LEGAL PRACTITIONERS' LIABILITY COMMITTEE

The new normal

Presenter's workbook

Contents

Introduction

The new normal explores client relationship and retainer management as well as the importance of comprehensive documentation of all aspects of the matter in the context of a long time and demanding commercial client. It is about preventing professional negligence claims by increasing awareness of missed opportunities to prevent those claims. It is also about paying attention to trends in contemporary legal practice that could impact directly or indirectly on professional liability.

The scenario is based on a real life claim and raises opportunities for reducing risk by better managing the client relationship, the retainer, the matter, records and change. It considers how the risk of a claim can be reduced if practitioners recognise and respond:

- to basic risk factors or warning signs in a matter
- appropriately to changing client needs and expectations of the law practice.

Workshop suggested format

The new normal scenario is designed to be delivered workshop style. It is suitable for a variety of audiences. The materials anticipate a one-hour or one and a half-hour workshop with discussion of the scenario as the main focus. However, there is sufficient depth of content for a longer workshop and it can also be used as a component of other programs.

The workshop involves facilitated discussion of the scenario content to:

- identify risk factors
- consider risk management strategies
- apply lessons learned to the particular law practice.

The content is most suitable for the following audiences or programs.

- Mixed groups by practice area and position including principals.
- By position such as junior lawyers, senior lawyers or new principals.
- By practice group – primarily property or commercial transactions although there is some content generic to all practice groups.
- By topic – risk management, skill of advising, innovation, client focus, client communication and practice management.

The video runs for approximately 13.5 minutes and it is recommended you pause for discussion at least once and preferably more before the end as the final scene summarises the key risk factors and management strategies. The material indicated the suggested positions throughout the video to pause and discuss what has just occurred.

For a one-hour session timing is tight so it is recommended that participants be asked to be ready start on time.

Group size is flexible as the discussion can be facilitate in several ways including:

- table groups
- ‘turn to your neighbour’
- comments from the floor.

In facilitating discussion, take into account that some people find it difficult to talk about mistakes, especially in front of their peers or their boss. The scenario usually provides the necessary distance to get discussion started but with some audiences keeping discussion going can be challenging. Techniques to prompt discussion include:

- don’t rely solely on comments from the floor and use table groups or ‘turn to your neighbour’ to prime the audience for speaking up
- don’t let anyone (especially a partner) dominate discussion and ask them to ‘hold that thought’ while you hear from others
- give advance warning you will be calling on nominated groups to comment such as from each table or solicitors before partners.

Risk factors and opportunities to prevent claims

An act of negligence that triggers a claim or allegation does not occur in isolation. Things happen in the lead up and aftermath and in the wider context of the client relationship and legal services market. In the typical claim there are several missed opportunities to have prevented the act of negligence or prevented an allegation escalating into a claim. Lawyers and law practices need to get better at recognising and taking these opportunities.

A risk factor is anything that increases the risk or likelihood of a claim or allegation of breach of duty of care. A non-legal example is that everyone has the risk of developing a disease like diabetes but some people have an increased risk due factors of family history or lifestyle.

Every legal matter carries the risk of a claim and professional liability is an occupational hazard. However, some matters are inherently more risky or become more claims-prone such as:

- working on matters outside your area of expertise or
- being the second or third lawyer handling the case.

Certain conditions under which work is produced are also more claims-prone including:

- inadequate supervision
- poor client communication or
- creating unrealistic client expectations.

Key risk factors or warning signs of potential increased liability raised by the scenario are:

- clients with unrealistic expectations or difficult behaviours around fees, listening and taking advice and belief in their own legal understanding
- limited scope retainers with clients doing some of the work themselves
- transactions that are high stakes for the client and have changing commercial terms, interrelated documents, multiple drafts and unusual terms
- the increasingly 'lost art' of advising.
- litigation involving documents drafted by the law practice
- inadequate record keeping
- changing client needs and expectations of the law practice.

