NAVIGATING COMMERCIAL LITIGATION

Insights from practice

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INTRODUCTION

Claims happen to good lawyers too!

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Do the basics well

The common risks of each phase

Before litigation: First instructions to filing pleadings

During litigation: giving advice and recording advice

End of litigation: Terms of settlement and ending the retainer

Should you sue for unpaid fees?

PHASE ONE:
START OF THE LITIGATION

PHASE ONE: START OF THE PROCESS

Initial investigations: the facts, the law and the practicalities

Defining the client and the retainer

The difficult client

Use of counsel

Factual questions

Test the client's instructions with the following:

- **Documents**
- **Witnesses**
- **Company and title searches**
- **Pre-litigation discovery**
- **Critical documents request under section 26 of the *Civil Procedure Act 2010* (Vic) (if proceedings already on foot)**

If you don't have time to do the above, do you have time for the matter?

Does your claim have a proper basis on the factual and legal material available?

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Legal questions:

- **Parties and cause(s) of action**
- **Proportionate liability / contribution**
- **Jurisdiction**
- **Limitation period(s): confirm this upfront**

Practicalities

Costs: are they reasonable and proportionate factoring in the likely quantum of the claim?

Timeframe

Client's goals

What can litigation achieve? Is there an alternative form of resolution available?

1. Proper investigations

What can happen if you don't take the time at the start

Negligence Claim

Non-Party Costs Order under rule 63.23 / s24 of the Supreme Court Act

Compensation or costs order under s29 of *Civil Procedure Act 2010* (Vic), for breach of overarching obligations

Naming the right parties

Case Study

The client instructed the practitioner to commence proceedings for theft, and misleading and deceptive conduct. The client had disclosed details of an invention to a possible investor.

Sometime after this disclosure, the client discovered the investor was selling a similar product.

A proceeding was issued in the name of the client personally as the plaintiff.

The claim for misleading and deceptive conduct was successful but no damages were awarded as the client's company (not the client personally) owned the business which suffered the loss.

Takeaway:

- Which party actually suffered the loss?

Issuing without a proper basis/no evidence

Case Study

The practitioner acted for a defendant who was being pursued by a lender for payment of a debt. The money had been borrowed to purchase a motorcycle which had caught fire and been destroyed.

The practitioner issued a third party proceeding on behalf of the defendant client against the dealership and against the manufacturer of the motorcycle. The client settled with the manufacturer before trial but lost against the plaintiff and the dealership.

The dealership applied for its costs of the third party proceeding on an indemnity basis to be paid 20 per cent by the defendant client and 80 per cent by the practitioner's firm, on the ground there was no proper basis for the third party proceeding as the evidence was that the fire was the manufacturer's fault.

The Magistrate found that the defendant had an 'overwhelmingly hopeless evidentiary position' and ordered that the dealership was entitled to recover 60 per cent of its costs on an indemnity basis against the practitioner's firm.

Takeaways:

- You must consider the claim against every defendant and ensure you have a proper basis for it, before you issue.

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Failing to investigate the facts to a defence

Case Study

A solicitor acted for a surveyor defending a claim by a purchaser that land had been incorrectly surveyed. The purchaser was successful in the Magistrates' Court and awarded damages and costs. It was later discovered that the purchaser received a copy of the survey after the contract was signed so there was no reliance by the purchaser on the survey.

However, no defence argument had been raised in the Magistrates' Court proceeding along those lines, suggesting an incomplete preparation of the defence. The question of when the client received the survey had never been raised.

Takeaways:

- Keep a record of each element of the cause of action, and what evidence exists to prove it. Don't assume the facts exist if they are being alleged !

2. Who is the client(s) and what is my retainer?

*1. Who are you **acting** for?*

*2. Have you received instructions from **all** clients, or does one client have authority?*

*3. Have you advised your clients of **conflicts** if there is a joint retainer and obtained informed consent?*

*4. Have you **documented** what you are retained to do and what you are **not** retained to do?*

2. Who is the client(s)?

Case Study

A solicitor acted for a husband, wife and company who were all respondents to a Federal Court Proceeding. The plaintiff alleged that the respondents had represented to him that he would receive a half share in the business, that he had not received it, and that their actions were misleading and deceptive. The claims against each respondent however were slightly different.

At most stages, the solicitor sought instructions only from one of its clients (the husband).

