

# law practice management

newsletter

Volume 4 Number 3

Print Post Approved 255003/05838

## Risk management for the new year — what's on your agenda?

Ronwyn North

STREETON CONSULTING PTY LTD

Information contained in this  
newsletter is current as at  
January 2005

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The new year is underway and a good question to ask yourself is, 'What progress have I made with my risk management agenda?'

You do have a risk management agenda don't you — things you want to do, improve or achieve in the area of managing your professional or business risks? Well, here are a few thoughts about why you need a risk agenda and how to decide what should be on it.

### Having an 'agenda' — it's not a dirty word

There are so many risks in practice and in business you can't tackle everything at once. Consequently you need a sense of purpose and priority about your risk management activities.

Whether you are managing just yourself, your team or your whole firm, the purpose of 'managing' is to achieve results, the right results, results that matter to you.

As a practice manager you have a choice. You can do nothing, leave the outcomes to chance and be satisfied, or not, with the results you get; or you can take action aimed at improving the odds of getting the results you want.

Even if 2004 was completely free of claims, complaints, rising insurance premiums, bad debts or other practice difficulties, what are you going to do to make sure there is no deterioration in your track record in 2005?

As I have said in an earlier article, achieving an attractive and competitive risk profile is real work, not an optional extra, and zero risk is not the goal.<sup>1</sup> Managing risk is about making a meaningful effort to reduce exposure to a variety of threats and uncertainties that can have adverse impacts on clients, staff, insurers and other stakeholders of your practice, including you.

Having an agenda has been identified in various studies as being a characteristic of high performing managers and was popularised in Stephen Covey's book *The Seven Habits of Highly Effective People*.<sup>2</sup>

What gives having an agenda a bad name is the 'hidden' agenda or an agenda that is unwieldy, unfocused or unpursued. The most effective agenda is one which has the support of the people most affected by a manageable number of things that have the potential to make a real difference and which actually get done.

### Starting your risk agenda

People often say they want to do more to manage their risks, but given the myriad of possible risks they don't know where to start or what should be on their

agenda. My advice is 'start anywhere, but just start'.

While there are good and bad agendas there is no such thing as a perfect agenda or a perfect place to start. You don't need to start with a comprehensive risk analysis, valuable as such an exercise may be if you are ready for it.<sup>3</sup>

Start with something you know to be a concern because it has caused you grief (for example, an unhappy client, an unpaid bill, professional indemnity notification or a computer crash). Have you done enough to make sure these incidents don't happen again?

While every practice has its own unique risk profile and risk factors, there are also some common patterns of risk. If you don't want to develop your own risk agenda, then use someone else's. For example, check out the website of your professional indemnity insurer for issues that might be relevant to your practice.

It is important to overcome initial inertia and do a couple of easy things to get the ball rolling. Once underway, refining or even redirecting the agenda will be easier.

## Setting your risk agenda

Here are some ideas to help you narrow down areas of potential risk.

- Is your main focus professional liability risk or business risk (that is, risks of lawyers hurting clients or risks of clients or others hurting you)?
- In the professional liability area do you think your biggest area of exposure is:
  - poor client and matter selection and engagement management;
  - poor client communication;
  - simple oversights that have big consequences (for example, missed time limits, errors in documents and misdirected emails); or
  - poor record keeping?<sup>4</sup>
- In the business risk area do you think your biggest area of exposure is
  - financial loss;
  - lack of preparedness for business interruption and fraud security breaches; or
  - non-compliance with business or professional regulation?

- Where are you looking to identify weaknesses in your defences and opportunities?
  - What lessons can you learn from past incidents, non-compliances or losses?
  - What new risks or risk trends could be looming?
  - Since today's work will give rise to tomorrow's problems, what are the highest current risk matters or operations in your practice and what can you do to reduce the risk?
- What would you do differently if you were uninsured? To what extent, consciously or unconsciously, are your risk and quality assurance practices influenced by assumptions about the continuing availability and affordability of insurance?

Hopefully these questions have helped you to identify one or two 'hot spots' that can be hosed down immediately and give you a better idea of the process involved in setting a risk agenda.

But a final reminder, while it is important to have an agenda, the agenda is only a means to an end not an end in itself. The end is better protection of you, your practice and your clients, and that takes action, not good intentions. So what are you waiting for?

Safe practice! ●



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## Endnotes

1. North R 'Are you a good risk?' (2003) 2(6) LPM 84.
2. Simon & Shuster 1990.
3. See for example Risk Management Standard AS/NZS 4360:2004 available from SAI Global, distributors of Australian Standards.
4. Underlying causes of claims based on research conducted and published by Streeton Consulting as 'Managing client expectations and professional risk' by R & P North 1994.

# Fighting fraud in law firms

Warwick Dolman DOLMAN BATEMAN

*This first of two articles deals with the key indicators for fraud in law firms; the next article will deal with how systems and corporate culture can be improved to reduce the risk of fraud*

According to a study by CPA Australia in September 2003, 28 per cent of small businesses suffered from employee fraud during the previous two years. This is consistent with other surveys which have found more than 50 percent of all organisations have suffered some form of fraud in the last four years. Law firms are just as much at risk of employee fraud as other businesses.

Fraud in law firms can be prevented or at least detected at an early stage. An effective detection and prevention program requires management to pay close attention both to their day to day systems and their corporate culture.

Law firms are open to a range of common types of fraud, including the misappropriation of funds such as cash and cheques, theft of inventory and equipment and fraudulent financial statements.

Law firms are particularly susceptible to types of employee fraud that often don't occur in other industries, for example, staff managing their own clients on the side — otherwise known as 'moonlighting'. Such staff would use the resources of the practice to service their own clients, including the time that they should be billing to the company's clients.

Other instances include the theft of intellectual property, computer systems, business software and other sensitive data.

