



# **Accountability, Responsibility and Authority – its all about the limits!**

Presenter: Sean Popperwell,  
Popperwell & Co.

# Why are we here?

- To understand the risks arising from a practices failure to define the limits of authority for the conduct of a legal matter that are linked to a practitioners capability.
- To consider what practical steps you can take to reduce the risks and help your practice avoid potential liability claims.

# Sean Popperwell

Currently the Principal of Popperwell & Co, Sean was admitted to practice as a barrister in England & Wales in 1987 and as a legal practitioner in WA in 1991.

Sean practices almost exclusively in the area of professional negligence. He has represented Law Mutual's Insureds since 2001.

# Legal Practice as a Business

## The Law Practice as an Agent

Fundamental objective – to deliver legal services to customers (clients)

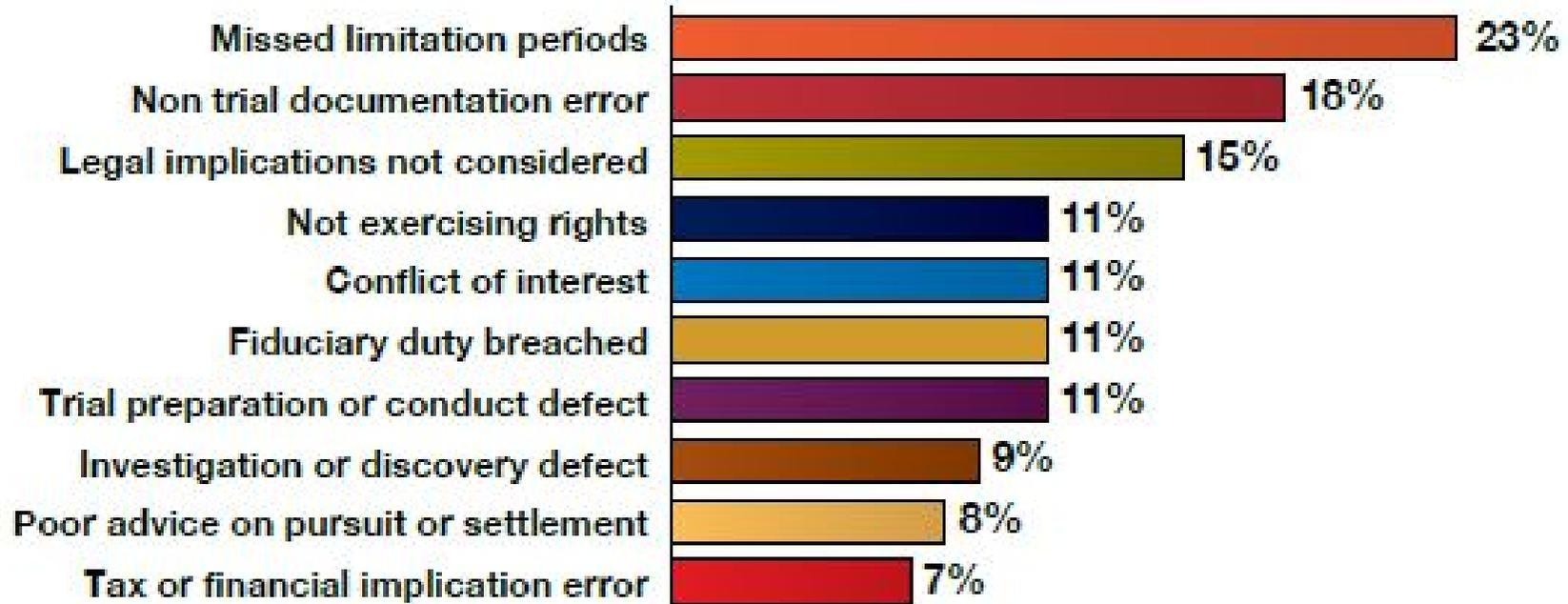
- Legal services delivered on behalf of the client.
- Law practice represents the interest of the client.