The wife signed terms of settlement based on advice from the solicitor that made her jointly and severally liable for the settlement amount. She subsequently sought to recover the settlement amount from the solicitor. The wife alleged that the husband was not authorised to provide instructions on her behalf, and she was never advised of the potential conflict of interest.

Takeaways:

- Don't assume all clients have the same interests, even if they are telling you that they do!
- Advise the clients of potential conflicts and seek their informed consent to a joint retainer, but even then, only if you can act jointly in the best interests of all clients (ASCR 11.3)
- Beware of arrangements whereby one client speaks on behalf of others. Seek authority in writing.
- Avoid multiple party retainers where there is a possibility for interests to become adverse.

2. What is my retainer?

Case Study

The claimant purchased two expensive paintings. The purchases were facilitated by loans. The claimant encountered difficulties in meeting repayment obligations under the loans. The solicitor was retained following threats by the lender to list the claimant's default with the relevant credit reporting agency if loan repayments were not brought up to date.

The solicitor prepared a draft letter to the lender which was sent by the plaintiff. The lender listed the claimant with the credit reporting agency VEDA shortly thereafter. The claimant alleged that the solicitor was retained not only to draft the letter, but to advise the client about subsequent events as they arose in disputes with the lender. The claimant alleges that the solicitor failed to recommend that the amount in dispute be paid while reserving all rights to recover the amount paid in order to prevent the credit default listing.

In a Costs Agreement provided to the claimant, the solicitor described the scope of the retainer as *"peruse and consider documentation and advise with a view to drafting documentation"*.

Takeaways:

- Clearly define your retainer and what are you not retained to do.

3. Beware the difficult client

Unrealistic expectations

Previously changed solicitors

Difficult to contact

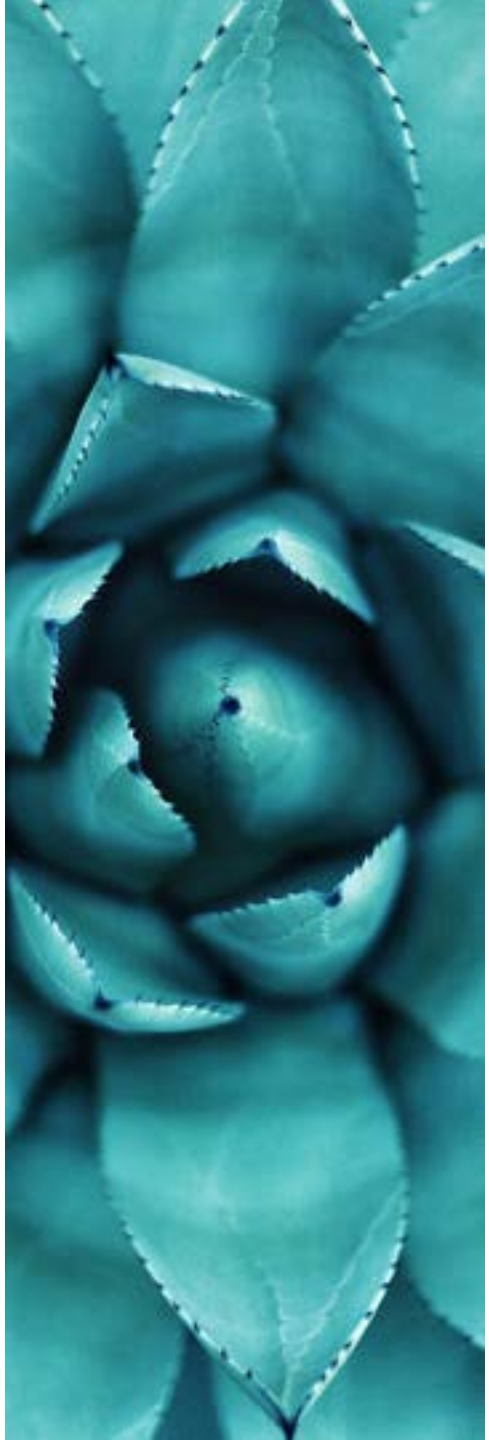
Dubious case

Does not listen to advice

4. Use of counsel

Key takeaways

- Appropriate to engage at the beginning
- Reasonable reliance is fine, but solicitors cannot act a "postbox"
- You must know enough to assess whether counsel's advice is appropriate/accurate
- Estimate counsel's fees for the client



4. Use of counsel

Case Study #1

A solicitor was engaged for a client pursuing a claim in another state.

