

MANAGING RISK

LAW FIRM RISK MANAGEMENT

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New risk standard launched

Web4Law is pleased to announce the launch of a new risk and quality management standard aimed specifically at larger commercial law firms

The Commercial Risk and Quality Standard (CRQS) provides a template for a risk programme for commercial law firms. It has been developed in conjunction with two major practices, both of which are at an advanced stage in the design of their own programmes.

A distinctive feature of **CRQS** is that it links into the internationally recognised management standard – ISO 9001 – so that firms can develop a risk programme that can passport to ISO 9001 accreditation if required.

Although developed by Web4Law, **CRQS** is to be administered by a newly formed body – Legal Quality Assessment Ltd (LQA).

Headed by Web4Law director, Simon Bray, LQA has an exclusive licence to administer the new scheme. As Simon Bray explains, “the advent of the Code of

Conduct has heightened the need for the product among larger firms, many of which have traditionally been diffident about the concept of formal quality management systems. Rule 5 is causing great concern among larger firms that they might not have the necessary policies and processes in place.

“**CRQS** provides a template for their particular operations and the opportunity for an independent assessment at either a documentary or a fuller level to certify compliance”.

The benefits of the programme also include the availability of a relevant standard that will assist in tendering processes, evidence to insurers of proper risk systems, and a due diligence test for use in mergers and bolt-ons. •

Full details of the new standard can be seen at www.legalqa.co.uk

Solicitors warned not to deal with unregulated claims managers

Solicitors could face disciplinary sanctions if they deal with certain unregulated claims referral companies or claims management companies.

Regulation of claims management services came into force on 23 April. The regulation is backed by criminal sanctions. Solicitors should check the status of any claims management company which provides their firm with regulated claims management services. Failure to do so could result in disciplinary action or even prosecution.

The new measures have been brought in by the **Compensation Act 2006** in order to improve standards in the claims management industry.

“We expect solicitors to take care that they are only using companies which are properly regulated. These are important measures designed to protect the public from claims farmers who have been using unscrupulous tactics and aggressive selling techniques,” said Peter Williamson, chairman of the Solicitors Regulation Authority.

Claims management companies will have to comply with new rules of conduct covering advertising, marketing and soliciting of business. Rules include giving information to clients before they sign a contract and a duty to have a complaints procedure.

“The authorisation process has already been effective in requiring some businesses to change their advertising and contracts. We will be closely monitoring the activities of claims management businesses and will not hesitate to take regulatory action where necessary. We will also pass onto the SRA information about solicitors who take business that has been improperly acquired” said Mark Boleat, Head of Claims Management Regulation at the Department for Constitutional Affairs.

Solicitors can check the status of an introducer on a dedicated website: www.claimsregulation.gov.uk.

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Code of Conduct takes effect

The long awaited revised Solicitors' Code of Conduct finally takes effect on 1 July. It represents the culmination of several years' effort to simplify and modernise the main rules of legal practice.

The revision amounts to a considerable simplification on the structure to the former Guide to Professional Conduct with a structure of 'core duties' in rule 1, a series of further more detailed rules on most major issues of legal practice, with all of the rules being accompanied by extensive guidance.

The rule makers have, of course, been aiming at a moving target, with the upheaval in the regulatory bodies having a bearing on the implementation of the new provisions. The original intention was for the guidance notes not to form part of the rules, but there are growing concerns that the newly constituted Solicitors Regulation Authority will be bound to enforce the guidance notes as if they were mandatory. If this does prove to be the case, it would partly defeat one of the original aims of the revisions process – to reduce, and so simplify, the amount of regulation to which practitioners are subject.

The early response by most solicitors to the new Code seems to be largely positive, though some of the provisions

will need test cases before their precise application can be determined.

Since one of the stated aims of the revisions process was to deregulate where possible, solicitors who carry on as if the Guide were still in force are more likely to be compliant than not. This is not the case with the rule 6 on Equality and Diversity, however, where the model policy that all firms were deemed to have adopted under the Anti-Discrimination Rule 2004 has been removed.

The net effect of this is that all firms must adopt their own policy, preferably not in a standard *pro forma* version. Failure to adopt a policy could result in non-compliance with rule 6.03 and also leave the firm more exposed to liability for discrimination claims though their inadvertent failure to have adopted a suitable policy. •

For details of guidance on the key provisions of the Solicitors Code of Conduct, 2007, see page six.

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Monitoring breach of human rights

The monitoring of an employee's e-mail, phone and Internet use was a breach of her human rights, the European Court of Human Rights has ruled. The government has been ordered to pay £3,000 damages and £6,000 costs in the case of *Copeland -v- United Kingdom (62617/00)*.

The case arose from a claim by Lynette Copeland who said that her Internet and telephone use were all monitored by Carmarthenshire College so as to breach her rights to privacy under Article 8 of the European Convention on

Human Rights.

The government argued that the monitoring was to determine the use of college resources for personal communication.

The Court said that:

- (1) Internet and telephone use, including e-mail, were covered by Article 8 of the Convention;
- (2) the claimant had no notice of the monitoring and therefore had a reasonable expectation of privacy;
- (3) the monitoring was an interference with her rights, and not in accordance with the law.

Data exposed as employees share sensitive data

A survey by Websense of 100 employees in the UK has found that over half believed their company would have no way of knowing whether they took or accidentally sent sensitive information outside the company.

Further, one in 12 employees would happily share sensitive information with friends at rival companies, highlighting the pitfalls companies face if they do not protect their confidential information. 46% openly admitted to allowing friends and family to use their company laptop – which allowed one-click access to their company's sensitive information.

Other findings included:

- 51% felt it very unlikely their company would realise, or have the facilities to monitor whether critical data had been wrongly or accidentally distributed outside the company;
- 65% sent potentially confidential information to insecure personal web mail

accounts like Yahoo! and Hotmail to work from home

- 52% of employees admitted to trying to hack into a colleague's e-mail account
- 1 in 10 accidentally sent out sensitive company information via e-mail
- 1 in 12 employees would happily share sensitive information with friends at rival companies
- 46% admitted to letting their friends and family use their company laptop

Commenting on the poll, Frank Coggrave, Regional Director for Western Europe at Websense, said: "It is a real eye-opener to realise that so many employees are willing to put aside confidentiality agreements for friends. When you see that over half of the people surveyed had tried to hack into a colleague's e-mail account, this should start alarm bells ringing for many companies. Not taking proactive steps to secure confidential data can lead to extremely costly information leaks."

