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Running a Litigation File: Some Comments for Junior Lawyers

Running a litigation matter can be one of the most exciting things a lawyer will do professionally. It can also be one of the most tedious, nerve-wracking, mind-numbing, life-consuming, exhausting, terrifying or exhilarating. Which of these applies to you mainly depends on things such as the client, the size of the matter, whether you are prosecuting an action or defending and how much else you have on.

The purpose of this paper is not to cover every possible scenario and put out a step by step instruction on how to run a litigation file. Each firm, and each individual, will have their own method. In this paper I aim to provide some comment on observations I have made over the past almost-20 years that will allow you to have some control over the things you can control to hopefully make the experience more positive than negative.

At the Start

The best place to start is the start, that particular point where the matter first enters your office. As you become more experienced, this might be a phone call from a client or a call to the front desk to meet someone who has walked in off the street. In the early years of your career, it will probably be a partner or senior solicitor delivering the good news that "this one is yours" while having three boxes placed near your desk. Whichever way, the first thing you need to do is assess what you actually have in front of you.

This sounds sensible, even stupidly so, but all too often people will simply "believe" they have been given what they are told. This is especially the case where people are given a file that has already commenced. In those instances, you can have all the respect in the world for the person who the file has come from. But professionally you need to take control of the file. At some point you may need to swear an affidavit that commences to that effect. Make sure you do have control.

You need to actually look.

Don't just accept the file note from the solicitor now departed the firm or team that says "*everything is fine, the client has been asked to do a few things, and matters can wait until they get back to us*". If the file is in the type of order I describe below, it won't take you long to confirm the true status of the matter. If it isn't in some form of order, then your first question should be –

"Is this a ticking bomb?"

The expectation quite rightly upon you is that any issues will be identified early and dealt with. So look.

Where you are the actual first person in the firm dealing with a matter, in some ways this is simpler. You can obtain the key information first hand. I will discuss this further below. If you inherit a file, then get it in order.

Keeping Order

There are any number of ways that "order" can be established – chronologically, alphabetically, numerically, content type or systemic. For my mind, in reference to a litigation file, one definition in the Macquarie Dictionary stands out – "in a state of readiness". If your file is created and maintained in a way which can be described as being in a state of readiness for conduct of the litigation, then you will not only save yourself any amount of heartache but also will maintain control.

Another important outcome of correctly maintaining order in a litigation file is the reduction of fees. I do not refer necessarily to the costs to the client (but this certainly can occur), but rather the fees of the lawyer written off as being unable to be charged because the work has been excessive in the context of the matter. This of course impacts on the lawyer's ability to meet their own budget requirements. A file that is easy to access and clear in its layout reduces the time taken to locate documents.

As Counsel, you receive three types of brief. First is the one contained in folders, with an index, numbered pages and clear sections, and with clear instructions on where things are at and what is required. Second is the one which is in a folder, and while it might have an index and the pages numbered, it is basically a copy of the solicitors file from start to finish. The third is just a pile of documents. Why is it of concern to the solicitor what the brief to counsel looks like? The client pays the fee. Here is an opportunity to reduce your client's fees, keeping them happy, by reducing the time it takes for Counsel to do something. If it is all in order, as in the first example, as Counsel I know where to look for something. If it is the third example, I will spend a lot of unproductive time sorting it out. Depending how you run your file, the second can go either way.

My personal preference when running litigation files was for five basic sections – Court Documents, Correspondence, Clients Instructions and Documents, Research and Miscellaneous. These might be physically in one folder or separate folders, but were always identifiable.[1]

Before I talk about what is in each section, I will note that generally the documents within each section should be in chronological order. Whether earliest first or latest first, they need to be in order.[2]

The content of the ***Court Documents*** section might be thought obvious. But to be clear, every document either filed in *or issued by* a court, tribunal, commission or registry for the matter should be in this section. It is somewhat disconcerting to be reading something which refers to a particular order having been made and to not have a copy of that order. My immediate thought is "*What other orders were made that day?*" No matter how innocuous it might seem, put that Order, Notice from the registrar or Direction in with the Court documents. Don't leave it stuck to the back of the letter from the other side or the registry and file it somewhere else.

