With the recent contraction of the doctrine of advocate’s immunity (see Riskwatch – July 2017) and a rise in reported claims against barristers being seen at Law Claims this month’s Riskwatch will look at some risk management techniques applicable to Counsel.

In a paper first presented to the NSW Bar Practice Court in 2004 Mr P H Greenwood SC listed ten basic precautions for barristers. These are:

1. Record the date and time of receipt on all briefs.
2. Examine all briefs on receipt to determine what you are being asked to do and any time limits.
3. Send fee agreements/disclosures.
4. When advising, enunciate any restrictions you perceive to the retainer (e.g. I note that I have not been asked to advise on...).
5. Make notes of conferences which include a description of what happened, what you said and your impressions.
6. When in doubt about ANYTHING, consult with others.
7. Warn clients of the risks of litigation, including the costs ramifications.
8. “Smell” problems, and address them, there and then.
9. Invite suggestions, comments and perceptions from solicitors and clients.
10. The client who doesn’t want to listen is the client who really needs to hear. Explain why he or she needs to hear.

Practitioners who act as Counsel should, just like those who practice as Solicitors, adhere to good risk management principles.
The good sense of these precautions should be obvious: indeed, the sending of fee agreements/disclosures is now required by the *Legal Practitioners Act 1981 (SA)*.

The making of notes by practitioners (Precaution No. 3 above) is a well-known “*hobby horse*” of Law Claims and has been addressed in a number of *Riskwatch* articles (see for example *Riskwatch* October 2016 and February 2015) but a recent claim matter dealt with by Law Claims emphasises the fact that it is just as important for barristers to make (and *retain*) proper file notes as it is for solicitors.

In this matter a Claimant alleged both the barrister (insured in SA) and the solicitors (insured interstate by different insurers) involved had provided negligent advice in respect of court proceedings including in respect of settlement offers made at a mediation. The solicitors claimed, in part, that they had relied upon the advice provided by the barrister as to the prospects of success of the claimant’s case and the level of damages the claimants would recover. The barrister did not retain his brief and had no notes of the advice provided at the mediation which made dealing with the claim extremely difficult from the barrister's point of view.

Where it is not possible for a barrister to retain his or her brief (and this would be ideal from the risk management point of view) then at the very least all notes of conferences, mediations and court appearances should be retained for at least 7 years after the conclusion of the relevant matter.

This recent claim also underlined the importance of Precaution No. 7 above – warning clients of the risks of litigation, including costs ramifications. It was also alleged by the Claimant that, in effect, the advice provided was overly “*bullish*” and did not appropriately reflect the risk (indeed, any risk) of not settling at the mediation and proceeding with the claim in Court. As it happened the claim proceeded and was entirely unsuccessful. Such records as were available indicated that the advice which was provided was to the effect that the minimum amount that the client would receive was “[x] %” of the amount claimed, with no indication that there was a risk that the claim might in fact wholly fail. Whilst it is certainly the case that a mistaken view is not necessarily a negligent one, the issue in this case was that the client was not apparently advised of there being any risk at all when that was plainly not the case.

Further litigation will often be launched on the basis of an opinion from Counsel. If this opinion takes an overly ambitious view problems may ensure if the litigation becomes expensive and protracted. It will also often be the case that, as the matter progresses, the key points of dispute may narrow to a critical matter of construction or evidence which becomes the difference between winning and losing. This key point might well not have been at all apparent at the early stages of the dispute, however, by the end of a trial it will often seem obvious, especially to a disgruntled losing party – hindsight being a wonderful thing.

One way of avoiding these sorts of problems is to make sure at all stages that you properly evaluate the risks in the client’s claim or defence and that the client properly understands
both the risks of litigation and the risks in their own claim or defence. Another useful approach is to regularly review and reassess the client’s claim/defence and the initial advice provided as the matter progresses.

If it becomes clear that, as a result of further evaluation or the availability of new evidence, the initial advice is too “bullish” it is better to confront that issue as soon as possible rather than just leave it be in the hope that it might just be “alright on the night” (as they say in the Theatre).

Finally, the nature of the duties of Counsel and what may occur if there is a shortfall in meeting those duties are set out by the Chief Justice in the recent case of Wallis v Wallis [2017] SASC91, especially at para [30].