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COMMERCIAL LITIGATION
STAY ALERT

AN LPLC PRACTICE RISK GUIDE

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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CONTENTS

1. INTRODUCTION

This guide provides examples of how things can go wrong in commercial litigation and how practitioners can minimise the risk of a claim. Managing the client's expectations during litigation is the key to containing risks in this area.

The relationship between litigation practitioners and their clients can often be difficult from the start. To many clients the court system, which includes a number of tribunals, is unfamiliar and confusing. A litigant's discontent is likely to be exacerbated when faced with delays, unexpected or unexplained costs, and unfavourable results. Not surprisingly, litigation is a significant area of claims each year.

Commercial litigation claims generally account for approximately 15 per cent of the number of claims each policy year, and between approximately 10 and 15 per cent of the cost of claims each policy year in dollar terms that amounts to approximately $3million to $5million.

These claims concern commercial litigation in its broad sense – contractual disputes, debt recovery, employment claims, building disputes and insurance litigation.

As litigation is an unfamiliar environment for many litigants, practitioners need to manage the client and the retainer as well as the law.

Unfortunately, the failure to listen, ask relevant questions and explain matters to clients in a way they 'hear' and understand underpins many litigation claims.

Poor communication results in:

- the client's expectations not being managed about what can be achieved in the litigation and how much it will cost
- the legal issues not being managed because insufficient information about the facts of the matter is obtained
- lack of appropriate advice.

This is not a comprehensive text on how to run commercial litigation, but rather a guide on how to avoid the hotspots where mistakes happen. The next chapter deals with managing difficult clients and then the following 10 chapters deal with a category of mistakes. Claims examples are given along with commentary on why they occur, as well as recommendations for what to do to avoid them. There are three chapters at the end addressing the risk areas of the *Civil Procedure Act 2010* (Vic), proportionate liability and GST and the last chapter contains a detailed checklist.

2. MANAGING DIFFICULT CLIENTS

There are some clients, particularly in the litigation area, who are difficult to deal with and for whom careful management and clear communication is essential.

Some features that should alert a litigator that a client may be high risk and require careful attention include a client who:

- has unrealistic expectations about the outcome
- has already fallen out with previous practitioners
- has a deadline looming which will be difficult to meet
- becomes hard to contact, reluctant or unable to pay disbursements and gives inadequate instructions

- has a case that is dubious or even hopeless
- wants you to approve their misconduct
- is impecunious
- does not pay bills
- does not appear to listen or understand:
    - warnings about costs consequences
    - your advice about prospects of success
    - recommendations about settlement
    - their overarching obligations.

OUR RECOMMENDATIONS

- ❑ Before taking on any new matter practitioners should ask themselves whether this is the right client, right matter and right time. This is particularly important in litigation given the often tight timeframes and the duties you have to the court and any clients.
- ❑ Communicate with the client at the very beginning about:
    - who the client(s) is/are
    - who will give you instructions and their authority
    - the facts of the matter
    - what the client wants out of the process
    - what you can realistically provide
    - how the litigation process works
    - how much it will cost clearly, honestly and accurately (most important)
    - if there is more than one client, whether there is a conflict or whether one is likely to arise.
- ❑ Maintain regular communication with the client throughout the matter and in particular:
    - focus on managing the client's expectations and how best to communicate key issues
    - keep the client informed about the costs incurred
    - supply information to enable the client to make informed decisions.
- ❑ Maintain civil and respectful communications with the court and other parties, and in particular:
    - respond to all offers of settlement or requests for negotiations
    - advise the court and other parties promptly when you know of issues that may cause delay such as unavailability of counsel.
- ❑ Be organised and efficient in the management of your files including:
    - send a letter that accurately describes the scope of the retainer, and ensure you send updated letters if and when the scope of the retainer changes
    - send an accurate cost disclosure, and update your cost disclosure as necessary
    - keep detailed file notes

- confirm advice in writing
- keep pleadings separately from correspondence.
- Comply with court timetables and directions.

- ❑ Brief competent counsel with full briefs.
- ❑ Communicate effectively with counsel so all relevant issues are canvassed and deadlines are met.
- ❑ Maintain objectivity and focus on the issues, not the personalities.
- ❑ Regularly review your strategy and advice as evidence is obtained and pleadings are amended.
- ❑ Be conscious of your obligations to the court to facilitate the just, efficient, timely and cost-effective resolution of the real issues in the dispute when formulating your pleadings and preparing for trial, including your obligations and your client's obligations under the *Civil Procedure Act 2010* (Vic).
- ❑ Plead and argue only those points that have a proper basis.
- ❑ Act decisively when an issue arises, including non-payment of your legal costs and disbursements, that means you should cease acting.

3. FAILURE TO ISSUE PROCEEDINGS

This category of claims covers all instances where the client has lost a right or cause of action. These often result from a lack of legal knowledge, such as specific statutory limitation periods under building or workplace relations legislation, or more unusual areas of law like aviation or maritime legislation. Others are more fundamental errors such as failing to recognise a defence or failing to document advice given to the client about the relevant limitation periods.

Some claims arise due to a simple oversight in considering and diarising limitation periods and deadlines.

CLAIMS EXAMPLES

Missed time limit through distraction with settlement negotiations

In early 2004 the practitioner took instructions from a client for a claim against a stockbroker. The client alleged the stockbroker had been negligent and invested funds without the client's consent. Settlement negotiations extended over many years due in part to delays caused by the practitioner. In late 2010 the client instructed the practitioner to lodge a dispute application with the Financial Services Ombudsman (FSO) (now the Australian Financial Complaints Authority (AFCA)) which was rejected as it was out of time. Applications to the FSO/AFCA must be lodged within six years of the applicant first becoming aware they have suffered a loss.

