

Risk Update



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Managing risk in the recession

With many firms facing difficult times, this newsletter reflects the changes in the areas of professional regulation and professional indemnity on which we have been instructed since the last issue. Managing risk in a credit crunch requires a different focus as new issues emerge, or the effect of previously identified risks is exacerbated. We have advised many leading firms on issues arising from mortgage fraud (commercial as well as residential), insurance coverage and investigations by the Solicitors Regulation Authority, as well as the consequences of redundancy (see below); we are currently advising several top 100 firms on SRA investigations.

Two credit-crunch risk-related articles by Frank Maher published in *FD Legal* can be found with a large number of other articles on our website - <http://www.legalrisk.co.uk/Pages/Resources.aspx?id=237>.

With the SRA set to inspect every firm in due course, practices are focusing on the extent to which they are compliant with the Code of Conduct, and we have been reviewing city firms, regional firms and others to assist them in this.

Details of two new publications designed to help firms with compliance appear on page 2.

Credit Crunch employment issues

As firms have to consider staff redundancies, additional problems may arise from failing adequately to pass the baton when handing over files – there may be failure to tie up loose ends such as time critical registration of charges, or failure to communicate clients' instructions to the person taking over the file. We have produced a checklist for firms in the UK and overseas and overseas to help manage the process. Details and pricing available from info@legalrisk.co.uk

Anti-money laundering audit

The Money Laundering Regulations 2007 have now been with us for over a year. They require that firms implement and maintain risk sensitive and appropriate policies and procedures. The monitoring and management of compliance with the regulations themselves forms part of the requirement under Regulation 20. Ongoing monitoring of business relationships is similarly required. In order to fulfil these requirements, it is essential to review your risk assessment and your compliance to ensure its continued appropriateness.

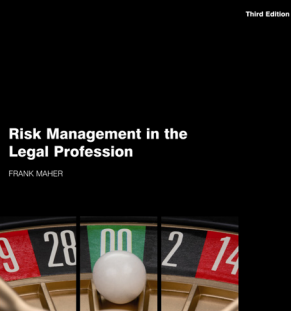
We have undertaken audits for several firms. Quite apart from what staff have or have not done during the year, it is easy to overlook the impact of change on the firm – such as new offices, new practice areas or new clients.

Recent events have reinforced the need for review. The Financial Services Authority's £5.25 Million fine on Aon (reduced from £7.5 Million for co-operation) was not for involvement in money laundering, but for failing to implement adequate risk management systems, controls and training to prevent bribery and corruption in high risk jurisdictions and high risk business sectors, aviation and energy. There are concerns among other major organisations that they too could face exposure to similar risks.

Those who do business in the EU should note that they cannot afford to be complacent: the FSA fine on Sindicatum and its Money Laundering Reporting Officer, mentioned in the November 2008 edition of Risk Update, related to Eastern European countries.

Readers should not assume that the action is all taking place outside the legal profession – there is an increasing number of solicitors receiving sanctions in the Solicitors Disciplinary Tribunal for negligent failure to prevent mortgage fraud and money laundering, as opposed to being deliberately complicit in it. For assistance with compliance, policies, risk audits and training, contact sue.mawdsley@legalrisk.co.uk.

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Risk Management in the Legal Profession 3rd Edition.
Published January 2009.

Order enquiries:
info@legalrisk.co.uk

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Anti-money laundering – latest publications

JMLSG Guidance on Equivalent Markets 21 Jan 2009 ([click here to link](#)).

Home Office Circular 029 / 2008 Proceeds Of Crime Act 2002: Obligations To Report Money Laundering - The Consent Regime ([click here to link](#)).

Referral arrangements – self audit tool

Note that we say 'referral', not 'referral fees' – many assume incorrectly that Rule 9 of the Solicitors' Code of Conduct 2007 only applies to high street personal injury and conveyancing and where fees are paid. It may, for example, also affect those doing government work, or providing helplines for corporate clients' customers.

Concern about non-compliance was raised at the Solicitors Regulation Authority board meeting in December 2008. Our database of Solicitors Disciplinary Tribunal decisions involving referral breaches records average fines of £10,500 and costs of £7,738. (Figures cover the period to the end of August 2008 and include cases where there were other charges.)

With this in mind, we have launched a self-assessment tool, using Desktop, our online risk diagnostic tool. The introductory cost, including a written report, is £350 plus VAT. Terms apply. Contact info@legalrisk.co.uk

New publications

We will soon be publishing '**A practical guide to Rule 5 (business management) of the Solicitors' Code of Conduct 2007**'. For further details, contact info@legalrisk.co.uk.

