

RISK management QUARTERLY



Volume 2
Issue 4 Dec 2006

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A quarterly publication of Professional Indemnity Insurance Committee, Malaysian Bar Council in collaboration with Jardine Lloyd Thompson Sdn Bhd (JLT Malaysia)

<http://www.myPII.com.my>

Editorial

2006 has been an exciting year indeed - with significant inroads made into enhancing and developing both our PII Scheme and the Malaysian Bar's Risk Management Programme.

On the PII front, through endless negotiations with insurers, the process of revamping the whole Scheme has slowly begun. 2007 will mark a transition year for the Malaysian Bar's PII Scheme, whereby, we have removed the NCB structure. This move, though causing an increase of 25% to member's basic premiums is necessary for the betterment of the Malaysian Bar's Scheme, that is, ensure that the Malaysian Bar has a sustainable, workable Scheme that will be able to stave off risk of collapse in the event of problems arising either in the Scheme itself or on the global insurance market. We want a scheme that protects the public and members of the Bar as well!

Further, the removal of NCB has paved the way for removal of the untenable claims loading of previous years. This loading structure caused members to be loaded upon notification of a claim and drove at least 7 – 8 members out of practice yearly. The March 2006 AGM provided affirmation of the support for these changes from members.

In the interim, the PII Committee has also been kept busy with preparatory discussions and presentations for the move towards a self insurance fund, roadshows, planning workshops and presentations by different brokers – the details of which will be published in the Malaysian Bar's Annual Report 2007/08.

The Risk Management team too have been tirelessly working on their various breakthrough projects. This year alone, they have conducted Practice Reviews on 21 legal firms throughout Malaysia, published a 2007 Risk Management Calendar, continued publication of the RMQ, conducted the second annual PII/ RM Survey, conducted risk management seminars and assisted in the preparation and launch of the General Litigation and Conveyancing Checklists.

The Practice Review and Checklist projects have by far been the PII & RM Department's most ambitious endeavours. Both these projects will be ongoing in 2007, with updates for the current General Litigation and Conveyancing Checklists and new checklists for different practice areas, for example, Office and Accounts Management, Execution of Judgment, Conflicts of Interest, etc.

Reports and highlights of the PII & RM Department's many endeavours have been included in this final edition of the 2006 RMQ. As is customary, we have a risk management article: *An Unlikely Risk: The Non-Client*, with an accompanying case study to raise awareness on the importance of utilising both a retainer letter and non-engagement letter in your legal practice.

We hope you have found the RMQ 2006 useful and informative – we will be continuing publication of the RMQ in 2007 in a revised format. Finally, I would like to take this opportunity to wish all members a Happy New Year. May 2007 be an exceptional year for us all!

Ragunath Kesavan
Chairman
Professional Indemnity Insurance Committee

AN UNLIKELY RISK: THE NON-CLIENT



It is our choices that show what we truly are, far more than our abilities.

J. K. Rowling

Advocates and solicitors (A&S) owe many duties to their clients, but generally do not owe duties to the public while performing their obligations to their clients. It is paramount, therefore, that an A&S be able to distinguish between clients and non-clients. While this may sound like a simple task, often it is not.

Suits by persons claiming to be clients (but whom the A&S did not intend to represent) frequently fall into three categories:

- (i) Plaintiffs who claim to have been clients, because they benefited from the legal services that the A&S provided to his actual client (for example, participants in a multi-party transaction, beneficiaries, etc).
- (ii) Where the A&S believes he declined to represent the plaintiff, but the plaintiff believes otherwise.
- (iii) Plaintiffs who claim to have relied on advice or a legal opinion the A&S provided to a client, that the client then disseminated to others.

The Case Study, found at the end of this article, provides an example of how such disputes may arise. Presented is a classic situation where the A&S believes she is not representing the potential client, but the potential client believes otherwise. In the example, the A&S did not realise that she and the plaintiff had different understandings until after the statute of limitations had run on the plaintiff's claims in the Sabah hospital case.

Another example of how conflict frequently arises is in a failed business venture. In such disputes, the A&S may have represented one party in the venture while other interested parties in that venture were unrepresented. When the venture fails, the unrepresented owners of the company, and sometimes its investors, may claim that the A&S was also their A&S, and failed to adequately protect their interests! Any ambiguity or absence of sufficient documentation on who the A&S did or did not represent in the failed business venture may leave the A&S vulnerable to a negligence suit.

