Practice Management and Business Skills

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OVERVIEW

When I sat down to write this paper, I thought what advice can I pass on from my 30+ years of legal practice that would help other practitioners achieve or improve practice management and profitability in their legal practice or assist young practitioners who are embarking on careers as sole practitioners or partners. The tips or suggestions contained in this paper are gleaned from my personal experience and supplemented by the obligatory reading of texts and journals written by 'the experts'.

I have never worked in a large or even medium sized firm, always preferring the autonomy or relative independence of operating on my own or as a member of a small partnership. As such, I do not profess to be knowledgeable in the complex dynamics and economies of large firms; there are practitioners far better able than me to talk about profitability in those enterprises. Of course many of the matters that I raise have equal application in any business and in that sense may be of interest to those in larger firms whether incorporated or as members of the traditional partnership.

The first myth I wish to dispel is that as a sole practitioner or member of a small partnership, you have the freedom to work less if you choose or the flexibility to have time off when you so desire and are answerable to no one. My experience is that whilst this may be so in theory, the practise is far different with most small practitioners working long hours for most of their careers and rarely having the luxury of time off due to the pressures and demands of the business. Furthermore, you are continually answerable to clients, the court and of course

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the law society and those charged with enforcing professional standards as well as fulfilling obligations to staff and family. Whilst those who choose to take on partners have some respite in terms of being able to “get away”, they have the additional pressure of being answerable to their partners and even small partnerships can involve complex personal dynamics and interactions.

Having taken the decision to either establish a practice, buy an existing one, or to enter into a partnership, then what steps can be taken to assist in ensuring that the venture is not only personally fulfilling but profitable? Here are some thoughts and ideas that I have found valuable.

DEVELOP A PASSION

Not everyone is born with the gift of enjoying their work or being passionate about what they do or how they go about it. If you clearly do not enjoy your work or even worse, despise, it, then a change in career may be the answer rather than embarking on the challenge of managing a legal practice. If, however, you are determined to stay the course and do not want to remain an employee, then there are things you can do to develop a passion.

You should perhaps reflect on aspects of practice that you do like and feel confident about and concentrate on those. Many practitioners, for instance, who don’t want the rigour of general practice have found success by finding an area of specialty they like and carving a niche for themselves in that area. By developing an expertise in a narrow area he or she enjoys, the practitioner will develop in confidence and knowledge of their specialist area and their increased

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knowledge and ability to get the job right will lead to appreciative clients who will reinforce the positive feelings and satisfaction that the practitioner derives. Undoubtedly, success breeds success and the more positive the practitioner feels about clients and their issues, the more positive the clients will feel about the practitioner and this is mutually reinforcing. We all know the feeling we get when we perceive that a professional with whom we are dealing not only knows his or her stuff, but enjoys tackling the problem faced by the client and finding a solution. Believe me, all of this impacts on the success of the practice and profitability.

DEVELOPING THE RIGHT CULTURE

Equally as important as developing a passion for your work is that of creating the “right culture” for your firm. Are you a group of nine to fivers who really don’t want extra work and are content to breeze along doing as little as possible at maximum charge out rates, with no desire to develop the ability of the firm to better service the clients, but content to provide a mediocre service so long as the fees are paid? Or are you a firm where everyone is prepared to work as a team to provide the service that clients are searching for? A firm seeking to achieve the best possible outcome who will continually strive to extend the capacity of the firm through professional development and constant questioning of procedures and protocols.

The culture of a firm is hard to define and has many components including the following:

1. How the firm sees itself and its place in the legal market;

2. The ethos of the firm and whether that ethos is perceived as worthwhile and valued by those both inside and outside the firm;
3. Whether the firm is seen by its actions as consistent with its ethos or vision of itself;
4. Whether there is a clear direction by partners in giving effect to the ethos and whether staff are encouraged to be part of that process;
5. Whether partners through their approach and leadership are able to infuse staff with a desire to be involved and to help the firm achieve its goals.

In short, the culture of the practice is made up of what the firm is trying to do, how it goes about achieving it and whether those goals and actions are perceived as worthwhile and valuable. Furthermore, it includes whether the firm is seen as consistent in its goals and processes. I will examine some of these aspects such as the role and direction of the principal/s and the staff in more detail later in the paper.

There is room, however, for considerable variance in the methods and objectives of firms at least in terms of achieving success as a business. For instance, the members of one firm whilst adhering to professional standards and ethical obligations can see themselves as litigators and develop a culture and reputation as hard nosed negotiators who are prepared to take every point in the interests of maximising whatever it is the client is seeking.

Another firm may recognise a wider social obligation and place emphasis on trying to settle the matter expeditiously and effectively but with a minimum of harm to the relationships involved and seeing drawn out litigation and a court

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solution as a last resort. Yet another may offer a combination of the above but with an emphasis on thoroughness and the effectiveness of its processes whether settlement or trial driven.

There are many variances of the above, but my point is that regardless of the objectives and approach, providing the firm is consistent in seeking and carrying out its objectives it will develop a culture that will have some attraction to particular parts of the market place. Other things being equal, this will enable it to achieve profitability and success as a business. We can all, I am sure, recognise practices and practitioners that develop clear objectives and a culture which enables them to stand out in the marketplace and it is this recognition that draws clients and helps to increase profitability.

In my view, the culture of the firm is integral to how others, including clients and colleagues, perceive it. It is this perception that is important to its success and undoubtedly, there is a very wide range of cultures that are attractive in particular circumstances and to particular clients. Of course, whether and how the firm lives up to what attracted the client in the first place and how it is perceived in the marketplace will largely determine the prospect of future referrals.

