



IN CONVERSATION: DEBORAH EVANS,
CEO, LEGAL COMPLAINTS SERVICE
TAKING ON PARTNERS
CORPORATE GOVERNANCE

MANAGING Risk **Winter**
2007

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MANAGING Risk Winter 2007

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...from the editor

Welcome to the Winter issue of **MANAGING Risk**.

Much has happened since our last issue. The professional indemnity renewal

period has come to an end – by all accounts, the renewal market remains 'soft'.

Another key development has been the arrival, on 30 October, of the **Legal Services Act 2007**. This legislation promises some seismic implications for law firms of every size and composition. Sensible law firms will have already made their own assessments of the strategies they need to adopt to compete in the new legal services market.

In this issue, Matthew Moore highlights some key requirements of the Money Laundering Regulations 2007, looking particularly at new practices and procedures for undertaking 'customer due diligence' and investigating beneficial ownership.

We talk to Deborah Evans, CEO of the Legal Complaints Service, reviewing current issues in the complaints-handling process and looking to the future under the **Legal Services Act 2007**.

Web4Law, publishers of Managing Risk, would like to thank readers, contributors and advertisers for their support throughout 2007 and wish everyone a happy Christmas and prosperous 2008.

RUPERT KENDRICK LL.M
Editor

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New post for Managing Risk consultant editor

Law firm, TLT, has appointed John Verry as its new director of risk. He joins TLT from international risk services provider Lockton, where he was director of risk and quality, providing risk and compliance consultancy advice to major firms.

John is well-known in the risk and compliance field. He has written numerous articles on risk and compliance and has also co-authored with Web4law director, Matthew Moore, *Risk and Quality Management in Legal Practice*, published by The Law Society; and is consultant editor to *Managing Risk*.

New regulatory measures introduced by SRA

A new system of concluding investigations by agreement with solicitors has been introduced by the SRA.

Written agreements will give details of an investigation and findings and could include solicitors agreeing to come off the roll permanently or for specified periods of time.

SRA chief executive, Antony Townsend, said "These agreements will help to provide prompt, transparent and efficient regulation; and a robust outcome to our investigation, with solicitors agreeing to our sanctions.

They will mean a more timely and generally less costly process than going to the Tribunal."

Examples of possible agreements are:

- where there has been a system failure within a firm, rather than a culpable individual failure, and it is clear that the problem has been addressed;
- where solicitors have failed to spot conflicts of interest but agree to better procedures with training and verification.

<http://www.sra.org.uk/consultations/110.article>

Indemnity rates fall at renewal

According to Marsh, the October renewal season saw competition-driven reductions in renewal premiums for most law firms.

Sandra Neilson-Moore, European Practice Leader for Law Firms' Professional Indemnity at Marsh, said: "The market continued to be soft with the rates on coverage for primary layers decreasing by 10% and more for firms in the top 100. Gross revenues for most of the larger firms continue to increase, which again enabled insurers to hold premiums relatively steady, while granting healthy reductions in terms of rate on revenue. Where competition was present, or if a firm was overpriced to begin with, real premium reductions were also possible.

"However, despite the continuing intense market activity, our experience this year was that only a minority of firms changed insurer. Incumbent insurers in most cases 'did enough' to keep the clients they wanted to keep."

Email encryption businesses across UK

Specialist UK security provider, Securecoms, has launched high-end email encryption services. The *Secure-mail* and *Secure-mail:lite* services overcome the threat of interception as an email passes across the public internet.

According to a recent survey of attitudes towards email security by Strategy One, there is a widespread and mistaken belief that existing anti-virus and spam protection solutions, provide sufficient email protection.

Secure-mail and *Secure-mail:lite* can be installed in a few minutes without disruption to an IT setup. They do not require software integration and are simple to implement.

Securecoms chief executive, David

Ford, claims *Secure-mail* and *Secure-mail:lite* fill an important gap in the security marketplace: "The growth in the volume of email used to send highly sensitive information presents a real risk, particularly to professional service firms and any organisations dealing with other people's confidential information. We believe the widespread adoption of email encryption has just not happened because of complexity and cost in both resources and money.

HSBC Bank plc – a shareholder in the company – is also Securecoms' banker for the launch of the *Secure-mail* service.

www.securecoms.com

New fee earner disciplines required

The Money Laundering Regulations raise new compliance issues for fee earners. Matthew Moore explains

The most pressing elements of the new **Money Laundering Regulations 2007** (the regulations) are those relating to 'customer due diligence' ('CDD'). These go further than the relatively straightforward client identification ('ID') procedures that have been in place for some time under the 2003 Regulations, and are likely to represent a significant challenge in commercial practice.

