The humble file note as important as ever

By GREG COUSTON

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For decades, younger and older practitioners alike have been encouraged, and sometimes lectured, about the benefits of making file notes.

But against the background of the modern legal practice, and the landscape of instantaneous electronic communications, has the humble file note become an irrelevant anachronism?

Historically, best practice required lawyers to document or record in writing important agreements, conversations or occurrences. Part of this practice arose out of judicial attitudes.

In 1953, in the case of *Griffiths v Evans*,1 Lord Justice Denning considered a dispute between a solicitor and client about the terms of the solicitor's retainer. There was no written material evidencing the retainer. Lord Justice Denning said: "If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences. The word of the client is to be preferred to the word of the solicitor."2

Although this pronouncement was not endorsed by Australian courts,3 judicial attitude to the importance of matters being "evidenced in writing" had a particular impact on the profession - and on the trends in best practice and risk management. More recently, however, a decision of the Supreme Court of NSW notably emphasised the importance and role of a file note. In the latter part of 2010, Justice Rein delivered judgment in a dispute between a client and his former solicitor.4 One of the crucial issues in the case was whether a particular conversation (disclosing an important fact) took place between the solicitor and his client.

In this context Justice Rein said: "[The solicitor] has no diary notes of any conferences or conversations with [the client]. There is no letter from him to [the client] setting out any advice given to him pertaining to the issue of [the solicitor's] conflict of interest or in respect of any advice given and not followed ... The degree to which notes are made by solicitors ... is obviously not uniform, but I think that when important advice is given orally by a legal practitioner, a failure to follow up that oral advice with a letter, or at least to note the advice by means of a file note, particularly where the subject matter of the advice is relevant to the existence of a conflict of interest or where the client has indicated that he or she does not wish to follow the express advice given, is extraordinary and sufficiently remarkable as to induce doubt whether the advice was given at all."5

In the outcome, the evidence of the client was preferred to that of the solicitor.

So, in the 50 years since Lord Justice Denning's pronouncements - has all that much changed? An Australian court has now expressed a judicial attitude of drawing adverse inferences (on credibility) from the absence of a file note. That is to say, when it comes down to an issue of conflict between the recollection of a client and that of a solicitor over a conversation on an important matter, the absence of a file note is of particular relevance and is potentially prejudicial to a solicitor's position/ defence.

The pressures on lawyers are ever increasing. The prevalence of emails has helpfully led to a great many communications being recorded in writing - and the practice of confirming communications by email should be encouraged.

There are nevertheless still a large number of important professional communications which are oral. Technology has increased the speed and efficiency of lawyers' practice - but it has not improved the (unaided) memory/ recollection of lawyers.

In the context of risk management, the humble file note is as important today, if not more important than it has been in prior times.

ENDNOTES

1. *Griffiths v Evans* [1953] 2All ER 1364.
2. Ibid at p.1369.
3. *May v Burcul* (NSWCA, 18 October 1982, unreported); *Polperro Holdings v Vincent* (WASC, 16 September 1996, unreported); *Meerkin and Apel v Rossett* [1998] 4 VR 54.
4. *Sewell v Zelden* [2010] NSWSC 1180.
5. Ibid at [56].