There are so many aspects that contribute to a firm's culture and it is the unique combination of those that make the firm what it is. Whether the firm seems welcoming and staff helpful and supportive can be vitally important to the firm's success, as can whether the firm lives up to its promise of getting things done. There is little point in firms allocating significant resources to marketing for instance if staff fail to answer the phones or respond to clients.

To a large extent, the culture is intangible. It is probably best summed up by trying to indentify how people feel about the firm and why. Because it is intangible, it is hard to go about achieving a culture that enables the firm to stand out but the following are some of the factors that play a role:

1. Has the firm considered what it stands for and seeks to achieve? In other words, does the firm have a mission statement?
2. Has the firm given consideration to and developed a strategy for getting to where it wants to be or, in other words, does it have a plan for developing and achieving both its legal and financial goals?
3. Is what the firm is striving to achieve worthwhile and is it likely to be valued by staff, colleagues and clients?
4. Are the firm's day to day actions and processes consistent with its goals and objectives?
5. Regardless of where in the marketplace the firm wants to be or the extent and nature of the appeal it is trying to develop, is the firm perceived as fair and ethical?
6. Does the firm approach its service delivery with integrity and is it perceived as a firm with integrity?
7. Do the staff perceive the firm's goals and objectives as worthwhile, do they perceive the firm as consistent in seeking such goals and do they feel valued for their part in the process and encouraged to contribute.
8. Does the firm try to recruit committed and motivated staff and is the firm prepared to invest in training and development.

Another term akin to culture is brand. The Law Institute Victoria publication "The Successful Law Firm" describes a brand as being at heart "the promise you make and the image and perceptions you want your customers to have about your practice”. It goes on to say:

> “A brand is more than just a logo and brochures; it is the values of a practice. What the brand represents creates a trusted relationship between the practice and it’s clients, which in turn translates into customer loyalty and increased profits”.

Identifying the brand helps the practice to find what makes it different from its competitors.

As an illustration of culture and its significance in driving profitability, I have appended an extract from Deloitte’s website detailing the company’s seven signals used to shape the firm’s culture and improve its competitiveness and market profile (see Appendix One). It provides an excellent example of the importance of a firm’s culture.

To a large extent, I believe that the culture of a small practice reflects the personality, values, ability and direction or the leadership of the principal or partners. This is one of the unique aspects of a sole practice or small firm. As firms grow it is sometimes harder in my view for the partners to imprint their personality and values on the firm. However, I would submit that although the culture is more intangible in larger firms the unique personalities and attributes of the partners will impact on the goals, direction, ethos and reputation of the firm and in so doing, contribute to the creation of a firm culture and ultimately determine the success or otherwise of the firm.

In his widely recognised text 'Managing the Professional Service Firm', David Maister makes the following highly pertinent comments on the qualities distinguishing successful firms:

> "What is it that distinguishes the most successful firms (or practices) from ordinary firms in the same market? My experience suggests that it has little to do with creative strategies or unique management systems. Nor is it a matter of IQ or professional talent. The partners I meet in the most successful firms are not consistently smarter or more talented than their counterparts at other firms. What *is* noticeably different at the best firms is a characteristic variously described as energy, drive, enthusiasm, motivation, morale, determination, dedication, and commitment."

THE TEAM

The first thing to realise is that you can't do it all yourself. On your own you quickly realise that there are only so many hours in a day and that your return is limited accordingly. You will face pressure in meeting overheads and covering costs before any profit is made.

It is important in my view to surround yourself with a good team if you are to maximise your success. This involves engaging staff, whether solicitors or support staff with the necessary personal attributes and team approach.

Staff are undoubtedly the most important asset of the business. They must be chosen wisely and once selected, they must be nurtured and appreciated and their further professional development encouraged. The work environment must be stimulating, safe and enjoyable with the emphasis at all times on each employee being part of a team.

Development of the team, however, extends beyond the immediate staff and involves engaging or developing relations with many others including an accountant, personal banker, IT person, phone technician, product supplier, photocopy repairer, landlord, air conditioning mechanic, building manager and others. All of these need to be able to be called on at short notice if required and how quickly they respond and the support they may lend will depend at least to some extent on how they are treated and how they perceive their relations with the firm.

The IT person for instance can make or break the firm on a particular day and may quickly find he or she is too busy to assist if their relationship with the firm has not been nurtured.

Regular communication is required with a competent accountant to assist in setting and measuring financial goals and in meeting deadlines that apply to lodging BAS and income returns. Similarly sensible tax planning can assist greatly in improving cash flow and indeed profitability.

Likewise good communication with a personal banker can provide initial start up capital or an avenue to take advantage of opportunities that come along such as to buy business premises or to avail the firm of superannuation concessions to reduce income tax payable in a particular year.

Of vital importance however is engaging capable staff who understand what the business is seeking to achieve and feel involved and appreciated for their role in achieving these goals. I am happy to say that my staff are vital to the success of the business and are prepared to go the extra mile. This is very gratifying and helpful to me as a business proprietor. Above all whilst applying their individual skills, they are prepared to work and think as a team. I would submit that regardless of size, this aspect is essential to the success of any business.

I remember chatting to a very successful stock and station agent some years ago and he said that one of his secrets was to get to the office before his staff. My take on this is that he was saying it is important to be interested in the business if it is to succeed. If you are not interested in tending to your own business then you can hardly expect your staff to be. On the other hand, enthusiasm and leadership by the principal or partners will enthuse staff and engender in them a desire to assist you to achieve your goals. Your example and leadership, I would submit, will impact on every aspect of the business.

