

RISK management QUARTERLY



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A quarterly publication of Professional Indemnity Insurance Committee, Malaysian Bar Council in collaboration with Jardine Lloyd Thompson Sdn Bhd (JLT Malaysia)

<http://www.jltecsolutions.com/barcouncil>

Editorial

The RMQ is now in its 3rd edition. It is fast becoming a guide and must have for Members with questions about professional indemnity and the insurance Scheme. We are glad to see this progress. However, for the PII Scheme to be dynamic and better improved for the profession, risk management has to begin playing a more significant role.

In this issue, we begin to move beyond the basics of the two previous issues. We've included an article aptly named “How to be a Memory Friendly Firm?” as an introduction for firms which are curious and eager to move forward in implementing a risk management culture in their practice. The subject of memory and its application should interest both litigants and non-litigants alike.

It is also that time of year again – when most firms are knee-deep in completing their PII Proposal Form and also preparing submission for Sijil Annual - a guide is once again included for your reference. Take note to refrain from tearing off the “sample” proposal form. The Proposal Form 2006 can be downloaded from <https://www3.jltecsolutions.com/eccover/> or the Bar Council website at <http://www.malaysianbar.org.my/>

We also hope that a reprint of an article previously found in INFOLINE titled “What is a Claim?” will clarify the oft-asked question – what is a claims-made policy?

The PII Committee has conducted their Survey of the PII Scheme, the interim report of which has been included in this newsletter. We hope the report emphasises the significance of Members' involvement in the Scheme and its success.

We are also pleased to announce that in conjunction with the 13th Malaysian Law Conference, the PII Committee is organising a PII Workshop. This Workshop is our attempt to bring together under one roof, as many Law Societies from the Commonwealth to share their experience and knowledge of their PII Schemes.

We intend to learn from these participants and ensure that in coming years, our Scheme becomes more comprehensive and serves the actual needs of our Members.

Ragunath Kesavan
Chairman
Professional Indemnity Insurance Committee



Risk Management: Become a “Memory-Friendly” Firm

By Ronwyn North

Ronwyn North LLB is a legal practice consultant whose firm Streeton Consulting (ph. 9909 3266) conducted the Risk Management Study for [LawCover](#). This article first appeared in Law Society Journal (Volume 36, June 1998 page 37)

HOW GOOD IS YOUR MEMORY? Good enough to protect you from a professional liability claim? How about your staff and your clients. Are you unnecessarily exposed to their memory failures?

“I have done that,’ says my memory. “I cannot have done that,” says my pride, and remains adamant. At last – memory yields

Nietzsche

There are several links between claims and memory that raise questions about the role of firms, as well as individuals, in taking steps to guard against memory failures.

Many lawyers involved in claims think they have excellent memories when the claims in which they are involved suggest otherwise. For example, claims where solicitors have forgotten or overlooked the law, a relevant fact, a critical step or whether advice was given etc.

Less often but still cause for concern, claims arise from oversights of staff, such as forgetting to lodge documents, order or check searches or pass on information. When we experience or observe such memory failures in ourselves or our staff should we be concerned that memory function is deteriorating? Can memory failures be avoided?

Also, a large number of claims come down to the word of the lawyer against the word of the client. Are all these clients lying? If instead clients are prone to confused recollection, is there anything lawyers can do, in addition to the obvious of keeping better-written records?



Mechanics of Memory

Whatever an individual’s memory strengths, research suggests that it is common for people, particularly from their late 30s onwards, to experience some anxiety about becoming forgetful. Since law firms have their fair share of ‘thirty something’ members and clients, these studies should be of considerable interest.

Computers are useless. They can only give you answers

Pablo Picasso

Memory is one of several information processing functions of the brain we call thinking and its two essential components are storage and recall of information. Scientists are just beginning to understand how the brain makes all this possible. One recent study suggests that brain systems for storage and recall of events are quite separate.

Whether you prefer the analogy with a filing system (in-tray, filing cabinet, neatly labelled files) or a computer (working data that needs to be saved regularly to named documents which are themselves saved in particular

directories or folders), the essentials of how memory works seem to be:

- ♦ Paying attention: From the mass of information, something potentially worth knowing catches our attention and is selected for storage. (The risk is that important information loses the competition for our attention.)
- ♦ Storage in immediate memory: Unorganised, unclassified data is stored temporarily in an 'in-tray'. Storage is limited to five to nine items. (The risk is that acquisition of new information occurs before the existing data has been manipulated or moved to more durable storage which in turn causes data to be dumped or wiped from temporary storage.)
- ♦ Storage in enduring memory: Information is manipulated or organised to some degree and located in the 'filing cabinets' of recent memory and lifetime memory. (The risk is that processing will not be sufficiently deep or meaningful to permit easy recall).
- ♦ Recall: Information is retrieved from storage and, most importantly, reassembled. In other words recalled data is not the original. The original has in fact been destroyed in processing. (The risk is that something has been misfiled or otherwise rendered inaccessible, or that the reassembly is a poor replica of the original).