The risk factors in the lead up to a particular claim are important and in LPLC's experience there are often multiple missed opportunities for prevention in that lead up.

Also important is the broader context in which claims occur. In certain areas of practice client expectations of lawyers are changing. Change can be both an opportunity and a threat. In seizing the opportunity or seeing off the threat lawyers need to be mindful of the impact of change on their liability exposure. There is potential for increased liability risk in the way lawyers respond or fail to respond to changing client and market expectations of legal services

The scenario is an opportunity to practise spotting risk factors and what might be done about them.

Whether in the lead up to the particular claim or the new legal services environment, will you be able to see the risk factors the lawyers missed?

Where is your firm exposed? Is there action you can take or we all can take to reduce the risks of a claim?

The new normal

A law practice has a long standing commercial client so the likelihood of being sued for negligence is the last thing on anyone's mind. But the warning signs are there in in the client's changing needs and expectations of the firm, and in a commercial leasing transaction that ends up heading for litigation. In hindsight the risk factors are obvious so why did the lawyers miss them? What could they have done differently to have prevented or reduced the risk of a claim?

The scenario takes you on a journey with the law firm and its lawyers to find opportunities to prevent claims. The journey starts with the client, moves into the firm and on to the particular matter. The lawyers won't find the risk factors until the end but your task as you watch the story unfold is to:

- spot the risk factors that might cause or contribute to increasing the risk of a claims *
- identify what the lawyers could have done differently, that is, opportunities to have prevented the claim. *

*****If using the slides, click at these points for the arrows graphics to fly in

Characters

Anna	CFO Client company
Katherine	Client relationship partner
John	Property partner
Ethan	Junior lawyer

Client's changing needs and expectations

This segment looks at the client's changing needs and expectations, and how the lawyers can manage them without compromising service and exposing themselves to claims.

Scene 1 – Client's office – 0:00 to 1:39

Anna gives Katherine good news – the firm has been reappointed to the panel – and bad news – the firm must lift its game in some areas. They discuss the client's changing expectations: "more for less", "containing costs", "doing things differently" and "DIY litigation". Katherine makes promise and offers assistance of a lawyer on secondment. Anna says if the firm can deliver on its promises then there may be no need for an in-house lawyer. Anna asks Katherine to tell John that she will be in touch about developments in a warehouse lease matter.

Scene 2 – Later same day at law practice – 1:40 to 4:33

Katherine and John discuss Anna's feedback and expectations. Katherine thinks Anna has a point but John resists Anna's ideas as not being in the best interests of clients, the firm or the profession. He uses the example of his commercial leasing work for Anna. Katherine raises Anna's negative feedback about inefficiency and the number of drafts in the leasing work and John blames Anna.

Do you agree more with Katherine or John?

Are the client's changing needs and expectations:

- **opportunities or threats?**
- **passing fad or new normal?**
- **risks?**

Changing client needs and expectations are a risk factor. There are risks in embracing change and risks in not embracing change. The impacts need to be identified and managed.

- Opportunity: Back on panel, compare well, possible new stream of compliance work if they perform.
- Threat: Negative feedback, loss of litigation work in-house, loss of other work if they don't deliver.
- Potential lack of shared understanding of what client means by 'more for less' 'control spending', 'do things differently' and 'spend our money wisely'
- Strategic risks to client relationship and workflow from failure to manage change (eg if assume passing fad, fail to deliver on promises, fail to address the negative feedback).
- Potential liability risks from unrealistic client expectations or pressure for change may cause shortcuts or lowering of professional standards.

Are disaggregation/limited retainers generally more or less risky?

Disaggregation/limited retainers where the client or third parties are doing some of the work need care to avoid increased commercial and liability risks arising from:

- ill-defined scope, disputes about who is responsible for what
- communication issues, more parties to be consulted or informed
- ambiguity about who can give make decisions, give directions or instructions
- impact of poor quality work of others on firm's work
- liability for work of outsourced providers.

