

Ready to defend yourself? The power of the file note

By Janice Purvis



Janice Purvis is a Solicitor and Manager, Practice Support Services at Lawcover.



Every Lawcover presentation or workshop stresses the importance of making contemporaneous and comprehensive file notes of communications with, and advice provided to your clients. Lack of file notes is a significant handicap in presenting a successful defence on behalf of an insured, in the event of a professional negligence claim. Despite this, in just about every Lawcover presentation and workshop, practitioners provide me with various reasons as to why this is not possible: ‘I don’t have time in my busy practice’; ‘I can’t charge the client for spending time writing file notes’; or ‘I don’t see the necessity for them’.

So why does Lawcover continue to impress upon practitioners the importance of file notes?

If file notes are not made at the time or shortly after, there is a real risk that should a claim arise, there will be no clear documentary evidence of the oral communications between solicitor, client and other parties involved in the matter. Not only this, file notes assist in refreshing memory as to the status of a file, they help to provide a complete picture of the file which will enable another practitioner to work on the file if necessary and courts and judges expect that practitioners will document advice provided to a client.

What do the courts say about file notes?

In *Sewell v Zelden* [2010] NSWSC 1180, an action defended by Lawcover, the comments by Justice Rein are instructive as to how the court will treat the uncorroborated evidence of a solicitor when that evidence conflicts with that of the solicitor’s client. In this matter, Lawcover could only successfully defend the action if the solicitor was believed. However the solicitor made no file notes of conversations with his client.

The Court found in favour of the plaintiff, with Justice Rein stating: ‘[w]hen 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

Snapshot

- A lack of file notes is a significant handicap in presenting a successful defence on behalf of an insured.
- Should a claim arise, without file notes there will be no clear documentary evidence of the oral communications between the solicitor, client and other parties involved in the matter.
- File notes should be contemporaneous, comprehensive and legible.

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given at all’ (at [56]).

In *Renard & Geach* [2013] FCCA 617, the Federal Circuit Court declared that a financial agreement signed in 2008 was not binding upon the parties. The husband sought a declaration on the basis that he did not receive the required independent legal advice from his solicitor before he signed the agreement. Family lawyers will know that this set of circumstances is, unfortunately, not uncommon.

In answer to the question from the judge: ‘Where are the file notes?’, the solicitor replied ‘the file notes are the document’ and ‘there is no need for file notes’ where the solicitor has ticked the clauses on the draft (at [57]). When asked whether a prudent solicitor would write notes in their file, the solicitor replied: ‘Not when you’re charging \$440’ (at [59]).

Justice Small stated (at [79]) that ‘[a] lawyer should always make clear and contemporaneous notes of any advice given to a client, and for exactly the reason that has led to this litigation – that is, to support any assertion that such advice has been given and to refute any assertion that it has not’.

Like them or not, the taking of file notes should be an integral part of your practice of law. Many practitioners take hand written notes while talking to their clients. Some practitioners find this distracting and will dictate or type the file notes afterwards. In this modern digital age there are endless ways to record file notes - voice activated word processing, smart pens and apps are all available using the smart phone in your pocket.

Conclusion

No matter which method you choose, there is no excuse for not producing contemporaneous, comprehensive and legible file notes. If you are struggling to maintain fulsome, up to date file notes, don’t see the value or don’t have the time, you might consider how you would respond to a claim on a file with vague or no file notes at all. When a claim comes down to a difference of opinion between a solicitor and a client regarding advice or instructions provided, a detailed file note will be worth a lot more than the time it takes to complete it.

File notes – they don’t take a lot of time and it is time well spent. **LSJ**