Outstanding response for tickets for 150 Year Celebrations

As you will have read in the last Canterbury Tales, in October we celebrate 150 years of a Law Society branch in Canterbury-Westland. The tickets for the three events – professional photograph, formal dinner and Gala Ball went on sale on Wednesday, 15 August and the response was outstanding.

As with most other years the Law Dinner sold out in record speed. If you unfortunately missed out on a ticket to the formal dinner do not panic – all is not lost – come along and celebrate with the hundreds of others who have already purchased their tickets to attend the Gala Ball on Saturday, 27 October, at 6.30pm, to mark this special occasion.

The Gala Ball promises to be a spectacular event including a delicious three-course dinner, drinks, and entertainment by the Beat Girls and the Little Cabaret Band. It is to be held at the Conference & Events Hall in the Wigram Airforce Museum which is a very large venue and therefore has the capacity for significantly more attendees than the Law Dinner.

This is our opportunity to celebrate together and enjoy the collegiality of others in our profession. Get a group together and book your seats via the Bookwhen site: bookwhen.com/nzlscanterburywestland.

Tables of 10 or individual tickets are available for purchase at the amazing price of $190 per person.

There will also be a photo of the profession being taken – 1pm, Thursday, 25 October in the Quadrangle of the Christchurch Justice Precinct. This is for all current practising lawyers and judges. Please book into this event at the same link above to assist us with the organisation on the day.

If you have any questions please contact Zylpha Kovacs – zylpha.kovacs@lawsociety.org.nz or phone 03-3669184.

Thanks to our generous law firm sponsors featured below along with Bridgeside, Canterbury, Left Bank, Atticus and Clarendon Chambers as well as independent QC’s.

With Regret
The Council of the Canterbury Westland Branch of the New Zealand Law Society records with regret the death of Jane Walsh, barrister and solicitor, on 13th August 2018.
VINO FINO
Photo Caption

Each month we have a photo caption competition where we invite you to submit a caption. The winner will receive two bottles of wine sponsored by Vino Fino (www.vinifino.co.nz, 188 Durham Street). Send your entry to the Canterbury Westland Branch New Zealand Law Society, P.O. Box 565, Christchurch. Or email to canterbury-westland@lawsociety.org.nz. All entries must be received by September 17 2018. The winner will be announced in the next edition of Canterbury Tales.

President’s Column

By Grant Tyrrell

Jane Walsh
With sadness I record the untimely passing of Jane Walsh, a partner at Gresson Dorman & Co. Jane is survived by her husband and two young children. A highly talented lawyer and an outstanding person with a (highly approved) wicked sense of humour, Jane’s passing will leave a huge gap in many people’s lives. My thoughts, and no doubt the thoughts of the profession, are with her family, friends and colleagues. The profession is often at its best at times of greatest need and I have no doubt that our colleagues at Gresson Dorman will have much needed support over the coming weeks and months. Jane: you will be missed by all fortunate enough to have known you.

Young lawyers meet members of the judiciary

On Thursday, 16 August, the Canterbury Westland Young Lawyers Committee held an evening gathering for young lawyers where they could meet members of the judiciary. It was held at the Bangalore Polo Club on Oxford Terrace. An enjoyable evening for all who attended – we will have to wait for the next edition of Canterbury Tales for the photographic evidence. Thank you to the judges, and also a special thanks to the sponsor of the event – MAS.

150th celebrations

Preparations for the celebrations of 150 years of a Law Society in Canterbury are continuing apace. The ever popular dinner sold out in under 15 minutes, a testament to the fact that collegiality within the Canterbury/Westland profession remains strong.

The “class photo” will be taken in the courtyard of the Justice and Emergency Precinct at 1pm on Thursday, 25 October 2018. District Court sittings have been adjusted to allow as many of the judiciary and profession to attend as possible.

On Saturday, 27 October the celebrations culminate in a Gala Ball to be held at Wigram Airforce Museum. This promises to be a magnificent event. Tickets are being snapped up fast however, (at least as at the time of typing this column) tickets for the Ball still remain.

Many thanks to all those firms who committed financially to ensure that these events could go ahead: Wynn Williams, Anthony Harper, Layburn Hodgins, Malley & Co, Cuningham Taylor, Clark Boyce, Cavell Leitch, Young Hunter, Duncan Cotterill, Harmans Lawyers, Saunders Robinson Brown, Corcoran French, Anderson Lloyd, Chapman Tripp, Tavendale and Partners, Buddle Findlay, Lane Neave, Bridgeside, Canterbury, Left Bank, Atticus and Clarendon Chambers as well as independent QCs. Without this support we simply could not have committed to the celebrations in this form. Again, it speaks to the quality of the profession that there are still many who are willing to contribute.

I particularly want to thank the 150th organising committee – Lana Paul, Susie Tait, Sarah Holder, James Pullar, Emily Nind, Rachel Walsh and Zylpha Kovacs – this committee first began to take shape in preparation for the 2016 dinner but with an eye firmly on the events of this year. It is no exaggeration to acknowledge that two years of work has gone into the staging of these events.

Justice Precinct

In my last column I referenced concerns around the lack of defined constitutional separation between the police and the court facilities within the Justice Precinct. This is an ongoing issue, however it is fair to acknowledge that police have accepted that a non-urgent arrest made from a court-based interview room during a meeting with counsel was not appropriate.