Counterpoint: Less risky and more cost effective for everyone because matter tasks are staffed at appropriate skill level

What are the concerns associated with leasing work?

Examples of leasing work concerns.

- As above for limited retainers.
- Non-lawyer client doing part of the work.
- Standardised processes, pushing work down to lowest level without supervision under costs pressure risks, missing a non-standard issue.
- Client won't pay for letters of advice – how are services priced? Would value pricing help – pay for the advice, get the letter for free, reframe letter as client benefit not simply risk management for firm.
- Profitability pressures – doing work at a loss is not sustainable, increased risk of over-delegation, shortcuts, poor morale.
- Objections/discounts on bill- commercial tactic or genuine dissatisfaction?
- John resists the negative feedback and blames client for problems but doesn't seem to have provided feedback or solutions or pushed back against unreasonable demands.
- We don't know enough about cost structure and culture of firm to know to what extent John's resistance to change might be rooted in concern for his position (eg not making budget, firm getting out of low margin work).

Is a longstanding client relationship a risk factor or a protection against claims?

A longstanding relationship should carry a lower risk of a claim if the lines of communication are open so there is a reduced risk of misunderstandings, fair sharing of responsibility for mistakes and a reasonable attitude towards stuff ups. However, a long standing relationship may not be a quality relationship, complacency can set in and people lose touch without realising it. The practitioners need to retain client focus, listen

and respond to client needs and not make assumptions. John may not know his client and Anna as well as he thinks.

Other risk factors?

- **Panel review: outcomes not predicable**
- **Overpromising: Promises made by CRP without consultation?**
- **Insourcing litigation: Appointment of in-house counsel good for law firm or threat?**
- **Secondment: Liability risks?**

- Procurement of legal services is undergoing big changes and even the idea of having a fixed panel is under review in some companies. For clients and lawyers alike the 'request for tender processes' are resource intensive and not always a good test of the market. Some companies are replacing panels with more flexible systems of preferred providers and are open to approaches from any 'disruptive provider' with a good proposal.
- Business development in isolation from those who will be doing the work is risky. If Katherine had been doing her job properly she would have known about John's work and issues herself beforehand instead of hearing them from the client.
- In-house counsel appointment could be an opportunity or a threat. There is some evidence that appointment of in-house counsel increases external legal spend. Explosion of regulation means compliance is an area of growing demand, however the function has moved from identifying legal needs and managing legal services to actually providing legal services 'in competition' to outside counsel. Direct briefing of barristers is on the increase.
- There is a potential risk in secondments such as the wrong person on secondment, unclear who is responsible (liable) for supervision/quality assurance of the secondee, confidentiality and conflicts of interest issues

Let's finalise this now

These two segments look at team work, version control, taking file notes and managing the client. They also cover the importance of being aware of potential risks in the documentation and providing advice.

Scene 3a – A few days later in partner's office – 4:34 to 6:45

John and Ethan discuss the specific lease transaction ahead of telephoning Anna. Ethan reports that the lease has needed only two minor changes in light of the new deal – a change to the area being leased and the termination provisions. John explains the commercial background to the tenant taking more space. In return for leasing the whole warehouse, Anna's company has hired the tenant to provide distribution services. The parties have entered into a separate distribution agreement. The fees for distribution services will offset the increase in rent. The lease is to provide the tenant can terminate if Anna's company fails to pay for distribution services on time. There is no need for the tenant to issue a demand for payment. Late payment is sufficient ground. Somehow the

lease documents have gone through eight drafts, a new record. John is inclined to blame the tenant's lawyers but Ethan confesses he caused one redraft by amending the wrong version. John doesn't refer to Anna's negative feedback but simply tells Ethan to be more careful with version control in future.

Scene 3b – On phone to client – 6:46 to 7:45

Anna and John are defensive with each other on the phone. Anna does not want to pay for Ethan to sit in on the call so John sends him out of the room. As a final issue before execution of the lease, John seeks to check Anna is comfortable with the termination provisions now that the tenant can terminate if the company fails to pay distribution agreement invoices on time. Anna considers the issue closed and reveals the significant commercial imperatives to get the deal done. The company cannot risk the tenant backing out of the deal. John confirms there are no legal issues so long as the company pays on time.