These mechanics of memory could help explain other studies showing, in contrast to what was once thought, that the types of memory problems complained of the most (i.e. lapses of forgetfulness or fluctuations) are caused more by information processing problems at the first two stages rather than the last two.

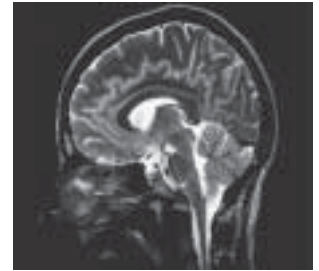
It seems that, in the absence of diseases such as dementia or chronic alcoholism only some memory functions are affected by age while others are completely unaffected. Further, those memory functions affected by age can be affected by lifestyle, health and attitudinal factors at any age.

It seems that as we get older, immediate memory and lifelong memory tend to remain intact. People retain the ability to remember five to nine items as soon as they are seen or heard, and lifetime memories continue being accessible and accumulated.

However, our age, lifestyle, health and attitudes can affect our ability to pay attention (including our ability to ignore distractions, switch between tasks, do several things at once, pick up where we left off), and the time it takes to learn (and recall) new things.

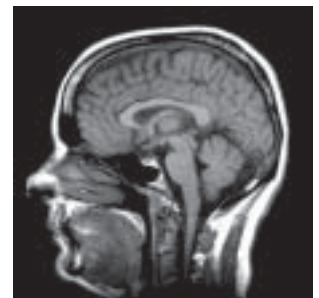
Memory Strategies

To what extent does the typical law firm workplace acknowledge memory problems and support creative use of memory strategies? This is critical because lack of understanding about how memory works makes it uncomfortable or indeed unacceptable in some circles for people to talk about memory concerns, or causes people to judge those with memory problems unduly harshly. Either way, the result is unnecessary anxiety which in turn impairs performance even further.



The purpose of learning is growth, and our minds, unlike our bodies, can continue growing as we continue to live

[Mortimer Adler](#)



*I hear and I forget.
I see and I remember.
I do and I understand*

[Confucius](#)



Becoming a memory-friendly firm involves much more than using notes and letters as the primary if not only, memory back-up strategies. It involves the firm's whole approach to creating a work environment that values and supports remembering and in practical ways reduces the demands on memory and maximises the likelihood that information can be retrieved when required.

The list of strategies is endless but includes controlling noise and other distractions, simplifying work processes and work instructions, more creative use of aids to reinforce memory, particularly visual aids, avoiding information overload and repeating, chunking and highlighting important information, allowing time for questions and clarification, encouraging people to disclose memory concerns, giving permission to be reminded.

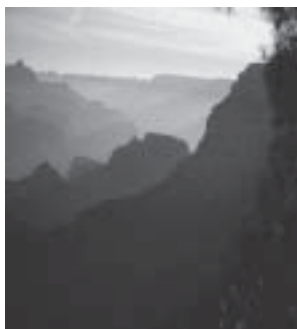
Everyone is entitled to their own opinion, but not their own facts

Daniel Patrick Moynihan

So how seriously does your firm take being memory-friendly?

References

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- ◆ The Brain's Memory Helpers, 1996 Science News Vol 150.



