

Personal Injury

The quality of legal services in
the personal injury sector

December 2017

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There is a perception among some stakeholders (eg members of the public, insurers, defendant law firms and the NHS Litigation Authority) based on their experiences that:

- the personal injury (PI) sector has resulted in the growth of a compensation culture
- there has been an increase in fraudulent and frivolous PI claims
- the PI sector fails to safeguard and promote the interests of vulnerable clients.

Concerns tend to relate to:

- the competence of solicitors
- solicitor behaviours
- structural changes to firms in this market.

These perceptions undermine the reputation of the legal profession and relate directly to a solicitor's core role of upholding the law and supporting the administration of justice. In addition, they raise issues about solicitor competence and integrity.

A survey by ICF Consulting Services (Survey) showed that most respondents thought the PI market is working well. But we continue to receive many reports from the public and others about serious concerns in PI cases.

This PI project is one of the ways in which we are increasing our understanding of this part of the legal sector and working to improve the experience for the users of legal services. We want to make sure we have a thorough understanding of:

- how firms are operating in the PI market
- whether the concerns expressed are prevalent and supported by evidence
- whether people are negatively affected by the practices and behaviours of solicitors within the PI sector.

We looked at 14 areas of the PI market where concerns have been raised. We visited 40 law firms. Firms generally showed they had systems and processes in place to make sure a proper service is provided to clients. Although there are good and poor practices in all these areas, some areas raised more concern than others.

There was little evidence of any significant concerns in the following eight areas:

- operation of Alternative Business Structures (ABSs)
- case selection and triage
- litigation process
- medical evidence
- defendant delay & costs
- settlement
- fixed fees
- merger, acquisition or file purchase.

In the remaining six areas, although we did not find widespread issues, we did find some causes for concern due to the practices of a small number of firms.

These areas and concerns included:

- introducers (one firm was found to have breached The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and one firm was referred into our internal disciplinary processes for possible breaches of LASPO)
- training, skills, knowledge and experience (several firms have never provided training in a number of areas, notably the Rehabilitation Code and 13 percent of firms did not keep staff training records)
- costs explanation (some firms are failing to consider an appropriate success fee for each individual case while others are providing insufficient costs information for cases that fall out of the claims portal)

- acting on instructions (we found two files where confidential information was shared with a third party without client consent as well as other files where there was no evidence that instructions were confirmed at key stages of the litigation process)
- fraudulent & frivolous claims (some firms do not obtain evidence of identity at the outset).

Thematic review key findings

- Despite the restrictions introduced by LASPO, firms are still using referral arrangements.
- 78 percent of all firms we visited had referral arrangements in place.
- 48 percent of firms had referral arrangements in place with CMCs.
- One firm was found to have breached LASPO and one firm referred into our disciplinary processes for possible breaches of LASPO. No evidence of such breaches were found at any other firms.

The PI market includes introducers such as Claims Management Companies (CMCs) and insurers.

In April 2013, LASPO introduced a restriction on the payment of referral fees in PI cases. There have been concerns raised about the effectiveness of the referral fee ban and whether solicitors have complied with its provisions.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • The firm sources all of its PI work via direct marketing. • The firm sources work from a range of introducers. • Any CMC referrer is registered with the Ministry of Justice. • Additional checks are carried out with Companies House. • The firm asks introducers to sign an undertaking that they will not cold call or engage in any restricted practices. • The firm insists that introducers have a landline number and allows the firm to visit their offices. • The firm undertakes random compliance visits to the premises of the CMC. • Call vetting and a review of the CMC's marketing material takes place. • Firms sought advice to review and check the legality of their referral agreements. 	<ul style="list-style-type: none"> • The firm sources work from non-regulated CMCs. • The firm carries out no checks to review the arrangements in place. • The firm is wholly reliant on a single source of work. • The firm is in breach of the requirements of LASPO. • The person responsible for the relationship between the firm and the CMC has responsibilities for both bringing work into the firm and overseeing compliance, giving rise to a potential conflict.