Virus writers launch encrypted attachment strategy

Virus writers are attempting to evade the capture of malicious code by sending it as either an encrypted e-mail or within a password protected zip file attachment, according to e-mail management specialist Email Systems.

While this strategy has appeared previously in different guises, with encrypted zip attachments first becoming a major issue six months ago, the situation has worsened considerably in recent weeks with a significant increase in the number of such mails being propagated.

The e-mails frequently contain a security warning, offering to protect the user from a threat. The phrase ATTN! is frequently prominent within the subject line of such e-mails – although others include 'Worm Detected!', 'Virus Detected!',

'Spyware Alert!' and 'Warning!'. On receipt of the e-mail, users are prompted with the password and are thereby unwittingly able to release the virus on their machine. On execution of the file, the Storm Trojan virus, is designed to retrieve additional malicious code from the Internet.

Neil Hammerton, CEO of Email Systems, commented, this type of Trojan attack is an attempt to evade capture by encrypting the virus in a hope that it may slip through the net. However, with multiple layers of security protecting each customer from spam, viruses and other malicious software, this type of attack again underscores the value of a managed service such as ours which is able to intercept threats before they reach the user."

Data protection crisis 'overblown'

A data protection 'crisis' predicted by some experts has been overblown, and the law change behind it will affect only a very few organisations, according to a leading data protection expert.

In six months' time an exemption from the **Data Protection Act 1998** will expire. The transitional relief exemption allowed some paper files to escape the control of the 1998 Act for a limited period in order to give organisations time to organise those files so that they would comply.

Some analysts, including consulting and audit firm KPMG, have warned that this will result in a crisis as

mountains of paper files suddenly come under the control of the Act.

But according to Rosemary Jay, a data protection expert with Pinsent Masons, the law firm behind Out-Law.com, the exemption did not apply to all paper files and is likely to affect only a few organisations.

"It is hard to see where any normal data controller is likely to have significant problems," said Jay. "The end of the transition period only affects information held on structured manual files – not all manual files – so it is not applicable to all old pieces of paper."

(www.out-law.com)

Reforms for renewal?

Piers Winton, Professional Indemnity Executive, Lexcel Consultant, HSBC Insurance Brokers Limited, looks ahead to some key issues for law firms to consider in the Autumn indemnity insurance round

The 2007 solicitors' professional indemnity renewal is fast approaching, to the delight of solicitors, brokers and insurers in England and Wales.

After the continued reduction in the premium pool over the last three years, it has to be questioned whether insurers can continue to cut their rates and manage to operate profit-making books of business.

Underwriters' challenge

Early indications suggest that the simple answer is that they cannot. This year, it is understood that one underwriter will be withdrawing from the market while another is to undergo a major review of its underwriting strategy.

This reduction in capacity could cause a hardening of rates, though others wishing to increase their books may see this as an opportunity for expansion. However, paid claims continue to be a burden in the open market and, combined with the lower premium pools, underwriting solicitors is perhaps not as attractive as it once was.

Brokers

We are, of course, not forgetting another significant factor in influencing market prices: brokers. The intense competition for clients experienced last year among brokers was certainly another factor keeping premiums low.

This is set to continue, given the softness of the professional indemnity market in general, which makes the comparatively higher premiums of solicitors essential for making up lost income.

Risk management

Price remains the main driver in a client's choice of broker but our experience this year suggests that risk management continues to grow in importance for firms,

exemplified by the increasing presence of the Lexcel standard and requests for HSBC Insurance Brokers' risk management services.

Trends this year are certainly showing that those firms that have implemented risk management procedures are benefiting from better claims results which will stand them in good stead when the market hardens. Furthermore, the need for operational efficiency remains essential to their businesses as the effects of the Clementi review and pending introduction of HIP's are certain to increase competition in the sector.

2007 Renewal

So what is in store for firms this year? All firms can expect the traditional bombardment of proposal forms through the letter box and then they must decide from whom they wish to obtain quotations. The battle of the brokers will then begin – bargaining for the best prices. However, HSBC Insurance Brokers believe that a far more stress-free and less time-consuming option is available.



Use a comprehensive proposal form and send it to your existing broker and one other broker. In this way, you can be confident that your risk will be presented to appropriate insurers. Sending duplicate submissions into the market can be counter-productive. Underwriters who have seen the same proposal forms from a number of brokers will often withdraw their quote or decline the risk in its entirety.

The profession is financially better off compared with the last year of the Solicitors Indemnity Fund in 1999. This year, whether the rates increase or remain static, we must acknowledge that, in light of the challenges and reforms that the profession faces in 2007/8, keeping the cost of professional indemnity affordable is of increasing necessity to all firms. •

Piers Winton can be contacted at pierswinton@hsbc.com



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Should you require a free review of your Indemnity arrangements or further information regarding our client services please do not hesitate to contact one of The Solicitors Team:

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Piers Winton - Account Executive - 020 7661 2089



LEXCEL ADVICE from Web4Law

We have a team of expert trainers for the Law Society in the Lexcel Scheme and can provide specific advice on particular elements. Our experience is that most firms have a manual which is largely compliant with the new standard but often need assistance to make the procedures a reality. We prefer to work with firms to help them develop the necessary system rather than impose a standard package. Firms wishing to obtain specific advice on elements of the standard might like to consider:

Structures and Policies

Advice on limited liability partnership conversions, strategic elements of quality management systems, provision of money laundering advice and training for compliance with the MLR 2003

Strategy, the Provision of Services and Marketing

Business planning and marketing reviews – chairing of partnership weekends a specialisation

Financial Management

Training on time capture and enhanced financial controls

Facilities and IT

Fixed price computer use audit and report service

People Management

Training in all elements of recruitment, appraisal and people management skills, advice on partner appraisals and reward schemes

Supervision and Risk Management

Advice on the development of risk strategies and training in supervision – our experience being that partners and team leaders often fail to take their supervisory duties sufficiently seriously

Client Care

Advice and training in all aspects of improving the services provided to clients

Case and File Management

Advice on the development of appropriate systems and procedures and staff training to enhance awareness of the systems



Contact Simon Bray (Lexcel Consultant) at simon@web4law.biz or telephone 07768 614440

Information Barriers – Levels of compl

Web4Law director, Matthew Moore, argues that formal information barriers might not always be needed, and that this is a rule from the Code that more firms should address

Rule 4 of the Solicitors Code of Conduct 2007 is a bold attempt to regulate a highly complex area which is of particular concern to larger commercial practices.

