the law

Winter 2019 - 20

Endorsed by The Law Society

Armstrong Watson's specialist publication for the legal profession

In this edition...

ArmstrongWatson®
Accountants, Business & Financial Advisers
A track record of providing solutions to the legal profession

In this edition...

The Law Society has exclusively endorsed Armstrong Watson for the provision of the following services to law firms:

Endorsed by The Law Society

- Strategy Planning Workshops
- Business Plans
- Benchmarking
- Mergers & Acquisitions of Law Firms
- Law Firm Valuations
- Forecasts
- Raising Finance
- Lock-up Reviews
- Pro-active Tax Planning
- Tax Compliance
- Audits
- Accounts Rules Reporting
- Accounts Preparation
- LLP conversions
- Incorporations
- ABS Applications

Welcome

Welcome to the Winter 2019/20 edition of The LAW, the specialist publication for the legal profession from the legal sector team at Armstrong Watson – where has 2019 gone?

Specialists are available from all of our 17 offices, to provide pro-active support and advice to lawyers in compliance and business improvement matters. This publication is designed to allow us to share our collective experience in acting for lawyers throughout the UK.

We've continued our series of public and in-house formal training courses on the new SRA Accounts Rules, which are now fully in force. If you haven't yet arranged training for your team, we would be happy to discuss how we can help your COFA with their obligations to keep your team up to date. Please contact me if you would like further details.

In this edition we cover a wide variety of law firm management topics, including:

- **Outsourcing for law firms**
- **Cyber Security**
- **Further case analysis on VAT on disbursements**
- **Thoughts on the merits of differing sizes of law firms**
- **Lasting Powers of Attorney**

To find out more on any of the above, including how we can work with you to help you and your clients, please do get in touch with me.

Andy Poole
Legal Sector Partner
@AW_AndyPoole
andy.poole@armstrongwatson.co.uk

Outsourcing for law firms

Larger numbers of law firms appear to be outsourcing increasing aspects of their businesses as they look to build leaner and more efficient practices. Here our Strategic Business Adviser, Nick Palmer outlines some of the key issues.

Following a successful 1962 mission to orbit the earth, John Glenn (US astronaut and, later, politician) was asked what it felt like to sit in a rocket awaiting blast-off. He replied:

"I felt exactly how you would feel if you were getting ready to launch and knew you were sitting on top of two million parts – all built by the lowest bidder on a Government contract".

The balance of quality, expertise and cost has always been at the heart of any decision to outsource. In order to avoid the risk of being dragged into a cost-only outsourcing model, we offer the following comments.

Why outsource? And what to look out for?

Perhaps the need to outsource comes from a lack of in-house expertise, or a desire to remove a non-core activity (and thereby allow individuals to concentrate on their expertise). Perhaps the need comes from a desire to reduce costs (why pay someone full-time for a part-time demand?)

Either way, at Armstrong Watson our encouragement is for our clients to be certain on their purpose and justification for any outsourcing decision. What advantages will result? How will these be measured? How often will these be measured? What process will there be should the anticipated advantages not result? What process will there be to review any business planning?

As with any business decision, one hopes for a level of planning to ensure that the logic of any outsourcing decision is, in fact, valid. As the PFI example in recent years illustrates, there are sometimes cost implications that might not feature in the initial financial analysis, but which can cause significant pain or irritation over time. The media like to remind tax payers about the costs to replace a lightbulb in a PFI-financed facility.

Research

Whilst a Government-outsourced project is likely to look different from an outsourced project within a small business, the due diligence should (hopefully) cover the same themes. As well as identifying (then tracking) the anticipated financial benefits, what steps does a business take to scrutinise the delivery of any intended supplier? How can the decision maker "mystery-shop" the prospective partner in action? Is the prospective supplier's delivery as slick as their marketing? What can be agreed between the parties should circumstances change or should delivery fail to meet expectations?

Of course, this due diligence "works" both ways, and should be part of the engagement conversation for companies to whom others outsource (such as professional service companies!) How can both parties agree on what success looks like? What balance of service, quality and cost will make it worthwhile for both parties? How can the provider be "referral-worthy".

How well do you know your own process?