One important aspect of this is to trust your staff and have confidence in their ability and willingness to give their best. If you want them to make decisions then encourage and support them when they do. From my experience if you have confidence in them, they will appreciate this and respond accordingly. On the other hand, you must be available to mentor them when they need it. Like many aspects, it is a fine balance.

"EATING THAT FROG" AND PRIORITISING

I recommend that anyone interested in improving the profitability of their legal practice, purchase and read a wonderful book by Brian Tracy aptly titled 'Eat that Frog'.

The book is based on an old saying that if the first thing you do in the morning is to eat a live frog then you will have the satisfaction of knowing that it's probably the worst thing you'll do all day.

'Eat that Frog' takes this saying as a metaphor for tackling the most challenging task of your day – the one you are most likely to put off - the message being that successful people don't try to do everything, but focus on the most important tasks and make sure they get them done and this, together with their ability to make decisions and to apply themselves with discipline and determination, largely accounts for their success.

Some of the helpful points made by the author include the following:

- The ability to concentrate single-mindedly on your most important task, to do it well and to finish it completely, is the key to great success and achievement in life;
- "If you have to eat two frogs then eat the ugliest one first";
- "Failure to execute is one of the biggest problems in organisations today";

- "The number one reason why some people get more work done faster is because they are absolutely clear about their goals and objectives and they don't deviate from them";
- "Proper prior planning prevents poor performance";
- The three key qualities to develop the essential habits of focus and concentration are decision, discipline and determination.
- Resist the temptation to clear up small things first.
- The more thought you invest in planning and setting priorities before you begin, the more important things you will do and the faster you will get them done once you get started.
- One of the most helpful time management techniques is for you to get better at your key tasks. Personal and professional improvement is one of the best time savers there is.
- The 80 / 20 rule. 20 percent of your activities will account for 80 percent of your results, 20 percent of your products or services will account for 80 percent of your profits, etc.

There are numerous other pearls of wisdom in this gem of a book and I would thoroughly recommend a read.

OTHER ASPECTS OF MAINTAINING AND IMPROVING PROFITABILITY

- Whilst profitability is important, it should not come at the expense of the ethical requirements of practice. The way in which a solicitor or group of solicitors conduct his, her of their practice will impact on how they are seen by clients and colleagues and ultimately on the level of success (financial or otherwise) that they are able to achieve. Practising ethically therefore is not just important for its own sake, but adds to profitability and is a significant contributor to the ‘culture’ of the firm.

- If client demands and expectations are to be properly met then the practice must manage its workload effectively. This can involve individual practitioners being able to identify signs of burnout and seek assistance or for the firm to look at it’s delegations and devise better ways of distributing the workload so as to maximise the service to clients. As the Law Institute Victoria publication notes:

  > “Overworked solicitors can fall into various traps such as failing to meet time limits, procrastination on files, failing to communicate and generally failing in other basic obligations to clients”.

  It may be possible to better utilise staff, for instance, by training them to take on new duties. It may also be necessary to say ‘no’ to taking on a new matter when the existing work is not being properly handled.

- A proper and effective accounting and bookkeeping system is essential to knowing where the firm is at, at a particular time and to achieving and maintaining profitability. Whilst engaging a competent accountant is essential to this, in the first instance, management of the firm's financial records by an experienced bookkeeper is crucial.

- The firm must have up to date financial statements, not only to assist with tax planning and budgeting, but to be able to produce to other interested parties such as banks.
- Non-payment of accounts may arise because the client has unfulfilled expectations about the services that were to be provided. The best way to overcome this is through regular communication with the client about the work to be undertaken for them and the objectives.
- The practice must ensure that its insurance needs have been met to properly protect its interests. An unfortunate event can have a devastating impact on a firm's profitability if the firm is under insured.
- It is trite to say that one aspect of practice management that enhances profitability is to choose the right location for the practice and the best situation e.g. shared premises, leased or purchased, etc.
- Practices must embrace a sufficient level of information technology to place them on a level playing field to compete with colleagues in the same practice area. It is good in my view to work closely with an IT consultant who can keep the firm abreast of current developments and also be able to respond to urgent needs relating to technology, including breakdowns and viruses etc.

LAW AS A BUSINESS

Whilst we no doubt believe that we are part of a noble profession, Law is also very much a business and failure to give attention to basic business principles and issues of costs will, no doubt over time, impact significantly on the success of the business and may even threaten its continued survival.

Professional practices are businesses and we must run them effectively and efficiently if the business is to be profitable.

The following admonition provided in the forward of the Law Institute Victoria publication ‘The Successful Law Firm – Tips and Tools for a Profitable Practice’ is both pertinent and useful:

> “The transition from expert lawyer to expert lawyer and effective business manager can be bewildering and frustrating. Many lawyers feel both elated and concerned with their decision to ‘hang out their shingle’ or buy equity in an established law firm. Often the new business owner is so busy working in the business that there is little time left to devote to the management of the business. However, profitable businesses are the result of hard work, and the application of sound business principles and practices”.

Legal practices like all the professions face continual changes and challenges particularly in terms of technology, client loyalty and competition.

I spent a significant earlier part of my career as a partner in a busy practice in Northern New South Wales in an environment where clients would utilise one firm for all their legal requirements and rarely changed firms, their loyalty being a hallmark of legal practice. This made the prospect of new firms opening up or 'squatting' a difficult proposition. Whilst computerisation had taken hold, technology was still relatively unsophisticated. The main form of marketing was (and still is) I believe to do a good job and bills of costs as they were known were, as always, received with a degree of reticence but rarely disputed.

