

# **RISK MATTERS: SELLING THE REWARDS OF RISK MANAGEMENT TO PEOPLE TOO BUSY TO CARE**

## **Introduction**

When I first discussed giving this talk with Sheila Wells, we thought about taking as the topic the difficulties of promoting good risk management in times of economic downturn. But when I began thinking about the subject a little more deeply, and in particular why risk management strategies fail, I realised that we are talking about much more than the current economic climate. What I am proposing to do is to look more widely at the difficulties of promoting good risk management practices to busy lawyers and the rough format of my talk will be as follows.

First I will look at the legal backdrop, concentrating on the cultural changes which have significantly changed the climate when it comes to risk management and have made a good risk management culture an essential part of a profitable law practice.

Next I will go on to look four particular aspects which cause problems when it comes to persuading lawyers to contain risk. These are in no particular order:

- Bucking the system
- Personal ambition
- Speed and mobility
- The buzz of the job

Finally I will try to focus on some solutions.

I am hoping that the session will be interactive and I do hope that people will chip in with their own experiences.

## **The legal backdrop**

The solicitors' profession has undergone a sea change in culture over the last 10 years in particular. I became a partner in RPC in 1986. At that time many firms, and RPC was no exception, operated a lock step system for partners. A partner's drawings and profit share would be on an automatic escalator, progressing upwards through the rungs until you reached a ceiling and/or retired from the partnership. As lawyers have been forced to become more commercial and

the business world has become more competitive, few law firms have retained a lock step structure. Most now endeavour to reward partners on the basis of their contribution to the practice, and that will include in large measure a consideration of the fees which the partner has generated for the firm. The resultant change of ethos has caused partners to become far more entrepreneurial and much less averse to risk – and I will be talking about that in more detail later in this talk.

At the same time the regulation of the profession has changed beyond all recognition. We have moved from a rather lax regime to a new era of heightened regulation. The system is about to change yet again with the introduction of outcomes focused regulation which is coming into being in October 2011. Solicitors will then be judged by outcomes – if a risk is realised then whether or not you have complied with all of the requirements under the current Solicitors' Code of Conduct, you will still be found to be at fault. The new regulatory regime is far more nebulous than our current system. There is no prescriptive guidance which in some ways may be good but which also creates far greater vulnerability to a finding of fault.

There has also been a culture change when it comes to clients. Gone are the days when clients would loyally instruct the same firm year on year and when solicitors were regarded with respect and a certain level of deference. I am sure that that is a good thing, but we also have to recognise that there is a greater propensity on the part of clients to complain if the level of service, or sometimes even the legal outcome, is not what they had expected it to be.

There is no doubt that law firms are increasingly rising to the challenge of setting up good risk management systems and that they appreciate the demands of clients in what is an intensely competitive market place. More and more firms have appointed a risk manager, either on a full or part time basis, and there is far more awareness of risk now than at any time in the profession's history. That is not to say that risk management is universally welcomed by partners or even by the management executive. There remains the view that risk management is not a profit generating exercise (a view which I would dispute) and neither is it cost free (a view which I accept). It is seen as diverting lawyers away from the real business of the firm.

So against that backdrop, I want to look at various things which can frustrate our efforts to sell the rewards of risk management.

## **Bucking the system**

I have mentioned the fact that with the change of culture, the most successful partners in a law firm will often be those who are the most entrepreneurial. The partners who are always out and about, meeting clients and ensuring that their needs are being met. These partners are invariably time poor, often impatient and possibly sufficiently self-assured as to believe that risk management procedures are beneath them. They will say that they simply do not have the time. This can present a real problem as it can mean that risk management systems within a firm become ineffective because they are not operated correctly.

