

## Victorian Bar - Seminar 7 November 2005

### Practising Safe Settlements

A significant proportion of the professional liability claims against barristers arise from the compromise of litigation.

#### Common Law - duty to encourage settlement

The common law position is well settled and not controversial:

1. A barrister has a duty to advise the client of the available options for resolving the dispute, and indeed the relative desirability of doing so.
2. It is acceptable to apply pressure (though not coercion) to settle.
3. It is a breach of duty for Counsel to settle a matter without a client's instructions to do so, no matter how beneficial the settlement might be. Ultimately, the decision to settle, and on what terms, is a matter for the client.

#### Legal Profession Act 2004

Section 3.4.13 of the new Act (to come into operation on 12 December 2005) provides:

##### *3.4.13 Additional disclosure – settlement of litigious matters*

- (1 *If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed –*
  - a. *a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay) ; and*
  - b. *a reasonable estimate of any contributions towards those costs likely to be received from another party.*
- (2 *A law practice retained on behalf of a client by another law practice is not required to make a disclosure to the client under sub-section (1) if the other law practice makes the disclosure to the client before the settlement is executed.*

A barrister holding a practicing certificate is a 'law practice' for the purposes of the Act.

The disclosure requirement in section 3.4.13(1) is a new statutory requirement for legal practitioners.

Section 3.4.13(2) means that a barrister, when retained by another law practice, does not have to comply with the disclosure requirement contained in 3.4.13(1) provided the instructing solicitor has done so.

It would seem to impose on the barrister an obligation to satisfy himself/herself that the instructing solicitor has complied with 3.4.13(1).

See also section 3.4.17 detailing the consequences of any failure to make the required disclosure – which includes restrictions on the ability to recover legal costs, and may also amount to unsatisfactory conduct or professional misconduct.

### **Victorian Bar - Practice Rules**

The following are probably not the only relevant Rules, but are certainly ones to be kept in mind when navigating settlements:

- Rule 12 –

*“A barrister must seek to assist the client to understand the issues in the case and the client’s possible rights and obligations, if the barrister is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.”*

*“Compromise” is defined in Rule 9 and “includes any form of settlement of the case, whether pursuant to a formal offer under the rules or procedure of a court or otherwise”.*

The obligations contained in Rule 12 seem to be cast in terms lower than a barrister’s common law duty of care to the client. I say this because it would be strongly arguable that an obligation to advise about settlement can arise at law whether or not the barrister is instructed to give such advice. For example, in a case obviously without merit, it would no doubt be contended that Counsel’s duty was to speak out whether or not that advice was asked for.

- For the Criminal Bar, see (the broadly equivalent) Rule 151 –

*“It is the duty of a barrister representing a person charged with a criminal offence to advise that person generally about any plea to the charge. It should be made clear that whether or not the client pleads “not guilty” or “guilty”, the client has the responsibility for and complete freedom of choice in any plea entered. For the purposes of giving proper advice, the barrister is entitled to refer to all aspects of the case and where appropriate may advise a client in strong terms that the client is unlikely to escape conviction, and that a plea of guilty is generally regarded by the court as a mitigating factor, at least to the extent that the client is thereby viewed by the court as co-operating in the criminal judicial process.”*

- Rule 49 –

*“A barrister must not, in any communication with another person on behalf of a client threaten the institution of criminal or disciplinary proceedings against the other person in default of the person satisfying a concurrent civil liability to the barrister’s client.*

- Rule 50 –

*“A barrister must not knowingly make a false statement to the opponent concerning the facts of, evidence in support of, or law applicable to the client’s case.”*

This is of general application, but may have specific relevance to negotiations giving rise to a settlement or to the entry into a plea bargain.

- Rule 57 –

*“A barrister shall not disclose to the court, whether in examination, cross-examination or otherwise, any communication between the barrister and legal representatives appearing in the proceedings for any other party to the proceedings –*

- (a) *except by consent;*
- (b) *unless what occurred resulted in the creation of some contractual or other legal relationship;*
- (c) *unless it was expressly stated before or at the commencement of such communication that matters communicated should not be regarded as without prejudice or privileged from use or disclosure.”*

Sub-paragraph (b) clearly contemplates a settlement constituted by offer and acceptance between Counsel as being open to disclosure to the Court.

- Rule 73 –

*“A barrister who believes on reasonable grounds that the interests of the client may conflict with the instructing solicitor, or that the client may have a claim against the instructing solicitor, must:*

- (a) *advise the instructing solicitor of the barrister’s belief in writing; and*
- (b) *if the instructing solicitor does not agree to advise the client of the barrister’s belief, seek to advise the client in conference in the presence of the instructing solicitor of the barrister’s belief;*

*provided that if such a conference has not or cannot be held, or if the solicitor refuses to pass on the advice, the barrister should consult the Ethics Committee for the appropriate procedure to be followed.*

The occasion when this Rule may most starkly be brought into operation is when a settlement opportunity is presented to the client, and Counsel is aware that the instructing solicitor has a conflict of interest.