Meaning of CDD

CDD is stated by regulation 5 to mean three things:

- identifying and verifying the client on the basis of 'documents, data or information obtained from a reliable source';
- identifying if there is a beneficial owner other than the client and taking 'adequate measures, on a risk sensitive basis, to verify his identity' including measures to understand the ownership and control structure of any 'legal person, trust or similar legal arrangement';
- obtaining information on the purpose and intended nature of the business relationship.

The new regime advances a 'risk-based' approach to ID checking. There is a new duty under regulation 7(3) on all firms to undertake their own risk

assessment of their potential exposure and to be able to justify their approach, if questioned, to the SRA. In some circumstances, 'simplified due diligence' is permitted, in which case no formal checking is needed. In others, as where the client is not physically present or the new definition of a 'politically exposed person' applies, more checking ('enhanced due diligence') is required.

The risk-based approach has its merits – there is little point in having to establish the identity of a major plc or local authority client. Conducting the necessary risk assessment, however, is yet another responsibility for those in compliance roles; nor can there be any guarantee that their conclusions will be acceptable, if challenged.

Beneficial ownership

The regulations introduce obligations to undertake greater checking on the beneficial ownership of most trusts and organisations, along with their management controls.

The initial Treasury draft of the regulations received considerable criticism and was revised under pressure from the Law Society and others. This has allowed more specific advice on the obligations of firms to be developed, but the practical problem remains of ensuring that those taking instructions in areas such as trusts and corporate work persist with enquiries that are often resisted by clients. There is then a need to apply CDD to beneficial owners, though not usually to the same degree as clients.

Similar concerns will apply to the need to ask the client about control and



Matthew Moore

management structures. These might be simple enough in domestic family owned companies, but much more arduous if dealing with an international client base operating through, often deliberately, complex and obtuse structures. All of this, of course, is undertaken before any work is done for the client.

Monitoring data

The firm cannot even relax its guard completely once the client has an established relationship with the practice. In addition to taking ID evidence when instructions are first received, there is now an ongoing obligation to monitor the relevant data. Law Society advice suggests renewing the full CDD process if, for example, there is a three year gap since instructions were received, but it may well be that more limited checking of address details, at least, is needed if the gap between instructions is less.

The problems for management are twofold: first, how to settle the regime for compliance now that one size no longer fits all practices; second, how to ensure that fee earners support the new regime when taking and monitoring instructions. As ever, the administrative burdens are increased by the new provisions, and the risks associated with non-compliance are also increased.

Matthew Moore can be contacted at matthew@web4law.biz

The rise and rise to partnership status

Time to appoint new partners? John Machell and Jennifer Haywood, barristers, Serle Court Chambers, examine some key issues to which the best candidates will expect a business-like response

Most legal practices are conducted through partnerships or limited liability partnerships. It is surprising how little due diligence is undertaken by prospective partners. Many accept partnership without any idea of the implications and lose sight of the fact that they are taking on liabilities as well as gaining status and a share of profits.

Decision to join

The kinds of questions that prospective partners need to address include:

- the business, financial and personal case for partnership;
- the kind of work place; the approach to work/life balance; the expectations of the firm and their expectations;
- the business structure – whether a traditional unlimited partnership, an LLP or company;
- whether there are plans to incorporate an unlimited partnership, and reasons for not having done so already;
- the partnership agreement; or, if none, the basic terms governing the partnership;
- the history of partnership disputes;
- the firm's performance;
- the firm's profits over the last three years;
- the balance sheet; the sustainability of the gearing; and contingent liabilities;
- the likely capital contribution;

- remuneration and future expectations;
- termination processes, including notice, expulsion without cause, compensation issues, 'garden leave', return of profit and capital, and restrictive covenants;

Fiduciary duties

Fiduciary duties and good faith between partners is the cornerstone of partnership law: a partner's conduct "will bear to be tried by the highest standard of honour" (*Lindley LJ: Blisset v Daniel (1853)*).

Most partnership and LLP agreements incorporate a duty of good faith. Fiduciary obligations can be varied by agreement. An incoming partner who wishes to follow other business interests will need to examine the partnership agreement to determine whether such conduct is permitted.

This relationship between partners arises even before the partnership has been formed. Unlike most commercial situations, prospective partners owe each other a fiduciary obligation to disclose all information material to the decision whether to enter into

partnership. Failure to comply with the obligation can render an agreement to enter into partnership voidable and may give the innocent partner a remedy in damages or for an account of profit.

Profit sharing arrangements

Most professional service firms have different categories of partner. Most commonly partners are admitted as salaried or fixed share partners and later promoted to equity partnership. Salaried and fixed share partners are remunerated with a fixed amount, often coupled with a profit or performance-related bonus.

