Sole Practitioner Power of Attorney – Draft Guidelines November 2011

Every sole practitioner and sole director of an incorporated law firm is required, pursuant to s44 of the Lawyers and Conveyancers Act 2006 (LCA), to comply with Schedule 1 of the LCA and appoint an agent, and an alternate, to conduct the sole practice, or act as the board of the incorporated firm, should certain circumstances arise. This is done by way of execution of a power of attorney document and enables the donee to conduct the donor's practice, operate the trust account, dispose of the donor's practice (in certain circumstances) and do all things necessary or incidental to the above.

Barristers practising on own account are not required to execute a s44 power of attorney document.

Where do I find the power of attorney document?

The document is available free of charge on the NZLS website http://www.lawsociety.org.nz/__data/assets/word_doc/0019/3709/power-of-attorney-sole-practice.doc

When do I have to complete the deed?

Before a power of attorney is given the written consent of the intended donee must be obtained.

This must be done within 3 months after the date of commencement of practice on own account as a barrister and solicitor in sole practice or within 3 months of becoming the only director of an incorporated law firm (s44 (1) (a) and (b) LCA).An attorney and an alternate attorney must be appointed.

You must give notice of the details of your power of attorney to the NZLS and to your attorney. As mentioned later the NZLS also requires a copy of the document which can be emailed to registry@lawsociety.org.nz or faxed to 04 463 2989

Why do I have to have an attorney?

While it is a requirement of the LCA it is also important for the profession and the public that there is a streamlined process in place to ensure that a your practice can continue running smoothly, in an orderly fashion, and that there is minimum disruption to clients' business and interests in the event that you are for any reason unable to conduct your practice.

What happens if I don't appoint an attorney or unlawfully revoke a power of attorney?

This is an offence under s 45 LCA. The offender is liable on summary conviction to a fine not exceeding $50,000 (natural person) or $150,000 (corporation).

A power of attorney can only be revoked in accordance with clause 14 of Schedule 1 by appointing another practitioner as donee. In this situation both the replacement donee and the remaining donee are required to sign a new power of attorney document.

In certain circumstances the President of the NZLS may execute on behalf of the practitioner a power of attorney and this will have effect as if it had been given by the practitioner (clause 12, Schedule 1).

Are there any professional attorneys?
Not that the NZLS is aware of. There is however no reason why a lawyer entitled to practise on own account (and TAS qualified if necessary) could not be a professional attorney for a number of law firms in much the same manner as locums are available. A donee is entitled to charge for work undertaken during the period in which a power of attorney is invoked (see the section for donees below).

Who can be my attorney?

Both your attorney and your alternate need to be entitled to practise on own account (in sole practice or partnership) so that either can step into your shoes. If you operate a trust account your attorney and alternate must also be TAS qualified and have paid the appropriate fees.

A lawyer who is employed or is a barrister is not able to be your attorney or alternate as they will not hold the correct practising certificate and will also have a contract with a third party and therefore would not be able to "step into your shoes" at short notice.

Who should I ask to be my attorney?

Ideally this will be someone well known to you – perhaps a longstanding personal friend or someone you trust and someone who is familiar with the fields of law in which you practice and whose office is in close proximity to your own. Some sole practitioners have an arrangement with another sole practitioner to be each other's attorney. This can have its downside, as a sole practitioner is unlikely to have sufficient time to devote to another practice in an emergency unless the attorney has a number of employees.

Why can't the NZLS run the firm if something happens to a sole practitioner?

The role of the NZLS is not to manage or run private law firms. If the NZLS were required to step in every time a practice was in trouble it would require resources for which it is not funded and could result in a substantial increase in practising fees.

For donees (or potential donees)

I have been asked to be an attorney but I am not sure whether to accept?

