



# Risk Management Training - Screening

2019

Presenters:

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# What are we here for?

- Understand priority risk concerns during screening phase



- Discuss best practice among WA law firms
  - prevent these risks occurring
  - manage their consequences

# Why this topic?

- Priority topic based on claims analysis and risk polling
- Part of Law Mutual's 3 year risk management training plan

# 3 year training program

- Based on risk management priorities
- Structured towards tangible improvement in claims prevention among firms
- Linked to practical guidance and support
- Where possible tailored to firm size and practice area

# 3 year training program

| Training Area              | 2018/19   | 2019/20  | 2020/21  |
|----------------------------|---|--|--|
| <b>Risk management</b>     | Introduction to risk management<br><br>Screening                            | Delivery   | Close out  |
| <b>Practice management</b> | Supervision and delegation  | Managing firm growth   | Strategy and risk appetite                             |
| <b>Matter management</b>   | Screening matters and clients<br><br>Scoping work                           | Client management during delivery<br><br>Closing out matters                 | Deadlines + limitation periods                         |
| <b>Legal services</b>      | Screening – conflicts + client identify<br><br>Client engagement agreements | Litigation risks<br><br>3rd party expert risks<br><br>Terminating a retainer | Non-litigation risks<br><br>Managing claims resolution |

# Related seminars

- Screening for and managing conflicts  
(Ashley Macknay – June 2018)
- ‘You’re not my client; are you?’ client  
identification and risk  
(Sean Popperwell – July 2018)

# Other resources

- **Matter management guidelines**

Requirements for screening phase around:

- Client identity and authority
- Understanding legal need
- Conflicts
- Suitability
- Decision making and communication

# Other resources

- **Screening guidance**

For each requirement in guideline

- Risks
- Must do's
- How to's
- Key controls

- **Control templates**



# How will this workshop work?

1

## INTRODUCTION

Purpose  
Process  
Outcomes

2

## RISK + CONTROL

Risks  
Causes  
Controls

3

## CONCLUSION

What will we do?  
What should you do?

# Process – preparation

1. Identified key risks and most vulnerable firms
2. Pre-session polling
3. Focus group risk workshops
  - Causes + impacts
  - Best practice controls

# Process – this session

- Workshop outputs – causes and controls
- Polling – control effectiveness and implementation

# How many practitioners are in your firm

- A. Sole Practitioner
- B. 2-5
- C. 6-9
- D. 10-15
- E. >15

# How many years in practice

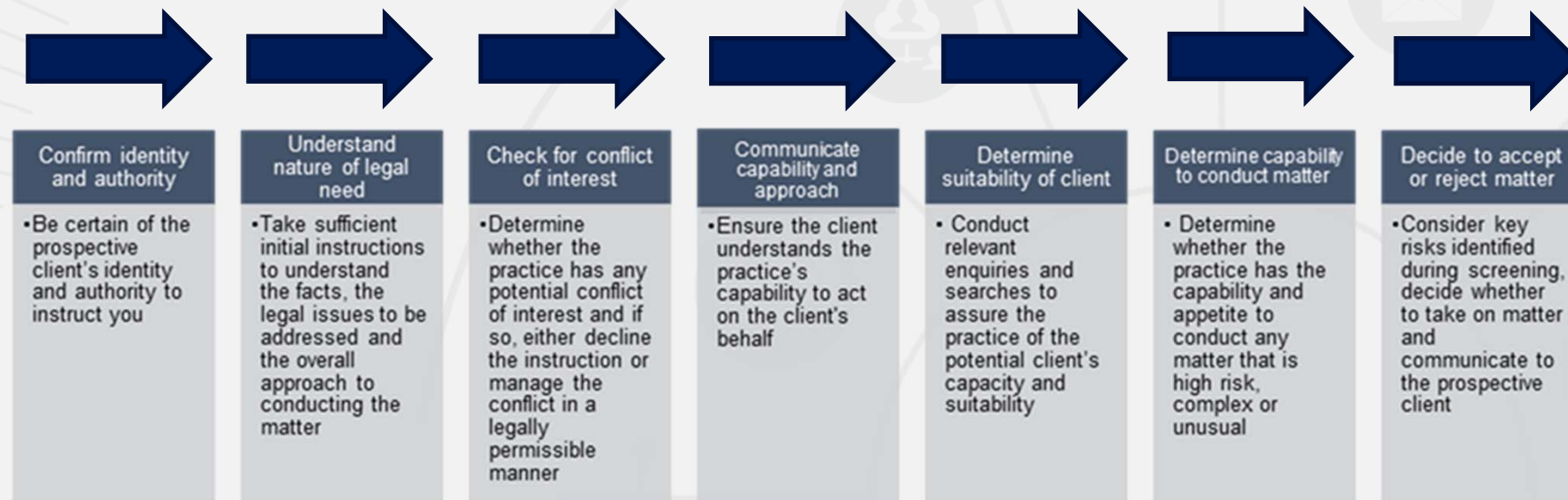
- A. 1 - 5
- B. 6 - 9
- C. 10 - 15
- D. >15

# What is your firm's area of specialty

- A. Family
- B. Personal Injury
- C. Wills & Probate
- D. Commercial
- E. Criminal
- F. Property
- G. Employment
- H. Litigation & Disputes
- I. None

