LEGAL PRACTITIONERS' LIABILITY COMMITTEE

Mind the gap

Presenter's Workbook

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Contents

Introduction

The *Mind the gap* scenario covers strategic commercial advice that straddles commercial and litigation practices within a firm. The video explores issues relating to acting for partnerships or joint ventures and managing a limited retainer in the context of a complex commercial matter that ends up in litigation. These materials are designed to be used with the video.

It covers the following issues.

- Acting for partnerships/joint venturers including clarifying who are the clients.
- Managing the limited retainer including:
    - understanding the limits of the retainer
    - documenting the retainer
    - retainer creep.
- Supervision and no partner taking ultimate responsibility for the junior doing the leg work.

Retainer management basics

What are some of the things you think about when you hear retainer management?

A critical part of managing any retainer effectively is setting it up.

Before accepting a retainer ask yourself 'should I act for this client in this matter at this time?' In answering that question you should consider the following things.

- Who is the client?
- Can I act – is there a conflict?
- Do I have the time and the resources?
- What will the scope of the retainer be?
- Who can I delegate it to?
- How often and by what means will I communicate with the client during the retainer?

There is more to retainer management than simply complying with the cost disclosure requirements in legislation. Once you accept the retainer some of the things to manage include:

- the retainer letter
- the cost disclosure
- the cost agreement
- when to terminate the retainer
- how to terminate the retainer.

Mind the gap

The video scenario

The firm is given a high-level strategic overview role by a 'top 20' corporate client. Specifically, they are to give strategic advice on options in a licensing agreement by joint venture parties. The in-house counsel who is providing instructions is an ex-senior associate of the firm. The dynamics between the relationship partner and his junior practitioner and with the client underscore poor communication about the scope of this sophisticated limited retainer.

'Take 2' offers a more cautionary approach to managing a limited retainer with a valued client (see the section 'What would have made the difference?' page 8).

You can play the scenario all the way through and discuss the questions below at the end or pause at the indicated points to discuss what has just occurred.

Scenes 1 and 2 - Initial interactions - 0:00 to 3:52

A meeting between the relationship partner and his junior practitioner, Sonia, about a new matter. Then a subsequent meeting with Fruit Corp's in-house counsel, Brian White, who is an ex-senior associate at the firm.

What is the transaction and what is the firm's role?

- There is a joint venture arrangement with licences to each of the joint venture partners (JVP) and Bento Pty Ltd (Bento).
- The second installment of $1.2 million is due soon but some JVPs are getting cold feet and one has entered into a sub-licence.
- The sub-licence could trigger a default for all relevant parties; they could lose their money and have to pay the last installment.
- Each JVP has an option (open for three months) to opt out and make Bento buy back their share.
- The firm is directed to keep the contract afloat until the other investors can get advice on how to exercise their options.
- The firm's role is strategic overview.
- Brian asks to get the firm's litigators involved just in case Fruit Corp does not get a successful commercial outcome.
- Charge-out rates for the matter are mentioned as a passing comment at the end of the meeting – same as discussed last month.

Scenes 3 and 4 - Three months later … - 3:53 to 6:05

There is a conversation between the relationship partner and Sonia about Fruit Corp negotiations failing and the need for big picture advice about the options. There is a further discussion to prepare for meeting with the JVPs, their lawyers, Brian White and the firm's litigator, Dominic Ryan. Sonia mentions how Dominic has been unable to locate the retainer letter on the file.

What has happened?

- The negotiations to restructure the arrangements have fallen through. Bento is going to try to terminate the agreement.
- The firm is giving big picture advice on options but the junior solicitor has looked at the fine detail as well.
- The partner says they are not looking after each JVP's requirements regarding options.
- Litigators are now going to run the matter. The partner has become disinterested (and we get the feeling there is a lack of proper supervision of the junior practitioner).

Scene 5 – A further three months later and things have ended badly - 6:06 to 8:27

The relationship partner is talking to Bruce, another partner in the firm, about the situation, what went wrong and the allegations being made against the firm by one JVP Morely. He is threatening to sue because his company has not validly exercised its option as it had to be debt free when exercising the option and it was not.