Lawyer-client relationships are based on contract. That contract, however, can be implied from the conduct of the parties. The absence of the normal indicia of a lawyer-client relationship (such as a fee agreement and billing statements) may not be dispositive of the question of whether a lawyer-client relationship exists. Hence, the best protection against such claims is *documentation of*

- (a) Who the A&S represented
- (b) On what matters, and
- (c) Documentation of who the A&S *did not* represent.

The scope of an A&S's representation (of a client) should, as far as possible, be defined in a fee agreement and/or retention letter. These documents should clearly state who the A&S is representing and the scope of that representation.

Should an A&S decline to represent a potential client, he should document

that decision in a “non-engagement” letter to that potential client as well. Without such documentation, the alleged client may be able to create sufficient questions of fact to submit the question of the existence of a lawyer-client relationship to the judge.

Problems like the one highlighted in the Case Study may be avoided by taking a few minutes to prepare and provide a non-engagement letter. Following are sample non-engagement letters:¹

Dear Encik Zakaria,

I am writing to advise you that I have decided not to represent you in suing the driver of the car that injured you in the motor vehicle accident on 1 Jan 2001. You will not, therefore, be hearing from me further about this matter. I encourage you to seek a different lawyer to represent you in pursuing your claims as soon as possible, since there are deadlines applicable to your case which, if not met, could affect your rights in bringing this claim.

I wish you success in pursuing your case.

Yours very truly,
Messrs Annie Ting

Dear Ms. Tan,

I am writing to confirm that I will not be representing you in any matter related to your business venture with my client, MBC Sdn. Bhd. I was hired by Mr. Foo to prepare the documents for that venture and to provide him with legal advice about that venture, so he is my only client in this matter.

Although you may receive some incidental benefit from the work I do for Mr. Foo, I want to make sure you understand that I am not representing your interests in this matter. You may want to retain your own lawyer to review the documents I prepared for Mr. Foo and to otherwise provide you with legal advice about your proposed business venture with Mr. Foo.

Yours very truly,
Messrs Annie Ting

One source of debate concerning the content of a non-engagement letter is whether the A&S should advise the person of the actual deadline(s) applicable to their case, particularly if a deadline is quickly approaching.

For example, does the A&S tell the person that the statute of limitations will bar their claim if they do not file their suit by the sixth year from the date of their accident if the accident happened 5 years ago? There is no right answer to this question. The problem, of course, with trying to advise someone about specific case deadlines is that the A&S may not have sufficient expertise or facts to identify *all* of the applicable deadlines. Some prefer not to provide advice to non-clients about specific deadlines applicable to their cases unless that deadline is imminent. By providing the person with advice about specific deadlines, the A&S may be liable if that advice is wrong or if the A&S fails to advise the person of *other* applicable dispositive deadlines.

¹ These letters could be used to decline representation of a potential new client or an existing client on new matters.

CASE STUDY: The Non-Engagement Letter



The wisest men follow their own direction.

[Euripides](#)

The Facts

Michelle Law (“Law”) is a lawyer in Kuala Lumpur who’s main area of practice involves medical negligence. Sulaiman Wahab is Law’s client. While on vacation in Sipadan Island, Sabah, Encik Sulaiman suffered a severe reaction to medication prescribed by his family physician. The reaction required Encik Sulaiman to eventually seek treatment at a government hospital in Sabah (the hospital). Encik Sulaiman’s family physician is located Kuala Lumpur.

Encik Sulaiman took approximately a year to fully recover from his medical complications (as a result of the reaction). A few months later, on his children’s advice, he consulted Law about filing a suit against his family physician.

Law discovered that the reaction suffered by Encik Sulaiman is a common side effect of the medication prescribed by his treating physician. A consulting medical expert orally advises Law that had Encik Sulaiman sought medical treatment earlier, the residual effects of the reaction would have been minimal.

Law believes that Encik Sulaiman was not properly warned of the side effects of the medication and was not properly instructed to seek immediate medical treatment if an adverse reaction occurred. Law agrees to take the case and enters into a retainer agreement with Encik Sulaiman. The retainer agreement provides that Law will represent Encik Sulaiman against the parties who caused his medical complications.

Law filed a suit in the Kuala Lumpur

High Court against the family physician and, during discovery, learns that there may be a case against the hospital in Sabah. Law orally advises Encik Sulaiman that she is not able to pursue the case for him in Sabah, but that she can find a lawyer in Sabah to initiate a negligence suit against the hospital that provided treatment. Law believes that the stronger case lies against the family physician that prescribed the medication.

