

MAKING THE BEST OF A PI NOTIFICATION

By Julian Lovatt

Anger, trauma, embarrassment, concern, self-doubt. These are just some of the range of emotions which can be experienced by a professional in circumstances which necessitate a notification under a PI Policy.

It is a sad reflection of economic downturns that the number of notifications we receive increases significantly during such periods. Often this is a reflection of matters outside the control of the professional advisor. Clients look to cut costs, seizing on any opportunity to reduce or set off fees that are owed and becoming more aggressive and adversarial in their relationships with their professional advisors. When profit margins are under pressure, squeezing the professional advisor frequently becomes the name of the game, especially if the potential for involving PI insurers is on the horizon.

Irrespective of the reason or reasons for a notification, one of the key issues on any professional indemnity policy, no matter how well it is placed and no matter how effective the underwriters may be, is the efficient handling of notifications to ensure proper and timely notification, that underwriters do not form the wrong view; and that underwriters act in a responsive manner and the handling and processing of a notification is for the benefit of the professional.

Such issues dictate our approach towards handling PI notifications for our clients. How to transfer that approach into practical application involves important considerations from the outset since what happens at the outset of a notification determines the speed, the understanding and ultimate

conclusion of the notification. The considerations which we believe are vital include the following:

- *Ensuring underwriters are armed with correct and adequate information from day one. This will avoid unnecessary delay through additional questioning. It will accelerate the adoption of an informed and agreed strategy and thereby potentially reduce the risk of litigation with the accompanying publicity as litigation is in the public domain.*
- *Alerting underwriters to any concerns the professional may have over whether an error has arisen, rather than being too defensive with underwriters.*
- *It is part of any underwriter's mindset that all claimants are "the enemy". In fact it may well be the case that the potential or actual claimant is an important client of the policyholder and maintaining a future business relationship is vital to the professional advisor. Such information must be made known from the moment a notification is made so that everything possible can be done to try and create an environment where that business relationship can be sustained despite what one may term a "local difficulty".*

Fine words, one might say, but these considerations can be achieved, thereby ameliorating the situation which, at first sight, may appear to have great commercial concern.

The key to our understanding is to tune in to the mind of underwriters; some underwriters have commented that we seem to know more about what they require than they do. This approach and its implementation seems to be widely



Julian Lovatt

regarded and enables the meeting of minds from the outset of a notification. This does not just benefit underwriters but, more importantly, it benefits the policyholder.

How does one implement this approach and the considerations that such an approach entails? As observed, how a notification is presented to underwriters is fundamental not only to the relationship between the policyholder and the underwriter but it is also the point at which strategy, understanding and agreement must be triggered. Delays occasioned by the absence of appropriate information can only serve to promulgate misunderstandings and misperceptions. We believe it is the broker's responsibility to not only help and advise the policyholder but also to educate the policyholder as regards what underwriters need to enhance the prospects of a notification being resolved or concluded in such a way that the policyholder and the latter's

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underwriters are ad idem and that both parties can feel there has been as near to a team effort as is possible when a professional is faced with a claim.

The knowledge and experience of our claims staff is of course vital and our mantra is when in doubt speak to us. Apart from having claims staff to speak to at any time, it is a standard condition of any PI Policy that a notification is made in writing by the policyholder. The following, in our opinion, represent extremely important aspects of the notification process:

- *The fact that a professional advisor has received a complaint or allegation is in itself only half the story. The other half and which is probably even more important, especially when considering if there is an exposure to a liability, is the contractual background. What were the terms of the professional advisor's engagement? What was the period of the engagement? Who were the parties to the contract? To assist we have compiled template Notification Forms for all the professions. These forms are designed to capture through our knowledge and experience, what underwriters require. These templates*

can be altered to meet the specific needs of a professional practice but would still retain the essential points which we know underwriters require and which if not provided from the outset, will merely lead to delays. Notification Forms are not there solely for the benefit of underwriters. They can also provide the policyholder with an historical document relating to the notification that is made and which in turn can assist in risk management considerations; a useful aide memoire to someone coming fresh to the notification and/or the circumstances of that notification; and facilitating full disclosure of all notifications on a Proposal Form for future cover.