Employee fraud has a direct impact on a company's bottom line and can have a major effect on the profitability and even the viability of the firm. Without prevention or early detection, fraud also has the capacity to severely damage the reputation of a law firm.

## Indicators of fraud

Fraudsters quite often say they will only commit the fraud when they are confident it will not be picked up by the organisation's systems. According to data from the Association of Certified Fraud

Examiners in 2002, only 3 per cent of fraud is detected within three months and 40 per cent of cases run for more than two years before detection.

There are a number of red flags that the management of law firms should be aware of which may indicate that the firm is being exploited. These include:

- an employee consistently working long hours, especially if there is no proportional increase in billable hours;
- excessive hours charged to matters beyond what would reasonably be expected;
- an employee consistently failing to take leave;
- changes in the lifestyle of an employee, such as conspicuous spending;
- an employee having problems with gambling or alcohol;
- computer usage outside normal hours or logins using passwords of absent or ex-employees;
- expenditure or purchases in excess of budgeted amounts;
- missing records, documents or files;
- an unexplained decrease in practice profits; and
- low employee morale and frequent rumours.

## A perk of the job or fraud?

Firms are also at risk if the line between the 'perks of the job' and fraud becomes blurred.

A perk is defined as a sanctioned minor benefit outside official remuneration, and these are often used to boost employee morale and productivity or make a position more attractive. As much as possible, these should be decided upon by management and outlined in a letter of appointment or employment contract so both parties know what is expected and allowed.

A more serious issue is 'fiddles', usually committed by a group of people working together and involve the systematic and planned stealing of company funds, goods or paid time kept at a low level to avoid detection.

The problem in many businesses is that the line between what is unofficially sanctioned as a perk and

what is technically fraudulent is often so blurred that it is difficult for management to detect when an employee is over-stepping the mark and committing fraud.

## Culture is a major factor

Organisational culture — values, beliefs, goals and norms shared by employees — can have a significant impact on the potential for internal fraud.

A negative culture can produce suspicion, secrecy, low productivity and poor commitment to the organisation. This typically results in poor adherence to procedures and policies without penalty — a perfect recipe for encouraging fraud.

On the other hand, a positive anti-fraud culture encourages employee honesty and alignment with organisational values and goals.

Some indicators of a negative culture include overly aggressive organisational targets, understaffing, procedural 'slackness' and a lack of stated ethical standards and open internal communications.

Management and partners should recognise that there is a fine line between a culture that encourages productivity and a culture that can encourage employee fraud.

## Conclusion

Legal practices are often heavily systematised and it is common for management to feel that their firm is almost fraud-proof. However, this is not the case. A range of frauds can strike a law firm as a result of procedural slackness or other system failures and this can be exacerbated by a culture that encourages fraudsters, or at least encourages innocent staff to 'turn a blind eye' to fraudulent activity. ●



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> Dolman Bateman, specialists in the detection, investigation and minimisation of fraud.



# Letter from London

CO-ORDINATED BY

**Caroline Poynton**

EDITOR MANAGING PARTNER LONDON

## Recruitment can damage your wealth

**Frank Maher** LEGAL RISK

What part can a law firm's human resource director or partner play in minimising a firm's professional indemnity costs, the third highest overhead for most practices?

This article explores some of the issues which can impact on this. Those discussed here are:

- recruitment; and
- successor practice issues, which can effectively make the firm liable for another firm's claims.

### Recruitment

Millions of dollars can be at stake, even in comparatively small firms, if they get the recruitment of just one person wrong.

Incredible though this may seem, the reality is that few firms carry out all the checks they should when taking on staff, particularly when making lateral hires of partners and teams.

As one law firm found to its cost in 2003, this can make them almost uninsurable. Imagine the following scenario. A firm is focused on serving its large corporate clients and punches above its weight in corporate work, but is short on commercial property expertise. The senior partner, with his eye rightly focused on the big picture, surveys the scene and decides, with the head of corporate, that internal growth in property will not satisfy the short term need. He knows a property lawyer who is a partner in another local firm from the golf club and they arrange to meet with the head of property.

The target partner has a client following which the firm perceives is essential and soon afterwards the deal is done.

The problems then begin to emerge. Less than a year after the partner joins the firm, three £1 million claims come in with some unsavoury allegations of conflict of interest and related misdeeds. The firm decides enough is enough and encourages the partner to go his own way, taking his clients with him.

However, at this point the firm's problems have scarcely begun. The firm applies to renew its insurance. The insurers are less than happy about the year's claims, indeed they were already becoming wary of the partner concerned when he was at his old firm, which they also insured.

The firm's insurance brokers look for insurance cover elsewhere but the insurance market seems less than interested. At this point, the firm is heading towards the assigned risks pool (ARP), the Law Society's 'sin bin' for the uninsurable. Premiums for this are high and assessed on a sliding scale, with 25 per cent of gross fees for the first slice. For example, a firm with turnover of £30 million would pay a premium of nearly £2.8 million for just £1 million cover, albeit on an 'each and every claim' basis.

Firms in the ARP are likely to have severe difficulty finding any top up insurance, and practising with only £1 million cover would be unacceptable for most partners in commercial firms, let alone the difficulties they would have in satisfying the requirements of some clients who may insist on additional cover being in place.

Fortunately, a new insurer in the market is prepared to cover the firm, but only with a significant hike in

premium and a vastly increased excess on the policy.

The problems are exacerbated because in an ideal world you would audit the files to see what else may be lurking and notify anything adverse to the existing insurer before renewal. This would have the effect of making any subsequent claims fall under the existing insurer's policy, giving some comfort to a new insurer, all being well, that it would not have to deal with claims from the ex-partner's files. This in turn would help minimise the premium.

However, in the scenario outlined above, the partner may have taken the clients and the file on leaving the firm, meaning any audit is impossible. Getting rid of the partner does not get rid of the problem.

