CONFIDENTIAL

NZ LAW
Risk Management Manual

fee langstone

AON

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INTRODUCTION

This Risk Manual has been produced by NZ LAW, for the benefit of member firms, to assist them to avoid problems in their practices which may result in a claim.

The manual is the product of a process of consultation between NZ LAW, Aon (member firm's insurance brokers), NZI (a division of IAG New Zealand Limited) (insurer), and Fee Langstone (an insurer panel law firm).

It aims to provide practical advice to member firms and to illustrate the advice with actual claim examples or cases.

It also aims to communicate to member firms that, above all else, successful management of the risks of legal practice involves effective communication with your insurance broker and your insurer. However, it is a general guide only and specific advice concerning a particular factual scenario should always be obtained.

1. THE RELATIONSHIP WITH THE CLIENT

The foundation of the lawyer's duties is the contract of retainer with the client. The contract of retainer determines what the lawyer is obliged to do for the client, and therefore what obligations the lawyer may have to the client under contract and in tort. It can also affect the tortious duties to third parties, since generally a duty to a third party will not exist if it is inconsistent with the duty to the client.

Should I Accept the instructions?

1.1 The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**the Rules**) provides that a lawyer must not refuse to accept an instruction without good cause.[1] Good cause is defined as including:

(a) lack of available time;

(b) the instruction falls outside the lawyer's normal field of practice;

(c) instructions that would require the lawyer to breach a professional obligation; and

(d) the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for the work.

What does the Client want me to do?

1.2 The lawyer's duty in tort will generally be co-extensive with his/her duty in contract under the contract of retainer. It is therefore of utmost importance that the lawyer defines precisely who is the client and what are the terms of the contract of retainer. While a contract of retainer may evolve, particular care should be taken at the outset of the relationship to define:

(a) The client's instruction to the lawyer, that is who is my client and what does the client want the lawyer to do; and

(b) The lawyer's acceptance (or non-acceptance) of those instructions.

[1] Rule 4

1.3 Lawyers are frequently criticised not for what advice they gave, but for a failure to give **more** advice, that is to warn the client on matters which fall outside what the lawyer regarded his/her task to be. The extent to which a lawyer is obliged to give advice beyond the express scope of the contract of retainer is a 'grey area'.

1.4 It is certainly true that in addition to the strict parameters of the instruction, you may also be expected to advise on matters which are closely connected with, or impliedly associated with the express instructions. However, if you are in doubt about what is the scope of the retainer you should confirm your understanding of what is involved, and that you are not doing anything more for the client than this.

1.5 In particular, clients often complain that a lawyer did not warn the client against the commercial or business risks associated with a venture or business. However, advising as to whether a particular property is a "good buy", or a business likely to be profitable, would generally fall outside the retainer. The Privy Council has said:

> *"When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."*[2]

Case Study – *Clark Boyce v Mouat*

Mrs Mouat agreed that she would mortgage her property for the benefit of her son. The law firm acted for the son. The firm obtained an acknowledgement from Mrs Mouat that she understood that the firm acted for her son and that the firm had recommended that she obtain independent advice, but she had declined to do so. When her son's business collapsed she sued the lawyers asserting negligence and a breach of fiduciary duty. The Privy Council held that law firm had effectively limited the contract of retainer to that of a facilitator of the conveyancing transaction and the firm had no obligation to proffer advice beyond that retainer.

1.6 However, this does not negate a lawyer's duty to advise the client on the effect (including the risks) associated with the particular transaction. This is a core function of a lawyer. For example, when advising on a financing transaction, a lawyer will be obliged to advise on the implications of default in payment of the loan. Without such advice, the lawyer will not discharge the duty to advise on the effect and implications of the transaction.

1.7 There may be some implications of a transaction which the lawyer wishes to ensure fall outside the contract of retainer. An example of this might be tax consequences arising out of the sale of a property. Absent an express communication that the lawyer is **not** advising on the tax implications of a sale, it is likely (and certainly arguable) that advice on this issue will fall within the usual scope of the retainer [3]. The lawyer should expressly communicate that advice on the tax implications of a sale is not within the scope of the contract of retainer. If advice on this issue should be sought, then an express contract of retainer to this effect must be entered into.

1.8 If there is no clarification of the extent of the retainer, then the lawyer runs a risk of there being a retainer which is broader than the lawyer may have intended. So, it is important that the lawyer think carefully about precisely what he/she is being instructed to do and identify, if in doubt, what this retainer does **not** involve.

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[2] *Clark Boyce v Mouat* [1993] 3 NZLR 641.

[3] The NZLA Property Law Guidelines dated June 2021 indicate that it is expected that lawyers will consider the tax implications of the transaction – including RLWT, GST and the Bright-line Test [2.8].

1.7 Consequently, for example, when a lawyer is instructed to handle a purchase of a business he/she should communicate that he/she is not an accountant or business consultant qualified to advise on the profitability or the value of a particular business.

1.8 Unlike other professionals or service providers lawyers are not completely free to contract out of their professional responsibilities by exclusion clauses, and the like. The Rules provide that any exclusion of liability must be "fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances".[4] So, identifying the scope of the retainer is probably the simplest, and most effective, primary risk management strategy.

1.9 Once you accept the duty to perform the contract of retainer, it is an implied term of that contract that you will exercise reasonable care in the performance of that contract of retainer. There is a co-extensive duty of care in tort. The care you must exercise is not a standard of perfection, but the standard to be expected of the reasonably competent lawyer in the particular circumstances of the case. The High Court has articulated the standard of care to be as follows:

> *"I also accept that lawyers are often faced with finely balanced problems and the fact that a decision turns out to be wrong does not necessarily mean that there has been a failure to exercise the required standard of care. The standard of care expected of a professional who works in an environment where judgment calls have to be made within time constraints and under difficult circumstances must not be set at a level that is unrealistic and must be assessed in context: Chamberlains v Lai [2006] NZSC 70 (SC) per Elias CJ at [77] and [78]. Moreover, the actions of the lawyer should not be judged with the benefit of hindsight."* [5]

What if I am not being paid?

1.10 A contract of retainer can exist, and professional duties remain, even where the client fails or refuses to pay for the lawyer's services.[6]

1.11 If the client fails to pay the lawyer then the lawyer needs to specifically terminate the contract of retainer, otherwise the lawyer will face ongoing potential responsibilities without the benefit of being paid for it.[7]

What about family members?

1.12 Acting for family members can be very difficult for lawyers as it is hard to maintain objectivity in the relationship. Furthermore, billing the family member may prove to be a source of conflict between the lawyer's duties to the family member, and his/her duties to the firm. If the file is not going to be billed, there is a natural tendency to make the file not a priority. This can give rise to problems.

1.13 The lawyer's professional duties exist when acting for family members. But in order to ensure objectivity is maintained, it is good practice for the file to be handled by a lawyer in the firm who is not related to the client. Sometimes insurers impose an exclusion in the firm's policy which says that there is no cover where this practice is not observed. In cases where there is this exclusion it is of course essential that the practice is

[4] Rule R3.5(c)

[5] *Heslop v Cousins* [2007] 3 NZLR 679

[6] Rule 1.2 – definition of retainer includes "agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not"

[7] See Law Risk Manual [3.11] – [3.13]

followed, but even where there is no such exclusion it is strongly recommended that the firm adopt this policy. It will help to avoid problems.

Do I need a contract in writing?

1.14 Whereas prior to the implementation of the Rules a contract of retainer could, and was generally entered into orally, the Rules now require that certain information be provided **in advance** of the work being done[8] and other information be provided before substantial work is done. Regardless of this, it is always good practice to confirm in writing those things which define the contract of retainer.

1.15 It is good practice to have a standardised client contract, which can be modified to include the client and file specific information. The most important thing to communicate at the very beginning of the relationship is:

(a) The terms of the contract of retainer (see above);

(b) What are the client's instructions with respect to the matter at issue – i.e. summarise the facts as communicated by the client and record any assumptions. The above will influence the correctness of the legal advice given.

1.16 The above should be communicated/confirmed in writing to the client or in a file note. If there is no file note, then the lawyer puts his/her credibility on the line. Courts frequently choose not to believe the recollection of a lawyer as to the client's instructions. This is not necessarily because the court regards the lawyer as being an unreliable witness. Rather the court will be aware that a lawyer will handle hundreds of transactions, whereas for the client the interaction with the lawyer may be more memorable. The fact that there is no file note, given that it is prudent practice, may indicate to the court that the lawyer has failed to take due care in the handling of this file and/or was under time pressure, and therefore more likely to make a mistake. A file note or a letter of advice/instruction makes a very good impression and will be highly persuasive. These comments apply equally to all interactions with the client during the handling of the file.

1.17 The Rules also contain detailed requirements as to what must be confirmed in writing at the beginning of the file[9] or before substantial work is done.[10] These requirements should be fulfilled by the completion of a client contract, which should be sent to the client at the beginning of the instruction. A sample client contract is appended to this manual (Part 21).

1.18 An important point to note is that you should identify at the outset and include in the client details the actual client for whom you are acting. This will be essential when it comes to suing for your fees and identifying whose instructions you were obliged to follow.

1.19 If possible, obtain the client's signature to the client contract before beginning work. If not, remember to follow up on the signed contract to ensure it is done. If it is not signed, you are entitled to say (and should say if the issue ever arises) that you accepted the instruction based on the client contract terms which you had provided to the client.

Can I limit my liability?

1.20 Section 4 of the Lawyers and Conveyancers Act 2006 states that a lawyer who provides regulated services has certain fundamental obligations, including a duty of care owed

[8] Rule 3.4

[9] Rule 3.4(a) to (d)

[10] Rule 3.5(a) to (c)

to clients. The Rules also provide that a lawyer must always act competently and in a timely manner consistent with the duty to take reasonable care.[11] Lawyers cannot contract out of this obligation, so that any breach of the duty to be careful renders the lawyer subject to disciplinary sanctions, including an order for compensation (currently no more than $25,000).

1.21 But there is a distinction between contracting out of a duty to take care (which is not permitted) and limiting the lawyer's liability in damages (which may be permissible).

1.22 Rule 3.5 of the Rules allows for the possibility of a lawyer including a term of limitation in a contract of retainer, but the term must be "fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances". Therefore, so long as the limitation of liability clause is fair and reasonable, it will not breach the professional disciplinary rules.

Incorporation into the contract

1.23 There are a number of common law formalities which must be satisfied before a limitation of liability clause is a term of the contract. These are:

(a) The term must be incorporated into the contract; and

(b) The term must be drawn to the client's attention; and

(c) The wording must be sufficiently clear.

1.24 If the term is contained in the lawyer's terms of engagement with the client and is clearly drafted, then these requirements will be satisfied. It is preferable that the client acknowledge receipt of the terms and agree to be bound by them before professional work is begun. This will make incorporation of the term easier to establish.

What is the effect of a limitation of liability?

1.25 Even if the limitation of liability clause operates to limit the lawyer's liability in damages for breach of contract, the lawyer will remain potentially liable for disciplinary sanction (as noted above) where the clause is not fair and reasonable, and (potentially) liable for breaching certain statutory duties. Further, there is uncertainty as to whether the clause will be effective to limit the lawyer's liability for breach of a tortious duty.

Statutory Liability

1.26 The Consumer Guarantees Act 1993 (**CGA**) applies to contracts for the supply of legal services which are "ordinarily acquired for personal, domestic or household use". Even where the services may be provided to a commercial client, if the services are commonly used by consumers for personal, domestic or household use, the client may be a "consumer". An example of this would be conveyance of a residential property.

1.27 Where the client is a "consumer", the CGA[12] prohibits contracting out, except where certain conditions are satisfied, namely.

(a) The agreement is in writing; and

(b) The services are supplied and acquired 'in trade'; and

(c) The client and the lawyer agree to contract out of the provisions of the CGU; and

[11] Rule 3

[12] Consumer Guarantees Act 1993, s 43

(d) It is fair and reasonable that the parties are bound by the provisions of the agreement. The criteria to be considered by a court to determine what is fair and reasonable include: the subject matter of the agreement; the value of the services; the respective bargaining power of the parties (including the ability of the client to negotiate the terms of the agreement, whether the client was required to either accept or reject the agreement on those terms, and whether the client was legally represented).

1.28 It is important to comply with the requirements in the CGA. The CGA makes it an offence to purport to contract out of the provisions of the CGA without satisfying the statutory requirements (s43(4)).

1.29 The FTA imposes a duty on a person in trade not to engage in deceptive and misleading conduct. Contracting out of the provisions of the Act is not permitted.[13]

Tortious Liability

1.30 In respect of a lawyer's tortious duty of care, the Court of Appeal, in the well-known decision of *Frost & Sutcliffe v Tuiara*[14] allowed for the possibility that a court may refuse to permit a lawyer's tortious obligation to be limited by a contractual provision on the grounds of public policy:

> *"An express contractual limitation of the scope of the contractual duty in an artificial and improper way might result in the Court finding that the duty so excluded was nevertheless still owed in tort. The basis for that approach would be a policy one, preventing the professional person from improperly limiting the scope of their professional responsibilities by express contractual term.... It is not necessary to decide that issue in the present case. Anything more definitive should be left for another day*."

1.31 In summary, it remains uncertain that such a clause will be effective, especially for liability other than in contract. Provided care is taken to comply with the statutory requirements set out above, there would appear to be little downside risk in inserting a term in contracts of engagement which limits the lawyer's liability in a reasonable and fair manner.

What is a reasonable and fair limitation of liability clause?

1.32 The Law Society itself publishes a template for clauses that define the scope of the lawyer's duty and (as an option) limits the lawyer's liability to the amount payable under the professional indemnity insurance held by the firm. It is reasonable to infer from this that the Law Society considers a clause such as this to be reasonable.[15] Presumably the rationale is that the lawyer has arranged insurance to cover the liability to the client for negligence, and in the event of a claim, it is to this fund that the client and lawyer should look, not to the lawyer's personal assets.

1.33 There would be few insurers that would relish the prospect of such a clause being incorporated into the terms of contract. In the event of a claim by the client, it would enable the client to be told the sum insured under the policy. Insurers try to keep this information confidential, as it can be prejudicial to the insurer's interests.

1.34 Further, to tie the limit of liability to the sum insured under the policy fails to recognise that the lawyer has an interest in reducing liability to the client, even where it is covered

[13] Section 5D permits contracting out but in such limited circumstances that the section is unlikely to be of much use.

[14] [2004] 1 NZLR 782 at 786 and 790

[15] There is UK authority holding that a term recording that liability is limited to the sum available under the professional indemnity policy is a fair and reasonable clause under the Unfair Contracts Act.

by insurance. Therefore, it remains fair and reasonable to agree on a maximum cap on liability below the level of the sum insured of the policy.

1.35 One of the options available is limiting liability to a sum which is substantial but is not tied to the amount of the professional indemnity policy. Relevant criteria would include the value of the transactions which the lawyer routinely handles and the character of the lawyer's practice. Where the law firm carries on conveyancing, the average house price in the area in which the firm practices will be relevant. The key point is that the law firm ought to carefully consider what is fair and document, so that it can justify later, if need be, what factors it took into account.

1.36 Many professions assess the limit of liability with reference to multiplication of the fees charged. For example, The Institute of Professional Engineers of NZ (IPENZ) has included in its standard short form agreement a clause that limits liability to five times the fee, to a maximum of $500,000. Notwithstanding their common usage, clauses which limit liability to a multiplication of fees charged have a higher risk of being seen as arbitrary and therefore, if called into question, harder to justify.

1.37 A template for you to consider incorporating in terms and engagement is attached as an appendix to this manual. It is important that the facts of each engagement be considered individually, with the following criteria in mind:

(a) Are the legal services of a kind which are ordinarily acquired for personal, domestic, or household use or consumption?[16] This test has been expansively defined to include services where it is not uncommon for these services to be consumed by clients for personal or domestic purposes.[17] If yes, then your liability under the CGA to be careful and the client's remedies for breach cannot be contracted out of. It is a criminal offence to attempt to do so.[18]

(b) Even if the services are of a kind which are ordinarily acquired for personal, domestic or household use, if the particular client is "in trade", then you can limit your liability where the formalities provided in s43(2) are complied with. The template should record that the client accepts these formalities are satisfied.[19]

Capacity to Give Instructions

1.38 Acting for a person who has a disability, or who becomes disabled during the retainer, can be an extraordinarily difficult task. A lawyer has a duty to act to protect the client's interests, as he/she would with any client. But, the practical impact of acting for a client who is unable to give clear instructions is very great.

[16] In *Kaori v Shrinkforce Shrink Wrap Services Limited (in receivership)* [2012] NZHC 3204 the Court held that the application of shrink wrap plastic on a super-yacht as part of a painting process was not the supply of goods or services that are "ordinarily" used for personal, domestic or household use or consumption. What was key was that the services are normally supplied for construction purposes. .

[17] In *Nesbit v Porter* CA (165/99, 30 March 2000) the Court of Appeal considered whether a sale of a Nissan Navara 4 wheel drive utility vehicle was a sale to which the CGA applied. About 20% of all sales of this vehicle are to private purchasers for domestic use. The Court said that because it was not uncommon for a domestic purchaser to buy the vehicle, the CGA applied.

[18] Section 43(4) of the Consumer Guarantees Act 1993 and s 13(i) of the Fair Trading Act 1986

[19] The most problematic criteria of those listed in s43(2A) is whether the client 'received advice from, or were represented by, a lawyer'. To ensure that the client received legal advice from a lawyer prior to his or her engagement with you as a lawyer, may be practically difficult to achieve and is circular. For that reason, the template contemplates that the client acknowledges it is free to but has chosen not to take advice from an independent lawyer.

1.39 As far as possible the lawyer should aim to maintain a normal lawyer/client relationship.[20] However there will be very important issues to bear in mind:

(a) Is the client legally capable of giving instructions turning on the particular transaction intended?

- Legal capacity to contract is different to legal capacity to make a will. To make a will the legal test has been formulated as follows:

> *"…the party must know what he is about, have sense and knowledge of what his property was, and who those persons were that then were the objects of his bounty."*[21]

> *"[the testator] ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the element of which it is composed, and the disposition of his property in its simple form."*[22]

- The ability to contract requires a lesser degree of competency. What is required is that the contracting party knows what he or she is doing. So, for example, it is not necessary that the contracting party know the extent of his/her property.[23]

(b) You should carefully consider whether there are grounds to, and whether for the benefit of the client itself, apply to appoint a manager under the Protection of Personal and Property Rights Act 1988 ("PPPR"). If you do not, then the client may enter into foolish transactions which may be open to challenge by the client or the client's estate or family. The lawyer may be blamed.

(c) A lawyer has a duty to make proper inquiries to satisfy him/herself of the legal capacity of the client. Your file should properly record your interactions with the client, your opinion as to the client's capacity, any inquiries you make of those caring for the client, and the basis upon which a conclusion was reached. Crucially, a lawyer should make inquiries of those properly qualified to offer an opinion.

(d) In *Sandman v McKay* the importance of and reliance on contemporaneous documentation came to the fore. The documentation (including correspondence and a medical certificate) did not cast doubt on the mother's capacity, nor were the lawyers wilfully blind to that possibility. Once prudent steps had been taken, it was not up to the lawyer – who is after all not a medical expert – to decide whether a client has testamentary capacity and whether to follow his or her instructions. The solicitor has a duty, even if he or she has doubt as to the client's mental capacity – to prepare and arrange for the execution of the will. Whether the client had mental capacity at the time of

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[20] This is an ethical rule in Canada (2.02(6)) but not specifically carried over into the New Zealand ethical rules. That said, it is not one of the grounds for refusing instruction contained in rule 4.1. The rules permit the lawyer to not provide a client contract where "there is no reasonable likelihood that the client will understand the information because the client… is a person with a mental health issue or disability" (3.7(c)(ii))

[21] *Re White* [1951] NZLR 393

[22] *Banks v Goodfellow* (1870) LR 5 QB 549

[23] *Ryan v Public Trustee* [2000] 1 NZLR 700

execution of the will should be decided after the client's death, on the basis of the evidence including expert medical evidence.[24]

Case Study – *Ryan v Public Trustee*

The testatrix had a hallucinatory disorder and the Public Trust was appointed manager under s31 of the PPPR. The court order did not prevent testamentary dispositions. The testatrix made an appointment with the Public Trust to make a will, and the testatrix instructed that the plaintiff be given a bequest under the will. The plaintiff had provided help to the testatrix over the years by cleaning, cooking and running errands.[25]

The officer at the Public Trust spoke to the matron of the institution where the testatrix lived and the matron opined that the testatrix was not capable of making a will due to her mental state. No inquiries with the testatrix's doctor were made.

The court found that the Public Trust owed a duty to the testatrix and to the plaintiff to properly investigate the testatrix's legal capacity. Specifically the Public Trust should have obtained an opinion from the doctor who was treating the testatrix. As a result of this failure, the testatrix and the third party lost an opportunity to have a will made in her favour.[26] The court emphasised the importance of making those inquires and, crucially, making a record of those inquiries:

"It seems to me that after due inquiry and if capacity is in doubt, then the will should be accompanied by a full record of opinions so that if need be, a court can adjudicate. Otherwise the client is deprived of the opportunity of making a valid will."[27]

Case Study – *Sandman v McKay*[28]

The testator's son received a greater share of his mother's estate under a will signed in 2005, than under the will signed in 2010. The son sued the law firm who prepared and executed the 2010 will. Rather than suing in negligence, which was untenable, the son alleged the firm was liable as an accessory to a breach of fiduciary duty.

The claim was struck out. The Supreme Court decision recognised that it is not for a lawyer to determine a client's capacity. The Supreme Court set out the steps that a prudent solicitor would take if in doubt as to whether a client lacked capacity. It observed:

"When acting for a client, solicitors have a duty to follow their client's instructions. Solicitors also, however, need to provide the relevant advice and information to ensure the client is in an appropriate position to give informed instructions. Where the instructions are to prepare a will in circumstances where there might later be issues raised about capacity, the lawyer should carefully document the advice given and the steps taken. In this regard, it would be prudent for a solicitor to suggest that a medical certificate be obtained. It would also be prudent to document the reasons for the provisions of the will and the process involved in

[24] *Sandman v McKay* [2019] NZSC 41 at [81]

[25] The plaintiff asserted in the subsequent case a testamentary promise in her favour, which the court upheld.

[26] The case clarified that s 54, which says that a person subject to a PPPR order may still be able to make testamentary dispositions, applies to both will and testamentary promises. The court order may specifically prohibit such dispositions, in which case the testator may not make a will or other disposition without the court's approval.

[27] Pg 718, line 35

[28] [2019] NZSC 41.

taking instructions and in ensuring that the instructions had been correctly understood."[29]

Claim Example

The firm was asked to prepare a deed of arrangement aimed to secure for an elderly lady a lease for life. The deed was signed but was held to be ineffective to achieve her security of tenure. A claim was made against the law firm 10 years after the deed was signed. The client was ill, blind, deaf and below average intelligence. In taking instructions, the firm failed to identify this and the impact that it had on her capacity to understand the transaction. It also meant that time to bring an action had been suspended.

Fiduciary Duties

1.40 In addition to the contractual and tortious duty to take reasonable care which arises from the contract of retainer, the lawyer also owes fiduciary duties to the client. These duties arise from the relationship of trust that exists between a lawyer and the client. The duties will include the duty not to make a secret profit; to act honestly in the dealings with the client; and not to act in a conflict of interest. The issue of conflict of interest is dealt with in more detail from paragraph 4.10 onwards.

