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GOOD **COUNSEL**

PRACTICE RISK GUIDE FOR BARRISTERS

LPLC
LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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1. INTRODUCTION

This publication is a risk management resource for barristers in Victoria.

Historically the number of claims LPLC has seen made against barristers has been low. However, there are some steady trends over the years with litigation in commercial matters being the area attracting most claims. The most costly and common mistakes are generally about:

- failure to advise
- mistakes in settlement of litigation
- dissatisfied litigants.

Experienced barristers generally account for the more numerous and costly claims and notifications than newer barristers.

This Practice Risk Guide provides details of the types of mistakes made by barristers based on the professional indemnity claims made in Victoria since LPLC began insuring barristers in 2005, and provides recommendations on how to avoid those mistakes. The guide also provides links to risk management checklists and at the end a list of cases relevant to conflicts, and personal costs orders.

LPLC welcomes discussion with any Victorian barristers about the contents of this Practice Risk Guide. Contact can be directed to our Chief Risk Manager or to any of our Claims Solicitors.

2. YOUR BEST RISK MANAGEMENT

Manage expectations of clients and instructing solicitors

Many of the circumstances surrounding claims made against barristers are underlined by the mismatch of expectations between the client, instructing solicitor and the barrister. The best risk management advice is to consciously manage the expectations of both clients and instructing solicitors. This means asking questions about timeframes, workloads, knowledge, available evidence and expected outcomes. Then give clear advice and direction about what is needed and what outcomes are realistic.

Time management

As part of managing expectations, you need to be able to manage your time to meet the expectations you have set or agreed to. This means you should always act promptly to assess the brief when you first receive it and leave yourself sufficient time to complete a task properly. If a client or instructor pressures you to produce work in an unrealistically short timeframe, always request a reasonable period to carry out the task and be prepared to say no as soon as possible if you can't meet their expectations. Trying to get 'off risk' when there is no time left is bad risk management.

Be an objective and dispassionate adviser

While you can be passionate about representing your client, you need to be dispassionate about the legal analysis necessary to represent them well. That means looking objectively at the whole situation and specific facts and evidence and giving dispassionate advice. It also means behaving with courtesy and candour in your dealings with all parties and their representatives in each matter.

Documenting advice

There is no inherent duty to confirm in writing advice you give a client in conference, but in many cases it helps to clarify your thoughts and opinions and reinforces the advice for the client as they can revisit it at a later date. The details of oral advice are not always remembered later and recording it also assists you to remember later what you advised and helps to defend claims if they arise.

Make it a habit always to keep file notes of discussions with instructing solicitors and clients and confirm any advice you gave in writing. LPLC has created a very basic generic File Note MS word (.dotx) template for practitioners to download, adapt and use to create electronic file notes.

3. KEY MISTAKES LEADING TO CLAIMS

In this section we identify the key types of claims LPLC sees against barristers. This list is not ordered in terms of frequency, but in the sequence of the civil litigation process from which the vast majority of claims arise.

3.1 ACCEPTING THE BRIEF

In some claims, the mistake made by the barrister was in accepting the brief in the first place.
It was a mistake because:

- the brief was not within the barrister's area of expertise
- the barrister was too busy and did not have the time to invest in working on the brief
- the brief was ill-defined or contained insufficient information
- the brief was to act for friends/relatives of the barrister.

In many claims a combination of these factors was involved. The risk of a claim or dispute is much higher where the barrister accepts a direct access brief from the client[1].

Recommendations

- Be clear about what falls within and falls outside your expertise.
- When you receive a brief, read it thoroughly as soon as possible after receiving it. Don't let it languish. There is always the risk that the brief has been delivered to you just prior to the expiry of a limitation period!
- Respond to the solicitor promptly with any requests for further information.

1. As well as the increased risks of a claim or dispute, stringent rules apply to barristers who take on a direct access brief: see R. Annesley QC, Good Conduct Guide (2nd ed, 2019) ('Good Conduct Guide'), Chapter 7.

- Diarise to follow up the solicitor for more information.
- If you are acting for friends or family, treat those matters as you would any other. Do not deal with it last. Action it with the priority it deserves.
- If you are asked to accept a direct access brief, carefully consider whether it is permissible, appropriate and sensible to do so, or whether you should require an instructing solicitor.

3.2 ACTING WITHOUT INSTRUCTIONS/AUTHORITY

Claims can arise where the barrister fails to identify precisely who the client is, or to check that the representative of the client, with whom the barrister is dealing, is properly authorised to give instructions. This can happen particularly in the following situations:

- when advising multiple people in the one family
- when advising companies and trusts
- when representing owners' corporations.