Thematic review key findings

- We visited 11 ABSs. Each ABS carried out a range of PI work. The majority of the entities were reliant on traditional referrers and sources to secure work eg direct marketing.
- We had received anecdotal information that suggested the ABS model had been adopted by many to comply with the referral fee ban. We found only two ABSs received 100 percent of their work from a parent company. The other nine ABSs had referral arrangements in place with various unconnected providers and took steps to comply with the ban.

There was a general concern about whether ABSs are observing our Code of Conduct eg maintaining client confidentiality and acting in the best interests of the client.

The Survey also highlighted that some interview respondents felt that ABSs and joint ventures were being established to circumvent the ban on referral fees.



Good practice

- Safeguards are in place to protect the confidential information of clients.
- Information is not shared with other entities without informed written consent.
- Client interests remain paramount despite commercial pressures of the ABS structure.



Poor practice

- Confidential client information is shared with connected, non-legal entities without the client's consent.
- The commercial interests of the ABS are placed above the professional obligations of the authorised legal body.

Thematic review key findings

- Most firms used a mixture of internal and external training.
- Several firms have never provided training in a number of areas, notably the Rehabilitation Code.
- The majority of firms kept records that enable them to better plan future training.
- The majority of staff within our sample had more than three years experience.
- Forty one percent of individuals within the firms were legally qualified eg a solicitor or a regulated legal executive (ie a member of the Chartered Institute of Legal Executives).
- Paralegals represented 42 percent of the employees within our sample.

The Survey noted concerns that less experienced, unadmitted staff (individuals not admitted to the roll of solicitors) are engaged in triaging and case preparation. This could have an impact on the quality and progress of the case.

General concerns were also expressed by judges in the Survey about a decline in quality of case materials.

✓ Good practice	✗ Poor practice
<ul style="list-style-type: none">• Keeping a central database of staff training to make sure that all fee earners can be kept up to date on changes to law and procedure.• Internal training delivered by experienced staff with relevant expertise.• Providing a mixture of regular internal and external training to make sure that fee earners are kept up to date and engaged.	<ul style="list-style-type: none">• Failure to record training centrally or at all.• Miscommunication with staff about the nature of the competency statement and the importance of being able to evidence training.• Failure to provide training to staff in relation to a number of areas, notably the Rehabilitation Code.

Firms used experienced, qualified staff to deliver internal training...



Partners

26



e-learning packages

26



Associates

19



Barristers

18



Paralegal
(+2 years)

15



Legal executives

7



Paralegal
(-2 years)

