

Commercial Litigation – Do the basics well

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Contact

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The Client

- Who is your client?
 - Is it the individual or a corporate entity "controlled by them" – who has the cause of action (if you are acting for the plaintiff)
 - If it is a corporate entity is there anyone else you need to take instructions from?
- Do you need to obtain authority from another director to take instructions from one director only?
- Is your client competent to provide you with instructions? Should a litigation guardian be appointed?

The Client

- What is your client trying to achieve?
- For a plaintiff, the client might have a cause of action but is there any prospect of recovery against the defendant(s) even if they succeed?
- Have you given advice to your client about their prospects of recovery (if known) or that your client may wish to investigate this before initiating any claim?
- Is your client aware of the costs of litigation?
- The obvious is monetary but there might also be the emotional costs to the client, possible affect on reputation and the time they need to invest in the case.
- Litigating may also reveal commercial and confidential information.

Discussion

If a client approached you wanting to litigate – what matters would you discuss with them?

Issuing Proceedings (Acting for a Plaintiff)

- Have you named the right parties as defendants?
- Do you have the correct name for the individual? A person might be known by a number of names, and your client might only know that person's alias.
- For corporate entities – ensure that the ACN is correct. There may be a number of entities with similar names.

Issuing Proceedings (Acting for a plaintiff)

- Is the defendant a partnership? Has the partnership dissolved?
- Can the party be sued?
- 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 reinstatement?
- Is the individual or company a trustee of a trust?

Issuing Proceedings (Acting for a plaintiff)

- Have you considered and advised about the correct forum for the proceeding?
- Have you considered and advised about any possible limitations issues?
- Interview your client, and any other relevant witnesses – prepare proofs of evidence for their review and instructions.
- Does counsel need to be retained to prepare any pleadings?

Service of Proceedings

- Have you considered service of the proceedings once issued?
- Time in which the proceedings are to be served.
- Where the defendant(s) is/are located.
- Is personal service required? Or service by other means under the relevant Rules.

Discussion

- If a client comes to you after been served with proceedings, what advice would you give them?

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.
- Have you given an estimate of anticipated fees and disbursements as required?
- Are you checking whether you need to provide an updated cost estimate.
- Have you given advice to the client about unrecoverable costs?
- Have you considered whether it is appropriate to make a Calderbank offer or an Offer of Compromise?

Advice on the Merits

- Do you ensure that you reassess the merits of the case, and advise your client accordingly, as further information and documents become available which may affect your previous advice? For example:
 - Once the other side file a defence or a reply.
 - After inspection of the other parties' discovery and/or subpoenaed documents.

- Have you considered and given clear advice to your client about what evidence and/or information is needed to succeed in the cause of action or to successfully defend the cause of action.

Court Procedure

- Be familiar with:
 - The Rules of Court or the Rules of a Tribunal including any changes in the Rules.
 - The Civil Procedure Act 2010 (Vic) (CPA) if the litigation is in the Victorian Courts.
 - Practice Notes issued by the Courts and Tribunals.

Court Procedure

- Advise your client about the Court Procedure and keep them updated regarding orders that are made.
- Advise them of their obligations. For example, under the CPA or pursuant to the Court Rules (such as discovery obligations)

After Judgment

- Once judgment has been delivered by the Court, provide advice as to:
 - The findings made by the Court.
 - Any prospects for appeal.
 - Options available to them to seek enforcement of the judgment.
 - Applications for costs of the proceeding.
 - Summons for taxation of costs (if necessary).
 - Timing of Any Appeals

Questions?



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