

# law practice management

newsletter

Volume 4 Number 2

Print Post Approved 255003/05838

## Directors' and officers' liability insurance — what does it really cover?

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AON FINANCIAL SERVICES

*Information contained in this newsletter  
is current as at November 2004*

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Lawyers often need to address the question of whether they need directors' and officers' liability insurance in relation to their own positions when they are invited to assume directorships of client companies or to become committee members for non-profit organisations. Lawyers also are often asked those questions by clients in relation to the client's position. These questions are just as likely to be asked of single practitioners providing advice to a small business owner/director as of a lawyer in a larger practice who can refer specific concerns to an insurance specialist if necessary.

This article will provide a guide to directors' and officers' (D&O) insurance — greater detail should be sought from a specialist broker or lawyer if required.

#### Do you need D&O insurance?

Lawyers are well placed to appreciate the personal liability faced by directors from a range of sources including shareholders (if relevant), creditors and regulators, and will also be aware that even vexatious or unfounded allegations and enquiries can involve significant legal costs.

What you are not in a position to do is to assess with any precision the likelihood of such a claim. You know that a diligent and compliance focused director of a small service company who is also the only shareholder of the company probably does not need much of the cover offered by this insurance. And conversely, you know that a director of a large public company that engages in highly speculative activities which may impact upon the environment is at much greater risk of being sued by someone, somewhere, somehow.

But when it comes to directors of companies that fall somewhere between those extremes, lawyers are no better at assessing the real likelihood of personal liability than they are at predicting the likelihood of any other risk. It is clear, however, that in business things can change very quickly. Consider, for example, the director of an Australian subsidiary of an overseas internet company at the beginning of 2001. The possibility that the parent company would not provide indemnity to the subsidiary for any liabilities it or its directors incurred seemed utterly remote to the director at the time. However, within that policy period the parent company was put into liquidation and the local directors only barely managed to save the company from insolvency and the attendant personal liability that could have gone with it.

### Does the D&O policy insure individuals only or the company too?

The policy is only triggered by claims against individuals. Where the director is personally named in the proceedings, the policy responds subject to its terms. However, where a company is permitted to provide indemnity to its director or officer, the policy will respond on that basis and will provide cover to the company for loss it has incurred in providing indemnity to the director or officer. To that extent and only in circumstances where the trigger for the claim is that the director has been personally sued or prosecuted, the policy can provide cover to the company.

Further, in circumstances where the company is able to provide indemnity, the policy will operate as if the company has provided that indemnity and the claim will have to be made by the company.

### Wouldn't the company indemnify its directors?

This question goes to the heart of the value of D&O insurance. If a company can provide indemnity to its directors and officers, and indeed the policy will assume that the indemnity has been granted, why buy D&O insurance?

First, there is a view that the range of circumstances in which a company may provide indemnity to its directors and officers is more limited than the range of circumstances for which insurance may cover those individuals.

Specifically, s 199A of the *Corporations Act 2001* (Cth) strictly regulates the circumstances in which a company may provide indemnity to its directors and officers. There is a less restrictive provision concerning the ability of a company to purchase insurance to protect its directors and officers in the event of personal liability. Thus, in terms of legislative prohibitions, the entitlement to indemnity from an insurer is greater than that from a company.

However, the real benefit is more practical. A company will not be able to indemnify its directors or officers if it is insolvent — this is not confined to liability for the debts of the company but refers to any liability, even those liabilities incurred in good faith and

without any fault or negligence, as those terms are understood by the business community. Similarly, there have been many cases where a company has been at odds with a director just when the director needs assurance of his or her entitlement to indemnity. An insurance policy, properly tailored, will provide indemnity to the officer and seek recovery for the relevant excess from the company in such circumstances.

### What does it actually cover?

Policies typically insure directors and officers for loss incurred as a result of wrongful acts. The term 'wrongful acts' is usually very broadly defined to include negligence, breach of duty and all manner of acts, errors and omissions. The term 'loss' is also usually very broadly defined to include liability for damages, legal costs incurred by the director or officer, legal costs payable to a third party and possibly even some fines and penalties to the extent that those fines and penalties are insurable at law. Broadly speaking, a D&O policy is structured so that it *can* insure the full range of civil liabilities and can provide indemnity for all manner of legal costs however incurred (that is, whether in civil or criminal proceedings) and can even provide indemnity for fines and penalties and other financial awards made by courts which do not fall within the definition of damages.

Some examples of liabilities which may be covered by a D&O policy are liability from claims by:

- regulators — the Australian Securities and Investments Commission, WorkCover and others may call directors to account alleging breaches of various laws, and such actions are likely to cause the director to incur legal costs;
- employees — employment practices liability issues (discrimination, harassment, wrongful dismissal and so on) which can include one executive director against the others where that executive director is bringing the action in his or her role as an aggrieved employee;
- creditors and others — seeking compensation in the event of the company's insolvency;

- competitors — alleging restrictive trade practices or other anti-competitive behaviour or defamation;
- shareholders — seeking compensation or remedial action for wrongful acts causing harm to the value of their shareholding or current or future earnings;
- clients — alleging misrepresentation including defamation and contractual breaches against the directors personally; and
- business partners — within a joint venture or other types of commercial relationships, alleging lack of good faith.

### What about exclusions?

Common exclusions remove cover for:

- any claim brought by the company itself, other than shareholder derivative actions;
- fines and penalties — although this can be negotiated in some cases to include some sub-limited cover for, say, civil penalties;

- insolvent trading liability — imposed for start-up companies, and more likely to be removed as the company's performance is established, as the insurance program matures and as the company's relationship with an insurer is consolidated;
- liability arising out of the director or officer's dishonest conduct or abuse of position as a director — but the exclusion should be expressed to apply only where that conduct has been proved to be dishonest, usually in court;
- liability arising from pollution — the exclusion should however be expressed so that it does not apply to legal costs in defending prosecutions relating to pollution;
- liability arising from personal injury — the exclusion should be expressed so that it does not apply to legal costs in defending an occupational health and safety prosecution; and
- any liability for tax — there should

be no exclusion for legal costs in defending an action to make a director personally liable for the company's unpaid tax bills.