It therefore comes as no surprise to note that this is the area that has attracted unease from firms affected by its provisions, with one partly successful challenge already having been mounted to its provisions.

The challenge was based on experience with the new rules since rules 3 and 4, on conflict and confidentiality respectively, were brought into effect in advance of the other provisions of the Code in May 2006.

Rule 4 duties

There are three duties in rule 4:

- **4.01 – the duty of confidentiality** (the duty to keep information secret)
- **4.02 – the duty of disclosure** (the duty to be fully open with the client)
- **4.03** – the duty not to accept instructions that will jeopardise the above duties where there is an **'interest adverse'**

Distinguishing disclosure

Whereas the confidentiality rule mostly repeats the earlier position from the Guide, the rule on disclosure represents newer ground. Rule 4.02 consists of a duty to disclose all material information to the client on their matter 'of which you are aware'. This latter duty is stated to be a personal duty, whereas the duty of confidentiality applies to the firm in general, or 'you and your firm' as it is worded.

The thinking on this distinction seems to be that it would be unrealistic to seek to discipline an individual who did not disclose material facts to a client, when they had no knowledge that one of their partners or colleagues was in possession of such information.

Fiduciary duty

The duty of disclosure is also described as forming part of the fiduciary – or contractual – duties to the client, and is thus a matter of contract. It is therefore envisaged by 4.02(b) (ii) that you can agree 'expressly that no duty to disclose arises or a different standard of disclosure applies'. This is explained further at note 26 – 'The client might agree, therefore, that the usual duty to disclose would not apply.' This is an important consideration in terms of business in commercial work, especially for firms that have a particular industry specialisation.

'Interest adverse'

The rule on disclosure is supplemented by rule 4.03, which provides that if the firm holds confidential information in relation to a client or former client, it must not risk breaching confidentiality by acting, or continuing to act, for another client on a matter where that information might reasonably be expected to be material. This arises if the client has an 'interest adverse' to the existing or former client, and is subject to the exception that proper arrangements can be made to protect that information in accordance with rules 4.04 and 4.05.

City practice challenge

This rule produced one of the two points that a group of City practices campaigned to change in 2006. They had understood the Law Society to be seeking to put into the rules the common law position on the point, to which they were broadly agreeable.

They argued that the drafting process had over-stated the common law position, however, by defining 'adversity' as arising 'where one party is, or is likely to become, the opposing party on a matter, whether in negotiations or some form of dispute resolution'.

The City firms argued that this overstepped the common law position, and that there is



Matthew Moore

no authority to regard the other side in negotiations as having an 'interest adverse' to a client in the same way as happens in litigation. Notwithstanding the protests, the Law Society did not concede this point.

'Chinese Walls'

The main exception to acting where there is an interest adverse is where information barriers, or 'Chinese walls' can be established. These provisions generated the second grievance of the City firms.

There remains a good deal of confusion over such arrangements. Information barriers have never overcome a conflict between the differing interests of two or more clients – they are merely an expedient to allow the firm, in exceptional circumstances, to continue to act without revealing, to a new client, material information that should normally be disclosed to them.

They therefore allow an exception to the duties of disclosure and not to act where there is an interest adverse at rules 4.02 and 4.03. The firms involved campaigned to overcome the requirement in rule 4.04 that acting through information barriers would only be possible with the 'informed consent' of both the former client to whom a duty of confidentiality is owed, and the new client to whom the duty of disclosure is owed. The process of obtaining 'informed' consent, it has been observed, is more often than not likely itself to be a breach of one or other of the rules, and probably both.

exity in Rule 4

Client consent

On this point, the City firms were partly successful, leading to a change in the guidance, but not the rule. It was ruled that clients can be asked to consent upfront to the withholding of material information in the engagement process, meaning that the firm will not be obliged to go back to a former or current client for permission for the firm to act in new instructions where confidential information will be withheld from the new client. If accompanied by a waiver from the new client that the normal duty to disclose will not apply – possible for 'sophisticated' clients – formal information barriers do become more of a possibility.

The attention on the workings of formal information barriers at the largest firms have perhaps disguised the fact that these and many other firms will take advantage of the exception contained in rule 4.04 in more informal circumstances. Formal information barriers need to be accompanied by

sophisticated barriers in those parts of the practice with 'lock down' arrangements to keep information in accessible to other parts of the practice having been installed at many of the largest practices. The full list of safeguards at guidance note 45 to rule 4 makes daunting reading, with physical segregation, IT barriers and personal assurances from those involved all being required.

Safeguards not enshrined

It is envisaged, however, that these guidelines will not always be appropriate and it is stated in guidance note 42 that 'rigid safeguards for information barriers have not been enshrined in the rules'. Other guidance notes seem to suggest that barriers can be very much more informal. One of the more common problems for firms of all sizes, for example, is the appointment of a new partner or member of staff who holds confidential

information from their previous firm.

Guidance note 24 seems to suggest passing the client over to a colleague in such circumstances as long as the client 'agrees to this, knowing the reason for the transfer and, if you have already started to act for the client, agreeing that you are released from your duty to disclose up to the time when you personally cease to act for the client on that matter'.

This is followed by a cautionary note to the effect that 'you should consider carefully whether, even if these conditions are satisfied, it is appropriate for any members of your firm to act'. This does, however, seem to open up the possibility of a valid exception to the rules without the formal information barriers required in most such circumstances. •

Matthew Moore can be contacted by e-mail at matt@web4law.biz

Web4Law Guidance to the Code of Conduct 2007

In force 1 July 2007

Now available for use in your firm - authoritative guidance on the key provisions of the new Code of Conduct

Provided as an Adobe or Word document download from the Web4Law website this 11,000 word document reviews the key elements of the new rules, and provides guidance on compliance with the new Code. The Web4Law Guidance to the Code of Conduct has been written by the authors of the Law Society Office Procedures Manual and the authorised trainers for the Lexcel quality standard scheme.

Indexed and easily accessed, the material can be used for a variety of purposes, including:

- posting on your firm's intranet for fee earner reference and guidance;
- use in your in-house training sessions on the new regime; and
- editing into your firm's staff induction training materials

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In Conversation...

