

August 2021

The value of advice records and attendance notes



The importance of practitioners making detailed attendance notes and the courts' ongoing preference for this type of evidence, has been highlighted once again in the recent case of *Mundil-Williams v Williams & Ors*.¹

In this matter, the High Court was concerned with the identity of the last valid will of the claimant's father (the testator). The will had been drafted seven years previously and the judge was required to determine whether the contents were truly known and approved of by the testator in 2014. The judge heard evidence from the person (Miss Campbell) who prepared the 2014 Will, who had worked as a paralegal at the time of the drafting.

The judge reached the conclusion that the testator did not have knowledge and approval of the contents of the 2014 Will. Amongst other factors, the judge reached this conclusion by reference to Miss Campbell's file note. He stated that the file note was a more reliable record than Miss Campbell's recollection several years later. The judge commented that, "throughout her evidence Miss Campbell showed obvious, though understandable, signs of remembering things in a manner that accorded with what she knows she ought to have done and what, as a qualified solicitor, she now would do... the file note is more reliable as a record than a recollection several years later; when the file notes differ from Miss Campbell's recollection, I prefer to rely on the file notes." In this case, the file note supported the argument that Miss Campbell did not go through the testator's previous instructions or point out his change in instructions.

This case reiterates the sentiment in the 2016 case of *Hogg v Crutes*², where the judge referred to the often-quoted passage in *Gestmin v Credit Suisse (UK) Ltd & Anor*³, where Leggatt J stressed the importance of contemporaneous documents, the fallibility of human memory, and the dangers of accepting oral testimony that conflicts with contemporaneous documents. Applying that case, the

judge similarly attached more weight to the solicitors' file notes and the contemporaneous correspondence, than witness statements produced eight years later.

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

In *Hague v British Telecommunications Plc*⁴, the court needed to determine the scope of a compromise agreement, where an issue had arisen between the parties as to the scope and extent of their agreement regarding immunotherapy funding. During his determination, Master Thornton made reference to the attendance notes completed during the parties' negotiations. He confirmed that attendance notes would be admissible evidence as to the common intention of the parties.

In *Fraser v Bolt Burden*⁵, the High Court considered whether sufficient advice had been given to the claimant to accept a settlement offer, at the door of the court, of £200,000 in relation to a claim said to be worth up to £1.4 million. The judge placed reliance on the solicitors' full attendance notes in order to determine that reasonable care and skill had been exercised by the solicitors in reaching their conclusions and advising the client adequately.

1| *Mundil-Williams v Williams & Ors*. [2021] EWHC 586 (Ch).

2| *Hogg v Crutes LLP* [2016] EW Misc B29.

3| *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560.

4| *Hague v British Telecommunications Plc (Immunotherapy: Reasonableness of Treatment: Private Dictionary Principle)* [2018] EWHC 2227.

5| *Fraser v Bolt Burden Claims & Ors* [2009] EWHC 2906.

EVIDENTIAL VALUE

Conversely, where claims are concerned, the lack of detailed attendance notes can make cases difficult to defend. This was flagged in the decision of *Padden v Bevan Ashford*⁶, where the Court of Appeal endorsed the High Court's decision to find in favour of the claimant, as the claimant's evidence had been credible and the solicitor had no recollection of the advice he gave and his normal practice could not be supported by any attendance note. In *Wellesley v Withers*⁷, the court confirmed that it remains good practice to make attendance notes, in order to establish easily and evidence what instructions have been received and what advice has been given. One of the issues in this case concerned a specific amendment made by the solicitor when drafting an option agreement for the client. It was believed that the reason for the amendment had originated during a telephone call between the client and the solicitor.

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

Wellesley v Withers demonstrates the difficulties faced when taking instructions by telephone and the benefit of incorporating an attendance note into a follow-up email communication with the client, to ensure that it is clear what has been agreed. That isn't always practical, but nevertheless checking that instructions and/or advice have been correctly understood is important. Suggested approaches for doctors giving advice by telephone include asking patients to repeat the advice back, so that the practitioner can note that the advice was understood.⁸ This technique may be implemented by solicitors when giving difficult advice to clients and when taking instructions from the client; that is, the solicitor confirms his/her instructions to the client (and notes the confirmation).