Failing to advise on limitation period

The practitioner acted for a client in an unfair dismissal claim under the *Fair Work Act 2009* (Cth). The practitioner advised the client generally about the claim against the employer but did not tell the client that the time limit within which proceedings could be issued was 60 days from dismissal. The client was unable to provide instructions for a number of months due to personal matters and the time to bring the application lapsed. An application to extend the time to bring the application two months out of time was luckily successful.

OUR RECOMMENDATIONS

- ❑ Think laterally about alternative rights of recovery under contract, statute and common law.
- ❑ Always check the legislation to ensure you know the limitation period, especially if you do not act in that area regularly.
- ❑ Refer to the LPLC limitation periods practice risk guide, Know your limits, for common limitation periods.
- ❑ Tell your client of the limitation period at the start of the retainer and where the retainer is terminated before the resolution of the client's dispute. Confirm the advice in writing.
- ❑ Set up systems for diarising and tracking deadlines and limitation periods. Actively monitor their effectiveness.
- ❑ Be careful about the method of lodging applications and proceedings when deadlines are near. It is better to take any necessary action well before the date any proceeding or application must be issued and served.

4. FAILURE TO CONSIDER OR INVESTIGATE A CAUSE OF ACTION

This category of claims involves the failure to understand or act on the client's cause of action and includes the following scenarios.

- Proceedings not properly considered or investigated before being issued, ill-founded or including the wrong party.
- Failing to include one type of claim among others such as a claim for interest or for loss of profits in a property damage case.
- Inadequately prepared pleadings.
- Proceedings brought in the wrong jurisdiction – often overlooking the Victorian Civil and Administrative Tribunal's (**VCAT**) review jurisdiction. By the time the mistake is discovered it is too late to issue in the correct court or the court chosen has unnecessary cost exposure.

Communicating with the client and investigating the matter thoroughly before proceedings are initiated is crucial given the obligations placed on both litigants and solicitors under the Civil Procedure Act.

CLAIMS EXAMPLES

Failure to consider cause of action

The client was threatened with dismissal by her employer. The employer arranged to meet with the client and her practitioner. Due to a misunderstanding neither the client nor the practitioner attended the meeting, resulting in the client's employment being terminated. The practitioner commenced proceedings seeking compensation for the client but failed to seek reinstatement of the client's employment. The client complained later that failing to seek reinstatement undermined the client's bargaining position on compensation. This could have been avoided if the claim had been properly explored with the client before the proceeding was issued.

Not properly investigating before issuing proceeding

The practitioner issued proceedings in the name of an owners corporation involving a dispute over common property. Under the *Owners Corporations Act 2006* (Vic) proceedings could not be issued in the name of the owners corporation unless authorised by a special resolution. The practitioner did not ask if the proceeding was authorised. The failure to obtain a special resolution was raised at mediation and the respondent subsequently issued a summary judgment application. To avoid the situation the practitioner could have issued the proceeding in the name of a lot owner rather than the owners corporation.

Grounds of defence not properly explored

The practitioner 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.

OUR RECOMMENDATIONS

- Adopt a forensic approach to taking instruction, in particular:
  - explore with your client what outcome they are seeking such as damages or some other remedy
  - thoroughly interview the client to ensure you understand the client's expectations, such as winning at all costs or settling and maintaining the relationship with the other party
  - assemble and critically consider the facts and key documents necessary to support the case before any proceeding is initiated.
- Prior to issuing proceedings:
  - if necessary, recommend to your client further investigation be undertaken and advise on the likely cost
  - provide a preliminary assessment of the merits of the case in writing including your appraisal of possible claims or likely defences
  - advise on the risks of litigation and cost consequences in writing
  - consider which court is appropriate and, where there is a choice, discuss the options and consequences with the client.

5. DELAY, STRIKE OUT AND DEFAULT JUDGMENT

Delay and failure to comply with court orders or litigation timetables continue to give rise to avoidable claims against litigation practitioners.

There are a number of reasons these claims occur including:

- an issue in the case is 'too hard' or the practitioner procrastinates
- practitioner error in recording a hearing date
- the practitioner is too busy or becomes side-tracked
- the client is non-responsive or difficult
- the practitioner ignores or overlooks counsel's advice
- counsel sits on the brief.

CLAIMS EXAMPLES

Miscalculation of period to file and serve

The practitioner acted for a defendant company in a Supreme Court matter and the proceeding was settled prior to the final hearing. After a breach of the terms of settlement by the defendant, a statutory demand was served. Shortly after receiving a copy of the statutory demand from the client, the practitioner sent a letter to the creditor's practitioner, stating that an application would be made to set aside the demand. The practitioner miscalculated the date when the application to set aside the demand needed to be filed and served, resulting in the application being served outside the 21day period, and a presumption that the client company was insolvent.

The practitioner could have avoided this by diarising the deadline and by preparing, filing and serving the application as soon as possible, rather leaving it until later. The client ultimately complied with the terms of settlement and the statutory demand was withdrawn.

Diary error results in judgment being entered

The practitioner was instructed by the client to object to a winding up application on behalf of the client. A hearing date had been set early in the New Year. The practitioner and client met just prior to the end of year to discuss the conduct of the matter and shortly after this meeting the practitioner diarised the hearing date.

Approximately two months later the practitioner was notified by the client that the matter had been heard by the court and orders made to wind up the company. The practitioner checked his diary and discovered he had entered the wrong date in his diary.

The practitioner made a successful application to set aside the judgment on behalf of the client.