For example, within RPC we have devised a detailed protocol for the opening of new matters to ensure that all the correct checks, such as conflict searches, anti-money laundering etc, are carried out. The aim is to minimise the input required at partner level so various aspects of the process are done by the associate, the lawyer who will have the day to day conduct of the file, and his/her secretary. The only input required from the partner is upon the escalation of the matter by the associate because of a potential conflict and at the end of the file opening process when the partner is required to answer certain risk questions designed to flush out whether the taking on of a particular matter would trigger any risk for the firm. The risk questions take less than 5 minutes to answer and yet we have partners who buck the system by asking their secretaries to go to their PC and answer the questions for them. The secretaries are not qualified to do so, meaning that they will answer all the risk questions in the negative, leaving any risk issues unconsidered by the firm.

My second example of bucking the system reflects very well the profit versus risk avoidance balance which is constantly having to be struck. Because of the requirements to undertake conflict searches, money laundering and know your client checks, and because these take time to complete, we have a system whereby a file can be opened immediately even if the various checks are ongoing. The file is then known as interim open but the lawyers working on the matter are able to record their time and the tasks being undertaken for the client in the usual way. Now until all the searches have been completed, there remains a risk that the matter might have to be aborted in which case we would not be paid for any work undertaken on the case. For that reason we have imposed a limit on the level of work in progress which can be recorded during the interim open phase. Sometimes new matters, particularly in the corporate sphere, have incredibly tight deadlines within which a deal must be done, with high levels of concentrated work carried out over a very short timeframe. This combination of intense pressure and intense activity does not sit well with risk management, a far less glamorous activity. The result has been that certain partners will buck the system – the file is opened as a non-chargeable matter so that no work in progress figure will show in the interim open file reports. The risk is being run but there are no alarm bells. If for

any reason the work on the file had to be aborted, say because of a conflict, we would lose all of the work in progress which had been undertaken.

Now the partners who are dodging the system are not doing so to expose the firm to risk. They are doing it because they regard the procedures as unnecessary and intrusive into their time when they have more important client work to do. I will come back to this theme.

### **Personal ambition**

I have already spoken about the changes which have taken place within many legal partnerships, with the emphasis now being on a partner's reward, ie income, reflecting his contribution to the business. This change of culture has led to a less collegiate feel within partnerships, which is being replaced by an every man for himself philosophy. This can mean that an individual partner will act in a way which he believes will be good for him, rather than good for the practice as a whole. For example, supposing the partner has a very good client who wants to introduce some new work to the practice. The area of specialism is not one which the partner normally deals with and he has a partner colleague with far greater expertise in the area of law concerned. But the fees will be good and the partner decides to do the work himself. From a risk perspective this is a very bad idea from a host of different angles –

- he may do a bad job – even be negligent;
- he will do the job inefficiently as he lacks expertise – he may have to write off a lot of time and he may face a client complaint;
- he may endanger his good reputation with the client, or even the firm's reputation.

Hanging on to files which are in truth not within a partner's area of expertise is not restricted to the go getting entrepreneurs of the practice. It can also apply to partners at the other end of the scale – those facing lean pickings and a dearth of work will be very tempted to hang on to a lucrative new instruction even if in reality it is outside their area of expertise.

There is another risk which is linked to having entrepreneurial partners. They may be tempted to take on work which lies outside their normal area of expertise and is outside their comfort zone. This is quite a difficult area generally. The law is always changing and evolving – if you look at the types of matters being dealt with by lawyers today and compare it with the Victorian times, the picture will look very different. Lawyers need to adapt and take on new challenges. But if they are venturing into a slightly new area (usually allied to their normal workload) at least this can be done

in the knowledge of the risk. Other senior colleagues might be involved to act as sounding boards, specialist Counsel might be instructed (possibly without passing the fee onto the client) as the firm would effectively be investing in building up a new area of expertise. What would not be done, however, would be to leave the one partner to take on the case unsupported.

### **Speed and mobility**

Legal services are precisely that – a service given to the consumer. The concept of giving service underpins the profession and the speed of service now possible is increasing all the time. When I first qualified as a solicitor, the fastest turnaround for written communications was first class post, ie by the next day. Imagine my excitement when I joined RPC and found the firm had a Telex – even that was reserved for exceptional matters, not the every day case. Now with the advent of email and Blackberries, people are in contact 24/7 and expect almost instantaneous advice. The pressure to respond quickly is increasing all the time and speed of service often does not fit well with risk management practices and procedures, which are seen as clunky, time consuming and basically an irritation.