Being an attorney is not something to be taken lightly and there are a number of factors to be taken into consideration before agreeing to be one. It could be a rewarding experience as part of the collegial support network which underpins the legal profession. It can also be a difficult task. You could be required to operate a firm with no forewarning for an extensive period of time with very little assistance and this could be very burdensome. This is discussed later in the article together with information on some assistance available where an attorney encounters difficulties.

However an attorney could be used, on a voluntary basis, as a locum when a sole practitioner wants to take a period of leave for holiday, medical or other reasons. This could be a reciprocal arrangement where sole practitioners are attorneys for each other. This may not always be the best arrangement as one overworked sole practitioner may not have capacity to take over for another in the same position.

Before you accept you might want to consider the following:

- Asking the donor to disclose his/her complaints/disciplinary matters to you – past and present (this will help you to assess the likely risk involved)

- Asking the donor to disclose past trust account inspection reports.

- Is an annual retainer being offered? This will help put the relationship on a more businesslike footing but may not pay for time spent in a crisis situation.

- Are you familiar with the donor's practice, the manner in which it operates, its accounting system, and its financial health? Is there rent owing or is the firm account in overdraft?

- Are you aware of the personal health of the donor?

- Is the donor's place of business near your work practice – if you are located in a different town it is likely to be a problem if you are called upon to act at short notices.

- What is the state of the donor's desk – office? Does it look as though records are being kept in order? A messy office with files littered over the floor may not be a good sign and may make it more difficult to operate the firm if so required.

- You may want to look through sample files checking to ensure there has been adequate reporting to clients and that all correspondence appears to be on the file.

- Does the donor have PI insurance? Are you covered by your own PI insurance?

- Is the field of law in which the donor practises in an area in which you have experience in?

- Could you cope realistically if called upon with no warning in the worst case scenario to deal with a dysfunctional practice and disgruntled clients?

If you decide to accept consider the following:

- Asking for a duplicate set of keys to the donor's office, post office box, deeds safe (if necessary).

- Asking for relevant computer/banking and other passwords to be kept safe in a separate sealed envelope.

- Asking for a list of employees, personal contact numbers and access to employment agreements (for example details of any unwritten profit sharing arrangements). Similarly employees or at least a senior staff member or life partner of the donor should know who the donee is and how to contact you.

- If the donor practises in property law, asking the donor to ensure that you are linked to the donor's Landonline licence. (Specific guidance is given about this in *The Property Lawyer*, volume 7 issue 3 p.9 and volume 7 issue 4 p.9)

- Ensure you are familiar with the office mail, telephone, computer and trust account software systems.

- Ensure that you are aware of the Bank at which the trust account and firm accounts are held. The donee should be recorded as a signatory to the donor's trust account and depending on the circumstances, the office account.

- Having a regular meeting with the donor to update the above. Let the donor know immediately if your status changes and you are no longer eligible to be a donee. The donor should also let the donee know if any matter changes such as the opening of a trust account which may affect the eligibility of the donee.

- Attention to the above details in advance will be in the interests of the donor, donee and clients in the long term.

As attorney am I able or required to carry out any roles the donor may have had such as trustee or sole executor of an estate?

The question may be whether any work is incidental to conducting the donor's practice (clause 9 Schedule 1). Where there is doubt it is advisable for the donor to execute a standard power of attorney document in favour of the donee covering any other duties ancillary to the law practice that are not strictly actions as a solicitor.

I am an attorney and need to exercise my powers – what should I do first?

- You must comply with clause 21(2) of Schedule l LCA. The Power of Attorney must be produced for inspection by the NZLS and you must provide a certified copy. You must also give a copy to the auditor of the firm (if there is one) and to the Bank where the trust account is held. Notify your local NZLS branch office of the circumstances giving rise to the need to operate the deed as they may be able to assist you.

- If the donor has been suspended or struck off then the consent of the Council of the NZLS is required before you can exercise your powers. (Clause 7 of Schedule 1)

- Secure premises, postal and email if the practitioner is suspended or struck off.

