Running a Succession Law Practice:

Facing the Competing Challenges Head-on

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Sam McCullough

simmons WOLFHAGEN Lawyers

Introduction

This paper and the associated conference presentation seek to provide a workshop approach to allow participants time and prompts to reflect on:

- their current approach to delivering succession law products;
- whether and why changes to that approach should be made; and
- how to do so without compromising relevant professional obligations.

Lawyers have been getting paid for getting things done for their clients for a very long time, as the following extract from Bram Stoker's "Dracula"[1] illustrates:

> *12 May.*—Let me begin with facts—bare, meagre facts, verified by books and figures, and of which there can be no doubt. I must not confuse them with experiences which will have to rest on my own observation, or my memory of them. Last evening when the Count came from his room he began by asking me questions on legal matters and on the doing of certain kinds of business. I had spent the day wearily over books, and, simply to keep my mind occupied, went over some of the matters I had been examined in at Lincoln's Inn. There was a certain method in the Count's inquiries, so I shall try to put them down in sequence; the knowledge may somehow or some time be useful to me.
>
> First, he asked if a man in England might have two solicitors or more. I told him he might have a dozen if he wished, but that it would not be wise to have more than one solicitor engaged in one transaction, as only one could act at a time, and that to change would be certain to militate against his interest. He seemed thoroughly to understand, and went on to ask if there would be any practical difficulty in having one man to attend, say, to banking, and another to look after shipping, in case local help were needed in a place far from the home of the banking solicitor.

Yes, that's right – Dracula had a lawyer, who later in the book arranged for the transportation of fifty boxes of Transylvanian earth, which were required by the client to be able to establish himself in his new home in London.

But would Dracula have procured and/or received his legal services differently if the year were 2019, rather than 1897? Perhaps he may have gone online and submitted a form to order documents. Would there have been a "value discovery process" gone through with him, so that the price could be set accordingly? Would his accountant have given the instructions on his behalf? Would he have paid less, or more? And was his Estate Planning up to date?!

Four case studies and several examples from the Australian marketplace are used in this paper as illustrations.

The content is structured as follows:

[1] Stoker, B, *Dracula*, 1897.

- Introduction to the case studies.
- "Succession Law products."
- Lawyers' Professional responsibilities when providing succession law products – using Wills to illustrate.
- Business model, value proposition, competition and competitive advantage and pricing.
- Innovation.

The writer's perspective is that of a private client lawyer with a focussed succession planning and estate and trust dispute practice since 2006, including seven years as a principal of a private client firm known for its succession law. The writer has a strong interest in the business aspects of his topic, but does not profess to have all the answers, just to be trying to work out what are the right questions, and to try things in his firm and personal practice.

Introduction to the Case Studies

The following case studies are intended to illustrate four different types of legal practice in the succession law area:

- a sole practitioner accredited specialist;
- a commercial/property department of a medium sized firm;
- a general practice firm in a regional area; and
- a firm providing legal documents online.

Participants should not get too caught up in the facts of each example. Any similarities to actual firms, businesses or practitioners are coincidental.

Case Study #1 - Graham: The Solo Specialist

Graham is a sole practitioner based in Kew, Victoria.

He is an accredited specialist in Wills and Estates, and has worked in the area for thirty years. He has a number of returning Estate Planning clients, and receives referrals from local accountants and financial planners. He provides a full range of succession law products, but with a weighting towards succession planning, and estate and trust administration work. Graham also does residential conveyancing and (occasionally) Magistrates' Court appearances for this clients and family/friends that they refer to him.

Graham operates from a rented office, sharing meeting room facilities and secretarial services with two other professional services firms. He regularly sees clients at the offices of referrers.

Graham operates as a sole trader, and is 56 years of age.

Graham charges by hourly rate, providing broad cost estimates to clients once he has seen them in conference.

Case Study #2 - Sharp Law Commercial/Property Department: A Partner's Challenge

Sharp law is a medium sized firm based in Woolangong, New South Wales, with a smaller leased office in the Sydney CBD.

It provides a full range of legal services to personal, private business and government businesses.

Jill is the commercial law partner, responsible for 20 lawyers providing a full range of commercial and property law services. Those services include preparing "basic" Wills for clients, and estate administration, but not estate and trust litigation. Most lawyers provide those services as a relatively small part of their broader commercial/property practices, and mostly for "their" personal clients. Jill does not personally practice in the succession law area. One of Jill's partners has suggested that a few lawyers become "skilled up" in succession law work, so that other lawyers in the firm can have them prepare documents when required.

The firm recently lost a significant longstanding government business client to a cheaper tender, which has created a significant hole in revenue for Jill's department.

Sharp Law is structured as an incorporated legal practice.

Case Study #3 - Solid Legal Partners: The Longstanding Regional Practice

Solid Legal Partners are as solid as they sound – they are the firm that your grandfather's grandfather was with.

They are based in Bundaberg, Queensland (a lovely two storey building owned and occupied by the firm for 130 years), with leased branch and visiting offices in Hervey Bay, Gladstone, Emerald and Charleville.

They are a true traditional general practice, offering every type of legal service. They do a lot of probate work arising out of their extensive deeds room, and prepare "straightforward" Wills and Powers of Attorney for their clients at low cost. Most of their clients are existing clients.

Their structure is a traditional legal practice of four equal equity partners.

Case Study #4 - Click Here Law: The Online Firm

Click Here Law was established in 2016, by two university friends, Todd and Steve.

Todd has a background in IT and online businesses, and built the IT platform (www.betaclickalawyerson.com.au)[2] from which the business operates. Steve has a law degree, and was admitted to practice in South Australia, but left the firm he was with to focus on Click Here Law.

Click Here Law sources the documents that it offers under license from other online providers. The documents offered include what are described as: "Standard Will"; "Will – Testamentary Trusts"; "Codicil"; "Probate Application – NSW"; and "Family Trust"). The price of documents is determined in part by the location of the user (determined by a device location finder that the user consents to), with those in more affluent areas paying full fixed prices, and those in less affluent areas paying progressively lower prices. They also offer a subscription service with three tiers, giving users the ability to access and use their documents, including for professional advisers to provide them to their clients. They refer more complex legal work to a panel of firms in Adelaide at fees 5% below their normal fees, in exchange for a "promotion and advertising" fee of 10% of gross fees. They use Google Adwords to direct traffic to their site.

Click Here is owned and operated by a company with a separate incorporated legal practice owned by a family trust controlled by Steve providing legal services to it. Todd now lives in Austin, Texas, and Steve is currently backpacking around Asia. They do not have a physical office, and do not hold original documents for clients.

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[2] Yes, this domain name is available to the first lucky reader to snap it up.

"Succession Law" Goods and Services

Make something people want[3]*.*

It is more difficult than it might first appear to define what a "succession law" good and/or service actually is. There is no standard definition used in the Australian legal industry, and none in common use by consumers of legal services. "Wills and Estates" is perhaps in reasonably common use by both lawyers and clients, but it describes the field much more narrowly than it actually is, and, by doing so, can tend to undervalue what lawyers can and do provide to clients in the area.

It is, however, essential to start a discussion about the business of providing succession law products by defining what those products actually are, and to make some distinction between what are "goods" and what are "services".

Succession law "goods" and "services" can be grouped and defined as follows:

#	Goods and/or Services Involved	Examples
A	Documents that **provide for a change at a future time to the ownership and/or control of property**.	Wills, Enduring Powers of Attorney, Binding Death Benefit Nominations.
B	Documents and transactions that **change the ownership, change legal rights, and/or control of property between related parties** within a family group, or within an existing ownership structure.	Deed of Change of Trustee, Contract for the Sale of Land, Shareholders Agreement.
C	Documents and transactions **relating to the administration of a deceased estate**.	Probate application documents, advertising for claims, Assent transferring real estate to beneficiary.
D	Documents and transactions **relating to the administration of a trust**.	Trust distribution minute, Deed of Variation.
E	Documents and representation relating to **a legal dispute about the succession to the ownership and/or control of property held in a deceased estate or a trust**.	Family provision claim, contested probate dispute, application to a Trustee to account.
F	**Legal advice and guidance** about any of the above.	"Estate Planning" advice about what documents and transactions are required for a particular client, and advice and recommendations to the client about their options.

[3] Paul Graham/Y Combinator: http://www.paulgraham.com/good.html 13.2.19.

For convenience and consistency in this paper, **A** and **B** above are grouped and referred to as "succession planning" (also offered referred to as "estate planning"), **C** and **D** as "estate and trust administration", and **E** as "estate and trust disputes". **F** of course traverses each of the other categories.

The total offering is referred to in this paper as the succession law "product".

It is worth noting that the products described in the table above are broad in scope, and the professional and other skills required to provide them vary greatly. They traverse related but very different legal areas. Some involve litigation and Courts, whereas others (hopefully) do not. Some lawyers practice in some but not all of them, others in some but not all aspects of each of them.

Goods and services are different:

- Goods are usually tangible physical products, whereas services are usually intangible.
- Goods are often able to be used by the consumer multiple times, whereas services are often single use.
- Goods can be owned, potentially for a long time, but services are often for single use.
- Goods usually spend longer as "inventory" between their production and their delivery to the consumer, whereas services are often produced at the point of consumption.
- Goods can be easier to compare between providers in terms of quality and features than services.
- Goods will often be to standardise and produce at economies of scale compared to services.
- Goods are usually sold at a fixed price per unit, whereas services are usually sold at a price that varies and is determined by the time, effort and/or expertise required to provide the service.

What documents and services a client needs will depend on their circumstances and requirements, both of which may change over time. The client may not know they need a particular document or service, or may not even know that what they need even exists.

Succession law documents often (but not always) start life in a homogenous or "standard" form (i.e. precedents). The lawyer then drafts amendments to the precedent to reflect the client's circumstances and instructions. By that process, a standard generic document is turned into a "one off" document prepared for the particular client.

Succession law products have traditionally involved the provision in a single client transaction of both a tangible "good" (normally a client document(s), including the drafting involved to produce it), and an intangible "service" (normally the attendances on the client to take instructions and provide advice about the document(s)). That commonly hybrid nature of a succession law product can make it difficult for the client as consumer to know and describe what they are paying for, and for the lawyer to be clear about what they are selling, and why the consumer should value it.

Lawyers are expected to achieve the legal outcome that the client seeks by their instructions. It could therefore be said that what the client is buying from the lawyer is the outcome, not the means (legal goods and/or services) required to achieve that outcome. But that would be an incorrect oversimplification, as clients like all consumers have other expectations and needs when purchasing succession law products, including: good service, assurance, convenience, price. Further, many legal outcomes cannot simply be "sold" – for example, a favourable outcome in a family provision application.

The above discussion illustrates that providers of succession law products face real challenges of definition and expression when trying to design, market and deliver their products to consumers.

The method by which succession law products are offered by law firms and other providers in Australia varies.

Within the field of providers offering only succession law products, some will offer the full range, whereas others will other a more limited scope.

An example of a law firm offering a specific aspect of succession law products outside the more commonly seen focus on succession planning is Sunny Capital, a Bondi based firm with an online offering focussed on estate and trust administration: www.sunny.com.au A modern web platform offers three levels of service, the first being free (online document generation), the second "assisted" (with different pricing depending on the level of assistance provided), and the third described as "using a solicitor" and with the appearance of a more traditional "full service" probate offering.

Case Studies

Case Study #1 – Graham: the Solo Specialist

Graham provides a full range of succession law products, but with a weighting towards succession planning, and estate and trust administration. He also "dabbles" in non-succession law areas, including conveyancing and some Magistrates' Court work.

In reviewing his product offering, Graham may wish to consider the mix of his time/effort between the three areas of succession planning, estate and trust administration and estate and trust disputes. Relevant questions could include:

- What % of total revenue has each of the three areas represented on average over the last five years?
- What % of total profit has each of the three areas represented on average over the last five years?
- How do the time, effort and resources that go into each area compare?
- Why is the mix the way it is? Is it a result of deliberate strategy by Graham, or is it more accidental/circumstantial?
- Which of these areas is likely to grow in the next 5-10 years? Which is likely to decline?

