

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Family Law Litigation - Do the basics well

Presenter: Craig Henderson, Partner, Lander & Rogers



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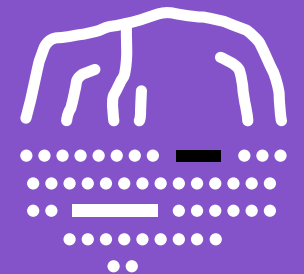
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ACKNOWLEDGEMENT OF COUNTRY

Lander & Rogers acknowledges the Traditional Custodians of the land on which we work, in Melbourne, the Wurundjeri People of the Kulin Nation, and we pay our respects to Elders past and present.

As a law firm, we are aware that our legal system is based on the dispossession of First Nations people, who have a sacred and sovereign connection to the land.





“You never pay a price for too much preparation...”

“I surround myself with quality people – don’t ask me to define quality but I know it when I see it...”

General Normal Schwarzkopf

THE FRONT END

Client engagement



THE FRONT END – CLIENT ENGAGEMENT

A. Preliminary instructions

- obtain key information in writing
- use a client information sheet or an online on-boarding app
- remember, good records means good defence; no records means no defence

THE FRONT END – CLIENT ENGAGEMENT

B. Conflict checks

- cover off on all used surnames
- ensure current ASIC searches are undertaken to explore problematic corporate connections
- consider duties of loyalty, honesty and fairness - in particular where asked to act against a former client
- **Tip:** do not act personally for family, friends or for someone with whom you share personal financial interests
- do not act for more than one party unless you can be satisfied there is no possibility of a conflict in their common interests

THE FRONT END – CLIENT ENGAGEMENT

C. Costs Agreements

- Legal Profession Uniform Law (Victoria) applies - see Schedule 1 section 174
- where costs will be less than \$750, no agreement is required
- where costs will be between \$750 and \$3000, a standard short form of costs disclosure is permissible
- where costs are more than \$3000, full costs disclosure is required
- free precedent costs agreements are available for LIV members

D. Consequences of non compliance with disclosure obligations

- costs agreements may be set aside
- recovery proceedings cannot be instituted until costs are assessed
- costs may be reduced upon assessment for non compliance
- may result in allegations of professional misconduct

THE FRONT END – CLIENT ENGAGEMENT

E. Disclosure obligations include

- full description of the scope of work required
- confirmation of lawyer hourly rates, counsels fees, witness expenses, mediators fees, filing fees
- the basis upon which legal costs will be calculated
- a single estimate of the total legal costs, not a 'range'
- Note: no 'conditional' or 'uplift' fees are permitted in matters under the Family Law Act

THE FRONT END – CLIENT ENGAGEMENT

F. Do's

- make sure costs agreements are explained and signed before work begins
- request funds in trust before commencing work
- provide a full explanation of funding arrangements to both clients and other persons who may be paying their fees
- give written notice and a revised cost estimate where there has been a change in the scope of work to be undertaken
- give written notice and a revised cost estimate where hourly rates have changed
- give written notice and a revised cost estimate where circumstances have changed and will result in likely higher costs (see attached suggested letter)

THE FRONT END – CLIENT ENGAGEMENT

Costs incurred to date

We note that to date you have incurred professional costs with Lander & Rogers in the sum of [\$0.00] including GST and disbursements in the sum of [\$0.00] including GST. Of these costs, the total sum of [\$0.00] remains unpaid and outstanding.

[Optional text] The further sum of [\$0.00] inclusive of GST for work undertaken on your file is yet to be billed. [END OPT TXT]

Revised estimate

Our last estimate of your total costs was [\$0.00] inclusive of GST. In the circumstances described below, we need to revise our total costs estimate to [\$0.00] inclusive of GST, which can be broken down as follows:

Estimated legal fees: *[fee estimate] inclusive of GST

Estimated disbursements: *[disbursement estimate] inclusive of GST on taxable disbursements

Estimated total legal costs: *[total(s)] inclusive of GST

Basis for the revised estimate

The costs estimate has been revised in the following circumstances:

Multiple Alternatives – choose the applicable paragraph/s from below and delete the others

[ALTERNATIVES FOR NON-LITIGATED MATTERS]

1. Matters of discovery are more complex and time consuming than originally anticipated.
2. Your former partner and [his][her] lawyers have adopted an unhelpful approach in engaging the pre-action procedures.
3. Your instructions have necessitated us adopting an approach to this matter which involves more work than was originally anticipated.
4. We are of the view that you have made all genuine attempts to resolve the matter without success and that Court proceedings are now required to assist in reaching resolution of your dispute.
5. Commencing Court proceedings require us to comply with the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, including but not limited to preparing the following documents in a timely manner:

Multiple Alternatives – choose the applicable documents from below and delete the others

- (a) Initiating Application / Response to an Initiating Application
 - (b) Genuine Steps Certificate
 - (c) Financial Statement
 - (d) Financial Questionnaire
 - (e) Parenting Questionnaire
 - (f) Notice of child abuse, family violence or risk
 - (g) Affidavit, in support of your interim orders sought
 - (h) Undertaking as to disclosure
 - (i) Case Outlines and Minutes of Orders sought
 - (j) Subpoenas, including inspection of materials produced
6. [add other provisions applicable to the non-litigated matter]. [END ALTS FOR NON-LITIGATED MATTERS]

THE FRONT END – CLIENT ENGAGEMENT

[ALTERNATIVES FOR LITIGATED MATTERS]

1. Your former partner and [his][her] lawyers have adopted an unhelpful approach.
2. Pursuant to the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, the Court requires matters to go through the Family Law Case Management pathway, including work in preparing various Court documents in compliance with the Rules.
3. Matters of discovery are more complex and time consuming than originally anticipated.

Costs orders

[ALT PARAGRAPH - if no litigation is on foot or being contemplated]

Under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, the primary position is that each party is to be responsible for their own legal costs in litigated matters. Whilst your matter is being negotiated outside of Court with the assistance of solicitors, you should nevertheless approach your legal fees on the basis that they will be borne by you alone, and will not be recoverable from the other party.

[END ALT PARA]

[ALT PARAGRAPH - if litigation is on foot or being contemplated]

Under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*, the primary position is that each party is to be responsible for their own legal costs. Whilst the Court does have a discretion from time to time to order that the other party should pay costs associated with certain aspects of proceedings, this is not routinely ordered and even then, any sums recovered rarely match the legal fees that you actually incur with your own solicitor. In addition, you need to be aware that the Court could order that you meet a costs order in favour of the other party by reason of one or more of the following:

1. An application brought by you which is unsuccessful in whole or part;
2. A failure to accept an earlier settlement offer in circumstances where the Court awards you the same or less than the terms of that offer;
3. A failure to comply with an existing order of the Court or the Rules;
4. A failure to comply with a pre-action procedure;
5. Improper or unreasonable conduct; or
6. Undue delay or default. [END ALT PARA]

THE FRONT END – CLIENT ENGAGEMENT

G. Reasonable steps to ensure client understanding

- explain the method of payment required
- explain billing arrangements
- explain the law relating to costs under the FLA and the FCFCOA rules and the effect of any costs orders in any proceedings
- arrangements for the retention and or destruction of documents
- the process of resolving disputes as to costs
- arrangements for engaging agents and other service providers
- explain clients right to negotiate
- clearly identify any claims for interest on unpaid accounts after 30 days
- what constitutes a change in the scope of the work to be undertaken

H. Costs assessments

- clients may apply for an assessment of their bills up to 12 months (or longer with leave) after receiving a final bill, even if all costs have been paid
- legal firms must apply for any necessary costs assessment within 12 months of a final bill

THE MIDDLE

working towards settlement



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THE MIDDLE – WORKING TOWARDS SETTLEMENT

A. Ensure that all relevant parties are joined to any proceedings.

Rule 3.01 of the FCFCOA rules provides that 'a person whose rights may be directly affected by an issue in a proceeding and whose participation as a party is necessary for the court to determine all issues in dispute in the proceeding must be included as a party to the proceeding'.

THE MIDDLE – WORKING TOWARDS SETTLEMENT

B. ASIC and Land title searches

- understand the relevant corporate structure so you can properly advise on relevant issues and the structure of any settlement. Obtain ASIC name searches for your client and any other party to identify the companies in which they are directors and or shareholders and those other persons who hold positions of office or are shareholders are essential
- same considerations apply to land title searches to accurately identify registered proprietorship and the full extent of any encumbrances
- assume your client's instructions are wrong about these things - they very frequently are...
- where searches indicate shares are not held beneficially, further inquiries will be required to identify which persons or entities ultimately hold or control those shares. Such a search is often a good indicator of the existence of trusts which will not be evident in the ASIC searches themselves (or the land title searches)
- ensure your searches request historical information, not just current data. This will reveal possibly recent changes in structure and ownership of relevant entities, in relation to which enquiries or further court steps to set aside transactions may be required

