

Client-focussed approach to Risk Management

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Practice Areas

Risk Management

- Professional negligence claims prevention advice
- Assessment of law firms' risk exposures
- Advising on, and implementing, risk management systems for lawyers
- Contractual issues, including limiting liability
- Protection of partner assets
- Review and auditing of risk management systems
- Cross border issues

Regulatory Compliance

- Professional Conduct issues
- Avoiding and managing conflicts of interests
- Anti Money Laundering
- Disciplinary, including representation in tribunals

Partnership

- Structuring firms, and drafting Agreements
- Partnership dispute resolution
- Risk management issues on creation, merger and dissolution

Professional Indemnity

- Defending claims
- Policy coverage issues
- Strategies for obtaining improved terms of cover
- Successor Practice issues

Training

- Risk management
- Anti money laundering
- Professional conduct

About us

Frank Maher is a solicitor with 20 years experience defending professional indemnity claims including cross-border liabilities and major frauds. He has a diploma in Anti-Money Laundering and has written books and numerous articles on professional indemnity, risk management and anti-money laundering.

Sue Mawdsley is a solicitor and was previously a licensed insolvency practitioner. She acted for many national accountancy practices and high street banks, as well as conducting high value, technical commercial litigation. Sue advises many professional practices, from multi-national to high street firms, on money laundering, compliance and management.

Francis Dingwall is a solicitor and joined the firm as a partner in November 2007. He has substantial experience of defendant professional indemnity and has acted for many law firms, including US lawyers, and has also represented accountants, insurance brokers, IT consultants, surveyors and other construction-related professionals. He regularly advises insurers on policy coverage issues.



Partners: **Frank Maher, Sue Mawdsley, Francis Dingwall**
Regulated by the **Solicitors Regulation Authority**

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The firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Seminar outline

- LR Retainer as risk transfer
- LR Are mistakes only made by the stupid and reckless?
- LR Tools for managing client risks
- LR Beyond client risk: Rule 5.01(1)(I)
- LR The risk management process
- LR Identify, assess, respond: the risk management process on client engagement
- LR Onward risk transfer
- LR Risk and reward

Client-focussed approach to Risk Management

- LR Retainer of solicitor as **'risk transfer'** by client:
 - LR Commercial: Risk to client of failing to ensure that the deal he has done is enforceable.
 - LR Conveyancing: Risk that the client does not get good title to his main asset (and risk to the lender too).
 - LR Company: Risk of failing to comply with the Companies Act; *British Racing Drivers' Club v. Hextall Erskine*
 - LR Litigation: Risk of the case being struck out for a procedural error.
 - LR Family: The risk of paying too much (or receiving too little) by way of divorce settlement.
 - LR Private client: The risk of paying more tax than you need to.

Retainer as 'risk transfer'

- LR Solicitor as '**risk taker**', underwriting the **legal risks** in the transaction.
- LR Solicitor gives no cast-iron guarantee that he will avert the legal risk?
- LR Reasonably competent practitioner?
- LR High standard of care applied by the Courts
 - “The fact that [the accidental removal of the words] occurred should in no way be taken to detract from the **conscientiousness** and **thoroughness** of Mr Talbot. Such things happen and in some ways are understandable in a fast-moving and complex transaction such as this, but it was negligent nonetheless.”
 - Mann J in *Fulham Leisure Holdings v. Nicholson Graham & Jones* at first instance [2006] EWHC 158 (Ch)
- LR A law firm is a risk-taking business; we deliberately take on risks, each time we accept new instructions.

Retainer as risk transfer

- LR** The transfer of legal risk to the solicitor is not capricious...
- LR** ...because the solicitor is equipped to manage precisely this type of risk.
- LR** Just as flying a plane would be extremely hazardous for you or me...
- LR** ...but is significantly less hazardous for a trained pilot.

Competence, as a risk management tool

- LR The aviation industry is predicated on the assumption that people are fallible.
- LR Lawyers are extensively educated to ‘get it right’, and not to acknowledge that we are prone to error.
- LR “I doubt there is any professional man who is not capable of making a mistake. Many mistakes do not give rise to problems... Because of that, they may go unnoticed... But they are mistakes nonetheless...”