### Conclusion

D&O insurance is complicated. It should not be seen as a first line defence or comprehensive solution for the very real exposures faced by directors in the governance and management of companies. However, a D&O policy is a price effective way to insure some liabilities faced by directors. It has the key benefits that it will respond within its terms where the company fails financially, or where a director is unable to get the comfort required from the company on which they served. ●



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# Conversations as knowledge sharing: can we talk?

**Brian Bailey**  
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*In an earlier issue,<sup>1</sup> Stuart Kay and I suggested that a knowledge management (KM) strategy offers a way of influencing flows of key information and knowledge in the professional services firm. Discussions on the nature of knowledge management often focus on technology tools, yet the most powerful tool of all may be one we may take for granted: the humble conversation.*

When you think of workplace conversations, does it conjure up images of colleagues sharing Monday morning party and sporting war stories by the coffee machine while you have to wait for someone to draw breath in order to follow up on a task?

In the professional services environment, where the flow of information and knowledge is stock in

trade, it is perhaps worth looking at conversations in a new light — as a flexible yet powerful way to get the *right* people talking to each other. Whether you want to disseminate the detail of your firm's strategy, identify new niche markets or re-engineer critical internal processes, there may be a supported conversation style that can help you get the best your people have to offer.

### Our changing business environment and the 'knowledge worker'

Australian government sources suggest half our gross domestic product already comes from knowledge based industries. The boom in information and communications technology has put an unimaginable amount of information and knowledge at our fingertips.<sup>2</sup>

"Knowledge worker", a term coined by Peter Drucker, describes participants in an economy where information and its manipulation are the commodity *and* the activity. Contrast this with the industrial age worker, who was primarily required to produce a tangible object. Examples of knowledge workers include, but are not limited to, marketing analysts, engineers, product developers, resource planners, researchers and legal counsellors.<sup>3</sup> Berkeley University online glossary.<sup>3</sup>

As the gap between what we know and what we do at work narrows, blind obedience and loyalty have diminished, replaced by informed scepticism and a market-based approach to workplace relations on

any number of levels. The mode of workplace management has shifted from 'command and control' to one of persuasion.<sup>4</sup> It's hard to escape the sense that the days of people doing what they're told have gone forever, but it has become increasingly necessary to capture a new precious resource in the workplace — attention.<sup>5</sup> Think about the people around you; how many of them accept instruction they don't agree with? While it may be a more complex working environment, would you truly want your staff to blithely follow instruction any more?

### Why conversations?

Conversations can be fluid or highly structured, with all the variations in

for the firm: a common contact in a tough new account, finding out what is giving your client insomnia, finding the individual to head up that new practice group, and so on. Using a knowledge management approach, however, means you can raise the chances of that lucky accident; getting the right knowledge shared between the right people at the right time. By identifying those areas of the business that are strategically vital and applying structured and unstructured conversations among people, you can positively influence information and knowledge flows to the most important parts of your business.

Here are just eight of the many ways to nurture conversations in your organisation.

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between. They enable trust to develop, they allow people to make discerning choices in how they allocate their attention and their actions, they help people to understand and assimilate complex issues and nuances and, most importantly, they help set the *context* for knowledge sharing.

'The characteristics of conversations map to the conditions for genuine knowledge generation and sharing: they're unpredictable interactions among people speaking in their own voice about something they're interested in.

'The conversants implicitly acknowledge that they don't have all the answers (or else the conversation is really a lecture) and risk being wrong in front of someone else.'  
David Weinberger.<sup>6</sup>

### Eight knowledge-supporting conversations

Conversations can be spontaneous and serendipitous, resulting in value

#### ***Talk about what fascinates your clients***

Have conversations with your clients individually and in groups, themed on issues of common interest. What is your firm's point of view on key market conditions? Work out what you have to say and initiate conversations with your clients to share ideas with them. They may not always agree with your point of view, but you can use the dialogue to understand their position in their industry and their real needs, getting to know them better in the process.

#### ***Scenario analysis and strategic planning***

Bring the right people together to discuss the big issues. Brainstorm, research, predict and investigate possible future events and strategies. Test out the future and make the desirable alternatives a reality. Remember the adage, 'The best way to predict the future is to create it'.<sup>7</sup> Act on the conversations and show the

participants how their input can lead to beneficial change. Ernst & Young Australia runs this type of program to discuss and act on the big issues, recently bringing 68 people together for three days to identify how to continue attracting, engaging and retaining the best people. This approach is branded as an Accelerated Collaboration Event or 'ACE', and is just one way of actively sharing knowledge between the right people at the right time.

**Client planning meetings and reviews**

It is easy to fall prey to the myth of the rational decision making model, thinking that each of your staff is assessing problems and opportunities, seeking out alternative solutions and applying the best of them to their client work. However, decision makers can actually shy away from information and knowledge sources, if only to protect their ability to function as quickly as they can to keep up with workload and commitments. Instead of looking for the right solution, they may well rely on what has worked before, which may not be optimal now.

Encourage a disciplined approach to understanding client needs. Actively inject into your planning and review processes a knowledge of the people, processes, technologies, culture and prevailing market conditions facing clients. As Socrates was fond of saying, 'Wisdom begins in wonder.'

**Expert briefing sessions**

Consider bringing in experts to help expand and deepen the insights available to your leaders and your client facing people. Get the best industry specialists to spend time with staff and to share their knowledge while looking for fresh approaches to clients' issues. Gadens Lawyers held a workshop with KM leader Karl Erik Sveiby to help partners see the sharing opportunities in a leading legal practice, reducing the barriers to the effective exchange of ideas and knowledge by powerfully getting the right message across.

**Cross-practice briefings**

Share insights between different client facing groups. Share sources, lessons learned wins, losses and approaches wherever it is appropriate and ethical. Hearing things in a different way or from a respected source can make an idea relevant, irrespective of whether it's new or not.

