



Litigation

Instructions

Use the below questions as a prompt for matters that you should consider when you are acting for clients in litigation.

Who is your client?

Is your client an individual or a corporate entity?

Where the client is a company or some type of conglomerate, identify the person from whom instructions are to be taken/to whom advice is to be given.

If a corporate entity:

- conduct an ASIC search to determine the status of the entity and its directors
- consider if there anyone else you need to take instructions from such as a co-director
- do you need to obtain written authority from another director to take instructions from one director only?

If you act for the plaintiff, consider who has the cause of action. Is it the individual, a corporate entity or the partners comprising the partnership?

Undertake necessary searches to determine whether the client is an undischarged bankrupt or under administration.

Is your client competent to provide you with instructions? If not, should a litigation guardian be appointed?

Consider any possible conflicts in acting for the client.

Costs

Accurate costs estimates, from the outset of your retainer, can be a determining factor as to whether you are later sued by your client for an unfavourable outcome

Resist the urge to give an off-the-cuff estimate range as clients will only remember the lower figure in the range.

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- Invest time at the outset of the retainer to properly scope the matter so realistic estimates can be given to clients.

- Set out your cost estimates clearly in writing and update the estimate promptly when you are approaching the estimate.

- Give advice to the client about the possibility of unrecoverable costs

- Keep your client informed about the costs on an ongoing basis. Consider providing monthly accounts or information statements even where you have agreed to costs being payable at different stages or at the end of the matter, just so clients understand how the fees are mounting.

- Do not delay in contacting clients when their account is not paid by the due date. Ensure the client understands that the consequence of failing to pay is that you may cease to act.

- Have you given an estimate of anticipated fees and disbursements as required by the Legal Profession Uniform Law Application Act 2014?

Managing the engagement and the client

- Do not agree to act as a mere post box for your client, including where the client wants to brief counsel directly but requires a solicitor on the record.

- Send your client an engagement letter as soon as practicable after the initial contact.
 - include your notes of any conversation(s), (or convert your file note into a proof of evidence) and ask the client for any further information.
 - explain your arrangement for costs and provide an estimate.
 - confirm any advice you gave the client.
 - confirm what work you will undertake for the client.
 - confirm any limitation periods.
 - include your cost disclosure statement and any cost disclosure information from any counsel.



- Adopt a forensic approach to taking instruction, in particular:
 - thoroughly interview the client to ensure you understand the client's expectations and desired outcome. Are plaintiff's seeking damages or some other remedy or defendants wanting to defend at all costs or a quick settlement to save the relationship? Discuss any unrealistic expectations with the client early on
 - assemble the facts and key documents necessary to support the case.
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- Manage the client's expectations relating to the value of the case throughout the life of the litigation.
 - give your client preliminary advice about the value of the case (i.e. your cost estimate, including advice regarding the possibility of adverse costs orders being incurred and the likely value) early in the retainer and before any proceeding is issued.
 - inform your client this advice may change as further evidence is obtained.
 - warn your client of the specific risks of litigation and any risks specifically associated with the client's claim
 - regularly update your client on the value of the case.

Issuing proceedings

- Are there alternative rights of recovery under contract, statute and common law?
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- Consider which court or tribunal is appropriate. Where there is a choice, discuss the options and consequences with the client
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- Check the relevant legislation to ensure you know the limitation period
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- Tell the client in writing about the limitation period.
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- Record the limitation period in a common diary system.
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- Undertake necessary searches to determine whether any prospective defendant is an undischarged bankrupt or under administration.
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- Seek instructions from the client about whether further investigation be undertaken about the prospect of recovery against the defendant(s) before the issue of proceedings.

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Given the client written advice on:

- the prospects of success
 - evidence required
 - likely defences raised
 - likely costs.
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Have you named the right defendants?

- read and analyse the available documents carefully to ensure you issue the proceeding against all of the correct defendants. Responsibility does not rest solely with counsel settling the statement of claim.
 - for corporate entities ensure that the ACN is correct.
 - an individual might be known by a number of names, and your client might only know that person's alias.
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Is the defendant a partnership? Has the partnership dissolved? If so, you will need to name each partner and serve each partner with the proceedings

Can the party be sued? Consider:

- is the individual bankrupt or dead?
 - is the company in liquidation or administration?
 - is the company deregistered, and an application needs to be made for its re-instatement?
 - is the individual or company a trustee of a trust?
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Understand the differences between Commonwealth and Victorian proportionate liability regimes concerning the joinder of concurrent wrongdoers to ensure all the necessary parties are joined as defendants.

Statement of Claim:

- should counsel need to be retained to prepare the pleadings?
 - if counsel is briefed ensure that they are fully briefed with all relevant documents, and instructions.
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Only plead matters which have a proper basis.



Defending proceedings

- Objectively assess whether your client has a defence to the causes of action alleged and advise your client accordingly.
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- If the plaintiff is a corporation or is ordinarily resident outside of Victoria, should your client consider making an application for security for costs?
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- Defence:
- should counsel need to be retained to prepare the defence?
 - if counsel is briefed ensure that counsel is fully briefed with all relevant documents, and instructions.
 - plead only defences which have a proper basis.
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- Consider if there are any concurrent wrongdoers or if contribution should be sought against any other party? Be mindful of the time limits to bring any contribution claim.

