Record keeping – a litigator's perspective

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RECORDS BECOME PROTECTION should your work ever be called into question. Having good records can be proof that you gave appropriate advice, made considered decisions and took appropriate action.

If your work is questioned records take on a special importance. They are a contemporaneous note of what happened. They are more reliable and persuasive than memory alone. Good records can jog the memories of those involved in a project which has long since passed. The record can speak for itself on important events in the life cycle of a project when witnesses have forgotten the relevant details or have since passed away.

Should questions arise about a project, very few people can remember sufficient details about it up to 15 years after it was concluded. So what records should you make and keep? From a litigator's perspective having a written contract is extremely important. It is proof of what was agreed between the parties. A lack of a written contract leaves the court having to determine what the parties intended. The other important records show what was and was not designed and inspected such as: plans and specifications, photographs, diagrams, peer review, expert reports, calculations, site notes and file notes of important conversations and telephone calls.

When preparing records you should avoid illegible hand writing, abbreviations, euphemisms and jargon as the reader of your record may not be able to decipher it. Bear in mind that you might not be around to explain what "ROG in the PRG" means by the time a dispute makes it before a court. Do take photos and draw diagrams if you think they might help provide clarity about a potentially contentious item or issue at some stage in the future. Finally make sure that your records are retained for 15 years after a project has concluded and ensure that stored records are organised, labelled, secure, easy to find and easy to be retrieved.

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Good records can help persuade a potential litigant not to sue you. Picture a situation where a builder chose to build something contrary to the advice of an engineer and the engineer pointed out the discrepancy onsite. The builder told the engineer that he did not adopt the engineer's design because it was too expensive. The engineer took a file note of that conversation. Later when a report points to the onsite departure as the cause of subsidence, the engineer can rely on her file note to avoid being joined to the resulting litigation.

The importance of records in the court process is demonstrated by the obligations placed on lawyers to ensure that their clients discover all relevant documents and take no steps to withhold or destroy documents that ought to be disclosed. The obligations placed on solicitors have been described by the court as "a great responsibility and a heavy burden".

One of the primary aims of the court's discovery process is to ensure that the parties are not taken by surprise if the case proceeds to trial. Each party should be able to assess the strengths and weaknesses of each other's positions at a relatively early stage.

If a dispute makes its way to mediation or trial, records are likely to become the focus of attention. They help the decision maker to understand the facts and they greatly influence the ultimate outcome. Often a good record will be the cause of a successful negotiated settlement or a favourable judgment.

Evidence at trial is usually given by witness statement and then tested by cross examination. The evidence that is preferred by the court usually comes down to who the Judge considers to be the most credible. Helpful records provide the party who relies upon them with strong corroboration of their testimony. This may lead to an early resolution of the dispute (which will help the party to avoid significant legal costs and interruption to their business) or judgment in their favour.

By way of contrast, poor record keeping often means reliance on imperfect memories and being unable to counter what another party's records say. A lawyer's worst nightmare is the absence of any records central to their client's defence. This is usually because they never existed or have been lost or even destroyed. The court might draw adverse inferences about the lack of records and assume that the sloppiness of the record keeping is indicative of sloppy work onsite. A lack of records also causes difficulty for witnesses as they have nothing to prompt their memory and they are unable to distinguish the project in question from the many other similar projects they have worked on in the meantime.

The moral of this article is to keep good records. If you keep good records you will have protection should your work ever be called into question. You will manage your risk, and hopefully avoid litigation. Most importantly you will not find yourself having a battle of "he said, she said" in a court having to rely entirely on your memory.