2. DUTIES OWED TO THIRD PARTIES

It is clear that lawyers can owe duties to third parties which stand independent of the duty owed to the client. These duties will need to arise from a cause of action which the law recognises such as negligent misstatement or negligent acts causing loss to third parties.[30] Certificates provided to the other side in a transaction can also result in liability when the facts certified prove to be wrong.[31] Under the Fair Trading Act a lawyer may be liable to third parties for any conduct (acts or omissions) which mislead or deceive.

3. FILE OPENING

Initial Client Interview

3.1 At the initial client interview, ensure that all relevant contact information for the client is obtained, including the following:

(a) Full name, addresses (both home and work) and all contact telephone numbers.

(b) Name(s) of previous advisors.

(c) Name(s) of other professionals involved in the proposed matter.

[29] At [80].

[30] An example of this worth remembering is the liability which lawyers may have to beneficiaries under a will when the lawyer fails to ensure the disposition is valid. In *Gartside v Sheffield Young & Ellis* [1983] NZLR37 the Court of Appeal held that a lawyer who failed to prepare a will in a timely fashion may owe a duty of care to the intended beneficiary.

[31] These are considered in Parts 12, 13 and 14 of this Manual.

(d) Name of referee.

(e) Details as to how and why client referred to the lawyer.

(f) Evidence of identification of the client (refer Anti-Money Laundering and Countering Financing of Terrorism Act section and E-dealing).

(g) You may need to satisfy yourself that the client is not suffering from a disability of some kind and is otherwise able to give you proper instructions. This is particularly important when handling the affairs of the elderly. If you have concerns about this, then you should obtain the assistance of the client's medical advisers or other professionals.[32]

(h) Identify any next of kin, particularly for the elderly or disabled client, who should be noted on the file as contact points should there be any problem with communicating with the client.

(i) The modes of lawyer/client communication (telephone, fax, email, letter). Check that sensitive communications can be sent to the address given.

3.2 Each time a new file is opened for the same client, check that all relevant contact information for the client is current so as to avoid correspondence being forwarded to the incorrect address.

3.3 Other matters that should be discussed at the initial interview and then confirmed in writing in the client contract include:

(a) The client's interpretation of the issues and the desired solution.

(b) Identify any timing constraints.

(c) Explain the client's obligations and the consequences of any actions that the client may or may not take.

(d) Inform client of fee basis (e.g., any interim charges, disbursements, statutory charges, GST, non-payment procedures).

(e) Who will carry out the work and who will supervise it.

(f) Inform the client as to what they should do if they are not satisfied with any aspect of the lawyer's services and set out the firm's complaint process.

(g) Procedure for withdrawal of instructions.

Screening Clients

3.4 Screen new clients. Have a written "New File" file opening form containing a checklist dealing with the risk factors identified and critically review each new client and each new engagement against this rule of thumb – what is the risk posed by this client, and does the risk to the firm outweigh the benefits to be obtained from the client? To assist in evaluating the risk and the benefits the following steps should be taken:

(a) Learn as much as possible about the new client, its business, management and dealings.

[32] See part 1 supra

(b) Obtain a credit check on each new client. If the client is a company, obtain a full company search. Question frequent, recent or unusual changes in shareholding or directorship. Is there anything unusual?

(c) Probe as to why the client is changing lawyers?

(d) Obtain the previous lawyers files.

(e) If you have doubts, discuss your concerns with your partners or trusted senior staff.

3.5 Try to detect "problem" clients. Be wary of clients who:

(a) Have a history of improper, illegal or dubious dealings.

(b) Have financial problems.

(c) Have poor internal procedures, management and controls.

(d) Experience frequent turnover in management.

(e) Are in the "start-up" phase of development.

(f) Change or complain about their previous advisors — lawyer, accountant etc.

(g) Are repeatedly involved in significant litigation.

(h) Require expertise not possessed by the firm.

(i) Are reluctant to pay fees or a retainer in advance.

3.6 Finally, and importantly, trust your instincts. If alarm bells are ringing then there is probably a very good reason for it. Respect what your intuition tells you.

Checks on All Clients

3.7 The following steps should be followed for all clients - new and existing.

(a) Do a conflict check throughout the firm as part of the file opening procedure.

(b) Prepare a client contract recording the terms of the retainer (and other detail set out in this manual) and obtain the client's signature if possible.

(c) Obtain fee retainers from clients, new and existing, as a matter of course.

(d) Satisfy yourself that this client will be in a position to pay the fees. Not only is there no point working for a client who won't pay you, but statistics show that non-paying clients become claimants.

(e) Satisfy yourself that the firm will be able to handle the file promptly and competently. One of the major causes of claims is the firm being under work pressure so that standards drop and mistakes are made. Another cause is the firm handling a transaction which is outside its area of competency. Identify the area of law which this file throws up and make sure that this is within your areas of expertise. If it is not, then avoid the temptation to learn as you go.

Overseas Investment Office

3.8 Under the Overseas Investment Act 2005, certain overseas people are restricted from buying residential land in New Zealand. The Act does not apply to New Zealand

citizens and permanent residents, Australian and Singapore citizens and permanent residents or other people who can demonstrate to the Overseas Investment Office that the person:

(a) Has a commitment to reside in, and become a tax resident in, New Zealand; or (the commitment test)

(b) They will increase the housing supply through their investment; or (increased housing test)

(c) Will satisfy the non-residential use test; or

(d) The development will be beneficial to New Zealand (the benefit test).

3.9 Under s 51A of the Act, where a solicitor is providing conveyancing services to a person acquiring residential land the solicitor must provide a certificate that, to the best of the solicitor's knowledge, the completion of the transaction will not contravene the Act. For further information refer to the overseas investment office's website at https://www.linz.govt.nz/overseas-investment

Variations to the Contract of Retainer

3.10 If instructions are amended record this in writing immediately. Record how particular changes affect the scope and nature of the engagement. Has the amended instruction come from your client i.e. the person having the requisite authority to give instructions?

Termination of the Contract of Retainer

3.11 Colloquially known as the "cab rank rule", a fundamental duty of a lawyer is to accept instructions from members of the public within the lawyer's area of practice. Under rule 4.1 of the Rules, lawyers may not decline instructions without good cause. While a client can terminate a lawyer's retainer at will, a lawyer who has accepted instructions cannot terminate the retainer without good cause. This is set out in rule 4.2 which provides guidance on a lawyer's obligations when terminating a retainer and as to what constitutes "good cause". This includes:

(a) Instructions that require the lawyer to breach any professional obligation;

(b) Inability or failure of the client to pay fees;

(c) The client misleading or deceiving the lawyer in a material aspect;

(d) The client failing to provide instructions in a sufficiently timely way;

(e) Except in litigation matters, the client adopting a course of action against the lawyer's advice that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations;

(f) Certain client behaviour such as bullying, discrimination or sexual or racial harassment, threatening behaviour or violence.

3.12 Terminating a retainer without genuine grounds for good cause may amount to unsatisfactory conduct or misconduct. Reasonable notice specifying the grounds for termination must also be given to the client if a lawyer terminates a retainer for good cause.

3.13 If your firm is "disengaged" record a "disengagement" letter. The process for disengagement needs to be carefully managed as it can be a source of complaints and claims. A disengagement should be effected or confirmed (if effected verbally) by a letter citing carefully the reasons why you are disengaging.

3.14 If you wish to terminate the retainer because there has been a mistake made, or a possibility of a claim made against the firm, then before the disengagement, and as soon as you realise that there is a problem, you ought to urgently notify your broker so that the insurer can be consulted. What to do and what to say should be approved by your insurer before it is done.

3.15 In situations other than above, the letter of termination should:

(a) Set out the reasons for the disengagement, being careful not to engender a dispute or a challenge from the client to what you are relying on. The tone of the letter may be important.

(b) Outline the work done to date.

(c) Explain your position with respect to payment of outstanding fees. Your attitude to this needs to be carefully thought through, so that you are making the decision which is in the long-term interests of the firm.

(d) Consultation with your partners and/or trusted senior staff may provide you with greater objectivity, as your dealings with the client may have become strained.

(e) Bear in mind that the attitude you display on fees, at the point of time at which your relationship has broken down, has a significant impact on the risk of on-going problems with this client.

(f) Clear advice that the client should seek alternative professional advice should be given.

(g) A decision may need to be made as to whether you will permit the client to uplift the file. **If you do, make sure you copy the file and retain a complete copy**. Check the file and remove any documents which are not the client's to have. This includes internal memorandum or internal file notes. Check to make sure that only documents relating to that particular matter are contained on it. If there has been a notification to an insurer remove any documents relating to or referring to the notification.

(h) Give clear advice regarding any deadline or time limitation issues.

(i) Make sure that you retain a copy of the file for as long as practicable. You remain vulnerable to being sued for up to 15 years, as set out in more detail in the Limitation section of this manual.

4. CONDUCT/FILE MANAGEMENT

4.1 Mistakes are a fact of life; what is more important is how one deals with a mistake once it arises.

4.2 Encourage a culture of openness and honesty among work colleagues. Lead by example – be open with your staff and partners when problems arise, and let the staff see how you (and your fellow partners) work constructively to resolve the problem. This way your staff will not try to cover up their own mistakes and will see that a very important part of legal practice is proactively managing problems, not hiding from them. An important strategy for encouraging openness, and to ensure that the firm meets its obligation to its insurer, is to require staff solicitors and partner to complete an Error and Omissions Quarterly Certificate (see Appendix 28]. This will capture problems that arise, so that you can handle it soon rather than later.

4.3 Consult with your staff and explore strategies for minimising problems, so that everyone is brought into the process of working out what will work for your firm. Bring non-professional staff into those discussions, as often mistakes are made by non-professional staff. Systems will not last where all partners and staff do not "buy in".

4.4 This consultation should be a routine part of the firm's operation. In the same way as businesses have incorporated health and safety reviews as an integral part of the way they conduct business, aim to have risk identification and minimisation as an integral part of your firm. Work out for yourself, practically speaking, how this review should take place.

4.5 Make sure that the file will, at any one time, properly reflect what has happened on the file, what instructions were given by the client, what advice was provided by the firm, what action was taken (or not taken). The litmus test should be – if the lawyer handling the file is absent from the office, will someone picking it up be able to see accurately what has happened, and what needs to be done.

4.6 File notes are a crucial part of ensuring that the file is complete and accurate. If you need to write a file note after an event, then make it clear when you dictated the file note. Do not pretend that a file note is contemporaneous if it is not.

4.7 Below is a list of some commonly occurring problems within legal practice.

Delays

(a) Delays cause complaints and claims.

(b) Get firm instructions recorded in writing from the client regarding any time limits from the client. When is the work needed by and why?

(c) Don't make promises that cannot be kept. Be realistic when advising how long the work will take.

(d) Is the work in the "too hard" basket? If so get a colleague involved and if the firm does not have the requisite expertise refer the file to someone who does.

(e) If your accounting package will allow you to do so, regularly print out reports which highlight any files where work has not been done on them recently. This will highlight mental block files or files which have slipped between the cracks.

Deadlines/Time Limitations

(a) Failure to observe limitation periods or missing deadlines is one of the most significant sources of claims against practitioners for negligence.

(b) Recognise the deadline **immediately** you are instructed.

(c) Do not leave things to the last minute – do them as soon as you can.

(d) Create a system which works for your firm to note the date and ensure that action is taken to meet the deadline. For example, you could engage a system of:

- Noting in a prominent place on the file (eg the inside front cover) any relevant deadlines
- Diary the date in your own diary, and diary an "advance warning" of impending dates

- Having a firm master diary monitored by another partner or lawyer which notes everyone's deadlines. Particular attention should be paid to this diary when staff or partners are absent from the office.

(e) Establish a system of monitoring the incoming mail and any applicable deadlines for staff or partners who are away from the office. This is an essential risk management strategy, since without it crucial deadlines can be overlooked. This is particularly so when short absences stretch out into long absences, perhaps without anyone assuming responsibility for managing the absent lawyer's files.

(f) Keep up to date with changes to statutory time limit periods. If you are unsure check the legislation or obtain expert advice. A schedule of some limitation periods is attached in Part 22. Be aware this list is not exhaustive and is intended as a guide only.

Claim Example

The firm was acting for the tenant of a commercial property who had a right to buy the property if it exercised the option by paying money to the landlord by a particular time. The tenant paid a personal cheque to the landlord which needed time to clear. The landlord is now arguing that this was not valid payment on the day. The client has put the firm on notice that if the landlord succeeds in this argument, then it will look to the firm to pay the damages it has suffered.

Claim Example

The firm was acting for the vendor in a sale and purchase agreement. The vendor received a back-up offer on the last day which was significantly higher in value than the existing one. The firm was instructed to cancel the offer under the cash-out clause in the agreement. The lawyer handling the file asked his secretary to send a fax to the solicitor acting for the purchaser cancelling the contract. The secretary put the fax into the fax machine on Friday afternoon at 4.55 but it failed to go through. The existing contract was confirmed by the purchasers and the clients have sued the firm for the difference between the sale price under this contract and the offer.

Claim Example

The firm had acted for many years for a client who lived in a de facto relationship with another. When the client's partner died, the firm received an instruction to file proceedings under the Property (Relationships) Act, but failed to do so within the requisite time period. The trustees of the deceased had in the meantime distributed the estate. The firm was sued by the client for one half of the estate property.

File Notes

(g) Keeping file notes that accurately record information received and given, and the critical steps taken in the process of carrying out legal services, are vital.

(h) The creation of a historical record of events will provide a key component to the defence of any litigation brought against the law firm in relation to the file. A failure to have a file note will severely compromise your ability to establish what happened. If the case were to ever go to trial you face a court choosing not to believe your version of events. Not only will this compromise your defence but also lead to damage to your reputation.

(i) Remember to ensure:

- That all information received in relation to a client's file is noted, including the date, time and method of receipt.

- Record in writing any information received and place responsibility for the accuracy of the information with the person giving it, not with the firm.

- Any oral advice given is confirmed in writing even if that must wait until shortly after the event, although it is preferable for the written advice to be given prior to any decision necessary by the client.

- There is a consistent policy throughout the firm with respect to the principles adopted and the practice of keeping file notes. As with any policy this should be monitored for compliance. This will avoid any suggestion at a later time that a different practice on a particular file should lead to some adverse conclusion against the firm.

- Record attempts to contact the client even if unsuccessful, and the return of telephone calls.

- File notes are legible, full and accurate.

- The file note is not amended at a later time. If some matter not recorded in a particular note is later recalled, make a new file note of that fact recording the reasons for incompleteness.

Outgoing/incoming mail

(j) The generation, receipt and management of correspondence is a key professional responsibility. The failure to handle correspondence properly, in turn, is a significant risk to any firm. Here are some suggested risk management techniques:

- Incoming and outgoing mail should be monitored. This is an opportunity to reveal queries or potential problems at an early stage.

- Ensure you have systems in place which provide for:

    - Mail (whether received by post, fax or delivery) in each office to be opened, dated and read by responsible, experienced employees, and preferably a partner on a rotating basis.

    - Queries or possible problems copied to fee earners and their supervisor for attention and review.

    - Correspondence sent to clients must contain partner references, so that the partner remains in the loop on the file. This is an important way for the partner to become aware of problems as the client is more likely to contact the partner with a problem. The courts and the disciplinary bodies expect partners to exercise supervisory control over professional and non-professional staff.

    - Acknowledge receipt of mail if there will be delay in sending a full response.

    - Determine what outgoing mail requires prior approval by a partner and implement a procedure for ensuring this is achieved.

- Faxes to be uplifted and delivered around the office regularly.

- Ensure there is a system for the receipt of mail and faxes for those working remotely and for if/when the office cannot be accessed and everyone is working remotely.

- Where an opinion or a piece of significant legal advice is to be provided the firm should have a procedure whereby the opinion can be checked by another appropriate person.

- Ensure the fax number is correct before sending — this is a frequent cause of problems so take particular care. Retain on file fax transmission slips.

- Mail must be on firm letterhead. Private mail must not be on firm letterhead.

Electronic Mail

(k) Emails, because of their nature, are dealt with quickly and sometimes without the thought or consideration which a formal letter would attract. This is a temptation which should be resisted. Emails can be circulated widely, literally with the push of a button.

(l) A frequent source of claims or notifications is an author sending confidential (and privileged) emails to the wrong person. Consider implementing changes to your IT systems so that outgoing emails are kept in the author's outbox for a period of time (from 1 to 5 minutes) to give the author time to delete an email which is addressed to the wrong person.

(m) Use the same care in the compilation of an email which you would use with a letter. Imagine that the email will be seen by others, not just the recipient, as this will ensure that you maintain a professional tone.

(n) Print out all messages sent and received as they are sent and received and place on file. Alternatively, store emails by an electronic storage system, but make sure that the emails will be able to be retrieved should a claim arise. Not only will this be important for re-constructing the events around a file, but it is part of your obligation to discover all relevant documents in any litigation.

(o) Ensure that you have a system for others in the firm to check the email accounts of those who are away and have a policy in place for out of office auto-responses as senders of emails often expect quick responses.

(p) Have a system for regularly checking 'junk' inboxes for legitimate emails.

(q) Consider your firm's position on whether to accept service of documents by email. If so, note this in the signature of emails.

(r) Ensure the computer system has a back-up mechanism to store e-mails for a reasonable period of time.

(s) Have internet and email policies in place. Suggested examples are attached in Part 23 and 24.

Supervision and Delegation

(t) For a law firm to operate cost effectively, some work on most files will need to be delegated from the partner involved to less experienced practitioners. Necessarily when this occurs, some control is lost and it is easy for the partner

to simply forget about the file on the basis that “someone else is dealing with it”. This has obvious dangers.

(u) Some basic rules are:

- Ensure that the person to whom the task or file is delegated has the experience, competence and time to undertake the work required.

- Give clear instructions. Memoranda are useful in providing the less experienced practitioner with a reference point where uncertainties arise.

- Provide a clear time frame for completion of the work and leave some time to review the work completed and make any adjustments necessary. Try to ensure the time frame is realistic given the work to be completed, the practitioner’s workload and experience.

- Have an understood reporting/consultation/communication system in place. Make the scope of authority and the type of actions that can be taken without consultation clear to the less experienced practitioner.

- Delegation does not mean abdication of responsibility. Individuals have different supervision techniques. Whatever type of supervision is employed it must be adequate to ensure that a supervising partner is broadly aware of the work being undertaken on a file and the level of fees being incurred in relation to delegated tasks.

- Be proactive not reactive. Senior lawyers/partners who delegate work should make a practice of requiring periodic reports regarding progress. Randomly check that files are progressing. Make time for inexperienced practitioners to consult supervising partners regarding files. Encourage inexperienced practitioners to recognise when they require assistance. Make sure that assistance is available when it is requested.

- Have a policy in place for the sending of emails to external parties and what needs to be reviewed by partners before emails are sent. For example, routine emails, checking whether something has been received may be sent without partners’ review, as opposed to an email containing substantive advice or strategy.

- Closely review an inexperienced practitioner’s work before providing it to a client. Have a clear and understood practice in place for the review of advice for clients, particularly the provision of significant advice. Consider implementing a policy regarding who may sign correspondence and advice. Ensure inexperienced practitioners are aware of the procedure and comply with it. It can be useful, where the advice is significant, novel or difficult or where there are any concerns about the advice to be given, for a partner not only to review the advice but discuss it with a colleague of similar or greater experience.

- Provide feedback. The more quickly an inexperienced practitioner learns the more responsibility he/she can undertake and the less risk he/she presents to the firm.

- Do not leave doing things to the last minute. Do things when you can, not when you have to.

- Have a system in place to check the mail and emails of lawyers who are absent.

Claim Example

The firm acted for a vendor of property who had signed a sale agreement with a purchaser under which the vendor had a right of cancellation by a particular time. The vendor obtained a second offer at a higher price from another person, and instructed the firm to cancel the first agreement. The firm failed to validly cancel the contract. The client, believing that the first contract had been cancelled signed the second agreement. The client now had two binding agreements and must renege on one. The client is suing the firm for damages.

- Remember to see to the 'tidy up' matters on a file, especially those where you have to do things a long time after the file has been closed. They may be relatively unimportant, or at least don't seem to be important at the time but may become important later.[33]

Claim Example

On the settlement of a residential purchase the staff solicitor handling the purchase overlooked transferring the Masterbuild Guarantee into the clients' names. This transfer must take place within a strict time limit, otherwise the guarantee is not honoured. The property is now in need of repairs in excess of $200,000, of which $100,000 would have been covered by the guarantee, but for the failure to transfer the guarantee.

Claim Example

A law firm acted for a husband and wife in connection with their wills and estate. They began a process of gifting of their property over time to avoid liability for residential care costs should either of them go into care. Three gifts were made, but the firm forgot to see to any more. When the husband had a stroke and required care, the family were liable for the future costs of his care. They made a claim against the law firm.

Engagement of Third Parties (including barristers)

4.8 A law firm often obtains the services of outside consultants, contractors or agents. These can include search and filing agents who, for example, conduct company searches and file documents; other firms of professionals who are engaged to provide specialist advice or undertake portions of engagements (eg surveyors); individuals who are on fixed term contracts to carry out particular services or projects for the firm or barristers engaged to handle litigation for the firm's client.

4.9 The following are common areas of risk for a law firm when engaging such third parties:

(a) Responsibility for the fees of those persons.

(b) Responsibility for the performance by those persons of their tasks.

(c) Potential breaches of the duty of confidentiality owed by the firm to its clients.

Fees

[33] An example of something that may need to be done long after the file has been closed is renewals of securities registrations, such as PPSA registrations. The firm should have a system of diarying these events.

(e) If a law firm engages a barrister or contractor the firm should squarely address the question of who will be responsible for that person's fee. In many situations expectations will be obvious. For example, it would be highly unusual for search agents to be paid directly by the firm's client and most law firms accept the obligation to pay for such fees as a routine disbursement associated with the performance of the file.

(f) There are situations in which expectations might differ and in which it is very important to address the question of whether the law firm is responsible for the fee or whether it is the firm's client who will be responsible.

(g) It is especially important to address this question where the firm looks to outside professionals or specialists for particular advice or input into a particular aspect of an engagement.

(h) The question is important because if the law firm is responsible for the fee the law firm must pay it regardless of any difficulties the law firm encounters in recovering reimbursement from its client. There may also be ethical consequences for the firm or the practitioner if a debt is not honoured in a timely way.

(i) It will usually be implied, in the absence of express agreement to the contrary, that if a law firm issues instructions to another person, the law firm will be responsible for the fee. To remove doubt the law firm should specifically state that the client engages the person concerned, not the law firm. To be legally effective, the law firm needs to identify the client to the person contracted.

(j) Remember that a lawyer who instructs a barrister, in the absence of an express agreement to the contrary, is personally responsible for the prompt and final payment of the fee of the instructed practitioner under the lawyer's ethical rules. It is not an excuse to delay payment because the client has not paid you.

(k) Remember that if you need to instruct another practitioner to appear on your behalf on a matter, the client's prior consent should be obtained (unless the matter is urgent and it is not possible to obtain instructions).

(l) If the person engaged by the law firm fails to perform their tasks to a proper standard the question arises as to whether the law firm is responsible for that failure or whether the client's remedy lies solely against the consultant, contractor or agent.

Responsibility

(m) Usually, if the law firm engages some other person to carry out any part of a service or engagement which the law firm has undertaken to provide to its client then the law firm will be responsible for the proper performance of the work. That means that the law firm will be liable for any negligence of the third parties engaged or any act which results in the law firm being in breach of its contract with its client.

(n) Although the law firm will usually have a right to be indemnified by the third person it has engaged, the law firm will be exposed to costs associated with any claim and the indemnity might turn out to be worthless if the third party is not solvent.