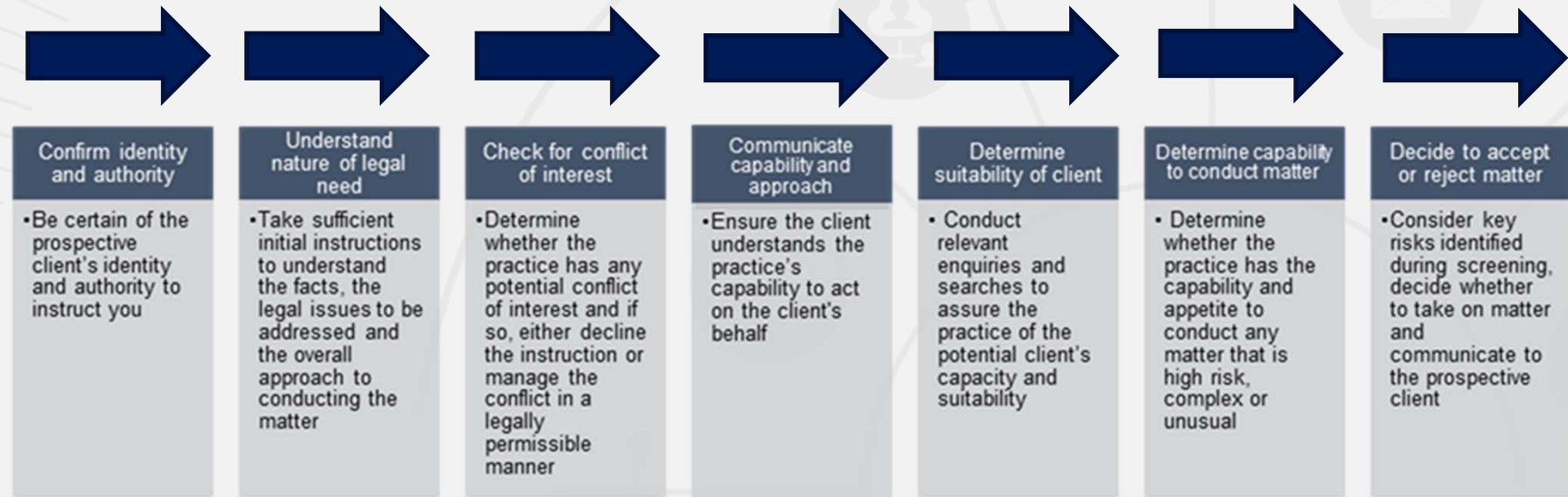
# RISK + CONTROL

# Screening requirements





# Screening risks

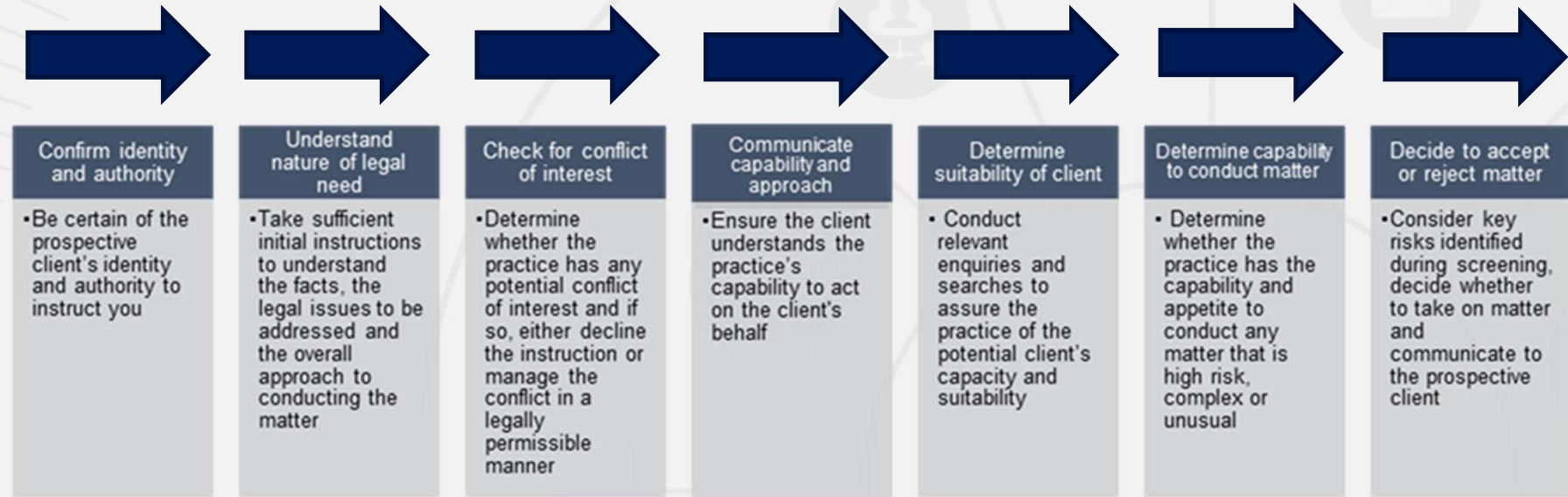


Person not who he says he is

Wrong corporate client – incorrectly described and/or complex structure

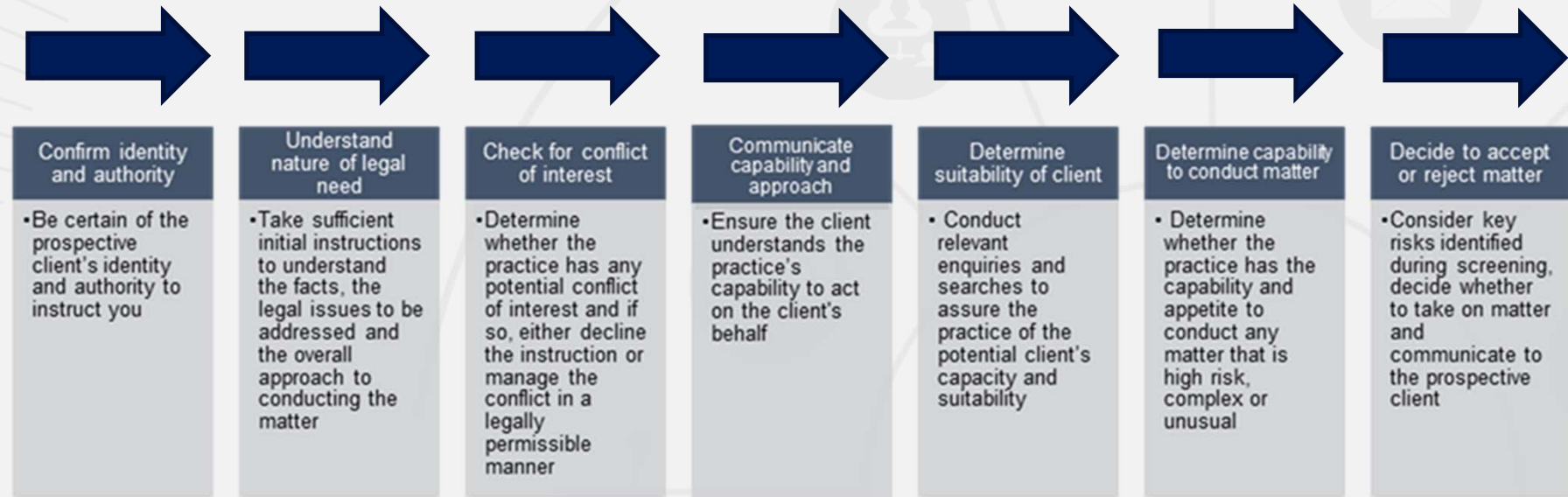
Person you meet does not have authority to represent the client

# Screening risks



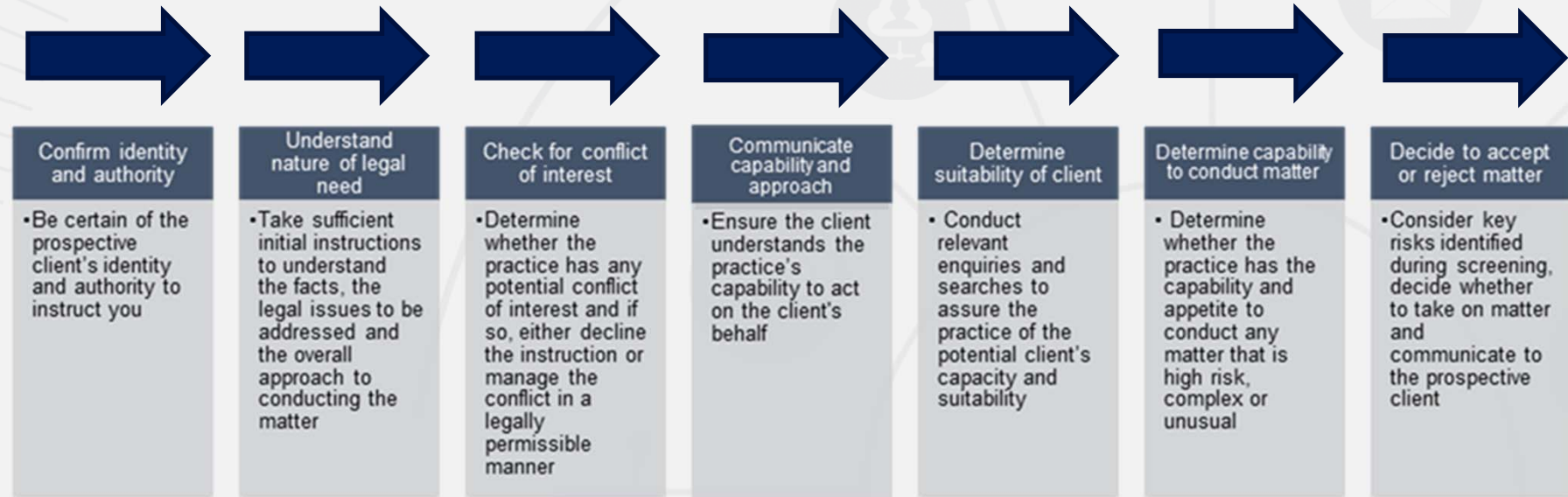
|   |   |
|---|---|
| <p>Person not who he says he is</p> <p>Wrong corporate client – incorrectly described and/or complex structure</p> <p>Person you meet does not have authority to represent the client</p> | <p>Incorrect decision to take on matter due to incomplete understanding of facts/issues</p> <p>Accept matter without IDing imminent deadline</p> <p>Take action based on insufficient understanding of facts/issues</p> |
|---|---|