Recommendations

- Check precisely who your client is. Particularly when meeting in conference and giving written advice, ensure that you have identified who is the client or an agent of the client, and who are attending in other capacities. If others attend the conference, identify their role and consider whether it is necessary to tell them that you are not giving them legal advice. These checks may protect you from others claiming to have relied upon your advice[2].
- On the day when you receive the brief, it may be worth carrying out (or recommending your instructor carry out) an online ASIC check as to the status of all relevant companies including any client company. Is each company currently registered? Are the directors, or some external administrator such as a liquidator, in control?
- Deliver your disclosure statement and costs agreement to your instructor or direct access client as early as possible because this clarifies and confirms the identity of your client(s).
- When dealing with an agent only — such as a brother, sister, son or daughter of your client, or a manager or executive of a company or other organisation — consider whether it may be prudent to check with your instructor that the instructions are those of the client.
- When representing an owners' corporation, always ensure that the solicitors, managers and/or representatives of the owners' corporation are properly authorised under the Owners Corporations Act 2006 (Vic) (or interstate equivalent).

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

3.3 ACTING IN A CONFLICT OF INTEREST OR DUTY

Multiple clients

Barristers sometimes find themselves acting for more than one party in a matter. This may not be a problem where the parties' interests are sufficiently alike. However, there are many instances where the clients' interests are not aligned or at some point become misaligned, and they require separate advice and representation. When acting for clients who have different interests, the aggrieved client commonly alleges that the barrister preferred the interests of the other client and breached the fiduciary duty owed to the aggrieved client.

Acting against former clients

An opposing party may apply for orders preventing a barrister from continuing to act, where it is alleged that the barrister acted for that party at another time and/or knows information that is confidential and relevant to the current proceeding.
See Appendix 2 for some cases involving conflicts of interest.

Recommendations

- If there is more than one client, consider at the start if the clients' interests are the same.
- Keep revisiting the question as the case progresses and more evidence is produced and the interests of each of your clients becomes clearer.
- If a former client alleges you have a conflict in continuing to act for a current client, familarise yourself with the case law on what constitutes confidential information[3].
- If you are unsure about whether the information you have constitutes confidential information, or you may be in breach of your ethical obligations, do not proceed until you have talked through the issue with an experienced practitioner. You are welcome to speak with one of LPLC's Claims Solicitors on (03)9672 3800. Also, where appropriate, you may be required to notify a member of the Victorian Bar Ethics Committee.

3.4 ERRORS CONCERNING IDENTIFICATION AND JOINDER OF PARTIES

In commercial disputes barristers are commonly sued where they draw pleadings against the wrong party or miss a proper party altogether.

Joining an unnecessary party can result in a personal costs order, particularly if the problem is not fixed quickly. Not joining a party, or the right party at the start, can result in a claim, particularly where the limitation period expires or judgment is obtained before the mistake is discovered.

3. Including the cases referred to in Appendix Two below.

Recommendations

When drawing pleadings:

- Check you have enough information in your brief to identify your client, the relief they might seek, and against whom
- Ask for more information promptly if the brief is lacking in detail
- Clarify whether the parties to be sued are individuals or corporations
- Go back to the basic rules of pleadings and think about the elements of the cause of action, who is entitled to relief and who is obliged to give that relief
- For civil property damage and economic loss claims, carefully check the law and procedures that apply to contribution claims and the defence of proportionate liability, including any limitation periods that may apply.[4]

3.5 FAILURE TO ADVISE OR CONSIDER THE PROSPECTS OF SUCCESS

Clients often complain after a matter is settled, or run and lost, that they were not advised about their prospects of success adequately — or at all. In hindsight, they may allege that had they received clear and complete advice about their chances, they would have settled earlier, and often for a better amount and certainly saved a lot of legal costs. Alternately, they may assert they would never have commenced proceedings in the first place had they been advised adequately.
The barrister contribute to this by:

- failing to fully distil the key facts and legal issues, which can result in overlooking or failing to investigate a viable cause of action
- pleading a case on the client's instructions, without testing those instructions against other evidence and assessing its merits and whether it has a proper basis[5]
- pursuing a flawed claim or a hopeless defence due to lack of objectivity or proper analysis
- giving inadequate advice about settlement offers
- misjudging the significance of potential evidence.

Barristers and solicitors often both report that they did tell the client about their poor prospects, but the client was determined to pursue the matter, often as a matter of principle. Commonly, when defending the claim the problem has been that there was no clear evidence that the advice had been given or was sufficiently robust.