**Competitor briefings**

Your firm doesn't operate in a vacuum, so drive awareness of competitor behaviours, locally and internationally. What is innovative in the market? What weaknesses do your competitors have? What weaknesses of yours might they try to exploit?

**Further reading suggestions**

If you are interested in finding out more about conversations, look up Theodore Zeldin (a 'Google' search is always a good start). Insight into how conversations fit into human networks and behaviour can be found in the treasure trove that is <www.gladwell.com>, the online home of author and *New Yorker* columnist Malcolm Gladwell. Two articles to look at are 'Six Degrees of Lois Weisberg' and 'Why your bosses want to turn your new office into Greenwich Village'. ●



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**Incorporate experience into reviews**

Review projects and major client engagements to build learning into the system in order to support business improvement. Have your staff talk about what they did well and get them to do more of it. Make sure you discuss when things don't go so well and learn from it. Design in the good and manage out the bad.

**Communities of practice**

Identify groups of people who share common practices and encourage them to share their thoughts and ideas. Though too big a subject to tackle here, this would be an incomplete list indeed without mentioning what Etienne Wenger describes as being 'a company's most versatile and dynamic knowledge resource ... the basis of an organisation's ability to know and learn'.<sup>8</sup>

Henry Wadsworth Longfellow said 'A single conversation across the table with a wise man is better than 10 years mere study of books,' and how much more valuable is this than a bank of databases?

**Endnotes**

1. Kay S and Bailey B 'The role of knowledge audit — a comparison of practices at Gilbert + Tobin and Ernst & Young' 2004 3(9) LPM 129.
2. Minister for Trade, Mark Vaile in a speech to the Economist Intelligence Unit, October 2000 <[http://dfat.gov.au/media/speeches/trade/2000/001031\\_eiu.html](http://dfat.gov.au/media/speeches/trade/2000/001031_eiu.html)>.
3. <[www.sims.berkeley.edu](http://www.sims.berkeley.edu)>.
4. For a study of differences in the 'Industrial' and 'Information' Ages, see Hidding, G J and Catterall S M (1998), 'Anatomy of a Learning Organisation' *Knowledge and Process Management* 5, pp 3-13.
5. Davenport TH and Beck JC *The Attention Economy: Understanding the New Currency of Business*, Harvard Business School Press 2001.
6. David Weinberger, co-author of 'The ClueTrain Manifesto' cited at <[www.gurteen.com](http://www.gurteen.com)>.
7. The guru of CoPs (as they are known in shorthand) is Etienne Wenger. Look first at 'Communities of Practice: Learning as a social system.' <[www.co-i-l.com/coil/knowledge-garden/cop/lss.shtml](http://www.co-i-l.com/coil/knowledge-garden/cop/lss.shtml)>.



# Letter from London

CO-ORDINATED BY

**Caroline Poynton**, EDITOR, MANAGING PARTNER, LONDON

*When Crowell & Moring opened its London office, managing partner Peter Teare had his work cut out. But a solid strategy of cross-selling and commercial focus has created a European business that could well claim that elusive prize of being truly differentiated from its competitors. Following is an edited version of an interview with Peter Teare.*

## A single source solution — making a law firm into a commercial hub for clients

**Peter Teare**

CROWELL & MORING

### Development of the London office of Crowell & Moring

I have to confess that the development of Crowell & Moring in London had a lot more to do with being opportunistic than any carefully thought out strategic plan.

I had spent five years working with Crowell & Moring in Washington between 1991 and 1998. I knew that after five years it was time to come home. I can remember a casual conversation in the hallway with Took Crowell (our founding partner), who said that if I was going to go back to London I should open up an office for the firm to serve as a bridgehead into Europe.

I could also see the potential among the US client base for developing a European practice. So we opened in London without much further discussion, without any formal business plan and, at that time, with no clients.

From that humble start — it was just me and a secretary — we were able to develop a practice by extending existing US client relationships in a European direction. In the early days, our typical client was a US multinational that had sales and marketing and, possibly, manufacturing operations in Europe,

but had no corporate presence or inhouse lawyers on the ground. We quickly found that the general counsel of a number of our major US clients were frustrated with their existing relationship with lawyers in London, whom they found to lack the responsiveness and commercial awareness that they found among their US lawyers. In some cases, getting new work was like taking candy from a baby because the general counsel was very happy to redirect work in Europe to a trusted firm that understood and met the firm's service expectations.

Our first business objective was simply to build a self-sustaining practice in Europe that extended and deepened our existing client relationships. We aimed to capture the work that was flowing from our major US clients to other law firms in London. When we opened our office in Brussels in 1999, the initial objective was the same for that market.

We have now achieved those goals in both London and Brussels, and last year adopted a more formal (but short) business plan that established a new set of five objectives for our European practice:

- maintain a profitable practice in Europe that shares the same standards of excellence and culture as our offices in the US;
- grow our offices in London and Brussels to 30 lawyers each;
- expand the cross-generation of revenues between the European and US offices;
- increase the European revenues generated by the European offices to levels that match or exceed the European revenues generated by the US offices; and
- increase the productivity of the European lawyers to comparable levels to US lawyers, while taking account of the differing productivity standards that are considered the norm in the respective cities in which we maintain offices.

In short, we want to continue to expand our representation of American clients in London and Brussels but, at the same time, we want to become less dependent upon the US client base as the source of our revenues in Europe. We aim to achieve this by attracting more local partners with local business, practising in areas where we have an existing reputation and expertise in our US offices.

## Culture of the office and the firm as a whole

The strong culture of the firm is what I believe stands us apart from most other law firms. It is what makes Crowell & Moring a good place to work and a hard place to leave. It is a rare thing that we have a partner leave to join another firm.

We are an unpretentious and irreverent group of individuals who take our work, but not ourselves, seriously. We work hard, but not too hard, because we respect the importance of the home lives of our lawyers and staff.

