

MANAGING RISK

LAW FIRM RISK MANAGEMENT

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Mixed Fortunes in Renewals Round

The 2004 indemnity insurance round has been even more difficult to read than previous years.

Despite widespread predictions of increases in the range of 10-20%, many firms have experienced savings on previous years.

William Cooper, Senior Professional Indemnity Executive at HSBC Insurance Brokers, suggests that the picture has been heavily influenced by new underwriters entering the market. "There has definitely been more competition for the business, resulting in discounts of 20-30% on last year's rates in some cases."

He suggests that delay in arranging cover has again meant that some firms have paid more than they might have done. "This is not a market where bargains come to those who wait", he explains, "insurers harden their approach as they fill their quota, not the opposite. Those who delay definitely risk unfavourable renewal terms."

"This year, we've found premiums down 20-30%. That's because there's been much more competition, there are more players in the marketplace and so there's been more capacity. "There's still been the problem of late renewals, though. "Solicitors again left submissions to the last minute, so ran the risk of unfavourable renewal terms," he claims.

Many firms have commented on the increased detail needed in this year's renewal for. William explains that additional information needed enables the brokers to approach a wider range of insurers to obtain the best deals. "The greater detail provided has meant

that we can answer the variety of questions asked by the different players now in the market which in turn means that we can provide the all-round broker service that we are committed to," he comments.

"Unfortunately, some firms have not done themselves any favours by providing poor quality submissions. Clear presentation and reliable information from the firm can make all the difference." Asked for tips for next year, William replies "Plan well ahead, choose your broker wisely and do not flood the market with your proposal form."



LETG Award Nomination for Web4Law



Matthew Moore and the Web4Law team

Web4Law was nominated for the prestigious 'training organisation of the year' award at a recent meeting of the Legal Education and Training Group (LETG) – the influential interest group representing training personnel in law firms. The nomination comes early in the existence of web4law, which only started its operations in late 2002.

Our particular thanks are due to Penningtons, for whom we have delivered management and anti-money laundering training sessions in recent months.

In her nomination to LETG, Andrea Law said, "Matthew Moore and Web4Law have delivered a number of skills and management training programmes for Penningtons including New Partner Training, Networking and Senior Solicitors days.

"Matthew has demonstrated an ability to engage everyone from senior partners to secretaries and consistently ensured that those

continued on P3

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- David Eastwood, Managing Partner, Tollers, talks to *Managing Risk*
- Small Firms' Fight for Survival
 - Advising Clients on Costs
- Reducing Risk through Document Management

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From the Editor's Pen

Indemnity insurance renewal...

As this edition of *Managing Risk* goes to press, many law firms are embroiled in the now (probably) familiar round of annual professional indemnity insurance renewal. There are conflicting reports of trends this year. HSBC Insurance Brokers report their experience that some premiums have been reduced.

However, *The Times* (30 August 2004) reported 'Lawyers' fees rise to pay for their mistakes' – claiming that 'many law firms will pay at least 20% more this year for their compulsory insurance cover.'

In this issue, David Eastwood, managing partner of Tollers, in an interview with the Editor, comments that underwriters are now becoming much more demanding in terms of information required for the proposal. Indeed, the size of the form has increased from four to nine pages, as money laundering and financial services are now becoming key risk areas for law firms.

Whatever, it is apparent that there is no clear trend – all that can be said is that the market is variable, probably more demanding; and that attractive renewals depend increasingly on evidence of serious efforts by law firms to manage their exposure to risk.

This issue covers a wide range of risk areas for law firms. Peter Scott looks at a fundamental risk faced by small firms – their survival against the backdrop of Clementi. At the other end of the spectrum, Louis Powden-Wardlaw highlights a new document management solution that doubles as a risk and client relationship management tool, while Sheila Hoyle addresses the much underrated risk of stress in the office.

If there are risk issues that you think justify coverage – contact the Editor!

Rupert Kendrick LL.M
Editor

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WEB4LAW

HSBC (continued from P1)



Andrea Law, Penningtons

attending his training sessions achieved the agreed specified learning objectives.

"We were delighted to nominate Matthew and Web4Law for this award," says Andrea.

Tax Confusion for Law firms

Law firms could go to the wall unless a tax mess is sorted out soon, the Law Society has warned.

Confusion surrounds the interpretation of FRS5 Application Note G that appears to change the way in which profits, including 'work in progress', will have to be calculated when working out firms' tax bills. Firms could be left paying tax on work for which they have not yet been paid.

The Law Society fears it could result in large 'one-off' payments as tax demands are adjusted to take the new rule into account, hitting firms' cashflow severely.

In a letter to Ian Mackintosh, Accounting Standards Board chairman, Law Society president, Nally says: "Despite the passage of eight months since the publication of the application note, the accountancy position is still far from clear." He says there is a difference of opinion among accountants about how the rule should be interpreted in practice, not only from firm to firm, but from professional body to professional body.

Nally says: "The uncertainty as to the correct interpretation of the application note is extremely unsatisfactory, particularly as the advice solicitors' firms will receive will very much depend on the opinions of the accountants in question, which could lead to some firms receiving a much larger tax hit than others."

Stress at Work

Stress is one of the biggest causes of lost working days. Health and Safety Executive officials recently surveyed thousands of London's commuters in a workplace stress consultation.

At over 13 million days a year, work-related stress costs about £3.7 billion a year, according to the HSE. In 2001/2002, over half a million individuals in Britain experienced stress at levels that made them ill.

The aim was to highlight Management Standards to help employers gauge stress levels, identify causes and work with employees to resolve any issues. The Standards are not

regulations; rather a benchmark to help organisations meet their duty of care and assess work-related stress risk. Highlighted are: good organization; job design; and management that checks stress levels and enhances productivity.

Employers have a duty to ensure the health, safety and welfare of employees under the **Health and Safety at Work etc. Act 1974**, and to assess for health and safety risk under the Management of Health and Safety at Work Regulations of 1999. These include work-related stress. Information Commissioner's Annual Report.



Peaceful sunset after a stressful day

Document Verification Service

A new service is being launched through the postmasters' network enabling anyone to have their signatures verified when signing a legal document. Veri-fy™ will provide an easy to use and convenient way to meet the growing requirements for checking identity and authorization as a result of increasingly stringent money laundering regulations and more people using legal services outside their home area.

