

Come what May

This year's professional indemnity insurance deadline may still seem far away, but you can make the process simpler and more cost-efficient for your firm by getting prepared now. **Francis Dingwall** looks at the steps you should take this month

The professional indemnity insurance (PII) market this year probably won't be any easier for solicitors; it may well be much tougher. The recent news that Quinn Insurance, which insured almost 10% of the profession, mainly small firms, has gone into administration, is likely to make cover this year even more expensive across the profession. But you can ensure you are not one of the firms left scabbling for cover as the deadline looms by getting prepared now.

If you were applying for a loan, you would need to persuade the lender to lend, make out a case, provide evidence to

Lexcel is a valuable risk-management tool, which certainly provides a starting point, but it does not provide a full answer. Lexcel has not saved a number of accredited firms from accumulating bad claims histories.

Key areas of risk from a PII perspective are as follows:

- professional risks;
- client risks;
- operational risks; and
- people risks.

Insurers will want to see that your firm actively manages the risks it runs – the risks which the insurer is going to be

system. They will not be impressed by a promise in the proposal form to do so in the future. It may even have a negative effect: it highlights the fact that no safeguards are in place, and the insurer cannot be sure that they will materialise once it has concluded the contract of insurance. The insurer knows it will not be able to cancel the contract if the risk management system does not materialise, so may not take the chance. However, establishing a system before you apply, even if you only do so now, will give the insurer evidence that the firm is moving in the right direction, and has developed a good attitude to risk.

How can you take it to the next level – or make a start? A good place is by updating – or compiling – your list of the top 10 risks the firm faces and needs to tackle. Risks should be identified in all the categories mentioned above. You then need to evaluate, address and review each risk, demonstrating that you have effectively tackled it, or at least made a start. An external risk audit or gap analysis by a specialist firm could help with this process by providing a ready-made risk register for your firm.

MAKE NOTIFICATIONS PROMPTLY

Under the terms of your existing policy, there is an obligation to notify claims and circumstances 'as soon as possible after you become aware of them'. Despite that wording, 30% of all claims are notified in the last two weeks of September.

If you make a rash of late notifications this September, or if you already have a track record of late notification, it will sound a warning to the insurance market. A new insurer wants to know that what could be notified to the current insurer has been notified, so that, as far as possible, you come to the new policy year with a clean sheet.

The more effectively you manage the risk yourself, the less risk you transfer to the insurer, and the lower the cost of the insurance. But you have to persuade the insurer that you are managing the risks effectively

satisfy the lender that you would be able to make the repayments – maybe even a budgeted business plan. Put the same effort into applying for PII – the criteria may be different, but the concept is the same.

IMPLEMENT RISK MANAGEMENT

It would be wrong to imagine that the risks a firm faces are peripheral. They sit at the heart of the practice. Contrary to many lawyers' beliefs, law firms are risk-taking businesses. Every time you accept instructions, you accept the transfer of risk from the client, such as the risk of missing a key date for the issue of proceedings, for registering title, or for filing documents with Companies House. The lawyer has – or should have – the skills and systems for managing those risks, and risk management is about supporting and developing those skills and systems.

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Now is the time to revisit your risk management system, or urgently establish and implement one if you have not got that far. September – or even July – will be too late. Risk management is forward-looking: it will not prevent the claims materialising that already lurk in closed files. By contrast, insurance is backwards-looking, when written on a 'claims made' basis, as PII is. Insurers next year will be picking up claims that relate back to acts or omissions committed in previous months and years.

Insurers will want to see that you have already taken positive steps to maintain, develop or establish a risk management

And even if you are planning to renew with your existing insurer, that insurer will want to see a good track record of prompt notification. Firms often fear that frequent precautionary notifications of circumstances during the policy year will alarm an insurer, but they can actually be a sign of a well run practice. We all make mistakes, however competent we are. Good solicitors will spot those mistakes, and report them. If you make a notification promptly, and it turns out to amount to nothing, the insurer may be prepared to discount it by the time renewal arrives. And if it does turn into something, then all the better that it was notified. An absence of any notifications whatsoever can be more alarming.

