NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Sole Practitioner Power of Attorney Guidelines (updated April 2013)

Every sole practitioner and sole director of an incorporated law firm is required, pursuant to section 44 of the Lawyers and Conveyancers Act 2006 (LCA), to comply with Schedule 1 of the LCA and give a power of attorney in favour of a barrister and solicitor entitled to practice on his or her own account (an attorney), and in favour of an alternate, to conduct the sole practice, or act as the board of the incorporated firm, should certain circumstances arise. The power of attorney enables the attorney to conduct the donor's practice, operate the trust account, dispose of the donor's practice (in certain circumstances) and do all things necessary or incidental to the above.

Barristers practising on their own account are not required to execute a section 44 power of attorney document.

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1. Where is the power of attorney document?

There are two types of attorney documents available on the NZLS website:

- Power of attorney by a lawyer in sole practice https://www.lawsociety.org.nz/assets/Professional-practice-docs/Practice-management/power-of-attorney-sole-practice.pdf

- Power of attorney by a sole director of an incorporated law firm https://www.lawsociety.org.nz/assets/Professional-practice-docs/Practice-management/power-of-attorney-sole-director.pdf

2. What is required?

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

Every sole practitioner and sole director of an incorporated law firm must:

- Appoint an attorney and an alternate attorney within 3 months:
  - of the date of commencement of practice on own account as a barrister and solicitor in sole practice; or
  - of becoming the only director of an incorporated law firm (s44 (1) (a) and (b) LCA)..
- Give notice of the details of the power of attorney to the Law Society and to the attorney.
- Provide a copy of the document to the Law Society (registry@lawsociety.org.nz or fax to 04 463 2989).

3. Why is an attorney required?

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

4. Can an attorney resign or refuse to act?

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

5. What happens if no attorney is appointed or the power of attorney is unlawfully revoked?

Failure to give a power of attorney, or unlawful revocation of a power of attorney is an offence under section 45 LCA. The offender is liable on summary conviction to a fine not exceeding $50,000 (natural person) or $150,000 (corporation).

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

Clause 12, Schedule 1 LCA allows the President of the Law Society to execute a power of attorney on behalf of the practitioner, but only in certain circumstances.

6. Are there any professional attorneys?

The Law Society is not aware of any professional attorneys. However, there is no reason why a lawyer entitled to practise on his/her own account (and TAS qualified if necessary) could not be a professional attorney for a number of law firms in much the same manner as a locum. An attorney is entitled to charge for work undertaken during the period in which a power of attorney is invoked (see 'Is the attorney paid?' at 14 below).

7. Who can be an attorney?

Both an attorney and an alternate need to be entitled to practise on their own account (in sole practice or partnership) so that either can step into the donor's shoes. If the donor operates a trust account, the attorney and alternate must also be TAS qualified and have paid the appropriate fees.

A lawyer who is employed or is a barrister is **not able** to be an attorney or alternate as they will not hold the correct practising certificate. An employed lawyer will have a contract with a third party and will be unable to "step into the donor's shoes" at short notice without the consent of the third party.

8. Choosing a potential attorney

An ideal attorney is someone well known to the donor, perhaps a longstanding personal friend or a trusted local practitioner, who is familiar with the fields of law in which the donor practices. Some sole practitioners have a reciprocal arrangement with another sole practitioner. This can present difficulties if the sole practitioner has insufficient time to devote to another practice in an emergency.

9. Why can't the Law Society run the firm if something happens to a sole practitioner?

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

FOR ATTORNEYS (OR POTENTIAL ATTORNEYS)

10. What to consider before accepting an attorneyship

Acting as an attorney is not something to be taken lightly and there are a number of factors to be taken into consideration. It can be a rewarding experience as part of the collegial support network which underpins the legal profession. However, it can also be a difficult task. An attorney may be required to operate a firm with no forewarning for an extensive period of time with very little assistance. This could be very burdensome (see below).

However, when a sole practitioner wants to take a period of leave for holiday, medical or other reasons, an attorney can act like a locum on a voluntary basis. This could be a reciprocal arrangement where sole practitioners are attorneys for each other. However, this will only work if the attorney has capacity to undertake the work of the donor.

Before accepting an attorneyship, consider the following:

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

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

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

iv. Is the attorney happy with their knowledge of the donor's practice, the manner in which it operates, its accounting system, and its financial health, to step into the donor's shoes? Is there rent owing or is the firm account in overdraft? Have the donor's staff and the attorney met?

v. What is the personal health of the donor?

vi. Is the donor's place of business near the attorney's office? If the two are located in different towns it is likely to be a problem if the attorney has to act at short notice.

vii. What is the state of the donor's desk and office? Are the records kept in order? A messy office with files littered over the floor may not be a good sign and may make it more difficult to operate the firm.

viii. Checking through a number of files to ensure there is adequate reporting to clients and that all correspondence is on the file. Has the donor obtained authority from his or her clients to allow the attorney to act and hold client files and deeds? This could be done in the donor's letter of engagement. What are the donor's file closure and destruction practices? Where will the files be accommodated?

ix. Does the donor have adequate PI insurance? Does the attorney's PI insurance cover the attorney? Is there any increase in the premium which the donor could cover?

x. Does the attorney have experience of the donor's area of practice?

xi. Could the attorney realistically cope if called upon with no warning in the worst case scenario to deal with a dysfunctional practice, disgruntled clients and worried staff?