# Screening risks



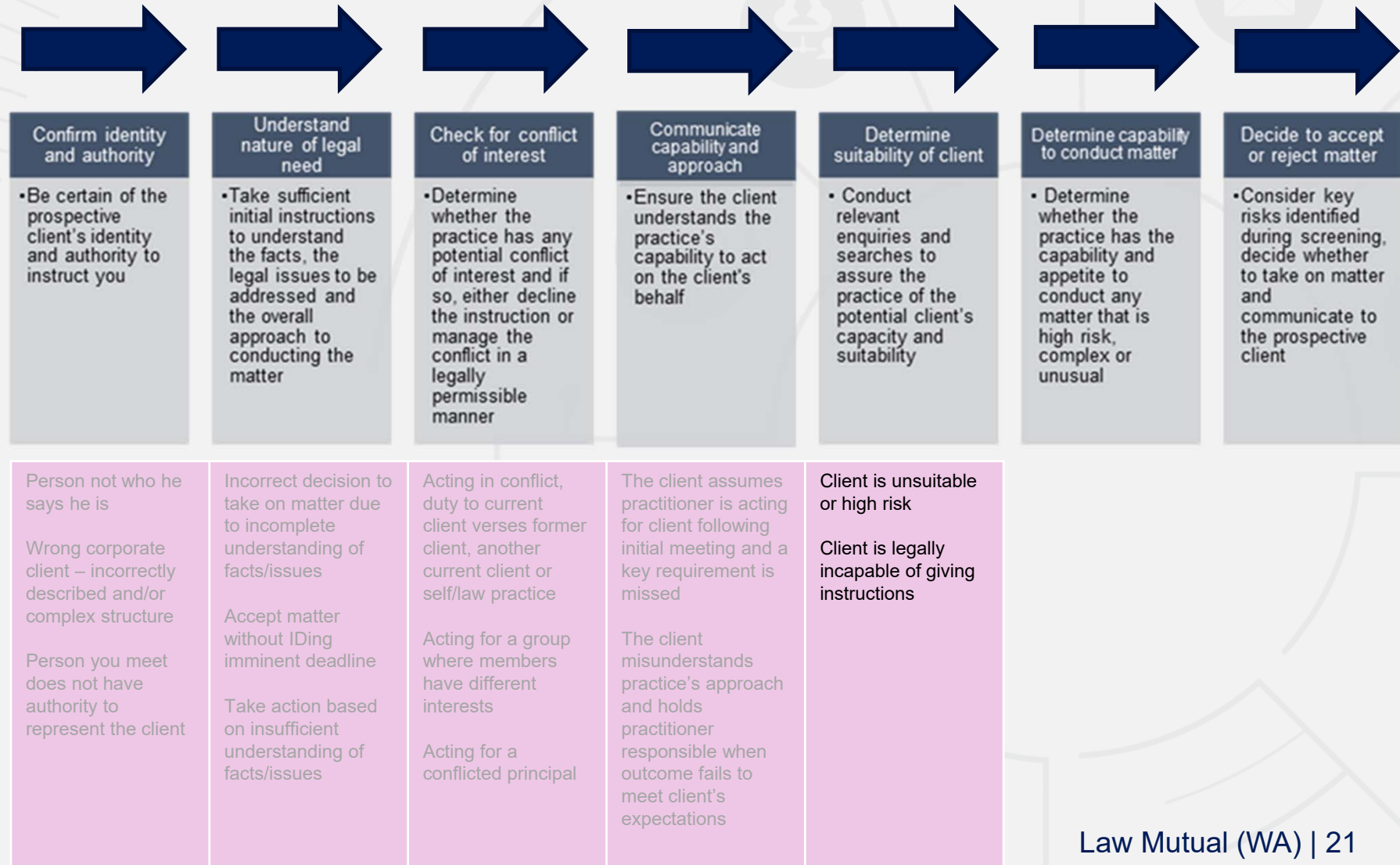
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|---|---|---|

# Screening risks



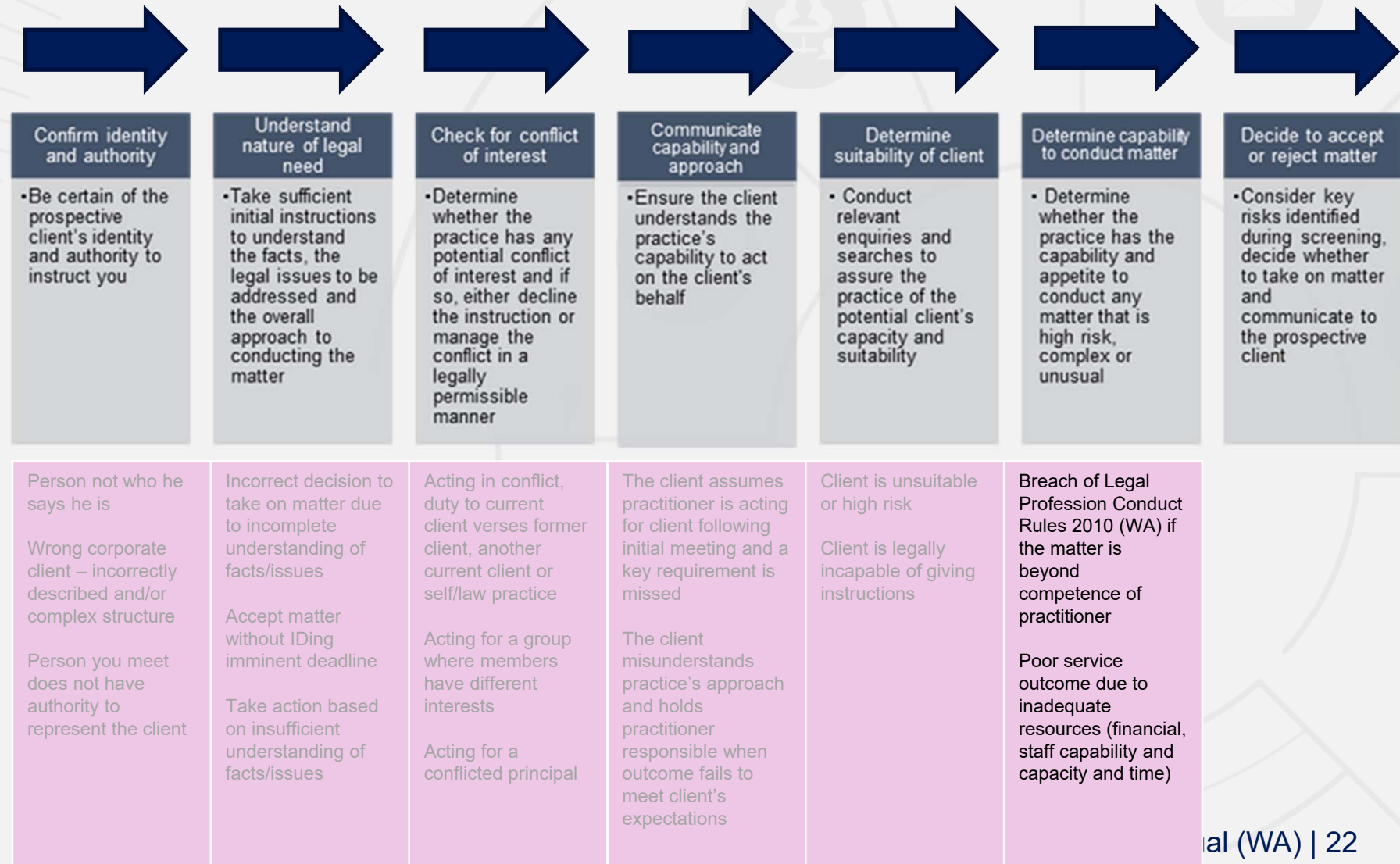
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|---|---|---|--|