- *As alluded to previously, we are firmly of the opinion that encouraging an open dialogue with underwriters, from the outset of a notification, will, in the vast majority of cases be in the best interests of the policyholder. Since it is vital that the policyholder and underwriters are on the same side, being defensive with underwriters as a consequence of any of the emotions which were mentioned at the very beginning, will inhibit the approach*

which we believe is needed to underpin the notification process and relationship with the underwriters. Underwriters never like surprises and it is all too easy for a divergence of views and for problems to arise where there is any perception that either the policyholder or the underwriters have a reluctance to be open with each other.

We never have been and we never will be a post box. An active, professional and experienced claims broker can be an extremely influential and instrumental party within the notification process to help secure a resolution or conclusion which is to the benefit of the policyholder. Building trust with underwriters is fundamental to the process and if the underwriter has confidence with the broker and the broker's ability to understand and to know what underwriters need, that will be reflected positively in the way in which the underwriters respond to the needs and aspirations of the policyholder.

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MARCUS ELWES

Marcus Elwes joined July 2009.

Marcus began his career in insurance in 1989 and joined Windsor in July 2009, having spent 20 years at Miller Insurance Services Limited. In that time, Marcus has built up an extensive knowledge of the professional indemnity requirements of medium to large professional practices in the UK and Ireland, in particular those in the property sector.

Marcus is the professional indemnity adviser to the Royal Institution of Chartered Surveyors (RICS), using his knowledge on assorted issues such as market practice and developments, minimum wordings, regulatory frameworks, general coverage issues and the operation and management of the Assigned Risk Pool (ARP).

Marcus is an acknowledged market specialist on regulated insurance requirements, having consulted and advised a number of other professional bodies, in addition to the RICS, over the years. Marcus is a qualified Fellow of the Chartered Insurance Institute.

Marcus is married to Sandra and has two children 11 and 8, enjoys a broad range of sports as both a participator and occasionally as a spectator – testament to this is his ongoing affection for AFC Wimbledon.



EMILY HOLLOWAY

We are delighted to welcome Emily Holloway to the Windsor PI Division's Financial Institutions team.

Emily has spent six years in the insurance business, the last three years specialising in financial institutions and focusing on insurance solutions for the investment industry. This has enabled her to gain a sound understanding of how the various different types of investment business are structured and the risks they face.

Prior to joining Windsor Emily worked with Howden where she was Head of Offshore Funds and was instrumental in developing and growing their client base. She joins Windsor as a key member of the Financial Institutions Team with responsibility for introducing and maintaining client relationships in both the UK and Channel Islands (for which she is an Authorised Insurance Representative) with a particular emphasis on private equity, hedge funds, real estate and fund administrators.

In her spare time Emily enjoys various sporting activities including running, skiing and hiking.



LAW FIRM RISK AND OUTSOURCING THE MAINTENANCE OF COMPLIANCE

Steve Ray is responsible for Windsor's specialist risk management service. One of his areas of special interest is in helping law firms minimise their PI insurance costs by working with them to reduce the likelihood of professional negligence claims.

In this article, Steve discusses how lawyers can minimise the risk of making legal errors in their advice to clients with Elizabeth Woodman of the Practical Law Company. Practical Law Company is a specialist provider of services to the legal profession. It employs 120 experienced lawyers dedicated to providing online maintained documents and other legal resources to 1,500 law firms in the UK.

SR: This year's insurance renewal has been painful and expensive for many law firms. To get the best premiums, law firms need to make the case with the assistance of their brokers to their insurers that they manage risk well. However, in many cases law firm partners responsible for risk management give themselves too narrow a brief. They rightly focus on spotting potential fraud, money laundering and conflicts of interest but tend to have a blind spot when it comes to managing the risks of lawyers getting the law wrong. In my view, they should pay attention to managing the risk of legal errors too. There have always been claims made as a result of drafting errors and incorrect advice and there are some particularly significant ones around at the moment.

