Guidance

Guidance

Adequate and appropriate indemnity insurance

Adequate and appropriate indemnity insurance

Updated 25 November 2019 (Date first published: 12 September 2019)

Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

Who is this guidance for?

All SRA regulated firms and their managers

All solicitors or registered European lawyers (RELs) practising in a non-commercial body providing some reserved legal services.

All solicitors or RELs practising as freelance solicitors providing reserved legal services.

Purpose of this guidance

To explain the requirement to take out and maintain professional indemnity insurance that:

- provides adequate and appropriate cover in respect of services you provide or have provided (whether or not the services comprise reserved legal activities); and
- takes into account any alternative arrangements you or your clients may make.

This is referred to in this guidance as the "adequate and appropriate insurance" requirement.

General

The adequate and appropriate insurance requirement is the only insurance obligation imposed by us on:

- Solicitors and RELs that are practising as freelance solicitors (and not through a recognised sole practice) and are providing reserved legal services (under regulation 10.2(b) of the Authorisation of Individuals Regulations [https://higher-rights.sra.org.uk/solicitors/standards-regulations/authorisation-individuals-regulations/]).

- Solicitors and RELs in non-commercial bodies that are providing reserved legal services (see paragraph 5.6 of the Code of Conduct for Solicitors, RELs and RFLs [https://higher-rights.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/]). Since the non-commercial body itself will arrange the policy, the obligation on the solicitor or REL is to ensure that the body takes out insurance that meets the requirement

SRA authorised bodies and their managers are obliged to purchase qualifying insurance on the SRA's minimum terms and conditions but are also subject to the adequate and appropriate insurance requirement (see rule 3.1 of the SRA Indemnity Insurance Rules [https://higher-rights.sra.org.uk/solicitors/standards-regulations/indemnity-insurance-rules/]). This means that they will need to consider whether and when to purchase top up cover for their qualifying policy.

Assessing whether insurance is 'adequate and appropriate'

What is an ‘adequate and appropriate’ level and scope of cover will potentially differ from one solicitor or firm to the next and depend upon your individual business and circumstances.

If you are an SRA authorised body, we set a minimum level of insurance you are required to hold. This does not necessarily mean such cover would be considered adequate and appropriate in all cases and therefore you should consider the right insurance cover for your firm, having regard to the guidance below.

If you are a freelance solicitor or in a non-commercial body, the obligation to have adequate and appropriate insurance only arises if you provide reserved legal services. However, once the obligation has arisen it applies to all of your services to clients whether reserved or non-reserved**.**

When assessing whether the professional indemnity insurance you have in place is ‘adequate and appropriate’ we will want to see evidence that you have made a reasonable and rational assessment of the appropriate level and wider terms of professional indemnity insurance cover required. We will take into account a range of factors. We would therefore suggest that you consider these factors when arranging or assessing your insurance requirements. They include:

- your client profile
- the number and type of client matters

- the value of engagements you undertake each year
- an estimate of the probable maximum loss for each type of work undertaken (in most cases it is unlikely that the loss, and your potential liability for it, will be the full value of any underlying transaction or asset)
- your historical claims experience
- what alternative arrangements you or your clients may make to cover potential losses
- in the case of an SRA authorised body, the level of additional cover in place (called top up or excess layer cover) above the minimum requirement and the extent and level of any cap on your liability to clients that you impose above that requirement
- the extent to which the information provided to clients about insurance cover is transparent and appropriate to their needs. In the case of an authorised body, it may sometimes be appropriate, for example, for clients to accept risk above any SRA minimum level of cover, but this should be based on sufficient information being provided to enable them to make an informed decision to do so.

If a firm or individual can demonstrate to our satisfaction that they made an assessment, which includes consideration of any relevant factors listed in this guidance, and reached a reasonable and rational decision as to the appropriate level and wider terms of professional indemnity insurance cover, then we would not second guess that decision or take action for breach of this requirement.

Professional indemnity insurance for legal services normally provides cover on a 'claims made' basis. In other words, the cover relates to the period when the claim is made, not when the work that led to the claim was performed.

This means that, if you are still practising in the same body or same capacity, you must take into account past practice and the potential for historical claims when considering what an 'adequate and appropriate' level of insurance would be for your current practice. This is why the obligation is expressly stated to cover both the services you provide and those you have provided, where relevant.