Teamwork:

Any risks in how John and Ethan work together?

Risks of poor delegation, supervision and teamwork.

- On the one hand John and Ethan seem to be working well together. Ethan sounds like he knows what he is doing (ie no over-delegation) while John is explaining the background and stepping in at a critical time (ie good supervision).
- On the other hand, he seems to have been 'missing in action' for a time as he does not know about the eight drafts.

Version error:

Is enough attention paid to Ethan's 'close call' error in version control?

Close calls are a big warning sign.

- Telling Ethan to be more careful in future may not be enough to make sure there is no repeat of the error if the cause of the error was a skill gap or systemic problem with document management processes.
- Then and there may not have been the right time for John to probe how the error occurred but John could have flagged that he wants to know more later and to be sure the right lessons from the close call are learned. Even if the error turns out to be a simple oversight it is an opportunity for John to reinforce that in legal practice little things can have big consequences for liability and client relationships as well as reinforcing that good checking routines are important.

Matter risk factors:

What are the risk factors in this particular lease matter?

Does John do enough to manage the risks?

Risks in commercial transactions are many and varied but this transaction and how it is being conducted show some risk factors that means that extra care is needed. There is added risk in:

- just documenting it – limited scope retainer, no negotiation, no letter of advice etc.
- the deal keeps changing
- interdependent contracts*
- the differences of professional opinion over drafting (eg what can the lawyer agree to and what should be referred to client for instructions)
- having a teleconference when purpose of the meeting is the execution of documents
- high stakes commercially and now urgent for client (which seems to catch John by surprise)
- the advice is given piecemeal during the matter and last minute under pressure.

* Taken in isolation changes to the deal and documents can seem minor but the implications for whole deal, and interrelated documents need to be taken into account. One of UK's largest claims involved a minor change to one finance document considered in isolation which, unfortunately for several law firms, involved had an unintended knock on effect for the deal as a whole. London Underground v Freshfields; Herbert Smith – the case has been settled. Search the case online as there are many articles in the UK Press.

Advice:

If Anna doesn't want a letter of advice, what is the extent of John's duty to advise if any, and if so, has he discharged his duty?

If giving advice is part of the retainer then John has a duty to give competent advice.

(Note: This discussion is intended to be about the general nature of advising not the substantive technicalities of termination clauses. The point is whether the audience spots the potential for the allegation to be made later that the clause is 'harsh and unusual' and what constitutes competent advice in those circumstances. The issue of advising can be revisited once the audience knows the claim has been made.)

Is giving advice part of John's retainer if Anna doesn't want a letter of advice?

- Exclusion of advice: An interesting question whether giving advice can be excluded entirely from a retainer or is there always some obligation? If a client does not want advice, the practitioner may have a duty to warn the client of the risks of not seeking advice. Even if there is no duty it would be prudent to warn the client.
- Limited retainer traps: In a standardised 'just document the deal' situation the extent of the duty to advise can be problematic. If advice is given once on the first standard deal or documents, does the client expect or need to be reminded of the earlier advice each time or only if circumstances suggest a reminder is needed? If a particular matter raises new issues that are not standard and have not been advised on previously (as would seem to be the case here) then does the retainer make clear that advice is expected or is the solicitor in the 'duty to warn' situation mentioned earlier? A New Zealand case – Frost & Sutcliffe v Tuiara [2004] 1 NZLR 782 contains *obiter* comments on how far a retainer can be limited.
- Here, Anna seems to expect advice even if she doesn't want a letter or to pay for a letter.

Has John given competent advice or what constitutes negligent advice?