One critical step is to be clear about how the prospective outsourced activity fits within your own operations? As a LEAN six sigma black belt practitioner, I remind my clients to focus on the "voice of the customer" in order to design or improve any business process or activity.

In an outsourcing conversation that becomes easier because you are the customer! How well do you know your own process? How well can you anticipate the implications of error or failure within that process? How will that affect your other operations? How well does the prospective partner grasp the implications of your processes and systems? How well do they understand your end user?

As an example, at Armstrong Watson we have a "quest" to help our clients achieve prosperity, security and peace of mind. That encourages us to ensure everything we do has a positive impact throughout the organisations we support.

An employer might engage our financial planning team to provide a company pension structure, but we encourage them to go one step further and invite our specialists in to run education seminars around financial protection for individuals across their whole team. This addresses the statutory requirement to provide an employer pension structure, but it also helps enlighten employers to "engage" and reward loyal employees such that the business can avoid the recruitment and training costs of disengaged staff.

Beware an obsession with cost

One overriding concern with outsourcing is that, in situations where cost is the only consideration, it becomes very difficult for the outsource provider to add significant value to the customer. In essence, when cost is the only consideration, the supplier is invited to commoditise their offering. It's not impossible to add value in such circumstances, but it's not easy either.

I don't think it's too controversial to suggest that we are probably all aware of outsourced contracts that have failed due to an exclusive desire to buy on price.

My experiences as a business advisor suggest that in any delegation, the chances of success will likely improve with clarity of purpose, instruction and an alignment of values.

This clarity factor can be overlooked even when delegating internally, so it's critical to consider in an outsourcing context, especially where the business process is subject to a volatile, uncertain, complex and ambiguous world. There might not be any point finding the cheapest supplier if they don't understand your purpose, instructions or values.

Whilst the reasons to consider outsourcing might be varied, the balance of quality, expertise and cost is constant. In order to avoid the risk of ending up in a cost-driven situation, it pays to be clear on purpose, process and competence. Can the headline price realistically deliver the desired outcome?

Nick Palmer - Strategic Business Adviser
nick.palmer@armstrongwatson.co.uk

Cyber Security for law firms – what's the latest?

ICO sends Marriott and BA an intention to issue a penalty notice - how big could the fines be?

In today's highly connected world, new risks emerge every hour of every day.

Connecting to the internet opens up the possibility (if not probability) of a criminal targeting your business. Cybercrime is becoming big business, and cyber risk a focus of businesses and governments globally. Monetary and reputational risks are high if businesses don't have an appropriate cyber security plan.

For instance, if we take GDPR, the Law Society provides reasonable guidance on information and cyber security; however, it doesn't go anywhere close to being of real value, because it forgets the importance of managing the entire process. Simply stated; this is not just an IT thing!

An emphasis is placed upon the Articles of EU 2016/679 (GDPR), but the truth is that whilst this is of vital concern, so are the requirements set out in the Data Protection Act 2018 (DPA18) and related legislation.

The key phrases being, "risk of varying likelihood and severity for the rights and freedoms of natural persons" and "implement appropriate technical and organisational measures."

So the real question is, if very little was implemented to satisfy the DPA98 and let us be honest with an assessment of that, then what assurance (and thus confidence) does an individual have that a law firm will in fact implement the requirements of DPA2018 and GDPR? The answer to that question has very little to do with any monetary penalty notice or enforcement notice from the Information Commissioners Office (ICO).

But, all of the above are centred upon the protection of personal data (and special categories of the same).

A law firm has other information, data and knowledge that is equally important (sensitive), and potentially more important in some cases. Much of this information will be in various forms: physical (files and papers); digital (structured and unstructured data, and metadata); and that which is in the head.

- Will a firewall help – possibly, but only if the rules for ingress and egress filtering are managed correctly. If not, the firewall will eventually fail to do its job.
- Will antivirus help – possibly, but only if there are regular (daily) updates of signature files. If not, it will soon be of little value. How often does the antivirus application do a sweep of files; daily? If not, then it too will soon be of little value. Unfortunately, and this is a fact of on-line life, antivirus will not help with zero-day malware; therefore, other controls will be required to compensate for this weakness.
- Will patching help – possibly, if it is done. This is patching of operating systems and other applications used by the firm. If there is no patching procedure in place or the firm is running with 'out of support' (read old) operating systems and other applications, then expect the worst.