Referral

Law, through her contacts, locates a Sabah lawyer named Stan Munusamy (“Munusamy”) who maintains a general practice. Law sends Munusamy some medical records and refers Encik Sulaiman’s case against the hospital to Munusamy. Law’s cover letter mentions nothing about a fee arrangement, only that Munusamy should liaise with Encik Sulaiman to determine if a viable claim exists against the hospital.

Law calls Munusamy on several occasions to ask whether the suit against the hospital has been filed. On each occasion, Munusamy is out of the office; Law speaks to Munusamy’s assistant instead, who tells Law that Munusamy was in the midst of reviewing and preparing Encik Sulaiman’s papers. Law assumes that Munusamy has timely filed the suit and will, as requested in her earlier letter to him, liaise with Encik Sulaiman directly.

Several months later, during an office visit to discuss the KL suit, Law asks Encik Sulaiman if he ever heard back from Munusamy. Encik Sulaiman says that he has not heard from Munusamy at all – he assumed that Law would be following up on the Sabah hospital suit. Law proceeds to write to Munusamy

requesting an update on the Sabah suit. Munusamy writes back stating that he never agreed to take the case; he only agreed to review the file materials to determine if there was any basis for a suit. Munusamy points to the fact that no retainer agreement exists between him and Encik Sulaiman. In addition, Munusamy discloses for the first time that a potential conflict exists, such that he would be ethically prohibited from suing the hospital.

The Implications

Encik Sulaiman consults a new lawyer, who replaces Law as counsel in the KL suit and eventually files a negligence suit against both Law and Munusamy for failing to protect his interests against the statute of limitations running against the Sabah hospital.

Discovery reveals that the hospital was grossly negligent in its treatment of Encik Sulaiman and that Encik Sulaiman had sought medical assistance on a timely basis after the onset of the reaction. Had the hospital followed proper protocol, the residual effects of the reaction would have been minimal. The suit against the family physician is settled by Encik Sulaiman's new lawyer for nuisance value.

Law attempts to argue that she never agreed to handle the Sabah suit and that she made an appropriate referral to a Sabah lawyer. Munusamy alleges that no lawyer-client relationship ever existed between him and Encik Sulaiman. Eventually, the claims against both Law and Munusamy are settled out of court by their insurers for a substantial sum.



A lot of people are afraid to say what they want. That's why they don't get what they want.

[Madonna](#)

TRAPS THAT TRIP

Law could have prevented the claim against her had she utilised a non-engagement letter:

- ✗ Law, who is not an admitted member of the Sabah Bar, was legally prevented from filing a suit in that State. The fact that she cannot file a suit there is insufficient to shield her from liability for the running of the statute of limitations.
- ✗ Law's oral statement that she would not be initiating the suit against the Sabah hospital will not absolve her of liability. The broad language in the initial retainer agreement between Law and Encik Sulaiman most likely will be sufficient to establish the scope of Law's duty to Encik Sulaiman and enable the case to go to court.

! *By executing a non-engagement letter and modifying her retainer agreement, Law could have protected herself from exposure to this claim!*

Munusamy also could have used a non-engagement letter to prevent a claim against him:

- ✗ By immediately focusing on the conflict issue, Munusamy could have disclosed to both Law and Encik Sulaiman the fact that he could not bring a suit against the hospital.
- ✗ This would have allowed Law and Encik Sulaiman sufficient time to obtain another Sabah lawyer who could have timely brought the suit.

! *Both Law and Munusamy failed to inform Encik Sulaiman of the shorter limitation period under the Public Authority Protection Act 1948 (3 years instead of 6 years) in relation to his Sabah hospital negligence suit.*



*If you must play,
decide upon three
things at the start:
the rules of the game,
the stakes, and the
quitting time.*

Chinese Proverb

TOOLS FOR THOUGHT

Do make sure that in declining instructions, your law practice issues:

- ♦ **Non-engagement Letters.** Non-engagement letters may be just as, if not more important than retainer letters. Therefore, in the event you decide *not* to accept a client's instructions, ensure that a non-engagement letter is sent to them advising them that they should seek a new lawyer.

As per the samples provided in the accompanying article, "An Unlikely Risk: The Non-Client", non-engagement letters should be brief but contain the following:

- (i) *Statement of Declined Representation.* Any non-engagement letter should reference enough facts to identify the matter and should specifically decline representation.
- (ii) *Time Sensitive Dates.* Without calculating the exact dates involved, the non-engagement letter should alert the non-client to any pertinent statute of limitations and other imminent deadlines.
- (iii) *Recommending Other Lawyers.* Although specific referrals to other lawyers are risky, the non-engagement letter should always recommend that the non-client consult with another lawyer on the case in question.