### **Receipt of the brief**

Mark the date on which the papers were received, and review them promptly to identify matters requiring attention.

Most litigation does settle, and for the most part it works in a very straightforward way. Recognising these odds, it makes sense to turn your mind to settlement from the moment the brief is first received and opened.

### **Conference with the client/instructing solicitor**

To advise accurately on settlement, you need to be confident of the facts.

This is one of the key purposes of a conference with the client and the instructing solicitor after the brief has been delivered.

What risk management strategies are appropriate for the conference with the client insofar as settlement is concerned?

- Preferably, your instructing solicitor will be present.
  - The client will be more at ease
  - The solicitor is a witness to the instructions the barrister receives, and the advice given
  - To facilitate any further preparation required arising from the matters discussed in conference, particularly if time is pressing
- Counsel should take his or her own notes of the substance of instructions communicated by the client, and the advice given.
- If the barrister's assessment of the case differs from the client's or solicitor's view, then a memorandum following the conference is prudent to remove any possibility of your advice being misinterpreted or misunderstood.

Specific occasions for 'going into print' are:

- When the client's instructions depart from statements the client has previously made
- When the client has been through a succession of solicitors
- When there are signs of tension between the client and the solicitor in terms of the way the matter has been conducted to date
- When the client repeatedly asks you what evidence he/she should give

### ***Assess the client's aptitude for risk***

From an early stage of taking instructions, you'll be looking to gain an appreciation of the client's willingness to go on with the contest or to look for a negotiated resolution. Most clients and solicitors come to barristers wanting and expecting guidance in that area.

The mere fact that a brief is accepted carries with it an obligation to provide advice that is relevant to the matter at hand.

See Kolavo v Pitsikas & Anor [203] NSWCA 59 for a case in which Counsel (and instructing solicitors) were held liable for failing to advise the client that her case was hopeless, and ordered to indemnify the client for the costs ordered to be paid to the other party consequent upon the client's case being dismissed.

### ***Record and document advice***

It is important that all of this preparation be documented with notes kept of conferences with the client, and where appropriate, for a written memorandum to be sent to the instructing solicitor.

Counsel's notes were once upon a time returned with the brief, although this is a practice which seems to have declined with the advent of the electronic age. A well organised and indexed database is vital for storing your documents, together with a back up system in the event of computer failure.

You will also be very familiar with the need for your handwritten notes to be able to be interpreted by others in your absence. So file notes in particular are always better when dictated in the form of a memorandum, rather than a cryptic note decipherable only to you.

### **Discussions with opposing Counsel**

Exercise common sense and an appropriate degree of caution and business formality whenever such discussions are taking place:

- Negotiations should occur, so far as is possible, in an environment that is conducive to the seriousness of the occasion.
- Politeness and mutual respect.
- Make sure you have your client's authority before making a settlement offer.
- It is not necessary in every case to have written settlement authority, but there are certain situations where it would clearly be desirable:
  - 'Multiple clients'
  - Where the process of obtaining instructions has been drawn out and difficult.

### **Costs**

An important point to clarify with the instructing solicitor is the position with respect to costs. What costs have been incurred to date? What advice has the solicitor provided to the client? What authority are you being given to negotiate the settlement of costs?

Costs disputes loom frequently amongst the reported claims and circumstances notified by members of The Bar to insurers.

### **Mediation pitfalls**

Most clients won't be familiar with the mediation process. Explain the process.

Be patient with solicitors who may require more time to get through a mediation than barristers tend to prefer.

### ***Late night settlements***

Personal circumstances can often mean that one or some members of the negotiating team need to depart from the mediation, leaving others to continue.

There is a point at which a collective decision needs to be made whether the mediation should be adjourned to another date/time.

The danger with that course is that any momentum towards settlement can be lost, and that if everyone goes away, the effort is wasted.

This can present a risk management dilemma not only for legal representatives involved in the mediation process, but also for mediators themselves.

If the mediation continues late into the night, great care is required by all concerned to make sure that:

- (a) any settlement reached accurately reflects the agreement of the parties i.e. that all relevant terms are included in the settlement agreement
- (b) clients are not placed under undue pressure to settle, late at night, when they are tired, hungry or vulnerable

### **Documenting settlements**

Is an interpreter required?

Keep records of negotiations.

Document the settlement immediately. It may be worthwhile adopting the practice of announcing to everyone at the outset that there is no settlement until everyone has signed a document at the end of the process.

A healthy percentage of liability claims against barristers arise because of errors that creep into the settlement documentation.