Some examples demonstrated on the Law Society web page advice:

A law firm (and indeed any other business) should already have put in place, "appropriate technical and organisational measures" before GDPR and DPA2018 came into existence.

Firewalls, switches, antivirus, patching, use of encryption etc. are all technical measures, but what of the organisational measures that the firm has put in place? Will there be any?

In any business there are two key phrases – consistency (of approach), and constant improvement. In the world of information and cyber security these two key phrases play their part.

Be consistent with the management and application of information and cyber security and ensure that the firm has an objective to constantly improve upon what (hopefully) it has in place.

Armstrong Watson is moving ahead of the times by having a Client Technology service that helps clients to deal with issues such as Cyber Security, but also how to get the most out of your technology generally to be able to improve your business.

Timely reminder post-election: Keeling Schedule to the The Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU exit) Regulations 2019 for UK-GDPR, DPA2018 and at some point, PECR2003.

For any advice on the above points, or for any other technology queries, get in touch via barry.maxey@armstrongwatson.co.uk

Barry Maxey - Director of Client Technology
barry.maxey@armstrongwatson.co.uk

VAT on disbursements

A recent VAT case (British Airways Plc v Prosser [2019]) is relevant to law firms and adds further legal commentary to the already busy environment concerning the VAT considerations of firms incurring costs as part of their supplies to clients.

The case which is viewed as the seminal case on disbursements is the Brabners litigation, which is familiar to the majority of practices. However, as the Brabners decision was handed down by the First Tier Tax Tribunal, the decision only bound the two parties involved in the case, and its principles were therefore not required to be mandatorily adopted by all, in a way that, for example, a CJEU decision would demand. Therefore, whilst most firms adopted the 'Brabners principles', some didn't where it was beneficial to do so, or their fact pattern was distinguishable to that considered in the case. Where their own facts were distinguishable from those in Brabners, a minority of firms exercised a choice to distance themselves from Brabners, with references to differences in terms and conditions often held out as a primary distinguishing feature. The British Airways ("BA") case now potentially brings that distinction into doubt and this is backed up by the most recent Law Society guidance on the matter.

The BA case focussed on whether VAT is chargeable on medical reports bought in from third parties - upon which the solicitor then makes comment. HMRC has long accepted, following the 2011 case in Barratt, Goff and Tomlinson that as the reports are private medical records protected by statute, and therefore can only belong to the client, a solicitor could only ever obtain them "on behalf of the client". This decision also gave firms the potential defence against an assessment based on Brabners where the relevant legal relationships were clear and unequivocal.

However, the BA decision turns this premise entirely and suggests that the only differentiating factor in the matter of the treatment of disbursements is whether or not the solicitor acts as a "post-box". This will rarely, if ever, be the case as the judge stated with some clarity in the decision.

In addition, the judge pointed out that in UK contract law, there would rarely, if ever, be a relationship between the provider of the records and the client; in addition, as solicitors will generally have contracted with the provider as principal and as a matter of domestic law, will not have acted merely as an agent of the client.

In comments that resonate with the Brabners' decision, the judge in BA stated that the solicitors in question obtained the report in order to advise the client on the merits of the claim and/or to facilitate his pursuit of the client's claim. Consideration of the report was part of the solicitor's broader supply of legal services to his client. The solicitor's role was not merely to forward the report to the client but the report was supplied to the solicitor to enable him effectively to perform a service to his client. It did not matter to whom the reports belonged, other than where the solicitor is clearly a conduit or delivery facilitator.

This decision has a broader impact on the treatment of disbursements, indicating that the contractual position may not reflect the economic reality. In short, in the view of the court, any disbursement incurred on anything other than a "post-box" basis will be incorporated within the supply of services by the solicitor who is acting as principal.

If the solicitor is acting as principal, will that mean that the default for HMRC is that no items currently treated as disbursements can ever be incurred "on behalf of the client"?