In contrast, today's firms, even the relatively small ones are of course, fairly sophisticated in terms of technology. Clients responding to their own pressures are prepared to shop around leading to the abandonment in many instances of long established relationships. There has been a clear trend to greater specialisation with boutique firms emerging across the range of practice areas and clients expecting a high quality of service.

All the professions are facing pressures in terms of costs, both in relation to fees rendered to clients and to the costs associated with running a practice. With aggressive competition and more demanding clients, legal practices must adopt effective management techniques to retain and advance their position in the market.

Basically what we do is relatively simple in that we provide legal services or work in progress (WIP) which must be turned into bills and then collected to produce income. From such income we pay outgoings to hopefully arrive at profit, some of which should be invested in the continuing development of the practice.

Therefore the three key financial elements in running a practice are:

1. Generation of an adequate level of fees;
2. Conversion of fees to cash; and
3. Control of costs.

To state the obvious, lawyers sell their time and the gross income of the firm is determined by the amount of time sold. The income can be increased either by increasing the number of hours worked or by increasing the per hour charge out rate or by a combination of both.

Leverage which represents the ratio of equity partners to other fee earners is a vital part of increasing the overall profitability of the firm. In theory the higher the leveraging, the higher the profitability but this of course depends on other factors such as the ability and capacity of the employed solicitors, the ability of the partner or proprietor to properly supervise those under him or her without overly reducing their own output, and of course the overall amount of work the firm has.

CASH FLOW

Managing cash flow is essential to the good management and viability and survival of the practice. Cash flow relates to the level of cash available to the firm at a particular time. It is basically a product of cash in bank at the time and cash inflow (or monies received from clients at that time) less cash outflows (or payments out for practice expenses and drawings) to arrive at the new cash balance. The need or aim is to retain the income and payments out at a manageable level so that the firm's cash is not depleted to the extent that it is unable to meet its obligations.

In professional practice, difficulty is often experienced in managing income because of uneven cash flow, erratic billings and persistent collection problems.

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Temporary shortfalls in cash flow can be met by overdraft facilities but long term shortfalls, unless managed and regulated, will threaten the continuing viability of the practice.

SUGGESTIONS ON IMPROVING CASH FLOW

1. Render Interim Accounts

Arrange your billing cycle so as to bill immediately when an interim stage of a matter is completed or a beneficial psychological event has occurred. Clients understand and expect to receive a bill at the end of a stage in the proceedings such as an interim hearing. Psychologically they are far more open to receiving an account or accepting your charges if, for instance, they have just had a good win in court. At that time the client is on the peak of the client satisfaction curve and their resistance to paying fees is at its lowest. If you miss this opportunity and overlook rendering an account until a later date, then of course the client may forget how important you were in achieving the result and wonder why the bill is so high. In such an altered state of mind it is reasonable to assume the client is much less likely to pay the account promptly.

Another reason why accounts should be rendered at regular intervals is that in my experience, clients have much less aversion to paying smaller accounts at appropriately spaced intervals rather than facing a large lump sum at the end. This is all the more so if the outcome of the matter is adverse to the client. The client will be looking for someone to blame and you of course are a prime candidate. So often, in my view, a last minute complaint is in reality reflective of a reluctance to pay an account once the matter is over.

Interim billing has an immediate and positive effect on cash flow. Work in progress should be regularly reviewed and an account forwarded before the amount due becomes too large. Clients don't like receiving accounts months after the work is done and such irregular billing will simply contribute to the prospect of default.

A further reason why interim billing is good for the practice is that it alerts you to possible problems regarding recovery of an account before the account gets too big. With lump sum costing, the stage may be reached where the firm is in so deep in terms of what is owing by the client that it may have to continue to do work for the client even if the prospects of successfully concluding the proceedings are problematic. This situation, when it arises, can also impact on the lawyers objectivity as the solicitor can become more or less aligned with the client in seeking to pursue a cause in an effort to recover costs when a more objective assessment by the solicitor may have led to the client being advised to abandon an action where the merits of proceeding were questionable.

2. Money Up Front

These days the EFTPOS machine is of enormous assistance to practitioners in securing payment of monies into trust on account of costs and outlays and in securing prompt payment of monies outstanding. As the consultation with a client draws to a close, the perfect opportunity arises to ask the client to top up funds held in trust or to pay an account rendered and still outstanding. Most clients carry a credit or EFTPOS card on them and will usually respond to this request to assist with cash flow. Either they will replenish funds or meet outstanding obligations or if they don't, alarm bells will start ringing about their capacity or willingness to meet future obligations.

3. Managing Credit Risk

Unless clients pay in advance then there is an element of credit risk in every transaction or service provided. The risk can be that you won't receive payment, or you will receive it outside your trading terms and each of these will impact on your cash flow and in the former case, your profitability. Whilst we can't go to the extent of the corporates in assessing credit risk, we do need to undertake some evaluation by pertinent questioning to make an informed decision about the credit risk that a particular client may pose to the firm with a view to minimising that risk. Clearly the higher the prospective account, the more important the inquiry as to how the client intends to provide for payment. If you determine the risk is too great then of course you don't turn the client away, but look for safer ways of providing the service such as money in trust.

4. Follow Up Outstanding Accounts

It is important that the firm has an appropriate procedure in place to chase up unpaid bills if an adequate cash flow is to be maintained.

There is an adage that the longer an account is outstanding the harder it is to recover. All of us are busy and it is amazing how quickly time can pass when an account is outstanding and suddenly we find it has been outstanding for

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120 days or longer. A normal response, I would suggest, is for firms undertaking follow up recovery work to concentrate on the accounts that have been outstanding for 90 days or more. However, the quicker money is likely to be found in the accounts that have only been outstanding for 30 or 60 days and an added benefit of concentrating on these ones is that you stand a reasonable possibility of stopping them from becoming 90 day accounts and hence you are assisting cash flow and the firm's profitability.