# Screening risks

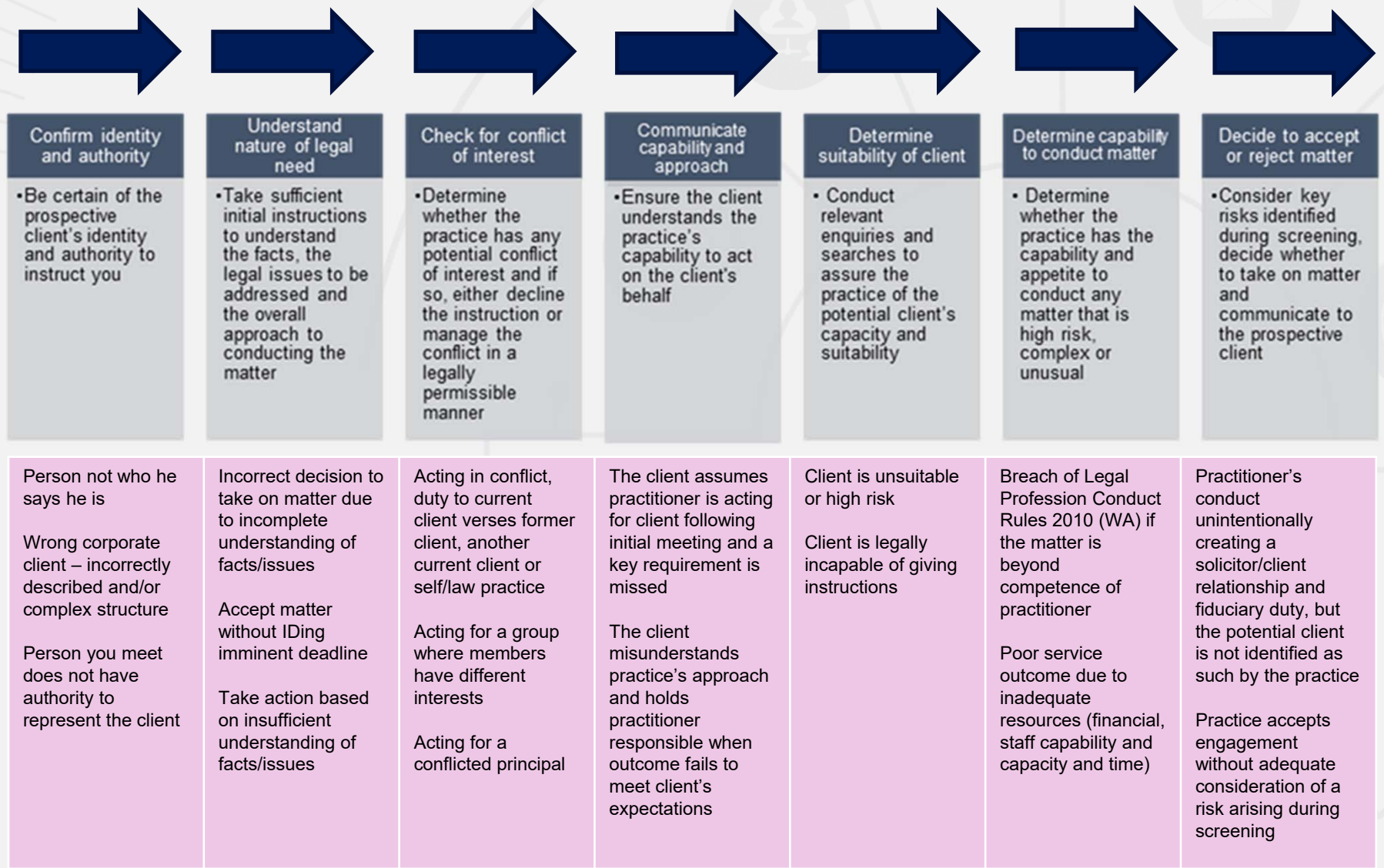




# Screening risks



# Screening risks



## Key risks during screening

- Failure to properly confirm the client's identity results in fraud
- Failure to identify who is the actual client results in a conflict or a breach of duty
- Failure to take sufficient initial instructions results in a prejudicial outcome for the client



