SMART PRACTICE – MAKING FIXED FEES PROFITABLE

By Erin Ebborn, Rohan Cochrane & Jarrod Coburn

Introduction

Smart Practice

This paper has been written to provoke lawyers into examining the ways they approach business. It will introduce you to a concept we call "Smart Practice" and the elements that go into taking a fresh look at your firm and making small improvements over time. We make an argument that an understanding of how a law firm works leads to efficiencies and a greater ability to move toward a fixed-fee paradigm. We hope you gain some insight from our experiences and look forward to robust debate about how we can – as a profession – adopt new ways of thinking-about and doing business.

A colleague of one of the authors recently opined that "law is a profession, not a business". Whilst the statement is noble it could be argued to be inaccurate, for the practice of law is not an island that stands alone in an ever-burgeoning global market.

Our proposal is that law is a business, and we make that statement on the following facts: firstly, law firms are expected to make money, or at least not to trade in insolvency; secondly, they are governed by the laws of the land and treated in all respects as any other kind of business when it comes to taxation, employment, health & safety and a number of other areas of legislation; finally, law firms rely on clients to pay them for services.

Our colleague might more accurately have said "law is not a typical business: it is unique". We agree wholeheartedly with this statement. Those of us who have spent our entire lives working solely in the law profession might not realise it, but law businesses are very different from those in other industries. What sets us apart is our dedication and devotion to ethical and professional standards. We have an important constitutional role. We are beholden not only to the Courts, not only to government and clients, but also to our peers through the New Zealand Law Society. We as individuals understand the impact one bad apple can have on the rest. How much better New Zealand would be if other industries aspired to such lofty goals! Our dedication to professionalism and ethics is a grand tradition, one that nobody wants to meddle with too drastically. Perhaps this is why law firms are often stuck in their ways when it comes to innovation, embracing risk or thinking out of the box.

It is appreciated that not all of the examples in this paper will fit all practices. Some advice won't suit a sole practitioner. Some advice is more relevant to fixed fee legal aid. Please pick and choose, adapt and be creative with your own solutions.

Erin Ebborn

Erin has specialised in family law for 15 years. Driven by values she has embraced the changes to legal aid and started a firm in September 2012 that now supports a fulltime staff of seven. Erin's innovative Christchurch-based practice specialises in matters before the Family Court and is a leading provider of

family law services to legally-aided people in Canterbury, making legal aid profitable through a focus on lean management and technology.

Erin is a member of the New Zealand Institute of Directors and a corporate member of the Canterbury Employer's Chamber of Commerce. In addition to her work in law she occupies a governance position with the not-for-profit organisation START Timataia te mahu-oranga. START is an independent Christchurch based social service agency established in 1987 that provides counselling for children, youth and adults who have been subject to sexual crime, alongside specific support for their whanau.

Rohan Cochrane

Rohan has specialised in family law since his admission in 1999, and has been a partner/director at Family Law Specialists in Porirua (and its predecessors) since 2005. Family Law Specialists is committed to the continued provision of legal services to legal aid clients alongside private clients.

Rohan has a particular interest in how lawyers can maintain professional standards while delivering legal services under financial and time constraints, and is appointed to two New Zealand Law Society Standards Committees and the Ministry of Justice Legal Aid Provider Selection Panel.

Jarrod Coburn

Jarrod is the practice manager of Ebborn Law and has experience in private enterprise, government and not-for-profit management, having worked as a Senior Advisor for the Wellington City Council, Development Manager for the Royal NZ Plunket Society, and was contracted to author the risk management framework of the Department of Corrections.

Jarrod is a passionate entrepreneur with a strong interest in strategic management and marketing, and is a member of the Institute of Management. He is a board member of the Draco Foundation NZ Charitable Trust and holds a Master of Management Studies degree from Victoria University.

Our Thesis

We propose the following: that law firms and clients can benefit greatly through the adoption of smart business practices, leading to greater efficiency and the ability to break away from traditional hourly rate charging models.

Definitions

For the purpose of this paper we offer the following definitions.

What is 'Smart Practice'?

Smart Practice encapsulates many concepts: doing less but earning more, achieving growth during tight economic times, providing great service and having a good reputation, being adaptable, using technology to get the best from out people.

We suggest three steps to achieving Smart Practice are:

Identifying Goals

Smart Practice is setting a vision first, then developing the plan. The business environment is constantly changing, technology is evolving, information is becoming easier to access, and customers are better informed. A firm that can successfully identify (predict) upcoming trends and pitfalls has a significant competitive advantage, because it will be able to set realistic goals that will be useful as a framework for its business planning. Whether you are a sole practitioner or one lawyer of many, it can be a valuable use of time to think about what you want to achieve in your business and what success will look like.

Assessing Risk

Risk is not just threat, it is also opportunity. Ignoring opportunities can be as harmful to a business as ignoring threats. Part of Smart Practice involves actively looking for threats and opportunities both in your plan and in the business environment, and dealing with them appropriately.

Implementing Change

Smart Practice requires action as well as planning. Two effective tools to change how a business operates are the use of technology and the introduction of systems. Both have the potential to harness the maximum potential of staff and reduce costly errors.

What is 'Technology'?

The Oxford English Dictionary defines technology as "the application of scientific knowledge for practical purposes, especially in industry"[1]. Knowledge that is scientific is simply knowledge that has been proven and repeatable. The Greek root the word derives from means 'systemic treatment'. Technology in the context of Smart Practice is not limited to electronics, it could be something as simple (yet effective) as a pen and paper. Technology is something practical that has been proven to work, applied to a task. We will discuss three types of technology: mundane (low-tech), computer, and disruptive.

What are 'Systems'?

A system is defined as "a set of things working together as parts of a mechanism or an interconnecting network"[2]. Systems are inherently complex and involve people or objects connected and operating under a set of pre-determined controls.

What is 'Risk Management'?

Risk management is actively identifying and dealing with risk. The standard definition for risk is that it is the "effect of uncertainty on objectives"[3]. Let's say we are going to the park for a picnic. It could rain: that is a risk; specifically it is a threat. There also could there be free ice-cream for people wearing

[1] (2013) Oxford Dictionary online. Accessed at http://www.oxforddictionaries.com
[2] ibid
[3] AS/NZS ISO (2009). *Risk management – Principles and guidelines (AS/NZS ISO 31000:2009)*. Australian/New Zealand Standards Organisation and International Standards Organisation.

yellow shoes: that too is a risk, called an opportunity. Ignoring risk could result in a negative consequence. Ignoring an opportunity could result in missing out on a benefit (in itself a negative consequence).

What are 'Fixed Fees'?

Fixed fees means an all-inclusive price published by a firm for a finite scope of legal work. An obvious example is a firm charging – say – $300 incl. GST for a (simple, one-person) will. This fee is static and would be charged no matter how much time was taken to complete the work, or how urgently it needed to be completed.

Technology and Smart Practice

Businesses are complex. Most businesses rely on some sort of value being added to a product or service that is in demand by consumers. Adding value costs resources: time, labour, or capital. The amount a business can reduce that cost is directly relatable to its bottom line. This is called *efficiency* and in a competitive market can mean the difference between growth and stagnation, success and failure.

Efficiency can be achieved by introducing systems (we'll talk about those soon) or utilising technology. Technology can provide a means to assist a person to do a job. The humble plough – a piece of wood with handles that is dragged behind oxen – is considered to be one of the most world-changing pieces of technology, as it allowed the peoples of ancient Mesopotamia to bulk-plant seed and create surplus harvests that could be stored for future needs, thus allowing a population boom[4].

Nowadays the word 'technology' is commonly associated with electronic gadgets or robotics, but this is not necessarily the case. Below are examples of three different types of technologies used by Ebborn Law to increase efficiency:

Mundane Technology

If you think creatively enough you can re-frame a law firm and view it as a manufacturing plant – specifically a production line. Clients come in at one end, have a specialist legal product and service applied to them, and go out the other end hopefully better off. Value is added in the process.

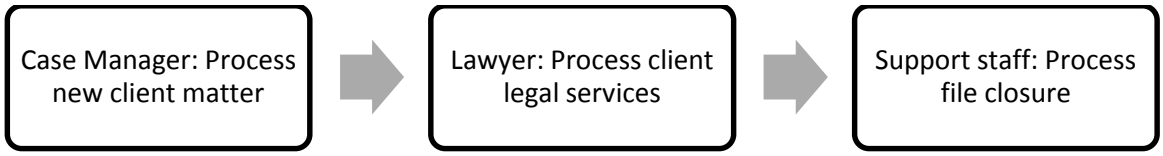
Whilst no client is the same, there are some tasks common to all clients. For example, each client has a file opened for each matter. Every client needs to receive a terms of engagement and client care statement. All clients have to pay somehow. If you take a Smart Practice approach to these tasks the first thing that should be noted is that they are all the same, and are all repeated for each client. This is a key to efficiency, because things that need repeating can normally be made more efficient through use of technology.