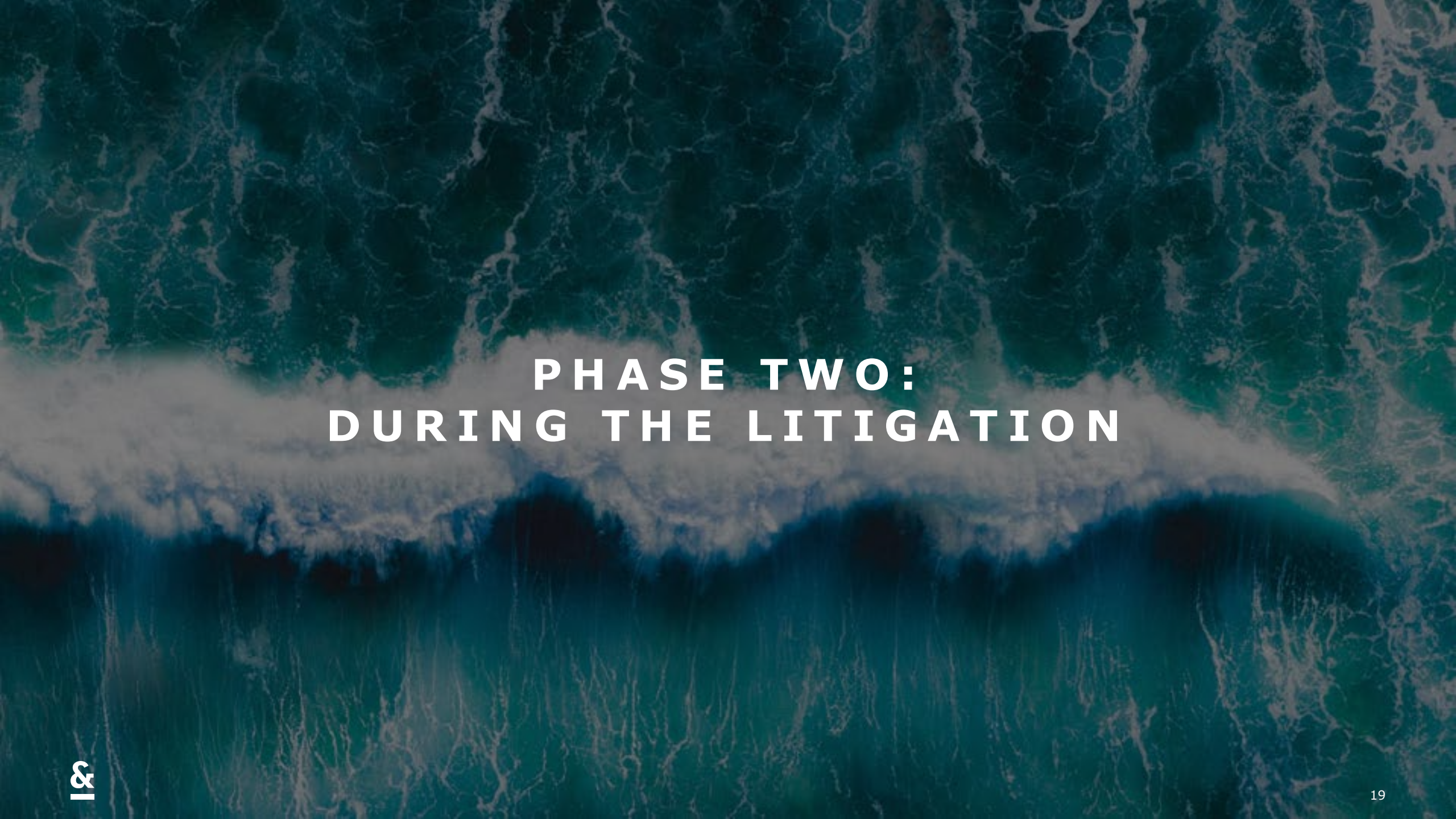
The solicitor engaged an interstate barrister for advice.

The advice from the barrister was wrong regarding the relevant time period within which the claim had to be lodged. As a result, the limitation period was missed by the solicitor.

The solicitor was totally reliant on counsel and thus unable to assess the accuracy of his advice and then was subject to a claim.

Takeaways:

- If something is entirely outside your expertise, it is safest to refuse the instructions.