Shortly after this occurred the client retained new practitioners to act on its behalf and brought a claim against the original practitioner for costs and expenses incurred as a result of having to make an application to set aside the judgment.

As far as the client was concerned, the costs of setting aside the judgment would not have been incurred had the original practitioner correctly diarised the hearing date. The claim against the original practitioner was settled with a substantial payment to the client.

Delays by practitioner

The practitioner received instructions from a company to defend a claim for payment of money owing pursuant to a sale of business agreement. The trial was originally set down for hearing in February but was adjourned for three months due to a delay in the practitioner finalising witness statements. The delay was in part due to the practitioner overlooking an email from the client setting out amendments to its witness statement.

The practitioner also delayed briefing counsel to appear at the hearing of the matter because the practitioner thought the matter would settle prior to hearing.

The barrister was contacted the day prior to the hearing. At the hearing the barrister sought a further adjournment due to the delay in finalising the witness statements but the request was refused and judgment was entered for the plaintiff. An application was made to set aside the judgment and at that stage the client was referred elsewhere.

OUR RECOMMENDATIONS

- ❑ 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.
- ❑ Explain clearly to your client reasons for delay and the consequences. Where the client is causing the delay set out in writing the ramifications of continued delay and any relevant time limits.
- ❑ Consider terminating the retainer where your client will not give you instructions to proceed and does not heed your warnings. If you do terminate the retainer, you need to do so for just cause and on reasonable notice[1]. Do this in writing, giving details of any time limits.
- ❑ Do not allow briefs to languish with counsel.
    - 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.
- ❑ Review files on a regular basis.

6. WRONG PARTIES

These claims arise where there is a failure to identify and serve the correct parties.

They tend to arise where:

- proceedings are complicated
- proceedings are based on events that occurred some time ago
- there is a large volume of paper evidence or
- there is scant evidence.

These issues result in the correct identity of parties not being detected until a limitation period has already expired. One common mistake occurs when the proceeding is issued in the name of the client personally

[1] Rule 13.1.3 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

but the cause of action belongs to the client's company. Thorough and careful instruction-taking will usually enable you to structure the proceeding correctly.

Consideration must be given to the correct joinder of concurrent wrongdoers as defendants to apportionable claims either under Part IVAA of the *Wrongs Act 1958* (Vic) or applicable Commonwealth legislation (referred to in further detail below)

CLAIMS EXAMPLES

Failure to sue director personally

The practitioner acted for a purchaser who obtained a building inspection report before buying a property. The report failed to disclose several major defects. Proceedings were issued against the company that provided the building inspection report, however the defendant company went into liquidation not long before trial. The director of the company was not named as a defendant and by the time the company had gone into liquidation the limitation period had expired so any claim against the director personally was out of time.

Failure to issue in name of company

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.

Failure to sue a concurrent wrong doer

The practitioner acted for a landowner whose property was destroyed in a fire which spread from an adjoining property. There was some difficulty in identifying all those responsible for the fire.

Shortly before the limitation period expired counsel was briefed to draw the pleading. Three defendants were named in the statement of claim. A fourth person was identified as a potential defendant but on counsel's advice was not joined.

At the mediation the three named defendants adopted the position that the fourth person was primarily liable, and accordingly were unwilling to make any substantial contribution to settlement.

OUR RECOMMENDATIONS

- ❑ Read the available documents carefully to ensure you issue the proceeding in the name of the correct plaintiff and against all correct defendants. Responsibility does not rest solely with counsel settling the statement of claim.
- ❑ If the evidence or the causes of action evolve as the matter progresses, keep revisiting the question of the appropriate defendants and the relevant limitation period.
- ❑ 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.
  See page 22 for additional information on proportionate liability.

7. DISSATISFIED LITIGANTS

These claims are brought by litigants who did not get the result they wanted at trial, on an interlocutory application or at mediation.

They usually complain that:

- the case was not properly prepared
- the evidence was not properly presented or
- they should have been advised to accept an earlier settlement offer.

Nearly all claims involve a failure to properly manage the client's expectations as to likely outcomes and the cost of achieving those outcomes.

Some of these claims are opportunistic and without merit. Many are subject to an advocates' immunity defence as articulated in *Giannarelli v Wraith* (1988) 165 CLR 543, *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 and more recently considered by the High Court in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.

CLAIMS EXAMPLES

Not the right way

The practitioner acted for a client in a dispute with a neighbour about the use of a carriageway easement. The client complained that the neighbour obstructed the carriageway by placing pots and leaving rubbish bins on the easement. While the neighbour denied the allegations, the client had photographic evidence.

The client had a choice between firstly trying to resolve the matter at mediation or issuing a proceeding and was warned of the costs of taking court action. On advice from counsel, the client instructed the practitioner to proceed with court action.

The practitioner sought an interlocutory injunction. The neighbour filed a defence and the court determined that an injunction was not appropriate and ordered the costs of the application against the client. The matter subsequently settled at a court ordered mediation on a walk away basis but with the client to pay the costs of the defendant relating to the interlocutory injunction.

The plaintiff was unhappy with the outcome and complained to the practitioner that the client did not understand what an interlocutory injunction was and did not understand why the practitioner had not sought damages. The client also believed the court documents were poorly drafted.

Client blinded by principle

The practitioner took instructions from a client in an emotionally charged partnership dispute. The client's insistence on fighting his partner 'as a matter of principle' persisted throughout the interlocutory process and despite the practitioner's warnings about costs. Two days into the trial, the Judge foreshadowed doubt about some of the client's evidence and shortly after, the client was persuaded to settle the case. Only at this late stage, faced with overwhelming costs risks and an apparently unreceptive Judge, was the client prepared to let go of the 'principle' driving the litigation.

