

# Professional Indemnity Insurance

## General guidance for obtaining the best quote

### What is the best quote?

- 1.1. Firm should not make the mistake of presuming that the best quote for your firm is the cheapest quote. Firms should consider the financial stability of the insurer, the premium price, the service provided by your broker, the level of expertise of the insurer, and their contingency plans for Brexit if they are UK based.

### Underwriter requirements

- 1.2. Underwriters are responsible for making decisions on your PII application. They often have an accountancy or actuarial background. They are tasked with pricing the risk associated with different applicants as accurately as possible in accordance with actuarial practices. Their objective is to make a profit for their employer and therefore their ideal firms are those that are less likely than average to have a claim.
- 1.3. It is important to have knowledge of underwriter requirements in the insurance industry generally, and knowledge of the difference between requirements of individual organisations, both in Dublin and in the head office for the insurer, in order to tailor your application. There may be distinct differences between the requirements of underwriters in Dublin and senior management in the head office of the insurer, where final decisions in difficult cases are made.
- 1.4. Firms are advised to seek information on underwriter requirements from their broker, and take such information into consideration when preparing the proposal form.

### Underwriter expectations of solicitor firms

- 1.5. Underwriters expect solicitor firms to be well managed and business orientated. They expect firms to have, at the very least, a basic grasp of the principles of practice and risk management.
- 1.6. Some underwriters have precise requirements for the register of undertakings and will not accept registers that do not conform to these requirements.
- 1.7. In most cases, the requirements of underwriters are unspoken and unpublished, and are subject to change annually based on the claims experience of previous years. This is why insurers have such an input into the common proposal form, in order to make the requirements of underwriters more transparent, as they are reflected in the questions in the form.
- 1.8. Distressed firms should seek advice from their broker and take time to research this area, as compliance with the requirements of underwriters can make the difference between being offered cover and being refused.

## **Communication**

1.9. Firms are advised to consider how best to bridge the gap in understanding and communication between the firm and the insurers. Firms should not attempt to operate from memory or rely on trust as a substitute for good risk management systems and procedures. Firms need to adhere to basic operating standards for law firms in order to present themselves as a good risk to insurers.

## **Register of undertakings**

1.10. The common proposal form contains extensive questions of the handling of undertakings by firms, including the register of undertakings, as this is a good risk indicator for insurers.

1.11. The main issues to be kept in mind with regard to the register of undertakings are the importance of using a good format and the importance of actively managing the register once it is in a good format.

1.12. The advantages of keeping your register in good format include:

- (a) enhanced understanding of your firm's risk exposure;
- (b) the register acts as a powerful indicator to underwriters that your firm's risk exposure in this area is minimised, which puts the firm into a lower risk category;
- (c) the register allows you to track and monitor the status of transactions;
- (d) the register highlights undertakings which are in a high risk category and permits you to prioritise them; and
- (e) the register is an excellent supervision tool.

## **Duty of utmost good faith**

1.13. In addition to reviewing underwriter criteria, firms are advised to review the duties of solicitors applying for PII. While in certain respects the common law in relation to insurance is overridden by the minimum terms and conditions, attention must be paid to the doctrine of utmost good faith that underpins the contractual relationship, except as varied by the minimum terms and conditions.

1.14. There are two elements to this doctrine:

- (a) the obligation to make full and proper disclosure; and
- (b) the duty to avoid making material mis-statements.

1.15. The general position is that only the insured persons know the special facts upon which the policy is to be computed and the underwriter has to rely on the representations made to him or her that induce him or her to insure the risk. Suppression of relevant information, even without fraudulent intent, can have serious effects on the validity of your policy. Therefore, firms are advised to ensure that material facts and material changes are disclosed in the common proposal form.

## **Material fact**

- 1.16. Material facts are generally understood to be any information which may influence the judgment of a prudent insurer in deciding whether to accept the risk and, if so, on what terms.
- 1.17. An obvious example of a material fact is to disclose a firm's claims record. Failure to disclose the claims record with the common proposal form can be expected to result in a lot of difficulties for firms.