Do make sure that in accepting instructions, your law practice verifies, issues and/ or conducts:

- ♦ **Identity of Client and Lawyer.** This may sound obvious, but it can go a long way in preventing or resolving any potential misunderstandings. In some cases, you may also need to specify whom you are *not* representing.
- ♦ **Engagement/ Retainer Letters.** The most important aspect of risk management in your law practice. You should ensure that your clients know what you will or will not do for them. Therefore, the fee, scope and objectives of representation should be in writing.

Specify the matter for which your law practice has been retained. Clients may be involved in more than one claim. By specifying the matter for which your law practice has been retained, you can avoid any potential claim that the client had hired you for both matters. Therefore, your retainer letter should be as comprehensive as possible and written in simple language, avoid legalese whenever possible. This will also allow clients an early opportunity to correct any discrepancies and/ or decide against engaging you as their lawyer.

It is advisable to have clients acknowledge and sign their agreement to this retainer. There should be two signed copies of this agreement – a copy for the client's reference and the second copy to be kept in the client's file.

Further, if your law practice has a standard terms and conditions form, it should be enclosed with the retainer letter.

- ♦ **Fee Agreements.** Your fee agreement should also be in writing. Any fee agreement should identify who the client is, denominate who will be paying for the representation. You must inform the client in writing what your rates will be. Further, it is prudent to tell your clients how you will be billing them – monthly, quarterly, etc. and to agree on the timing and form of their payments. Have the client acknowledge and sign this agreement.
- ♦ **Conflicts of Interest Checks.** Do a conflicts check on both your client and the other party (and the directors, subsidiaries, etc where applicable), consider the conflicts issues, consider the effect your own interests may have on the representation and the effect of any third parties' interests, and consult with your client. This is not just important at the start but throughout representation, you will need to identify and analyse whether any conflicts of interest have arisen and handle them accordingly.
- ♦ **File Closure Letters.** File closure letters should incorporate various points such as:
 - (i) *Reason(s) for the File Closure.* It could be that the work has been completed or that the client has decided to change lawyers or has given you no further instructions.
 - (ii) *Work Done.* Explain fully in your file closure letter all the work that has been done and the outcome.
 - (iii) *Outstanding Matters.* If there are any outstanding matters to be dealt with by the client, the letter should clearly state what these matters are and the deadlines, if any.
 - (iv) *The Client's File.* Find out from the client if they would like their physical file returned to them or if they would prefer that your law practice stores it. Inform clients how long you will store their file for, if they choose the latter option.
 - (v) *Return Original Documents.* Ensure that all original documents are enclosed with your file closure letter and that clients acknowledge receipt of these documents.
 - (vi) *Acknowledge Receipt.* It is a good idea to send two copies of the file closure letter to the client and ask them to sign both letters and send one back to you.
- ♦ **Disengagement Letters.** This letter should be in writing and should advise the client that the matter entrusted to your law practice has ended, giving reasons, and what, if any, additional action may be required.

Client, conflict checks and documentation of the above processes will not prevent all potential problems, but will provide an increased likelihood of getting paid, avoiding conflicts, and reducing negligence suits associated with dissatisfied clients.



*In matters of style,
swim with the current;
in matters of principle,
stand like a rock.*

Thomas Jefferson

RISK MANAGEMENT PROGRAMME: 2006 HIGHLIGHTS

The Risk Management programme has made significant progress since Jan 2005. The continued support and belief in its role by the PII Committee in addressing emerging practice risks has culminated in several successful projects in 2006: Practice Review, Practice Area Checklists, 2007 Calendar, etc.

The Practice Review¹ project, initiated in Aug 2006, has provided valuable information and statistics. Further, legal firms audited are now able to zero in on identified risks, whilst insurers have a greater understanding of the mechanisms and good practice of Malaysian legal firms (thus debunking the general perception that legal firms which report claims are not managed well).

Another project that has benefited members of the Bar is the simultaneous publication of two (2) Practice Area tools, namely the General Litigation and Real Estate Conveyancing Checklists. Thereafter, legal firms will be able to use these Checklists to guide and monitor both their lawyers and staff in the aforementioned Practice Areas.

Efforts initiated in 2005 remain pivotal to ensure that risk management (for the legal profession) becomes a priority and culture for members. These ongoing projects are the Risk Management Quarterly newsletter (RMQ) and the Risk Management sessions (Ethics Seminars) for pupils in chambers, which have been garnering favourable reviews and creating the awareness that the Programme hopes to achieve.