Over 1,000 law firms across the UK are expected to support the scheme where they advise their clients to use the Veri-fy™ service. Clients simply pay £5 for postmasters to witness their signing of the document along with checking their photo ID – either a passport or driving licence.

The scheme is the brainchild of Your Solicitor Ltd. Alan Benstock, of Your Solicitor, says, "There is growing concern about fraud and identification abuse, coupled with stricter rules and requirements. The days are limited of providing something like a utility bill for proof of identity in legal transactions. Veri-fy™ provides a fool-proof safe and reliable method of authenticating signatures." Further details at www.veri-fy.com

FSA Insurance Regulations

Regulations governing the selling and administering of insurance policies come into force on 14 January 2005.

They apply to firms purchasing or arranging insurance for third parties or

assisting third parties in preparing insurance claims.

They will only apply where remuneration is received by the firm for providing these services, though the application of the regulations will depend on the circumstances of the parties and the nature of the transaction.

IT Risk Watch

Key IT risk solution developments in the news

How Safe is it Out There?

Nebulas Security Limited has released the results of penetration-testing partner Imperva's Report: *How safe is it out there?*

Periodic penetration testing alone is not an effective means of reducing risks associated with web-enabled applications. Despite periodic penetration testing, the inherent risk to an application does not decrease, but is constant and may even increase.

Re-tests revealed that 'high' or 'critical' vulnerabilities increased from 89% to 93% after first time tests. In more than 50% of the retests, new categories of vulnerability appeared. The report offers various explanations:

- after penetration testing developers did not fix the

identified vulnerabilities;

- developers introduced new vulnerabilities during the time between tests – either as part of the normal evolution of the website, or as part of an attempt to fix vulnerabilities identified during the penetration test;
- with additional time, the penetration testing team was able to find additional vulnerabilities that were undetected during the first test.

The study analyses over 300 penetration tests of public and private sector web applications.

Further information from: Angela Bullock, Nebulas Security at angela.bullock@nebulassecurity.com www.nebulassecurity.com

UK Business unprepared for Disaster

Research from the Chartered Management Institute shows many UK businesses are unprepared for disaster. The research, published in association with the Business Continuity Institute, Colt Telecom and Nortel, found only 47% of organisations have a business continuity plan.



Last year, nearly half the events causing business disruption resulted from loss of IT capacity or telecommunications. Businesses that do have business continuity plans tend to concentrate plans on these events. But there are many events that could also cause disruption – loss of key staff and skills, damage to corporate image/reputation and, increasingly prevalent, terrorist damage.

Many businesses cannot know if their plans work, as only 57% test their plans at least once a year. 83% who tested their plans said the rehearsals revealed shortcomings in their effectiveness. One in ten admitted that they had not made changes even when they discover shortcomings as a result of testing.

Recommendations

- All businesses, no matter what the size, should have a business continuity plan;
- Business continuity plans should cover all events that could disrupt the business;
- Business continuity plans should be tested at least once a year and any shortcomings promptly rectified; and
- Contracts with third parties to provide services should include an obligation on the third party to have a prudent disaster recovery plan

Further details from Anna Tweedale annatweedale@eversheds.com (Source: Eversheds e80 Newsletter)

After Durant

Johnson v Medical Defence Union (2004) has further clarified the definition of personal data. It must clearly focus on an individual and must be easily accessible to the data controller. However, the court has widened the circumstances where an individual can require a data controller to disclose personal data where that data refers to third parties.

Under the **Data Protection Act 1998**, personal data may be disclosed to the individual to whom it relates (the data subject) when that individual makes a request for it from the body using that information (the data controller). This applied the principle in *Durant (Managing Risk, Spring 2004, p 6)* in considering whether

information held was "personal data".

The court said that information that was at one time held in an electronic format, but no longer is, does not automatically have to be disclosed to a data subject following a subject access request. A data controller can only be required to search through data which it has at the time the request comes in.

In addition, the court said that a data controller's employees must be able to identify relevant data at the outset with reasonable certainty and speed and without having to make a manual search.

The court followed Durant in that it is only information which focuses on the data subject and affects his privacy which can be classed as personal data and therefore

which may be disclosed. The court also said that if what is sought is not personal data, then neither the data nor the source or addressees of it are disclosable. Durant stated that the Act creates a presumption that information about a third party can only be disclosed to a data subject with the consent of that third party.

However, this case sets out that information identifying a third party can be disclosed without his consent, where it is necessarily part of the personal data requested and where the data controller considers it reasonable to do so in all the circumstances,

having considered all the facts of the case.

Finally, under section 7(1)(c)(ii) of the Act, an individual may be entitled to information which the data controller has about the source of the individual's personal data.

The court said that the definition of "sources" in section 7 of the Act is quite narrow and does not include every hand through which data may have passed.

(Source: Eversheds e80 Newsletter)

Law Risk Watch

A round-up of some of the latest risk issues

Information Commissioner's Annual Report

Last year, the Information Commissioner, Richard Thomas, received just over 68,000 enquiries, dealt with over 11,500 complaints and obtained eight convictions, seven of them against individuals, according to his latest annual report.

Richard Thomas urged public bodies to prepare for the coming into force of the Freedom of Information Act (FOI) in January next year, claiming that the FOIA, will need a transformation in the way public authorities deal with information requests from the general public. Some parts of FOIA are already in force, but many important provisions of both Acts are not due to take effect until 1 January 2005.

These include:

- A general right of access to information held by public authorities;
- A duty to disclose exempted information where it is in the public interest; and
- Adoption of approved schemes for the publication of information.

Thomas also agreed that some data protection rules are too complicated. "My task has to be to de-mystify the law, explaining things as clearly as possible and exploring the scope for simplification.

We must make it as easy as possible for organisations and individuals to understand what to do and expect. There is still much to be done."

No compensation for Injured Feelings

The House of Lords has overturned a ruling that damages awarded for unfair dismissal should compensate injured feelings. The ruling restores certainty for employers. The **Employment Rights Act 1996** says compensation for unfair dismissal should be: "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

In March 2004, the Court of Appeal approved an award for injured feelings in a claim against Hull City Council. The ruling created uncertainty for employers, trying to work out how to quantify damages for injury to feelings or, as the Court of Appeal put it, "self-respect".

Commenting, Robyn McIlroy, employment law specialist with Masons, warned that the decision only related to losses in unfair dismissal cases. "Employees will still be entitled to compensation for injury to feelings in discrimination cases," she explained.