## **Material change**

- 1.18. Material changes are generally understood to be changes to material facts that arise on renewal or during the currency of the policy that have not previously been disclosed to the insurer as a material fact.
- 1.19. Examples of material changes include:
- (a) fraud on the part of any of the partners and employees of the firm;
  - (b) changes in the composition of the firm; and
  - (c) mergers with, and acquisitions of, other firms.
- 1.20. Firms experiencing any of these types of material change are advised to contact their broker and insurer prior to the event occurring if possible (for example in cases of mergers and acquisitions).
- 1.21. Other changes in the composition of a firm may take place where the duty to inform the insurer is not so obvious, in particular where a principal or partner becomes ill or incapacitated. In such cases, where the principal or partner is not working in the office for a number of months, there has been a practical change in the composition of the firm and it should be reported in order to keep the firm compliant with the duty of disclosure.
- 1.22. It should be noted that a firm cannot provide legal services for any period of time without a principal with a practising certificate being in place, or a practice manager as approved by the Law Society.

## **Misrepresentation or non-disclosure in placing PII**

- 1.23. Any misrepresentations or non-disclosure in placing PII has the potential to reduce the effective level of cover for your firm, or remove cover altogether for claimants that are financial institutions.
- 1.24. Claims by financial institutions can be declined by the insurer if there is any material misrepresentation or non-disclosure (other than innocent misrepresentation or non-disclosure) in placing the insurance. In this case, the insurer is required to demonstrate that the firm was guilty of material misrepresentation or material non-disclosure in placing the insurance. The burden of proof is on the insurer to prove that this is the case.

- 1.25. In the case of claims by non-financial institutions, cover cannot be avoided by the insurer for misrepresentation or non-disclosure, but your firm may have to indemnify the insurer for claims in such cases.
- 1.26. The insurer cannot avoid or repudiate insurance on any other grounds, with the exception of proven material misrepresentation or non-disclosure or the 'double trigger', including in the case of innocent misrepresentation or non-disclosure.
- 1.27. Therefore, firms must complete the common proposal form correctly in all respects and all relevant information provided to your insurer.

### **Firm profile**

- 1.28. It is important to have a clear understanding of the profile of your firm as this is one of the main factors taken into account by underwriters. A firm's profile is derived from:
- (a) the size of the practice;
  - (b) the practice areas and fee income derived;
  - (c) risk level of legal services provided; and
  - (d) expertise and experience in core areas of practice.

### Size of practice

- 1.29. With regard to the size of the practice, sole practitioners and sole principals may find that the number of insurers interested in covering such firms is limited. It is important to ascertain which insurer will quote this business. Firms with four partners or more may find that there are more options open to them as certain insurers feel that the bigger the practice, the lower the risk. This preference is based on the assumption that proper resources are available in larger firms to manage risk and put proper systems in place.

### Practice areas and fee income derived

- 1.30. With regard to the practice areas and the fee income derived, certain areas are regarded by insurers as high risk. These areas of practice vary over the years and an area which is considered high risk this year may be low risk in a few years. Firms which had a high concentration of domestic and commercial conveyancing over the past few years now find that this area is approached with caution by insurers. Other areas pose a lower risk. The perception of risk for particular practice areas varies from insurer to insurer, and firms are advised to seek information from their brokers on the views of insurers regarding the risk associated with specific practice areas, and to take such views into account when completing the common proposal form.

### Risk level of legal services

- 1.31. With regarding to risk level of legal services provided, legal services with lower claim statistics tend to be criminal law, family law, general commercial work and probate<sup>1</sup>. If firms are engaged in what are perceived as high risk areas, they should pay special

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<sup>1</sup> Although some insurer still view probate work as high risk.

attention to informing the insurer of the risk management systems in place in the firm relating to those practice areas.