The client blamed the result on the practitioner in not warning the client about the risks associated with the client's evidence. In fact, the client had filtered out the unpalatable aspects of the practitioner's advice that did not suit the client's position. The defence to the claim brought against the practitioner by the client would have been assisted by better written warnings to the client about the risks of proceeding.

Missed settlement opportunity

The practitioner acted for an employer in relation to three unfair dismissal claims. The employer was ordered to reinstate the employees and pay back-pay. The employees sought costs on the basis the employer unreasonably refused to settle the claims. The employer complained it had not been fully advised by the practitioner on the employees' prospects of success or the implications of not accepting earlier settlement offers.

OUR RECOMMENDATIONS

- ❑ Warn your client about the specific risks of litigation.
- ❑ Advise your client in writing of the cost consequences of winning or losing.
- ❑ Advise your client about the progress of the proceeding and if necessary, make settlement recommendations, including during a trial.
- ❑ Confirm your advice and your client's instructions in writing, particularly where an offer is made and rejected against your advice.
- ❑ If you require funds in trust before preparing for trial, ensure you receive them well in advance.
- ❑ Ensure the client understands the consequences of not paying funds when required, including that you may cease acting. Give the client sufficient written notice if you intend to terminate the retainer, and ensure you have reasonable grounds for doing so, particularly where a trial date is looming.

8. REVISITED SETTLEMENTS

In these types of claims the client later regrets settlement and seeks to blame the practitioner.

Typically, there is poor communication with the client and a failure by the practitioner to manage the client's expectations. The client often has an unrealistic expectation of the claim's worth and feels pressured into settlement, usually at mediation, without fully understanding or engaging in the settlement process.

Communicating with clients who are often traumatised by the litigation process requires great skill so the client will 'hear' as well as understand.

CLAIMS EXAMPLES

Getting down to business

A practitioner acted for a client in a dispute about the alleged sale of a half share in a business to a third party.

A proceeding was commenced by the third party, who sought damages. The proceeding included a claim against the client's wife that two payments had been made to her in error and should be refunded.

The practitioner sought advice from counsel and provided that advice to the client (the husband). Counsel provided some comments about whether the wife should be removed as a party but believed it was preferable for her to remain. The practitioner did not give counsel's advice to the wife.

A settlement was negotiated and terms of settlement were entered into and signed by the husband and wife in the presence of the practitioner.

The husband and wife failed to pay and the plaintiff obtained summary judgment in the County Court.

The wife brought a claim against the practitioner on the basis that he was acting for her but failed to properly advise her. The wife also alleged that had she received counsel's advice she would not have entered into the terms of settlement.

At no time did the practitioner turn his mind to who he was acting for and any potential conflict of interest between the husband and wife.

The claim was settled with a substantial payment to the wife.

Pressure to settle

The client in his capacity as attorney for a company, instructed the practitioner to act for the company in a debt recovery matter. The practitioner issued proceedings on behalf of the company. Prior to the final hearing the matter was referred to mediation.

Just prior to the mediation, the practitioner notified the client that he would cease acting if his outstanding legal costs were not paid. Notwithstanding that the costs were not paid, the practitioner appeared at the mediation on behalf of the client, where the matter settled.

The client later alleged the practitioner had a conflict and had pressured the client to settle the matter at the mediation given that the terms of settlement would result in a payment to the client which could be used to pay the practitioner's outstanding accounts.

Client changing instructions

The client purchased an apartment off-the-plan but refused to settle. The vendor issued proceedings to enforce the contract. The matter was settled and the letter evidencing the terms of settlement signed by the practitioners for the parties referred to the parties entering into a formal deed of settlement.

The client refused to sign the formal deed of settlement saying his claim was now worth more. The client alleged he was induced to agree to settle by misrepresentations about the value of the property made at the mediation.

OUR RECOMMENDATIONS

- ❑ Manage the client's expectations about the value of their case throughout the matter:
    - when you give your client preliminary advice about the value of the claim inform them this may change as evidence is obtained
    - then update your client on the value of the claim promptly as new evidence is obtained
    - advice about the value of a claim includes advice about risks associated with adverse costs orders.
- ❑ Well before any settlement conference/mediation advise your client about how it will be conducted and what will be expected of the client.
- ❑ Provide the client with your recommendation ahead of any settlement conference/mediation and discuss your recommendation with the client.
- ❑ When acting for more than one client consider any potential conflict and the need to recommend that independent legal advice be sought.
- ❑ Where an offer is made and rejected either on or against your advice, confirm the instructions and the advice in writing.

- ❑ Where the client wants to settle for an amount you think is too low make a file note of your advice to the client including the reasons the client has given you for settling and confirm your instructions in writing.
- ❑ If you intend briefing counsel to attend mediation, it is preferable you or someone from your office who knows the client and the matter accompanies them. If the client cannot afford for you to attend, the client should meet counsel to discuss the case and what will happen at the mediation before it starts. It is preferable that occur at least several days before, and not on the day of the mediation.
- ❑ Be sensitive to the pressures on clients to settle at the end of a long or taxing mediation and the importance of getting fully informed consent to settle.
- ❑ 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.
- ❑ 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.

9. SETTLEMENT WITHOUT AUTHORITY

Claims in this category often arise because of a lack of communication, a lack of documentary evidence or both. They usually involve a failure to obtain:

- instructions from all clients, for example, an insurer as well as an insured when acting for the insurer
- authority when acting for more than one client such as a husband and wife or
- full instructions of the terms on which the client is prepared to settle.