Nothing is at last sacred but the integrity of your own mind

Ralph Waldo Emerson

**GUIDE TO PROPOSAL FORM 2006
PROFESSIONAL INDEMNITY INSURANCE**

PAGE	QUESTION	REMARKS																
Page 1	Question 1 DETAILS OF FIRM	(a) Indicate the name of the Firm as approved by the Bar Council via their letter of "no objection" (b) Indicate date the Name of Firm was approved unconditionally by the BC. (c) Indicate latest correspondence address (d) Indicate ALL available telephone numbers, facsimile and the Firm's e-mail address.																
Page 1	Question 2 (a) DETAILS OF LEGAL PRACTITIONERS	Please state name of each and every (1) Sole Proprietor/Partner (2) Consultant (3) Legal Assistant Other staff/personnel e.g. pupils in chamber, interns, office manager, clerical, secretarial, despatch, etc. are to be part of the headcount in Question 3. Note: Please list the names of every legal practitioner who is currently with the Firm.																
Page 2	Question 2 (b) [INFORMATION ON PREVIOUS FIRM]	You NEED to REPEAT the names indicated in Question 2(a) if the person was from another firm and joined your Firm after 1 January 2001. Also include details of the person's previous firm, date joined and left and also the designation/status (e.g. partner, legal assistant, etc) whilst he was at that previous firm.																
Page 2	Question 3 NON-ADMITTED STAFF	Indicate the number of staff on payroll excluding the names from Question 2 (a). Note: All non-legally qualified staff.																
Page 2	Question 4 GROSS LEGAL FEE INCOME	For consistency, please provide information based on the accountant's report as submitted or to be submitted with the application for the Sijil Annual. Please also provide the Estimate for the Current Year.																
Page 3	Question 5 NATURE OF WORK	Please provide information based on the accountant's report as submitted or to be submitted with the application for the Sijil Annual. <table border="0"> <tr> <td>(a) <u>Company Work</u> X 100%</td> <td>(e) <u>Taxation</u> X 100%</td> </tr> <tr> <td>Total Gross Annual Legal Fees</td> <td>Total Gross Annual Legal Fees</td> </tr> <tr> <td>(b) <u>Insolvency Work</u> X 100%</td> <td>(f) <u>Civil Litigation</u> X 100%</td> </tr> <tr> <td>Total Gross Annual Legal Fees</td> <td>Total Gross Annual Legal Fees</td> </tr> <tr> <td>(c) <u>Conveyancing Commercial</u> X 100%</td> <td>(g) <u>Criminal Litigation</u> X 100%</td> </tr> <tr> <td>Total Gross Annual Legal Fees</td> <td>Total Gross Annual Legal Fees</td> </tr> <tr> <td>(d) <u>Conveyancing Residential</u> X 100%</td> <td>(h) <u>All other work</u> X 100%</td> </tr> <tr> <td>Total Gross Annual Legal Fees</td> <td>Total Gross Annual Legal Fees</td> </tr> </table> (Please describe) Note: If you are a new firm, please complete based on an estimate of the type of work you expect to do.	(a) <u>Company Work</u> X 100%	(e) <u>Taxation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(b) <u>Insolvency Work</u> X 100%	(f) <u>Civil Litigation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(c) <u>Conveyancing Commercial</u> X 100%	(g) <u>Criminal Litigation</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees	(d) <u>Conveyancing Residential</u> X 100%	(h) <u>All other work</u> X 100%	Total Gross Annual Legal Fees	Total Gross Annual Legal Fees
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Total Gross Annual Legal Fees	Total Gross Annual Legal Fees																	

<p>Page 3</p>	<p>Question 6 CLAIMS EXPERIENCE</p>	<p>(a) To the best of your knowledge, please confirm the claims history of <u>BOTH the Firm and ALL</u> the persons named in Question 2. (b) Same</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Note: When completing this Question please note the following: -</p> <ul style="list-style-type: none"> • If YES is ticked for (a) and/or (b), please provide details for each claim or threatened claim. • Please declare the claims experience even if the claim was described in the 2005 Proposal Form. • Claims against your Firm • Claim against any of the legal practitioners named in Question 2. • Claim against any of the legal practitioners at a previous firm. • The DECLARATION requires the firm to obtain WRITTEN CONFIRMATION from each legal practitioner named in this Form that he is aware and answerable to ensure the accuracy of the Question answered. </div>
<p>Page 3</p>	<p>Question 7 NOTIFIABLE CIRCUMSTANCES</p>	<p>To include any circumstances that the Firm/Legal practitioners may be aware of and which may give rise to a claim. This includes any claim against the person, the previous firm's personnel and the previous firm.</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Please refer to the Note in Question 6 as a guide to complete this question. The same criteria apply to Notifiable Circumstances.</p> </div>
<p>Page 4</p>	<p>Question 8 TOP-UP QUOTATIONS</p>	<p>Complete this question if you wish to obtain quotations for Top-up insurance. Please note that you are free to arrange Top-up Insurance with another Insurer.</p>
<p>Page 4</p>	<p>AUTHORITY TO INSURERS & OTHER PARTIES</p>	<p>Your attention is drawn to the Bar Council Circular 63/2005 of 14 September 2005 which is reproduced below for easy reference:</p> <p><i>The Bar Council, as the Master Policy holder, has taken steps to take an active role in the management of the PII Scheme and we have incorporated a clause in the Proposal Form allowing us access to information and particulars of claims notified and the payments made.</i></p> <p><i>This information would allow the Bar Council to obtain accurate statistics and information to assist us in the management of the Scheme as well as develop our Risk Management Programme.</i></p> <p><i>We have previously been hampered as the Insurers have always refused us information on grounds that such information is confidential and this has been a great hindrance to us.</i></p>
<p>Page 4</p>	<p>DECLARATION</p>	<p>EXCEPT for sole proprietorships, any one Partner/Principal may sign the Proposal Form on the Firm's behalf. However, ALL parties named in the Proposal Form must ensure that they are aware of all information stated in the Proposal Form.</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Note: Upon signing the Declaration, the Partner signing should obtain WRITTEN CONFIRMATION from each of the persons named in Questions 2(a) and 2(b) for the answers to Questions 6 and 7. Subsequent claims of ignorance or inaccuracy with regard to the answers in the completed Proposal Form will not be accepted as all legal practitioners/partners are deemed to have sighted and declared the requisite information.</p> </div>