Mann J in *Fulham Leisure Holdings v. Nicholson Graham & Jones* [2006] EWHC 2017

- LR Are mistakes made only by solicitors who are **stupid or reckless**?

Are mistakes only made by the stupid and reckless?

- LR Each of us, however able, is a combination of strengths and weaknesses;
- LR We get tired: after 22 hours' non-stop work, the engineers responsible for a major shipping disaster were described as 'red eyed, goofy and incoherent';
- LR We take on too much work, finding it difficult to say 'no' to clients;
- LR We are subjected to pressure by external factors we cannot control, e.g. deadlines coming together;
- LR We may be distracted by the state of our personal life, e.g. a divorce, or even a wedding;
- LR We change, e.g. powers of recall may deteriorate, requiring new tools to aid memory.

Are mistakes only made by the stupid and the reckless?

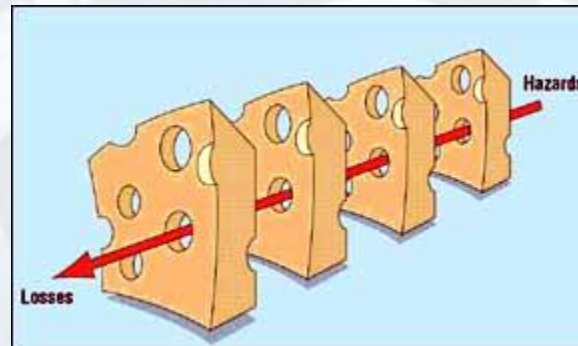
- LR “The lights are going out all over Europe, we shall not see them light again in our lifetime”
- LR Predictable errors:
 - LR Misdated cheques in January
 - LR The most common photocopying error
- LR 10 ways to miss a timelimit

10 ways to miss a timelimit

1. Lack of knowledge of the law
2. Staff communication (the partner thinks the assistant is doing it)
3. Client communication (the client gives you the wrong date when he received the form)
4. Stress (mental block file; fee-earner overworked and loses ability to cope)
5. Power failure (computer down)
6. Fault in case management system (programming: no letter triggered by the key date)
7. Inputting error by fallible human (inputting wrong month/year, easy in Outlook; and c.f. Misdated cheques in January)
8. Losing a file
9. Omitting to enclose form with covering letter etc
10. Sending document to wrong person/court

The fallible fee-earner:
the first slice of cheese

LR The need for error-tolerant design in
our systems of work



LR Tools which support the fee-earner in
managing the risks

Tools for managing risks: **Timelimits**

- LR Competence (fee-earner's legal knowledge/memory/diary)
- LR Client intake procedure (do not accept instructions if limitation imminent)
- LR Secretarial support (attendance notes)
- LR File opening form, with box for timelimits
- LR Textbooks/Lawtel, for difficult points and changes in the law
- LR Case management system (key dates; generate letters; automatic addresses)
- LR Diary (client has his own!)
 - LR System for checking diary daily (maybe Outlook reminder)
 - LR Manual back-up (card reminder system)
 - LR Office Manual requiring reminder in good time before deadline
 - LR System for checking in fee-earner's absence
- LR Supervision (fee-earner as 'risk taker', partner as 'risk controller')
- LR File audits
- LR Secretarial support (again: this time, address and enclosures)
- LR Postroom
- LR IT support, including back-up
- LR Archiving

Beyond client risk

- LR Like any other business, a solicitor's firm faces the risk that its tools, whether or not client-facing, will fail or prove inadequate.
- LR Other risks:
 - LR Financial risks
 - LR e.g. Risk of clients failing to pay; fraudulent transfers; partner borrowings
 - LR Strategic risks
 - LR e.g. Over-dependence on one client/introducer; threat from Tesco
 - LR Regulatory risks
 - LR e.g. breaches of Code of Conduct, such as Referral Arrangements
- LR “Business management is as central to the proper delivery of **services to clients** as professional competence”

The Regulation Review Working Party

“Business management is as central to the proper delivery of services to clients as professional competence”

LR Hence, Rule 5.01(1)(I)