It would also be worthwhile for Graham to track and consider which of the individual "products" are being taken up by his clients. Which are most in demand? Which are rarely in demand?

Does Graham have the right emphasis on Item F above – legal advice and guidance compared to "goods" (Wills, Enduring Powers of Attorney etc)? What is of most value to his clients – the process or the end result?

Graham should seriously question whether and to what extent he should be providing the non-succession law products. This is particularly relevant to him as an accredited specialist in Wills and Estates. Relevant questions could include:

- If these ancillary services weren't offered, would there be a negative impact on the succession law parts of the practice?
- If the time, effort and resources put into conveyancing etc were instead directed to growing the succession law parts of the practice, what are the potential benefits to profitability?

- Are some of these products (for example, conveyancing of estate properties) *simpatico* to the core succession law practice, whereas others are not (for example, Magistrates' Court work that does not involve a succession law aspect)?
- Is there a way that Graham could refer these non-core aspects of his work away and yet retain the clients for their succession law work and grow his business?

Case Study #2 – Sharp Law Commercial/Property Department: A Partner's Challenge

The facts of the case study suggest that succession law products have not been and are not currently a key offering. They are a part of their private client practice, which itself is a part of their broader practice.

For a larger firm like Sharp, which has a broad litigation practice and likely several lawyers or a whole department working in litigation, it is perhaps surprising that they do not have an estate and trust disputes offering. Succession planning, and estate and trust administration, will usually be a good fit with related litigation services where the firm has the expertise to provide them. There are three main reasons for this. The first is that planning and probate/administration files generate related litigation work, so Sharp's existing succession law products are likely to provide leads for work into this related field. The second reason is that having lawyers practicing in the succession planning field, either as a specialisation or as a significant part of their practice, is likely to give Sharp the expertise and knowledge required to conduct related litigation. In the writer's experience, litigation lawyers without a succession planning background can struggle with the law, family dynamics and processes involved in estate litigation. The third and final reason they are well placed to offer estate and trust dispute products is that the skills, experience and personality type required to conduct litigation in the estates field already exists in the firm.

As the relevant partner, Jill should consider whether to:

(a) continue the existing model of commercial/property lawyers offering succession planning services to "their" clients, as an adjunct to other commercial/property law services;

(b) move towards more of a specialisation model where clients are directed and referred internally to specialist succession planning lawyers, who then see the clients and do the work; or

(c) adopt a "hybrid" approach of the type noted in the case study facts, where the preparation of documents and advice is done by specialist practitioners internally, but with the commercial/property lawyers continuing all client facing roles.

Possible advantages of **(b)** (specialist lawyers) over **(a)** (status quo) may include: the commercial/property lawyers having more time and focus on their commercial/property services; the ability to provide more services and/or charge more to clients by increasing the quality and breadth of the succession law products and expertise on offer; increased client perception of value from dealing with a specialist; reduced risk of losing important property/commercial clients to other firms that can offer those services as well as a specialist succession law (particularly succession planning) services that certain clients may want; and decreased professional risk.

The status quo is very likely to be underserving the needs of many clients, and therefore missing out on providing value to those clients, and consequential value to the firm.

Option **(c)** (the "hybrid" model) is worthy of consideration, as it may have some of the advantages of moving to a complete specialisation model. If set up well, it may be a more efficient and effective way of producing succession

law documents than non-specialists doing so as only a small part of their whole practice. It may be easier to implement internally initially, as part of progressing over time to full specialisation. It may have some marketing/sales advantages – i.e. “We have in-house specialists who will prepare your documents”. However, for a firm of Sharp’s size and with the likely quality and nature of their client base, it misses the opportunities of introducing specialist succession lawyers and having them deal directly with the clients.

As the facts suggest that succession law products have not received a lot of attention from Sharp in the past, but also that they likely have a significant client base (and likely a significant Deeds room), there is likely to be significant scope for growth of this part of Sharp’s business within its existing client base. The cost of marketing to those existing/past clients will be lower, likely significantly lower, and likely more effective, than seeking to attract to new clients. Working on growing this part of Sharp’s business may make more sense than trying to grow other parts of its practice that could be described as more “mature”.

It is unlikely that it would be worth Jill considering any move to an online offering of succession law products of the document provider kind.

Case Study#3 – Solid Legal Partners: The Longstanding Regional Practice

Preparing Wills for clients is likely a key succession law product offered by Solid Legal Partners based on their model.

An important question for the partners of Solid is whether the revenue from Wills, which they provide at low cost, is above, at or below the cost of production. Unlike other industries, for example retail, where an operator would never, ever discount and sell below cost (even for “loss leader” products) many in the legal industry will provide services, including the preparation of Wills, that cost significantly more to produce than what the client pays for them.

Raising the cost of legal services to a returning client who expects to pay the same as what they paid the last time may be both an internal barrier to the partners and other lawyers of Solid wanting to do so, and also hurt client retention. This is particularly a problem because of the fact that succession planning products are typically not purchased each year, but every 3-10 years. Reasonable and moderate price increases over time may therefore appear more significant to clients – “It was double what it cost in 2011!”

Any firm assessing the succession law products it offers should seek to do so from the perspective of their clients as customer. What existing products are the clients using? Why are they using them? What value do they provide to the client? What is the existing offering not providing for the customer? What other offerings might the client want?

The nature of Solid’s practice likely makes it important that they continue to offer a broad range of succession law products, to be able to fulfil their offering of providing whatever the client needs. However, unless Solid has or can develop sufficient expertise in house, there are likely to be complex and/or high net wealth succession planning matters that their clients may bring to them, but which they should consider referring away.

Case Study#4 – Click Here Law: The Online Firm

The succession law products offered by Click Here are comprised of and are limited to specific documents ordered online. Click Here does not provide legal advice, therefore that element of each of the succession law products

identified above in Item F is absent from their offering. They have, however, provided a potential solution to their potential clients to that issue (the referral service), to avoid clients who want the online documents, but also want some advice or assistance relating to them, from going elsewhere. Ethical and professional conduct issues aside, they have also monetised that referral service.

Click Here could expand their offering by adding more document types, and/or by adding more sub-types of existing documents. For example, they could in addition to their existing "Family Trust" offer a "Family Trust – Immediate Family Only", as an option for potential clients to whom that may appeal. For online document providers like Click Here, expanding product offerings by way of versions of existing products likely has some advantages, including relatively low cost, an appearance of greater choice and more tailored documents, and the ability to "upsize" or "upsell" clients from a lower priced based document. A potential risk, however, is that clients who use an online provider like Click Here because it is simple (particularly compared to seeing a lawyer) may be discouraged when there is too much of an appearance of choice.

A product problem for Click Here is that there are many, many very similar providers in the Australian market place. They are a relatively small player. Their products are not differentiated from those of most of their competitors.

Lawyers' Professional Responsibilities When Providing Succession Law Products – Using Wills to Illustrate

"Few of the duties which devolve upon a solicitor,

more imperatively call for the exercise of a sound, discriminating, and well-informed judgment,

than that of taking instructions for wills."[4]

The professional duties that may arise for a lawyer when preparing a Will for a client can be used to illustrate the types of duties that can arise when providing succession law products more generally. Consideration can then be given to how different approaches to providing succession law products can be relevant to whether certain duties arise, and how they are addressed.

The cases and commentary refer to duties (or matters that are at the very least "best practice") that can be summarised as follows, noting that the circumstances will determine whether or what extent some of them arise in relation to a particular client and/or particular instructions:

#	Stage	Duties
1		• Communicate directly with the Willmaker

[4] Jarman on Wills, 8th Edition (1951), London, Sweet and Maxwell, Vol 3, page 2073, quoted with approval by Hallan J in *Petrovski v Nasev* [2011] NSWSC 1275 at paragraph 88.

	When taking instructions for the Will	• Make good file notes • Take instructions about all relevant matters • Confirm the Willmaker's identity • Provide cost and related information • Define instructions and the scope of the retainer • Consider who else should (and should not) be present during conferences • Consider testamentary capacity, undue influence (and elder abuse?) • Don't give incorrect or incomplete advice • Consider whether circumstances require an informal or urgent Will or advice • Comply with relevant professional conduct rules • Avoid conflicts of interest • Avoid conflicts of duty • Advise about the risk of family provision claims
2	**When drafting the Will**	• Draft the Will to reflect the Willmaker's instructions • Draft the Will to make the appointments and gifts required by the Willmaker effective on their death
3	**When having the Will executed**	• Disclose charging and commission clauses • Have the Will executed in accordance with the necessary formalities • Confirm the Willmaker's knowledge and approval of the Will • Amend the draft Will to reflect the Willmaker's final instructions • Comply with the matters noted above in 1 as applicable
4	**After having the Will executed**	• Hold the Will in safe custody • Retain the Willmaker's file and all file notes • Notify the Executor on the Willmaker's death

The following considers a selection of those items in some detail. They should be read in the context of whether they apply and how they apply to different providers of succession law products. Some observations using the case studies will follow.

1. When Taking Instructions for the Will

(a) Communicate directly with the Willmaker

The Willmaker should be seen in person by the lawyer for the purposes of taking instructions for a Will and providing related advice.[5]

> "A solicitor must be very cautious when taking instructions from an intermediary. It should not be done, and will expose the Will to criticisms of want of knowledge and approval. It may also constitute professional misconduct…."

The nature of taking instructions for a Will is said to make direct contact particularly important.[6]

> "Especially when what is involved is the testamentary disposition of the person's estate, there are few occasions where a lawyer could justifiably take instructions other than in person. The stakes are heightened in the testamentary context…."

There is a need to distinguish between legitimate initial contact with another person on behalf of the Willmaker client to facilitate the taking of instructions, and an inappropriate "taking instructions from an intermediary". Circumstances that may involve a legitimate first contact with another person could include:

- one spouse providing financial and family instructions in circumstances where it is more convenient for the couple to do so before a joint conference;
- one spouse attending a first appointment when the other spouse is unable due to work, illness or childcare circumstances to do so;
- a child making contact to arrange an appointment at the request of a parent in the absence of any other suspicious circumstances; and
- one of several clients providing an initial "briefing paper".

The writer's usual approach is to require a second conference with both/all clients present. At that second conference the information, discussions and any preliminary instructions that occurred at the first conference are recapped and confirmed with those who were not previously in attendance. It is not uncommon for couples to legitimately want one of them to "take the lead role" in different aspects of their financial arrangements, including their estate planning. The lawyer should usually try to facilitate that which the clients reasonably require, whilst fulfilling their obligation to take instructions directly from both.

An unsettled question is whether "seeing" clients by video-link is adequate. Whilst it may be a poor substitute in many cases for seeing a client in person, video conferencing is clearly better than only phone or written communication. It may be the client's preference, or the best option available (for example if the

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5 Sparke, C, Collins K et al, *Wills Probate and Administration Victoria*, LexisNexis, Australia, 2019, paragraph 56, 003.

6 Dal Pont, G, Mackie, K, *Law of Succession*, LexisNexis, Australia, 2013 page 748.

client is interstate or overseas). As the rationale for the "see your client" rule is the necessity to have direct communication and to take direct instructions, video conferencing satisfies the purpose of the rule.

On the use of questionnaires as part of taking instructions:[7]

> "Some solicitors send a prepared questionnaire to clients who wish to make Wills, and then, on the basis of the answers given in the questionnaire, prepare draft Wills for them….. Questionnaires can be an efficient means of the client providing instructions and also a reasonable record of the client's instructions given to the solicitor should a later problem arise. It is important that the solicitor take the time to discuss the client's answers as noted in the questionnaire with them, to form a view as to the complexity of the client's affairs and the client's own understanding of them, and to advise generally on the range of estate planning issues that would usually arise…."