New DLA Risk Director

International law firm, DLA has appointed Julia Graham to head up risk management. She will develop DLA's policy, standards and framework in this area working across all offices in the UK, Europe and Asia.

Last year, Graham was named 'Industry Personality of the Year' at the 5th International Business Continuity Awards organized by the Business Continuity Institute and Continuity Insurance & Risk.

Electronic Documents



The British Standards Institution has recently updated its Code of Practice on the Legal Admissibility and Evidential Weight of Information Stored Electronically to provide considered and up-to-date guidelines for storing information electronically and operating electronic storage systems. The current Code is PD0008:1999 and the updated Code will be obtainable from the BSI web site at www.bsi-global.com

The Code requires the production of a comprehensive user manual setting out storage, enhancement, retrieval and deletion policies. Although compliance can only strengthen a claim by a business that its electronically stored documents are reliable evidence for a court, compliance can be costly and there are reports of large multi-nationals contemplating abandoning attempts at compliance.

Clearly this is a risk management issue for any business looking to reduce its reliance on hard-copy documents.

Web Postings

The European Court of Justice (ECJ) has confirmed that posting information about individuals, such as their names and telephone numbers, on a web site is processing personal data by automatic means, bringing it within data protection regulation, but, it is not a transfer to a third country which would otherwise be prohibited.

The case was referred to the ECJ by the Swedish Court of Appeal for interpretation of the Data Protection Directive

95/46. The defendant church worker set up a web site giving information for parishioners, including details of colleagues; names, job titles and hobbies; family circumstances; and telephone numbers. But, she had neither obtained consent nor informed them.

Under Swedish data protection legislation, she was fined, and appealed to the Swedish Court of Appeal on the basis that although she did not dispute the facts, she was not guilty of an offence.

Cost Compliance Worries

Matthew Moore examines the growing importance of confirming costs advice at the outset of all matters

The Solicitors Costs Information and Client Care Code ('the Code') was introduced in 1999 to provide guidance on how practices should ensure compliance with Practice Rule 15 on client care. The Code has been amended several times since it first appeared, most recently to reflect the changes to Practice Rule 7 on introductions and referral fees.

Although originally intended more by way of guidance on best practice, the Code is increasingly being enforced as if it created specific contractual rights for the client. Although its provisions throughout are worded as things that firms 'should' do, it is becoming increasingly clear that the courts regard them as provisions that 'must' be complied with on every file.

Mandatory

How did the rules in the Code become mandatory in their application? According to former Law Society President, Tony Girling – now a consultant and trainer on professional issues – it goes back to the landmark decision in ***Swain v The Law Society 1983***. In that case it was held that, when making rules, the Law Society does so under its statutory authority from the **Solicitors Act 1974**. On this basis, the current approach of costs judges is to deal with the Code as if it were secondary legislation. This was certainly the approach in ***Islington and Shoreditch Housing Association v Beachcroft Wansbroughs, 2002*** where Costs Judge Wright referred to one of the sections of the Code as being '... not just a professional rule, it is a statutory requirement.'

Rule 4a

Rule 4a from the Code is probably well known by most practitioners now, with its requirement that the client should be provided at the outset with 'the best information possible about the likely overall costs, including a breakdown between fees

VAT and disbursements'. Aside from cases where the adviser relies on general client care letters that merely set out the levels of hourly rates, the most common failures to achieve what is required emerge in commercial work. All too often, the claim is that 'my client doesn't want this – they simply want me to get on with things'. The work is subsequently performed and a fee is agreed at the end of the matter. Although common practice, this has to be seen as constituting a risk that the firm will be paid nothing for its efforts, especially if the solicitor-client relationship deteriorates during the course of the matter.

True enough, the Code does recognise that 'the full information required by the Code may be inappropriate' (2b) but the illustrations given do not give a blanket waiver for commercial work, as many seem to think. The Code actually provides that the information may not be required 'in every case, for a regular client for whom *repetitive work* is done (our italics)'. An exception might therefore arise for a property dealer who provides much the same instructions every time he or she approaches the firm, but not the owner-managed business that requires advice from different specialists within the firm. The other exception quoted is where it would be 'insensitive or impractical' to confirm terms – the deathbed will being the most often quoted example.

Lexcel

For the most part, on the need for initial information, Lexcel simply re-asserts the need to comply with the Code. In one respect, however, it places an additional burden on firms which would also be good practice in firms not intending to apply for recognition under the standard. At 7.2, there is a requirement that 'There must be a record of any standing terms of business with regular clients, such as many commercial clients'. In Lexcel awarded practices, this is already encouraging a more regular review of terms of business with key clients, perhaps in conjunction



Matthew Moore, "common practice in costs may constitute a risk issue"

with the new provision on reviewing services provided at 7.4.

Caution

Even with regular clients, caution is needed before relying on a general retainer. In ***Darby v the Law Society 2003*** Auld L.J. commented that the solicitor claiming that the prior experience of the client would mean that they would not need the usual information would have to show that they were 'sophisticated' and 'attentive to the costs implication of the litigation in question'. The safer line is assume that general terms of business may deal with most of the information required by the Code such as complaints handling and persons responsible for the work but not the specific information on costs risks in longer running matters.

There is little point in undertaking work that the firm will not be paid for. All partners and risk managers should ensure that terms of engagement on all files meet the requirements of the Code. Any failures to do so should be explained by reference to clearly accessible terms that exist elsewhere or a specific attendance note showing that exceptional circumstances did apply. •

The author is a director of Web4Law and the principal trainer for the Law Society in the Lexcel scheme. E-mail: matt@web4law.biz

Money Laundering Challenge

News that the Law Society, in conjunction with other professional bodies, is likely to mount a challenge in the courts to the new money laundering regime will be welcome by most practitioners, suggests Simon Bray.

Speaking at the American Bar Association conference, Law Society president, Edward Nally, referred to the 'growing unease' over the provisions of the money laundering regime, the Law Society's Gazette of the 19 August reported.

Disproportionate

A cursory scan of the NCIS website would support the view that the regime is disproportionately geared to collecting information on minor taxation irregularities and not enough on the serious crime that would be more likely to win public support. Notwithstanding the lurid illustrations of bundles of white powder and guns, instances of terrorism and drug trafficking investigated from information supplied seem to be very thin on the ground. It is admitted that the Inland Revenue and Customs and Excise have benefited from many of the disclosures received, however.

