2

Pre-action procedures

Many clients simply take the solicitor's initial advice and you don't hear from them again. The parties may reconcile, they may negotiate a settlement directly between themselves or the client may 'shop around' and go to another solicitor.

If your client instructs you to go to the next stage, the main issues will be divorce, property, children or maintenance/child support. (Divorce applications will be discussed in detail in Chapter 5.)

The question of which court you should issue proceedings in (if that becomes necessary), is dealt with in Chapter 3. Before we deal with that, it is necessary to look at how to go about negotiating family law issues with the other side.

The Family Law Rules give directions on how a client should negotiate prior to issuing in the Family Court. There are no pre-action obligations which apply if you issue in the other courts. However, it is thought that, by and large, the Family Law Rules represent family law 'best practice' in this area. Hence it is recommended that you follow these guidelines for negotiations and primary dispute resolution

even if you have no intention of taking proceedings in the Family Court and would prefer to take proceedings in the Federal Magistrates Court. (Perhaps the Federal Magistrates Court choose not to make rules covering this area on the quite reasonable assumption that good family lawyers follow this type of negotiating methodology anyway, regardless of whether there are formal rules).

An obvious advantage of subsequently proceeding in the Federal Magistrates Court is that you need not be quite so anxious about having complied with the minutiae of the Family Court pre-action procedures, because a Federal Magistrate cannot penalise you for breaching them. However, we reiterate that these pre-action procedures should be followed in the majority of cases. Hence you should read the rest of this chapter as being equally applicable prior to proceedings in all courts.

(Unless otherwise mentioned, the rules referred to in this chapter are the Family Law Rules. The consequences of breaching those rules apply only in Family Court proceedings).

Exceptions

Most applications apart from divorce have similar processes. Lawyers are obliged to inform their clients of ways of settling cases without starting legal action. They are obliged to tell their clients of the pre-action procedures and the client's duty under the rules to make full disclosure. Rule 1.05 requires each prospective party to comply with the pre-action procedures, which are in Schedule 1 of the rules, before going to court unless:

1. for a parenting case, the case involves allegations of child abuse;
2. for a property case, the case involves allegations of fraud;
3. there are allegations of family violence;
4. the application is urgent;
5. the applicant would be unduly prejudiced;
6. there is a genuinely intractable dispute;
7. there has been a previous application in the same cause of action within the last 12 months;
8. the case is an Application for Divorce; or,
9. the case is a child support matter.

Some of these reasons for avoiding the pre-action procedures are open to interpretation. If questions arise about a party breaching the pre-action procedures, the court will interpret them in the light of the main purposes of the rules as set out in Chapter 1 – rule 1.03(2). Rule 1.04 provides that the main purpose of the rules is to ensure that each case is resolved in a just and timely manner at a cost that is reasonable in the circumstances. The cost also has to be proportionate to the issues involved (rule 1.07). Obviously, if the matters in dispute between the parties are minor, the court will probably take a tougher line on interpreting whether an application is urgent. Similarly, it will be difficult to convince a court that the pre-action procedures should be avoided because an applicant would be 'unduly prejudiced' if the dispute is minor.

General principles

As mentioned, the pre-action procedures list what is best practice in family law. It is most important to read Schedule 1 carefully as well as Chapter 1 of the rules. Schedule 1, Part 1, 1(6) of the pre-action procedures is significant; in summary it stipulates that the parties must have regard to:

1 the need to protect and safeguard the interests of any child;
2 the need to foster as good a relationship between the other parent and the child as is possible in the circumstances;
3 the potential damage to a child if the child is encouraged to take sides in the dispute between the parents;
4 the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
5 the impact of correspondence on the other side; and,
6 the need to keep the costs of the case proportionate to the value of the subject matter of the dispute.

Clause 1(7), (8) and (9) provide that:

1 parties must not use the pre-action procedures for an improper purpose such as harassing the other party or causing unnecessary cost or delay;
2 parties must not raise irrelevant issues or inflammatory issues;
3 the court expects parties to take a sensible and responsible approach to the pre-action procedures; and,
4 pre-action procedures need not be followed to a party's detriment if reasonable attempts to follow them have not achieved a satisfactory solution.

The pre-action procedures require lawyers to 'actively discourage' clients from making ambit claims or seeking orders that are not reasonably achievable (Schedule 1, Part 1, 6(1)(i)).

BEWARE: You need to bear in mind at each stage of the court and pre-court process that rule 11.02(2) provides that if a party does not comply with the rules the court may order costs. Furthermore, rule 11.02(1) provides that if any step is taken after the time specified under the rules, 'the step is of no effect'. The rules provide that you can apply for leave to extend the time but the court may order costs, including against the solicitor, on such an application.

Specific requirements

Your first step is to write to the other side, basing your letter on the following. The pre-action procedures require a party to:

1 give the other party a copy of the pre-action procedures. Note that there are different pre-action procedure brochures in financial cases and children's

cases, although the two brochures are very similar. If your case involves both financial matters and children's matters, then you have to give the other party copies of both brochures;

2 invite the other party to participate in a particular primary dispute process to discuss the matters in issue; and,

3 both parties are *required to cooperate* in the primary dispute resolution process and to make a *genuine effort* to settle.