Clients can and do make errors when completing questionnaires. They also can and do change their instructions from what they put in an initial questionnaire and what they say in conference or when finalising their Will in draft form. An initial questionnaire will often be completed before the client has received any legal advice or guidance as to what their planning issues and options may be, and will therefore constitute relatively uninformed answers in many cases.

The writer's view is that questionnaires can be a useful and efficient way of gathering general client information, but are less useful and reliable as a means of taking instructions, compared to doing so by face to face interview.

An example of how not to do it can be found in the case of *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128. The practitioner took instructions from the daughter of the Willmaker (referred to as "BJ" in the judgment), dictated the Will in that daughter's presence, and then sent the Will to the Willmaker with the following:

1. The enclosed Will was prepared in accordance with your instructions as relayed to me by your daughter [BJ].

2. Please ensure that you understand the terms of the Will and that you agree with the contents of your Will.

3. If in any doubt about anything whatsoever please telephone me before you sign the Will. Ordinarily I would visit you to discuss your instructions but I note that you do not wish this to occur and you are content for me to draw the Will based on the instructions [BJ] gives to me on your behalf.

4. If you sign the Will then I assume you are totally satisfied with its contents and with the fact that you did not wish to discuss anything with me.

[7] Birtles, C and Neal, R, *Hutley's 9th Edition*, LexisNexis, Australia, 2016 page 4.

The practitioner conceded that taking instructions for a Will in that manner constituted unprofessional conduct. Gray ACJ agreed, noting at paragraph 12 of the judgment that "it was a wholly inadequate way in which to take instructions".

(b) Make good file notes

The importance of making and keeping good file notes cannot be overstated in the context of preparing Wills for clients. With some other circumstances of legal practise (for example, the file notes during settlement discussions), file notes made about Wills are among the potentially most important notes a lawyer may be required to later produce.

File notes are required at three main stages – when taking instructions, when reviewing and signing the Will and related documents, and when having peripheral discussions with the clients and where applicable other family members and other advisors in relation to the client.

Kunc J in *Ryan v Dalton* [2017] NSW SC 1007 emphasised the importance of good file notes at paragraph 108:

> …In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely.

Practical challenges with making file notes are often overlooked or not given any regard at all in comments in and by commentators. Possible reasons why file notes may not be of the quality they need to be in relation to Wills include:

- Practical difficulties involved with seeing elderly and/or unwell clients in hospitals, in aged care facilities and in their own home, including lack of seating; lack of a desk to write on; lack of privacy; urgency; interruption.

- The need to engage with the client and to give full mental engagement to the instructions and advice being given that may be broken or made more abstract by taking notes.

- Discussions that may be complex and/or lengthy and therefore challenging to document.

- Risk of inaccuracy and/or incompleteness if another person (e.g. staff member) takes notes.

File notes are simply a written version, usually of only one person present, of what those present said, (sometimes) how they said it, and (sometimes) what they did. They are rarely if ever a wholly accurate account or transcript. They rarely if ever effectively capture non-verbal aspects of the event. The purpose of file notes is as a working record for the lawyer, as part of conducting the file, and (particularly in the Wills context) as documentary evidence of what they record. Where there are "warning signs" relating to capacity, knowledge and approval or undue influence, there may be a case for video recording or audio recording (with notice to the client) the attendances, in addition to taking a written note.

(c) Take instructions about all relevant matters

A lawyer should:[8]

> "…..obtain detailed instructions from the client so that a Will can be prepared which properly reflects the wishes of the client. The length of time taken to obtain detailed instructions will obviously vary with the circumstances of each client…"

But instructions to ascertain the client's wishes is too narrow a statement of what a good succession planning lawyer should do. That lawyer should consider: educating the client on relevant matters so that their instructions are considered and informed; testing the client on different options; and taking instructions about relevant matters beyond simply the terms for the Will the client may believe they require.

What are "relevant matters" will be specific to the client, their circumstances and the context in which the lawyer is retained. Hutley's 9th Edition[9] at pages 25-32 provides a good detailed summary of the usual matters that should be considered. The authors there suggest that for a "regularly straightforward" Will at least one interview will be required to take instructions and often a second interview will be required to do so. For difficult or complex Wills or planning, they note that "a lot of time and several interviews" will likely be required.

Clients with any complexity in their financial circumstances will often require further information and documents to be gathered after the first conference. For example: financial statements and constituent documents for related trusts, companies, and self-managed super funds; life insurance policy schedules; and cost base information. Other clients will not know what is relevant until they are advised.

(d) Confirm the Willmaker's identity

This may be by previous dealings with the client, or by obtaining appropriate identification to establish proof of identity.

Confirming client's "identity" also means knowing who your client or clients are:[10]

> Like all lawyers entering into a retainer, succession practitioners must be clear as to the identity of the client. This is critical, because it is the client to whom the lawyer owes legal and professional duties in the main…. It is the client to whom tortious duty of care is owed, to whom fiduciary duties are owed, and who is the beneficiary of the lawyer's duty of confidentiality.

(e) Provide cost and related information

Regulation in each Australian jurisdiction requires that the lawyer provide specified cost and related information to the client.[11]

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8 Wills Probate and Administration *supra* paragraph 56, 005.

9 Birtles, C and Neal, R, *Hutley's 9th Edition*, LexisNexis, Australia, 2016.

10 Law of Succession *supra* page 748.

11 **NSW:** *Legal Profession Uniform Law Application Act* 2014 (NSW); *Legal Profession Uniform Law (NSW)*. **Tas**: *Legal Profession Act* 2007 (Tas). **Vic:** *Legal Profession Uniform Application Law* 2014 (Vic). **Qld:** *Legal Profession Act* 2007 (Qld). **NT**: *Legal Profession Act* (NT). **ACT**: *Legal Profession Act* 2006 (ACT). **SA:** *Legal Practitioners Act* 1981 (SA). **WA:** *Legal Profession Act* 2008 (WA).

For example, in New South Wales[12]:

> 174 DISCLOSURE OBLIGATIONS OF LAW PRACTICE REGARDING CLIENTS
>
> (1) Main disclosure requirement A law practice--
>
> (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
>
> (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client--
>
> together with the information referred to in subsection (2).
>
> …

Subsection 2 of the NSW Act sets out the additional information that must be provided to the client, including the client's right to negotiate a costs agreement, and to request an itemised bill.

Some jurisdictions require that the amount of legal costs must be "fair and reasonable":[13]

> *172 LEGAL COSTS MUST BE FAIR AND REASONABLE*
>
> (1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are--
>
> (a) proportionately and reasonably incurred; and
>
> (b) proportionate and reasonable in amount.
>
> (2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect--
>
> (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and
>
> (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
>
> (c) the labour and responsibility involved; and
>
> (d) the circumstances in acting on the matter, including (for example) any or all of the following--
>
> (i) the urgency of the matter;
>
> (ii) the time spent on the matter;
>
> (iii) the time when business was transacted in the matter;
>
> (iv) the place where business was transacted in the matter;
>
> (v) the number and importance of any documents involved; and
>
> (e) the quality of the work done; and
>
> (f) the retainer and the instructions (express or implied) given in the matter.
>
> (3) …

12 *Legal Profession Uniform Law Application Act* 2014 (NSW); *Legal Profession Uniform Law (NSW)*.

13 *Legal Profession Uniform Law (NSW)* Section 172.

(f) Define instructions and the scope of the retainer

A lawyer should define with the client what the lawyer is and is not required to advise about and/or do.

(g) Consider who else should (and should not) be present during conferences

Young J in *Woodly-Page v Simmons* (1987) 217 ALR 25 at 34 said:

> It has long been a practice that has been adopted by experienced solicitors in probate matters over many years that if a friend brings the testator into the solicitor's office, especially if the testator indicates that the friend is a major beneficiary, the testator must be seen alone…

The reason given for this by His Honour on the particular facts of that case were so that the solicitor could confirm that there was no testamentary undue influence. This is one of but not the only reason that it may be appropriate to exclude.

Clients may have legitimate reasons for wishing family, friends or other support persons to take part. Ideally a means of taking instructions and advising the client should be implemented that balances the client's preference and the potential benefits of having others present in some interviews with the risks of doing so. For example, in a conference with an elderly client the information about financial position and family relationships should be taken from the Willmaker, not voiced by another in attendance on their behalf. Potential beneficiaries should usually be asked to leave the conference at relevant times.

(h) Consider testamentary capacity, knowledge and approval and undue influence (and elder abuse?)

As a general statement, a lawyer who is not sure that the client lacks capacity should complete their instructions and assist the client to make the Will, take reasonable steps and provide reasonable advice, and leave it to the Executors appointed and (if necessary) the Court to decide any question about testamentary capacity. A lawyer does not need to have all doubts about capacity removed.

Robb J in *Estate of Beryl Lee Hordern (Deceased); Homersham v Carr* [2017] NSWSC 753 said at 205:

> **It is not part of the professional duty of a solicitor to ensure that his or her client has testamentary capacity,** so that any will made by the client is valid. The solicitor is not an insurer for the validity of the will, but **can only act with reasonable diligence**. Where, as in the present case, a court later finds on all of the evidence that a client who suffered at the time from moderate to serious dementia was in fact actuated by some false belief concerning the entitlement of an existing beneficiary under a former will, and that the existence of that delusion, albeit not an insane one, has vitiated the client's testamentary capacity, the responsibility for that outcome should not be laid at the feet of a careful solicitor.
>
> [Emphasis added]

The qualification, of course, is that the solicitor must "act with reasonable diligence" and be "a careful solicitor".

The difficulty of expecting a lawyer to make judgments about capacity is well illustrated by the outcome in that case. Robb J's finding that capacity was lacking was overturned on appeal. Had the lawyer in question

refused to make the Will because there was doubt about capacity, a Will found later to be valid may not have been made, and the testator's true Will would not have been carried out.

Kunch J in *Ryan v Dalton*[14] outlined the following "basic rule of thumb" for a solicitor preparing a Will:

(1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

(2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

(3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.

(4) In case of anyone:

(a) over 70;

(b) being cared for by someone;

(c) who resides in a nursing home or similar facility; or

(d) about whom for any other reason the solicitor might have concern about capacity,

the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

Kunch J noted that these were basic precautions, their application was fact specific, and no rule or procedure could cover each case to avoid the possibility of litigation[15]. His Honour also noted that the above process if followed "may identify problems which need to be addressed". What those problems may be or how they should be addressed is not covered by the guide.

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14 *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 at paragraphs 107-108.

15 At 108 and 106.

The following comments of Santow J in *Pates v Craig & Anor; The Estate of Cole* (NSWSC, 28 August 1995, unreported) were extracted with approval by Hallen As J in *Petrovski Nasev: The Estate of Janakievska* [2011] NSWSC 1275:[16]

> There is an additional consideration, not dependent on the question of conflict of interest. That is**, the duty of the solicitor taking instructions from an obviously enfeebled testator, where capacity is potentially in doubt, to take particular care to gain reasonable assurance as to the testamentary capacity of the testator**. It is clearly undesirable to attempt to lay down precise and specific rules as to what that necessarily entails for every case. Such rules may lead to a perfunctory, mechanical checklist approach. **What should be done in each case will depend on the apparent state of the testator at the time and other relevant surrounding circumstances**. Any suggestion that someone, potentially interested, has instigated the will, whether or not a client of the will draftsperson, should particularly place the solicitor concerned, on the alert. **At the least, a solicitor should ask the kind of questions designed to probe the testator's understanding of the basic matters which connote testamentary capacity**...
>
> [Emphasis added]

In relation to knowledge and approval, Hallen As J said the following at paragraph 306, ultimately refusing to accept the solicitor's evidence of what had occurred:

> A solicitor may, in some perfunctory manner, go far enough to satisfy herself, or himself, as to capacity and knowledge and approval, but it is to be remembered that **her, or his, duty is to go far enough to satisfy the court that the steps taken were sufficient to warrant her, or his, satisfaction. In this case, I am not so satisfied.** Ms Zlatevska appeared not to ask non-leading, or open, questions, to ascertain whether the understood and whether she knew and approved, the terms of the 2004 Will. Further, since the instructions for part only of the Will had come from Alek, and the rest she had included herself, Ms Zlatevska needed to explain, in detail, the terms of the 2004 Will to the deceased and ensure that the deceased agreed with its terms. **She ought to have sought detailed responses, not merely nodding approval.**
>
> [Emphasis added]

Hallen As J also said the following in *Romascu v Manolache* [2011] NSWSC 1362 at paragraph 170:

> Although not necessary regarded as a "golden rule" in Australia, some authority suggests that it would be prudent for a solicitor to obtain a medical opinion as to the deceased's medical condition and effect on his, or her, capacity, before making a new will for an elderly client where there is a doubt about testamentary capacity, see, for example: *Fradgley v Pocklington (No 2)* [2011] QSC 355 at [28]. This is no more than a recommendation for good practice.

