

Getting the message across: clients, clarity and communication



Melissa Fenton is a partner at Colin Biggers & Paisley and **Emma Griffith** is a claims solicitor at Lawcover.



It shouldn't be surprising that a defining trait of a successful solicitor is their ability to communicate clearly and concisely. It may, however, come as a surprise to learn that this trait includes the ability to be a good listener and assess whether your client has understood your advice.

Lawcover sees a number of professional negligence claims against solicitors arising out of an alleged failure to provide adequate legal advice. These types of claims are frequently pleaded in terms of the alleged negligent mismanagement of litigation. Whilst this captures a broad array of claims, ranging from the failure to meet Court ordered timeframes to a failure to advise on settlement negotiations, recent judicial authority has demonstrated that the courts are willing to assess the reasonableness of advice given by solicitors on the merits of running or settling a case.

Spralja v Bullard & Ors

In *Spralja v Bullard & Ors* [2018] VCC 437, the plaintiff signed an agreement for the sale of his fishing permit and shark catch quota. There was a dispute over the terms and the litigation settled. Mr Spralja subsequently asserted that his solicitor and barrister had not provided proper advice regarding the terms of the settlement and that he had been forced into terms he did not agree to. For present purposes the relevant issue was whether the solicitor had failed to properly advise his client concerning settlement opportunities and/or failed to secure clear instructions. The Court held that:

- Mr Spralja's solicitor and barrister were negligent and liable;
- the advice did not allow the client to meaningfully consider his options in accepting the settlement;
- the advice was given at a very general level and did not consider the various claims within the proceeding;
- the advice as to prospects of success only addressed the risks in pursuing the matter to hearing, rather than providing a well-rounded assessment including the potential for a successful outcome;
- there was no written record demonstrating his instructions

Snapshot

- Clear and effective communication is key in minimising the likelihood of a professional negligence claim.
- Legal advice should assist a client to understand the relevant legal issues and make informed choices.

to consent to the offer that was finally agreed.

Nearly 50 per cent of Lawcover claims are caused by poor communications with clients, including written advice. This case provides a reminder of the requirement for solicitors to communicate clear and timely advice to assist clients in understanding legal issues and to make informed choices about actions to be taken (see rule 7 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*).

The reference in the rule to an 'informed choice' is not limited to your client's capacity issues, but extends to ensuring your client fully understands your advice. Rule 7.2 requires a solicitor to inform his or her client about the alternatives to a fully contested adjudication of the case, which are reasonably available to the client. This means that solicitors will need to provide advice about the prospects of success; pros and cons of exploring settlement; and a realistic settlement range within which to consider alternatives to a fully contested hearing.

Communication tips to minimise risk

Clear communication is an essential skill that is often overlooked. It is the cornerstone of a successful legal practice and can go a long way in managing risk to yourself and your clients. Solicitors can minimise risk by:

- keeping the three Cs front of mind throughout a matter – client, communication and clarity;
- keeping detailed, contemporaneous file notes of all communications with the client;
- ensuring any advice is balanced and considers all aspects of the claim;
- providing holistic advice not solely focussed on the risks of the litigation, but also addressing what success looks like;
- providing the client with a quantum table indicating the likely range to be awarded, addressing each head of damage individually (where appropriate, and particularly where a case consists of various factors likely to affect the outcome);
- ensuring that communication is documented, and confirms receipt and instructions of offers in writing. **LSJ**