The third edition of **Risk Management in the Legal Profession** by Frank Maher is now available. The core text is increased by 50% on the last edition with a particular focus on credit crunch risks, monitoring and enforcement by the SRA, a review of compliance with the Money Laundering Regulations 2007, and the Legal Services Act. For details contact info@legalrisk.co.uk

Events

Title	Presenter	Event	Date
Anti Money Laundering	Sue Mawdsley	Law Society regional seminars	Various dates in February
Conflicts Masterclass	Frank Maher, Sue Mawdsley and Francis Dingwall	The Lawyer Strategic Risk Management conference, interactive workshop aimed at the needs of city firms, international practices and other large firms	16-17 March 2009
Credit crunch: New challenges, New risks	Frank Maher	Managing Partner Webinar	26 March 2009
Constructing strategic risk assessment frameworks and auditing processes for law firms'	Francis Dingwall	Ark Group Conference	31 March-1 April 2009

Details of all these are on the Events page on our website, www.legalrisk.co.uk

Code of Conduct amendment – Rule 7

Rule 7 (Publicity) and the accompanying guidance was amended on 14 January 2009 'to make it clear that it bans practices such as "clipboarding" members of the public'.

Firms with referral arrangements should ensure that their introducers are aware of this.

Continued ...

Conflicts of interest

Details of The Lawyer Masterclass on Conflicts appear above and on our website under Events.

Conflict issues tend to come to the fore in a recession, particularly on claims by lenders, but problems such as indemnity, coverage and aggregation mean we are already seeing compliance issues over the handling of claims by defendant insurance firms who need to ensure their staff are fully up to speed on their obligations under the Solicitors' Code of Conduct 2007. It has yet to be seen whether the crisis in the banking sector may result in a Sarbanes-Oxley style response with consequent challenges to confidentiality and conflicts issues for corporate lawyers.

The Solicitors Regulation Authority issued a consultation paper on 11 December 2008 entitled 'Proposed amendments to rule 3 (conflicts of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007', following pressure from City firms. Responses are due by 31 March 2009. The SRA's website explains that the proposal to amend rule 3 would increase the exceptions under which firms can act for sophisticated clients with conflicting interests where the clients give informed consent; the amendment to rule 4 would extend the circumstances in which information barriers can be used without the consent of the client whose confidential information is being protected. <http://www.sra.org.uk/sra/consultations/1649.article>

Consent by sophisticated clients is permitted in other jurisdictions, and an example where it went wrong can be found in a recent American case, **Centra, Inc. v. Estrin** 538 F.3d 402 (6th Cir. 2008). The client's knowledge of the lawyer's prior work representing parties adverse to it in different matters was held not to be sufficient to inform the client adequately of the scope of the lawyers' conflict of interest regarding the instruction in dispute; on the facts, the implied consent extended only to pre-existing conflicts.

A link to this case and conflicts rules, reported cases and other materials from over a dozen jurisdictions can be found on the Conflicts Resources page on our website - <http://www.legalrisk.co.uk/Pages/Directory.aspx?id=245>

The consultation on rule 4 does not address an issue on rule 4.02 (a), which states that 'the duty of confidentiality ... always overrides the duty to disclose'. At common law, this is no longer the case since the decision of the House of Lords in **Hilton v Barker Booth & Eastwood** [2005] UKHL 8, which was decided after the rule was drafted. While it is open to a rule to differ from the common law, it is questionable whether it is desirable.

Top 100 Risk management and professional Indemnity survey

Our sixth annual survey is in course of preparation. There are still a few days left for any final submissions.

Our services

Legal Risk LLP is a firm of solicitors providing specialist legal advice on **professional regulation** and **professional indemnity** to law firms and other professional practices. Clients include over 20 of the Top 100 law firms in England & Wales and leading European and multinational practices. We advise law firms on:

- Compliance with the Solicitors' Code of Conduct 2007;
- Compliance with Money Laundering Regulations 2007;
- Representing solicitors on investigations by the Solicitors Regulation Authority, by the Legal Complaints Service/Office for Legal Complaints, and in the Solicitors Disciplinary Tribunal.
- Professional indemnity policy coverage disputes on behalf of insured solicitors;
- Professional indemnity insurance issues on mergers/demergers;
- Risk management, and implementing risk management systems;
- Defending professional negligence claims.

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