

Fundamentals of Litigation

Pre Litigation Steps

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Where is the best place to start?

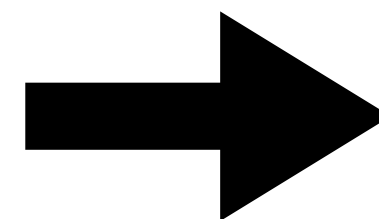


Getting to know your client:

- The first thing a solicitor must do when agreeing to take instructions from a new or potential client is to verify who the client is and ensure that you receive instructions from a person authorised to provide you with instructions.

The process should ensure that:

- A client is who they say they are;
- The client has the authority to do what they instruct you to do; and
- An evidence trail of the VOI is preserved.



The Queensland Law Society and Lexon have published guidance notes on how to verify a client's identity:

(see <https://www.qls.com.au/Practice-Support-Tips/Verification-of-client-identity>)

Lexon VOI RTD Checklist

Checklist

Verification of Identity AND Right to Deal or Entitlement to Sign



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If being used for a matter outside Queensland jurisdiction, consider local law. NB: if the law is not Australian Law then consider the Policy coverage terms regarding the Foreign Law exclusion.

All Matters

Practitioners should always undertake a Verification of Identity ('**VOI**') AND the Right to Deal ('**RTD**') or Entitlement to Sign ('**ETS**') as required by the relevant legislation and rules, as well as when prudent to do so.

There are five parts to this checklist: Complete Part A **OR** Part B; **AND** then complete Parts C, D and E in all instances:

Part A	VOI Standard
Part B	Other VOI
Part C	RTD or ETS
Part D	Evidence
Part E	Signatures

[Question 2](#) below identifies circumstances where a practitioner must take reasonable steps to verify identity AND RTD or ETS. Other circumstances where this is prudent include:

- land dealings generally;
- making of wills and powers of attorney;
- where an asset is moving (e.g. shares, personal property, etc.);
- matters that are high risk, or there are "Warning Signs", for example, email only instructions, urgency, client seems hesitant to provide basic identification, inconsistency in documents, or involvement of novel features.

Verify Source of Funds

- Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) requires verification as to the source of funds must also be undertaken.
- The Queensland Law Society has published a guidance note for law practices concerning Proceeds of Crime Compliance and Anti-Money Laundering and is rolling out specific educational presentations regarding amendments to the legislation
- (see https://www.qls.com.au/Guidance-Statements/No-13#_ftn14)



Setting and Managing Client Expectations

Some practical things to consider discussing with your client early on in the solicitor/ client relationship:

- The cost of litigation - be open and realistic. Consider obligations under sections 308, 310, 315 and 316 of the *Legal Profession Act 2007*.
- The importance of ADR and early dispute resolution processes - can you help your client negotiate a resolution of your client's dispute before advancing litigation?



Setting and Managing Client Expectations

- Consider whether:
 - Settlement discussions may narrow down issues in dispute or even resolve a dispute
 - Would your case benefit from a pre-litigation mediation?
 - There is forensic value in an early offer of settlement/compromise (i.e. principles set out in *Calderbank v Calderbank*; Chapter 9 Part 5 of the Uniform Civil Procedure Rules 1999; Rule 25.14 Federal Courts Rules)
 - Does your client's contract contain mediation or arbitration clauses?
 - The length of time it may take to get to a final hearing - clients are often not aware of how long the length of time it takes to obtain a trial date
 - The imposition of the time a litigant will need to invest with their lawyer over the course of a matter and the cost it will have on a client's business - the commercial reality of litigation - is it really commercial?



Taking and verifying instructions

- The best Practice is to take a client's statement at first instance
- The preliminary statement does not necessarily need to be a document you would consider filing in court, although it should include:
 - A full account of the client's story of events
 - Supported by all relevant documents that the client possesses
 - Control that supports the matters contained in the client's statement
- This statement can be used as an aid memoir throughout the matter and can be tested during the litigation - e.g. following disclosure or mediation



Taking and verifying instructions



- The preliminary statement may also form the basis for the preparation of Affidavits of evidence in chief or complying with relevant practice directions:
- (see, for example, *Commercial and Corporations Practice Note* (C&C-1)).
- By referencing supporting documents in the initial statement should place you in a position to identify:
 - Other potential witnesses you should speak with; and/ or
 - Any missing pieces to the case; and/ or
 - Documents that may be disclosable in civil proceedings.

Collation of documents and identifying disclosable documents early assists you in complying with professional obligations:

- (see Rule 5 *Uniform Civil Procedure Rules 1999*, Supreme Court PD 18/2018 - Amended *Efficient Conduct of Civil Litigation*, Supreme Court PD 9/2023 - *Caseflow Management - Civil Jurisdiction*)

Early collation of a statement should place you in the best position to advise your client about:

- The prospects of their case
- Potential issues or outcomes to expect

Also, it assists you in gaining the best understanding as to whether your client is being truthful or has an accurate recollection of events.

Developing Case Theory

- The Case Theory is the strategy adopted from the outset of a matter, designed to structure arguments and determine how to best present your client's case.
- You will not be in a position to develop a reasonable case theory unless you have:
 - Analysed the case;
 - Fully understand client instructions; and
 - Know the client's desired outcome.



Alternative Dispute Resolution

Toby Boys

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Partner, Holding Redlich

- Why use ADR?
- Contract and Court requirements to use ADR
- How to set up the process
- Common mistakes and issues that arise
- Getting yourself and your client ready to negotiate

Litigation

Florence Chen
Level Twenty Seven Chambers

- Prior to commencing litigation
- Commencing litigation
- Interlocutory proceedings
- Pre-Trial
- Trial