LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Fore!

Choosing clients and avoiding bunkers

Presenter's Workbook

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Contents

Introduction

Fore! Choosing clients and avoiding bunkers explores client selection and management in the context of two partners in a small business with contractual problems who end up in litigation. These materials are designed to be used with the video.

The issues raised are:

- client selection
- who is the client? – differentiating between the needs of two partners in a partnership
- scope of work – assessing the clients' needs
- managing the clients' expectations throughout the life of the matter, particularly relating to costs
- supervision of senior associates.

Retainer management basics

What are some of the things you think about when you hear retainer management?

A critical part of managing any retainer effectively is setting it up.

Before accepting a retainer ask yourself 'should I act for this client in this matter at this time?' In answering that question you should consider the following things.

- Who is the client?
- Can I act – is there a conflict?
- Do I have the time and the resources?
- What will the scope of the retainer be?
- Who can I delegate it to?
- How often and by what means will I communicate with the client during the retainer?

There is more to retainer management than simply complying with the cost disclosure requirements in legislation. Once you accept the retainer some of the things to manage include:

- the retainer letter
- the cost disclosure
- the cost agreement
- when to terminate the retainer
- how to terminate the retainer.

Fore! Choosing clients and avoiding bunkers

Look at the scenario and then discuss what went wrong.

A litigation partner is confronted with numerous allegations brought by two unhappy golf professionals in a golf coaching business at a driving range.

The complaint surrounds work the firm did for the golf professionals in a contractual dispute with the driving range management. The golf professionals alleged there were oral terms, especially about exclusive rights, that needed to be taken into account.

When the clients initially approach the firm with their problem the firm recommends seeking urgent injunctive relief. The work and costs quickly mount. The clients' needs and the commercial reality are given insufficient attention.

The clients' passions and naivety together with the firm's litigation strategy and failure to communicate turn out to be a disaster all round.

The video looks at a situation in which the firm could have better handled issues of client selection, assessing the clients' needs and commerciality of what can be achieved, estimating and managing costs, and supervising practitioners even when they are experienced.

You can play the scenario all the way through and discuss the questions below at the end or pause at the indicated points to discuss what has just occurred.

Options, estimates and understanding

This segment looks at the options the clients were provided, the costs estimates and the clients' understanding of these as well as the complexity of the case.

Scene 1 – Two years later… – 0:00 to 0:37

Claims solicitor Anne and litigation partner Georgina discuss the claim the two golf professionals have against her and the firm. The allegations include the lack of options provided to the clients as well as their misunderstanding of the cost estimates.

Scenes 2 and 3 – Initial meeting and post-meeting discussion – 0:38 to 4:17

It is the initial meeting between commercial partner Bill and the two golf professionals, Michael Flint and Rob Sutherland. They discuss the letter from the new owners of the driving range as well as the old written licence and how the new owners are going to strictly enforce it.

Bill provides two options – walk away or litigate. He has already canvassed the case with Georgina and calls her and her senior associate, Jeremy Fisk into the meeting.

Georgina talks them through the process and makes some suggestions including recommending to litigate. She discusses injunction timing and costs of between $100,000 and $150,000. She then explains the aim of getting an interlocutory injunction to encourage the new driving range owners to come to the bargaining table, costing between $20,000 and $40,000.

Georgina says she will start drafting the letter of demand and Jeremy requests Rob and Michael's files. Her closing comment is that she will put a cost agreement in the mail to explain the structure of their fees and charges, and that she will keep Bill posted.

Michael and Rob have a post-meeting conversation discussing the cost of the injunction, how they could settle this once and for all, and maybe work out a five-year option.

What happened in this segment?

What was missing from the initial meeting with the clients?

Were the clients provided options on how to proceed with their case against the driving range owners?

Who is the lead practitioner?

Did the practitioners ask about the clients' business?

Was there confirmation who the firm was acting for – Michael, Rob or both?

Did the clients understand what was involved in litigating - the costs, the length of time and the time commitment to build the case?

Supervision and managing costs

This segment looks at how the costs were or were not managed including the supervision of practitioners - even the experienced ones. The clients' needs and the commercial reality of their business do not seem to be addressed in the practitioners' approach.

Scene 4 – Two years later… – 4:18 to 4:43

Anne and Georgina continue to discuss the claim and the spiralling costs including the cost of the letter of demand, hand–delivery of the letter to the driving range and the six practitioners working on the affidavit.

Scene 5 – Sunday meeting with barrister – 4:44 to 6:26

Jeremy, Michael and Rob meet with the barrister (Rex) in his chambers on a Sunday. They discuss lodging the 20-page affidavit on Monday with Rex saying his instructors want it

listed as soon as possible. The driving range owners did not respond to the letter of demand. Jeremy mentions working on Michael's 300 pages of notes and condensing them down to the affidavit. Jeremy and Michael spent seven hours together working on the notes.

