

RISK NOTE

RECORD KEEPING AND STRUCTURING RECORDS OF ADVICE

Recent comments from Clyde & Co indicate they are seeing fewer detailed attendance notes on solicitors' files than in the past, making it difficult to establish the specific advice given.

*"We are increasingly seeing a lack of attendance notes on files, even on litigators' files, where traditionally lawyers were more exacting in keeping notes than their corporate counterparts. This may be down to time and costs pressures faced by fee earners, who are not taking the time to dictate notes. There is also a tendency by lawyers to see attendance notes as replaced by emails to clients or colleagues recording a conversation, but the detail of exactly what was explained to the client and their instruction may not necessarily be recorded as well as in a traditional attendance note."*¹

Where claims are concerned, this lack of information can make cases difficult to defend. As a guide (though not a liability test), when a claim comes in, files with five or more attendance notes (or clear records of advice given) tend to be easier to defend than those with fewer than five.



Regarding the content of the attendance notes, similar expectations to the Financial Conduct Authority's (FCA's) framework of "key facts", "reasons why", and "attitude to risk" (which often apply in financial services sales)² appear to have been being set by the Solicitors Regulation Authority (SRA). Achieving SRA requirements involves:

- Having evidence that clients were in a position to make informed choices (paraphrasing Outcome 1.12, SRA Handbook).
- On fee arrangements, demonstrating that there was discussion as to whether the cost and risk involved for the client is justified, given the potential outcomes (paraphrasing Indicative Behaviour 1.13, SRA Handbook).

Having a template for attendance notes sets a consistent framework for delivering good service and ensures that there is a record demonstrating that the client was fully advised. This, in turn, is a good risk mitigant, preventing claims and complaints, especially when dealing with "difficult" clients (see our separate risk note on difficult clients for more information).



JOHN KUNZLER, HEAD OF FINANCIAL AND PROFESSIONAL LIABILITY, GIVES HIS THOUGHTS ON RECORD KEEPING.

Telephone advice in particular can be a challenge as it is relatively easy to record instructions while listening, but more difficult to write down advice given while it is being spoken. Similar difficulties are faced by doctors when giving advice over the telephone. Suggested approaches for doctors include asking patients to repeat the advice back, so that the practitioner can confirm that the advice was understood³.

That isn't always practical with law firm clients, but nevertheless checking that advice is understood is important. A follow-up email with the same headings as an attendance note can be used, provided that the detail is not lost.

With this advice in mind, we suggest the following (see table on page 2):

LACK OF INFORMATION CAN MAKE CASES DIFFICULT TO DEFEND.

RISK ACTIONS:

ACTION	BENEFIT
<p>Specify a standard approach to achieve the consistent quality of records.</p> <p>Design template attendance notes and advice records for correspondence from your firm. Standard headings should include:</p> <ul style="list-style-type: none"> • Instructions received. • Advice given. • Evidence that the advice is understood. • Cost advice given (including funding options) and costs benefit justification. • Actions and timescales. 	<ul style="list-style-type: none"> • Sets a logical framework for the delivery of consistent, good service. • Generates evidence that the client was properly advised and regulatory requirements were met.
<p>Implement a consistent framework and work instructions:</p> <ul style="list-style-type: none"> • Amend training manuals, induction processes and templates, and case software to detail the templates. 	<ul style="list-style-type: none"> • Ensures the procedures are embedded across the firm.
<p>Active management:</p> <ul style="list-style-type: none"> • Where possible, set exception-reporting to capture files that have not used the relevant templates. • Include in your system of checking quality. • Compare cases where there are complaints and claims, with those where there are none. Were there a reasonable number of attendance notes in the files for either? 	<ul style="list-style-type: none"> • Demonstrates good practice to underwriters – this is likely to be reflected in the claims history over time, and in professional indemnity premiums. • Ensures appropriate systems to check quality for clients on a regular basis are in place (Outcome O7.8).

FOOTNOTES

1. Clyde & Co. "Lawyers' liability briefing – Summer 2015," available at http://www.clydeco.com/uploads/Files/CC007500_Landscape_for_lawyers_Liability_26-05-15_v4.pdf, accessed 21 October 2015.
2. Financial Conduct Authority. "Assessing Customers' Needs," available at https://www.the-fca.org.uk/quality-investment-advice/assessing-customers-needs?field_fcasf_sector=unset&field_fcasf_page_category=unset, accessed 21 October 2015.
3. The BMJ. "Telephone consultations," available at <http://www.bmj.com/content/326/7396/966.full>, accessed 21 October 2015.

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