1

... though some firms missed vital areas



PI Law and procedure

1



Evidence

2



Settlement

3



Damages

2



Rehab code

6



Costs

2



Fraudulent claims

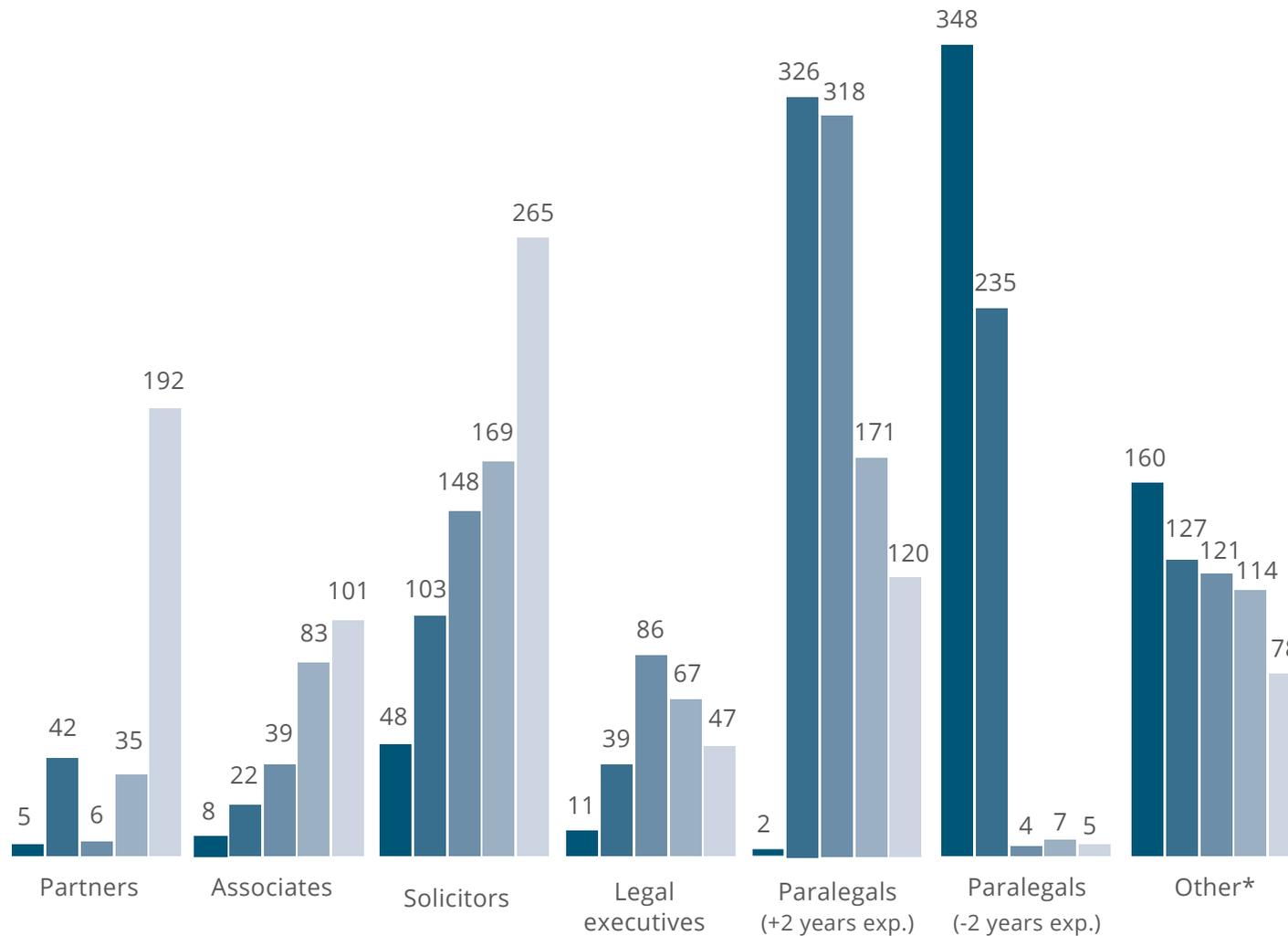
3

* + 2 years

** 2 years or less

Staff experience

- Less than 1 year
- 1 to less than 3 years
- 3 to less than 6 years
- 6 to less than 10 years
- 10 years +



* includes: secretaries, legal assistants, practice managers, apprentices, registered european lawyers, in-house nurses, consultants

Thematic review key findings

- Unadmitted staff formed the majority of the workforce in the firms we visited.
- Unadmitted staff were not necessarily inexperienced or junior personnel eg they could be practice managers or head of departments.
- Many firms have dedicated teams to select and triage cases.
- 13 firms did not involve unadmitted staff in the triage process.
- Most firms had not exceeded the limitation period during any cases within the past year.
- Most firms had a policy in place to avoid exceeding limitation.

Case selection and triaging is about sorting and signposting different types of PI cases to teams depending on complexity and facts. There were concerns that firms were failing to appropriately triage matters.

This could lead to a case being prolonged, particularly if essential information was not gathered at the outset of a case. There was also a concern that these practices could lead to claims being incorrectly valued or not being prosecuted within the limitation period.

✓ Good practice	✗ Poor practice
<ul style="list-style-type: none">• A standardised method of gathering vital case information at the outset of a matter.• Having dedicated, competent and trained staff to triage and select cases.• Robust and effective procedures for tracking and managing the limitation period.	<ul style="list-style-type: none">• Total delegation of triaging and case selection to individual fee earners who lack experience and expertise.• Failing to assess cases in a standardised way that can lead to different criteria being applied.• Lack of systems to prevent limitation periods expiring.• Failure to alert supervisors and relevant parties when the limitation period is approaching.