- Failure to advise: Allegations of failure to advise arise in several ways such as omitting to give advice despite being retained to give it, or giving advice that is wrong in law, incomplete, misleading or inadequately explained.
- Failure to explain or incomplete advice: Competent advice includes advice and explanation of the legal nature and effect of obligations or provisions. 'Nature' is the content or legal substance which may be straightforward or complex, usual or unusual and 'Effect' means consequences or implications which may be significant or inconsequential, benign or harsh.
  Clients need to be clear about the legal point, the risks they are taking and what they need to do in order to comply or protect themselves. It can be hard to know how far to go in advising on legal, practical or commercial issues or consequences but it is clear that extra care is needed in advising in the case of harsh or unusual conditions so the question is whether John has discharge this duty (which will become apparent in next scene).
- Obvious and inherent risks: Generally no duty to advise on an obvious risk (obvious to reasonable person) or inherent risk (cannot be avoided) but it depends on retainer and circumstances. Is risk of not paying on time obvious?
- Non-legal advice: Generally no duty to give non-legal or commercial advice unless the lawyer has agreed to do so as part of the retainer or duty to warn vulnerable client arises. Does duty arise here?
- Experienced and vulnerable clients: The extent of legal, practical or commercial advice required depends on scope of the retainer but also on the nature of the particular client. There may be no duty to advise an experienced client in circumstances where there will be a duty to advise a vulnerable client (eg as to prudence of entering a transaction or meaning of commercial terms). However, this is a question of fact not law. In a particular case an experienced client may be entitled to expect advice on obvious risks or the extent to which a transaction or agreement is

likely to meet the client's business or personal objectives. Experienced clients can have knowledge gaps about legal, practical or even commercial matters and lawyers make assumptions at their peril. Is any extra care needed here?

- In summary, has John gone far enough?

Handling Client:

Does John do enough to manage Anna's behaviour and expectations?

Do John and Anna suffer from 'deal mentality'?

- Anna demonstrates some difficult expectations and behaviour (eg over fees and Ethan sitting in, not listening or taking advice, belief in her own legal understanding) and John could have done more to be assertive and push back in the face of these risk factors.
- Client focused does not mean the client is always right, despite what John said to Katherine earlier. John allows Anna to get to him. He is on the defensive from the start and allows himself to be bullied into sending Ethan out of the room. Ethan could have stayed at the firm's cost as an investment in client relations and risk management.
- Clients who won't accept or seek advice: Generally there is no duty to force a client to accept the lawyer's advice or seek other expert advice. However, this is a big risk factor as it is not easy to predict how courts will expect a lawyer to pressure the client or check that other advice has been taken, particularly in the case of vulnerable clients. Anna sounds so confident in talking about legal matters it is easy to forget she is not a lawyer. She may well be legally savvy enough to understand the issues but does John make assumptions about Anna's knowledge rather than proactively satisfying himself that she gets the point? He doesn't push back and Anna doesn't really give him the chance. This is a recurring theme we see in claims – lawyers making assumptions about what their sophisticated cleints know about legal issues and consequences.
- The decision may ultimately be Anna's but are commercial drivers being allowed to overshadow legal considerations. Might both John and Anna suffer from deal mentality, losing sight of the bigger picture and long term business interests in order to get a deal across the line?

Safeguards:

Given what John said earlier about the limited retainer in leasing matters and his concern for professional standards, what safeguards would you expect him to have in place?

- Retainer agreement or acknowledgement of instructions setting out the scope and exclusions.
- We know Anna won't pay for letters of advice but John should keep good file notes of discussions with her or record issues in emails.
- File note or confirming email made after the telephone call.

Proactive monitoring and client satisfaction

This scene looks at the client's level of satisfaction (or dissatisfaction) and how it should never be a surprise.