EW: I agree; reliance on the diligence and ability of individual lawyers does not seem a very robust risk strategy. This could be a particular issue in smaller law firms where there are fewer colleagues to consult and less time and resources available for lawyers to focus on legal technicalities.

SR: I regularly see lawyers whom I suspect are still using the precedent documents they brought with them from their previous law firm which they may have left fifteen years ago.

EW: Yes, that is our experience too. It is understandable that lawyers like to use familiar documents, but there

are obvious dangers. Cases are decided and 'good practice' develops over time which means that documents need to be amended. It is very easy for diligent but busy lawyers to miss these developments. Even if their documents are not legally incorrect, they may look old fashioned and unfamiliar to the lawyer on the other side of the deal. That inevitably increases the time taken to get the deal done and takes the focus away from agreeing the commercial issues.

SR: A real concern to insurers is that in this recession, lawyers are taking on work outside their normal area of practice.

EW: We know that is happening and it is alarming. Without proper support errors and claims are inevitable.

SR: So how can a law firm ensure that lawyers work on the basis of correct law, but minimise the cost of doing so?

EW: In a sentence, outsource know how and document maintenance and embed the use of maintained documents in the firm's culture and practices. It is not enough to provide lawyers with sources of up-to-date legislation or case law. From a risk perspective, this approach places too much reliance on the discipline of individual lawyers to monitor updates and amend their own precedent bank accordingly. It is also an inefficient use of fee-earners' time.

Firms should then adopt these precedents as their firm's standard as part of their risk management strategy.

For most law firms, the cost of investing in a team of professional support lawyers to do this on behalf of its fee earners is out of the question. Even the largest City law firms are outsourcing their know how to us these days. It is much safer and more cost-effective to work with a provider which supplies precedent documents, checklists, updates and other resources which are continually maintained by expert lawyers. In this way, law firms can be confident that when drafting and advising, their lawyers are always working from a quality assured starting point.

SR: What makes a good provider of legal know-how from a risk perspective?

EW: A good provider of outsourced know-how should monitor and assimilate legal developments so that fee earners do not have to do that themselves. Any development which changes law or practice should be reflected immediately in the relevant documents, checklists and practice notes. The provider should consult with and encourage feedback from the profession - the more subscribers they have and the more they encourage feedback, the better. To do this well, the provider needs to employ dedicated and highly-experienced editors who have worked on the front line themselves.

ACQUIRED KNOW-HOW: EXPERTISE

Helpful drafting notes should warn lawyers of points to watch for when drafting documents. This know-how should be readily accessible by lawyers working at home and the precedent documents easy to find, amend and edit when the lawyer needs to amend a document to suit a particular deal.

In addition, one of the reasons the two founders of our business started PLC was to support junior lawyers who tended to have work thrown at them and then left to sink or swim. Our resources are clearly written and even complicated concepts are explained clearly in plain English

enabling junior assistants and trainees to get up to speed quickly. Sometimes trainees may be too nervous to ask partners for help on a difficult issue, or feel they should know the answer. Today, all lawyers can quickly find notes and documents on our service, or contact us for help if they are not sure what they are looking for.

See how the service works within the attached diagram.



Steve Ray

SR: Tell me about document automation?

