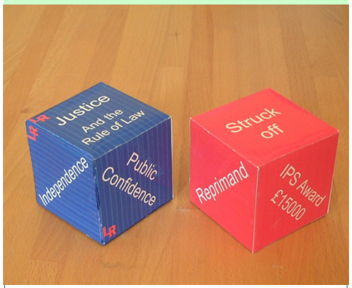
Legal Risk
Risk Management Solicitors

RISK UPDATE

Rule 1 – Core duties

- Justice and the rule of law
- Integrity
- Independence
- Best interests of clients
- Standard of service
- Public confidence



'The die is cast…'

In this issue

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Solicitors Code of Conduct

The Solicitors' Code of Conduct was passed just as our last issue of Risk Update was published. It comes into force on 1 July 2007.

This is focusing the minds of many practices from city firm to high street on what they have to do to comply. Many are arranging training and undertaking risk audits, either internal or external, to help ensure compliance. To achieve this, firms will need a good understanding of the Code and a systematic approach to analysing their management of business risk in accordance with rule 5. Compliance with the Money Laundering Regulations is also an express requirement – see our article on money laundering below.

There are some changes from the draft which was available previously. Some are relatively minor, but a number worth noting are mentioned below with other key rules. The key difference for the profession, however, is likely to be not so much the changes in the rules but the way in which, and the extent to which, they are enforced.

Code of Conduct
Implementation for City firms

We are assisting a number of city firms with their implementation programmes, including reviews of procedures and risk management, and training, all by practising solicitors.

Code of Conduct
Implementation for smaller firms

We are also assisting a variety of smaller practices with risk reviews, training and advice on referral fee issues. Firms should note that they risk committing offences if they take referrals from claims management companies who have not registered as such. Use the search facility on **http://www.claimsregulation.gov.uk**

Core Duties

These have changed markedly from the draft. They underpin the whole Code. The feedback from the Legal Services Consultative Panel, under the approval process laid down in Schedule 4 to the Courts and Legal Services Act 1990, was -

> "If core duties are to be thought of, and to have the function of, core duties, the rules should state unequivocally that the core duties are regulatory principles enforceable in their own right and applicable in all circumstances, even where more detailed rules exist elsewhere in the Code. In doing so, it would reinforce the emphasis on principles-based regulation."

However, there is a school of thought that 'principles-based' regulation comes at a price. It is currently in vogue in regulation of the financial services sector. It may increase the risk of difference in opinion between the Solicitors Regulation Authority and those it regulates.

Client Care

Rule 2 (Relations with clients). If someone asked your clients –

a) when they would next hear from you,
b) how much the next bill would be, and
c) the total cost of the service you were providing,

how many clients would know the answers? If not, it is clear that you carry the risk not only of being unable to recover your costs, but that you may be exposed to a finding of professional misconduct and at risk of an award for Inadequate Professional Services (for which the maximum is currently £15,000).

The issue on recoverability of costs under the current Practice Rule 15 has been highlighted by the recent Supreme Court Costs Office case of **Mastercigars Direct Limited v Withers LLP** (25 April 2007, Lawtel 17 May 2007).

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Conflicts and Confidentiality

Rule 3 (Conflicts) replicates the current Rule 16D. Rule 4 (Confidentiality) is identical to the current Rule 16E. There has been a small amendment to the guidance to rule 4 at the request of the Department for Constitutional Affairs, to emphasise the level of client protection required when acting under the conflict exceptions and using information barriers. This now states 'Wherever possible you should try to ensure that the clients are advised of the potential risks arising from your firm acting before seeking their consent.'

Cross-border regulation - CCBE

These amendments follow the changes in the May 2006 revision of the CCBE Code of Conduct. The CCBE is the Council of Bars and Law Societies of Europe. Its rules have long been incorporated into the obligations of solicitors in England and Wales in relation to their European cross-border activities.

The Code has been amended to adopt an important change relating to the different status accorded by lawyers in different states to "without prejudice" communications or communications subject to "professional secrecy". A lawyer wishing to send such a communication cross-border must first ask the intended recipient if it can be accepted on the basis intended.

If the communication is actually sent, and the recipient cannot accept it on that basis, the previous version of the Code stated that the recipient must return the communication without revealing its contents to others (i.e. including the client). The revised version of the Code clarifies the obligations of the sender and the recipient, and makes the obligations of the recipient more consistent with national professional obligations. See rule 16.05.

The Code also applies in relation to the CCBE's six additional observer states (Bulgaria, Croatia, Macedonia, Romania, Turkey and Ukraine).

Equality and Diversity

Readers should note that rule 6, renamed 'Equality and Diversity', requires each firm to draft their own diversity policy. There is no model policy contained in the Code.

Those relying on the current Law Society model draft, and doubtless the majority with their own policy, should note that the requirements are now wider, particularly noting that they also cover age discrimination. A policy should cover all the items in rule 6.01.

Limitation of liability by contract

This has become increasingly common, as reported in Legal Risk's Top 100 Professional Indemnity and Risk Management Survey 2007. The requirement that 'You must bring any limitation clearly to the attention of the client, and the client must understand and accept it and the agreement must be in writing' has now been moved from note 60 of the draft rule 2 guidance to the rule itself – see rule 2.07 (b), though it is difficult to see how one might otherwise in practice have limited liability without doing this.

We have been assisting several firms, including some of the largest, with both the drafting of terms limiting liability and establishing policies and procedures to help maximise the prospect of such terms being held to be effective.

►*For further information on the Code of Conduct and on limiting liability,* ***contact frank.maher@legalrisk.co.uk****.*

Money laundering

The result of the Law Society of England and Wales's campaign for change to the draft Money Laundering Regulations 2007 is still awaited, particularly on the issue of beneficial interests.