In some matters you may have a number of actions running in parallel in a number of forums between either the same parties or involving the same facts. In some personal injury matters, this multiplicity of proceedings is sometimes unavoidable.[3] However, when parties are dueling on a number of fronts, they are indicating a willingness to pull out all the stops. In such matters my experience has been that the numbers of documents filed in all matters increases. Separate the documents for each matter into separate sections – there are going to be a lot of documents to keep track of. The advantage is that sometimes you pick up where one party has neglected to deal with one matter. Regularly checking the e-Courts list of documents for files in relevant courts is a good way of ensuring that you have all documents filed.

Correspondence was always, in my mind, of two types – that relevant to conduct of a matter, and that relevant to managing the matter. The latter is usually small in number, things such as fee agreements, invoices, and the like. I would usually separate this out in the Miscellaneous section of the file as I would only ever need to access it rarely, but when I did I didn't want to be wading through the correspondence that otherwise would accumulate on the file. For the former group, every letter between myself, my client, the other party and the Court would be placed in the Correspondence section. Again, this sounds simple. But I can recall any number of times where a letter was referred to in one document on a file I had inherited, and that letter was nowhere to be found. Usually, it would of course be a critical letter.

If you start off at the beginning placing every document into the file as I suggest, you can be confident that the document will be there at that critical time when it must be found, and FOUND NOW!

The next section, ***Clients Instructions and Documents***, might be called "Evidence". It is the most complex and proves the most difficult to bring order to. Clients will provide instructions, but they are never stand alone. In some instances a letter of instructions will refer to other documents that they attach, and in other

[1] Some places I've seen coloured folders, others with file numbering prefixes or suffixes. It doesn't matter how, so long as they are.
[2] The order can be different between sections, for example, earliest first for Court Documents, latest first for correspondence.
[3] Although in my experience in defending matters, this was usually as a result of poor initial advice to a plaintiff.

instances you simply get a bundle of documents in no particular order that are seemingly unrelated. Quite often it is unclear whether two pages are one document or two, let alone the five pages following them.

I talk more about obtaining client instructions and documents below. In relation to maintaining order though, ultimately the documents will need to be separated into individual documents for disclosure purposes. Do this from the beginning of your conduct of the file. Put them in chronological order. Where a statement of a witness is included, place that in order at the date the statement was made. Things such as DVD's, manuals, and the like may not fit easily into such a sequence. This is okay – it is all about bringing as much order as you can to the file.

Now, if your client has orderly files, I am not necessarily saying to pull those apart and combine all the documents into one big pile. In most instances it is appropriate to simply disclose the entire file, and you can keep them together. But in some cases, you may need to extract specific documents. Where you find yourself in a matter with documents not arriving by folder load, but by the truck, then it is time to talk serious document management with a professional document management firm.

Clients will give you multiple copies of the same document. If it is truly a copy, stick it in a different folder marked "Client's Copies". But make sure it is an exact copy. If not, determine if any difference is relevant, when any change or note was made, and if able who by. Then place it in the Client Documents file chronologically to when the change was made. You do not want to be scratching around at a conference or in court when the client says "I made a note about that on a copy of that letter".[4]

Finally, if you can't determine a date for something, then place it either at the end or at the beginning and seek instructions on it.

In the ***Research*** section I would place all the directly relevant information that I had located, not that provided by the client. Relevant legal research would be placed here. Also, any other relevant information obtained by you should be placed in this section. This might include any amount of internet searches, notes, and other documents obtained (brochures, etc). The important thing is that it is relevant, not just copies of the results of "chasing every rabbit down a hole" or "wandering up a dry gully".

On the point of research, when obtaining a copy of a case, get at least the first page of the case in the report as well as the relevant pages, plus identify which member of the judiciary is commenting.[5] In relation to books, also copy the title page and publication information so you are not trying to track it down later. The same with any large document that you don't need a complete copy of – you have it in your hand, copy the extra few pages. With an internet search, keep details of what you searched, how you got there and the URL for the site a document was obtained from.