4. *Wrongs Act 1958* (Vic), Parts IV and IVAA respectively, as well as any Commonwealth or interstate equivalents.
5. *Civil Procedure Act* 2010, s 18.

Recommendations

- Maintain your objectivity and don't get caught up in the client's or the instructing solicitor's emotions.
- Keep in mind, and continually review, the elements of the cause of action and what evidence is required to prove those elements.
- Manage the client's and your instructor's expectations throughout the matter. This includes talking to them about:
  - what outcome the client wants to achieve, and whether that outcome is realistic in terms of likelihood, costs and timing
  - what needs to be proven, what evidence you have and what evidence is required
  - the risks of a court not accepting evidence, particularly oral evidence
  - the opportunities for mediation and other forms of alternative dispute resolution before, during and after trial
  - the risks of appeal and the effect that may have upon timing, cost and outcome
  - as a barrister and an officer of the court, the limits of your obligation to comply with your client's instructions
  - the overarching obligations of the client, instructing solicitor and barrister under the *Civil Procedure Act 2010* (Vic). See Appendix 1 for more details on the overarching obligations.
- Consider whether to confirm your advice in writing, even where the client does not wish to pay for written advice.
- Keep well organised records of your communications with the client and your instructors, including any advice whether given in writing or in conference.
- Consider whether diagrams will assist you to communicate important points to your client, particularly where the facts and/or the law are complex.
- Continually re-assess the client's prospects of success, including timing and the potential for increased costs.
- Prepare the client for mediation by explaining how mediation works, what information will be disclosed and what the likely range of settlement should be.
- Always keep in mind the need to balance each possible outcome against the legal costs that the client may incur in achieving that outcome. While your instructors have the primary obligation to advise the client on the costs of litigation, it is prudent for you to monitor whether the client has realistic expectations regarding the possible outcome of litigation taking into account legal costs.[6]

6. In particular, the overarching obligation of proportionality: *Civil Procedure Act* 2010 (Vic), s 24.

3.6 PROBLEMS WITH PLEADINGS

Drafting deficiencies usually occur in statements of claim rather than defences, and occur because the barrister has:

- failed to properly plead all of the elements of a causes of action
- inappropriately included argument and evidence.

While pleading deficiencies can usually be overcome with an application for amendment, sometimes, after several attempts, the claim is still not articulated properly. The resulting costs exposure for the client may become a personal costs order for the barrister and/or liability to the client in negligence.

The reasons for these pleading issues are often for the same reasons articulated above, namely:

- the client and/or the solicitor has not given the barrister sufficient information to plead the case properly
- the barrister has not critically analysed the client's position
- the barrister is attempting to bring a claim on the client's instructions without devoting the time required to consider that claim in sufficient depth.

In some cases, we see pleadings involving allegations of fraud or dishonesty which are unsubstantiated at the trial. The barrister and the solicitor are both then criticised by the court for pleading serious allegations without evidentiary proof.

Causes of action which are dropped from pleadings at the last minute, or for which there is no evidence elicited at court, have attracted applications for personal cost orders against both the barrister and the solicitor.

Recommendations

- Check you have enough information in your brief to identify your client and what remedy they seek.
- Ask for more information promptly if the brief is lacking in detail.
- Go back to the basic rules of pleadings and think about the elements of the cause of action, who is entitled to relief and who is obliged to give that relief.
- Be objective when assessing a cause of action and the available evidence.
- Prepare a chronology. Chronologies are a key device in understanding how the facts of the case fit together, and in testing the truth of your case.
- Continually reassess the evidence and pleadings as the matter progresses.
- When pleading novel causes of action, give your instructing solicitor and client clear warnings both orally and in writing about the risks and the likelihood of the initial decision being appealed.
- Be particularly cautious when pleading fraud or dishonesty.

3.7 DELAY

The costliest delay mistake is not preparing a claim, whether by way of a statement of claim, a notice of contribution or otherwise, before the limitation period expires.

Other delays that can be costly include delay in attending to court orders, in giving timely ongoing advice to the client, and in responding to inquiries and requests from instructors and clients.