Meanwhile there have been some important developments. First the Law Society has issued **Company and Commercial Guidance** (4 April 2007) which is important for all solicitors, not just company/commercial practitioners. It deals with a number of miscellaneous issues. Significantly, it helps address the difficult situation where a relatively minor breach by a large company may have little practical effect on its overall financial position. Secondly, and of wider relevance, it indicates a change of position in the Society's advice on **Bowman v Fels** and further guidance on this is anticipated.

On this second point, the guidance states that

> 'if no disclosure can be made due to [legal professional privilege], solicitors will have a reasonable excuse for not making a disclosure and will not commit a money laundering offence by virtue of sections 327(2)(b)), 328(2)(b) and 329(2)(b). Similarly, if no disclosure can be made due to common law legal professional privilege or statutory privilege, solicitors will have a reasonable excuse for not making a disclosure under section 330. However, whether they should continue to act may raise ethical issues.'

Reliance on the 'reasonable excuse' defence in sections 327-9 raises an interesting but difficult issue. Each of the provisions referred to in the guidance above states that 'a person does not commit such an offence if…he *intended* [our emphasis] to make a disclosure but had a reasonable excuse for not doing so.'

This begs the question – how can a person who decided not to report (because of privilege) say that he *intended* to report? The view which we advanced in our book, *The Money Laundering Reporting Officer's Handbook: A Guide for Solicitors,* was that the provision might have quite restricted application. Where the provision might apply in practice, in our view, would be where, for example, the Money Laundering Reporting Officer ("MLRO") intended to fax the report to the Serious Organised Crime Agency ("SOCA") but due to a fault with the fax machine or a mistake by the operator, the MLRO had a printout showing the right number of pages had been sent to the right number but nothing other than blank pages had appeared in SOCA's office.

Continued ...

It may be that less strenuous attempts at compliance would also come within the provision but in the absence of any authority it is not possible to give any categorical assurance.

By contrast, the ‘failure to notify’ provisions in sections 330, 331 and 332, do not require a prior intention to make a disclosure, merely that the person concerned had ‘a reasonable excuse for not notifying the information or matter.’ The difference in wording is presumably not accidental.

Other developments in the field of money laundering since our last newsletter include two cases. **UMBS v SOCA** [2007] EWCA Civ 406 held that SOCA could be subject to judicial review for refusing to revisit its decision refusing consent. **Hogan v DPP** [2007] EWHC 978 (Admin) held that once a defendant charged with acquisition, use or possession of criminal property had raised the defence of having provided adequate payment for it, the prosecution had to prove that there was either no consideration or inadequate consideration.

Other money laundering issues include the extension by the Fraud Act 2006 of fraudulent trading provisions to sole traders, partnerships and trusts. The Serious Crime Bill proposes civil Serious Crime Prevention Orders, which have been referred to as ‘corporate ASBOs’ (Anti-Social Behaviour Orders for our overseas readers). It also proposes extending asset recovery proceedings to the Serious Fraud Office.

The decision in extradition proceedings of **Norris v USA and others** [2007] EWHC 71 (Admin), holding that alleged price-fixing constituted a common law offence, means that corporate and commercial lawyers whose clients are involved in allegations of cartels should consider the money laundering implications.

We have had a significant increase in the number of firms using our money laundering helpline since the closure of the Law Society’s dedicated helpline. ►*For further information contact* ***sue.mawdsley@legalrisk.co.uk***.

Cross-border risk

We highlighted this in our January 2007 newsletter, since when there have been further developments. The long arm of the American courts may yet get longer, with an appeal by claimants to the Supreme Court in **Charter Communications v Scientific Atlanta** which may expose professionals to accessory liability in fraud cases.

We drew attention in our March 2007 newsletter to the risks of unsuccessful attempts to establish trusts offshore. Further concerns arise from an amendment introduced by the Finance Act 2006 with effect from 6 April 2007, which introduced a new test for UK residence of a trustee by treating one ‘as if he were resident in the United Kingdom at any time when he acts as trustee in the course of a business which he carries on in the United Kingdom through a branch, agency or permanent establishment there.’

The concern is that UK trusts operating through offshore corporate trustees who have UK offices could find that clients are taxed as UK resident when the purpose of establishing them in this way was to avoid UK tax.

We have carried out a variety of risk management engagements, including risk audits on overseas and offshore firms and overseas offices of UK solicitors. ►*For further information contact* ***frank.maher@legalrisk.co.uk***.

The insurance renewal

Some firms have already started the process in anticipation of the 1 October 2007 renewal which applies to all solicitors in England and Wales. We are assisting several with reviews of their risk management. There are no significant changes in the draft of this year’s Minimum Terms and Conditions of insurance. We are still finding that firms instruct us days, or in one case hours, before merging, with problems which are more difficult to unravel at short notice. Insurance aspects of mergers should always be near the top of the agenda, not left till last: they are not a formality. ►*For further information contact* ***frank.maher@legalrisk.co.uk***.

Events

Money Laundering
Sue Mawdsley is speaking for the Law Society LMS at a series of Money Laundering seminars across the country. Next venues are London (24 May), Llandudno (12 June), Birmingham (14 June) and Wakefield (26 June). Further details from **www.legalrisk.co.uk/news/shwNews.asp**.

Lateral Hires: Lawyers and their Teams
Frank Maher will be speaking on insurance, conflicts and information barriers at Managing Partner's Masterclass on Lateral Hires on 26 June 2007. Further details from **www.legalrisk.co.uk/news/shwNews.asp**.

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