[16] At 89.

The case of *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128 considered above also considered the duty of the practitioner in relation to ascertaining testamentary capacity:[17]

> …had the practitioner taken instructions directly from ZG and had he obtained all, or some of, the above history, it might be expected that he would have proceeded in a very different manner. At the very least, he would have sought an appropriate medical opinion, probably from a geriatrician, as to ZG's mental capacity, and in particular, whether she had testamentary capacity. Had all this occurred, it is highly probable, in my view, that the problems that followed would not have occurred. I consider that the practitioner's unprofessional conduct in the taking of instructions was, at the very least, one of the causes of the litigation that ensued, the cost of which exceeded the value of the estate.

Another example from a WA professional conduct case is *Legal Profession Complaints Committee and Wells* [2014] WASAT 112[18]:

> The practitioner received instructions from an interested beneficiary of a will and donee of an enduring power of attorney to attend at a hospice. When the practitioner attended the hospice the patient's lack of capacity was obvious and he had doubts about the patient's capacity. The practitioner declined an offer from a doctor to answer questions about the patient's condition. He purported to take instructions from, and then supervise, the witnessing of the will and enduring power of attorney despite his doubts as to capacity. The practitioner disregarded the basic obligations of a practitioner where there is a doubt as to a patient's capacity. The practitioner was found to have engaged in professional misconduct.

The following was said in that case about a solicitor's duty when taking instructions for and supervising the execution of a will:[19]

> ***A solicitor's obligations when taking instructions for and supervising the execution of a will***
>
> 10 When taking instructions for a will and supervising the execution of a will, a solicitor has, at least, the following obligations:
>
> a) to determine whether the testator has testamentary capacity;
>
> b) if capacity is in doubt, to ask non-leading questions designed to properly probe that capacity;
>
> c) if capacity is in doubt, to seek medical advice;
>
> d) to be alert to possible conflicts of interest where the person instigating the will is a beneficiary, or associated with a beneficiary; and

17 Gray ACJ at paragraph 16.

18 Headnote summary.

19 At paragraphs 10-15.

e) to take proper notes.

11 Disputes about wills produce, or lay bare, disharmony in families. They also waste money, often that of the estate.

12 …

13 A solicitor who is taking instructions from an obviously ill testator:

… where capacity is potentially in doubt … [needs] to take particular care to gain reasonable assurance as to the testamentary capacity of the testator.

14 In general, a beneficiary and a donee should be excluded from the room while instructions are being taken or a will witnessed, at least where there is a doubt as to capacity: …

15 A practitioner should also avoid leading questions (*Dellios* at [51] [52]).

From the judgment of Fryberg J in the well known Queensland case of *Legal Services Commissioner v Ford* [2008] LPT 12:[20]

In my judgment, Mr Ford, ought to have been particularly alert to the possibility that there might be some question as to Mrs Adams' capacity to do these things. She was, to his knowledge, an elderly person. She was in a nursing home. She was cutting her family out of her will. She was leaving everything to the person who was facilitating the arrangements.

Ms Holland had made a comment to him on his way into the facility regarding Mrs Adams' mental health and specifically her memory loss. He should have observed Mrs Adams' short term memory loss. If he interviewed Mrs Adams for as long as he claimed he should also, in my judgment, have observed her cognitive impairment.

None of those factors, by itself, is conclusive of a failure of the necessary care nor, for that matter, are they collectively capable of requiring a conclusion by the solicitors that Mrs Adams was suffering memory loss or dementia. However, in my judgment, they are such as ought to have alerted a reasonable person to the possibility of such a state of affairs.

In those circumstances, I am satisfied that the practitioner failed to conduct appropriate inquiries to satisfy himself that Mrs Adams fully understood the legal effect of the documents and was capable of executing them. I am satisfied that he failed to undertake an interview with the client in accordance with the Queensland Law Society's Capacity Guidelines for Witnesses of Enduring Powers of Attorney and in accordance with the need to be sure that section 41 of the Act was satisfied. I am also satisfied that Mr Ford permitted Mrs Adams to sign the document in

[20] Pages 21-22.

> circumstances where he ought to have known that doubts might be raised about her capacity to sign the documents and, finally, I am satisfied that he failed to make an appropriate written record of all steps taken in assessing Mrs Adams' competence or, toward that end, including all questions and answers.

The increase of attention on elder abuse in recent years makes this a related area that succession lawyers needs to consider.

The signs or precursors of Elder Abuse have been said to include:[21]

- social isolation
- vulnerable or fragile family structures
- confusion over belongings
- carer stress
- lack of checks and balances
- cognitive impairment
- informal family agreements
- inheritance impatience.

(i) Don't give incorrect or incomplete advice

(j) Consider whether circumstances require an informal or urgent Will or advice

See *Howe v Fischer* [2013] NSWCA 286.

The authors of Wills, Probate and Administration Victoria note[22]:

> The Court of Appeal's decision has lifted the burden on practitioners. However, practitioners may think it appropriate to consider whether an informal will is an appropriate step in some circumstances.

The High Court refused special leave[23].

(k) Comply with relevant professional conduct rules

The Australian Solicitors Conduct Rules as updated in 2015 ("ASCR") have been adopted in Victoria, New South Wales, Queensland, South Australia and the ACT[24], and have been approved to soon be introduced in Tasmania.

The ASCR contains the following rules of a general nature that will be relevant in a retainer to prepare a Will, with additional more specific rules being considered below under the relevant headings:

> 4.1 **A solicitor must also**:

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21 Lewis, R, *Identifying and Responding to Elder Abuse*, Television Education Network, First Annual Elder Law Symposium Gold Goad, Queensland, 7 June 2018 at page 1.

22 Wills Probate and Administration *supra* at 56,010.

23 *Fischer v Howe* [2015] HCASL 35.

24 https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules 12.1.19

4.1.1 **act in the best interests of a client** in any matter in which the solicitor represents the client;

4.1.2 be **honest and courteous** in all dealings in the course of legal practice;

4.1.3 **deliver legal services competently, diligently and as promptly as reasonably possible**;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

7.1 A solicitor must **provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement**.

8.1 A solicitor must **follow a client's lawful, proper and competent instructions**.

9.1 A solicitor must **not disclose any information which is confidential to a client and** acquired by the solicitor during the client's engagement to any person who is not…EXCEPT as permitted in Rule 9.2

[Emphasis added]

(l) Avoid conflicts of interest

ASCR:

12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

12.4 A solicitor will not have breached this Rule merely by:

12.4.1 drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will:

(i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;

(ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and

(iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.

12.4.2 drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to

executor's commission and proper fees, provided the person instructing the solicitor is either:

(i) a member of the solicitor's immediate family; or

(ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor

…

(m) Avoid conflicts of duty

Santow J in *Pates v Craig & Anor; The Estate of Cole* (NSWSC, 28 August 1995, unreported) in the context of instructions received by an existing client of the lawyer on behalf of the Willmaker, where the existing client is to be a significant beneficiary:

> "… The essence of a solicitor's fiduciary obligations to a client is the unfettered service of that client's interests. This will require the solicitor to avoid acting for more than one party to a transaction where there is a likelihood of a real conflict of interest between the parties. As Wootten J stated in *Thompson v Mikrelsen* (Supreme Court of NSW, 3 October 1974, unreported), in the analogous context of conveyancing transactions: 'The reasonable expectations of a client instructing a solicitor [is] that the solicitor will be in a position to approach the matter concerned with nothing [in mind] but the protection of his client's interests against [those] of another party. [The client] should not have to depend on a person who had conflicting allegiances and who may be tempted either consciously or unconsciously to favour the other client, or simply to seek a resolution of the matter in a way which is least embarrassing to himself.'
>
> The same considerations may arise in the context of preparation of wills. It is clear that a conflict of interest may arise between the interests of an intended principal beneficiary seeking to procure a will in his, or her, favour and the interests of the testator. The testator should be assisted by his legal or her legal adviser only in making a valid will. This means, inter alia, that the natural objects of the testator's bounty must be capable of being appreciated, by the testator, even though the testator may choose to exercise that capacity so as to omit such objects or disfavour them. In such circumstances, the legal practitioner would be expected to give advice to the intended testator on a number of matters. Some of these may be potentially contrary to the interests of the proposed beneficiary. The legal practitioner should take such steps as are reasonably practicable to enable that practitioner to give proper consideration to any matters going to the validity of the proposed will and then should advise and act in conformity with that consideration. Such a conflict will especially arise where there is a reason to fear lack of testamentary capacity on the part of the testator by reason such as fragility, illness or advanced age. Further, in such context, the solicitor could not prudently rely on the informed consent of both clients to act in such a transaction where their interests conflict, there being doubts about the capacity of the testator to give such informed consent...

ASCR:

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2. 10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS: 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or 10.2.2 an effective information barrier has been established.

ASCR:

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule. 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

(n) Advise about the risk of family provision claims

French CJ, Kiefel and Keane JJ in *Badenach v Calvert* [2016] HCA 18 summarised what is required of a lawyer on notice of a potential family provision claim at paragraph 27:

> On receiving the original instructions the solicitor would have observed that no provision had been made for any family member. Prudence would have dictated an enquiry about the client's family. That enquiry would have yielded information as to the existence of the daughter. It is not disputed that the solicitor would then have been obliged to advise the client that it was possible that a claim might be brought by her against the client's estate under the TFM Act. What is at issue on this appeal is whether more was required.

There can also be circumstances where it would be prudent to advise about the possibility of a family provision claim when in receipt of instructions from which a claim based on provision being *inadequate* appears more than only possible.

2. When Drafting the Will

(a) Draft the Will to reflect the Willmaker's instructions

As the authors of Hutley's 9th Edition[25] point out:

> Drafting Wills is a learned, practiced skill – but it has to be learned very fast as there is little scope for error. The underlying difficulty is that once the will has been prepared, executed and filed in safe custody, there is little likelihood that any errors it might contain will be discovered until after the testator's death, when it is too late to correct them. So from the very first will you draft you

[25] Birtles, C and Neal, R, *Hutley's 9th Edition*, LexisNexis, Australia, 2016 page 19.

must make every effort to work to the highest standards, giving time and thought to every will, getting advice from experienced people and "getting your act together".

It is not uncommon at the drafting point for the instructions of the client not to cover all matters, or not to expressly address specific issues or choices relating to a particular matter. For example, a client who in conference asked for child B to be given the option to take an item of real estate as part of their share in residue may not have yet considered and/or provided instructions about whether children A and C are to have next option if B doesn't exercise theirs, or how long the relevant periods within the detail of the option should be. Drafting in these circumstances requires a mixture of the application of experience and judgment, and the ability to infer from the client's personality, circumstances and other instructions what they are most likely to want in relation to a particular issue. The matter should of course be checked with the Willmaker when the draft Will is reviewed.