THE MIDDLE – WORKING TOWARDS SETTLEMENT

C. Valuations

- even if your client suggests they know the value of land, businesses, shares and other assets, at least have the conversation about the option of single expert valuations
- in selecting a valuer, aim for quality, independence and specialized knowledge
- explain that there may be a range of methodologies which apply in specific instances. Many clients assume a 'net asset valuation' based on the current balance sheet is the 'only' approach. Often assets are carried at historical cost which makes even this approach problematic in many situations. Some 'liabilities' may be illusory

THE MIDDLE – WORKING TOWARDS SETTLEMENT

D. Income Tax, Stamp Duty, GST, CGT and Super Splitting

- Tip: Don't rely on what you think you know - establish a panel of your 'go to' experts on these subjects. Don't rely on the 'other side's' experts. They are often neither experts nor independent. They may have little experience in family law matters
- beware of the 'false allure' of 'indicative advice' and 'market appraisals' to 'save costs'
- have the conversation about experts with your client and confirm what you've suggested in writing. If your client insists on possibly false economy, at least you can prove you've addressed the issue
- check your client will not get an unexpected tax assessment on payments they thought they would keep in toto. Eg Where a payment is made from a family company to an 'associate' of a shareholder (and spouses are associates) there may be a deemed dividend under division 7A of the ITAA which is taxable in the hands of the recipient

THE MIDDLE – WORKING TOWARDS SETTLEMENT

D. Income Tax, Stamp Duty, GST, CGT and Super Splitting

- if there are pre-CGT assets held by a corporate trustee and there is a change in 50% or more in the underlying ownership of the holding company as part of the terms of settlement, the assets may be 'freshened up' for CGT purposes and tax payable on later disposal
- get the timing of resignations 'right' – E.g. if there is to be a capital distribution to your client as a trust beneficiary, don't provide for an amendment to the trust deed to exclude them as beneficiaries until after payment. Same goes as to a proposed dividend - your client will need to be shareholder; the transfer of shares can occur after payment
- watch out for the effect of any divorce - usually 'spouses' are defined as amongst the classes of eligible trust beneficiaries but 'former spouses' are more often not

THE MIDDLE – WORKING TOWARDS SETTLEMENT

D. Income Tax, Stamp Duty, GST, CGT and Super Splitting

- don't assume the proceeds of sale of the matrimonial home will be CGT exempt. The house and 2 hectares will generally be exempt but the sale of other surrounding acreage may attract CGT
- have a plan as to how to deal with loan accounts in family entities - both credit and debit. E.g. If your client 'owes' money to a family company and it is liquidated after settlement, your client's loan may be called in and there may be no recourse
- if you are considering a super split, make sure you understand the composition of the assets of the fund and how your client's 'share' will be funded. Often SMSF's hold real estate and other 'illiquid' assets which will have to be sold to effect a cash split. Sale expenses, CGT and other expenses may eat into the split entitlement. Be clear who is bearing the realization costs

THE MIDDLE – WORKING TOWARDS SETTLEMENT

D. Income Tax, Stamp Duty, GST, CGT and Super Splitting

- if there is to be an 'assets in specie' super split, make sure the documents confirm what is coming to your client. E.g. - don't let your client get 'stuck' with all the CGT-pregnant shares or the less desirable investments. Consider the valuation issues raised above
- if there is a 'defined benefit' super scheme membership entitlement, you will need an expert valuation
- get advice on the best way to structure the settlement - don't forget to explore the possible use of tax losses. Why should one party get all the upside?
- consider all options - a change of control of an entity which holds assets may give a better result than a transfer of the assets - look for the 'win/wins'

THE END

Final orders and / financial agreements



THE END – FINAL ORDERS AND / FINANCIAL AGREEMENTS

Tips and Traps

- discuss with your client the relative merits of any combination of final orders, BFA's and CSA's
- try if you can to settle all issues - don't leave the door open for further/later claims
- if acting for a potentially liable party, make sure you effectively 'terminate' spousal maintenance claims - BFA's are more effective than orders. Put a BFA 'on the table' early in negotiations
- if the orders/BFA are intended to effect a final settlement, make sure they actually cover all assets, liabilities, superannuation and financial resources
- Tip: When drafting final settlement documents, use a 'definitions section' at the start in which you identify the subject matter of the orders, who is and who will become entitled to (or liable for) each asset/liability. The orders can then often be simplified and are easier to read using the 'abbreviated' descriptions. That way nothing gets missed