Unlike the Canadian Bar Association, who successfully challenged some of the money laundering provisions to which they found themselves subjected, the courts here would be constrained by European law and the Second Directive on Money Laundering in particular. A challenge might therefore win sympathy only from the courts, who themselves have struggled with the need for disclosures when difficult evidence has arisen at hearings. It will be interesting to see if restrictions on the field of crimes that need to be disclosed – thereby excluding taxation issues – could be seen to be still consistent with the Directive.

Criminal offence

For the time being, non-compliance with the Money Laundering Regulations remains a criminal offence. Most firms seem to have adapted quite well to the requirement for checking of identification at the outset of matters but not so well to the issue of what to do with the evidence. The Regulations require that the evidence is stored for at least five years from the end of the transaction or the end of the business relationship. Most firms are taking the view that the check is not one that they wish to repeat with regular clients, so some form of central record

which can be referred to in future instructions is preferable. Given the amount of records that will build in even the smaller firms, some form of computerisation of the information is highly attractive. Better some scanning system than have the accounts department 'disappearing under ID forms' as one of our client firms recently commented.

CPD requirement

For the time being, training in money laundering awareness remains a requirement and the end of the CPD year may be a good time to organise a refresher session for those who have joined the firm since any initial training was conducted. Where there would be insufficient for a viable group, the acclaimed Web4Law money laundering CD with full notes could be the solution. This could also be the best way to ensure that money laundering is adequately covered in your firm's induction training meetings for new joiners. •

Simon Bray is a director of Web4Law and a member of the anti-money laundering training team.

E-mail: simon@web4law.biz

COMBATING MONEY LAUNDERING CD BASED COMPLIANCE TRAINING

All personnel in legal practice run the risk of liability under the money laundering provisions found in the Proceeds of Crime Act 2002 and the Terrorism Act 2000. In addition, those firms subject to the Money Laundering Regulations 2003 must train 'relevant employees' on the subject (Reg 3:c). Failure to comply with the Regulations on training is itself a criminal offence for those running the practice.

The Web4Law Money Laundering Training CD is the ideal accompaniment to staff induction training programmes. Simply provide a copy of our easy to follow notes and guidelines, place the CD in the computer, choose 'slide show' under PowerPoint and follow the expert narration on the topic. The disc can also be shown via projector for departmental or firmwide meetings. The 20 minute presentation covers the offences under the law and the impact of the Regulations. Completion of the accompanying Web4Law training certificate is your proof that you have complied with the training requirements.

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Practice or Management – Make yo



How can law firms balance the need to offer quality legal services with the demands for effective management strategies? David Eastwood, managing partner with Tollers, explains how he sees the dilemma to Editor, Rupert Kendrick

“Management issues are taking up more and more of my time,” says David Eastwood, managing partner of Tollers. “I combine it with a family law caseload. Last year, the ratio was about 70% practice to 30% management. This year, it’s more like an equal division.”

Tollers is a mid-size Northamptonshire law firm. There are 18 partners and 170 fee earners and support staff. Management issues are set to take more and more of his time.

“I could delegate more of my caseload, but family clients tend to require personal attention. The result is that if there is a management issue, I find myself dealing with client work in unusual hours. Like many managing partners, I suspect, I came into the role with no specific management training save for that learnt on the job.”

He is luckier than some managing partners, though. He has the support of a director of administration and a director of finance. Neither are lawyers. It is recognition by the firm that there are other skills needed for a law firm to operate effectively apart from legal knowledge.

“Our executive board meets each month and consists of me; the finance partner; two elected partners and the two directors. We are a broad-based firm with five departments: business legal services (including corporate, commercial property; employment and commercial litigation); personal injury, probate; family and residential conveyancing.

“Such a wide range of disciplines calls for an appropriate management response. To meet that, we have quarterly meetings between me, the departmental heads and

the director of administration and finance.”

The practice recognises the importance of quality standards. “For some time now, we have been accredited with ISO and a legal aid franchise. ISO is process-driven and we feel that accreditation with a standard that recognises the importance of managing people is called for. So, next year we shall be looking at Lexcel.

“It’s really been driven by the need to improve performance. I don’t believe in kitemarks for their own sake. We also want to improve our service delivery. We are doing this by checking performance of each step over the life of a file – from handling the initial enquiry to closure. We want to address the issues with which clients seem dissatisfied from feedback we receive – issues that concern them and which therefore also concern us.

“Fundamentally, it’s about improving the quality of our work, and therefore our competitiveness in the market”.

The firm is ‘risk management’ aware, but David Eastwood is candid enough to admit that it could be improved. “ISO is mainly about documented procedures and therefore addresses risk management in a relatively limited way,” he says. “In certain areas of the practice, we need to be more formalised in our procedures.

“Our risk partner is responsible for handling complaints, professional indemnity issues and overall risk management. We identify risk areas

from client feedback, any client complaints and the risk management form on the case management system.

“If a member of staff has a concern about a case or client, either at the outset or as the matter continues, a risk assessment report is filed with the risk partner who offers advice and guidance. It may arise where a case becomes complex or has significant financial implications, or involves a novel or uncertain point of law”.

The firm generates a risk management report which is produced to the partners each year at its annual conference. “It’s a detailed study of the firm’s exposure to risk and looks at all aspects,” he says.

I wonder why it is that so many law firms seem, almost positively, to avoid risk management. He suggests various reasons. “For law firms – and perhaps for other professionals – it’s a new culture.

“Of course, lawyers, as a breed, are used to giving advice and a risk management strategy naturally calls into question working methods and processes – some self-examination, which is rarely welcome. No-one takes easily to recognition of their faults.”

But he’s noticed a “different” approach to risk management adopted by newly admitted solicitors. “They can be very defensive. They record long and detailed attendance notes and write longer letters to clients. It is a fault on the right side, but such detail can annoy or even confuse



Tollers probate team

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clients – so it's important to learn to identify and focus on the key risk issues. It's all a question of balance."

There's clearly a growing awareness of risk incidence and I wonder what he thinks are the reasons why Lexcel has not been more widely embraced by law firms. "I think Lexcel is a largely unknown quantity. ISO is already widely recognised. Lexcel has yet to acquire such a brand name. And, of course, it's expensive, particularly for a multi-office practice – much more so than ISO.