At the last SIG meeting, Sheila and Tim were looking at confidentiality and the dangers posed by the use of email, but today I am looking at the dangers of email from a slightly different perspective. One of the key tenets of good risk management is for lawyers to keep a written record of the advice which they have given. The saving of emails is much harder to regulate than other types of written correspondence. At RPC if a lawyer generates an email from his PC he will be prompted to save it within the relevant file directory. However, if the email is sent by the lawyer from his blackberry, until quite recently he would not have been able to save it into the firm's document management system and we were reliant on the lawyer saving that email to the system on his return to the office. We have recently rolled out a new e-filing tool which does allow emails to be saved via the blackberry but the visual prompt to save is still not there and busy lawyers will not always take the steps required to save the email. We are seeing an increase in people communicating by text which adds a whole new layer of difficulty when trying to ensure that all communications with the client have been logged on to the matter.

The need to be responsive to clients, available 24/7 can put lawyers at risk in other ways. Emails constitute a double danger because by their nature they encourage the sending of a rapid, often informal and sometimes unconsidered response. The response, being in writing, is vulnerable to being leaked. A recent example is that of the Eversheds partner who, in an email, questioned the likely commitment of a female job applicant who had recently had a baby. His email was leaked and ended up being featured in the Daily Mail. I have no doubt that he has since wished that he had given the matter a little more careful consideration before pressing send. Clearly at that firm,

the risk manager had not sufficiently publicised and organised training on the firm's equality and diversity policy – or else the partner concerned was just too busy to attend it!

### **The buzz of the job**

I have mentioned already the contrast between working in the law now and working in the law in Victorian times. The rapidly changing legal backdrop, the demands of clients, the need for swift and proactive advice, all add up to an exciting and challenging environment. It can be very easy in such circumstances to get rather carried away and to forget the basics. I can give you a couple of very different examples of this.

One of my colleagues was instructed by clients to assist them with a particularly nasty dispute over some construction work which they had carried out. Their customer was an extremely wealthy captain of industry, lets call him M, who was used to getting his own way if he challenged somebody else's bill. M refused to pay for the building works and our clients sued. The parties were required to have a without prejudice meeting to see if the dispute might be resolved without recourse to litigation. Both sides attended with their solicitors. The meeting became somewhat fraught – certain things were said on both sides which probably should not have been said. After the meeting, M made a formal complaint to the SRA accusing the RPC partner of behaving unprofessionally. We were able in the event to satisfy the requirements of the SRA, but the case illustrates the importance of always remembering one's professional constraints. In this case, the RPC partner was so committed to assisting his client that he allowed himself to become too personally involved in the debate, rather than remaining cool and dispassionate.

My second example is a more common occurrence. This is where the lawyers become so enthused by the legal work that they are doing, that they overlook some of the basic requirements, such as ensuring that any costs estimates are adhered to or, if that is not possible, that they have been adjusted and agreed with the client. Also, when acting for Insurers, they need to ensure that the claim and costs reserves are correct and are regularly reviewed. Fees that are in excess of an estimate or a costs reserve are the biggest source of client complaint.

So far I have been looking at examples of where things can go or have gone wrong, linked to the demands on busy lawyers. I have yet to go on to look at how to sell the rewards of risk management but before doing so it cannot be ignored that there are real costs to good risk management as well.

## **Cost**

It is not easy to instil into the firm a culture of good risk management. You may have all the necessary procedures and policies in place but this is no good unless everyone is aware of them and, equally importantly, buys into them. You need to invest in order to achieve this. At RPC we are currently putting together a tailor-made training programme which will be compulsory for all the lawyers at the firm. The cost of this work will be significant – the costs incurred in putting together the training; the costs of then rolling out the training; the loss of lawyer time, ie taking them away from their desks; the costs of follow up and rounding up all of the non-attendees. I will come on to the benefits in a moment but suffice it to say that when called in for risk management training, very few busy lawyers will see any benefits straight away.