Remuneration arrangements among equity partners differ significantly. Some firms implement 'lockstep' systems where profits are shared according to holdings of points, with junior partners being awarded points at the bottom of the lockstep with annual increases. Other firms operate a merit-based arrangement where profit is allocated by a committee based on performance criteria. Many firms have agreements that incorporate elements of both basic systems.

Capital

Most firms require partners to contribute capital. The amount varies. Firms often have arrangements with their bankers enabling the partners to borrow capital contributions.

Jennifer Haywood



John Machell





Partnership does not have to be the luck of the draw

Liability

Partners in a traditional partnership have unlimited liability. A partner is personally liable for all the debts and obligations of the firm incurred while he or she is a partner.

A partner joining a firm does not assume responsibility for debts and obligations incurred before joining. However, it is extremely important for a prospective partner to understand if there is (as between the partners, by way of indemnity or contribution obligation) any liability for past liabilities.

A provision imposing such an obligation may not be obvious: for example, there may be a clause providing that the partners from time to time shall discharge the debts and liabilities of the firm or, more obscurely, a clause imposing an obligation on the continuing partners to indemnify an outgoing partner against all the debts and liabilities of the firm, whenever incurred. Past liabilities that may be caught by such clauses will include accrued liability for dilapidations on the firm's premises and uninsured professional indemnity claims, which may well be unknown at the date of the admission of a new partner.

The position of someone joining an LLP is better. An LLP is a corporate entity with its own separate legal existence. The partners (known as 'members') are not personally liable for the LLP's debts and obligations and stand only to lose their capital in the event the LLP fails.

However, LLP membership is not

wholly risk free. Broadly speaking, members can face potential personal liability in two situations. First, in the event that the LLP becomes insolvent, members face potential liability under the **Insolvency Act**: for example, for wrongful trading, return of drawings and transactions at undervalue.

Second, in the event of a catastrophic professional indemnity claim that exceeds insurance cover, a member may face direct personal liability to the client in tort. The question of the personal liability of a member of an LLP in tort is untested in the English court. The key question is whether there was a special relationship between individual member and the client such that the member is taken to have assumed personal responsibility.

Ultimately, the matter is one of policy: should the law recognise the right of professionals to trade with limited liability or should all professionals be personally liable for their own negligence? Even if the law imposes a duty, it may well be possible to exclude it by a provision in the LLP's terms of business.

Some LLPs have additional insurance to provide funds for the dependants of individual members

who face catastrophic personal liability, so-called 'lifeboat' cover.

Even if the business is operated through an LLP, third parties dealing with the LLP (such as banks and landlords) may insist that the members give personal guarantees.

Leaving

Few prospective partners consider the departure issues from the LLP. There are a number of key issues:

- the periods of notice either way;
- enforced removal, with or without good cause; and
- the financial and other consequences of departure.

In the past, many partners have remained in the same firm for their entire careers, but mobility between firms is now commonplace. The attraction of a lateral hire to another firm is often largely dependant upon client following. Most partnership agreements contain covenants restricting the ability of an outgoing partner to deal with the firm's clients. Although the courts often strike down such covenants as unreasonable in the employment field, English courts are notoriously reluctant to interfere with covenants given between partners.

In Conversation...

*Why is complaints-handling still so much of an issue?
Deborah Evans, Chief Executive of the Legal Complaints Service
talks to Editor, Rupert Kendrick about the problems*

"It's been an unusual career path for me," explains Deborah Evans, as we sit down to discuss how she arrived at her position as CEO of the Legal Complaints Service (LCS). She's certainly not joking!

"I took a degree in genetic engineering, and then joined trading standards dealing, for instance, with due diligence issues; at the same time undergoing some legal training. From there, I moved to the Legal Aid Board where I undertook audits, then to a large law firm in Birmingham where I was Practice Director for eight years."

Even without a formal legal qualification, she feels this experience has more than equipped her for her present position which she has held for just over a year, as we speak.

Does she feel that the profession is making any progress in terms of managing its complaints? "I can't say in all honesty that the number of complaints against solicitors is improving. There's no real sign of things getting any better," she explains.

"The LCS is currently involved in a new project, *Engaging the Profession* in which we are holding conferences and delivering presentations in order to try and educate the profession to manage potential and actual complaints.

"But I'm afraid the basic causes of complaints remain the same: excessive fees; delay; and lack of communication. As much as just over 25% of the claims arise from conveyancing – mainly client relationship management issues – failing to provide a good service to the client.

"We handle about 18,000 complaints annually, but less than ten per cent relate to conduct issues. The complaints are chiefly private client complaints and mostly arise from small firms, because they undertake a greater proportion of that type of work."