Recommendations

- Always review the brief and check for any pending expiry of a statutory or contractual limitation period.
- Assess how much time will it take you to prepare the claim, including meeting with witnesses, seeking further instructions and obtaining necessary documents, and how much time you have before the limitation period expires. To stop time running can you issue a generally indorsed writ or other form of originating motion?
- For dormant briefs, consider whether to provide your instructors with a brief written advice on the likely date when the applicable limitation period(s) will expire. Alternatively, where appropriate, consider advising them that you have not been briefed to advise on that issue, or have insufficient instructions to do so, and that the instructors should consider and advise the client as soon as possible as to the likely expiry of such limitation period(s). Be particularly mindful of this issue where the client has briefed you directly.
- Diarise all limitation period expiry dates and time frames by which the work must be completed.
- Have a mindset that paperwork is important and must be time managed as much as court work.
- Be honest with yourself about whether you have the time to complete a task in a reasonable time frame. Return the brief if you do not have sufficient time.
- If you require further information from your instructing solicitor or the client, ask for it promptly. If the request is made orally, confirm in writing.
- Diarise to chase up any requests for information. Do not just rely on the solicitor or client coming back to you.
- For longer matters, keep your instructing solicitor informed on your progress.
- For contribution claims under the Wrongs Act 1958 (Vic), remember that the limitation period can be quite short.[7]
- For claims where a defendant raises the defence of proportionate liability and joins additional defendants (concurrent wrongdoers) for that purpose[8], remember that the plaintiff remains subject to the usual limitation periods in pursuing a claim against those additional defendants.[9]

7. s 24(4).
8. as required under Victorian proportionate liability law: *Wrongs Act* 1958 (Vic), s 24AI(3).
9. *Adams v Clark Homes Pty Ltd* [2015] VCAT 1658 per Jenkins J at [88]. The issue is yet to be considered by a superior court.

3.8 OTHER PROBLEMS IN THE CONDUCT OF LITIGATION

Duties to the client and to the court

All barristers know that their overriding duty is to the court, even if that means acting contrary to the client's instructions. The duty is personal and non-delegable. A barrister cannot seek to hide behind the robes of senior or junior counsel.[10]

A barrister will be held to account not only where they knowingly mislead the court, but when the misleading conduct is accidental.[11] Barristers and instructing solicitors have been ordered personally to indemnify others for the costs of trial, where they have been held to have misled the court by failing to reveal the existence of a third version of an expert report, thereby causing a mistrial.[12]

A barrister owes a duty to their client; not to their instructing solicitor,[13] nor to another barrister briefed by the same client.[14]

Where a barrister considers that the client may have a claim against their instructing solicitors, then the barrister must advise the instructing solicitors of that opinion and, if the solicitors do not agree to advise the client of that opinion, must seek to advise the client directly in the solicitors' presence.[15]

Breach of undertakings

A barrister can be held personally liable for breach of an undertaking given to the court, to another lawyer, or to a third party.[16] Undertakings are usually enforced strictly.

Courts may order the barrister to compensate a person who suffers loss because of the breach. Also, an aggrieved person may have a civil cause of action against the barrister in contract, tort or under statute for misleading and deceptive conduct.

Where a party to litigation has been compelled to disclose documents or information, the persons receiving those documents, including the barrister, may be held personally liable if they breach their implied undertaking not to use those documents for a collateral purpose (ie, the 'Harman' undertaking).[17] When reviewing documents contained in your brief, consider whether you need to ask for details as to the source of those documents.

Ex parte applications

Barristers must be particularly careful when making applications ex parte. In making these applications, barristers owe a duty of utmost good faith — a duty of candour — to disclose all material matters within their knowledge that are not protected by privilege, including matters which would support an argument against granting the relief sought.[18]

10. Good Conduct Guide, p9 23-24, paras 3.1 and 3.3.
11. *Civil Procedure Act* 2010, s 21, and considered by John Dixon J in *Hudspeth v Scholastic Cleaning And Consultancy Services Pty Ltd & Ors (No 8)* [2014] VSC 567 at [180] and [194].
12. Hudspeth v Scholastic Cleaning [2014] VSCA 78
13. *Moy v Pettman Smith (a firm)* [2002] EWCA Civ 875 per Latham LJ.
14. *O'Doherty v Birrell* (2001) 3 VR 147; [2001] VSCA 44.
15. Good Conduct Guide, p 70, para 5.29.
16. As well as the risk of facing disciplinary action and contempt of court.
17. without leave of the court, or unless it has been received into evidence: *Hearne v Street* [2008] HCA 36; 235 CLR 125 at [96]
18. *Thomas A Edison Ltd v Bullock* [1912] HCA 72; (1912) 15 CLR 679 at 682.

3.9 SETTLEMENT OF LITIGATION

No authority to settle

In some instances, clients complain that no instructions were given to settle at all, or on the terms reached.