- Advise your PI insurer of the situation and check that any cover extends to your role as donee. Advise the donor's insurers of your role and operation of the power of attorney.

- You must comply with all trust account rules and regulations in force as if the donor was personally conducting the practice.

- Liaise with the NZLS Inspectorate if there is a trust account to make sure everything is in order and no funds are missing before any payments are made. If appropriate a back up copy of all electronic information should be obtained.

- The donor must have a current practising certificate. (clause 25, schedule 1).The donee acting under the power of attorney must apply for and pay all practising fees and levies out of the funds of the donor. If the donor is deceased the practising fees must still be paid.

- In some cases the donee will need to closely liaise with the local standards committee which may be investigating complaints against the donor, contemplating disciplinary action and/or possibly intervening in the trust account or practice. Files or trust monies should not be released in such circumstances without careful consideration.

- Negotiate ongoing arrangements with landlord and other service contract providers if required.

- Meet with the donor's staff initially and on a regular basis to address any issues that arise and to keep them updated. Ensure staff know who is responsible for the firm, the continuing employment arrangements and the appropriate channels for dealing with any concerns that arise.

- If appropriate arrange a meeting with the donor's family members. There may be personal property of the donor in the practice that the family would like to uplift. If the donor has died liaise with the administrators of the estate.

- Check if there is any urgent work in progress such as conveyancing files with settlements due or Court hearings scheduled and attend to these promptly.

- If there is a lot of work involved make contact with the local branch of the NZLS. It may be that an SOS can be sent out to local practitioners for assistance.

- Establish a procedure whereby client files are handed over to other solicitors when clients have so requested but only after having examined them and obtaining proper acknowledgement for files and funds uplifted. It is usually preferable to send files and funds to new solicitors rather to clients direct but first ensuring that any unbilled work on the file will be recovered for the practice. If there are any problems on the files take steps to notify insurers and seek directions before releasing the files.

- Inform current clients, practitioners and the public of your role. It may be appropriate to add a note to existing letterhead. (consider developing precedents?)

- If there is any public concern or media interest liaise with the communications section of the NZLS for guidance.

Will I be paid for my time?

If you are taking over uncompleted files then work done to complete work would be invoiced by the firm and if necessary can be pro rated between you as attorney and the firm. Clause 11 states that all costs, charges and expenses incurred by the donee in the exercise of the donee's powers (including such reasonable remuneration as may be approved by the NZLS Council) are payable, unless the High Court directs otherwise, out of the property of the practitioner or incorporated firm by whom or on whose behalf the power of attorney was given.

In many situations when an attorney is called in the donor may be in dire straits either financially or from a professional disciplinary point of view. An attorney may be compensated financially if funds are available.

When does an attorney have to step in?

This can be for a number of reasons as set out in clause 7 (a) –(h) and clause 8 (a) to (h) of Schedule 1. Most of these circumstances are crisis related. The power of attorney does not terminate by reason only of the death of the donor or the donor becoming of unsound mind. The most common situations in which the attorney will be required to exercise his/her powers are:

- The incapacitation of the donor.
- When the donor is absent from the practice.
- Following the death of the donor until the practice is disposed of or until the administrator of the estate revokes the power of attorney. *A donee may not exercise powers after the expiration of 1 year from the date of the grant of administration in the estate of the donor unless approved by the NZLS Council*.
- When the donor is prohibited by an order of the Disciplinary Tribunal from practising on his or her own account.
- Where the donor is suspended or struck off *subject to the consent of the NZLS Council.*
- An amendment to the LCA is expected shortly to enable the power of attorney provisions to come into effect on the bankruptcy of the donor. The donee would have to work in association with the Official Assignee who may be the *owner* of the practice.

Clause 19, Schedule 1 deals with the situation where the donor is mentally disordered or deceased. The manager under the Protection of Personal and Property Rights Act 1988 may suspend or revoke the power of attorney and appoint another donee. The administrator of an estate may revoke the power of attorney and appoint another donee. Both situations require the prior consent of the NZLS Council.