Scene 4 – Six months later – 7:46 to 11:04

John and Ethan are discussing a website 'Reinvent law' looking for ideas to keep Anna happy. Katherine interrupts them with the news that Anna has arrived unannounced and is waiting in the conference room. Hoping for good news, Katherine and John meet with her to see what she wants. The tenant has terminated the lease on the seemingly spurious grounds that the company has paid the tenant's invoice one day late. John and Katherine's hopes of a new litigation matter are dashed when Anna reveals she has already taken advice from a barrister. In the barrister's opinion the firm would have a conflict of interest in litigating a lease drafted by the firm itself. Furthermore, the barrister says the termination clause is harsh and unusual and Anna claims John has failed to properly advise. Anna reveals that if litigation against the tenant is not successful the company will be making a claim against the firm for $1m. However, the prospect of the claim does not mean the firm is being sacked entirely. Anna assumes the firm has insurance. If the claim can be resolved satisfactorily then Anna is happy for the relationship with the firm to continue

Checking client satisfaction:

Is it reasonable to assume that if new instructions are coming and the client is still paying the bills that all is right with the client relationship?

Checking client satisfaction should be proactive not reactive

- Lawyers who operate on the reactive principle that the client will tell them if there's a problem could be in for a shock. Sometimes the first the lawyer knows of a problem is when they hear from the client's new lawyers or receive the notice of claim or formal complaint. Firms should have processes to ask clients for feedback, positive or negative.
- Here John is getting new work but seems not to have been having the direct personal contact with Anna that might alert him that trouble is brewing. Katherine's intuition says something is wrong (and she is soon to be proved right but at least the relationship proves strong enough that Anna comes to see them in person and does not see the relationship as terminally damaged by the claim).

Litigating your own document:

Could the firm have accepted instructions in the lease termination matter if Anna had carried through with her first intention of approaching the firm first instead of direct briefing a barrister?

Litigating your own document carries an increased risk of a claim in two ways – if the case is lost the client may allege that the document was faulty or they were not properly advised (ie the claim may arise after the event instead of before as in this case). The client may also allege the litigation was conducted in the interests of the firm not the client, particularly if settlement is recommended.

Yes, no or settle?

In this last scene questions are asked that, in hindsight, show how obvious the risk factors were.

Scene 5 – A few days later – 11:05 to end

Katherine seeks information from John about the retainer and conduct of the matter in the hope of being able to refute the allegations of negligence. Alas, John comes up well short which means insurers may need to settle the claim. They discuss how similar claims might be prevented in future. John can't believe he missed seeing the risk factors. They wonder how to meet the demands of changing times without dropping professional standards and increasing liability. They resolve to have a further look at the website Reinvent Law.

Do you think the claim should be vigorously defended or settled?

Defend or settle? Did John give competent advice? Can you prove it?

- The claim may go away if the tenant changes its mind (either voluntarily or by court order) or if the client can re-lease the warehouse.
- Pro defend: Anna is experienced enough to know the legal consequence of non-payment on time and the risks of not paying on time are obvious especially to a CFO. John is under no duty to give commercial advice or warn Anna to check the adequacy of the company's internal processes and Anna was so determined for the deal to go ahead that she would have taken the risk regardless of anything John said.
- Pro settle: A reasonable solicitor would have done more than John did to advise on the 'harsh and unusual term'. The absence of the need for a demand is significant. Clients, even sophisticated ones, may not understand the legal significance of a 'drop dead deadline' because in their world deadlines are not always rigorously enforced or can be renegotiated and extended. John was aware of the company's business objectives (ie not like Anna had kept him in the dark) and he knew the termination provision was a risk to those objectives. John's explanation was incomplete. He explained 'pay on time' but did not do enough to get a solid unambiguous response from Anna that showed she understood and accepted the risks of not paying on time. Anna is likely to be believed that the risks of not paying on time were not fully explained, given that the worst that could happen has happened (ie triggered by late payment of 1 day). She is also more likely to be believed she would have sought modification of the clause or not gone ahead if she had been properly advised.