Geoffrey Vos QC, Chair of the Bar Council, is interviewed about the Legal Services Bill, as he explains to

Geoffrey Vos QC specialises in Chancery and Commercial litigation. His practice includes insurance and reinsurance, insolvency, banking and financial services, and company and commercial work generally.

His reputation is formidable. He was recently described by Legal 500 as “one of the Bar’s top advocates” and an “approachable intellectual heavyweight”. None better to talk to, then, about some of the challenges facing the Bar in the wake of the Clementi Review and as the Legal Services Bill wends its way slowly through Parliament.

He is quick to recognise the problems facing new entrants to the Bar and the situation is one he’s eager to address. “My personal view is that accessibility to the Bar to as many applicants as possible is central to its future.” He explains.

“It’s a competitive and taxing profession. Its processes and procedures make it more difficult for the less privileged because of its formal environment.

“I’m trying to address this through involvement with the Social Mobility Foundation which was established to identify able youngsters for entry into the profession by mentoring them and to acclimatise them for, what can be, an intimidating environment.”

Related to this issue is the question of securing pupillages. He accepts more pupillages would be desirable and that the present limitations are a real barrier to entry – and that this applies both to prospective employed and self-employed barristers.

“One way of addressing this,” he

explains, “could be to incentivise Chambers to offer more pupillages. We need to look at all options. At the moment, about 550 pupillages are offered each year. It’s too few, although my personal view is it is not too few by a huge amount.”

The question of the Bar Vocational Course also presents difficulties for less privileged potential entrants. “There are no local authority grants for this and it therefore makes the Bar less accessible. Even more so, because those from a lower socio-economic group are less prepared to risk taking on the huge loans that are required, with the uncertainty of any immediate prospect of repayment. It’s rather different for trainee solicitors, who at least have the benefit and assurance of an income once a training contract is secured.”

For the future of the commercial Bar, he has a great deal of confidence, and doesn’t accept that the arrival of alternative dispute resolution will make any impact on the number of these practitioners. “The commercial Bar is in good shape. It’s resilient and provides a national and international pool of some of the best specialist practitioners in the world.

“It’s estimated that the legal profession earns some £2.5 billion each year from exports and of this, the Bar contributes about 10%. The expertise of the commercial Bar helps solicitors to sell services in numerous jurisdictions and solicitors recognise this expertise. Apart from cyclical variations in work, and the possible long term effects of the EU discussion of a Common Framework of Reference, there’s no evidence of any shrinkage of the commercial Bar.”

We move on to discuss how the Bar

has reacted to the Clementi Review and begin by looking at measures to ensure solicitors and the public receive a quality service. The Bar Council is looking to introduce a Bar Quality Advisory Panel (BQAP) to supervise practitioners’ standards. Although it can’t impose sanctions for shoddy work, Geoffrey Vos is adamant that it would be sufficiently effective to ensure quality.

Its aim would be to bring to the attention of the profession any barrister who is not performing to the highest quality of standards. “We need to perform to the highest quality standards. So often, one hears anecdotal evidence of poor work by a barrister which is quite unsupported by any evidence and is a purely personal view. The BQAP will enable a barrister to offer an explanation and if there’s a problem it is brought to others’ attention.”

“Although it will be an internal process, it will give us a better idea of the scale of any problems there might be. It’s a more constructive approach to the issue, and we hope that judges will recognise this procedure – and that it might become a disciplinary ruling that advice should be sought from the BQAP.”

The other strand of the administrative process is the Bar Standards Board (BSB). He is proud that this was created some time before the legislation and it has been effectively endorsed by the Legal Services Bill. “It’s appointed by a transparent process.” He explains. “It’s ring-fenced as recommended by Clementi and is strictly regulatory. It governs professional issues; training, qualifications; admissions; monitoring, complaints and rule-making.”

Upbeat about the Bar's prospects in the face of Managing Risk Editor, Rupert Kendrick

To stress its independence, he points to the fact that "it operates alongside, and in consultation with, a consumers' panel." The BSB consists of seven lay members and eight barristers.

He does not foresee insuperable difficulties being caused by the arrival of Alternative Business Structures (ABS). His personal view is that the BSB should regulate all barristers, whether self-employed or employed, and even those who may in the future choose to practise in an ABS or partnership. As we talked, this issue was out for consultation with the membership, scheduled to end on 20 April. Any changes needed as a result of the response will be placed before the BSB; "we just felt we had to know how the profession felt on this," he explains.

Looking ahead to the effects of the Legal Services Bill, he dismisses as "most unlikely" the suggestion that the Bill will result in any significant migration of barristers to become in-house advocates.

"I think there's room for in-house advocates and self-employed advocates under the Bill. In my view, some limited migration may result more from constraints on the availability of legal aid rather than any effect of the Bill.

"There may be a slight variation in balance between the current 3,000 employed and 11,500 self-employed barristers over a period of the next ten years or so, but I think the case for self-employed barristers is unanswerable. The issue of conflict of interest with an employer cannot arise in a case, and their specialist knowledge – for instance in such niche areas as revenue; property; administrative and environmental law – is a unique resource



Geoffrey Vos, QC

My personal view is that accessibility to the Bar to as many applicants as possible is central to its future

which places them in a unique position."

We end by considering whether the post Clementi era will herald any changes in the traditional barrister-solicitor relationships as a business model, as the ABS presents the possibility of blurring the lines of demarcation.

"The rules on hospitality are clear –

there can be no inducements to offer work but proportionate networking is permissible. This is another area on which the BSB has been engaged in consultation, but there's been no abuse of any note as far as I am aware – certainly none to justify interference by a risk-based regulator. I think the existing relationship between solicitors and barristers will continue much as before." •

Nine sure-fire strategies for reducing employee or supplier fraud

Jane Colston, Partner in Masseys LLP, identifies key areas of organisational fraud and some strategies to address them

Strategy One – **Recruit carefully**

Screen all new employees. Remember that fraudsters are frequently charming, plausible and persuasive. Often, fraudulent employees who have been dismissed for gross misconduct go on to obtain new employment, and almost inevitably will defraud their new employer.