CLAIMS EXAMPLES

Insurer's consent not obtained

The practitioner acted for an insurance company in a building dispute and the insured building company was a defendant. The practitioner joined a third party to the proceeding and the insurance company was not notified. The matter settled but the insurance company refused to indemnify the building company for the costs of joining the third party.

No instructions to settle

A practitioner acted for a landlord in a retail tenancy dispute. The landlord refused to consent to a transfer of lease due to existing breaches of the lease by the current tenant and on the basis that the new tenant was unsatisfactory. The landlord was prepared to enter into a new lease with the tenant on a higher rent than the existing lease.

The tenant issued a proceeding in VCAT seeking an order that the landlord consent to the transfer of lease. The matter proceeded to mediation and the practitioner attended. Terms of settlement were agreed and were signed by the practitioner rather than being signed by the landlord, more for convenience than any other reason. The terms of settlement provided for a new rent of $220,000 inclusive of GST.

The practitioner subsequently prepared the new lease and sent it to the landlord client. In response, the client stated the terms of settlement were incorrect as the rent amount should have been $220,000 plus GST.

The client brought a claim against the practitioner alleging the practitioner had settled without instructions for a new rent amount of $220,000 GST inclusive. The negligence claim against the practitioner was settled with a payment to the landlord.

OUR RECOMMENDATIONS

- ❑ Ensure you have instructions from all clients. Do not assume one party has authority to deal on behalf of another.
- ❑ Explain the basis of the settlement to your client clearly before seeking instructions to settle.
- ❑ Keep a detailed file note of your client's instructions to settle and follow up with prompt written confirmation.
- ❑ Where possible, obtain written confirmation of settlement instructions from the client.

10. INAPPROPRIATE TERMS OF SETTLEMENT

This category of claims includes a settlement that does not accurately reflect the client's authority and a release which is inadequate or drafted too widely.

CLAIM EXAMPLES:

Terms of settlement not approved

A claim was made by an owners corporation on its insurance policy for defective building works. The practitioner acted for the insurer of the owners corporation. The matter was settled by the insurance company. The practitioner acting for the insurance company prepared minutes of consent orders. The orders referred to a release of the builder in relation to 'all fire safety measures'.

Subsequent to the settlement, the owners corporation wished to take further action against the builder. This action related to additional defects but was met with a defence by the builder that the terms of settlement were not limited to the fire safety measures – the subject of the proceeding – but covered all fire and safety measures.

The practitioner acting for the owners corporation alleged the orders were agreed by the practitioner for the insurance company without reference to the owners corporation. It was also alleged the orders should have specifically provided that the release was only in relation to the defects raised in the proceeding.

Indemnity drafted too widely

A builder brought a claim against an electricity contractor and supplier for damages suffered as a result of the interruption to the electricity supply at a building site. The matter settled and a deed of release was entered into by the parties.

The deed of release, which contained an indemnity provided by the builder, was drafted very widely so it applied to any third party claim against the electricity contractor and supplier. The builder's practitioners did not appreciate the potential effect of the clause.

Following settlement, the developer of the building brought a claim against the electricity supplier. In its defence the electricity supplier sought to rely on the indemnity given by the builder.

OUR RECOMMENDATIONS

- ❑ Consider if a release covers only the matters raised by the proceeding/dispute or is drafted too widely.
- ❑ 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.
- ❑ Document your client's instructions and your advice relating to settlement negotiations.
- ❑ Consider any GST consequences of the settlement. See page Section 15 for further information on GST in the context of commercial litigation.

11. COSTS ORDERS AND DISPUTES

Adverse costs consequences as a result of the practitioner's action or inaction is a common trigger for claims. The client may seek to recoup the costs from the practitioner or applications for personal costs may be made against the practitioner relating to:

- wasted costs for interlocutory applications for such things as repeated amendments to pleadings, flawed or inadequate discovery or privilege incorrectly claimed
- fraud improperly alleged in pleadings, that is, without clear evidence and a proper basis
- parties unnecessarily joined
- particular issues or claims unnecessarily pursued in court, wasting the court and other parties' time.

Generally, costs orders may be made against practitioners where they have caused costs to be incurred by a failure to act with reasonable competence and expedition. See page 29 for further information on the *Civil Procedure Act*. While LPLC has always handled claims against practitioners for payment of other parties' costs, in recent years we have seen an increase in the number of claims due in part to the introduction of the *Civil Procedure Act*.

CLAIMS EXAMPLES

Client seeks to recoup costs for struck out proceeding

The practitioner acted for an owner of a hire car business. A vehicle was stolen and the insurer of the vehicle denied the claim. The practitioner was instructed to pursue the claim against the insurer and to defend a claim by a finance company seeking to recover the balance owing under the vehicle finance agreement. The practitioner issued the proceeding in the wrong court and the proceeding was eventually struck out. The client was ordered to pay the insurer's costs and sought to recoup the costs from the practitioner.

Under-prepared for trial and adjournment refused

The practitioner acted in a dispute about an alleged overpayment to a contractor undertaking certain earth works. Counsel was briefed but later informed the practitioner he was not available to appear at trial.

Due to a delay in the client providing money up front, the practitioner was only able to brief alternative counsel the week before the hearing. The newly briefed counsel sought an adjournment on the basis that the matter was hopelessly under-prepared, but the application was refused. The matter proceeded and the client lost the case, after which the services of the practitioner were terminated. A dispute with the practitioner ensued about the costs incurred by the client in seeking the adjournment.

Personal costs order sought by client

The practitioner acted for a company and was not aware at the time of commencing a proceeding that the defendant company was deregistered due to non-payment of fees owing to ASIC. When the error was discovered the practitioner applied to have the company reinstated, however that did not cure the defect of issuing the proceeding against a de-registered company. The client instructed a new practitioner to commence a new proceeding and obtain personal costs orders against the first practitioner.