Professional Indemnity Insurance Scheme Survey August 2005: Interim Report

INTRODUCTION

The Professional Indemnity Insurance Scheme (PII) Survey was conducted from 30 July to 11 September 2005 as part of the PII Committee's continuous efforts to improve the service level and effectiveness of the PII Scheme's objectives.

It had two essential aims:

- ◆ To gauge the level of awareness Members have of the PII Scheme, including the terms and conditions of the insurance, claims process, etc,
- ◆ To determine from Members their perception of the level of service provided by the brokers, loss adjusters and insurers committed to this Scheme thus far.

A general PII Survey was posted online at the Bar Council website and opened to all Members who are registered on www.malaysianbar.org.my (Online Survey). Additionally, survey forms were mailed and/or faxed to 110 law firms who had appealed to the Joint Claims Committee (JCC Survey).

RESULTS

The success of any survey is highly dependent on the support it attains. Greater participation will reflect the majority view and not a "pool" or "sampling" statistical results. This was not the case here:

- ◆ The online response was weak and disappointing with an average of 12 hits, that is, only about 1% of members registered with www.malaysianbar.org.my responded to the online survey
- ◆ The JCC Survey did not fare any better with only 22 of the 110 firms responding, that is a 20% response rate.

Herewith is a short summary of both the Online Survey and JCC Survey results:

Online Survey (General Members)

The Online Survey was primarily hampered by the underwhelming response from Members, nevertheless, the results we did obtain demonstrated:

- ◆ A high level of ignorance and/ or indifference of Members with regards the performance and service of brokers and insurers,
- ◆ An apathetic mindset in relation to the PII scheme: for every basic question asked about the PII Scheme, at least 50% of the participants answered "don't know", and
- ◆ A general lack of awareness and knowledge on risk management, with many still choosing to answer questions with "don't know".

What we see depends mainly on what we look for

[John Lubbock](#)



The cure for boredom is curiosity. There is no cure for curiosity.

[Ellen Parr](#)

JCC Survey

The Members' general perception of the PII Scheme, brokers and insurers (the parties) is one of mediocrity.

PII Scheme

Participants were generally very knowledgeable with regards their own policies i.e. their mandatory limit, base excess, coverage and premiums. Their average scores were as follows:

	Average Score	Total
Mandatory Limit	12.22	15
Base Excess	6.33	10
Coverage	14.22	25
Premium – Terms & Conditions	7.67	15

However, it must be pointed out that this knowledge (of their policy) is likely due to the fact that these firms have already been through the claims and/or JCC appeal process and therefore, necessitating such knowledge.

NOTE: In the general survey (as above), 50% of participants knew little of their PII Scheme.

Risk Management Programme

The risk management programme was viewed favourably especially the Malaysian Bar Council's efforts vis-à-vis the Professional Indemnity Insurance Scheme and the Ethics Seminars. Also, an encouraging 61.1% of participants found the RM Quarterly Newsletter/ Website useful and helpful.

Insurers and Brokers

The divide on knowledge amongst practitioners here was most obvious, they had either no personal knowledge of the services provided for by these two parties or they were altogether dissatisfied.

(i) Insurers – Oriental Capital Assurance Berhad (OCA)

Practitioners were most uninformed about their insurers. 50% had no knowledge of the insurers' credibility, responsiveness, claims handling, etc. However, 44.4% of survey participants are aware of who their insurers are and gave OCA a rating of "average".

(ii) Brokers – Jardine Lloyd Thompson Sdn Bhd (JLT)

The brokers fared better under scrutiny, in that, practitioners knew of them and were able to rate them with some level of competency. In fact, 72% of practitioners rated JLT favourably.