Thematic review key findings

- Conditional Fee Agreements (CFAs) are by far the most common form of funding for PI work.
- A range of success fees are charged to clients in CFA work. This reflects attempts by firms to obtain a competitive edge.
- Few firms use damages-based agreements (DBAs), and those who do tend to use them for unusual cases.
- Firms had differing attitudes about After The Event (ATE) policies, as premiums are not now recoverable from defendants. Attitudes ranged from discussing ATE with clients, continuing to cover most cases with ATE or advising clients against taking out an ATE policy.

The Survey noted a concern among some clients that the basis of the solicitor’s fees had not been properly explained. Concerns included:

- costs being hidden in the ‘small print’ of client care documentation
- clients having a poor grasp of what they were being charged and why.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • Firm checks whether clients have Before The Event legal expenses insurance which could cover the costs of a claim. • Including explanatory leaflets with CFAs to explain their purpose, effects and the client’s obligations. • Written information about costs is provided in plain English together with an explanation of fundamental dishonesty and its consequences. • Giving clients a preliminary estimate of costs as well as the costs of likely disbursements. • Clients are kept up to date with costs as they increase. • Giving a clear explanation of the advantages and disadvantages of ATE and the implications of qualified one way costs shifting. • Clients are provided with a verbal explanation of costs and an opportunity to ask questions. This discussion is recorded in a file note and followed up by a letter. 	<ul style="list-style-type: none"> • Reliance on either wholly written or wholly verbal ways of explaining the basis of funding. • Complex and difficult to understand client care letters and terms of business. • Failure to explain the meaning of “fixed fees” and the costs implications of a claim falling out of the claims portal. • Success fees being set without undertaking a proper assessment of the prospects of success for that particular claim.

Thematic review key findings

- The majority of firms and fee earners took care to check instructions directly with the client at key stages of the case.
- There used to be an issue with clients having instructed more than one firm, but firms reported that it had not been a problem for some time.
- Most firms do not accept instructions from third parties and the majority of those who do have policies in place to protect the client's interests.
- There were two files out of the 80 we reviewed where confidential information was shared with a third party without client consent.

Our Warning Notice on risk factors in PI claims noted a general concern that some firms may be pursuing PI cases without reference to the client. This involves taking instructions from third parties without making sure they have authority from the client.

These third parties could be referrers or other parties seeking to speak on behalf of the client.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • Firm checks instructions directly with the client at key stages of a case. • Standard processes for keeping clients informed either at key stages or at regular intervals. • Written instructions are obtained before relying on instructions from third parties. • Making sure that the client has not instructed another firm at the outset of a case. • Making sure that instructions ultimately come from the client and not a third party. • The firm properly identifies the client by obtaining and verifying proof of identity and address. • The firm does not share client information with any third party without the client's informed written consent. 	<ul style="list-style-type: none"> • Failing to get written authority from a client to take instructions from a third party. • Failing to record the client's instructions on the file. • Sharing information with third parties without the client's consent. • Failing to get direct instructions from the client at key stages of a case. • Failing to properly supervise files to ensure regular updates are provided to clients.

Thematic review key findings

- Some firms do not obtain evidence of identity at the outset. This decision is partly because PI work does not fall within scope of the Money Laundering Regulations 2017. It is also based on a risk assessment of the source and type of claims they carry out.
- Firms use a variety of methods to obtain client identification.
- Firms also have various processes and procedures in place for when fraud is alleged or detected.
- Firms use a variety of fraud indicators.
- Defendant firms tend not to pursue fraudulent claims as it is easier for them to get a notice of discontinuance. This ends the claim. This may explain the low number of actual fraudulent claims overall.
- There is tension in the relationship between claimant and defendant firms on the issue of fraud.
- Particular tensions include the high volume of fraud allegations from defendants and the failure to promptly disclose information.

