
Casual Conversations: A Panel Solicitor's Point of View



In a continuation of frank conversations with stakeholders of the Malaysian Bar PII Scheme, we sit down with three Panel Solicitors ("PS") to get their views of the Scheme and an in-depth look at their experiences so far in defending Insured.



Q1 How closely do you work with Insured Practices ("IP")?

Panel Solicitor 1

I try to work as closely as time permits with all my clients, including IPs. I do not distinguish between IPs and other clients in terms of time and effort.

My method for all clients is usually to have at least one experienced Associate or Partner assisting on every file I work on so that they can follow up and keep in touch with my client if I am not available.

Panel Solicitor 2

We work very closely with IPs. We take their views and file strategy into consideration.

Panel Solicitor 3

In essence, the IPs are our "clients". As such, we would work closely with them at all times. I do as a matter of practice send them drafts of pleadings/affidavits before the same are filed. The rule of thumb is that the more vigorous the litigation is, the more the IP would be involved.

Where we have been appointed to defend an IP, our actual client from whom ultimate instructions come is the Insurer. In practical terms, most of a PS' day to day communications are with the Echelon Claims Consultant ("Echelon"), who manage and administer the process on behalf of all parties. In court we represent the IP and we owe duties to the IP to represent him to the best of our abilities to that extent. We also owe duties to the court as do all lawyers and I might add that the court treats us as the IP's lawyer, not the Insurer's lawyer. We have to keep all parties fully informed of all developments and fulfil our respective roles so the flow of communication is constant.

In practical terms, although ultimately we take instructions from the Insurer, the IP would only feel the difference if there is a chance of settlement and a consensus between the IP and Insurers cannot be achieved, or if the Insurers decide to repudiate coverage. In all other respects the IP would "feel" like our client and we would treat the IP as such.

This means that as far as possible we would discuss all aspects of the case with the IP and seek to achieve consensus between the IP and Insurers so that the IP would feel fully part of the process.

I am not sure if I would call this a problem, but another difference between having an IP as a client and a lay person is that very often IPs, being lawyers themselves, will have a fixed idea how they would like their case handled and what arguments should be taken. This a bit of a mixed blessing.

It can sometimes be useful to have a lawyer contribute to the brainstorming on a case, but a lawyer fighting his own case may sometimes lose the objectivity required to make the best strategic decisions.



Q2 What are the common problems faced by PS in handling PII files?

Panel Solicitor 1

For the most part, when I work with IPs, it is not much different from any other client.

Perhaps the biggest difference is that for a PS engaged to defend an IP in court proceedings the "chain of instructions and command" is a little more complicated than in a normal case where we deal directly and owe duties only to our client who is also the direct party to the litigation.

If my views on how to proceed differ from the IP then we would usually have a discussion. So far I cannot remember a situation when an IP has not eventually been satisfied with the action taken, but sometimes the effort required to persuade a fellow lawyer may be disproportionate to the benefits gained from being able to debate the case with the IP.

Panel Solicitor 2

More often than not, the IPs would want to file application for striking out even though it is clear that the Court will be reluctant to allow the striking out based on the facts of the case. Also, IPs would want to challenge or object to procedural non-conformity by the Claimant's solicitors.

Getting complete documents from IP. IP being lawyers, may think that some documents are not relevant and would not provide it to us. Then at some point before or even during trial, the documents surface and this may throw us off tangent completely.

It is more challenging to deal with IPs who are not litigation lawyers due to their lack of experience in court procedures.

Another problem is that IP would ask for reduction in our fees.

Panel Solicitor 3

A common problem is IPs who are uncooperative and irresponsible. We do our best to help them but they must help themselves by being concerned and involved in the litigation.



Q3 As a PS, what are your expectations of IPs? Have there been any exceptional experiences you wish to share from your encounters?

Panel Solicitor 1

Generally, I would expect full and frank disclosure of all relevant facts and documents in a timely fashion; cooperation and availability from an IP so that I can represent the IP in court to the fullest. This is much the same as I would expect from any client.

Perhaps the main difference between an IP under the Scheme and other clients is that failure by a lay client to meet my expectations would probably lead me to grumble loudly to my associate, whereas failure by an IP would have to be reported to the Insurers and might be grounds for the Insurers to repudiate coverage.

I do not see any material difference between my expectations generally and the responses from IPs or lay clients for each of the specific situations above except in cases where there are allegations of fraud or dishonesty against a lay client or IP. In such cases a PS has to be especially diligent and objective in assessing if the instructions given by the IP are truthful and planning strategy.

In a normal case involving a lay client, even if such client has been dishonest or fraudulent, his or her solicitor might still continue to represent the client provided the strategy adopted is ethical and not misleading, perhaps with the objective of achieving a fair settlement.

However, dishonesty or fraud by an IP would ipso facto be grounds to repudiate cover and obviously, if an IP has been dishonest or fraudulent the tendency would be to hide this from all parties including the Insurers and PS.