The Risk Management team continues to strive to achieve the following objectives in 2007:

- ♦ Implement risk management techniques to allow the introduction of a fairer premium allocation system that does not overly penalise members who have claims;
- ♦ To inform and educate the profession about the Bar Council's Professional Indemnity Scheme and its benefits;

- ♦ To imbue the profession with an understanding of the concepts of risk management and the necessity of adopting a risk management culture in legal practice;
- ♦ Provide information on practical systems, procedures, checklists and file management to minimise risk with emphasis on quality assurance.

The following is a summary of the various activities and initiatives that the Risk Management team continued from 2005 and/or conceptualised, developed and implemented for the benefit of members in 2006:

PUBLICATION

1. Risk Management Quarterly Newsletter

- ♦ **Mar 06:** A copy of the RMQ is sent to all members of the Bar vis-a-vis being sent to firms only in 2005.
- ♦ As of **Dec 06**, there will be a total of **eight (8) RMQ publications with 75,000 copies** in circulation.
- ♦ To further enhance the practicality and effectiveness of the RMQ, Case Studies based on the PI Scheme's claims history have been included as a regular feature since Sep 2006.
- ♦ Other new features in the newsletter include *the "Tools for Thought"* feature that offers best practices tips in the various practice areas.

2. 2007 Risk Management Calendar

- ♦ Titled "A-Z of Risk Management", the calendar is a breakthrough project which has incorporated education and practicality into a risk management tool.
- ♦ More than 12,000 copies were sent to all members with the Sep/ Oct 2006 Praxis.

¹ Please find the 2006 Practice Review report on Page 11

PRACTICE AREA TOOLS

1. Practice Area Checklists

- ◆ This project was initiated to address “Practice Traps” that were apparent in the various Practice Areas.
- ◆ Our first initiative was to introduce two (2) Checklists: General Litigation and Real Estate Conveyancing.
- ◆ *The first edition of these Checklists was launched on 15 Dec 2006. They are now available to all members online @ www.myPII.com.my and will be mailed to all legal firms by Jan 2007.*

SEMINARS

1. Risk Management Session for CLE Ethics Lectures

- ◆ First session commenced in Jun 05 in Kuala Lumpur.
- ◆ By Dec 2006, a total **19 sessions** would have been held.
- ◆ In these sessions, the risk manager introduces pupils in chambers to the elements of risk management and briefs them on the Malaysian Bar’s PII Scheme.
- ◆ Similar sessions conducted in Penang (Jan 2006 and Aug 2006) and Johor Bar (Jan 2006) received favourable responses.
- ◆ More than *900 pupils in chambers* have attended these sessions in 2006.

2. Other Seminars

- ◆ **Apr 06:** Risk Management Seminar was held for Practitioners at a legal firm in Kuala Lumpur. Approximately 20 lawyers and staff attended this session.
- ◆ **Jul 06:** PII/RM Briefing for the Bar Council Secretariat staff. About 30 staff attended this session.

PRACTICE REVIEW

This project is one of the most ambitious endeavours undertaken since the commencement of the PII Scheme in 1992. In Jul 2006, the Risk Management team was tasked to visit and review selected legal firms based on four (4) claims-prone

areas: Office Management, Accounts Management, Conveyancing and Litigation. Hence, the risk manager developed a module to review legal practices, and created a template which enabled a systematic and thorough methodology to be adopted in deriving useful information about risk management practices within the context of the legal profession.

21 legal firms throughout Malaysia were reviewed beginning late Aug 2006 through Nov 2006. The Team met enthusiastic Managing Partners, Office Managers and staff who responded positively to recommendations for changes (if any). Number of legal firms visited:

- ◆ Penang – 7 firms
- ◆ Kuala Lumpur – 3 firms
- ◆ Selangor – 2 firms
- ◆ Seremban – 2 firms
- ◆ Johor Bahru – 6 firms
- ◆ Melaka – 1 firm

ANNUAL SURVEY

- ◆ **Aug 06:** RMQ Telephone Survey (116 legal firms called)
- ◆ **Sep 06:** Annual PII/ RM 2006 Survey (215 responses received)
- ◆ **Dec 06:** RM Calendar Feedback Telephone Survey

HELPDESK

- ◆ **Jan 06:** Appointment of additional resources. PII & RM Department officially set up to handle queries from members.
- ◆ The PII & RM Department comprises one (1) Risk Manager, two (2) Executive Officers and one (1) Admin Assistant.

MISCELLANEOUS

- ◆ **Jun 06 & Sep 06:** Risk Management Strategy Development Plan commenced with assistance of consultants from JLT Asia and JLT Risk Solutions Asia.
- ◆ **Dec 06:** Follow up of Strategy meeting with presentation by JLT Asia on their recommendations for the Risk Management programme and moving forward.