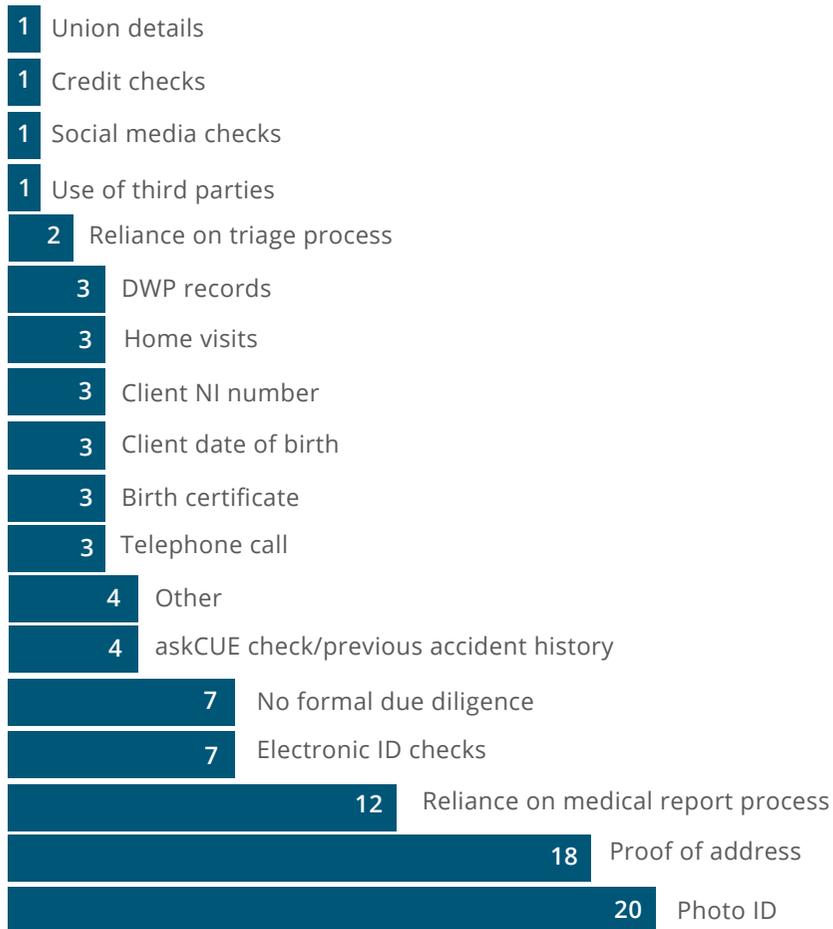
Clients must be properly identified by obtaining and verifying proof of identity and address. Unusual or suspicious factors must be investigated fully.

If any third party, including an agent, provides copy documentation such as a photocopy of a passport, the client must confirm its authenticity.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • Make sure you have adequate ways of identifying your client. • Have a process to assess the risk of fraud based on consistent risk factors. • The risk of fraud should be monitored throughout the life of the case. • Make sure that fee earners are aware of the firm's identification policy and what to do if fraud is suspected. • Provide training on the detection of fraudulent cases. • Have adequate supervision in place to help detect fraudulent cases. • Thoroughly investigating any allegation of fraud raised in a claim. 	<ul style="list-style-type: none"> • Failure to make sure that clients are appropriately identified. • Poor risk assessment of cases. • Little or no training on how to detect fraud. • Limited supervision of cases.