I have heard anecdotes of cases where obtaining consensus on settlements have given rise to problems especially where there will be a financial or reputational impact on an IP but in practice I have actually never come across a problem. The Insurers of course have the final say in most settlements (unless the dispute resolution mechanism under the policy is adopted which I have never personally experienced).

They generally make objective decisions based on advice from lawyers and loss adjusters and from their own experience. I like to involve the IPs as part of the decision making process so that they can be assured the final decision will be fair to them. In my experience IPs who have been involved in the process have been happy to follow the decisions of the Insurers.

Panel Solicitor 2

In general, IPs are defensive. Most of them think that they are not liable and the claims against them are baseless. Therefore, their first instruction is always to file striking out application. They also seek opinions of other lawyer friends, who would advise them without having the benefit of full facts/documents.

We expect for the IPs to have followed the risk management practice but most of the time there is no RM check list or even if they have one in place, they are not followed. We also encountered many IPs who have delegated their duties to third parties; either to their clerks, junior legal assistants etc. Many IPs have resorted to shortcuts in their practises that have resulted in the situation they are in.

In respect of lawyers missing court dates, we have encountered one file so far. This particular IP was doing the client (for another matter) a favour by filing Defence for him while the client negotiated with the plaintiff for settlement. The IP didn't attend Court on that day because he had verbally asked the client to attend Court personally since it was the IP's position that he was not representing the client. The Client failed to attend Court and judgment was entered against him. After full trial, the Court found the IP to be negligent. When it comes to company work related claims, we find IPs are inclined to

proceed with standard agreements thus not recording all the terms discussed in the negotiation meetings held in the agreement of the IPs' draft. Even if the parties have specifically wished to omit certain terms, these instructions are not subsequently confirmed in writing.

Panel Solicitor 3

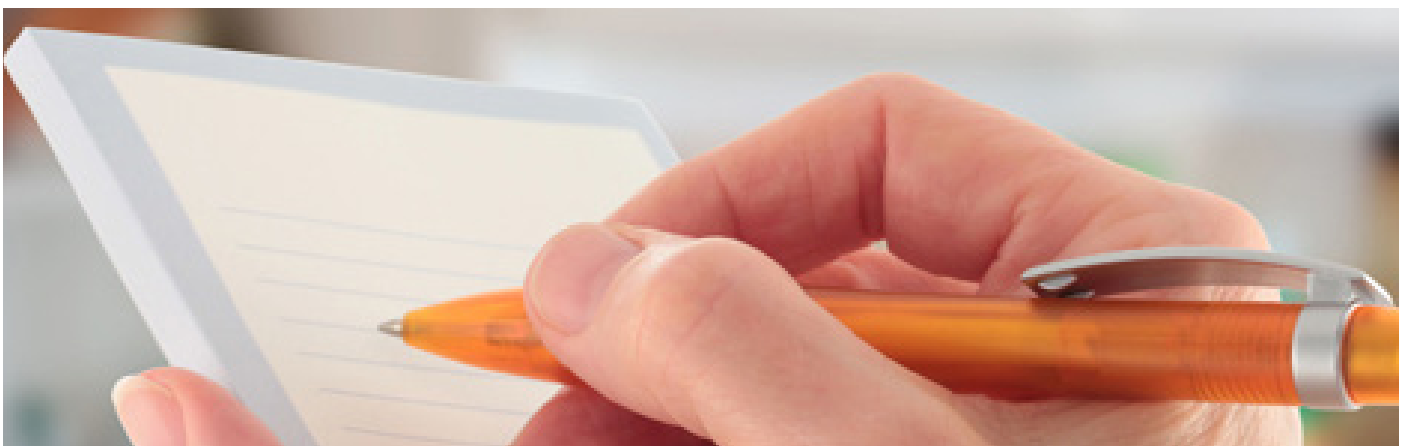
Generally speaking, the majority of IPs are responsible and unproblematic.

With regards to fraud and/or embezzlement in conveyancing related claims, these are the most difficult and sensitive in that the IP's bona fides are being questioned. Unless the IP is treated sensitively, the cooperation may be negatively impacted.

When the claim relates to transfer of property, the standard of a conveyancing practitioners vary greatly from the very competent to the other extreme. This type of claim brings out the contrast in our fellow Members of the Bar. It also underscores the mantra that a practitioner should stick to his/her area of expertise. Thus, even the most illustrious of litigators may be an incompetent conveyancer.

When it comes to cases of lawyers missing their court dates it is usually a sole practitioner who is trying his best to juggle his/her files. On the other hand, there are also those who through sheer lack of care ought not to be in practice.

When a settlement is offered and/or can be reached – most IPs are pragmatic but naturally are driven by the bottom line ie if their exposure is restricted to the base excess, they may choose to litigate as the downside to the case being lost is pretty much carried by the Insurer.