LR “[The partners] must make effective arrangements for the management of the firm..., and in particular provide for:

LR ...(I) **the management of risk.**”

LR The risk management process:

LR **Identify**, or spot each risk: one City Firm has identified 92 risks

LR **Assess**, or evaluate, measure, quantify

LR **Respond**: the options are (1) avoid, (2) control/mitigate/manage, (3) transfer, or (4) retain

LR **Monitor**, or review

Risk management framework

- LR In order to conduct the risk management process, you need a framework, in the same way as you need a framework for managing the firm's finances.
- LR Report on the King's Cross fire in 1987
- LR "The Chairman of London Regional Transport ...told me that whereas **financial matters** were strictly monitored, **safety** was not...In my view, he was mistaken as to his responsibility."

(Fennell report, 1988, p. 17)

- LR Risk Management Framework, seek equivalents for:
 - LR Finance partner
 - LR Accounts manager
 - LR Control of payments and receipts, bank account etc.
 - LR Monthly monitoring of targets/budgets
 - LR Independent audit

Risk management framework

- LR** The City Firms now have sophisticated systems in place.
- LR** Lexcel provides a starting point, but not an answer.
- LR** AS/NZS 4360:2004, Standard plus Guidelines
- LR** BS31100, code of practice for risk management (due to be published in July 2008)
- LR** Legal Risk – Risk Report, using Desktop

Responding to risks: client engagement

LR Case study

- LR One of your junior associates, Harold Potter, is currently acting for Mr Lockhart in his professional negligence claim against his former solicitors, Snape & Co. The trial has just started.
- LR Lockhart wants to instruct your firm to pursue a claim for personal injuries he suffered in a ballooning accident almost 2 years ago.
- LR He wants Harold to handle it, even though he is not a Personal Injury specialist, because he has been doing such a terrific job on the Snape & Co claim.
- LR He says the accident caused a major deal to fall through, worth tens of millions in lost profits.
- LR He also mentions that the tax implications of his claim will need to be fed into his tax return, which is already overdue.

Identify, assess, respond: Client engagement

- LR** Is the client seeking to transfer unmanageable risks?
- LR** Client risk assessment:
 - LR** Can **any** solicitor satisfy this client's demands? Does he have unrealistic expectations? Has he changed solicitors already?
 - LR** Is there an impending deadline, or a very tight timetable?
 - LR** Is your gut reaction to say 'no' to this client or job?
 - LR** Avoid the risk?
- LR** If you decide to act, what extra safety net do you need? E.g. Record meetings? Extra supervision?