The beginning of knowledge is the discovery of something we do not understand

Frank Herbert



It is better to know some of the questions than all of the answers

James Thurber

Joint Claims Committee (JCC)

The JCC scored an average of 19 over 40 but did receive some positive feedback from those who had brought their appeals to them as illustrated by this comment:

"I was pleased with the courtesy and respect received at the JCC. Keep up the good work..."

CONCLUSION

The results of the PII Survey were meant to assist the PII Committee in their appraisal and evaluation of the brokers, insurers, and loss adjusters. More importantly, this Survey was to serve as a gauge of the level of awareness and level of familiarity amongst Members on the PII Scheme, the terms and conditions of the insurance and the claims process in order for the Committee to better address areas of weakness and gaps in knowledge of the Members.

The ***underwhelming*** response from both the Online and JCC Survey severely undermined these objectives. Not only were there few returned forms to work with, but the unconcerned, indifferent manner in which some survey forms were filled further hampered the exercise.

However, this casual disregard of the survey has nonetheless provided the following observations:

- ◆ There has been informative and instructive feedback, albeit from a small pool of lawyers.
- ◆ This casual disregard highlights the crux of the matter, that is, the Members' blasé attitude towards the PII Scheme and Risk Management.
- ◆ There exists a high level of ignorance of a general form amongst the Members which would allow for a starting point for the risk management programme

In essence, this survey has provided a guide from which future events, for example, talks, road shows, etc could find focus. Therefore, a good basis for future events would be that of establishing some basic knowledge of all the following:

- ◆ Professional Indemnity Insurance Scheme
- ◆ The Brokers
- ◆ The Insurers, and
- ◆ Risk Management.

To this end, the PII committee is committed to raise the profile of the risk management programme by participating/ organising

- ◆ A CLE talk in October 2005 (as at press time postponed until December 2005)
- ◆ PII Workshop in Conjunction with the Malaysian Law Conference in November 2005
- ◆ Continue work with the Risk Management Quarterly
- ◆ A Road Show in early 2006 that will travel to the various State Bars

Additionally, a fresh survey will be posted to Members in October/November 2005 with the view of generating more interest and response. To facilitate this, the questions from the original survey have been reviewed and revised.

We hope that the PII Survey 2005: Interim Report will mark a stepping stone for the PII Scheme towards achieving its objectives and improving the legal profession's perception of the PII Scheme.

Reported by
Risk Management
PII Scheme



What is a Claim?

When, What and Why does a Practice disclose in a proposal form and to Jardine Lloyd Thompson Sdn Bhd

by **Carolyn Richards**

Carolyn Richards was formerly Risk Management Consultant for Willis (Malaysia) Sdn Bhd. She is currently the Ombudsman for the Northern Territory and Commissioner, Health & Community Services - Complaints Commission, in Australia.

This article first appeared in Infoline (June 2003 edition, pages 13-14). The contents of the article were accurate per the terms of the 2003 Certificate of Insurance. Thereafter, some terms & conditions of the Malaysian Bar's Professional Indemnity Insurance have changed. Where applicable, the revised terms have been incorporated. The changes highlighted in *blue ink* are based on the 2005 Certificate of Insurance and Proposal Form 2005.

It is most common when thinking of making a claim in the context of insurance to think of the situation where an insured person fills in a claim form, sends it to the Insurance company or adjuster and then receives payment for the insured damage or loss. The motor vehicle accident is the simplest example.

That is only one category of claim. It is a claim by an Insured on the Insurer.

The Malaysian Bar Professional Indemnity Insurance Scheme ("The Scheme") is a '**claims made**' Scheme. 'Claim' used in this context refers to a claim made by a third party on or against a Firm or a lawyer in the Firm. A third party is anyone who is a third party to the contract of Insurance and is called 'the Client' in this article.

The Contract of Insurance

The insuring Clause 4.1 of the Certificate of Insurance issued by Insurers of the Scheme to all lawyers says relevantly:

'4.1...The Insurer shall indemnify the Insured against any Claim first made...during the period of Insurance in respect of any civil liability...'

The entitlement of a Firm to be indemnified arises from and attaches to the Insurers by the action of a Client making a claim against the Firm (this article refers to that situation as a 'Client Claim'). The Firm then must make its own claim against the Insurers (called in this article 'the Firm Claim').

How Does a Firm Make a Claim?