A number of meetings have occurred with senior Police, MOJ staff, Law Society and Criminal Bar representatives.

A protocol is, we are told, being developed to assist with a greater understanding of the appropriate roles. It would appear to be an area where ‘eternal vigilance’ is needed.

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Obiter by Eason

Dogs
Interesting experiences are to be found with the care and overall management of dogs. Our dog Grace has transitioned from the paddock, where she accumulated staunch rural attitudes (it happens to people as well), to the city. One of the most notable things about city-dwelling dogs is that they are singly responsible for converting the one-use plastic bag to multi use.

It used to be, decades ago, that owners of evening exercised dogs would carry plastics for another reason. Under the cover of darkness cuttings from desirable plants or shrubs can be carefully plucked and carried to ‘foster homes’. What the dog produced at the same time could be scuffed into the donor plant garden. It was a kind of elemental conservation response.

Another aspect of city-dwelling dogs is that they need to visit a dog park on a regular basis. You must be aware to choose the park most suitable for your dog. A lot depends on the breeding. The Cashmere dog park is the domain of the purest of breeds. Ms Carolyn Browne’s boys frequent the park in early morning at a time when their distant pure breed cousins have not yet been roused by their servants. The Browne boys, however, are from a wide-ranging DNA chowder. They are of such an indistinguishable breed that they need to visit a dog park on a regular basis. They are of evening exercised dogs will carry plastics for another reason. Under the cover of darkness cuttings from desirable plants or shrubs can be carefully plucked and carried to ‘foster homes’. What the dog produced at the same time could be scuffed into the donor plant garden. It was a kind of elemental conservation response.

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A. Toussenel (1803-1885), a French writer, wrote:
“The more one gets to know of men, the more one values dogs.”
This saying is obviously true when it comes to the Police and their dogs. We recently had a demonstration of the great value that the Police place on their dogs and to save them they will not now think twice about summoning a helicopter to the rescue of an injured dog and flying it to a dressing station of some sort. Miraculously, they squeezed blood out of another dog and put it into the injured beast. Well, some think, not often this would be done for humans. The Police do sometimes call for an ambulance and at the same time order a hearse in the event that the ambulance is delayed.

Cats
A. Toussenel (1803-1885), says nothing about cats. Neither do I.

New Car
I decided that my sturdy Land Cruiser needed replacing. The vehicle has served me well. I have had it since its birth in 2004 and have covered more than 400,000km trouble free. I had decided, after considering changing brands, to stick with Toyota and simply replace it with a new model. It was surprising how easily this was to arrange and how quickly the new beauty came. I had only been driving for a few months when it was the time to change over. I decided that my sturdy Land Cruiser needed replacing. The vehicle has served me well. I have had it since its birth in 2004 and have covered more than 400,000km trouble free. I had decided, after considering changing brands, to stick with Toyota and simply replace it with a new model. It was surprising how easily this was to arrange and how quickly the new beauty came into my possession. Driving this vehicle is quite a different thing than simply looking at it. As soon as one starts driving you are aware of technical...continued on page 5

Canterbury tales

Canterbury tales is the official newsletter of the Canterbury-Westland Branch New Zealand Law Society. Publications Committee: Zylpha Kovacs (convener), Simon Shamy (editor), Carolyn Browne, Ann Maria Buckley, Daniel Weatherley, Beatrix Chin. All correspondence and photographs should be forwarded to: The Branch Manager, Canterbury-Westland Branch New Zealand Law Society, Level 1, 307 Durham Street, Christchurch. PO Box 565 Christchurch, DX WX 10074. Contact: Jim Kennedy, 03 366-9184, jimkennedy005@gmail.com. Email: iml@insolvency.co.nz

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What makes you happiest?

By Andrew Nuttall

A primary role for many of us is to help our clients make good decisions about money because money is important to people. For some it provides security and for others, choice, peace of mind and freedom. Sadly, an over-emphasis on monetary matters can result in unintended consequences and unhappy people.

A friend recently sent me the message below which provides helpful reminders of important things.

Steve Jobs, the CEO of Apple, died a billionaire. Below are some of his last thoughts and words.

“I reached the pinnacle of success in the business world.

In others’ eyes, my life is the epitome of success.

However, aside from work, I have little joy. In the end, wealth is just a fact of life I have become accustomed to.

At this moment, I am on my sick bed, recalling my life. I realize that all of the recognition and wealth in which I took so much pride, have become meaningless in the face of my impending death.

You can employ someone to drive a car for you, and to make money for you, but you cannot employ anyone to bear illness for you.

Material things, when lost, can be found, but the one thing that can never be found when it is lost, is your health, and eventually your life itself.

Whatever stage in life we are at currently, in time we all face that day when the curtain comes down.

Treasure love for your family, love for your spouse, love for children, and love for your friends. Treat yourself well and cherish others.

As we grow older, and hopefully wiser, we realize that wearing a $3,000 or a $30 watch is not important – the time is the same.

Whether we carry a $300 or $30 wallet/handbag, the contents are the same.

Whether we drink a bottle of $100 or $10 wine, the hangover is the same.

Whether the house we live in is 3,000 or 300 sq. ft., the loneliness is the same.

Whether you fly first class or economy, if the plane goes down, you go down with it.

