

# Risky but not doomed to fail – The importance of a paper trail

Candice Perriman  
Risk Education  
Manager



The recent case of *Victorian X-Ray Group Pty Ltd v Malouf t/a Malouf Solicitors (No 3) [2024] NSWSC 888* shines light on advising on prospects of success, in particular whether proposed defences, were doomed to fail.

## Background

The solicitor defendants acted for the plaintiffs in a series of District Court cases. There were three cases against different entities in the Victorian X-Ray Group of companies, and each of those three companies were being sued by Phillips Electronics for an alleged debt. There was a service agreement for equipment in a medical imaging business, and the company alleged that the service agreement had been breached. These three companies hadn't paid the amounts that were due.

The plaintiffs failed in the District Court proceedings and then sued the solicitors alleging a failure to advise that their defences were hopeless and doomed to fail. The solicitors were ultimately successful, but why was this case defensible?

At the time that the solicitors certified the defences in the underlying proceedings, they were required to have reasonably believed on the basis of provable facts and a reasonably arguable view of the law, that the defences had reasonable prospects of success (see *Legal Profession Uniform Law Application Act 2014 (NSW) Schedule 2 cl 2*). This involved making relevant enquiries and assessing the legal position, but as noted by Cavanagh J, the discharge of their duty did not require the solicitors to be aware of 'every case and every fine legal argument which might be raised' (at [79]).

Further, the District Court accepted that the solicitors never gave optimistic advice in relation to the defences in the underlying proceedings as '...such advice would be inconsistent with all correspondence and contemporaneous file notes' (at [96]).

The following documentation proved invaluable in the solicitor's defence:

## 1. Detailed, contemporaneous file notes

The solicitors working on the file kept detailed file notes about the conversation where an oral variation to the written contract was said to have occurred. These notes clearly showed the information available to the solicitors at the time and when they were assessing whether or not the case would have reasonable prospects of success.

## 2. Clear communications in writing

From the outset the solicitors working on the file had made enquiries, took detailed instructions and asked clarifying questions via email. This, coupled with detailed file notes, meant there was a clear and concise paper trail showing the timeline of enquiries made, questions asked and answers provided.





## Risky but not doomed to fail – The importance of a paper trail

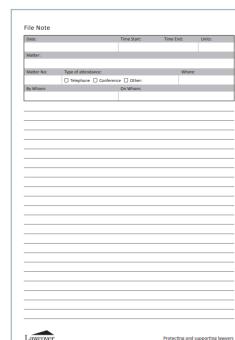
### Forming a view about prospects – how much is enough?

As Cavanagh J noted in his judgment, the solicitor's task of forming a view about prospects needs to be a practical one. *'As a general proposition, the obligations on a solicitor must have practical application. They should not be so onerous as to prevent a solicitor from exercising his or her judgment in a practical and cost-effective way'* (at [244]). The Judge also noted that the solicitor wasn't required to know every conceivable argument relating to the law and was also not required to form a view about whether the client's evidence would be accepted over the other side's evidence regarding an oral conversation. Noting the size of the case and the size of the practice, undertaking extensive analysis was not necessarily practical or cost-effective.

*Note: The decision of Victorian X-Ray Group Pty Ltd v Malouf t/a Malouf Solicitors (No 3) [2024] NSWSC 888 is under appeal.*

### Risk management tips

- Record detailed and contemporaneous file notes of interactions with clients
- Maintain a paper trail - keep a complete file including emails, file notes, enquiries made, questions answered, information requested and received, conversations etc.
- Make enquiries and ask questions from the outset. If there are records, emails, diary entries, etc that might support a defence, request them upfront.



The image shows a 'File Note' template form. It includes fields for 'Date', 'Time', 'Location', and 'Client'. Below these are sections for 'Subject', 'Type of information', and 'Details'. The 'Details' section has checkboxes for 'Interview', 'Conference', 'Advice', and 'Other'. The form is followed by several horizontal lines for writing. At the bottom, there is a 'Lawcover' logo and the text 'Handling and supporting teams'.

File Notes  
template

[Click here](#) to download.