



## Barristers Checklist for Safe Practice

This checklist provides a list of risk management steps and issues to consider for various stages of any brief. Using this checklist will help barristers avoid claims and provide good service to their clients. This checklist can be used alongside LPLC's [Good Counsel –Practice Risk Guide for Barristers](#).

### Accepting a brief

- Be clear about what falls within and falls outside your expertise.

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- When you receive a brief, read it thoroughly as soon as possible after receiving it and check for any pending expiry of a statutory or contractual limitation period. There is always the risk that the brief has been delivered to you just prior to the expiry of a limitation period!

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- For contribution claims under the Wrongs Act 1958 (Vic), remember that the limitation period can be quite short [1]

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- For claims where a defendant raises the defence of proportionate liability and joins additional defendants (concurrent wrongdoers) for that purpose [2], remember that the plaintiff remains subject to the usual limitation periods in pursuing a claim against those additional defendants [3].

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- Assess how much time will it take you to prepare the claim, including meeting with witnesses, seeking further instructions and obtaining necessary documents, and how much time do you have before the limitation period expires. To stop time running can you issue a generally indorsed writ or other form of originating process?

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- Diarise all limitation period expiry dates and time frames by which the work must be completed.

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- Be honest with yourself about whether you have the time to complete a task in a reasonable time frame. Return the brief if you do not have sufficient time.

[1] s 24 (4)

[2] as required under Victorian proportionate liability law: Wrongs Act 1958 (Vic), s 24A(3).

[3] Adams v Clark Homes Pty Ltd [2015] VCAT 1658 per Jenkins J at [88]. The issue is yet to be considered by a superior court.

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- Check you have enough information in your brief to identify your client, the relief they might seek, and against whom.

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- Ask for more information promptly if the brief is lacking. If the request is made orally, confirm in writing.

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- Diarise to chase up any requests for information. Do not just rely on the solicitor or client coming back to you.

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- Confirm in writing the scope of any retainer to advise.

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- Have a mindset that paperwork is important and must be time managed as much as court work.

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- For longer matters, keep your instructing solicitor informed on your progress.

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- If you are acting for friends or family, treat those matters as you would any other. Do not deal with it last. Action it with the priority it deserves.

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- If you are asked to accept a direct access brief, carefully consider whether it is permissible, appropriate and sensible to do so, or whether you should require an instructing solicitor.

## Who is the client?

- Check precisely who your client is. Particularly when meeting in conference and giving written advice, ensure that you have identified who is the client or an agent of the client, and who are attending in other capacities.

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- If others attend the conference, identify their role and consider whether it is necessary to tell them that you are not giving them legal advice. These checks may protect you from others claiming to have relied upon your advice [4]

[4] For example, see the facts in *Giroto v Phillips Fox (a firm) & Anor* [2011] VSC 293.

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- On the day when you receive the brief, it may be worth carrying out (or recommending your instructor carry out) an online ASIC check as to the status of all relevant companies including any client company. Is each company currently registered? Are the directors, or some external administrator such as a liquidator, in control?
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- Deliver your disclosure statement and costs agreement to your instructor or direct access client as early as possible because this clarifies and confirms the identity of your client(s).
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- When dealing with an agent only – such as a brother, sister, son or daughter of your client, or a manager or executive of a company or other organisation – consider whether it may be prudent to check with your instructor that the instructions are those of the client.
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- When representing an owners' corporation, always ensure that the solicitors, managers and/or representatives of the owners' corporation are properly authorised under the Owners Corporations Act 2006 (Vic) (or interstate equivalent).

## Conflicts

- If there is more than one client, consider at the start if the clients' interests are the same.
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- Keep revisiting the question as the case progresses and more evidence is produced and the interests of each of your clients becomes clearer.
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- If a former client alleges you have a conflict in continuing to act for a current client, familiarise yourself with the case law on what constitutes confidential information [5]

5] Including the cases referred to in Appendix Two below.



- If you are unsure about whether the information you have constitutes confidential information, or you may be in breach of your ethical obligations, do not proceed until you have talked through the issue with an experienced practitioner. You are welcome to speak with one of LPLC's Claims Solicitors on (03)9672 3800. Also, where appropriate, you may be required to notify a member of the Victorian Bar Ethics Committee.

## Drawing pleadings

- Go back to the basic rules of pleadings and think about the elements of the cause of action, who is entitled to relief and who is obliged to give that relief.

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- For civil property damage and economic loss claims, carefully check the law and procedures that apply to contribution claims and the defence of proportionate liability, including any limitation periods that may apply [6]

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- Be objective when assessing a cause of action and the available evidence.

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- Prepare a chronology. Chronologies are a key device in understanding how the facts of the case fit together, and in testing the truth of your case.

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- Clarify whether the parties to be sued are individuals or corporations.

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- When pleading novel causes of action, give your instructing solicitor and client clear warnings both orally and in writing about the risks and the likelihood of the initial decision being appealed.

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- Be particularly cautious when pleading fraud or dishonesty.

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- Continually reassess the evidence and pleadings as the matter progresses.

[6] Wrongs Act 1958 (Vic), Parts IV and IVAA respectively, as well as any Commonwealth or interstate equivalents.



## Acting in the matter and advising on prospects of success

- Communicate clearly with instructors and clients as early as possible about the prospects of success and evidence required.

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- Maintain your objectivity and don't get caught up in the client's or the solicitor's emotions.

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- Keep in mind, and continually review, the elements of the cause of action and what evidence is required to prove those elements.