Obtain references for all new employees and call the referees provided. If a pre-prepared reference is provided and no contact details are given, insist that the prospective employee provides contact details of at least two referees. Where the individual is still employed elsewhere and seemingly cannot provide those details immediately, ask for contact details of two previous employers or character references, or make the job offer conditional on satisfactory references. Ensure that a responsible person speaks to the referees and obtains the referees' frank views regarding the prospective employee.

Strategy Two – **Conduct periodic staff evaluations**

Carry out periodic, for example, bi-annual, staff assessments where feedback is obtained on employees' performance and any issues can be discussed. Such a dialogue can highlight factors such as family or financial difficulties which might motivate an employee to act dishonestly, or might allow him or her to rationalise their dishonesty, such as dissatisfaction at work.

Staff should be left in no doubt over the standards that are expected of them; this should be made clear in their evaluation or set out in an employee hand-book, employment contract or elsewhere. This should set out, for example, organisational policy on: the personal use of the Internet and telephone system; the

use of confidential information; documenting expenses claims; or conflicts of interest.

Strategy Three – **Personal behaviour of employees**

Be alert to employees moon-lighting by setting up a competing business which: diverts business from you; supplies goods or services to you at a non-competitive price; or uses your confidential information, for example, in regard to customer or supplier data or prices. Moon-lighting might also motivate dishonesty in order to obtain funding for a new business venture.

Other employees are often aware of fellow employees moon-lighting. Do not ignore rumours. A moon-lighting employee may be careless with incriminating letters or faxes. Do not, therefore, ignore suspicions.

Furthermore, as they divert business from you to their new business, your profitability or figures may plummet. Investigate such changes thoroughly.

Be aware of employees awarding contracts to a non-competitive supplier because of a 'kick-back'. A 'secret' profit such as this will place the employee in a position where there is a conflict of interest. Prohibit undeclared bribes or sweeteners or secret profits. Require a declaration of any conflict of interests. Require tenders for new business.

Be alert to employees' behaviour, for example, the seemingly 'perfect' employee who is always in the office, or is unwilling to take holidays, or sick leave, or who displays disproportionate concern about visits by auditors. Such behaviour may be indicative of their discomfort at handing over their work to others for fear of discovery. Look out for employees who are loners, or who are unwilling to

delegate work and are over-protective of their duties; they may well be hiding something.

Be aware of employees who are making a disproportionate 'profit' and consistently have good results while their contemporaries struggle to meet targets.

An employee's extravagant lifestyle, for example, the purchase of a yacht, or excessive gambling, might indicate that this is at your expense. Family difficulties, for example, an affair or a divorce, might motivate an otherwise honest employee/supplier to commit fraud. Other employees are often aware of such extravagance. Do not ignore such rumours.

Strategy Four – **Procedural irregularities**

Separate and differentiate spend and payment functions. Create a system of checks and balances, for example, require a framework for payments and benefits supported by procedures for verification of evidence.

It is critical, especially in finance departments, that systems and procedures designed to safeguard the company against fraud are strictly observed and monitored. For example, where two signatures are required on payments by cheque, both signatories should scrutinise the cheque, and both must check the supporting documentation before signing the cheque. A lazy second signatory will undermine the efficacy of the system. Periodically reinforce the need for strict controls.

Control expense claims by insisting on supporting documentation, and cash transactions. Do not allow a system where staff can pocket cash payments. If employees become aware, for example, that invoices are not required to support

Maintain a grasp on technology



expense claims, the fraudster will see an opportunity to misrepresent figures. Be alert to the 'bully bosses' who decline to account for their actions, for example by refusing to provide receipts for expenses.

Be alert to employees who breach protocol. Further investigation may reveal a fraud.

Be alert to the possibility of "ghost employees". Check that employees exist by performing annual evaluations. Check that employees are taking leave. Check the addresses and bank account details of each employee and ensure there are no common addresses or bank accounts. The use of fictitious employees in order to defraud a company is common.

Strategy Five – Maintain a grasp on technology

Maintain an effective grasp on technology. Do not abdicate responsibility so that you lose control and transparency.

Strategy Six – Implement an effective whistle-blowing policy

Whistle-blowing is an important weapon in the fight against fraud. Surveys reveal that many employees were aware or suspected that a fraud was occurring but took no action.

If a written whistle-blowing policy is effectively implemented employees can become "watchdogs" for irregularities and wrong-doing. Employees should be encouraged to raise matters even if they are simply concerns. Employees should have faith in the whistle-blowing policy and procedure and confidence that they are listened to, and will be held blameless.

Concerns expressed by financial controllers, accountants, or auditors should not be ignored and should be investigated.

Strategy Seven – Know your suppliers

Know your suppliers and the nature of their business. Visit their premises to verify their existence and that their businesses are *bona fide*. Many frauds have been committed by ghost suppliers being set up by dishonest employees.

Publish the standards you require from suppliers and monitor their performance. Do not expect them to confess their errors or wrong-doing to you, for example if they have been paid twice.

Strategy Eight – Supervise accounting procedures

Ensure that staff check that invoices correspond with contracted payments. Detect duplicate invoices, overpayments and other irregularities and empower accounting staff in their positions with reliable accounting software.

Ensure that supplier invoices match the agreed contract price. Frauds are often committed by accounting staff's failure, whether through negligence or fraud, to match the invoiced sum against the agreed price. This mis-match can disguise a kick-back by an employee in the accounts department. Do not disregard invoicing anomalies or accept glib explanations. Investigate them as they may reveal a fraud by the supplier, perhaps with the assistance of an employee.

Failure to match invoices against the agreed price or purchase orders can also lead to duplicate supplier invoices. Where a supplier's services come to an

end for whatever reason, make sure no further invoices are received from them. Suppliers themselves may try their luck, or employees may take advantage of the transition period from one supplier to the next to create fictitious invoices. Make sure that standing orders and direct debits to exiting staff and suppliers are immediately cancelled.

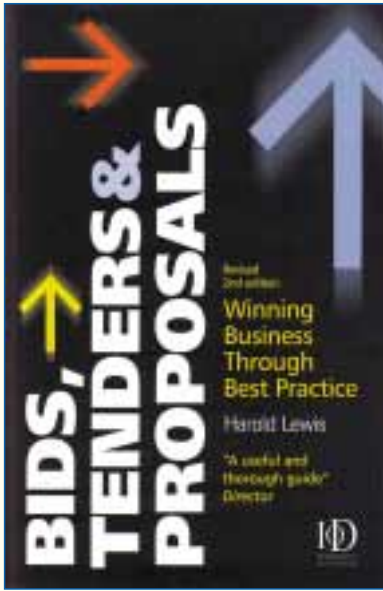
Carry out checks to ensure that invoices are not paid twice. Ensure that staff are thorough in processing invoices and have systems in place that will reveal duplications. Software is available which takes a sample of a company's data and analyses it for duplicate payments.