To the audience: take the next few minutes to have a chat with the person next to you or on your table about what mistakes were made by the firm.

- The allegations by Morley were that:
  - because Morely's company was a partner of the joint venture, it had retained the firm
  - the firm considered the requirements for validly exercising the option and was involved in advising Morely's company on the timing for exercising the option – accordingly, it knew enough to trigger the duty to advise Morely's company of the risks in relation to the option.
- The firm failed to really consider who its client or clients were.

- The firm failed to initially articulate and clearly document what its retainer included and did not include.
- The relationship partner did not adequately supervise or listen to the junior lawyer.

What would have made the difference?

'Take 2' - 8:33 to end

What could the practitioners have done in this scenario that would have made a difference to the outcome?

We thought that clarifying with the client early in the matter what they actually wanted and seeking more history and other details about the matter would have made a difference.

In our view, this would have led to better documentation of the retainer because the partner would have been more engaged in the matter (as you could see in 'Take 2'). He may have also taken the time to properly consider and scope the matter, rather than just letting the client 'run roughshod' over the firm.

It can be a balancing act. In 'Take 2' the partner was quite forceful with the client, which can have some risks but acting without clear instructions is invariably high risk.

The real claim

In the real case on which *Mind the gap* is based, the commercial partner was very busy and the junior practitioner was told she was to report to both the commercial partner and a litigation partner from the beginning. It appears she 'fell between the stools' as neither partner took sufficient interest in what she was doing.

No proper retainer agreement/letter setting out the scope of the retainer was written at the start partly due to neither partner taking ownership of the matter and turning their minds to managing the retainer.

The lack of formal documentation may have been also partly due to the instructions coming from the firm's former senior associate. There was a degree of familiarity we often see in claims involving family and friends.

Another aspect of the dynamic was that one of the relevant partners was the relationship partner for the large and important client so there was some reluctance to push back on what the client was asking them to do.

Who is the client? - acting in a joint venture

In this scenario 'joint venture' means an arrangement where two or more parties get together to undertake a commercial venture. Sometimes these business arrangements are documented in a joint venture agreement, sometimes they involve a partnership arrangement or a unit holders' agreement, or there could be a combination of agreements. Sometimes there is no written agreement at all. The point is there are several different interests coming together with a mutually agreed purpose.

The parties are not antagonists or adversaries. They appear to be in furious agreement about what everyone is contributing to the arrangement and how they are all going to work together to make this enterprise successful. Therefore, it is often the case that one lawyer will end up acting for all of the parties.

What could be the problem?

- The parties may have very different interests, be in different positions and may all need very different advice.
- They may be getting different things out of the deal.
- They may have different amounts or types of assets at risk.
- Misunderstanding about who the practitioner is acting for – by the practitioner and the client(s).

In the scenario the firm thought it was acting for the joint venture, not the individual JVPs but one of the JVPs (Morely and his company) thought perhaps in hindsight the firm was looking after him/it.

Morely's company had a different company structure than some of the other JVPs which ultimately caused it problems. This was a good example where not all of the partners were 'equal'.

It is easy to see why unrepresented JVPs may think the practitioner acting for the joint venture is also looking after their interests. Even in situations where all the parties have their own legal representation, circumstances still arise where parties can misunderstand what the practitioner is doing and who they are acting for.

When allegations are later made, many practitioners are left feeling incredulous that they could be found to have acted for or at least owed a duty, to a party for whom they did not consider they were acting.

In *Mind the gap* the JVPs had their own practitioners and attended meetings with those practitioners. Nevertheless Morely thought he was being looked after and protected by the firm.

Joint ventures and the obliging practitioner

Often the practitioner is drawn into these situations out of a sense of obligation or in an attempt to be obliging and accommodate everyone. See if any of that rings true in the following examples.

Examples

1 Sale of shareholding for brother

The practitioner acted for his own brother in selling a 50 per cent shareholding in the brother's business to a third party, Paul. Acting for family is often problematic in many ways.

Paul paid over $100,000 for the half share in this business. Prior to this transaction, the practitioner had never acted for Paul although he did act for Paul on the sale of a property after the transaction.