(o) Sometimes it is possible and appropriate for the law firm to not only outsource tasks but also the direct responsibility for the work. If a law firm undertakes an engagement which involves some aspect that the law firm must or wishes to outsource, the law firm should disclose this to the client, and seek the client's approval for the particular person to undertake that part of the engagement. It

is highly desirable that this be addressed at the outset of the engagement, so that the arrangement and responsibilities are clear.

(p) The legal effect of the law firm engaging a barrister, in the event that the barrister is negligent, is quite different. The engagement of a barrister does not entirely abrogate the lawyer's responsibility, just changes it.

- The lawyer must exercise care in selecting an appropriate barrister (for example one which is sufficiently skilled to handle the matter).

- The lawyer is entitled to rely on the advice of experienced counsel. If a lawyer acts in accordance with the advice of counsel, the lawyer will not usually be held liable in negligence, even if counsel's advice proves to be mistaken or misconceived.[34]

- However, a lawyer must not follow counsel's advice blindly. If the advice is obviously or glaringly wrong then there is a duty on the lawyer to reject the advice or obtain a second opinion.[35] So, in other words the lawyer should test the advice to satisfy himself/herself that it is seems to be correct. If there is some aspect of the advice that does not pass this test, then the lawyer should go back to the barrister for clarification or obtain a second opinion.

- Reverse briefs by barristers pose a risk for lawyers where the barrister does not keep the lawyer fully informed or provide advice in a way which allows the lawyer to discharge its duty to the client.

Claim Example

A law firm was given a reverse brief by a barrister. The litigation was very complex and involved the client beginning proceedings against an accountancy firm for breach of contract and negligence. Breach of fiduciary duty was not pleaded. The matter went to trial, and the client did not succeed in the claim against the accountants on either cause of action pleaded. But, the evidence of a breach of fiduciary duty was strong and the client tried to file fresh proceedings against the accountants on this basis, but was unable to since this cause of action could have been brought against the accountants in the other proceeding. The client sued the law firm alleging that it was negligent in failing to recommend a breach of fiduciary duty, but did not sue the barrister.

- When a barrister reverse briefs a lawyer, it is recommended that the lawyer emphasise to the barrister the need for the barrister to keep the lawyer informed and to communicate important advice to the lawyer as well as the client.

(q) When engaging third parties a law firm must ensure that the duty of confidentiality it owes to its client is not undermined. Thus, when engaging others the law firm must ensure that they are under the same duties of confidentiality as is the law firm. It may therefore be appropriate to record that in writing with the other person. The law firm should also be careful to disclose no more information than is necessary for the third party to carry out their services properly. Certainly if there is any doubt about disclosing information in particular circumstances the client should be consulted.

[34] *Kemp v Burt* (1833) 4 B. & Ad. 424 and *Potts v Sparrow* (1836) 6 C. & P. 749.

[35] *Locke v Camberwell Health Authority* [1991] Med.L.R. 249 and *Harley v McDonald* [1999] 3 NZLR 545.

Conflicts of Interest

4.10 Claims for damage resulting from the lawyer acting in a conflict of interest are very common. In addition to being an ethical issue, acting in a conflict exposes the lawyer to a high risk of suit.

4.11 The obligation not to act in a conflict of interest is an ethical obligation,[36] an implied term of the contract of retainer, and a fiduciary duty arising from the special relationship of trust and confidence between the lawyer and client.

4.12 The unifying obligation is one of loyalty — single minded loyalty as a fiduciary. As your client's lawyer you:

(a) Must not be in position where your duty to the client and your own interests may conflict.

(b) Must not act for your own benefit or the benefit of a third person without informed consent from your client.

(c) Must disclose and reveal all information in your possession about client's affairs and must not divulge confidential information received from your client.

(d) Must not profit out of the relationship without the informed consent of your client. The general rule is do not become involved in financial transactions with your client. If you do, then you should insist on your client obtaining independent advice from another lawyer.

4.13 Where a file or transaction involves more than one party the lawyer needs to:

(a) Identify with clarity who the lawyer is acting for. Be aware that where there are multiple parties on a file one or more of the parties may assume that the lawyer is acting for more than one party when they are not. Frequently lawyers can face claims or complaints where the client mistakenly believed that the lawyer was acting for them. This is particularly the case when the lawyer has acted for one or other of the parties before.

(b) So it is essential that the lawyer write to the each of the multiple parties identifying who the lawyer is acting for, and strongly recommending that the parties for whom they are not acting get advice from their own lawyer on the transaction.

(c) Please also be careful to avoid use of the phrase 'independent advice' in your communication, as it is consistent with the lawyer acting for the client but recommending that (additional) advice from another lawyer be obtained. Instead we recommend you communicate that the party should get advice from his or her own lawyer.

(d) Be acutely aware of the possibility of a conflict of interest. Some cases of conflict will be easy to identify. **A lawyer can rarely (if at all) act for vendor and purchaser in the same transaction even if both parties consent**. The risks of something going wrong are simply too high. Wanting to retain the relationship with both clients is never an explanation which will satisfy a court examining the lawyer's liability once something has gone wrong. For reasons set out below in the vendor and purchaser situation, there is an ever-present risk that the lawyer may become unable to discharge his or her duty to the vendor as well as the purchaser. This future risk of a conflict (even if there is

[36] Rules 5.4 – 5.12 and Rule 6.

no manifested conflict at the time of instruction) is sufficient to require that the lawyer agree to act for only one client.

Claim Example

The firm acted for vendor and purchaser in connection with the sale and purchase of a very expensive property in Auckland. The property did not have a code compliance certificate, so on settlement of the purchase, the firm withheld $50,000 from the purchaser pending the obtaining of a CCC, believing that this would be more than enough to sort out whatever minor items required to be completed. But the CCC was never obtained, because the building is a leaky building and the Council required a full reclad of the property. It requires repairs in excess of $1m. The lawyer was sued and faced a significant exposure to the parties to the litigation in damages.

4.14 Other conflicts of interest exist, as a matter of law, but are routinely managed. For example, it is common practice for a mortgagee to instruct the mortgagor's lawyer in respect of a transfer or financing of property. Technically, the mortgagor's lawyer is acting for more than one party, but the mortgagee gives the mortgagor's lawyer instructions which are narrowly prescribed, so that there is a limited contract of retainer. However, even here, conflicts can arise between the interests of the mortgagor and mortgagee and need to be recognised as soon as they arise.[37] For example a problem can arise where the lawyer knows something about the client which he knows the mortgagee doesn't know but would be material to its decision to lend. In this case the solicitor may be in a conflict of interest since he/she may have a duty to the mortgagee to disclose information which would be contrary to the interests of the client.

4.15 There is a wide range of potential conflicts of interest where lawyers need to be aware of the potential for problems to arise prior to accepting an instruction from multiple clients on a single transaction. Common examples, which frequently cause claims to be made against lawyers, are:

(a) As noted above, transactions between vendor and purchaser.

(b) Transactions involving a husband and wife, where the interests of the spouses are not identical.[38]

(c) Transactions involving a number of shareholders or investors.

(d) Transactions involving a company and the directors or shareholders who are providing a guarantee.

4.16 Lawyers should carefully consider:

(a) What are the interests of each of the clients involved in this transaction?

(b) Are the interests of each of the clients entirely aligned? What advice must be given to each of these clients in order to discharge the duty owed to each client and ensure that their interests are protected?

(c) Does this advice conflict with the interests of either clients, or is the robustness of the advice going to be curtailed by an obligation which is owed to either clients?

[37] See Undertakings Part 12

[38] For example, where one spouse/de facto partner wishes to use the matrimonial home to secure a business borrowing or where one spouse/de facto partner is making a disproportionate contribution to the asset.

(d) If the answer to the last question is "yes", then the lawyer cannot act for multiple clients on the transaction.

Conduct and Client Care Rules

4.17 The position with respect to conflicts of interest and informed consent has significantly changed with the passing of the Rules in 2008.[39]

(a) The Rules embody a lawyers' professional obligation when it comes to managing a conflict of interest between clients. A practitioner must ensure familiarity with the Rules, not only to avoid professional censure but also liability for civil wrong. The Rules will be a guide to the civil obligations of a lawyer.

(b) The old ethical rules used to say that "a practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties".[40] The effect of this was that prior informed consent cured the conflict, and so long as this was obtained, the practitioner was free to act for two or more clients. But now the Rules say something quite different. They provide:

> *"6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."*

This rule is a formulation of when a conflict will arise. The key point is that it does not require that a conflict of interest has actually arisen. It requires the lawyer to anticipate whether there **may** be circumstances in the future where he/she may be unable to discharge an obligation to either client. The lawyer should carefully consider the matters at paragraph 4.13 – 4.16 above in deciding whether to act for multiple parties.

(c) Given that the lawyer's conduct will only be considered once a problem has arisen it is highly unlikely that either a court or the NZLS (on a complaint) will accept that there was only a negligible risk.

4.18 The other key change is in connection with informed consent. As noted above while informed consent used to cure the conflict, the Rules take a different approach. They say:

> *"6.1.1. – Subject to [6.1 above], a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained."*

The effect of making 6.1.1 subject to 6.1 is that the lawyer must still be able to discharge his/her obligation to the clients notwithstanding the clients' informed consent. So if there is more than a negligible risk that the lawyer will not be able to discharge the duty to the client then informed consent will not cure the conflict.

4.19 The LCRO[41] has interpreted the Rules as follows:

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[39] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 Act

[40] Rule 1.04

[41] *CA v XU* LCRO 196/2010

(a) Rule 6.1 is stricter than the previous Rule 1.04 of the Rules of Professional Conduct. The Privy Council's decision in *Clark Boyce v* Mouat[42] is a decision given under the old regime.

(b) The effect of rule 6.1 is that if the advice given to one client must be compromised because of a duty of confidence or a duty to protect the interests of the other client, then the lawyer must cease to act. So rule 6.1 stands alone and must be satisfied, regardless of whether the clients give their informed consent.

(c) Informed consent requires that the consent must be given freely without any influencing factors (such as the influence of the other client or the lawyer who might just want to keep the file). The client must be fully aware of the consequences of giving such consent.

Claim Example

In *CA v XU* LCRO 196/2010 the lawyer was asked to act for an ex-husband and ex-wife. The ex-wife owned a property but was finding it difficult to meet her mortgage payments. The ex-husband agreed that a company he owned would buy the property from the ex-wife for $240,000. The bank would only lend his company part of the purchase price ($150,000). The balance of the purchase price ($90,000) was to be unsecured, recorded by a deed of acknowledgment of debt. Both parties wanted the lawyer to act for them to save money. The lawyer orally explained that his firm was in a conflict of interest and encouraged the ex-wife to instruct her own lawyer but she refused. The lawyer got both parties to sign a "Deed of Indemnity" which included an acknowledgement that both parties had refused to get independent advice.

The LCRO found that the lawyer acted in breach of the rule 6.1 because he had not discharged his duty to the ex-wife. He ought to have advised her of the risks of this transaction and specifically that leaving the $90,000 unsecured disadvantaged her. The lawyer ought to have declined to act.

There was no informed consent in this case because the ex-wife did not know how the deal was disadvantaging her. Therefore her consent was not truly informed.

Case Study – *LN v Whitcombe* [2021] NZLCRO 60

Mr Whitcombe had previously acted for Mr and Mrs LN. In August 2017, they advised Mr Whitcombe that they wished to tender for a property. Mr Whitcombe realised that he had been instructed to act for the vendors so he arranged for an associate of his firm, Mr RC, to act for the LNs.

The LN's tender for the property was accepted, resulting in an agreement with a condition that it was subject to the sale of their existing property by 3 November 2017, with a settlement date of 1 December 2017 or by mutual agreement. The agreement also contained an "escape" clause whereby, if the vendors accepted an unconditional offer for the sale of the property to another party, they could issue a notice to the LNs, advising that if they did not declare their contract unconditional within 10 working days, the vendors would be able to cancel the agreement. If the agreement was cancelled, the LNs were entitled to a refund of the deposit and any other sums paid.

Mr RC wrote to the LNs drawing the conflict of interest to their attention and obtaining their consent to the firm acting for vendor and purchaser.

On behalf of the vendors, Mr Whitcombe gave notice under the escape clause. The LNs confirmed the agreement, notwithstanding that they had not sold their existing property.

[42] See supra part 1.5

Ultimately, the LNs were unable to sell their property, or settle the purchase, resulting in them being liable to the vendors in damages.

Ultimately, the vendors cancelled. The LNs said that RN was in a conflict of interest and they were never properly advised about the seriousness of the situation should they default. At instruction (and subsequently) RN repeatedly recommended they seek alternative advice, but he did not explain why this was essential.

The LCRO found that there was more than a negligible risk that the firm would be unable to discharge their duty to the LNs. This was the case at the time of engagement, as there were issues with respect to due diligence, and whether the agreement should be conditional or unconditional.

But the conflict of interest was most acute when the LNs were struggling to sell their property and the question of whether to go unconditional on the agreement arose.

Simply recommending that the LNs take independent advice was not adequate, without an explanation of why that was needed. That the LNs signed the letter of consent did not mean they provided informed consent. Accordingly, both Mr Whitcombe and Mr RC were in breach of r 6.1.1.

Mr Whitcome also breached his obligation of confidentiality, by acting for the LNs when refinancing their borrowing on the existing property at the time when the escape clause had been triggered.

(d) As is clear from the facts of *CA v XU* informed consent will rarely exculpate a practitioner from the consequences of acting in a conflict of interest. The Rules are worded in such a way that even with informed consent the lawyer must still discharge his or her duties to the client by giving fulsome advice of the risks of the transaction. If to give such advice to one client would compromise the lawyers' duty to the other then the lawyer must cease acting. Informed consent will not cure the conflict.

(e) *LN v Whitcombe* also shows that a letter of consent and merely recommending that legal advice be taken (even on repeated occasions) did not suffice. More is required.[43] Indeed, the detail required to explain the conflict may – by itself – create a conflict of interest, as it may require disclosure of the other client's affairs.

4.20 For this reason, **ceasing to act when there is a conflict of interest (or the potential to be a conflict of interest) will almost always be the best thing to do**. It is simply too difficult to comply with both requirements – to fully discharge your duty and obtain fully informed consent of all clients.

4.21 If you nonetheless decide that you can discharge your duty to both clients, then you must still obtain the informed consent of both. It is crucial to record such consent in writing. But, it is not enough for the lawyer to simply wave the form under the client's nose and get it signed. In order for the waiver to be effective there needs to be **fully informed consent**. A fully informed waiver must record:

(a) An explanation that the lawyer is acting for more than one party to the transaction and the nature of the interest of each party.

(b) An explanation that the Rules require that you discharge your duties to each client and obtain each client's fully informed consent to you acting.

(c) That you will provide full advice to both clients as to the transaction, its risks and consequences. If there are some things you cannot say because it would

[43] At [113].

be contrary to one client's interests then **you cannot discharge your duties to both clients, informed consent will not cure the conflict and you must not act for both clients**.

(d) Be very careful that you take into account the degree of sophistication your client has — does your client actually understand what is being explained and has proper consideration been given by them to your advice?

(e) Consider whether the client is exercising independent thought or is he/she being dominated by the will of the other. If you have any concerns about this you cannot discharge your duty to both clients and you must not act for both clients.

4.22 *Clark Boyce v Mouat*[44] did not liberalise the practice of acting for more than one client. This is a case which reinforces the lengths to which a lawyer needs to go to satisfy the informed consent criteria. The onus to establish informed consent is a heavy one. Furthermore, the rules of professional conduct have changed so that the decision may no longer assist or represent the law. Informed consent is not a 'magic bullet'.

4.23 The lawyer should ask him/herself whether the fees which will be charged on this file and/or the benefit in remaining involved in this file for both clients worth the risk being run.

Claim Example

The law firm acted for a client who wanted to buy a business. Part of the purchase price was coming from a mortgage over the matrimonial home. The firm acted for both the client and his wife in connection with the mortgage, but did not send the wife away for independent advice. The business failed and she made a claim against the law firm alleging that she should have received independent advice and should not have used the home as security.

4.24 Sometimes a lawyer may reasonably believe that he or she can discharge the duty to both clients, but something happens during the file which means that a conflict arises. In this case the lawyer must inform the clients of the conflict and terminate the retainer with all clients.[45] The clients can consent to the lawyer continuing to act for one client where the other client(s):

(a) Get independent advice; and

(b) Give informed consent; and

(c) The lawyer will not breach any duties to the consenting clients (for example be in possession of confidential information of the consenting client(s)).

The above requirements are so hard to satisfy that there is a high risk that the lawyer cannot continue to act for any client and may lose both clients. This is another reason why it is better to only act for one client, since even if everything is done correctly, should circumstances change the lawyer may end up losing both clients.

4.25 The above Rules apply equally when two clients in a conflict are represented by two lawyers in the same firm.[46] An information barrier between the two lawyers (commonly called a Chinese Wall) does not affect the application of the Rules.[47] What this means

[44] See part 1.5 above.

[45] Rule 6.1.2.

[46] Rule 6.2.

[47] Rule 6.3.

is that, for the purposes of the conflict rules, lawyers in the same firm are treated as one person.

4.26 Sometimes a conflict arises at a point in time when there is the need for urgent action. There may not be time to refer the client for independent advice. In these situations it is recommended that:

(a) The lawyer take advice from others in the firm to ensure that the right decision is made as to what to do.

(b) Consider whether you should consult with a trusted and experienced member of the profession, on a confidential basis. If you do that, then you have demonstrated a responsible attitude to your professional duties.

(c) Your insurer's panel solicitors are usually very willing to help out urgently, since prudent steps taken at these crucial stages can avoid a much bigger problem later. So, speak to your broker and explain the problem.

5. COMPLAINTS

5.1 Law firms must have a clear policy for responding to complaints and the perceived or actual threat of a liability claim in accordance with the Client Care Rules.

5.2 Of course, complaints come in all shapes and sizes. At the very serious end of the spectrum are threats to sue. These must be immediately notified to your insurance broker. But, a firm may also receive complaints of a less serious nature and it is sometimes a difficult question of judgment to decide how to handle a complaint, and (in particular) what kind of complaint should be notified to your broker.

5.3 It is rare for a client to launch into a formal complaint or proceedings without articulating his/her dissatisfaction in some way beforehand. It is good practice to have one's antennae attuned to signs of dissatisfaction, so that appropriate (and proactive) action can be taken.

Niggles

5.4 Some of the warning signs include:

(a) "Niggles" about an inability to contact a lawyer, non-return of calls, fees, or delay in actioning instructions. These represent a good opportunity for the firm to be proactive and try to nip these complaints in the bud by taking steps to satisfy the client.

(b) Solicitors handling the file should be told that whenever a niggle of this kind is communicated, the partner should be informed and a strategy for resolving the problem should be decided upon. There may be a raft of solutions which would satisfy the client. For example, the firm should consider:

- The partner discussing the issues raised, one on one, with the client.
- The partner assuming responsibility, if it is a complaint about the staff solicitor's handling of the file.
- If it is a complaint about a partner's conduct, handing the file to another partner.

Letters of Complaint

5.5 If the niggle becomes more formal, for example by the writing of a letter to the firm, then the firm should immediately engage its internal complaints procedure. The firm should also notify its insurance broker immediately before responding to the client, so as to ensure that the firm does not prejudice the insurer's position. From this point, consultation with the insurer is crucial so that the insurer agrees with the approach that is being taken. The broker and insurer are experienced in handling all manner of claims, and their experience can also greatly assist in resolving the problem.

5.6 Sometimes the matter at issue may be below the level of the firm's excess. Even where this is the case the complaint should still be notified to the firm's broker, since the insurer will want to know about the complaint. This is because complaints can start small and get bigger. Failure to notify the complaint may endanger the firm's insurance cover.

5.7 Do not ignore a complaint just because you carried out the work a long time ago. As noted in the limitation section, lawyers remain exposed to being sued for up to 15 years from the date that they did the work. If you receive a complaint or claim notify your insurance broker immediately, regardless of when the work was carried out.

Circumstances/Claims

5.8 If the client alleges that the firm made a mistake or in some way failed in its duty to the client, then this is a circumstance which may lead to a claim being made against the firm. The firm should notify the circumstance to its broker immediately.

5.9 The client may not articulate a particular loss, the complaint may be generalised at this point. But, if the client says that a specific problem was not foreseen or avoided and that this had ramifications for the client, then the firm should treat the matter very seriously and treat it as a circumstance.

5.10 In these situations, the firm should be acutely aware of the need to avoid any statements or behaviour, which indicates to the client that the law firm accepts a mistake has taken place, or legal responsibility for that mistake. Most policies contain terms which say that the law firm must make no admissions of liability. Furthermore, it is good practice, where possible, to avoid any discussions or conduct which might be construed by the client as an admission such as agreeing to write off fees.

5.11 It is not uncommon for the lawyer him or herself to realise that a mistake has been made without the client being aware of it. This puts the lawyer in a conflict of interest, given that his/her personal interests (i.e. to avoid a claim) now conflict with his/her loyalty owed to the client. Rule 5.11 of the Rules requires a practitioner who becomes aware of the potential claim to advise the client to seek independent advice in connection with the matter and to inform the client that the practitioner can no longer act in the matter unless, the client having been independently advised, requests it.

5.12 So, the general rule of thumb should be that if the client asserts something which may mean a claim is likely, then:

(a) Engage in no further discussions or correspondence with the client.

(b) Notify your broker and await instructions from the insurer.

(c) The Rules will require you to refer the client for independent advice.

(d) If you need to take steps urgently and no instructions have been received from the insurer, then act as a prudent uninsured person. The steps in paragraph 4.16 of this manual might be helpful and should be considered.

Termination of the Contract of Retainer

5.13 Termination of the contract of retainer, either by the firm or the client, is an indicator of a problem with the relationship. It should be carefully handled to minimise the chance of a complaint or a claim. A good rule of thumb is to take some time to consider the problem from the client's point of view. Put aside personal hurt feelings or wounded pride and consider ways of resolving the dispute.

Complaint Procedure

5.14 Establishing appropriate procedures and protocols for dealing with a complaint is very important. There must be internal channels of communication to be adopted and a coordinating of damage control objectives into the overall risk management plan.

5.15 It should be noted that there is a complaints process which members of the New Zealand Law Society are obliged to participate in. The process is disciplinary in nature rather than a means by which to determine liability, although it can have significant implications in respect of a civil claim for damages.

Summary

5.16 In summary, the principal points to remember include:

(a) Try to recognise the signs of a claim early.

(b) Encourage openness among the staff to encourage them to report to you problems as soon as they arise.

(c) Educate your staff about the firm's obligation to notify potential problems to their insurance broker immediately. Reinforce this by regulating circulating the Error and Omissions Quarterly Declaration (Part 28).

(d) **Take prudent steps to manage the problem proactively, but be aware that failure to notify your insurer promptly may put your insurance cover at risk. Insurers would prefer that you err on the side of notifying too much, than too little.**

(e) Do not instruct your own counsel without referring this to your broker first and obtaining the insurer's consent. Failure to do so will most likely result in the insurer declining to cover those costs. The insurer will typically decide if counsel assistance is required, and if it is, appoint counsel of their own choosing.

(f) Allocate responsibility to defined personnel for complaints and responses. Do not allow the lawyer whose file is the subject of the complaint to handle the complaint.

(g) Respond to complaints via approved channels only. Any written responses to the complaint should be referred to the firm's broker for approval before they are sent.

(h) Do not make any admission of liability for a claim.

(i) Do not enter into any negotiations to settle the complaint without consulting your broker first. This also applies to complaints which are under the firm's excess.

