LEGAL RISK LLP
SOLICITORS

Risk Update

NO. 62 MARCH 2015

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Making non-compliance hurt

The Solicitors Disciplinary Tribunal

The record £305,000 fine imposed by the SDT in *Harvie* (11257-2014), reported last week, raises a wider issue. The SRA press release suggests that this was an extreme example of an own interest conflict. The wider issue, however, is what penalty might be imposed in a client conflict case where a firm made substantial fees by acting in breach of the rules. The previous highest fine was £50,000 on Fuglers (10917-2012), with fines of £20,000 and two of £5,000 each on the partners, principally for using client account as a banking facility. On appeal the judge observed that 'a total fine of £75,000, being six months' profits for a notional firm making a 15% profit on an annual turnover of £1 million, is not a disproportionately large sum'. This opens the door to profit-related fines which did not arise in previous high profile conflicts cases when the maximum fine which the SDT could impose was a mere £5,000.

Is compliance getting in the way of business?

How many lawyers see their compliance team as the 'business prevention department'? Compliance should be as much about how things *can* be done, rather than why they can't be done, while maintaining reputations and staying the right side of the law. Fee-earners must be shown how the processes help them *take on* work, rather than turn it away – for example not taking on the small job which conflicts them from acting on a larger one. Or linking anti-money laundering procedures to ensuring that the firm acts for the right clients, in its chosen sectors and is properly paid.

Some of the challenges clients have set us include –

- "This case is worth billions of dollars, and another key client is saying we must drop it because of a conflict of interests."
- "We want to take over the London office of a US firm which is closing but can we avoid being successor practice for insurance purposes?"
- "We want to take on some significant work for a client in a tax haven, but how can we comply with the money laundering requirements?"
- "We have had some large claims and we're worried about what impact this will have on renewing our insurance."

We have also provided partner workshops on conflicts for leading City, overseas and regional firms and reviewed client and matter engagement processes to enhance business as well as compliance.

Anti-money Laundering and the Serious Crime Act 2015

The SRA is half-way through its visits to 500 firms. To date, it has found issues requiring a re-visit in 10% of the firms visited. At this stage, they are being helpful, and they are promising to produce a report on the feedback. As the depth of their understanding of AML compliance develops, law firms' understanding will need to keep pace to match it.

Concern about the low level of Suspicious Activity Reports produced by the profession continues to be expressed, in spite of the fact that legal professional privilege goes some way to explaining this. Law enforcement and other parts of the AML regulated community do not always appear to understand how this affects the reporting requirements from a lawyer's perspective. London property work is under the spotlight with Transparency International's report, 'Corruption on your Doorstep: How corrupt capital is used to buy property in the UK'. An interactive map detailing the number of offshore-owned homes per London borough can be viewed at www.ukunmaskthecorrupt.org. A similar report has been released by the New York Times, concerning the New York property market.

Recent articles

A rogue in your midst

Professional indemnity insurance: proceed with care

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

Events

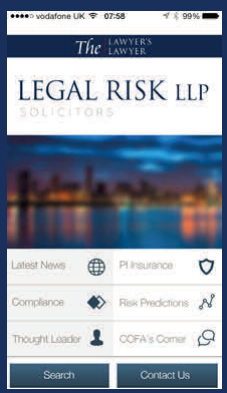
APIL Annual Conference 2015

Frank Maher will be delivering the seminar: 'Compliance: what you really need to know to avoid getting into trouble'

Regulatory and Compliance Risks: Are you aware?

Frank Maher is chairing Liverpool Law Society's Regulatory and Compliance risk conference and will be delivering a session on the future of Professional Indemnity Insurance. Sue Mawdsley will also be giving an AML update.

For more details see our website.



The Legal Risk App

There is a perception that law enforcement view solicitors as 'professional enablers', and the Serious Crime Act 2015, which comes into force on 3 May 2015, may give rise to prosecutions of lawyers for participating in the criminal activities of an 'organised crime group'. The principal money laundering offences under the Proceeds of Crime Act 2002 provide for a subjective test. The test for the offence under section 45 of the new Act is that a 'person knows or reasonably suspects', an odd use of words. It will be interesting to see how this is interpreted in practice. With the imminent introduction of the 4th EU directive, the storm clouds are gathering.

About retainers

Limitations of liability are to be encouraged. In *Barclays Bank Plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm) the High Court upheld an auditor's disclaimer, following the ICAEW standard form, ruling that it was effective and satisfied the reasonableness test in the Unfair Contract Terms Act 1977. We regularly advise on, and draft, limitation of liability clauses.

General retainers are to be discouraged. They expose the firm to inadequate scoping of the retainer, and failure to do conflicts and other matter engagement checks. But lawyers will find ways round a ban, and they cannot always be avoided. In *Hodgson v Richard Wilson Solicitors Ltd* [2015] EWHC 2015 a claim for failure to issue proceedings in time was, on the facts, dismissed: the solicitor's general retainer was found not to have extended to advice on the issue of proceedings.

The Tower of London: will solicitors face imprisonment under the Serious Crime Act?

Did your proposal form say that you always use engagement letters? And have you had claims where there were no engagement letters? Even if you do have an engagement letter, do your fee-earners properly scope out the engagement and say what is and is not included in the retainer? And do they make clear who the client is - e.g. the company, not its subsidiaries and not the directors personally? We frequently discover such issues on file audit; our report may be protected by legal professional privilege.

The Law Society has published a practice note on *Unbundling civil legal services*, i.e. acting on a limited retainer basis, usually in litigation. There are risks both of professional liability and of the duty to the court. It has been common for commercial clients in the US and elsewhere for many years to require firms to rely on the work of outsourced providers for disclosure/discovery, with the client in some cases instructing them direct. We are aware of a small number of cases where this has resulted in massive potential liabilities for the law firms.

In the meantime, more law firms are reported to be supplying contract lawyers. It is a complex area which will give rise to challenges on conflicts of interest, as well as other areas of compliance such as supervision and professional indemnity insurance. We have advised one of the leading providers on these issues.

Professional Indemnity Insurance

We understand the expected review of the SRA Minimum Terms and Conditions will not propose change before 2016. The SRA has published insurer market shares for 2014/15. We understand the total premium was down a little over 5 per cent.

The Legal Risk App

The Legal Risk app for Apple, Blackberry and Android provides frequent risk tips, updates and thought leaders. 7 Day Free Trial on Apple and 30 Day Free Trial on Android and Blackberry.

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