THE END – FINAL ORDERS AND / FINANCIAL AGREEMENTS

Tips and Traps

- include the section 81 notation as to the intentions of the parties to end financial relationships
- make sure you deal with any extant or unsatisfied obligations under interim orders previously made in the proceedings. Discharge those orders if necessary. It's easy to forget them in the rush to settle
- beware the 'cross-collateralized' mortgage. Understand what repayments any secured lender will require on settlement of the sale of an asset - before the orders are made
- don't rely on 'bare' indemnities. They may prove 'arid' and they do not bind creditors unless they are parties to the orders/BFA
- specify (as far as you can) what's to happen in all instances of default and cover off on all eventualities – E.g. what if the house sells for less than the agreed reserve or there's not enough left to clear the debt. What happens if there's a windfall gain? Think it through

THE END – FINAL ORDERS AND / FINANCIAL AGREEMENTS

Tips and Traps

- make sure any person or corporation upon whom a necessary obligation falls is a party to the orders/BFA. That way the entity is bound by the orders/BFA even if there's a later change in control of that entity
- join the family SMSF trustee if there's to be a super split. Recite the necessary provisions as to procedural fairness
- if there is to be a super split, get your 'procedural fairness' letter off to super trustees as soon as you can. Delays can be problematic and may result in redrafting in accordance with trustee requirements
- if there is to be winding up of a company/trust to meet entitlements, consider the possibility that there may be potentially voidable transactions during the four year 'relation back' period
- avoid provisions which permit transfers to 'a party or their nominee' unless you've checked the 'revenue' consequences - there's a hidden potential 'deemed disposal'

THE END – FINAL ORDERS AND / FINANCIAL AGREEMENTS

Tips and Traps

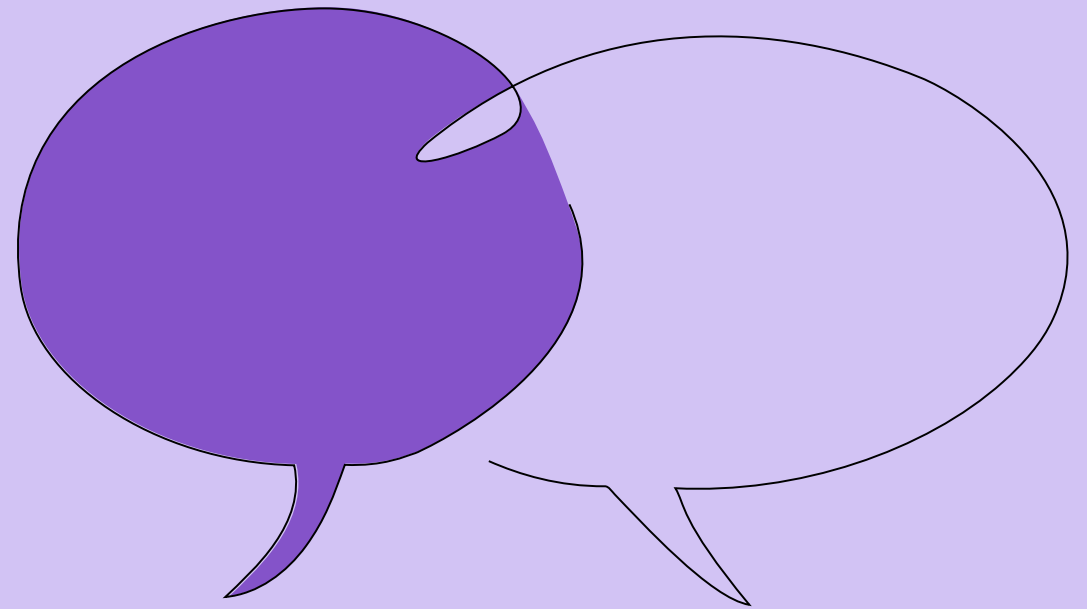
- if orders are proposed under the Corporations Act, you will need the proceedings transferred to Division 1 (if not already there) before the orders are made
- measure twice, cut once. When you think all is ready, put the documents aside and have a fresh look the following day. Better still, have a colleague or your Counsel look over them too. You often see what you think you've written, not what's actually there
- avoid the pressure to get orders/BFA's/CFA drafted and signed 'on the day' the deal is done or (even worse) late at night. Have them checked for revenue consequences and completeness. Better not to sign up in haste and have to repent at leisure

THE END – FINAL ORDERS AND / FINANCIAL AGREEMENTS

Tips and Traps

- if someone else has drafted the settlement documents, insist on sufficient time to consider them. It is often much harder to work out what's missing than to deal with what's actually in print
- don't just rely on Counsel and don't let orders go through without knowing what's in them - you have a duty to know and intervene if you're not comfortable, even at the risk of some temporary unpopularity

QUESTIONS



KEY CONTACTS



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THANK YOU

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