The business went badly and eventually Paul made a complaint to Professional Standards about the practitioner. He alleged the practitioner had acted for him in the purchase of the business and should have warned Paul:

- the business was in dire financial straits
- the co-director/vendor (the practitioner's brother) was a very bad businessman and had several failed businesses
- that he should check the financial status of the company before committing himself.

After listing all of the problems with the brother's past business history the complaint included the following quotes from Paul.

> *'the solicitor knew all of the above and it was his obligation to advise me to get another lawyer to act on my behalf, obviously he did not have my interests at heart and deliberately withheld at the very least hid this information from me, by using his status as a lawyer. He knew beyond a shadow of a doubt my investment was very much at risk. …… the investment was bad one and could have been prevented had (the solicitor) done the right thing by me followed the law, been honest and warned me'.*

This does not look good for the practitioner but in his version of events he was contacted by his brother and asked to prepare a sale agreement which he did and faxed dutifully to his brother. A month or so later he was then asked to prepare a simpler agreement which he did and again faxed to his brother. Approximately a month after that his brother advised him the parties had settled the transaction.

Later both the brother and Paul attended the practitioner's office to have some company documents prepared. During this meeting Paul indicated he would be using the practitioner for his legal work. This was the first time the practitioner had met Paul. The practitioner subsequently acted for Paul in the sale of Paul's property. At no point prior to the share sale agreement being executed by Paul had the practitioner spoken, met or written to Paul. His only contact had been with his brother.

Professional Standards dismissed the complaint and it was not been taken any further. However this illustrates how lay people could conclude that because a practitioner is involved in the transaction that practitioner is looking after their interests. The fact the practitioner was acting for his brother may have lead him to treat the matter more casually than he would if the client had not been related. Had the practitioner written to Paul and explained he was not acting for him and Paul should get independent legal advice before entering into the contract, there would not have been any scope for Paul to have brought his allegations to Professional Standards.

2 The three amigos investing with failed businessman

The practitioner had previously acted for a collapsed group of companies of which Adam was a director. The practitioner was aware Adam had been charged with various criminal offences as a result of articles he had read in the paper. In hindsight, he thought he was also probably aware at the time the transaction occurred that Adam was bankrupt as well.

Adam approached the practitioner to set up a new company and draft a shareholders' agreement. Adam had come up with this new business idea and had found three people who were prepared to become directors and shareholders, and run the business. At least two of those people were known to the practitioner and had been recent clients of the firm. For the purposes of the example let's call them the three amigos.

The practitioner had a meeting with all four in which it was agreed who would lend money to the new company and what amounts, what the shareholdings and directorships would be, and what amount Adam would receive as a founder's fee.

The practitioner believed he was acting for the new company but wrote letters to all parties saying "thank you for consulting us and we would look forward to acting on your behalf". The letter also said "we confirm that this firm is acting on behalf of the company which is constituted by its shareholders. However, if any dispute arises between shareholders each party will be required to seek independent advice".

After the initial set up of the company was finalised, the practitioner wrote a letter to all parties with details of his account and stated he had given them a discount because they were a valued client. Later still, he sent letters to each of the directors and gave them details of the role the director should take in a company. When one of the directors wanted to resign the practitioner did the paperwork and then billed the company.

The new company failed and the three amigos sued the practitioner saying:

'you acted for us and you should have told us about Adam's history in failed companies and the charges against him as well as the fact that he was a bankrupt'.

The practitioner was astounded, said he never acted for the three amigos and that he thought he was only ever acting for the company despite what his letters had said.

The other defences raised by the practitioner were that the shareholders would have invested regardless of what he told them about Adam's history and even if he did act for them he could not divulge information about Adam. This argument clearly shows the practitioner was in a conflict situation. The practitioner also said he thought the three amigos would have known about Adam's history given it had been in the papers and they'd had long discussions with Adam, negotiating most of the details with him.

While the practitioner thought he had it clear in his own mind who his client was, he did not make it clear on his file and in the minds of the three amigos.

