

Making file notes and writing letters is a well-worn risk management message for practitioners. Creating that useable trail is as much a part of the job as providing advice. We regularly see claims where no file note is made or the practitioner has kept some file notes, but they do not contain the relevant advice given or contain a cryptic 'note to self' which could be interpreted very differently by someone else at a later date.

Creating and keeping a useable trail is critical, especially when the client is not accepting your advice. The absence of a file note or written correspondence may well be relied upon by a court to draw an adverse finding against the practitioner and lead to a preference for the evidence of the client over that of the practitioner.

If you have any doubt as to the value of making contemporaneous file notes there are many cases where the courts have not believed the practitioner's version of events because they didn't have a file note to support them. A recent decision of *Bakovski and Lenehan* in New South Wales is a good example.

In this case the practitioner and the clients, Mr and Mrs Bacovski, had very different versions of what happened when the clients came to the law office to sign some documents. The practitioner's evidence that he gave the clients strong advice about the transaction and urged them not to enter into it was not believed.

The lack of contemporaneous file notes of the meeting was a significant factor in the court's decision. The judge commented that "the failure to make a file note or other record is contrary to the expected practice of an experienced solicitor." The judge said he would have expected the practitioner to have made a file note if the meeting had occurred as the practitioner said it had. The lack of file note was at least consistent with the clients' version of events.

The judge found the Mr and Mrs Bakovski did not understand the nature of the transaction and the practitioner failed to advise them on the legal effect of the mortgage, its harsh and oppressive terms and the risks of entering into the transaction.

This case can be contrasted with the recent decision in the Supreme Court of Tasmania, *Masters and Dobson Mitchell & Allport*. In this case the client and the practitioner again had very different versions of events—this time in relation to settlement discussions both at mediation and subsequently when the matter settled. The practitioner had file notes made at the mediation and in subsequent telephone conversations with the client that confirmed his version of events. The court accepted the practitioner's version of events largely because of his supporting file notes. These two cases clearly confirm the value of contemporaneous file notes. Here are some tips to keep in mind to avoid these types of claims.

Keep detailed file notes of all conferences and telephone conversations with your clients and others.

Confirm your advice in writing to the client.

Ensure 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 yourself.

Consider other ways of recording what advice was given including audio or audio-visual recording of the conference. One of the benefits is the client can be given a copy to listen to again later.