Slow down at the end

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One of the most important tasks that practitioners undertake is to negotiate a settlement for a litigation client.

The temptation is to rush this part of the process just when they should be slowing down and taking extra care. To obtain a sustainable and satisfactory outcome for their clients, practitioners need to keep in mind the risks that arise at this critical time.

There are extra risks in litigation because of the nature of both the work and the clients. In the past five years, 55 percent of all claims reported to Law Claims involved litigation matters and almost nine million dollars has been paid out or reserved on these claims.

A good practitioner knows that issuing correct proceedings on time and progressing a matter diligently are essential tools.

Getting it right at the end, however, is also vital, regardless of whether the negotiation process and potential settlement are through mediation, conciliation or a settlement conference. Practitioners need to do all that they can to avoid clients alleging 'my settlement was an ill advised compromise'.

Deane J. in Hawkins v. Clayton (1988) 164 CLR 539 at 578 579 said:

> *"The solicitor, as a specially trained person possessing expert knowledge and skill, assumes responsibility for the performance of professional work requiring such knowledge and skill. The client relies upon the solicitor to apply his expert knowledge and skill in the performance of his work."*

Practitioners must use their knowledge and skill at this critical time to ensure that they provide clients with all the necessary information and advice to enable them to make a meaningful assessment of the settlement options available.

This involves preparing the client for the settlement process and ensuring that the clients' expectations and desires are clarified. Clients often do not have a proper appreciation of the risks, the commitment, the process, or the costs associated with a settlement, particularly if they have judgment awarded against them.

Claims in this area fall into three broad areas of vulnerability. The first can be described as settling without informed consent or proper authority.

Claims under this heading arise for a variety of reasons. For example, a client may allege that his practitioner failed to warn or adequately advise him of critical issues. Therefore, it is critical to communicate with clients in a way that allows a clear understanding of their options.

As Davies AJA said in Curnuck v. Nitschke (2001) NSWCA 176,

> *"In considering duties of care arising under tort and contract, the courts have imposed upon professional practitioners a duty to give an appropriate warning in respect of matters of which the client should be informed."*

Alternatively, the problem may not lie with the adequacy of advice, but rather with inadequate documentation of either advice and information given or instructions received. This leaves the practitioner in a situation where he or she cannot prove what was said or decided. The importance of a paper trail cannot be over estimated.

As Doyle C.J. commented in National Australia Bank v. Mitiolo and Ors (2002) SASC 102:

> *"…this case stands as yet another warning to solicitors about the desirability of keeping a written record, at least an outline of advice given in such cases. It is an illustration of the benefits of confirming in writing advice given on crucial points, or on points on which there might be a misunderstanding."*

Preventative steps range from ensuring that clients are provided with sufficient information that will enable them to make a considered decision, to undertaking all necessary tasks and making enquiries in a timely manner. It is vital that practitioners keep detailed file notes of clients' instructions and ensure

that they do not put clients into pressured situations without appropriate preparation.

Clients should 'sign off' on settlement instructions before the conclusion of a settlement. After the settlement, the client should receive prompt written confirmation of the decision in order to properly explain what has happened and why.

The second area of vulnerability can be identified as inadequate releases or deeds of settlement. Claims can arise when practitioners fail to ensure that their clients' instructions are reflected in the documentation. They may leave something out such as a restraint of trade clause or a particular asset or they may inadvertently give something away such as rights to take other actions.

Practitioners may prepare documents inadequately and fail to use precise enough language, perhaps as a result of time pressures, and terms such as 'salary' or 'wages' may not be clearly defined. They may also fail to adequately proofread documents, particularly in relation to critical details. Using a wrong precedent or failing to pick up a typing error are common traps.

Practitioners need to slow down at this critical time. If they are working in a team it is important that any instructions regarding particular terms required in a settlement are communicated clearly to all practitioners involved. The practitioner needs to ensure that settlement documentation is clear, comprehensive, and comprehensible.

Careful supervision of less experienced practitioners should ensure that the task of drafting settlement documentation is not treated lightly.

The third area of vulnerability is where clients have settled, but subsequently they decide that they are unhappy with the outcome. They can be described as suffering from post settlement remorse syndrome.

To avoid such an outcome it is vital that practitioners understand, respect and manage the uncertainty and apprehension that clients feel at this time. No matter how well educated or commercially aware a client is, the litigation process is still foreign to most. While it is second nature to the legal team, clients often feel intimidated by the system and will therefore need to be carefully managed.

Clients suffering from this malaise could comment along the following lines:

> *'We were feeling overawed. We had never been in a courtroom before. There was so much discussion between our practitioner, our counsel and the other side that we were confused about our position. When our practitioner said the other side had made an offer we were relieved; we agreed to the terms so we could leave. We felt out of our depth with the prospect of proceeding to trial.'*

'Post settlement remorse syndrome' can occur when a practitioner fails to manage a client's expectations, fails to adequately prepare the client for the dispute resolution process or fails to understand, respect and manage the client's uncertainty and apprehension.

It is clear that the client must make the decision whether to compromise or proceed with their matter. (It may be they know something that their practitioner does not know, such as the possibility of adverse video footage.) If, however, they appear to be making an unwise decision, then slowing the process down to talk matters though is most helpful.

It is not only the legal issues that need to be dealt with at this time, but also the uncertainty and apprehension of clients. Providing written advice in opposition to a particular course and obtaining signed instructions to proceed often prompts clients to reconsider their instructions. But even if the instructions remain, these steps will help them own their decision and will provide a paper trail and protection for the firm.

Clients can also regret their settlement decisions even if they have given their practitioner wise instructions. They can be challenged by family, peers or colleagues after the event. A clear, positive post-settlement letter from their practitioner can assist them to remain comfortable with their decisions and explain them to others.

Good preparation, drafting, proofreading and communication will help ensure clients understand, consent and 'own' their settlements. This can be achieved by slowing down at the end to ensure that neither the lawyer nor the client 'acts in haste and repents at leisure'.