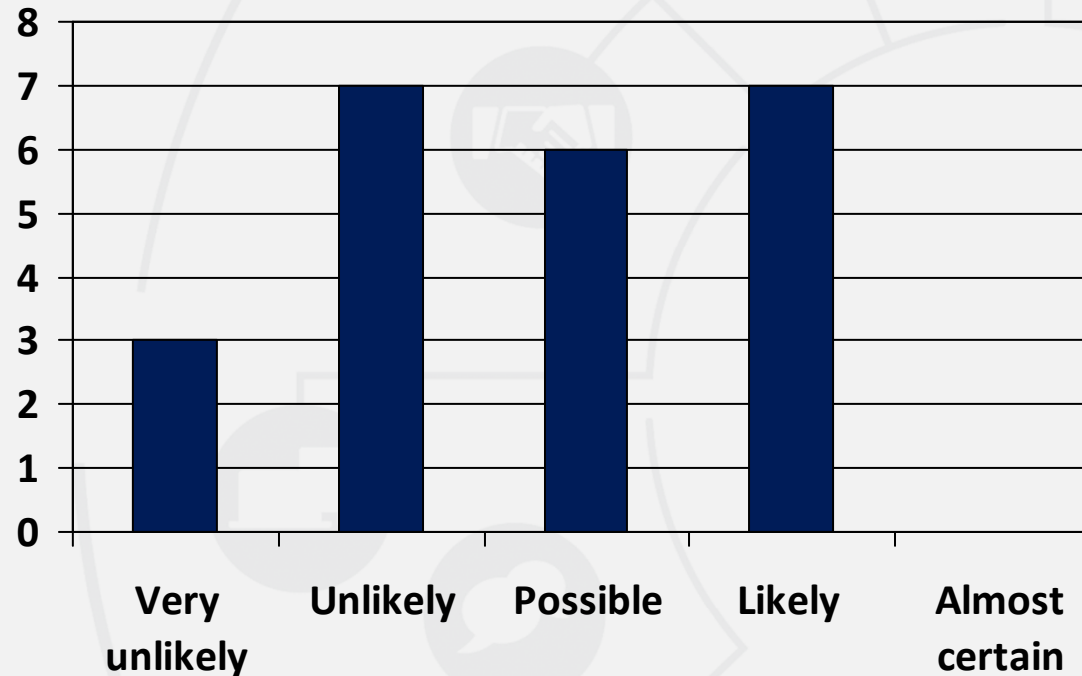
## Key risks during screening

- Failure to conduct a sufficient conflicts check or properly manage an identified conflict results in claim
- Failure to identify or properly manage a higher risk client or matter results in requirement to write off fees or a claim

# Risks – survey results

| Risk   | Likelihood |        |                |
|--|------------|--------|----------------|
|  | Possible   | Likely | Almost certain |
| 1. Failure to identify or properly manage a higher risk client or matter                           | 6          | 7      | 0              |
| 2. Failure to conduct a sufficient conflicts check or properly manage an identified conflict       | 2          | 2      | 1              |
| 3. Failure to take sufficient initial instructions results in a prejudicial outcome for the client | 4          | 1      | 0              |
| 4. Failure to properly confirm the client's identity results in fraud                              | 2          | 0      | 2              |
| 5. Failure to identify who is the actual client results in a conflict or a breach of duty          | 4          | 1      | 0              |

# 1. Failure to identify or properly manage a higher risk client or matter



# What is the risk?

- 'Higher risk client or matter'
  - Client's nature
  - Client's unrealistic expectations
  - Matter outside firm's capability
- Failure to identify
- Failure to properly manage
  - Terms of engagement, resourcing or turned down
- Results in the client relationship breaking down so badly that the firm is forced to write off fees and/or made subject to a claim.

# What are the causes of this risk?

# Causes – most likely?

| Cause   |  |
|---|--|
| Failure to identify risk factors in initial meeting                           |  |
| Failure to balance risk versus reward and turn away clients who are too risky |  |
| Failure to manage referrals i.e. screen referred clients                      |  |
| Failure to manage who can accept clients on behalf of the firm                |  |

# Matter management guidelines

| Activity  | Requirement  |
|---|--|
| Determine capacity and suitability of the client    | Conduct relevant enquiries and searches to assure the practice of the client's capacity and suitability                            |
| Determine capability and appetite to conduct matter | Determine whether the firm has the capability and appetite to conduct any matter that is high risk, complex or unusual             |
| Decide to accept or reject client and matter        | Consider key risks identified during screening, decide whether to take on matter and communicate to the client and related parties |

# How does a firm meet requirements?

1. There must be a shared approach
2. There must be mechanisms to ensure this shared approach is followed

These mechanisms are called 'controls'



# The Castle



It's 'the vibe'

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How do you know your firm always meets a requirement?



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# Our shared approach

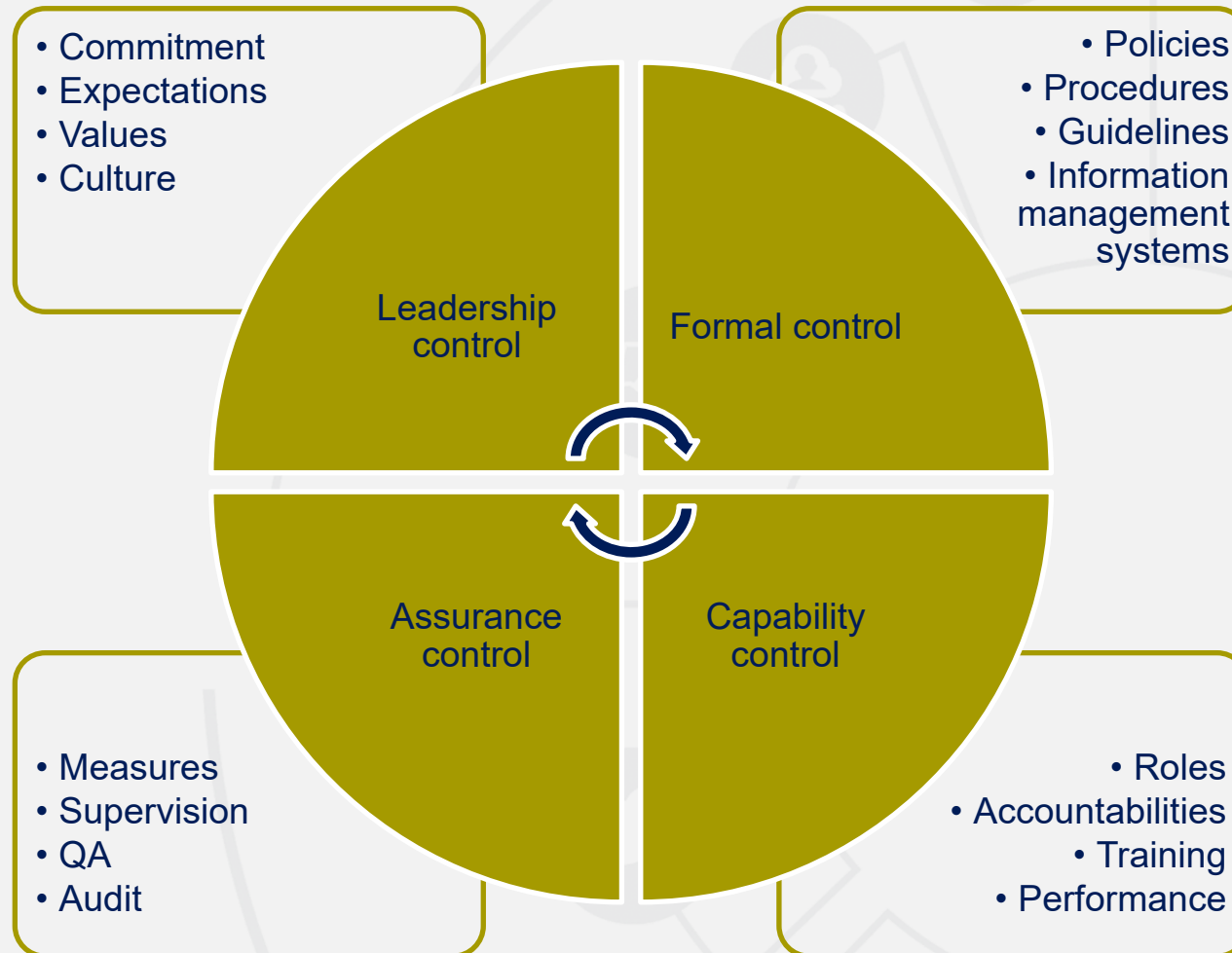
- Do we really have a shared approach?
- Are there gaps in our shared approach? Even if it is followed, are we left exposed?