I ask if there is any sort of dialogue between law firms and the LCS in terms of direct contact for advice and opinions on complaints avoidance. The LCS operates LawyerLine which is a facility enabling solicitors to ring up for advice and consultation, but she says. "it's not heavily used. That's one of the reasons we've launched the consultation – to try and establish more of a dialogue."

Why should it be that solicitors still seem unable to offer clients the basic courtesy of accurate fee estimates, prompt service and timely communications?

"I think it may be that many lawyers don't realise there is a pattern to the complaints against them. They are

trained to very high standards as lawyers and don't always recognise that good legal advice needs to be accompanied by a good service.

"Sometimes, lawyers tell us that they don't know how they could make the quality of their service any more client-friendly.

"But there are some obvious indicators for potential client dissatisfaction in the way that some solicitors work. For example, some take on far too much work - too many files to manage the client relationship satisfactorily. They can just about handle the volume of work, but haven't the time, or awareness, to see that the client needs to feel that a good service been offered as well."

I wonder if she finds a wall of resentment when the LCS is required to take up a complaint made against a firm.

"I don't detect anything like this," she explains. "Most firms recognise that claims need to be handled impartially. In fact, my message to the profession is that there are many more informal ways of resolving complaints before they reach the LCS.

"In the case of small firms, there is no reason why local law societies can't be involved to give an independent viewpoint, or perhaps a referral made to another local firm for an opinion on the justification of the complaint. Many complaints are far better handled in-house. That's by far the best way to keep a client."



Deborah Evans

The process by which the LCS resolves a complaint is, in general, twofold: either by adjudicated settlement or by conciliation. Deborah Evans is a great believer in conciliation in these situations. "We resolve about 50% of complaints by conciliation," she explains. "There's no reason why firms cannot do this for themselves."

"Whilst there are often issues of compensation (LCS has the power to award compensation of up to £15,000), most clients simply want an apology."

She thinks the profession may have a rude 'wake-up' call when alternative business structures arrive. "I think the new commercial entrants to the legal marketplace will have a very different approach to complaints-handling," she says. "They have a brand name to protect and mishandled complaints will significantly damage reputation across the brand. So, I think, they will be 'spot-on' in their processes in resolving complaints speedily and fairly. It is something that solicitors will need to be aware of and to compete with as the market develops."

"Fundamentally, my message is that lawyers need to match the excellent legal advice the overwhelming number of them provide with an equal measure of interest in the client's experience of the service they are offering."

We move on to the audit of the performance of the LCS itself. In the legal press, it seems that the LCS is constantly joining battle with the Legal Services Complaints Commissioner (LSCC) over its complaints-handling

processes. "We have formal meetings with the Office of the LSCC each month and talk informally with her staff regularly," she explains.

"I think the differences between us are not that great, actually. We have the same objective after all. But I think our measurements of success are different. We see improvement as a measure of success; the LSCC sees reaching the endpoint as the measure of success."

"We try to adopt benchmark standards of performance and by comparison with other similar bodies, such as the Financial Services Ombudsman or the Bar Standards Council, I think we compare quite favourably."

"We are regularly audited by the LSCC, sometimes extremely thoroughly to the extent that every file involving a specific complaint is inspected individually. I don't object to being audited - it's important that the public see that there is an independent external auditor, and it's also good practice."

On the question of whether the

LSCC is empowered to audit both the LCS' performance and its decision-making, she is less certain. "Of course, the LSCC can monitor our performance - there are targets and the power to impose fines if they aren't met."

"But the strategic decisions are, in my view, the property of the Board of the LCS, although the views of the LSCC and the LSO are welcome," she says, with a smile.

We end by looking at the future. With the **Legal Services Act 2007**, the LCS has a limited shelf-life. What are her feelings?

"I think the creation of the Office for Legal Complaints is an excellent solution. It's good that clients should have a one-stop shop to replace the rather complex complaints infrastructure that exists at the moment."

"Clients become very confused at the prospect of different complaints-handling bodies for say, solicitors, the Bar and ILEX. Much more simplicity is needed throughout the complaints-handling system."

Controlling and measuring IT governance

John Mitchell, managing Director of LHS Business Control, discusses the implications of corporate governance for the management of IT infrastructures

IT governance is a sub-set of corporate governance. Corporate governance is usually defined as: the leadership, organizational structures and processes that ensure that the enterprise sustains and extends its strategies and objectives. IT governance may therefore be defined as: a structure of relationships and processes to direct and control the IT function in order to achieve the enterprise's goals by supporting and extending the enterprise's strategies and objectives.