(b) Draft the Will to make the appointments and gifts required by the Willmaker effective on their death

A lawyer may owe a duty in tort to the intended beneficiaries of a Will: see *Hill v Van Erp* (1997) CLR 159, but as to the limits of that liability see: *Badenach v Calvert* [2016] HCA 18. When a duty will not arise where the Willmaker does finalise their testamentary intentions see *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)* [2000] QCA 93.

Some of the many considerations that may arise here include:

- whether and how property will form part of the estate, including: joint tenancy assets; superannuation interests; and assets held in related trusts and companies;
- for specific gifts of property, provision for ademption to apply (or not);
- the impact of inflation on monetary gifts, and whether an adjustment should apply;
- the impact of unrealised capital gains, and whether an adjustment should apply;
- loans and gifts between the Willmaker and their beneficiaries and others;
- default provisions if a beneficiary dies before the Willmaker;
- provisions for a gift to be held on trust for a particular beneficiary until a particular age/event; and
- in relation to control roles in Trusts and companies, the rules and documents relevant to those appointments outside the Will.

3. When Having the Will Executed

> …It is quite inappropriate for a solicitor to attend a lady in a nursing home, to give her a will, tell her to read it, and then ask if that's what she wanted, when normally she will say "Yes, dear". All that is evidence of is that she said, "Yes dear". It is no evidence whatsoever that the deceased knew what was in the will…[26]

(a) Disclose charging and commission clauses

See ASCR 12.4.1 extracted above.

[26] *Coates v Wattson: Estate of Sullivan* [2013] NSWSC 69, per Windeyer J AJ at 18.

(b) Have the Will executed in accordance with the necessary formalities

This includes both complying with the witnessing requirements, and avoiding beneficiaries acting as witnesses.

(c) Confirm the Willmaker's knowledge and approval of the Will

See the quote above under the heading of this part 3.

The lawyer should go through the terms of the Will with the Willmaker, to confirm that they know and approve those terms. It may also be appropriate at this stage to test the Willmaker's initial instructions as reflected in parts of the draft, and to confirm in relation to important matters where the Will reflects the Willmaker's choice of one option over another.

(d) Amend the draft Will to reflect the Willmaker's final instructions

Care needs to be taken to ensure that changes to the draft Will required by the Willmaker's instructions at the review conference are correctly reflected in the document before it is executed.

4. After Having the Will Executed

(a) Hold the Will in safe custody

ASCR:

16.1 A solicitor must not charge: 16.1.1 for the storage of documents, files or other property on behalf of clients or former clients of the solicitor or law practice (or predecessors in practice); or 16.1.2 for retrieval from storage of those documents, files or other property, UNLESS the client or former client has agreed in writing to such charge being made.

(b) Retain the Willmaker's file and all file notes

ASCR:

14.2 A solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

In the case of succession planning, including but not limited to Wills, the relevant event that activates the legal consequences of documents and events prepared (for example, death or incapacity) may occur at a future point beyond the statutory requirements in relation to file retention. Comments from contested probate cases and the desirability of having evidence to rebut claims of negligence and/or unprofessional conduct made many years in the future may support retention of file notes beyond the minimum period.

(c) Notify the Executor on the Willmaker's death

A lawyer holding a Will for a client usually owes a duty in tort to the Executor of that Will following the Willmaker's death to notify that Executor within a reasonable time that the Will is held: *Hawkins v Clayton* (1988) 164 CLR 539.

Case Studies

Case Study #1 – Graham: the Solo Specialist

Graham is subject to the full gauntlet of duties and issues discussed above. His specialist accreditation raises the standard that would be expected of him generally, and particularly in more complex and difficult situations. Graham is perhaps more likely to be brought into situations giving rise to greater risk, for example to see clients at a hospital, or to see clients with dementia or where there is an underlying family dispute.

Defining the scope of his instructions/retainer is something that Graham should focus on. "Estate Planning" can be a broad retainer, unless lawyer and client are clear about what the lawyer is and is not doing and/or advising about. Because Graham is likely attracting more clients who want a full Estate Planning service, there is likely more need for him than other less specialised practitioners to confirm what he is and is not doing for a particular client.

Is one solution to reduce risk for Graham to refuse to act in more "risky" circumstances? Whilst the answer may in some be yes, this may be easier said than done.

Case Study #2 – Sharp Law Commercial/Property Department: A Partner's Challenge

The "hybrid" model that Jill is considering raises some professional issues for the lawyers involved, due to the separation of the client conferences from the preparation of the documents. As seen above, it is the client interactions that give rise to most of the professional duties/considerations in relation to Wills. The main issue that present at the drafting stage is that the Will produced reflects the client's instructions, and that its terms will achieve the outcome the client wants. Arguably, the ultimate responsibility for both of those things will fall back to the lawyer who sees the client in any event.

A related concern is that the lawyer with specialised knowledge is not the one providing the advice directly to the client. This may lead to inefficiencies at best, or at worst lead to advice not being given to the client because it is not passed on, or is misinterpreted or mis-explained. The meaning, effect and purpose of a document or clause in a document drafted may be misunderstood or mis-explained by the client facing lawyer.

The use of client questionnaires and checklists may be useful to Jill in seeking to standardise the approach to the provision of succession law products, and to reduce some of the professional risks.

Case Study#3 – Solid Legal Partners: The Longstanding Regional Practice

The nature of Solid's practice and history may place it at greater risk than other types of firms of a conflict of interest and/or duty arising in relation to other past or current clients. It is not uncommon for longstanding country or suburban firms to act for several members and/or generations of the same family, in a variety of transactions. Because the nature of succession planning and Wills in particular will often involve the interests of those different family members/generations in property, there is a clear risk of conflicts arising. For example, if the firm provided some family law advice to child A six months ago but he ultimately stayed in his relationship, is that relevant information that creates a conflict when parents B and C are seeing a different lawyer and planning for how A's inheritance should be structured?

Continuing the discussion of issues associated with the low cost of Wills and other succession law products, it is likely that a consequence of low fees will be an adverse impact on things like investment in CPD and know how in

the area, associated increased risk of professional and/or liability issues, and a reduced investment in precedents and information resources. Perhaps the most significant issue however, is that it is natural that when low or very little fees are paid, less time and effort will be applied. Corners are more likely to be cut, and the quality to the client will likely be lower.

Case Study#4 – Click Here Law: The Online Firm

Click Here is not a law firm, and like most online providers of legal documents would likely expressly disavow any responsibility for the provision of legal advice or services.

The following extract is from the terms and conditions from the website of document provider Cleardocs:[27]

"8. You agree that:

a. we cannot, and do not, give you legal, tax, accounting, commercial or other professional advice;
b. Thomson Reuters is not a professional services firm;
c. our service provides information to help you answer the questions and to order a product and that that information is information only, not advice;
d. we cannot and do not warrant that a product you decide to order is appropriate or suits your needs;
e. we cannot and do not warrant that your use of our service is appropriate or suits your needs;
f. the legal, taxation, accounting and commercial effects of a product vary and a product's suitability will therefore vary according to particular circumstances;
g. only you know the purpose for which you intend to apply a product you order and that we are not responsible for the choice you make regarding the product that you order;
h. you must consult with a lawyer, taxation adviser, accountant, or commercial or other appropriately qualified professional adviser (not Thomson Reuters) for advice concerning the suitability of a product you order using our service;
i. the master documents are general only and prepared by the person named as the author on the relevant product's page of our website (not Thomson Reuters) and that Thomson Reuters does not endorse and disclaims responsibility for them;
j. Unless expressly stated otherwise, Thomson Reuters does not provide the information, commentary, advice and other documents (including sample letters) which appear on our website. Instead, all of that material is provided by the person named as the author on the relevant product's page of our website — Thomson Reuters does not endorse that information, commentary or advice;
k. Thomson Reuters disclaims responsibility for the information, commentary, advice and other documents (including sample letters) referred to in paragraph 7(j); and
l. Thomson Reuters is not aware of any reason to doubt the accuracy or the quality of the work of any author of the master documents and associated information referred to in paragraph 7(j) for any of our products — even so, Thomson Reuters is not a professional adviser and does not endorse that work. Thomson Reuters' only responsibility is to engage a person with the relevant expertise, to draft the relevant document

[27] https://www.cleardocs.com/terms-and-conditions.html, 11 February 2019.

which it does on the basis that you will seek appropriate advice in making use of that document in your particular circumstances."

Without making any comments about the Cleardocs offerings, or terms, and as a general comment, a common feature of online document providers is that the consumer is encouraged to obtain appropriate advice to make use of the document, and to work out for themselves whether the product and how they intend to use it fits their needs (or are even advised to seek independent legal advice about that). This is often in the context of legal documents promoted as an easier and cheaper alternative to using a lawyer. Many provide what is said to be general information about the documents they offer, by way of explaining how the document is structured, and how to complete it. It is unclear sometimes how that type of information/guidance does not constitute the provision of legal services, and whether users would see the distinction between being provided with legal information compared to being provided with legal advice by a business from whom they were purchasing legal documents that are being prepared on their instructions.

Arguably, the following duties/best practices identified above in relation to the Wills product would not apply to Click Here, or at least not apply to the same extent as they would to a "traditional retainer":

- Communicate directly with the Willmaker.
- Make good file notes.
- Take instructions about all relevant matters.
- Confirm client identity.
- Consider who else should be present during conferences.
- Consider testamentary capacity, undue influence (and elder abuse?).
- Don't give negligent advice (except for standard information/guidance on the site).
- Comply with relevant professional conduct rules.
- Avoid conflicts of interest.
- Avoid conflicts of duty.
- Ensure the client knows and approves of the terms of the Will.
- Ensure the Will is correctly executed.
- Hold the Will in safe custody.
- Notify the Executors on death that the Will is held.

Clearly, the scope of the duties are more limited, as are the steps and processes that Click Here needs to follow to provide their version of the Will product compared to a lawyer doing so in the "traditional" way. This likely reduces the cost of delivering these products.

This raises a question about whether the clients of Click Here may be disadvantaged by the absence of those features of a traditional lawyer/client engagement for the making of a Will. Clearly the answer must be yes. If by using the Click Here product the client is receiving less, and is exposed to increased legal risk (generally speaking), are they aware when they make their decision to purchase from Click Here that this is the case? Are they aware of, and do they consider other options?

Often, "traditional" lawyers do not articulate well (or at all) that the client is getting the benefit of those things.

It is also worth pointing out the difference between the duties/best practice to be expected of Click Here, as the document provider, and a lawyer, accountant or financial adviser who uses Click Here to obtain documents for their ultimate client. As a general comment, online providers of succession law documents tend to be geared more towards "wholesale" than "retail". Many actively market and sell directly to advisers, as a means of obtaining documents for their clients.

Some advisers using online services will pass on the cost as a disbursement to the client, whereas others will charge some kinds of "facilitation fee" (however described) for their role in the process. Whichever applies, a lawyer using an online provider like Click Here would in the writer's view in most cases be subject to the normal duties/best practices identified above, notwithstanding that the documents were created by a third party provider on instruction, who is not.

The terms and conditions of Cleardocs make the position very clear to advisers using their site to produce documents for clients:

> **We are not responsible for your mistakes — you indemnify us**
>
> 1. Except for any cost, loss, liability or damage directly caused or contributed to by Thomson Reuters, you agree that you indemnify us in relation to any cost, loss, liability, or damage that any of you, your client, or a third party suffers:
>   a. because the product you order is not suitable for its intended purpose or does not suit the relevant circumstances;
>   b. because you fail to obtain formal advice from an appropriately qualified professional adviser concerning whether the product you choose is suitable for its intended purpose or is suitable for particular circumstances;
>   c. because of the answers you provide to questions asked of you when using our service;
>   d. because you do not answer all questions completely and accurately;
>   e. because you modify the products after they are provided to you; or
>   f. because you breach these terms and conditions in some other way.
> 2. You agree that you continually indemnify us against any cost, loss, liability, or damage that we incur as a result of your use of our service except for any cost, loss, liability or damage directly caused or contributed to by Thomson Reuters.