The key piece of technology at Ebborn Law is what the firm calls the 'New Client Checklist'. It's not an original idea by any stretch of the imagination, but it serves as an essential part of the daily work

[4] White, L (1962). *Medieval Technology and Social Change*. Oxford: University Press, p.42.

routine. There are several versions (i.e. legal aid, private client, etc.) but each is essentially the same: a checklist printed on a piece of paper glued to the back of the matter folder (Appendix One). Despite operating a policy of 'paperless office' the firm has retained the age-old technology of folders – not to store data in (some hardcopy originals are stored in them but everything is scanned anyway) but to act as an 'avatar' of the client. The folder is a proxy representation of the client as the matter progresses and the checklist on the back ensures the case manager can check off and date each process as it is undertaken. Introduction of this technology has resulted in a 99.8%[5] error-free rate for processing new client matters, from the time clients contact the firm until the time they meet with their lawyer.

After the lawyer has finished providing legal services a checklist is attached to the front of the folder, outlining the steps required to close the file (including checks on trust account balances, monies owed, deeds, etc.). The folder again acts as a physical representation of the client until it is closed and archived.



At any stage of the opening or closure processes a staff manager can clearly see if a step has been completed, when it was completed, and by whom. This technology is particularly useful for new or temporary staff, as all they need to do is follow the checklist in the timeframes outlined.

Computer Technology

Some technologies increase efficiency by making it easier for staff to communicate. A firm's practice management software is an obvious example, but real efficiencies come through being portable as well as networked.

Problem: Managing and sharing information amongst several staff.

Smart Practice: Invest in technology that makes life easier for staff.

1. Think about how your staff work, how they share information, what they need to know and when:
   - where do your staff need information?
   - how do you store information about your clients?
   - how do staff access information?
   - are you overly-reliant on one means of data storage?
   - what happens when it snows, or when the power goes off at work?
2. Consider investing in computer technology that increases efficiency. It's a lot less expensive than you might think!
3. Think about the barriers and walls you put up that prevent staff from sharing information… are they always necessary?

[5] The 0.2% of times errors have been committed (such as a legal aid application not being submitted) has been because the checklist was not followed

Case Example: Virtual Desktop

Ebborn Law started with server-based hosting but moved to a virtual hosting environment in June 2013. Supported by a well-regarded Canterbury IT company, the law firm's data is held off-site in secure servers in Christchurch and Auckland, backed up hourly. Staff access their computer desktop through a login process that means they can 'hot desk' at any computer in the office. Therefore, if a lawyer needs to go into a meeting with a client they simply login into the meeting room computer and their desktop appears exactly as it did on their own computer.

The software normally installed on a work computer is now accessed remotely e.g. Outlook, Microsoft Office 2013, trust accounting software. To make this work the client files are held electronically so staff can see all email, documents and correspondence without needing the physical file. Data is 100% stored in New Zealand. The benefit of this is:

- access to the most up-to-date versions of Outlook and Microsoft Office because they are provided as part of our contract with our server host
- effective IT support without having to employ an IT expert on site
- access to all client information without the paper file
- data is securely stored in two different locations so it can be accessed off either server with a maximum of one hour of data potentially being lost if disaster strikes the Christchurch server
- in the event of an emergency staff can operate remotely without needing paper files or access to a physical office (businesses in Christchurch take this very seriously these days!)
- access to a full-service desktop at the staff member's desk, on computers in the office meeting rooms, from home or anywhere via lap top or iPad
- support staff can manage emails for lawyers (all external emails for lawyers go to a common inbox[6]) and have access to each other's data[7] so if a support staff member or a solicitor is away sick then another can access their work

Originally Ebborn Law aimed to have a paperless office, although this might still be some way off for reasons explained earlier. However, the growing amount of information distributed by email helps the firm run a virtual filing system because it is so easy to 'drag and drop' attachments. It also avoids printing and filing emails and attachments, which is not only environmentally friendly but helps keep within the standard legal aid disbursement allowance. A lot of information is still received by post, though, and there are still expectations that documents receive an original signature from a solicitor rather than a jpg[8]. The Family Court Rules require this even if the document is accepted for filing through email.

To ensure the easy retrieval of records the firm has standardised file storage and file naming. At Ebborn Law the file naming protocol is:

CLIENT NAME-DATE-DOCUMENT CODE-DOCUMENT DESCRIPTION-CLIENT MATTER CODE

[6] Note that internal emails between staff remain private to those staff members, and there is a separate email address for clients to contact the Managing Director privately in the case of a complaint

[7] The exception being the data held by the Practice Manager relating to sensitive information such as HR

[8] This is also a risk management issue

e.g. IMACLIENT-20131105-LT-client reporting letter-491

This makes it easy to search for documents by either client name, matter code or document type and uses the 'universal sortable date/time pattern', which means files will always be in chronological order when sorted by name.

The firm's paper files are not complete records (the complete record being held virtually). Their next step is to introduce IT into courtroom appearances because the solicitors still feel vulnerable stepping into court without having available all information – even though most of the time that information is not required. They are yet to adapt to using electronic documents in fixtures but have their eyes firmly in that direction.

Networked computer technology aids efficiency through allowing staff to work in the office, at Court, at a mediation or at their home in a secure online environment. Staff can access any file they need, can make changes, and save them. Even if there is a power cut the desktop and any open documents will be exactly as the staff member left them when the computer shut down.

Staff spend a lot of their time in front of computers so to increase productivity further each staff member has three monitors, reducing the amount of time needed to swap between applications and making it easier to 'drag and drop' data and files.

"To make utilising a virtual desktop and file easier we have three computer monitors at each desk. This means documents can be moved around screens and it is easier to work off multiple documents or multiple programmes e.g. timesheet, email, word documents, calendar at the same time because there is a choice of three screens for viewing rather than one. Initially my staff thought it was an expensive extravagance. I now have complaints about the restriction caused by only one monitor in the meeting rooms!"

Disruptive Technology

In 1995 the Harvard Business Review published an article about 'disruptive technologies' and the phenomenon of large, established businesses being superseded by smaller, more agile firms who

developed products that customers apparently didn't want.[9] The article argues that because the larger companies "listened" to their clients, they overlooked new ways of doing things that in the end became accepted ways of doing things.

Adopting a new technology (or adapting an existing technology in a field that it is not normally used) carries significant business risk, but it is important to bear in mind that the business environment and the market as a whole are constantly changing and businesses have to keep up. The clients of today do not think the same as the clients of 30 years ago, because in 1983 there was no EFTPOS, no laptops, no smartphones. There was no gay marriage or Care of Children Act. Indeed, the Family Court was just three years old!

An example of a disruptive technology is the use of computer systems to pre-populate templates based on precedents. This is not new technology, but Ebborn Law has applied it in an innovative way that – when combined with systems and risk management – enables very high levels of efficiency in the office.

Problem: Dictating or drafting the same information over and over again.

Smart Practice: Stop re-inventing the wheel.

1. Think about the case flow of a file and what issues or stages arise frequently. Develop a precedent which can be used to address those issues/stages. For example, standardise correspondence about the following:
    - what has been filed in court and what might happen next
    - the role of Lawyer for Child
    - what a mediation is for
    - what a Formal Proof Hearing is
    - what a Protection Order means
2. Consider investing in a file management system which lets you automatically insert client data into merge fields to auto-populate letters.
3. Think about what information needs to be in the letter from the client's point of view, not just from the perspective of ensuring you have recorded your advice.

Case Example: Client Reporting Letters (Appendix Two)

The layout of Ebborn Law "Client Reporting Letters" was designed to solve the following problems:

- clients don't know what they have to do
- clients don't know what their lawyer does
- it isn't enough to report what has happened

Their semi-automated reporting letters include the following headings, followed by bullet points:

- what is enclosed
- what you need to do
- what your lawyer needs to do

[9] Bower, J. and Christensen, C. (1995). *Disruptive Technologies: Catching the Wave*. Harvard: Harvard Business Review.

- next Court date: [date, time, place] You do/do not need to attend

The bullet points underneath “What you need to do” might be, for example:

- bring in your marriage certificate
- make an appointment to do an updating affidavit
- attend the mediation
- phone the police if your Temporary Protection Order is breached
- comply with the contact arrangements in the Interim Parenting Order

The bullet points underneath “What your lawyers need to do” might be, for example:

- prepare a Memorandum of Issues before the Judicial Conference
- draft your affidavit
- ring you a couple days ahead of (event)
- nothing until Lawyer for Child has filed a report
- nothing until you bring in the information to support your affidavit

The information gives the client a clear of idea of what the next step is in the process, their responsibilities and the lawyer’s responsibilities – especially where the lawyer’s next step is reliant on the client doing their step first.

The firm has over a hundred template precedents available to staff, from Court documents (including Applications and Notices) to client letters and governmental forms. From the moment a client enters the system nearly every document is automatically generated pre-populated with any relevant details available in the database.

How many times are we given forms to complete that replicate data on separate pieces of paper? It is senseless to require a person – be they client or staff member – to mindlessly write a name or address more than once.

When a client first contacts Ebborn Law their details are captured in a computer file and used to generate a slew of documents. In addition the details of the other parties (ex-partners, children, social workers, etc.) are also captured. Relevant documents (for example a Without Notice Application for a Parenting Order, and an Affidavit in Support) can be immediately drafted by a case manager to be completed by a lawyer later.

This use of technology was adopted specifically to save time. If one thinks about the amount of time a lawyer (or PA) has to spend typing a person’s name and address, or the names and dates of birth of children, and then multiplies that by hundreds of client matters a year, then it is easy to see how efficiency can be gained through the use of pre-populated templates.

There are many times Ebborn Law sends the same letters again and again to different clients, for instance when a formal proof hearing is timetabled, or a mediation is arranged. Creating a letter from scratch is time-consuming and is also inconsistent depending on who is composing it. Using technology that can automatically populate data (even to the point of selecting appropriate pronouns) is a real time-saver (see Appendix Two).

Systems and Smart Practice

Technology is a tool that can create efficiencies but it is only part of the solution. To maximise efficiency, technology needs to be matched to streamlined systems and a focus on management.

Law firms should invest time developing their systems, and this should be an ongoing activity. Systems are ways of doing things that are consistent over time and across the people who do the work. They are repeatable and often scalable - in other words, a system is a way of doing something that adds to the efficiency of an operation because everyone is not having to constantly re-invent the wheel. Good systems should:

- create consistency, leading to efficiencies
- help people understand the most efficient way to do something properly
- be general enough to apply to all eventualities, but
- have fail-safes built in so if an exception arises it raises a red flag.

For the purpose of this paper we will look at three parts of a system: people (the subjects of a system); processes (the rules of a system), and; policy (which governs systems).

People

People are complex and unpredictable. In a law firm the people who usually are a part of your systems will be staff (in their various roles), clients, and externals (experts, other Counsel, etc.). You can expect with a fair degree of certainty that staff will comply with your systems, clients will sometimes comply with your systems and externals will probably never comply with your systems!

Systems are especially good for managing risk and preventing mayhem. For example, *trust accounting* is a system that is audited externally and is quite rigid. Some systems are not as formal nor as rigid, for example how many law firms have a system around how a client should be treated when they arrive in the office?

Ebborn Law uses systems for two reasons: firstly to ensure statutory and ethical compliance, and; secondly to make sure staff are as efficient as possible.

Processes

Ebborn Law has a system for urgent protection orders[10]. It involves the flow of information from the time the client contacts us until when the client is informed of the Court's decision. One of the processes involves using 'precedent' templates - rather than having to write an Application and Affidavit from scratch we auto-generate draft documents that contain the elements most common to all cases.

The work flow process needs to be streamlined from the moment a client rings to the moment a client's matter is finalised.

Think about the following:

- what hiccups currently exist with your interaction with clients?

[10] Called the "Urgent Domestic Violence Portal", it is a web portal that enables refuges in the Canterbury region to submit information about a client directly to Ebborn Law, who then guarantees a 15-minute turnaround time on deciding if (a) they can take the client or (b) if there is another law firm available.

- what is the experience the client has with the firm?
- how do you or your staff interact with clients?
- where do bottlenecks arise during the course of a file?
- what are the frustrations you experience in dealing direct with the client, dealing with interruptions, completing work?
- are you complying with your duties and ethical obligations?

Then ask how and why these problems exist. Think about how you can do it better. Then do it.

Problem: Client attends office, lawyer completes legal aid form, lawyer files on notice application, Legal Aid Office requests further information, the client fails to provide the further information, legal aid is declined, correspondence to client has been 'returned to sender', lawyer seeks leave to withdraw (while meeting all duties in the meantime) but doesn't have a new address for service for the client, there is a large bill which is unlikely to be recovered from the client.

Result: Lawyer blames the client for not bringing in the information requested by Legal Aid. Law firm partners lament that offering services to legal aid clients is unprofitable.

Smart Practice: Build a system to avoid wastage of fee-earner time.

1. delegate the role of completing the legal aid form to non-lawyer staff
2. require the legal aid grant to be in place before any work is undertaken[11]
3. send out legal aid and other forms to the client in advance of them coming into the office, so they can fill them out in their own time (not yours)
4. ensure that legal aid forms are completed correctly and the necessary information (such as proof of income) is provided at the time the grant is applied for
5. obtain from the client an authority to receive information held about them, so the firm can uplift the information needed for the legal aid form rather than rely on the client if necessary
6. obtain from the client an alternative address for service – useful in the event that the initial contact details change and are not updated

Case Example: Client Set-up Process (Appendices One & Three)

Ebborn Law has a clear process it follows each time a new client joins the firm. It has found this process to be valuable because:

- files can be generated on the computer system in advance, and pre-populated forms mailed out to the prospective client
- in the initial stages (from contact through to first lawyer appointment) the client deals with a case manager, not a lawyer
- clients form a bond with their case manager and when they call the office with a question, will deal with that member of staff in the first instance, thereby reducing unnecessary interruptions for fee-earners

[11] It is reasonable to expect certainty of payment before commencing work. Most legal aid clients, especially those on the margin of qualifying for legal aid, prefer to know that their legal fees will be met by legal aid rather than run the risk of (non-urgent) work being commenced and then discovering that their application has been declined

- no professional work is undertaken until payment is guaranteed, reducing debtors

The process is designed to:

- provide a consistent standard of service to all clients
- ensure timeframes are met
- promote accountability of individual staff-members
- prevent mistakes (such as a s24 notification not being sent out)
- provide a method for staff to understand a file's progress in the event of staff absence
- cover off all the responsibilities of the firm to the client, the Court and to other parties
- ensure other internal systems are maintained

Following this process every time ensures the right information is gathered and distributed, in the prescribed timeframe, to enable the client to get to a point where they can access legal advice from the firm.

These processes can be derived using management theories. Useful theories to investigate include the Theory of Constraints[12] (a process to identify bottlenecks in a system), Value Chain Theory[13] (which identifies the operations that add value to a client), and Lean Manufacturing[14] (a process-oriented theory that helps radically improve efficiencies).

Policy

A policy is a statement of intent that comes from the highest levels of an organisation that guides staff and clients as to how things should be done (Appendix Four). Policies guide the development of processes. Processes are a tangible outcome of policy.

Smart Practice would see a law firm implementing policies for a number of reasons:

- to ensure compliance with regulation or professional obligations
- to show an external party (such as an insurer) that necessary functions have been considered and planned
- to provide a framework to negotiate with staff in good faith (i.e. Health & Safety Policy)
- to limit the firm's exposure to risk in dealings with clients (i.e. Payments Policy[15])

Policy is a useful tool to steer a business strategically, and is also used to limit or mitigate risk. People will often 'hide' behind policy (e.g. "It is the firm's policy not to provide relationship property services funded through legal aid") and that is absolutely fair enough. Your policy is the framework upon which <u>your</u> business is built. Having policies written down and accessible to staff (especially!) and clients is a very smart idea. Deriving your business processes from those policies is definitely Smart Practice.

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[12] Cox, J. and Goldratt, E., (1986). *The goal: a process of ongoing improvement*. New York: North River Press

[13] Porter, M. (1985). Competitive Advantage: Creating and Sustaining Superior Performance. New York: Simon and Schuster

[14] Womack, J., Jones, D. and Roos, D. (1990). *The Machine That Changed the World*. New York: Harper Collins

[15] Ebborn Law's payment policy requires guarantee of payment up-front (either in cash or by a grant of legal aid) before any work is undertaken on a case, with some exceptions (such as urgent protection orders)

Risk Management and Smart Practice

It is accepted amongst many managers that "all management is risk management".[16] In other words, managing any firm – especially one with so much at stake such as a law firm – is entirely about making decisions on how mitigate threats and take advantage of opportunities. Risk is traditionally evaluated by two factors: the potential for occurrence (likelihood) and the potential impact (consequence). Risks are expressed using the following 'risk statement': "Because of [something], there is a risk that [something will happen], resulting in [something good or bad].

Smart Practice is about embracing risk, not avoiding it. That means being aware of the risks the firm faces every day and not consigning the management of those risks to others. As discussed earlier in this paper, there are a number of tools available to a smart manager in which to deal with threats or opportunities: policies, processes, technology among them. But it is not enough to have a policy or a process in place and to simply walk away as "no single management system will address all of the components of a given risk"[17].

A smart business is one where all staff understand the principles of risk management, and it is a cultural norm to be constantly alert and in discussion about risks that exist or arise. It's not a complex concept, but it can be difficult to implement as good risk management involves a change in organisational culture at absolutely every level. There are significant benefits attached to actively managing risk, discussed below in the areas of opportunities and threats.

Opportunities

If you reviewed the way you do business in your firm, would you find ways to make things more efficient? More secure? More client-friendly? These are all examples of opportunity-risk. They are classed as risks because there is a potential the business will benefit if you identify and act on them.

Below are some ways to identify opportunity-risk:

- Ask your team to contribute ideas for improving the business – but do so in a formal way (such as via email) so that the ideas are all captured and considered. Give feedback and encouragement. Staff are often in the best position to identify ways to do things more efficiently
- Survey your clients. Send a yearly survey to all your clients asking them to rank you in areas that you feel are critical to the service you provide. Promise to share the results with staff and with clients and do so fearlessly to promote discussion
- Use reports from your financial and practice management software to identify areas of improvement

[16] Crockford, G. N. (2005). *The Changing Face of Risk Management*. Geneva Papers on Risk & Insurance - Issues & Practice, 30(1), 5-10

[17] Risk Management Ltd. *Plus ça change, plus c'est la même chose*. 2011. Available at http://www.riskmgmt.co.nz/blog/view/plus-ca-change-plus-cest-la-meme-chose, Accessed October 8 2013.

- Revisit your business plan each year, and strategically plan for the next three to five years. When you do this, undertake a PESTLE analysis[18] and use Porter's Five Forces[19] (Appendix Five) to help better understand the business and market environment

Threats

What is your policy if someone notices there is a problem with how you do things at your firm? Who is responsible for reviewing legislative and regulatory changes and ensuring your firm's documentation is up-to-date? When was the last time you pre-empted a potential insurance risk by voluntarily reporting it to your insurance company?

Running a business invites a constant stream of threats. The trick is not to deal with all of them, but to spend your resources on dealing with the ones that are the most likely to cause an unwanted consequence. Therein lies the real skill of risk management, and a good reason to get everybody in your firm onboard: so they can help you.

Below are two threat-risks we think you should consider (if you haven't already). The first threat is one that is shared by all law firms. The second threat is associated with the opportunity of freeing up lawyer time. We go into substantive detail in the latter.

Threat-risk 1: Business continuity v Secure storage

Problem: Storing documents in hardcopy form is time-consuming, costly, and can lead to catastrophe if damaged or inaccessible.

Solution: Scan documents and store them in the 'cloud' (online).

Opportunity: Improved disaster recovery timeframe and business continuity capability, less use of resources.

Risk Statement: Because of wide-ranging powers of governments regarding information retrieval, there is a risk that client information could be intercepted by foreign security agencies, resulting in a breach of privacy for the firm's clients.

Threat: 'Cloud' storage offers a business risk with regard to a lawyer's commitment to client privacy, as some countries (the US is notable) have laws that allow the government to view data stored on servers located in their sovereign territory.

Smart Practice: Ensure that any virtual or cloud storage is undertaken solely in New Zealand. Review the Privacy Act and consider whether you need to inform your clients that you use a third-party to store data. Ensure a contract with the third party that ensures your right to access and/or remove proprietary information from their servers on demand, and consider a one-way non-disclosure agreement.

Threat-risk 2: Lawyer time v Professional responsibilities

[18] PESTLE is an acronym for a group of areas to consider when undertaking strategic business planning: Political, Economic, Social, Technological, Legislative, and Environmental

[19] Porter's Five Forces is a simple tool that assists managers to reframe the competitive environment

Problem: Fee-earners are constantly interrupted by non-essential or irrelevant inquiries from clients, potential clients or other parties.

Solution: Delegate some of the workload to non-lawyer employees

Risk Statement (1): Because of an expectation by clients that they can access their lawyer at any time, there is a risk that lawyers become bogged down in trivial work, resulting in lower billing for the firm.

Opportunity: Fee-earners can concentrate on the work that earns the firm money, while others can take care of the 'non-billable' tasks, therefore increasing profitability and passing work over to less-expensive staff.

Risk Statement (2): Because of a policy that fee-earners purely undertake reserved legal work, there is a risk that non-lawyers cross a line and give a client legal advice, resulting in legal action against the partners or directors.

Threat: The legal boundary that defines legal and non-legal advice is one no law firm wants to step over. Caution dictates that to act on the safe side is the best course of action. But you then risk having your high-paid professionals doing work that could be done by capable support staff, thus reducing profitability.

Smart Practice: Create a clear boundary for non-lawyer staff that defines what is acceptable to tell clients and what is not. Delegate all work to the level that is suitably qualified to deal with it. This includes delegating work from senior lawyers to junior lawyers, and work from lawyers to legal executives or support staff. Free up your fee-earners to earn fees!

Context: Few lawyers choose to specialise in family law solely in pursuit of remuneration. It is sometimes noted that other areas of law are more profitable. But to be effective family law practitioners we need to run sustainable and profitable practices.

Whether lawyers are:

- providing legal aid services in a fixed fee regime;
- providing pre-proceedings "legal assistance" advice to clients under the new Family Court model for dealing with Care of Children Act cases, or;
- acting for cost conscious clients, on time based billing or fixed fees.

It is helpful to step back and consider which parts of the services provided to clients are:

- services which should be provided by a qualified lawyer, and;
- services which may be provided by a properly supervised non-qualified employee in the role of legal executive, case manager, paralegal, law clerk or secretary, and;
- services that can be undertaken as a limited retainer to make legal advice more affordable and accessible - for example giving advice "behind the scenes" to a client who chooses to, or is required to, represent himself or herself in Court or during negotiations.

Factors to be taken into account include:

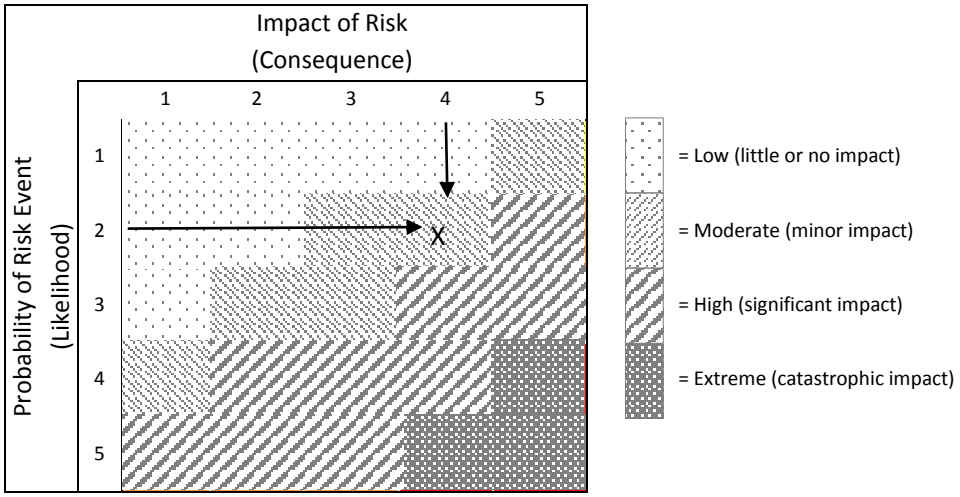
- Regulatory and professional requirements arising from the Lawyers and Conveyancers Act 2006 and associated regulations, including the Rules of Client Care and Conduct;

- Contractual obligations to the client and to the Ministry of Justice (including adherence to legal aid practice standards);
- Client relationships, and the preferences and expectations of individual clients.

Delegation that is managed and supervised well can produce a more cost-effective service, allowing practices to remain profitable and continue to provide a high level of service to the client. However, delegation without planning, training and careful supervision can result in a breach of professional obligations, a breach of the Lawyers and Conveyancers Act, a breach of legal aid practice standards and client dissatisfaction.

Within firms it is common for work to be delegated to junior lawyers. In the fields of conveyancing, trusts and estates a significant amount of the work produced by firms is undertaken by legal executives. A similar model can be applied to at least some aspects of family law.

By applying an assessment of the likelihood of a risk occurring and the consequence if it does, we can plot the level of risk on a composite risk matrix (below). In the instance of risk statement 2, the probability of a non-lawyer crossing the line of legal advice is low-medium (let us assume we have good staff and good training) and the consequence of this happening is high. Thus, we can assess the risk as moderate.



In comparison to other risk-threats Ebborn Law faced in setting up its operation, a moderate risk was considered acceptable to engage with, so long as there were mitigations available to reduce the likelihood of the threat occurring. This is explained in detail below.

Case study: The Case Manager

The problems Ebborn Law needed to solve were:

- how can we lessen the interruptions to our lawyers so that they are better able to focus on the task at hand?
- how can we make sure our lawyer time is used wisely by so the lawyer is spending time on tasks only a lawyer can do?
- how can we make sure our clients' needs are meet without reliance on a lawyer providing all parts of that service?

Some of the interruptions were emails and phone calls about matters the lawyer doesn't need to deal with. That doesn't mean that the calls are 'nuisance' calls, simply that they are about issues another staff member can deal with. For example:

- "I've received a notice from the court. Do I need to go to court on that day? "(yes, it's a court where parties must attend/no, it's a case management review)
- "When is my court appearance?" (it is Friday week at 2:25 p.m.)
- "Have you heard from the other lawyer yet?" (no, we don't expect to for a few more days/yes, but there is nothing to report)
- "I just want the lawyer to know that……." (thank you, I've noted that on you file and I'll make sure that it is passed on to your lawyer)
- "Can we have a mediation conference on this date?" (yes/no)
- "Can I refer a client to you?" (of course! what are their details?)

Members of the public are familiar with dealing with a case manager in other situations. It is a phrase which denotes first port of call. Ebborn Law's case manager is responsible for:

- triaging new client calls
- the first meeting with the client to fill in the legal aid form and other Ebborn Law client forms
- ensure information is collated to support the legal aid form
- briefing the lawyer ahead of the first lawyer-client meeting
- dealing with client enquiries (including viewing emails) and answering non-law enquiries
- notify the lawyer if a matter arises which does require the lawyer to make a strategic decision or give legal advice to the client

This is an important role and it requires someone who knows where the boundary lies between what is legal advice and what is answering a query about file management.

What Can Be Delegated?

Section 24 of the Lawyers and Conveyancers Act provides:

"24 Reserved areas of work for lawyers and incorporated law firms

(1) A person commits an offence—

(a) who, for gain or reward (whether direct or indirect) and not being a lawyer or an incorporated law firm, carries out work of a kind described in paragraph (a) of the definition of reserved areas of work (as set out in section 6); or

(b) who, not being a lawyer, carries out work of a kind described in paragraph (b) or paragraph (c) or paragraph (d) of the definition of reserved areas of work (as set out in section 6)."

Reserved areas of work under the Act include:

"reserved areas of work means the work carried out by a person—

(a) in giving legal advice to any other person in relation to the direction or management of—

(i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or

(ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or

(b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or

(c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or

(d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer."

Section 26 of the Lawyers and Conveyancers Act creates an offence of drafting, settling or revising Court documents for gain or reward by any person except for:

"(a) a lawyer; or

(b) a person who is entitled under an Act to draft, settle or revise a document that is to be filed in those proceedings; or

(c) a person acting under the supervision of a lawyer."

The New Zealand Lawyers and Conveyancers Disciplinary Tribunal grappled with the application of these provisions to a family law practice in the case of 2012 NZLCDT 4 *Canterbury/Westland Standards Committee 2 v Cheryl Simes*.

The Standards Committee alleged that the practitioner employed non lawyer staff who had, under her direction and authority, undertaken legal work in reserved areas of work pertaining to the direction and management of proceedings before a Court.

The work was said to be the giving of legal advice in relation to protection orders, preparing without notice applications to the Family Court, and preparing affidavits for Court proceedings.

While the Tribunal did not consider that it needed to make a formal finding on the operation of section 24 (because of its finding that there was no evidence to show that the non-lawyer employees had committed an actual offence) the Tribunal found merit in a submission that the purpose of section 24 must be to ensure that the reserved areas of work are undertaken and provided only by lawyers (including incorporated law firms in that context) but that did not preclude non lawyer employees of lawyers or incorporated law firms being involved as a part of their employment.

The Tribunal found:

[79] In such case the legal advice regarding direction and management is effectively provided by the lawyer in whose name it is provided. That lawyer is responsible for the work, and takes continuing responsibility, notwithstanding that the work might actually have been undertaken within the lawyer's organisation, and under that lawyer's supervision and control, by a non-lawyer employee. Indeed, provided there is appropriate supervision

and control of delegated work, D'Allessandro suggests there is a public interest in efficient delegation. Of course, complete delegation, meaning that there was no appropriate supervision and control of the non-lawyer concerned, would not be acceptable as without those protections public interest issues arise as noted in D'Allessandro.

[80] It is the fact that the work is recognised as that of the lawyer, being provided in the name and under the control and supervision of the lawyer which is critical. The appropriate degree of supervision will vary depending on the complexity of the issue and the skill of the person doing the actual work for the employing lawyer or incorporated law firm. There should be no requirement to examine, in that context, whether the actual person doing the work within the lawyer's organisation is a lawyer.

[81] A non-lawyer undertaking such work is not, in those circumstances, "giving legal advice to any other person". The employing lawyer is giving that advice, even if not directly involved ... The critical issue is that there has been appropriate control and supervision of the work delegated to an employee by a lawyer, with no abdication of the lawyer's professional responsibilities by failure to oversee the work through adequate control and supervision.

Practical Example - Delegation

The extent to which delegation to non-lawyers within a practice can safely be undertaken will depend from case to case. In all cases supervision provided by a lawyer qualified to practise on his or her own account is crucial to ensure compliance with professional standards.

In the context of a Family Law practice, a decision to file an application in the Court seeking an order under the Domestic Violence Act 1995 without the respondent first being given notice clearly falls within the area of work in that the decision relates to the direction or management of the proceedings, and must be undertaken by a qualified lawyer. The Act requires a certificate from a lawyer in the case of such an application. Making unsupervised decisions about the direction or management of Court proceedings is not acceptable delegation.

Taking details from the client in an interview setting, identifying issues, and preparing of draft documents for a lawyer's approval (including Court proceedings) can be (and is often) undertaken by a non-lawyer. For example it is common for Child Youth & Family social workers to draft their own affidavits and have the content reviewed and approved by a Ministry lawyer.

The extent to which law firms choose to delegate to non-lawyer employees, part of the work traditionally undertaken by lawyers, will depend upon the preferences of the lawyers and clients involved, the resources of the firm, the training and supervision systems of the firm and the skills of the non-lawyer staff.

All the examples of risk outlined above have been identified and dealt with using a process of risk management. A smart business will have a risk management policy in place from which procedures to deal with risk will be developed. The five stages of the risk management process are:

- step one – establish the context
- step two – identify the risks
- step three – analyse the risks

- step four – evaluate the risks
- step five – treat the risks

In the example of delegation of work to non-lawyer staff, the context was a necessity to free up fee-earner's time to increase productivity and profitability, whilst keeping within the scope of various legislative and ethical requirements. Three useful tools to help establish context are SWOT Analysis, PESTLE Analysis, and Horizon Scanning. The risk was identified and written out in risk sentence structure. The risk was analysed to understand the likelihood of it happening and consequence if it did happen. The risk was evaluated to ascertain the composite risk, enabling prioritisation if several risks exist in the firm. Finally the risk was treated by undertaking a review of the legislation and case law and – in the real-life instance – introducing policy and procedures (in other words a 'system') to manage and monitor what non-lawyer staff say to clients when undertaking work done on behalf of lawyers.

Further information about risk management can be found online either by visiting the website of the New Zealand Society of Risk Management (http://www.risksociety.org.nz/) or Standards New Zealand (http://standards.co.nz) – AS/NZS ISO 3100:2009 Risk management – Principles and guidelines, and HB 296:2007 Legal risk management.

Fixed Fees and Smart Practice

The argument for fixed fees is compelling and, it can be argued, soon to be one of necessity rather than choice, as the political, legislative, economic and social aspects of the market change. Changing a long-held paradigm is challenging and difficult – but these are not reasons to resist such a change.

The change to a "fixed fee" regime incentivises new ways of managing cases run on legal aid. Some of this will be positive, some will not be. Legal Aid is available for preparation and attendance at Judicial Conferences, but may discourage pro-actively managing pre-trial issues by negotiation because the fee which the lawyer is paid does not increase to reflect the time put into such negotiation.

Will this result in lawyers acting for legally aided clients operating under financial pressure to return matters to the Court that previously could be dealt with by counsel? Or, will it result in greater client participation through reliance on repeatable steps such as round-table meetings?

Under the previous legal aid scheme work could be funded only on the basis of time spent by an approved provider. Fixed fees for stages in proceedings provide motivation to identify which parts of the work lawyers do for clients that can be done by non-qualified staff, freeing up fee-earners to focus on those parts of the case which require legal skills.

When acting for legally-aided clients, lawyers must be mindful not only of the lawyer-client relationship, but also the lawyer's contractual obligations to the Ministry of Justice, including adherence to the Legal Aid Practice Standards. Those standards largely reiterate statutory and professional obligations which lawyers owe to their clients in any event.

As explained in the previous chapter, there is no bar to efficient and well-supervised delegation arising from the Legal Services Act 2011, the Legal Service (Quality Assurance) Regulations 2011 or compliance with the Legal Aid Practice Standards. However a tension exists between practice and policy because the approvals policy requires lead providers to be available to undertake the work, yet

the legal aid forms no longer require the person who undertook the work to be specified (unless it is fixed fee plus and the hourly rate connects to the practitioner's experience level) and the expediency lends itself to delegation.

Legal aid grants schedules are important documents. Those with legal aid contracts have contracted to provide the services listed. In so doing they forego the opportunity to be paid directly by legally-aided clients other than the $50.00 user charge (assuming that this is actually paid). Legal aid contractors are not funded to provide the kind of services which some lawyers have previously offered under a time-based billing model, for example requests by clients for ongoing assistance to arrange contact visits week after week are not funded and are not sustainable.

In taking instructions from a client, obtaining information and defining issues lawyers try to provide a sympathetic ear. There is a need to build relationships of trust and confidence with clients that can take time, which is accepted will sometimes exceed the available funding. But lawyers are not funded to be either 'relationship counsellors' or 'friends' of the client.

Correspondence between lawyers about minor parenting issues (mirroring the Justice Minister's concerns about "haircut cases") is an example of an area into which lawyers have sometimes strayed, on the basis of client expectation, rather than the need to resolve a legal issue of the kind of gravity which would be put before the Court.

It is a responsibility of lawyers (and to some extent the law firm) to set the client's expectations about the areas in which they will/can be assisted, and to be clear and consistent about the areas where they cannot.

In a parenting dispute in which one party has the funding restrictions of legal aid and the other does not, a difference in expectations can arise. Resetting these expectations requires care, but need not be inconsistent with the professional duties of courtesy to colleagues or self-represented parties. It is, however, important that the terms of engagement set out the parameters for the work undertaken. An example of appropriate wording could be:

Attached to this terms of engagement is the fixed fee legal aid schedule for (area of work). The fee schedule forms part of our terms of engagement. Our role is to undertake the tasks set out in the legal aid schedule. These are the tasks necessary to move your matter through the court process. It is not our role to be a conduit of information which is unrelated to the Court process or is not provided for in the fixed fee schedule or to attend to parenting disputes or communication issues about which a Judge cannot make an enforceable Court Order.

If a lawyer is faced with a matter about which a Judge cannot make an enforceable Court Order is it a matter they should even be dealing with? If it isn't in the legal aid schedule, how would the firm be expected to be paid for the work?

Being clear from the outset about the scope of service to be provided minimises the likelihood of client dissatisfaction, because there will be occasions where a client's expectations about which issues he or she can expect legal assistance for will clash with the what the lawyer is willing to do.

Examining the service lawyers can provide to legally-aided clients in the current environment can lead one to question which parts of the work that law firms do for their private clients actually represent good value for the client.

That's probably worth reframing, because it is a pivotal point: if private clients paid only a fixed amount of money, rather than an hourly rate, could a law firm trim work off the file without affecting the overall outcome? The answer is probably yes in many cases.

So why are law firms still charging by the hour?

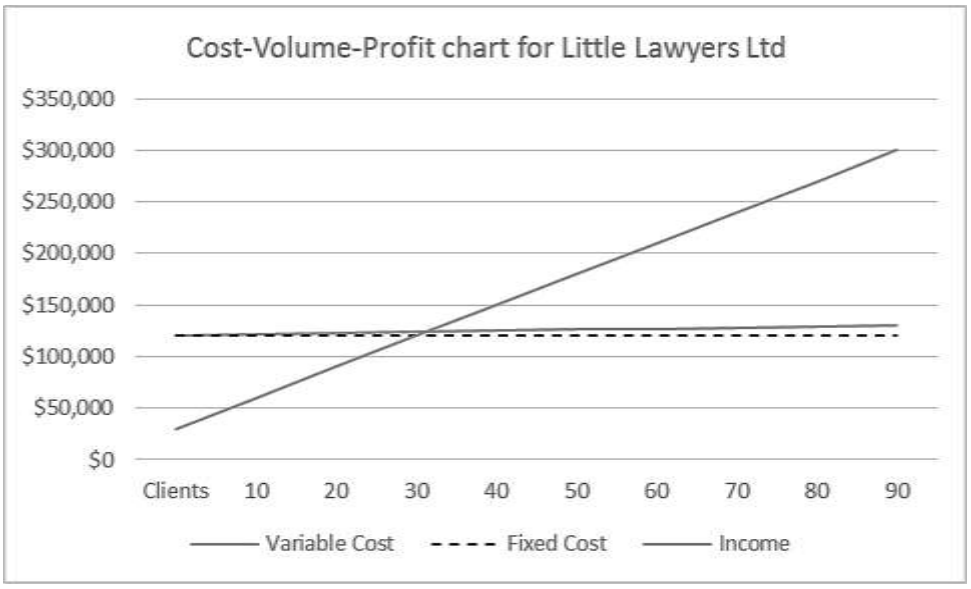
When a person books a flight from Auckland to Los Angeles, the airline doesn't have perfect knowledge of the costs it will incur in advance. For all they know, the person might weigh 180 kg and be carrying 60 kg of baggage. The person might, however, be a weedy 18 year-old who barely tips the scales at 50 kg, and is only carrying a cabin bag weighing 7 kg. The airline probably also doesn't know who will be flying the plane that day: is it Captain Ace Eagle, veteran pilot who gets paid $500K+ a year? Or Captain Wilbur Wright, who has the bare minimum of flight hours under his belt to take the triple-7 across the Pacific? And what about weather conditions – what if there is a huge headwind that requires an additional 20% of fuel for the trip? What about the volatile cost of aviation fuel itself?

In truth airlines have many more variables to deal with in delivering their service than do law firms. Consider if Air New Zealand charged in the same way as our profession traditionally does:

"*Good afternoon and welcome onboard this Air New Zealand flight to Los Angeles. Your Associate Pilot is being assisted today by a Consultant, and as such we'll require an additional $1,000 from you for the trip. For those private customers seated in economy we will be distributing shoe-shine kits and shower caps, and that will be an additional $50 each. I hope you enjoy your flight. We'll get back to you later on if the weather turns bad and we need some more money for the extra fuel.*"

How are industries that have to deal with massive uncertainty able to charge a fixed fee for a product or service? The answer is as simple as the graph[20] below:

This chart shows three lines. The flat, dotted line represents the fixed costs of the business (salaries, rent, HLP, insurance, etc.). The gradually inclined line represents the amount of variable cost per unit (client). The steeply inclined line represents the amount of gross income per unit (client).



Consider the types of costs a law firm has: in fixed terms they are the cost of staff, equipment, office space, electricity, internet, etc. (for Little Lawyers Ltd this is $120,000 per year). Add to that the variable cost for each client: printing, phone calls, cup of tea or coffee when they attend the office, postage (conservatively,

[20] Such a chart will be different for each firm, and the scenario presented is purposefully simplistic

$100). Court fees and other transactional costs specific to certain types of matters are considered 'step variable costs' and can be taken into account by incorporating an overall estimate into the firm's fixed costs. Little Lawyers receive on average $3,000 gross income from each client.

The point where the steep line intersects the gradual line is the point of 'break-even', where every client from that point onward represents pure profit. Note the tiny contribution the variable costs make in the overall cost of doing business per client.

The arguments for fixed-fee billing are compelling:

1. Fixed fees are not hard to plan for:
    - Law firms have very few variable costs, most of their costs are fixed and therefore are known quantities
    - There is no barrier to charging fixed fees, at least not legally, professionally or ethically
2. Fixed fees would be popular with consumers:
    - With the advent of the internet there is a greater expectation, in general, that when a consumer shops for a product they will find a guaranteed price
    - A fixed fee represents an acceptance of risk on behalf of a firm that matches the risk being taken by the client (whereas with hourly billing a firm is placing the entire risk on the shoulders of the client)
3. Fixed fees would benefit the profession as a whole:
    - Porter's Five Forces shows there are threats of new entrants (Generation Z lawyers starting firms that use fixed-fee models) and substitution (clients that self-represent more often as it becomes easier) – in other words, if consumers demand a product and the market doesn't provide, someone else will or the consumers will find another way to get what they want
    - The major costs for law firms are office space, equipment and idle staff – fees are only earned when these things are productive
    - Fixed fees don't mean lower fees (a price war is a downward race to the bottom) – but a different model of pricing based on the strategic objectives of each individual firm

To be blunt, there is very little in the way of barriers or law firms to charge fixed fees. What is required is a significant paradigm shift in the profession, and the Ministry of Justice's move to a fixed fee legal aid framework is giving those law firms still providing legal aid services a competitive advantage in this respect. As they adjust to measuring the work we do for clients in receipt of legal aid on the basis of 'steps' rather than time, they have the opportunity to offer private clients a similar costing process – 'fixed fees' for stages of proceedings. This provides more certainty for both the client and the firm in term of cost/income, and for the client and the lawyer in terms of expectations.

Limited retainer

Acting on a limited retainer for private clients advising on certain aspects of proceedings or a negotiation can allow a cost-conscious client to buy the legal services he or she needs without necessarily engaging a lawyer to provide the 'first class' service traditionally provided.

A practical example of where such services are likely to be provided in future is advising clients in a parenting dispute in which lawyers are unable to 'act' under the reformed Family Court model. In

relationship property or child support cases a client may prefer to engage in his or her own negotiation while seeking advice from a lawyer in the background.

In all such cases, clearly setting out the scope of services which the lawyer is engaged to perform is important. When the legal aid environment in the United Kingdom changed, unbundling legal services became more popular. The UK Law Society does recommend law firms consider declining to provide advice if the information provided by the client is insufficient for the lawyer to give accurate advice.[21]

Summary

Smart Practice leads to competitive advantage, through improving efficiency, freeing-up fee-earners, and readying a firm to move into a fixed-fee billing model, which will be more attractive to consumers than the traditional models of billing.

Efficiencies can be gained by utilising unused or under-used resources: particularly labour. Time wasted on repetitive processes that could otherwise be streamlined through use of technology or systems is money wasted – either in terms of profit or benefits passed onto the client.

Technology does not need to be expensive, nor even high-tech. When used in conjunction with good processes, which are derived from policies that reflect the strategy of the firm, technology can save money and reduce errors.

All management is risk management and through accepting risk exists and embracing it – both threats and opportunities – a law firm can maintain high levels of professionalism and ethics whilst building its competitive advantage.

The law profession is notable for its collegiality and supportive nature, and as such care must be taken to adopt new ideas slowly and across the board. However if the profession moves too slowly to adapt to the changing environment it could be overtaken by hungry new law firms run by the cream of recent graduates or through legislative changes imposed upon it.

To make fixed fees profitable firms need to decline work which is unnecessary, not 'legal work', and does not progress the client's matter. Work should be undertaken in a manner that is as efficient as possible and delegated to ensure lawyer time is used efficiently. There is no benefit to either the lawyer or (usually) the client for there to be delay and on fixed-fee legal aid delay means that the fee doesn't stretch as far; you need to move on to fixed fee plus or you aren't working on another file for which you could claim another fee.

If law firms are currently able to make fixed fee legal aid profitable then the profession should be able to make fixed fees for private paying clients work too. In fact, the more efficient lawyers are in delivering services under fixed fee legal aid the less 'profitable' they become under an hourly rate model because the efficiency speed undercuts the usefulness of the hourly rate as a billing tool.

Lawyers are very used to looking at their hourly rate as being the only way to measure profit and loss i.e. if I am not charging my full hourly rate then I am not making profit. This is only one way of looking at billing and it is one that is hard to defend any more.

[21] http://www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/#un4

Unlike many service industries, many of our business costs are known and fixed. Lawyers can consider what their costs are, what volume of work is needed to meet those costs and then how much profit is likely to be made. Supply, demand and price impact on volume.

Applying Porters Five Forces, the Family Court reforms give us a threat of new entrants (FDR rather than Counsel-led mediation, Gen-Z law firms, NGOs providing assistance with documents preparation rather than lawyers), the threat of substituted products (potentially "refined" or "tick box" applications, more self-representing participants), and greater competitive rivalry for the work which does remain available to lawyers. Smart Practice suggests that lawyers should consider whether an hourly rate is still representative of their market value.

Conclusion

We fully expect this paper will provoke discussion. We have purposefully taken a view on the side of a fixed fee paradigm because we believe it is well beyond time that the honourable profession of law starts asking itself questions around what the future holds.

To delay having this difficult conversation will not in any way solve the problems that await us in the future. Lawyers are notoriously conservative in their approach to risk – they're paid to be careful after all! – but business is not law. Businesses exist at the mercy of external forces, few of which are as logical or predictable as in law.

Borrowing from the expertise of professional business managers would be a step in the right direction. Adopting Smart Practice ideas will help firms build a framework upon which to head into the unknown with confidence.

Erin Ebborn, LLB

Rohan Cochrane, LLB

Jarrod Coburn, MMS

October 2013

Appendices

Appendix One – Folder Checklists

Ebborn Law Limited

New Client Checklist – Legal Aid

v5.0

This form is to be attached to the back of every new file folder and manually signed and dated at the completion of each sub-step.

Step	Action	Done	Date	Max time
1. Booking	Telephone call take and TPS Cover Sheet completed	.....		30 min
	ACTION: create contacts in ActionStep			
	Lawyers emailed about new potential client (2nd conflict check)	.....	.....	
2. Set-up	Matter file created in ActionStep — Matter no:			
	Physical file created			
	Support Manager emailed (create f ledger)			
	Matter folder created on J: drive			
	Matter details added to UFL			
3. Pre-engagement	*ACTION: generate client document*			
	New client pack posted to client: - Pre-engagement letter - Legal aid form part 1 - Client care statement - Scope of work - Admin docs (including client details, alternate address, Court fee waiver			
	Disbursement entered for new clie			
4. Pre-meeting (JLA)	Client called/txted prior to intervie			
	ACTION: meet and greet			
	Client ID sighted and scanned			
	ACTION: introduce Case Manager			
5. Case Management meeting	*ACTION: Client Care Statement and*			
	All administrative forms (including signed			
	ACTION: take brief from client			
	Appointment to meet with Lawyer arranged with client Ap			
6. Post-engagement	*ACTION: complete LA application*			
	ACTION: Erin to sign LA application			
	LA application submitted with appr			
	Documents pre-drafted and placed in client draft folder in J: drive	.....	.....	
7. Legal aid approved	*ACTION: generate s24, ToE (if needed) and LA approved letter*			30 min
	ACTION: Lawyer to sign Terms of Engagement			
	If court procedures are live then s24 notifications sent: Court: Yes | No | n/a Lawyer for Child: Yes | No | n/a Opposing Lawyer: Yes | No | n/a Self-Litigant: Yes | No | n/a Other party (specify):	.....		
	Update LA number & grants officer in ActionStep	.....		
	Update Universal File List (status)	.....		
	Update Universal Billing List (dates of LA approval, ToE, s24, client letter)	.....		
	Send LA approval letter to client (with ToE if appropriate)	..... $	.....	
	ACTION: scan all documents, upload, and place originals in physical file			
	ACTION: double-check that lawyer appointment and any Court dates are in diary			

- Appt. to be put in diary - File note needs to be written $ - Disbursement must be recorded

Appendix Two – Pre-Populated Client Reporting Letter

Ebborn Law Limited

[[system_date]]

[[Firstname|pt=Client]] [[Lastname|pt=Client]]
[[Addressline1|pt=Client]]
[[Addressline2|pt=Client|ifnull=ignore]]
[[City|pt=CLIENT]] [[Postcode|pt=Client]]

Dear [[Salutation|pt=Client]] [[Lastname|pt=Client]]

RE: Formal Proof Hearing

Please find **enclosed**:

1. A copy of the Notice of Formal Proof Hearing. The Court has referred your case for a formal proof hearing.

What is a Formal Proof Hearing?

A formal proof hearing is directed by the Court when a party has not defended the other person's application. In this case [[Firstname|pt=Opposing_party]] ([[Lastname|pt=Opposing_party]]) has not filed a Notice of Defence to your Application for ORDER. The Judge will decide at the hearing whether the order(s) you want should be made. The hearing usually lasts no more than 15 minutes. At the hearing it is possible that you will be sworn in and asked to confirm your affidavit is correct. The Judge and/or Lawyer for Child might also ask you some questions about your application.

What you need to do:

- If it has been a number of months since you last filed an affidavit or there has been a change in circumstances or more difficulties you should phone your lawyer. Your lawyer might decide to file an updating affidavit prior to the hearing;
- Read over your affidavit before the hearing;
- **Attend** the Formal Proof Hearing;
- Bring a copy of your affidavit filed in support of your application for ORDER. If you no longer have a copy please advise us so we can bring a spare copy for you.

What your Lawyer Needs to Do

We will get in touch with you a couple of days before the formal proof hearing to take instructions and discuss the hearing.

Next Court Date: TIME a.m./p.m. on SELECT DATE at PLACE.

Yours sincerely
EBBORN LAW LTD

[[Fullname|pt=Lawyer]]
Lawyer

(03) 339 2233 • 285 Lincoln Road, Addington • PO Box 291, Christchurch 8140 • EbbornLaw.co.nz