# How do ensure our shared approach is always followed?

## *What are our controls?*

- **Knowledge:** How do people know the shared approach?
  - Training? Formal? Informal?
  - Documented procedure?
- **Accountability & authority:** Is it clear who is accountable and responsible for each step? Is it clear who has authority to do each step and who does not?
  - Documented?
- **Culture & recognition:** Does our leadership and culture encourage people to follow the approach? Does the way we recognise and reward people support or undermine adherence to the approach?
- **Assurance:** Are there ways to independently check that the approach has been followed? Are these checks conducted?

# The control model



# Controls – most effective?

| Controls  | Votes |
|---|-------|
| Policy on who can and cannot screen and accept clients  |       |
| Checklist around risk factors, including referrals  |       |
| Requirements around time for initial meeting  |       |
| Requirement to refer to senior person if risk factors are identified                          |       |
| Leadership direction around elevating risk concerns versus accepting risky but lucrative work |       |
| Requirements for supervision and review to include review of client management                |       |
| Culture that encourages everyone to elevate issues  |       |

# Which of these controls are implemented in your firm?

1. Policy on who can and cannot screen and accept clients
2. Leadership direction around elevating risk concerns versus accepting risky but lucrative work
3. Requirements for supervision and review to include review of client management
4. Culture that encourages everyone to elevate issues
5. Checklist around risk factors
6. Requirements around time for initial meeting
7. Requirement to refer to senior person if risk factors are identified

# ***If not implemented - which of these controls should your firm implement?***

1. Policy on who can and cannot screen and accept clients
2. Leadership direction around elevating risk concerns versus accepting risky but lucrative work
3. Requirements for supervision and review to include review of client management
4. Culture that encourages everyone to elevate issues
5. Checklist around risk factors
6. Requirements around time for initial meeting
7. Requirement to refer to senior person if risk factors are identified



# Implementation

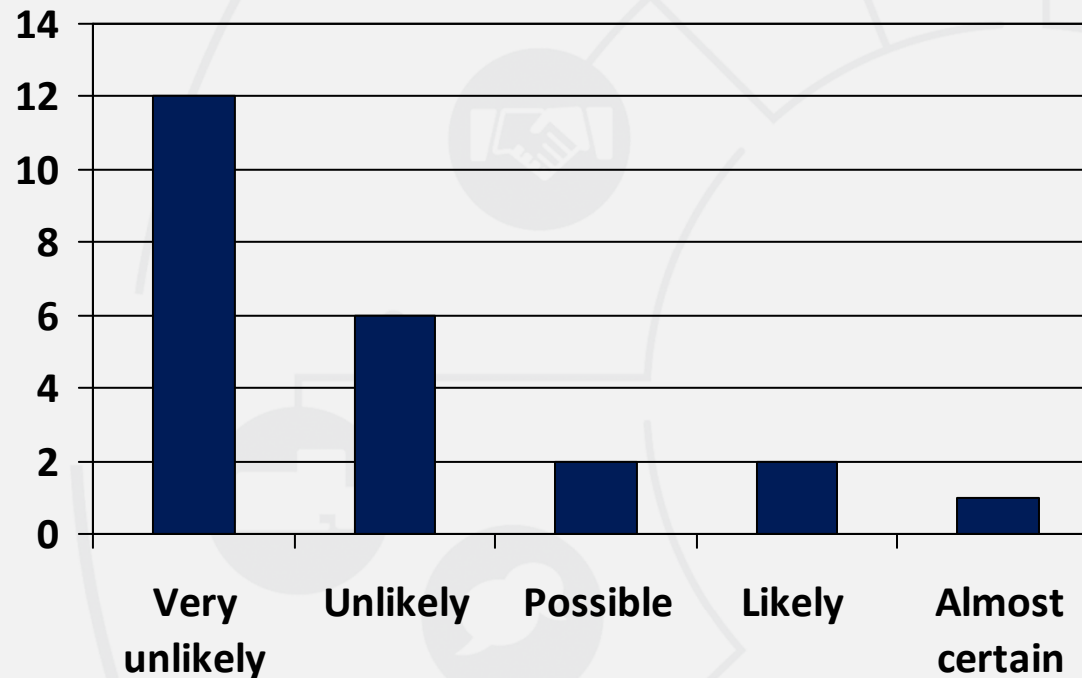
- Requirements for initial meetings should include
  - Firm's approach to phone, internet, Skype
  - Requirements around time
- Have senior lawyer attend some/all initial meetings and close out meetings
- Risk checklist should be accompanied by training/discussion as it is nuanced
- Culture around escalating high risk prospects and early problems with clients can be built through
  - “Bring out the dead” sessions before Friday drinks
  - Senior lawyers raising their risks and issues with midlevel and junior lawyers

# Risk factors/red flags when screening prospects

## Prospect:

- Is litigious
- Has instructed other lawyers on the matter
- Runs down lawyers
- Runs down other experts e.g. his accountant, doctor
- Has unrealistic expectations as to outcome, time or cost and cannot be convinced otherwise
- Overbearing and/or difficult

## 2. Failure to conduct a sufficient conflicts check or properly manage identified conflict



# What is the risk?

- A relationship that gives rise to a conflict exists, but is not identified by the firm
- The relationship giving rise to the conflict is known, but either the conflict is not recognised by the firm, or it is managed in a way that gives rise to a claim