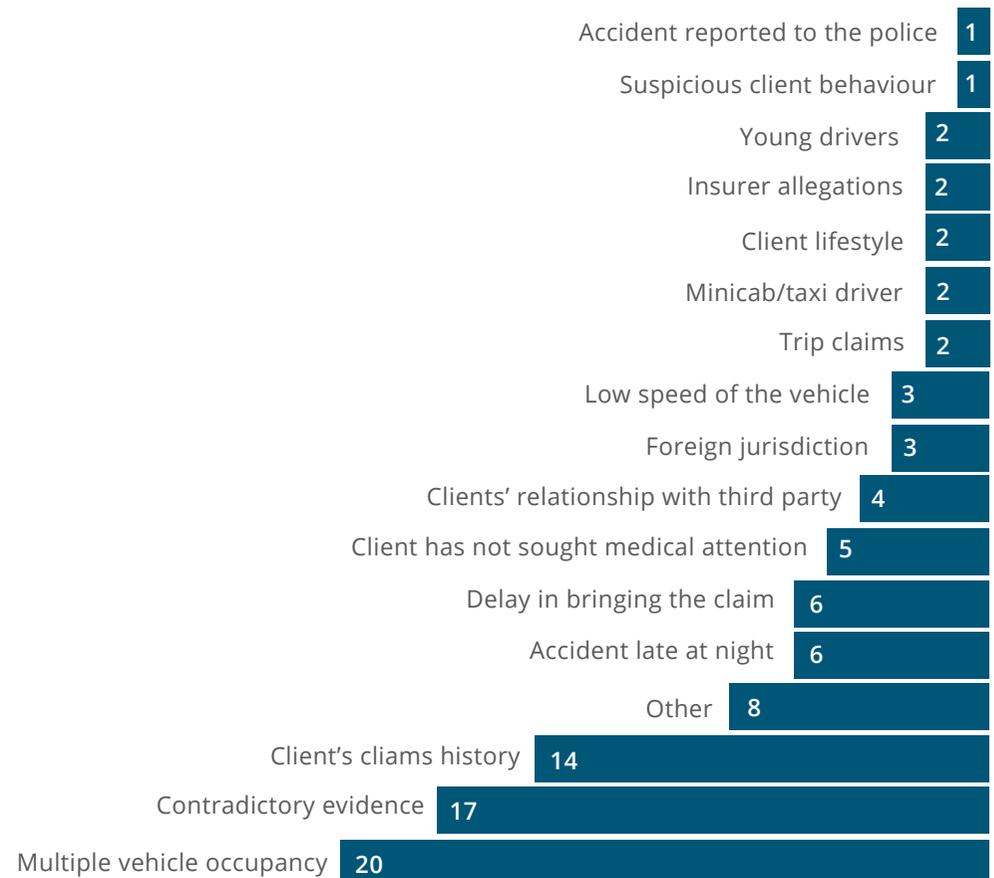
Fraud detection

What due diligence do you review to determine whether a claim is frivolous or fraudulent?



Number of firms

What key indicators do you review to determine whether a claim is frivolous or fraudulent?



Number of firms

Thematic review key findings

- Firms adopted a variety of different methods of supervision in the litigation process. These vary depending on the size of the firm and the complexity of cases.
- Litigation tends to be carried out by solicitors or more experienced paralegals. Some firms focus on the experience and skill set of fee earners rather than legal qualification.
- Litigation fee earners had a lower case holding than those who did pre litigation work. Many fee earners had a mix of litigation and non-litigation cases. However, some firms had specialist litigation teams.

We wanted to understand how firms approach the litigation process and keep clients informed. This included whether litigation was carried out by properly experienced staff.

The litigation process includes

1

Preparation of a claim form



2

Appropriate disclosure to make sure that evidence is collected and disclosed



3

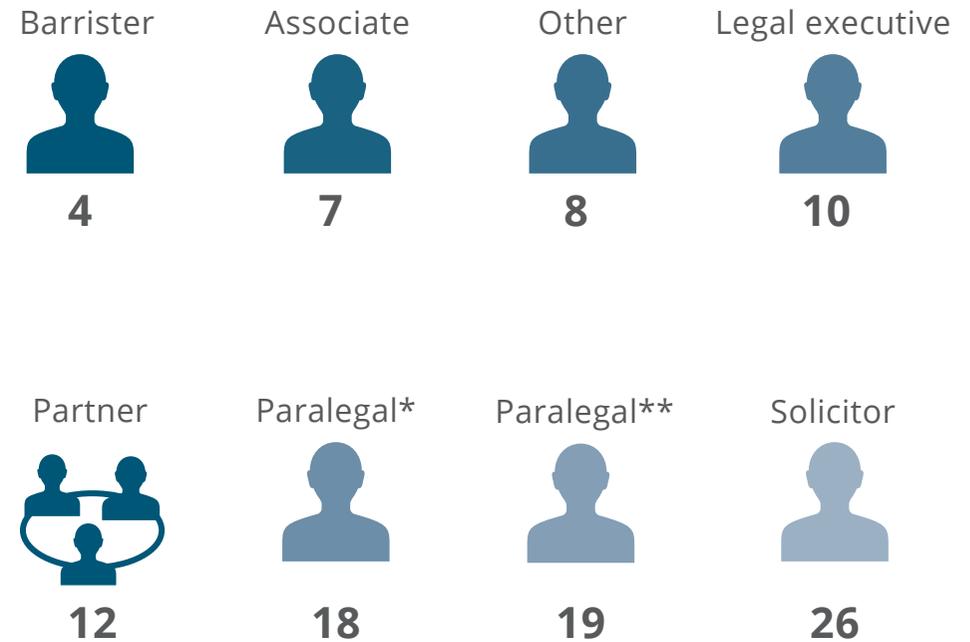
Preparation of an accurate and (where needed) detailed witness statement