3 Building joint venture

This joint venture involved the parties building an office block and renting it out to one of the related joint venture partners. One of the joint venturers was a company which conducted a building enterprise ('the building Co') and it owned the land on which the building was to be built. It was agreed the building Co would supply the land and construct the building while the other joint venture parties (who were companies controlling super funds of three people – the superfund parties) would provide the finances.

The practitioner in this claim was the brother of two of the shareholders of the building company (Bill and Ben). After discussions with Bill and Ben, the practitioner proposed a structure for the joint venture. The structure involved setting up a unit trust in which the building company would own half the units and the superfund parties through their super fund companies would own the other half of the units. The practitioner drew up the required documents including a unit holder's agreement. The documents were given to the superfund parties and a date was made for a meeting to sign the unit holders' agreement.

At this point, the practitioner was aware the superfund parties had their own practitioners. On the day of the meeting, the superfund parties' practitioner could not attend the meeting and instead of postponing the meeting it went ahead. The practitioner explained to all of the parties the terms and effect of the unit holders' agreement and it was executed.

The arrangement was that once the building was completed it would be leased to a related company of the superfund parties. The tenant failed to pay rent and the lease was terminated. The unit holders' agreement provided that the property would be sold in such circumstances and the superfund parties' share of the balance of the proceeds of the sale would first be used to discharge any losses the building Co suffered. The balance would then be given to the superfund parties. The agreement was clearly advantageous to the building Co.

When the building Co sought to recover their losses from the balance of proceeds of sale of the building it resulted in litigation. The superfund parties joined the practitioner to the proceedings, stating the practitioner was retained by them to advise in relation to the structure of the joint venture and to act on their behalf at the meeting where the unit holders' agreement was signed. It was also argued the practitioner owed them a duty of care by reason of the representations made by the practitioner throughout the course of the transactions.

At this point the practitioner had sent no letters to the superfund parties setting out what his role was to be. He kept no file notes of the meeting where the agreement was signed and he did send his account to the superfund parties asking for payment.

It had been agreed between the parties that the superfund parties would pay for the legal fees because they were using the more complicated superfund structure which had caused most of the legal work. The practitioner said he thought he was only acting for the building Co and Bill and Ben's interests, and the superfund parties had their own legal representation. If this was the case why did the practitioner explain in detail the terms of the unit holders' agreement?

This matter settled on the basis the practitioner walked away and bore his own costs, which were not insubstantial. The practitioner also absorbed the cost of the countless hours given in order to prepare witness statements, finding documents and other relevant work.

This claim may never have eventuated if the practitioner had set out clearly from the start whom he was and was not acting for as well as adjourning the fateful meeting. Alternatively to adjourning the meeting he could have declared clearly at that meeting he was only protecting the interests of one party.

Even when you think the other parties are represented you can still get into trouble.

4 Guarantees for building company

The practitioner had acted for a builder and his company over several years. One morning the builder telephoned the practitioner asking if he could witness some guarantees. The builder had been in discussions with a building marketing company and in order for the builder to be able to construct more houses, he required increased insurance. The insurer required extra guarantees and the directors of the building marketing company had agreed to give those guarantees.

The building marketing company practitioners were said to be unavailable so all the guarantors attended the builder's practitioner's office to have the guarantees executed. The guarantors included the builder, his wife and the three directors of the building marketing company (only one of which owned his own home). The practitioner explained the terms of the guarantee and said he explained to the three directors he had acted for the builder for some time. He also said he pointed out clearly to all of those present that the guarantees were joint and explained what that meant. It was also discussed (with a lot of joking) that only one of the parties owned their own home and so would be most at risk. The guarantors signed and went on their way.

The practitioner did not tell the directors he was acting for the builder in two current proceedings where debts were owed by the builder and he knew the builder was in a dire financial position.

Shortly after the guarantees were signed, the builder became bankrupt and the directors made a complaint to Professional Standards. Initially the practitioner's response was that he was only asked to explain the guarantee.

At the end of the transaction, the practitioner had written to the directors and thanked them for their instructions and enclosed a memorandum of his fees for their attention. The enclosed account stated it was for 'acting on behalf of the guarantors'.

In this case the practitioner was trying to be obliging and failed to recognise the conflict situation he was in. It also illustrates the importance of getting the description right on accounts.