Business Model, Value Proposition, Competition and Competitive Advantage and Pricing

It's the end of the professions as we know them

(and I feel fine)[28]

Business Model

The business model of a legal practice is how it operates to (hopefully) make money[29]:

> …business models are "at heart, stories — stories that explain how enterprises work. A good business model answers Peter Drucker's age-old questions, 'Who is the customer? And what does the customer value?' It also answers the fundamental questions every manager must ask: How do we make money in this business? What is the underlying economic logic that explains how we can deliver value to customers at an appropriate cost?

The following is a useful expression of the components of a business model[30]:

> A business model, she says, has two parts: "Part one includes all the activities associated with making something: designing it, purchasing raw materials, manufacturing, and so on. Part two includes all the activities associated with selling something: finding and reaching customers, transacting a sale, distributing the product, or delivering the service. A new business model may turn on designing a new product for an unmet need or on a process innovation. That is it may be new in either end."

Breaking the two stages down gives:

- Steps/elements to **produce** a legal product or service; and
- Steps/elements to **sell** a legal product or service.

Of course, to be profitable and able to be continued and repeated, the revenue from sales must exceed the cost of the production and selling. There must also be sufficient capital to run the business.

Business model is different from business structure, however there may be elements of structure that are also parts of the model. Matters relevant to business structure are considered below.

The following is a summary of a comparison between the business models of "traditional firms" and "NewLaw", based on a recent ALMA article[31]:

	Traditional Law Firm	**NewLaw Firm**

28 View Legal. *It's the end of the professions as we know them (and I feel fine)*, View Legal, www.viewlegal.com.au.

29 Ovans, Andrea, *What is a Business Model?,* Harvard Business Review, January 23 2015, https://hbr.org/2015/01/what-is-a-business-model, quoting Joan Magretta.

30 Ovans, Andrea, *What is a Business Model?,* Harvard Business Review, January 23 2015, https://hbr.org/2015/01/what-is-a-business-model, quoting Joan Magretta.

31 Bullock, L, *Firms must alter business model to survive,* Lawyers Weekly: www.lawyersweekly.com.au/news/19696-firms-must-alter-business-model-to-survive 17.9.18.

Winning work	Personal brands, lawyers as both sellers and producers, charging on hourly rates	Corporate brands, sales separated from production, alternative fee arrangements
Doing work	Attract best legal talent, use of technology to make work more efficient	Business-savy lawyers on flexible work arrangements, use of disruptive technologies that substitute for lawyers' work
Organisation	Partnerships, small number of equity partnerships to ensure maximum return per person	Often corporately owned with external investment, discipline of external shareholders

View Legal gives the following examples of attributes shared by innovative professional service providers that are "firms of the future-now"[32]:

- abandon time sheets, leave policies, individual budgets, and performance reviews;
- adopt guaranteed fixed pricing;
- focus only on results;
- have no diversity goals, but rather focus on diversity of thinking;
- a results only work environment;
- "solution choregraphed teams" working in whatever way best serves the client's objectives;
- use of after action reviews to learn; and
- "diversity of thought".

If distinctions of the type noted above are right, are the two models just different viable models, or is one inherently better than the other? How is that to be assessed?

If "NewLaw" is the better model, which of the features noted above make it so? Some of them? All of them? Are they all essential to the NewLaw model? Does it depend on the type of firm – for example, will a corporate brand really be better for a solo practitioner than a personal brand? Clearly, not all "features" are unique to NewLaw – for example, many "traditional" firms have flexible work arrangements.

Business Structure

A law firm providing succession law products may operate in any of the business structures that are in general use, including:

- sole trader;
- partnerships, including partnerships of individuals, and partnerships involving trusts and/or companies as partners;
- companies – incorporated legal practices ("ILPs"); and
- multi-disciplinary practices ("MDPs").

[32] View Legal. *It's the end of the professions as we know them (and I feel fine)*, View Legal, www.viewlegal.com.au.

The Queensland Legal Services Commission explains ILPs and MDPs as follows[33]:

> An incorporated legal practice (an ILP) is a corporation (typically a company within the meaning of the Corporations Act) that provides legal services and that may provide other services in addition to legal services.
>
> …
>
> Crucially:
>
> - an ILP must have at least one director who is a legal practitioner (a 'legal practitioner director') and, if it ceases to have a legal practitioner director, it must make sure that it remedies that fact within 7 days or cease to engage in legal practice;
> - the legal practitioner directors of an ILP and any other legal practitioners who provide legal services on behalf of an ILP have the same professional obligations as all other legal practitioners;
> - the legal practitioner directors of an ILP have additional obligations over and above their professional obligations as legal practitioners.
>
> A multi-disciplinary partnership (MDP) is a partnership between one or more legal practitioners and one or more persons who are not legal practitioners that provides legal services and other services in addition to legal services.
>
> …
>
> Notably:
>
> - a legal practitioner who intends to engage in legal practice as a partner in a MDP must give notice to the QLS in the approved form of his or her intention before commencing legal practice in Queensland as a partner in the MDP;
> - a legal practitioner partner of an MDP and any other legal practitioners who provide legal services on behalf of a MDP have the same professional obligations as all other legal practitioners;
> - a legal practitioner partner of a MDP has additional obligations over and above their professional obligations as legal practitioners. The Act makes them responsible for the management of the legal services provided by the MDP and, in particular, requires them:
>   - to implement and keep 'appropriate management systems' to ensure the MDP meets the same standards of legal practice expected of any other legal practice; and
>   - if those standards are breached, to take appropriate remedial action.

An important factor in business structure is size, including size by reference to equity participants, employee numbers, and fee revenue.

Geographic location has historically been an important element of "traditional" law firm structure.

The Pitcher Partners' Legal Firm Survey 2018 included the following interesting general observations in relation to structure:[34]

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33 https://www.lsc.qld.gov.au/compliance/incorporated-legal-practices 18.2.19

34 http://www.pitcher.com.au/sites/default/files/downloads/2018_legal-survey_national_180321_e.pdf 18.2.19 at page 5.

- Firms with fewer than 5 equity partners were more profitable as a percentage of revenue (32%) followed by firms with greater than 10 equity partners (27%) and then firms with between 5-10 equity partners (21%)

- Firms with 5-10 equity partners were more profitable per equity partner (over $711k) followed by firms with >10 equity partners (over $637k) and firms with <5 equity partners (over $511k)

- Firms where decisions were made more collaboratively (all partners, board or committee of partners) were more profitable than those where decisions were made by the managing partner.

Value Proposition

A value proposition can be described as:[35]

> …an easy-to-understand reason **why a customer should purchase a product or service from that specific business**. A value proposition should be a clear statement that explains how a product solves a pain point, communicates the specifics of its added benefit and states the reason why it's better than similar products on the market. The ideal value proposition is concise and **appeals to a customer's strongest decision-making drivers**.
>
> [Emphasis added]

What makes a successful or a good value proposition?:[36]

> A company's value proposition communicates the number one reason why a product or service is best suited for a customer segment. Therefore, it should always be displayed prominently on a company's website and in other consumer touch points. It also must be intuitive, so that a customer can read or hear the value proposition and understand the delivered value without further explanation.

View Legal put it this way when describing what "winning" firms of the future will need to be:[37]

- differentiated or unique;
- of demonstratable value; and
- delivered in a way that is difficult to replicate.

Competition and Competitive Advantage

A "competitive advantage" is[38]:

> …conditions that allow a company or country to produce a good or service of equal value at a lower price or in a more desirable fashion. These conditions allow the productive entity to generate more sales or superior margins compared to its market rivals. Competitive advantages are attributed to a variety of

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35 https://www.investopedia.com/terms/v/valueproposition.asp, 29.1.19

36 https://www.investopedia.com/terms/v/valueproposition.asp, 29.1.19

37 View Legal. *It's the end of the professions as we know them (and I feel fine)*, View Legal, www.viewlegal.com.au page 4.

38 https://www.investopedia.com/terms/c/competitive_advantage.asp, 29.1.19.

> factors including cost structure, branding, the quality of product offerings, the distribution network, intellectual property and customer service.

The first element of competitive advantage is "comparative advantage"[39]:

> A firm's ability to produce a good or service more efficiently than its competitors, which leads to greater profit margins, creates a comparative advantage. Rational consumers will choose the cheaper of any two perfect substitutes offered…
>
> Economies of scale, efficient internal systems and geographic location can also create comparative advantage. A comparative advantage does not imply a better product or service, though. It only shows the firm can offer a product or service of the same value at a lower price…

The second element of competitive advantage is "differential advantage"[40]:

> … when a firm's products or services differ from its competitors' offerings and are seen as superior. Advanced technology, patent-protected products or processes, superior personnel and a strong brand identity are all drivers of differential advantage. These factors support wide margins and large market shares.

A real world example of how to establish a competitive advantage in the provision of succession law products can be seen from DBA Lawyers: www.dbalawyers.com.au. DBA's model includes the provision of SMSF, Trust and company documents by online order. However, their competitive advantage is expertise, and product quality, rather than price. They actively promote that their documents are different (better) than others available in the marketplace.

For example, their company constitution document is said to have twelve advantages that other constitutions may not. Those advantages include, their constitution allows for the appointment of "successor directors", and a template to make those appointments is included.

Founder and Director of DBA Dan Butler explains:[41]

> Small private companies are widely used to manage and control financial affairs. At times they are used as companies in their own right, but they are also commonly used as trustees for SMSFs, family trusts and unit trusts. Regardless of whether a company acts as trustee or not, the directors hold day-to-day control over the company. Despite the importance of this director role, few pay proper attention to how control of a company could be lost simply by failing to plan ahead. This risk is especially pronounced where there is a possible dispute in the event of a key family member dying or losing capacity. One planning strategy is to appoint successor directors to take the place of a director who has died or lost capacity. Unfortunately, very few constitutions allow successor directors to be appointed at all.

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39 https://www.investopedia.com/terms/c/competitive_advantage.asp, 29.1.19.

40 https://www.investopedia.com/terms/c/competitive_advantage.asp, 29.1.19.

41 https://www.dbalawyers.com.au/announcements/preserve-the-intended-control-of-a-company-using-successor-directors/ 18.2.19.

> Typically under a company constitution, a director automatically loses their office as a director when they die or lose mental capacity. This second circumstance (loss of mental capacity) is often forgotten.
>
> …
>
> The use of successor directors is a strategy to address the problematic scenario discussed. Under a successor director strategy, a director is able to appoint one or more persons to 'step into the director's shoes' in the event of the original director's mental incapacity or death. If Lee's company constitution had allowed for successor directors and the relevant documents were completed, Lee's children would have immediately stepped in as directors when Lee lost capacity. Kay's consent would not have been needed.
>
> Very few constitutions allow for the use of successor directors. However, the DBA Lawyers company constitution has been specifically drafted to cover this, as well as other succession and general strategies. New companies through DBA Lawyers are provided with our constitution at the outset. On the other hand, existing companies can utilise our constitution upgrade service to obtain an up to date company constitution.
>
> Every DBA Lawyers constitution includes a successor director appointment form. This has been designed for ease of use, but it is recommended that advice be obtained before using a successor director strategy. The successor director form is just one advantage offered by a DBA Lawyers company. There are also many other advantages that are not found anywhere else. …

DBA markets their specialist knowledge and the benefits of their documents, particularly in the area of SMSFs, by regular "roadshows" to adviser groups around Australia, online updates, and regular professional writing.

This competitive advantage allows DBA to charge more for their documents than many other online providers of similar titled documents. For example, to upgrade to a soft copy of DBA's company constitution online costs $500.00[42], whereas provider Law Central charges only $99.00 for their "Company Constitution Update"[43].

Pricing

Clients are seeking more value and in response, law firms are adopting innovative billing alternatives.

Despite the steady increase in alternative fee arrangements, traditional hourly rate billings still dominate how firms bill their clients.