Cost orders for fishing expeditions

The practitioner acted for a defendant who was being pursued 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 remaining third party, 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. It was really a fishing expedition as the defendant had no idea about the cause of the fire.

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.

Cost order for badly run application

The practitioner was retained by a husband and wife to help resolve a dispute about three caveats lodged on title, so settlement of the sale of their property could be affected. After much negotiation, the parties eventually agreed to pay the proceeds of sale into court pending resolution of the various disputes so that settlement of the property could occur.

Several months later the wife instructed the practitioner to apply to have her share of the proceeds released from court on the basis that she was not indebted to two of the caveators.

The practitioner prepared an application and an affidavit on behalf of the wife. The Associate Judge who heard the matter was scathing about the application for a number of reasons including that the wife's affidavit was very poorly drafted and there was no evidence that one of the caveators had been served.

The Associate Judge dismissed the application and ordered the wife pay the other parties' costs and that the practitioner's firm show cause as to why it should not be ordered to pay those costs. The costs were ultimately paid by LPLC in settlement of a claim by the wife against the firm.

OUR RECOMMENDATIONS

- ❑ Determine at the start of a retainer whether the client has a good cause of action. Regularly review your assessment during the course of the matter and advise the client.
- ❑ Interview witnesses extensively to ensure you know what they will say in the witness box. Consider how a witness' evidence is relevant and whether it is helpful.
- ❑ Ensure you have an evidentiary foundation for all claims made in the proceeding.
- ❑ Avoid delays. A court is more likely to make an adverse costs order against a practitioner when the delay is due to the conduct of the practitioner.

12. SUE FOR COSTS AND RECEIVE A COUNTERCLAIM

This category of claims has risen steadily in recent years. These claims occur when practitioners take steps to recover costs owed to them by a client and are met with allegations of negligence and/or misconduct in response.

The client's allegations are sometimes unfounded and come 'out of the blue'. In some cases they are designed to obtain a reduction in the amount of costs to be paid. In other cases the client is airing a legitimate complaint about treatment by the practitioner and objects to paying the bill.

In some situations the client has unrealistic expectations about the costs likely to be incurred and the likelihood of losing the case. In others the practitioner has not kept the client properly informed of the delays experienced in getting to court and the effect on the costs incurred.

Managing the client's expectations relating to costs throughout the matter is the key to avoiding these types of claims. This includes properly scoping the matter, estimating the likely range of costs at the outset and keeping the client informed as the costs are incurred during the matter.

Many practitioners bill on an interim basis in order to avoid clients experiencing unpleasant surprises about the costs incurred at a late stage in the litigation. Regular interim bills assist to manage the client's expectations about costs throughout the life of the matter and about costs consequences in the context of settlement offers.

CLAIMS EXAMPLE

Termination of retainer when costs not paid

The practitioner acted for a client in a claim against a financial advisor. A writ was issued primarily to avoid the limitation period expiring. The writ was not served.

The practitioner experienced some difficulty obtaining evidence from the client. The client was warned on a number of occasions of the need to provide evidence in support of the claim and that it was necessary to obtain an expert's report.

The practitioner sent the client monthly accounts which were initially paid. The client ceased paying the monthly accounts because they believed the practitioner had agreed to act on a no win no fee basis. At that point the practitioner ceased to act.

The client engaged another practitioner who settled the claim for $30,000.

The practitioner sued the former client for unpaid fees in excess of $70,000. The former client filed a defence and counterclaim alleging the practitioner had told him he had a good case and would recover $200,000 in damages.

The matter settled with the practitioner receiving payment of approximately 50 per cent of the outstanding costs.

Although there was no negligence proven, the practitioner could have avoided the claim by insisting on payment of the monthly accounts and communicating with the client about the costs throughout the matter.

OUR RECOMMENDATIONS

- ❑ Resist the urge to give an off-the-cuff estimate rage as clients will only remember the lower figure in the range.
- ❑ 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.
- ❑ Keep your client informed on an ongoing basis on key issues including:
    - costs, for example provide monthly accounts even where you have agreed to costs being payable at the end of the matter
    - the likely success of the case
    - any delays that occur and how they will affect the costs.
- ❑ 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.
- ❑ When advising your client regarding settlement, provide up to date information on costs.
- ❑ Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the cost involved.

The following three chapters deal in more detail with risk issues involving:

- Civil Procedure Act 2010
- Proportionate liability
- GST

13. CIVIL PRODECURE ACT 2010

SUMMARY

Practitioners have always owed a paramount duty to the court. The effect of the *Civil Procedure Act 2010* (Vic) is to codify those obligations. It came into operation on 1 January 2011 and was amended by the *Civil Procedure Amendment Act 2012*.

The following is a summary of practitioners' obligations pursuant to the Civil Procedure Act.

The Civil Procedure Act sets up a hierarchy of duties and obligations owed by practitioners.

- Duty to the court.
- Overarching obligations.
- Duty to the client.

The obligations set out in the Act apply to civil proceedings commenced after 1 January 2011.

The overarching purpose of the Act is the just, efficient, timely and cost-effective resolution of civil disputes. The courts are required to give effect to the overarching purpose of the Act when interpreting and exercising their powers and functions in the conduct of civil proceedings.