The firm's logo is a rubber duck, which came about after some comedian decided to fill the fountain in our main reception with these little yellow beasts. The ducks have stayed because they seem just right for us.

The culture of the firm has a lot to do with its history. This year is Crowell & Moring's 25th anniversary. The partnership was founded in Washington as a breakaway from Jones Day with 53 lawyers. At that time we were predominantly a US 'government contracts' practice. The firm enjoyed a first class client list which included most of the major US defence and aerospace companies, but we were servicing those clients in a narrow field of practice. The successful growth of the firm has depended on the ability of our partners to cross-sell the talents of other partners to our existing clients. That cross-selling culture drives the way we do business today and distinguishes Crowell & Moring from many other firms.

## Applying the culture to meet client needs in a European marketplace

We enjoy a number of very long-standing client relationships. I am sure that a part of the reason for the loyalty shown by those clients is that they like the culture of the firm and

can see that we run a happy ship with a team of motivated and talented lawyers.

More importantly, in a European context, we try to show a willingness to do more for our clients than European lawyers traditionally do. We make the effort to visit our clients and (at our own cost) learn their business, understand their commercial environment and know their objectives. We undertake a proactive style of representation, alerting clients to legal and policy issues that are going to affect their business. For many businesses, we provide eyes and ears within the European market and its institutions. For the general counsel who sits thousands of miles away, the fact that we are looking out for their interests, and will call about an issue before being asked, provides added value.

Indeed, for some of our US clients doing business in Europe but who don't have any lawyers or other corporate function here, we assume the role of their European general counsel. This has been a very successful business model for us.

At the most mundane level, this means looking after the statutory books and making sure all the filings

Our ability to offer a single source for the solution of European legal issues, tailored to the needs of multinational companies, has been a major factor in the successful development of our European practice.

in all the countries in which the client does business are made on time. But, by working with correspondent law firms throughout Europe, we can manage all the client's legal service requirements in Europe. We provide a simple single point of contact and we take care of managing the outside law firm relationships within Europe.

Clients like this arrangement because they know that we have built a good network of specialists from different law firms in each European jurisdiction that we know and trust. By providing a one-stop shop for advice on European business law and regulation, we offer a solution for those international businesses that do not want to have to find and then manage multiple law firm relationships in a different continent.

Our ability to offer a single source for the solution of European legal issues, tailored to the needs of multinational companies, has been a major factor in the successful development of our European practice.

## Maintaining the consultative client relationship

We try to develop as many different points of contact at as many different levels within our respective organisations as possible, and make sure that our lawyers take the time to physically visit the clients at their place of work to learn and understand their business.

Our goal should always be to make the individual with whom we are working look good in the eyes of their boss. If we can achieve that, we will have a happy and loyal client — but we can only do that if we get to know that

individual and understand the challenges that they face in their work.

It is important that communications with the clients are not limited to high level partner contacts. We want to become an extension of the client's law department, and to do that we must become as integrated as possible. We try to make sure that

personal relationships exist among all levels, including secretaries, paralegals and junior lawyers and partners.

We also make sure that on a practice level we are fully integrated among our various offices. Apart from ensuring that we provide better client services, it means that we are better able to identify and exploit cross-selling opportunities within the practice groups when they arise. As a practice

sentence must state the question and the second sentence must give a clear answer or recommendation. The conclusion can be followed by pages of legal analysis with footnotes, but right up front we must give the client some clear practical advice based upon that analysis.

Internally, we have to make sure that we have internal structures, mechanisms and incentives in place to

Many lawyers are uncomfortable doing more than opining on the law and do not want to assume the role of trusted business adviser — but we have a rule in our office that in any written work that goes to a client, the first sentence must state the question and the second sentence must give a clear answer or recommendation.

matter, this means that we encourage our lawyers to visit their colleagues in our other European and US offices on a regular basis.

### **Solving difficulties along the way**

The greatest challenge is to encourage some of the lawyers who we recruit from traditional English firms to change the way they relate to clients. Our proactive, informal style of practice often means that we expect our lawyers to adopt a far more commercial approach to the practice of law than they may have become accustomed to. Our clients expect us to do more than traditional legal analysis. They also expect us to come off the fence and make an assessment of risk and apply some commercial judgment to the problems they face. The decision to assume any particular risk will ultimately be made by the client, but our clients expect us to express a view and make a recommendation.

Many lawyers are uncomfortable doing more than opining on the law and do not want to assume the role of trusted business adviser — but we have a rule in our office that in any written work that goes to a client, the first

facilitate and encourage cross-selling. A part of this is dealt with through the partner compensation structure that recognises and rewards partners who generate work for other partners, but we also have standing committees and practice groups that work with the marketing team to continually monitor the opportunities to market our capabilities to existing clients. Much of our marketing is inward looking.

### **Future goals ... and achieving them**

I am happy with the business model that we have developed in Europe. Our goal is simply to make it bigger. We have no ambitions to open new offices in Europe, but we have taken space in London and Brussels to accommodate 30 lawyers in each place. I want to fill both offices with productive and happy lawyers by the end of 2005. ●



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# dear duncan ...

Comment by Duncan Hart

## Coaching ... for those of us who didn't get to Athens

Over the last few months it has proved impossible to avoid sport. First the Olympics and, at least from a Melbourne perspective, an even more important event, the AFL grand final.

Both involved elite athletes for whom no one questions the necessity and value of the advice and support of a legion of coaches. The importance of such coaching is particularly acknowledged in the early development and nurturing of an athlete's initial skills.

Why then is the coaching of the elite, let alone the majority of practitioners, viewed with such suspicion? I can't think of a better analogy for legal practice these days than a marathon. It's not only a marathon; from time to time you are expected to throw the odd shot-put, execute a long jump or a double back flip off the 10m board! Worse than a marathon, it becomes a veritable decathlon.

Not surprisingly, there are numerous hurdles of varying severity to overcome, some of which impact clients but many of which require heavy input from management while assistance is sought.