How are fee earners supervised to make sure the claim form is accurate?



Who prepares the witness statements?



* 2 years or less experience

** 2+ years experience

Thematic review key findings

- There were no issues about the quality of the medical reports we inspected during our file reviews.
- MedCo had contacted 25 percent of firms about perceived misuse of the MedCo system.
- A significant majority of firms had received an offer of settlement before medical evidence had been obtained.
- A significant majority of firms were able to show how they had considered the Rehabilitation Code.

The poor quality of medical evidence provided in PI claims has been a source of concern for the sector.

The Survey outlined the following concerns:

- the poor quality of medical reports
- failures by fee earners to understand and assess information contained within medical reports
- failures by fee earners to scrutinise and respond to poor quality medical reports.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • The firm provides adequate supervision to allow fee earners to make informed decisions about medical issues. • The firm employs in house medical staff to review and respond to medical information and expert reports. • The firm considers the requirements of the Rehabilitation Code on an ongoing basis and records their decision making. • The firm provides an explanation to the client about prognosis and makes sure it is kept under review. • The firm adheres to MedCo guidance. • Medical reports are appropriately prepared and cover all relevant issues. 	<ul style="list-style-type: none"> • Fee earners are poorly supported and supervised when reviewing medical reports. • The fee earner seeks to conclude a matter without ensuring they have fully understood the client's prognosis. • Fee earners make multiple searches on the MedCo system to find a preferred expert. • Fee earners fail to consider the Rehabilitation Code.

Thematic review key findings

- Defendant insurers usually prepared the Letter of Response to a claim under the Pre-Action Protocol for PI Claims.
- Defendant work is most often governed by the contractual relationship between the firm and their client. This will involve certain service level agreements and key performance indicators which must be met.
- Defendant firms will settle cases at the earliest available opportunity. There is no incentive for defendant firms to delay a claim as this increases costs. This is very important for fixed fee work.

The Survey raised a number of concerns about the conduct of firms acting for defendants.



Thematic review key findings

- A significant majority of firms settle 95 percent of all PI matters.
- The majority of firms provided evidence to show they had attempted to re-negotiate a better settlement for their client.
- Pre-medical offers were not popular amongst claimant firms and were very rarely recommended.

Concerns have been raised about the quality of settlements secured by solicitors for their clients. In particular:

- firms under-settle matters
- firms improperly expedite the closure of cases
- pre medical offers of settlement are being made when the claimant is not in a position to value the injuries. This could mean that clients are at risk of receiving inadequate compensation.



Good practice

- The firm research appropriate compensation figures and provide information so the client can make sensible decisions.
- The firm provides advice and guidance on pre-medical offers and outline possible alternatives eg interim payments.
- The firm seeks client instructions before accepting or making a settlement offer.
- Large or unusual cases are referred to a supervisor or counsel for consideration and determination of quantum.
- The firm provide specific training on settlement and in particular quantum.
- The firm review information and evidence on the file to see whether further information is required to determine a settlement figure.



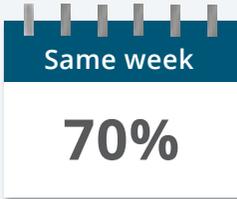
Poor practice

- The firm fail to take instructions from the client prior to accepting or making a settlement offer.
- The firm fail to take into account all relevant information and in doing so lead the client to under-settle their claim.