6. LAW SOCIETY COMPLAINTS

6.1 Complaints against lawyers now come under Part 7 of The Lawyers and Conveyancers Act 2006 (ss120 – 272) ("the Act").

6.2 All complaints are dealt with by the New Zealand Law Society under a national system and are, at first instance, referred to a Regional Standards Committee whose members are appointed by the Law Society. The committees include lawyers and lay members and they generally sit once a month. There are over one thousand complaints made a year. There are two relevant standards – "unsatisfactory conduct"[48] and "misconduct".[49]

6.3 All complaints made about the firm or any lawyer in the firm must be notified to your broker immediately (see part 5). Fee complaints may be a precursor to a complaint over the firm's handling of the file, and should also be referred to your broker. A decision will then be made whether this complaint should also be notified to your underwriter. While fines or costs orders are not covered under most professional indemnity policies, you may have cover under your policy for the defence costs and any order of compensation. The insurer may appoint an insurance panel lawyer to assist you through this difficult process. The insurer will also be aware that this complaint may be a precursor to a civil claim, and so will want to ensure the best possible defence is put forward.

Unsatisfactory Conduct

6.4 Upon receipt of the complaint, the Society will ask the lawyer to provide an explanation in writing. There will be no hearing, or right of audience, but the complaint will be dealt with on the papers. Ensure that your draft response is sent to your broker before it is sent, so that the insurers (and any panel lawyer appointed) can approve it.

6.5 A complaint by a client will be evaluated to see if it amounts to "unsatisfactory conduct". This means conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. While the wording of the Act suggests negligence, NZLS tends to interpret this as behaviour which is not necessarily negligent. The conduct may relate to matters such as rudeness, failure to provide proper information around fees, or the general conduct of a file. There also does not need to have been any loss arising out of the conduct for it to be found unsatisfactory.

6.6 If the Complaints Committee makes a finding of unsatisfactory conduct, it can order censure or reprimand, apology, compensation to be paid (up to $25,000), or a reduction in fees, or fine (up to $15,000), or costs.

6.7 The parties have a right to apply for review to Legal Complaints Review Officer. Further appeal is by judicial review.

Misconduct

6.8 If a complaint appears to satisfy "misconduct" on part of a lawyer, the Standards Committee will refer it to the Disciplinary Tribunal for a formal hearing which can result in the lawyer being removed from the roll of lawyers, or a restriction put on his/her practice. The Tribunal can order fines of up to $30,000 payable to the Law Society.

Appeal from the Disciplinary Tribunal is to the High Court. The High Court retains an inherent jurisdiction to discipline and regulate the legal profession.

[48] The Lawyers and Conveyancers Act 2006, s 12.

[49] The Lawyers and Conveyancers Act 2006, s 7.

6.9 All complaints, no matter how trivial they may appear to the lawyer, should be treated very seriously. There is significant reputational damage which can be done no matter what the circumstances. A complaint is frequently a precursor to a claim for damages. If the complainant wins the complaint, then this will have a detrimental effect on the defence of any civil claim.

Reporting misconduct or unsatisfactory conduct

6.10 From July 2021, a lawyer who has reasonable grounds to suspect that another lawyer may have engaged in misconduct must make a confidential report to the Law Society at the earliest opportunity.[50]

6.11 The threshold has been lowered from the prior rule which required mandatory reporting when the lawyer had reasonable grounds to suspect another lawyer "has been guilty of misconduct". This means that the rule now does not require there to be proof of guilt although there must still be "reasonable grounds to suspect". Rumour or speculation, therefore, would not in itself trigger the mandatory reporting obligation.

6.12 However, a lawyer has a discretion to make a confidential report to the Law Society if he or she has reasonable grounds to suspect another lawyer may have engaged in unsatisfactory conduct.[51] This includes lawyers within the firm.

6.13 Where a lawyer is unsure whether the alleged conduct constitutes the more serious disciplinary standard of misconduct, we recommend that the lawyer first consult internally to obtain a consensus as to what should be done. Sometimes it is also useful to obtain the input of a practitioner external to the firm, so that there is objective oversight of the decision reached. Whatever is the outcome of the deliberations, it is good practice to record why the firm made the decision that it did.

6.14 A confidential report may be made by using the forms on the Law Society website, emailing the Lawyers Complaints Services or by their telephone line.

6.15 Law practices must have effective policies and systems in place to protect staff and clients from unacceptable conduct from other staff or partners. This includes having a designated lawyer in each law practice reporting to the Law Society annually on its compliance with its obligation to report any unacceptable conduct, such as bullying or sexual harassment.

6.16 Further, law practices must have effective policies and systems in place to protect staff and clients from unacceptable conduct and to have appropriate procedures to investigate complaints by clients. This includes having a designated lawyer in each law practice reporting to the Law Society annually on its compliance with its obligation to report any unacceptable conduct, and any investigations undertaken in that law practice.

Case Study – *"Lawyer's behaviour at professional social event determined to be unsatisfactory conduct" (22 September 2022)* – LawTalk

The Standards Committee received a complaint by a female lawyer (Ms B) against a male lawyer who was around thirty years her senior (Mr A) concerning his behaviour toward her at the professional social event. Ms B complained that, while they were seated at a dinner table, Mr A repeatedly touched her arm and inappropriately encouraged her to drink (alcohol). Ms B also complained that Mr A later grabbed her lower back and bottom as she passed him on the dance floor.

[50] At r 2.8.

[51] At r 2.9.

The Standards Committee concluded that Mr A's conduct at the event could not be said to be unconnected to the provision of regulated services. The event had been organised by a legal professional body and was attended primarily by lawyers and legal staff; Mr A had attended the event in his capacity as lawyer. It therefore determined that Mr A's conduct could be considered in terms of s 12(b) or s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006.

In relation to the arm-touching and comments, the Committee considered Mr A's direct apology to Ms B adequately addressed that aspect of the complaint. However, the Committee advised Mr A to "be more mindful of other people's personal boundaries and space when conducting himself in professional and social/professional settings".

In relation to the dance floor incident, the Committee said it had "no hesitation in finding that [Mr A's] conduct was unacceptable". It said: "Unsolicited and unwelcome sexualised physical contact of this nature has no place in the legal profession." The Committee therefore determined that Mr A's conduct would be regarded by lawyers of good standing as being unsatisfactory conduct under s 12(b) of the Act.

The Committee also determined that Mr A had failed to maintain professional standards and failed to treat Ms B with respect and courtesy, in breach of the Rules.

The Law Society commented that this decision was made prior to the *Gardner-Hopkins* decisions and that it is not known whether the Standards Committee would have reached a different conclusion (and referred the matter to the Disciplinary Tribunal) had this decision been made in the wake of Gardner-Hopkins events and decisions.

7. ACCOUNTING

7.1 Lawyers handling clients' moneys must observe strictly the requirements of:

(a) The Lawyers and Conveyancers Act 2006.

(b) The Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

(c) The Lawyers and Conveyancers Act (Lawyers Nominee Company) Rules 2008.

7.2 Compliance with the Act and the Regulations is mandatory. A lawyer's failure to comply with these requirements may amount to professional misconduct. Therefore, it is imperative that lawyers who receive or hold moneys on behalf of clients ensure that they are aware of their obligations pursuant to the Act and the Regulations and ensure that proper controls and procedures are implemented in their practice.

7.3 There are some key duties incumbent on lawyers in respect of the trust account:

(a) Solicitors who receive moneys on behalf of their clients must deal with those moneys in accordance with the clients' directions.[52]

(b) It is important to ensure that the client's instructions are clear. If in doubt, seek clarification. Evidence of the client's instructions must be retained for at least 6 years.

[52] Lawyers and Conveyancers Act 2006, s 110.

(c) Trust moneys received by the lawyer must be banked into the lawyer's trust account promptly after receipt - daily where practicable.[53]

(d) Trust money must be receipted when it is received even if the payee does not request a receipt. Trust receipts must be numbered sequentially and a copy of each trust receipt given must be kept by the lawyer.

(e) Every firm of lawyers is required to have a 'trust account partner' for each office or the firm having separate trust account records.

(f) The trust account partner is responsible for the administration of the trust accounting of the lawyer or firm, for ensuring compliance with the relevant statute and regulations, and taking appropriate measures to verify the correctness of, and sign, all reports. In particular, the trust account partner is required to certify by the 10th working day of each month to the Executive Director of the New Zealand Law Society as to the correctness and propriety of trust account records.

(g) Ensure that the partner nominated to be the trust account partner is capable of supervising the firm's handling of trust moneys and trust account records.

(h) To ensure there is no confusion as to whether moneys constitute trust moneys, a lawyer should put the relevant bank (and any other interested parties) on notice that the money in each trust bank account of the lawyer is trust money, and ensure that each trust bank account is designated "trust account".

(i) The lawyer is responsible for ensuring that trust account records are kept up to date and clearly disclose the money in the trust account.[54]

(j) The trust account records will include trust cash book, trust bank account statements, client ledger accounts, and journals. The partners, particularly the nominated trust account partner, must be fully conversant with the purpose and operation of these trust account records and the details which must be recorded in each of them.

(k) Procedures should be implemented to ensure that trust account records are secure against retrospective alterations or deletions.[55]

(l) Each practice must provide to each client for whom trust money is held, a "complete and understandable" statement for all trust money handled for the client, all transactions in the client's account and the balance of the client's account, promptly after or prior to the completion of the transaction or where matters are on-going, at intervals of not more than 12 months[56].

(m) All entries in the client ledger accounts and in other records which are the source of such entries, should be dated and include references that identify their source or destination and enable them to be traced backward and forward.

(n) All entries in the journal should include sufficient detail to make their purpose evident.

[53] Lawyers and Conveyancers Act 2006, s 110.

[54] Lawyers and Conveyancers Act 2006, s 112.

[55] See Lawyers and Conveyancers Act (Trust Account) Regulations 2008, Rule 12.

[56] Ibid Rule 12(7)

Payments from Trust Account

(o) A lawyer may only make payment from a client's trust money if:

(i) The lawyer has authority from the client to make the transfer or payment.[57] Best practice should be to obtain these instructions in writing. Alternatively, if the instructions or authority were by telephone, a written report should be sent to the client and a copy kept on the file immediately after those instructions were given.

(ii) The client's ledger account has funds that are cleared and available for the purpose.

(iii) Payments from the trust account must be made in a form that permits the crediting of money only to the account of the intended payee.

(iv) The details to be recorded for every payment from the trust account are:

(A) The date.

(B) The amount.

(C) The account debited.

(D) The payee.

(E) A short narrative as to the purpose of the payment.

Overdrawing the Trust Account

(p) It is not permissible to make a payment from the trust account which would result in an account in the trust ledger being overdrawn even if it means that your firm makes funds available through the system, (i.e. the firm account) to the client to cover disbursements.

Email scams

The advent of technology has seen the rise of email scams and other attempts to defraud lawyers. Where a law firm has to make payment to a third party, it has an obligation to ensure that the payment is made to the intended recipient, consistent with the client's instructions. To do so, the lawyer must obtain the correct bank account details of the intended recipient. This is a risk area for lawyers. Mistakes in transcribing the details can be made. Further, these days, lawyers are vulnerable to email scams, such as "spoofing emails" where the fraudster sends an email to the lawyer, using a forged sender address, giving instructions to transfer money into the fraudster's bank account.

(q) It is therefore incumbent on lawyers to ensure that the bank account details they obtain are accurate. The best procedure to follow is to obtain a copy of the bank deposit slip, which is verified by a phone call made by law firm to the intended payee.

(r) Because sophisticated fraudsters have been known to engage people to impersonate the payee, it is important to verify that the oral instructions you are getting are from the genuine client or payee. This is particularly important where the lawyer does not personally know the client or the payee, or the client or the payee is based overseas. Verify the phone number from publicly

[57] Lawyers and Conveyancers Act (Trust Account) Regulations 2008, Rule 12(6)(b).

available (and reliable) information. Make sure you make the phone call, and don't rely on the phone call being made to you.

(s) If details are taken over the phone, the Law Society Inspectorate encourages lawyers to follow this up by writing to the client (email or letter), asking them to respond confirming the details. It would also be prudent to record this in a written file note.

(t) Prevention is always better than cure. Law firms should ensure that their IT networks and systems are secure, with anti-virus and anti-spam software in place and regularly updated and use other measures such as firewalls, strong passwords and multi-factor authentication.

Case Study – *"Acting on hacker's instructions" (5 May 2017)* – LawTalk

A lawyer, D, who acted on instructions from a hacker he believed was his client and paid client funds into unrelated bank accounts, was found guilty of unsatisfactory conduct.

Ms C had instructed D in relation to some property transactions. She emailed D her bank account details for deposit of the balance of settlement funds. The hacker emailed D on settlement day from Ms C's email address and provided D with alternative bank details. The account number was different but the bank and account name were the same.

D spoke to Ms C three times on settlement day but did not raise the issue of the change in her instructions.

Funds were then transferred into the account provided by the hacker. The following day, the bank automatically returned the funds to D's trust account because the account name and number did not match.

Further emails were exchanged by the hacker and D, and the hacker directed D to transfer the funds to a business account in Malaysia. D emailed the hacker and said he could only transfer funds to a bank account in New Zealand. The hacker replied, asking D to split the settlement funds between two different bank accounts.

The Standards Committee found that D did not take "adequate steps" to confirm the authenticity of the change in bank account details provided to him by the hacker. Following settlement funds bouncing back to his trust account, D "ought to have been on notice of the possibility that the alternative account details provided to him were either incorrect or were not legitimate." From that point, D had a positive obligation to satisfy himself as to his client's instructions and ought to have continued his efforts to speak to Ms C by telephone.

While D may have subjectively believed that he was acting on his client's instructions, given D was familiar with his client's personal circumstances, it was not reasonable for him to have done so in the circumstances. D also failed to immediately contact the two banks once he realised he had transferred Ms C's funds to unrelated accounts.

The Standards Committee concluded that D had breached his obligations to his client under sections 110 and 111 of the Lawyers and Conveyancers Act and held this constituted unsatisfactory conduct.

Claim example:

A lawyer, A, received instructions to act for a vendor based in UK, who was selling a property in New Zealand. After the sale settled, the lawyer received an email purporting to be from the client asking the lawyer to send the proceedings of the sale – over $2m – to a bank account different from the one previously provided to the lawyer. He then received a phone call from an person impersonating the client confirming the (fraudulent) bank account details. The impersonator even had an English accent and sounded like the age of the client. The proceedings of sale were sent to the fraudster's bank account and the scam was discovered when the client rang inquiring as to when she should expect to receive the money.

Trust Account Statements

(u) The lawyer has a responsibility to provide to each client a complete and understandable statement of all trust money held for the client, all transactions in the client's account and the balance of the client's account.

(v) Trust account records should be kept accurate and kept up to date to enable compliance with reporting obligations to clients.

(w) The lawyer has a duty to ensure that, wherever practicable, all money held on behalf of any person by that lawyer earns interest for the benefit of that person unless that person instructs otherwise or it is not reasonable and practicable. Every client must have its own separate interest bearing account.

8. ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRISOM ACT

8.1 From 1 July 2018 lawyers became "reporting entities" under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("the **AML Act**"). Lawyers have to comply with the AML Act if they carry out any of the following captured activities in the ordinary course of business:[58]

(a) Acting as a formation agent of legal persons or legal arrangements.

(b) Acting as, or arranging for a person to act as, a nominee director/shareholder or trustee in relation to legal persons or legal arrangements.

(c) Providing a registered office or business address (unless provided solely as an ancillary service to the provision of other services).

(d) Managing client funds (other than professional fees), accounts, securities or other assets.

(e) Real Estate/conveyancing.

[58] Anti-Money Laundering and Counter Financing of Terrorism Act 2009, s 5(1).

8.2 Most lawyers will be caught by the AML Act because of their management of client funds in the trust account. Lawyers who carry out any of these activities in the ordinary course of business must have in place:

(a) An AML/CML Compliance Officer (Section 56);

(b) A written Risk Assessment which assesses and documents the money laundering and terrorist financing risks that the firm faces (Section 58); and

(c) A compliance programme detailing how the firm will detect and manage these risks (section 57).

8.3 The Act imposes on all "reporting entities" the following on-going obligations:

(a) To undertake customer due diligence (CDD) (Subpart 1);

(i) Verification of name and date of birth of the customer is required as per:

(ii) Section 16: standard customer due diligence

(iii) Section 20: simplified customer due diligence

(iv) Section 24 enhanced customer due diligence

(v) Section 28: wire transfers

(b) Prescribed transaction reports to the Commissioner of Police in respect of transactions in cash that are NZ$10,000 or more or international wire transfers of NZ$1000 or more;

(c) Reporting suspicious transactions or activities to the Commissioner of Police (Subpart 2);

(d) Retain transaction, verification and certain other prescribed records for specified periods.

(e) Regularly reviewing their risk assessment and compliance programme;

(f) Having their risk assessment and compliance programme audited regularly; and

(g) Submit an annual report to the DIA (the regulator).

8.4 Examples of 'red flags' that might suggest suspicious transactions or activities might be as follows:

(a) Activity that is inconsistent with the business activity or profile of the customer.

(b) The customer that does not fit the normal profile for your business.

(c) The customer avoids CDD, acts through an intermediary or obscures the beneficial owner.

(d) The customer is unconcerned by a loss or makes uneconomical decisions.

8.5 Legal professional privilege will continue to apply, except when the information is communicated for a dishonest purpose or to aid or commit a crime. Information kept in relation to lawyers' trust accounts will not be privileged (s 42).

8.6 Reporting entities are prohibited from disclosing to any person (other than the Commissioner of Police) any report of a suspicious transaction.

8.7 The identity of the person reporting a suspicious transaction is protected by the Act;

8.8 A safe deposit service where money is held is subject to the Act.

8.9 Verification is not prescribed under the Act. But common sense should be employed. Best practice would suggest that every new client should be verified as a matter of course, upon accepting instructions. Lawyers should ask to see an original passport, driver's licence or similar.

8.10 The Financial Markets Authority has released an Amended Identity Verification Code of Practice 2013, approved by notice in the New Zealand Gazette, which provides a suggested best practice for all reporting entities conducting name and date of birth identity verification on customers that have been assessed to be low to medium risk. While the Code is not mandatory, compliance with the Code is deemed to be compliant with the relevant parts of the Act.

Claim Example

The owner of a mortgage free home in Auckland went on holiday. While she was away, a fraudster had redirected her mail to a PO Box. The fraudster, using a false passport, presented herself to a lender and a lawyer claiming to be the owner of the house. She said she wanted to borrow $190,000 for home improvements and an overseas holiday. The fraudster presented the lawyer with her false passport and copies of the real owner's bank statements and rate demands. The loan was drawn down. The fraud was discovered when the registered property owner returned from overseas and started receiving mortgage repayment demands from the bank. Because the lawyer had asked for, and been provided with, proper documentation of identity there was no claim against the lawyer pursued by the bank.

8.11 The NZ Police website contains a copy of the Best Practice Guidelines for Financial Institutions (www.police.govt.nz). These guidelines contain useful advice and examples of suspicious transactions. These guidelines are also regularly updated with recent developments in money laundering so lawyers should review them from time to time.

8.12 If lawyers fail to comply with the Anti-Money Laundering and Countering Financing of Terrorism Act they may commit an offence under that Act. In addition, the Crimes Act 1961 contains criminal offences which may apply if the lawyer suspects that a client is using the trust bank account to launder money, and allows the transaction to continue. Refer to 4.29 to 4.34 above in relation to your AML obligations.

9 BILLING

9.1 Billing is an important part of a lawyer's business. Not only is it obviously important in collecting revenue, but it can be the source of dissatisfaction and complaint by clients and may be the trigger for clients to allege fault in the lawyer's work. Accordingly, the process must be handled with the following principles in mind.

(a) Invoicing should be:

(i) In accordance with the arrangement agreed at the outset and recorded in the engagement letter.

(ii) Justifiable in relation to accepted standards of practice.

(iii) Informative in terms of work done, persons involved and method of calculation.

(iv) Timely. Bill once work completed not many weeks or months later.

(v) Addressed to the person responsible for the fees.

(b) Do not let unpaid invoices drift. Make the due date for payment clear and stick to it. If invoices are not paid, consider ceasing the engagement.

(c) When agreeing a fee arrangement with a client, it is important to recognise the following:

- Small invoices payable regularly are likely to be more manageable for a client than a large amount payable at once and are better for the law firm's cash flow.

- Regular invoicing will also enable the firm to identify files or clients who are a problem. It is important to avoid surprises, particularly with litigation work where fees can escalate in size very quickly. It is better to bill smaller amounts more frequently than one very large bill.

- If a client is unable to pay an invoice, a client may be more likely to later raise disputes. Therefore, a client's ability to meet fees is one fact that should be considered when deciding whether to accept that client or engagement.

- Consider making a practice of obtaining retainers at the commencement of an engagement.

- If an estimate is given, record it in writing and make it clear that it is an estimate only. Agree on the level of fees to be expended before referring back to the client. Describe any matters which may alter the estimate and the circumstances in which it may need to be revised.

- The best way for a client to be informed and be able to review the ongoing cost or viability of an engagement is to have regular invoices which include a full narrative of the work undertaken.

- Informed clients are less likely to later challenge invoices or complain about the services provided.

- Whatever arrangement is agreed with a client, record it clearly in writing and don't forget about it.

- Where it becomes apparent that fees will exceed an estimate given, communicate this immediately to the client and obtain approval to continue with the engagement. Review for future reference the reasons why the engagement could not be completed within the estimate and bear this in mind when giving future estimates.

9.2 Sometimes complaints about the services provided by professional advisers are triggered by a practitioner's attempt to collect unpaid fees. In response the client complains or counterclaims, often for an amount far more than the unpaid fees. Avoid this situation by:

(a) Complying with the agreed arrangement for invoicing.

(b) Do not allow unpaid fees to accumulate without being addressed.

(c) Ensure that the supervising partner responsible for the file specifically approves any formal debt collection measures. Before doing so review the file:

- Is there an obvious reason for non-payment?
- Is there likely to be a dispute?
- Is the cost of any such dispute whether genuine or not likely to outweigh the unpaid fees?
- Are you entirely comfortable with the services provided? If not, do the terms of your insurance policy require notification of that fact?
- Should you consider not pursuing unpaid fees, given that there is the possibility of a claim being made against the firm?

Claim Example

The firm acted for a client in the collection of a debt from the third party. The client lost the case, and the firm billed the client for the cost of the trial (in excess of $50,000). The client refused to pay, and the firm issued proceedings to recover the fees. The client counter-claimed over $250,000 on the grounds that the firm was negligent.

(d) The New Zealand Law Society complaint procedure is now the mechanism for fee complaints to be resolved. This involves the client making a complaint of unsatisfactory conduct against the firm - something which may have severe reputational consequences.

10 PROFESSIONAL RESPONSIBILITY

10.1 A number of regulations have been passed which impose rules to govern the practice of law. These regulations have been made pursuant to the Lawyers and Conveyancers Act 2006. They include regulations relating to:

(a) Conduct and Client Care;

(b) Nominee Companies;

(c) Professional Indemnity;

(d) Fidelity Fund;

(e) Trust Accounts; and

(f) Complaints.

10.2 Compliance with these regulations is mandatory. In addition to exposing the lawyer to a disciplinary action, a breach will evidence a failure to comply with the appropriate professional standards.

10.3 The Regulations:

(a) Express the legal profession's own judgment as to how lawyers should conduct themselves and the standards expected of lawyers in their dealings with clients, the court and the community.

(b) Define the bounds within which a lawyer can practice.

(c) Provide guidelines for lawyers on issues of professional responsibility and how they should conduct themselves in specific situations.