Some due diligence at the recruitment stage would have gone a long way to avoid these problems. Research by Legal Risk<sup>1</sup> found that few top 100 law firms do adequate due diligence when making lateral hires.

As Figure 1 shows, although most of the 36 responding firms said they checked curriculum vitae (81 per cent) and references (89 per cent), fewer checked for current practising certificates (69 per cent), yet to my knowledge a number of firms have been caught out on this, including one multinational firm.

Where firms really fell short on their due diligence, however, was in checking the disciplinary record (36 per cent) for the cost of a simple telephone call to the Law Society,<sup>2</sup> and

the claims record (50 per cent). While independent verification of the claims record may present problems, the very least the firm can do is ask the incoming partner the question and have him or her sign for the accuracy of the answer. This point is important, not only because past performance may be a guide to future performance, but because some insurers record claims against individuals concerned: a bad claims record against individuals at their previous firms may be taken into account by the insurers in assessing the

### Successor practices

All law firms in England and Wales are insured for the first £1 million of claims on terms which have to comply with the Law Society's minimum terms and conditions for professional indemnity insurance.<sup>3</sup> These have been in force with minor changes since the abolition of the Solicitors Indemnity Fund in 2000.

One of the aims of these provisions is to ensure that the public is protected, and this includes cover for claims against firms which have ceased to exist. In order to achieve this, the terms

The rules aim to find a 'successor practice' — a firm which is then fixed with all the claims baggage of the firm which has closed. If a claim comes in, the partners in the successor practice have to meet the excess and the firm's claims record will be affected.

premiums of firms they join.

Bear in mind, too, that many claims are related to stress — for example, missed time limits where a fee earner has simply not got round to the job despite being aware it needed attention, and even some dishonesty cases where people have behaved in unexpected ways, either due to financial pressure or general workload issues. Past history of stress related problems is an issue to consider when recruiting.

These insurance issues lead on conveniently to the next topic, successor practices.

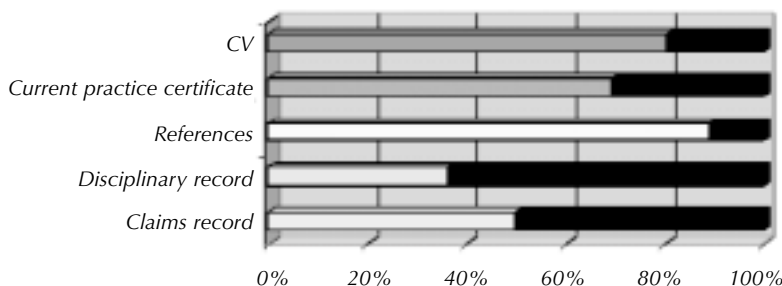
go to considerable lengths to find a practice which is in some way connected with the firm which has ceased to exist. This is not just about retiring sole practitioners: even larger firms can occasionally go under and the dissolution of Garratts, the legal arm of Andersen, is a reminder that it can be a big firm issue too.

The rules aim to find a 'successor practice' — a firm which is then fixed with all the claims baggage of the firm which has closed. If a claim comes in, the partners in the successor practice have to meet the excess and the firm's claims record will be affected.

The rules are complex and it is important to note that once you have become a successor practice there is generally not a lot you can do to unscramble your position.

Where your firm is intending to take over another practice, it will generally not be an unreasonable consequence if the firm which takes the benefit of clients and future income also takes the burden in the form of insurance and claims risk. But the rules are complex

Figure 1. Top 100 law firm checks on lateral hire partners



and can bring about unintended consequences.

Examples of cases where a firm can become the 'successor practice' include taking on a sole practitioner, even in a support role such as a librarian. Another situation is where a firm takes on the majority of partners from another firm. This is not as straightforward as it first sounds. The 'majority' does not have to be more than half — the *Concise Oxford English Dictionary* definition includes

practice. The partners had failed to take on board that the indemnity they had from him was only as good as his assets and, as far as their insurers were concerned, the liability to pay was theirs; recovery from the consultant was not their concern. Had they addressed the issue, their insurers might have agreed to a smaller excess on claims from the consultant's old practice.

The moral of the story is to consider the insurance implications when

## The moral of the story is to consider the insurance implications when recruiting, particularly at partner level.

'the greater in number'. So, for example, if a 20 partner law firm folds and one firm takes on a niche team of five partners, while the rest go off to other firms or set up on their own in groups of three or four with the odd one retiring or becoming a district judge, the firm taking five partners could end up as the successor practice with all the consequences, almost certainly unintended, that entails.

Holding your firm out as a successor practice — not just to clients but even, for example, to the Inland Revenue — can be a key issue in determining liability in this area. One stray email to a client or one ill thought out press release can be enough to cause irreparable harm. There are other provisions in the rules which are beyond the scope of this article.

Sometimes a firm will take on new recruits, knowing about the successor practice consequences which flow, but ask the new recruits to indemnify the firm against possible claims liability. This can cause problems too, because unless a deal is done with insurers, the excesses on their claims will be at their new firm's level. In one case I dealt with, a retiring sole practitioner joined a firm as a consultant. The firm he joined had a £50,000 excess on its policy. His intention was to hand over clients and ease his way into retirement. Only when the claims came in did he realise that he was stuck with £50,000 excesses, as opposed to the £3000 he had been liable for in his old

recruiting, particularly at partner level. The case study on p 35 is an example of problems which can arise in practice.

### Conclusion

The message is: if you are responsible for human resources in your firm, you have a real contribution to make in saving on the firm's professional indemnity cost. Recruitment due diligence, successor practice and other insurance issues can all play a significant part in reducing the firm's professional indemnity risk, even before considering other critical issues such as stress, supervision and partner to partner review. ●



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*Frank specialises in risk management for professional firms. He is co-author of the Money Laundering Reporting Officers' Handbook 2004 and A Practical Guide to Minimising Risk.*

### Endnotes

1. Top 100 Professional Indemnity Survey, 2004.
2. Phone 0870 606 2555.
3. Additional cover is required for limited liability partnerships. A link to The Law Society's Minimum Terms and Conditions can be found on [www.legalrisk.co.uk/successor.asp](http://www.legalrisk.co.uk/successor.asp).