Precedent: Sample first letter to other party (Attachment 2A)

What constitutes 'primary dispute resolution' is very broad. The beginning of Parts 1 and 2 of Schedule 1 of the rules (relating to financial cases and parenting cases respectively) stipulate that primary dispute resolution includes negotiation, conciliation, mediation, arbitration and counselling. In other words, the traditional process of negotiating through solicitors is clearly contemplated by this range of options, although it is not for a moment suggested that that is always the best way to proceed. There is a deal of emotional and psychological 'analysis' involved in deciding the best type of dispute resolution process in a particular situation.

For example, in the stereotyped and still common case of an abused wife (whether physically or emotionally abused or both), the power imbalance between the parties is very likely to make formal mediation impractical and unworkable. (Whilst the pre-action procedures are not compulsory when there is an allegation of family violence, the reality is that the majority of people from a situation of family violence will still want to avoid court and it would still be appropriate to explore a negotiated settlement.) In this case the traditional process of negotiating through solicitors is likely to be best.

Where both parties have a relatively civil relationship and, possibly, at least a minimum level of intelligence and common sense, mediation with a mediation service is likely to be a helpful way to endeavour to reach a settlement. You would tell your client in that case that any settlement reached is not legally binding without court orders being made and they would need to return to you to get the formal paperwork prepared once their settlement is arrived at. You should also encourage the client to come back to you with questions at any stage of the mediation process. At the very least the mediation process is likely to go on for two or three meetings and may span a number of months. Hence there is a significant potential role for a solicitor as an occasional adviser to the client throughout the mediation process.

Both Schedule 1 of the rules and the statements of members of the court at public seminars make it clear that the concept of primary dispute resolution is to be interpreted as broadly as possible and, as mentioned before, as long as the client basically has a 'good go' at negotiation, this will constitute primary dispute resolution for the purpose of the rules.

Having said that, the pre-action procedures brochure says that if there is no primary dispute resolution service available (but when you consider the ready availability of solicitor-based negotiation, this is not really applicable) or if the primary dispute resolution fails to resolve matters, or the other party fails to participate, your client is then entitled to go to the next stage – court. Before that is described, however, it is necessary to discuss disclosure.

Disclosure

Parties to a case have a duty to make full and frank disclosure of all *information* relevant to the issues in dispute in a timely manner (clause 4(1), Parts 1 and 2 of the First Schedule to the rules). This clearly means more than mere documents.

The parties should as soon as practicable, and 'if appropriate' as a part of the exchange of correspondence during the primary dispute resolution phase, exchange 'in financial cases':

4 a schedule of assets, income and liabilities;
5 a list of documents in their possession or control relevant to the dispute. This is potentially quite broad. Common sense suggests that the list of documents needs to be kept within reasonable bounds; and,
6 a copy of any document requested by the other party from the list.

Interestingly, it is mandated that 'if a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, to cease to act for the client' (Part 1, clause 6(4) and Part 2, clause 6(4) of Schedule 1 of the rules).

In children's cases, the same obligation to make full and frank disclosure applies and the parties must exchange copies of documents in their possession or control relevant to an issue in the dispute (for example, medical reports, school reports, letters, drawings, photographs) – see clause 4(2), Part 2, Schedule 1.

Your second letter

Before applying to court, even after going through primary dispute resolution, the applicant must give the other party another written notice. This states your intention to apply to court and sets out:

1 the issues in dispute;
2 a genuine offer to settle the case (with proposed orders);
3 a time for response – at least 14 days after the date of the letter; and,
4 enclosing another copy of the pre-action procedures brochure or brochures (if 2 are appropriate).

Precedent: Sample second letter to other party (Attachment 2B)

The proposed respondent must within the nominated time reply in writing and, if the offer is not accepted, must set out:

1 the issues in dispute;
2 a genuine counter-offer (and proposed orders); and,
3 a time for reply (at least 14 days after the date of the letter).

Precedent: Sample letter responding to the second letter (Attachment 2C)

The applicant is not to commence proceedings unless this process has been followed through and a reasonable attempt to settle has failed.

It is a matter of judgment as to when you pull out of the pre-action negotiations (if they are still proceeding) and issue court proceedings. The unfortunate fact is that protracted negotiations can be just as expensive and even slower to resolve matters than issuing a court application. It is not uncommon to be dealing with somebody who simply does not want to deal with the issues. They get a solicitor's letter and refuse to get their own solicitor. They are having trouble coping with the end of the marriage. It has become very difficult for them to deal with the legal issues. By all means, you certainly should invite them to enter into primary dispute resolution. You should recommend that they go to personal counselling in some cases (even if it is the other party). However, eventually, you will have to tell your client that it may be better to simply issue proceedings.

The majority of difficult prospective litigants will instruct a lawyer when they get your court application. That may help to overcome their reluctance to deal with the issues and to get to a settlement. There is also nothing like getting a lawyer's first account to focus the minds of some parties, and that can have a good effect on the negotiation process.

If you decide that continuing in the primary dispute resolution process simply will not work within a reasonable time frame then you are ready to recommend to your client that you should issue a court application, and you should then refer to the next chapter.

If you have successfully negotiated a settlement for your client or your client has done it for themselves and comes to you to finalise the settlement, refer to Chapters 13A and 13B on consent orders as to how to finalise matters.