Whilst the account remains unpaid, send regular accounts rendered. You need to keep reminding the client that you are aware that the account is still outstanding and require payment. If necessary, particularly with big amounts outstanding, set aside time at regular intervals to ring the client who owes you money. I can assure you that in most instances, if you go to sleep on it or overlook reminders then the client will too. Clients who ring you to remind you they have still not paid your account should be greatly valued.

You need to develop a range of strategies for different clients and to monitor the debtors list on a regular basis. The longer a debt is let go the harder it is to recover.

Most of you will of course have debt recovery sections or bookkeepers to chase up outstanding accounts. However many sole practitioners may not have such a luxury and in any event it is usually you rather than the bookkeeper who has the best knowledge of the client and know the most appropriate time to approach the client seeking recovery.

While you may be the person who knows when it is best to approach the client it is better, if possible, to have someone not directly involved with the matter follow up payment of the account. If you as the person who did the work are involved, the likelihood is that if any criticism of the work is forthcoming, you will defend your own professionalism, become emotionally involved in the discussion and more intent on defending your position than recovering the fee.

If you do have the luxury of having someone other than yourself to chase up debts, then I would suggest that you use that facility as it is a specialist role. Over the years I have found phone contact to be the best as it is more direct whereas a letter or email can so easily be disregarded.

On the other hand, particularly in a smaller or boutique practice, you are often the one to whom follow up action is left and as the one who has done the work you are in the best position to assess whether some small discount is perhaps warranted or some compromise necessary to ensure prompt payment of the account so that cash flow is assisted.

An issue to consider is the amount of the debt and whether it is worth pursuing. For example you wouldn't risk losing a longstanding client over a small amount. Furthermore, if the amount outstanding is relatively small, you might question the wisdom and cost of seeking to pursue it at all.

Sometimes, of course, the debt is significant and there appears to be no reason why it hasn't been paid. In those circumstances engaging a debt collection agency may provide the best option. The important thing is to look at each debt individually and try to determine the best way of dealing with it.

5. Be Prepared To Consider A Compromise

Ideally it is best, of course, to recover the full amount due. However, there are circumstances when for whatever reason this may not be possible and in those cases, in my view, a compromise may be appropriate on the basis that it is best to recover some costs in the matter rather than nothing at all.

On a sizeable account, quite often the client complaining is only seeking to have a win of sorts and only a small concession is needed to ensure immediate payment and the possibility of an accepting rather than a disgruntled client. In the overall picture this seems a small price to pay.

Often an account that was almost irrecoverable may suddenly become recoverable through offering an incentive to a client in terms of a discount for immediate payment.

6. Write Offs

It is important that bad debts be written off by 30 June each year to secure the tax benefit but what happens to bad debts once they are written off?

I would venture to suggest that in many instances it is a matter of out of sight out of mind. This should not be the case as at least some such debts may still be recoverable and whilst it is important that they don't remain on the trial balance it is important that at the very least they be properly reviewed to see if any possibility still exists to recover them.

7. Don't Be Your Client's Banker

In the past solicitors have often funded client disbursements and, of course, one of the obstacles to establishing a practice in days gone by was the need to 'capitalise your disbursements'. This involved injecting sufficient capital to enable you to effectively fund client outlays until such time as the practice was returning a steady flow of income.

These days most firms are far more reluctant to fund client outlays and whilst perhaps there is some need to do so, to obtain and retain work in fields such as personal injury, by and large there is no good reason to fund client outlays other than in special circumstances. The effect of so doing is to place oneself in the role of banker or lender to the client and this places very real pressures on cash flow. Not only can you find yourself in the role of banker to the client but the reality is that you are providing an interest free facility.

8. Outgoings

Cash flow, of course, also depends on keeping payments or outgoings under control. Good management requires that payments be controlled and reduced where possible.

Regular outgoings can also be spread to minimize their impact on cash flow. Discretionary spending should be reduced or at least postponed until the firm is in a position to meet it.

Debt recovery and effective financial management of the practice is of course a full topic in itself and I have only touched on some important aspects in this paper.

TRUST ACCOUNT AUTHORITIES

Normally a solicitor will require the client to place an agreed sum in the firm's trust account on account of professional fees likely to be incurred by the practitioner and anticipated outlays.

Section 8 of the Trust Accounts Act 1973 sets out the circumstances and purposes for which money can be withdrawn from the trust account.

In the absence of a signed authority, Section 8(1)(c) effectively provides that the practitioner cannot apply funds to himself or herself for professional costs or outlays for a period of one month after delivery of an untaxed bill to the client.

This provision can impact on cash flow and for this reason it is important that the solicitor or the firm obtain an appropriate trust account authority from the client at the first opportunity. I normally ask the client to sign a trust account authority at the end of the initial consultation in the context of asking the client to arrange to deposit some funds into trust on account of anticipated costs and outlays. It is frustrating if you get to the end of a matter and the firm has some pressing cash flow needs and you find you are unable to access the funds held in trust because you lack an authority. Apart from any delay in having the account paid, the additional one month required gives the client an ideal opportunity to find something to complain about regarding the account or the matter itself, particularly where the client is not overly happy with the result.

The obtaining of a trust account authority is a simple matter which I would submit can easily be overlooked if firms don't have regular protocols in place.

BE UPFRONT WITH YOUR BILLING

The Family Law Rules and the Legal Profession Act require you to be upfront in relation to your proposed charges and the anticipated costs of the proceedings and I will say more about this below.