Basically, this concerns how the IT department is structured, lead and managed in order to help the business meet its goals in a cost effective manner.

Obviously, IT must operate within the internal and external constraints applied to any other department, but in the case of IT, much of what it does is both invisible and expensive. This makes all the more important, the need for assurance that it is well controlled and provides value for money. After all, if a company invests in a new building, the Chief Executive Officer (CEO) sees a tangible asset. If it invests in new software, the CEO sees nothing tangible for the investment made.

Assurance requirements

The London Stock Exchange combined code requires that an annual report should contain a statement that the board has examined the effectiveness of its system of internal control. Internal control includes:

- financial control;
- operational control;
- compliance control; and
- risk management.

Computer departments are often major operational centres which have to comply with a number of statutes. The best way of managing such a function is to assess the risks that would prevent it from meeting its objectives and then managing these risks to a level that is acceptable to senior management. Therefore, effective IT governance implies superior risk management.

Risk management

This is the key to IT governance and it is simply another process which requires that key operations and compliance requirements to be identified; and then that the significant risks impacting on them are identified. These risks then need to be assessed and prioritised and a decision made as to whether the risk is to be tolerated, terminated, transferred or 'treated'.

'Treatment' requires appropriate controls to be put in place to provide assurance that the environment is controlled. Embedded monitors reporting that all is in order will need to be identified, together with early warning indicators that warn of issues

needing to be addressed before becoming critical.

In simplistic terms, the Chief Information Officer (CIO) is expected to provide assurance in respect of:

- confidentiality of data and software;
- integrity of data and software;
- availability of data, software and services when required;
- compliance with external and internal regulations; and
- proof that IT is providing value for money.

This requires assurance that the following areas are being suitably managed:

- planning & organisation of IT;
- acquisition and implementation of IT resources;
- delivery and support of IT services; and
- monitoring of those services and learning how to do them better.

Internal drivers

Of course, the CIO does not have complete freedom of operation and is under pressure from a number of areas. For example:

- the CEO wants IT to provide more value to the business;
- Human Resources want IT to use less resource;
- the Operations Director wants it done quicker;
- the Finance Director wants it done cheaper; and
- the Compliance Officer wants assurance that IT is legal.



These drivers mean that good IT governance will always be a balancing act, but, unlike many other business areas, there are some excellent measurement tools available which can provide the proof that the CIO is indeed doing his/her job effectively.

Available tools

The Capability Maturity Model (CMM) measures IT governance on a scale of 0-5, where the lower score indicates that there is no concept of governance and the higher score indicates full integration with corporate governance.

Achievement of a particular CMM stage is measured across a wide range of factors which can be found in a tool named CobiT (Control Objectives for IT) which can be obtained from the IT Governance Institute (www.itgi.org).

CobiT was originally developed to help IT auditors, but its latest incarnation is aimed squarely at IT professionals. After all, if it is the auditor's job to provide independent and objective assurance that IT is well

managed, then the IT professionals need to know the base lines for measurement.

Other indicators of good IT governance may come through the adoption of international standards such as ISO 9000, ISO 9126 and ISO 17799.

This will provide the CIO with the ultimate proof of good governance as he/she will be able to say to the CEO, 'on the software quality side, the organisation is at CMM level 4 as proved by the latest independent audit based on ISO 15504'.

One major European bank spends around 2 billion euros a year on its IT having adopted the CMM process. It proved in its system development that by moving from CMM level 2 to CMM level 3 it attained a 40% cost improvement – not bad for a small investment in a management and measurement technique. When was the last time that your IT function gave a similar return on anything?

Conclusion

If you couple the above with a

comprehensive risk register and IT balanced score card, you will be operating IT governance to at least CMM level 4, and, possibly level 5.

Corporate governance is nothing more than the good management of resources within regulatory constraints to help sustain and grow the enterprise. Achievement of corporate governance is a process that requires objectives and measures of success to be identified. IT is a key, expensive and often invisible resource that needs to be managed within this context. The tools are now available to enable this to be done.

John Mitchell possesses a Doctorate in Risk Management from City University, London.

He can be contacted at john@lhscontrol.com

Web4Law Ltd, publisher of *Managing Risk*, has now developed the *Commercial Risk and Quality Standard* specifically for large law firms and which incorporates benchmark standards for IT and corporate governance.

For more information see www.legalqa.co.uk



Andrew Rose

Plugging the Leak

Andrew Rose, global IT risk manager at Clifford Chance, highlights the proliferation of information leakage within law firms and looks at the implications

One of the hot topics in the security industry at the moment is 'information leakage', which largely relates to the accidental, or deliberate, disclosure of information by a staff member.