11. Upon deciding to act as an attorney:

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

ii. Set up computer/banking passwords to access the donor's accounts.

iii. Ask for a list of employees, personal contact numbers and access to employment agreements (for example details of any unwritten profit sharing arrangements). Similarly, employees or at least a senior staff member or life partner of the donor should know who the attorney is and have contact details for them.

iv. If the donor practises property law, ask the donor to ensure that the attorney is linked to the donor's Landonline licence. (Specific guidance is given about this in *The Property Lawyer*, volume 7 issue 3 page 9 and volume 7 issue 4 page 9. Contact the Property Law Section for these articles).

v. Be familiar with the office mail, telephone, computer and trust account software systems.

vi. Find out the Bank at which the trust account and firm accounts are held. The attorney should be recorded as a signatory to the donor's trust account and depending on the circumstances, the office account.

vii. Have regular meetings with the donor to update the above and keep you up to date with the donor's software, client databases and accounting systems.

viii. Be aware of the eligibility requirements to act as attorney and let the donor know immediately if the attorney is no longer eligible to act as such. The donor should also let the attorney know if any matter changes such as the opening of a trust account which may affect the eligibility of the attorney.

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

12. Can an attorney carry out any roles the donor may have had, such as trustee or sole executor of an estate?

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

13. Acting as an attorney – what to do first

i. The attorney must comply with clause 21(2), Schedule 1 LCA by producing the power of attorney for inspection by the Law Society, providing a certified copy and giving appropriate notices to the auditor of the firm (if there is one) and to the Bank where the

trust account is held. Notify the local NZLS branch of the circumstances giving rise to the need to operate the deed, as they may be able to assist.

ii. If the donor has been suspended or struck off, then the consent of the Law Society Council is required before the attorney can exercise his or her powers (clause 7 of Schedule 1).

iii. Secure the premises, post and email if the practitioner is suspended, struck off, dies or is declared bankrupt.

iv. Advise the donor's and the attorney's PI insurer of the situation and check that there is appropriate cover.

v. The attorney must comply with all trust account rules and regulations, as if the donor was personally conducting the practice.

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

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

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

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

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

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

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

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

xiv. Establish a procedure to hand over client files when clients have given authority to do so. It is best practice to keep a copy of the file. A lien may be claimed over the file if there are outstanding fees. Refer to Rule 4.4 and 4.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. If a lien is claimed and a request is made under the Privacy Act then a copy of any personal information must be provided to the client. Any

fee for photocopying is payable by the client. If any problems are identified on the file, notify the firm's insurers and seek directions before releasing the file.

xv. Inform current clients of your role by way of letter.

xvi. If there is any public concern or media interest, contact the communications team of the Law Society for guidance.

14. Is the attorney paid?

Work carried out on incomplete files should be invoiced and if necessary can be pro-rated between the attorney and the firm.

Clause 11 states that all costs, charges and expenses incurred by the attorney in the exercise of the attorney's powers (including such reasonable remuneration as may be approved by the Law Society Council) are payable (unless the High Court directs otherwise) out of the property of the practitioner or incorporated firm by whom or on whose behalf the power of attorney was given, if any such funds are available.

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

15. When does an attorney have to step in?

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

- The incapacitation of the donor.
- When the donor is absent from the practice.
- Following the death of the donor until the practice is disposed of (or until the administrator of the estate revokes the power of attorney, if they are able to select someone else to take over the attorney's duties). Clause 16, Schedule 1 LCA states that an attorney may not exercise the powers under the power of attorney after the expiration of 1 year from the date of the grant of administration in the estate of the donor. If the affairs of the donor are not wound up within this time, an application must be made to the Council of the Law Society to extend the period.
- When the donor is prohibited by an order of the Disciplinary Tribunal from practising on his or her own account.
- Where the donor is suspended or struck off subject to the consent of the NZLS Council.
- On the bankruptcy of the donor. The attorney will work in association with the Official Assignee who may be the owner of the practice.

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

power of attorney and appoint another attorney. Both situations require the prior consent of the Council of the Law Society.

16. Will the NZLS store any old files of the practice?

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

Under clause 11, Schedule 1 LCA, the attorney may be able to recover storage costs, if funds are available. However, storage costs for long standing practices with lots of records will be a burden.

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

However, remember there are obligations to keep certain documents. See the Law Society Guidelines for the Retention of Records on Termination of Retainer. If clients cannot be located, deeds must be transferred or retained as the attorney thinks fit.

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

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

18. Power of attorney documents made under the Law Practitioners Act 1982

Following the Lawyers and Conveyancers Amendment Act 2012, lawyers were required to execute a new power of attorney. Powers of attorney put in place under section 70 of the Law Practitioners Act will be deemed to have been given under the LCA as long as they conform with clauses 2 and 6-9 (other than clause 9(c)) of Schedule 1. Those clauses require, among other things, prior written consent by the intended attorney, the appointment of an alternate, and that the power of attorney provides for the attorney to exercise particular powers and duties in given circumstances and for given periods.

19. Can a donor revoke a power of attorney?

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

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

20. What is the relationship between the attorney and the alternate?

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

21. What is the role of the Law Society?

Notice of the power of attorney must be given to the Law Society under clause 20, Schedule 1. The Law Society scans a copy of every power of attorney document into its database and ensures that attorneys have the appropriate qualifications to be appointed.

The Law Society will endeavour to notify the donor if an attorney is no longer qualified to be an attorney, for example if the attorney ceases practice. The Law Society will notify the attorney if it becomes aware that the attorney's services are required.

The Law Society regularly follows up those sole practitioners who have omitted to provide the required notification about their powers of attorney.

In addition, the Law Society:

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

22. Power to appoint substitute

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

23. Joint and several attorneys

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

24. Lawyers Nominee Companies

The Executive Director of the Law Society is authorized by the Council to exercise any of the powers set out in Rule 14 of the LCA (Lawyers: Nominee Company) Rules 2008. Rule 14 gives the power to appoint a director or liquidate the company. The Executive Director may make a decision together with the attorney on what is the best way forward i.e. appoint the attorney a director or appoint a liquidator.