- In the real case the defence lawyers strongly recommended settlement.
- Preserving client relationship: Defending the claim would involve attempting to transfer some or all of the blame on to Anna. The firm has a big commercial incentive to settle to keep Anna as client. It may rankle that Anna ties continuing work to resolution of the claim (which does happen in real life if not in this particular real life case). However, this may be Anna's indirect way of making up for her role in the debacle without having to admit it to her own boss. There remains the risk that the client company may overrule Anna and insist the firm be sacked.

What do you think was the most significant missed opportunity to have prevented this claim?

Most significant missed opportunity – get a couple of views before moving onto the lessons and relevance for the audience

Key lessons

What do you see as the key lessons or relevance to your practice?

Lessons revolve around management of the:

- client
- retainer
- matter
- records
- change.

Client management

What do you see as the key lessons or relevance to your practice?

- While not suggesting this is the new normal, the reality is that good clients make claims too. Don't be lulled into a false sense of security by a longstanding client relationship. No matter how good or bad the client relationship is, clients will sue you if you hurt them. The only difference is that good clients may feel bad about it and leave the door open to continuing the relationship. It's business not personal. A corporation has duty to shareholders to recover if they can.
- You may not know your client as well as you think you do. Sophisticated clients may not be as legally savvy as they think they are. Practise professional scepticism, be open to doubt and check and probe for understanding, don't make assumptions or be fobbed off.

- Clients may not tell you they are unhappy. A client not paying the bill is a warning sign but a client paying the bill is no guarantee of satisfaction. Be proactive. Solicit feedback informally and often by keeping in touch. Seek feedback formally as well. Make panel processes work for you. The cleint relationship partner must make sure the feedback reaches teams promptly and is actioned
- The client is not always right. Don't allow yourself to be bullied. Sometimes you need to draw a line in the sand and say 'no'. But push back in a client focussed, solution oriented win/win way.

Limited retainer management

What do you see as the key lessons or relevance to your practice?

- For every retainer a well-defined scope of work that matches the client's objectives is one of the best risk management strategies. The quote "Scope until you are sick of it" is the recommendation of Maria Polcynski, General Counsel, Adelaide and Bendigo Bank made to the Law Council's World Masters of Management program in Sydney in early 2015 and was said in the context of the way work is divided up between inside and outside counsel.
- Map out the whole before agreeing to your part. In a disaggregated matter, you need to be sure that you and the client have a shared picture of the whole job before allocating parts. If there are 10 things to be done and you are doing six of them you need to be sure the client is really doing the other four and doesn't think they are only doing two or three. In one matter the lawyer's retainer excluded tax advice. Interestingly the accountant's brief also excluded tax advice. Both professionals thought the client's own treasury team was giving tax advice but the client thought otherwise and a big tax liability was missed.
- Being specific about what you are not doing is critical in a limited retainer. Agree what's all part of the service and what's excluded.
- You need to know what you are on risk for and not on risk for but risk-sharing must be fair. A good client will not force you into lowering professional standards or a non-profit position. If your leanest cost structure and most innovative efficiency measures cannot meet the client's price demands then leave that client or work to somebody else.

Matter management

What do you see as the key lessons or relevance to your practice?

- Lawyers love a good legal problem but as Katherine said, they can be happy to chase endless rabbits down endless burrows or let legal processes run their course. Sometimes those processes are inefficient but there is often little incentive to fix them. In the 'new normal' being solutions-oriented is critical.

- Don't let problem processes hang around. Fix them. John knows there are problems with the leasing matter processes but does nothing to improve them. We can't be confident he will tackle the version control issues either.
- Be open to the idea that better ways of doing things might come from outside the law. Legal processes may need to be different but adapting solutions is very much part of the new normal (eg. various technology applications are being customised for lawyers.)
- When clients say they wish lawyers were more 'commercial' they often mean more solutions-oriented. Advice is a means to an end for a client, not an end in itself. John does tell Anna to pay on time but if he was more outcomes-focussed or commercial he might have said to Anna "If you pay a day late you could have an empty warehouse and still be locked into the distribution agreement".
- Take more of an interest in why clients want advice and determine what outcomes are most important for the client?
- Also know what are acceptable trade-offs between quality, time and cost. The rule of thumb is that you have two out of the three. To get all three – better, faster and cheaper – you need true innovation, not just doing the same things more efficiently.