The ***Miscellaneous*** section is where you throw everything else. As mentioned above you might keep the fee agreements and invoices there (you can keep them entirely separate), but here is where to throw all the boarding passes, maps, irrelevant Google searches[6], and related information you have acquired and which is not really relevant to the other sections. Drafts of advices might go here, as well as draft Court documents. Copies of such documents that are not the client's are a vexed issue.[7] My preference is to get rid of them completely.

I will make just one final comment, on electronic files. These are fantastic for portability and when something needs to be provided urgently. Again, the key to usability lies at the start of the matter. You need to establish naming protocols for files that, when they are all saved into separate folders, list each document in an ordered way, and are identifiable immediately. While you may find things quickly in your

[4] Otherwise, the only time you will need the "Client's Copies" folder is if you need to quickly hand over a copy of the document.
[5] I note the Qld Supreme Court Practice Direction No.16 of 2013, replicated by Practice Directions in the QLD District and Magistrates Courts, requiring the citation of authorised reports rather than unauthorised. If the report is not the authorised version, see if there is one and use that.
[6] with a note as to why you thought it possibly relevant is a good idea
[7] Such as three copies of a draft used for a meeting. The copying fee will be charged, but they have no purpose past the meeting.

office, once you e-mail a document or deliver an entire brief electronically, this becomes critical in maintaining order.

Timeframes
There are always timeframes relevant to litigation. In some matters there may be more than one applicable timeframe that is immediately relevant to a client. Some may seem far off. They aren't.

The Honourable Justice White, at the Bar Association Annual Conference in 2012[8] made the comment that a lawyer would be derelict in their duty if they did not, each time a new matter came before them, ask the question "Is there a piece of legislation that applies to this matter?". In each case there will be at least one – the *Limitation of Actions Act* ("***the LAA***").[9]

Look at this Act regularly. Read the actual sections. If need be, find out what a "specialty" is.[10]

But of course, this is not the only relevant legislation that affects timeframes. For example, in Queensland there are timeframes particularly relevant to the conduct of personal injuries actions under the *Personal Injuries Proceedings Act 2002*, the *Motor Accident Insurance Act 1994* and the *Workers' Compensation and Rehabilitation Act 2003*. [11]The commencement of family provision matters is regulated under the *Succession Act 1981*. If you want to review administrative action by the Queensland government, the *Judicial Review Act 1991* imposes a strict and short timeframe. All jurisdictions have similar and varied legislation.

And once you have an action commenced, the rules of procedure that apply to the particular forum you are in keep the parties moving along. I will mention some of the more pertinent in the context of actions in Queensland's Supreme, District and Magistrates Courts, but similar rules, or results, apply in most jurisdictions.

Under the *Uniform Civil Procedure Rules 1999* ("the UCPR"), a rough time line of an action commenced by Claim might generally be described as follows – the Claim (with the Statement of Claim attached) is to be served on the Defendant within 1 year of commencement (UCPR r.24(2)). Once served, the Defendant has 28 days in which to file a Notice of Intention to Defend, conditional or otherwise (UCPR r.137). If the Notice is conditional, the Defendant must seek an order to set aside the proceedings within 14 days (UCPR r.144(3)). The Plaintiff can file a Reply to a Defence, but must do so within 14 days of service of the Defence unless a longer period is allowed by the Court (UCPR r164). The parties must undertake disclosure to each other within 28 days of the last day a Reply could have been filed (UCPR r.214(2)).

There are many variations of this. The UCPR allows for the time periods to be shortened and lengthened depending on the circumstances. Further, completely different time frames apply to a proceeding started by Application. Under the UCPR, only 3 business days' notice is required (UCPR r.28). [12] This is not to mention the ability for the Court, by way of Practice Direction, to further alter the way in which a matter might progress.[13]

If you act for a Defendant or Respondent, make sure you get the details of when the document was served on them, as in some cases you might find they are due to file something in Court tomorrow, or worse still today or yesterday. I have had numerous documents brought to me where it sat on someone's desk while they were away on leave, and 28 days has turned into something like two.