Law firms will need to consider their own treatment of all disbursements recognising that relying on differentiators from Brabners will no longer be sufficient. This decision is binding on all taxpayers and will only lead to more firms facing questions and assessments from HMRC where they continue to treat disbursements as VAT-free which could, to any degree, be seen to form part of the solicitor's services.

Following this decision there are essentially four broad categories of cost incurred on client engagements that require consideration by all firms. The key question is whether the firm receives a service as opposed to paying a statutory fee and what the firm does with that information once it has been received.

Costs incurred on non-statutory fees and any services from third parties

The judgement suggest that it is rare that these costs will be true VAT disbursements as it is unlikely that there is a contract with the client by the provider and in most cases the costs are incorporated within the supply of legal services. Where a law firm receives any service from a third party, it is likely that those will not be considered as VAT disbursements and VAT is due on the recharge of such costs to the client.

Statutory fees forming part of the legal services

These will be those similar to the Brabners decision where a third party cost such as a search fee are consumed within the supply of legal services. The key point being that the client expects to receive and obtains advice relating to that cost, and the law firm applies its resources to considering the impact of that information supplied by the third party.

Statutory fees not forming part of the legal services

Some fees will still be accepted by HMRC as being true VAT disbursements where it is clear that the law firm is nothing other than a conduit for payment. This might include a court fee payable for lodging papers. The difficulty is that this decision would suggest that such fees may not qualify if they are incorporated within the services provided. For example the client expects it to happen and the law firm adds value to the process by filling in, checking and submitting the forms as part of an all-encompassing service. HMRCs position here is likely to be formally established in the coming months via a Business Brief or similar publication.

Payment of clear client obligations

The decision does not impact on instances where a solicitor pays a client's obligations on a matter such as stamp duty on the purchase of a home. This is a clear case where the solicitor receives no service, and is merely transferring client monies.

Please do not hesitate to contact Armstrong Watson's dedicated VAT team or your usual Armstrong Watson contact for a more detailed discussion on these matters.

Alex Nicholson - VAT DIrector
alex.nicholson@armstrongwatson.co.uk

Does size matter?

Mark Baines, Legal Sector Manager at Armstrong Watson reviews LexisNexis' Is the Future Small? The latest discussion paper in their Bellweather Report Series.

With 95% of law firms in England and Wales billing under £500k each year, and 50% billing under £150k Lexis Nexis asks the question - is the future small? This is a big question and one which seems more relevant then ever when you consider the size difference between the top ten firms, which turnover a £1bn or more, and everyone else.

46% of respondents were from 'very small' firms, with 2 to 10 fee earners; and a further 23% were from 'small firms', those with between 11 and 20 fee earners. When you bear in mind that two out of three of all of the respondents had worked in medium to large firms in the past, a suggestion is made that there are very real advantages to working in a small firm, given the respondents' decisions to downsize.

Advantages

The report lists thirteen advantages each of which receive an agreement rating of greater than 55%. The bottom of these was surprisingly work life balance at 56%. This suggests that, yes having a work life balance is a nice idea and people seem to be talking about it much more often nowadays, but your everyday solicitor, has more important concerns about their work and their work environment. Here's the top five:

Ability to remain in control	82%
Better client experience	79%
Lower level of bureaucracy/swift decision making	76%
Same person runs their matter from beginning to end	75%
Clients being serviced by more senior lawyers	70%

It's worth reading through that list again; every single one of them points in the direction of better client service that is driven by the fee earner being able to provide their service with less hindrance. Better client service and a happy workforce is always a recipe for success, and one which when you get it right leads to a virtuous cycle, and those common goals: growth and profit.