Clause 5.3 of the Scheme's Certificate of Insurance says that the **only** way for a Firm to make a claim is by *giving notification in writing or by tested facsimile to Jardine Lloyd Thompson Sdn Bhd ("Jardine")*. *Jardine is the broker appointed by the Malaysian Bar Council to represent the Members and the Bar's interest. As your representative, Jardine will ensure that all notification made to them will be forwarded to the Insurers.*



I am always doing that which I cannot do, in order that I may learn how to do it

Pablo Picasso



The function of wisdom is to discriminate between good and evil

Cicero



If you have always done it that way, it is probably wrong

Charles Kettering

What is a Client Claim?

Websters New World Dictionary defines a claim as:

- (i) a demand of a right or a *supposed* right
- (ii) calling on another for something due or *supposed* to be due
- (iii) a demand for compensation benefits or payment.

The Oxford Dictionary includes a definition:

- (iv) an assertion of a right to something.

A Client makes a Claim merely by asserting that a lawyer or a Firm owes the client some compensation, or asserting that the Firm has an obligation to make some payment or give some redress or service for the client's benefit.

When Must a Firm Notify Insurers Representatives?

Clause 5.2.1 of the Scheme's Certificate of Insurance requires the 'the Practice' to give Notice:

'5.2.1...as soon as practicable, but no later than 30 days, of any claim made against the Insured during the Period of Insurance which may form the subject of indemnity ...or of the receipt of any intimation of an intention to make a claim against the Insured'

(Use of the definition 'Practice' means there is a joint and several obligation on every Partner to ensure the notice is given.)

Comment

Lawyers are accustomed to sending letters of demand; of hearing and making oral assertions about a client's rights and intentions to take action to pursue those rights. Often those expressed intentions are not pursued. Because of this overexposure, when an assertion is made against a Firm or a lawyer; there is a tendency to not take it seriously; to consider that the assertion has no basis in fact or law, and to dismiss it if the threat is unmeritorious or unfounded. To follow that inclination and to hold off notifying Insurers because the Client Claim is baseless could result in the firm losing the right to indemnity if the Client proceeds with the claim. A Firm is entitled to have the costs of defending an unjustified claim paid by the Insurers (subject to an excess) and a firm could at the very least lose that entitlement.



It does not matter how slowly you go so long as you do not stop

Confucius

Why a Firm Needs to Notify Even Unfounded Client Claims

The insuring clause obliges the Insurer to indemnify a Firm for a claim *first* made during the period of insurance. If in 2003 a mere assertion of a right is made by a client, that claim is *first* made in 2003. If the Firm does not notify **Jardine (sic)** until 2004, the Insurers in 2004 will deny the Firm's Claim because it was *first* made in 2003, and those Insurers agree to indemnify only claims first made in 2004. The 2003 Insurers will not have the right to deny the Firm's Claim even if the Firm waits until 2004 to give them notice of it. After 1

January 2004 however they will have the right to recover whatever they had to pay on the Client Claim from the Firm. The Firm by coming to its own conclusion that the Client Claim was unmeritorious and deciding not to notify it to **Jardine (sic)** becomes, in effect, its own insurer of that potential claim.

If the proposal form does not disclose the Client Claim and the failure to disclose it was other than innocent the Insurers can refuse any payment at all.

Potential Claims

The Scheme's Certificate of Insurance also relevantly says in General Conditions 5.2.2:

'5.2.2....Notice shall **also** be given of any matter, event or circumstance of which the Insured **shall** become aware...which may reasonably be expected to give rise to a claim...'

'Claim' in this clause refers to both a Client Claim, as well as a Firm Claim.

In *Joel v Law Union & Crown Insurance (1908)* 2 KB 863 at 864, Moulton J said:

'...the obligation to disclose...necessarily depends on the knowledge you possess. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so'

Section 50 of the Insurance Act 1996 repeats the concept in that dictum.

Firms have an obligation to notify circumstances that come to their knowledge even if there is no Client Claim made. If a judgment in default is entered against a client because the Firm was not at Court, or failed to file a defence in time, the Firm will know about it before the client.

The Proposal Form

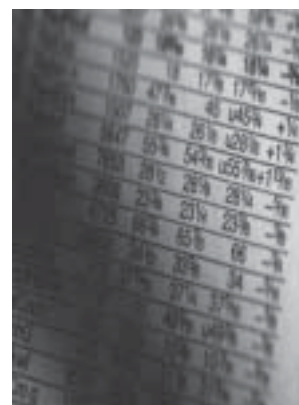
There is a direct link in the Scheme between the obligation to notify and the questions asked in the Scheme Proposal for Insurance. *Question 6* asks about claims already made against any lawyer in the Firm. *Question 6* is asking about Client Claims (not Firm Claims). Even the mere assertion by a Client of a totally unjustified intention to claim from the Firm means that the correct answer to *Question 6* is 'Yes'. If the answer given is 'No' the Firm is electing to be self-insured for any such Client Claim *first* made earlier than the date on the proposal form.