Strategy Nine – Practise what you preach

Implement, enforce and monitor an anti-fraud strategy. When fraud is suspected or uncovered, prompt and focused action is a first essential. Treat all suspicions seriously. Do not ignore them or explain them away without further thought and investigation.

Plainly, any investigation into a suspected fraud must be undertaken without alerting the suspect. A thought-out strategy, agreed ahead of time and on which legal advice has been taken, will ensure that the first steps are the right ones in both the short and long term.

Investigate and punish fraud. While prevention is plainly better than cure, if fraud does strike, the civil courts are very well armed to act quickly and effectively to preserve and trace stolen monies, and order payment of damages, with interest and costs. •



Bids, Tenders and Proposals

Harold Lewis
Kogan Page; 2007; 270 pp
Price £19.99; Pbk
ISBN 10:0-74944973-X

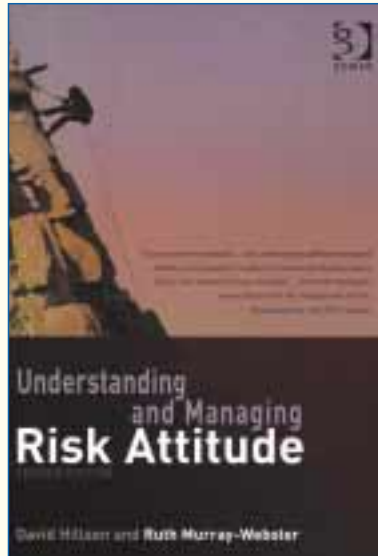
Whether engaged in professional services, consultancy or research, the ability to tender effectively is an essential skill. With local authorities and the larger corporate bodies now regarding the tendering process as routine in locating suitable suppliers of services for their needs, law firms, in particular, need to be able to master the tendering process if they are to compete effectively.

This book addresses the key skills in which any organisation has to be competent in the context of tendering.

This is a revised edition and provides expert guidance on how to win services, consultancy contracts and government funding through competitive tendering.

The process is examined in detail, including: analysing client requirements; managing bids; researching the bid; building a bid team; writing the bid; defining outputs and deliverables; adding value; describing professional experience; pricing; producing and submitting tenders; understanding how clients evaluate tenders; and making presentations.

In short, no law firm involved in the tendering process should be without this book.



Understanding and Managing Risk Attitude

David Hillson and Ruth Murray-Webster
Gower Publishing; 2007 170 pp
Price £25.00; Pbk
ISBN 978-0-566-08798-1

Risk management consistently remains the *bete noire* for many law firms, despite the fact that the importance of risk management is uppermost on the agenda of professional indemnity insurers. A key problem is the human dimension and the way people perceive risk and risk management. Each person takes an individual approach – and the problem is compounded when people work in groups.

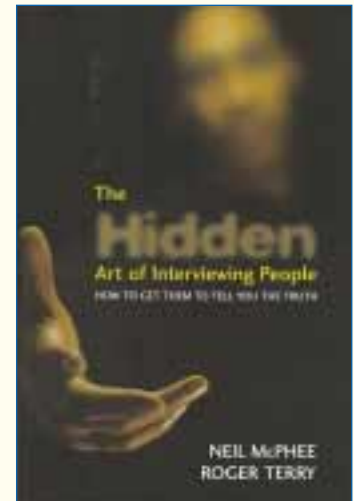
In this book, the authors develop a powerful approach to addressing the most common shortfall in current risk management – the failure to manage the human aspects of the process.

The book covers: the risk problem; the status quo; the importance of human factors in risk management; understanding risk attitudes; general principles of risk attitudes; group and individual risk attitudes; emotional literacy and relevance; individually and in groups; implementation and literacy tools.

This is a book for law firms, or more exactly, the risk managers of law firms, who are concerned to master risk management issues as part of an ongoing and continuous project. It is a serious study of how people handle risk in different scenarios and provides a genuine insight into how people behave in risk situations.

BOOK SHELF

Reviews of some Recent Publications



The Hidden Art of Interviewing People

Neil McPhee and Roger Terry
Wiley Publishing 2007; 300 pp
Price £18.99; Hbk;
ISBN 0-470-06079-7

Sub-titled 'how to get them to tell you the truth', this book is based upon the technique known as Neuro Linguistic Programming (NLP) and its use as a qualitative market research technique. NLP was previously used in psychology to understand how people think and react, and is a tool in self-development, interpersonal skills and business, looking at how our brains think of, and experience, the world.

Experts now believe that by applying this technique, researchers can understand the human brain and armed with this power, they can discover the truth from interviewees.

The book provides practical tools for decoding marketing problems and respondents reactions to questions; and features a range of techniques from NLP including rapport development; linguistics, reading facial expressions, body language and spatial positioning.

It is not a book for the faint-hearted, but time taken to absorb its findings will be time well spent in the context of identifying and recruiting personnel of greatest potential value to the firms.

Enter – the sophisticated businessman!

Edward Coulson, partner in Robin Simon LLP, discovers the emergence of a new legal character – the sophisticated businessman – which has radical implications for a solicitor's duty

Is the “sophisticated businessman” about to achieve the status of other iconic figures such as the “man on the Clapham omnibus”?

Developments following the Privy Council's decision in *Pickersgill -v- Riley* and Mr Justice Rimer's judgment in *The Football League -v- Edge Ellison [2006] EWHC 1462 Ch* (see *Managing Risk*, Autumn 2006) suggest we may be about to hear more about this intriguing figure.

The Privy Council concluded in *Pickersgill* that a Jersey lawyer did not owe a duty to an obviously experienced businessman to investigate the financial status of a limited company from whom the businessman was taking an indemnity and which subsequently became insolvent.

Beyond scope of instructions

Further, the Jersey lawyer had not been instructed to do so “... in the ordinary way a solicitor is ordinarily obliged not to travel outside his instructions and make investigations which are not expressly or impliedly requested by the client” (see *Clark Boyce -v- Mouat [1994] AC 428* - another Privy Council decision). In *Pickersgill*, the client had not made any such request.