Thematic review key findings

- The majority of firms paid damages to clients on the same day or within the same week.
- Firms supervised claims in a number of ways to make sure there was no delay in making payments to clients.
- We were unable to find any wide spread payments of damages to third parties.

How long does it usually take you to transfer damages to clients?



PI claims are often contingency fee-based and there may be a considerable time lapse before the client receives a payment. This is significant as the client may be in a vulnerable position and need the money to assist with their rehabilitation and/or move on with their lives.

The Survey raised a concern that firms failed to pay compensation promptly to their clients. This seriously affected clients, firms' cash flows and led to additional chasing of payments.

✓ Good practice	✗ Poor practice
<ul style="list-style-type: none"> • The firm adopts and enforces reasonable time scales for payment of client damages. • Firms chase payment of damages from defendants where there are unreasonable delays. • The firm review the receipt and payment of client damages to monitor prompt payment and delays. • Firms make electronic payments to clients rather than paying by cheque. 	<ul style="list-style-type: none"> • The firm to pay client damages promptly. • The firm do not have appropriate systems in place to monitor the receipt and payment of damages. • Damages are deducted on behalf of a third party without client's consent or knowledge.

Thematic review key findings

- The majority of firms said that they apply the same level of supervision to fixed fee and hourly rate work.
- Some firms applied a higher level of supervision to fixed fee work as it tended to be carried out by less experienced staff.
- A quarter of firms applied a lower level of supervision to fixed fee work. The main reason given was that it is generally more straightforward.

A concern was raised in the Survey that solicitors were using unadmitted and inexperienced staff on fixed fee claims.

This is because fixed fees are considered less profitable than work at an hourly rate.

 Good practice	 Poor practice
<ul style="list-style-type: none"> • Retaining a risk sensitive level of supervision on all files. • Active and regular supervision of cases. • Fixed fee work is supervised by a former partner whose sole job is to proactively review work. 	<ul style="list-style-type: none"> • Reliance on fee earners to come to senior staff with issues rather than active supervision of files. • Levels of supervision based on the profitability of the work as opposed to the risk.

Key concerns

Key concerns that firms:

- lack the competence and expertise to deal with and progress cases in new areas
- have not conducted proper due diligence on the files acquired
- are acquiring cases in bulk leading to errors and a failure to progress matters.

Thematic review key findings

- Six firms acquired a total of 6,499 PI cases as a result of mergers, acquisitions or file purchases in the last two years. This included one firm who had acquired 5,088 files and another who had purchased 1,323.
- Firms sought client consent before conducting due diligence on the files or alternatively did not review the files before taking them on where time and consent was an issue.
- Once received, files were allocated and progressed.
- None of the cases acquired represented a new area of PI work for the firms involved and no new staff were recruited to deal with the additional work.



Good practice

- The manager of the PI team obtained client consent and reviewed each of the 63 files purchased. This was followed by a second review by an independent firm of solicitors to assess the state of each file.
- The firm have a due diligence checklist which it uses when undertaking any file purchase. This includes a review of limitation, prospects of success and medical reports.
- The firm carried out early due diligence on each file well in advance of any transfer or contractual obligations being executed.
- The limitation period was recorded on the case management system as soon as the files were acquired. Cases were immediately allocated to fee earners and clients were contacted as soon as possible. All acquired cases were subject to a three monthly review.
- Files were allocated to different case handlers in the firm. Although there was an increase in staff workload for a period of time, staff progressed the cases and contacted clients to provide updates. Clinical negligence files were triaged on the first day they were acquired. The acquisition process was assisted by the fact that both firms had the same case management system that meant files could be migrated over immediately and reports on progress and limitation could be produced straight away.



Poor practice

- No due diligence was conducted by the firm before the files were taken on and it transpired that many of the files acquired were in a poor state.
- One firm had taken on Noise Induced Hearing Loss cases even though they did not have the expertise to progress them. That firm had to acknowledge to clients that it did not have the specialist knowledge to deal with the matters and needed to transfer them.
- Limitation dates were missed due to issues with compatibility of case management systems. Although one firm had a similar case management system to the firm that it acquired, limitation was still missed on the odd file due to appropriate flags not being replaced on the case management system.