# What are the causes of this risk?

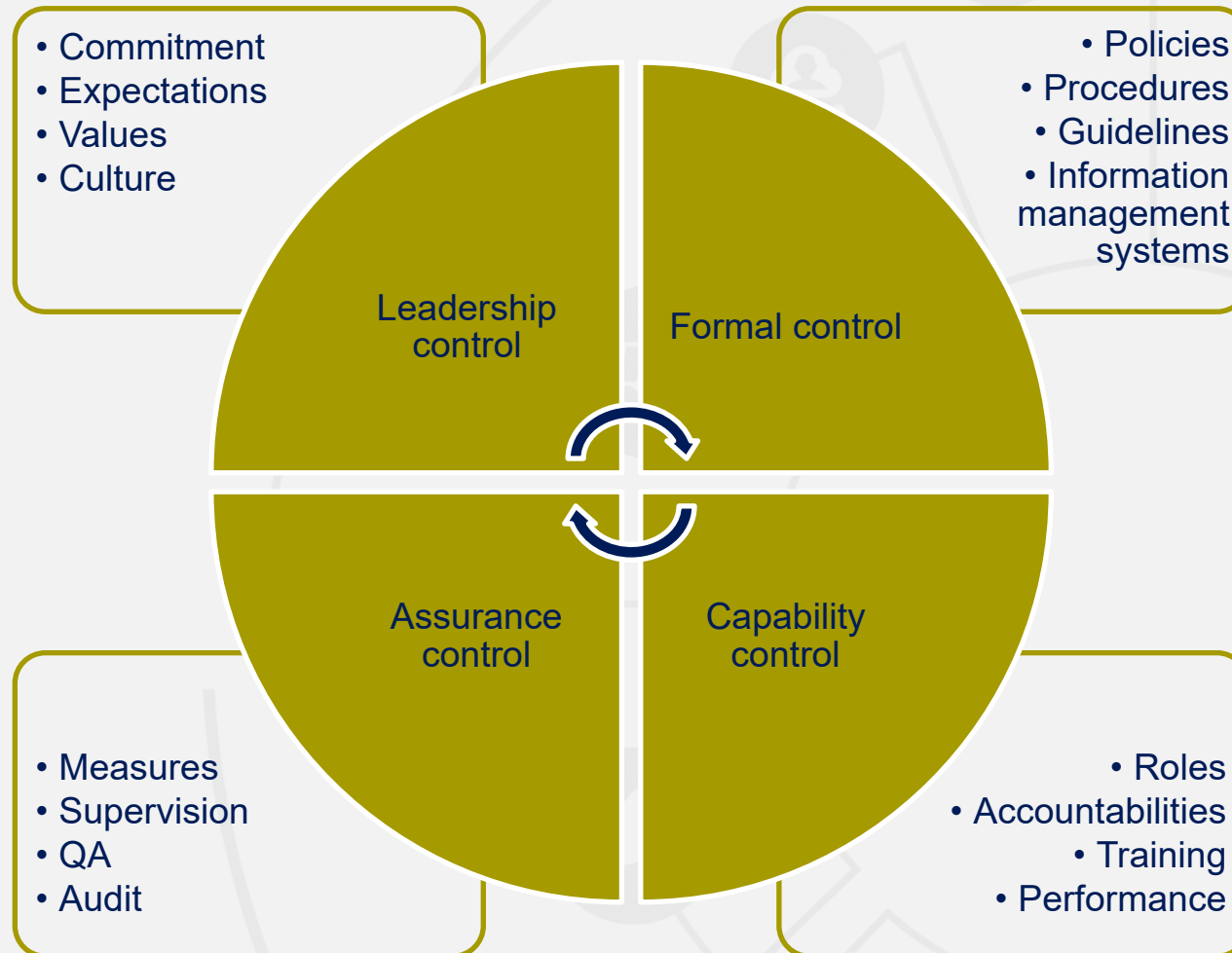
# Causes – most likely?

| Cause   |  |
|---|--|
| Failure to communicate new instructions within the firm (so do not identify that someone in firm has a relationship with the matter)                                |  |
| Failure to properly ID who you will act for - corporate vs individual, name changes etc.  |  |
| Conflict data used for conflict check is not complete e.g. not updated, all information from prior matters is not inputted, maiden names but not married names etc. |  |
| Conflict check not done   |  |
| No firm-wide and informed approach to when we are acting in a conflict, so individual lawyer incorrectly decides there is no conflict                               |  |
| Firm's approach to risk vs reward not followed. I.e. Individual lawyer understands there is a conflict but goes ahead anyway to chase fees etc.                     |  |
| Failure to obtain informed consent  |  |
| New conflicts post engagement are not identified  |  |

# Matter management guidelines

| Activity                       | Requirement   |
|--------------------------------|---|
| Check for conflict of interest | Consider whether the Practice has any potential conflict of interest and if so, decline the instructions or manage the conflict in a legally permissible manner |

# The control model





# Controls – most effective?

| Controls  | Votes |
|---|-------|
| Requirements for how conflicts database is updated  |       |
| Requirements for further identity checks e.g. ASIC checks in certain situations                                   |       |
| Accountability for completing conflicts check   |       |
| Requirement or mechanism that no file can be opened until conflicts check completed                               |       |
| Conflicts process includes communication of new instructions within the firm                                      |       |
| Leadership and training around conflicts and firm's risk appetite   |       |
| Firm guidelines around conflicts  |       |
| Requirements around obtaining informed consent  |       |
| Requirement to inform clients to communicate changes that may introduce new conflicts and the consequence of this |       |
| Include new conflict and identification management in requirements for supervision and review                     |       |

# Which of these controls are implemented in your firm?

1. Requirements for update of conflicts database
2. Requirements for identity checks e.g. ASIC checks
3. Accountability for conflicts check
4. Requirement or mechanism that no file can be opened until conflicts check
5. Communication of new instructions within the firm
6. Leadership and training around conflicts and firm's risk appetite
7. Firm guidelines around conflicts
8. Requirements around obtaining informed consent
9. Requirement to inform clients to communicate changes that may introduce new conflicts
10. Include new conflict identification in requirements for supervision and review

# ***If not implemented* - which of these controls should your firm implement?**

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# Implementation

- If unsure whether a conflict arises, there are barristers you can call who will advise on this question for free

# **‘Screening for and managing conflicts’**

## **Ashley Macknay**

- Conflicts check is not a purely administrative or data driven process but requires legal judgment
- Red flag instructions

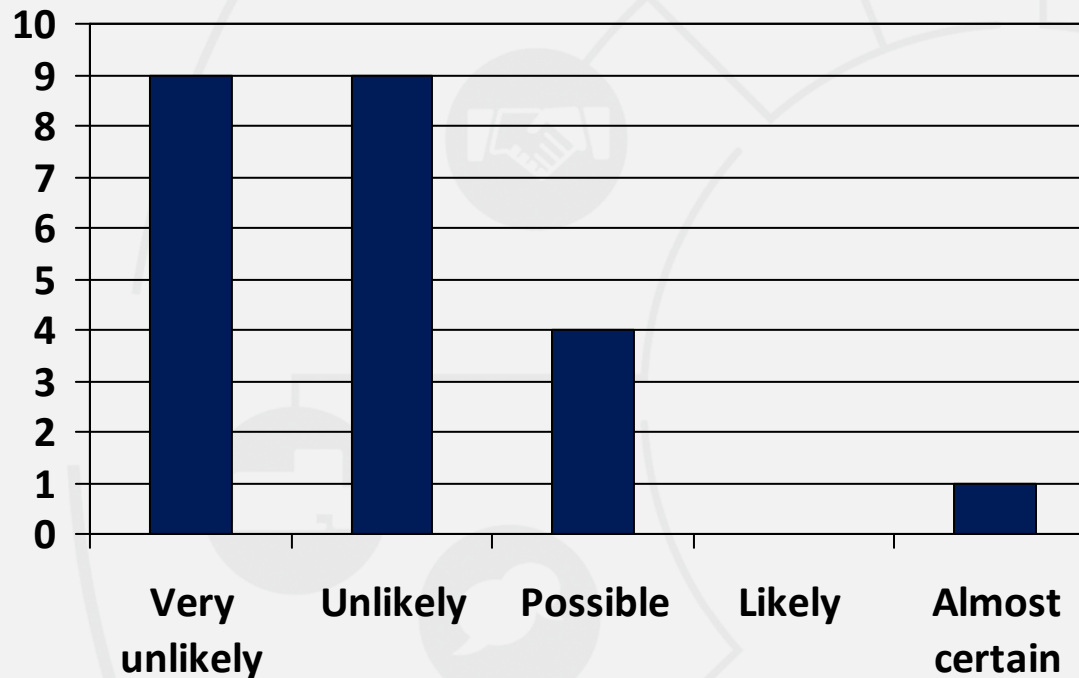
# Red flag instructions

- Representing a relative in litigation or a commercial transaction
- Undertaking a commercial transaction for your immediate family through your law firm
- Undertaking a commercial transaction with a client who is not independently represented
- Receiving a referral from an existing client to act for a party entering into a commercial transaction with that client.