(d) Are a reliable indicator as to whether disciplinary (and other) proceedings might be commenced against a lawyer.

(e) Provide a defence to allegations of misconduct. The Rules can be used by practitioners to justify their actions as the professionally correct approach required in various situations. Although a Court is not bound to apply the Rules, it may place considerable weight on them when determining whether the lawyer has breached the standards of behaviour of the reasonable lawyer.

10.4 All lawyers need to comply with the regulations and should be able to demonstrate that their actions in a specific case comply with the Rules. Accordingly, it is imperative that all lawyers are familiar with them.

10.5 It is recommended that you run regular in-house training sessions to ensure that all lawyers in the firm know what their obligations are pursuant to the regulations, are aware of the dilemmas that can arise and how they should be resolved.

10.6 The disciplinary sanctions for infringements in the field of professional responsibility are severe and include the name of a lawyer being struck off the roll and summary suspension from practice.

11 CONFIDENTIALITY

11.1 Solicitors are subject to obligations of confidentiality to his or her clients arising from:

(a) The lawyer/client relationship;

(b) Chapter 8 of the Rules; and

(c) The general law - including the Privacy Act 2020.

11.2 The duty of confidentiality is particularly onerous in lawyer-client relationships because "the degree of the confidential character of the relationship is in the eyes of the law the very highest". Accordingly, the court "can fix a standard for the behaviour of its own officers which is higher than it would be practicable to exact from persons in other types of confidential relations."[59]

11.3 The duty of confidentiality is a continuing duty which survives the termination of the lawyer-client relationship and the death of the client.[60]

11.4 Rule 8 provides that a practitioner "has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship".

11.5 There are a number of limited circumstances where disclosure will be permitted.[61]

(a) The client has authorised the disclosure. If information has been received from more than one client, the lawyer must obtain the consent of all clients in order to be relieved of his/her duty of confidentiality. Where the client

[59] *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch 831 at 840 per Fletcher Moulton LJ.

[60] Rule 8.1. After death the right to confidentiality passes to the client's personal representatives.

[61] Rule 8.4.

consents to the disclosure of information for a particular purpose, the lawyer must not disclose or use that information for other purposes.

(b) Where disclosure is reasonably necessary for the "effective operation of the lawyer's practice" including arranging insurance cover or collection of the lawyer's fees.[62]

(c) Disclosure is necessary to answer or defend any complaint, claim, allegation or proceeding against the lawyer by the client.[63] It is not a breach of legal professional privilege for a lawyer to disclose information to professional bodies and tribunals which are investigating, and have sought, information in the exercise of their disciplinary functions. The client is deemed to have waived the right to confidentiality by pursuing the claim against the lawyer.

(d) The information relates to the anticipated or proposed commission of a crime.[64] The appropriate body to which disclosure should be made is usually the Police and, in cases of urgency or threatened personal injury, the likely victim or her or his lawyer. Keep in mind that if a client confides in his or her lawyer that he or she has previously committed a criminal act which has resulted in the death or injury of another, the lawyer is not permitted to disclose this matter.

(e) Disclosure is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable to effectively protect his or her own interests.

11.6 Disclosure will be mandatory:

(a) Where the anticipated crime is one involving the possibility of physical injury to another person[65] or punishable by imprisonment for three years or more.[66]

(b) Where disclosure is required by law. If a statute requires the lawyer to disclose his or her client's confidences the lawyer must comply, except where those confidences are privileged, and that privilege is not overridden by the statute. For example, the AML Act requires that lawyers report financial transactions which they suspect may be connected with money laundering or the proceeds of crime.

(c) Disclosure is required by order of a court.

(d) Where the lawyer reasonably believes that disclosure is necessary to prevent a serious and imminent risk to the health or safety of any person. In such a case, the lawyer may disclose to a health agency or health professional whatever information is necessary to assist to prevent such harm. The lawyer must ensure that any such disclosure is made only to the extent necessary to minimise that threat.

(e) The lawyer has an overriding duty to the court. The duty of confidentiality to the client cannot override the lawyer's duty to the administration of justice. For example, if the disclosure permitted by the client in court proceedings is limited and would mean that the lawyer would only be presenting a half truth to the court, the lawyer has an overriding obligation not to be a party to

[62] Rule 8.4(f).

[63] Rule 8.4(g).

[64] Rules 8.4(b) and 8.4(d).

[65] Client Care Rule 8.2(b).

[66] Client Care Rule 8.2(a).

misleading the court. If the lawyer were to partake in such conduct, he or she would be exposed to disciplinary action being taken against him or her.

11.7 The Privacy Act 2020 lays down a wide ranging and detailed scheme governing the disclosure of and access to personal data or information. Firms of lawyers will be subject to the requirements of this Act. It prescribes Information Privacy Principles governing the collection, source, storage, use and disclosure of personal information. The New Zealand Law Society has issued Guidelines for Law Practitioners explaining the meaning and applicability of the Information Privacy Principles for lawyers and has reviewed the Rules to ensure that there are no inconsistencies between the Act and the Rules.

11.8 Inadvertent disclosure of confidential information to the wrong recipient by fax, email or post can potentially disadvantage or prejudice a client. It may result in:

(a) The information coming into the hands of persons who the client would not have wanted the information disclosed to, for example a commercial competitor or an ex-spouse.

(b) The waiver of any legal professional privilege in respect of the information.

(c) A complaint to the Privacy Commissioner and a subsequent award of compensation.

(d) A complaint to the New Zealand Law Society, which may result in professional sanctions.

(e) Court proceedings brought by the client for breach of confidentiality and an award of damages.

(f) If the breach is threatened or continuing, the court may grant an injunction to restrain the lawyer from disclosing or using the information.

11.9 Some general guidelines are:

(a) Information about a person should be collected from that person, with that person's consent, for purposes and use made known to that person or expressly/impliedly authorised by that person.

(b) Personal information must be stored securely and destroyed once used for the purpose for which it was collected.

(c) Disclosure of personal information must only occur with the consent of the person to whom the information belongs. If the information has been provided from joint clients, the consent of all clients must be obtained before it can be disclosed.

(d) The information must only be used for the purpose for which it was collected.

(e) Information gained about one client must never be used to assist another client or the lawyer personally.

(f) Be particularly cautious about inadvertent disclosure, particularly in the context of communicating by email. Check carefully the addresses to which email is sent. Ensure that a disclaimer is attached to all outgoing email messages, which states that the content of the email is privileged and confidential. For example:

> *"The content of this email and any attachments are confidential and may be subject to legal professional privilege and copyright. If the reader of this email is not the intended recipient, you must not use, read, distribute,*

copy, print or retain it on your computer system. If you have received this email in error, please immediately notify me by return email and then delete the email and any attachments."

(g) Ensure that staff fully appreciate the risks and consequences of disclosure by mistake to the wrong person, and the importance of ensuring that all mail, faxes, and emails are addressed to the intended recipient.

(h) Be discrete. Ensure meetings or discussions with or about the client take place in private and cannot be overheard. Law firms should preferably have dedicated meeting rooms so as to avoid meeting clients in their office. If this is not possible, other client files should be moved out of sight for the course of any meeting. Be conscious about location when making mobile phone calls to or concerning a client. Avoid carrying client files in public where information on the outside of the file may be seen by a passer-by.

(i) It is useful for a law firm to implement an information policy regarding access to client files and disclosure of information. Monitor compliance and particularly ensure that front line staff are aware of the policy. Ensure all staff are aware of their obligations of confidentiality and include provisions to this effect in all employment contracts.

Information Barriers

11.10 Where a client-client conflict of interest exists, the lawyer who represented the former client and those members of his or her firm who have had access to relevant confidential information relating to that client are disqualified from representing the new client against the former client.

11.11 To avoid any conflict of interest or issue in relation to the unauthorised disclosure of confidential information, the firm should adopt a policy that the disqualification of the individual lawyer extends to the other partners of the firm.

11.12 A lawyer must not act for a client against a former client of the lawyer, or any other member of the lawyer's practice, where:[67]

(a) The lawyer holds information confidential to the former client;

(b) The disclosure of the confidential information would be likely to affect the interests of the former client adversely;

(c) There is more than a negligible risk of disclosure of the confidential information; and

(d) The fiduciary duty owed to the former client would be undermined.

11.13 An information barrier, sometimes colloquially referred to as 'Chinese Wall', may be effective to prevent a breach of these rules where it results in a "negligible risk that the confidential information in respect of the former client will be or has been disclosed to the new client or any lawyer acting for the new client".[68]

11.14 Some general guidelines are:

(a) Advise the affected clients of the conflict and the procedures by which the lawyer will maintain the confidentiality of any information the clients have provided. Clients may require an undertaking on behalf of the lawyer and all

[67] Rule 8.7.1

[68] The efficacy of the information barrier was given judicial recognition in *Russell McVeagh v Tower* [1998] 3 NZLR 640.

the relevant partners and employees not to disclose directly or indirectly to any person the relevant confidential information. Ensure that you can fulfil any undertaking you so provide.

(b) Separate the various departments physically to avoid the risk of inadvertent disclosure of confidential information.

(c) Implement an ongoing educational programme for all employees and staff to emphasise the importance of not improperly or inadvertently divulging confidential information.

(d) Implement strict procedures for dealing with a situation where there is any possibility, however minimal, that the information barrier may or should be crossed.

(e) Appoint and train compliance officers to monitor and record the effectiveness of the information barrier.

(f) Implement procedures for dealing with a situation when the information barrier has been crossed, including advising the effected clients and strictly enforced disciplinary sanctions against the employees involved.

12 UNDERTAKINGS

12.1 Rule 10.5 of the Rules provides that "[a] lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice."

12.2 A lawyer who does not honour an undertaking to the court will be in contempt of court. Furthermore, the undertaking provided to any person may be enforced by the court, in the exercise of its supervisory jurisdiction over lawyers as officers of court. If the undertaking is not capable of being enforced, damages may be awarded against the lawyer for breaching the undertaking.

12.3 Once a lawyer gives a personal undertaking, it must be honoured. The lawyer remains bound by the undertaking irrespective of subsequent developments. It will be strictly enforced against him or her, and it is no defence that the undertaking required a third party to do an act, was subject to contradictory instructions from a client, could not be performed due to the death or incapacity of a client, or that performance of it would be a breach of a duty owed to the lawyer's client.

12.4 Where a lawyer has given a client undertaking without the authority of his or her client the lawyer runs the risk of having the undertaking deemed a personal undertaking. The authority provided by the client will not be valid unless he or she fully understood the legal consequences of the undertaking at the time of authorising it. The authority provided by the client should be expressed to be irrevocable.

12.5 The risk to a firm as a result of not honouring a personal undertaking is any one of the following:

(a) A complaint to the New Zealand Law Society which may result in professional sanctions.

(b) Civil proceedings brought by the recipient of the undertaking for breach of contract (if a contract can be established or under the Fair Trading Act 1986).

(c) The recipient of the undertaking seeking an order from a court that the court enforce the undertaking or order damages in lieu.

12.6 Some general guidelines are:

(a) Ensure that the lawyer has obtained the client's express irrevocable authority to give the undertaking before an undertaking is given by the lawyer on behalf of the client. No lawyer's undertaking should be given on behalf of a client until the lawyer has received the client's authority. Make sure the client understands the extent of his or her liability on giving the undertaking and get him or her to sign an acknowledgment to this effect.

(b) Do not give any personal undertakings which you are not absolutely sure you will be able to perform. In particular, do not give undertakings which are dependent on a third party taking some action or on subsequent instructions from your client.

(c) Do not give any personal financial undertakings on behalf of a client unless you have received cleared funds from the client which will enable you to honour the undertaking.

(d) Have a policy whereby only partners give undertakings.

Case Study – *IRD v Bhanabhai* [69]

The defendants were a firm of solicitors who acted for two companies which were involved in the construction and management of a block of apartments. Mr Bhanabhai, a partner of the firm, had become involved in the companies initially as an investor then later as a director and finally as solicitor to the project. The project failed before completion and, due to having entered into contracts of sale for certain apartments, the companies had incurred obligations to pay GST which they had not met. Mr Bhanabhai provided a written undertaking to the Commissioner of Inland Revenue which provided that "we undertake on settlement of [identified units] we will forthwith pay to you the GST component of the sale consideration". The undertaking was not met, the companies were liquidated, and the GST was never paid.

The IRD began proceedings to enforce the undertaking or, in the alternative, damages for compensation for breaching the undertaking. The lawyer's insurer declined on a few grounds including that the failure to honour the undertaking was dishonest.

The court found:

(a) The undertaking was unambiguous and given in the lawyer's professional capacity;

(b) Circumstances changed during the file which made the undertaking impossible to perform. A lawyer who had given an undertaking must take reasonable steps to ensure that the undertaking was performed or that the position of the third party was not prejudiced by the changed circumstances. Where it appeared that the lawyer would not be able to perform the undertaking, the lawyer must inform the party to whom the undertaking was given as soon as this became apparent.

(c) The court could order compensation when the failure to honour the undertaking is inexcusable and there was no scope for a genuine misunderstanding.

(d) Because the lawyer's conduct was inexcusable the court ordered compensation be paid to the IRD. The conduct of the lawyer was dishonest so that he was not entitled to indemnity under the insurance policy.

[69] [2006] 1 NZLR 797.

Case Study – "*Censure and fine for 'serious failures*" (17 June 2016) – LawTalk – unenforceable undertakings

Mr Jefferies acted for two couples (Mr and Mrs A, and Mr B and Ms C) in a property transaction. The couples intended to build a house on the section that would ultimately be sold and the profits shared. The purchase was completed and the building commenced. Subsequently Mr B and Ms C separated and Mr B placed a Notice of Claim over the property and stopped paying the costs of the building. Mr and Mrs A completed the build with Ms C.

The property was then sold. Mr B and Ms C instructed Mr Jefferies in relation to the sale and that they had reached agreements about how to divide the sales proceeds. To settle the sale, Mr B had to consent to the Notice of Claim being released. Mr Jefferies provided an undertaking to Mr B's lawyer that if agreement was not reached, the division of the balance of the sale proceeds would be submitted for determination by the President of the Waikato Bay of Plenty Law Society – a procedure which was never available, and so was not capable of performance.

The Standards Committee's view was that Mr Jefferies should have ensured that any undertaking given by him was capable of being complied with. In providing the undertaking that Mr Jefferies did, he placed himself in a situation where he was unable to honour it. If there is an inability to perform an undertaking because of some supervening events, the practitioner is required to immediately inform the party to whom the undertaking was given.

It concluded that the provision of an unenforceable undertaking is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer and amounted to unsatisfactory conduct. Mr Jefferies was censured and fined $10,000.

13 SOLICITORS' CERTIFICATES

13.1 Often lawyers will be required to issue certificates particularly in relation to conveyancing, banking, financial and commercial transactions, which contain undertakings or promises that certain matters have been or will be attended to.

13.2 A lawyer who fails to fulfil an undertaking given by him or her in a lawyer's certificate may be liable in contract and/or tort. In addition, the High Court has an inherent disciplinary jurisdiction over lawyers in respect of undertakings provided by them in their professional capacity. Disciplinary action may also be taken by the Law Society for a breach of the Rules.

13.3 Some guidelines for the provision of lawyer's certificates are to:

(a) Ensure certificates are only issued by partners.

(b) Take care to certify only those matters which are within the lawyer's knowledge and control. Carefully consider the future when deciding if the matter is in your control – i.e. can things occur which make the certificate wrong?

(c) Do not issue certificates which give an undertaking to do something that can be performed only if the lawyer continues acting in the transaction.

(d) Before issuing the certificate, the partner concerned should ensure that he or she has taken care to read the certificate, understand it and verified that it

can safely be given. Whenever appropriate, the partner should check the file which the certificate relates to.

(e) Some solicitor's certificates issued by banks require the lawyer to acknowledge that you have a professional indemnity policy limit that is equal to or greater than the transaction value. Great care should be taken before signing the certificate. If the firm's policy limit does not equal or exceed the value of the transaction then the certificate must not be signed, since by doing so the firm is making a false representation which will warrant you have greater insurance cover than you do. The firm should negotiate with the bank an amendment to the certificate by which the bank accepts the limit which the firm has is suitable. Acceptance by the bank of your policy limit should be confirmed in writing by a written amendment to the certificate, accompanied by a letter confirming the position for greater clarity if you wish.

13.4 Implement a firm wide policy regarding the procedure which must be followed when lawyer's certificates are required to be issued in relation to major financial transactions. This should include the requirement that prior to issuing a lawyer's certificate the partner must always carefully check the base file and record in a file note whether the certificate can be appropriately given or whether its contents should be amended so as to make it appropriate.

Case Study – *Westpac v Neumegen & Co*[70]

N acted for a client, LC. LC was involved in the nightclub business. LC entered into a contract to purchase a nightclub business in Karangahape Road and the building in which the business operated. LC instructed N to act on his behalf in respect of the transactions.

Part of the funding of the acquisition was a remortgaging of the existing first mortgage over the residential property with Westpac. The second mortgagee ("EF") over the residential property consented to Westpac's first mortgage security, but on a number of conditions relating to the priority between security holders in respect of the nightclub business.

Neumegen provided Westpac with a solicitor's certificate which certified that Westpac would have a first ranking security over the residential property. The funds were drawn down, the existing first mortgagee was repaid and the purchase of the nightclub business was settled.

After the settlement, the conditions imposed by EF could not be satisfied and EF refused to cede priority to Westpac.

Westpac successfully sued N for damages for N's failure to honour the solicitor's certificate.

14 RELATIONSHIP PROPERTY AGREEMENT CERTIFICATION

14.1 Relationship property is governed by the Property (Relationships) Act 1976. The courts have recognised that when a lawyer gives advice to a party to a relationship property agreement, not only does the lawyer have a duty to his/her client to ensure the client understands the agreement, but also to the other spouse who has an interest in ensuring that the agreement will be effective.

14.2 What this means in practice is that the lawyer acting for a party to such an agreement ought to exercise great care to ensure that the client:

(a) Understands the terms of the agreement;

[70] Auckland High Court CIV 2007-404-6529.

(b) Understands the effect of the agreement. In order to understand this, the lawyer needs to explain what the client may be giving up by signing the agreement. The lawyer will need to know what relationship property exists, what this property is worth, what the status of the property would be without the agreement and what the outcome of signing the agreement will be.

(c) Is not under any pressure or duress or some other disability.

Case Study - *Connell v Odlum* [71]

C and O were married on 17 December 1981. The day before their marriage they entered into an agreement pursuant to s 21 of the Matrimonial Property Act 1976. The agreement was prepared by O's solicitor. Mr Connell witnessed C's signature and certified that, before C signed the agreement, he had explained to her its effect and implications. Six years later, Mr and Mrs O separated. C applied to the District Court to set the agreement aside, pursuant to s 21(8) of the Matrimonial Property Act. The District Court held that the agreement was void on the grounds that Mr Connell had not properly explained the effect and implications of the agreement to C and that it would therefore be unjust to give effect to it. O commenced proceedings against Mr Connell alleging that he was negligent when advising C pursuant to the requirements of s 21(6) of the Matrimonial Property Act. He claimed damages in the amount which he paid in settlement of C's claim, along with his legal costs. Mr Connell applied to the High Court to strike out the claim against him, on the basis that he owed no duty of care to O.

The High Court and the Court of Appeal held that a duty of care may be owed. The true nature of the relationship between O and Mr Connell must be considered by reference to s 21 of the Matrimonial Property Act 1976. The solicitor's certificate required by the section provides an assurance that the prerequisites of a valid agreement have been met and was of critical "procedural" importance to the other spouse. It was an effective means by which the assurance that the requirements of the section had been complied with was conveyed to the other party.

15 DIRECTORSHIPS

15.1 Members of law firms are often appointed to the boards of directors of companies.

15.2 Directors bear responsibilities and obligations imposed by law. Failure to fulfil a director's duty or a breach by a director of a statutory requirement may lead to liability either to the company or to its creditors.

Common areas of liability for directors

15.3 Common Areas of liability include:

(a) Breach of the duty to act in the best interests of the company.

(b) Breach of a director's duty of care to the company.

(c) Failing to ensure that the company does not trade recklessly.

(d) Failing to certify or erroneously certifying that the company can satisfy the solvency test upon entering a major transaction.

[71] [1993] 2 NZLR 257.

(e) Responsibility for statements or conduct which is negligent, misleading, deceptive or false, or having deemed responsibility for such statements or conduct of other officers or employees of the company.

The context of appointments

15.4 Members of law firms are often appointed on the basis that they have particular professional skills of use to the particular company. Even in privately held companies a lawyer who accepts such an appointment may have little knowledge of or practical control over the day-to-day affairs of the company. Sometimes a lawyer is appointed as a "nominee" director where he or she is appointed as the representative of corporate interests and has little or no personal say in the decision-making. Furthermore, a lawyer may be appointed as a director of several companies which may be connected or closely related.

15.5 Before an appointment is accepted the lawyer should carefully review the situation and assess whether in all the circumstances the lawyer will be able to discharge his or her obligations as a director in the manner required by the law. Be particularly conservative in deciding whether to accept such an appointment. Bear in mind that such directorships are not your core business. Moreover, if the appointment is sought because of the lawyer's particular professional skills, the lawyer should query whether it is more appropriate to act in the professional role of a lawyer rather than undertaking the added responsibilities of a directorship.

15.6 Before accepting an appointment as a director, the lawyer should ensure that adequate insurance cover is obtained in respect of any liability which might arise. Review the firm's insurance policy because cover which is limited to liability arising out of professional services may not cover liability arising out of a directorship and separate cover taken out by the board is usually appropriate.

15.7 Some key points to remember are:

(a) Where appointed to the board of more than one company the lawyer should ensure that the duties of loyalty owed to each of those companies are reconcilable.

(b) Take a robust view of the situation. For example, the companies might be a series of closely related companies. Those companies may be involved in transactions with each other. Often, the structure will be such that it is intended that the companies act in the best interests of the group rather that in the particular best interests of one or other of the companies. If the companies are privately held the persons having a financial interest in the companies are usually prepared to act in such manner, having confidence that because of their control it is unlikely that any issue will ever be taken about any breach of loyalty to a particular company. However, because the lawyer is unlikely to have a significant financial interest in the companies and is unlikely to have ultimate control over the structure, you should not easily accept appointments in this situation.

(c) Obtain an indemnity pursuant to the Companies Act 1993 from the company for the firm. Ensure the company obtains D&O insurance cover which protects your interests.

(d) Be particularly concerned to ensure that the interests of the director as a director of another party to the transaction is noted in the interests register of each company. If in any doubt relinquish the directorship. Simply abstaining from voting on a particular transaction is unlikely to avoid liability if liability subsequently arises from the transaction.

(e) Before accepting an appointment ask for and review financial information concerning the company, its budgetary forecasts, its source of funding and the nature of the company's business.

(f) If there is any suggestion that the company is likely to suffer financial difficulties decline the appointment.

(g) At board meetings insist that full operational reports and managerial accounting information prepared by a reliable person are presented for consideration.

(h) Always be aware of whether a particular transaction is a "major transaction".

(i) Be particularly wary of the operation of current accounts for other directors, particularly those directors who have a financial interest in the company.

(j) If the position of director of a particular company involves specialist business knowledge of a kind which you do not possess, do not accept the appointment unless you are confident that proper advice can and will be sought by the company.

(k) Avoid guarantees.

16 TRUSTEESHIPS

16.1 It is extremely common for members of law firms to receive requests from clients to act as a trustee. Most commonly this will be in respect of discretionary family trusts.