### How much should it cost?

Questions of costs often arise, in my view somewhat questionably. One on one coaching involves:

- an analysis of the practitioner's strengths and weaknesses (personal and practice);
- the creation of a personal plan (fitting with firm/team plans); and
- meeting regularly (once per month at a minimum) to monitor and review implementation of the plan.

This should cost no more than approximately one third to one half the cost of a PA for the year.

### A coach is not for poor performers!

The situations in which coaching can be worthwhile are very diverse. Again it is usually called for where there is a 'problem practitioner', a precursor to 'letting the practitioner go' — a sort of 'pre-outplacement' intervention. But should such intervention be reserved for someone who has dropped the oar, so to speak?

More constructively, a coach can be used:

- to encourage and reward a younger practitioner who is beginning to make their mark;
- to assist a practitioner review and redirect their practice;

Older practitioners sometimes believe that they should simply 'tough it out', as do the firm's management.

This can of course lead to years of sub-optimal performance by the individual when an earlier intervention could have produced something entirely different.

- to get a senior associate or group of senior associates to the point where they can be considered for partnership;
- to assist a practice group to get over a hurdle or make sure it becomes a far more effective unit;

- to assist in the formal appraisal process to ensure fairness and impartiality; and
- to help integrate an individual or a group into the firm.

### The issue is not cost

When the benefits of retention and growth of the practice is considered, I do not believe cost is really such a vital issue. More importantly are the twin issues of the:

- willingness of the person to work with a coach (and the firm to endorse it); and
- the qualifications and, more importantly, the experience of the coach.

In my experience, many younger practitioners are very keen for guidance of this sort. They appreciate that they cannot expect the attention of the managing partner for this sort of activity, and an outside resource can be an excellent solution and a tangible demonstration of the firm's commitment to them.

Older practitioners sometimes believe that they should simply 'tough it out', as do the firm's management. This can of course lead to years of sub-optimal performance by the individual when an earlier intervention could have produced something entirely different.

It is also important for a firm not to accept poor behaviour from a high performer, because once this behaviour is accepted it is difficult to reverse. Once again 'stars' are rare but can prove very destructive.

The leadership of any firm bears a heavy responsibility to retain and make the best use of their principal assets — their practitioners. It is the leadership who must actively review the benefit of involving a coach; they must be equally careful in deciding whom they appoint.

### What does the coach do?

As for the coach, no amount of formal training can substitute for the respect and insights that are provided by someone who has 'been there, done that' — in short, experience at the coal face!

While psychometric assessments and the like have their place, in most coaching situations I have experienced it is mainly a matter of:

- giving the practitioner 'permission' to stop and reflect upon where they are going;

- giving the practitioner encouragement and some insights which may assist in steering their career where they want it to go;
- providing some basic planning tools to guide the coaching exercise over the next 12 months;
- being there regularly (and accessible by phone) to maintain the pace in the implementation phase; and
- liaising with the firm to ensure the aims of the exercise are understood, agreed and supported.

In the end the firm needs to have sufficient maturity to see coaching in the same light as do athletes. It can play a significant role in developing the younger talent in the firm as well as assisting more experienced practitioners to find new direction in their careers.

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## International legal malpractice in a global economy: a growing phenomenon

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International and domestic transactions involving foreign parties present special challenges to the legal practitioner and increased risks of legal malpractice. This is particularly true for transactions involving parties operating in or from countries without a well developed rule of law. Not only can it be difficult to ascertain the proper answers to legal questions, but actual practice also may deviate from relevant written norms.

From 1973 to 1999, according to the World Trade Organization, the volume of international trade in goods grew from US\$578 billion to US\$5473 billion. Since the 1970s, according to the United Nations Conference on Trade and Development, worldwide foreign direct investment has increased seven-fold,

reaching US\$865 billion in 1999.

Furthermore, the cross-border provision of services has also increased significantly in recent years. This growth in international transactions has contributed to an increased demand for legal services and almost certainly an increase in the number of errors made by lawyers in fulfilling this demand, though the publicly available data tends to mask this development.

Nonetheless, despite the globalisation of the world economy, a lack of lawyers and business people with a well-grounded understanding of the country-specific legal and cultural factors often hinder commercial success.

One recent prominent case may prove to be a 'case study' in this area. Insufficient practical knowledge of the

political, economic and legal environment in Turkey on the part of Motorola's and Nokia's outside lawyers (and other advisors) may have contributed to their initial loss of more than US\$2.7 billion dollars as a result of their dealings with Telsim Mobil Telekomunikasyon Hizmetleri AS (Telsim) and members of the Uzam family who reportedly are part of an organised crime syndicate. As the *Economist* noted with more than a touch of sarcasm, 'the world's two largest mobile phone makers may be wishing they had called around a bit before choosing a business partner in Turkey.' Given that the plaintiffs' relationship with Telsim began in 1997 and involved the preparation of scores of licensing, loans and purchase agreements as well as other documents by lawyers for the two telecom companies, one might wonder whether the lawyers took too narrow a view of their role in the numerous separate transactions over the years (that is, a responsibility to share their judgment of the situation and not merely the preparation of documents). Ultimately, the US District Court for the Southern District of New York awarded Motorola and Nokia in excess of US\$5.7 billion in compensatory and punitive damages (*Motorola v Kemel Uzan* 274 F Supp 2d 481 (SDNY 2003)). Fortunately for Motorola and Nokia, the defendants have some assets that are reachable, though it remains to be seen how much money they will actually recover. If recovery proves impossible, will such companies begin looking around for other possibly negligent parties to compensate for their losses?

## The American Bar Association survey

A study conducted by the American Bar Association (ABA)<sup>2</sup> is mentioned as the principal public source on legal malpractice claims. The data were collected from the member companies of the National Association of Bar-Related Insurance Companies (NABRICO) as well as some other insurance providers. Given the small size of this sampling, and the fact that it does not include many of the major international providers, it is not clear to what degree the data are representative.<sup>3</sup>

The survey data indicated that approximately 11 per cent of legal malpractice claims (2042) in the period 1990-95 were in the area of 'business

transactions/commercial law'. Only 0.08 per cent of the survey's legal malpractice claims (16) were within the category of 'international law', which was defined as covering 'all aspects of the relations among states, international business transactions, international taxation, customs and trade law, and foreign and comparative law'. The survey, however, did not permit a respondent to list a claim under more than one category, thus probably understating the 'international' factor in legal malpractice, since many were likely listed in the 'business transactions/commercial law' category.