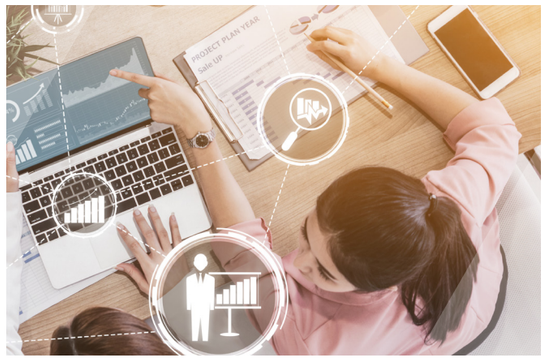
Challenges

While the advantages of working in a smaller firm are numerous, and may come as a surprise to some, the challenges are all too apparent to many partners in small firms:

Hard to grow a model/succession plan if clients are buying "you" personally	91%
Increasing compliance regulation	85%
Lack of capacity which may necessitate turning good work away	82%
Hard to take time off	78%
Cost of PII	77%

The first three are incredibly important as they all work together to constrain the amount of work you can process and therefore your profitable fee income. With only a small number of partners, and increasing regulation taking more and more time out of their working day, there's less time to manage and even less time to fee earn and get the marketing message out there. When you do have the chance of a good piece of work there's no one to do it.

If there are a few partners with some administrative support its tough enough, but when you are starting a law firm or you are a sole practitioner, these constraints will be very, very real as you reach the limit of the amount of time you can actually work. It's simple arithmetic; if you can only fee earn for half your time, then money earned has to cover the firms overheads, any salaries, and what's left is available to cover your needs AND investment in the future.



So what does the future hold?

According to the report 91% of respondents are feeling positive about the future with 51% saying that they are optimally sized to take advantage of the expected growth. That's a very positive outlook where the majority of small firms are saying that they are ready to take advantage of the opportunities rather than be constrained by the challenges.

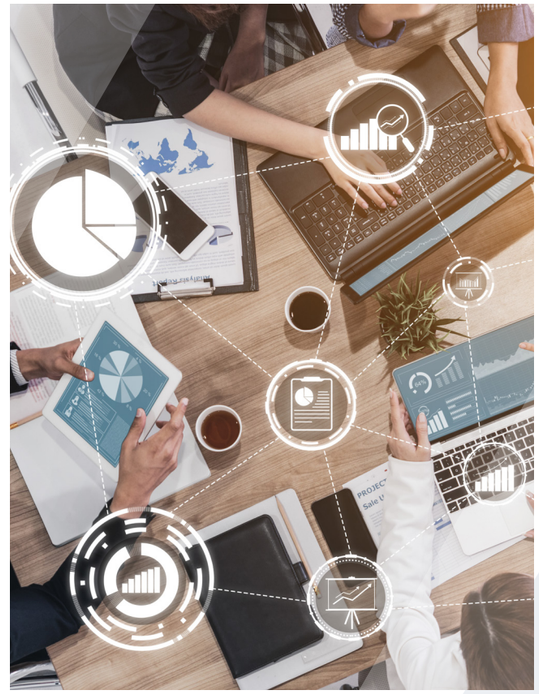
There are also 41% of firms who think that they need to be bigger which is probably driven by the three big challenges noted above: if you haven't got spare capacity you can't take hold of the opportunity and you can't match the investment and technology of the larger firms.

So will size matter in the future? In some cases potentially, and this is driving much increased consolidation in the sector right now – we have never been involved in as many law firm mergers as we are right now. However, small and niche still works well in many cases and our benchmarking shows that some very small firms are much more profitable than their larger counterparts.

Rather than size itself dictating future success, what's much more important is your strategy, service and mind-set to be able to service clients profitably. That tends to be based more on your attitude and the right culture and structural fit.

However, size cannot be left entirely out of the question. Too small and you're stuck in the position of doing all the work yourself with no time to build, unless niche/value billing allows otherwise. Too large and the Lexis Nexis survey indicates that client service could suffer or your solicitors could leave for smaller firms.

Armstrong Watson's legal sector team, can help you get to that happy position, whether by the right strategy, merger/acquisition or organic growth.



Mark Baines - Legal Sector Manager
mark.baines@armstrongwatson.co.uk

Making investment decisions into old age - Lasting Power of Attorney

More than 615,000 pensioners are on course to make investment decisions into old age but new research carried out by YouGov Plc suggests tens of thousands have not set up a Lasting Power of Attorney (LPA), with 7 in 10 people in retirement not having set up an LPA.

The findings, which coincided with Dementia Action Week, revealed tens of thousands of pensioners could be financially vulnerable in retirement. An LPA is a very important part of advance planning for a time when a person may not be able to make certain decisions for themself.