"In generic terms, I certainly see the benefits of standards, especially a standard specific to law firms. The audits alone are a benefit in terms of imposing good discipline for compliance. But I cannot see that clients will necessarily be impressed – they are much more concerned with the quality of the service.

"Our objective in achieving Lexcel will be to make the firm more cohesive, more efficient, with improved management of our personnel. At the same time, we want to avoid bureaucracy which can arise all too easily. For instance, at Tollers, we now face several different audits – ISO; legal aid franchise; and solicitors' accounts rules – all taking up management time.

"In the future, though, I think Lexcel will develop and change to meet the needs of law firms in the changing legal market."

So far, Lexcel does not appear to have been a major influence on professional

indemnity premiums. But his feeling is that the market is becoming much tougher. "The move to the open market has certainly sharpened us up in terms of identifying problem issues," he says.

"The underwriters are much more demanding in respect of information for proposals – money laundering and financial services are two areas under great scrutiny. The underwriters warned that this year would be different and we are all waiting to see the results. I expect underwriters to concentrate much more on claims records and areas of concern. It is becoming a very difficult market."

We end our discussion with a look ahead and some crystal-ball gazing over the Clementi review. "I regard Clementi as a wake-up call," he says. "I think the practice of law has become increasingly price-driven. That's what seems most important to 80% of clients. Service quality is taken for granted. Law firms need to have in place a team to deliver.

"More and more, the ability to practice will depend on size. Economy of scale will be critical. I think it will be very difficult for the

sole practitioner to survive in the long run, unless practising in a niche area. The market place is changing in favour of bulk providers."

I suggest that such changes inevitably mean changes in management – from partnerships to corporate organisations. Won't this mean importing specialist management expertise, largely beyond the remit of lawyers?

"Generally, I think it is very difficult to bring in external management skills into a law firm, although it would depend on the firm, of course. Anecdotally, the role of the chief executive in law firms has not been successful. Established partners, especially, tend to be very wary of non-lawyers running their businesses for them! When conflict arises, life for a chief executive can become very difficult – it can be bad enough for the solicitor managing partner! It will be different when non-lawyers can have a stake in the equity.

"But, I agree, the days may be numbered for the old fashioned managing partner being appointed simply from the solicitor qualification without any relevant management training. Maybe there will be a new breed of lawyer, with a management qualification that will be appropriate to the new way of delivering legal services." •



An exit from legal practice for the sole practitioner?

Risk on a Broad Front



Simon Young

Simon Young, solicitor, focuses on some risk areas to which many law firms appear astonishingly oblivious

Having been involved in risk management over the last few years, I have come to preach the heresy that the risk which solicitors ought to be least worried about concern professional negligence claims.

Since negligence claims have been at the forefront of the profession's consciousness for so long, any decent firm will have refined its internal systems to minimize the chances, of negligence either occurring, or remaining undetected by file reviews or supervisory mechanisms. The risk cannot be eradicated, but it can be insured at a rate reflected by a competitive market. Further, firms can select the level of acceptable uninsured exposure by choosing the amount of their excess.

Unappreciated

However, there are many other risks that the profession still does not fully appreciate. Take employees' claims for various forms of discrimination. These claims have no statutory ceiling and are

virtually never insured. In theory, insurance can be arranged but, even if firms have robust systems in their HR departments, it is likely to be prohibitively expensive. I once saw a quote for a firm which was about 6% of turnover!

It came as no surprise recently to see one major firm facing a claim running into millions of pounds from two ladies who had been denied equity partnership because, as they saw it, all the 'decent' work was allocated to male counterparts - so that they were unable to reach fee targets for aspiring partners. Anecdotal evidence indicates that that firm is not alone in facing such claims, and that other firms face potentially crippling similar claims.

Other areas

Other areas where firms ignore risk at their peril include:

Catastrophic IT failure

This may result from technical or human problems, such as a disgruntled member of staff, or a hacker. How many firms, comforted with the thought of nightly data back-up, have tested its effectiveness, and their ability to reconstitute data after a disaster?

Unavailability of their buildings

This may be due to, for example, fire or terrorism. Firms suffering such problems have been grateful for the help of professional colleagues in making space and IT facilities available. But how much easier would it have been if they had plans in place with a group of firms in the area, to provide for mutual help and support in time of need?

Reputational risk

It is not only the likes of Andersen who find professional reputation damaged by the acts of one rogue within the firm, or other, external, issues. Firms seldom have plans to cope with this type of damage, and often take insufficient care to develop good relations with the media.

Professional risk

There are a growing number of areas in which solicitors may be surprised that professional and disciplinary sanctions can attach to certain activity. Take, discrimination, for instance. How many

firms realise that, if a partner is found guilty of discrimination, not only may there be a claim against the firm, but that claim, if successful, may lead to all its partners appearing before the Solicitors Disciplinary Tribunal?

Fraud

The sad fact is that most fraud within the profession is perpetrated by partners rather than staff. How many firms have systems sufficiently robust to challenge the senior partner?

Risk of statutory breach

The instance at the forefront of partners' minds at present is the frighteningly wide-reaching impact of money laundering legislation. The message for professionals is that, if they are not perfectly protected by their systems, and do not exercise their judgement correctly, the end of the game is 'Go directly to jail....' •

A Six-Step Guide to minimise Risk

One

Appoint someone senior to take real responsibility for risk

Two

Identify each risk and analyse its likely frequency and potential impact, so as to prioritise necessary attention and resources

Three

Design and document internal systems to eradicate risk as far as possible

Four

Examine possibilities for transferring risk, for example, by insurance or outsourcing

Five

Monitor actual performance

Six

Review results of monitoring, and implement changes necessary

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Making Sense of Change Management
Esther Cameron and Mike Green;
Kogan Page; 2004; 270 pp;
Price £24.95; pbk;
ISBN 0-7494-4087-2a



The ability to manage change is a key risk management issue for all organisations – law firms perhaps more than most in view of the sea-change likely to engulf the profession post-Clementi.

The management of change is about making change easier. This book is aimed at any

organisation that needs to understand why change happens, how it happens and what needs to be done to make a change a welcome, rather than an unwelcome, visitor.

The book is specifically written to avoid the simplistic 'one size fits all' approach. It therefore offers a view of change from a variety of perspectives and frameworks. These include different ways of approaching change and the adoption of the right approach to each unique situation.

Contents include: individual change; team change; organisational change; leading change; structural change; cultural change; implementation of change; handling mergers and acquisitions and IT based process change. From not a single one of these is any law firm exempt.