- 1.32. For any practice areas that require client monies to be handled by the firm, special attention should be paid to setting out the cybersecurity measures in place to minimise risk. Information on cybersecurity can be found on the Society's website at [www.lawsociety.ie/Solicitors/Running-a-Practice/Cybersecurity/](http://www.lawsociety.ie/Solicitors/Running-a-Practice/Cybersecurity/)

#### Expertise and experience in practice areas

- 1.33. Insurers are reassured if firms can demonstrate expertise and experience in the firm's practice areas. For example, firms should be able to clearly define their core business, even if the firm is a general practice, as there are a number of practice areas which you will offer and a number of practice areas which you will not.
- 1.34. Firms should be clear on the areas in which they offer legal services, and those areas in which they do not offer legal services. Many claims arise in situations where firms agree to act in transactions where they were not sufficiently knowledgeable. In this way, small firms which practice in a number of different unrelated areas, or firms which have recently set up and have little or no experience in their practice areas, can be seen by insurers as presenting a higher risk.

#### **Risk management procedures and policies**

- 1.35. The common proposal form strongly emphasises the importance of risk management to insurers, including risk management procedures and systems, risk management accreditation, how the firm deals with undertakings and cybersecurity, and whether the firm limits its liability by contract.
- 1.36. Firms that lack a formal, effective, written risk management strategy are seen by insurers as presenting a higher risk.
- 1.37. Risk management should be viewed as an opportunity to help your practice improve efficiency and reduce costs, leaving you free to concentrate on fee earning, rather than a burden imposed.
- 1.38. Implementation of risk management systems help to reduce exposure to claims. In-depth written policies, marks of quality and accreditation can be a key differentiator to insurers when calculating premiums, as insurers are increasingly looking for reassurance that risk management is being properly addressed and covering what they see as the main causes of claims. Insurers have adopted a robust and co-ordinated approach to risk assessment which has resulted in more selective underwriting.
- 1.39. Insurers look for systems in firms that mitigate risk, and may wish firms to be audited to ensure compliance with such risk management systems. Firms are advised to show that post-loss corrective actions are taken by firms following claims as evidence of the firm's commitment to high risk management standards and best practice.
- 1.40. The Society's published risk management guidance notes set out risk management policies and procedures that firms should consider implementing in order to reduce the firm's risk profile and corresponding PII premium. The guidance notes are available on the Society's website at [www.lawsociety.ie/PII](http://www.lawsociety.ie/PII).

- 1.41. Considerable focus has been placed by insurers on cybercrime risk and prevention, including questions on cybersecurity in the common proposal form. Firms are advised to keep themselves updated on the latest frauds and information through the Society's cybersecurity section at <https://www.lawsociety.ie/Solicitors/Running-a-Practice/Cybersecurity/>. The webpage includes information on cybersecurity, types of cyber-attacks, alerts regarding specific fraud attacks, standard precautions, cybersecurity course information, published articles, a reporting system for victims of cybercrime, and information on cybercrime and PII.

### **Claims history**

- 1.42. PII operates on a "claims made and notified" basis which means that the firm's current insurer is responsible for covering any claim which is both made and notified to the insurers during the same indemnity period .
- 1.43. The implications of this from an insurer's perspective are that they must assess the risk based, not just on the firm's commitment to risk management going forward, but also on what risk management measures have been in force in the past. Firms that lack clear risk management procedures present a higher risk of claims to insurers.
- 1.44. A claims history is regarded by an insurer as being a reflection of future performance. If the insurer sees a poor claims history, the assumption is that the circumstances which gave rise to claims in the past may cause claims to arise in the future. The simplest decision an insurer can make in this situation is to decline the risk. As stated previously, firms with poor claims histories are advised to provide explanations for such claims histories and state the risk management procedures put in place to prevent such claims arising in future. It is hard to overstate the importance of explaining your firm's claims history. If necessary, firms should consider retaining expert advice if the claims history of the firm is poor.
- 1.45. Firms should obtain their written claims history from their current insurer for the current indemnity period, and previous insurers for previous indemnity periods and take the time to analyse it and explain the actions the firm has taken to ensure that similar claims do not arise in future.
- 1.46. If your firm has a claims free history, the question is whether that claims free history is a result of good luck, or good management. Firms with a claims free history of over 30 years can still be bankrupted by a single claim. If you believe your claims free history is attributable to good management, ensure that this is set out in the covering letter provided to the insurer.

