



# PREPARING YOUR DEFENCE

An effective paper trail follows the five Cs.

By Ellen J. Bessner

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**W**ithout a paper trail, the most diligent advisor may not be in a position to prove fulfillment of legal and regulatory obligations. An effective paper trail follows the five Cs.

**1. CORRECT:** Notes, whether handwritten or typed, must accurately reflect the information imparted to or

by the client. They must include details about the client's background, unique concerns or needs. If the information written in your notes is correct, then the complaining client may have difficulty disputing the information, particularly since few clients take notes of what is discussed with their advisors. If incorrect information appears in your notes, all other notes may be questioned, even if accurate. For example, if you describe a product that has certain attributes or covers certain risk but it in fact doesn't, the notes may reflect the incorrect advice, damaging your defence and bolstering the client's claim. This is particularly relevant with insurance products that advisors assert cover

certain risks that ultimately become the central issue of a lawsuit. Inform yourself thoroughly of the risks and limitations associated with the products you sell and ensure your notes and records reflect the explanation of those attributes to clients.

**2. CURRENT:** Keep each client file factually up-to-date. If there are long periods with no paperwork, it will be difficult for you to prove that you know your client. If your client's evidence is that particular needs changed over time, you will be seen as neglecting your duties. For example, clients with changing financial situations will likely

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need to change their investment portfolio and these changes will need to be accurately reflected in the advisor's file. If your notes do not reflect the client changes and need for product adjustment, but a product change is made which results in you receiving commissions, you may be accused of churning.

**3. COMPLETE:** You explain the risks to the client but do you do so as products and client needs change? Over time, the risks associated with a product may change, as will the needs of the client. Even if an explanation of the risks is provided, how will a judge or arbitrator determine whether the client's version of events (that the risks were never explained) is to be believed over your assertion that the risks were clearly explained? If your explanation is not reflected in notes, letters or other documentation, then the judge or arbitrator may find in favour of the client. Accordingly, complete notes of each meeting or telephone conversation with clients should be reflected in their files. For complicated matters, a confirming letter or e-mail is recommended. If you chose to rely on e-mail, ensure the e-mail is properly thought through before pressing

"send." Keep a copy, electronic or paper.

**4. CONSISTENT:** Advisors often ask me how a judge will know whether an advisor manufactured the paper trail or prepared the notes and records as events were unfolding. My response is twofold. First, many computer programs offer an electronic paper trail that prohibit you from moving back into the notes from a previous day. Second, make sure your notes are always made in a systematic manner. If you work as part of a team (for example, two assistants and three advisors), have the entire team operate by these consistent methods. So if the notes are taken by your assistant, you can attest to the fact that the entire team operates in a certain manner. If you presently do not have a system in place, develop a system with input from the other individuals on your team. The system should include the date and time the meeting began and ended; names of people in attendance; and where the meeting was held. The more details you have in your notes, the more credible your testimony.

**5. CONTEMPORANEOUS:** The notes taken should be prepared contemporaneously with the events as

they occur. Many well-intended advisors do not make notes during a client meeting, expecting to have time later in the day to prepare a paper record. However, as the day goes on, either there is no time to reflect on the day or the advisor's recollection is unclear. If you convert notes into typed form, keep the handwritten notes in the client file (in chronological order) should any questions arise concerning the accuracy of the typed notes. While on the telephone with clients, ensure you either have your hands free to type notes on your computer or pen in hand to take notes while the client is speaking. Also place those notes in the client file so they can refresh your memory later.

Regardless of whether the notes are handwritten or typed, what matters is that the five Cs of a paper trail are followed. Find a process that is simple and works best for you. Otherwise, no one (including you) will follow it. More important, there will be no system in place to protect you when you want the judge or arbitrator to believe you! **AE**

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