5 Purchase of property

The practitioner was approached by a client and the other joint venturer to document the venture whereby one party (Bonnie) would contribute 50 per cent of the purchase price and the other party (Clyde) would have to borrow his half secured against the joint venture property. It was agreed Clyde would be solely responsible for the mortgage repayments. When Clyde was unable to continue with the payments and subsequently disappeared, Bonnie complained she had not been warned she would end up having to pay the mortgage.

It was not in Bonnie's best interest to have allowed the mortgage over the property and if the practitioner had only been acting for Bonnie he could have advised her more earnestly. There may have been other security Bonnie could have obtained from the Clyde or Clyde could have offered to the bank. At the very least, the practitioner would not have been in a position where it was easy for Bonnie to argue he preferred the rights of Clyde over her interests, assuming he documented his advice and her response!

In a similar case, the parties purchased a residence and adjoining business. The proposal was one party put up the funds to purchase the land which was in his name and the other party provided plant, equipment and expertise to run the business. At one point when the parties were arguing, the practitioner said to the party who had not previously been his client 'if you want to get other advice you should'.

The parties resolved their differences and the joint venture agreement was eventually signed. It was agreed the party providing the expertise would lodge a caveat over the property, which was done. Eventually the business relationship disintegrated with accusation on both sides the other party was not contributing as they should. The practitioner had copious notes of the long meetings with the clients but no file notes telling the one party to go and get independent advice.

When asked what he would do in hindsight the practitioner responded he 'would send X packing', also admitting that it would have been difficult.

Risk management strategies

As some of these examples show, you do not need to have a formal written retainer agreement for a party to think you are acting for them and the courts have also ruled on this issue.

The courts have found liability can arise where:

- there is an implied retainer including evidence such as written communication between the practitioner and the other party, and the practitioner assumed responsibility to the other party
- there is sufficient proximity of relationship between a practitioner and other party to give rise to a duty of care
- a fiduciary relationship exists – a relationship of trust and confidence.

There is no one rule that fits all in this area and the reason practitioners get caught out is because it is difficult and complex. You might have a situation where all of the joint venturers are contributing similar things, are all carrying the same risk and have similar assets at risk and so there is no apparent conflict preventing you acting, but as Justice Byrne said in a Pyramid Building Society case:

> *'How many cases like this need to come before the courts before solicitors appreciate the folly of acting for more than one party in the most innocent appearing of transactions? Judges for nearly a century have inveighed against the practice. … I am unimpressed with the argument that in a friendly and uncomplicated conveyancing transaction of whatever kind it is proper for a solicitor to act for more than one party because no conflict is apprehended. Lawyers are in a better position than others to know that in the friendliest of partnerships, commercial dealings and marriages there is always the prospect of discord and conflict….The problem with conflicts is that they tend to arise in unexpected ways and often at short notice...'*

Before you decide to act for all parties in a joint venture situation or for more than one party in a transaction you might consider whether it is best practice. You also need to:

- be clear about who you are acting for right from the start and confirm this in writing to everyone, including the parties you are not acting for
- avoid giving any advice to other joint venturers and where mortgages and guarantees are involved

- not sign solicitors certificates for the other joint venturers
- recommend to unrepresented non-clients they get independent legal advice
- ensure you do not put yourself in a conflict situation, no matter how obliging and accommodating you want to be.

Limited retainers

In the video scenario the firm had a limited retainer which could have been described as a helicopter overview.

Is there anything wrong with having a limited retainer?

What can go wrong with limited retainers?

- Practitioners fail to document the retainer well enough, leaving room for the client to argue later certain advice that was not given, should have been given.
- The practitioner may document the retainer at the start but when retainer creep occurs, perhaps as further issues become apparent, they fail to update their documentation. This provides the opportunity for the client to later argue the retainer had changed more than was assumed by the practitioner.
- Practitioners do not always ensure they get the full picture of what is going on from the client, leaving situations where important information is not given to the practitioner.
- The practitioner attempts to stick strictly to the limited retainer and consequently misses a closely related issue that is arguably within scope.
- There is scope for misunderstanding between the client and the practitioner as to who is doing what, with allegations later that the practitioner missed an issue.