Will the NZLS store any old files of the practice?

No. There is no legal basis for the NZLS to have possession of such files. The only statutory basis would be in the context of an intervention by a standards committee. It is a burden on the Society's resources for which it is unlikely to make any recovery and is not an activity to which the protections in ss185 and 272 of the LCA apply.

It could be argued that the Society could justify involvement by the general proposition that it has a responsibility to protect former clients of a firm as part of its regulatory functions. It is suggested that if a suitable place cannot be located for storage under the control of the donee that the files are returned direct to the clients.

Deeds can be transferred or retained as the donee thinks fit.

Can the donee charge for costs incurred in research as to whether the donee has the authority to carry out certain work pursuant to the POA?

An attorney should not impose any costs incurred in satisfying him/herself about the nature and extent of powers and duties. That is an incident of practice where a person has accepted the burden and responsibility of attorneyship. An attorney cannot charge for undertaking a legal analysis which any reasonably competent lawyer could be expected to know.

I had a power of attorney document under the Law Practitioners Act 1982 – do I need to make a new one?

If you already have a power of attorney in place under s70 of the Law Practitioners Act, it will be deemed to have been given under the LCA as long as it conforms with clauses 2 and 6-9 (other than clause 9(c)) of Schedule 1. Those clauses require, among other things, prior written consent by the intended donee, the appointment of an alternate, and that the power of attorney provides for the donee to exercise particular powers and duties in given circumstances and for given periods.

Can a donor revoke a power of attorney?

A donor may only revoke a power of attorney if at the time of the revocation the donor gives a substitute power of attorney to a suitable donee. In certain circumstances, such as bankruptcy, neglect of duty, incapacity or misconduct by the donee, the President of the NZLS can revoke a power of attorney (clause 13(2) Schedule 1) and appoint a new donee.

A power of attorney is revoked by operation of law when the practitioner to whose practice it relates commences practice in partnership with any other practitioner(s). (clause 22(4) schedule 1)

What is the relationship between the donee and the alternate?

The alternate must exercise the powers and duties of the donee in any case where the donee is for the time being unable or unwilling to act (clause 6, schedule 1). Even where the alternate is not required to act the donee may find that the alternate is willing to assist with the workload under the direction of the donee.

There is too much work and I am snowed under with my own practice – can I resign as attorney or refuse to act?

No, see clause 22(2), Schedule 1 LCA. Consider asking for assistance from the alternate donee or the local profession. Your local branch of the NZLS may be able to assist you in finding help.

What is the role of the NZLS?

Notice of the power of attorney must be given to the NZLS under clause 20 of Schedule l. The NZLS scans a copy of every power of attorney document into its database and ensures that the donees have the appropriate qualifications to be appointed. The NZLS will endeavour to notify you if a donee is no longer qualified to be an attorney, for example if the donee ceases practice. The NZLS will notify your donee if it becomes aware that the donee's services are required.

The NZLS regularly follows up those sole practitioners who have omitted to provide the required notification about their powers of attorney.
In addition the NZLS:

- Provides the Power of Attorney form on its website
- Can assist with media inquiries
- Can provide Inspectorate assistance with trust account matters
- Through its local branch office may be able to assist with seeking assistance from other local firms and with communication.

Power to appoint substitute

Clause 24 of Schedule 1 states that the power of attorney must include provision authorizing the donee of the power of attorney to appoint a substitute.

Joint and several donees

The LCA permits the appointment of more than one donee and more than one alternate, jointly or severally. If there is more than one then consequential changes may and should be made to the power of attorney document including specifying whether they are authorized to act jointly or severally.

Lawyers Nominee Company

The Executive Director of the NZLS is authorized by the Council to exercise any of the powers set out in R14 of the LCA (Lawyers: Nominee Company) Rules 2008.