In *The Football League*, Rimer J adopted this reasoning, holding that solicitors were not under a duty to advise their sophisticated clients to obtain a parent company guarantee when entering a very substantial transaction with a subsidiary which subsequently became insolvent.

Line of cases

This line of cases has been followed in two further, first instance, decisions: *Marplace (No. 512) Ltd -v- Chaffe Street [2006] EWHC 1919 Ch* (a decision of Mr Justice Lawrence Collins) and *Stone Heritage Developments Ltd*

-v- Davis Blank Furniss [2006] (a decision of His Honour Judge Hodge). In *Marplace*, the solicitor defendants were held not to be negligent in failing to advise their commercially sophisticated client in relation to the possible breach of an option agreement by the counterparty. Both *Pickersgill* and *The Football League* were quoted and approved. In *Stone Heritage*, the solicitor defendants had (negligently) failed to advise their sophisticated clients about the extent of the land they needed to acquire for a development scheme. However, the clients were well aware of the problem so the loss fell outside the scope of the solicitors' duty and was irrecoverable. Properly speaking, *Stone Heritage* seems to be primarily a ‘causation’ case, rather than a ‘scope of duty’ case but *Pickersgill* was quoted and approved by the trial judge.

Accordingly, it seems that *Pickersgill* is well on the way to making the successful transition from a persuasive to a binding authority. It also seems unlikely that, given the composition of the Privy Council in *Pickersgill* (Lords Nicholls, Hoffman and Hope and Baroness Hale), any appeal on this point of law will prove successful if the case reaches the House of Lords as currently constituted.

Implications

This has implications for the scope of a solicitor's duty not just in corporate transactions (such as those in *The Football League* and *Stone Heritage*) but also in litigation or potential litigation (as in *Marplace*). It also shifts attention and scrutiny away from the solicitor defendant towards the claimant: what did he know about the matters on which he claims to have expected advice and what was the extent of his experience?

It would be going too far to suggest that this represents a quantum shift in terms of judicial analysis of a solicitor's duty.



Edward Coulson

Pickersgill and *The Football League* were both based on impeccable and long established case law. However, that case law was none the worse for being restated and it will help solicitors who find themselves the victim of complaints by clients who were well aware of the commercial reality of the transaction and the risks they were undertaking.

It is also interesting that some of these cases show a willingness on the part of first instance judges to find that even though the defendant solicitor was negligent, the breach of duty did not cause the loss which the claimant seeks to recover. It has been suggested above that *Stone Heritage* falls in this category. Other recent examples include *Fulham Leisure Holdings Ltd -v- Nicholson Graham Jones [2006] EWHC 2017 Ch* and *Hicks -v- Russell Jones & Walker [2007] EWHC 940 Ch* in the transactional and contentious arenas respectively.

Risk management

In risk management terms, this illustrates the need to establish at the outset of the client relationship exactly what is expected from the legal advisors. This will not provide those advisors with an impenetrable shield but it will assist them if the client subsequently complains about a failure to provide commercial rather than legal advice. In short, prevention – or at any rate pre-emption – is better than cure. •

The Compensation Act 2006: A brief overview

Kevin Rogers LLB, LLM, Lecturer in Law, School of Law, University of Hertfordshire, considers the key features of the Compensation Act 2006

The Compensation Act (the Act) received Royal Assent on 25 July 2006. It relates to three linked areas: first to the law of negligence and breach of statutory duty; second, to damages for mesothelioma, caused by being negligently exposed to asbestos (both of these areas feature in part one of the Act); and third, to the regulation of claims management services (found within part two of the Act).

The Act seeks to address some of the problems caused by the perceived 'compensation culture' and also respond to some of the recommendations of the Better Regulation Task Force (BRTF) in its report *Better Routes to Redress*, published in May 2004. It applies to England and Wales (except for section 3, which also applies to Scotland and Northern Ireland).

Negligence

To be successful in a claim for negligence or for a breach of a duty of care, the claimant needs to demonstrate that a duty of care is owed by the defendant to the claimant, that there has been a breach of this duty and that the claimant has suffered a loss or injury caused by the breach. Section 1 of the Act deals with the second element (a breach of duty), and states:

"A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might-

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity."

This section seeks to reassure people and organisations who are concerned over the threat of litigation and encourages people to continue normal activities and not be discouraged by thinking they need to comply with overtly risk-aware behaviour. In the words of the explanatory notes: to reassure the public that "normal activities are not prevented because of the fear of litigation".

Further, section 2 outlines the fact that an apology or other form of redress by the defendant shall not amount to an admission of negligence or breach of statutory duty. Currently, it remains to be seen whether the courts will use the Act to its full potential in trying to provide balance between carrying on of normal activities and ensuring that an adequate and reasonable duty of care is maintained.

Mesothelioma

Section 3 relates to asbestos-linked mesothelioma and sets out *inter alia* the conditions that must be satisfied before the main provisions of the section will apply. The conditions are that the claimant has contracted mesothelioma from exposure to asbestos, second that they were exposed to asbestos as a result of negligence by a person, and third, that it is not possible to prove whose negligent act caused them to become ill.

Claims management

The bulk of the legislation focuses upon claims management services and seeks to tackle the 'compensation culture'.

It applies to companies, including solicitors, 'no-win, no-fee' companies and voluntary or not-for-profit organisations, who act as complaints handlers.

The Act provides that from 6 April 2007 such handlers must be regulated and authorised to conduct such business.



Kevin Rogers

Under section 7 of the Act, failure to provide a regulated claims management service (as under section 4 of the Act) is an offence with penalties of up to two years' imprisonment and/or an unlimited fine.

Initially, the Secretary of State for Constitutional Affairs will be the regulator and will be supported by a senior civil servant who will be the head of regulation. A trading standards unit will provide the monitoring and compliance function. This includes processing applications for authorisation, investigating any suspected evasions of authorisation and also monitoring compliance with the regulatory rules.

Companies engaged in claims management services are also required to give consumers clear and valid advice about their claim, provide guidance on how to fund the case and also provide a complaints mechanism should things go wrong. •

For further details on the Compensation Act 2006, please go to the relevant pages on the Department for Constitutional Affairs website at: <http://www.dca.gov.uk/legist/compensation.htm>.