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[8] As a panel member, made to the conference in response to the paper by (now His Honour) Jackson QC "Statutory Interpretation – Text in Context – Is the Taxonomy Failing?"
[9] or the correlating Federal and analogous State and Territory Acts
[10] See s9(3) of the *Limitation of Actions Act 1974* (Qld)
[11] On these Acts, see the excellent publication by Jones, A "*Pre-court Personal Injuries Procedure in Queensland*" (2nd Edition) LexisNexis: Australia 2010
[12] In the Federal Court, it is 5 days - rule 8.06 *Federal Court Rules 2011*
[13] See for example, Qld Supreme Court Practice Direction 8 of 2001, relating to the conduct of Family Provision applications

Note the date on your file, and immediately calculate out the basic timeframe that is going to apply to the matter. Then note this somewhere obvious. I am not a fan of complex systems – there is too much risk in something going wrong. But it must come to your attention early when something requires attention. My system was two-fold – a list of the dates on the front of the file (updated as required) and bring-ups in my diary at times which would allow me to deal with the next step, either personally or by delegation.

Also, check that the conduct of the other side is in compliance with their timeframes. If not, this point needs to be made early. Where an application requires service a certain number of days before hearing, insist on this. Where the proceedings are brought outside a limitation period, note this. Generally, where a party fails to plead a limitation point that bars an action[14], the bar can't be relied upon. In Queensland, the UCPR specifically requires a party who wishes to rely upon a limitation of action point to specifically plead that fact.[15] A failure to do so can result in a finding of waiver of the point. In that case, the action continues and your client loses a knock-out blow to the proceeding.

Finally, you can insist on strict compliance with the timeframes under the UCPR and similar rules, but always remember that those who live by the sword can also die by the sword. I talk more about the importance of communication with the other side later.

Client Statements

I spoke to a number of chamber colleagues about this paper, hoping to glean ideas for further content. All immediately focused on one thing –

"*Tell them to make sure they get a statement from the client!*"[16]

Take heed of such uniformity.

A good client statement is imperative to ensuring clarity in instructions, as well as testing the client on their recollection, coherence and, sadly at times, truthfulness. It will also help you to bring some order to the matter at an early stage.

You should start preparing the statement from the time of your first instructions. It should be a recitation of the relevant facts known to the client in a chronological order. It should be broken into numbered paragraphs. Try to keep the content of each paragraph limited to one concept or idea. And keep asking questions about all the information given to you – who, when, where, why, and what documents, e-mails, notes or other facts has the client got which support their statement.

Be clear to the client - this is a big task but an important one. It will also possibly prove to be one which saves them a lot of money – it is far better to find out early if there is something missing than late. You may also identify that "knockout" document which the client would never have thought relevant. As you work with the client through everything, you are afforded the opportunity to identify what documents might exist, which ones you haven't been given, and can work out the next steps required by the client to provide instructions to you.

Clear instructions in a statement make application of the law a whole lot easier, and make briefing of Counsel even simpler. If left to their own devices, clients will generally tend to jump at shadows, focus on irrelevant points, and skip over the documents they have. You need to assist most clients in providing the information that will form their statement, by keeping them on track and tying up the loose ends.

And get it signed. It doesn't have to be in the form of an Affidavit, although it may do so in appropriate forums where evidence in chief is by Affidavit. But have it signed by the client and witnessed by somebody.

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[14] As opposed to extinguishes it, such as under s12(2) of the *Limitation of Actions Act 1974 (Qld)*

[15] Rule 150 *Uniform Civil Procedure Rules 1999* (Qld)

[16] Unfortunately this didn't help me, as I had already thought of that one.

A strategic decision might be made to release the statement to the other side to enhance costs prospects or bring an early end to a matter.

