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Articles

[PII: where is the battle being fought?](#)

July – time for school sports day. But in the legal world this summer, a different kind of race is being run: the race to the bottom, some would say.

Frist published in Legal Compliance Bulletin July 2016.

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

The upside of risk

Too often, partners talk about the ‘business prevention department’, but it is important to identify positives and ensure that the tone from the top reflects the value of managing risk to the business. All members of the firm should appreciate the upside of risk.

For example, if conflicts of interests are properly managed and understood, they may increase business. A simple example would be declining a panel appointment from a client who has little intention of sending any instructions but wishes to eliminate the firm from acting for competitors – a threat to independence identified in the SRA’s latest [Risk Outlook 2016/17](#). Another would be limiting the scope of a retainer in an appropriate case in order to remove the area of conflict.

Another example is satisfying client demands on information security, without which you will not be instructed. Keeping cyber risk in the front of everyone’s minds is an important element. Hazlewoods, accountants, [reported on 20 July 2016](#) that law firms’ cyber losses were up 40 per cent in a year. The SRA’s Risk Outlook 2016/17 advises that ‘Training staff can help mitigate the risk of social engineering, phishing and vishing’. We have provided many firms with our online training, Phishing for Trouble, available in both UK and international versions.

We have also advised a wide cross-section of clients on risk, compliance and governance, including leading law firms, professional liability insurers and regulators in the UK, Europe, USA and Australia.

Anti-money laundering and financial crime

Recent terrorist incidents, including Paris, Brussels, Nice, Munich and Saint-Etienne-du-Rouvray, have intensified the focus on counter terrorist financing controls. Despite the fact that the Fourth EU Money Laundering Directive requirements will be implemented by mid-2017 (UK Brexit related tweaks aside) the EU has moved to strengthen the [counter-terrorist financing \(CTF\) response](#) more urgently.

In our experience, whilst firms have AML policies and training, CTF is seldom mentioned and awareness amongst staff is far lower than for AML issues. It is perhaps ironic that the House of Commons Home Affairs Committee’s [Fifth Report of Session 2016–17 on Proceeds of crime](#), which is highly critical of the results produced by the UK’s AML regime, says almost nothing about CTF. Clients are reporting growing interest from investors in higher risk jurisdictions such as Turkey and China.

Although outside the field of financial crime, lessons may be learned from the [Parliamentary enquiry](#) into BHS – ‘Advisory firms are legally required to carry out ‘know your client’ checks on new clients to confirm their identity and provide protection against money laundering and terrorist financing. The only constraint beyond the legally required checks is the risk that a company is willing to take that its reputation may be tarnished by association with a particular client or deal. In the case of BHS, it appears that advisory firms either did not consider the reputational risk or demonstrated a remarkable level of ‘group-think’ in relying solely on each other’s presence.’

Brexit and law firm risk

Apart from the widespread concern about the commercial impact of the referendum decision for Britain to leave the European Union, there are several areas where we believe there may be additional exposure to liability. Space does not permit our growing list, but these include currency and exchange rate risk, delay giving rise to missed opportunities to claim funding or establish business in the EU, jurisdiction and choice of law clauses in contracts, and lawyers seeking business in higher risk jurisdictions.

Conflicts of interests

We continue to add materials from many jurisdictions to the [Conflicts Resources](#) page on our website. We advise on both domestic and cross-border conflicts issues as part of our helpline service and on a one-off basis. We also provide practical workshops for partners and associates in leading international and national practices, here and overseas, covering a variety of diverse practice areas such as aviation, banking and capital markets, corporate, energy, intellectual property and real estate.



The upside of risk: brakes slow you down – but they also help you drive faster

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Professional indemnity insurance (PII)

There is plenty happening in the world of PII, despite the continuing benign state of the market for those firms approaching renewal.

Even large firms make mistakes on proposal forms, and we are advising an increasing number of firms on coverage disputes with insurers. Note that the Insurance Act 2015 comes into force on 12 August 2016. (See our [March 2016 issue](#).)

The Solicitors Regulation Authority (SRA) consultation on PII is expected this autumn, though there is still some uncertainty about the date. Meanwhile, the Legal Services Board (LSB) has published a [Thematic review](#) of restrictions on choice of insurer along with a paper prepared by the Regulatory Policy Institute (RPI) entitled [Regulatory issues](#) surrounding PII arrangements in legal services provision.

We found the RPI report less helpful than the LSB appears to have found it. The RPI report asks, 'Is the PII market characterised by an unwillingness or inability to take on certain types of risks (because of informational/risk assessment challenges)? Put another way, is the scope of the coverage that is on offer unduly narrow?' Most informed commentators accept that the scope of coverage for solicitors in England & Wales is the widest of any profession in the world.

We suspect that the LSB is building the foundations for frontline regulators to conclude that PII providing broad cover is an avoidable cost. We fear that current levels of protection will be sacrificed on an altar of ideology, pursuing the mantra of innovation. Experimenting may imperil people's houses, their life savings, or the fund providing care for a brain damaged child, unleashing the equivalent of not just a driverless car, but a fleet of experimental pilotless aeroplanes.

If cover is reduced, someone has to lose. Despite reductions in the incidence of claims in recent years, offset partially by more large claims, the burden remains high. There is ample evidence in the number of failed insurers, most recently with the [announcement](#) that a provisional liquidator was appointed for Enterprise Insurance Company on 25 July 2016.

But claims are not just a small firm issue, as evidenced by the continuing troubles of Solicitors Indemnity Mutual Insurance Association Limited (SIMIA), which has published its [2015 accounts](#). SIMIA, now in run-off, provided excess layer cover for larger firms. It did so on a 50/50 basis with the commercial market, matching premiums too, from which it is reasonable to infer that the commercial market has lost money on the same risks.

Despite all this, mention of claims in the LSB and RPI reports is rather limited: PII is not just about premiums. We have recently completed a review of a compulsory PII scheme in Australia and know from this and our experience of, and contact with, many other schemes around the world that it is not only in the UK that the benefits of such arrangements may be too easily overlooked.

SRA Accounts Rules investigations

We discussed accounts rule breaches in our March 2016 Newsletter, an area where we are seeing more SRA activity in City and other well-respected large firms, and we are advising in relation to several SRA investigations. We are also carrying out file reviews for accounts compliance.

Misuse of client account as a banking facility is a key concern. In [Moosavi v The Law Society \(Solicitors Regulation Authority\) \[2016\] EWHC 1821 \(Admin\)](#), the court noted the SRA's appeal panel finding that "drafting contracts for clients does not of itself justify the receipt of significant sums into the client account for investors ... we consider [the template agreements shown to the appeal panel] are unlikely to have required legal advice or involved legal work".

Data protection

The Information Commissioner's [annual report 2015/16](#) states that 4 per cent of self-reports are by solicitors and barristers. The General Data Protection Regulation (GDPR) will result in an increased obligation to self-report. We provide advice on preparation for the GDPR, and advice, training and online courses on data protection.