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Time to brush up on your litigation insurance knowledge

Failure to advise clients on their options could land lawyers in hot water with the regulators, writes Robert Warner

Lawyers ought to be familiar with litigation finance and insurance and should be routinely advising all clients, from the impecunious to multinational corporations, about the options. Not doing so risks negligence claims and even action by professional regulators.

The market has grown exponentially over the past ten years and by now most litigators will have had some interaction with the available products.

That growing awareness means solicitors who fail to advise clients that they could insure their risk or secure non-recourse funding for the legal costs could find themselves under scrutiny if they are on the losing end of litigation.

Ultimately, such a failure could trigger a negligence claim for the amount of the client's legal costs as well as any costs the client is ordered to pay an opponent. In extreme circumstances it could lead to a "loss of chance" claim if, for example, a lack of advice about funding or risk mitigation meant that the client chose not to pursue a claim that could have been funded and/or insured.

Putting clients in an informed position requires solicitors to understand the products, and many lawyers are failing to keep pace.

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For example, one quirk of litigation insurance is that payment of the premium is usually "contingent upon success", meaning the client only pays a premium if their case succeeds. This is a significant nuance of litigation insurance which, if explained properly, is a fundamental element of what would constitute a client making an informed decision.

The boom in litigation finance creates additional issues for lawyers. Solely introducing clients to a "preferred" funder and ignoring the significant competition in the market could result in a lawyer facing criticism and even legal action.

For example, there could be potential claims brought by clients who argue that they have overpaid for the cost of their funding. Indeed, those claims could be for large sums as significant price variances in the millions or even tens of millions are common between competing funders.

There are broadly two significant drivers pushing lawyers to interact with the insurance and funding markets. The first is competition. Clients are increasingly seeking greater certainty over their legal budgets and want to know about any mechanisms that reduce the risk or cash drain associated with the disputes.

The second driver is the Solicitors Regulation Authority's code of conduct. Many of the concepts in the code are broad. General principles include putting the client in an informed position, highlighting any conflicts and generally acting at all times in the client's best interests.

While funding and insurance present significant business development opportunities for law firms, they could also create potential conflicting positions between lawyers and clients. Failing to understand, and therefore be able to advise on, the full range of financing options could result in a host of unintended consequences.

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