PII & RM DEPARTMENT 2006/2007 CALENDAR

September 2006

- ✓ 1: Annual PII/ RM Survey 2006 Begins
- ✓ 6: RM Practice Review 2006 (Melaka)
- ✓ 7: PII 2007 Roadshow @ KL Bar
- ✓ 14: RM Strategy Development Meeting with JLT
- ✓ 20: Ethics Lecture: RM Session in KL
- ✓ 26: PII 2007 Roadshow @ Kelantan Bar
- ✓ 27: PII 2007 Roadshow @ Terengganu Bar
- ✓ 27: RM Practice Review 2006 (Seremban)
- ✓ 28: PII 2007 Roadshow @ Penang Bar
- ✓ 29: PII 2007 Roadshow @ Melaka Bar
- ✓ 29: RM Practice Review 2006 (Penang)
- ✓ 30: Ethics Lecture: RM Session in Penang

December 2006

- ✓ 8: PII Committee Meeting
- ✓ 13: Ethics Lecture: RM Session in KL
- ✓ 14: RM Strategy Development Meeting with JLT
- ✓ 15: Launch of General Litigation & Conveyancing Practice Area Checklists

October 2006

- ✓ 4: PII 2007 Roadshow @ Pahang Bar
- ✓ 5: PII 2007 Roadshow @ Kedah Bar
- ✓ 6: PII 2007 Roadshow @ Perak Bar
- ✓ 10 – 13: RM Practice Review 2006 (Johor Baru)
- ✓ 11: PII 2007 Roadshow @ KL Bar
- ✓ 16 – 17: RM Practice Review 2006 (Penang)
- ✓ 30: Annual PII/ RM Survey 2006 ends
- ✓ RMQ, September 2006
- ✓ 2007 Calendar: A to Z of Risk Management

January 2007

- RMQ, December 2006
- 17: Ethics Lecture: RM Session in KL
- 18: Ethics Lecture: RM Session in JB
- ★ Ethics Lecture: RM Session in Penang

April 2007

- Ethics Lecture: RM Session in KL
- ★ RM Seminar 1 for Legal Firms

November 2006

- ✓ 3: PII 2007 Roadshow @ Johor Bar
- ✓ 8: Ethics Lecture: RM Session in KL
- ✓ 28: RM Practice Review 2006 (KL)

February 2007

- Ethics Lecture: RM Session in KL
- ★ KL Bar CLE, RM Talk

May 2007

- Ethics Lecture: RM Session in KL
- ★ RM Seminar 1 for State Bars
- ★ RM Brochure

March 2007

- Ethics Lecture: RM Session in KL
- RMQ, Mar 2007
- ★ PII/ RM Briefing for Bar Secretariat (Follow-up session)

RISK MANAGEMENT REPORT: PRACTICE REVIEW OF LEGAL FIRMS 2006

By Corrinne Wong, Risk Manager, PII Scheme

A. PRACTICE REVIEW OBJECTIVES

As part of the Professional Indemnity Insurance (PII) Committee's continuous efforts to improve the service level and effectiveness of the PII Scheme, the Practice Review project was initiated in mid August 2006. 21 firms were reviewed over the course of 12 weeks (beginning 18 August 2006 till 28 November 2006). All except for two (2) of the firms reviewed have experienced claims problems over the past 5 years.

This Practice Review was to

- ✓ Help gauge the practice management standards of legal firms.
- ✓ Investigate the effectiveness of these legal firms' practice management.
- ✓ Ascertain whether there is use of risk management practices within these legal firms.
- ✓ Provide solutions.
- ✓ Aid with the implementation of solutions.
- ✓ In the long run, reduce the incidence and severity of claims that arise.

B. OVERVIEW OF THE PRACTICE REVIEW 2006

There are four (4) Risk Topics on which the Practice Review is based upon. They are:

1. Office Management
2. Accounts Management
3. Conveyancing
4. Civil Litigation

Omissions/Exclusions

1. Because of the ever-changing ways in which lawyers work, for example, in the area of e-commerce, it is impossible to produce a "definitive" list of questions to cover everything.
2. Certain specific areas have been omitted. For example, there is no risk topic covering investment or the Solicitors' Accounts Rules.
3. The Risk Topics focused on those areas which, in the PII Scheme's claims experience, produce the highest volume of claims for professional negligence.

a. Office Management

The overall results of the legal firms which were reviewed garnered *surprising* results. In the Office Management category, **61.90% of legal firms scored a risk rating of 0**, signifying that a majority of legal firms have "bad risk management" in respect of this risk topic. This risk topic is further divided into six (6) categories which were reviewed based on effectiveness of the legal firm's current systems, hence resulting in an **Effectiveness Score**. They are



What we have to do is to be forever curiously testing new opinions and courting new impressions.