Dementia is a devastating condition which strips a person of their memories, relationships and identities. That's why it is so important that time is taken for advance planning, always ensuring that individuals living with dementia are at the heart of any decision to get an LPA or deputy, so they have the right to make important choices about their life that might come later.

Four years ago, an overhaul of the pension rules gave people the freedom to keep their pensions invested in retirement and draw an income as and when they like. Based on the latest Financial Conduct Authority data, it is estimated as many as 615,000 people have since switched their savings into 'drawdown'.

In some cases, DIY investors may be managing drawdown without professional financial advice and could need to make decisions on where to invest and how much to withdraw, at a time when their physical or mental health might be deteriorating. There are risks with this and without an LPA in place, their families or friends would be unable to quickly step in to help them - without facing a lengthy court process.

Registering an LPA has become even more crucial since the pension reforms. Hundreds of thousands of people are now making complex decisions about their pension into old age, when the risk of developing illnesses such as dementia increases.

If you are registering LPAs for clients in order for them to make it easier to take the right future financial decisions please email me in the first instance and we can discuss how best to help them.

Justin Rourke - Senior Financial Planning Manager
justin.rourke@armstrongwatson.co.uk

An interview with...

Chris Wright, Executive Director at Howden Professional and Financial Lines – Howden Insurance Brokers Limited.

1. How was the 2019 PII renewal season?

After having been relatively stable for some years with little if any bad news for law firms, 2019 has seen a hardening of the market for solicitors' professional indemnity insurance (PII). This was expected in the wake of the thematic review that was published by Lloyds in July 2018, highlighting that PII was one of their worst performing lines of business. Company markets had also experienced poor performance on their PII books and the scene was therefore set for change.

While most law firms have experienced modest rate increases on the compulsory £2m or £3m limits, the level of increase has varied depending on the insurer, the areas of practice undertaken by the firm and its claims history. The excess layer rate changes were more volatile and significant in percentage terms. The renewal date has also had some impact, with insurers generally seeking a greater rate increase as the year has progressed. At the present time it is expected that market conditions will continue to harden into 2020.

While there are still a good number of "A" rated insurers in the solicitors' PII market, we have seen the departure of Managing General Agents, Omnyy and Maven this year. The general appetite for new business was not as keen as it has been historically either, so firms looking to change insurers struggled if looking to do so late in the renewal seasons. In particular we saw restrictions on the level of conveyancing work that insurers were prepared to consider for new business cases. For some insurers this was no higher than 25% and at least one insurer was not prepared to consider new business that undertook any conveyancing work at all.

As mentioned, the excess layer market has been under pressure. In recent years more claims have been hitting these top up layers. As a result, premiums have increased significantly and capacity has reduced. Law firms also need to take care with the wording of excess layer cover, as it does not always follow that of the primary layer.

howden
specialist insurance brokers

2. In what circumstances might an individual working at a law firm find themselves personally liable?

Data recently published by the SRA, confirms that as at October 2019 there are 10,341 legal practices regulated by the SRA. Of these 63% are LLPs or companies. Practising within such limited liability structures remains the best way to avoid personal liability, but even then there can be occasions when you assume personal responsibility – for example, where you accept a personal appointment as a trustee. Comprehensive PII cover, such as that provided by the Minimum Terms and Conditions (MTCs), therefore continues to be important for those practising within incorporated structures. It is even more critical for sole practitioners and those practising as a partnership.

It will be interesting to watch the development of the new freelance practising styles that have been introduced by the SRA alongside the new Codes of Conduct for firms and individuals. This will allow solicitors to deliver unreserved legal services from non-SRA authorised entities without any PII at all. Personal liability will be an issue for solicitors who adopt these models. Some will want to purchase PII (and freelancers engaged in reserved work are required to), but this will inevitably be more restricted than the broad MTC cover.

While solicitors who practise with SRA-regulated firms can be confident that the MTCs continue to provide the broadest scope of cover in the market, attention needs to be paid to the limit of cover.