A lawyer who settles a claim without instructions, but believing that it was genuinely in the client's best interests to do so, is liable for a breach of professional duty, no matter how well-intentioned the actions.[19]

A common problem is where there is more than one client, typically a husband and wife or business partners, and one says later that they didn't give instructions to settle. It is essential to confirm that all clients have given instructions, or that a particular client has clear authority to consent to settlement on behalf of the others.

Establishing whether your client has the necessary authority to settle will turn on the evidence. Where there is no written evidence of authority, it becomes harder to defend. The best evidence will be the client's signature on the terms of settlement, or a copy of the draft orders to be handed to the court. 'Signing up' a client in this way is effective risk management to minimise the risk of an allegation of breach of authority to settle.

Revisited settlements

Revisited settlement claims usually arise because the client alleges they felt pressured into settling and/or misunderstood the basis of the settlement, often because they didn't appreciate the amount of legal costs and disbursements they would have to pay.

Door of the court settlements

Revisiting 'door of the court' settlements most commonly arise in personal injury litigation. Typically, the explanation for the recommendation to settle includes concerns about aspects of the client's credibility. These are legitimate concerns that an advocate needs to warn a client about. Ideally, this should not happen for the first time at the door of the court where a client may feel pressured into settlement with little time to consider the matter carefully.

Late night settlements

Another common scenario for revisited settlements is the late-night settlement at mediation. When settlements occur late in the evening after a long day of negotiations the clients are often tired, hungry and feel pressured to settle which can lead to misunderstandings about the settlement terms or 'settler's regret' the next day.[20]

Pressure to settle

It is not uncommon for clients to allege that a barrister pressured them to settle by:

- intimidating the client by raising one's voice, finger-pointing, talking over the client
- use of legalese, instead of plain-English explanations

19. *Fray v Voules* (1859) E&E 839.
20. For example, see the facts in *Tapoohi v Lewenberg* (No 2) [2003] VSC 410 per Habersberger J, particularly at [86].

- impatience and rudeness, including swearing
- threatening to abandon the client
- departing the settlement conference before it is finished.

These behaviours leave a lasting negative impression on clients and fuel allegations of undue pressure.

Whether a settlement can be set aside for duress or undue influence by a legal adviser was considered in *Studer v Boettcher*,[21] where the client (Studer) claimed to have been coerced by his lawyers into settling a Supreme Court dispute for more than he wanted to pay.

The court accepted the following as relevant legal principles:

- it is appropriate for lawyers to put pressure on clients to do what is, in the lawyer's view, in the client's own interest. Persuasion is acceptable, even forceful persuasion, so long as it is devoid of self-interest.
- however, a lawyer is not entitled to coerce a client into a compromise, even if objectively it is in the client's best interests.
- if the client appears unable to give you thoughtful instructions, then you should not proceed until you can be confident that the client, or someone authorised to represent the client, appears to have the necessary capacity to give instructions.

Settlement assessment

Courts are commonly reluctant to review the assessment made by barristers and solicitors in advising on a settlement because so many subjective matters come into that assessment. The court is unlikely to interfere unless the view taken by the barrister or solicitor was one that no reasonable barrister or solicitor could have arrived at.

Hickman v Blake Lapthorn,[22] is an example where the court did review the assessment and found the barrister made the error of expressing an opinion on the value of the claim, without having undertaken a thorough assessment of the medical evidence.

Legal Costs

Failure to address the client's current costs liability clearly during settlement negotiations, can lead to a dissatisfied client when they receive less than expected from the settlement. Many clients do not understand or take into account the extent of their costs liability when discussing settlement unless it is clearly brought to their attention. Section 177 of the Uniform Law requires that before a settlement is executed, a law practice (including a barrister) must provide a reasonable estimate of the amount of legal costs payable by the client if the matter settles. This includes the costs of another party that the client might have to pay. Before going to mediation, ask your instructing solicitor to provide you with an estimate of the total costs outstanding and the other party's likely costs.

21. [1998] NSWSC 524 (first instance); [2000] NSWCA 263 (appeal).
22. [2005] EWHC 2714.