PHASE TWO:
DURING THE LITIGATION

PHASE TWO: DURING THE PROCESS

Giving advice

Recording your advice

Managing the pressure of litigation

1. Giving Advice

Key takeaways

- Beware precedents: make sure you amend any precedent, so it is client and matter specific
- Regular communication about merits/quantum/costs throughout the retainer is key to risk management. Don’t leave all the advice to the end
- Analyse the evidence against the elements of the cause of action.
- All clients are owed the same duty of care, even difficult ones.
- We often see claims against solicitors in circumstances where no advice on prospects or quantum is given until the mediation, at which point the barrister provides advice and the client feels "blindsided" on the day. The client goes on to sue the solicitor for failing to advise them about the possible outcomes until it was too late, and significant costs were incurred.

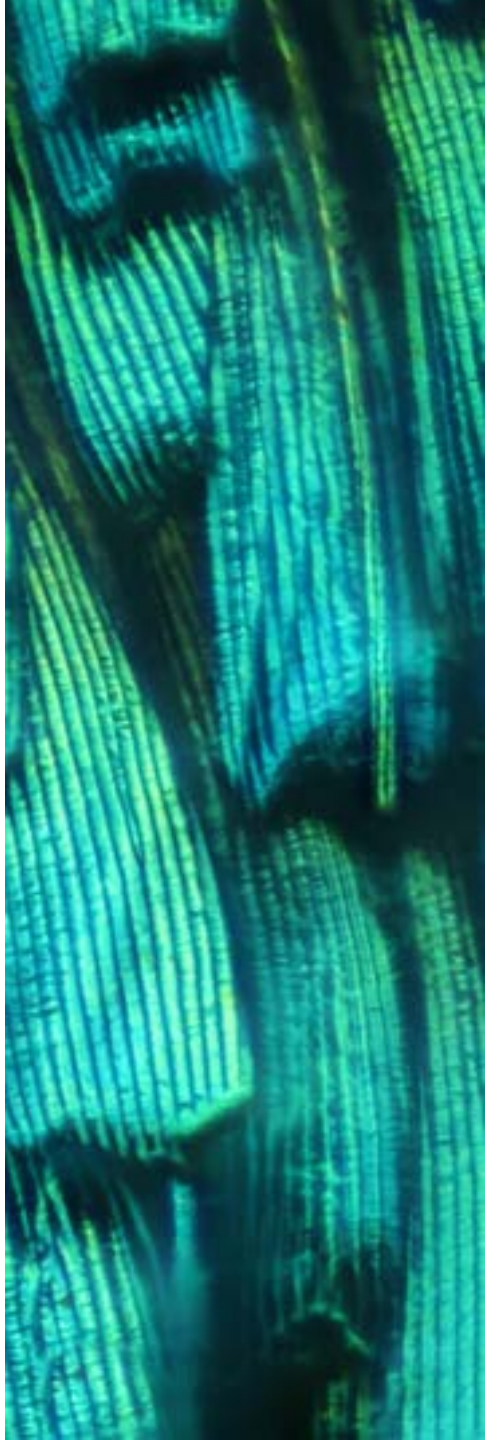
2. Recording Your Advice

Confirming your advice in writing, and contemporaneous file notes, are crucial

Case Study

A solicitor meets with a client over a weekend who wants to issue a proceeding contrary to the solicitor's advice. The solicitor sends an email late at night recording "*I confirm I have advised you and you disagree with my advice and wish to issue*".

The email failed to identify what the solicitor's advice actually was. The solicitor is later sued on the basis of a different version of events from the client. The client says they were not suitably warned about the potential disastrous outcome of litigation, due to particular risks. The solicitor was adamant that they had given that advice. However, the solicitor had no record of the content of their oral advice, beyond the broadly drafted email.



3. Managing the Pressure of Litigation

Litigation is fast-paced, time management is key

Failing to promptly progress the litigation and/or wasting the court or parties' time with repeated amendments, delays or weak points.

Poor time management of files, resulting in missed deadlines, and no paper trail to explain the error.

Not reading a letter properly and misunderstanding its meaning, leading to erroneous advice to the client.