Firms should adapt to client expectations about how they want to be billed and consider offering contemporary and innovative fee arrangements such as fixed, success based, value based, subscription based, capped and staged/ milestone billing options.[44]

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42 https://www.dbalawyers.com.au/constitution-update/ 18.2.19.

43 https://lawcentral.com.au/CreateDoc/createlink.asp?docId=161 The writer has not reviewed the Law Central document referred to and expresses no views or comparison as to quality or content between it and the DBA document referred to, except in relation to the advertised price of each document.

44 Pitcher Partners' Legal Firm Survey 2018 at page 2: http://www.pitcher.com.au/sites/default/files/downloads/2018_legal-survey_national_180321_e.pdf 18.2.19.

The price charged for different succession law products is obviously likely to be a critical component of any business model.

Price can be defined as:[45]

> A value that will purchase a finite quality, weight, or other measure of a good or service As the conditional given for the exchange of ownership, price forms the essential basis of commercial transactions. It may be fixed by a contract left to be determined by an agreed upon formula at a future date, or discovered or negotiated during the course of dealings between the parties involved. In common, a price is determined by what (1) a buyer is willing to pay, (2) a seller is willing to accept, and (3) the competition is allowing to be charged. With product, promotion, and place of marketing mix, it is one of the business variables over which organizations can exercise some degree of control…

In broad terms, law firm and non-law firm providers of succession law products typically price and charge using one or a combination of the following:

- hourly rate;
- fixed fee, for either the completion and provision of a specific document (e.g. a Family Trust Deed), or a specific process (e.g. a full Estate Planning review);
- some form of success or contingency fee (where legal); and
- some form of project management fee (e.g. "to facilitate Estate Planning").

A pricing strategy that has received considerable attention in recent times in relation to the Australian legal industry is "value based pricing":[46]

> Value-based pricing is a price-setting strategy where prices are set primarily on a consumers' perceived value of the product or service. By contrast, cost-plus pricing is a pricing strategy in which costs of production influence the price. Companies that offer unique or highly valuable features or services are better positioned to take advantage of value-based pricing than are companies with commoditized products and services.

The battle between hourly rates and "fixed fee" is considered further below in the context of whether hourly rates inhibit innovation in how legal services are provided.

As noted above in the context of Wills, lawyers and law firms in each jurisdiction are subject to consideration regulation in relation to pricing of legal services, and in relation to how they contract with clients to provide legal services[47]. Non-law firms providing succession law products are not subject to that regulation, but remain subject to the Australian Consumer Law, and if trading in New South Wales be subject to unfair contract term legislation.[48]

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45 http://www.businessdictionary.com/definition/price.html 18.2.19

46 https://www.investopedia.com/terms/v/valuebasedpricing.asp 18.2.19

47 **NSW:** *Legal Profession Uniform Law Application Act* 2014 (NSW); *Legal Profession Uniform Law (NSW)*. **Tas**: *Legal Profession Act* 2007 (Tas). **Vic:** *Legal Profession Uniform Application Law* 2014 (Vic). **Qld:** *Legal Profession Act* 2007 (Qld). **NT**: *Legal Profession Act* (NT). **ACT**: *Legal Profession Act* 2006 (ACT). **SA:** *Legal Practitioners Act* 1981 (SA). **WA:** *Legal Profession Act* 2008 (WA).

48 *Contracts Review Act* 1980 (NSW).

Case Studies

Case Study #1 – Graham: the Solo Specialist

Graham's business model can be described as very "hands on". He personally attracts the clients, personally sees the clients, personally prepares all the documents, and personally does a significant amount of the day to day running and administration of his business. It is a "traditional" law firm business model.

Graham has the advantage of being an accredited specialist in (most) of the products that he is providing. There is a significant barrier to most competitors being able to match that advantage in the future. This is therefore a clear and important competitive advantage for Graham, or at the very least presents as competitive advantage for him.

As a sole practitioner, Graham faces the challenges that come with being a sole operator, but also the advantage of being able to change and adapt quickly and without needing to bring business partners and/or employees "on board".

Planning for the succession of his own practice may be an important consideration for Graham.

"Does Graham practice what he preaches – in other words, what is his succession plan?" asks Matthew Burgess of View Legal[49].

Because of the "high touch" approach of Graham to how he services his clients, and the long term and personal nature of the succession planning that he undertakes for them, this issue may go directly to Graham's ability to attract and retain clients. How can Graham offer continuity of advice and service if he was incapacitated, died or retired from practice? What would happen in those circumstances to any Executor, Trustee or other controlling roles that he had taken on in relation to his clients?

How Graham articulates the value that he provides to his clients is important, both to his marketing, and his client relationships. As posed above in relation to product offering, is Graham providing and focussing on the right types of succession law products, and is Graham fully communicating the value that he provides as a specialist providing highly personalised services?

Graham's pricing, service delivery and payment methods are traditional "do and charge". The client identifies a need, they see Graham and provide instructions, Graham provides the advice and documents, then the client is strictly speaking no longer a client until (and if) in the future they again identify a need **and** again select Graham to service that need. There are risks and opportunities for Graham in this.

Graham may wish to consider whether his existing client base and model would allow other types of pricing/revenue models, and a more proactive rather than reactive approach. For example, is there a means by which Graham can engage more regularly with his clients to identify legal needs for them, rather than waiting for them to do so and come to him? Should he do so directly, or via their other advisers (e.g. their accountant or financial adviser).

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[49] The writer gratefully acknowledges the informal input and assistance of Matthew Burgess of View Legal to the writer when researching this paper. This paper extracts parts of that input, received on review of early drafts of the case studies used in this paper. They should not be read as comments or opinions on any matters covered in this paper, and readers should review to the white papers and other material on the website of View Legal for their formal/public comment: www.viewlegal.com.au . All errors and omissions are the writer's.

Would a form of subscription model work for Graham's succession planning products, whereby his clients pay an agreed annual fee for agreed reviews and updates within a defined scope?

Case Study #2 – Sharp Law Commercial/Property Department: A Partner's Challenge

Sharp's succession law products are only a relatively small part of their larger business model. The firm as a whole operates as a model for providing the total legal services that it does. Within that whole, succession law products are provided in a particular way, and to a particular part of the firm's overall client base.

The point for Jill is that her review of the succession law offerings is taking place in the broader context of the firm's overall business model. How the firm as a whole attracts customers, sells legal services and is paid for those services is likely the starting point for her more specific review.

In terms of business structure, Jill may wish to consider whether Sharp should provide their succession law product under the banner of their other offering, or whether a separate brand, or even separate firm, should be used.

Case Study#3 – Solid Legal Partners: The Longstanding Regional Practice

Solid have an existing business model that has stood the test of time. It is also a model that is not likely to disappear from the Australian legal services landscape anytime soon, if ever. But those things do not mean that Solid should not strive for improving and if necessary changing parts of its business model. It should be noted that doing so does not require throwing out the existing model altogether, and for many firms to do so may not be the best approach.

"What would be the consequences for Solid Legal be if they focused all human capital in each physical location on investing solely in client relationships, outsourcing the legal work to freelancers, technology or white label providers?" asks View Legal's Matthew Burgess.

An approach of that type would seek to build on the competitive advantages and value proposition that Solid already has – personal brand, client relationships, the ability to service all types of legal needs, and a physical "local" presence in the areas that its clients live and work in.

Investing further in client relationships, and their longstanding "high touch" approach, could certainly be of value to Solid. It may, in part, assist to get over the price barriers. This is tied to a consideration of what the client actually values, and what they are (at least in part) paying for, when they use a firm like Solid.

A direction of that type would see the Partners at Solid moving more towards being "facilitators" of legal and related services.

Solid may wish to consider moving to an ILP structure, for reasons including being able to more easily bring new equity owners on. Their business model and the strong regional nature of their practice may also make worthy of consideration a MDP made up of Solid and some of the larger established accounting and financial services providers in the same towns.

Case Study#4 – Click Here Law: The Online Firm

Click Here obviously has a very "NewLaw" model, including:

- no physical offices;

- the provision of all succession law products online only;
- a high level of automation in customer orders, product creation and delivery, and payment;
- payment on ordering of products rather than invoices after provision of services of products;
- fixed fee rather than hourly rate;
- a heavy reliance on online marketing; and
- informal staff arrangements, and the ability to work remotely.

Whereas "traditional firms" may benefit from looking at the Click Here model for ideas and ways to update their business model, and for competitive risk, the inverse is also true for Click Here. Click Here and online providers of legal documents generally would do well to consider (and many likely have and are considering) what "good bits" of traditional law can be delivered differently and effectively using technology and online platforms.

Elements of the Click Here model are likely to give rise to challenges. For example, informal staff arrangements, and remote work, give rise to a host of considerations and practical difficulties that do not arise for firms with a physical office attended by all of their staff.

Innovation

Mr. Verma welcomed Sir Richard to Silicon Valley, "the Innovation Capital of the World," as he described it, quipping that "in the last 40 years, 90% of the wealth created in the world was created in the 50 mile drive between San Francisco and San Jose. The remaining wealth, was created by Richard Branson!"

But to Sir Richard, success isn't measured in wealth, it is measured by innovation. "I'm a person who looks forward more than looks back," he explained. His philosophy dictates being rich in ideas and being rich in new approaches. It's always been the goal not to accumulate wealth, but to make the world a better place by making sure everyone has access to the things they need to thrive.[50]

The Australian Legal Practice Management Authority reported recently that innovation is in fact taking hold in Australian law firms[51]:

> There seems to have been a step-change in the legal industry's approach to innovation this year, with many firms putting forward transformative projects that revamped the way their firms did business and went well beyond tinkering around the edges.

But is there any scope left for real innovation in succession law products? Hasn't it all been done by now, and how much can you really change a Will or an Enduring Power of Attorney?

"As with every area of law, and indeed every area of business, there would appear to be very little limitation on the ability to innovate" says Matthew Burgess of View Legal.

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50 https://apttus.com/blog/live-from-accelerate-18-a-discussion-with-sir-richard-branson/ 13.2.19

51 "An Innovation Mindset Taking hold in the legal industry says ALPMA", quoting ALPMA CEO and president of Sladen Legal Andrew Barnes.

"Arguably, the biggest innovations will come from those able to re-purpose ideas from other industries into the estate planning area."

Burgess gives the example of Steve Jobs' claim that the innovation he was most proud of was the magnetised cord on an Apple Mac – an idea 'stolen' by Apple from the Japanese toaster industry.

Does Charging by the Hour Inhibit Innovation?

One regularly expressed view is that the use of hourly rates inhibits law firm innovation, for fear of reducing revenue[52]:

> The hours billed by a traditional law firm's lawyers represent the entire inventory of the firm…it is what the firm sells and the sole means by which the firm makes money. When a law firm engages in any of the most common types of innovation, it eliminates hours, thereby reducing its inventory and lowering its lawyers' revenue. It is no wonder innovation is anathema within most law firms…

As an aside, it could be said that one benefit of the feature of the hourly rate is that the "traditional" law firm business model does not have "inventory" in the sense of product/service prepared and awaiting sale. Most firms "produce" legal services at hourly rates as clients order them. This type of production can therefore be described as having some of the desirable features of "just in time" manufacturing, or "lean" manufacturing. The time it takes to convert WIP to debtors and debtors to client payment of course remains relevant. But the inherent efficiency and usual desirability of only producing the produce when there is a buyer who has ordered that produce remains, and is something that is sometimes overlooked in commentary about the downsides of hourly billing.

The assertion that hourly billing inhibits innovation, because innovation would reduce billable hours and therefore revenue and therefore profit, requires challenging. A loss of revenue could, of course, be avoided by increasing hourly rates (price). If that is done, then the firm that by innovation takes less time and effort to do the same work earns the same revenue, and has either spare productive capacity to take on more work, or spare productive capacity that could be eliminated or a combination of both. The firm is effectively just increasing margin in the same way any business that cuts expenses whilst maintaining revenue does. Viewed that way, to innovate on the production side should not be a disincentive. There is also the possibility of decreasing hourly rates (price) in order to increase client demand, which can then be serviced from the newly created spare productive capacity.

