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SOLICITORS

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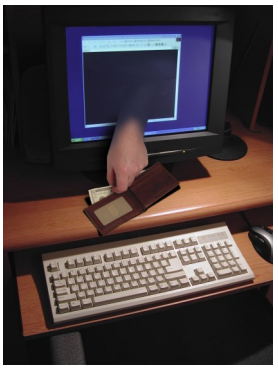
Renewal: 'How much PII cover should we buy?'

The SRA has published Ethics Guidance on Professional Indemnity Insurance Cover http://goo.gl/nYE7hR and some accompanying case studies http://goo.gl/bVKJf4. The guidance addresses the process for determining the appropriate level of cover to satisfy Outcome 7.13 in the SRA Code of Conduct, which in essence requires you to assess and buy appropriate levels of cover. However the case studies show the weakness in relying on Outcome 7.13 for client protection, because –

1. They pay insufficient attention to the retrospective, claims made, nature of professional indemnity cover;
2. They ignore claimants' costs, which are included in the limit of cover, and may be substantial;
3. They take no account of aggregation, under which multiple claims may be treated as one (see the new decision in AIG Europe Ltd v OC320301 LLP & Ors [2015] EWHC 2398 - an important decision relevant to a number of cases we have ongoing);
4. They do not address the risk of third party claims.

The Guidance demonstrates that it is not enough to rely on a regulatory outcome which will protect nobody when the amount determined in one year becomes relevant for the purposes of a claim in a later year. It also highlights another fundamental weakness: the provisions setting out the current minimum take up 73 words and achieve certainty, while the Principles, Outcomes, Guidance and Case Study take up 958 words and create only an illusion of consumer protection.

Double-click for disaster



We are all one double-click from disaster. That is all it takes to open an attachment from a phishing email, which will then introduce malware into the firm's system. Even if you personally are alive to the issue, does *everyone* across the firm appreciate what will happen if they double-click on that random/tempting attachment? It only takes one person.

Do your staff realise that a client's – or a solicitor's – email may have been fabricated by a fraudster? Do they appreciate that fake invoice scams are on the increase? Are they alive to "Friday fraud"? Have they listened to the BBC recording of a telephone bank scam as it unfolded? Do they know that across the legal industry there have now been losses running into perhaps £50 million?

Our low cost online training course, *Phishing for Trouble*, is designed to raise staff awareness of the risks. Insurers are asking questions on proposal forms about what training staff have had. It is available in both UK and international versions. We have received very positive feedback from the wide range of firms that have used it to date, from large international practices to small niche players. Details: http://goo.gl/FOwHN7 .

SRA discussion paper on Protecting Clients' Financial Interests

We are very concerned that the changes under discussion would leave solicitors and clients dangerously exposed, and that they would have retrospective effect, because of the claims made basis on which policies are underwritten. They may end all compulsory cover except for individuals, certain micro-enterprises and small charities. In turn, this may result in loss of conveyancing for small firms. The proposals are a particular concern for people who have no say in how much cover a firm buys, including those who retire or change firms, and would also mean the SRA would no longer be able to direct one or other insurer to defend a claim where there is a coverage dispute, an increasingly common scenario.

It is also of note that the SRA's own written submissions to the court in AIG Europe Ltd v OC320301 LLP & Others [2015] EWHC 2398 (Comm) pressed for the widest possible cover, yet the proposals in the Discussion Paper appear to press for the complete opposite. We have made our submissions which are available here. http://goo.gl/Rzu4K3 The SRA's Discussion Paper requires responses by 16 September 2015.

Is naming and shaming law firms the way forward to combatting money laundering?

AML: talking it up, and talking it down

David Cameron has taken to trumpeting the need to tackle money-laundering, following the disclosure of the extent to which residential properties in London are owned by off-shore companies. It has become a regular topic in the broadsheets, with an indication that a campaign may be underway to name and shame law firms who handled controversial transactions and who may even fall within the category of 'professional enablers'.