Retainer creep

The initial instructions in *Mind the gap* were to keep the retainer afloat long enough to allow the parties to exercise the options, which was only two weeks away. However, three months later the firm had been negotiating to recast the whole deal as well as advising on strategic issues relating to exercising the options. It is easy to let something like that happen without documenting it, however this often results in the practitioner having to deal with differing inferences about the extent of the retainer.

Following are some more limited retainer agreement examples.

Examples

1 Redraft MOU

A firm was asked to review a draft memorandum of understanding that had been prepared by the client to replace a now expired memorandum. The firm did what it was asked to do.

Months later one of the parties sought advice about restructuring. The restructuring exercise revealed the structure underpinning the memorandum was not tax-effective. The client complained the firm should have advised on that problem when asked to review the memorandum.

The firm said it had not been asked to go behind the memorandum and look at the structure; rather, it was asked to advise only on the wording of the new memorandum. The structure had already been set up by previous practitioners. However, the underlying assumptions were flawed, resulting in the memorandum not achieving what was intended. The client argued that the firm should have satisfied itself about those assumptions in order to give the advice. This was clearly not what the firm thought it was retained to do at the time.

2 Review employment agreement

An employment agency instructed a firm to act in a limited capacity relating to the purchase of another agency. At the end of the transaction the firm was also asked to ensure that certain employment agreements conformed with the sale of business agreement it had just entered. The firm reviewed the agreements and made some amendments. It was subsequently discovered that some of the employees were not being paid the appropriate award rates of pay.

The client alleged the firm should not have approved the employment agreements where the conditions did not meet award standards. The firm said they had been specifically instructed not to undertake any due diligence relating to the purchase of the business as the client intended to do it. They believed the later instruction was confined to ensuring the employment agreements complied with the client's obligations in the sale agreement and nothing more. The instructions and retainer were not adequately documented.

3 Slipped between the cracks

While in some cases the firm effectively specifies the matters it is not advising on such as tax, it can still get into trouble when advice from other experts is received by the firm and then not acted on or clarified with the client.

A client asked a firm to establish a new entity and advise on the transfer of assets into the new entity. The firm specified what it was retained to do and early in the transaction recommended the client obtain independent accounting advice about CGT, stamp duty, income tax and GST. The firm received a short email from the client's accountant later stating GST was payable on the sale of the assets. The firm took no action relating to that advice and made no recommendations as to what steps should be taken.

The client later argued the firm should have advised that a 'plus GST' clause be added to the agreement. The firm said they were not retained to deal with the tax issues. The practitioner handling the matter went on holidays the day after the advice was received from the accountant and, although he was back in the office before the matter settled, the issue seems to have been overlooked by everyone.

4 Acting for borrower and lender

In June 1995, the practitioner acted on what he described as an 'intra-client' loan – the practitioner had probably acted for lender and borrower in a loan transaction.

The lender was persuaded to borrow funds to make the loan and the loan agreement drafted by the practitioner provided for payment of all the lender's holding costs, interest and an attractive facility fee of $56,000.

The loan for $565,000 was to be repaid in 60 days with interest. It was secured by a debenture charge over the borrower company's assets and an assignment of $1 million worth of shares in an associated company when those shares were issued. The lender was anxious to ensure the loan was secure and the practitioner allegedly assured the lender it would be.

The borrower paid the first installment of interest and then nothing else. The date for repayment was extended several times and the lender was allegedly warned by the practitioner against taking any 'precipitous action'. However, in June 1997 when the lender finally insisted the practitioner commence recovery proceedings:

- the practitioner said he would not act against his other client, the borrower
- the $1 million share issue had never been made and the substituted shares were worthless
- the debenture charge had not been registered and by that time, the company's major assets had evaporated.

By way of defence, the practitioner maintained his retainer was limited to preparing the necessary documents in respect of a 'done deal'. Whether this was the case, the lender's principal allegation was that the practitioner had also acted for the borrower (and the company director of the borrower) in this transaction in an obvious conflict of interest, in circumstances where the borrower's interests were preferred over the interests of the lender.