16.2 There are, broadly speaking, two categories of trustee liability:

(a) A breach of the trustee's duty to the trust or the beneficiaries;

(b) The incurring as a personal debt a liability of the trust.

16.3 The following are general principles relating to trustee's liability and trust law:

(a) Trustees are chosen for their individual particular skill. So trustees (generally speaking) may not delegate their duties.

(b) The presence of an independent person ought to contribute to the quality of the decision making. Proper records must be kept of all decisions made.

(c) Unless the trust deed specifically provides otherwise, trustees must act unanimously, so decisions such as whether to enter into property transactions or (for example) to issue and continue legal proceedings, require the trustees to act unanimously and cannot be delegated to another.

(d) A court will quickly conclude a dereliction of duty on the part of an inert trustee who leaves management of the trust to others.

(e) A trustee can only act in his/her personal capacity, unlike a company which can, and does, have separate legal existence.

Breach of Trustee's Duty

16.4 A trustee will have a duty of good faith to act honestly in connection with the affairs of the trust.

16.5 He or she will also owe a duty to exercise reasonable care in the affairs of the trust so as not to cause the assets of the trust to be diminished. This duty is embodied in statute.[72]

16.6 If decisions are not taken in an appropriate manner the trust could be set aside and/or the trustees could be required to reinstate the trust assets. If a trust is set aside the firm, in its capacity as solicitor acting for the trust, might be held liable for negligent advice if the firm was involved in the advice to establish the trust.

16.7 Trustees can also be held liable for negligent management of trust assets. Each trustee, including the independent trustee, must properly consider the investment of trust funds and properly consider whether any distribution should be made and to whom. Professional advice on properly balancing the trust investments should be obtained.

Case Study *Re Mullligan (deceased)*[73]

The trustees in this claim were successfully sued for a breach of trust. M died in 1949 and left his wife a life interest in the estate. The residue was left to nieces and nephews. The estate was invested by the trustee in a manner which emphasised the immediate cash return to the benefit of the widow, at the sacrifice of long-term capital increase.

A trustee must balance the interests of all beneficiaries. This will involve a consideration of the proper way of protecting the capital value of an estate. The court found the trustee liable for poor investment decisions.

16.8 The duty owed as trustee is distinct from the duty as solicitor.

Case Study *Re Young v Sladden Cochrane*[74]

The solicitor was appointed trustee and executor of a will. The estate proceeds were invested in companies trading on the NASDAQ stock exchange and lost significant value in the 2000 Technology Crash. The client sued the lawyer **as executor**.

The duties of all three (solicitor, trustee and executor) were analysed and were distinct. As a trustee the solicitor was obliged to get the funds in so that they could be administered by the estate.

The executor's role was to hold the funds pursuant to the will. Under the will he had an indemnity from estate for any losses due to investment.

As solicitor the defendants were obliged to advise a client as to what should be prudently done with the funds. The key distinction was between adviser – a solicitor's role – and decision-maker (the executor's role).

The lawyer got a lucky break. Because the client failed to sue the lawyer **as solicitor** and because the will contained an indemnity to the executor, the claim failed.

Personal Liability for Trust Debts

16.9 As a corollary of the fact that trust does not have a separate legal existence, a trust can only act through its trustees. A trust's debt will generally be a trustee's debt.

Limitations of Liability

[72] Trusts Act 2019, ss 29-38.

[73] [1998] 1 NZLR 481.

[74] CA 240/02 16 September 2003.

16.10 In entering transactions on behalf of the trust the trustee's liability for the transaction is personal and in the absence of express agreement will not be limited to the assets of the trust. Trustees ought to be vigilant to ensure that whenever a commitment is entered with a third party that there is a clause limiting the trustee's liability to the assets of the trust and acknowledging no personal liability is incurred.

Case Study – *NZHB Holdings v Bartells*[75]

NZHB sued a number of trustees who had signed deeds of indemnity and mortgage documents "as trustees" . Those trustees who had signed the deeds with a specific clause which limited their liability to the assets of the trust were not personally liable. Those who had signed as trustees without such a limitation clause were personally liable for the debt created by the document.

"*Unlike a company or an incorporated society a 'trust' is not a legal person recognised as distinct from the humans who direct their affairs. On the contrary, trustees can contract only in their own right: either they do so and are personally liable to the extent provided by the ordinary law which the agreement may modify or there is no agreement at all."*

Claim Example

The firm acted for a trust, and a partner in the firm was a trustee. The partner signed a loan guarantee as trustee of the trust, but did not limit his liability to the assets of the trust. The bank has called in the guarantee because the trust is insolvent. The professional indemnity policy does not respond because the guarantee is a trading debt.

Trading Trusts

16.11 Transactions involving trading trusts are particularly problematic. A trading trust will incur trading debts, for example, with the IRD or with creditors, which the lawyer may be unaware of and will not be able to be 'contracted' out of. Examples of this are tax liabilities, liabilities owed to liquidators for advances or distributions made to the trust prior to liquidation, and liabilities for costs on court proceedings.

16.12 Where a lawyer accepts an appointment to be a trustee in a trading trust he/she should exercise particular care to ensure that the trust can pay all its debts at all times. The lawyer should always insist on knowing what is going on. That may involve ensuring that financial information is sent to him/her on a regular basis, or even ensuring that cheques are countersigned.

16.13 The lawyer may not have insurance cover for liabilities of this kind, since most insurance policies have exclusions for trading debts.

Case Study – *AMP v Macalister Todd* [76]

A trust was carrying on a subdivision of property in Queenstown. The developer and his lawyer were trustees of the trust. The proceeds of the subdivision were insufficient to clear the bank borrowings and the GST. The trustees of the trust were personally liable to the Inland Revenue for the GST. Subsequently the lawyer was engaged in litigation to the Supreme Court to recover from its professional indemnity insurer.

> "[41] The Trustees carried out a number of land development projects, the legal aspects of which were handled by Mr Todd's firm, principally through him. Such activities attracted GST, income tax, PAYE and ACC levies. By virtue of the tax statutes, the trustees were personally liable, jointly and severally, for those imposts. Mr Todd and Mr Walker were unaware of their personal liability until officers of the IRD said they would be looked to personally for payment.

[75] (2005) 5 NZCPR 506.

[76] [2007] 1 NZLR 485.

[42] In imposing personal liability the tax statutes do no more than recognise the general principle that liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee. This is an aspect of the nature of a trust which is not a person but an equitable obligation to deal with property for the benefit of beneficiaries. A creditor has a personal right to sue a trustee and to get judgment and to make the trustee bankrupt. As Latham CJ when referring to a trustee's liability in *Vacuum Oil Company Pty Limited v Wiltshire* said*:*

"in respect of debts incurred by him and so carrying on the business, he is personally liable to the trading creditors – the debts are his debts"

[43] The personal liability of a trustee is counter-balanced by equity, which allows full indemnification of the trustee out of the trust's property, or for the trustee to apply the trust property in discharge of the liability. Unfortunately, for Mr Todd and Mr Walker, they did not learn of their liability at a time when there were any assets of which they could have recourse. "

Case Study – *Regal Castings v Lightbody*[77]

In 1998 Mr & Mrs Lightbody transferred their home to a family trust. They and their solicitor were a trustees. At the time of the transfer Mr Lightbody owed a creditor a debt and had come to an arrangement to repay it over time. Shortly after the transfer Mr Lightbody could not keep up the repayments and he became bankrupt.

The Supreme Court reversed the High Court and Court of Appeal holding that the transfer was an alienation made with the intent to defeat creditors (s60 Property Law Act). The knowledge of one trustee was the knowledge of the others. The trustees were ordered to transfer Mr Lightbody's half share of the property to the Official Assignee. This was a personal liability of the trustees, including the solicitor/trustee.

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Trustee Companies

16.14 It may be good practice for the firm to hold trusteeships through a trust company vehicle. It assists in ring-fencing any liability associated with the trust. These companies can be specific to a particular trust, or for a number of trusts.

16.15 The question of whether the trustee company should hold more than one trusteeship, and if so how many, involves a weighing up the increased complexity associated with more than one trusteeship, the increased cost associated with managing a large number of separate companies and the implications should the company become insolvent because it incurred a liability through its role as a trustee.

16.16 While it may be administratively expensive, law firms ought to consider whether separate corporate vehicles ought to be set up for each trust. This avoids all trusts being affected by the collapse of one trust.

16.17 It is an important policy decision for the partners of the law firm to make. A possible way of managing this risk is to assess the particular trust on a case by case basis. If the trust is carrying on a trading activity it would be advisable to set up a specific corporate trust company for that trust, thereby ring-fencing any potential future liability.

Case Study *CIR v Newmarket Trustees*[78]

Newmarket Trustees was the trustee company for Castle Brown, a law firm operating in Auckland. It was the corporate trustee for 100 trusts, including a trust which incurred a debt to

[77] See *Regal Castings v Lightbody* [2009] NZLR 433.

[78] [2012] NZCA 351

the IRD for GST on property transactions of $293,000. The IRD applied for an order liquidating the trustee company. In the High Court the order of liquidation was refused on discretionary grounds - principally because the trustee company owned no assets in its own right and it would cause great inconvenience to the innocent clients whose trusts would be affected by Newmarket Trustee's liquidation. On appeal the Court of Appeal overturned the High Court and ordered liquidation. The discretionary factors did not outweigh the general principle that an insolvent company ought to be liquidated.

Recommendations

16.18 So there are a number of things to consider when you are appointed as trustee of a trust:

(a) Consider setting up a trustee company for this trust, especially where the trust is going to be carrying on an activity which may incur debts to third parties. But be aware that this may not protect you where you as director may have incurred a debt which you had no reasonable expectation of repaying. In addition to duties owed as a trustee, the directors will also have duties as directors to fulfil.

(b) Wherever possible ensure that any liabilities incurred by the trust are expressly limited to the assets of the trust. Most lending institutions are accustomed to allowing this provided there is adequate security.

(c) Do not allow your client (or anyone else for that matter) to take over the management of the trust without keeping you informed.

(d) Be very wary of accepting appointments as trustees for trading trusts. If you do, make sure that the trust is able to pay all its debts at all times, especially those to the IRD, since your professional indemnity policy may not cover such debts. The trusts debts will be your debts.

(e) Ensure that any bank accounts of the trust require the signatures of all trustees. If such a practice is not adopted the trustees might be held liable if the finds are mismanaged or improperly distributed, even where some trustees were unaware of this.

(f) Ensure that all trustees meet regularly (at least twice a year) to consider the investment position of the trust and to consider any proposed distributions.

(g) Ensure that minutes are kept of all decisions of the trustees; the minutes or resolutions are signed by all trustees and kept in a minute book.

(h) Ensure that each trustee properly considers whether a particular distribution should be made. Although the trust might by nature be discretionary the trustees must still go through the process of considering the various beneficiaries and articulating the reason for a distribution.

(i) Avoid making decisions purely at the behest of another person such as the settlor, a beneficiary or another trustee.

(j) Accept appointment only if the trust deed allows a professional person to bill for his or her time attending to trust matters.

(k) Be aware of the scope of the trustees' duties under the trust deed. The law places very strict duties upon trustees in relation to investment and management of trust funds.

(l) Insurance cover should be arranged which includes liability as a trustee, but be aware that professional indemnity policies may only cover the firm's liability for a breach of a trustee's duty, not all trustee's liabilities, and when

the appointment was accepted and conducted in the capacity as a lawyer. So there is an uninsured exposure which needs to be very carefully managed.

(m) Obtain cover for all trustee companies the firm operates and director's cover for the partners of the firm who are directors of those companies.

17 PARTNERS LEAVING/JOINING

17.1 The acquisition of another law firm or the addition of partners to the firm with the additional clients, skills and expertise that this brings can provide significant benefits to a law firm. But in terms of risk management, it is important not to overlook the risks that the firm exposes itself to, particularly if it focuses only on the desirable effects of expansion.

17.2 The benefits to be gained from expansion carry with them very real increased risks to the firm. An expanded client base can include high risk clients of which the firm is unaware. Expanded services can mean the firm provides services with which it, as a whole, is not familiar or experienced in. Increased staff levels can include staff that have poor professional standards or ethics or attitudes which differ from those of the firm and are undesirable to it. A focus only on billing performance can ignore professional standards or a history of complaints.

17.3 The departure of partners from a firm also brings with it risks of non-cooperation by that partner, the exit of valuable clients and the exposure of the firm to the ongoing risk of claims if the departure is not handled with care.

17.4 It is possible to substantially reduce the risks inherent in these types of changes by identifying the risks beforehand and implementing control measures to limit the firm's exposure.

17.5 When a partner retires, leaves or joins, you must notify your insurance broker. All of these instances could have an effect on your insurance policy and the coverage which applies for the firm and for the individual concerned. At the same time you should review the sum insured of your policy, to ensure that it complies with the minimum Law Society requirements.[79]

17.6 Regularly review, with the assistance of expert advice, whether the firm should incorporate.

18 PARTNERS JOINING/ACQUISITION

18.1 The level and formality of the steps to be undertaken will differ depending on whether the change to be dealt with is the acquisition of another firm, a substantial influx of new partners (and accompanying staff) or the joining of a single new partner. Some general guidelines are:

(a) Undertake an appropriate form of due diligence. Investigate:

- The potential partner's credentials, education, professional history including claims and productivity.

[79] When the firm elects option 2, the minimum requirements are currently $900,000 per partner and the excess no more than 1% of the sum insured.

- The quality of the work undertaken by the potential partner or firm. How good are the systems and procedures used? Is there evidence of an awareness of good practice management and implementation of systems to identify and minimise risk?

- Claims made or pending, how they arose, which clients are involved and the practices of the potential partner or firm involved.

- Types of clients, the nature of their business and financial stability. Identify high risk clients or engagements.

- Insurance cover. Review the terms of the cover in place for the potential partner or firm and review how the acquisition or joining of the partner or firm will impact on your firm's current cover. This needs to be carefully discussed with the firm's broker. When a firm is acquiring another firm most insurers will typically require that firm to convert the existing professional indemnity policy of the firm being acquired into "run-off". This is a way of ring-fencing the liabilities of the firm being acquired. It will involve the firm meeting on-going costs of cover, in addition to the cost of resolving any actual claims by payment of the excess.

(b) Consider how the arrangement is to work in practice, identify the risks involved, and implement an appropriate written agreement setting out:

- The terms of the acquisition or joining of the new partner.

- The form of the transaction.

- The consideration to be paid.

- Any pre-agreement representations made by either party to the agreement (eg. in respect of client base or productivity levels to be achieved).

- The way in which client files are to be transferred.

- Insurance cover to be provided dealing with the transition and any risks already incurred by each party which may not surface as a claim for some time and any indemnities to be provided.

- The way in which clients of firms are to be advised of the change.

- Exit provisions.

- Remuneration and equity entitlements.

(c) Do not adopt a 'sink or swim' approach once the firm is acquired or the new partner has joined. Make a continuing effort to integrate the new additions. Ensure they are aware of day-to-day firm procedures (especially those put in place to reduce risk).

19 PARTNERS/PROFESSIONAL STAFF LEAVING

19.1 The aim should be to make the transition as smooth as possible. Have a written agreement in place so that there are agreed and understood procedures to be followed in this situation. Some guidelines are:

(a) Ensure that client files are maintained in such a manner that they can be easily transferred to another fee earner upon the departure of the partner or staff solicitor.

(b) Ensure that client files are up to date prior to the departure. Do thorough reviews of every file that the departing lawyer handled to identify what work needs to be done to complete them. Diary any time limits you identify.

(c) Have an agreed procedure in place to deal with departing partners or staff taking clients with them, using firm information or removing material. Do not release client files without the consent in writing of the client, which should be retained and consider retaining a copy of any files released.

(d) Have an agreed procedure in place regarding the period of notice of resignation to be given and how the transition period is to be managed.

(e) Remember that an amicable and managed departure dealt with in accordance with agreed procedures reduces the risk of disputes between partners and former partners and claims against the firm by disgruntled clients.

(f) Remember to amend the partnership agreement, insurance cover (retaining cover for acts of partners while partners) and advise clients of the changes.

(g) Resolve issues regarding how and when departing partners are to pay their share of accounts received and payment of capital accounts.

(h) If there is to be a continuing relationship, in any form, record the terms of this in writing.

(i) Retain current contact details for the retiring partner or solicitor in case a claim arises relating to work handled by him/her and he/she may be needed as a witness.

20 TERMINATION

Closing/Archiving

20.1 At the conclusion of a retainer, the file needs to be billed and closed. Interim bills should have been issued through the life of the file unless there are practical reasons for doing otherwise.

20.2 On conclusion of a retainer complete a file review. Before any file is closed the fee earner or supervisor should review the file to ensure:

(a) Transactions are completed.

(b) Final advice has been given to the client together with advice that the file will now be closed and the retainer ceased.

(c) Original documents either sent to the client with receipt acknowledged, or filed in deeds.

(d) Review the file for any “problems” and take steps to resolve these.

(e) Bills sent and paid.

(f) Trust account checked to ensure any client monies received have been properly dealt with and accounted for.

(g) A final check is made to ensure all necessary client instructions have been completed.

(h) Review correspondence to ensure no outstanding issues including any dates where certain steps need to be taken in future, for example the renewal of a securities registration.

(i) Copy any useful documentation for precedent system.

20.3 It is useful to have a pre-prepared checklist to complete upon closing which is then filed on the file.

20.4 Ensure all the above matters are completed even where the file is to be uplifted by the client or transferred to another lawyer. In such circumstances ensure a complete copy of the file is retained.

Records, Storage and Retention

20.5 It may be necessary at some point to determine who owns what documents on a client's file. For example, where a client requests a file be uplifted, care must be taken to properly assess what documents should be delivered to the client.

20.6 The general rule is that:

(a) Documents which come into existence before the retainer commences and are sent/delivered to the lawyer by the client are owned by the client. The lawyer holds them as agent for the client and these documents should be handled as the client directs.

(b) Documents which come into existence during the currency of the retainer and for the purposes of the business transacted by the lawyer on the client's behalf fall into the following categories:

- Documents prepared by the lawyer for the benefit of the client and may have been said to have been paid for by the client. This would include letters and documents (both final and draft) written on the client's behalf to third parties or to the client itself, notes of telephone conversations with the client or third parties; pleadings filed on behalf of the client;

- Documents prepared by the lawyer for his/her own benefit or protection, and not regarded as an item chargeable to the client, are the lawyer's documents and do not belong to the client. Included in this category would be any inter-office memorandum and diary entries.[80]

20.7 There are many types of records that typically may not be considered part of a client file but which reflect or materially relate to the professional services rendered to clients such as rules or regulations which may subsequently have been amended. Although these materials are not usually included physically in the files maintained for clients, do not discard them prematurely - such records are relevant and discoverable in professional indemnity litigation. Items such as diaries and billing

[80] While some of the older texts refer to time sheets and books of account being owned by the lawyer, in practice most lawyers would provide copies of billing and trust account records to the client upon request.

records may prove useful to later confirm work performed or meetings attended, especially when the client may be promoting a different version of events.

20.8 Ensure that you maintain a complete copy of what your file was like during the contract of retainer. This will be crucial to establishing what happened if there is a claim. Adopt a policy of having a complete copy of a file where the client wants to uplift it as it may indicate that they are dissatisfied with your work.

20.9 Over time, economic considerations play a part in client file retention. Costs include: storage space, maintaining security for files, organising, indexing and cataloguing.

20.10 A firm's ability to best protect itself in a professional liability litigation begins long before litigation is even contemplated - it begins during the engagement itself. The premature destruction of client files may leave you defenceless against a claim for negligence.

20.11 It is recommended that client files be retained for a period of at least 15 years from the date of the closing of the client file. Remember that:

(a) Trust account records relating to a client must be retained for a period of at least six years from the date of the last transaction recorded.

(b) Evidence relied on in support of matters stated in the certification of an electronic instrument under section 30 of the Land Transfer Act 2017 must be retained by the certifier for 10 years after the date on which the instrument is lodged for registration or notation.

20.12 Once a decision is made to retain client documents for a period of time and when destruction will occur, it is important that this policy be recorded in writing and that the policy is consistently followed by all members of the firm. Inconsistent destruction of documents only enables aggrieved clients to suggest that the lawyer is hiding some misdeed. Ensure that storage systems allow for files to be easily identified and accessed should a claim arise. A record of the number, type and location of client files should be maintained.

20.13 Archived files need to be able to be accessed to ensure there is a proper filing system in place so files (complete) can easily be retrieved later.

21 CLIENT CONTRACT

Date

Name and Address

Warning: this engagement letter is in general form only. Its contents must be carefully considered and completed and/or amended to comply with your firms practices before it is adopted.

Dear

OUR TERMS OF ENGAGEMENT #

1. It was a pleasure meeting with you on [date].

2. Included in this letter are our terms of engagement and attached is a form headed Client Care and Service Information which sets out the rights you are entitled to whenever you receive legal services from a lawyer.

Our Service

3. You have engaged our firm to act for you in connection with [insert brief description of services to be performed and include here any limitations of retainer].

4. Our firm is committed to serving you professionally and ethically. We make the following undertakings to you:

   - We will hold strictly confidential all communications with you and all information that we receive from you during the course of our dealings. We will not reveal your confidences without your agreement.

   - We will pursue your work conscientiously. In turn we will need your full and timely co-operation to help represent you.

   - We will work with you to develop an understanding of your expectations. We will work together to establish goals and deadlines that meet your needs.

   - We will communicate with you and keep you informed about the status of your work. Your telephone calls will be returned promptly. We will send to you copies of significant correspondence and other documents.

Solicitors

5. [Name] a partner/associate/solicitor will have primary responsibility for your matter, but will utilise other solicitors and legal assistants in the office in the best exercise of their professional judgement.

Professional Fees

6. Generally our fees are based on the time taken to complete the work and any other relevant factors specified by the New Zealand Law Society.

7. Our firm's schedule of hourly rates for solicitors and other members of the professional staff are based on years of experience, specialisation and level of professional attainment. [Name's] present hour rate is $_____ (not including GST) and to the extent that other solicitors and legal assistants are involved, their present rates will vary from $_____ to $_____ an hour plus GST. Hourly rates are subject

to review at which time you will receive notice of the reviewed rates. There are no additional charges for secretarial, word processing and similar services.

8. The time spent by us on your behalf for which you will be charged will include:

- Personal and telephone attendances on you.
- Correspondence with you.
- Considering the law and facts of your matter.
- Reading and considering incoming letters, papers and documents.
- Preparing papers.
- Correspondence with solicitors and third parties.
- Instructing inquiry agents and experts.
- Attendances on your behalf.
- Time spent on travelling.

9. Apart from time, other factors that may be taken into account in setting our fee include the urgency with which the matter is required to be completed, the degree of specialised knowledge required, the degree of risk assumed by us in undertaking the services including the value of any property involved and the complexity of the matter.

Legal Aid (if applicable)

10. You may wish to apply for a grant of Legal Aid. If Legal Aid is granted the writer's hourly rate will be $_____ (GST inclusive). In the event that Legal Aid is not granted, you will be liable for our account charged at the private rates outlined above.

11. Please provide the following to complete your Legal Aid application:

(a) XXXXX

(b) XXXXX

Retainer (when applicable)

12. Before commencing work on your behalf, we require a retainer of $ _____. The retainer will be deposited in our trust account and used on account of fees and disbursements. Any unused portion of the retainer will be returned to you upon completion or termination of our services. Please provide this retainer to our office at your earliest convenience. Further retainers may be necessary as the matter progresses and the earlier retainer has been used.

Our Estimate of Costs

13. [Option 1}

Based upon the information we have now, we estimate that our fee will be approximately $_____ plus GST, together with disbursements of approximately $ _____.

