

USE COUNSEL WISELY

Think about your approach to accepting work and briefing counsel.

LPLC receives claims that can be attributed to practitioners' over-reliance on, or poor briefing of, a barrister. In some instances, the practitioner acts outside their area of expertise and thinks they can just brief a barrister. In others, they fail to adopt a proactive approach to managing the barrister throughout a matter.

Acting outside expertise

It is high risk for practitioners to act outside their area of expertise, even when assisted by counsel who is an expert in the relevant area.

In one claim, a practitioner acted for a client in a property dispute with the client's ex-girlfriend despite the practitioner's lack of expertise in family law matters.

The client denied there was any de facto relationship and wanted the matter heard in VCAT. The practitioner briefed a family law barrister, who advised that the Family Court would likely find there was a de facto relationship and had jurisdiction to hear the matter.

The practitioner told the client he had initially disagreed with the barrister's advice regarding jurisdiction but now agreed that it was a Family Court matter. He said the client could object to jurisdiction but it would be a costly exercise that was unlikely to succeed. He also gave advice about the appropriate division of the property pool.

The client told the practitioner he remained unconvinced of the Family Court's jurisdiction but would not make an objection.

The matter subsequently settled at a conciliation conference with the barrister negotiating a property settlement that was less favourable than what the practitioner had assessed and previously advised the client. Only the barrister and the client attended the conference.

The confused client later brought a claim against the practitioner and the barrister alleging the Family Court did not have jurisdiction and the advice to settle was wrong. He pointed to the practitioner's earlier advice about property division, which was more generous for the client, as supporting his allegation that the barrister's approach to negotiating the split of assets was incorrect.

The practitioner should not have given advice to the client on jurisdiction or division of the property pool as they were matters outside his expertise.

It is poor risk management to take on matters you have little or no expertise or knowledge of, expecting that you can just brief the barrister to manage it. Without the right expertise you will not know when or what to instruct the barrister to do or advise on.

Clients are entitled to expect the solicitor they retain knows the law relevant to their matter. Have a policy on what areas of law you will work in and don't stray outside those areas.

Other risk issues

Practitioners should always ensure counsel is competent to accept the brief and consult their professional network and barristers' clerks if uncertain.

After the barrister is selected and briefed, maintain a proactive approach to remain in control of the matter. Regularly review the progress of files and if the barrister is sitting on a brief, find out what further information is required and provide it promptly. Do not accept excuses for delay, have an office policy about retrieving briefs from non-performing barristers and set clear time limits.

Practitioners need to communicate effectively with counsel so all relevant issues are canvassed and deadlines met.

Barristers frequently comment on not being fully briefed, with instructions that are half-baked and poorly expressed. Consult the barrister if you are unsure about instructions or what a comprehensive and complete brief should contain.

Practitioners ignoring or overlooking barristers' advice has resulted in claims, so read and properly consider any advice as soon as possible after receiving it. ■

This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.



TIPS

- Do not act outside your area of expertise, even when assisted by a barrister who is an expert in the area.
- Ensure the barrister is competent to accept the brief.
- Brief the barrister fully with comprehensive instructions.
- Do not accept delays from the barrister and retrieve briefs if necessary.
- Review advice and if you think it is incorrect, question the barrister.