



Professional Practice in Engineering Management

University of Sydney Faculty of
Engineering & Information
Technologies



Anticipating litigation

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Warning signs that a matter is about to become litigious

- Increasingly aggressive or demanding tone in communications
- “Lawyers language” in communications:
 - quoting from contracts
 - imposing deadlines for responses
 - requiring undertakings
 - reservation of rights
- Unwillingness to meet or negotiate
- Escalation to senior management and/or lawyers



Issues to be addressed

- Protocols for dealing with complaints and threatened claims
- Avoid admissions of liability
- Properly setting up claim or defence
- Taking advantage of ADR procedures
- Educate non-legal staff
- Maintain appropriate records
- Insurance issues
- PR issues



Protocol for dealing with claims

- The client needs to have a centralised point of contact for complaints and claims – perhaps the in-house legal department. (Avoid the phenomenon of letting deadlines expire while claim sits in an in-tray)
- All complaints need to be escalated to the appropriate level of management. (Attract the right level of involvement early and avoid phenomenon of people trying quietly to fix their own mistakes)



Protocol for dealing with claims

- Involve the lawyers early:
 - Clients need to learn not to be afraid to involve lawyers – many problems can be solved more easily and cheaply with early legal intervention
 - Commercial lawyers need to learn when to involve litigation lawyers
 - Litigation lawyers need to be conscious that not all disputes require a major investigation and evidence gathering exercise as a first step



Avoid unintentional admissions of liability

- There is nothing wrong with making admissions if they are intended and the consequences have been considered
- Typical unintended admissions:
 - Long running projects (eg, building or IT projects), especially where there is a steering or management committee
 - Joint ventures
 - So-called “without prejudice” communications



Set up the claim or the defence

- Every claim is different; there are no precedents
- As a rule of thumb, the sending or receipt of a letter of demand is the latest time for involving litigation expertise – in some cases earlier involvement is critical
- Letters of demand are not without prejudice
- The set-up or response can be critical, and its effects can ripple throughout the dispute



Using ADR procedures

- ADR clauses are increasingly common – look at the agreed disputes procedure before deciding on strategy
- Important to determine client's commercial objectives:
 - Does the ADR clause provide opportunities for client to take advantage of?
 - Does the ADR clause create impediments that need to be avoided?
- ADR is always an option in every dispute, regardless of what is in the agreement



Document retention

- Documents must be retained if their destruction would amount to an attempt to pervert the course of justice or a contempt of court (McCabe)
- At common law, perversion of the course of justice involves erosion of integrity of judicial process, denying a tribunal knowledge of true circumstances of the case, or impeding tribunal's exercise of its jurisdiction and power



Document retention

- When is litigation “anticipated”?
- When is a document destruction policy acceptable?
- Amendment to Legal Practitioners Regulations: Obligation to advise clients not to move or destroy documents if litigation likely to be commenced in which documents may be required



Other document retention obligations

- It is an offence to destroy or alter any document or thing with intention of preventing it from being used in judicial proceedings (Crimes Act (Cth), s.39) or destroy anything known to be required as evidence in proceedings (Crimes Act (NSW) s.317)
- Corporations Act: obligation to keep financial records
- Taxation Administration Act: obligation to keep accounting and financial records



Electronic documents

- Why are electronic documents a problem?
 - they are so abundant
 - they breed upon themselves: “cc”, “reply to all”, “reply with history”
 - email users are more likely to speak frankly or unreservedly: Microsoft
 - they cannot be deleted
 - they may contain damaging metadata
 - they may be automatically and unintentionally changed by using the machine on which they reside



Implications for litigation

- Documents are defined broadly and include “data or information stored by electronic means”. Would include:
 - metadata
 - deleted document fragments
- Fertile opportunity to find damaging document trails
- Burden and potential oppression of the discovery task is increased – perhaps by many orders of magnitude
- Obligation to retain documents in their original form may be impossible to comply with



Educate non-legal staff

- Staff need clear direction as to:
 - the issues in dispute
 - open vs without prejudice communications
 - what kinds of communication need legal clearance
 - How to communicate in steering or management committee meetings
 - External communications



Legal professional privilege

- Protects from disclosure communications
 - between clients and lawyers (and sometimes third parties) to enable the client to obtain, or the adviser to give, legal advice, including in context of existing litigation;
 - between lawyers and third parties for the purpose of actual, pending or contemplated litigation;
 - between clients and third parties for the purpose of obtaining information to be submitted to the client's lawyers for the purpose of actual, pending or contemplated litigation



Privilege – The Test

- Dominant purpose test
 - Esso Australia Resources Limited v Commissioner of Taxation [1999] HCA 67
- Relevant purpose is that of the author or the person under whose direction the document was produced or brought into existence
- Substance versus form
- In-house Counsel
- Formal Communications Protocol



Managing the PR

- For many companies, the PR fallout of a dispute is as significant as the legal or commercial implications
- PR professionals typically have very different and conflicting imperatives to those of the lawyers
- Important to establish a policy for co-ordinated communications so that:
 - Legal strategy doesn't undermine PR
 - PR strategy doesn't undermine litigation



Insurance obligations

- Insurance policies require full disclosure to be made to the insurer
- Insurer may also have a right to give directions as to the conduct of the litigation
- Problems may arise when insurer has indemnified more than one officer when cross claims are possible:
 - Waiver of privilege
 - Chinese walls
 - Standstill agreements