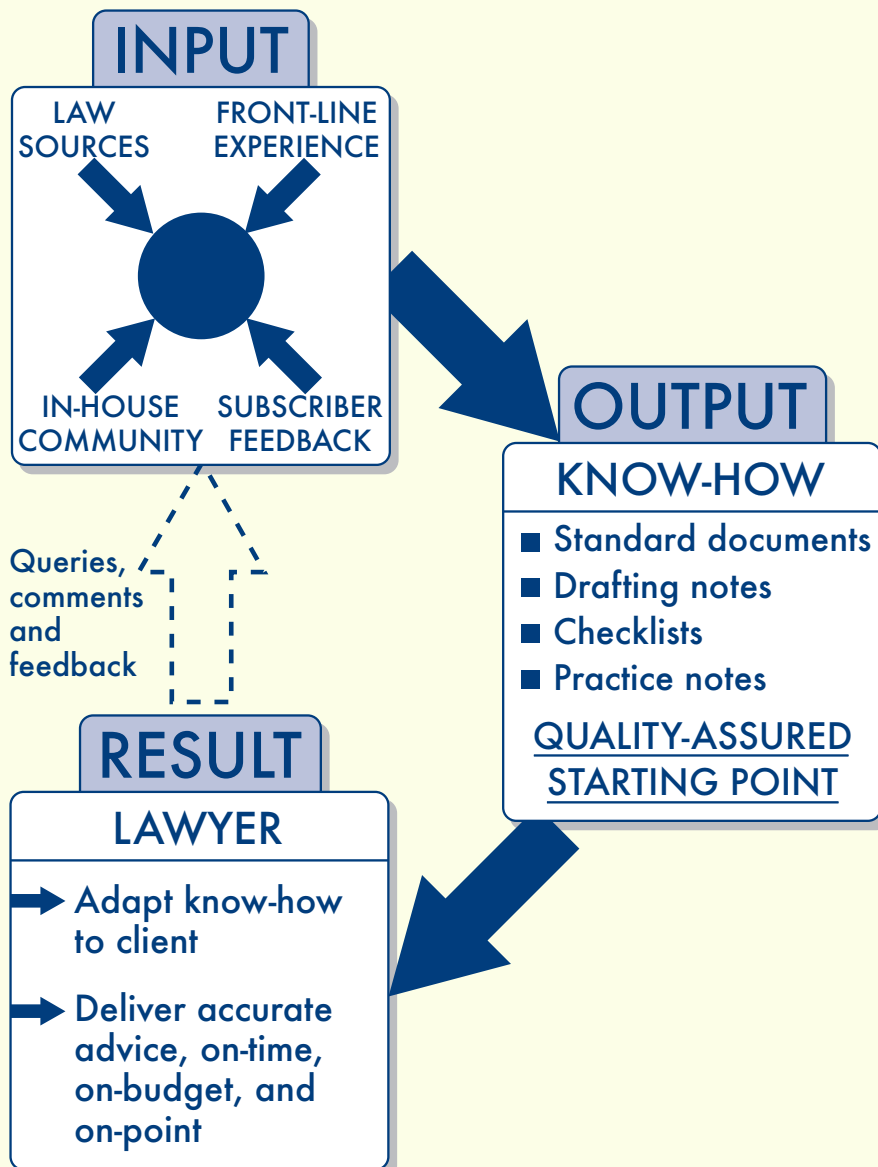
EW: We have automated some of the most common documents used by law firms. If you wish, instead of downloading and amending documents in the usual way, you can use a simple interface to produce advanced first drafts of the documents (and in some cases entire suites of documents) very fast. This frees lawyers from the tedium and the risk of errors in the initial drafts allowing them to focus on ensuring they are following their clients' instructions.

SR: So, who are your customers?

EW: 1,500 UK law firms subscribe to us, from sole practitioners to the magic circle. This means that even very small law firms have access to the same level of resources and expertise as the very largest. The fact the very largest law firms are prepared to outsource their generic know how to us illustrates our quality. The good news is that this is quality which is available to everyone.

(Practical Law Company materials are continually maintained by the 120 highly-experienced commercial and private client lawyers they employ. PLC covers 18 practice areas across commercial law, and now including private client law. It provides a variety of resources, from standard documents and drafting notes, to checklists and practice notes to provide an invisible foundation for law firm practices.)

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PROFESSIONAL INDEMNITY FOR SURVEYORS – THE CURRENT MARKET

For many within the surveying profession, the professional indemnity insurance market is as difficult now as at any time in the last 15 years. Some firms even appear to be unable to afford to continue to trade, victims of the combined impact of increasing insurance premiums and decreasing income, whilst others are trading with the more limited cover afforded by the RICS Assigned Risks Pool, literally the insurer of last resort.