According to the ABA survey, the percentage of malpractice claims labelled 'business transactions/commercial law' from 1990-95 increased by 7.62 per cent over the 1983-85 period. The comparable rate of increase for so-called 'international law' claims grew only by 0.04 per cent.<sup>4</sup> On first impression, such data are surprising given the greater complexity of international commerce. In our opinion, these data are misleading and most likely do not reflect the current realities given the limited number of companies responding and certain methodological limitations of the survey itself.

Furthermore, the low figure given for international malpractice claims may be explained by a number of important factors. First, clients may feel that they assumed the risk by conducting business abroad. Second, clients may have less confidence that they could successfully make a claim against US counsel on an international matter due to the actions of their own personnel. Third, the data may not be accurate (for example, international business transactions/commercial law may already include cross-border transactions).

The full scope of international legal malpractice is also obscured because these disputes are often resolved through private arbitration. The extent of the problem is difficult to gauge because the malpractice insurers regard as proprietary information the number and amount of their claims, as well as the formulae for calculating insurance premiums.

Our experience is that the number of international legal malpractice claims is significant and is likely to increase. At present or in the near future, more legal practitioners working on international matters will learn that they are not

immune from malpractice suits (many already have learned this). Following are some of the likely factors supporting this view.

- In recent years, there has been a dramatic increase in both the number of US law firms opening subsidiaries or branches, or establishing formal relations with local affiliates abroad. As this occurs, clients will develop higher expectations of the work product and standard of care shown by the attorneys of such law firms.
- As less developed countries and states transition from centrally planned to market economies they will create laws and institutions (often with the assistance of foreign aid organisations or multinational organisations), and clients will have an opportunity to better assess the performance of law firms.
- Less costly local lawyers (many of whom have been trained by Western law firms or educated in US law schools) have been forming their own law firms with up to date technology. As these attorneys gain the knowledge and experience to better service clients from developed countries, general counsels of established corporations are likely to become even more willing to retain them. At the same time, this will position the foreign local law firms to bring to the attention of their client alleged shortcomings in work done by more established law firms.

Consequently, it is indeed likely that the past will not be prologue in the area of legal malpractice. In the past, a Western corporation might have been hesitant to bring a claim against a large law firm it used in Russia, since it might also use the services of the same law firm in Japan, France and Germany. Now, the same corporation has the option of using different law firms in different countries or discontinuing a relationship with a law firm that provided inadequate or overpriced services.

## Smaller law firms reluctant to seek expertise

Most American lawyers practice in small to medium sized firms. Many are reluctant to refer matters to larger law firms with an established international practice out of fear of permanently losing the client. While such lawyers could work

with local foreign counsel, they are unlikely to have established the necessary personal and professional relations. In addition, where local attorneys are capable of providing the full range of sophisticated legal services, the US lawyer may fear being excluded from the matter as it progresses, particularly where foreign legislation and documents are in an unfamiliar language.

## Lack of knowledge and experience in foreign jurisdictions

Many lawyers lack knowledge or experience in many of the jurisdictions in which their clients conduct business.

The US has primarily a common law legal system, though international treaties, laws and regulations play important roles in determining the content of US law. With the exception of most of the English speaking countries, the majority of countries have civil law legal systems (for example, France, Germany, Japan and Spain). In civil law systems, law is systematically codified into various 'codes' (civil, administrative, labour and so on). Although there is the freedom to contract in many areas, in others, the Civil Codes (and analogous laws) establish pre-emptory rules which cannot be overridden by private agreement. Furthermore, countries have different practices with respect to their ease in piercing the corporate veil. Thus, the use of special purpose entities for tax reasons may present other unforeseen consequences.

The neophytes to the world of international trade are more reliant on counsel for guidance than is ordinarily the case. At the same time, lawyers are often reluctant to educate themselves before educating a client for fear of spending excessive time that cannot be billed. Similarly, unsophisticated users of legal services as well as those operating on a limited budget are often reluctant to keep counsel informed of aspects of a transaction for fear of generating a high bill.

This can be termed 'the practice of American law in a foreign country'. Quite frankly, it causes significant problems: it often strains relations with one's counterpart(s) and it can lead to contracts that cannot be legally implemented due to foreign regulatory

requirements. This situation may also result in contracts that prove unenforceable by foreign courts.

## International legal malpractice is more than missing deadlines

In the period 1983-85, the ABA found that the largest category of malpractice claims were in connection with the alleged failure to 'calendar properly' (that is, missed deadlines). In the later 1990-95 ABA survey, however, the principal cause of malpractice claims was the 'failure to know or apply law'. Since most of such 'failure to know' cases would have involved US law, where foreign law and practice are involved the risks of malpractice increase. While the broad categories used in the survey are of limited value, it would seem that as the volume of law to know expands (for example, by conducting business abroad), one's ability to ascertain and properly apply it decreases.

The human component of international malpractice must not be ignored. It is difficult to manage from afar. In many markets, senior attorneys lack the language skills to properly render legal services to clients. Expatriate lawyers become increasingly dependent on the judgment of junior, inexperienced local attorneys. While many firms do an excellent job training and assimilating local lawyers, this is not always the case. Furthermore, US based law firms often find that using expatriate lawyers presents special problems. While it is usually easy to find qualified individuals to live and work in Berlin, Hong Kong, London, and Paris, this is less true in locations where the standard of living is low, Western goods are in short supply and good medical care is not accessible. The result is high turnover among expatriate lawyers. These factors have accelerated the process of American firms relying prematurely on local lawyers in various less developed countries.