You will come to realize that true inner happiness does not come from the material things of this world.

Therefore, treasure your buddies, old friends, brothers and sisters. Chat often, laugh, sing songs with them. That is true happiness.

Don’t educate your children to be rich. Educate them to be happy and share, so when they grow up they will know the value of things, and not just their price.

Eat your food as your medicines, otherwise you have to eat medicines as your food.

There is a big difference between a human being and being human.

You are loved when you are born. You will be loved when you die. In between, only YOU are in charge of your life decisions.

If you just want to walk fast, walk alone. But if you want to walk far, walk with friends.”

Andrew Nuttall is an Authorised Financial Adviser at Cambridge Partners, an independent and fee only firm based in Christchurch. His disclosure statement is available free of charge and on demand. Telephone 3649119 www.cambridgepartners.co.nz

Has your client considered including a charity in their will?

Please give them the opportunity to leave a legacy to St John that will provide a vital service to benefit their community.

Email fundraising@stjohn.org.nz or call the Legacy Coordinator South Island Region for further information:

03 353 7110 ext 3238

Andrew Nuttall
advances that are surprising. I am assisted in parking and recognising dangerous areas of the road such as railway lines and high crash incident areas. On cruise control I am kept a reasonable distance from cars ahead. In fact, I am so well catered for that there is now no need for me to be accompanied in my driving so that others from different positions in the car could give their gentle and kind directions as to how I should drive. Perhaps the most startling find is that, not only are there heated seats, there are also cooling seats (yes!!!). If you turn the heating device on to the appropriate cooling site you get cool air diverted into the rear regions through holes in the seat. Just the thing following mid-summer tennis matches, when the after-match function is cucumber sandwiches and lemonade at Jacinda’s place.

**Court titbits**

Recently, I was in the Saturday arrest Court as a duty lawyer along with others, including Ms Claire Yardley. As you may probably know those courts are presided over by two Justices of the Peace, one of whom takes the lead role. Of the various clients we each represented on that day I was fortunate to have interviewed a young woman who had breached her bail conditions on each of the previous two days. The Saturday Court dealt the third day of a breach of bail and the presiding Justice made it clear to the woman that she did not have much of a chance in being readmitted to bail, except that on that morning he was feeling very benevolent and so granted her a readmission to bail. But the presiding Justice was clear that were it not for his benevolent attitude on the morning, she would have been locked in the dungeons (Police custody suites as they are now called) until some later time. Ms Yardley had a turn and explained that she was representing another woman who had had difficulties with adherence to her bail conditions. The woman was in a state of risk as to whether she was going to be re-granted bail or not. Ms Yardley asked that in her case could the Justice again exercise the benevolence that he referred to in the previous case. The Justice laughed and said “Don’t push your luck Ms Yardley” … she was nonetheless just as successful as I.

**Katie Cowan and Learn Law Life**

Katie Cowan, known to many for her legal consulting and coaching practice, Symphony Law, her podcast, The New Lawyer, and her regular writing for LawTalk, is now writing a fortnightly column on the website learnlawlife.co.nz. Learn Law Life is designed to be a hub for law students and recent graduates across New Zealand, covering news and information on study, careers and wellbeing. In her first article, Katie introduces the column, discusses why she decided to start writing it and opens up the floor to law students/graduates to get in touch with questions or topics they would like her to address.

We encourage you to head to the website and have a read of Katie’s articles.

**News from the New Zealand Institute of Legal Executives Canterbury Westland Branch**

The last couple of months have been relatively quiet for the branch with everyone coming to grips with the AML/CFT requirements.

The Christchurch legal executives had their mid-winter dinner on Thursday, 19 July at Keo Thai, and the Ashburton legal executives had their mid-winter function on Wednesday, 18 July.

Our seminar held on Wednesday, 15 August, on reverse mortgages, presented by representatives from Heartland Bank, was well attended. Our next seminar is scheduled to be held mid-October on body corporate properties and associated matters.

A movie night is planned for Christchurch members on 20 September and a flyer will be sent to members early September.

**Jill Forde**
President
The Press has reported on a prosecution of an employee for falsifying export applications on behalf of a group of companies, which were also charged individually. The employee, who pleaded guilty, opposed interim suppression of the company names but this was granted until trial.

What disturbed me was the statement by counsel for the companies, who said of the employee’s counsel, “If his client’s going down he wants to drag as many people down as he can”. Now, the submission, whether justified or not, is entirely improper when aimed at his fellow member of the bar. If it was justified (of which I have no idea) it should have been aimed at the employee.

All barristers should understand that they are only the mouthpiece of their client. That is their only standing in court, and to assume that they have somehow become a party by their appearance is absurd and dangerous.

As an elderly example of this profession I have had 50 years’ experience of court appearances and am certain that this degree of separation is essential, not only to our reputation, but to the success of our work.

In fact, I even worry about the oft-repeated principle that we have a duty to the court – for it can mean no more that we should behave to it with respect and not mislead it. But between the court and our client, and between the latter and his opponent, we are in a privileged position, and should do nothing to threaten this. In criminal work, it is long acknowledged that if the client admits to the commission of a crime, we are prevented by that knowledge from appearing in his defence, and must send him elsewhere (usually with an explanation which might make him more careful next time).

