

Whether law firm insurance covers trustee solicitor liability

Following the launch of the Charity Commission's *Get On Board* campaign, designed to encourage more people to become trustees, Veronica Cowan talks to Frank Maher, a partner at Legal Risk, about whether a solicitor in private practice is covered by their firm's insurance if they decide to become a trustee for a charity...

The Charity Commission has just launched its *Get On Board* campaign to encourage more people to become trustees, and to increase diversity on boards. Most people over 18 can be trustees, but exceptions include those who have been disqualified as company directors and who have been convicted of an offence involving dishonesty or deception. It is becoming increasingly common to see advertisements in the press for individuals with legal or financial qualifications to act as voluntary trustees, spurred on, perhaps, by the Charity Commission wanting charities to carry out a skills audit on potential trustees in an effort to get people with specific skills to offer.

This raises the question of whether, where the professional in question is a solicitor still in private practice, the insurance of his or her law firm would cover any liability, or whether it only covers the solicitor for work done on behalf of the firm. Frank Maher a partner at Legal Risk said: "If the solicitor gives legal advice to the charity, then by and large it is covered by the commercial market under the Law Society Minimum Terms and Conditions (MT&C), which give the widest cover enjoyed by any profession in the world."

Maher points to Clause 8.16 of the MT&C 2004 (8.17 of the MT&C 2005) which provides that cover extends to 'any insured acting as an executor, trustee, attorney, notary, insolvency practitioner or other personal appointment'. The activity does however have to be in the course of practice as a solicitor, he remarked.

However, Clause 6.10 in both 2004 and 2005 versions provides that: 'the insurance may exclude liability of the insurer to indemnify any natural person in their capacity as a director or officer of a body corporate (other than a recognised body or a service, administration, trustee or nominee company referred to in clauses 1.3(b), 1.5(b) or 1.7(b)) except that; (a) the insurance must nonetheless cover any liability of that person which arises from a breach of duty in the performance of (or failure to perform) legal work; and (b) the insurance must nonetheless cover each other insured against any vicarious or joint liability.

Maher noted that the Solicitors' Indemnity Fund, which provided cover before the commercial market assumed the risks, required that any fees should be paid to the law firm as a practice. "But that's not in the Minimum Terms and Conditions (slightly surprisingly)," he commented.

That relates to where there is a contractual arrangement between the solicitor and a charity, but how about when solicitors are acting as volunteers? "If the

solicitor is doing pro bono work in his or her capacity as a solicitor, s/he would be well-advised to clear it with the firm's insurer at the outset," he said.

Maher added that there may be a distinction between what the solicitor does as a lawyer and what he or she does as an ordinary trustee: "If the solicitor gives wrong advice on the law s/he will be liable." But can a professional, like a solicitor, ever be categorised as being just another board member? After all, the advice might not be formally given, but a lawyer who volunteers to act on a board with non-professional trustees could be perceived as holding him or herself out as having expertise on which the others might rely. "It is true that lay trustees tend to assume lawyers know about every area of law, and just by being there and going along with a decision might attract potential liability, or at least bring in a claim," Maher noted.

Another issue, Maher added, could be whether any liability is personal to that solicitor or whether it could extend to his or her partners. "Whether the personal assets of a solicitor's partners for a professional negligence claim are at risk could turn on whether s/he is perceived or held out as being a representative of his or her firm, or a volunteer in a purely personal capacity. You have to look at each case on its own facts." He added: "In the USA I have heard a recommendation that lawyers divide the two functions, namely don't give legal advice while at a board meeting, and if the solicitor knows it will be required, take along a colleague to give it. This separates the two roles so it is clear what hat the trustee solicitor is wearing."

As to barristers, Maher said that Bar Mutual, the insurer for barristers, does not consider it part of a barrister's practice to act as a trustee and therefore they have no cover for this activity from Bar Mutual. However, it does cover barristers for claims arising out of giving legal advice to charities and other not-for-profit organisations (other than local authorities) in the capacity of an Honorary Legal Advisor. It also covers all legal advice given pro bono through means of instruction recognised by the Bar Council as falling within their practice.

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