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Early warnings across the pond

Developments in the US merit attention, with the expansion of US firms into the UK market, the need to manage the expectations of US clients, who may, for example, expect compliance with conflicts rules that are in some ways more onerous than here, and also because what happens in the US often follows here. The last point is amply illustrated by last year's prediction that client pressure would result in a reduced numbers of associates.

Over 400 delegates, the writer among them, attended a packed law firm liability and risk management conference in Chicago in March.

Much as in the UK, the expected credit crunch claims had largely yet to materialise, and there has been no discernible rise in the frequency of claims. Speakers thought that this might, in part, be because potential claimants do not wish to spend the money of pursuing claims on legal fees. Contrary to some UK perceptions, this was not the sort of work the US firms would be willing to fund on a speculative, contingent fee basis. In the UK, however, my suspicion is that claims may be slow in gestation because the stagnant property market has meant banks cannot sell property, and have therefore yet to crystallise their losses before choosing to pursue claims. For the present, they merely appear to be asking for solicitors' files (although with considerable doubt as to their entitlement in many cases).

Insurance issues

Speakers from the insurance industry expressed the view that insurance rates will increase, which may well happen in the UK with further pressure from the provisional administration of Quinn Insurance. Although Quinn has not insured larger firms, there could be an indirect effect because of the Assigned Risks Pool (ARP) – despite the belief a decade ago that the abolition of the Solicitors Indemnity

Fund would put an end to the firms with good claims records subsidising the bad. Coverage disputes are far more common in the US, although my firm has also been involved in an increasing number in the UK.

On the question of conflicts, ABA Model 1.10 has been revised to permit the use of information barriers to screen lateral hire lawyers. This was previously only permitted in the case of those who came from government. Advance conflicts waivers were discussed, and doubts expressed about their efficacy, although they may open the door to further discussion when issues arise. Meanwhile, in England and Wales the Solicitors Regulation Authority has just abandoned the proposed rule change to allow firms to act with client consent where there is a conflict, judging it would be more in the best interests of law firms than their clients. Communications with in-house counsel may create a conflict, resulting in there being no privilege. Instructing an external law firm may be a way round this (which was music to the ears of the writer!)

Lateral litigation

Large law firm closures, significant lateral movement and unprecedented redundancies have been a feature of the US market over the past year. There is, however, still an increase in law firm mergers and acquisitions. There are insurance coverage issues when recruiting lateral hire partners from collapsing firms, both in the US, and from the writer's experience of advising US and UK firms, in rather different ways in the UK. Laterals can face litigation, exacerbated by inadequate insurance coverage, which may also be a distraction from doing the work of their new firm.

Outsourcing has been much in the press in the UK, and it is also a significant issue in the US, where firms (or perhaps their clients) are probably ahead of us. Commentators there expect this to provide

challenges for professional liability and compliance too, and it will be no less so in the UK. Particular issues arise where clients instruct more than one firm to deal with separate aspects of the same matter, especially where activities such as litigation and e-discovery (disclosure) are outsourced to save cost, potentially exposing the firm to breaches of its duties to the court.

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Suing for fees, meanwhile, which in turn provokes a counterclaim for professional liability, is as much an ongoing problem in the US as in the UK. Interestingly, one large international firm requires the practice area to instruct an outside law firm to act for it on fee recovery claims, paid for out of its own budget.

Is the billable hour dead? Not yet, it seems, but it will not be the default mode going forwards. Discussion focused on outcomes and what constitutes delivering value – which might, for example, be settling a dispute by Friday, or preventing the CEO from having to give evidence. It was noted, however, that clients often fail to reward firms proposing value-based arrangements, perhaps not trusting the alternative to be good for them. Alternatives considered included the expected – volume and discounted fees, blended hourly rates, contingency fees, fixed fees, capped fees, success or incentive fees – but also, less predictably, reverse contingencies (paying the firm a percentage of avoided loss) and retrospective assessment based on value, the last of these being heavily reliant on mutual trust. ^{mp}

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