I think, from what I have seen and read of current practice, a number of barristers and solicitors, especially the younger brigade, are not properly informed about their independence. But however exciting the case, and however large the fee, this crucial objectivity must not be sacrificed. In fact, I have always approved of the saying which came to us many years ago from the English Bar: “A good barrister never cares whether he wins or loses”.

To many young practitioners this will seem outrageous – and certainly to most of our clients – but read simply it means only that we will use every effort and skill to present each case, without becoming worried or excited about the outcome. For an excited barrister is a disaster and his client will always suffer.

I am not saying that one need not stay alert. All too often you see lawyers deep in their papers, or writing madly, while they should be watching the witness they are about to cross-examine. You will not forget any point that comes up, and on which you can usefully cross-examine. Patrick Hastings (amongst the greatest British barristers) would never allow his pupils to take a note.

Achieving a reputation consists of acquaintance with the facts and the law, and the balanced presentation of each. We are there to persuade, and that can only be done by moving from what has been proved to what justice requires. It is not always possible, of course, but that is no excuse for bad temper. In fact, with a good degree of apology I must say that at the Sydney Bar, where I spent a number of years, I often found young women barristers (otherwise balanced and able) to quite often get visibly cross when their case was going wrong. I am not brave enough to attribute this to their youth or to some womanly trait, but as time went on you could see them becoming more sure of themselves. As we all must.

And this is not helped by treating your learned opponent as an enemy. Both of you are simply in a privileged occupation which can, I think, give more interest and satisfaction than any other I know, and we should relax and enjoy it.
Checklist for practices considering opening a trust account

This Practice Briefing has been prepared for those law practices intending to open a trust account. It is intended to provide guidance and information on best practices and does not constitute legal advice.

Introduction
Information regarding trust account management is available on the Law Society website (go to For Lawyers then Regulatory requirements). A trust account is defined in section 6 of the Lawyers and Conveyancers Act 2006 (‘the Act’) as meaning, in relation to a practitioner or incorporated firm, “any trust account at a bank in New Zealand that is a trust account in the name of that practitioner or incorporated firm”.

Trust money means all money that is, when received by a practice, subject to the provisions of section 110 of the Act. The other Practice Briefings referred to in this briefing can be found in Practice Resources.

Trust account requirements
You must be practising on your own account as a barrister and solicitor and meet the criteria in regulation 19 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 before opening and operating a lawyer’s trust account.

Determine the type of accounting system you will use, whether manual, computer or bureau (see the Lawyers Trust Accounting Guidelines (LTAG) about computer systems. These are available for downloading from the Law Society website). Please do not hesitate to contact the Law Society Inspectors for guidance about your trust accounting needs. An Inspector can be contacted via email at inspectorate@lawsociety.org.nz.

It is recommended that a practice operates a trust account using an appropriate software package, rather than a manual system. Open a designated trust bank account (in the name of the practice) with a bank in New Zealand (including a related Interest Bearing Deposit facility), and advise the New Zealand Law Society that you have opened the account. When opening such an account it is useful to direct the bank to sections 299 to 303 of the Lawyers and Conveyancers Act 2006. The bank must record the account as a lawyer’s trust account.

Ensure that the trust account cheque book meets the requirements (refer to the LTAG for guidance) – trust account cheques are to be printed with a restrictive crossing, “Not Transferable”, and without the words “or bearer”.

Open a separate bank account for the law practice (if you do not already have one). The trust account number (or suffix) should differ from the practice account number to avoid confusion.

Essential trust accounting records
Check that your intended trust accounting system is appropriate (Inspectors can assist). You may also wish to check with other practices that the software you are intending to utilise is reliable and user-friendly.

Check that the trust accounting software can produce acceptable receipts as these are required in certain circumstances. If it cannot, obtain receipt books from an approved printer. A list of approved printers is available from the Law Society’s Inspectorate.

Implement the following:

- A central file of electronic payments (refer to the LTAG).
- A journal book or equivalent (refer to the LTAG).
- A payment requisitioning system.
- A record of valuable property (held on clients’ behalf).
- A register of trustees, executors & attorneys (recommended).
- A record of invoices/fees.

Reconciliations
Refer to the LTAG for a list of the reports underpinning end of month certifications (see below) which must be retained. These materials include:

- The cashbook summary/bank reconciliation.
- Photocopy or printout of end of month bank statement for the trust bank account.
- Unpresented cheques listing, detailing cheque numbers, dates, payees and amounts (if any).
- Details of all other adjusting items, if any (including copies of relevant bank statements with key balances highlighted).

- Listing of client balances (credits should, of course, in total equate to the cash book balance).

And separately for each deposit facility:

- Bank reconciliation/control report.
- Printout/photocopy of month end bank statement/schedule for each investment account.
- Practice listing of deposit account balances, often called a client trial balance. You need to retain each end of month reconciliation and supporting documents. If you decide to utilise a hardcopy system, it is recommended that the practice uses a ring binder folder with a series of monthly indices. Each set of month end workpapers occupies the relevant month in that folder. This allows a quick checking that balances are correctly carried forward from one month to another, or that adjusting items have cleared in the succeeding month, etc.

If you are using an electronic filing system, it is recommended that your documentation is in a PDF format and filed with an appropriate and identifiable naming protocol. Whichever method you use, it is essential that an external reviewer can see that the documents have been reviewed by the appropriate person (often by signature).