A simple checklist for an ordinary commercial dispute might cover the following items:

- Correct identification of the participating parties
- Identify the Court proceeding, if there is one
- Brief Recitals to provide a background/context for the Terms of Settlement
- Payment obligations – by whom, to whom, in what manner, by what time?
- If more than one paying party, are the obligations joint or several?
- Is the settlement inclusive of costs or ‘plus costs’?
  - If inclusive of costs, what about extant costs orders?
  - If plus costs, what is the basis of assessment or taxation?
- GST on the settlement sum? If so, who is bearing the liability?
- Capital gains tax or stamp duty consequences of the settlement? If so, who is bearing the liability?
- Is settlement with an admission of liability or with a denial of liability?
- Record any other specific obligations agreed by the parties to each other.
- Provisions for default
- Disposition of the proceeding – discontinuance/dismissal/consent orders?
- Is a release to be given? Is it mutual? Width of the release? Is the release to be operative on entry into the agreement, or only upon performance of the agreement?
- Are there confidentiality requirements?
- Settlement relating to interest in land? (Needs signing by the party to be charged)
- Guarantees by directors or others?
- Does the settlement need to be in the form of a Deed?
- Is the settlement conditional upon Court approval?

‘Sign up’ the client wherever possible. Give the client time to read the settlement agreement and raise any questions with you – record those questions and your advice.

### **At Court**

With the growth of mediation as a form of dispute resolution, less litigation is being settled at the door of the Court. But when it does occur, it has its own risks that need to be managed.

At the door of the Court you’re almost always time-poor.

The time constraints mean that whenever an offer or negotiations occur, the client may be asked to make a decision ‘on the spot’. If not prepared for it, then mistakes can be made.

The rush to reach a settlement brings with it several risks that have to be managed and can have the potential to cause a claim to be made against a barrister. One of the keys is

to be able to articulate convincing reasons to the client why the settlement is in his or her best interests.

Sometimes, not very often, a case will collapse in the midst of a trial. A witness doesn't swear up as anticipated; the Judge sends a strong hint to Counsel from the Bench. Unpredictable judges are frequently cited as a reason for settling. Clients usually find this explanation unconvincing.

### **Revisited settlements**

By 'revisited settlement', we mean those claims where a client later threatens action against the barrister arising from some deficiency in an earlier settlement of the client's claim.

The types of allegations typically encountered under this heading are:

- Personal injury cases:
  - Failure to have navigated the relevant statutory regimes or the correct gateway for the commencement of the client's claim.
  - Ambit claims by disaffected litigants – 'near misses'.
  - Failure to correctly document the terms of any associated releases and indemnities that might have formed part of the settlement agreement (note this also applies often to settlements of commercial litigation).
  - Incorrect advice about costs.
  - Failure to consider the extent of psychiatric injuries before settlement, and later finding these have intensified.

Personal injury litigation is a minefield for novices, and inexperienced Counsel need to think carefully before accepting a brief in that area.

The barrister's capacity to defend himself/herself from allegations of having settled too cheaply will be greatly assisted in cases where the barrister has maintained notes and memoranda detailing the advice given at the time the settlement was negotiated.

- Family Law cases
  - The most commonly encountered claim involves allegations of drafting oversights – usually in relation to consent orders consequent upon property settlements.
- Clients who allege being pressured into settlement
- Criminal cases

- The client who changes his plea at the last minute (from a contest to guilty), and later regrets doing so.

Have a contemporaneous paper trail to explain the client's final instructions to you.

Involve the instructing solicitor as much as possible in the settlement deliberations.

Prepare a memorandum to be returned with the brief both as a record and an aide memoire for later protection.

### **Advocates Immunity**

There is certainly authority that the advice and work done in connection with the compromise of litigation can be sufficiently connected with work in court so as to attract immunity from suit.

See Biggar v McLeod [1978] 2 NZLR 9. This was a case in which the plaintiff sued a barrister for allegedly negligent advice which she said had lead to her giving instructions to settle her matrimonial litigation mid-trial. Immunity was held to apply and the statement of claim was struck out.

But see also Donnellan & Ors Watson & Anor (1990) 2 NSWLR 335. This was a case in which a solicitor was instructed by the client to compromise a pending appeal by consenting to an order that it be dismissed or withdrawn with no order as to costs. The solicitor engaged an agent who consented to different orders, resulting in the client losing the benefit of successful orders in the initial proceeding. The Court held that the negligence in failing to carry the authorised compromise into effect did not attract immunity, and that the client was entitled to damages.

All one can confidently say is that each case will depend on its own facts as to whether the advice in connection with the settlement of litigation is "intimately connected with work in Court".

Legislative abolition of the immunity is probably inevitable in the long run.

### **Conclusion**

In representing clients in litigation, you are managing the client's risk.

With settlement, you also need to manage your own risk.

Keep it strictly business and never personal.

Notify the LPLC as early as possible of any problems that might give rise to a claim.

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