Question 7 asks about potential Client or Firm claims as discussed above. A further statement of the duty to disclose potential Client Claims or circumstances that might lead to a Claim is that of Mr Justice Atkinson (as he then was) in *Simon v Ors & Beer (1945)* 78 L1. LR 337 at 355:



In the middle of every difficulty lies opportunity

Albert Einstein



Tradition is a guide and not a jailer

W. Somerset Maugham

'The question is: Would a reasonable solicitor of utmost good faith think it right to disclose any facts which were within his knowledge? Again, the mere fact that a solicitor has been guilty of such act or omission of negligence in the past is not necessarily a material fact to be disclosed; the materiality must depend on the possibility of a claim'

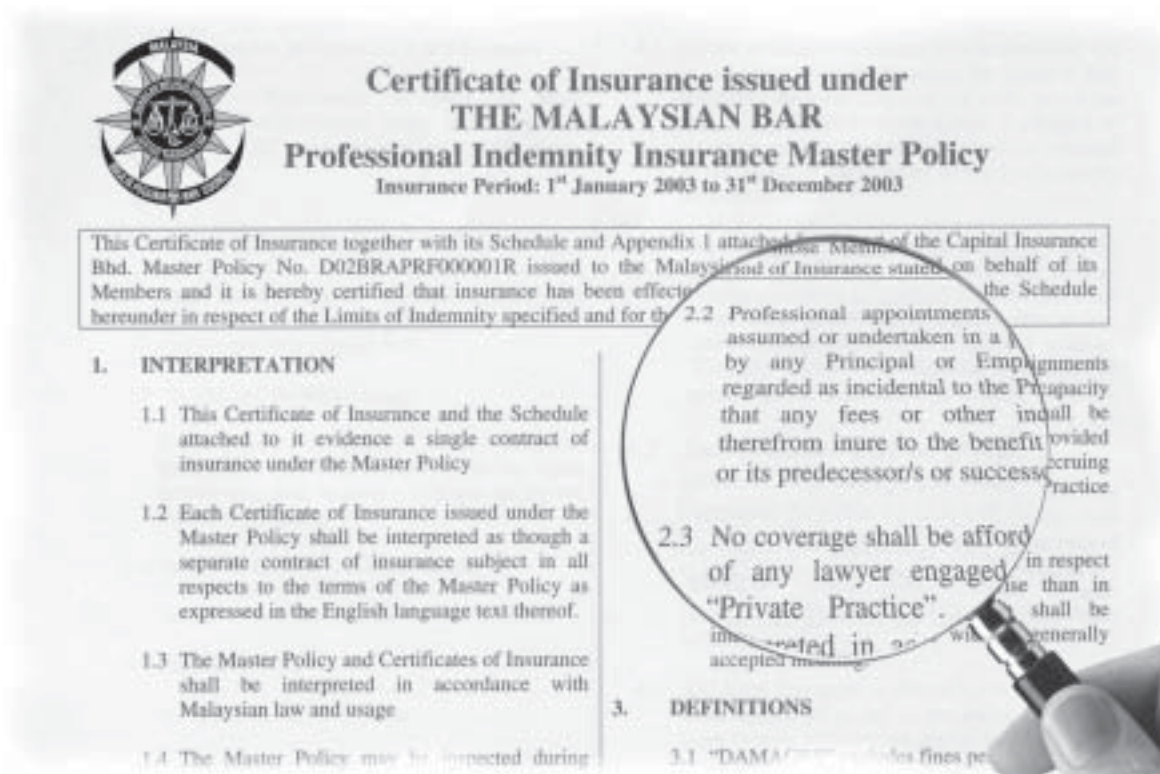
Section 150 subsection (2) of the Insurance Act specifies that any fact material either to the acceptance of the risk or to the amount of the premium must be disclosed.

Comment

Careful consideration of these issues and concepts is warranted by Firms when completing their proposal forms. The execution clause of the proposal form also needs to be borne in mind. That clause is in the following relevant terms

'I/We warrant that all the above statements are true and complete and, in relation to the answers to Questions 6 and 7, I/we have obtained written confirmation from each of the legal practitioners named in Questions 2 (a) and 2 (b). I/we agree that this completed Proposal shall be the basis of the contract between the Firm and the Insurers.'

Those words mean what they say.