Interest bearing deposit (IBD)
You have a duty to ensure client monies earn interest wherever practicable: see section 114 of the Act. Consider whether balances will generate sufficient interest to cover the attendant administration load to justify being placed on IBD. Discuss this with your client or include it in your practice’s terms of engagement.

Once you start using an IBD account, please ensure that the client name recorded on the IBD is correct and matches your own records. Names are indicative of ownership. The composition of the two lists should be checked periodically.

The Automatic Exchange of Information, the Common Reporting Standard (AEOI/ CRS), and Foreign Account Tax Compliance Act (FATCA) have ramifications for IBD monies, including due diligence procedures that should be carried out prior to placing monies on IBD.
Please refer to the practice briefings on the NZLS website. It is recommended that you familiarise yourself with these regimes and attendant requirements.

**Controlled accounts**

A controlled account is an account where a lawyer has, in the course of his or her practice, control of money for or on behalf of a client. An example of this is where a lawyer holds a power of attorney for an impaired client and makes payments on behalf of that client from the client’s bank account. The bank account is under the control of the lawyer. These must be administered so that the practice accounts properly to the client and keeps records, both to the same standard as required for a practice’s trust account.

It is recommended that a controlled account should form part of the monthly trust account reconciliation as a separate control account. Practices may wish to consider if it is appropriate to transfer the monies from the controlled bank account into the practice’s trust account.

Please refer to the Practice Briefing ‘Looking after a client’s bank account’ available on the Law Society website.

**Payments from the trust account**

The key legislative obligations relating to payments are set out in regulations 11 and 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008: 11(1): “It is the duty of every practice required by section 112(1) of the Act to keep records in respect of trust accounts to do so in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate.”

And, 12(6): “A practice may make transfers or payments from a client’s trust money only if – (a) the client’s ledger account has sufficient funds and they are available for that purpose; and (b) the practice obtains the client’s instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it; and (c) payments to a third party are made in a form that permits the crediting of the money only to the account of the intended payee”.

Accordingly, for inspection purposes, your filing systems must be capable of retrieval of the salient details i.e. authorities, account nominations and the bank reports. A written record would be in the form of a formal file note if the instruction is verbal. It is recommended that this is confirmed in writing to the client.

Ensure that all payments are referenced to client instructions and you hold robust evidence of the payee bank account numbers. Emails are at risk of scamming or hacking and should be verified before being acted upon even when an email chain is being followed. Handwritten bank account numbers are not evidentially robust, as they are subject to a legibility risk, and thus are not recommended. Many practices keep copies of bank batch reports with evidence of client instruction and bank account numbers in a central file as well as a copy on the client file.

Additionally, in the cashbook there should be reference in the narration to the authority underlying the payment. This could be “[client name] email [date] instructions to pay (detail) which was confirmed via telephone contact” or suchlike. You should ensure the narrations show the payee and reference the client authority.

**Journals**

It is recommended that you operate a journal book or similar requisition system to record journal transfers. All inter-client journals should be able to be referenced back to client instructions or authority. The only exception is an error correction.

All inter-client transfers must be capable of reference to authority. If such authority is not readily implicit, explicit authority is required or a written record of it. Where applicable, there should be reference in the narration to the authority supporting the journal. This could be “sale & purchase agreement dated …” or “company or trustee resolution dated …”.

**Deduction of fees from trust account**

The Inspectorate’s recommended approach is to request that clients explicitly approve fees before they are taken by deduction. If you rely on the less preferred option (via a default authority conferment clause in your client care materials) you may be required to evidence not only that the client/s has been sent the invoice but also that the client care materials have been received and accepted by the client.

Prior to deducting fees, you need to comply with regulation 9. Your fee invoices must be dated and show the recipient address (postal or email). The fee element and disbursements must show separately on the invoice. Disbursements can only be charged at the actual cost to an arm’s length third party, and the paid invoice should be provided to the client with your practice’s invoice.

Overhead recovery fees (photocopying, phone, stationery, etc) can be charged but these must be described as fees not disbursements and noted in your client care and service information prior to being charged. Further information regarding invoicing is available on the Law Society website.

**Regular reporting to the law society – regulation 17**

As Trust Account Supervisor you will be required to complete an online certification monthly from when you open a trust account or payment, and retains that instruction or authority (if in writing) or a written record of it; and (c) payments to a third party are made in a form that permits the crediting of the money only to the account of the intended payee”.

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As Trust Account Supervisor you will be required to complete an online certification monthly from when you open a trust account or payment, and retains that instruction or authority (if in writing) or a written record of it; and (c) payments to a third party are made in a form that permits the crediting of the money only to the account of the intended payee”.

Accordingly, for inspection purposes, your filing systems must be capable of retrieval of the salient details i.e. authorities, account nominations and the bank reports. A written record would be in the form of a formal file note if the instruction is verbal. It is recommended that this is confirmed in writing to the client.

Ensure that all payments are referenced to client instructions and you hold robust evidence of the payee bank account numbers. Emails are at risk of scamming or hacking and should be verified before being acted upon even when an email chain is being followed. Handwritten bank account numbers are not evidentially robust, as they are subject to a legibility risk, and thus are not recommended. Many practices keep copies of bank batch reports with evidence of client instruction and bank account numbers in a central file as well as a copy on the client file.

Additionally, in the cashbook there should be reference in the narration to the authority underlying the payment. This could be “[client name] email [date] instructions to pay (detail) which was confirmed via telephone contact” or suchlike. You should ensure the narrations show the payee and reference the client authority.
account. Please ensure that the certificates are submitted as follows:

- **Monthly certificate**: By the 10th working day of the new month (15th working day in January).
- **Quarterly certificate**: By the 10th working day of the new month (15th working day in January).

Please note that regional public holidays are counted as a working day for the purposes of regulation 17. The Law Society website has some FAQs under Regulatory requirements. Alternatively, you can call the Inspectorate on 04 463 2974 for assistance.

**Regular reporting to clients – regulation 12(7)**

The regulations require each practice to provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client’s account, and the balance of the client’s account:

- at intervals of not more than 12 months; and
- in respect of all transactions that are not completed within 12 months, at intervals of not more than 12 months; and
- in respect of all other transactions, promptly after or prior to the completion of the transaction.

Failing to meet this requirement is a common fault and the cause of client complaints.

Most modern software packages can provide a listing of balances that have been held for longer than 12 months and ledger reports that can usually serve as a proxy reporting statement. The Inspectorate recommends that practices review such ‘stale balance’ reports periodically and check that reporting is being completed and that instructions warrant the ongoing retention of such monies.

The Inspectorate also recommends that practices send a copy of the ledger associated with all IBD balances to accompany the RWT certificate sent around April/May each year.

**Files and filing systems**

Decide if you want to utilise a hardcopy or electronic filing system. Electronic files are increasingly being used by practices.

Whatever format is used, files must be able to be conveniently and properly reviewed by the Inspectorate. Files must be retained for at least six years from the date of the last transaction. Please refer to the opinion regarding ownership and retention on the Law Society website.

**Client care and services information/ engagement documentation**

If you have not done so already, establish forms and procedures to ensure compliance with Rules 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 – eg, letters of engagement, provision of information to clients, etc. Templates are available on the Law Society website.

**IT**

Consider issues such as passwords, access levels, remote access and back-ups of the trust account and records.

The following is an extract from the generic guidance provided by the Government agency CERT. Full detail is available on cert.govt.nz under Businesses and individuals.

1. Back up your data.
2. Keep your operating system and your apps up-to-date.
3. Choose unique passwords.
4. Turn on two-factor or multifactor authentication.
5. Be creative with the answers to your account recovery questions.
6. Be cautious when you’re using untrusted networks and free wi-fi.
7. Install an antivirus and scan for viruses regularly.
8. Be smart about social media.
9. Don’t give out personal information online unless you know who’s asking for it and why.
10. Always check your bank statements. Expert advice is recommended.

**Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT)**

Lawyers have been under obligation to report entities under AML/CFT since 1 July 2018. The Law Society has prepared some information in relation to this and it is recommended that you read it.

For trust accounts, the Law Society recommends that practices only provide their trust account number to those who need it, to avoid being inadvertently used for money laundering. An example of how the trust account could be used in this way is that funds could be ‘accidently’ deposited into the practice trust account and then the practice contacted about the ‘error’ and asked to refund the monies to a different account.

**Processes**

It is recommended that you ensure all processes are documented.

**Review inspections**

Practices opening a new trust account should expect a review to be conducted by the Law Society Inspectorate within the first six months of commencement.

The principal purpose of this first review is constructive – to identify any inadvertent noncompliance and rectify any omissions or weaknesses. You will be contacted with a request for information to be provided prior to an Inspector visiting the practice.

If you need any assistance or have any questions before or after that visit however please do not hesitate to contact your local inspector/s.
Continued from page 12...

to assist the commission of a crime or fraud (whether the lawyer is aware or not of the unlawful purpose) - R v Cox (1884) 14 QBD 153. The exception is also consistent with the conduct rule which provides that a lawyer may not assist any person (including concealment) in any activity the lawyer knows is criminal or fraudulent (rule 2.4 of the RCCC).

3. If legal privilege is not overridden by the relevant power, what information is protected from disclosure?

- This will require a careful consideration of what information would fall within the definition of legal professional privilege. It is important to remember that not every communication with a client or client related information will be legally privileged (See Professional Responsibility in New Zealand, “Legal Professional Privilege”, Liesle Theron, LexisNexis Online at 390,010 onwards).

4. Is there is any legal impediment to disclosing the request for disclosure to your client?

- This will require a consideration of a lawyer’s duty of candour to his or her clients under rule 7 of the RCCC and any ‘tipping-off’ provisions in the relevant legislation overriding these obligations by restraining disclosure. A lawyer may also have disclosure obligations to a client under the Privacy Act 1993.

Specific powers of compulsion

A number of statutory regimes contain both specific protections for legal professional privilege and carve outs from that protection. For example, some statutory regimes expressly provide that lawyers trust account records are not to be considered privileged communications for the purposes of the particular Act.

The authors of Ethics, Professional Responsibility and the Lawyer, 3rd edition (Duncan Webb, Kathryn Dalziel and Kerry Cook, LexisNexis NZ Ltd, Wellington 2016 at 8.8.2) note that a warrant should expressly exclude privileged material and unless the legislature makes it absolutely clear that privilege is overridden, the Court will presume it continues to be protected (Rosenberg v Jaine [1983] NZLR 1 at 8, per Davidson CJ; CIR v West-Walker [1954] NZLR 191 (CA)).

