CHECKLIST

February 2024

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Personal Injury Litigation

This checklist suggests risk management strategies practices can implement when dealing with personal injury litigation matters.

Client:

Matter:

Missed common law potential

- [ ] Ascertain the date of injury as early as possible.
- [ ] Keep detailed file notes or record conferences with your client, paying particular attention to the initial conference.
- [ ] Advise your client in writing at the start of the retainer of the limitation period and the consequences if it is missed.
- [ ] Be forensic in your approach to taking initial instructions. Take the time with your client to tease out a comprehensive background.
- [ ] Send your client a retainer letter after the initial conference which:
  - includes your notes of the conference and asks the client for any further instructions they may not yet have raised. Consider converting your file note into a proof of evidence and sending that to the client instead
  - sets out your arrangement for costs
  - confirms any advice you gave the client including the limitation period, even if it is preliminary advice subject to obtaining further information
  - confirms what actions you will undertake for the client.
- [ ] Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.
- [ ] Set up systems for tracking deadlines and actively monitor their effectiveness. Ensure your systems do not rely solely on one person.

- [ ] If advising a client they do not have a common law claim, provide clear written reasons why.
- [ ] Suggest that if your client has any concerns about your advice they should obtain a second opinion.
- [ ] If further investigations are possible, advise your client about the type of investigations that could be made and why you believe they should or should not be undertaken.
- [ ] Be proactive in following up requested information such as medical reports and instructions from your client. Centrally diarise these tasks.
- [ ] Have documented policies and procedures for the effective handover of files. Ensure that the client is informed if their lawyer changes.

Delay/strike out

- [ ] Advise your client in writing at the start of the retainer of the limitation period and the consequences if it is missed.
- [ ] Do not allow the 'too hard' cases to drag on. Discuss difficult files with a colleague or seek advice from appropriate counsel. Peer review is an invaluable tool for dealing with difficult files.
- [ ] Explain clearly to your client reasons for delay and the consequences. Where your client is causing the delay set out in writing the ramifications of continued delay and any relevant time limits.
- [ ] Be proactive in obtaining medical reports in sufficient time to meet critical dates.
- [ ] Act quickly in obtaining evidence.
- [ ] Consider terminating the retainer if your client will not give you instructions to proceed and does not heed your warnings. If you do terminate the retainer, do so for just cause and on reasonable notice. **Do this in writing, giving details of any time limits.**
- [ ] If your client is unable to pay accounts as agreed, do not let the file languish in the hope the client will find the money. If you are not prepared to continue acting, terminate the retainer promptly.
- [ ] Do not allow briefs to languish with counsel. If counsel is delaying the matter, ask counsel to return the brief as a matter of urgency.

- [ ] Find out what further information counsel requires and follow this up.
- [ ] Do not accept excuses for delay from counsel.
- [ ] Have an office policy about retrieving briefs from non-performing counsel.
- [ ] Set time limits within which counsel must perform.
- [ ] Check and double check that court/tribunal documents have been properly filed, especially if you have relied on other staff within the office to attend to the filing.
- [ ] Review files on a regular basis.

Revisited settlements

- [ ] Document your client's instructions. Obtain a full and complete statement which is checked and signed by your client.
- [ ] Manage your client's expectations about to the value of the claim throughout the life of the case.
- [ ] Qualify any advice about the value of the case and stress to your client that this may change as evidence is obtained.
- [ ] Warn your client about the specific risks of litigation, particularly cost consequences, well before the door of the court.
- [ ] Check your client understands your advice and record their response.
- [ ] Update your client on the value of the case as new evidence is obtained.
- [ ] Prior to the settlement conference advise your client about how it will be conducted and what to expect.
- [ ] Before a settlement conference or when advising on settlement:

- ensure you have up-to-date medical evidence including copies of the other side's relevant medical reports you are entitled to
- have up to date Medicare Past Benefits, Centrelink and any other notices or information required that may impact on your client's compensation payment
- read and review medical reports carefully, comparing any inconsistencies and discussions of future treatment
- look out for latent diseases or other injuries not covered in your client's claim and watch out for injuries that have not stabilised.

☐ Explain and document your advice. Where your client wants to settle against your advice, make a contemporaneous file note of your advice including the reasons your client has given you for settling. Confirm this in writing. Where an offer is made and rejected, either on or against your advice, confirm these instructions including the reasons given and the advice in writing.