[Walter Pater](#)

1. Personnel Management
2. Insurance (61.90%)
3. Office Diary Systems
4. Filing System
5. Employee Development Programme
6. Business Continuity (71.43%)



*Don't let yesterday
use up too much of
today.*

Cherokee Proverb

Understandably, the categories that were reviewed did not receive positive scores. A majority of legal firms scored **“Low” Effectiveness Scores** for Items 2 and 6 above.

The feedback obtained from partners was that emphasis on these two categories would increase their business overheads. Most partners were not persuaded that the purchase of theft insurance, fire insurance, etc would mitigate such related losses. Policies for Business Continuity were unheard of by many partners. However, some variation of the “occupational health and safety” guidelines were implemented in legal firms.

Other Office Management Observations

- ♦ All, except for one legal firm that was reviewed, did not have a formal/written policy and procedures office manual.
- ♦ Informal policies and procedures which exist in these legal firms were adapted over time and disseminated amongst staff and lawyers verbally.
- ♦ We interviewed one (1) legal firm which has a written Standard Operating Procedures (SOP) guide for each Department.
- ♦ PI insurance information is limited to managing partner(s) or partners.
- ♦ Legal firms with branches – it appears that some branches are run autonomously; hence lacking any uniformity in systems.
- ♦ Furthermore, any complaints or claims are not dealt with at a central level even though these complaints will ultimately affect the entire legal firm.

b. Accounts Management

The Accounts Management risk topic had **76.19% of the legal firms reviewed score a risk rating of 2** – signifying that good risk management practices exist in the overall accounts management of these legal firms. This Risk Topic is further divided into five (5) other categories. They are

1. Budget & Accounting (66.67%)
2. Management Reports & Procedures
3. Dealing with Client’s Accounts
4. Billing
5. Dealing with Office Accounts (57.14%).

57.14% of the legal firms reviewed obtained a **“Low” Effectiveness Score** for Item 3. We noted that most managing partners assume a dominant role in managing the clients’ accounts and are granted sweeping signatory powers. We suggest a ‘multi-level’ *signing/approval authority* be adopted by all legal firms; whereby any dealings with a significant amount of clients’ monies would require more than one signing authority. Furthermore, the existing Certificate of Insurance (COI) provides for the fulfilment of this risk management procedure

to enable any legal firm to receive coverage for Misconduct (of employees). Refer to Section 12 COI 2006.

Other Accounts Management Observations

- ◆ Almost all the legal firms reviewed had invested in some form of accounting software.
- ◆ Heavy reliance on accounts staff.
- ◆ Some accounts' staff are inundated with various responsibilities without additional support and minimal supervision.
- ◆ Lawyers have minimum understanding of accounting practices.
- ◆ No annual budget planned (especially in small legal firms).
- ◆ Not able to read basic Profit & Loss accounts to manage legal firms.
- ◆ Signing authorities for both office and clients' accounts are the same despite the different levels of risks involved in handling of clients' account.

c. Conveyancing

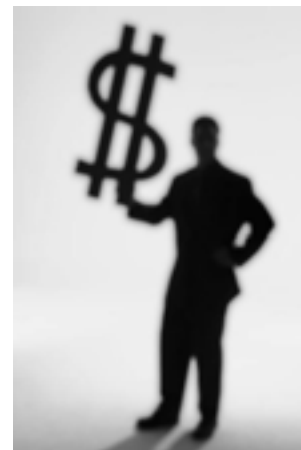
The Conveyancing risk topic is a concern as **only 47.37%** of the legal firms achieved a **risk rating of 2**. *31.58% of legal firms scored 1* and the remaining *21.05% of legal firms scored 0*. These results indicate that there has yet to be any conclusive risk management practices implemented to date by legal firms in respect of the real estate conveyancing practices. The Conveyancing risk topic is categorised into the following:

1. Searches (90%)
2. Stakeholding (25%)
3. Safe Custody of Documents & Property
4. Management of Critical Dates
5. Conflict of Interest
6. Undertaking
7. Managing Clients' Expectation/Claim Prevention

Item 1 had a **“High” Effectiveness Score** for **90% of the legal firms** reviewed. Searches are basic requirement expected in a conveyancing transaction. The review indicated that most legal firms conduct a minimum of two (2) searches. Where the legal firms' clients are institutional clients, the legal firms are pre-disposed to being “struck off” the panelship for such non-compliance.