## Case study: successor practices — could it be you?

The bluebells were out and three young rabbits crossed the woodland coastal path in front of Thomas Hacker as he took his morning stroll one fine spring day. He looked wistfully at the yachts moored in the harbour beyond and started thinking it was time he did something about enjoying life.

Tom had built up a profitable personal injury practice, Accident Express, with his partners Richard Dibley and Harold Muston. The firm had enjoyed considerable success since ditching conveyancing and crime in the mid 1990s and was generating profits which many partners in even the larger firms in town could only dream of. Dick had retired a couple of years ago and Harry had taken over as chief executive of the claims consultants who referred most of the firm's work.

Attempts at bringing in new blood had been unsuccessful, as the firm was known to be something of a sweatshop. Those young assistant solicitors had not been up to the job of taking over and the partners had taken the view that the firm ran much better on an army of paralegals. If only he could find someone to take over from him, allowing him to do a bit of consultancy — he could then go sailing as often as he liked.

There had been a few problems in recent months which he could have done without and sorting out an exit strategy while the going was good seemed a good idea.

The solution came quicker than Tom had even hoped in the form of Parratt & Co. Parratt & Co was a three partner firm 20 miles away. It had been anxious to gain a proper foothold in the personal injury market as it saw its efforts on the subject so far to have been rather lame.

Jim Young had just become the senior partner of Parratt & Co and was anxious to make his mark on the

practice. He had been wondering about Accident Express as Tom was not getting any younger and was now running the practice on his own. He decided the time was ripe to fix a lunch with Tom.

Lunch turned out to be something of a misnomer for the occasion. The wine flowed and nine hours later the two finally went their separate ways, agreeing to ask their accountants to speak to each other in the morning with a view to progressing matters. If there was a deal to be done, Tom had said, it should be done quickly to avoid the risk of gossip and damaging speculation, and Jim was in no fit state to differ.

A fortnight later, the accountants, fresh from dipping their timesheets in the pot, the two men struck the deal. Tom would join Parratt & Co on 1 May as a consultant working three days per week for the first year, then reducing to two days per week, and Parratt & Co would pay him a handsome sum for the practice.

Spring turned into summer and renewal time for professional indemnity was soon upon Jim. He set about filling in the form, copying it from last year's as he had done several times before. It all seemed fairly easy, just updating the income figures and attaching the claims summary when it dawned on him that he needed to include the Accident Express details on the form too. Tom was off that week so he asked Brian, his practice manager, to do it for him as he was going to be away himself for three weeks. It would be a simple task as the brokers would no doubt just get a quote off their existing insurers, Geneva International, with whom they had been insured since the end of Solicitors Indemnity Fund, and who had also insured Accident Express.

When Jim returned from his holiday, pleased with his achievements so early in his term as senior partner, there was a note on his desk from Brian asking to speak to him about the renewal. Assuming the brokers had found a better quote

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elsewhere and just wanted clearance to make the move from Geneva International, he called Brian.

Brian told him Geneva International had declined to renew cover. The brokers were having difficulty finding other cover. With turnover just short of £2 million, it would mean a premium of nearly £400,000 if they could not find cover and ended up in the ARP sin bin.

Jim, now feeling his holiday disappearing into a distant memory, set about finding out why. It turned out that the conveyancing department of Tom's old firm, long since disposed of, had been causing a few difficult claims from banks.

Society a couple of years earlier and disciplinary proceedings against the three were now under way. Having taken Tom on, Parratt & Co were the 'successor practice' under the Law Society's Minimum Terms and Conditions.

Jim's thoughts turned to ditching Accident Express and unscrambling the whole deal. But that was not a solution, because it would still leave Parratt & Co as the successor practice.

Eventually, the brokers announced that they could find cover for £200,000, but that was not the end of the story. All claims relating to Tom and his former partners were to be subject to a £75,000 excess.

... the conveyancing department of Tom's old firm, long since disposed of, had been causing a few difficult claims from banks. One bank in particular was pursuing substantial claims in relation to the conversion of a baronial hall into flats.

One bank in particular was pursuing substantial claims in relation to the conversion of a baronial hall into flats. The developer had gone into liquidation. The management company had not been set up properly and there were all sorts of issues over the liability to repair the fabric of the building at considerable expense.

Worse still, the bank had discovered that the buyers of the flats were nearly all connected with either the developer or Tom, as the valuer who had reported to them could only have done so on the basis of a 'third gear' valuation or worse, and the statements of case were laden with allegations of fraud and conflict of interest by all sides, including Tom and his former partners, Dick and Harry. The bank had reported the matter to the Law

It began to dawn on Jim why Tom had been so quick to sign up on what had seemed such advantageous terms to himself. In his haste to do the deal he had not thought to speak to his brokers first, not given a second thought to checking Tom's disciplinary record with the Law Society, and had failed to ask about Accident Express's claims record. Tom was also concerned, as he had given Parratt & Co an indemnity against any excesses on claims, not that Jim was shedding any tears for Tom.

*Check the successor practice position before you do the deal!*

Note: This case study draws on a number of real life cases but names and details have been changed to protect the identities of those involved.



# Rosemary says ...

## Are you listening to me? Re-evaluating the power of conversation

In the last issue ((2004) 4(2) LPM 15), Brian Bailey gave a plug for 'the humble conversation' as a powerful tool in knowledge management. He is right. Conversation is another one of those life tools that we undervalue because it is commonplace and largely untutored.

In business life, conversation (as distinct from the apparently more purposive nouns like instruction, direction, explanation, briefing and debate) has been dealt a near fatal blow from three different assailants.