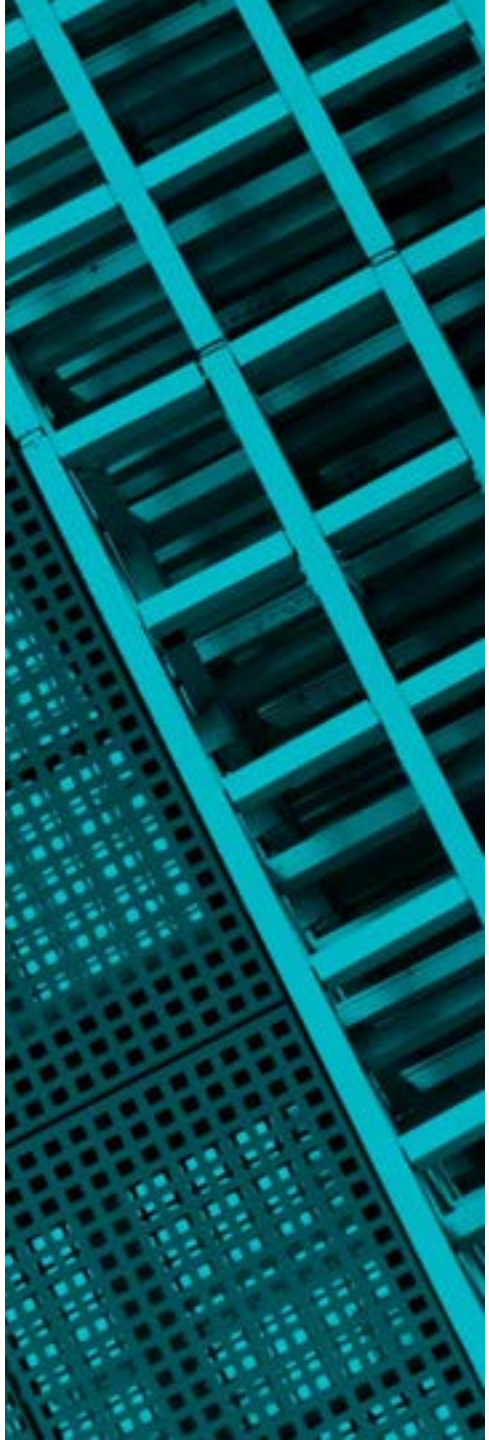
Not engaging counsel or preparing for trial with sufficient time.

The wrong date is diarised for a winding up application and the client company then is wound up.

PHASE THREE:
END OF THE LITIGATION

PHASE THREE: END OF THE PROCESS

- **Terms of settlement**
- **Ending a retainer: do it right**
- **Claims made in response to demands for unpaid fees**



1. Terms of settlement

Key takeaways

- File note and/or confirm in writing your advice to the client about the the settlement (including what they will receive "in hand"), the meaning of the settlement terms, and the client's instructions to agree to the settlement.
- Prepare terms in advance of the mediation if possible. Pay careful attention to releases and indemnities.
- Meet with the client and the barrister prior to mediation to explain the process and any likely terms.
- Consider if the insurer needs to consent to the settlement

1. Terms of settlement

Case Study

Two men, Mr Smith and Mr Bloggs, entered litigation regarding control over a company. The solicitor acted for Mr Smith. After a long piece of litigation, the parties entered a settlement seeking to end all disputes between the two men, their associated companies and the subject company. The subject company was returned to the control of the solicitor's client, Mr Smith.

However, after the settlement, Mr Bloggs' ex wife came out of the woodwork and said she had made a loan to the subject company when it was under Mr Bloggs' control, which was secured by a charge over the subject company. She sought repayment of that loan.

Mr Smith sued his solicitor for failing to undertake a PPSR search of the subject company before the settlement.

Key takeaways:

- If the dispute concerns a company, do a PPSR search. Consider if you need an indemnity from a past director, for any debts incurred whilst he or she was a director of a company.
- Don’t assume that the desire of all parties for a full and final settlement, is necessarily reflected in the terms!