In addition to the cost of instilling good risk management practices, the four problem areas which we have already looked at:

- bucking the system
- personal ambition
- speed and mobility
- the buzz of the job

can all in fact be reduced to two issues – time and perception.

## **Time**

Time is a major factor which stops lawyers from complying with what they see as the minutiae of risk management. If a corporate lawyer is hell bent on tying up a deal within a ridiculous deadline or a litigation lawyer is approaching a major trial, the last thing on the priority list will be risk management. This may be even more so in today's economic climate when the focus is on obtaining and retaining business, not on reducing risk.

## **Perception**

Risk management has a bad press – it is seen as obstructive rather than constructive; as inhibiting rather than assisting client service. A classic dilemma arises out of the engagement letter. Clients who give us repeat instructions often say that they do not want to receive a long letter of engagement each time – and yet the current code of conduct has detailed requirements as to the information which must be given to the client at the start of each new instruction. A good risk manager will work with the partner concerned to find a compromise solution that will satisfy the

client while not exposing the firm to unnecessary risk. A risk manager must strive to find solutions and not obstacles.

Well I am not sure how you are feeling at this stage, but I think that I have persuaded myself that selling risk management is not an easy task! There are certain things however which make the task easier. It helps if you are seen as one of us rather than one of them. For this reason it can be easier if a partner takes on the role as he or she will be able to see things from a partner's perspective. I also really believe that there are significant rewards for a firm if it espouses good risk management practices and real risks for those firms who do not. It is a question of convincing individual partners of those benefits and risks.

## **Cost**

The first thing to underline is that good risk management is all about **retaining** profit. It is no good charging after new work if you then lose all the profit through inadequate risk management – for example we have lost money where

- a costs estimate was not reviewed and updated – we had to write off all our fees above the estimate and pay compensation for the inconvenience to the client;
- invoices remain unpaid and we have poor prospects of recovery – precisely the type of case where money should have been requested from the outset to be held on account of our fees and the outstanding costs position should have been closely monitored;
- we are required to devote resources to dealing with a client complaint or a conduct issue

## **Time**

It is not a productive use of lawyers' time to do work that they will not be paid for. It makes sense to do the necessary conflict and anti-money laundering checks as soon as possible at the outset of an instruction as, if a problem later emerges, we will need to cease acting and almost certainly will not be paid for what we have done.

It is also not a productive use of time to do work when there is a lack of expertise – particularly where there is the required expertise elsewhere in the firm. Having an inexperienced lawyer will result in a significant right down of the time spent on the matter (at best) and at worst may mean that the case is negligently handled.

## **Perception**

The risk management team need to be seen as a constructive force – a solver of problems rather than a creator of these. We are a specialist resource and need to be seen as such. For example, a lawyer may well face a complaint or even a conduct issue during the course of his or her career but hopefully will not do so on a regular basis. By going to the firm's risk manager as soon as the problem arises, that lawyer will benefit from the expertise of someone who does have regular experience of handling complaints/conduct issues and is much more likely to be able to achieve a better outcome. The risk manager needs to be embedded in the firm and available to deal with queries or problems of whatever nature. There needs to be contact at partner level which is why it is often so helpful for a partner to take on the role. The risk manager needs to be the first port of call not the last port of call.

## **Culture**

It is necessary to create a culture of good risk management, particularly with the new regulatory regime and the advent of outcomes focussed regulation. This leads on to possibly the most important feature of good risk management – management buy-in. The firm's management needs to be fully behind the firm's risk management strategies. This entails

- rewarding partners for good risk management practices, and possibly penalising those who flout the rules
- supporting any risk management initiatives, eg training courses, new procedures or systems;
- involving the risk manager in partnership business at partner level so that the risk manager is aware of changes within the business, new areas of activity etc;
- conveying the message that lax risk management leads to loss of profit and much more, eg loss of reputation.

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