### The efficiency myth

The drive to demonstrate efficiency is behind a lot of business activity. Wasting time is the ultimate sin to be avoided.

The drive to prove we are efficient pushes the pace — we can't be seen to be wasting time. Inaction is the antithesis of 'in action' and we must be busy at all costs. Faster sits right up there alongside bigger and cheaper as an important success indicator.

We have lost sight of how much more is achieved when we move the focus from efficiency to effectiveness. Efficiency rushes us to complete a task quickly and well. Effectiveness prompts us to stop and ask the questions — 'Why am I doing this? Is it necessary and valuable? What am I trying to achieve? Is there a better way to get the results I want?'. Effectiveness produces the kind of qualitative, durable benefits that efficiency may steamroll in the rush to complete.

### If I can't charge for it I'm not doing it!

We have become accustomed to selling our time and to being constantly accountable for how we use it. Effective time management is to be

much admired. However, there is a range of non-chargeable activities which vastly enhances our fee earning capacity. Learning a new, in demand, technical skill is an obvious example. Just as important is building effective working relationships with those whose administrative role can make your life heaven or hell. Our short sightedness in valuing the chargeable

Talk works<sup>1</sup> — we know it does because there are so many 'if only' stories. A great example appeared in the 2004 annual report of the Banking ombudsman.<sup>2</sup> The report notes that while complaints are down, it appeared that banks could resolve many of their disputes if they spent more time in face to face communication with their clients. At the same time, it also noted

Our short sightedness in valuing the chargeable hour over everything has discouraged investment in conversation as a business asset.

hour over everything has discouraged investment in conversation as a business asset.

### I can't talk now — send me an email

If the social psychologists are to be believed, we have now created Generation Y, whose idea of paradise is to sit in a locked room with only a computer screen for company. This is an exaggeration perhaps, but not completely far fetched. We are all so accustomed to voicemail, email and computerised interaction that it can sometimes be a surprise when a phone call is answered by the desired human.

### Resuscitating the conversation

Combining these three forces provides a reasonable explanation of why the conversation has gone missing. So why launch a search and rescue mission?

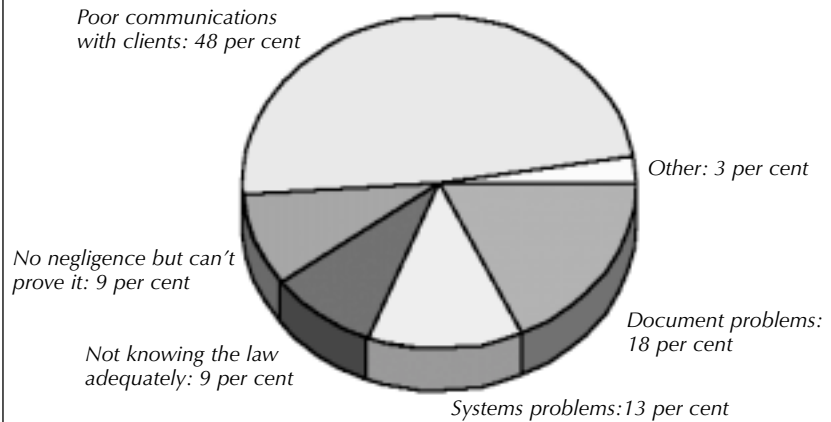
that another problem was being caused by customers taking their disputes directly to the Ombudsman rather than first trying to resolve them with the bank.

Quizzed about this on the ABC's *World Today* program, Colin Neave, the Banking and Financial Services Ombudsman, said, 'I think a failure to have across the desk discussions between banks and their customers are contributing to disputes arising ...' In describing examples of the problem, Neave demonstrated that the banks' lack of commitment to conversation was a very expensive exercise for them in terms of relationships and dollars.<sup>3</sup>

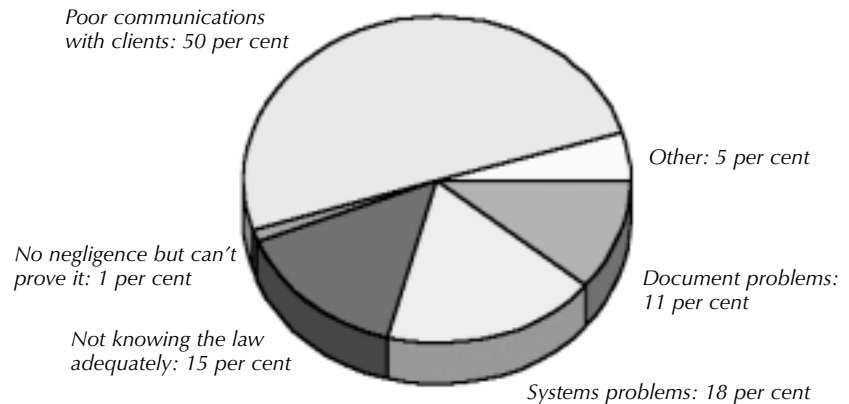
Closer to home, there is more compelling evidence of the power of the conversation and the penalty paid for its absence.

The LawCover research into the causes of claims against solicitors in NSW reveals that poor communication is considered to be the root cause of

**Chart 1 — Causes of LawCover Claims 1987-1997**



**Chart 2 — Causes of LawCover claims 1 July 1999 to 30 June 2000**



claims in approximately 50 percent of cases (a statistic which has remained stable from 1987 until the present time) as is demonstrated by the two charts (provided by LawCover) above.

While conversation is only one form of communication, my own focus group research with clients, staff and suppliers

**Promoting the conversation**

For lawyers, a most useful project is underway. Sponsored by Clark Cunningham, Professor of Law, Washington University School of Law, the Effective Lawyer-Client Communication Project (ELCC)<sup>4</sup> began with a pilot project. This

Poor communication is considered to be the root cause of claims in approximately 50 percent of cases (a statistic which has remained stable from 1987 until the present time) ...

gives clear evidence of lawyers' failure to value the significance of the conversation and to use it to build the most effective working relationships. As the LawCover charts demonstrate, this failure is costly for lawyers.

project correlated client satisfaction with a sociolinguistic analysis of recorded interview. The notion was to move the focus from what was being communicated (the lawyers' focus) to how it was being

communicated (the clients' experience).