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We're on the Web!
See us at:

www.jltcsolutions.com/barcouncil

Next edition

- **Risk Management:**
No Excuses for Missing
Critical Dates
- **Professional Indemnity
Insurance:**
Summary of Terms 2006
- **PII Workshop, Nov 2005:**
Round Up Report
- **Risk Management
Programme Overview**
An update of the Risk
Management programme for
2005/2006

Disclaimer Notice:

In compiling the information contained in this newsletter, the Malaysian Bar Council and JLT have used their best endeavours to ensure that the information is correct and current at the time of publication but accept no responsibility for any error, omission or deficiency.

Material in the newsletter is intended to provide general information and should not be considered a substitute to the PII Master Policy and the Certificate of Insurance 2005 (and its Schedule). We strongly advise that you refer to the Policy for the full terms and conditions.

For more details and information, you should contact JLT – Bar Council PII Department.



The important thing is this: To be able at any moment to sacrifice what we are for what we could become

Charles Dubois

Footnote:

We are looking at ways to improve this newsletter and work towards ensuring that any areas of interest which concerns Risk Management will be highlighted in this newsletter. As always, we are pleased to hear from you on matters relating to this newsletter and PII Scheme 2005.

Contact:

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Email: corrinne@malaysianbar.org.my

The 1st Malaysian Professional Indemnity Insurance Workshop

From 16th –18th November 2005, the Malaysian Bar Council will host the 13th Malaysian Law Conference in Kuala Lumpur. In conjunction with this biennial event, the 1st Professional Indemnity Insurance (PII) Workshop will be held specifically for the legal profession in Malaysia. The theme for the Workshop is

“The Professional Indemnity Insurance Scheme – The Way Forward”

Programme

The Workshop will be held on 17th and 18th November 2005 at the Putra World Trade Centre, Kuala Lumpur, Malaysia.

The two-day programme will feature talks by representatives of Law Societies from the Commonwealth jurisdiction, insurers and re-insurers, brokers and risk consultants.

Workshop and forum will include:

- ◆ Overview: Professional Indemnity Insurance In Other Jurisdictions. Success Or Failure?
- ◆ Risk Management: Its Impact on Legal Professions.
- ◆ Claims Management: What Are The Options?

Why Should You Attend?

- ◆ Experts and consultants from the insurance industry and every major Law Society under the same roof.
- ◆ An important platform for Law Societies to share their experiences through dialogue and discussion.
- ◆ Opportunity to exchange ideas and increase awareness in professional indemnity insurance and risk management.

Social Programme

The Social Programme includes lunch and refreshment breaks with the Malaysian Law Conference delegates. It will culminate with the Malaysian Law Conference Dinner & Dance at the Pan Pacific Hotel on 18th November 2005.

WORKSHOP REGISTRATION FORM

YES, PLEASE SIGN ME UP

Full Name (please underline surname):

Title: Tun Tan Sri Dato' Justice Judge

Prof Dr Mr Mrs Ms

Institution/Company:

Address:

Postcode: City:

Country:

Telephone:

Fax:

Email:

Preferred name for Badge:

Note: Substitution/Cancellation

1. Substitution may be made for registered delegates provided the Organisers are informed in writing before the Workshop.
2. For cancellation, a refund less 10% will be given if the cancellation is received in writing by 2 November 2005. No refund will be given for cancellation received after 2 November 2005.

Workshop Registration Fee

	Total
i) Local	
Members of the Malaysian Bar (inclusive Conference Dinner and Dance)	
Conference Fee: RM600 X	RM.....
Non- Members (inclusive Conference Dinner and Dance)	
Conference Fee: RM900 X	RM.....
ii) Foreign Delegates (inclusive Conference Dinner and Dance)	
Conference Fee: USD400 X	USD.....
Registered Participants of Malaysian Law Conference (excluding dinner)	
Conference Fee: RM200 X	RM.....
Workshop Total Fee	RM.....
Workshop Fee includes limited participation in Malaysian Law Conference sessions from 17 th -18 th November 2005, conference materials, refreshment during breaks and Gala Dinner & Dance (unless stipulated otherwise).	USD.....

Method of Payment

Payment can be made by cheque, bank draft or bank transfer. Cheques and bank drafts should be made payable to "Bar Council Malaysian Law Conference". Payment must be made in advance of the Workshop.

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Website: www.malaysianbar.org.my

Bank Transfer: EON Bank Berhad, No 9, Jln Tun Tan Cheng Lok, 50000 Kuala Lumpur, Malaysia
Account No: 0005-10-001612-9
SWIFT CODE NO: EOBBMYKL

Please fax a copy of the bank transfer for verification purposes