

Protecting yourself from claims – when a file note saves the day



Renée Stevens is
Legal Risk Manager
at Lawcover.



Lawcover consistently deals with negligence claims brought against solicitors where, for example, a client alleges a legal issue was not explained properly, but the solicitor has not kept any file notes or other evidence to prove otherwise. The taking of file notes should be an integral part of every law practice. Without file notes or other evidence of what has transpired in a matter, it is extremely difficult to defend a professional negligence claim subsequently made by the client. Where it is one word against the other, a court may be more inclined to believe the client.

File notes do not, of themselves, provide a legal defence to a professional indemnity claim. However, detailed and contemporaneous notes are essential to successfully defend a claim where the client's oral instructions or the terms of oral advice are in issue. File notes also assist in refreshing our memory as to the status of a file; they help provide a complete picture of a file which will enable a colleague to work on the file; and courts and judges expect that solicitors will document advice provided to a client.

File notes in action

In *BHCP Pty Ltd (ATF BHCP Trust) v Reliable Constructions (Australia) P/L* [2020] NSWDC 414, an action was brought against a firm where one solicitor provided independent legal advice to a client on proposed loan documents, including a directors' guarantee and real property mortgage. After the advance was made, the company defaulted on the loan, the guarantee was called upon and a possession claim was made on the company director's home. The client brought a negligence claim against the solicitors, on the basis that the retainer extended to advice on: (i) the alternatives available to them to avoid personal liability; and (ii) consequences if they refused to provide the guarantee and mortgage sought by the lender.

The Court considered the question of whether there was a breach of the solicitor's retainer, and the nature and extent of the retainer. This involved examination of the credit of the witnesses as to what occurred at the one-hour conference with the solicitor. The clients gave evidence they received no legal

Snapshot

- A lack of file notes can significantly hinder a solicitor's successful defence against a client's claim.
- File notes provide documentary evidence of oral communications between the solicitor, client and other parties involved in the matter.
- File notes should be clear, contemporaneous and record the principal points discussed.

advice of any substance, even though they signed a statutory declaration to 'the contrary effect' in the solicitor's presence (at [30]) and despite the fact that 'obtaining such advice was the sole reason for them attending on [the solicitor]' (at [65]).

In finding there was no breach of duty, the Court referred to the solicitor's detailed file note which suggested 'that an explanation of the documents to be explained was made consistently with her evidence'. The file note also included 'a note of the genesis of the transaction, and the fact that the [clients'] home and personal property were at risk' (at [62]).

In this case, the solicitor was also able to recollect the conference she had with the clients, but often, solicitors will struggle to remember the precise details of conferences with clients, especially if they are giving evidence well after the event. This is where a clear and detailed file note will be critical.

Tips to minimise risk

- Always make clear and contemporaneous notes of instructions received and advice given to clients, particularly if the instructions or advice are oral.
- If a file note cannot be made at the time, prepare one as soon as practical after the event.
- Record the date, time and duration of the call or conference and the principal points discussed. Take particular care to note discussions regarding unusual provisions, obvious practical implications or circumstances which might adversely affect the client's interests.

In the absence of a file note, it is difficult for a practice to provide supporting evidence for its version of events, where the client has a contrary recollection. With a file note to support your recollection, the prospects of successfully defending the complaint or claim will be greatly improved.

Whether they are handwritten, dictated, typed or take the form of copies of emails to the client confirming what has just been discussed, file notes are a vital part of your practice's risk management. **LSJ**