Michael says 'it's war' and the issue needs to be resolved. Rob is not as gun-oh but also wants the matter settled. Rex will see them in court on Wednesday.

And the commercial reality…

In this segment the matter is rolling like an out of control train. The senior associate loses sight of the commercial reality of the matter and is caught up in the minor details of the clients' relationship with the driving range owners. Costs are not mentioned to the clients until the third court appearance.

Scene 6 – Two years later… – 6:20 to 8:20

Anne and Georgina continue to discuss the cost blow outs including the five legal representatives in court, the affidavit and subsequent court appearance relating to the $9 ball charge. They also cover the lack of supervision and communication between practitioners.

Scene 7 – $9-ball charge – 8:21 to 9:20

Michael and Rob are in Jeremy's office discussing the $9-ball charge. Jeremy explains that the affidavits may take all day. Michael mentions how the driving range management have also filled in the holes on the putting green with Jeremy responding that this makes the driving range owners look bad and clients now have the high moral ground.

Michael wants to 'fix them up'. Jeremy thinks the judge will now be on their side.

Has the process been explained to the clients?

Did the practitioners inform the clients of the pitfalls/dangers of a 'win at all costs' approach?

Do both clients want the same thing? Is the practitioner responsible for resolving or at least discussing the possible conflict between the clients?

Who is taking responsibility for the clients' needs?

Has the legal strategy been planned or are they making it up as they go? Have they advised the clients on the costs of this unplanned and knee-jerk approach?

What was wrong with Jeremy's conduct and behaviour at this meeting?

Scene 8 – Two years later… – 9:21 to 10:24

In Anne and Georgina's final discussion the third court appearance was raised as well as the judge recommending that taking the history into account, the lawyers should stand the case down and try and negotiate an amicable settlement.

The final figures of the cost blow-out were also revealed including:

- Bill's charge out of $16,000 over a period when it was said Georgina conducted the file
- $1,200 for a graduate lawyer to transport documents to and from the court
- the clients not being sent a cost agreement until one week after the firm had started acting and more than $8,675 had already been incurred at that point
- it wasn't until the third court appearance that Jeremy told the clients "we are getting close to the budget" but in fact the metre was already at $82,000.

Do you think the costs are reasonable and justifiable? (Note: the details of this claim have been altered but the associated costs are all real.)

An alternative approach

This segment looks at an alternative initial meeting between Bill, Michael and Rob. It illustrates the different path a matter can take when all options are investigated, time is taken to explain the process to the clients, clients are equipped to make informed decisions, and practitioners are supervised and take responsibility for their actions.

Scene 9 – "Take 2" – 10:30 to end

Bill explains the problem of the old written license with Michael and Rob. He wants to work out the best way forward for the golf professionals and their business. He mentions how Michael and Rob have only two years left in their license. Michael raises how they are meant to have a five-year option.

Bill asks them to estimate what the last two years of the license are worth as well as the option. They have cleared $90,000 in the last two years but think it will be less over the next two years without the exclusive license and the rent increase.

Michael and Rob are provided a few options – accept they are not going to get any concessions in dealing with the new owners and do the best they can. The other options suggested are taking the new owners to court or trying to sell the business and go elsewhere.

Bill explains the pros and cons of going to court and commits to providing writing advice on the steps that need to be taken and some cost estimates.

His closing remark is recommending Michael and Rob see their accountant and consider getting a valuation of the business. The three can then meet to talk about the strategy forward, armed with the appropriate information.

Is there anything you think Bill has missed out in this alternative initial meeting?

How do you think this matter will now proceed?

Client selection

Not every client is the right client for every firm so client selection is an important risk management tool.

In this scenario the clients are people running a small business. Putting aside the lack of communication about the appropriate strategy, one of the issues may have been that these clients were not the right fit for the size of the firm or the work they do.

We see firms with claims where they acted for clients who ultimately were unhappy with the services provided by the firm partly because the billing rates and firm structure did not match the client's needs. This can happen where firms have grown rapidly and don't have a clear strategy or vision of who their client base should be, don't articulate it to the partners or don't have buy-in from partners. There will be some partners in the firm that continue to act for the type of people they had previously acted for without considering if they fit the new strategy.

Some firms have a clear strategy of not acting for individuals or small businesses partly because they know their bill rates and structure do not match the expectations of most clients in those categories. Other firms have a deliberate strategy of acting for those clients but they manage the clients and payment of their costs very closely.

Does your firm have a client selection policy?

What are the criteria – does it just relate to business type?

Scope of work

Understanding the scope of the work required by the client seems like an obvious early step in a retainer but it is surprising how many times practitioners don't get this right.