Identify, assess, respond:
Client engagement

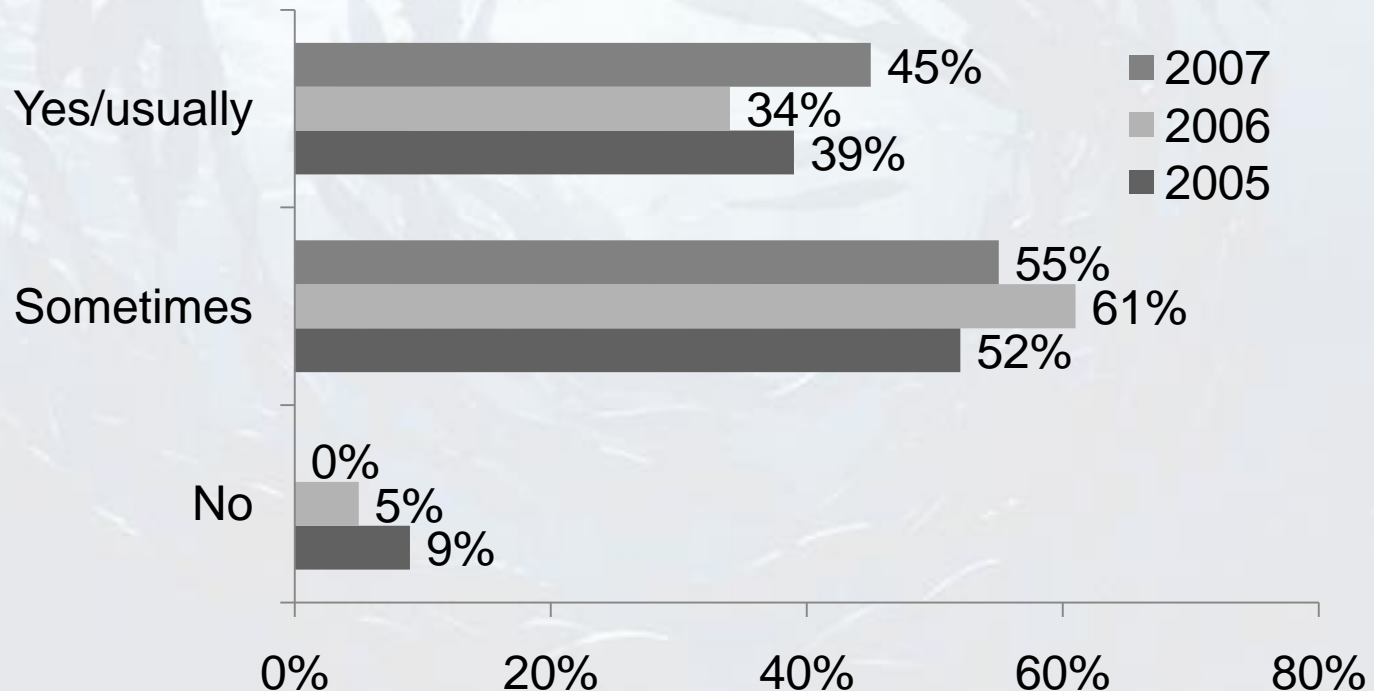
- LR** Do you have sufficient capacity/resources to manage the risk? If not, reject it.
 - LR** Do you have the necessary expertise?
 - LR** Solicitors' Code of Conduct rule 2(b) (you must decline to act “..where you have insufficient resources...”)
 - LR** “Saying ‘yes’ to one thing, means saying ‘no’ to something else”
 - LR** Fee-earner’s conflict in turning away work (professional’s fear of running out of work, targets, client loyalty)
 - LR** Centralised work allocation?
 - LR** Systematic, proactive assessment of capacity: (use WIP, hours recorded)

Identify, assess, respond: Client engagement

- LR Limit the risk, by scoping the engagement:
 - LR What risks is the solicitor underwriting, and what risks is he not underwriting?
 - LR Tell the client what you are not going to do: tax advice
 - LR Offering **commercial advice** dramatically extends the risks you are underwriting: the **commercial risks** of the transaction, instead of the **legal risks**

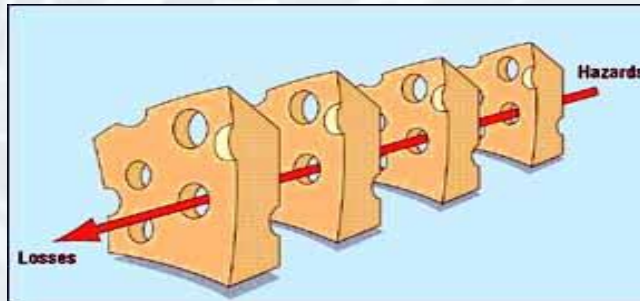
Identify, assess, respond: Client engagement

LR Limit the risks you underwrite by contractually limiting your liability: see Legal Risk's Top 100 survey:



Identify, assess, respond: Client engagement

- LR Lay off the risk transferred to you:
 - LR by instructing a barrister, or another professional
 - LR by purchasing professional indemnity insurance



- LR Residual risk remains:
 - LR Policy excess
 - LR Claims record, future premiums (possibly ruinous)
 - LR Damage to client relations
 - LR Reputational damage
 - LR Wasted time dealing with the claim
 - LR **Disciplinary action from Solicitors Regulation Authority**

- LR** Insurers underwrite risks in exchange for **premium**.
- LR** Solicitors accept responsibility for managing the legal risks attaching to a transaction or case in exchange for **fees**.
- LR** It is the element of risk and importance which makes clients prepared to pay the traditionally high fees of professionals.
- LR** Make sure the level of your fees reflects the cost of managing the risk the client transfers to you.

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