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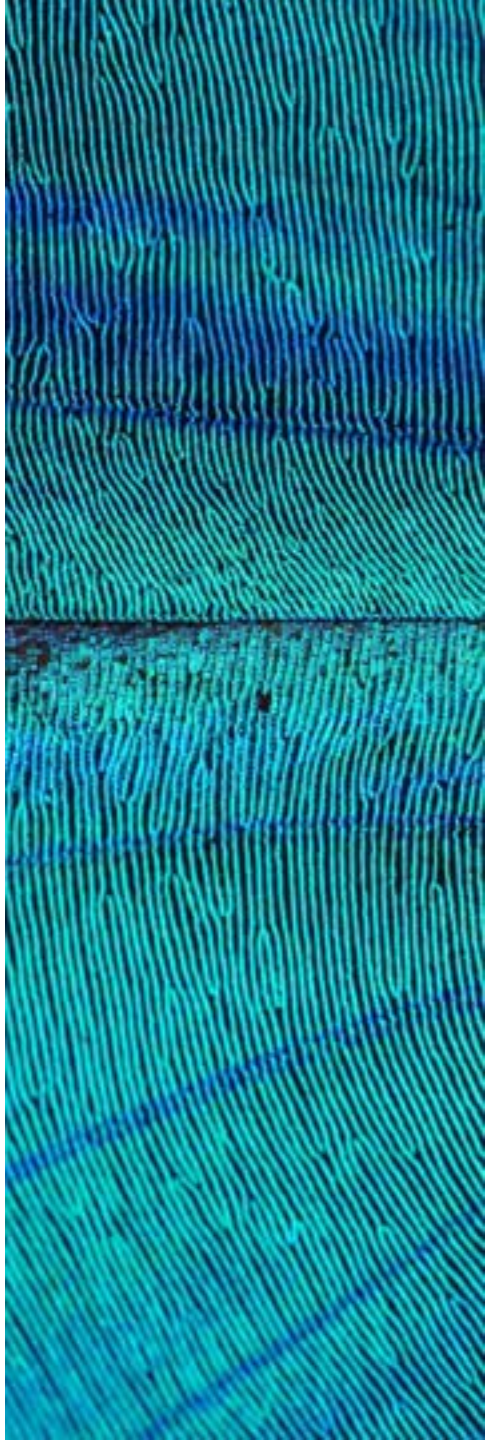

1. Terms of settlement

Case Study

Plaintiff and defendant enter terms of settlement at the door of court. Solicitor acts for the plaintiff.

Barrister agrees to a fulsome indemnity in the terms of settlement, in favour of defendant, for any future claim against the defendant arising from the circumstances of the plaintiff's claim. Barrister not aware of the plaintiff's potential future claim against *other* defendants. Terms are signed.

A few years down the track, the plaintiff issues a claim against other parties, with the same solicitor representing him. The new parties join the original defendant, and he pleads the indemnity back against the plaintiff.

The plaintiff then sues the solicitor for the drafting of the deed and the commencement of the later proceeding, because any damages he could recover against the new defendants, he effectively has to pay himself thanks to the indemnity. The solicitor had not even realized the indemnity was in the deed, as it came from a barrister's precedent!

Key takeaway:

- Consider and advise upon all terms of settlement particularly releases and indemnities and make a record of that advice. Stay close to drafting of terms!

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2. Ending a retainer

Key takeaways

- If you have finished what you consider you were retained to do, the retainer is over.
- If a client is no longer instructing you, send correspondence confirming the retainer has ended and you are no longer taking steps to protect their interests.
- In that letter, you should confirm again the relevant limitation period if the claim has not yet been issued.
- To terminate a retainer, you must provide just cause and reasonable notice to the client (ASCR 13)

3. Claims made in response to demands for fees

Key takeaways

- We often see claims issued against solicitor as counterclaims in response to demands for unpaid fees
- Consider whether a fee claim is worth it for a disgruntled client.
- Having initial and ongoing discussions about costs, and risk, throughout the retainer is the best way to avoid this type of claim.