By identifying problems early, you give both yourself and your insurer time to assess the real extent of the problem (and possibly even time to resolve it). If you only notify the insurer in the busy renewal period, the insurer may assume the worst. It may not even have time to decide whether to accept the notification, which will deter any other insurers from insuring you, because they may have to accept the notification in the new policy year. The issue is particularly acute if you discover a widespread problem.

The issue is not only relevant to the question of obtaining cover next year. If you notify a claim or circumstances next year, which should have been notified this year, it may lead, in effect, to the claim not being covered at all (because although the insurer may have to pay it under the generous provisions of the Minimum Terms and Conditions of Professional Indemnity Insurance for Solicitors Registered in England and Wales, the insurer may have a right of reimbursement).

Most firms circulate a form of certificate to all staff at the time of renewal, requiring them to certify that they have disclosed to the managing partner any claims or circumstances of which they are aware. You should consider circulating that form not only at that time, but also now, and in future on a quarterly basis. You should ask for details of 'mistakes or complaints (that is, any expression of dissatisfaction) or circumstances (that is, an incident, fact, matter, act or omission which may give rise to a claim, which may not, for a variety of reasons, materialise or – even if it does – may not succeed)'. Warn staff that they should not attempt

to judge for themselves whether the occurrence will give rise to a loss or claim. Tell them to err on the side of caution, so that the managing partner can take the decision. Take the opportunity of

seek a substantial increase in premium, or decline to renew the risk at all.

A particular issue arises this year where a firm proposes to take over, or merge with, another firm. At present,

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reminding them of their obligation to inform the relevant partner of any other mistakes, as soon as they become aware of them. Don't restrict it to fee-earners – many proposal forms warrant that you have asked all members of the practice, and you may also need to include members of any former firm to which you are successor practice.

CONSULT ON CHANGES

If you were applying for a loan to a bank, you would usually strengthen your position by giving the bank an opportunity to get to know you. The same is true of insurers. In advance of the busy renewal season, some underwriters are happy to visit firms. Whether or not you meet your current insurer face to face, you should make a point of discussing with the insurer any changes you propose to make to the business which will change the risk profile – before you go ahead with the changes. You may want to take on a new high-risk line of work, such as intellectual property, or a new high-risk employee.

Your current insurer has no control over the changes you make in the currency of the policy period. Some qualifying insurers, but not all, include a 'material alteration' clause, requiring the insured to give immediate notice of any material alteration to the risk during the policy year, including any material change in the nature of the professional services offered by the firm. But even then, the terms do not always entitle the insurer to adjust the premium.

Where your insurer does have power, however, is at the next renewal. It may

where firm B takes over, or merges with, firm A (where firm A ceases to exist), there is a high risk of firm B becoming the successor to firm A, with the result that claims in the future against firm A will be dealt with on firm B's policy. The Solicitors Regulation Authority has recently conducted a consultation on amendments to the successor practice rules. It is proposed that the rule be relaxed, so that firm A can elect to go into run-off, enabling firm B to avoid becoming the successor practice. This has two possible implications for firms contemplating a merger. First, a firm in firm B's position may wish to consider deferring the merger until the new rule comes into effect, if it does actually see the light of day. Second, a firm in firm A's position should consider bringing forward the merger, because one knock-on effect may be that run-off premiums increase dramatically in the next policy year.

CONCLUSION

The insurance market is likely to get worse before it gets better. How it moves is outside your control. But you do have the power to influence your insurability. Take steps now to gather the evidence that will demonstrate to insurers that you are a good risk, and that where you have had weaknesses in the past, you have addressed them. ■

Francis Dingwall is a partner at Legal Risk LLP, a firm of solicitors specialising in professional indemnity and professional regulation.