Inconsistent record

Given the often-sensitive work of law firms, information leakage is an issue we have all been aware of for some time. Despite this awareness, however, it is interesting to note that the legal sector has an inconsistent record.

Although client/matter related information leaks are rare, some firms have concerns that their intellectual property is leaving the firm as staff move on to new challenges. Most significantly, we have tended to see a considerable number of 'internal issues' aired in public, please stand up www.rollonfriday.com!

The increasing use of technology exacerbates this risk, with new channels

of communication opening up – such as instant messaging (IM), voice over Internet, and social networking sites – and the increasing use of mobility in computing, all of which are starting to be demanded by 'Generation Y' employees who make up an ever increasing proportion of our workforce.

As we may expect, technology firms are acquiring partners and starting to bring solutions to the market. These 'data loss prevention' tools have considerable appeal, however they may struggle to adapt to the legal marketplace.

Legal documents

While it is relatively simple to identify potentially sensitive data in a finance environment – 16 digit credit card numbers, for example – it is infinitely more difficult to apply simple logic to legal documents. In the legal world, words and figures lack meaning without context and the technology solutions available will struggle with the vagaries. Only where clear, unambiguous rules can be defined will the technical solutions offer realistic protection.

Addressing the risk

So, if we cannot rely on these new solutions to prevent information

leakage without impacting business processes, what solutions can we use that will begin to mitigate the risk?

The first step for any firm to take is to create a process to address information leaks when they happen. Agree and document how the firm will react in certain circumstances – if a USB stick containing client confidential information is mislaid or a sensitive e-mail is misdirected, for example.

Next, know where the key data is. This may be surprisingly difficult. Data is often duplicated for reasons such as back-up, testing, development, remote working, etc. In each location, the data is subject to different levels of staff access and different threats to its confidentiality. It is important that these are subject to risk analysis and consistent, considered controls.

Finally, concentrate on how to minimise the number of accidental information leaks, which Gartner feel make up 80-90% of the whole. The solution is a level of staff education. When staff are aware of the risks, consequences and acceptable behaviour, they are less likely to make mistakes.

Many of us may recall Claire Swire falling foul of e-mail. Each of us needs to be wary not to be the first firm to have a similar incident caused by IM, Skype, or Facebook.



The USB stick – a classic vulnerability in information leakage

Limitation or bust: limiting liability

Trying to limit your firm's liability? Edward Coulson, partner in Robin Simon LLP suggests a pause for thought



Edward Coulson

An obvious risk management strategy is to limit a firm's liability by inserting appropriate provisions in its contract of retainer with a client. Doing so effectively calls for thought.

Code of Conduct

The Code of Conduct and current law affects the ability to do so. In brief summary:-

- a firm may not exclude liability completely and may only limit it to a sum equivalent to or greater than compulsory professional indemnity insurance cover (currently £2m for partnerships; £3m for LLPs) – rule 2.07 of the Code of Conduct;
- any agreement must also be in writing and brought to the client's attention – rule 2.07;
- it will also be subject to the requirement of reasonableness – section 2(2) of the **Unfair Contract Terms Act 1977** (UCTA);
- the **Unfair Terms in Consumer Contracts Regulations 1999** may apply to standard term retainers;
- a provision releasing a solicitor from liability for negligence or relieving the solicitor from other responsibility is void – section 60(5) of the **Solicitors Act 1974** (the Act).

Section 60(5) of the Act is amended by the **Legal Services Act 2007**. This limits its application so far as negligence alone is concerned to natural persons and situations where the solicitor is acting for purposes outside the client's trade, business or profession.

The solicitor's position as regards other responsibilities, for example, undertakings, is unaffected. However, the impact may be quite limited; not all retainers relating to contentious business are contentious business agreements as defined in section 59 of the Act. A firm may wish to deal with this in its retainer letter.

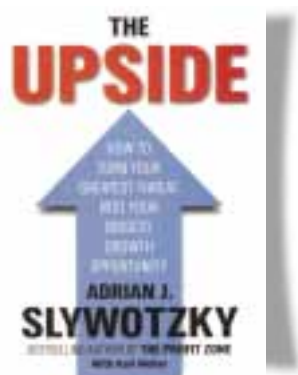
Considerations

Important points to consider when drafting a limitation clause are:

- whether the amount of the limit will be equal to, or less than, the indemnity insurance cover – but note that the availability of cover is relevant to the consideration of reasonableness under UCTA;
- the structure of indemnity insurance as regards deductible and top-up cover;
- that rule 2.07 makes it very difficult – probably impossible – to limit exposure to a large number of small claims within a deductible;

- that top-up cover is likely to be limited in aggregate (i.e. not on an each and every claim basis) for claims made against the firm in North America; bear this in mind if such claims are possible;
- that the limit of cover may not remain the same and indemnity cover will be on a 'claims made' basis – i.e. the relevant amount of cover will be that when the claim is made not at the date of the agreement with a client;
- that the firm should consider its position in contribution proceedings. It may be able to limit its liability to contribute with other potential defendants to, for example, a 'just and equitable' amount rather than being jointly liable for the entire loss suffered by the claimant.

