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## NOTE WELL:

### How to keep good file notes

#### Christina Kalantzis

Managing risk often comes down to the paper trail. And with all the recent mayhem surrounding how and when the Statement of Advice (SOA) should be provided and what it must contain, we are forgetting about the important role that file notes take in the financial planning process.

Believe it or not, file notes usually become the basis from which initial and ongoing advice is drafted.

From a risk management point of view file notes are also usually the first thing that starts off the paper trail and the last thing that ends the client paper trail.

And a usable paper trail is of paramount importance in the event that it becomes necessary for a different adviser to take over the client matter, or dare I say, to review a complaint.

The last thing you want is to be in a situation where it's your word against your client. The best way to overcome this problem is to have a clear documentation pathway.

In a recent search of ASIC news, we found a case (which was a typical example) where the regulator had ordered a Melbourne adviser to undergo four compliance audits over the next 18 months after finding that between January 2000 and October 2002 the financial adviser kept 'unreliable client records'. ASIC noted that it would take further action against the adviser if the four audits indicated that there is a continuing problem with the maintenance of client records.

Another search found that ASIC banned a former licensed securities dealer from Perth for two years. It was found that the licensee in question had failed, in his capacity as the director and key officer and as a client adviser, to maintain proper records of client communications.

The ASIC investigation found that recordings of recommendations to clients were inadequate, and indicative

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of lax internal controls and procedures and poor oversight.

Similar to an SOA, a file note may be the document which identifies any negligence or liability on your part.

It is the nature of all consumers that, if an issue arises, they would

look at the SOA and client file notes for further investigation, to determine whether blame can be attributed to another.

Taking good file notes also works in your favour. In a recent FICS panel decision, the complaint was not upheld, as the: "Panel were satisfied that the documentation that it relied upon in reaching its findings had been exchanged between the parties and as a consequence the parties understood the basis for their respective positions and the evidence upon which they rely."

### So what is the art of taking 'good file notes'.

This can be summarised by the 4C's. File notes need to be:

- Clear;
- Concise;
- Comprehensive; and,
- Current.

**Clear:** the file note must be able to be read by someone other than the writer. This is of particular importance when an adviser goes on leave and a different adviser needs to take over the client matter. An oral explanation given to an adviser about to take leave will not be sufficient.

**Concise:** the file note should contain relevant material. Irrelevant material will just open yourself up for possible further litigation.

**Comprehensive:** all critical points must be covered in sufficient depth. It is not possible for a clear picture to emerge unless all relevant information is recorded.

**Current:** reconstructed notes, like the recollection of past conversations, do not achieve maximum evidentiary weight. Sometimes the pressure of work invites us to cut corners and skip over the paper work. Avoid this temptation. Keep the paper trail clear.

Lets face it, in reality, not all file notes follow the 4C principle. So it may be comforting to know, that a recent Supreme Court case allowed a solicitor to rely upon his own unintelligible file notes, so he could recollect his memory of the events.

What this shows is that unintelligible file notes may assist at times. However, best practice clearly dictates adoption of the 4Cs.

### So why are file notes important?

Well firstly, file notes are required by law and secondly it reduces the successful challenges by unhappy clients.

Let's revisit Policy Statement 175 (PS175). PS 175 requires licensees to adopt certain personal advice record keeping obligations. There is a licence condition requiring licensees to keep (or cause

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to keep) records for at least seven years from the date that personal advice is provided to a retail client.

You need to keep records on:

- the client's relevant personal circumstances as determined under s945A(1)(a)(i);
- inquiries made about those rele-

vant personal circumstances;

- the consideration and investigation conducted on the subject matter of the advice; and,
- the advice, including reasons why the advice was considered to be 'appropriate'.

File notes are not only required for the provision of giving personal advice and developing the SOA, but they also play an important role when handling complaints.

Policy Statement 164 (PS164) highlights the importance of file notes in the dispute resolution process. A useful procedure to incorporate into your internal dispute resolution process includes the requirement that:

- file notes must be taken of all meetings and conversations with the client;
- ask the client to sign the file notes to confirm they contain a complete and accurate record of the complaint and subsequent negotiations.

### Risk management tips

Who can forget the Hartley Poynton case, where Harley Poynton learned that their supervision systems were inadequate at an additional cost of \$260,000 in exemplary damages?

That is, had Harley Poynton's supervision systems been adequate, the amount they would have to pay Ali would be \$260,000 less. The Court determined that Hartley Poynton should bear the additional cost because of its supervision system. This is why the Court ordered Hartley Poynton to pay the client \$260,000 more than the client had lost.

Part of any supervision system should include a review of client file notes.

Effective supervision and risk management systems are a requirement of all AFSL holders.

When drafting your client file notes procedure, you should keep in mind the following:

- file notes should be taken from your discussions with clients and their instructions. These records are required to be kept for at least seven years by AFSL holders;
- where appropriate confirm in writing the details of your advice in the Statement of Advice;
- as part of your supervision and monitoring licensee requirements, AFSL holders should undertake a regular review of representatives active files. ■■■

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