Innovation is not, of course, limited to providing legal services quicker. It also applies to the revenue (demand) side of legal practise. Innovations that increase the number of clients, increase what clients are prepared to pay, change client mix to clients who are prepared to pay more or buy more, or that create new products and services that can be sold are obviously likely to be positive. Innovation of that kind can occur whether or not there is hourly rate billing.

The Australian Government advocates the following general approach to innovation:[53]

1. Conduct an analysis of the trends in the market environment, your customers' wants and needs and your competitors.

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52 Furlong, J, *Time's up – if firms want to innovate, they need a new model*, Australian Law Management Journal, June 2018.

53 https://www.business.gov.au/change-and-growth/innovation 13.2.19

2. Consult with customers and employees for ideas on improving processes, products and services both internally and externally. Find out more about connecting with customers for ideas.
3. Seek advice. Use available resources such as business advisors, grants and assistance to drive innovation in your business. This may include seeking Intellectual Property (IP) protection to commercialise your ideas. Learn more about local collaboration and international collaboration with researchers.
4. Be open to new ideas and adaptive to change.
5. Develop a strategic, responsive plan, which promotes innovation as a key business process across the entire business. Learn about creating an innovative business culture and developing a strategy for innovation.
6. Train and empower your employees to think innovatively from the top down.

What role does technology have to play in innovation?

Clearly, a lot of innovation does not require technology, but technology can assist with a lot of innovation:[54]

> Innovation generally refers to changing processes or creating more effective processes, products and ideas. For businesses, this could mean implementing new ideas, creating dynamic products or improving your existing services. Innovation can be a catalyst for the growth and success of your business, and help you to adapt and grow in the marketplace. Being innovative does not only mean inventing. Innovation can mean changing your business model and adapting to changes in your environment to deliver better products or services. Successful innovation should be an in-built part of your business strategy, where you create a culture of innovation and lead the way in innovative thinking and creative problem solving. Innovation can increase the likelihood of your business succeeding. Businesses that innovate create more efficient work processes and have better productivity and performance.

A recent report into Australian law firms gives some insight (limited to the general limitations of surveys and statistics).

The ALPMA "What is shaping the future firm"? surveyed 243 firms across all Australian jurisdictions except the ACT and the NT, and New Zealand, across all areas of the law (including those with estates practices, which were 67% of those surveyed).

Some relevant findings were:

- 62% believed their firm was ready to deal with change in the future. Only 11% said they were not.
- 68% felt that technology would not affect job security.
- 91% said they believed their employees "would need a broader skillset to be ready for the future".
- 76% said that one reason they would outsource would be to gain process efficiency. Only 13% said that reason would be to gain outside specialist knowledge.
- 69% said they did not forsee outsourcing tasks to AI in the short term.
- 85% included "Will and estate" as one of the areas that they predicted AI would be effective.

[54] https://www.business.gov.au/change-and-growth/innovation 13.2.19

- Asked to rate how changes in technology in the last two years had helped or hindered productivity, 60.5% said productivity increased “slightly”, and only 17.2% said it increased “significantly”.
- small firms (by employee number – 1-24 employees) were as a group more open to the use of new technology.
- almost all achieved at least “some” of their strategy goals.
- lack of time was seen as a key constraint to growth, exceeding access to capital (investment).

The “innovations” part of the ALPMA report deserves special consideration. The following five options were given for plans for new technologies in the near future:

- AI
- Practice management software
- Digital/electronic signing technology
- Practice automation
- Document management software

19% selected “none of the above”. 19% said AI.

What actually is AI?:[55]

> **Artificial intelligence (AI)**, the ability of **a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings**. The term is frequently applied to the project of developing **systems endowed with the intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience**. …Still, despite continuing advances in computer processing speed and memory capacity, **there are as yet no programs that can match human flexibility over wider domains or in tasks requiring much everyday knowledge**. On the other hand, some programs have attained the performance levels of human experts and professionals in **performing certain specific tasks, so that artificial intelligence in this limited sense is found in applications** as diverse as medical diagnosis, computer search engines, and voice or handwriting recognition.
>
> [Emphasis added]

The main use for AI currently appears to be in assisting lawyers to do legal research, which is arguably AI in a very “limited sense”.

Erik Lindberg, Senior Director of Westlaw Product Management at Thompson Rueters:

> Customers really should care about how much automation is going into the tools they use, and how much is human-driven. The best tools are always going to be a combination of the automation coming from the technology and the insights that a human editor can bring to the situation. The legal language is very, very nuanced. We’re not training computers to replace lawyers. So automation is never going to get you the full picture, but it can eliminate some of the tasks and some of the work that you have to do along the way. It's that combination of the right people and the right technology that really will give you the best solution.

[55] https://www.britannica.com/technology/artificial-intelligence 13.2.19

Of the options listed in the ALPMA survey only AI can really be described as a "new" technology. The others have been around for a long time. They have been used by many, many "traditional" firms for a long time. They also cannot be described as particularly "innovative" – they are existing off the shelf products in widespread use in the industry. The vast majority of respondents to the ALPMA survey therefore intend to use *long existing and non-novel* technologies in the near future.

Also, one wonders whether all of the 19% of the respondents who said so really intend to use AI, or whether they really do not know what AI is, and rather intend to use things like automation and document production. If they really do intend to use true AI, then there is likely a lack of AI currently available to the market.

An interesting and innovative example of AI that includes but appears to go beyond simply facilitating legal research that has been around for a few years now is "Ailira"[56]:

> Ailira is the first artificially intelligent legal assistant of the type in the world. What she represents is the first practical and useful artificial intelligence for professional services starting with Australian federal tax law.
>
> …
>
> To answer legal questions, Ailira uses natural language processing, and can easily understand even technical and obscure questions.

You can chat with Ailira using our website widget or Facebook Messenger, whichever suits you best. Ailira is available 24/7, from any device, meaning means that it can assist you with answers whenever you need it.

> Chat with Ailira as you would with a friend or with a human lawyer, using natural language. The more complex and specific the question is, the better the answer returned by Ailira.
>
> Ailira was developed by professional lawyers in order to provide you with the most relevant and accurate answers to your legal questions. In case you want your Ailira generated document to be reviewed or commented by a human lawyer, Ailira can help you schedule a meeting with a lawyer who can consult you about any extra questions that you might have.

And whilst Ailira isn't about to do your clients' estate planning yet, she has aspirations:[57]

> Robots like Ailira aren't able to offer legal advice…yet. But she is able to offer you helpful legal information, and can also help you have a human lawyer give legal advice – in a much more efficient and cost-effective manner.
>
> Ailira can help with business structuring and Wills and estate planning. She is learning more aspects of law all the time, including assisting victims of domestic violence. If you are a tax professional Ailira is able to assist with tax research. Ailira is also able to assist with some general legal queries, but she is still learning, so please be patient.

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56 https://www.ailira.com/user-guide.html (extracts) 13.2.19

57 https://www.ailira.com/about.html (extracts) 13.2.19

Whilst 89% of ALPMA respondents said they intended to increase their investment in technology, only 25% planned to spend anything at all on *new* technologies. This may be a further indication that new technologies may not be critical (or at least not seen as being critical) for firms to continue to operate and complete effectively in the short-medium term.

Innovation related to fulfillment of professional responsibilities

An interesting question is whether law firms should be looking for ways to innovate in the area of fulfilling their professional responsibilities when delivering succession law products.

As seen above in the discussion about the professional duties/best practices relating to Wills when applied to the case studies, innovations in business model and particularly around how succession law products are ordered by and delivered to the consumer have had some real impact on the nature and scope of duties owed.

Innovation to improve compliance with professional responsibilities, and increase the level of expertise and service provided to the client, is not obviously in the Australian market.

The question must be asked whether the client as consumer values the high standard that applies to lawyers in this area. What part of the price they pay is paid because of it? At what price point would they give it up?

Case Studies

Case Study #1 – Graham: the Solo Specialist

Graham could look into AI assisted legal research, which may be worth the cost/investment because of the more bespoke and specialist nature of Graham's specialist practice. If AI is the future of legal research, but appears to be a long way of being used to give reliable advice, then Graham's most valuable offering is likely the synthesis of facts, instruction, research and judgment from experience.

Case Study #2 – Sharp Law Commercial/Property Department: A Partner's Challenge

Innovation need not require the invention of novel products or ways of doing things. A firm like Sharp Law can make changes that for it – compared to how things have been and are currently done – are innovative. For example, having common succession law documents produced centrally would be an innovation in the sense of a new and different way of doing things for Sharp Law. Sharp does not need AI to innovate effectively, or launch new succession law products.

Sharp could look to the example of View Legal as a good example of successful innovation in the provision of succession law products, and other legal products, in the Australian legal industry: www.viewlegal.com.au Amongst other things, View offers and promotes a platform and system for "adviser facilitated" succession planning, and estate and trust administration. As with DBA Lawyers, View markets itself on the basis of specialisation and product excellence.

Case Study#3 – Solid Legal Partners: The Longstanding Regional Practice

Solid Legal Partners should prioritise looking for innovation focussed on client service, and the client experience.

Case Study#4 – Click Here Law: The Online Firm

As noted above in relation to product, there may be some scope for product innovation for Click Here. However, their model would appear to make that opportunity limited, given the types of consumers they are more likely to attract.

Click Here have demonstrated innovation in relation to revenue streams, including the subscription model, and the referrer fee model. Also, the combination of the three types of offering (document production, subscriptions and referrals) itself can be seen as a form of innovation as a complete offering, being a point of differentiation between them and other providers of only pay-per-use documents. This illustrates that innovation can often be the use of existing ideas and/or products in an innovative or different way, or combination.

Conclusion

Succession law products are likely to be an area that will see significant "disruption", and with it significant opportunity, in the medium-long term. By taking an approach that first asks, "Who and where are we now?", then consider "What are others out there doing?", and then "What can **and** should we do the same or differently given that context?", law firms and individual lawyers can seek to best provide what their clients want, both now and in the future.

And what is the difference between Dracula and a lawyer? Attend the conference presentation of this paper to find out.

Sam McCullough

Hobart, February 2019

About the Author

Sam McCullough is a senior lawyer providing high quality legal advice, drafting, guidance and strategy to clients in the related areas of:

- **Wills and Estate Planning**
- **Estate and trust litigation**
- **Estate and trust administration**

Sam has a specialist practice within Simmons Wolfhagen in the above areas, and assists his clients to take advantage of the firm's full service offering where they have other legal needs.

Sam's background includes a degree in law and commerce from the University of Tasmania in 2002, followed by winning the Foley's List Advocacy Award at the Leo Cussen Institute in Melbourne in 2003, and then several years in legal practice in Melbourne. After a period living and working in Northern Ireland, he returned to Tasmania in 2006, and has then spent over eleven years as a succession/Wills and estates lawyer. Sam also has seven years' experience as a business owner and manager.

He is a full member of the international Society of Estate and Trust Practitioners ("STEP"), a member of the Tax Institute, and a member of the Law Society of Tasmania's Litigation Committee, and was a member of the Law Council of Australia's National Elder Law Committee for five years.

Sam is the co-author of the only text on Statutory Wills (Court authorised Wills) in Australia, published and on sale by Lexis Nexis: **Statutory Will Applications: A Practice Guide** (see Sam's website: www.statutorywills.com.au).

He is a regular presenter for client groups, other lawyers, professional education providers and others. He has presented twice for the Tax Institute of Australia at their National Conference (2011 and 2016).

An article by Sam about the Family Court's jurisdiction in relation to Family Trusts has been published internationally by STEP, and Sam has been a guest on several interviews on ABC local radio about Wills and succession law issues of interest.

Sam can be contacted by email to sam.mccullough@simwolf.com.au