TRENDS, CLAIMS AND COMPLAINTS

Worryingly, as long ago as 2015, one prominent law firm⁹ indicated that they were seeing fewer detailed attendance notes on solicitors' files, than in the past, making it difficult to establish the specific advice given. It was suggested that this may be down to time and costs pressures faced by fee earners, who were not taking the time to dictate notes, and also a tendency by lawyers to consider attendance notes as replaced by emails to clients or colleagues recording a conversation.

Unfortunately, as noted in *Jackson & Powell*¹⁰, "There is no substitute for a proper attendance note, recording the gist of the advice that was given. The lack of attendance notes has materially increased the number of successful claims that are brought against solicitors."¹¹

From a regulatory perspective, the use of detailed attendance notes is an important strand in demonstrating the standard of service provided. The SRA's Code of Conduct for Solicitors¹² requires that solicitors deliver competent service to clients (Paragraph 3), and that they are able to justify the decisions and actions they make (Paragraph 7.2). Therefore, the use of attendance notes when taking instructions and providing advice will be fundamental in evidencing compliance to the regulator.

Having a template for attendance notes sets a consistent framework for delivering good service, and ensures there is a record demonstrating that the client was fully advised. This, in turn, is good risk management, preventing claims and complaints.

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6] *Padden v Bevan Ashford (A Firm)* [2013] EWCA Civ 824.

7] *Wellesley Partners LLP v Withers LLP* [2014] EWHC 556.

8] The BMJ. "Telephone consultations," available at <http://www.bmj.com/content/326/7396/966.full>, accessed October 21, 2015.

9] Clyde & Co. "Lawyers' liability briefing – Summer 2015," available at: http://www.clydeco.com/uploads/Files/CC007500_Landscape_for_Lawyers_Liability_26-05-15_v4.pdf, accessed October 21, 2015.

10] *Jackson & Powell on Professional Liability* (Sweet & Maxwell) 11-181.

11] Cited with approval by the Hong Kong Court in *Delhaise v Ng & Co* [2004] 1 H.K.L.R.D. 573 at [51].

12] <https://www.sra.org.uk/solicitors/standards-regulations/> (in force from November 25, 2019).

With this above advice in mind, the following is recommended.

RISK ACTIONS

Action	Benefits
<p>Specify a standard approach to achieve consistent quality of records.</p> <p>Design template attendance notes and advice records for correspondence from your firm with standard headings such as:</p> <ul style="list-style-type: none"> • Instructions received. • Advice given. • Evidence that the advice is understood. • Check no additional advice required. • Cost advice given (including funding options) and costs benefit justification. • Actions and timescales. 	<ul style="list-style-type: none"> • Sets a logical framework for delivery of consistent good service. • Generates evidence that the client was properly advised and regulatory requirements were met. • Advice records sent to the client will promptly highlight instruction and/or advice misunderstandings.
<p>Specify a standard approach to achieve consistent quality of records.</p> <ul style="list-style-type: none"> • Amend training manuals, induction processes and templates, and case software to detail the templates. 	<ul style="list-style-type: none"> • Ensures the procedures are embedded across the firm.
<p>Active management:</p> <ul style="list-style-type: none"> • Where possible, set exception-reporting to capture files that have not used the relevant templates. • Include a system of quality checking. • Compare cases where there are complaints and claims with those where there are none: Were there a reasonable number of attendance notes in the files for either? 	<ul style="list-style-type: none"> • Demonstrates good practice to underwriters – this is likely to be reflected in the claims history over time, and in professional indemnity premiums. • Ensures appropriate systems in place to identify risks and evidence that the service provided to clients is competent (Paragraph 2.5 & 4.2 Code of Conduct for Firms 2019).

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