Stamp Duty Land Tax

Reg Nock;
Jordans; March 2004; 520 pp;
Price: £55.00; pbk;
ISBN 0-85308-891-8

How many professional indemnity insurers' coffers will shortly be swelled by increased premiums arising from negligence actions in respect of stamp duty land tax payments?

Stamp Duty Land Tax is a self-assessed tax on UK and land transactions. Many transactions, not previously subject to duty will now be chargeable under a complex new regime which will be supported by a whole range of draconian penalties. These include criminal



sanctions, including imprisonment and/or heavy fines for errors in completing the required returns and breaches of the

requirements for record keeping. The Revenue will audit transactions and as the tax is self-assessed there is a wide-ranging concept of negligence in relation to the compliance regime.

Issues addressed include: claims for relief or exemption; handling Revenue enquiries; penalties and sanctions; distinctions between residential and commercial conveyancing; and the new regime for tax on rents.

The author is a barrister and leading authority on stamp duty in the UK. This indispensable guide will provide practitioners with a practical analysis of the changes to stamp duty.

BOOK SHELF

Reviews of some recent publications

Crash Course: Managing People

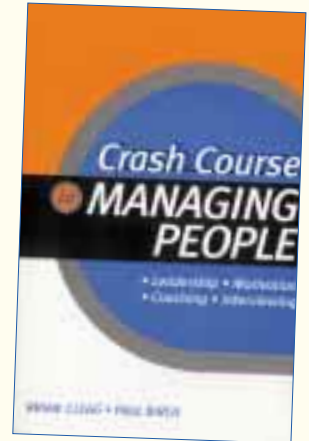
Brian Clegg and Paul Birch;
Kogan Page; 2004; 250pp;
Price: £14.99; pbk;
ISBN 0-7494-3834-7

The *Comment* column in the Summer issue of *Managing Risk* attributed much of the risk in law firm management to lawyers' difficulties in managing people. This book is an easy way to improve these skills fast.

After exploring the key elements that make for effective management, the course – and it is a course – consists of a programme of 150 exercises and

techniques to help the development of managerial skills.

Targeted reading ensures that the practical exercises are backed up with expert knowledge. The programme is split into 30 units each designed to be completed in one week – or if under pressure to get results – a whole unit can be completed in a day. The final section provides a refresher course that pulls together key learning points and detailed tables help the selection of appropriate techniques.



Inside Claims 2004 – A Guide to Claims against Solicitors

Reynolds Porter Chamberlain;
July 2004; 60 pp
Third edition

Reynolds Porter Chamberlain has a designated professional indemnity department and last published *Inside Claims* in 2001. Since then, there have been many developments, not least the opening of the indemnity market to qualifying insurers.

The guide is divided into three principal sections: insurance; aspects of liability; and practical matters. Within each section are subsections offering guidance as to the correct practice and procedure. These range across the whole spectrum of legal practice from scope of cover, to duty of care and notifications to insurers.

This is a handy and accessible guide for firms that become involved in professional indemnity issues



One Man's Risk is Another's Opportunity



Peter Scott

Peter Scott, solicitor, says that lawyers who won't face up to change, risk their futures

Once upon a time there was a solicitor who had a safe job. Indeed, he had everything – security, status and good income, but, over the years, these gradually eroded and now his very existence is under threat. Where did he go wrong?

If law firms are to survive they must adapt to change. As Charles Darwin wrote in *The Origin of the Species* 'It is not the strongest of the species that survive nor the most intelligent, but the ones who are the most responsive to change'.

Changing world

The world is changing at an ever faster pace. For many lawyers, clients are now 'consumers' who demand a cheap, packaged quality product and who, if not totally satisfied, will complain loudly. Consumer-led, commoditised volume work, such as personal injury and conveyancing, will, in future, only be capable of being profitable as part of a business, which continuously drives down

costs to compete on price and provide the levels of service that consumers demand.

'High street' firms doing such work in a traditional way will not survive for long unless they change to meet these challenges. High street grocers faced the same onslaught from supermarkets, 40 years ago. How many are left? We increasingly use terms such as 'Tesco Law' – but the analogy with what has happened to high streets across Britain should be self-evident to lawyers – and ignored at their peril.

The risks of not changing will become even greater. The present regulatory regime still affords some degree of protection to uncompetitive lawyers. Once legal services are opened up to competition, it will not be a question of 'if', but only of 'when', large organisations with financial muscle see synergies with their existing businesses, and acquire the best of the new breed of law firms which have adapted to meet the needs of the legal consumer.

Deregulation

Deregulation of the profession will accelerate the concentration of firms, both on and off the high street, adding to the changes already brought about by other agents of change. Why wait for Clementi? Practice Rule 7, as now amended, already provides the opportunity for non-lawyer organisations to share profits with solicitors. What are they waiting for?

Government

There is a more ominous threat to high street firms – government. Political risk has always been present in relation to publicly-funded work, but it should now be clear that government is now turning the screw on lawyers who do socially necessary, but (in governmental eyes) overly expensive legal work.

The result is that many firms are now moving out of publicly-funded work. Who or what will replace them – a government legal service? The pilot set up to deal with immigration cases is, perhaps, a taste of what is to come. What should 'at risk' firms now do? In one word – adapt – but adapt to what? Options are disappearing fast?

Strategies

Firms can try to compete in volume work, but only if they:

- consolidate and restructure to weed out underperformance;
- invest in IT and management; and
- continuously drive down costs and prices to attract clients.

They may prefer to remain small – but they are only likely to prosper if they focus on niche areas of work, in demand, and which command premium prices.

Whichever, consolidation will need to continue to build sufficient critical mass to create the necessary resources to provide the breadth and depth of expertise and service levels which clients now demand – and which will be key to success in the law in future.



Chilly outlook for small firms

A pessimistic view? I regard it as realistic – because those who cannot or will not adapt to change are unlikely to survive. For others, who can see opportunities beginning to open up in the legal profession, the prizes are there for the taking. Jack Welch, former CEO of General Electric, said, 'Change before you have to'. For those who do not, change will be all the more painful. •

Peter Scott is former managing partner of Eversheds in London and now runs Peter Scott Consulting He can be contacted at pscott@peterscottconsult.co.uk

Crisis!

What Crisis?