We have a category of claims called 'sue for costs and receive a counterclaim for negligence'. These claims often occur not because of negligence but because the client felt they did not receive value and so do not want to pay the firm's fees. The concept of value may be different for different clients. It may be that they wanted a quick resolution to the matter or to resolve the matter in a way that maintained their working relationship with the other party. Alternatively they might have wanted to take the matter all the way to court to create a precedent for future matters.

Value for a client might rest on how well the firm communicates with the client and treats them with respect. Unless a firm explores with the client what they want the result to be and how, they may never fully achieve a satisfactory outcome for a client.

In this scenario Bill and Jeremy both seemed to jump in and assume the clients wanted to win at all costs and teach the new management a lesson. The outcome was the costs of doing so far exceeded any benefit the clients would receive. One of the major differences in Take 2 was that Bill was much more interested in exploring with the clients what options they had and what would be an acceptable outcome for them.

How careful are you to explore at the start what the client is trying to achieve?

Risk management strategies

- Keep comprehensive file notes of all attendances on your client, whether in your office or elsewhere including what was said, who was present, what the client's responses to your questions were and how long it took.
- Check your file notes:
    - are dated
    - identify the author
    - record the duration of the attendance
    - record who was present or on the telephone
    - are legible to you and someone else
    - record the substance of the advice given and the client's response/instructions

- are a note to the file rather than a note to you.

- Do not provide financial advice.
- Be clear about who you are acting for in your correspondence with the other side.

Managing expectations

In this scenario it was not just at the start of the matter that the firm did not communicate well with the clients. They also failed to keep the clients informed of the costs as the matter progressed. The cost issue was extremely important to the overall strategy given the value of the business being defended and needed to be managed well with the clients. The initial estimate was well exceeded when the issue of costs was raised again and while the clients were told they were approaching the estimate they had in fact exceeded it. There was no attempt to revisit the strategy and have an open discussion about the best way forward.

Failing to talk about costs is a common failing in lawyers. Many seem embarrassed to discuss how much they will or have charged yet it is the thing that clients want to or need to know.

Firms that manage these issues well have a practice management system that flags when the costs are approaching the estimate and they raise the matter with the clients at that point. They do not procrastinate over discussing the issue of costs with their clients, they keep their clients fully informed about the costs along the way and bill their clients regularly. They say keeping clients informed about the costs along the way reduces extensively, if not eliminates, complaints about the bills and the service.

How well does your firm deal with the issue of costs at the start and throughout the life of a matter?

Supervision

One of the issues raised in the scenario was inadequate supervision of the senior associate Jeremy. If either of the partners had paid sufficient attention, they might have realised Jeremy's unrealistic 'win at all cost' approach was inappropriate for the situation with spiraling legal costs.

Just because Jeremy was a senior associate it does not mean the partners did not have to supervise him. The level of supervision of a senior associate will be different to that of a junior lawyer or clerk but there must still be some form of supervision.

Any supervision must be proactive and its effectiveness depends on people being consciously aware of the limits of expertise and experience of those they supervise. It also depends on managing the delegated work until it is completed. The person supervised also needs to be proactive about seeking guidance where needed.

What could have been put in place to supervise Jeremy?

- Weekly meetings to discuss his open files and their strategies.
- Review billing and work- in-progress information to look for unpaid fees or excessive amounts of billed hours on a matter.

For more information about this topic refer to the audio-visual training video *Supervision* on the LPLC website.

***Legal Practitioners Complaints Committee v Benari [2005]* WASAT 213**

In this Western Australian case, the State Administrative Tribunal looked at a legal practitioner's obligation to supervise an employed law clerk. The practitioner was taken to the tribunal in respect of three separate complaints, one of which related to failing to properly supervise an experienced law clerk.

The evidence showed the law clerk saw clients, took instructions, imparted legal advice, opened files and ran those files acting on behalf of clients. She had weekly meetings with the practitioner where she discussed any matter she needed to (or, perhaps more accurately, thought she needed to). While she gave evidence that it was protocol to discuss all issues of liability and settlement with the practitioner, there was no evidence of any involvement of the practitioner in the relevant matter.

The tribunal said the practitioner should have a proper system in place to ensure his actual involvement in or supervision of, all files. He had delegated all the functions mentioned above and, it was only if anything out of the ordinary happened that a matter was brought to his attention.

The lesson is practitioners need to maintain some level of active involvement in matters they are ultimately responsible. While many practitioners might claim to have an open door, it is not sufficient to expect clerks and juniors to always know when they need to enter that door.

In the judgment there is a summary of the obligations of a practitioner when supervising the work performed by a clerk, as discussed by Malcolm CJ in another Western Australian case, *D'Allessando and D'Angelo v Bouloudas* (1994) 10 WAR 191.