Recommendations

- Be prepared. Preparation instils trust and confidence in the client and means the client is more likely to receive and act on advice he or she may not really wish to hear. Preparation also reduces the likelihood of surprises at the door of the court. If surprises occur, you will be better equipped to respond appropriately.
- Good preparation includes:
  - approaching the question of settlement with a well organised mind
  - distilling the legal issues
  - having a thorough knowledge of the facts and the evidence that is expected to be called by either side
  - acting promptly so the client has enough time to digest advice before a decision is made.
- Give your client a clear explanation, both orally and in writing, of the risks of not settling.
- Allow your client time to consider and absorb the information and what the consequences are for them if they settle on the terms suggested.
- Before any mediation, obtain from the solicitor up to date assessment of all costs and disbursements.
- Give your client the cost assessment when seeking settlement instructions.
- Record the client's instructions to settle in a file note.
- Where possible have the client sign terms of settlement.
- If, on reflection, you are concerned about your behaviour when dealing with clients, particularly in settlement negotiations and other high-pressure situations, it is important to acknowledge it and seek help as soon as possible. You can seek assistance by contacting a member of the Health and Wellbeing Committee at the Victorian Bar.

Inappropriate release

At times, claims arise because releases are either drafted:

- too widely, which prevents a future claim that the client intended to bring, or
- too narrowly, thereby failing to eliminate a possible future related claim.

Sometimes there is a simple mistake in the drafting that affects the breadth of the release. At other times, the error involves a failure to look more broadly at the overall dispute and consider what other causes of action might be available and by whom. In one claim seen by LPLC the settlement involved the client taking back control of a company and property owned by the company, but the barrister drafting the settlement agreement, failed to review company searches and PPRS searches to identify other charges that should have been taken into account in the settlement agreement.

In *Associated Retailers Limited v Toys Unlimited Pty Ltd*[23] a barrister drafted a settlement agreement on behalf of a lender for a settlement against three guarantors. The agreement operated to release the guarantors from liability, instead of providing a covenant not to sue the guarantors. By releasing them from liability, the agreement unintentionally also released a fourth guarantor.[24]

Recommendations

- Think clearly about the what the proceeding does and does not cover and what the settlement involves. What avenues of redress do the clients want or not want to be available later?
- Carefully and accurately draft what has been agreed. See our Checklist for Terms of Settlement.
- Proofread the release and where possible have someone else review it with fresh eyes.
- Clients assume that a settlement is 'once and for all'. Carefully explain to your client any limits to the scope of the releases they provide to, and obtain from, the other party.
- Check the timing when the release commences. Does the release operate upon execution of the terms of settlement, upon payment of a settlement sum or at some other time? Is that timing in your client's interest?
- Ensure that enforcement terms in a settlement agreement, that are intended to protect your client in circumstances where the other party breaches the terms of the agreement, do not offend the doctrine of penalties.

3.10 FAILURE TO ACT/APPEAR

The failure to act or to appear in a matter accounts for relatively few claims or notifications LPLC sees each year and in most instances there is no negligence or breach of duty by the barrister. They do however, sometimes incur costs to defend them.

The claims most commonly relate to a barrister terminating their retainer before hearing because the client had either not paid the required fees, or the client would not accept the barrister's advice on the appropriateness of the pleadings or evidence to be called. In other matters the barrister could not appear at court because they were 'jammed'. While this was advised as soon as possible, the client can be expected to complain if the failure to appear results in an undesirable outcome. Other claims relate to barristers holding on to briefs for too long and not giving advice before the limitation period expires.

Lastly, some claims relate to the scope of the limited retainer. The barrister believed they were retained to give limited advice, but later it is alleged advice should have been given about other matters before time limits expired. An example of this is where the barrister was giving preliminary advice to a friend.

23. [2011] VSC 297

24. See also *Gosfield School Ltd v Birkett Long (a firm)* [2005] EWHC 2905; [2005] All ER 253.

Recommendations

- Confirm in writing the scope of any retainer to advise.
- Check limitation periods when first retained to advise on causes of action in new matters and diarise those time limits.
- Communicate clearly with instructors and clients as early as possible about the prospects of success and evidence required.
- Keep your instructor appraised of your availability as soon as possible.
- If you are feeling overwhelmed by workload or other issues seek help as soon as possible. You can seek assistance by contacting a member of the Health and Wellbeing Committee at the Victorian Bar.

3.11 DISSATISFIED LITIGANT

There is a category of claims that LPLC refers to as 'dissatisfied litigants'. These claims involve clients, or sometimes other parties, who are unhappy or dissatisfied with the outcome of their matter because it was not the outcome they wanted, or it took too long or it cost too much. In some instances, they allege they were not advised about their prospects of success.[25] On other occasions, the client contributed to the problems with the case because they were very difficult to deal with, would not listen to or accept advice or do what was asked of them promptly. The solicitor and barrister often also contributed to the problem by not managing the client's poor behaviour promptly and effectively and communicating important messages like consequences of delay, risks and likely outcomes in an appropriate way.