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- Manage the client's and your instructor's expectations throughout the matter. This includes talking to them about:
  - what outcome the client wants to achieve, and whether that outcome is realistic in terms of likelihood, costs and timing
  - what needs to be proven, what evidence you have and what evidence is required
  - the risks of a court not accepting evidence, particularly oral evidence
  - the opportunities for mediation and other forms of alternative dispute resolution before, during and after trial
  - the risks of appeal and the effect that may have upon timing, cost and outcome
  - as a barrister and an officer of the court, the limits of your obligation to comply with your client's instructions
  - the overarching obligations of the client, instructing solicitor and counsel under the Civil Procedure Act 2010 (Vic).

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- Consider whether to confirm your advice in writing, even where the client does not wish to pay for written advice.

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- Only meet with clients with your instructor present and ensure they take notes of the discussion.

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- Keep well organised records of your communications with the client and your instructors, including any advice whether given in writing or in conference.

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- Consider whether diagrams will assist you to communicate important points to your client, particularly where the facts and/or the law are complex.



- Continually re-assess the client's prospects of success, including timing and the potential for increased costs.
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- Always keep in mind the need to balance each possible outcome against the legal costs that the client may incur in achieving that outcome. While your instructors have the primary obligation to advise the client on the costs of litigation, it is prudent for you to monitor whether the client has realistic expectations regarding the possible outcome of litigation taking into account legal costs [7]
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- Keep your instructor apprised of your availability as soon as possible.
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- For dormant briefs, consider whether to provide your instructors with a brief written advice on the likely date when the applicable limitation period(s) will expire. Alternatively, where appropriate, consider advising them that you have not been briefed to advise on that issue, or have insufficient instructions to do so, and that the instructors should consider and advise the client as soon as possible as to the likely expiry of such limitation period(s). Be particularly mindful of this issue where the client has briefed you directly.

## Settlement

- Be prepared. Preparation instils trust and confidence in the client and means the client is more likely to receive and act on advice he or she may not really wish to hear. Preparation also reduces the likelihood of surprises at the door of the court. If surprises occur, you will be better equipped to respond appropriately.
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- Good preparation includes:
- approaching the question of settlement with a well organised mind
  - distilling the legal issues
  - having a thorough knowledge of the facts and the evidence that is expected to be called by either side
  - acting promptly so the client has enough time to digest advice before a decision is made.

[7] In particular, the overarching obligation of proportionality: Civil Procedure Act 2010 (Vic), s 24.

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- Before any mediation, obtain from the solicitor up to date assessment of all costs and disbursements.

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- Prepare the client for mediation by explaining how mediation works, what information will be disclosed and what the likely range of settlement should be.

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- Give your client a clear explanation, both orally and in writing, of the risks of not settling.

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- Give your client the cost assessment when seeking settlement instructions.

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- Allow your client time to consider and absorb the information and what the consequences are for them if they settle on the terms suggested.

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- Record the client's instructions to settle in a file note.

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- Where possible have the client sign terms of settlement.

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- Clients assume that a settlement is 'once and for all'. Carefully explain to your client any limits to the scope of the releases they provide to, and obtain from, the other party.

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- Think clearly about the what the proceeding covers and what the settlement involves when drafting the terms of settlement. What avenues of redress do the clients want or not want to be available later?

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- Proofread the terms of settlement and where possible have someone else review it with fresh eyes.



## Terms of settlement

Are parties correctly identified?

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Is the court proceeding correctly identified?

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Are there recitals giving brief background or context for terms of settlement, including a definition of any matters that are to be the subject of the release?

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Payment obligations –

- by whom?
  - joint or several?
  - to whom?
  - how?
  - when?
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Costs –

- Is the settlement inclusive of costs?
  - If settlement is 'plus costs', how are they to be assessed?
  - How are extant cost orders addressed?
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Taxes and duties –

- Is there GST on the settlement sum? If so, who will bear the GST?
  - Is there capital gains tax consequences? If so, who will bear the CGT?
  - Are there stamp duty consequences? If so, who will bear the duty?
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Is there an admission of liability or denial of liability?

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Are all specific obligations agreed by the parties recorded?

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Is the disposal of the proceeding recorded – discontinuance, dismissal, consent orders (including any past costs orders)?



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- Releases -
- Will there be a release?
  - Is it mutual?
  - Has the client specifically agreed to the scope of the release?
  - Is the release operative on signing the agreement or performance of agreement? Is the timing in your client's interest?

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- Are there confidentiality and/or non-disparagement requirements?
- Have these been correctly described?

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- Are there enforcement terms that will protect your client in circumstances where the other party breaches the terms of the agreement?
- Do they offend the doctrine of penalties?

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- Are there interests in land being addressed?
- Are the owners of the land signing?

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- Are directors' guarantees required?

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- Does the settlement need to be in the form of a deed?

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- Is the settlement conditional on court approval?

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- In the case of a self-represented litigants, do the terms acknowledge that they have been invited to seek their own legal advice before executing the terms?

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- Do the terms need to provide for the execution of counterparts?

## Wellbeing

- If, on reflection, you are concerned about your behaviour when dealing with clients, particularly in settlement negotiations and other high-pressure situations, it is important to acknowledge it and seek help as soon as possible.

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If you are feeling overwhelmed by workload or other issues seek help as soon as possible.

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You can seek assistance by contacting a member of the Health and Wellbeing Committee at the Victorian Bar.