



The power of the file note



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When your practice is busy, or when you are working away from your office, one thing that you should not let slip is making file notes.

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, practitioners often express reasons for not making file notes: '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 are file notes important?

If file notes are not made at the time or shortly after a conversation, 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 *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 (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]).

Judge 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 after. In this modern digital age there are endless



ways to record file notes—voice activated word processing and apps are all available using the smart phone in your pocket.

Conclusion

No matter which method you choose, it really is important to produce 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. An alternative is to write an email to the client, confirming the conversation, the instructions and the advice given. When a claim comes down to differing versions of a conversation regarding advice or instructions provided, a detailed file note will be worth a lot more than the time it takes to complete it. ■

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