Where the client has a number of people who can give evidence, follow the same process with them. Ensure that you take their versions separate from anyone else. Don't interview the entire family together in the same room. You can sort out any differences between them before the statements are signed through appropriate clarifying questions. This is especially relevant where the client is a company and statements are given by company officers. If the differences can't be sorted out, then you know early where major issues with a case may exist.

Finally, it is important to have a signed statement should the worst eventuate. If the client is hit by a bus, for example, a signed statement may be the game saver should an action be continued. You don't want a claim against the firm by the estate to succeed because you did not attempt to get a statement that might be used in evidence.

Documents
As referred to above, the other side of obtaining a statement is to make sure you obtain all the relevant documents.

My experience is you are never given all the documents on the first request. There will always be something along the lines of e-mails sent, a diary, even a contract, that the client doesn't think is relevant. Your job is to ensure they understand that everything is relevant, even to just get the "big picture". The big picture is important, because it is what a Court will be told. Counsel for the other side will be certain to tell this story if it seems detrimental to your client or puts them in a bad light. Conversely, your client's pious position should be placed on show too, and Counsel for the other side won't necessarily do that.

Once you have the documents, you can consider what is truly relevant. My advice to clients was to let me do all the hard work of deciding what was relevant. The larger majority of things you can decide upon quickly as to relevance. Clients will self-censor, too, thinking a particular document should not be released on the basis of some misguided idea as to privacy, commerciality or their understanding of the law. Dissuade them of this notion as you take the statement.

Finally, read the documents. Not just the "relevant content", but the document in its entirety. If a document has a fax header on it, where was it from or to, and when? If it is a contract, who is it actually between, or when was it signed, or which version is it? These little things can matter.

Where a client provides you with electronic documents, if the other side inspect the original electronic documents (as they are entitled to do)[17], take the time to look at the "file properties" of any key documents. By this I mean, look into the relevant metadata of the file that shows you when it was created originally, who it was created by, and when it was last amended and who by. The information may be critical to identifying which version of a document was in existence at a particular time.

I recall a personal injuries matter where I received a doctor's file. I started to read his notes and, in amongst the usual appointments for cuts, coughs and aches, I found a number of entries that were relevant to the injury the subject of the matter. The line I remember most is –

"I have grave concerns for this man's veracity."

"What does veracity mean?" I thought to myself. The next few lines of the doctor's notes spelt it out, but basically "truthfulness in speaking".[18]

[17] on a computer with original forms of the documents on it
[18] Never forget the usefulness of a dictionary

Thankfully I was acting for the defendant. Further investigation ensued, and ultimately we obtained surveillance footage of the person in question doing things physically impossible for someone with his claimed injury. How had I obtained this medical file? The plaintiff's solicitor had supplied us with a copy of the plaintiff's medical files. One X-ray report identified a referring doctor not mentioned anywhere else. A non-party discovery process gave me that doctor's file. I wonder whether the plaintiff's solicitor had noted the different doctor's name. Possibly, and in response the plaintiff may have said the doctor was just a locum at the surgery at the time. But it may also be the case that it was missed.

A Chronology

I am an advocate for chronologies. These simple lists bring an order across an entire file that cannot be beaten. They allow the story to unfurl before the reader. They allow the practitioner to see holes in a story, as well as the conflicting points.

Usually I construct such documents in a table in Word. They can just as easily be constructed in Excel or some similar program. The important fact is that the information is able to be manipulated – a simple paragraph reciting what happened is useless as a chronology. A good chronology will have every factual event listed, generally in three columns, detailing when the event took place, a description of the salient facts of the event, and also where the evidence of that factual event was obtained from. I will address each of these points in turn.

The level of detail required in forming the sequence of events is dependent on the appropriate timeframe for the matter. In a contractual dispute, the day is probably fine, with events that occur on the same day listed in order of occurrence if possible. In something like a medical negligence case, or an emergency response to an incident, a minute by minute sequence might be appropriate. The rapidness of actions, and the importance of this, will guide this development.