Records management

What do you see as the key lessons or relevance to your practice?

- Just document it! It can sometimes seem that there is only one risk management strategy but very often it is the missed opportunity that could have prevented a claim.
- Good records benefit all stakeholders as they:
    - benefit the client
    - justify your costs
    - aid your defence.
- Why is it so hard to invest in your own risk management?
- Find ways to improve/make it easier to record:
    - retainer and variations
    - advice given and work performed
    - client agreements, instructions, understanding and satisfaction.

    Examples included:
        - *Livescribe* pens
        - voice recognition software such as *Dragon Dictation*
        - digital dictation devices and software.

Change management

- As the quote says "Clients today have choices of legal services providers like never before and many of these service providers are not lawyers. (As an aside, one is even a computer called Ross, the son of IBM's supercomputer Watson). Another much quoted saying or perhaps a veiled threat is "Survival is not compulsory. No one has to change" *. Denial and resistance to change are perfectly normal responses to being and feeling under threat. They are just not all that helpful. They cannot stop change

happening any more than King Canute of long ago could stop the tide. These negative feeling and attitudes need to be 'unpacked', examined and reframed in the hope and expectation of turning them into a positive response to change. The key to survival is to turning denial and resistance into embracing and adapting to change. How do you do that?

- Listen to and involve your clients. It is all very well for the lawyers to be looking at *Reinvent Law* but maybe they should involve Anna sooner than later instead of second guessing what Anna wants and needs.
- Right pricing services to deliver value to the client encapsulates the shift that is happening away from billable hour doing things at lower and lower cost.
- Be risk–aware, not risk phobic. Be mindful of liability risk but keep perspective. Doing things differently does not mean the new things will breach professional standards. Yes professional standards are peer standards but they are adaptable and new ways of doing things soon become the new normal.

*The proper quote is apparently "Survival is optional. No one has to change", Professor W. Edwards Deming (quality management guru)

The last word

What are you going to do differently to:

- **reduce risk**
- **embrace and adapt to the new normal?**

If there is time ask for examples of what people are taking away from the session, what have they learned or been reminded of, and more importantly what are they going to do differently

Closing remarks – eg Draw attention to resources in firm, who to speak with about risk concerns, thank people for their participation

The quote about the future being already here just unevenly distributed is by North American writer William Gibson amongst whose many claims to fame is being the person who coined the term 'cyberspace'. The quote refers to those who have embraced the changes already and those who have not.

References and further reading

Limited retainers and advising

Managing the Risk of a Limited Retainer (British Columbia)

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Manage client expectations to be safe on limited scope retainers, Dan Pinnington, Practicepro (Ontario)

http://avoidaclaim.com/2014/manage-client-expectations-to-be-safe-on-limited-scope-retainers/

Project Management for Inhouse Counsel- Jennifer Fletcher, Partnering Perspectices, Winter 2011 p11

http://www.sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNlqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuaJEu0!/fileUpload.name=/Project%20Management%20for%20In-House%20Counsel%20-%20Fletcher.pdf

Scope of the duty of care – modifying the scope of duty via the retainer – Lawyer's Professional Responsibility, GE Dal Pont, Chapter 5

Changing client expectations and legal services market

Reinvent Law Laboratory

http://reinventlaw.com/main.html

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The Impact of the changing legal landscape on Australasian law firms, Andrew Barnes President of ALPMA,

http://www.alpma.com.au/a-survival-guide-for-legal-practice-managers/the-impact-of-the-changing-legal-landscape-on-australasian-law-firms

More with less as clients chase value, Katie Walsh, AFR, Jun 26 2015

http://www.afr.com/business/legal/more-with-less-as-clients-chase-value-20150625-ghxb06

Value based billing to have its day, Lawyers Weekly Staff Reporter

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