### **Disciplinary, regulatory and complaints history**

- 1.47. Insurers also consider the disciplinary, regulatory and complaints histories of firms and such details are required to be disclosed in the common proposal form. Firms with poor disciplinary, regulatory or complaints histories are advised to provide copies of any adverse decisions made against the firm and other relevant documentation, together with an explanation of how such matters arose and the steps taken by the firm to prevent a reoccurrence of such situations.
- 1.48. Provision of regulatory information is not necessarily negative. For example, an Investigating Accountant's report disclosing no adverse issues will be seen in a positive light by insurers.

1.49. Your firm's disciplinary, regulatory and complaints history provides an independent assessment of your firm's management of client accounts and compliance with regulations. A good history, or clear examples of firms putting in place effective procedures to deal with a poor history, are selling points for the firm.

1.50. However, it should be noted that a certificate of good standing is not a requirement to be included in your common proposal form.

### **Financial viability**

1.51. Firms may feel that their PII premium should decrease in situations where the fee turnover for the firm has decreased or is at a low level. PII is offered on a "claims made and notified" basis. Therefore, your firm's risk exposure is determined by the firm's past. If the firm had a high turnover in a high risk area for many years which has reduced, or the firm deals or dealt primarily in high risk areas, the risk of claims has not in fact reduced for the insurer.

1.52. Insurers take the financial viability of firms into account and may be reluctant to insure firms that may be required to close during the year due to financial issues. This is due to the fact that claims may arise on your firm and, as the firm has ceased during the indemnity period, the principal or partner may not be available to manage the claims for the rest of the indemnity period.

### **Changing insurer**

1.53. Consideration should be given to the effect of changing insurer, especially the loss of the benefits of continuation of cover with one insurer, including avoidance of coverage disputes that may arise between insurers in different policy years.

### **Improving your insurance profile**

1.54. Firms can distinguish their firm from others by:

- (a) treating the renewal as a priority, thereby improving both the number of insurers prepared to cover the firm and the terms upon which they may be prepared to do so;
- (b) applying early to demonstrate that your firm is professional and well managed, as late applications may be treated as distressed applications;
- (c) preparing for the renewal in the same way as you would prepare for a business tender, and make your proposal stand out through its clarity, presentation and level of detail, as these are indicative of the way the firm conducts the rest of its business;
- (d) taking responsibility for the renewal and application at a senior level;
- (e) ensuring there are no mistakes in the proposal form by checking and rechecking the proposal form before submitting the form to insurers;

- (f) taking the time to sell the firm as a good risk in the covering letter with the proposal form;
- (g) stressing your risk management and best practice processes and systems as a key component of your renewal strategy, including accreditations if obtained;
- (h) where claims have arisen, indicating the steps that you have taken to address such matters;
- (i) focusing on key high risk areas that insurers see as the main causes of claims and demonstrating to insurers the processes you have in place to prevent claims, such as the register of undertakings, critical dates diary, evidence of regular file reviews, a designated partner for risk management, regular meetings with fee earners, procedures to ensure proper cover for absent fee earners, and cybersecurity measures; and
- (j) following up on the application, as firms should not assume that “no news is good news” and should ensure they remain engaged with the insurer and the broker until the policy is put in place, and the cover is confirmed to the Society.

### **Benefits to the firm**

- 1.55. Implementation of good systems will be of benefit to the firm in the long run. Improving quality standards makes a statement to insurers, helps improve efficiency, and should reduce complaints, potential claims and the management time, expense and worry involved in dealing with them.
- 1.56. Such improved management practices may lead to greater profitability, not only by virtue of any reduction in insurance premiums that it may achieve, but also as a result of greater efficiency achieved throughout your practice.
- 1.57. While there is no guarantee that discounts on your premium will be secured, the more issues you can address, the greater the likelihood of minimising your premium.