# Law Practice as an 'employer'

- Engages others to deliver legal services:
  - Professional
  - Non-professional
- Engages agents to deliver legal services:
  - Experts
  - Investigators
  - Other law practices (Barristers)

- Limits of authority to represent the client as agent:
  - Actual
  - Implied
- Responsibility arising from the obligation to:
  - supervise employees
  - monitor external service providers

# Top 10 allegations against insured firms



\* Data taken from Law Mutual (WA) Professional Liability Risk Profile Analysis June 2016

# Authority as an agent

- Express
- Implied

Exceeding the authority leads to claims.

# Law Practice acquires knowledge

- What knowledge does the law practice possess on behalf of the client?
- Failure to impart knowledge leads to claims.



# **Actual Authority**

## **What does your retainer say?**

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10

# Q1. Actual authority

Do you describe the scope of legal services to be provided?

A. Yes

B. No

# Implied Authority



- Fact specific
- uncertain

## Q3. Implied authority

Does a law practice have an implied authority to commence legal proceedings on behalf of a client?

A. Yes

B. No

## Q4. Implied authority

Does a law practice have an implied authority to commence an appeal against any adverse outcome interlocutory or otherwise?

A. Yes

B. No

# Answers

Answer to both is No

## Q5. Implied authority

Does a law practice have an implied authority to consent to a springing order?

A. Yes

B. No

# Answer

## Materiality

- Retainer – implied authority to do all things incidental to advancing the clients interests.
- Balance against what should be referred to the client – consider practicality and cost.

## Q6. Contracts

Does a law practice have an implied authority to contract on behalf of the client?

A. Yes

B. No

# Answer

No



## Q7. Litigation

Does a law practice have authority to compromise litigation?

A. Yes

B. No

# Answer

## Yes

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21



## Q8. Notices

Does a law practice have authority to accept notices on behalf of the client?

A. Yes

B. No

# Answer

# No



## Q9. Money

Does a law practice acting in a transaction in which the client is to receive money, authorised to accept the money?

- A. Yes
- B. No

**Answer**

**Probably**

**BUT**

**What money?**

# Trust Accounts

- What authority does a lawyer need to make payments from the practice's trust account?
- Section 216 *Legal Professional Act 2008*

# Trust Accounts

- What systems does your practice have to authorise payments out of trust?

# Supervision



1. Partners
2. Employees
3. External Service Providers

# Supervision – Law Mutual (WA)

## Statistics

- Reviewed (at a high level) the claims against 4 to 9 practitioner firms
- Of 130 claims, there are 41 where a failure to properly delegate or supervise is a probable cause (there may be more than one cause)
- Over 30% of claims for those firms
- Of them, 22 (>50%) involve a missed date
- Next highest is inadequate drafting – 6 claims (15%)

# CONCLUSIONS?

- Hard to deny inference that formal delegation and supervisory practices will avoid professional negligence claims
- Important for small to medium size firms where principals' time is at a premium
- The existence of a “process” is not enough; training and review are essential elements of control of risks

## Q13. Supervision

Can a law clerk or paralegal autonomously proof witnesses and undertake discovery in litigation?