It is vital that a lawyer responding to any request or direction for disclosure is familiar with the provisions relating to disclosure and privilege in the particular statute in question. Often there may not be much time to respond to a request and a lawyer may need to urgently seek legal advice. A request could be made to the requesting agency to ascertain if an extension of time is possible to enable advice to be taken.

Some examples of the different statutory provisions under which client information may be compelled are provided below. This is a non-exhaustive list which is current as at February 2017. (Reference should be made directly to the particular statutory scheme to check for any legislative amendment). It is provided to assist lawyers to accurately identify the types of statutory provisions to search for and consider when responding to a specific disclosure requirement.

Search and Surveillance Act 2012

Under the Search and Surveillance Act 2012 (SAA) the protection of LPP is recognised. However, there is a specific exception to LPP based on communications or information created for a ‘dishonest purpose’ or facilitation of an offence (‘dishonest purpose exception’) (see, for example, sections 136 and 102 of the SAA).

A specific procedure is specified under s143 of the SAA for execution of a search warrant in respect of a lawyer or at a lawyer’s office. Such a warrant cannot be executed unless the lawyer or his or her representative is present and then only after the lawyer has had an opportunity to claim privilege on behalf of his or her client. If the lawyer cannot be contacted, then there is provision for another lawyer to be nominated by the New Zealand Law Society to attend the execution of the warrant and claim privilege, if required.

Under section 146 of the SAA there are interim steps to secure evidence that are to be taken pending resolution of a disputed claim of privilege by a Judge or in accordance with direction of the court in the relevant warrant (for example by nomination of an independent lawyer).

Criminal Proceeds (Recovery) Act 2009

Section 160 of the Criminal Proceeds (Recovery) Act 2009 (CPRA) preserves LPP subject to a ‘dishonest purpose exception’. However, the concept of ‘privileged communication’ specifically excludes financial records kept by the lawyer in relation to those aspects of practice subject to the Financial Transactions Reporting Act 1990 (s160(4)) (sections 136 and 102 of the SSA).

Financial Transactions Reporting Act 1990

The Financial Transactions Reporting Act 1990 (FTR) provides that defined ‘privileged communications’ are protected. There is an exception for communications made for the purpose of committing or furthering the commission of an offence (see section 19).

Trust accounting records are also excluded from the definition of ‘privileged communications’ at section 19(3). The search warrant procedures in the FTR have been repealed and are replaced by the provisions of Part 4 of the Search and Surveillance Act 2012.

Serious Fraud Office Act 1990

The Serious Fraud Office Act 1990 expressly preserves legal professional privilege save for the ability of the SFO Director to compel a lawyer to provide the last known name and address of a client in circumstances related to an investigation (please refer to section 24). There is also an exception for information related to the commission or furtherance of an offence.

The Act expressly overrides a duty of confidentiality (see section 23). Section 24(4) provides that lawyers trust account records are not within the scope of a ‘privileged communication’. 
Financial Markets Authority Act 2011
The FMA Act is otherwise silent on legal professional privilege but does provide that witnesses (and 'counsel' who are referred to only in the heading) have the same privileges and immunities as a witness before a proceeding in court (section 56).

Insolvency Act 2006
The Official Assignee may seek disclosure of information about a bankrupt’s affairs and sections 165 and 171 of the Act are often used to compel this information from lawyers.
There is no express provision in respect of legal professional privilege but the established principle is that the bankrupt’s right to assert privilege passes to the Official Assignee upon adjudication.
However, if information is sought by the Commissioner from a lawyer acting for a person other than the bankrupt then legal professional privilege issues may arise in the ordinary way and need to be carefully considered.

Tax Administration Act 1994
Section 17 of the Tax Administration Act empowers the Commissioner of Inland Revenue to compel disclosure of information about a person’s tax affairs.
However, section 20 of the Tax Administration Act 1994 protects from disclosure any information, book or document subject to LPP (following the earlier approach by the Courts in CIR v WestWalker). This is subject to a ‘dishonest purpose’ exception and there is a procedure for application to a District Court Judge for determination of validity in respect of a claim of privilege.

Anti-Money Laundering and Countering Financing of Terrorism Act 2009
The AML/CFT Act currently provides for the preservation of legal professional privilege (see section 40(3)). A lawyer’s trust account records are excluded from the scope of ‘privileged communication’ (section 42(2)).
However, as the legislative regime is extended to apply to lawyers in mid-2018, lawyers will need to familiarise themselves with amended provisions of the Act relating to LPP reporting obligations and required disclosure.