In relation to the description, what you are attempting to do is give a concise version of what happened. It is important not to over populate the entry. For example, in a contract case, you might simply note "*Contract for supply signed*". In a motor vehicle accident case, you might only need to state "*Date of incident – motor vehicle accident*". Comments such as "*Taken to RBWH by ambulance*" and "*Taken to work by tow truck*" have clearly different meanings in relation to the actual incident. There is no need for a complete outline of how the accident occurred or relevant conditions of the contract to be copied in. On the other hand, sometimes you need a little detail to convey the importance of the event – "*Plaintiff told defendant over telephone not to enter premises due to concerns about safety. Defendant advised would wait for plaintiff to arrive*" is better than "*Plaintiff spoke to Defendant on phone*".

The third part of the chronology is perhaps most important. When your brief gets to eleven volumes in size, are you going to remember where every single factual element was derived from? If you can then, good luck to you. But properly completing this third column can greatly reduce the time it takes to find something. As you build your chronology, put in the third column details of which document details the fact. Where two documents detail it, note them both. Each fact in the client's statement should be outlined in the chronology, cross referenced to the paragraph in the statement, as well as the fact the statement was given on a certain date.

Where documents differ, then you need to ask why. This is the last great purpose of the chronology. People can be mistaken as to timeframes, or content of documents, but such differences should be identified early. Once a chronology is drafted, this should be supplied to counsel in at least electronic form, so that they may then use it to develop the case theory which will dictate conduct of the matter.

Talk to People

Finally I would like to remind people that communication is extremely important in what we, as lawyers, do. There is communication with the client, but also that between opposing practitioners as well as colleagues.

In relation to talking to a client, it is surprising how much more information can be obtained if you visit them, rather than they visit you. This is especially true where large organisations are involved. The ability to talk to people "on the ground" can be invaluable. I recall the example of defending a claim where someone was injured while visiting a national park. The instructions from the client's head office were that the person had left a walking track, and suffered an injury when a tree fell on her. I took an article clerk with me and we went to film the site. While there, one ranger in general conversation mentioned there was some question about where the boundary to the property was. Up until that comment, the client's instructions were that the incident had occurred on their land. A survey of the site identified that the incident had in fact occurred on a neighbouring property by some fifty meters.

I would next like to briefly discuss professional courtesy and respect. We all know of firms and individuals who hold the reputation of being argumentative, belligerent and unreasonably inflexible in application of the Court rules. There is no need to be such a person. When you receive a matter and you can identify the lawyer for the other side, ring them up. Introduce yourself, let them you know you have conduct of the matter, and that they can call you any time. Develop a rapport. In many matters you find yourself at a juncture where this professional relationship is important. You may need extra time to complete a task, or they may, or options for early resolution might be discussed. It does not mean that you can't act in line with strict requirements, but a good professional relationship takes out any emotional consequences. And always remember that in litigation you tend to come up against the same opposing practitioners again and again. Today you might be against a firm, but tomorrow you may actually need their support in another matter. Leaving one matter with a strong on-going relationship will benefit your practice.

Finally, talk to your colleagues. It will be rare in your early years that you will do anything completely new. Colleagues will have ideas on how to handle a particular problem, or will confirm your thoughts on how it should be handled. But a word of caution - do not become the whinger who has to be spoon fed everything. Your colleagues will desert you, and in my mind, rightly so. An old partner of mine had a statement, and he took it so seriously he had it on a plaque on his desk just to remind each of us junior lawyers as we entered his office to think carefully about what we were going to say –

"If you come to me with a problem, but no solution, you are part of the problem."

Simply put, think up every way you might solve your particular dilemma, and then why each will or won't work. Be ready to explain these. Some spoken out loud will immediately sound fanciful. But guidance will be better achieved if you, yourself, come up with the solution.

Conclusion

As I indicated at the beginning, these are just some ideas on what will assist in the conduct of a litigation file. Not all will be relevant to every matter. But if you get yourself into a habit of doing the little things early, from the beginning, then as the bigger things come along, you will hopefully be able to stay a little more in control.

You may even enjoy the exciting, tedious, nerve-wracking, mind-numbing, life-consuming, exhausting, terrifying and exhilarating ride that is litigation.

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