This is not an exhaustive list of the considerations. Not all clients will agree to limit a firm's liability but, unless the issue is raised, the firm will not know its position. The firm needs to be aware of the limits to this strategy. For example, it will not be protected from claims by non-clients, such as claims for breach of fiduciary duty outside the solicitor-client relationship.



THE UPSIDE - HOW TO TURN YOUR GREATEST THREAT INTO YOUR BIGGEST GROWTH OPPORTUNITY

Adrian J. Slywotzky

John Wiley & Sons; 2007 250pp; Price £16.99; Hbk; ISBN 978-1-841-12785-9

High quality and low cost are now required just to enter any, including the legal, marketplace. They drive the new strategic imperative of making the moment of maximum risk, the greatest opportunity.

In this book, the author provides bold and original ideas for growth breakthrough. These ideas include: changing the odds for major initiatives; shaping and exploiting risk; and a recognition that competitors can be the greatest enablers of profit.

The author is cited by *Industry Week* as promising 'to be what Peter Drucker was for much of the 20th century – the management guru against whom all others are mentioned.'

The book contains various aids to explaining and understanding its theories, with tables and checklists.

It provides examples of major corporates which have achieved major risk reversals and explains how to analyse the strategic risk spectrum of an organisation in a detailed and closely analytical tabulated format.



IT RISK - TURNING BUSINESS THREATS INTO COMPETITIVE ADVANTAGE

George Westerman & Richard Hunter
Harvard Business School Press;

2007; 200pp;
Price £19.99; Pbk

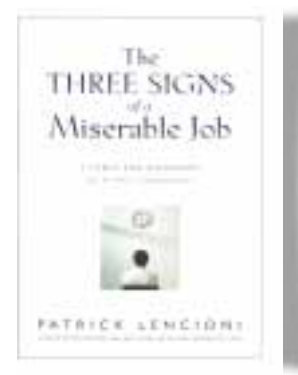
ISBN978-1-422-10666-2

The authors of this book claim that while IT has become increasingly central to business success, many enterprises have not adjusted their processes for IT decision-making and risk management. As a result, IT-risk incidents carry a much higher tag causing damage within and beyond the enterprise.

There are, it is claimed, four key elements: availability; access; accuracy; and agility. Management of each of these involves making trade-offs between risk and return. The authors introduce three disciplines that enterprises must master to manage IT risk effectively:

- a solid foundation of IT assets (people, processes and controls);
- a risk governance process (supervision that identifies and tracks risk);
- a risk-aware culture from the top that increases vigilance across the organisation.

Included are a range of ideas, tools and examples to convey the message of this book to the reader.



THE THREE SIGNS OF A MISERABLE JOB

Patrick Lencioni;

John Wiley & Sons; 2007; 250pp;
Price £15.99; Hbk;

ISBN 978-0-7879-9531-7

The core theme of this book is 'misery at work' and the confrontation of personality traits in both oneself and others that make job misery a painful reality in so many organisations.

By a miserable job, the author means a job that people dread going to, and that saps the energy of personnel. Miserable jobs are found everywhere, he claims: consulting firms; television stations; banks; schools, churches; (he does not specifically mention law firms); and at all levels from the chief executive to the mailing room.

The three signs of a miserable job are those where the individual feels, rightly or wrongly, that their position is: anonymous (it is not recognised); irrelevant (it does not matter); and immeasurable (it is impossible to gauge progress).

He then identifies some strategies for overcoming these obstacles and offers a number of case studies in support. If most organisations (including law firms) did but know it, this book could well prove a shrewd investment.

DO YOU NEED A CYBER-RISK AUDIT?

Assess your firm's vulnerability to cyber-risks!

Many law firms have yet to realise the full extent of their exposure to risk particularly in relation to their use of the Internet.

Almost every website is now caught by the Electronic Commerce (EC Directive) Regulations 2002, which came into force on 21 August 2002. It is not generally realised that from 23 October 2002, Trading Standards authorities have had the power to enforce its provisions with an order carrying fines and imprisonment!

- WHAT PROCEDURES ARE IN PLACE...

...to raise awareness arising of technology risks: insecure communications and data; 'hackers'; abuse of passwords; viruses; and disaster recovery?