He noted that:

The body of literature using sociolinguistics and other social science approaches to study lawyer-client communications is growing, but that research is almost never correlated with survey data from clients. Client satisfaction surveys, largely conducted by the organized bar and agencies rather than by academics, are not designed using insights from the sociolinguistic research. The topic of lawyer-client communication is increasingly addressed in a proliferation of legal education texts, but the pedagogy is not informed by the social science research.<sup>5</sup>

In making this analysis, Cunningham was also influenced by other research which was being undertaken around the world at the same time. He noted Professor Avrom Sherr's research on lawyer-client communication, presented at the 1996 APLEC Conference.<sup>6</sup> Professor Sherr, a pioneer of clinical legal education in the UK, is currently the first appointee to the Woolf Chair in Legal Education at the Institute of Advanced Legal Studies, University of London.

The same APLEC conference also received the work of Livingston Armitage, an Australian management consultant retained to investigate the role of specialist accreditation in enhancing client satisfaction.<sup>7</sup>

Drawing these strands together, Cunningham noted the disconnect between the increasing interest in studying lawyer-client communication and the training of lawyers:

Neither the world of professional practice nor the public funders of legal services rely to any significant degree on either social science analysis or client surveys to retain and evaluate attorneys.<sup>8</sup>

His proposed solution was a collaboration:

The time is now ripe for leaders of the legal profession, legal educators, and social scientists to combine forces to develop a shared approach to evaluating and improving lawyer-client communication.<sup>9</sup>

Following the publication of this working paper, Cunningham

continued to develop and disseminate his ideas. This culminated in the creation of ELCC, initially as a collaboration between Washington University and the Centre for Legal Education in Australia. It now includes participants from the US, South Africa, Scotland, Israel, India and the UK.

We are waiting with bated breath for the outcome of this collaboration. If we are fortunate, it will provide a blueprint for the revival of the conversation. ●

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### Endnotes

1. An allusion to Deborah M Kolb's *When Talk Works* Jossey-Bass Inc 1994. Kolb is a highly regarded teacher of communication and negotiation with leadership roles in the Program on Negotiation at Harvard Law School and at the Simmons College Graduate School of Management.

2. See <[www.abio.org.au](http://www.abio.org.au)>.

3. See <[www.abc.net.au](http://www.abc.net.au)> for the transcript of *The World Today* recorded on 25 October 2004.

4. See <<http://ls.wustl.edu/Communication>>.

5. See Cunningham C D 'Evaluating effective lawyer-client communication: an international project moving from research to reform' 67 *Fordham Law Review* 1959, reproduced at <[www.law.gsu.edu/ccunningham/](http://www.law.gsu.edu/ccunningham/)>.

6. Sherr A 'The value of experience in legal competence' 1996 1 *Skills Development For Tomorrow's Lawyers: Needs And Strategies* (conference papers) p 133, Australasian Professional Legal Education Council.

7. Above note 6, Armitage L 'Client satisfaction with specialists' services: lessons for legal educators' p 355.

8. Above note 6, Cunningham C D 'Evaluating Effective Lawyer Client Communication' p 2.

9. Above note 6.

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# Depression in professional life and approaches to managing it

Hugh Keller

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In a presentation in 2004 Professor Trevor Waring, Chancellor of Newcastle University, cited recent studies which show that depression is the second most prevalent disease after hypertension in our society. One in four people is suffering from it. If you don't have it, look around you. One in three of your colleagues is likely to have it. Why is this relevant to you? It is because depression seriously affects your performance, judgment, level of risk taking, how you deal with problems and, of course, your demeanor. It can also seriously affect your happiness.

Depression can come from overwork — too much stress, too many obligations and not having enough time for yourself. Most professionals soldier on, but getting help at the onset of symptoms can prevent many of its more serious flow on effects. And if you think you are not depressed, watch out for anxiety. One in five people in Australia have that condition, which can be just as destabilising as depression.

- you don't have the same ability to cope with issues as in the past;
- you have a tendency to hide from problems, either going into denial about them or just putting them into the too hard basket;
- your weight either goes up or down noticeably;
- you find it hard to sleep;
- you find it hard to get up in the morning;
- you don't take care of yourself the way you should — libido can be affected (downwards in depression, upwards in cases of anxiety); and
- you don't feel good about yourself.

## How depression affects your life and wellbeing

Too much stress can cause physical problems such as palpitations, tightness in the chest, high blood pressure, twitching or trembling, or increased perspiration. On the emotional side you may feel disoriented or disorganised. You may become detached from others. You can become defensive about things

Most professionals soldier on, but getting help at the onset of symptoms can prevent many of its more serious flow on effects.

## Symptoms to watch out for

Symptoms of depression can include:

- your energy levels are down and many things becomes an effort;
- you lack enthusiasm and feel you don't have much to look forward to;
- your work and other problems build up;

that should not be issues and/or you can go into denial about important parts of your life. When you are under too much stress, and depression knocks at the door, it is difficult to be objective about your circumstances.

If your workplace is characterised by a lot of stress, interpersonal conflict

and excessive pressure, it is inevitable that there will be people suffering from depression. Signs of too much of the wrong type of stress in the workplace include unproductive behaviours like gossiping, quarrelling, formation of cliques, lack of co-operation, lack of tolerance and a high staff turnover.

### Responses to depression

There are a number of ways to deal with depression and anxiety which can be broadly summarised as:

- functional;
- medical;
- psychological;
- energetic; and
- spiritual.