The overarching obligations apply to all parties, practitioners, insurers, funders and expert witnesses. They are to:

- act honestly at all times (section 17)
- only pursue claims and defences that have a proper basis, on the factual and legal material available at the time (section 18)
- only take steps reasonably believed to be necessary to resolve the dispute (section 19)
- co-operate with other parties (section 20)
- not mislead and deceive (section 21)
- use reasonable endeavours to resolve a dispute by agreement (section 22) or narrow issues (section 23)
- use reasonable endeavours to ensure costs are reasonable and proportionate to the complexity or importance of the issues and the amount in dispute (section 24)
- minimise delay (section 25)
- disclose 'critical documents' at the earliest reasonable time and on a continuous basis after becoming aware of their existence (section 26).

An overarching obligations certification is required by each party to a proceeding with the filing of the first substantive document in a civil proceeding (section 41).

If a practitioner is faced with instructions from a client that are inconsistent with the overarching obligations the practitioner cannot contravene, nor allow or cause the client to contravene the Act (sections 13 and 14).

The court has powers to award costs against practitioners personally for:

- contravening an overarching obligation (section 29)
- failing to comply with discovery obligations or engaging in conduct intended to delay, frustrate or avoid discovery of discoverable documents (section 56).

The court also has the power to order a practitioner to provide a memorandum relating to the costs already incurred, estimates of costs to the end of the proceeding and the estimated length of the trial. This memorandum may be required to be given to the court, the practitioner's own client or to the other parties in the matter. Practitioners may also be required to give estimates of costs the client is likely to incur if they lose.

The court has broad discretion to order costs in any way it deems appropriate and the power to make detailed orders relating to the preparation and use of expert reports including direction as to the number of expert reports and the appointment of a single joint expert or court appointed expert.

THE CPA IN OPERATION

LPLC has seen an increase in courts considering personal cost orders against practitioners for failure to comply with the Civil Procedure Act. Practitioners need to be mindful of their obligations under the Act throughout the conduct of a proceeding.

LPLC's policy of professional indemnity insurance provides cover for non-party cost orders unless the practitioner had an interest in the financial outcome of the proceeding or the practitioner engaged in conduct knowingly or recklessly in breach of duty to the court, including by having advanced a claim or defence found to have no real prospect of success (clause 15). A deterrent excess will be applied where an order for costs against an insured as a non-party to a proceeding is made (clause 5.4).

CASES RELATING TO THE CPA

The following cases are examples of the CPA in operation.

- *Actrol Parts Pty Ltd v Coppi (No 3)* [2015] VSC 758
- *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 6)* [2013] VSC 159
- *Norman South Pty Ltd & Anor v da Silva (No 2)* [2012] VSC 622
- *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337
- *Stewart v State of Victoria & Ors (No. 2)* [2015] VSC 373
- *Naumovski & Ors v Ugrinovski & Ors* [2015] VSC 49
- *Hambleton v State Trustees Ltd* [2016] VSC 215

14. PROPORTIONATE LIABILITY

Proportionate liability legislation exists at both State and Commonwealth level. It limits the liability of a defendant who is a concurrent wrongdoer to an amount reflecting the proportion of loss or damage the court considers just, having regard to the extent of the defendant's responsibility for the loss and damage. The court is obliged to apportion liability in a claim to which the regime applies.

It is important practitioners understand how this legislation operates and the differences between the State and Commonwealth statutes.

RELEVANT LEGISLATION

Victoria

Part IVAA of the *Wrongs Act 1958* applies to the following proceedings (section 24AF(1)):

- a claim for damages for economic loss or property damage arising from the failure to take reasonable care whether that claim is brought in tort, contract, pursuant to statute or otherwise
- a claim for damages for a contravention of section 18 of the Australian Consumer Law (Vic) – misleading or deceptive conduct.

The Victorian Act does not apply to claims arising out of a personal or bodily injury, or claims made pursuant to a number of statutes such as Part 3, 6 or 10 of the Transport Accident Act 1986 (Vic). For a complete list refer to section 24AG of the Wrongs Act.

The operation of Part IVAA of the Wrongs Act can be limited or excluded in relation to contracts involving approved projects under the Major Transport Projects Facilitation Act 2009 (Vic) (see section 260).

Commonwealth

Commonwealth proportionate liability regimes are included in:

- Subdivision GA, Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth)
- Division 2A of Part 7.10 of the *Corporations Act 2001* (Cth)
- Part 6A of the *Competition and Consumer Act 2010* (Cth) for economic loss or damage to property caused by conduct in contravention of the relevant consumer protection sections of the legislation.

KEY DIFFERENCES BETWEEN THE VICTORIAN AND COMMONWEALTH PROVISIONS

The key difference between the jurisdictions is the application to concurrent wrongdoers who are **not** parties to the litigation.

In Victoria, the court may only apportion responsibility between defendants to the proceeding, which includes third and subsequent parties. The court cannot have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding, unless the concurrent wrongdoer is dead or wound up. In essence, the responsibility rests with the **practitioners acting for defendants** who seek to rely on the proportionate liability regime in their defence to ensure all responsible parties have been joined to the proceeding for the purposes of apportionment.

Under the Commonwealth provisions, the court is empowered but not obliged to apportion responsibility between defendants (which includes third and subsequent parties) having regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding. Therefore, responsibility lies with the **plaintiff's practitioner** to ensure all relevant parties are before the court. This puts the onus on the existing defendants to an apportionable claim to notify the plaintiff of any information as to the identity of other concurrent wrong doers. Failure to do so may result in cost orders on an indemnity basis against the relevant defendants.

The Commonwealth provisions also provide for the plaintiff to bring a second proceeding in respect of the same loss to recover any proportion of loss not recovered from the first proceeding by reason of the non-joinder of concurrent wrongdoers.

