Justice Gerald Nation: partner, friend and a fearless lawyer

By Olly Matson
Partner
Wynn Williams

It is with mixed emotions that I write this tribute to my friend and (now) former partner Gerald. On 20 February 2015, Gerald was appointed to the Bench and formally assumed his new role as a High Court judge.

Gerald enjoyed his university studies and showed his academic abilities by gaining an honours degree in 1974. He was admitted to the Bar in 1975. At Canterbury University his mooting skills came to the fore and he won the Judges Cup for senior mooting. The late Sir Alan Holland, a former partner of Wynn Williams, was the judge and he wrote to Gerald shortly after the mooting competition asking Gerald to come to his office for a job interview. He did and Sir Alan offered him a job immediately.

Gerald had been keen to travel and was encouraged by Sir Alan to do so after he had been working for about two years. His travels saw him acquire a wide experience of life. He was in the Sudan when there was an outbreak of the Ebola virus, he worked on a sawmill in Jacksons Bay, on a kibbutz in Israel and in a bar near the Old Bailey which position was as close as he came to getting a job in the law in England.

It was while he was in London that he received a letter from Sir Alan inviting him to return to the firm which he did and there he remained for the rest of his practising career. He worked under Sir Alan and also with Sir Andrew Tipping. Sir Alan always encouraged his juniors to be thorough in their research and that is certainly an excellent trait Gerald has exhibited throughout his practising career.

Gerald was offered a partnership in 1978 when Sir Alan was appointed to the bench. He did accept the position a few months later and was formally admitted to the partnership on 1 April 1979. He has always been a valuable and valued member of our partnership. He has made a huge contribution to the firm, being an excellent sounding board and always giving wise counsel. He was also staff partner and partnership chairman for a number of years. Gerald continued the firm’s tradition in performing senior roles with the (then) Canterbury District Law Society Council. He was first elected to the Council in 1992 and remained on the Council until 2002 in which year he was president.

He had been treasurer in 2000 and vice president in 2001 and also served as a Canterbury delegate to the New Zealand Law Society Council between 2000 and 2002. During his presidency, Gerald had to deal with some difficult issues including a serious defalcation by a former practitioner. Gerald was required to provide a public front on behalf of the profession which he did with great skill and calmness.

His practice has been a varied one. He has operated in the criminal jurisdiction for both defendants and as a Crown panel prosecutor. He has worked in the family jurisdiction and in test cases concerning custody and access. He has always been a sought after senior relationship property lawyer. The breadth and depth of his experience are true indicators of Gerald’s ability as an advocate. He has always believed that good advocates should not only be able to but ought to cross boundaries and practice in different fields. Doing so only adds to an advocates knowledge and experience. One particularly high profile and publicly visible case he was involved in related to the closure of the Civic Crèche run by the Christchurch City Council. Gerald acted for four women who were charged in October 1992 with offences relating to sexual abuse of children. He was given little time to prepare for the depositions hearing. He formed the view early on that the case against the women was weak and he sensed the need to try and dispose of the charges against his clients at the earliest stage he could. When the case came to trial in the High Court in 1993, Gerald made a very strong argument for his clients’ discharge. He was successful in securing the discharge of the women which was a triumph in many respects. It was a forensic triumph that was founded on rigorous preparation, astute legal submissions and a tactical appreciation of the case of which any lawyer in the country would have been proud.

His involvement in this prosecution illustrates that Gerald is fearless, dedicated and supremely skilled in his handling of a difficult case and he clearly emerged with his reputation enhanced. Gerald has mentored many young lawyers in the firm who have greatly appreciated being able to learn from him. His contribution to the firm and its culture has been appreciated by all staff. He has similarly guided new partners in the firm and been a wise sounding board in recent years as the firm has grown and changed.

It is with a heavy heart that after 40 years since joining Wynn Williams, we see Gerald leave us and we will miss his huge contributions to the firm over many years. However, there is one saving grace in that he will be sitting in Christchurch. He goes with our blessings and good wishes to both himself and his delightful wife Sarah, and his family.
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.vinifinoco.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 March 9 2015. The winner will be announced in the next edition of Canterbury Tales.

The winning entry for last month’s picture (below) was submitted by Ben Tothill.
“Tomato sauce anyone?” — He should have gone to spec savers!

President’s Column

Dear Colleagues,

We are into this year at such a speed you can easily get the sense of thoughtlessly squandering many of the days of 2015 already. I trust you had a meaningful holiday or intend to have one soon. Here are some holiday things.

Best Christmas card

On the front of a card there is a picture of a woman sitting at a keyboard with the caption - “This time of year I am really busy so I’ll keep my Christmas family letter brief... my family is happier and more successful than yours. You should be really jealous. Merry Christmas.”

The inside of the card contains the following:
“Hope your holiday is better than anyone else’s”.

The Overseas Trip

My wife and I were asked to surrender our usual colourful Christmas summer for an all-white version — skiing in the French Alps with our godchildren. It was a tough decision. We had already booked into the Ashburton Camping Ground but reluctantly agreed to go.

We also spent a week in Paris. Jo and I were new to the place and approached the task of packing in as much as possible with vigour. Daytime temperatures roamed between 3 & 4°C.

The French language is lyrical, expressive, but not understandable. Even they couldn’t understand my French — I am reasonably confident with seven words — best way out was to speak in English with a French accent. They can get really animated trying to explain (I presume) that they are not English tourists.