It would seem clear however in any event that if you are upfront from the start with your client as to the cost of your services and your method of charging and the anticipated cost of the proceedings then you have laid a good foundation for communication with your client on these aspects. The best time to let your clients know about your trading terms is at the first consultation or even earlier by means of a brochure or website clearly explaining the range of services the firm offers and the firm's charges.

In the past practitioners have no doubt discussed fees at the time of retainer but one would suspect often only on a general basis, with no detailed file note necessarily being kept. The new requirements go much further in formalising cost arrangements and requiring written advice as to costs.

It is most important that if at any stage of the matter it appears that the actual costs will exceed the client's budget or the estimate given then the client should be advised and a revised billing and payment schedule agreed. Remember the key is to render a professional service by doing work for a client which is then converted to a bill and collected.

Part of this involves managing the client's expectations not only in terms of the delivery and quality of professional work but in terms of fee arrangements.

COSTS AGREEMENTS

The issue of costs agreements is a topic in itself and I would urge you to pay heed to the relevant rules of court and legislation and the decided cases as failure to do so may lead to your costs arrangement being set aside which will certainly impact on profitability.

Following are some comments regarding costs agreements set out by me in an earlier paper delivered in 2005 and so far as I am aware they would still be relevant.

A costs agreement must be fair and reasonable and the Court may set the agreement aside if it is unfair or unreasonable.

The Court may also set aside a costs agreement if the client was subject to undue influence or misrepresentation, or was fraudulently induced to enter the agreement.

In relation to the issues of undue influence, fairness and reasonableness, the following points can be gleaned from the cases:

- the relationship of solicitor/client raises a presumption of undue influence which is rebuttable by the solicitor;

- the facts which must be proved to discharge that onus will vary according to the circumstances of each case and the Courts have been careful not to fetter their jurisdiction by defining the exact limits of the exercise of undue influence;

- it is not sufficient to show that the client understood what he or she was doing and the significance thereof but what must be shown is that the subordinate party at the time of forming his or her intention was entirely independent of any sort of influence or control of the other party;

- in determining whether a presumption of undue influence has been rebutted the circumstances of each particular case will require close examination;

- there is a requirement at common law that a costs agreement between a solicitor and client be fair and reasonable;

- generally '*fairness'* relates to the point of entry into the agreement whilst '*reasonableness*' relates to the terms of the agreement itself.

- for the circumstances surrounding the entry into the agreement to be such that the agreement is fair then the following should be present:

  (i) the transaction should be without pressure;

  (ii) the client should fully understand and appreciate the agreement;

  (iii) the circumstances should preclude any suspicion of an improper attempt on the solicitor's part to benefit himself at the client's expense;

  (iv) if the agreement requires the client to pay more than scale then this should be properly explained to the client. The essential nature of the proposed agreement and the degree and impact of its difference from the scale must be explained and understood and accepted providing a real and genuine choice for the client;

  (v) the client should be advised that they are entitled to take independent advice concerning the agreement although it is not necessary to show that the client in fact received independent legal advice;

- the client should be advised that if costs are recovered in the matter those costs may be significantly less than what the client will be charged;

- the onus of proof in relation to fairness and undue influence rests on the solicitor. Ultimately it is a question of degree and where the gap between the fees charged and the scale is significant then the evidential onus will be greater;

- the obligation of fairness is intended to be a practical test and not an impossible one;

- where issues of uncertainty, undue influence and unfairness are negatived and formal requirements of the Rules and legislation have been complied with then the requirement that the terms of the agreement be reasonable still arises;

- courts are confronted with the difficulty of determining in individual cases what is a reasonable charge and when the requirement of reasonableness has been exceeded;

- Among the matters that it may be relevant to consider in individual cases to determine if the charge out rate is excessive are the following:

  (a) that seniority and expertise in a particular field of law may justify a premium for that service;

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(b) the nature of the work involved, its difficulty or complexity;

(c) the market for legal services in which the client, as a consumer, is obliged to contract;

(d) the entitlement, within limits, of a practitioner to hold himself or herself out as available to be engaged on terms which that solicitor regards as appropriate.

In summary, the Courts will enforce costs agreements between solicitor and client providing the agreements have been produced in a fair manner, providing the amount claimed is reasonable and providing the agreements otherwise comply with the requirements of the relevant rules and legislation.

COSTS ORDERS AGAINST SOLICITORS

I would also strongly urge you to be aware of the circumstances giving rise to costs orders against you as a solicitor. I do not propose traversing the relevant rules and principles pertaining to same in this paper.

Suffice it to say that with growing pressures upon the Court's limited resources to deal with its heavy workload it can be anticipated that failure to progress cases in accordance with Case Management Directions or to comply with the Rules of Court may well result in costs orders being made against lawyers in the absence of proper explanation. It should be clear to all that a costs order made against you in the course of carrying out your workload will have an immediate impact on profitability.

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HOW TO AVOID COSTS ORDERS AGAINST YOUR CLIENT OR AGAINST YOU AS A PRACTITIONER

The pressures of practice and managing our workloads are such that all of us are vulnerable to a costs order at some stage. The secret I believe is to put strategies in place to minimize the risk of possible exposure to a costs order and I make the following suggestions which are proposed as a guide only and not intended to be exclusive:

- Familiarise yourself with the relevant rules of Court and Case Management Guidelines and the obligations placed on lawyers at various stages of the proceedings in relation to provision of information and compliance generally.
- Ensure that you comply with the Rules wherever possible in relation to the various steps in the proceedings.
- Comply with the pre-action procedures before commencing proceedings.
- Carefully note all deadlines and allow yourself sufficient time to comply with same.
- Note all Court dates in your diary with reminders in relation to deadlines for procedural requirements.
- Develop the habit of keeping adequate dairy notes recording pertinent discussions, events and advice to clients as the matter progresses, particularly where your sixth sense tells you that your advice, actions, methods or manner may be called into question.
- Keep checklists in relation to the various stages of the proceedings.
- Develop appropriate client protocols to regulate your dealings with clients.