This issue affects the whole profession with larger practices, as well as smaller firms, suffering. In all cases, the common ground is there has been a significant amount of valuation activity undertaken by the organisation in question, an area of exposure highly unpopular with PI insurers at present, for reasons explained further in this article.

It is not all doom and gloom and those surveyors with low levels of valuation exposure remain an attractive proposition to the insurance market at present, meaning that, perhaps uniquely, surveyors as a generic profession are seeing both a hard market and a soft market at the same time. Which side of that particular fence a surveying firm falls will unfortunately simply be down to how much valuation work they carry out (or have carried out in the past).

Whilst it appears that, with consumer confidence slowly returning within the wider economy generally as well as the property market showing some signs of recovery, insurers' previous hard line is softening, there remains the spectre of the primary lending organisations finally getting their act together and consequently creating more havoc in the PI market by issuing a further round of negligence claims against valuers.

A number of seasoned observers are still expecting further wholesale action by the banks against their professional property advisers, in particular valuers and conveyancers, arising out of the countless properties re-possessed during the 'credit crunch' and potential repossessions. Were this to happen,

insurers' currently fragile confidence in the sector is likely to immediately evaporate, leaving surveying practices firmly back in the mire once again.

So why are surveyors, who carry out significant levels of valuation work, presently perceived as such an unattractive risk for insurers? There are three main reasons, most of which are entirely economy driven and will, as a consequence, be more acute in tough times;

1. FRAUD. Claims arising as a result of fraudulent property transactions always increase in an economic downturn and this time round is no exception. In fact, it has been estimated that fraud-related claims of anywhere between £200-700 million are being dealt with by the insurance market presently.

The trouble with this is that even the most sophisticated systems of monitoring, mandating and checking will not prevent the most resolute and accomplished fraudsters in any walk of life. The main problem for PI insurers is that, not only can they not exclude fraud under the RICS Minimum Wording; they also find it very difficult to underwrite it, due to its unpredictable, deliberate and endemic nature. Therefore, in many instances, insurers will simply not consider businesses where there is any vulnerability to fraud claims whatsoever, which will be principally valuers, of course, within the surveying industry. This may not be just or right; unfortunately it is a fact at present.

2. RELATIONSHIP WITH LENDERS. The behaviour of the lenders in this property downturn has come under greater scrutiny than in the past, due to their failure to observe their own lending procedures. However, whilst it still remains market practice for valuers to be held responsible for market devaluation, valuation activities (especially for secured lending purposes) will remain unpopular with insurers.

This is particularly so given the very high risk to reward ratio of carrying out a valuation for £200-300 and then

seemingly being responsible for the full loss of value in a property downturn. Until such time as valuers are seen to be providing no more than a snap-shot opinion (albeit expert) on value at a given time, with no guarantees of future performance, as is often the case in other countries, they will be subject to penal PI premium rates from insurers.

3. HIGH VALUES AT RISK.

The most common type of claims historically for surveyors are missed defects in property surveys/inspections. However, whilst more frequent in occurrence than valuation claims over a period of time, they tend to have far lower settlement values; usually rectification of the issue will suffice. Likewise, most other facets of a surveyor's activity will give rise to claims; however, they are unlikely, except in the most extreme circumstances, to give rise to amounts in dispute in excess of six figures. Valuation claims, especially when made by lenders, are routinely six figure amounts and often in the millions.

As a consequence of these issues, and depending on other factors, such as claims experience, location and profile, the premium rate for valuation activities can be as high a 10-15% of the firm's applicable fee income for this area of activity. This can be compared with an Estate Agents rate which can be as low as 0.3-0.5%. More than anything, this demonstrates insurers' extreme nervousness of certain aspects of the class at the moment, in comparison to other aspects of the industry.

