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The Importance of Attendance Notes and Structuring Records of Advice

The importance of solicitors making attendance notes has been highlighted by the recent pleural mesothelioma case of *Hague v British Telcommunications Plc*[1].

In this matter, the High Court was concerned with determining the scope of a compromise agreement, where an issue had arisen between the parties as to the scope and extent of their agreement regarding immunotherapy funding.

During his determination, Master Thornton made reference to the attendance notes completed during the parties' negotiations. He confirmed that attendance notes would be admissible evidence as to the common intention of the parties.

The significance of keeping detailed attendance notes is not a new concept.

In *Fraser v Bolt Burden*[2], the High Court considered whether sufficient advice had been given to the claimant to accept a settlement offer, at the door of the court, of £200,000 in relation to a claim said to be worth up to £1.4 million. The judge placed reliance on the solicitors' full attendance notes in order to determine that reasonable care and skill had been exercised by the solicitors in reaching their conclusions and advising the client adequately.

Further, in *Hogg v Crutes*[3], the judge referred to the often-quoted passage in *Gestmin v Credit Suisse*[4], where Leggatt J stresses the importance of contemporaneous documents, the fallibility of human memory, and the dangers of accepting oral testimony that conflicts with contemporaneous documents. Applying that case, the judge attached more weight to the solicitors' file notes and the contemporaneous correspondence than witness statements produced eight years later.

Evidential Value

Conversely, where claims are concerned, the lack of detailed attendance notes can make cases difficult to defend. This was flagged in the decision of *Padden v Bevan Ashford*[5], where the Court of Appeal endorsed the High Court's decision to find in favour of the claimant, as the claimant's evidence had been credible and the solicitor had no recollection of the advice he gave and his normal practice could not be supported by any attendance note.

In *Wellesley v Withers*[6], the court confirmed that it remains good practice to make attendance notes, in order to easily establish and evidence what instructions have been received and what advice has been given. One of the issues in this case concerned a specific amendment made by the solicitor when drafting an option agreement for the client. It was believed that the reason for the amendment had originated during a telephone call between the client and the solicitor.

1 *Hague v British Telcommunications Plc (Immunotherapy: Reasonableness of Treatment: Private Dictionary Principle)* [2018] EWHC 2227.
2 *Fraser v Bolt Burdon Claims & Ors* [2009] EWHC 2906.
3 *Hogg v Crutes LLP [2016]* EW Misc B29.
4 *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560.
5 *Padden v Bevan Ashford (A Firm)* [2013] EWCA Civ 824.
6 *Wellesley Partners LLP v Withers LLP* [2014] EWHC 556.

There was no attendance note of the call on the file. At the time of the call, it was clear that the solicitor was under some pressure because of the transaction, and his normal practice of making attendance notes and/or endorsing instructions within the document he was working on was not followed. Without an attendance note, considering all the evidence, the judge concluded that when instructions were taken the solicitor "either misunderstood at the time, or noted down wrong, or misremembered when he came to draft the clause."

Wellesley v Withers demonstrates the difficulties faced when taking instructions by telephone and the benefit of incorporating an attendance note into a follow-up email communication with the client, to ensure that it is clear what has been agreed. That isn't always practical, but nevertheless checking that instructions and/or advice have been correctly understood is important. Suggested approaches for doctors giving advice by telephone include asking patients to repeat the advice back, so that the practitioner can note that the advice was understood[7]. This technique may be implemented by solicitors when giving difficult advice to clients and when taking instructions from the client; that is, the solicitor confirms his/her instructions to the client (and notes the confirmation).

Trends, claims and complaints

Worryingly, as long ago as 2015, one prominent law firm[8] indicated that they were seeing fewer detailed attendance notes on solicitors' files than in the past, making it difficult to establish the specific advice given. It was suggested that this may be down to time and costs pressures faced by fee earners, who were not taking the time to dictate notes, and also a tendency by lawyers to consider attendance notes as replaced by emails to clients or colleagues recording a conversation.

Unfortunately, as noted in Jackson & Powell[9], "There is no substitute for a proper attendance note, recording the gist of the advice that was given. The lack of attendance notes has materially increased the number of successful claims that are brought against solicitors."[10]

From a regulatory perspective, the use of detailed attendance notes is an important strand in demonstrating the standard of service provided. The SRA's Code of Conduct for Solicitors[11] requires that solicitors deliver competent service to clients (Paragraph 3), and that they are able to justify the decisions and actions they make (Paragraph 7.2). Therefore, the use of attendance notes when taking instructions and providing advice will be fundamental in evidencing compliance to the regulator.

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Having a template for attendance notes sets a consistent framework for delivering good service, and ensures there is a record demonstrating that the client was fully advised. This, in turn, is good risk management, preventing claims and complaints (see our separate risk note on "difficult clients"[12]).

7 The BMJ. "Telephone consultations," available at http://www.bmj.com/content/326/7396/966.full, accessed 21 October 2015.
8 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.
9 *Jackson & Powell on Professional Liability* (Sweet & Maxwell) 11-181.
10 Cited with approval by the Hong Kong Court in *Delhaise v Ng & Co* [2004] 1 H.K.L.R.D. 573 at [51].
11 https://www.sra.org.uk/solicitors/standards-regulations/ (in force from 25 November 2019).
12 https://www.marsh.com/uk/insights/research/solicitors-dealing-with-difficult-clients.html.

With this above advice in mind, we suggest the following:

Risk actions:

Action	Benefits
Specify a standard approach to achieve consistent quality of records. Design template attendance notes and advice records for correspondence from your firm with standard headings such as: - Instructions received. - Advice given. - Evidence that the advice is understood. - Check no additional advice required? - Cost advice given (including funding options) and costs benefit justification. - Actions and timescales.	• Sets a logical framework for delivery of consistent good service. • Generates evidence that the client was properly advised and regulatory requirements were met. • Advice records sent to the client will promptly highlight instruction and/or advice misunderstandings.
Specify a standard approach to achieve consistent quality of records. • Amend training manuals, induction processes and templates, and case software to detail the templates.	• Ensures the procedures are embedded across the firm
Active management: • Where possible, set exception-reporting to capture files that have not used the relevant templates. • Include a system of quality checking. • 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?	• 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 in place to identify risks and evidence that the service provided to clients is competent (Paragraph 2.5 & 4.2 Code of Conduct for Firms 2019).

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