The practitioner's file was poor and showed:

- no attempt had been made to document any limited retainer, if there was one
- no investigation into the company was made or suggested

- no guarantees were obtained, with the practitioner saying "it would be normal to have guarantees but X (company director of the borrower) hates personal guarantees and in the circumstances I don't feel it is necessary"
- the security provided was unsatisfactory and inadequate, the shares were never provided and the practitioner failed to register the deed of charge for two years.

It was not clear who the practitioner was acting for. The practitioner's files and accounts mixed all the issues up but it did appear his first contact was with the company director of the borrower rather than the lender. The lender said the practitioner had told him 'X (company director of the borrower) has asked me to draw the documents and I'll be acting for both of you'. This was denied by the practitioner but there was certainly no other practitioner acting in the transaction. The borrower considered the practitioner to be its lawyer. It was not difficult for the lender to make a case that the practitioner was acting for both parties in a position of conflict.

Some major risks for limited retainers are:

- practitioners not documenting the retainer well enough, leaving room for the client to argue later that certain advice that was not given should have been given
- practitioners may document the retainer at the start but when the retainer creeps they fail to update their documentation, leaving it open for the client to argue later that the retainer had changed more than was assumed by the practitioner.

Risk management strategies

When it comes to limited retainers, practitioners need to think laterally and consider what they are **<u>not</u>** asked to do as well as what they are asked to do.

Clarify the extent of any limited retainer, confirm it in writing and where necessary, say what the firm is not going to do.

Where some of the work is being undertaken by the client or by another advisor, confirm that in writing. You may also need to inform the client of the risks of not doing the work.

Closely monitor the retainer as the matter progresses so if things change the retainer can be updated in writing.

Supervision

One of the issues raised in the scenario was inadequate supervision of the junior practitioner.

The junior did the best she could, was very diligent and worked hard at getting on top of the issues and the documentation. However, if the partner had paid sufficient attention, he might have realised and clarified the issue with Morely's company structure.

Any supervision must be proactive and effective supervision depends on people being consciously aware of the limits of expertise and experience of those they supervise as well as managing the delegated work until it is completed. The person supervised also needs to be proactive about seeking guidance where needed. There are some interesting decisions about supervision.

For more information about this topic refer to the audio-visual training video *Supervision* on the LPLC website.

***Legal Practitioners Complaints Committee v Benari [2005]* WASAT 213**

In this Western Australian case, the State Administrative Tribunal looked at a legal practitioner's obligation to supervise an employed law clerk. The practitioner was taken to the tribunal in respect of three separate complaints, one of which related to failing to properly supervise an experienced law clerk.

The evidence showed the law clerk saw clients, took instructions, imparted legal advice, opened files and ran those files acting on behalf of clients. She had weekly meetings with the practitioner where she discussed any matter she needed to (or, perhaps more accurately, thought she needed to). While she gave evidence that it was protocol to discuss all issues of liability and settlement with the practitioner, there was no evidence of any involvement of the practitioner in the relevant matter.

The tribunal said the practitioner should have a proper system in place to ensure his actual involvement in or supervision of, all files. He had delegated all the functions mentioned above and, it was only if anything out of the ordinary happened that a matter was brought to his attention.

The lesson is practitioners need to maintain some level of active involvement in matters they are ultimately responsible. While many practitioners might claim to have an open door, it is not sufficient to expect clerks and juniors to always know when they need to enter that door.

In the judgment there is a summary of the obligations of a practitioner when supervising the work performed by a clerk, as discussed by Malcolm CJ in another Western Australian case, *D'Allessando and D'Angelo v Bouloudas* (1994) 10 WAR 191.

Kelly v Jowett [2009] NSWCA 278

In this case, the clients of the firm were executors of an estate which was the subject of an application for maintenance and advancement of life brought by the son of the deceased (the 'applicant'). An employed practitioner had the conduct of the matter and signed the Notice of Appearance. Prior to the hearing, various court rules, order and directions relating to the filing of the clients' affidavits were not met.

