

File notes: when to take them & when to use them



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Few practitioners need to be educated about the importance of keeping detailed file notes. File notes are not legal advice per se, and they do not of themselves provide a legal defence to a professional indemnity claim. However, detailed and contemporary file notes are essential to the successful defence of professional indemnity claims in which the client's oral instructions or the terms of oral advice are in issue.

These contests typically occur years after the actual conversation and, as the High Court noted in *Fox v Percy* 214 CLR 118; [2003] HCA 22 [at 31], in these contests judges seek to base their findings on 'contemporary materials, objectively established facts and the apparent logic of events' in order to diminish their reliance upon an assessment of witnesses' credibility alone when making findings of fact.

While contemporary file notes will not be determinative of the credit issues, they still have an important part to play. Further, practitioners should always consider confirming oral advice in writing, and be aware that the integrity of that correspondence itself may be tested against the file note of the earlier conversation.

The important role file notes and confirmatory correspondence can play in claims against practitioners can be seen in *Symonds v Gadens Lawyers Sydney P/L* [2013] NSWSC 955. The plaintiff alleged that practitioners negligently failed to advise on the tax consequences of a transaction. Evidence was given by the practitioner that the relevant advice had been given in conference. Beech-Jones J declined to accept the practitioner's version of a conversation on the basis that, while a file note of the relevant meeting existed, its contents did not support his version of events. The practitioner later provided written advices in relation to the transaction, but these did not reiterate the advice he claimed to have given in conference. His Honour observed that, in the context in which the advice was being sought, if advice of the kind at issue had been given, he would have expected it to be followed up in writing. The importance of detailed file notes, and the need to assess in each case whether a file note alone is sufficient to protect the practitioner could not be clearer.

Again, in *Provident Capital Ltd v Papa (No 1)* [2011] NSWSC 460, it was alleged that a practitioner failed to advise the cli-

Snapshot

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ent of her obligations under loan documents. The relevant conference occurred on 1 March 2007 and the practitioner gave evidence that he had taken file notes of that meeting and a subsequent meeting. Seven days after the meeting, the practitioner sent a letter to the client purporting to confirm the advice given in conference. The practitioner later gave evidence which departed from the letter. The Court was not prepared to accept the practitioner's evidence or, it seems,

the contents of the letter created only days after the meeting, as reliable accounts of what occurred in the absence of a plausible explanation as to what became of the missing file notes. In short, contemporaneity is key if a court is to accept a file note (or a confirmatory letter) as a reliable record.

Uplifting or transferring of a file

The law draws a distinction between documents prepared by the practitioner for the client's benefit, and those created for the practitioner's benefit or protection. The former must be handed over to the client when the file is uplifted, subject to any lien. File notes are considered to fall into the latter category. Many practitioners remove them from a file when it is uplifted or transferred as a matter of course, simply because they are entitled to do so. This approach is not usually in the practitioner's interests.

If one starts from the basic premise that file notes are made for self-protection, some thought ought to be given to when they are most effectively deployed to achieve that purpose.

When uplifting or transferring a file, remember:

- If there is to be a change of practitioner, there is probably already a communication issue.
- Removing records can only amplify communication issues. It may result in an incoming practitioner misunderstanding the history of a matter and evaluating the instructions of the client less critically.
- If there is a dispute, file notes will be discoverable documents.
- Practitioners should always keep original file notes, or at least copies, when transferring files. It's not uncommon for file notes to go missing and systems should be put in place to maintain files. **LSJ**