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SOLICITORS

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Contents

Demolition job: SRA Consultation on Professional Indemnity Insurance (PII)	1
Challenging opponents' legal costs	1
What is integrity?	1
General Data Protection Regulation	2
Conflicts of Interests and Confidentiality	2
Anti-money laundering (AML)	2
Non-disclosure agreements	2

Events

APIL annual conference

Frank Maher will be delivering a session on GDPR.

Liverpool Law Society Compliance Conference

Frank Maher will be speaking on misusing client account as a banking facility (R14.5)

MBL Anti-Money Laundering for Law firms – Key Issues Conference 2018

Sue Mawdsley will be delivering a session on Terrorist Financing and Transfer of Funds.

Contact info@legalrisk.co.uk for further information on any of the above.

Demolition job: SRA Consultation on Professional Indemnity Insurance (PII)

The Solicitors Regulation Authority (SRA) has launched its latest consultation aimed at reducing the level and breadth of compulsory minimum cover required for solicitors' firms in England & Wales.

Their objective is said to be an attempt to shave what they estimate as 5-10 per cent off the cost of insurance in order to encourage new entrants to the profession and increase access to justice. The current requirements provide for £3m cover any one claim for incorporated practices and Alternative Business Structures (ABSs), and £2m for partnerships and sole practitioners.

Proposed changes include reducing the level of cover to £500,000, but £1m for conveyancing services, with the latter limit applying only to firms which in fact do conveyancing.

In our opinion, the proposals are misconceived for several reasons, including –

- They are based on a flawed dataset of ten years' claims, which omit the figures of insurers which have left the market and may be expected to have experienced some of the larger losses;
- They fail to recognise that even based on their own figures, which must represent a minimum exposure, most firms will have to buy more cover, and the cost of replacing the difference for the smaller firms they may hope to help will be significantly higher than any saving, due to the impact of minimum premiums;
- Their proposed changes will not address their concerns about the cost of run-off cover – instead, they will add significantly to the cost of closing down, by forcing firms to buy extra cover – even in cases where they have been taken over and have a successor practice;
- They say that 98 per cent of claims would be covered by £500,000 cover, when previously they said the figure was £580,000, which we understand to be due to rounding of minor percentage points – failing to address the fact that losses will fall on a random selection of claimants;
- They will create more scope for coverage disputes, for example aggregation or non-disclosure issues, resulting in greater need for firms to pay for separate advice;
- They ignore the fact that the claims made basis on which PII policies operate means that providing information to consumers on the levels of cover current at the time of the retainer is meaningless in approximately 90 per cent of cases – even if they are capable of realising that the indemnity limit needed to cover a claim may be approximately doubled by claimants' costs, interest and any CPR Part 36 uplift on damages and interest;
- They present a serious risk that reduction in compulsory cover for financial institutions will result in large numbers of small firms being removed from lender panels, increasing costs for consumers who will either have to pay for dual representation or face less choice.

In short, the proposals are most likely to damage those whom the SRA is trying to help. A link to the consultation can be found on our News Page https://www.legalrisk.co.uk/news/.

Challenging opponents' legal costs

As law firms either give up Personal Injury litigation (sometimes because the firm fails) or seek higher volumes to make it profitable, cases are transferred between them. Where the cases are funded on Conditional Fee Agreements, the transfers were being challenged if they were done by assignment.

The Court of Appeal's decision in Budana v Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980 upheld the validity of transfers of CFAs, albeit that the contractual analysis was less than crisp. Our feeling was that the Court of Appeal sent a signal that such challenges would receive short shrift in the future, and the first post-Budana decision published this week in Warren v Hill Dickinson LLP [2018] WL 01511620, dismissing a challenge to a series of assignments of CFAs, suggests that is correct. We regularly advise on costs arrangements and client engagement issues.

What is integrity?