# Red flag instructions (cont'd)

- Receiving instructions from a third party to prepare a will / enduring power of attorney or guardianship for a person, especially for one who is elderly
- Acting for a company / association where you are on the board / committee
- Accepting instructions to conduct litigation tactically to delay / other than to vindicate rights

### 3. Failure to take sufficient initial instructions results in prejudicial outcome for client





# What are the risks?

- making a decision to take on a matter without an adequate understanding of its facts and issues
- giving preliminary advice based on insufficient understanding of facts or issues, prejudicing the client
- accepting matter without having identified an imminent and critical deadline, resulting in a claim
- breach of *Legal Profession Conduct Rules 2010 (WA)* if matter beyond competence of practitioner or if client's lawful, proper and competent instructions have not been followed

# What are the causes of this risk?

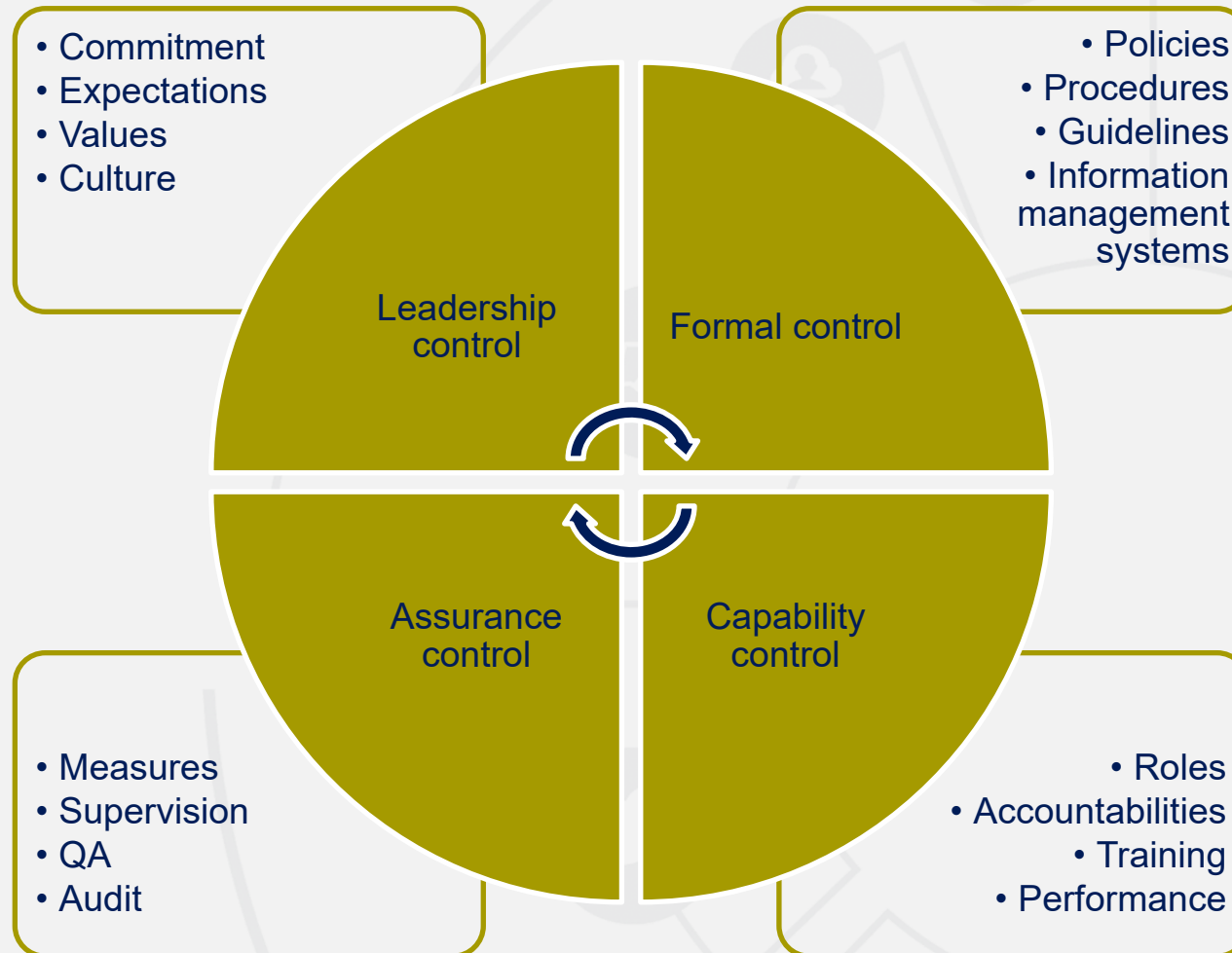
# Causes – most likely?

| Cause  |  |
|--|--|
| Insufficient time put aside for first meeting  |  |
| Poor questions and listening   |  |
| Lawyer accepts narrow instructions without gathering facts   |  |
| Lawyer lacks experience or expertise   |  |
| Fee pressure - client doesn't want to pay enough to give lawyer sufficient time to gather instructions |  |
| Client language or other difficulties communicating  |  |
| Over reliance on client information  |  |
| Error in the system or process used by the firm to produce questions/gather instructions               |  |
| Failure to follow up first 'business development' meeting with second meeting where required           |  |
|  |  |
|  |  |

# Matter management guidelines

| Activity                        | Requirement  |
|---------------------------------|--|
| Understand nature of legal need | Take sufficient initial instructions to understand the facts, the legal issues to be addressed and the overall approach to conducting the matter |

# The control model



# Controls – most effective?

| Controls   | Votes |
|--|-------|
| Minimum requirements for initial meetings  |       |
| Initial communication provide clarity to client as to whether meeting is to decide on engagement and/or provide advice                                   |       |
| Process for setting up first appointment includes request for prospect to provide information before the meeting   |       |
| Supervision requirements include review of initial instructions and first advice to client, plus peer review of instructions on critical/complex matters |       |
| Clear instructions to the client as to what he must do and what he must provide, and when, in order for firm to meet his objectives                      |       |
| Cost agreement/letter of engagement sets out the instructions/scope  |       |

# Which of these controls are implemented in your firm?

1. Minimum requirements for initial meetings
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# Implementation

- Take time to train lawyers on taking initial instructions
- In training and internal discussion:
  - be wary of over emphasising ‘costs agreement’ aspect, talk about ‘terms of engagement’
  - Accommodate need to tailor content to clients
    - e.g. based on sophistication, knowledge of English

# Screening Guidance

For each requirement in the guidelines...

|                                  |  |
|----------------------------------|--|
| <b>Risk considerations</b>       | What can go wrong if the requirement is not met                              |
| <b>“Must do’s”</b>               | Activities the firm should make mandatory                                    |
| <b>“How to’s”</b>                | Advice and detail on how to implement the must do’s                          |
| <b>Potential formal controls</b> | Policies, processes and checklists that ensure must do’s are done adequately |
| <b>Capability</b>                | Who should be accountable for must do’s                                      |
| <b>Supervision</b>               | How should senior lawyers supervise junior lawyers                           |

Thank you

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