Lawyers (particularly partners) whose firms maintain offices abroad need to be vigilant in exercising quality control over the work produced for clients. Otherwise, they may find themselves directly liable for malpractice under theories of the failure to supervise, or not having in place an adequate mechanism

for other attorneys to articulate their concerns about the unsatisfactory manner in which particular matters are being handled. Even in the US, large law firms are appointing general counsel out of concern for liability arising from their domestic American operations, while the chances of error internationally are, as a practical matter, much greater. Often, lawyers who are inclined to be 'whistleblowers' but see that their firm's management is non-responsive will stop expressing their views and may ultimately leave the firm. The result is that an overseas office will be staffed and overseen by attorneys who are less sensitive to potential legal malpractice risks or the requirements of professional conduct.

## Future risks for the insurance industry

It is human nature to expect that past is prologue; however, compared to the past, the number of international legal malpractice claims is likely to grow significantly. Increasingly, less developed countries going through economic transformation are developing a body of law that will offer standards to follow. Where the outcomes sought are not obtained, the client may seek a legal remedy in the US or by private arbitration.

Many law firms have sought protection against exposing themselves to liability by forming wholly owned or majority owned subsidiaries in foreign countries. In many cases, however, such efforts are ineffective. Despite the establishment of a foreign local subsidiary, judges and arbitrators may find the parent entity liable since it:

- supplied personnel to work on the relevant matter in the subsidiary's office;
- dealt with aspects of the matter in its own offices (for example, client communication and billing); and
- it and its subsidiary did not strictly observe corporate formalities (holding of required meetings, formation of required management bodies, and so on).

The number of instances when a client would refrain from making a malpractice claim against its outside counsel because the law firm also serviced it in other countries is becoming less common for a

number of reasons. As the law becomes more developed in foreign countries, clients are more likely to have standards by which to judge a lawyer's or law firm's performance. While personal relationships will continue to deter some corporations from filing a legal malpractice claim arising from their international commercial activities — with today's new emphasis on corporate ethics and with more active boards of

Often, lawyers who are inclined to be 'whistleblowers' but see that their firm's management is non-responsive will stop expressing their views and may ... leave the firm.

directors, their willingness to tolerate flawed services should decrease. Lawyers, law firms, and their insurers must react to these trends or face increased malpractice exposure.

At first glance, corporate risk managers may view outside counsel as a potential 'deep pocket' to pursue when there are losses from transactions with foreign counterparts, or as a result of unsuccessful direct investments abroad. Risk managers and corporate counsel must investigate the role of the company's employees in contributing to a failed endeavour. The corporation will face major problems if it has terminated staff who may be future witnesses in legal actions. Consequently, corporate risk managers and general counsel must:

- examine the dispute resolution clauses in the retention agreements (if any) with the law firms to ascertain the process by which the matters can be resolved; and
- determine whether potential legal actions will prove pointless if brought in contributory negligence jurisdictions.

Another factor that must be considered is whether a specific US court will be willing to exercise jurisdiction over the dispute, particularly if foreign law plays an important role and/or many of the potential witnesses (and evidence) are located abroad. Judges will often differ in this regard. These issues are indeed complex and cannot be overlooked.

International transactions and foreign direct investments tend to involve large amounts of money. Often, they take years to consummate. Insurance companies must be extremely careful in assessing a law firm's ability to assist their clients in international matters. They must be confident that the standard of care within a law firm will not deteriorate if key personnel depart. Consequently, insurers must ensure that

procedures are in place that minimise the risks posed by personnel turnover. In light of clients' rising expectations of law firms, insurers will have to take a more active role in knowing their insureds than ever before. ●



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*This article was first published in  
International Legal Practitioner 29(2)  
July 2004 and is reproduced by kind  
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## Endnotes

1. 'Beware Turks Bearing Phones' *The Economist* 31 January 2002.
2. The American Bar Association's Standing Committee on Lawyers' Professional Liability *Legal Malpractice Claims in the 1990s* (Chicago 1997) at 1-3.
3. See <[www.nabrico.org](http://www.nabrico.org)>.
4. The American Bar Association *The Lawyer's Guide to Preventing Legal Malpractice* (Chicago 1999), at 29-30.

# recent publications



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**Bagaric, M and Dimopoulous, P**  
'Legal ethics is (just) normal ethics: towards a coherent system of legal ethics' (2003) 3 *Queensland University of Technology Law and Justice Journal* 367-96. Discusses the need for the application of an overarching theory to the practical problem at hand — is capable of providing clear and coherent answers to all problems faced by lawyers.

**Burger, E S and Orban III, F A**  
'International legal malpractice in a global economy: a growing phenomenon' (2004) 29 *International Legal Practitioner* 157-61. Examines the following themes: economic globalisation and its impact on the provision of legal services; smaller law firms are often reluctant to seek needed expertise; many lawyers lack knowledge or experience in many of the jurisdictions in which their clients conduct business; international legal malpractice is more than missing deadlines; and future risks for the insurance industry.

**Byrnes, P** 'Supervised legal practice requirements' (2004) 24 (7) *Proctor* 19-20. Examines more aspects of the *Legal Profession Act 2004* (Qld).

**Condlin, R J** 'What's love got to do with it?' — It's not like they're your friends for Christ's sake: the complicated relationship between lawyer and client' (2003) 82 *Nebraska Law Review* 211-311. Discusses whether lawyers should love their clients and try to be their friends.

**Coupland, S** 'Success — how to achieve it in your firm' (2004) 42 *Law Society Journal* 50-55. Examines: what the successful practices are doing; fee earner productivity and performance; margin management and cost of

production; effective time utilisation; cash flow management; and achieving success in your practice.

**Francis, A M** 'Out of touch and out of time' lawyers, their leaders and collective mobility within the legal profession' (2004) 24 *Legal Studies* 322- 48. Discusses the failure of UK legal professional associations to come to grips with the enormous upheaval in the legal profession over the last 30 years.