#### Functional responses

There are things you can do to ease the situation. One of the main problems in depression is that there is nothing to look forward to. To counter this introduce into your life short term (daily), medium term (monthly) and longer term things to look forward to which bring hope, pleasure or joy into your daily life.

Psychologists such as Professor Waring suggest that organising one four-hour block of time per week in which to do things for yourself will help to prevent depression; however, even a few minutes each day focused on your inner needs can bring release and make you feel better.

Making time for the significant other in your life is really important. Like a plant, relationships need to be given attention if they are to bloom and grow. Quality time with your mate each day will significantly lift your spirits and help alleviate your troubles.

Friendships, not just work based associates but friends who do completely different things to you, are another valuable outlet. A social network plays a vital role in our stability, self-esteem and the pleasure we get from life. Dr Christine Northrop, an acclaimed medical practitioner and alternative therapist in the US, says we need to have our fingers in four pies to give our lives stability and help us through bad times. Work is one pie, family is another, a non-work related social group such as

a golf club is another, and a spiritual community can also be a great support when the going gets tough.

Another functional response is to take time out for a life review. Are you heading in the right direction or into a blind alley with your activities? Are you in the right firm, right arena, right country, right relationship or right career? Check in and see.

#### Medical responses.

You should not ignore the fact that depression is a deadly condition. Australia has one of the highest suicide rates among males in the world. It used to be youth suicide that was the big problem, but currently the largest group who suicide are older males.

There is a wide variety of medication that can help with depression and anxiety, and a reputable psychiatrist can diagnose whether you really need to take medication and, if you do, the best type for you.

#### Psychological responses

There are many well trained psychologists who can support you with talk therapy which is designed to give you greater understanding of the dynamics of your life and the relationships that you have in your life. This form of therapy, which usually involves a medium term commitment, teaches you strategies to deal with the challenges in your life.

#### Alternative responses

##### Energy healing

More and more people are turning to reputable energy healers for help with their problems and often find there are powerful benefits which complement the more traditional approaches.

Eastern philosophies hold that a person's energy field comprises their aura and chakras. During depression the chakras, whose job it is to convey energy in and out of the body, close down. Energy healing enables the chakras to work properly again.

Following is a brief account of a former barrister, Kim, who used energy healing to overcome illness and chronic lack of energy.

### Kim's story

I came across energy healing while I was practising as a barrister. I had a two year old daughter, had just gone through a divorce and was stressed. I contracted bronchitis and tried traditional approaches which did not work. I was ill for six months and often could not go to work. When someone suggested I try energy healing I laughed at the idea. However, as a last resort I decided to try it. Within days I was feeling noticeably better, and after a few treatments I was completely healed.

This event, which was outside of my paradigm of how life works, made me curious to explore the concept of energy healing. I gave up the Bar and now practise and teach energy healing and meditation full time.

#### Spiritual approach

The reason 12 step programs work for alcoholics and others who have addictive tendencies is because they teach people to find something inside themselves that is greater than they are. This is an example of a spiritual approach to problem solving.

Whether or not you are part of an organised religion, finding your inner stillness can transform your life into its most magnificent potential, if you do it right.

Meditation is a key component of the spiritual approach. It is like dropping an anchor into the calm, happy part of who we are. People are often amazed at what they get from it and how the time spent meditating is more than compensated by the surge in energy and focus that it gives them.

It is a matter of finding what works for you, enabling you to get on with having a satisfying, enjoyable and fulfilling life. ●



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For information from Kim Fraser about energy healing and meditation, visit <[www.kimfraser.com](http://www.kimfraser.com)>.

# recent publications



**Colin Fong**

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**Abrahams, N and Arnott, A** 'Open source software: understanding the risks' (2004) Issue 216 *Lawyers Weekly* 20-21. Discusses organisations' IT departments' use of 'open source' software and the legal risks and issues involved.

**Aitken, L** 'Resolving business disputes: litigate or mediate?' (2004) 42(7) *Law Society Journal* 66-68. Various disputes, whether petty or large commercial matters, can often benefit from the logic of mediation.

**Balachandran, R** 'Reasonable prospects of success' (2004) 42(10) *Law Society Journal* 61-63. Examines the provisions of the *Legal Profession Act 1987* (NSW) s 198J with relevant case law.

**Bivens, F E et al** 'Where will women lawyers be in 25 years?' (2003) 12 *Columbia Journal of Gender Law* 383-406. This panel discussion of practising lawyers examines how the problems facing women have changed, where the openings are that respond to the problems facing women in the profession at this point and a forecast as to where the profession is going.

**Bransgrove, M** 'What can solicitors do to reduce mortgage fraud?' (2004) 42(10) *Law Society Journal* 52-55. Discusses some of the alarm bells which may indicate the possibility of fraudulent dealing.

**Brust, G** 'Japanese story' (2004) 42(9) *Law Society Journal* 70-73. Discusses the opportunities for Australian lawyers in Japan with its economic upturn and the lifting of restrictions on practice. Examines the experiences and skills required, cultural aspects, Japanese language skills, remuneration, personal benefits and relevance of experience.

**Catanzariti, J** 'Electrolux decision has major implications for workforce' (2004) 42(10) *Law Society Journal* 36-38. Examines the recent High Court decision which provides greater certainty to employers, employees and unions seeking to negotiate a certified agreement.

**Checketts, M** 'Board independence: the Achilles heel of corporate governance' (2004) Issue 212 *Lawyers Weekly* 16-17. Discusses the lack of independence on Australia's top 250 company boards and inquires whether this alleged weakness is fatal to good corporate governance.

**Christensen, S A and Duncan, W D** *Professional Liability And Property Transactions* Federation Press Leichhardt NSW 2004. This book examines negligence with a focus on those associated with property deals. Professions targeted include: solicitors, land valuers, local councils, lenders, construction professionals, accountants and real estate agents.