At the same time, there is a counter-movement under the banner of cutting red tape from the Business Secretary, Sajid Javid (a former financier), who is reviewing whether the AML rules may "unintentionally [be] holding back new and existing British business…" The call for evidence from the Dept for Business, Innovation and Skills is open until 23 October.

In the meantime, the Government has put back the date for implementation of the transparency provisions in the Small Business, Enterprise and Employment Act 2015. Companies will now have to maintain the new register from April 2016 (instead of January), and file the information at Companies House from the end of June 2016 (instead of April). These and other changes can be found at https://goo.gl/AcssWG.

SDT: not striking off, but striking out

(1) Firm's responsibility for desperate acts of assistants under pressure

In the extraordinary decision of *SRA v Tunstall* (case no. 11289-2014), the SDT did not strike off a 2 year qualified assistant solicitor who, having fallen behind with litigation she was handling, fabricated an expert's report, Counsel's Opinion and time records, told clients that she had obtained more compensation for them than she had, and used the firm's money to make up the difference. They gave her an indefinite suspension instead. They decided she had not been dishonest. One of the key factors in their decision was the lack of support she had received from her supervising partner and the extreme pressure under which she had been placed by the firm. Where an individual fee-earner gets into trouble, he may defend himself by blaming the principals for putting him under too much pressure. Whether or not the defence is justified, the SRA are likely to look closely at the conduct of those responsible for supervision and management.

The principals in the firm will need to be able to demonstrate that they had in place a suitable system of supervision, of training, and of appraisal. That may be the easy part, if the firm has a good Compliance Manual: it may be harder to demonstrate that the systems were actually operated. And regularly monitored. It may be helpful to use tools such as Legal Risk LLP's 'Compliance Calendar Toolkit for Law Firms'.

(2) Presentation of cases by the SRA

In *SRA v Heer Manak Solicitors* (case no. 11165-2013) the SDT struck out the SRA's claim for abuse of process. The allegations were serious but the SDT found that the SRA had presented the case from the start in a way that was incoherent, confused and unmanageable. The Respondents could not understand the case and therefore there could not be a fair trial.
Even where the SRA's presentation of its case is not so bad as to be vulnerable to a strike-out, in our experience they often frame their allegations in an incoherent or scattergun fashion which makes them difficult to address. Often their initial communications seem to be aimed at someone other than the recipient, and the recipient walks into an interrogation with their guard down. Consider seeking expert advice when the SRA first knocks.

The cost of success

In *A and M v. Royal Mail Group* [2015] EW Misc B24 (CC), a Regional Costs Judge has called into question the common practice, post the Jackson Reforms, of quoting a 100% success fee in Personal Injury cases. Where a firm is acting for a minor or patient, the Court has to approve any costs settlement (absent a parental indemnity), and may well disallow a 100% success fee in the absence of justification in a risk assessment. The judge raised the question whether prospective clients should be advised that another firm may be prepared to handle litigation with a lower or zero success fee, and whether a firm which invariably takes fees up to the 25% cap is acting under a contingency fee. Finally, he questioned whether clients should be advised to take out ATE insurance where QOCS applies. Personal injury practices should review their costs arrangements. For assistance with this contact francis.dingwall@legalrisk.co.uk

Recent articles

The professional indemnity merry-go-round starts again
An early start and a good choice of broker are key to a smooth renewal process, writes Frank Maher. First published in Solicitors Journal

Overseas claims
Your law firm's international offices may be putting you at risk of high professional indemnity insurance claims, warns Frank Maher. First published in Managing Partner

The PII countdown begins (Pt 3)
Professional indemnity insurance: Frank Maher issues a call to action. First published by www.newlawjournal.co.uk.

Events

Ark Group's Risk Management for Law Firms & Regulatory Compliance for Law Firms Conference 1-2 December 2015
Frank Maher will be chairing the conference and Sue Mawdsley will be giving an AML and financial crime update

For further information on any of the above, please contact info@legalrisk.co.uk

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