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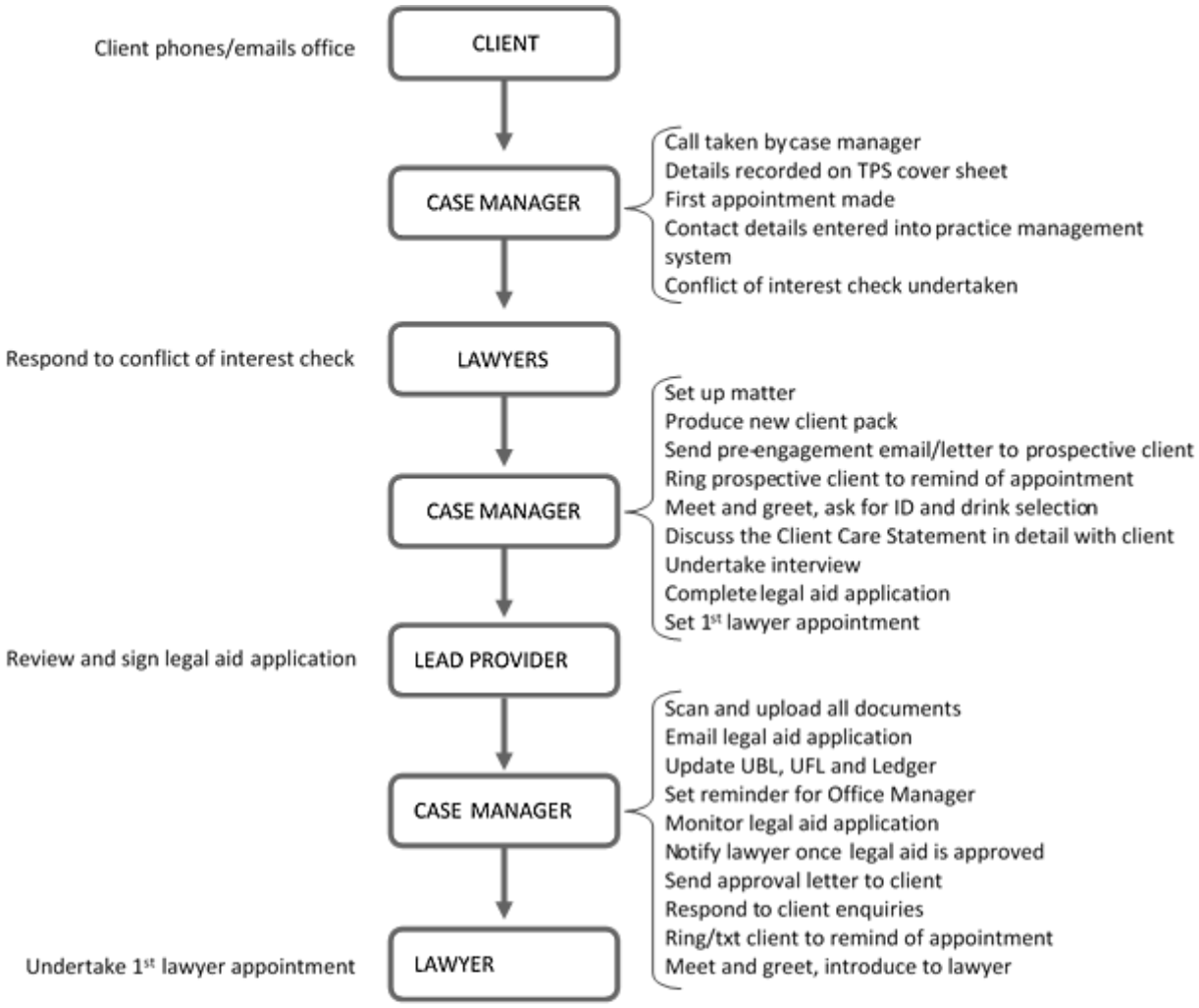
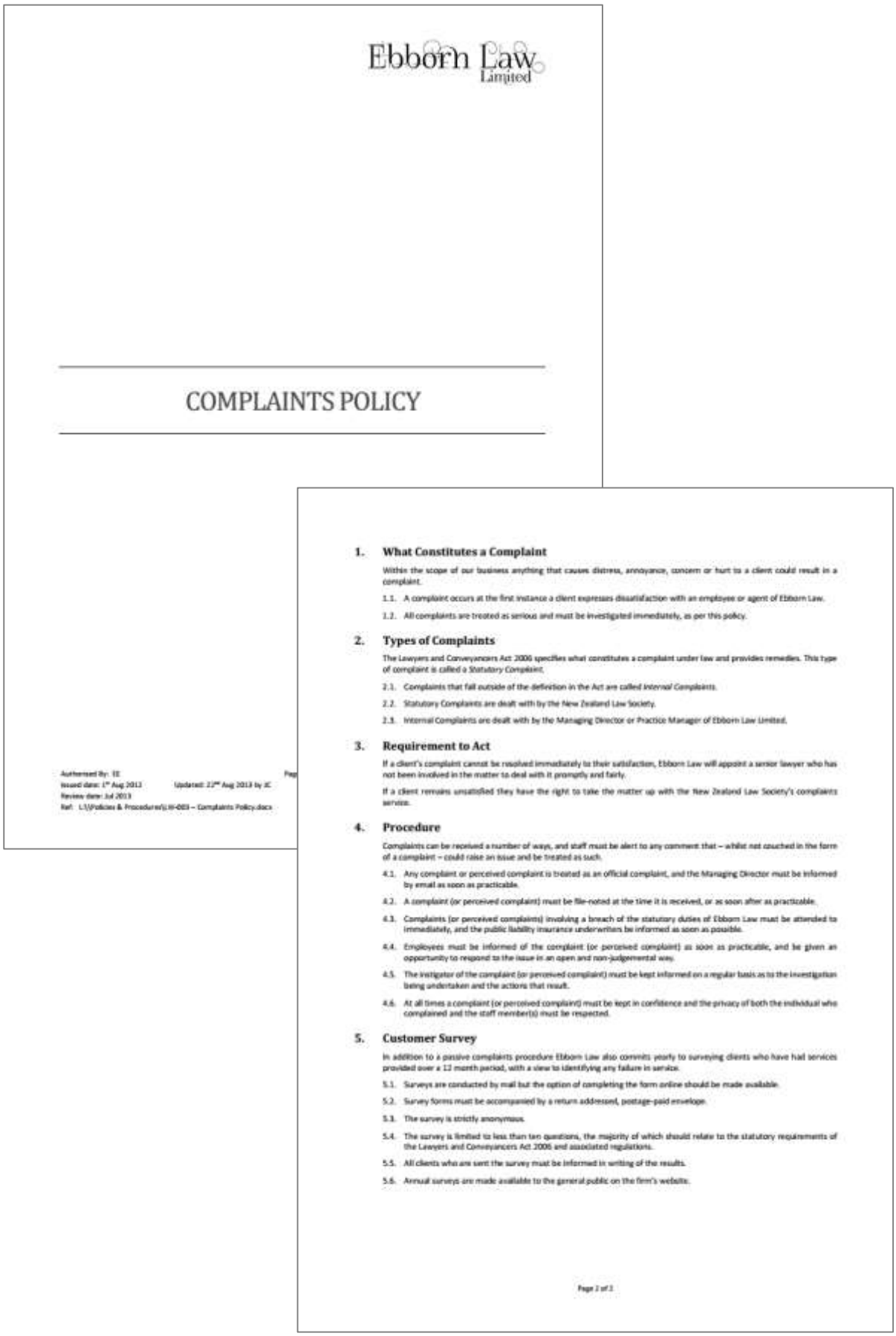
Appendix Three – New Client Process



Appendix Four – Complaints Policy



Ebborn Law Limited

COMPLAINTS POLICY

Authorised By: EE
Issued date: 1st Aug 2013 Updated: 22nd Aug 2013 by JC
Review date: Jul 2013
Ref: L:\(Policies & Procedures\)-HI-003 – Complaints Policy.docx

1. **What Constitutes a Complaint**

Within the scope of our business anything that causes distress, annoyance, concern or hurt to a client could result in a complaint.

1.1. A complaint occurs at the first instance a client expresses dissatisfaction with an employee or agent of Ebborn Law.

1.2. All complaints are treated as serious and must be investigated immediately, as per this policy.

2. **Types of Complaints**

The Lawyers and Conveyancers Act 2006 specifies what constitutes a complaint under law and provides remedies. This type of complaint is called a *Statutory Complaint*.

2.1. Complaints that fall outside of the definition in the Act are called *Internal Complaints*.

2.2. Statutory Complaints are dealt with by the New Zealand Law Society.

2.3. Internal Complaints are dealt with by the Managing Director or Practice Manager of Ebborn Law Limited.

3. **Requirement to Act**

If a client's complaint cannot be resolved immediately to their satisfaction, Ebborn Law will appoint a senior lawyer who has not been involved in the matter to deal with it promptly and fairly.

If a client remains unsatisfied they have the right to take the matter up with the New Zealand Law Society's complaints service.

4. **Procedure**

Complaints can be received a number of ways, and staff must be alert to any comment that – whilst not couched in the form of a complaint – could raise an issue and be treated as such.

4.1. Any complaint or perceived complaint is treated as an official complaint, and the Managing Director must be informed by email as soon as practicable.

4.2. A complaint (or perceived complaint) must be file-noted at the time it is received, or as soon after as practicable.

4.3. Complaints (or perceived complaints) involving a breach of the statutory duties of Ebborn Law must be attended to immediately, and the public liability insurance underwriters be informed as soon as possible.

4.4. Employees must be informed of the complaint (or perceived complaint) as soon as practicable, and be given an opportunity to respond to the issue in an open and non-judgemental way.

4.5. The instigator of the complaint (or perceived complaint) must be kept informed on a regular basis as to the investigation being undertaken and the actions that result.

4.6. At all times a complaint (or perceived complaint) must be kept in confidence and the privacy of both the individual who complained and the staff member(s) must be respected.

5. **Customer Survey**

In addition to a passive complaints procedure Ebborn Law also commits yearly to surveying clients who have had services provided over a 12 month period, with a view to identifying any failure in service.

5.1. Surveys are conducted by mail but the option of completing the form online should be made available.

5.2. Survey forms must be accompanied by a return addressed, postage-paid envelope.

5.3. The survey is strictly anonymous.

5.4. The survey is limited to less than ten questions, the majority of which should relate to the statutory requirements of the Lawyers and Conveyancers Act 2006 and associated regulations.

5.5. All clients who are sent the survey must be informed in writing of the results.

5.6. Annual surveys are made available to the general public on the firm's website.

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Appendix Five – Porter's Five Forces

Porter's Five Forces is a simple tool that assists managers to understand the competitive environment they operate within.