

All solicitors know about the role of the Solicitors Disciplinary Tribunal (SDT), but are they aware of a hidden second tier of proceedings lurking in their indemnity insurance policies?

A finding of dishonesty against a solicitor will usually result in striking-off. We are used to seeing findings of dishonesty under the glare of publicity in the SDT. But there is a second, hidden industry in dishonesty proceedings which runs in parallel to the SDT and which employs a powerful tool that provides a devastating shortcut. Regulatory lawyers need to be alive to it, because it may pre-empt the defence of the solicitor in the SDT.

The second 'dishonesty' industry operates in the context of professional indemnity insurance. It is largely hidden because most insurance policies contain clauses providing that disputes between insurer and solicitor will be subject to private arbitration. But, often, the issue is determined before it gets that far.

The issue arises because solicitors' insurance policies contain a dishonesty exclusion. If a claim results from the dishonesty of a sole practitioner, the insurer is not liable to pay the claim. In the case of a larger practice, the insurer will have to indemnify innocent partners, but will have a right of reimbursement against any dishonest individual(s), and in the case of an incorporated practice must indemnify the entity unless all principals condoned the dishonesty.

The powerful tool used by the insurance industry is one that it has inherited from the Solicitors Indemnity Fund (SIF). In the days of SIF, which provided cover from 1987 to 2000, if it suspected that a solicitor had been dishonest, it would instruct a separate firm of solicitors from

the panel firm handling the defence to advise on indemnity. Those solicitors would reserve SIF's position on coverage and invite the suspect to what was known as an 'indemnity con' – a conference with leading counsel at which the QC would cross-examine the individual concerned to determine whether or not he or she had been dishonest. In the writer's experience, no solicitor dared to decline the invitation. One of the considerations was that SIF was a mutual fund. The indemnity con would be recorded and transcribed.

When SIF was scrapped, the open market insurers continued calling solicitors to consultations if they suspected dishonesty.

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The problem with cross-examination is that it is unreliable. Paradoxically, it can sometimes be easier to 'prove' that an innocent person is dishonest than a guilty one. As the late Lord Toulson (who had practised as a professional negligence barrister before going to the bench) put it:

'Years of doing my particular area of law led me to believe that some of my clients who I thought were absolutely the most honest were the most awkward and shifty in the witness box, whereas others who I thought were total rogues came across with great smoothness and self-assurance...' (See <http://uksblog.com/interview-with-lord-toulson>.)

Lord Neuberger made much the same point when he said:

'I am very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant ...' (see www.supremecourt.uk/docs/speech-170210.pdf).

In the writer's experience, it is frequently the case that the more dishonest the solicitor, the more they are likely to present a polished appearance when cross-examined. Fictitious accounts lack the awkward incongruities and untidy loose ends of real life that can cause the honest witness to stumble.

The solicitor's position at an indemnity con is even worse than that of the solicitor in the witness box at trial. The person concerned is subjected to interrogation without any prior notice of the questions in advance of proceedings, before the issues have been defined by exchange of statements of case, before there has been exchange of documents or of witness statements between the parties, without the application of the rules of evidence, and without a judge to control the cross-examination.

Sometimes insurers' representatives claim that solicitors' obligations to cooperate in the handling of claims under the policy obliges them to attend indemnity consultations, which (in the absence of clear policy wording on the point), in the writer's view, is incorrect. Sometimes insurers concede that there is no obligation to attend, but they typically go on to say that the insurer 'is likely to draw adverse inferences from your

client's refusal to attend'. The argument is 'if you have nothing to hide, you have nothing to fear', but that assumes cross-examination provides a clear window into the soul.

It is highly unlikely that any arbitrator or judge would be entitled to draw any adverse inference from the solicitor's refusal to attend the consultation.

If the solicitor attends the indemnity consultation, and if he or she performs badly under cross-examination, it can be extremely difficult to retrieve the

situation. The questioning will have been recorded, and the insurer will rely on the transcript in any subsequent proceedings. If solicitors subsequently say that what they said in the indemnity consultation was wrong, by changing their story they can be painted as being all the more dishonest.

Where the insurer decides there has been dishonesty and declines indemnity or reserves its position, it will inform the Solicitors Regulation Authority (SRA) as it is required to do, and the SRA is likely to

take disciplinary action against the solicitor. In the face of a transcript of an indemnity consultation, it may be hard for the solicitor to defend himself or herself in the SDT.

Each case needs to be judged on its own merits, but in our experience, it will not normally be in the solicitor's interests to attend an indemnity consultation.

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