Part two will feature in October’s Canterbury Tales 24-9

Out of Christchurch:
» 1 Sept – Auck; 8 Sept – Wgtn – Evidence and Trial Preparation
» 4 Sept – Auck – Residential Property Sale and Purchase update
» 6 Sept – Auck – Tax Conference
» 12 Sept – Wgtn – Criminal Law Discharge without Conviction
» 20 Sept – Auck – The Future of Family Law
» 20-22 Sept Wgtn – Stepping Up
» 21 Sept – Auck – An Inspirational Career – with Lady Hale
» 27 Sept – Auck – Capacity – Key Advice and Tools
» 11 Oct – Auck – Business Sale and Purchase
» 13 Oct – Auck – Sexual Violence Cases – Best Practice Advocacy
» 15-16 Oct – Wgtn – Intro to Civil Litigation Skills
» 15 Oct – Wgtn, 18 Oct – Auck – Logic for Lawyers
» 15 Oct – Wgtn, 18 Oct – Auck – Advanced Logic for Lawyers,
» 18-19 Oct – Auck – Employment Law In a Time of Change
» 23 Oct – Auck – Estate Administration
» 26 Oct – Wgtn – Criminal Law Symposium
» 30-31 Oct – Auck – Lawyer as Negotiator
» 6 Nov – Auck – Spousal Maintenance – update and best practice
» 8-10 Nov – Auck – Stepping Up
» 13 Nov – Wgtn, 14 Nov – Auck – Sub Division intensive
» 14-15 Nov – Wgtn – Lawyer as Negotiator
» 16-18 Nov – Auck – Mediation for Lawyers part b – Civil/Commercial & Family
» 19-20 Nov – Wgtn, 26-27 Nov – Auck – Intro to Family Law Advocacy and Practice
» 22 Nov – Auck – Gift or Loan

Canterbury Westland Social:
» South Island Devils Own Golf – 2-4 November 2018 – Please look out for flyer
Compulsion of Client Information and Responding to a Search Warrant - Part One

Introduction

The Law Society regularly receives enquiries from lawyers concerned about their obligations to disclose client information under compulsion from Police or other government agencies.

The intention of this Practice Briefing is to provide assistance to lawyers faced with the difficulties arising from a request or formal requirement to disclose client information. It outlines issues which may need to be considered and practical steps to take. The information is not intended as a substitute for legal advice which may need to be sought.

Client confidentiality and legal professional privilege

Lawyers have an overriding duty of confidentiality owed to their client. The obligation is reflected in Chapter 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC). The duty continues indefinitely beyond the life of the retainer and captures any disclosure in respect of a proposed retainer (even if one never eventuates).

Rules 8.2 and 8.4 of the RCCC set out the limited and exceptional circumstances when a lawyer must disclose confidential information and also when disclosure is permissible.

Mandatory disclosure under rule 8.2 must occur when it is required by law or order of a court.

Any disclosure made in reliance on rules 8.2 or 8.4 must only be to an appropriate person and to the extent reasonably necessary for the required purpose.

Legal Professional Privilege is a fundamental and ancient privilege recognised in the common law which attaches to communications between a lawyer and a client seeking his or her advice. In the leading case B v Auckland District Law Society (2004) 1 NZLR 326 the Privy Council referred with approval to the approach of the English courts in R v Derby Magistrates Court ex parte B [1996] 1 AC 487. This approach recognises that legal professional privilege is more than a rule of evidence; it is a principle which is fundamental to the entire administration of justice.

Legal professional privilege protects only those confidential communications falling under the heads of either ‘advice’ (sometimes referred to as ‘solicitor-client’) or ‘litigation’ privilege. The Evidence Act 2006 sections 54 -56 provides a statutory restatement of the common law in respect of legal professional privilege.

Recognising the over-arching importance of the privilege, it is well established that Parliament may only abrogate legal professional privilege through the clearest of language. This principle was established in CIR v West-Walker [1954] NZLR 191 (CA) (see also Rosenberg v Jaine [1983] NZLR 1; [1983] 1 CRNZ 1 and Russell McVeagh v Auckland District Law Society [2003] UKPC 38 (PC)).

The privilege belongs to the client and may only be waived with the client’s express consent.

Disclosure requirements

In New Zealand there are a number of statutory provisions which intersect with the concepts of client confidentiality and legal professional privilege. Under these provisions an authorised body carrying out a public function may compel disclosure of certain client information by lawyers.

A lawyer who is provided with a request to disclose client information is often placed in the difficult position of balancing competing obligations. It will often fall on the lawyer to assert privilege on behalf of his or her client and to ensure privilege is protected and maintained.

An initial checklist is provided below of some of the issues a lawyer in this situation will need to consider. Undertaking this assessment may assist the lawyer in clarifying what their obligations are in a particular situation and what next steps are required.

Checklist of issues to consider

1. What is the specific authority for the request? Is the information compilable under a particular statutory provision or court order?

   » It is recommended that a lawyer who receives a request for disclosure of information requires the requesting agency to produce a formal notice to produce under the relevant empowering provision or seeks the relevant court order.

   » If there is no clear power of compulsion, then obligations of client confidentiality and legal privilege restrain disclosure.

   » If appropriate, a lawyer could seek their client’s consent to disclose the information. However, the lawyer would need to consider the client’s interests to ensure that he or she is fully advised and protected in respect of the risks of any disclosure.

2. If there is a clear power of compulsion, does it extend to legally privileged material?

   » The provisions of the empowering statute should be carefully considered to check whether there is an express provision overriding privilege. It may also be helpful to check any relevant text for commentary on disclosure powers. A non-exhaustive list of specific powers of compulsion is provided at the end of this Practice Briefing.

   » In exceptional cases, it may be important to consider the practical impact of the common law ‘fraud/criminal purpose exception’ which provides that there is no privilege where the solicitor-client communication is undertaken...continued on page 10