Please note any estimate is given in good faith based upon the information we have received to date, and our previous experience in such matters. If we find an estimate

is likely to be exceeded, we will advise you with due expedition, and explain why, so that we can obtain your further instructions at that time.

[Option 2]

It is not possible at this stage to give you an accurate estimate of our likely fees. However, based on our experience with similar work of this nature, we estimate likely fees in the range of $_____ to $_____ plus GST and disbursements. Once the matter progresses it may be possible to provide a more accurate estimate.

Please note any estimate is given in good faith based upon the information we have received to date, and our previous experience in such matters. If we find an estimate is likely to be exceeded, we will advise you with due expedition, and explain why, so that we can obtain your further instructions at that time.

[Option 3}

At this stage it is not possible to provide an estimate of our likely fees. This is because we cannot be certain at this stage how much work will be required. However, we will bill you regularly so that you are informed of ongoing costs as this matter progresses.

Accounts

14. Our accounts are due for payment 14 days after the date of the account unless prior arrangements are made with us in writing.

15. You authorise us to deduct our fees, expenses or disbursements from any funds held in our trust account on your behalf where we have provided an invoice.

16. Interim fees will be rendered monthly and a final account forwarded promptly on completion of the instructions.

17. If any account is not paid within 30 days interest will be charged on the outstanding balance at the rate of * per annum from the date upon which payment was due. You will be responsible for any reasonable debt collection costs that we incur in recovering outstanding amounts due to us.

18. If your accounts remain outstanding after 60 days, no further work will be undertaken by any lawyer of the firm until appropriate arrangements are made to bring the account back into good standing.

Disbursements

19. Disbursements include expenses such as court filing fees, barristers fees, toll calls, faxes, photocopying, travel expenses, couriers and the fees of agents who serve documents and who conduct investigations, searches and registrations. You are responsible for reimbursing our firm for disbursements. Disbursements may be included with our accounts or may be billed separately. Firm policy requires us to obtain from you funds in advance for significant disbursements.

Settlement Monies

20. For property and financing transactions where payment of monies is due by you, we require clear funds for the correct amount to be deposited with us no later than the morning of the settlement.

Termination of Legal Services

21. At all times you have the right to terminate our services upon giving us reasonable written notice to that effect.

22. We may terminate the retainer if there is good cause such as you not providing us with instructions in a sufficiently timely manner or in your unwillingness, inability or failure to pay our fee on an agreed basis, or, except in litigation matters your adopting against our advice a course of action which we believe is highly imprudent and may be inconsistent with our fundamental obligations as lawyers. If we terminate the retainer, we will give you reasonable notice so that you can arrange alternative representation and we shall give you reasonable assistance to find another lawyer.

23. If our retainer is terminated, you must pay us all fees due up to the date of termination and all expenses incurred up to that date.

Privacy of Information

24. Over the course of your involvement with us, we may collect and hold personal information concerning you. Failure to provide us with information may preclude us from providing services to you or limit the quality of the services provided.

25. Information concerning you will be used by us to provide legal services, to obtain credit or other references, to undertake credit management and to inform you of issues and developments that may be of interest to you. You authorise us to obtain from any person, or release to any person, any information necessary for those purposes and you authorise any person to release information to us that we require for those purposes.

    Subject to the above we will treat all information we hold about you as private and confidential and will not disclose any information we hold on your behalf or about you unless we are required to do so by law or when requested by you or with your consent.

26. Information concerning you will be held at our office. Under the Privacy Act 2020 you have the right of access to, and correction of, your personal information held by us.

27. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 requires us to collect from you and retain information required to verify your identity.

Communications

28. If you have a preferred method of our firm communicating with you, please let us know.

29. We do not accept any liability for loss arising from non-receipt of any communication, including computer email communications.

Limitation of Liability

30. [Refer to the discussion in Risk Manual as to the circumstances in which, and the terms of, any limitation of liability clause. An example of the kind of wording is:

    "To the extent permitted by law, [our][81] total liability to [you][82] in connection with any matter (or series of related matters) on which you engage us shall not exceed the sum of [……] (**the liability cap**) (including interest, costs, and all losses whatsoever). The liability cap will apply to liability of whatever kind howsoever arising, whether in contract, in tort (including negligence), statutory, in equity or otherwise. If we provide any services to any persons or entities related to or

[81] Insert whatever word you are using to describe your firm.

[82] Insert whatever word you are using to describe the client.

associated with you or to anyone else as your request (whether or not we also advise you) on a matter or series of related matters then our aggregate liability to you and all those persons and entities in respect of that matter (or series of related matters) will be subject to the liability cap. You will ensure that those persons or entities agree to this. The liability cap will accrue to the benefit of any partner, employee, or agent of [ours] who may have acted in connection with the matter, so that in no instance shall such person be liable for more than the liability cap."]

Files and Documents

31. At the end of your matter we will keep your file for a period of 10 years from completion and thereafter we will destroy it. You are welcome to uplift your file provided that all fees and costs have been paid. Please give us reasonable notice before collecting your file should you wish to do so.

The Lawyers' Fidelity Fund (the Fund)

32. The Fund exists to provide compensation of up to $100,000.00 per claimant for clients who suffer a pecuniary loss in certain circumstances. These circumstances are the theft by a lawyer of money or other valuable property entrusted to that lawyer while they are providing legal services to the public or while they are acting as a solicitor-trustee.

33. It should be noted though that the Fund will not pay compensation in respect of moneys instructed to be invested unless they are funds invested in a bank in New Zealand, or in some private loans such as family loans.

34. As your money has been paid to us with instructions to invest, it will not be subject to compensation from the Fund [**if appropriate**].

35. This is only a short summary of the major provisions in the Lawyers and Conveyancers Act 2006 relating to the Fund. If you would like further information, please ask us.

36. **Professional Indemnity Insurance (*please ensure you select one of the 3 options only and delete the provisions in italics)***

- Particulars of our professional indemnity insurance are as follows:

  Provision: These particulars will include name of insurer, indemnity limit, whether the indemnity limit applies to each claim, and the excess payable.

OR

- We hold current Professional Indemnity Insurance which meets/exceeds the minimum standards from time to time specified by the New Zealand Law Society for the purpose of limited disclosure.

  Provision: Minimum requirements of NZLS (2008) are as follows:

  a) The indemnity limit is the greater of $1.2 million per practice or $0.9 million for each partner (or in the case of an incorporated law firm, for each lawyer shareholder) within the practice.

  b) The indemnity limit applies either:
  i. on an aggregated basis to claims made in the policy period with not less than one automatic reinstatement, or
  ii. on any one claim basis with no aggregate limit.

  c) The excess payable does not exceed 1% of the indemnity fund.

OR

- We do not hold a Professional Indemnity insurance Policy cover.

If you have a Complaint

37. We will provide you with competent and timely service following your instructions, but if you have any complaint at all about our service please raise it with the partner responsible for your matter, or if you prefer, any other partner in our firm.

38. If it cannot be resolved immediately to your satisfaction we shall appoint a partner who has not been involved in your matter to deal with it promptly and fairly.

39. If you are not satisfied with the outcome, you have the right to take the matter up with the New Zealand Law Society which runs a complaints service. The New Zealand Law Society may be contacted by writing to PO Box 5041, Lambton Quay, Wellington 6145.

Agreement

40. If we do not hear to the contrary, we will assume that you agree with all of the above terms and will proceed accordingly. If you conclude that you do not want our firm to act on your behalf, please inform us promptly.

41. Please contact us if you have any questions or concerns relating to any matters outlined in this letter. We value our relationship with you and encourage you to talk to us about any queries you may have.

42. We look forward to working with you and shall use our best efforts on your behalf.

Yours sincerely

22 LIMITATION PERIODS

THIS IS INTENDED AS A GENERAL GUIDE ONLY.

The Limitation Acts 1950 and 2010

From 1 January 2011, the Limitation Act 2010 and the Limitation Act 1950 will apply to civil claims depending on when the act or omission took place on which the proceeding is based. If the act or omission occurred before 1 January 2011 the Limitation Act 1950 applies (with certain modifications, including the 15-year long stop). If afterwards, then the new regime will apply.

Limitation Act 2010

The 2010 Act retains a primary limitation period of six years in relation to **money claims** (which covers most claims in contract, tort and for breach of trust) but provides for this period to be extended where the claimant does not have knowledge of certain things.

The Primary Period

"Money Claim" is defined at s12 of the Act and includes all relief at common law, equity, or under an enactment.

In summary, the following limitation periods apply:

- An action for relief at common law, in equity, or under an enactment: **six years**
- An action for money secured by mortgage: **six years**
- An action for arrears of, or for damages in respect of areas of, interest in respect of a judgment debt: **six years**
- An action for personal injury (where not excluded by Accident Compensation legislation): **six years**

The twelve year limitation period which applied under the 1950 Act for deeds has been removed in relation to most of those cases. Deeds are now treated as contracts and are subject to the six year limitation period.

A change of fundamental character in the 2010 Act is that the time at which the limitation period commences in relation to money claims is the date of the act of omission on which the claim is based. This is referred to as the "start date".

Date of act or omission on which the claim is based

There is no general definition of the words "*date of the act or omission on which the claim is based".*

For claims in negligence and nuisance, time will run from the date of the defendant's act or omission and not from the date the damage occurs as with the accrual regime under the 1950 Act.

Section 16 sets out special start dates for various money claims for which the definition in s12 (money claims) is not appropriate. Similarly, s38 contains special start dates for certain claims under Part 3 (non-money claims).

Defamation claims had their own regime under the Defamation Act 1992 which provided for a two year limitation period, with the Court having the power to extend that period by up to six

years. Defamation claims have now been brought into the 2010 Act with a two year limitation period and a knowledge period of two years.

Late Knowledge Limitation Period

The 2010 Act does not provide a reasonable discoverability rule of general application. Instead, the 2010 Act provides for an extension of the limitation period by a "late knowledge limitation period" of **3 years** which begins on the date that such knowledge is gained or ought reasonably have been gained, but subject to the requirement that no claim may be brought **15 years** after the date of the act or omission on which the claim is based (the longstop period: s 11(3) and s 11(4) and subject to certain exceptions). So, the late knowledge limitation period can arise at any point after the expiration of the primary period, but before the 15 year longstop period.

What does the late knowledge date mean?

Under s 14, a claimant's late knowledge date is the date on which the claimant gained knowledge or ought reasonably to have gained knowledge of the following facts:

- The fact that the act or omission on which the claim is based had occurred;
- The fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved the defendant;
- If the defendant's liability or alleged liability is dependent on the claimant suffering loss, the fact that the claimant has suffered damage or loss;
- If the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission;
- If the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was included by fraud, or by a mistaken belief.

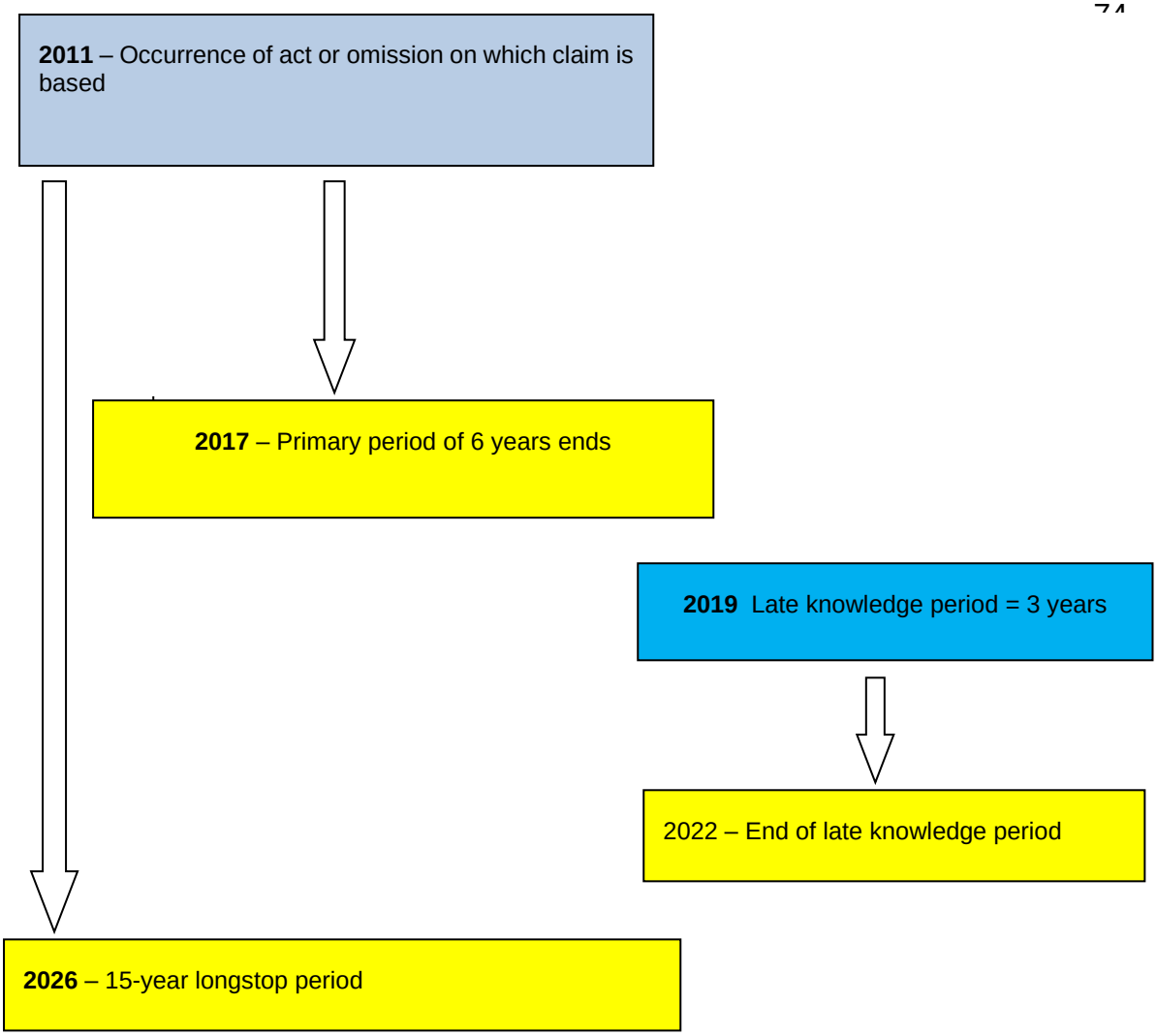
A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the claimant neither knew, nor ought reasonably to have known, all of the facts listed in s 14.

Exceptions to the general rules in ss 11 to 14 apply in cases of abuse, sexual abuse, minority, incapacitation, acknowledgement or part payment and fraud. Specific limitation definitions apply in relation to a range of claims prescribed in Part 3 of the Act.

The longstop period

If a claimant has "late knowledge" of a claim, instead of the primary period applying, a claimant *must* file the claim within three years of the "late knowledge date" (the late knowledge period) but subject to the requirement that no claim may be brought 15 years after the date of the act or omission on which the claim is based ("the longstop period") s 11(2) and (3).

The interrelationship between the primary period, the late knowledge period, and the longstop can be graphically represented as follows (assuming a start date of 2011, and late knowledge date of 2018):



Ancillary Claims

As with the 1950 Act there are exceptions for claims joining additional and substituted parties, set-offs and counterclaims. These are now called “ancillary claims”. The 2010 Act changes the way that these circumstances are dealt with. The provisions now grant the Court discretion to allow relief for an ancillary claim when allowing relief for an original claim. The claimant must, however, apply before a decision has been made that the ancillary claim is being made out of time.

Claims for contribution

Claims for contribution from another joint tortfeasor or joint obligor are dealt with by s 34. This section clarifies the position with respect to these claims by providing for the limitation defence to apply two years from the date the liability of the joint tortfeasor or joint obligor is quantified by an agreement, award or judgment.

Limitation Act 1950

This statute will continue to apply to actions which are based on acts or omissions prior to 1 January 2011.

Action for account: 6 yrs

Action on breach of trust: 6 yrs (NB s21(1))

Action on judgment: 12 yrs

Arrears of interest on judgment debt: 6 yrs

Arrears of mortgage interest: 6 yrs

Arrears of rent: 6 yrs

Bodily injury: 2 yrs

Bodily injury with consent of intended defendant/leave of the Court: 6 yrs

Contract: 6 yrs

Deed: 12 yrs

Defamation: 2 yrs

Defamation with leave from the Court: 6 yrs

Enforcement of award: 6 yrs

Recovery of land by any person other than Crown: 6 or 12 yrs

Recovery of mortgage principal: 12 yrs

Building Act 2004

Building work: 10 yrs

Contracts and Commercial Law Act 2017 (Replaced Carriage of Goods Act 1979)

Action for loss of goods (except in case of fraud by carrier): 1 yr

Action for damage/partial loss of goods (except in case of fraud by carrier): 1yr

Companies Act 1993

Compliance with Statutory Demand: 15 working days

Application to set aside Statutory Demand (and service of Application): 10 working days

Set aside voidable transaction: 20th working day

Notice requiring secured creditor to elect his/her/its rights under s305(1): 20 working days

Consumer Guarantees Act 1993

Governed by Limitation Acts

Fair Trading Act 1986

Contravention of Parts 2,3 & 4 of the Act: 3 yrs

Family Protection Act 1955

Application in respect of estate by party claiming a benefit: 1 yr

Application in respect of estate by administrator, on behalf of a party not of full age or mental capacity, claiming a benefit: 2 yrs

Insolvency Act 1967

Service of Bankruptcy Notice: 1 month

Compliance with Bankruptcy Notice: 14 working days

Creditors Petition: 3 months

Maritime Transport Act 1994

Claim or lien against a ship/owners of ship: 2 yrs

Action to recover contribution in respect of overpaid proportion of damages for loss of life/personal injury: 1 yr

Offence against Act: 6 months (NB s411(2))

Property Relationships Act 1976

De facto partners claim: 3 years after separation

Married couples' application: 12 months after dissolution

(Be aware of special time provisions where one spouse is deceased see e.g. section 90)

23 INTERNET POLICY

1 DEFINITIONS

In this Policy:

Access means to view or go to, whether directly or through links or other connections.

Confidential Information means data containing personal or confidential information, commercial-in-confidence information or other information which would usually be regarded as sensitive information which must not be disclosed publicly.

Employee means an employee of the Firm and, at the discretion of the Firm, may be extended to include Principals.

Firm means ……of…… New Zealand.

Internet means that digital network commonly known as the Internet that may be accessed through the world wide web.

Principal means a principal of the Firm.

2 INTERNET FACILITIES

2.1 The Internet Facilities (**Internet Facilities**) of the Firm include:

(a) the Firm's Internet and proxy servers and firewall equipment and each computer operated by the Firm; and

(b) the Firm's relevant software, including any software licensed by the Firm.

3 GENERAL RULES

3.1 This Internet Policy will take effect from and forms part of each Employee's conditions of employment.

3.2 The Firm's Internet Facilities are provided to support the provision of legal services by the Firm and to assist in all related administrative work.

3.3 No person will use the Firm's Internet Facilities for private or personal purposes, including commercial, political or religious purposes. Notwithstanding this, the Firm may from time to time elect to allow moderate use of Internet Facilities for an Employee's personal purposes. However, in such case:

(a) any personal use shall be carried out in the Employee's personal time;

(b) any such consent is not a general waiver of the prohibition in this clause 3 and the consent may be withdrawn at any time at the absolute discretion of the Firm; and

(c) the use must not interfere with duties owed by the Employee to the Firm or third parties, or otherwise breach this Policy.

3.4 No person will provide or allow access to the Firm's Internet Facilities to a third party.

3.5 An Employee must:

(a) use the Internet Facilities in a professional and reasonable manner;

(b) show restraint in the consumption of resources;

(c) observe professional integrity;

(d) observe the law relating to defamation, intellectual property and the ownership of data and software; and

(e) respect and observe the law relating to other Employees':

- privacy; and
- freedom from intimidation, harassment and annoyance.

4 SECURITY AND PRIVACY

4.1 The Firm does not accept responsibility to Employees for the privacy, confidentiality or security of data or information held on or transmitted over the Firm's Internet Facilities.

4.2 The Firm does not accept responsibility to Employees for loss, corruption, misdirection or delays in transmission of data over the Firm's Internet Facilities.

4.3 An Employee must:

(a) protect his or her data from unauthorised access; and

(b) if required by the Firm, maintain passwords to access the Internet Facilities.

4.4 An Employee is responsible where applicable and reasonable for compliance with relevant legislative requirements including (without limitation) the Copyright Act 1994, the Human Rights Act 1993 and the Privacy Act 2020.

4.5 Employees are made aware of and acknowledge that:

(a) the Firm monitors the Internet Facilities (for example, number called or web site accessed; call length and search content) to provide cost analysis and to manage the Firm's and personnel access to the Internet;

(b) the Firm reserves the right, in its absolute discretion, to monitor and review an Employee's use of the Internet Facilities to the extent necessary to ensure that Internet Facilities are being used in compliance with the law and with the Finn's policies;

(c) the Firm may, and reserves the right, in its absolute discretion, to maintain and to publish within the Firm (including to Principals and/or Employees) records of an Employee's use of the Internet Facilities. Employees acknowledge that no such maintaining or publication shall constitute a breach by the Firm of the Privacy Act 2020 or of the general laws relating to privacy and employment; and

(d) an Employee's electronic communications are not private and confidential in respect to the Firm.

5 PASSWORDS

5.1 If required by the Firm, each Employee must maintain a password to access the Internet Facilities.

5.2 An Employee's password must be of a format and style directed by the Firm.

5.3 An Employee must not reveal his or her password to any other person other than the IT manager or IT partner.

5.4 Passwords remain the Confidential Information of the Firm.

6 CONFIDENTIAL INFORMATION

6.1 All information stored on the Firm's Internet Facilities is the Firm's Confidential Information.

6.2 Employees must use security measures within the normal scope of control of an Employee. Unless otherwise specified by the Firm, an Employee must (without limitation):

(a) (to the extent possible) protect the privacy and integrity of computer desktops;

(b) ensure their user account (if any) is not left open or unlocked;

(c) not consign Confidential Information to any network other than the Firm's (by email or otherwise); and

(d) not disclose Confidential Information to any person except in the proper and authorised conduct of the Firm's business.

6.3 An Employee must not allow data to be used for a purpose other than that for which it was collected.

7 EMPLOYEE RESPONSIBILITIES (General)

7.1 An Employee is responsible for:

(a) all information sent from, requested, retrieved or viewed using his or her account or his or her computer (unless in the latter case the Employee can show that another person was responsible); and

(b) publicly accessible information placed on a computer using their account.

7.2 An Employee will:

(a) only use an account personally;

(b) adopt the home page (if any) specified by the Firm;

(c) only use Internet Facilities for the purpose for which they are allocated;

(d) keep access codes or passwords (if any) associated with his or her account confidential;

(e) prevent the use of an account by any other person; and

(f) notify the IT manager or the IT partner or the HR manager or the managing partner immediately the Employee becomes aware of any apparent malfunction in the Internet Facilities, whether in respect of a virus or otherwise.

7.3 An Employee must not:

(a) permit the use of a Firm account by any other person;

(b) use any other Employee's computer for Internet purposes without that Employee's express consent on each occasion;

(c) harass, annoy or defame another person using Internet Facilities;

(d) copy software or data without the permission of the copyright owner (by way of licence or otherwise);

(e) waste consumable resources, damage resources or behave in a manner which inconveniences other Employees of the Internet Facilities;

(f) erase Internet records;

(g) attempt to circumvent system security, network security or any protection or resource restrictions placed on an account or on the Internet Facilities generally; or

(h) attempt to create or install any form of malicious software (for example worms or viruses) which may affect computing or network equipment, software or data.