The matter was heard with the clients leading no evidence and no cross-examination of any of the witnesses. At the hearing, an order was made for the applicant to receive a legacy from the deceased's estate and a personal costs order was made against the practitioner. The clients subsequently applied for an order to stay the judgment, adducing evidence that they were never informed the matter was not proceeding satisfactorily. They had assumed the practitioner was looking after their case and everything was proceeding normally.

On appeal, evidence was adduced that the firm's principals knew or ought to have known, of the practitioner's unreliability and delinquency in this and other estate matters. The court held that a client's retainer is with the firm's principal and the firm's principals had neglected to properly supervise the practitioner they employed. The principals' failure to ensure their clients' affidavits were filed in time caused the applicant to incur costs relating to the proceedings, the stay application and the substantive appeal.

The principals were ordered to pay all of those costs on an indemnity basis. In addition, they had previously agreed to indemnify their clients for any costs for which they were liable in respect of the proceedings and the appeal.

Mills Oakley Lawyers Pty Ltd v Huon Property Holdings Pty Ltd [2012] VSC 39

The court found a practitioner negligent in failing to actively supervise a senior associate. When advising a purchaser on a commercial transaction, the relatively inexperienced senior associate failed to realise that last minute changes to proposed funding arrangements could put certain assets at risk. As is often the case, the responsible practitioner gave evidence that he was not aware of the changes to the funding arrangements (especially the crucial email) but that if he had been so aware, he would have been alert to the risks and advised the client to consider restructuring the transaction.

The court found the senior associate should not have been completing the transaction without active supervision given her experience in the type of matter. Had there been adequate, proactive supervision, the practitioner probably would have been able to fulfill the retainer to give competent legal advice by recognising and warning of the relevant risks.

Understanding the limits of an employee's abilities and experience is an important factor when delegating and supervising well. It is often difficult to assess.

Risk management lessons

Joint ventures

Before you decide to act for multiple parties in a joint venture situation you might consider whether it is best practice. You also need to:

- be clear about whom you are acting for from the outset and confirm this in writing to all parties including the parties who are unrepresented at that stage
- avoid giving any advice to non-client joint venturers and where mortgages and guarantees are involved, do not sign solicitor's certificates for the non-client joint venturers
- recommend to unrepresented parties they get independent legal advice
- ensure you are not putting yourself in a conflict situation no matter how obliging and accommodating you want to be. Be proactive and take precautions such as thinking about where potential conflicts might arise and carving potentially risky areas out of your retainer. Ensure you communicate those issues and the potential consequences to the clients and be decisive in avoiding conflicts by ceasing to act and referring clients for independent advice where appropriate.

While the interests of multiple parties may appear aligned at the start, it can be difficult to anticipate where they might diverge and conflicts can arise as the matter progresses. LPLC has seen numerous cases where joint clients have a falling out and one subsequently takes a position that differs from the understanding of the practitioner and the other client(s). In such cases, the 'loser' often alleges that the practitioner failed to protect their interests.

Limited retainer

When it comes to limited retainers, practitioners need to think laterally and consider what they are **not** asked to do as well as what they are asked to do. Clarify the extent of a limited retainer, confirm it in writing and where necessary, say what the firm is not going to do.

Where the client is undertaking some of the work themselves, confirm that in writing. In some instances you may need to confirm the risks of the client not doing the work properly and in time.

Closely monitor the retainer as the matter progresses so if things change the retainer can be updated in writing.

Supervision

There is no 'one-size-fits-all' approach to effective supervision. However, the supervisor and person to whom work is delegated both need to be proactive about supervision at all times.

Effective supervision for any given matter will depend on factors such as the personalities and experience of the individuals involved as well as the type of matter. The supervisor needs to maintain some level of active involvement in every matter.

It is important that the supervisor and person to whom work is delegated are on the same page about what is to be done. The supervisor should:

- give clear instructions about the task, any limits on time and resources, and the expected outcome for example the form and length of document to be produced
- provide sufficient background information to give context to the work, including commercial considerations and the client's objectives
- be proactive about confirming their instructions are understood
- keep the other person informed about changes in instructions or circumstances that impact on the work
- be open to queries
- provide constructive feedback regarding the person's performance of the work.

The person to whom the work is delegated should ensure they remain vigilant about obtaining all the information they need and seeking guidance where necessary.