**Gibeaut, J** 'The outside looking in' (2004) 90 (August) *ABA Journal* 46-52. Examines the expanding role of inhouse counsel and their outside counsel.

**Ginsburg, T and Wolf, A** 'The market for elite law firm associates' (2004) 31 *Florida State University Law Review* 909-63. This article examines the attrition rates at law firms from their associates and asks and answers many questions concerning the market for lawyers.

**Hatamyar, P W and Simmons, K M** 'Are women more ethical lawyers? An empirical study' (2004) 31 *Florida State University Law Review* 785-857. Discusses the possible 'gender gap' in attorney discipline based on cases from all 50 US states and the District of Columbia, and concludes that female attorneys in fact have significantly less disciplinary actions made against them than male attorneys relative to their respective numbers.

**Hebb, A** 'Poisonous practices and LPT remedies' (2004) 78(9) *Law Institute Journal* 56-9. Examines the need for lawyers to understand the dispute jurisdiction of the Legal Profession Tribunal (Victoria) and the options available to them.

**Law Society Report** 'Anti-money laundering reform — Solicitors will have to scrub up' (2004) 42(8) *Law Society Journal* 66-8. This article summarises and comments on the key issues arising from the publication of the Federal Minister for Justice and Customs policy principles paper, that outlines the key principles underpinning proposed changes to Australia's anti-money laundering system.

**McFadyen, G** 'How to make your practice fly' (2004) 24(7) *Proctor* 23-24. Discusses the adoption of the management practices which will ensure the financial success of a practice. Looks at recording your time; knowing the areas of practice that are more profitable; proactively managing clients; benchmarking your practice; and articulating your vision and values in a strategic plan.

**Markus, D and Markus, L P** 'Balancing the legal mind' (2004) 14(4) *Experience* 26-30. Discusses the way lawyers think by dissecting the legal mind and with the use of matrices.

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**Neil, M** 'Case closed. Now what?' (2004) 90 (August) *ABA Journal* 32-36. Discusses the strategies some lawyers use in surviving and thriving in time-consuming litigation.

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**Robertson, M** 'Principal, producer and consumer: the client's role in the co-production of lawyer's services' (2002) 6(1) *Newcastle Law Review* 35-60. Discusses the need to bring the

client's role in the service production process into the foreground, and to make more transparent the fact that legal clients are often co-producers of their own services.

(2004) 10(1) *University of New South Wales Law Journal Forum*: Stopping the clock? The future of the billable hour.

— **Debus, B** 'Directions in legal fees and costs'.

— Hall, D V 'Present difficulties with the assessment system'.

— **Walker, B** 'Proportionality and cost-shifting'.

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— **North, J** 'Costs disclosure and review: a national perspective'.

**Veasey, E N** 'Corporate governance and ethics in the post-Enron WorldCom environment. (The Changing Role of Directors in Corporate Governance)' (2003) 38 *Wake Forest Law Review* 839-853. Examines the ethical aspects of corporate governance and corporate counsel.

**Zeller, B** 'Traversing international waters' (2004) 78(9) *Law Institute Journal* 52-55. Examines the growth in international trade and the need for lawyers to become familiar with the terms of the Convention on Contracts for the International Sale of Goods.

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## On managing partners: the King Series

The King Series of seminars honours the memory of the late Philip King and his contribution to the professions, particularly to the management of professional services firms. Philip was the author of *Professional Practice Management* (Law Book Co 1995), was Managing Partner of Allen Allen & Hemsley from 1986 to 1990, and was Adjunct Professor at the University of Western Sydney. At the time of his death in January 2003 Philip was a Councillor of the Law Society of NSW, Chair of the College of Law and Consultant to Allens Arthur Robinson. Philip was a modernist and a fervent believer in individual liberty, excellence and competition.

Ian McGill, a partner at Allens Arthur Robinson, and John Gray, a professor at the University of Western Sydney, worked and researched with Philip King, and have organised the series, a forum in which matters to do with managing law firms and the profession are debated. Top speakers are invited and strictly moderated by the evening's chairman so that there is time for a discussant reply and general questions. Each speech and discussion is transcribed and the speech is then made available on Professor Gray's website at <<http://aegis.uws.edu.au>>. At the end of the series these will be edited into a publication.

The inaugural speech was given by Professor Tim Morris, Director of The Clifford Chance Centre for Study of Professions at Oxford University. He spoke of new practice development in professional service firms. Danny Gilbert, Managing Partner of Gilbert + Tobin was the discussant. This paper is on the AEGIS site.

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Allens Arthur Robinson, Level 23, The Chifley Tower, 2 Chifley Square, Sydney.

RSVP for catering purposes to <[Ian.McGill@aar.com.au](mailto:Ian.McGill@aar.com.au)> by Thursday 11 November 2004.

There is no fee for attendance but you do need to pre-register.

**Inquiries:** Dr John Gray <[jgray@uws.edu.au](mailto:jgray@uws.edu.au)> or Mr Ian McGill <[Ian.McGill@aar.com.au](mailto:Ian.McGill@aar.com.au)>.

#### ***The conflict between managerialism and professionalism***

February 2005  
Mr Justice JJ Spigelman, Chief Justice of New South Wales, with comments from Mr Tom Poulton, Managing Partner, Allens Arthur Robinson.

#### ***Managing partners***

March 2005  
Mr Philip Marcus Clark, Managing Partner, Minter Ellison, with comments from Mr Gary Flowers, Chief Executive Officer, Australian Rugby Union.

PUBLISHING EDITOR: Kerrie Tarrant BA, MBA MANAGING EDITOR: Elizabeth McCrone BA/LLB(Hons) MLitt PRODUCTION: Alexandra Mullan  
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia  
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood [www.lexisnexis.com.au](http://www.lexisnexis.com.au) [kerrie.tarrant@lexisnexis.com.au](mailto:kerrie.tarrant@lexisnexis.com.au)

ISSN 1445-7946 Print Post Approved PP 255003/05838 Cite as (2004) 4(2) LPM

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