Some telltale signs that a client may become a dissatisfied litigant are that they:

- continually change their instructions
- appear to be economical with the truth and provide insufficient documentary evidence
- want to run a matter as a point of principle
- are not receptive to advice that is contrary to their views
- fail to pay money into trust to cover costs of the litigation
- have changed solicitors or barristers (or both) several times.

Recommendations

- Clearly set out in writing what you need the client to do and by when.
- Only meet with clients with your instructor present and ensure they take notes of the discussion.

25. See section 5.5 above.

3.12 NON-PARTY OR PERSONAL COST ORDERS

Personal cost orders against barristers have been more prevalent since the introduction of the *Civil Procedure Act* 2010 (Vic). They do not attract advocates' immunity and as such, pose a significant professional risk to barristers. See Appendix 1 for more details of personal cost orders under the Civil Procedure Act.

Examples of claims where non-party cost applications have been made against a barrister personally include:

- cases that had no prospects of success
- wasted costs where excessive amounts of material were included in court books
- wasted costs where causes of action were pleaded, but then either abandoned during the trial, or no evidence was adduced supporting the cause of action during trial
- wasted costs of repeated amendments to complex pleadings, following successful strike-out applications
- costs incurred where fraud had been alleged in pleadings, without a proper foundation, and without proper particulars being provided or evidence adduced at trial
- costs of additional parties joined to litigation unnecessarily
- applications where it is alleged that the barrister represented more than one party in a proceeding, and where a conflict of interest between the clients became apparent mid-trial causing an adjournment and delay
- the barrister making prolix, repetitive or untenable submissions.

See Appendix 3 for some cases where applications for personal cost orders were made against barristers and solicitors.

3.13 FEE CLAIM PROMPTING COUNTERCLAIM

Barristers who sue for unpaid fees are often met with a negligence claim. Commonly, there is no negligence, but the client is unhappy with some aspect of how they have been treated and use the opportunity to vent that displeasure. The client is often unhappy because they have been surprised by the amount of the fees.

Barristers are in a difficult position as they do not always communicate their fees directly with the client but via the solicitor. Part 4.3 of the Uniform Law places strict obligation on solicitors to clearly disclose costs and likely costs to their clients. It is important for barristers to clearly articulate what their costs are or are likely to be to ensure everyone understands what is to be charged and on what basis and who is responsible to pay them. Where further appearances or work is to be done, the fee estimates should be revisited, discussed and confirmed in writing.

4. ADVOCATES' IMMUNITY

Barristers enjoy a special immunity for claims of negligence and claims for breach of contract that relate to the barrister's 'in court' work.[26] This includes 'work done out of court which leads to a decision affecting the conduct of the case in court'[27] such as considering how the trial should be run and evidence to be adduced.

Limits on the immunity include:

- advice that leads the parties to a settlement[28]
- claims for abuse of process or malicious prosecution[29]
- where the barrister acts in bad faith or dishonestly[30]
- arguably, where a barrister fails to disclose a conflict of interest[31]
- refund of fees.

While barristers are protected by an immunity for some types of claims, there are still many claims that don't attract the immunity as this Practice Risk Guide has shown. Of course, claims are often still pursued even where the immunity is available. The immunity is a defence and so still requires time and cost in pleading the defence and defending the claim. Focusing on the various recommendations in this guide will help avoid mistakes and claims both in, and out of the court.

5. KEY REFERENCE MATERIAL

LPLC Barristers Checklist for Safe Practice and the Checklist for Terms of Settlement combine all the recommendations in this Practice Risk Guide.

The following legislation and regulations can be found on the Victorian Bar website here:

- Legal Profession Uniform Law Application Act 2014 (Vic)
- Legal Profession Uniform Conduct (Barristers) Rules 2015
- Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015
- Application and Reading Regulations
- Legal Profession (Approved Clerks Trust Account) Rules 2015

The Victorian Bar Ethics Committee contact details can be found here.

26. See generally *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1.
27. *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543 at 560, endorsed by *D'Orta-Ekenaike* (above) at [86] and *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 at [38], [39] and [46].
28. *Attwells* (above) at [38]
29. *Donellan v Watson* (1990) 21 NSWLR 335 at 344; *Leerdam & Anor v Noori & Ors* [2009] NSWCA 90; (2009) 227 FLR 210 at [146]
30. *Del Borrello v Friedman and Lurie (A Firm) & Anor* [2001] WASCA 348 at [123]
31. *Abriel & v Rothman* [2004] NSWCA 40 at [27]

Relevant texts:

- Róisín Annesley QC, Good Conduct Guide - Professional Standards for Australian Barristers (Victorian Bar, 2nd edition, 2019)
- Stephen Walmsley, Ben Zipser, Alister Abadee, Gregory Sirtes, Professional Liability in Australia (Thomson Reuters, 3rd edition, 2015)
- Gino Dal Pont, Lawyers' Professional Responsibility (Thomson Reuters, 7th edition, 2020)

APPENDIX 1: CIVIL PROCEDURE ACT 2010

Summary

Practitioners have always owed a paramount duty to the court. The effect of the *Civil Procedure Act 2010* (Vic) (Act) is to codify that obligation.