Sheila Hoyle explains how a sensible PR strategy can protect a firm's reputation in a crisis

So ran the tabloid headlines many years ago when commenting on the political scene of the time. While it may be argued that well-run, professionally managed law firms have few crises – even of a minor nature – they often occur due to external or human factors.

Examples include:

- disgruntled clients threatening to go to the local press or parade outside the office with a banner; or worse, learning about the matter when the press or broadcast media ring up the firm for a comment;
- overlooking key dates or other compliance issues which can give rise to a professional negligence claim;
- workmen inadvertently damaging power or telephone lines;
- explosions or floods in the office, all of which can knock IT systems, critical for completing transactions.
- redundancies and dismissals;
- health & safety issues;
- employees who prefer to air grievances in the press first rather than through management.

Crisis PR

'Public Relations' are the means and method of communicating with clients, potential clients and other professionals – the reputation and influence of the individuals within the firm. Unfortunately, it has been seen as manipulation or spin.

Changing the meaning to 'Public Reputation' is closer to the mark, especially when things start to go wrong. Although good news travels fast, bad news travels even faster. Reputations can be enhanced through dealing with bad

news capably; few comment on product recalls these days, even though commonplace.

'Crisis' Public Relations means handling communications when there is bad news. Building good relationships with local legal journalists and the professional press is laying good foundations for the future – not always considered important when fee earning is paramount.

Assess the risks and consider the eventualities that might arise within the firm, however remote. The examples above are not fictitious! 'Crisis' Public Relations means having a strategy in place in advance in the hope that it will never be needed. It places the firm in much greater control of emerging situations.

External management

Control of information is a key factor. Organisations and businesses that give the public as much information as possible, and allow journalists access to the key people, survive crises and retain clients more effectively.

Have a prepared statement regarding the crisis. This is easier with knowledge of what might happen. More crucially, decide who will be responsible for the statement in the event of a crisis. A consensus opinion may not be possible if events are happening rapidly and unexpectedly.

Decide who will speak for the firm. This can be delegated internally or externally to a PR agency. There are specialist agencies with specialist knowledge of specific industries and professions. Even if such an agency has not previously been retained on the grounds of cost and need, it could be time and money well spent to research agencies, if only for advice. A crisis may be the one occasion justifying the appointing of an agency.

Internal management

If the matter is to be managed internally,

consider media training for lawyers. Generally speaking, live interviews with broadcast journalists mean that you are in



A sensible PR strategy can be a life jacket for a firm's reputation

control; pre-recorded interviews are likely to be edited so that emphasis is often lost. Press interviews are both live and, probably, edited and the journalist may be up against a deadline or word count. Never be afraid to ask for questions in advance and to telephone back within the journalist's time frame – it gives you some control and thinking time.

Brief all appropriate staff. Do not overlook switchboard and reception staff. They are likely to be the first people to handle enquiries. If necessary, have a team to initiate telephone calls to keep key people up to date rather than wait for the rumour mill to start grinding.

Henry Kissinger, a former US diplomat commented, "There cannot be a crisis next week. My schedule is already full." This suggests that such occurrences can be planned to order. This is not so – because of the very nature of a crisis, but damage limitation is certainly possible with some forward planning. •

Sheila Hoyle is a member of the Institute of Public Relations and experienced in law firm marketing and communications.

Dear Sir...

Innocent until proven guilty does not apply to corporate Britain – new email-based compliance and duty of care legislation has led to unprecedented levels of corporate and personal liability, with lawyers circling over company directors of UK businesses.

To avoid reputation-damaging court cases, punitive fines and unlimited damages, company directors must now demonstrate that they have taken all reasonable action to control employees' use or abuse of e-mail.

Even if directors are unaware that harassment is occurring, with no mechanism to identify or prevent such harassment, they have failed in their duty of care and are liable for prosecution. There are tools available that can be used

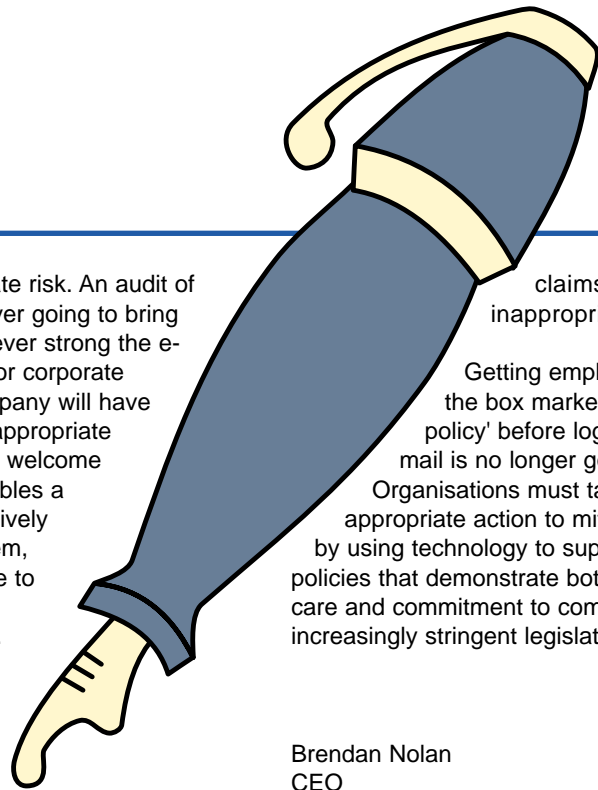
to mitigate corporate risk. An audit of e-mail traffic is never going to bring good news – however strong the e-mail usage policy or corporate culture, every company will have an incidence of inappropriate behaviour. But it is welcome bad news that enables a company to proactively address the problem, preventing damage to reputation and employee distress.

By combining regular, proactive audits and management reports with a forensic tool that exploits context sensitive searching to rapidly identify relevant communications, however obscure the language, organisations can offer a strong defence against

claims of inappropriate activity.

Getting employees to tick the box marked 'usage policy' before logging on to e-mail is no longer good enough.

Organisations must take the appropriate action to mitigate liability by using technology to support strong policies that demonstrate both duty of care and commitment to comply with increasingly stringent legislation.



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Should you require our team to review your existing arrangements or just provide you with an alternative quotation, please do not hesitate to contact the Team.

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Dealing with Documents in the 21st Century

Louis Plowden-Wardlaw, solicitor of General Counsel Direct, a document management solution provider identifies document management issues as a key risk-benefit area for law firms

Ever since the first love letter was written, document risk has been part of life – the risk that the wrong person will see the document, that it will be lost, or say the wrong thing.