- Don't take on more work than you can competently handle.
- Do your best to attend seminars and keep up with changes in the law.
- Set aside some time for professional reading.
- Look ahead and plan for what is coming up in your diary. Remember proper planning prevents poor performance.
- Remember that no one knows it all and be prepared to consult with colleagues when you have a problem. You will generally find them more than ready to assist.
- If a problem does arise and you have overlooked something or made an error then face it, as there are few issues which can't be resolved unless you keep your head in the sand and are not prepared to face them.
- Family Law is emotionally draining so strive to lead a balanced life to assist in handling stress and avoiding burnout.
- If you are a partner or sole practitioner then try to keep abreast of developments in information systems and technology as a means of dealing with increasing client expectations and consumer demands.
- Try to develop an appropriate practice culture and maintain your core values of integrity and honesty.
- Seek Counsel's advice wherever appropriate and consider making a timely and realistic offer of settlement to protect your client's position in the litigation.

BEST PRACTICE GUIDELINES

The best practice guidelines for lawyers doing family law work were drafted by a joint committee of the Family Law Section of the Law Council of Australia and the Family Law Council. The committee modelled its work on the Law Society of the United Kingdom, Family Law Protocol as adapted to reflect Australian circumstances.

The aim of the guidelines is expressed as being to encourage current best practice in Family Law, one of the characteristics of which is stated as ensuring that costs are not unreasonably incurred.

The costs component of the best practice guidelines includes the following aspects:

"1 Lawyers' responsibilities regarding costs

1.1 Lawyers should be familiar with any statutory rules of court relating to informing clients about costs and relating to the recovery of costs, including their obligations if entering into binding costs agreements with clients, and the steps they are required to take before instituting proceedings for recovery of outstanding fees and disbursements. In particular, lawyers should be aware that they:

- *should comply with the rules aimed at creating a proper expectation in a client about costs*
- *should, within a reasonable time after a client's request, provide a bill of costs covering all work performed for that client to which the request relates (LCA Code, para 40.2)*

- *should not bargain with a client for a share of the matter under litigation nor, except to the extent permitted by any applicable Scale of Costs, for a payment proportionate to any amount that may be recovered by the client in the proceedings (LCA Code, para 40.3)*
- *are entitled to require a security over costs to secure eventual payment of fees, but clients should be advised that they are entitled to seek independent advice over any document prepared for their signature*
- *are entitled to hold documents created for a client until fees are paid*
- *should explain to clients whether there are any prospects of recovering costs in the proceedings, and*
- *should ensure that clients understand that there is a difference between 'lawyer and client' costs on the one hand and 'party and party' costs on the other. The lawyer should explain that, should a costs application be successful, there is a difference between the amount a lawyer might charge a client and the amount charged by the other party, and that the difference is still liable to be paid by the client.*

1.2 Clients should be made aware that:

- *if they are well organized and have all their questions written down and all their documents organized, the time with their lawyer will be used efficiently, and*
- *lawyers are entitled to charge for every attendance upon them and for every telephone call.*

1.3 Lawyers should be aware that costs are a major source of complaints.

2 Costs orders

2.1 Lawyers should consider and explain to clients the factors which the court will take into account when considering making an order for costs under s 117 of the **Family Law Act**, *including:*

- *the financial circumstances of each of the separating couple*
- *whether either party had legal aid*
- *the conduct of the litigation, for example, irrelevant material, failure to disclose documents, delay, non-compliance with court directions*
- *offers of settlement*
- *whether the proceedings are caused by a failure to comply with previous orders, and*
- *the overall outcome.*

2.2 Lawyers should ensure that clients understand that if they settle a matter the agreement will be on the basis that each party pay their own costs (unless otherwise agreed).

2.3 Lawyers should always be aware of, and advise their clients concerning any exposure to costs orders which may arise from litigation and in particular, non compliance with orders or directions of the court.

2.4 Lawyers should ensure that clients understand the ramifications of making or receiving "without prejudice save as to costs' offers, or offers of settlement under s117C of the Family Law Act*.""*

I understand that the best practice guidelines are currently being reviewed and likely to be updated in 2010.

WAYS TO REDUCE COSTS FOR ALL CONCERNED

The high costs of litigation are well documented. In the Family Law arena there are also the emotional costs of highly conflictual and protracted proceedings which can be extremely damaging for parties directly involved and those caught in the crossfire which, in many instances, are the children of the parties.

Separation is never easy and emotions are often highly charged and readily fuelled. Whilst acting within the bounds of their instructions I believe that family lawyers have a responsibility to acknowledge the special features of the jurisdiction in which they practise and to endeavour to encourage settlement and advocate sensible solutions whenever possible aimed at minimizing the conflict and consequent distress and assisting the parties to resolve their issues without undue cost whether financial or emotional.

Apart from the pointers referred to above in relation to avoidance of costs orders, I suggest the following as ways of minimizing the legal costs of separation:

1) Direct your mind to resolving the matter from the time the client first consults you and continue to direct your efforts towards resolving the matter as it moves through the various stages. This does not involve settlement at all costs or rolling over but having a focus on obtaining a resolution that meets your client's needs and is realistic in the circumstances.