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

The Act sets up a hierarchy of duties and obligations for practitioners.

- Duty to the court [32]
- Overarching obligations [33]
- Duty to the client [34]

The concepts of 'overarching purpose' and 'overarching obligations' apply to all civil proceedings in the Courts (but not VCAT).

The overarching purpose of the Act is the just, efficient, timely and cost-effective resolution of disputes. The courts are required to comply with this when interpreting and exercising their powers and functions in the conduct of civil proceedings.[35]

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)

32. *Civil Procedure Act* 2010, s 15.
33. *Civil Procedure Act* 2010, s 16-27.
34. *Civil Procedure Act* 2010, s 13.
35. *Civil Procedure Act* 2010, s 7.

- 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).

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

If a practitioner is faced with instructions from a client that are inconsistent with the overarching obligations, the practitioner must not contravene, nor allow or cause the client to contravene, the Act (section 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 Act gives the court 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 (sections 65A and 65B).

The Act makes it clear that the court has broad discretion to order costs in any way it deems appropriate (section 65C).

The court may 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 (sections 65H-65J).

APPENDIX 2: CONFLICT CASES

Cases that consider legal practitioners ceasing to act because of a conflict of interest.

Barristers

Slaveski v State of Victoria & Ors [2009] VSC 540

Allison v Tuna Tasmania Pty Ltd (2012) 21 Tas R 293; [2012] TASSC 36; BC201203948

Mancini v Mancini [1999] NSWSC 800;

Watson v Watson unreported decision NSWSC 25/5/98

Uncle Toby's Co Pty Ltd v Trevor Jones Steel Fabrications Pty Ltd (in liq) unreported decision VSC Batt J 12/10/95

Solicitors

Spincode Pty Ltd v Look Software Pty Ltd (2001) 4 VR 501; [2001] VSCA 248

Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd [2014] FCA 1065

Burns & Sellers [2018] FamCA 91

Re Edgecliff Car Rentals Pty Ltd (dereg.) [2017] NSWSC 244

Birkett Investments Pty v Streatfeild Investments Pty Ltd [2016] ACTSC 323

Babcock & Brown DIF III Global Co-Investment Fund LP v BBLP LLC [2015] VSC 453

APPENDIX 3: CASES INVOLVING APPLICATIONS FOR PERSONAL COST ORDERS AGAINST PRACTITIONERS

- *Alliance Developments Pty Ltd v Arab & Anor* [2019] VSC 832
- *Re Wattie; Wattie v Wattie* [2019] VSC 701
- *Loutas v Sier & Ors* [2018] VSC 709
- *Kaufman & Sandor* [2018] FCCA 2701
- *Re Manlio* (No 2) [2016] VSC 130
- *Gibb v Gibb* [2015] VSC 35
- *Re Fanning* [No 2] [2014] VSC 370
- *Kiefel v State of Victoria* [2014] FCA 411 [2014] FCA 411
- *Norman South Pty Ltd & Anor v da Silva* (No 2) [2012] VSC 622
- *Apollo 169 Management Pty Ltd v Pinefield Nominees Pty Ltd* (No. 2) [2010] VSC 75

Fraud by solicitor

- *CHK16 v Minister for Immigration and Boarder Protection* [2021] FCCA 1482

Ignoring warnings given by court re irrelevant and inadmissible material in affidavit

- *Re Dodson: Dodson v Dodson* (No 3) [2020] VSC 862

Wasted costs where excessive amounts of material were included in court books:

- *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337

Wasted costs where barrister did not disclose reports or material facts. For example:

- *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors* [2014] VSCA 78
- *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors* (No. 6) [2013] VSC 159
- *Orpen v Tarantello &Ors* [2009] VSC 143

Costs of party joined without authority:

- *Bray & Anor v Dye & Anor* (no.2) [2010] VSC 152

Failure to act with reasonable competence and expedition

- *Stapleton v Central Club Hotel & Ors (Ruling No 2)* [2016] VCC 799
- *Anthony v Vaclav* (No 2) [2009] VSC 626

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