A firm and its personnel (subject to appropriate permission) should be able to see all documents detailing its business responsibilities and obligations, anytime, anywhere.

Lawyers

Lawyers can help clients to manage electronic storage and retrieval of documents. Lawyers have traditionally looked after documents for clients, as well as writing them and advising on them. The latest technology, developed by General Counsel Direct (GCD), as an outsourced solution, enables lawyers to make this easy and secure – also offering flexible permissioning to make sure the right person sees the right things.

The result is that a client can see all relevant documents, from constitutional and financing documentation to customer and supplier contracts, from any PC with a browser. Although aimed at contract documents, the technology is not limited to this.

As experts with documents, lawyers are key professional users of any technology designed to share and control documentation. Technology provides a simple way, for example, to share files with clients, avoiding the irritating correspondence that occurs when clients lose documents.

Take the acquisition of a business as an

example. Assembling and distributing documents describing the business and making it available to the relevant people is a significant logistical problem.

An appropriate document management system enables the purchaser to be given permission to view all relevant documents. Clients find the prospect of loading contractual documentation onto an appropriate platform at the point of sale to be attractive and convenient.

By implementing technology convenient for clients and assisting them to reduce document risk, firms can enhance client relationships and find new revenue. Clients will have the comfort of knowing that document services provided by lawyers are competently and professionally managed.

Outsource benefits

One of the key uses of document management technology is to make available documents executed or held at one office available to other offices.

Assembling and distributing documents describing the business and making it available to the relevant people is a significant logistical problem

Disciplined use of appropriate technology, controlled by either a trusted external advisor or an-house lawyer, is a simple way to ensure that geography is no barrier to document control or information.

Cost

By avoiding the need for investing in major IT infrastructure or maintenance staff, and shrink-wrapping it as a standardised product for a fixed monthly fee, document management technology currently available principally to the major financial institutions can be made available to the majority of enterprises. Some solution providers integrate physical and electronic documents as a whole, differentiating between situations where hard copies or electronic copies



Louis Plowden-Wardlaw

should be stored for future occasions.

While other solutions leave this to clients, GCD provides several functions in one package - a holistic approach, offering an appropriate solution, according to client requirements. A key advantage of external application service provision is that servers will be secure and off site, and backed up without the effort and expense of setting up this internally.

The alternative is to continue with no IT driven documentation solution – resulting in inefficiency – or to import in-house document and content management solutions. In-house solutions may be integrated with work flow software – Documentum, Filenet and Hummingbird are good examples. But outsourcing solutions may save on infrastructure and maintenance costs, and by developing appropriate processes for archiving and retention, aid risk management in the documentation process.

Cost

The complexity of each solution will be different. The more complex implementations will obviously be more expensive. But it is important that the solution is seen as a utility, not a luxury - and provided at utility, not luxury, cost.

Why Not Before?

Up to now, cost considerations have prevented all but the largest firms from adopting full electronic content management systems internally. Bandwidth and technical limitations have prevented outsourcing.

Now, outsourcing is a real option, and that offered by GCD is one with a specifically legal flavour. •

Louis Plowden-Wardlaw, General Counsel Direct may be contacted on +44 0870 1999 217, or by e-mail at lpw@generalcounseldirect.com www.generalcounseldirect.com

Conferences and Events

Key risk management events

7-8 October 2004

Sarbanes-Oxley – a Road map to Compliance, MIS Training, 020 7779 8153 – London

This event highlights the obligations affecting all organisations in terms of corporate governance – especially as those firms dealing with American corporates will be required to comply. The event covers the letter and spirit of the law; the critical nature of risks that it addresses; and looks at the essential requirements and controls and methodologies that must be in place to assure compliance

12-13 October 2004

Outsourcing: maximising value and minimising risk, Unicom Conferences, 01895 25648 – London

This event is essentially for IT managers and specialists in IT departments in medium to large firms. It comprises a series of sessions which examine outsourcing as a strategy and includes: project management and outsourcing to improve business performance; obtaining value from outsourcing; and implementation of suitable software for the process.

14 October 2004

Stress and the Law, LexisNexis UK Professional Education, 020 7347 3573 – London

This event addresses: the liability of employers for stress at work; the demands an employee can make of an employer; the employer's liability for an employee's harassment or bullying in the workplace; stress-related absences; and, sickness or disciplinary processes.

14 October 2004

Managing People within the Law, Industrial Relations Services, 020 7347 3500 – London

This event explains best practice in a wide range of common situations with which an organisation's manager has to deal in the workplace. Case studies illustrate best practice in; disciplinary procedures; discrimination; bullying and harassment; data protection and unfair dismissal.

15 October 2004

Dismissals: the law transformed, LexisNexis UK Professional Education, 020 7347 3573 – London

This event covers recent case law and regulation, including the revised Employment Tribunal regulations and Rules of Procedure and their impact. Statutory dismissal procedures; and the legal interpretation of dismissal, reasonableness and reasons for dismissal will be covered.

15-16 October 2004

Solicitors 2004, The ICC Birmingham, Registration:

www.annualconference.lawsociety.org.uk

This is the key annual event for law firms. In addition to an exhibition with over 50 exhibitors, sessions are planned on *pro bono*; the referral code; financial planning for law firms; anti-money laundering strategies; funding practices; working with lenders in the new environment, and legal aid.

18 October (London); 20 October (Manchester); 10 November (Newcastle); 24 November (London); 9 December (Leeds); and 10 December (Bristol).

Freedom of Information Training Courses
Privacy Laws and Business, 0208 423 1300

21 October 2004

Diversity and Equal Opportunities at Work, Industrial Relations Services, 020 7347 3500 – London

This event looks at key provisions included in a raft of complex law on age, religion and sexual orientation which are making organisations increasingly vulnerable to discrimination claims. The event aims to help organisations build and develop a diversity strategy.

4 November 2004

Informing and Consulting, LexisNexis Professional Education, 020 7347 3573 – London

This event considers the Information and Consultation of Employees Regulations, due to come into force on 6 April 2005. It covers: the new Regulations; preparation for information and consultation agreements; information and consultation strategies and models for information and consultation.

23-26 November 2004

Fraud Summit, MIS Training, 020 7779 8944

An event which will focus on proven tactics to protect against identity, electronic and financial fraud – including optional workshops.



For further information, please contact:

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