Item 2 had only **25% of the legal firms** scoring a **“High” Effectiveness Score**. The review on Stakeholding procedures is related to the legal firm's procedures in “Dealing with Clients' Account”. Since the latter risk topic did not fare well in the Review, neither did this risk topic, mainly due to a lack of “checks and balances” placed by legal firms in respect of the risk topic “Dealing With Clients' Accounts”. Furthermore, the monitoring of these monies is mainly left to the accounts' staff.

A majority of legal firms scored **“Medium” Effectiveness Scores** in the remaining five (5) categories. A **“Medium” Effectiveness Score** suggests that these areas require more attention in the medium to long-term basis. These legal firms are not exonerated in these categories from devising some improvement in their current systems, processes and procedures. They have



He is able who thinks he is able.

Buddha



Only those who will risk going too far can possibly find out how far one can go.

[T.S. Eliot](#)

to allocate funds and resources to make the necessary improvements in the near future.

Other Conveyancing Observations

- ◆ Items kept in safe are not recorded in a central register, only noted on file.
- ◆ Conveyancing departments generally do not use any form of diary system.
- ◆ Legal firms are highly dependent on staff in conveyancing transactions.
- ◆ Staff adopt their own file review and sensitive dates reminder systems.
- ◆ Any lawyer (in the firm) can sign routine undertakings.
- ◆ No confirmation letter is sent if an undertaking has been discharged.
- ◆ Stakeholding monies are normally left to the legal firm's Accounts Department/staff to monitor.
- ◆ No complaints register. Lawyers deal with complaints for each individual file. Partners only intervene if it is serious complaint.

d. Litigation

70.59% of the legal firms interviewed in the Litigation risk topic scored **a risk rating of 2**. The categories reviewed for effectiveness within the Litigation risk topic are:

1. Management of Critical Dates (58.82%)
2. File Management & Review (47.06%)
3. Undertaking
4. Conflict of Interest
5. Safe Custody of Documents & Property
6. Bankruptcy & Company Search (88.24%)
7. Managing Clients' Expectation/Claim Prevention

An interesting observation made was that a majority of the legal firms reviewed scored **"High" Effectiveness Scores** in Items 1, 2 and 6 above.

Other Litigation Observations

- ◆ Most firms have a central court diary.
- ◆ KIV dates are normally monitored by both lawyer and staff.
- ◆ Review systems in most firms are not uniformed.
- ◆ No sign-off or acknowledgment process once dates are entered/action done.
- ◆ Conflict checks are informal.
- ◆ Company search done but not bankruptcy search (unless requested by clients).
- ◆ No standard in writing to clients after each crucial stage.
- ◆ Fees are negotiated upfront but retainer letter is vague about extent of work done.



Conclusion

The Practice Review conducted for 21 legal firms has provided crucial information for the Risk Management team to determine and prioritise projects for 2007. Some critical areas have been identified as our priority, based on this Review. We are therefore formulating the best method to disseminate beneficial and meaningful risk management tools and aids to legal firms.

Some of the tools which will be introduced and/or implemented are:

1. Practice Area Checklist: General Litigation and Conveyancing
2. Seminar: Understanding Accounts Management and Financial Data
3. Practice Tools: Sample Standard Terms of Engagement
4. Practice Tools: Non-Engagement Letters

Most legal firms have also commented that they found the Review beneficial. As such, the project will continue to be part of the Risk Management programme. It is our hope to provide better solutions and achieve the Risk Management Programme's objectives. The continuity of the Project will also assist us to review existing methods and enable us to deliver better observations and solutions for the legal profession.



The least movement is of importance to all nature. The entire ocean is affected by a pebble.

Blaise Pascal



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RM Programme 2007*

- **Feb 07:**
KL Bar CLE Talk on Risk Management.
- **May 07:**
RM Brochure
- **Jun - Oct 07:**
Practice Review 2007
- **Nov 07:**
RM Calendar 2008
- **Dec 07:**
Practice Area Checklists Updates

* *Subject to change*

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For more details and information, please contact PII & RM Department at 03 - 2031 3003

Footnote:

We are always looking at ways to improve this newsletter and work towards ensuring that any areas of interest which concerns Risk Management will be highlighted in this newsletter. We therefore welcome hearing from you on matters relating to this newsletter and the PII Scheme.



But all endings are also beginnings. We just don't know it at the time.

Mitch Albom

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