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LexisNexis Butterworths

Counsel as strategists — the wisdom of briefing counsel upfront

Laina Chan *NINE WENTWORTH*

The standard model for running litigation in Australia is that solicitors are retained at the outset to set the initial strategy, carry out the preparation of the matter and eventually at the recommendation of the solicitor, retain counsel to assist. This is the de facto model that appears to be particularly favoured by top and mid-tier firms. While counsel may be retained at any time, it seems that by reason of cost and budgetary pressures within the law firms, counsel are now being retained very late in the life of a matter and only after the strategy has already been determined by the solicitors and its course has been entrenched in the conduct and preparation of the matter. Unfortunately, the strategy that the solicitors have set may or may not marry with the eventual strategy recommended by counsel. If there is a divergence in the strategy then it is inevitable that there will be wasted output and therefore costs.

This standard operational model can cause both clients and counsel frustration. If counsel recommend a change in strategy once they are retained and after a lot of work has already been invested in the matter then clients will be faced with significant legal bills, portions of which could have been avoided. Further, unless the clients are sophisticated users of legal services, they may be unaware of this.

Counsel share the same frustrations. It is never pleasant to be placed in a situation where you are aware that efficiencies could have been gained with wasted costs and superfluous output avoided. For political reasons, it is often not in the interests of counsel to be fully frank with the ultimate client on this issue.

There are many facets to the case strategy that counsel can set. In addition to the overall battle plan, judgment can be made as to which battles should be fought and which battles should be forfeited. In achieving a reasonable outcome for the client at a reasonable cost, it is unnecessary for every battle to be fought. Only battles that are in line with the overall strategic plan should be pursued. Fighting any other battles are pointless. At best, they lead to the incursion of additional legal fees, at worst they may prove to be counterproductive. For example, strike out applications of pleadings are notoriously counterproductive. Even if the application is successful in the short-term, the net effect of the application is invariably that your opponent prepares a strengthened amended pleading using the knowledge that the applicant has generously shared as to the deficiencies of their claim during the application. While it is very tempting to fight every battle and to take every point to gain some short-term personal satisfaction that you are triumphing over your opponent, this is not always in the best interests of your client. Truly winning strategy is knowing when to step away and not rise to every bait, to realise when taking a point will only lead to an increase in personal satisfaction but not advance the cause of your client at all and to have to wisdom to step away.

Further, counsel have the capacity to make an assessment at the beginning of a case as to the value of the case, the merits of the case, whether it should be pursued or defended or settled. This can lead to early resolution once it is determined that the case should not be either not commenced or otherwise not defended.

Consider this very simple scenario which has been loosely based upon fact, with actual names omitted.

An elderly lady slips over in a shopping centre and hurts her ankle. The elderly lady commences proceedings but right from the beginning, the plaintiff's lawyers seek a settlement conference and make it very clear that the plaintiff does not wish to go to final hearing and is only looking for a reasonable settlement.

What should the defendant's solicitor do? Should they agree to the settlement conference or should they insist upon a thorough investigation of the plaintiff's claim? Should the defendant's solicitor insist upon the plaintiff undertaking extensive medical examination so that a thorough assessment of quantum can be made? In my opinion, as a preliminary step, an initial assessment should be made as to liability and quantum on the basis that the plaintiff has a credible case. Following that an initial settlement conference should be convened to determine whether the matter may be settled for a reasonable amount. An experienced lawyer should have a fair idea as to the value of the case. If it emerges at the settlement conference that the plaintiff is in fact only looking for a reasonable outcome then all efforts should

be made to settle the matter at the settlement conference. No reasonable and competent counsel would recommend in such a scenario that a thorough examination and investigation of the case should take place prior to the aforementioned steps taking place.

Unfortunately, what in fact happened was that over a period of 8 months, the defendant's lawyers carried out their investigations and the plaintiff was subjected to 18 medical examinations. At the conclusion of the investigations, the lawyers for the defendant made an assessment as to quantum of liability and formed the view that the claim was worth about $600,000. Armed with this knowledge, a settlement conference was held and the matter was settled for $20,000 and the lawyers for the defendant issued a legal bill for $150,000 inclusive of disbursements. It is likely that the matter could have settled for $20,000 shortly after proceedings had been commenced. The settlement sum was congruent with the position of the plaintiff that has been on the table since the inception of the proceedings — that she was only looking for a reasonable sum and did not wish to litigate the matter. The plaintiff's lawyers had in fact been truthful when they said that their client was only looking for a reasonable settlement. However, the lawyers for the defendant had never taken the trouble to even determine what the plaintiff was willing to settle for until the settlement conference was ultimately held. With the legal fees for the defendant's lawyers more than 7 fold of the settlement sum, the unavoidable inference is that the real winners in this scenario are the lawyers for the defendant.

How would any client in the shoes of the defendant assess such an outcome? The plaintiff had been subjected to needless medical examinations for which the defendant had to pay and had settled for a very modest amount. However the route that the lawyers for the defendant had taken to reach that outcome was neither reasonable nor economical nor efficient.

Unfortunately, examples like these are very common place. They are not restricted to personal injury matters. In complex commercial matters with multiple issues to consider and cover off in evidence, there is an even higher risk of wasted output. It is therefore all the more important that clear strategy is set at the outset to ensure that all work produced is in line with the set strategy and goes towards enhancing the likelihood of the ultimate outcome.

Experienced counsel are specialist litigators who are trained in the art of persuasion. A part of this skill involves making judgment calls based upon our experience and understanding of what arguments are likely to succeed and which ones are not. Retaining counsel at the outset ensures that judgment calls can be made as to which causes of action should be pursued and which should not. Like every good business plan, a winning litigation strategy focusses upon 2 and at most 3 major actions. It is as important to know which causes of action we should be focusing on as to be aware of which causes of action will not be pursued. The skill that counsel bring to the table is that they focus their mind by making an assessment of the merits of the case as well as the risks of not pursuing some of the weaker causes of action. This assessment should be made at the outset of every case and revised when new or unexpected evidence comes to light. In the same way that a business cannot succeed in the absence of a carefully thought out and mapped out business plan which is implemented, a case cannot be won without a clear case strategy that informs the content of all the case preparation that is done to advance the cause of your client.

It is time for the model for standard litigation to be reversed. Rather than briefing counsel at the tail end of the litigation, counsel should be retained upfront. This will lead to increased efficiencies and better outcomes for the client. Any perception that counsel do not wish to be retained early in a matter is a misconception that has arisen with no factual basis! Counsel are also available to accept direct briefs from corporate counsel to enable these initial assessments as to merit, liability and quantum can be made. The rules that govern barrister allow this and it is always an approach that should be discussed directly between client and counsel.

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