The full text of the Act is available online at: <http://www.opsi.gov.uk/ACTS/acts2006/20060029.htm#aofs>, while the explanatory notes can be accessed from: <http://www.opsi.gov.uk/ACTS/en2006/2006en29.htm>.

Kevin Rogers can be contacted at: K.Rogers@herts.ac.uk

(See 'Solicitors warned not to deal with unregulated claims managers - front page)

The Importance of a good education

Andrew Rose, global IT risk manager at Clifford Chance, explains the critical role of instilling security awareness in personnel



Andrew Rose

For many years, organisations have focused on building a strong perimeter defence against the high-profile threats of hackers, viruses and spam.

Partnerships, and in particular law firm partnerships, more than any other sector, are inclined to mirror this concept within their culture and values, exhibiting a philosophy of trust that externalises the threats to the business and relies, to a significant extent, on the professionalism and trustworthiness of employees.

Unfortunately, the model of a constant, devoted, permanent workforce is no longer the norm. The use of external staffing, in the form of temporary staff and contractors, is growing and with it the realisation that the old rules may no longer apply.

Studies have regularly shown the greatest threat to information security to originate from within the network. Statistics vary; however the common figure places the risk balance at around 70/30 – with internal threats making up the majority. These threats largely originate from one area – staff.

Although exceptions exist, most staff are not malicious individuals determined to undermine an organisation from within. Most threats originate from staff making poor decisions, mistakes or being driven by curiosity.

Control bypass

While technological solutions are essential, it is clear that solutions on which reliance is placed for the protection of data can easily be bypassed. For example, a well secured laptop may require a password and smartcard for log-in and offer full hard disk encryption. However, if the laptop's owner writes the password on the back of the smartcard and leaves it constantly inserted into the laptop, all that good work is for nothing.

The laptop would be as open to attackers as if it had no security measures at all.

The legal sector, like many others, is particularly vulnerable to 'information leaks', where sensitive internal information escapes into the public domain. Such leaks can happen so easily, from a mis-addressed e-mail to a sensitive document being thrown out with the daily waste, yet they can have a significant impact on current deals and clients.

There are endless examples of security incidents that could have been avoided had a member of staff acted differently at some point.

The solution is clear – in addition to technological controls, a culture of IT and security awareness, fostered by training and supported by clear policies and guidelines, needs to exist.

IT training

Technological training is the first step towards a solution. Staff should be trained to be competent in using IT equipment and understanding the basics of the key tasks they have to undertake – and the potential pitfalls of making errors.

This will help prevent fundamental errors, such as electronic documents being saved to an insecure location or documents being mistakenly corrupted; and will form the basis for the next stage.

Security policy

Staff benefit from clear guidelines stating what is and is not acceptable within the firm. For example, is it acceptable to take confidential client documents outside the office on a USB stick? Is it acceptable to send and receive attachments via hotmail? Is it acceptable to use the Internet for personal use during work hours?

When pulled together, the answers to key questions such as these, form the basis of the most fundamental and important security policy document, the 'Acceptable Use Policy' (AUP).

Security-conscious culture

Security and risk training is entirely intertwined with the AUP. The policy should define acceptable use and describe best practice, while security and risk training should deliver this to staff in a consistent and appealing manner. Use of "war stories" and sharing practical experiences and solutions will help to reinforce the importance and breathe life into the issue.

Through hard work, and with imagination, it is possible to get staff to engage with the policy and follow its guidelines – this is the first step in building a security-conscious culture. This new culture will show an immediate reward, security incidents will fall in both number and severity, as staff start to make better choices and more educated decisions affecting the security of your data.

Conclusion

Security solution providers have realised that the 'perimeter control' model is dying – organisations now also need to grasp that realisation.

The trust culture we experience makes law firms exceptional places in which to work. Unfortunately, they also endanger the firms' security and, therefore, their reputation. We should aim to keep the best parts of this tradition while adding to it a culture of security where care and control is a part of everyone's working day.

Given limited budgets to address information security within a firm, there are six core steps that should be taken. Three of them are listed in this article – that is how important this topic is to the safety of your firm's security and reputation. •

Conferences and Events

Risk Management Events

6-7 June 2007

Law 2007 • *NEC, Birmingham* • www.thesolicitorsgroup.co.uk

This event follows hot on the heels of its sister event held at Olympia in March. It offers an exhibition and a course of seminars and keynote presentations on tracks of legal topics including: civil litigation; commercial issues; legal management and marketing; legal technology; private client and property (residential and commercial) This event is fast becoming the flagship law and legal practice management event for the profession and further events are planned in the Autumn, and Spring 2008.

14 June 2007

Privacy & the Media • *IBC Conferences* • *020 7017 5503*

This event reviews the latest case law and exploration of privacy, the media and criminal law and offers practical tips for managing cases. There will be keynote addresses, mock applications and interactive workshops which will enable a study of the limits of public interest, the waiver of privacy rights and the exposure of 'hypocrisy'.

5-6 July 2007

Probate Section 10th Anniversary Annual Conference • *The Law Society* • *020 7316 5678*

This event celebrates ten years since the formation of the Probate Section. It is wide ranging event featuring plenary session addressing; changes to the profession; wills probate and administration and an interactive development session. Parallel workshops include; a guide to IT in probate; non-contentious costs; Court of Protection issues; trusts after the Finance Act 2006; LPAs and mental capacity; bereavement and client care; probate problems and solutions; improving financial performance and EU cross-border succession issues.

1-2 October 2007

Law 2007 • **Olympia 2** • www.thesolicitorsgroup.com

Further to the success of its sister events Law NEC and Law London March, Law London Autumn will be host to 10 conferences covering all the latest black letter law, management and technology issues relating to the survival of law firms in this changing market. The event will attract over 2000 legal professionals over the course of the two days. 50 exhibitors will have the chance to market their products and services to this audience guaranteeing an unrivalled exhibiting experience.

17-18 October 2007

Storage Expo • **National Hall, Olympia** • www.storage-expo.com

This is the UK's only dedicated data storage event and provides visitors with the opportunity to compare the most comprehensive range of data storage solutions from all the leading suppliers. The show addresses today's key data storage issues within a broad education programme. Now in its seventh year, the event provides visitors with the opportunity to compare the most comprehensive range of data storage solutions from all the leading suppliers.

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