The easy observation to be made is that in Paris the citizens live in their history. It is all there to look at, read and touch. I suspect that even the disagreeable bits of their history do not appear to be hidden. We colonials do not have that advantage.

In the middle of our stay Paris became a quite different place with the terrorist attacks. Our hotel was within easy walking distance where one of the attacks happened and the day before we had casually strolled through the area.

When terrorists were thought to still be in the city we had a loud knock on our hotel room door during the night. There was no response to the “whose there?” My wife said in a convincing tone, “Don’t open the door”. It did produce a quick thinking episode which as you know I am not greatly accustom to.

Paris became a different place with probably thousands of well-armed police, the absence of tourist crowds, but fortunately the absence of long queues. There was a determination that Paris was going to continue with a “business as usual” policy. Although on the National Day of Mourning there seemed to be several demonstrations that had to be avoided.

Getting back to New Zealand to safety and peace was a great end to this holiday.

Congratulations

The following are to be congratulated:

• The Honourable Sir Graham Panckhurst on the conferring of a Knighthood in the New Year’s Honours List.

• His Honour Justice Gerald Nation on his appointment to the High Court Bench at Christchurch.

• Coroner Anna Tutton being sworn in as a coroner.

Local awards

Most Humorous Self-Introduction goes to Deirdre McNabb. Deirdre had become available in her more informed years to again pursue companionship (remains of the day sort of thing).

Deirdre fancied a gentlemen farmer who for years had become steeped in equine substance. He had had a misfortune in the matrimonial stakes and for a period had no stablemate whatsoever. Deirdre, who at the time did not know how to read a studbook properly, moved in with her gentleman farmer friend and they have lived together in equine harmony for a number of years.

Deirdre, at a recent law function, instead of recounting her life’s adventures, simply described herself in relation to her gentleman farmer as “the off course substitute”.

Until next time.

Colin Eason
What all lawyers need to know about handling client monies

By Philip Strang
Inspector

The compliance cost of running a trust account is not unduly onerous and when weighed against the risks of not running one when handling client funds there is no real choice.

A salutary reminder is provided by the Disciplinary Tribunal in [2014] NZLCDT 82 LCDT 014/13.

In this matter a barrister took fees directly from clients. Complaints arose from clients (2) and he was struck off.

Also the Legal Complaints Review Office; BW v NA LCRO 266/2012 and 269/2012 (9 June 2014). The Standards Committee found that the lawyer had breached Conduct and Client Care Rule 9.3, and Trust Account Regulations 9 and 10 by receiving funds from a client in advance of providing legal services and failing to pay them into a trust account.

GB v PW LCRO 140/2012

Here a barrister took instructions and fees directly, without reference to an instructing solicitor, in breach of the Intervention Rule.

Regardless of the intervention rule, barristers cannot hold fees they are not permitted to operate a trust property for or on behalf of another person as they cannot receive or hold money or other valuable property for or on behalf of another person as they are not permitted to operate a trust account. Accordingly barristers cannot hold fees in advance as these are deemed to be trust funds until such time as an invoice is issued for work and services have been rendered. Fees paid in advance must be held by the instructing solicitor who must operate a trust account. The solicitor holds such funds in the trust account in the name of the client and subject to the client’s instructions at all times. This requirement also has application to those solicitors who operate without a trust account. The operation of a trust account need not be unduly onerous; if volumes of transactions are minimal a modest manual trust account can be implemented and operated with ease and efficiency. If volumes are substantial then a more comprehensive trust account will be warranted but it should ‘earn it’s keep’ as a tool.

Modern software should not just enable the firm to complete the reconciliations with relative ease but also provide additional features; for instance generating reporting statements automatically. This can save valuable time.

On another tack, in Christchurch I am finding firms explaining dormant balances by stating that their file was lost in the earthquakes, and thus they have no instructions.

Granted the lack of a file may raise difficulties in dealing with the monies and heightens the importance of maintaining electronic records, but ultimately something must be done with them. The longer monies sit usually the harder they are to resolve.

If a firm holds client monies for more than 12 months the client must receive reporting, and that reporting must be updated at least annually, Trust account regulation 12(7) refers. Apart from being mandatory, regular reporting is a most important control feature and a good customer service but it also means that the lawyer remains in contact with the client and any change of address is likely to be notified by returned correspondence.

Payment of monies to the IRD as ‘unclaimed’ funds is very much a last resort and only justified where the client is unable to be located. As has been observed previously in Canterbury Tales the requirements of Reg 12(7) are such that sending ledgers to accountants (for tax purposes) does not achieve compliance.

Regardless of whether a file can or cannot be accessed, for all balances held for 12 months or more the client must receive reporting. Although considerable latitude has been extended to quake effected firms in many aspects, full compliance with Reg 12(7) will be expected from 2015 onwards.

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**Perfectionism or procrastination?**

**Why do we put things off?**

By Andrew Nuttall
Director, Bradley Nuttall Ltd

Important but not urgent. Why do we put it off?

No doubt you are all 100% back into your work, but how hard was it after such a great Canterbury summer and the distraction of the pending Cricket World Cup? Did you find it easy to get back into your work routine? A number of lawyers I know have said that it was not too bad as the work was lining up. However, once again they had not made any progress with their own personal planning even though they recognised that it was very important to them.

Why, I have often wondered, is it that we struggle to attend to matters that are important but not urgent? Could it be that at times we suffer from perfection paralysis? For many highly trained lawyers, perfection has been deeply embedded in their psyche. Renowned Business Coach, Dan Sullivan, suggests that perfectionism is an obsession and can result in people getting “stuck in the clouds” as nothing measures up and unreasonable expectations cannot be meet. This can lead to paralysis setting in and with it perpetual dissatisfaction and procrastination. If we keep putting off certain tasks we can accuse ourselves (and others) of being lazy which can lead to guilt which does nothing to solve the problem and everything to compound it. According to Sullivan procrastination is not about laziness but about fear: fear that our actions might not turn out perfectly or meet our own unrealistic standards.

Setting very high standards for ourselves can create problems, because in life we can never have perfect information and therefore make the ‘perfect decision’ so we need to learn that getting 80% done can be so valuable. We need to accept that aiming for 80% is not settling for mediocrity and Dan Sullivan provides three reasons.

1. 80% is better than nothing!
2. You can have more than 80%. When working on the first 80% you will likely learn something or allow other people to work on the remaining 20% to get you to 96% of the ideal.
3. There is no such thing as 100% and continuous progress is healthier and a more workable goal. Hopefully these concepts will help energise you into putting time aside to plan for you and those close to you, because the cost of not doing so can be high. Make a start with your personal planning to assess where you are and where you want to be. If you would like a hand please make contact and we will help you to get started.

Finally let us all hope Mike Hesson’s and Brendon McCullum’s careful planning and training comes to fruition and that they achieve the goals they desire over the next month. If they do not, they will still have the peace of mind that they have given it their best shot and will have had some fun on the way as well — after all that’s what life is really all about!

Andrew Nuttall is an Authorised Financial Adviser at Bradley Nuttall Ltd. His Disclosure Statement is available on demand and free of charge. He can be contacted on 364 9119 or andrew@bnl.co.nz.

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**Fancy a paraprosdokian?**

1. Where there is a will I want to be in it.
2. The last thing I want to do is hurt you, but it’s still on my list.
3. Since light travels faster than sound, some people appear bright — until you hear them speak.
4. If I agreed with you, we’d both be wrong.
5. We never really grow up, we only learn how to act in public.
6. War does not determine who is right — only who is left.
7. Knowledge is knowing a tomato is fruit. Wisdom is not putting it in a fruit salad.
8. To steal ideas from one person is plagiarism. To steal from many is research.
9. I didn’t say it was your fault. I said I was blaming you.
10. In filling out an application, where it says “In case of emergency, notify,” I put “Doctor.”
11. I asked God for a bike, but I know God doesn’t work that way. So I stole a bike and asked for forgiveness.
12. I want to die peacefully in my sleep, like my grandfather. Not screaming and yelling like the passengers in his car.

For anyone not in the know a paraprosdokian is a sentence or phrase that ends in an unexpected way.
Western Park Village Ltd v Baho, Court of Appeal, 19 December 2014, [2014] NZCA 630
SALE OF LAND — NUISANCE (ROCK FALL) — DAMAGES FOR BREACH OF WARRANTY

Appeal against dismissal of claim for breach of contractual warranty - counter-claim against appellants for balance due under mortgage - first appellant Western Park Village Ltd (Western Park) agreed to purchase one of four residential units at 30 Augustus Terrace Parnell (Augustus) by Agreement for sale and purchase dated 16 May 2007 (Agreement) - purchase price was $1,225M and payment to be made partly by cash with balance payable to respondent vendor in two instalments over two years - balance due in US dollars and secured by second mortgage guaranteed by DH (second appellant) - purchase settled in mid June 2007 with cash portion of purchase price paid on 5 July 2007 - DH discovered there was serious issue relating to rock fall from cliff forming part of Augustus onto neighbouring property on The Strand (Strand) - issue had not been disclosed by respondent during purchase negotiations notwithstanding letter from Strand solicitors of October 2006 (October letter) - October letter required owners of Augustus to eliminate nuisance and gave final opportunity to resolve issues by negotiation before commencing court proceedings - letter discussed at annual general meeting of Augustus body corporate in November 2006 which resolved that legal advisors and informal owners committee (including respondent) enter into negotiations to resolve dispute without litigation - in December 2006 Augustus solitici advised Augusta BC it was prima facie liable in nuisance - geotechnical engineers were retained and reported to body corporate in March 2007 - report included assessment of minimum work required to improve safety of Strand and cost - in October 2007 Strand BC issued District Court proceedings claiming injunctive relief to abate nuisance or unspecified sum for remedial costs - proceeding settled in December 2010 following meetings between representatives of each body corporate on basis: - (i) responsibility for remedial work shared between two bodies corporate - (ii) cost sharing arrangements for initial remedial work and future care and maintenance - (iii) percentage share of work assumed by Strand BC between 55% and 60% depending on item identified - (iv) appellants share of expenses $35,665.05 - in meantime DH had paid first instalment of loan to respondent but second instalment of US$127,750 remained due and owing - Western Park issued proceeding seeking rescission of Agreement for sale and purchase and mortgage or alternatively, damages of $300,000 for diminution in value of property - special damages of $60,000 sought for costs in resolving and settling nuisance claim - alleged breach of warranty under clause 6.1(d) of Agreement for sale and purchase (warranty that vendor had not received notice, demand or requisition from any other party) - misrepresentation based on pre-contractual discussions - respondent counterclaimed for balance due under mortgage - High Court dismissed appellants’ claims and entered judgment on counterclaim for $301,698.87 with interest on basis: - (1) October letter did not amount to notice, demand or requisition in terms of warranty - (2) no misrepresentation in terms of s6 Contractual Remedies Act 1979 or if there had been, it did not induce DH to enter into Agreement for sale and purchase - (3) valuation evidence did not establish diminution in value of unit in consequence of rock fall issue - (4) counterclaim established and conversion rate to New Zealand dollars fixed at date second instalment was due for payment - High Court findings of fact: - DH learned of rock fall issue at latest by time of extraordinary general meeting on 31 Jul 2007 - insufficient evidence to show he received notice of meeting with relevant information or otherwise learned of problem before settlement on 5 July 2007 - DH did not advise respondent solicitors he had not been made aware of nuisance claim until June 2008 when he raised it in correspondence regarding payment of first instalment due under second mortgage - late raising of issue was cynical attempt to avoid payment of monies owing to respondent and reflected adversely on DH’s credibility - Court of Appeal granted leave to amend statement of claim prior to appeal hearing to add claim for breach of warranty under clause 7.1(6)(b) of Agreement (vendor had no knowledge or notice of any fact indicating possibility of proceedings being instituted by or against body corporate) - principal issue in Court of Appeal: whether High Court correct to conclude Western Park was not entitled to damages because it had not established diminution in value of unit flowing from failure to disclose rock fall issues - secondary issue concerning correct date for conversion of sum due under mortgage - Court of Appeal compared clause 6.1(1)(d) (contemplating formal requirement or demand that specified action be taken) and more widely drawn clause 7.1(6)(b) - Court noted that clause 6.1(1)(d) more apt to refer to some form of official requirement from local body or government agency - possibility of formal demand by non-government party not excluded - discussion of valuation evidence relating to diminution in value - principles of assessment of damages for breach of warranty. HELD: High Court correct to find there was no breach of warranty under clause 6.1(1)(d) however there was breach of separate warranty under clause 7.1(6)(b) - letter was explicit in stating that if a resolution could not be promptly achieved, court proceedings for nuisance would be instituted against Augustus BC in terms of clause - High Court finding there was no evidence of diminution of value set aside - hypothetical purchaser would have been properly concerned if October letter had been disclosed and reasonable to expect he/she would have obtained significant discount on price - cost of remedial work to Augustus BC could not have exceeded $200,000 assuming issue of proceedings - 27.24% share attributable to unit D was $54,480 - Western Park entitled to damages for breach of warranty in sum of $50,000 assessed on basis of difference between price under Agreement for sale and purchase and value had respondent not breached warranty - respondent entitled to US$127,750 on 25 May 2009 under counterclaim - approach adopted by High Court was correct - respondent entitled to judgment of $154,073.48 being $204,073.48 less $50,000 - respondent entitled to judgment against appellants for $154,073.48 with interest thereon at 19%pa from 25 May 2009 to date of judgment - appellants successful in part and entitled to 80% of costs of appeal for standard appeal on band A basis with usual disbursements - High Court costs order set aside - High Court to fix costs in absence of agreement.
Ownership and retention on the termination of a retainer

The New Zealand Law Society commissioned Andrew Beck to write an opinion to provide guidance on the law and requirements relating to the ownership and retention of records on the termination of a retainer. This will be the first in a series that will highlight some of the main points in this opinion. The full opinion can be found at http://www.lawsociety.org.nz/__data/assets/pdf_file/0003/69762/Ownership-and-retention-of-records-opinion-Apr-2014.pdf.

**Contractual obligations between solicitor and client**

The obligation to retain records is frequently considered solely as a question of ownership of documents. This is, however, no more than a default position. It is important to note that the relationship between solicitor and client is essentially a contractual one. It is permissible for a solicitor to regulate by contract exactly which documents the client will be entitled to, and what is to happen to documents retained by the solicitor.

As a matter of practice, the ownership of and obligations relating to documents should be discussed on establishment of the retainer in order to avoid confusion at a later date. The contract between the solicitor and the client should specify which documents a client is entitled to, what documents will be retained by the solicitor for his or her own records, what will happen at the end of the retainer, and how the solicitor will deal with any documents retained after that time. Solicitors may find it advisable to address the following matters in the retainer:

- Whether drafts of a final document remain the property of the solicitor.
- Whether the solicitor is entitled to make and retain copies of documents sent to the client, which will be the property of the solicitor.
- Charges that will be made for any copies retained by the solicitor, or for documents provided to the client on request.
- Whether the solicitor is obliged to retain any documents on behalf of the client, or for any period of time.
- The right to retain intellectual property in any documents created by the solicitor.

**Categories of documents to be retained**

- Documents in existence before the retainer commences.
- Documents coming into existence during the retainer.
- Documents relating to joint instructions or fiduciary duties to others.

Rule 4.4.1 of the Conduct and Client Care Rules specifies that the client has the right to uplift all documents held on the client’s behalf when changing lawyers. However, the rule does not indicate which documents are held “on the client’s behalf”. A further test has to be applied in order to make this decision.

**Documents in existence before the retainer commences**

There is no doubt that these belong to the client and must be returned to the client on termination of the retainer, or be disposed of as directed by the client. In terms of rule 4.4.1 of the Conduct and Client Care Rules, these documents are clearly held on the client’s behalf.

**Documents coming into existence during retainer**

In this category, the nature of the retainer undertaken by the solicitor is of critical significance. In some situations, the solicitor is simply acting as the agent of the client. Other situations will involve the provision of professional services, including the production of documents for the client.

The old case of *Ex parte Horsfall* (1827) 7 B & C 528 equated entitlement to documents with payment for them. That is, however, too crude a measure, and the decision has subsequently been glossed in *Chantry Martin (A Firm) v Martin* [1953] 2 QB 286 (CA).

While payment is a relevant factor to be taken into consideration, the principal distinction which has been drawn by the Courts is between those documents prepared for the benefit of the client, and those prepared for the benefit of the solicitor: *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205; *Wentworth v De Montfort* (1988) 15 NSWLR 348.

A factual inquiry is needed to determine whether documents can properly be described as held “on the client’s behalf”. Bearing this in mind, documents can be divided into three broad categories:

- Documents created to be sent, received or held by the solicitor as agent for the client.
- Documents created for the benefit of the solicitor, or where property is intended to pass to the solicitor.
- Documents created for the benefit of the client.

(1) Documents created to be sent, received, or held by the solicitor as agent for the client

If a solicitor is acting solely as agent on behalf of the client as principal, the ordinary rules of agency apply. Letters received by the solicitor from third parties will often fall in this category.

In the nature of solicitors’ business, however, a document created by the solicitor purely as an agent is rare, and will be the exception rather than the rule.

In *Breen v Williams* (1996) 186 CLR 71, the High Court of Australia held that a patient had no proprietary interest in her medical records. Gaudron & McHugh JJ said (at 101):
tention of records of a retainer

"Professional persons are not ordinarily agents of their clients even though they often have express, implied or ostensible authority to enter contracts on their clients’ behalf. Documents prepared by an agent are ordinarily the property of the principal, but documents prepared by a professional person to assist him or her to do work for a client are the property of the professional person, not the lay client.”

Documents sent or received by the solicitor purely as agent belong to the client: Chantrey Martin v Martin; Wentworth v De Montfort (1988) 15 NSWLR 348. This category includes correspondence with third parties, as well as notes of telephone calls. Copies of such documents retained for the solicitor’s own file would, however, fall into category (c).

(b) Documents created for the benefit of the client

In the ordinary situation, where the solicitor is not acting as a simple agent, but is providing professional services, it is necessary to consider the reasons for creating a document. Where the retainer requires the solicitor to produce a document such as a contract or deed for the client, this will clearly be the property of the client: Gibbon v Pease [1905] 1 KB 810; Breen v Williams (1996) 186 CLR 71 at 89 per Dawson & Toohey JJ. Copies of letters written on behalf of the client and retained as evidence will likewise belong to the client: Marshall v Macalister [1952] NZLR 257; Wentworth v De Montfort (1988) 15 NSWLR 348 at 355.

The position of drafts and additional copies of letters for the solicitor’s file is more difficult. It has been suggested that, where the client pays for these, they belong to the client, and consequently that a solicitor should not charge for copies retained for his or her own protection. Additional copies of letters for the solicitor’s file are not brought into existence for the benefit of the client; their purpose is for the benefit of the solicitor.

Rule 4.5(b) of the Conduct and Client Care Rules expressly permits a practice of retaining copies of the client’s documents where this has been agreed in the retainer, or where it is considered necessary for the purposes of defending a claim or complaint. If the matter has not been agreed, the rule suggests that there may be some doubt as to whether copies of all documents may be retained.

In the event of a dispute, the solicitor would have to prove that retention was reasonably considered necessary to defend a possible claim or complaint. Although this threshold is unlikely to be a high one, the preferable course would be to regulate the matter by agreement. Drafts prepared by solicitors have been the subject of little in the way of judicial decision since Horsfall, in which they were held to be the property of the client who had paid for them. In Chantrey Martin (A Firm) v Martin [1953] 2 QB 286 (CA), however, the Court of Appeal had no difficulty in concluding that drafts prepared by chartered accountants were not the property of the client. The position taken in Cordery on Solicitors (8th ed 1988) at 90 is that, where solicitors base their charges on an expense rate which includes a proportion of overheads, the client is entitled to all drafts and copies.

In Andrew’s opinion, this approach is flawed, and cannot be reconciled with the reasoning in Chantrey Martin. Ownership is determined not by the basis on which expenses are charged, but by the intention of the parties. The position cannot be stated in a general way to cover all cases, which is why clarification of the basis of retainers is recommended. Normally, however, a solicitor would consider that he or she is entitled to discard drafts without reference to the client; it is — subject to specific instructions to the contrary — the final version of the document for which the client has contracted.

A matter that has received little attention in cases is the right to the intellectual property in documents created by the solicitor. The fact that a particular document has been created for a client does not automatically mean that the client is free to modify that document or use it for purposes other than the one for which it was prepared. Where there is significant intellectual property in a document, it would be advisable for this matter to be addressed by agreement.

An additional difficulty has arisen with electronic communications, such as email messages. If some of these are in fact the property of the client, the solicitor would have a duty to retain them, and solicitors should take this into account before deleting messages from the system. Once again, the matter is best regulated by contract. It may, however, be advisable to have a system whereby any significant electronic document is either copied or stored in a designated file.

Many email communications are ephemeral in nature, and retention would serve no obvious purpose. In such cases, it could be argued that there is no duty to retain them. To avoid dispute, this issue should be addressed in the retainer.

(c) Documents created for the benefit of the solicitor

It is now generally recognised that, in the conduct of professional practice, many documents will be generated which are in essence the benefit of the solicitor, and which are properly to be regarded as belonging to the solicitor.

It appears that the only recent case which has considered the position of solicitors directly is the decision of the Court of Appeal of New South Wales in Wentworth v De Montfort (1988) 15 NSWLR 348. In that case, Hope JA applied the authorities mentioned above, noting that the client would be entitled to a copy of such documents (for which a charge could be made) but that they remain the property of the solicitor.

As noted above Rule 4.5(b) of the Conduct and Client Care Rules suggests that there may be a restriction on the type of document that a solicitor may copy for his or her own purposes. A solicitor should therefore be able to provide a justification for the creation of a document intended to benefit the solicitor.

Next month in part two we will look at how to deal with the documents once the retainer has ended.
Comings & Goings

Joined firm/organisation
Elizabeth Browne (Canterbury DHB), Tom Appleton (Harman’s), Geraldine Biggs (Corcoran French), Lorin Currie (Corcoran French, Kaiapoi Office), Catherine Deans (Clark), Samuel Henry (Young Hunter), Michael Hills (AgResearch Limited), Pauline Leeming (Christchurch City Council), Sophie McGirt (Godfreys), Joseph Mooney (MOJ Public Defence Service), Bridget Morton (Lane Neave), Michelle Nicol (Chapman Tripp), Michael O’Flaherty (Mortlock McCormack Law), Michelle Nicol (Chapman Tripp), Nicholas Wightman (Andrew McKenzie Barrister), Natalie Wham (MacLean & Associates), Joseph Tupaea Tewnion (Aoraki Legal Limited), Victoria Tranter Taylor (Central Plains Water Limited), Felicity Gagandeep (Argyle Welsh Finnigan), Karen French, Kaiapoi Office), Catherine Deans (Harmans), Geraldine Biggs (Canterbury DHB), Tom Appleton (Harman’s), Geraldine Biggs (Corcoran French), Lorin Currie (Corcoran French, Kaiapoi Office), Catherine Deans (Clark), Samuel Henry (Young Hunter), Michael Hills (AgResearch Limited), Pauline Leeming (Christchurch City Council), Sophie McGirt (Godfreys), Joseph Mooney (MOJ Public Defence Service), Bridget Morton (Lane Neave), Michelle Nicol (Chapman Tripp), Michael O’Flaherty (Mortlock McCormack Law), Michelle Nicol (Chapman Tripp), Nicholas Wightman (Andrew McKenzie Barrister), Natalie Wham (Michael Starling Barrister), Nicholas Wightman (Duncan Cottelen).

Moved
Gareth Abdinor (Cavell Leitch to Taylor Shaw), Glenn Cooper (Anderson Lloyd to Cavell Leitch), Georgina Hamilton (Lane Neave to Tavendale and Partners, Ashburton), Michelle Hansen (Corcoran French to Duncan Cotterill), Deirdre McNabb (Commerce Commission to Touchstone Trustees Limited), Virginia Nichols (Virginia Nichols Ltd to Saunders & Co, as employee), Kirsty Osprey (Ministry of Social Development to Ebborn Law), Kathleen Page (Mortlock McCormack Law to Malley & Co), Kiran Parma (MOJ Public Defence to Better Lawyers), Tania Pearson (Chapman Tripp to PGG Wrightson Ltd), Emma Perry (GCA Lawyers to Christchurch City Council), Shonagh Burnhill, Tavendale & Partners to Ministry of Social Development.

Change of status
Mark Cathro, partner with Duncan Cotterill. Christopher Dann, partner with Anthony Harper. Paul Gooby, partner with Argyle Welsh Finnigan, Paul Jarman, partner with Kaiapoi & North Canterbury Law Office. Susan Rowe, partner with Buddle Findlay. Michael Kirkland, retired from partnership of Canterbury Chambers, Level 1, 62 Riccarton Road, Christchurch 8011, PO Box 9344, Tower Junction, Christchurch 8149, phone (03) 343-6768, email, markalma@xtra.co.nz. Simon Marks, retired from partnership of Anthony Harper, but to remain a consultant. Lindsay North, retired from partnership of Rhodes & Co, but to remain a consultant.

New barrister/firm/organisation
E.A. Law (Aliza Eveleigh sole practitioner, previously barrister) Unit 2, 2 Horner Street, Papanui, Christchurch 8053, PO Box 16532, Homby, Christchurch 8441, phone (03) 981 9202, 027 418 3148, email, aliza@ealaw.co.nz. Mark Russell, barrister (previously with Buddle Findlay) Canterbury Chambers, Level 1, 62 Riccarton Road, Christchurch 8011, PO Box 9344, Tower Junction, Christchurch 8149, phone (03) 343-6768, email, markalma@xtra.co.nz.

Change of detail
Beverly Alexander (sole practitioner) has relocated to Paraparaumu. Duncan Cotterill have moved back to the CBD, Duncan Cotterill Plaza, 148 Victoria Street, Malley & Co, Christchurch office now at 14 Dundas Street, Christchurch 8140. Mortlocks now at corner Creyke and Ilam Roads.

2015 Cradle to Grave Conference – 6.5 CPD hours
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Exploring the Legal Landscape of Capacity
Presenter: Sandra Grant, Barrister, Shortland Chambers

Assessing Capacity: The Medical Perspective for the GP Lawyer
Presenter: Dr Bide McVor, MB ChB, FRANZCP, Psychogenetician and Psychiatrist

Testamentary Capacity: The Lawyer’s Options When the Client May Not Have It
Presenter: Sorina Clapham, Barrister, Shortland Chambers

Trust-Related Case Law Update
Presenter: Anthony Grant, Barrister, Radcliffe Chambers

The Trusts Trust: The Optimal Solution for Succession Planning?
Presenter: Denham Martin, Barrister

Family Law Developments For Non-Specialists
Presenters: Brian Carter, Barrister, Bastion Chambers; Vanessa Bruton, Barrister

Decisions of Trustees: Principles, Problems and Options
Presenter: Bill Patterson, Partner, Patterson Hopkins

Wills from Start to Finish
Presenters: Chris Kelly, Consultant, Greg Kelly Law (Auckland session), Greg Kelly, Partner, Greg Kelly Law (Christchurch session)

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Standard Rate (after 30 March 2015)
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Difficult personalities and the practice of law

By Emily Morrow

When initially meeting with a client, I will frequently say, “Tell me about the people with whom you work”. The client will often say: “I work in a practice group of five people. I get along well with four of them, but have problems with one person who is really difficult”.

Usually I say, “Tell me more about that difficult individual. What is it about that person and the way you two interact that causes you to say s/he is a difficult personality?” The client then usually describes the individual in minute detail, focusing on behaviours that s/he perceives to be unpleasant or difficult.

I expect you have experienced “difficult personalities” in your law practice. How can you handle those relationships to minimise, if not eliminate, the problem? Clearly, getting along with all kinds of people, including “difficult personalities” is a critical skill for lawyers. As a lawyer, you must interact with professional colleagues in and outside of your office, your existing and prospective clients, referral sources and other community members. If you can manage your professional relationships optimally, you will be a better lawyer, have more work, and improve your chances for advancement and so forth. How do you achieve this?

The “truisms”

When I listen to a client describing a “difficult person” in painful detail, here is what I think to myself:

• No one wakes up in the morning, gets out of bed and says to him/herself: “Today I am going to work with the intention of being a difficult personality.” If someone is difficult, it is likely to be done unknowingly and unintentionally.

• If someone does something that does not make sense to you, it’s because you don’t know enough about that person and how s/he perceives the world and his/her place in it.

• How you choose to manage yourself around other people can minimise problems, even with difficult personalities.

• You typically cannot change someone else’s behaviour, but you can change how you manage yourself around other people. This will predictably impact how other people interact with you.

• With this in mind, I will often enquire:
  • “To what extent do you think your colleague intends to be a difficult person with whom to work?”
  • “What might you ask your colleague about him/herself that would help you better understand his/her behaviour?”
  • “How might you better manage yourself around your colleague to minimise friction?”
  • “If you managed yourself better around your colleague, how might your colleague better manage him/herself around you?”

In essence, I encourage clients to look at themselves and their own behaviour, rather than fixating on the other’s behaviour. As Jackie Stead, former National HR Director for Russell McVeagh and now HR Consultant, so aptly puts it: “You can’t give someone a ‘personality transplant’. However, by thinking differently about how you interact with a ‘difficult’ person, and managing your own behaviour, you will probably find benefits occur for both parties.”

Although, in the short run, this may be less “satisfying” than vilifying the other, in the long run, it’s a better strategy. That said, there are two particular skills that can minimise problems with people whom you experience as being difficult. These are the ability to influence effectively and the development of a basic understanding of temperament.

Influencing

Influencing (as opposed to the exercise of authority) is the ability to lead others outside your control so they make better decisions affecting you and your work. By influencing, you avoid “bumping up” against other people and reduce the likelihood of eliciting “difficult behaviour”. Instead, others will be more inclined to adopt your ideas willingly. Skillful influencing encourages collaborative and cooperative behaviour.

For example, Jane, a partner in a mid-sized firm, complained to me about Bill, a “difficult associate”, who failed to complete work in a timely and professional way.

When I spoke with Bill, he reported that Jane delegated work “on the fly” without giving sufficient information, and that she never gave him feedback. Later on, I asked Jane how she could enhance her delegation skills and how she might influence Bill to do his best work for her.

We discussed optimal delegation techniques, including how she could give Bill constructive criticism so he would learn from his mistakes. Jane started changing her own delegation style and soon found that both the quality of Bill’s work and her relationship with him improved.

Jane no longer perceived Bill as being a “difficult personality”.Temperament

If you understand your own and other people’s temperamental preferences and tailor your behaviour accordingly, you will encounter fewer difficult personalities in your practice. You might think that others should tailor their behaviour to accommodate you.

In fact, the most successful (and influential) lawyers tailor their own behaviour to bring out the best in others and reduce the likelihood of difficult professional interactions. They do not cater to other people, but they do take into account differences in the way people work, think, communicate and interact, and they do so to great advantage.

For example, let us assume you work in a focused, industrious, methodical and well-organised way and that the solicitor who reports to you is a big picture, conceptual, innovative and digressive thinker. You could perceive your colleague as being a difficult personality. Conversely, if you consider your colleague’s behavior and how his/her approach might complement yours and tailor your interactions accordingly, the outcome will be predictably better.
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CHRISTCHURCH
March
3 — Disclosure of Documents in Civil Litigation, Webinar.
4 — Criminal Law, working with intellectually disabled clients, Webinar.
5 — Sale and Purchase of Apartments - what's trending now? Webinar.
11 — Dealing with Difficult People Workshop.
17 — Trusts for Commercial and Company Lawyers.
23 — Trust Account Administrators.
24 — Advocacy Ethics.
24 — Insolvency — Key Commercial Developments.
25 — Time Mastery for Lawyers, Webinar.

April
21 — Construction Law, Webinar.
21 — Influential Presentations.
22 — Making use of Arbitration, Webinar.
22-24 April — Lawyer For Child.
23 — Dealing with Difficult Contractual.
28-29 April — Lawyer as Negotiator.

OUT OF CHRISTCHURCH
17 March — Auckland — Professional Indemnity Insurance.
31 March — Auckland — Contract and Property Decisions, The Supreme Court’s First Decade.
22-24 April — Lawyer for Child, Wellington.
23-24 April — Into To Criminal Law Practice, Wellington; 4-5 May Auckland.
30 April — Education Law, Auckland; 1 May Wellington.

Christchurch social
Sports Day — 4 March. Watch for flyer.
Law Dinner — 20 March.
Hunter Cup golf tournament — 24 March. Watch for flyer.

Library News

By Julia de Friez
Librarian

If your New Year’s resolution was to brush up on your legal research skills, why not contact the Library to arrange an individual or small group research training session.

The Library offers a 30-minute session with an experienced researcher where the content of the session can be tailored to your needs. Contact Julia for more information julia.defriez@lawsociety.org.nz.

Earthquake list
The Library’s “High Court Earthquake List” information page has just been updated, see: http://www.lawsociety.org.nz/law-library/news-archive/high-court-earthquake-list-case-summaries
Here you can find LINX case summaries of High court “Earthquake List” judgments and also a link to a useful spreadsheet published by the High Court on the courts website, which summarises High Court Earthquake List litigation — pending and settled (current to 29 January 2015).

Keep up to date
You now have an easy way to keep up to date with the latest journal articles via the Library catalogue available on the Law Society website. A “Current Table of Contents [View PDF] link” can be found on the catalogue record for journal titles. A “Tables of contents” tab on the catalogue toolbar lists new journal tables of contents for the last month.

New books
Recent additions to the Library’s collection include:
- Accident Compensation Act: key sections and commentary by Ben Thompson, LexisNexis (2014);
- Colinvaux’s law of insurance in New Zealand by Robert Merkin and Chris Nichol (eds.) Thomson Reuters (2014);
- Consumer law in New Zealand, 2nd edition by Katie Tokeley (ed.) LexisNexis (2014);
- Environmental and resource management law, 5th edition by Derek Nolan (ed.) LexisNexis (2014);
- Financial markets conduct regulation: a practitioner’s guide by Victoria Stace et al., LexisNexis (2014);
- Law of charity by Juliet Chevalier-Watts, Thomson Reuters (2014);
- Lewin on trusts by Lynton Tucker et al., 19th edition, Sweet and Maxwell (2015);
- New Zealand legal method handbook by Stephen Peck and Mary-Rose Russell, Thomson Reuters (2014);

See the “New titles” tab on the Library’s catalogue to find more titles recently ordered or added to the Law Society Library collection nationally.

Contact Library
For further information or for any research or document delivery requests, email canterbury@nzlslibrary.org.nz or phone 377-1852.

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TO OUR READERS
The Canterbury Westland Branch of the NZLS asks you to please support the advertisers in Canterbury Tales.
Their commitment makes this magazine possible. We encourage you to give them your custom.
Thank you.
Further, the most robust and successful teams are diverse teams. Some members are introverts, others are extroverts; some are analytical, others are more emotive; some focus on the big picture and others on the details; some will enjoy opening options while others will want to bring closure to things; and so forth. To reduce the potential for difficult interactions occurring within a diverse team, try using influence and taking into account your own and other people’s temperamental preferences. If you think someone is a difficult person, try not to focus on how you might “fix” or “change” that person. Instead, focus on understanding the other person, rather than on being understood by the other. If you do so, predictably the number of difficult personalities in your professional life (and perhaps personal life as well) will diminish noticeably. Try it. It really works and it makes life and the practice of law a lot easier and more enjoyable.

Emily Morrow BA (Hons), JD (Hons, Juris Doctor), was a lawyer and senior partner with a large firm in Vermont, where she built a premier trusts, estates and tax practice. Having lived and worked in Sydney and Vermont, Emily now resides in Auckland and provides tailored consulting services for lawyers, barristers, in-house counsel, law firms and barristers’ chambers focusing on non-technical skills that correlate with professional success; business development, communication, delegation, self-presentation, leadership, team building/management and the like.

This article first appeared in Law News Issue 4 (28 February 2014), published by Auckland District Law Society Inc.
Congratulations to.....

**New Years Honours List**
Justice Graham Panckhurst QC who was made a Knight Companion of The New Zealand Order of Merit for services to the judiciary.

**High Court**
Gerald Nation who was sworn in as a High Court judge on 20th February 2015.

**ICC Counsel**
Nigel Hampton QC who has been elected (by all counsel of the International Criminal Court (ICC) in The Hague) as an alternate member of the Disciplinary Appeals Board for ICC Counsel. The appointment is for a term of four years from 7 December 2014.

**Coroner**
Anna Tutton who has been appointed a Coroner in Christchurch and was sworn in on the 26 January. Ms Tutton succeeds retiring Christchurch Coroner Richard McElrea. Anna, prior to taking up this position, worked for the New Zealand Police as the Manager of the Lower North South legal team and acted as legal adviser to the Police response to the Pike River mine disaster.

**Tongan appointment**
Owen Paulsen who has resigned from the partnership of Cavell Leitch to take up the position of Lord Chief Justice of Tonga.