**Cockburn, T and Carver, T** 'Determining causation under the *Civil Liability Act* (Qld) 2003' (2004) 24(6) *Proctor* 15-18. Examines the interpretation and application of the causation provisions in Queensland's *Civil Liability Act*.

**Collins, R** 'Problems in practice. Intervention and assistance' (2004) 42(7) *Law Society Journal* 69-71. Examines the stresses of legal practice which can have dire consequences and discusses the avenues of help available to practitioners in trouble.

**Douglas, R J; Mullins, G R; Grant, S R** *The Annotated Civil Liability Act 2003* (Qld) LexisNexis Sydney 2004. Provides annotations to the Queensland *Civil Liability Act*.

**Drummond, S** 'Know who you're dealing with' (2004) Issue 212 *Lawyers Weekly* 18-19. Examines the call for adoption of electronic signatures despite the anonymity of the online world and issues of security.

**Drummond, S** 'When to call in the external experts' (2004) Issue 217 *Lawyers Weekly* 18. Examines which firms are using management consultants and for what purpose.

**Evans, A** 'Pro bono targets new look' (2004) 78(10) *Law Institute Journal* 38-41. Examines the demands for achieving pro bono targets with undermining the values of voluntariness and altruism.

**Fish, J and Rothfield, R** 'Interviewing for employers: tips for a successful hire' (2004) Issue 212 *Lawyers Weekly* 12-14. Examines how, in hiring, employers need to prepare just as thoroughly as their interviewees.

**Fleming, G et al** *The Big End Of Town — Big Business and Corporate Leadership in Twentieth Century Australia* Cambridge University Press Port Melbourne 2004. Discusses how big business has been a harbinger of modernity, responsible for new products and the improvement of old ones, and has transformed businesses into internationally competitive enterprises.

**Foster, A D** 'When colleagues need help' (2004) 21(7) *GPSolo* 14-17. Discusses the need for colleagues to assist lawyers dealing with substance abuse or mental health disorders.

**Havens, A** 'Law firm marketing — Lawyers win business with blogs' <[www.llrx.com/columns/marketing3.htm](http://www.llrx.com/columns/marketing3.htm)>. In interview format, discusses blogging as a good marketing investment for lawyers and law firms.

**Hovenden, D** 'Putting a face to public service' (2004) Issue 212 *Lawyers Weekly* 20-21. Profiles Simon Daley who headed up the legal team of the HIH Royal Commission. Also examines the issue that government lawyers have not always been given the same professional recognition as their private colleagues.

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**Liverani, M R** 'Collaborative law practice shaping up as the primary dispute resolution mode' (2004) 42(10) *Law Society Journal* 24-27. Examines the trend of collaborative law practice in assisting parties with a negotiated creative problem solving agreement.

**McCormack, J** 'Tax practice — a change in the landscape' (2004) 39 *Taxation in Australia* 204-208.

Discusses some of the factors that make a successful and enduring tax practice in the current Australian tax environment. Some of the issues discussed included securing challenging and top quality workflows, working with your selected clients, providing high quality advice, engaging and developing the highest quality staff, developing and maintaining high professional standards, marketplace creditability and meeting or exceeding benchmarks with other comparable practices.

**McFadyen, G and Maclean, S** 'What's your practice really worth?' (2004) 24(4) *Proctor* 13-15. Discusses the various methods of valuing businesses.

**McHugh, M** 'Women are not just men who wear skirts' (2004) Issue 217 *Lawyers Weekly* 20-21. This extract was from a speech which discusses why women have so few speaking parts in the High Court of Australia.

**Magallanes, C I** 'Transnational legal education' (2004) *New Zealand Law Journal* 379-80. Reports on an American Association of Law Schools' international conference with its implications for the transnational practice of law.

**Mead, P** 'Hard hats required' (2004) Issue 216 *Lawyers Weekly* 12-14, 16. Discusses the risks involved in construction projects and provides a guide to help lawyers negotiate the potholes for their lawyers.

**Paras, S** 'Costs agreements labelled top secret' (2004) 42(10) *Law Society Journal* 64-65. Discusses whether legal professional privilege and

confidentiality are the same thing in the light of various court cases.

**Parker, C** 'A critical morality for lawyers: four approaches to lawyers' ethics' (2004) 30 *Monash University Law Review* 49-74. This article proposes a set of conceptual tools for assessing the ethics in practice and moral judgments of Australian lawyers.

**Pattison, S** 'Costs risks of third parties funding litigation' (2004) 42(9) *Law Society Journal* 44-45. Discusses whether the funding of litigation by third parties as a commercial venture for reward is an abuse of process, so as to put them at risk for adverse costs orders.

**Sinclair, K** 'A solicitor's word ... the seriousness of an undertaking by you or your staff' (2004) 42(9) *Law Society Journal* 42-43. Examines various decisions of tribunals where they have held that a practitioner's breach of undertaking amounts to professional misconduct.

**Surdo, A L** 'When is the advice of in-house counsel privileged?' (2004) 42(9) *Law Society Journal* 68-69. Discusses whether communications are privileged or not may depend on the nature of employment of those giving legal advice.

**Wilkins, F** 'Chasing the dragon' (2004) Issue 217 *Lawyers Weekly* 13-14, 16. The world economic centre of gravity is predicted to shift towards China over the coming decades, however, it has been suggested that Western lawyers will not be able to easily capitalise on China's march to prominence.

**Wilkins, F** 'Going with the flow' (2004) Issue 216 *Lawyers Weekly* 18-19. Discusses analysing and then automating a firm's internal processes is one way it can maximise efficiency.

**Yew, J and Ruoff, C** 'The perils of office romance' (2004) 154 *New Law Journal* 1514-15. Examines the risks employers face with personal relationships at work. ●

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SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia  
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ISSN 1445-7946 Print Post Approved PP 255003/05838 Cite as (2004) 4(3) LPM

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