- WHAT PROCEDURES ARE IN PLACE...

...to raise awareness of legal and regulatory risks in: domain name security; website information, advertising, copyright and data management; confidentiality; online advice, contracting and transactions?

- WHAT PROCEDURES ARE IN PLACE...

...to raise awareness of operational risks in: staff behaviour; defamation; pornography; harassment; monitoring of employee activity in using e-mail, the Internet, the firm's website; and delivery of electronic legal services?

- WHAT POLICIES ARE IN PLACE...

...to identify and evaluate the exposure to these risks; to develop a risk control plan; and create and maintain a risk register?

- WHAT POLICIES ARE IN PLACE...

...to eliminate, reduce and/or manage these risks by: the appointment of a risk manager; the assignment of suitable personnel to address: the technology risks; the legal compliance risks; the operational issues; and ensure senior management 'buy-in'?

DON'T DELAY – GET AUDITED TODAY!

The Web4Law audit consists of a day's visit to the firm to interview any partners and staff responsible for IT use and preparation of a report highlighting actions needed and provision of sample policies.

Any further advice will be clearly proposed and costed for your consideration.

Contact Web4Law's cyber-risk expert, Rupert Kendrick, on
rupert@web4law.biz

WEB4LAW

Conferences & Events



4-6 DECEMBER 2007

Online Information 2007

*Imark Communications Ltd – London – Enquiries:
www.online-information.co.uk*

The theme of this event is 'Applying Web 2.0: innovation, impact and implementation'. Over 100 international information leaders will be exchanging views of the meaning and the implications for business and professionals of the new trend of proactive rather than reactive participation in World Wide Web activities. The aim of the event is to explain the impact of this development for the business and professional sectors. Many law firms are now posting their own 'blog' sites, while wikipedia is widely recognised as a valuable online resource for the accumulation of valuable and relevant data.

The event will enable delegates to;

- assess for themselves the implications of Web 2.0 for their businesses;
- experience the workings of Web 2.0 through case studies from corporate bodies in the professional and business sectors;
- identify new skills in using Web 2.0 as a professional;
- hear from leading experts in all aspects of information use and management; and
- view the latest industry developments at free exhibitions of over 200 online content and information management solution providers

24 JANUARY 2008

Corporate Manslaughter and Corporate Homicide Act 2007

Symposium Events – London – 020 7403 3990

The **Corporate Manslaughter and Corporate Homicide Act 2007**, legislation introducing the concept of corporate manslaughter, affects all organisations, whether professional or commercial. The aim of this event is to explore its impact and the implications for organisations of all types, particularly at director and senior management level.

Topics covered include:

- an exploration of how the act might affect an organisation's public image and even its corporate structure;
- anticipation of how deaths in the workplace should be handled;
- raising the awareness of directors and senior managers of their responsibilities.

For both law firms and clients, this is a significant change in the law with a number of far-reaching implications.

4-6 FEBRUARY 2008

Data Governance Conference Europe 2008

IRM UK and Wilshire Conferences – London – 020 8866 8366 – www.irmuk.co.uk

Data governance has emerged as a new discipline in response to both regulatory requirements and business necessity. This conference focuses on getting started, deploying and sustaining a data governance and stewardship programme. Topics addressed include: data governance basics; communications and data governance; business intelligence and data governance; frameworks, maturity models and methodologies; dealing with change, cultural and political issues; roles and responsibilities; avoiding pitfalls.

12-13 MARCH 2008

Law 2008

The Solicitors Group – www.thesolicitorsgroup.co.uk

Further to the success of its sister events Law NEC, Law London March and Law London Autumn, in 2007, this event will be host to a large number of conferences covering all the latest 'black letter' law, management and technology issues relating to the survival of law firms in this changing market. The Autumn event attracted around 2000 legal professionals over the course of the two days with numerous exhibitors marketing the latest products, services and solutions to this market.

2-3 April 2008

Business Continuity and Risk Management Expo 2008

Reed Exhibitions (Eskenzi PR) – 020 8910 7796

This event is fast becoming Europe's most definitive event on the management of business risk for both professional and commercial organisations. It is designed for organisations wishing to identify best practice in risk management and to learn ways to mitigate risk; identify industry trends and solutions; and find out how to devise and implement business continuity and recovery policies. The event comprises: a comprehensive exhibition from solution providers of the latest technology available to manage business continuity; a wide variety of free seminars from vendor exhibitors; and a formal conference for the debate of key issues. The steering committee promoting this event consists of leading business continuity and risk practitioners and explores the whole business continuity lifecycle from corporate governance risk, compliance, resilience and brand management, as well as practical solutions for contingency planning, incident management and recovery.