2) Rather than simply paying lip service to the pre-action procedures, see them as offering the parties a real opportunity to resolve the matter without the stress or cost of litigation.

3) Try to tailor the process to your client and his or her individual needs. Some clients will benefit from mediation whilst others may be better served by arbitration or a neutral assessment.

4) Try to effectively manage your client's expectations by sound advice, realistic assessment of their chances and the range of possible outcomes and by realistic and timely indications of the likely costs.

5) Be aware of underlying issues such as the history of the relationship and the circumstances of separation and timing issues that may be impacting on the prospects of a resolution.

6) Use Counsel appropriately as a means of reality testing the client. Sometimes a client may simply want a second opinion and defer to Counsel's view.

7) Try to develop an insight into what the client is experiencing and how that may be impacting on his or her view of the situation but don't lose your detachment and align yourself too closely with the client. If the client just wanted someone to agree with him or her then a neighbour might suffice. Don't lose sight of the fact that generally the client is unfamiliar with the law or has picked up uninformed views and is coming to you for detached professional advice.

8) Ensure your relationship with colleagues and court still is at all times courteous and professional with a view to advancing the client's case toward a resolution. Differences of view will of course occur, however these should not be allowed to develop into personality issues that hinder communication and impede the prospects of resolution.

9) Try to understand the significant impact that your charges have on the client and the importance of achieving a resolution so that the client can move on with his or her life.

Whilst it may seem that an emphasis on settlement will have a detrimental impact on profitability, my experience over a long period tells me that this need not be so, particularly if it assists the professional gain a reputation for trying to resolve matters and putting the clients interests above his or her own.

WORK/LIFE BALANCE

Running a practice has in all likelihood never been more challenging and involves constant and increasing demands on practitioners. Clearly we need not only to be expert lawyers, but if not an expert then at the very least, a competent business manager.

At the same time, we need to strive for a proper work/life balance. This involves caring for our health and taking time out for relaxation. Profitability will very soon become a rather empty goal if it is at the expense of our health (both physical and mental), our general well being and our relationships.

CONCLUDING THOUGHTS

In conclusion and by way of disclaimer may I say that my paper is not intended as a mini-treatise on the aspects of profitability but as providing some worthwhile pointers on practical measures that can be undertaken to improve the firm's management and profitability. Nor is my paper intended to convey a precise portrayal of how my own practice operates but rather to provide some benchmarks to aspire to. Like all practices I often fall short of the criteria I set for myself but this in no way diminishes their worth as something to strive for in our day to day practise of family law.

18 November 2009

Mike Emerson

Practice Management and Business Skills

APPENDIX ONE[1]

Culture and Beliefs

Driven by Signals

Great companies are built on a foundation of culture and values. At Deloitte, they are what make us unique, engaging, and successful.

Our seven Signals shape our culture. They inform the way we do business, inspire us to draw strength from each other, and enable us to deliver outstanding value to our clients, markets and communities. Our Signals remind us of the behaviours that set us apart: we recruit and retain the best, talk straight, play to win and think globally, grow and improve, aim to be famous, empower and trust, and have fun and celebrate.

Our Signals are, in the end, an expression of who we are.

Our Seven Signals:

Recruit and retain the best

Deloitte values talent – the talent of our people. Our continuing success requires us to retain and grow our talent through a constant inflow of innovative, creative people who add sensational value to our firm and our clients. To do this we:

- set high expectations
- focus unrelentingly on identifying talent
- develop career paths
- identify and invest in potential
- develop relationships and engage our alumni
- value diversity and foster an environment where talented women thrive and excel.

[1] Available at: http://www.deloitte.com/view/en_AU/au/about-us/culture-beliefs/index.htm

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Talk straight

Talk straight means open, regular, honest and constructive two way communication throughout the firm and with our clients. To do this we:

- tell it like it is, with empathy and respect
- communicate freely while mindful of the impact
- have no hidden agendas
- are courageous in our pursuit of truth
- stand up for what we believe in
- speak positively of others and respect each other's differences.

Play to win - think globally

Every relationship we enter, every opportunity we encounter, is approached with confidence based on our knowledge, skills and the power of our global winning partnerships. To do this we:

- think and act beyond the boundaries of our local markets or business disciplines
- believe in our ability to win
- develop superior products and services
- support and promote our people and our customers' success
- network and foster great relationships
- deliver on our promises.

Continuously grow and improve

We encourage our people towards a lifetime of learning, coaching and mentoring. We seek new challenges and find innovative ways to deal with changing circumstances through the 3 Gs: Grow the business; Grow the team; and Grow yourself. To do this we:

- learn from the ideas of others
- think outside the square and are prepared to take risks
- innovate
- reward achievement
- encourage our people to expand their experience and grow.

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Aim to be famous

Deloitte's differentiation pivots on the reputation of our people. This occurs at two levels, the Firm's fame and the individual's fame.
To do this we:

- have distinctive competence and work hard to develop it
- develop deep specialisation
- relentlessly focus on results and improvements
- acknowledge others' fame
- focus on 'we' rather than 'I'
- express a point of view.

Empower and trust

At Deloitte we encourage ownership and pride by providing clarity and delegating responsibility and authority to all our people.
To do this we:

- take ownership for what we do
- take personal accountability for our actions
- give and delegate responsibility
- balance the future of the firm with the need for short term results
- build trust and have confidence in each other.

Have fun and celebrate

We acknowledge the great results achieved each day by the people around us; we build the Deloitte community and contribute to the community outside the firm.
To do this we:

- always take the opportunity to celebrate accomplishments
- bring a positive attitude to everything we do
- catch others doing something right and reward achievement
- seek opportunities to contribute to the community.

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