CONCLUDING REMARKS: KEY TAKEAWAYS

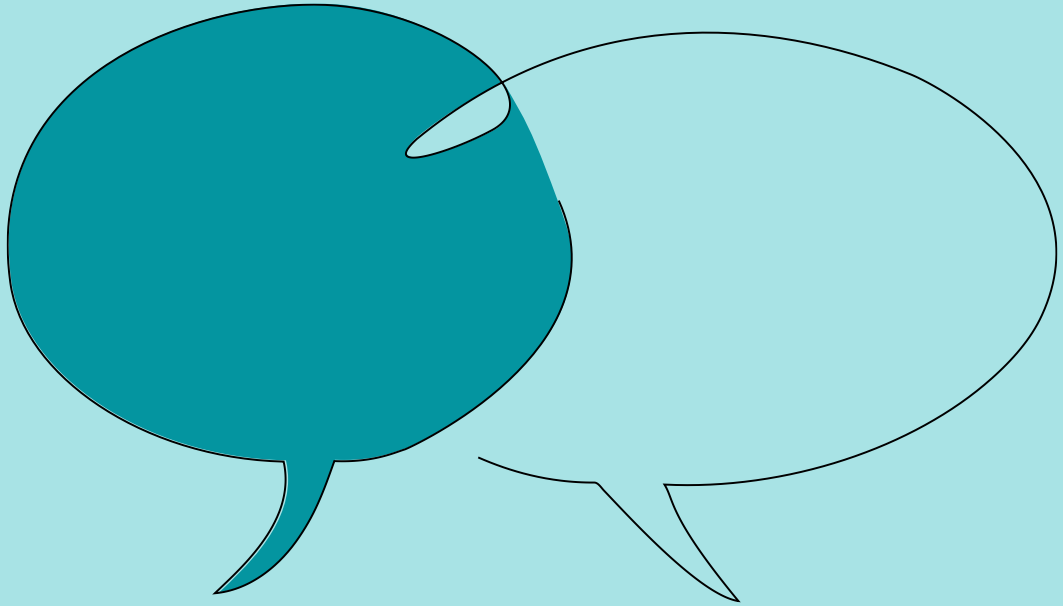
Get it right at the start: investigate the facts, parties, limitation periods, jurisdiction, cause of action, costs and timeframes

Give and record your advice in writing, along the way

Make a record of your advice to a client about a settlement and settlement terms, and stay involved in drafting!

Client expectation management is crucial

QUESTIONS



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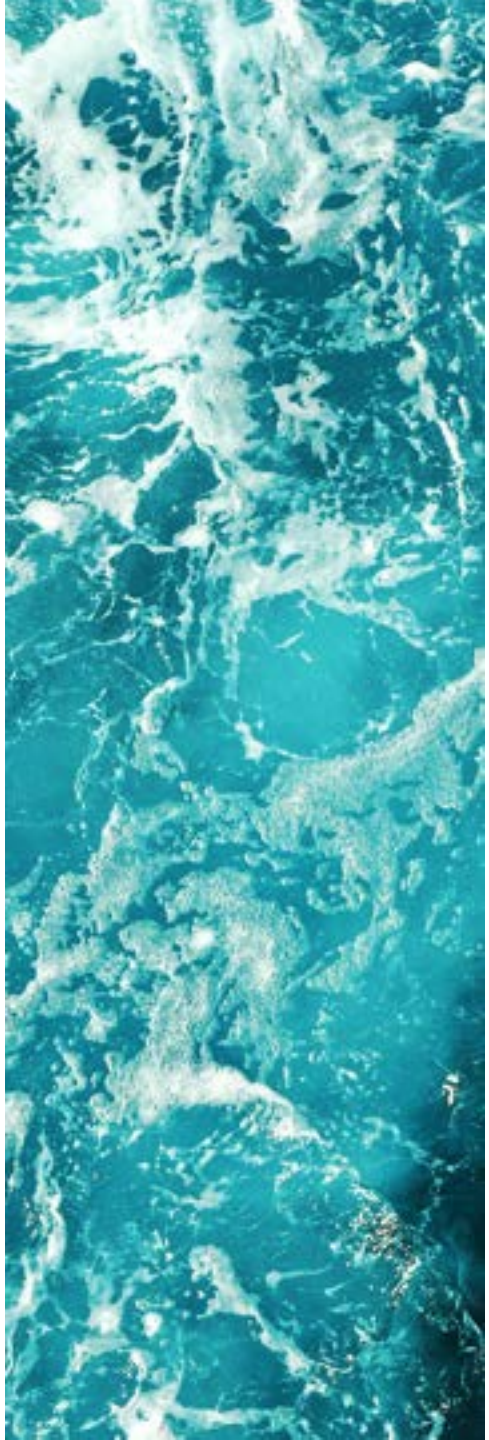

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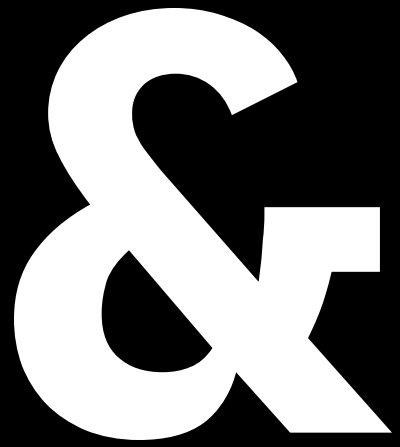

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