Q4 What are your views on uncooperative lawyers, in examples below:

- a. IP notified third party proceeding against him, but IP failed to respond to any correspondence from the Insurers and/or their representatives; AND did not provide any choice of PS (no appointment of PS). IP also did not provide any further cause papers/documents after notification.**
- b. IP notified date for case management (which is in three days' time) and did not attend court. At this point a PS is still not appointed, and when requested by the Broker/Insurers for IP to provide an update – no information is forthcoming. How could this affect the IP?**

Panel Solicitor 1

I would think that in both scenarios (a) and (b) the IP has incurred the risk of insurance cover being repudiated.

Before appointment of the PS, an IP must still take all relevant steps to defend itself and to protect the interests of the Insurers. Failure to respond to the Insurers after notification, or to take steps to protect itself, especially after being aware of proceedings might be grounds for repudiation.

In example (a), it is possible that after it notified the PS did nothing or that it proceeded to act for itself or appointed its own lawyers in either case without reference to the Insurers. Doing nothing could obviously lead to problems.

Perhaps surprisingly, representing itself or appointing its own lawyers without reference to the Insurers might also lead to problems, for example if the strategy or steps adopted in the defence turned out to be inadequate or worse still, defective.

The proper procedure which would avoid any problems should be to follow up closely with the Insurers immediately.

Similarly in example (b), an IP cannot assume that when the Insurers are informed of a date, that the IP's obligations have ended. Until a PS has been appointed, the IP must take all necessary steps, including attendance at court.

Panel Solicitor 2

In scenario (a), Insurers should decline based on breach of conditions in the Certificate of Insurance. However, before declining, due notices should be given to IPs and opportunities should be given to them to explain why they failed to do so.

In the following scenario (b), attendance in Court for case management and providing update to Insurers are crucial. Adverse directions or order may be given against the IP in their failure to attend the case management. In such an event the Insurers will be prejudiced and may decline the claim.

Panel Solicitor 3

For the former scenario, I subscribe to the saying that you must help yourself – in this regard I am not sympathetic to IPs who do not provide information in a timely manner.

I maintain the same for scenario (b), although I would add however that I would also expect the appointment of a PS to be fast tracked in these circumstances.

Q5 Could you share with us a few of your experiences dealing with IPs (if different from above and/or in addition to above).

Panel Solicitor 1

I would rather not go into specifics except to say that IPs are human beings just like normal lay clients (hence would naturally be anxious about their cases). They are also legally trained. So generally a PS representing an IP would have to be on his/her toes at all times.

Panel Solicitor 2

We have dealt with young and inexperienced IPs who were made partners of firms. The firms are controlled by former Members of the Bar who have been struck off the rolls. These practises have resulted in the young and inexperienced IPs sued for negligence. It is very disheartening to see young Members of the Bar being sued and held liable for negligent act/misconduct of unscrupulous former Members of the Bar.

Panel Solicitor 3

I have felt a pang of conscience on a number of occasions when I have successfully defended claims as I know that the IP is a danger to the public.



Q6 **How do you think IPs could better manage their claims, and what would your advice be to IPs with claims?**

Panel Solicitor 1

As I said, an IP would naturally be anxious. Sometimes, a defendant with legal knowledge has more fears and anxiety than one without.

In fact, in my experience, lawyers being sued suffer more emotional trauma than other people and the stress can be tremendous. It can affect their whole lives and sometimes affects their ability to manage their own claim.

If I see an IP is particularly suffering from inordinate stress I usually advise them to try to treat their case as just another client's file in the office. I actually tell them to open a file in the normal way, index it normally, put it away except when something has to be done and treat it just like a normal file. That way it can be just another routine case and not consume all their energy. That way they can try to get on with business as normal.

I also remind them that the reason they took out insurance in the first place was for the very reason that if they are sued, they can effectively transfer the worry to the PS and the Insurers. Once an IP has been to see me, effectively his/her case becomes my case and I can do the worrying for both of us!

Panel Solicitor 2

Always remember client is your number ONE enemy. Always ensure that all correspondences and/or instructions are property documented in writing.

Panel Solicitor 3

Stay in constant communication with the PS.

Q7 **Based on your experience handling PII files, what risk management and/or best practices can you share?**

Panel Solicitor 1

Risk management is largely about having good systems in place and common sense. A lawyer with a good system which is diligently followed usually doesn't go far wrong. In situations not covered by the system, common sense is usually a good starting and ending point.

In some situations, if a lawyer (or client) dreams up a brilliant perhaps slightly dodgy scheme and asks me "can I do it", as a rule of thumb, I always advise them to imagine that they are standing up in court giving evidence to a judge or better still, submitting to the entire Federal Court Bench that there's nothing wrong with what they just did... Sometimes a scheme that looks really brilliant on paper sounds really stupid when described out aloud under such circumstances.

Panel Solicitor 2

Same as my answer for question 6.

Panel Solicitor 3

Do not venture out of your area of practice!



The PII Scheme Panel Solicitors List can be found on page 31.