Unlike the minimum terms and conditions which apply to SRA authorised firms, there is no requirement to purchase a specific level of run-off cover. However, we would expect you, when assessing what insurance cover is adequate and appropriate for your needs, to consider how you will meet any claims that may be made once you cease to practise. This is because the services cannot be adequately and appropriately insured if the solicitor knows that they will be unable to meet the potential claims arising from their practice.

Example of how an adequate and appropriate level may change over time:

Solicitor S leaves a recognised body and sets up as a freelance solicitor providing a mixture of reserved and non-reserved legal services. S intends to carry out a mix of employment work and criminal advocacy. S is subject to the adequate and appropriate insurance requirement, but as S is not operating through a recognised sole practice the obligation to purchase qualifying insurance on the SRA's minimum terms and conditions does not apply.

Year 1

In arranging adequate and appropriate insurance for the first year, S does not have to take into account past practice; any claims arising from previous years' cases would be covered by ongoing or run-off insurance arranged by the recognised body. In relation to current practice, S knows the type of clientele she is hoping to attract, the areas that she will specialise in and the likely risks and amounts at stake; and arranges cover accordingly. This includes both reserved and non-reserved services. S keeps this cover under review - if it appears during the year that the scale or risk of the work is higher than anticipated, S may need to increase cover.

Year 2 and 3

S continues to review the cover based on experience, bearing in mind factors such as changing caseload and claims that may be received from the previous year(s).

Year 4

S decides to concentrate solely on criminal advocacy. S considers that this is a lower risk area for negligence claims than employment. However, S decides not to lower cover yet because claims may still come in for employment matters from year 1, 2 or 3.

Information requirements

As explained above, one factor that we will consider when assessing whether the professional indemnity insurance level you have arranged is adequate and appropriate is the extent to which there has been transparency with clients.

A fully informed client might decide to instruct you even though you have a level of insurance that does not cover all of their possible losses because, for example, they are a repeat client who trusts the quality of services that you provide or because your charges are less than other available providers and this matters more to them. Alternatively, it may be that you are able to show that the firm itself will be able to cover the

loss or any excess. You must still be satisfied that it is in the client's best interests for you to proceed in these circumstances (SRA Principle 7).

If you are a freelance solicitor providing reserved legal services under regulation 10.2(b) of the Authorisation of Individuals Regulations, you must meet further specific information requirements. Your clients must be told before engagement that you are not required to meet the SRA's minimum terms and conditions. You must specify that alternative insurance arrangements are in place and if requested by the client, provide information about the cover provided. This requirement applies whether the client is purchasing reserved or non-reserved legal services from you. (See rule 4.3 of the SRA Transparency Rules [https://higher-rights.sra.org.uk/solicitors/standards-regulations/transparency-rules/] .)

Capping your liability to the client

An SRA authorised body is not allowed to cap its liability to clients below the minimum level under the SRA's minimum terms and conditions, as to do so would defeat the purpose of that level.

Whilst this particular restriction does not apply to solicitors or RELs practising outside of an authorised body, you should consider the following obligations in any instance when you seek to cap your liability to a client:

- The duty not to abuse your position by taking unfair advantage of clients (see paragraph 1.2 of both the Code of Conduct for Solicitors and RELs and the Code of Conduct for Firms).

- The duty to give clients information in a way they can understand and ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them (see paragraph 8.6 of the Code of Conduct for Solicitors and RELs and 7.1 of the Code of Conduct for Firms).

Any such cap should therefore:

i. be fair and reasonable in the particular circumstances of the client and the case;
ii. reflect the balance of power and knowledge between the solicitor, REL or firm and that client; and
iii. take into account the best interests of that client (SRA Principle 7); and

must be communicated to the client in a way that they can understand the impact.

In addition to our requirements, the client will be protected by general consumer law which focuses on making sure that terms of any contract

for service are not unfair.

We would therefore not expect to see caps put on liability to clients as a matter of routine.

Further guidance

Case studies: Adequate and appropriate indemnity insurance [https://higher-rights.sra.org.uk/solicitors/guidance/adequate-appropriate-indemnity-insurance/]

Further help

If you require further assistance, please contact the Professional Ethics helpline [https://higher-rights.sra.org.uk/home/contact-us/] .