Lord Justice Jackson's judgment In *Wingate and others v. The Solicitors Regulation Authority* [2018] EWCA Civ 366, delivered as a Parthian shot the day before he retired, leaves us with a common sense – if nebulous – definition of 'integrity'. He describes it as "a useful shorthand to express the higher standards which society expects from professional persons". Along the way, he makes a series of points the significance of which may only be felt as cases come to be decided long after his retirement. The definition is an important one, because allegations of lack of integrity lie at the heart of many prosecutions in the Solicitors Disciplinary Tribunal.

General Data Protection Regulation (GDPR)

Implementation on 25 May 2018 is now imminent. We have advised major US and UK firms on risk assessment and specific issues. We have resource pages on our website www.legalrisk.co.uk/GDPR and, for US firms, www.legalrisk.co.uk/GDPRUSA to which we will be adding more materials as time progresses.
Frank Maher recently addressed many leading US firms in Washington DC and will be speaking at the APIL conference for personal injury lawyers on 18 April 2018. Details of the latter are on our Events page https://www.legalrisk.co.uk/events/.

In a recent speech, the Prime Minister cited data protection as one of "five foundations" that will underpin the future relationship between the UK and the EU. She indicated that she wanted more than just an adequacy decision for the UK (enabling the free flow of personal data from the EU to the UK) but also, perhaps optimistically, an ongoing EU role for the UK's data protection regulator and effective representation for UK businesses under the 'one stop shop' mechanism.

The flow of official guidance continues unabated, and links appear on our News page as they are released. One of the most useful recent examples is the guidance from the Information Commissioner's Office on Legitimate Interests. Expanded guidance has been produced on Data Protection Officers, the Right to be Informed, and an Introduction to the Data Protection Bill.

The Article 29 Working Party has published a letter on the impact of FATCA (Foreign Account Tax Compliance Act) on accidental American citizens and compliance with data protection legislation.

Links can be found on our News Page https://www.legalrisk.co.uk/news/.

Conflicts of Interests and Confidentiality

The Financial Conduct Authority's report on the Royal Bank of Scotland's Global Restructuring Group has led the SRA to seek evidence which was collected into possible conflicts involving lawyers seconded to the Bank. This is not thought to have affected customers adversely but may have enabled firms to obtain an advantage over their peers when tendering for work.

The American Bar Association has published an ethics guidance in Formal Opinion, ABA Op. 479: Using former clients' information and Formal Opinion 480 Confidentiality Obligations for Lawyer Blogging and Other Public Commentary.

Links to the Formal Opinions and an extensive collection of conflicts resources can be found on www.legalrisk.co.uk/conflicts.

Anti-money laundering (AML)

The anti-money laundering (AML) guidance produced by the legal sector AML supervisors, including the Law Society, has now received the approval of HM Treasury.

There is one small change which is of significant concern: where the draft said 'You should not ignore obvious forgeries, but you are not required to be an expert in forged documents', it now adds that 'You may consider providing relevant employees with appropriate training and equipment to help identify forged documents'.

This imposes a far higher obligation on solicitors, most likely to impact on smaller firms, which is not expected of financial institutions. It is fanciful to believe that solicitors can acquire the skills of forensic document examiners in which even immigration authorities and law enforcement may be deficient.

The SRA has published its second Thematic Review which appears to be reasonably thorough, and its sectoral risk assessment which, although less inspiring than the Thematic Review, should form the basis for firms' own risk assessments along with the national risk assessment and knowledge of their services, clients and delivery channels.

Links to these documents, and details of the other changes in the Treasury-approved AML guidance, can be found on https://www.legalrisk.co.uk/news/.

Non-disclosure agreements

These have been much publicised in the press recently. We have defended a number of SRA investigations where solicitors misguidedly sought to restrict a complainant's right to complain to the SRA.

The SRA has published a Warning Notice. A link can be found on https://www.legalrisk.co.uk/news/.

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Note

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Subjects covered change constantly and develop.

No responsibility can be accepted by the firm or the author for any loss occasioned by any person acting or refraining from acting on the basis of this.