8 SPECIFIC RESPONSIBILITIES

8.1 Without limiting the general responsibilities covered elsewhere in this Policy, an Employee must not:

(a) access, distribute or publish pornographic or sexually explicit or otherwise offensive material;

(b) access chat rooms, chat sites, bulletin board sites or similar;

(c) access games rooms or sites;

(d) engage in conferencing via the Internet other than strictly for business purposes; or

(e) attempt to download any executable or programme files. For sake of clarity, this includes, by way of example only, screensavers.

9 BREACH OF THIS POLICY

9.1 An Employee in breach of this Policy may be:

(a) disciplined by the Firm in accordance with the Firm's procedures, the Employee's contract of employment (if any) and the law;

(b) suspended (either temporarily or permanently) from access to any of the Firm's Internet Facilities; and/or

(c) reported to the appropriate external authority.

10 CHANGES TO POLICY

10.1 The Firm reserves the right to vary, add to and/or remove from this Policy from time to time at its discretion.

24 EMAIL POLICY

I INTRODUCTION

1.1 The Firm's external email network enables all of the Firm's personnel to communicate via email and with the outside world. This accessibility raises many security and privacy issues and hence the need to document the Firm's policy.

1.2 The purpose of this policy is to ensure that the integrity of our PC LAN network is preserved and to provide rules of appropriate conduct of users.

2 SCOPE OF POLICY

2.1 While the need for this Policy has arisen as a result of the provision of external email the terms of the Policy shall apply also to internal email communications where appropriate.

3 THE POLICY

3.1 All email is the property of the Firm. Users are strictly prohibited from sending email messages (with or without attachments) of a harassing, intimidating, offensive or discriminatory nature.

3.2 Users must exercise good judgment and common-sense when creating and distributing email messages. In no event shall users distribute personal email received from outside the firm to anyone within the Firm.

3.3 The Firm acknowledges that on occasions email may be used for personal use but reserves the right to limit such personal use.

3.4 The Firm retains the right to access users' email at any time for any reason without notice to the user. Following the introduction of this Policy, all users shall immediately inform the Firm's IT Manager of their password for the email system and all users shall from time to time inform the IT Manager of any changes to such password. Users should not expect that email is confidential or private.

3.5 Users must understand and accept the binding nature of email and the harm which could be caused to the Firm by incorrect or indiscriminate use of email messages.

3.6 Users must not let the use of email exceed the authority otherwise given to them by the Firm. For example, users who do not customarily provide advice on the Firm's behalf by way of letterhead communication must not provide advice by way of email communication. As a further example, only users who are authorised by the Firm to form or vary contracts on behalf of the Firm by way of letterhead may do so by email.

3.7 All outward and inward communications on behalf of or concerning clients must be printed (not necessarily including attachments) and the hard copy placed on the client's file.

3.8 Email must not in any circumstances be opened unless the user knows and is able to identify the sender of the mail. hi any case of receipt of mail from an unknown source the IT Manager is to be contacted immediately.

3.9 Executable (programme) files must not in any circumstances be received by email. Accordingly, users must not open any attachments other than files in respect of which the name ends in the suffixes ".doc" or ".xls".

3.10 All users are subject to the control and direction of the Firm's IT Manager.

4 USERS' OBLIGATIONS (General)

4.1 All personnel have an obligation to comply with this Policy to ensure that the integrity and security of the Firm's computer system is preserved. Contravention of all or part of this Policy will be regarded as a breach of that obligation and may constitute a serious breach of that person's employment obligations.

5 USERS' OBLIGATIONS IN RESPECT OF PROGRAMME ERRORS/VIRUSES ETC

5.1 Recognising that no anti-virus software is 100% effective, it is the obligation of each and every user to be vigilant and to report immediately to the IT Manager any unusual occurrence in the operation of the email programme (or in the user's PC after any such unusual occurrence). If in any doubt, the IT Manager must be consulted, and the email not opened.

6 CONTACTPERSONS

6.1 In the absence of the IT manager personnel are to contact the _____

_____, the _____ or the HR Manager in the event of any problem or difficulty.

7 CHANGES TO POLICY

7.1 The Firm reserves the right to alter this Policy at any time and to notify personnel accordingly.

25 CHECK LIST - SALE OF DOMESTIC PROPERTY

Vendor Name (s):

Postal Address:

Contact Details: Work; Home; Fax; Mob; E-mail.

Purchaser Name(s):

Purchaser's Solicitor:

Solicitor's Contact Details: Work; Home; Fax; Mob; E-mail.

Solicitor's Address:

Property Address: Legal Description.

Condition Dates:

Finance: Due; Confirmed; Settlement Date - Purchase Price.

Valuation: Due; Confirmed; Settlement Date - Deposit Amount.

LIM: Due; Confirmed; Paid to; When: Settlement Date - Balance Outstanding.

Requisitions: Due; Confirmed; Settlement Date - Agent's Commission; Date Released.

Other: Due; Confirmed; Issues?

Other issues?

Check List	Due Date	Author	Issues?	Finalised/Resolved
Title Search				
Letter/Fax/E-mail to client confirming terms of appointment				
Letter/Fax/E-mail to purchaser's lawyers				
Confirmation that agreement unconditional				
Deposit details				
Letter to client confirming above and fee & expenses				
Notice sent to Mortgagee requesting discharge and statement				
Council Rates Checked				
Regional Council Rates Checked [if applicable]				
Final Water Meter Reading arranged				
s36 Certificate				
Settlement statement and release prepared				
Settlement requirements requested				

Balance deposit received Commission statement verified				
Transfer received and signed Discharge documents received				
Settlement				
Report to Client				
Prepare Statement				
Notices of Sale Sent				
General Council Rates Paid				
Regional Council Rates Paid (If applicable)				
Water Rates Paid				
Mortgagee Repair				
Final Letter to Client. Net Proceeds paid to Client by Direct Credit/Cheque				

26 CHECK LIST - PURCHASE OF DOMESTIC PROPERTY

Client Name:

Postal Address:

Contact Details: Work: Home: Fax: Mob: E-mail:

Property Address: Legal Description.

Condition Dates:

Finance: Due; Confirmed; Settlement Date - Purchase Price.

Valuation: Due; Confirmed; Settlement Date - Deposit Amount

LIM: Due; Confirmed; Settlement Date - Paid to; When; Balance Outstanding; Resolved.

Requisitions: Due; Confirmed; Settlement Date - Agent's Commission; Released.

Sale of Property: Due; Confirmed.

Other Issues?

Check List	**Due Date**	**Author**	**Issues?**	**Finalised/Resolved**
Title Search [if vendor company obtained by company search]				
Letter/Fax/E-mail to client confirming terms of appointment				
LIM Requested				
Letter/Fax/E-mail to Vendor's Solicitors				
Report to Client				
Requisitions?				
Confirm Agreement as unconditional with: (a) Vendor's Solicitors (b) Client (c) Agent				
Confirm Fee & Disbursements by letter / fax /e-mail to Client				
Settlement letter / fax /e-mail to Solicitor				
Mortgage documents received and prepared				
Mortgage documents signed by Client				
Forward Solicitor's Certificate to Lender				
Settlement Statement received and checked				
Forward Settlement Statement to Client				

Cash Contribution Received				
Bank Cheque Ordered				
Report to Client				
Documents Registered				
Documents to Mortgagee/Deeds				
Fees/disbursements paid?				
Final letter to Client with Copy Title				

27 RISK MANAGEMENT CHECKPOINTS

Engagement Set Up – Client, Risk Factors & Selection of Services

27.1 Know your client

(a) Is the party or entity to whom duties will be owed crystal clear? Have the client's identity, capacity and authority to instruct been adequately verified and any doubts resolved?

Checklist

- Does this transaction involve more than one client? (eg include as separate clients any guarantors, any persons buying or selling a property together, company and its directors, mortgagee and mortgagor).
- If yes, what is the nature of **each** client's interests?
- Are the interests of all clients identical?
    - Refer to the detailed guidance set out in the NZ Law Risk Manual [4.10 – 4.28].
    - Refer to the Risk Factors Section of this Checklist.
- Will accepting this instruction create a conflict with an existing or previous client?
    - Refer to the NZ Law Risk Manual [4.17 – 4.28].
    - If yes, refer to Risk Factors Section
- Does the proposed client have full mental capacity to give me instructions? (age, ill health, mental issues, duress)? If not, refer to Risk Factors Section
- Does the client's identity need special verification under the Anti-Money Laundering and Countering Financing of Terrorism Act? If yes, refer to NZ Law Risk Manual [8].
- Does this transaction require an intermediary? Am I happy that I know enough about **who** my client is?

27.2 Consider special risk factors

(a) Is there a need for extra care to address any special client/matter risk factors? Is this a client who I ought to decline to accept in light of the risk factors? What precautions or steps should I take in light of the risk factors?

Checklist

<u>Conflicts</u>

- Where there is more than one client whose interests are not identical:
    - Can I discharge my duty to all clients?

- Identify what duty I have to each client;
- What steps or advice will I need to give to each client in order to discharge the separate duty that I owe to each?
- Does discharging my duty to each client require that I breach an obligation that I owe to one of the other clients (eg by giving to one client confidential information about the other)?
- Will I have to provide advice or warnings to one which I will not or cannot provide to another?
- Might there be issues which arise in this transaction where I will have to prefer the interest of one client over another?

Examples

- The interest of vendor and purchaser. **Never** act for both, as their interests are not aligned.
- Acting for a principal debtor and the guarantor. In order to discharge my duty to the guarantor will I have to disclose to him/her/it confidential information of the client whose debts he/she/it is guaranteeing? Is this advice against the interests of the principal debtor who needs/wants the guarantee?
- Where de facto partners have agreed to buy a property together but are making unequal contributions, in order to protect the interests of the de facto partner making the greater contribution am I going to have to recommend a relationship property agreement, which is advice against the interests of the spouse making the smaller contribution?
- Where a husband and wife are buying a business on security of the family home, what advice should I give to the spouse who is not primarily involved in the business to ensure that her/his interests in the home are protected? Is this protection in the interests of the other spouse? Will it endanger the business acquisition/funding?

- Note consider Rule 6.1 of the Rules. Where I cannot discharge the obligation to all clients then prior informed consent will not excuse me. But where I can discharge my duty to both clients then (and only then) have I obtained in writing from all clients:
    - Written acknowledgement of the existence and the nature of the conflict?
    - Their consent to me acting?
- Where I cannot discharge my duty then:
    - Have I referred one or more clients to another solicitor for independent advice?
    - Have I considered which client (ethically speaking) ought to be referred to another solicitor?

Refer NZ Law Risk Manual [4.10 – 4.28]

Urgency and Critical Dates

- Does this file require action urgently?
- Am I confident that I can deliver on the action required to a high standard?

Complexity

- Does this file require additional expertise or resources?
- Do I have such expertise or resources or does my duty to the client require that I refer the client onto a person who has this expertise or resources.

Barriers to Understanding the Client

- Are there any barriers that may prevent me from understanding who my client is, and what he/she/it wants?

  Examples

  - The existence of an intermediary;
  - Language difficulties;
  - Mental issues or ill health; or
  - Illness or infirmity.

Refer NZ Law Risk Manual 1.38 – 1.39

Due Diligence on the Client

- How did this client come to instruct me?
- Did the client instruct a previous firm and why did the client and the firm fall out?
- Am I sure that I be paid? Should I require payment in advance?
- Does the client want me to handle a transaction that 'smells' ethically and/or legally?
- Will handling this transaction potentially damage my reputation for fair dealing and professionalism?

Refer NZ Law Risk Manual [1.38 to 1.39]

Client's Expectations

- What is this client's expectations? Are they unrealistic?
- Is this client vulnerable (financially or emotionally) so that there is a high risk of misunderstanding or disappointment?

Lack of Objectivity

- Do I have a personal relationship with this client or any member of the client's family that may impair my ability to give robust and objective advice?

- Does this transaction require that I accept an appointment or give undertakings/certifications which involve a high risk of liability?

  Examples

  - Acting as a trustee (particularly for a trust which will have any dealings with IRD or creditors);
  - Acting as a director;
  - Providing certification or undertakings to third parties.
  - Complex GST or other taxation transactions.

Refer NZ Law Risk Manual, sections 4, 10, 11 to 16

Prepare a risk minimisation plan ie what steps am I going to take to minimise the risk?

Consider the following:

27.3 Sending a good letter of engagement before starting work

(a) Is the basis of engagement (retainer or services contract) clear, confirmed and documented before the services are performed?

Checklist

- Is there a letter of engagement, exchange of emails, costs agreement or other strong written evidence of a shared understanding between my client and me of the client's objectives?
- Does this engagement correspondence comply with the Rules?
- Does this correspondence include:
  - A concise description of who the client is and what are the client's instructions?
  - A concise description of what I am **not** agreeing to do for the client? (example – not advising on the wisdom of a particular transaction, value of the business, whether the property being acquired is worth the price being paid or is a leaky building)
  - All service terms including any fixed, capped or deferred fees, any payment of money as security for fees in advance?

Refer NZ Law Risk Manual [1.12 – 1.19]

Engagement Performance – Progress, Quality Assurance and Record Keeping

27.4 Keep the client informed and seek instructions

(a) Is the client kept updated, not in the dark, about progress of their matter? Are instructions sought appropriately? Are all material instructions or advice given to

the client and all material interactions with third parties involved in the file (eg lawyer on the other side) contemporaneously and accurately recorded on the file?

Note: the majority of claims and complaints could have been prevented by better communication. Clients do not object to being given the opportunity to make their own decisions but they do object to failure to seek instructions.

Checklist

- How often have I reported to the client? Is it often enough so that the client can be satisfied that he/she/it is fully informed?

- Is everything that has happened on the file properly recorded (i.e. if I were to drop dead tomorrow would someone be able to pick up the file and take over?)

27.5 Meet deadlines

(a) A reliable reminder system depends on critical dates being properly identified, calculated and logged in the first place). Is there a good back up or reminder system to prevent critical dates being missed?

Checklist

- At the beginning of the file, have I identified all relevant time limits and put them into my diary? Have I ensured that there are multiple reminders for this event?

- Have I empowered someone else to have 'nagging rights' or dual responsibility? Is there a diary reminder in this person's diary as well, so that there's a check-up on me?

Refer NZ Law Risk Manual, section 4

27.6 Properly supervise and check work

Is quality assurance adequate to ensure work is performed to acceptable standards?

Checklist

- Who has supervisory responsibility for proactively monitoring progress and approving certain decisions/work product?

- Am I the supervisor or the one being supervised?

- Is this file one which is suited to a team approach, so that there are checks and balances to ensure the work is of a high standard?

- Is there a plan for how and when the party with the supervisory rights will be exercised?

- How likely is it that the supervisor will be available for consultation?

- Has everyone working on the file or responsible for the file agreed a workable plan, diarised it and are we keeping to it?

- What work products (eg letters or advice) should be checked before they go out?

- What tools and resources are available to ensure the quality of the work product e.g., precedents, checklists, workflow tools or expertise of colleagues?

Refer NZ Law Risk Manual section 4

27.7 Periodically review engagement performance

(a) Is the matter on track, on time and on budget? If not, have any variations to the engagement (retainer or service contract) been mutually agreed with the client?

Checklist

- Has something happened which has changed the original terms of engagement or do they still hold good?
- Have the client's instructions changed?
- Is the scope of the services different?
- Reconsider the risk facts (see above)
    - Has the file now become urgent?
    - Does the file now require additional services or expertise?
    - Has a conflict of interest arisen?
    - Am I still confident about the client, or am I less sure that the client is one for whom I wish to continue to act?
- Reconsider the cost of the file and whether the previous assumptions as to cost remain valid.

27.8 Confront problems early and troubleshoot effectively

(a) Are there 'problems' in the matter that need timely remedial action or assistance to resolve?

Checklist

- Has something gone wrong on this file – eg delay, a mistake, cost blow out?
- Are there risk factors emerging, such as conflict of interest, unrealistic client expectations?
- Has the client starting to give 'bad' signals?
    - Failing to pay the bills or challenging the fee;
    - Failing to give proper instructions;
    - Failing to return phone calls or reply to emails.
- Has the client started to express dissatisfaction in the advice or work you are doing? Are there 'niggles' which cannot be resolved?
- How should I handle the client dissatisfaction:
    - Is there something I should do to try to remedy the situation with the client (eg speak to the client in the presence of a partner or senior solicitor).

- Should I consult with trusted colleagues (either within or outside the firm) and seek advice on what to do?
- If the relationship has soured should the client be offered alternative representation within the firm (ie the file passed to someone else).
- Should I consult my insurance broker to see if this problem is sufficiently serious that it ought to be notified to my insurer?

- Should some amount of the fee be written off, even if I don't think I've done anything wrong, just so that the relationship can be preserved with the client? If so, how should I express this so that I don't admit any wrongdoing?
- Should the contract of retainer be terminated?
  - How should I go about this, in a way which will best ensure goodwill is maintained, not make any admissions and best avoid any further legal action?

Refer NZ Law Risk Manual section 3 and 5.

27.9 Keep good records

Checklist

- Is the file a model of good records management? Remember the client owns much of the file so make sure that you do not create documents (eg emails) which will embarrass you for the client to see.
- Is there a good "useable trail" relating to the engagement, work performed and communications?
- Is the state of the file such that you have met all your obligations to the client and can justify the costs you have billed?
- Is the state of the file such that you can properly defend a complaint or claim?
- If there is a complaint or litigation, you may be forced to give up all documents which were created on the file/transaction. So, adopt the **objective by-stander** perspective – how will this file look is viewed by an objective by-stander? Will I be embarrassed by anything on it, or by the absence of crucial things from it?

Engagement Completion

27.10 Send a final letter and bill promptly

Checklist

- Is there a good completion letter sent with the final bill that gets the firm 'off risk' by, for example, confirming the matter is completed or the services fully performed?
- Have you communicated to the client any critical advice, deadlines or 'loose ends' that are now the client's responsibility?
- Have I promptly billed the file? Bills sent promptly on completion have a better chance of being paid.

28 QUARTERLY ERRORS & OMMISSIONS DECLARATION

28.1 In order for the firm to comply with their Professional Indemnity policy disclosure requirements, all employees, contractors and partners are required to complete, sign and return the attached declaration to xxxxxxxxxxxxxxxxx (practice manager/insurance partner).

I xxxxxxxxxxxxxxxxxx confirm that I am not aware of any new claim, circumstance or allegation made against myself or any other fellow employee/partner of the firm that could potentially give rise to a Professional Indemnity claim, and nor do I have any suspicion of dishonesty or fraud on the part of any past, or present employee or partner of the firm.

For the avoidance of doubt, a claim, circumstance or allegation includes and is not limited to the following:

a) A direct/indirect verbal complaint, written demand or a letter received by a third party or the third party's solicitor intimating a complaint or claim.

b) A complaint made to the Law Society including fee/remuneration complaints.

Signed by: _____

Name: _____

Position: _____

Firm: _____

Date: _____

29 LIMITATION OF LIABILITY CLAUSES

These clauses are to be included in the law firm's terms of engagement.

Option One: legal services ordinarily acquired for personal or domestic purposes

Scope of Duty

1. The service which we agree to provide to [you][83] relates only to the particular matter in respect of which you engage [us][84] (**the engagement**).

2. Where the engagement includes the giving of legal advice, this advice is an opinion only, based on the facts known to us and on our professional judgment. We will not be liable where we reasonably base our advice on information given by others, which turns out to be wrong, or the state of the law, which subsequently changes.

3. Once the matter in respect of which we were engaged is at an end, save for legal duties which may subsist beyond expiration of the contract of retainer as a matter of law, we will not owe you any duty or liability in respect of any other matter, even if related, unless you specifically engage us in respect of those related or other matters.

4. Our duty of care is to you, as the party by whom we have been engaged, and not to any other person, including (for example, but without limitation) any directors, shareholders, associated companies, employees or family members, unless we expressly agree in writing. Except as expressly agreed by us in writing, we do not accept any responsibility or liability whatsoever to any third parties who may be affected by the performance of the engagement or who may rely on any advice we give to you.

5. Any advice given by us is not to be referred to in connection with any prospectus, financial statement, or public document without our written consent.

6. Unless otherwise agreed, we may communicate with you and with others by electronic means. We cannot guarantee that these communications will not be lost or affected for some reason beyond our reasonable control, and we will not be liable for any damage or loss caused thereby.

Option Two: the legal services are ordinarily acquired for personal or domestic purposes, but the client is 'in trade'

Scope of Duty

As above.

Limitation of Liability

1. For the purposes of the Consumer Guarantees Act 1993 (**the Act**), or any equivalent legislation subsequently enacted, you acknowledge and agree:

[83] Insert whatever defined term indicates the client

[84] Insert whatever defined term indicates the firm

a. You are in trade; and

b. The legal services to be provided under the engagement are acquired by you in trade and/or for business purposes; and

c. You accept that the provisions of the engagement, including the liability cap set out below, are fair and reasonable in light of the following circumstances: [to be completed ……For example [the subject matter of the engagement, the value of the legal services to be provided, the value of the asset potentially affected, what is an appropriate allocation of the risk in the event that the advice or services may be wrong.]; and

d. You agree to contract out of the provisions of the Act as set out below and to the extent permitted by law and subject to the court's determination pursuant to s43(2A) of the Act; and

e. You are free to negotiate the terms of the engagement with us, were not required to accept or reject the terms of engagement without us being willing to negotiate, you understand the effect of the terms of the engagement, and were free to take legal advice, independent of us, on the effect of the engagement.

2. To the extent permitted by law, you agree that our total liability to you in connection with this matter, or on any related matters on which you engage us, shall not exceed the sum of [XXXXXXXXXX] (**the liability cap**) (including interest, costs, and all losses whatsoever).

3. The liability cap will apply to any liability of whatever kind, howsoever arising, whether in contract, in tort (including negligence), statutory, in equity or otherwise.

4. If we provide any service to any persons or entities related to or associated with you or to anyone else at your request (whether or not we also advise you) on a matter or series of related matters then our aggregate liability to you and all those persons and entities in respect of that matter (or series of related matters) will be subject to the liability cap. You will ensure that those persons or entities agree to this.

5. The liability cap will accrue to the benefit of any partner, employee, or agent of ours who may have acted in connection with the matter, so that in no instance shall the liability of any person, and all persons claimed against in the aggregate, be for more than the liability cap ."

Option Three: the legal services are not ordinarily acquired for personal or domestic purposes

Scope of Duty

As above.

Limitation of Liability

1. You acknowledge and agree that the engagement is for the commercial or business purposes, and the services to be provided are not ordinarily acquired for personal or domestic purposes.

2. To the extent permitted by law, you agree that our total liability to you in connection with this matter, or on any related matters on which you engage us, shall not exceed the sum of [XXXXXXXXX] (**the liability cap**) (including interest, costs, and all losses whatsoever).

3. The liability cap will apply to any liability of whatever kind, howsoever arising, whether in contract, in tort (including negligence), statutory, in equity or otherwise.

4. If we provide any service to any persons or entities related to or associated with you or to anyone else at your request (whether or not we also advise you) on a matter or series of related matters then our aggregate liability to you and all those persons and entities in respect of that matter (or series of related matters) will be subject to the liability cap. You will ensure that those persons or entities agree to this.

5. The liability cap will accrue to the benefit of any partner, employee, or agent of ours who may have acted in connection with the matter, so that in no instance shall the liability of any person, and all persons claimed against in the aggregate, be liable for more than the liability cap.