The compulsory limit remains at £2m for sole practitioners and partnerships and £3m for LLPs and companies, but we are seeing an increase in the number of claims above these minimum levels. The purchase of top-up cover is an issue that solicitors should always consider in order to address the risk that they could be called upon personally to fill a shortfall. This is also a regulatory obligation for all firms under rule 3.1 of the latest SRA Indemnity Insurance Rules.

Personal liability arising from regulatory issues is another issue that we urge all solicitors to consider. In 2017/18 the SRA investigated the conduct of 6,027 firms and individual solicitors. The SRA is able to fine an individual up to £2,000. For managers and employees of an ABS that figure increases to £50m.

If an individual is before the Solicitors Disciplinary Tribunal (SDT) there is no limit on the level of the fine they can impose and the SDT can also make an order for costs. The highest reported fine against an individual solicitor to date is £305,000 in 2015. The recent case of involving a partner at a large firm, accused of sexual misconduct, resulted in a fine of £35,000 plus costs of £200,000.

Cover for defence costs relating to disciplinary proceedings arising out of a claim were removed from the MTCs in 2008. Some insurers have retained a level of cover in their policies, but this will generally be the subject of a sub-limit. Directors and Officers Insurance can provide a solution here and it is discussed further below. Absent any cover, an SRA investigation and any subsequent disciplinary action against a solicitor can result in financial chaos on a personal level.

3. What are your views on Directors and Officers Insurance for law firms and do many law firms take this option?

In our view Directors and Officers Insurance (D&O) is an important purchase for law firms - as important as their PII and Cyber. D&O covers the owners, directors, officers and managers of a business against the risks associated with managing that business.

A D&O policy will indemnify a director, member, partner or officer for a wrongful act and in some instances the entity itself, if it paid an indemnity on behalf of a director etc. Even more importantly, it also covers the costs incurred in defending various actions including criminal and regulatory investigations and proceedings.

The disciplinary proceedings against Leigh Day in 2017 highlighted the importance of D&O cover to respond to defence costs for disciplinary issues. In the Leigh Day case, the defence costs bill was reported as being £7.6 million prior to the High Court appeal. Fortunately it is understood that Leigh Day had D&O cover to respond to this. There has been a surge of firms buying the cover after this high profile case, but in our experience there are still a number of firms that do not have this cover. This is a concern and puts firms and the individuals within those firms at considerable financial risk.

Firms purchasing D&O should check the wording of the policy carefully. It is important to ensure that it gives the cover you need. As always, the devil is in the detail. This is not like purchasing MTC cover, where you can be sure that the wording will always default to the MTC requirements in the event that there are shortcomings. Firms should seek advice on the terms from their broker.

4. Why might COLPs and COFAs wish to have additional insurance in their roles?

COLPs and COFAs are fundamental to ensuring regulatory compliance in a law firm. While the responsibility for compliance ultimately rests with the managers of a firm, the COLP and COFA risk regulatory action against them personally if they fail to meet their responsibilities. Historically the SRA have indicated that COLPs and COFAs will not be used as "sacrificial lambs", but the reality is that since their introduction in 2013 a number have been referred to the SDT. A recent report in the legal press noted that in the year ending 31 March 2019 a total of 19 COFAs were referred to the SDT. In the same period the SDT has struck off a COFA who employed a banned solicitor and fined another £10,000 for failing to ensure that managers and employees in the firm complied with their obligations. In addition to fines and other sanctions there is also the issue of costs orders and defence costs as discussed above.

The MTCs do not provide any cover for COLPs and COFAs who find themselves facing investigation or a referral to the SDT. Those who undertake these roles should therefore reach agreement with the firm as to how they are to be protected. In some instances a PII insurer might offer an endorsement for COLPs and COFAs, but the limit on the cover might be less than desirable. D&O cover is the better alternative and there are some D&O products in the market with express provisions for COLPs and COFAs. As outlined above, you need to be satisfied that the scope and limit of the cover meets your needs. The detail of the wording should be carefully considered and you should always seek advice from your broker on this.

Chris Wright
Executive Director at
Howden Professional and Financial Lines

Endorsed by

The Law Society

0808 144 5575
www.armstrongwatson.co.uk/legalsector

the Law
Winter 2019 - 20