What happens next with the market for surveyors' PI insurance will to a very large degree depend on the actions of the primary lenders, once they have fully evaluated their losses and decided whether they can seek to recover any of these from the property professionals they engaged during the property boom. Whatever is ahead, nervous times for many in the industry are guaranteed.

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SOLICITORS PROFESSIONAL INDEMNITY INSURANCE RENEWAL AT 1st OCTOBER 2009 AND THOUGHTS FOR THE FUTURE

The solicitors' renewal season, with all the 10,000 firms renewing on 1st October, can be a good indicator or barometer of the overall PI Insurance market cycle. This year's season has resulted in the usual coverage in the legal press but unusually also gained the attention of the national press too, this was occasioned by the polarisation within the market between the small practices and medium to large firms. This has given rise to various stories about what might become of the single renewal date and even some calls for revisiting the mutual arrangements.

However, whatever the repercussions in these areas, it is worth noting that for a couple of years, insurers have been saying that premiums will have to increase in the market, citing:

- *increased reinsurance costs;*
- *poor or lack of investment returns;*
- *an increase in the incidence of claims against the profession; and,*
- *a growth in the number of larger claims.*

It was clear that in October 2008 there were signs of the market hardening for smaller practices with the withdrawal of a couple of the insurers and increased 'fact finding' on proposal forms for certain areas of professional activity, however the overall premium collected only increased by 5%.

This year showed a hardening in those attitudes by insurers for those smaller firms particularly in the final two months before renewal. A number of the recognised insurance market leaders for solicitors practices lost their appetite for smaller firms and they tried to move their profile into four or five or more partner practices. We also saw much more interest in:

- *The credit risk or perhaps the likely*

sustainability of the practice - hence additional questions on submissions and / or for these to be supported by management accounts;

- *Small partnerships with more than one office caused concern in the eyes of insurers in terms of how control and supervision is undertaken;*
- *Insurers showed concerns with small practices which included a number of different activities, making insurers wary that they were 'dabbling' in some practice areas where they may not have been as experienced and as up to date as they should be.*

Ultimately the lack of competition for these firms led, in many cases, to some significant premium increases. Figures now available show that the premium for the profession as a whole increased from £226m in 2008 to £241m in 2009, this overall looks like a relatively modest rise. However the number of firms in the Assigned Risks Pool increased from 139 to 309, and indeed the 2008 number was three times the level of the previous few years.

The medium to larger firms, in the main, enjoyed plenty of willing insurers which kept pricing relatively flat or with modest increases. However for the smaller practices insurers were looking for reasons why they would want to quote for a new piece of business; obviously a good claim record is key, but other differentiators remain accreditation to the Lexcel standard or evidence of other risk management systems, particularly extending to partner-to-partner peer review.

The message from the insurers to the profession in terms of submitting proposal forms early also seemed to backfire slightly as despite their best assurances insurers were slow to provide

quotes, which caused concern for brokers and the practices alike.

This then led to many firms completing additional forms for other brokers; in turn this meant that insurers started to see the same firm's proposal form from a variety of sources. As the market for smaller practices was so limited this tried insurers' patience and in some cases resulted in a "no quote". The insurance market for professional firms, not just solicitors, is not a commodity market and clients can't use these specialist insurers in the same way as a motor policy and a 'compare the market' approach.

What can we expect for 2010? Our discussions post renewal with insurers indicate that a couple of the major players have now successfully re-positioned themselves where they had intended, in terms of practice profile. This means that they have been comfortable with increasing the perceived quality of their business at the expense of premium volume. As always there will be two significant factors which influence the deal available for firms at 1st October 2010, first the availability of competition (and particularly for smaller firms) and second the prevailing economic conditions.

Inevitably residential conveyancing will remain firmly in the spotlight, with plenty of evidence to suggest that the lenders are gearing up for a round of fact finding (i.e. requests for files) in order to recoup money. Many commentators believe that the firm which undertook the conveyance is likely to be the first port of call (rather than the surveyor or mortgage broker).

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