent clauses may refer to paragraph numbers – failure to renumber correctly could lead to an operative section being ineffective, because the paragraph number to which it refers is no longer relevant.

Making assumptions

Don't rely on someone else's drafting – it is easy to assume that because a lease, for example, has been assigned several times then the content must be satisfactory.

It might simply be that all the previous solicitors have made the same assumption, and you could be the first to spot that the repairing provisions are defective or that it purports to grant title over land that the head lessor doesn't own. Housing developments are notorious for this sort of defect and failure to reserve parking spaces or access rights, or lack of provision for repair and maintenance of common parts, is quite common. Insurers still very occasionally see the 'helicopter' lease – where the only access to the property would be by air, because no rights of way over common entrance areas have been reserved!

Some solutions

- Unless you have to type your own documents, it's a job best left to those with expert skills.
- Address the potential triggers for claims mentioned above, so –
- Have systems to spot and assist overloaded fee-earners
- Adopt and apply client acceptance procedures to identify potentially difficult/demanding clients
- Ensure that retainer documents are clear about clients' assumptions, intentions, timings and deadlines
- Use drafting software to spot errors, or adopt a "four-eyes" approach to document review – one person reading the text out, the other following the text
- Have drafts read by a colleague who will look at it with a fresh mind – even if this means investing time, and therefore money, in a mundane and unproductive task.

- Do a few test runs on any operative clauses – work out dates, count periods of notice and ask the 'what if' question. Always test out the possible outcomes, no matter how unlikely they may seem.
- If you are using precedents, then always check that the right clauses have been inserted – in the right place – and that other important clauses were not inadvertently deleted in the process.
- Ensure that you have in place – and use – good client identification procedures. This should help avoid the classic trap of issuing proceedings, assigning leases or transferring shares in the name of the wrong corporate client.
- Train your support staff to understand and identify risk, use precedents correctly and follow procedures for reviewing and checking documentation. All of these steps help you to reduce the risk of drafting errors.

If there is a problem

- All legal work involves words and documents and there is always going to be a risk of getting something wrong. If you think something has gone wrong, contact your insurer – they will be able to advise you whether they think that you have been negligent and may well be able to authorise urgent remedial action.
- In many cases, where the parties' original intentions are clear, errors can be resolved without too much difficulty and at relatively low cost.
- Reporting a potential claim protects your firm, whereas delay in notifying a matter can not only mean that it is more difficult to resolve but could also lead to insurers reserving their position, if they believe that the claim has been prejudiced by your delay.

If the worst happens

- If you do get a claim (or a near miss) then use it as a lesson in risk management. What went wrong, and how could you avoid this happening next time – staff training, new procedures, a risk alerter about what happened (or what nearly happened) or a team discussion?
- Negligence claims are very rarely 'just one of those things", and if something good is to come out of a bad experience then you need to analyse what went wrong, no matter how painful it may be.

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