A. Yes

B. No

# Answer

No



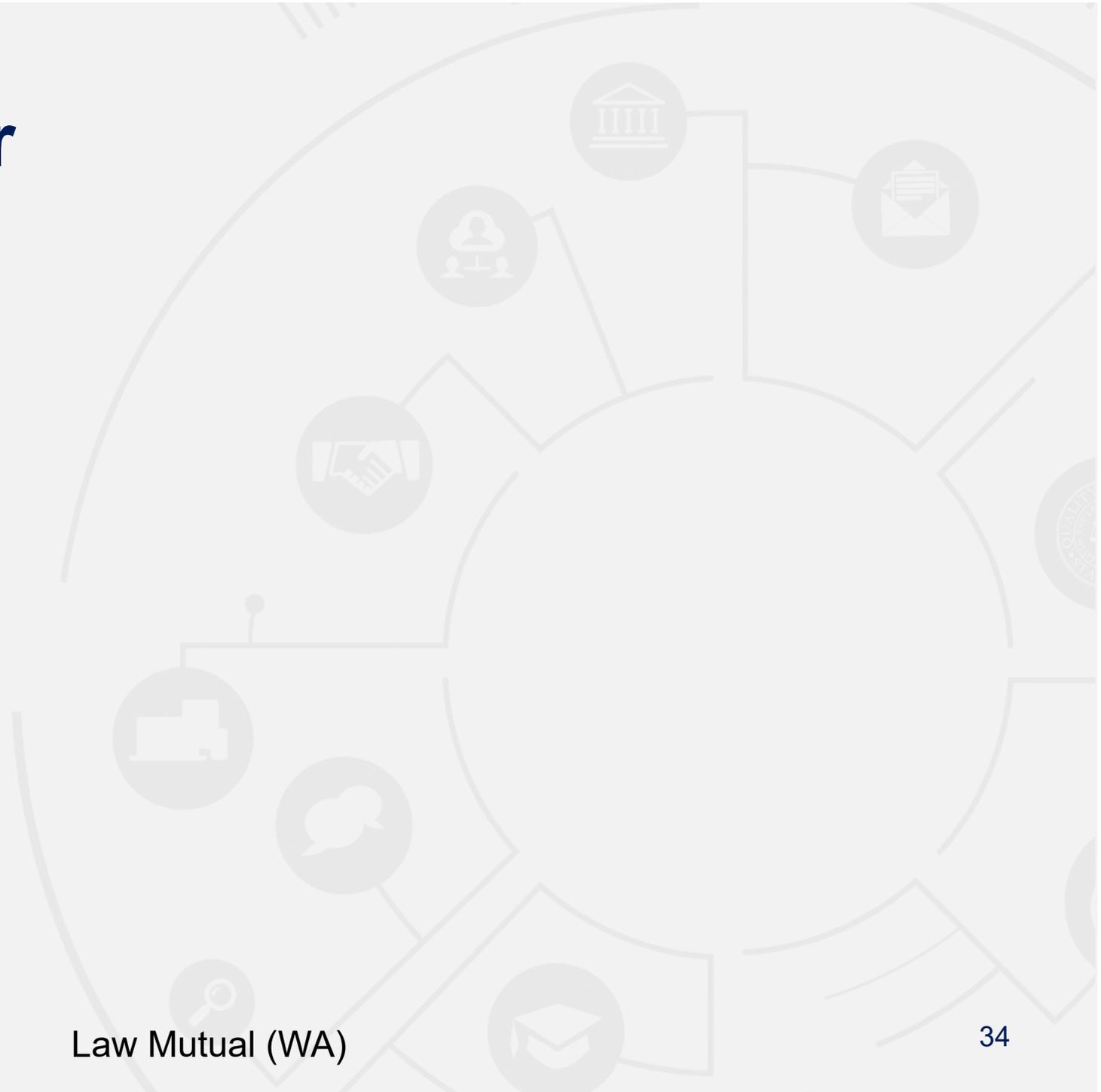
## Q14. Supervision

Can a supervising practitioner solely rely on the clerk or paralegal to bring problems to the practitioners attention?

- A. Yes
- B. No

# Answer

# No



# Lessons to be learned

- How often do you discuss files with:
  - Employed solicitors
  - Experienced employed solicitors
  - Other Partners
  - Employed solicitors practicing in areas that you do not have special knowledge or skills

# Electronic Communications

- Additional requirement to copy practitioner into all communications to the client; and
- Bring to the practitioners attention all communications received from the client.

# Uniform Law – 1 July 2020

- Will we be getting comprehensive Management systems directions

## Q14. External Service Providers

Is a legal practitioner absolved from liability when they act in reliance on the advice of Counsel?

- A. Yes
- B. No

# Answer

No

# External Service Providers

- Timing
- Briefing
- Competence
- Consideration
- Action
- Outside solicitor's bailiwick

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