***Kelly v Jowett [2009]* NSWCA 278**

In this case, the clients of the firm were executors of an estate which was the subject of an application for maintenance and advancement of life brought by the son of the deceased (the 'applicant'). An employed practitioner had the conduct of the matter and signed the Notice of Appearance. Prior to the hearing, various court rules, order and directions relating to the filing of the clients' affidavits were not met.

The matter was heard with the clients leading no evidence and no cross-examination of any of the witnesses. At the hearing, an order was made for the applicant to receive a legacy from the deceased's estate and a personal costs order was made against the practitioner. The clients subsequently applied for an order to stay the judgment, adducing evidence that they were never informed the matter was not proceeding satisfactorily. They had assumed the practitioner was looking after their case and everything was proceeding normally.

On appeal, evidence was adduced that the firm's principals knew or ought to have known, of the practitioner's unreliability and delinquency in this and other estate matters. The court held that a client's retainer is with the firm's principal and the firm's principals had neglected to properly supervise the practitioner they employed. The principals' failure to ensure their clients' affidavits were filed in time caused the applicant to incur costs relating to the proceedings, the stay application and the substantive appeal.

The principals were ordered to pay all of those costs on an indemnity basis. In addition, they had previously agreed to indemnify their clients for any costs for which they were liable in respect of the proceedings and the appeal.

***Mills Oakley Lawyers Pty Ltd v Huon Property Holdings Pty Ltd [2012]* VSC 39**

The court found a practitioner negligent in failing to actively supervise a senior associate. When advising a purchaser on a commercial transaction, the relatively inexperienced senior associate failed to realise that last minute changes to proposed funding arrangements could put certain assets at risk. As is often the case, the responsible practitioner gave evidence that he was not aware of the changes to the funding arrangements (especially the crucial email) but that if he had been so aware, he would have been alert to the risks and advised the client to consider restructuring the transaction.

The court found the senior associate should not have been completing the transaction without active supervision given her experience in the type of matter. Had there been adequate, proactive supervision, the practitioner probably would have been able to fulfill the retainer to give competent legal advice by recognising and warning of the relevant risks.

Understanding the limits of an employee's abilities and experience is an important factor when delegating and supervising well. It is often difficult to assess.

Risk management lessons

There is no 'one-size-fits-all' approach to effective supervision. However, the supervisor and person to whom work is delegated both need to be proactive about supervision at all times.

Effective supervision for any given matter will depend on factors such as the personalities and experience of the individuals involved as well as the type of matter. The supervisor needs to maintain some level of active involvement in every matter.

It is important that the supervisor and person to whom work is delegated are on the same page about what is to be done. The supervisor should:

- give clear instructions about the task, any limits on time and resources, and the expected outcome for example the form and length of document to be produced
- provide sufficient background information to give context to the work, including commercial considerations and the client's objectives
- be proactive about confirming their instructions are understood
- keep the other person informed about changes in instructions or circumstances that impact on the work
- be open to queries
- provide constructive feedback regarding the person's performance of the work.

The person to whom the work is delegated should ensure they remain vigilant about obtaining all the information they need and seeking guidance where necessary.

Who is the client? – acting in a joint venture

In this scenario Michael and Rob are partners of some kind in their golf coaching business. The firm doesn't seem to clarify who they are acting for at the start – either men or their business. The problem is that as the matter progresses it appears Michael and Rob have different views on how they want to handle the matter.

We regularly see claims involving joint venture arrangements where joint venture means an arrangement where two or more parties are together in a commercial venture. Sometimes these business arrangements are documented in a joint venture agreement, sometimes they involve a partnership arrangement or a unit holders agreement, or there could be a combination of agreements. Sometimes there is no written agreement at all. The point is there are several different interests coming together with a mutually agreed purpose.

The parties are not antagonists or adversaries. They appear to be in furious agreement about what everyone is contributing to the arrangement and how they are all going to work together to make this enterprise successful. Therefore, it is often the case that one lawyer will end up acting for all of the parties.

What could be the problem?

- The parties may have very different interests, be in different positions and may all need very different advice.
- They may be getting different things out of the deal.
- They may have different amounts or types of assets at risk.
- Misunderstandings about who the practitioner is acting for – by the practitioner and the client(s).

In the scenario the firm does not define whether it is working for Michael, Rob or both of them. Michael in keener on litigating as he 'never backs down" but Rob would also like the matter settled. Why was there a conflict?

Risk management strategies

Before you decide to act for all parties in a joint venture situation or for more than one party in a transaction you might consider whether it is best practice. You also need to:

- be clear about who you are acting for right from the start and confirm this in writing to everyone, including the parties you are not acting for

- avoid giving any advice to other joint venturers and where mortgages and guarantees are involved not sign solicitor's certificates for the other joint venturers
- recommend to unrepresented non clients they get independent legal advice
- ensure you do not put yourself in a conflict situation, no matter how obliging and accommodating you want to be.