Court procedure

- Familiarise yourself with:
- the rules of court or the rules of a tribunal where the proceeding has been issued
 - the Civil Procedure Act 2010 (VIC)(CPA) and the obligations under that act if litigation is in a Victorian court.
 - practice notes issued by the courts and tribunals
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- Advise your client about court procedure and their obligations particularly under the Civil Procedure Act or discovery under the court rules.

During the litigation

Clear communication with the client during the litigation, early identification of any risks for the client and keeping the client updated and informed may assist to deter any later claims if the client is not successful in the litigation.

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- Create a system for tracking deadlines including follow up reminders and actively monitor the system's effectiveness.

- Act quickly in obtaining evidence.

- If your client wants to delay in obtaining evidence, set out the risks of doing so in writing and confirm the client is taking the risk.

- Call for all relevant documents.

- Sometimes we cannot trust the client. You should review and consider the documents yourself.

- Interview your client, and any other relevant witnesses. Prepare proofs of evidence so that your client's and witnesses' instructions are recorded in writing.

- Consider what further investigations are required such as the issue of any subpoenas for the production of documents.

- Have you given, or obtained from counsel, well thought through advice on the merits? Preferably, the advice should be in writing.

- Reassess any merits advice you have given at critical stages of the proceeding, such as, once a defence or reply is filed or after inspection of discovery or any subpoenaed documents.

- Consider and give clear written advice to your client about what evidence and/or information is needed to:
 - succeed in the cause of action.
 - successfully defend the cause of action?

- Inform your client in writing and consider the best strategy for the client if information becomes available during the litigation which suggests that another party has no means to pay any judgment or costs order or a plaintiff has no means to pay any costs.

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- Keep your client informed of the procedural conduct of the proceeding – and, in particular, dates that require the client's compliance.
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- Consider whether it is appropriate to make a Calderbank offer or an Offer of Compromise.
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- Keep an organised file:
- keep detailed file notes of all conferences and telephone conversations with your client and others, including opposing practitioners, counsel, witnesses and the court or tribunal.
 - provide written advice or confirm any oral advice in writing.
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- Your file notes should:
- be dated
 - identify the author
 - record the duration of the attendance
 - record who was present or on the telephone
 - be legible to you and someone else
 - record the substance of discussions and advice given, and the client's response/instructions
 - be a note to the file rather than a note to yourself.
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- Keep court documents separate from correspondence.
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Avoiding delay

- Do not allow difficult cases to drag on. Discuss them with a colleague or seek advice from appropriate counsel. A peer review is an invaluable tool for dealing with difficult files
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- Explain clearly to your client the reasons for any delays in a case.
- where the client is causing the delay, set out in writing the consequences of continued delay and any relevant time limits.
 - where the client fails to give you instructions to proceed or to pay money into trust to enable counsel to be briefed consider terminating the retainer.
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- Act promptly to terminate the retainer when you have grounds to do so, so that you can give reasonable notice. Don't allow the matter to languish until it is too close to trial to cease acting.
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- If you terminate the retainer, advise the client in writing, give sufficient notice, ensure you have just cause for terminating, and give the client details of any time limits.
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- Do not allow briefs to languish with a barrister.
- find out what further information the barrister requires and follow this up.
 - do not accept excuses for delay from counsel.
 - have an office policy about retrieving briefs from non-performing counsel.
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- Set time limits within which counsel must perform.
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Settlement

- Well before any settlement conference/mediation advise your client about how it will be conducted and what will be expected of the client.
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- Provide the client with your recommendation and up to date information on costs ahead of any settlement conference/mediation and discuss your recommendation with the client.
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- Ensure you have instructions from all clients. Do not assume one party has authority to deal on behalf of another.
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- Be sensitive to the pressures on clients to settle at the end of a long or taxing mediation and the importance a getting fully informed consent to settle.
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- Keep a detailed file note of settlement negotiations and your client's instructions to settle and follow up with prompt written confirmation.
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- Where the client wants to settle for an amount you think is too low record the client's reasons for settling.
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- Where an offer is made and rejected against your advice confirm your advice and your client's instructions in writing.
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- Avoid drafting terms of settlement at late-night mediations. Mistakes are easily made by tired or hungry drafters. It is preferable to attend mediation with draft terms prepared so only the final details of the settlement need to be inserted.
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- Avoid resolving litigation on behalf of a client at mediation and leaving the mediation without documenting the terms of settlement. A client will not thank you for resolving a matter at mediation, only to have the other party change their mind overnight before terms of settlement are signed.
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- Consider if a release covers only the matters raised by the proceeding/dispute or is drafted too widely.
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- If a release is wider than the matters raised by the proceeding, advise your client accordingly and set out the potential ramifications. Where possible, negotiate a reduction in the scope of the release.
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- Consider any GST consequences of the settlement.

Judgement

- Once judgment is delivered by the Court or Tribunal, provide advice to your client about:
- the findings made by the Court or Tribunal.
 - any prospect of appeal, and the time frames for the issue of any appeal.
 - options available to the client to seek enforcement of the judgment or any costs order in their favour.
 - applications for costs.
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- Summons for taxation of costs (if necessary).
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- Calculate the correct time and diarise the date for filing any appeal.