☐ Advise your client on the impact of settlement on:

- entitlement to weekly payments and medical expenses
- common law rights
- entitlement to social security benefits, particularly the existence of preclusion periods and/or any repayments.

☐ Provide your client with up-to-date information on costs.

☐ Advise your client about the progress of the trial and if appropriate make settlement recommendations.

Inappropriate terms of settlement

☐ Stop to consider if the release covers only the matters raised by the proceeding and your client's instructions.

☐ If the release is wider than the matters raised by the proceeding, advise your client about this and explain the ramifications.

☐ Consider the consequences of an 'all forms all injuries' release.

☐ Advise your client of the impact of settlement on:

- entitlement to weekly payments and medical expenses
- common law rights

- entitlement to social security benefits, particularly the existence of preclusion periods and/or any repayments.

Workplace injuries

- [ ] Do not dabble if it is not your usual area of practice. This area of law is complex.
- [ ] Be aware of all of the time limits and how they overlap and interact with each other.
- [ ] Create a well-developed system for tracking timetables, including follow-up reminders.
- [ ] If your client has any concerns about your advice suggest they should obtain a second opinion.
- [ ] Advise your client to inform you immediately of changes in work arrangements, major alterations of medical treatment of the injury, specialist referrals or other medical investigations. Explain to your client why this is so important.
- [ ] Calculate and diarise the limitation period as early as possible.
- [ ] Advise your client in writing at the start of the retainer of the limitation date and the consequences if it is missed. If the matter is unresolved when the matter is terminated, repeat the advice.
- [ ] Make file notes of conferences with your client.
- [ ] Confirm your advice in writing.
- [ ] Tell your client when the proceedings must be commenced and confirm it in writing at the start of a retainer as well as when the retainer is terminated.
- [ ] Centrally diarise dates for receiving statutory offers and be proactive about checking if an offer is not received as anticipated.
- [ ] Comply with procedural requirements for filing applications and proceedings, particularly when deadlines are near as failing to do so may cause delays resulting the required date being missed.
- [ ] Be alert to applicable time limits and court timetables throughout the course of a proceeding. Deal proactively with issues that have the potential to delay progress of the proceeding.

- [ ] Review the applicable provisions of the *Accident Compensation Act 1985* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), and the relevant ministerial directions.

Public liability and medical negligence

- [ ] Identify all potential causes of action available to your client.
- [ ] If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.
- [ ] If it is longer than three years from the date of injury, obtain detailed instructions on facts relevant to the 'date of discoverability' provisions.
- [ ] Obtain detailed instructions to cover all the significant injury threshold issues.
- [ ] Ensure that clients on the borderline of the significant injury thresholds understand their rights and strategic benefits of proceeding or not.
- [ ] Identify prospective defendants early and determine their legal identity and insurance status.
- [ ] Calculate and diarise the limitation period as early as possible.
- [ ] When dealing with circumstances outside your usual practice always confirm limitation periods by checking the relevant legislation.
- [ ] Be aware that shorter limitation periods may apply for accidents on ships and aircraft.

Transport accident claims

- [ ] Identify the relevant jurisdiction, and calculate and diarise the limitation period as early as possible.
- [ ] Make file notes of conferences with your client.
- [ ] Confirm your advice in writing.
- [ ] Tell your client when the appeal must be commenced and confirm it in writing.

- [ ] Clarify who is your client.
- [ ] Identify all potential causes of action available to your client including possible psychiatric injuries.
- [ ] If the cause of action is outside your retainer or expertise, advise your client of their potential rights and the need to consult an expert with relevant expertise.

Personal cost orders

- [ ] Always be mindful of your obligations under the *Civil Procedure Act 2010* (Vic) in the preparation and conduct of a case.
- [ ] Your client's instructions must always be considered in light of the Act, as the overarching obligations prevail over your duties and obligations to your client where they are inconsistent.
- [ ] Obtain and record clear instructions. When acting for more than one party, seek instructions from all of them.
- [ ] Inform clients about the overarching obligations.
- [ ] Ensure your client's case has a proper basis and is supported by the evidence.
- [ ] Ensure pleadings are drawn accurately.
- [ ] Be mindful of costs and consider whether they are reasonable and proportionate to the complexity of the matter.
- [ ] Retain control of the conduct of a case, including communications between counsel, experts and clients.