RISKS FOR PRACTITIONERS

Failing to join a defendant under the proportionate liability regime poses risks for practitioners in the conduct of multi-party litigation. Whether the risk lies with the plaintiff's practitioner or the defendant's practitioner depends on whether the litigation is governed by the Commonwealth or Victorian proportionate liability legislation. Accordingly, litigators need to be familiar with and understand regimes and the relevant differences between the Victorian and Commonwealth legislation governing proportionate liability.

15. GST AND COMMERCIAL LITIGATION

On 20 June 2001, the Australian Taxation Office (**ATO**) released a ruling explaining how payment made in compliance with a court order or out-of-court settlement should be treated for the purposes of *A New Tax System (Good and Services Tax) Act 1999* (**the GST Act**): GSTR 2001/4 *Goods and Services Tax: GST consequences of court orders and out of court settlements*. The ruling was amended by Addendum 2001/4A in 2008.

The ruling provides that the consequences of payments made and things done pursuant to court orders and out-of-court settlements are as follows.

NO GST CONSEQUENCES

There are **no GST consequences** in the following situations if the payment or undertaking, made or given, is stand alone:

- a payment of damages (see examples below)
- a payment of party/party costs
- a payment to a plaintiff/claimant by an insurer through and/or on behalf of an insured/defendant or
- an undertaking to discontinue proceedings ('discontinuance supply') as part of a settlement.

There are **GST consequences** if:

- the dispute relates to an earlier supply that was taxable, in which case the order or settlement will have GST consequences relating to that earlier supply
- the order or settlement requires the making of a current supply, in which case the current supply will attract GST if it meets the requirements for a taxable supply.

Example - Goods supplied

Company A sells goods to Company B for $1,000 plus GST. Company B does not pay and Company A sues Company B. Judgment or settlement is effected for the total of the claim – the claim should be on a GST inclusive basis. Payment of $1,100 is made and the plaintiff must pay or account for GST of $100 to the ATO unless it has already done so on the original supply.

Note that costs paid by the defendant to the plaintiff in this example will not have GST consequences.

Example - Use of copyright

A plaintiff claims damages for breach of copyright. The proceeding is settled on terms that the defendant pays $50,000 for damages for past breaches and pays $50,000 to the plaintiff in return for an agreement to use the subject of the copyright.

GST is not payable on the damages but is payable on the payment for use of the copyright as a 'current supply' is made within the terms of settlement.

Insurance claims

Practitioners who deal in insurance claims should be aware that ATO ruling GSTR 2000/36 *Goods and Services Tax: insurance settlements by making supplies of goods and services* was withdrawn by GSTR 2000/36W on 21 December 2006 and has been replaced by ruling GSTR 2006/10.

The 2006 ruling discusses the interaction between Division 11 and Division 78 of the GST Act where a payment of money or a supply is made by an insurer in the course of settling a claim under an insurance policy.

The ATO has also issued a determination that ex gratia payments by an insurer in response to a claim made under an insurance policy are payments made in settlement of a claim for the purposes of section 78-10 GST Act (see GSTD 2011/1).

16. LPLC COMMERCIAL LITIGATION CHECKLIST

This checklist will help you avoid many of the mistakes made by practitioners in commercial litigation matters. It is a guide only and is not comprehensive. A stand alone version can be found in the checklist section of our website.

WHO IS YOUR CLIENT

- ❑ Is your client an individual or a corporate entity?
- ❑ Where the client is a company or some type of conglomerate, identity 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.
- ❑ 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.

- ❑ 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?
- ❑ Consider which court or tribunal is appropriate. Where there is a choice, discuss the options and consequences with the client.
- ❑ Check the relevant legislation to ensure you know the limitation period.
- ❑ Tell the client in writing about the limitation period.
- ❑ Record the limitation period in a common diary system.
- ❑ Undertake necessary searches to determine whether any prospective defendant is an undischarged bankrupt or under administration.
- ❑ 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.
- ❑ Given the client written advice on:
  - the prospects of success
  - evidence required
  - likely defences raised
  - likely costs.
- ❑ 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.
- ❑ 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?
- ❑ 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.
- ❑ 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.
- ❑ If the plaintiff is a corporation or is ordinarily resident outside of Victoria, should your client consider making an application for security for costs?
- ❑ 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.
- ❑ 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

- ❑ Familarise 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
- ❑ 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.

- ❑ 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.
- ❑ 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.
- ❑ Keep your client informed of the procedural conduct of the proceeding, and in particular, dates that require the client's compliance.
- ❑ Consider whether it is appropriate to make a Calderbank offer or an Offer of Compromise.
- ❑ 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.
- ❑ 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.

- ❑ Keep court documents separate from correspondence.

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.
- ❑ 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.
- ❑ 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.
- ❑ 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.
- ❑ 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
    - Set time limits within which counsel must perform.

SETTLEMENT

- ❑ Well before any settlement conference/mediation advise your client about how it will be conducted and what will be expected of the client.
- ❑ 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.
- ❑ Ensure you have instructions from all clients. Do not assume one party has authority to deal on behalf of another.
- ❑ 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.
- ❑ Keep a detailed file note of settlement negotiations and your client's instructions to settle and follow up with prompt written confirmation.
- ❑ Where the client wants to settle for an amount you think is too low record the client's reasons for settling.

- ❑ Where an offer is made and rejected against your advice confirm your advice and your client's instructions in writing.
- ❑ 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.
- ❑ 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.
- ❑ Consider if a release covers only the matters raised by the proceeding/dispute or is drafted too widely.
- ❑ 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.
- ❑ 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.
- ❑ Summons for taxation of costs (if necessary).
- ❑ Calculate the correct time and diarise the date for filing any appeal.

LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE