Bulletin

Risk Alert

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Risk Manager's Column

CHANGE OF ADDRESS
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CLAIMS TRENDS

Q 1 2011	Conveyancing	RAF Prescription	RAF Undersettlements	Litigation	General prescription	Commercial	Other	Total
No of claims	42	26	7	15	12	11	10	123
Percentage of total	34%	21%	6%	12%	10%	9%	8%	100%

As can be seen from the above table, there were 123 claims reported to the insurers in the first quarter of the 2011 year (1 July to 30 September 2011). Of these claims, 34% arose out of conveyancing instructions, while a total of 27% arose out of RAF matters.

Although there is an improvement in the number of conveyancing claims by comparison with the 2008 and 2009 years, the number of these claims is still unacceptably high. An analysis of these claims in the first quarter of 2011 reveals a disturbing carelessness amongst conveyancers and their staff when it comes to the disbursement of clients' trust money.

More than half of all conveyancing claims notified to us in the first quarter of the 2011 insurance year arose from allegedly <u>unauthorised</u> and/or <u>premature payments of trust money</u>.

There are various reasons for this type of payment, *inter alia*, the conveyancer/secretary pays the deposit or purchase price or part thereof:

- to the seller/developer/third party, before registration of transfer, without the written permission of the purchaser;
- to the seller/developer/third party, before registration of transfer, with the permission of the purchaser, but fails to properly advise the purchaser of the risks of doing so;
- to the incorrect party, after registration (sometimes because of fraud on the part of the payee).

The issue of unauthorised payments of trust money is an extremely serious one. The courts have over the past few years been particularly unsympathetic towards practitioners who do not deal with funds held in trust with caution.

(For the SCA's view on the duties of practitioners when dealing with trust money, see *Hirschowitz Flionis v Bartlett and Another* 2006(3) SA 575 SCA and *Du Preez and Others v Zwiegers* (2008 (4) SA 627 SCA.)

We once again urge all practitioners to exercise <u>extreme caution</u> when paying out money which is held in trust.

OPTIONS TO REDUCE LIMITS OF INDEMNITY: COMMENTS REQUIRED FROM THE PROFESSION

DECISION TO CHANGE THE POLICY COMMENCING 1 JULY 2012

The Board of the AIIF has decided that the options to reduce limits of indemnity and deductibles should no longer be offered to the profession as from 1 July 2012 for, *inter alia*, the reasons set out below.

HISTORY AND BACKGROUND

In 2001, the Board of the Attorneys Insurance Indemnity Fund ("AIIF") made a decision to offer practitioners options to reduce their limits of indemnity and deductibles by either 50% (option 2)or 75% (option 3) ("the options").

This decision was motivated by the concerns expressed by several small practices (particularly RAF practitioners and those who felt that they were not at risk for claims requiring high levels of professional indemnity cover) that the deductibles were unaffordably high.

Only a comparatively small number of practices chose one of the options, but initially, there was sufficient response from the profession for the AIIF to continue offering them to the profession. Each year has seen fewer practices electing to take one of the options and in the 2011/2012 insurance year, **less than 0.3% of all practices chose either option 2 or 3.**

At the time when the options were introduced, in the region of 200 claims or potential claims were reported to the AIIF every year. Currently the numbers have trebled to well over 600 per year. There are sometimes multiple claims against one firm and very often, particularly with prescribed and under-settled RAF matters, the amounts claimed are much higher than they previously were.

This increase in claims puts practitioners at great risk, particularly if they have chosen one of the options to reduce indemnity.

For example: A practice with 6 principals, on option 3, will only have **annual** cover of **R 390 625**. This cover will not provide adequate protection should there be multiple claims against the practice in the same year. One prescribed RAF matter could very easily breach this limit. **It should be borne in mind that the AIIF limit of indemnity is an annual aggregate limit and NOT a limit per claim!**

Although the professional indemnity provided free of charge to the profession is aimed at protecting the profession against claims, it is also there to protect the public in the event of damages suffered as a result of practitioners' breaches of mandate and mistakes. The reduced cover no longer adequately protects most clients and the public.

Most financial institutions now insist that practitioners on their panels do not reduce their limits of indemnity. They require certificates from the AIIF confirming that these practitioners have the full cover, failing which they may be suspended or removed from the institution's panel. As a rule, top-up professional indemnity insurance only covers practitioners for claims in excess of the standard AIIF cover. Taking either option 2 or 3 could leave practitioners with top-up insurance with a gap in their cover.

We request that members of the profession kindly provide us with their comments on the above proposal, on or before 1 March 2012.

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Important notice

THEFT BY STAFF MEMBERS

The efficacy and convenience of information technology and electronic banking has brought with it attendant risks of theft and fraud in relation to the practices of attorneys. Whilst there is no precise correlation, these events tend to increase during times of economic downturn and volatility.

To this end a number of instances of theft and fraud in relation to attorneys trust and business accounts have been brought to the attention of the Society. Practitioners are accordingly cautioned to maintain a heightened level of vigilance and awareness and ensure that proper and effective risk management policies and controls are put in place to address and mitigate against such risks.

Important notice continued...

Persons involved in such conduct are usually high level paralegals, especially in the conveyancing department and sometimes in the accounting department and occasionally professional staff.

Whilst not comprehensive and exhaustive the following types of theft and fraud have been reported to the Society:-

1. Creation of a fictitious property transaction against which bridging finance would be applied for and the proceeds stolen; the capital and interest would then be unlawfully paid from the accounts of other trust creditors;
2. Refunds received for whatever reason into the trust of the firm on behalf of clients (usually bond cancellation refunds) are paid into a bank account belonging to an employee of the firm instead of the account of the client;
3. Bypassing any controls the firm has instituted to address risk, which require partner authorisation in respect of cheques and EFT payments. In such a case the person seeking to perpetrate the fraud would seek the authorisation of another partner in the firm other than the partner in charge of the department to which the payment relates. A false explanation usually accompanies the request for authorisation. For example, a payment was due to a bond originator to settle bond initiation fees, etc;

Lastly, practitioners are once again urged to review the levels of their fidelity and other insurance cover.

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Risk management tips

Topics in this series so far:
- Engagement Management (*May 2010*)
- Managing client's expectations (*August 2010*)
- Analysing the Facts and the Law (*November 2010*)
- Deciding on and Planning an Appropriate Strategy (Part 1) (*November 2010*)
- Deciding on and Planning an Appropriate Strategy (Part 2) (*February 2011*)
- Supervision (*May 2011*)

COMMUNICATION

Many professional indemnity claims against practitioners result from problems with communication between the practitioner and her/his client or between two practitioners.

It goes without saying that communication is one of the most important tools at a practitioner's disposal. No number of qualifications, no amount of research, no years of practical experience can help if the practitioner is unable to effectively communicate with all role players (such as clients, witnesses, opposing attorneys, correspondent attorneys, counsel, magistrates or judges.)

Miscommunication can occur at any stage during the fulfilment of the mandate, for example, when:
- taking initial instructions;
- advising client on alternative courses of action and/or the implications thereof;
- taking instructions during the course of the mandate;
- advising client during the course of the mandate;
- discussing settlement of a matter;
- closing the mandate;
- seeking advice from a colleague, expert or counsel; or
- communicating with the representative of the other party.

It is important to carefully consider how the other person will understand your communication and how you should consider hers/his. There are many obvious and some more subtle barriers to effective communication:

i. Communication with client

Some factors to consider are the medium used, age, language, culture, literacy, knowledge/education, experience, emotional/mental state, **time constraints**, expectations, sexism and ethical obligations.

i. Communication with other members of the legal profession

Here, one can assume that there will be some equality insofar as literacy, knowledge and education are concerned. Some factors which still play a role are: hierarchy, age, language, culture, emotional state, competition, workload, **time pressure**, the adversarial nature of the interaction, personality and ethics.

Verbal communication:

*Is what you have actually **said** (or meant to say) what the other party has actually **heard**?*

Some guidelines:

- The person you are conversing with should be put at her/his ease, to facilitate the discussion.
- Use plain language wherever possible. Avoid jargon and legalese. These are sometimes used more out of insecurity than necessity.
- Repeat what you have said in different words to make sure that you are understood.
- Ask questions. Elicit a response from your listener to ensure that s/he has in fact understood the meaning and implications of what you have said.
- Develop listening skills. Talk less and listen more. Make sure that you have understood what the other person has said/intended to say. Repeat what you think you have heard, to make sure that you have got it right.
- Use probing questions to ensure that you get all relevant information.

> Follow up verbal discussions with written confirmation of the discussions, wherever possible and practical. This gives the other person the opportunity to correct any miscommunication. It also provides a reminder of, and proof of the content of a discussion months later, when memories may have faded.

Written communication:

Somehow, when confronted with the task of reducing matters to writing, many of us in the legal profession (from candidate attorneys to judges) are unable to do so in plain language. So much legal writing is smothered in legalese. We use clichés and choose the largest, most pedantic words. Our sentences are sometimes several lines long – and as a result, often difficult to follow.

In discussing the use of plain language by attorneys, one of my colleagues had the following to say: "*I am afraid that, if I don't use impressive legal terminology and I make my writing too simple, my client or colleague will not respect me and will think that I am not well educated.*"

It is actually more challenging to write in plain language than to ramble on and hide behind stock legal phrases. It always fills me with admiration when I come across an easy-to-read document that clearly and succinctly conveys ideas and information simply. There is an art in explaining a complex concept in simple language.

Much has been written on this topic and I am certainly not qualified to go into it in any detail. But here are a few basic ideas:

- Plan and structure your document so that there is a logical flow of ideas.
- Make it as easy as possible to read and understand.
- Keep sentences short. (Aim to use no more than 20 words.)
- Choose the active rather than the passive voice.
- Use precise words or terminology for clarity.
- Layout is important. White space can be used effectively.
- Emphasize key issues with devices like headings, bullets and highlighting.
- Express yourself simply, concisely and clearly.
- Remove all unnecessary words from your text.
- Change complicated, pretentious legalese to simple language.
- Avoid unnecessary repetition.

The Consumer Protection Act (CPA) and plain language

Communication in plain language is no longer simply a "nice to have". The CPA has thrown out the challenge to practitioners to provide information about products and services to consumers in "plain and understandable" language, in a way that complies with the law. This requirement will inevitably provide special challenges for practitioners where the drafting of contracts is concerned.

Please note: Since I drafted this article, *De Rebus* has published a helpful article on plain legal language, by Esti Louw (in 2011 (Dec) DR 22.)

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Attorneys practice and internet related risks part 2 (continued from November Bulletin, 5/2011)

3. MANAGING INTERNET RISKS:

3.1 Screening techniques - It is important for law firms to use appropriate screening techniques to avoid unintended attorney-client relationships.

A conspicuous **disclaimer** should be placed on the firm's website clearly stating that no attorney-client relationship exists unless and until expressly agreed to by all parties, preferably in a written **engagement letter** specifying the identity of the client, the scope of services to be provided, and the fee payable (at a minimum).

Another suggestion is to switch off the comment feature in your blog to avoid spam comments or other inappropriate replies being posted.

A disclaimer should be used to clearly point out that the blog, or the firm's website does not give legal advice. Generally posting content on a website for all to read is not considered to be the provision of legal services, however in some scenarios, blog entries could constitute legal advice. Once an attorney refers a client to information posted on his blog, the referral could be construed as providing advice using the blog.

When blogging, an attorney should review the regulatory rules on advertising.

In *Beazley Brief*, issue 20, February 2010, an American lawyer and risk management practitioner, David Jargiello, offers some common-sense advice that you should ensure that you know where you are and who you are talking to. He observes that when discussing the propriety of lawyers' social networking, there is a tendency to treat the practice as monolithic when in fact it is not. Jargiello stresses that the websites which are for communication among lawyers skirt the edges of an attorney-client relationship (e.g. Free Advice.com). It is therefore imperative to know your audience.

Respect client confidentiality even online. An attorney has no right to post confidential clients' information, for example on his Facebook.

Social networking sites are inappropriate for attorney-client communications and should not be used as a vehicle to provide legal advice. **Do not practice law on Facebook!**

3.2 Securing confidential communication in the internet

If law firms do not take reasonable measures to ensure that their electronic communications are private and secure, there is a risk that privileged information will be compromised.

Law firms should use restricted means of communication, such as encryption. **Encryption** is one form of protection that should be used for all confidential information that is transmitted over the Internet. Users without the proper key, that is, unauthorised recipients or browsers, cannot read encrypted messages. However it is unlikely that all of the firm's clients will have encryption hardware and software. Everything being equal, encryption is better than, and preferable to, using a disclaimer to an e-mail. Disclaimers are easily ignored. Law firms need to know what is going on in the technology realm and update their security practices to protect their clients' data. Information must still be protected even whilst it is stored in the computer. **Authentication** is one measure that may be employed to identify anyone seeking access. A **password** is the most common authentication device used to prevent user impersonation. It must be well chosen and changed frequently. Using a password only once, enhances authentication. **Digital signature** is another authentication tool that confirms to a recipient with certainty, who signed the document and that nothing contained therein has been altered.

A **firewall** can be used in a network that is connected to the internet. It is explained as policing traffic to internal systems. A firewall can log and examine all network connections, filter incoming communications, require authentication, restrict access to selected systems, and block certain services.

Partitioning is another tool that can be used to safeguard confidential information. It is applied so that internal computer resources are inaccessible. Confidential documents should not be stored on a system accessible to the public. Likewise a publicly accessible system should not be run on a firm's internal network.

The use of a **direct modem link** ensures that messages are transmitted directly between modems over telephone lines. Because

Attorneys practice and internet related risks part 2 (continued from November Bulletin, 5/2011)

these messages do not have to pass through a third-party computer, security risks are minimised.

Consider implementing a **service access policy** to assess what types of connectivity with other systems will be permitted. For example if e-mail is the only needed service, then a firm can restrict other forms of access, such as file transfer protocol (FTP).

Information can further be protected by converting word documents to PDF or some other non-changeable format before e-mailing them. The PDF format permits a party to read the document but does not enable that party to make changes or to read a previous version.

The use of a large network enhances the hacker threat, since larger networks are accessible to proportionally more hackers. **A small private network** or the use of the same commercial provider may be advisable.

3.3 Records-management policy
A clear policy that governs retention and destruction of electronic documents is imperative for attorneys and their clients. Law firms may consider employing a person responsible for overseeing their client data management, to ensure that electronic data are retained and are accessible as and when necessary to comply with discovery requirements on a timely basis.
In concluding, when using electronic media such as a blog, e-mail, and internet, the following checklist might be used-
• Include a disclaimer
• Do not offer legal advice
• Avoid creating attorney-client relationships
• Have regard to your law society's advertising rules
• Have an e-mail policy
• Enhance your technology's security by using:
- encryption
- a firewall
- a partition
- the conversion of documents to PDF formats
- an access service policy
- authentication tools
- a direct modem link (where possible)
- a small network (where possible)
- the same commercial service provider
• Obtain waiver from clients regarding e-mail communication
• Ensure that your attorney-client relationship is reduced to writing.

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Managing risks brought about by the sharing of office space by attorneys

A group of attorneys usually decides to share office space in order to limit overhead costs, share resources and enhance their image. Such an arrangement may nevertheless present risks. For example an apparent partnership can be created, which in turn places them at risk of being found vicariously liable for their office mates' misconduct. There is an added risk of breach of confidential client information and other ethical violations.

A single receptionist who opens mail or takes messages for all the various firms in the office is exposed to confidential information from each firm. Papers may be left in the shared conference rooms or photo copiers. Such confidentiality breaches can lead to, among others, ethical complaints and raise the likelihood that the group of attorneys will be found to be a *de facto* partnership, because they appear to be treating themselves like one big law firm.

Another problem that may arise is when attorneys in the same space represent opponents. Those attorneys who are in *de facto* partnerships, representing opposing sides may be found to be unethical.

Managing space risks

The following measures are proposed:
a. General
It is advisable to plan ahead and adhere strictly to internal rules and ethics. Communication must be at the core of the office mates' relationship.

b. Create autonomy for each practice
It is important to maintain strict separation of all practices in the shared space.

Do not share confidential information with officemates without the consent of a client. Obtain the prior consent of a client to your officemate's covering for you in court. Similarly a client ought to first approve fee-sharing arrangements with non-affiliated attorneys.

It is also imperative not to communicate to the public the false impression that may suggest affiliation with other attorneys. It is therefore important not to share letterheads with your officemates. All door signs must clearly indicate the separate firms. Communicating correctly is crucial. Your office receptionist must be instructed to refer to each firm separately. She/he must answer the telephone with the correct firm's name and must refrain from using collective phrases like "law offices."

c. Document the office sharing arrangement. The nature of the space sharing arrangement should be reduced to writing.

d. Do background checks on potential officemates.

e. Train all attorneys and staff to maintain client confidences.

f. Written guidelines need to be in place to help everyone understand the scope of their responsibilities. The guidelines must also be used to orientate any new employee. These guidelines should be reviewed regularly.

g. Minimise sharing of staff.
Do not share staff for handling of opening mail, faxes, filing.

h. Take extra precautions when officemates represent your clients' opponents.

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RAF Matters

RAF CASE LAW

1 *Akai v RAF*, South Gauteng High Court, case no: 10/04245, 13/10/2011

When this matter came before the Court, the only issue to be adjudicated upon was **general damages.** The defendant had raised a special plea in terms of which it questioned the Court's jurisdiction to deal with the issue of general damages, in the light of the plaintiff's failure to comply with regulation 3 to the amended Road Accident Fund Act 56 of 1996 (the Act).

In terms of regulation 3(1) a claimant who wishes to obtain compensation for non-pecuniary loss must submit a "serious injury assessment report" in terms of section 17 (1A) of the Act read with Regulation 3(3) after having been assessed by a medical practitioner. In terms of regulation 3(3)(c) the Fund shall only be obliged to compensate a third party for non-pecuniary loss as provided for in the Act, if a claim is supported by a serious injury assessment report submitted in terms of the Act and the Regulations, and the Road Accident Fund (RAF) is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in the regulations.

In the present case, the RAF had rejected the plaintiff's experts' serious injury assessments after they had been submitted. In its special plea, the RAF contended that, once it had rejected these reports the plaintiff was required to refer the dispute to an appeals tribunal for determination.

Kathree-Setiloane, J held that the reasons for the RAF's rejection of the assessments did not constitute a sound and proper basis for their non-acceptance. He held that in the absence of a valid dispute on the seriousness of the plaintiff's injuries, the plaintiff was not required, in terms of regulation 3, to refer his claim for general damages to the appeals tribunal. The defendant's special plea was accordingly dismissed and the RAF was ordered to pay R200 000 as general damages.

2 *Tshabangu v RAF* (2009/49589) {ZAGPJHC145 (19 October 2011)

The RAF had unsuccessfully raised a special plea that, in terms of section 17(1A) read together with regulation 3(1) of the Act, the plaintiff did not qualify for compensation for general damages as the plaintiff's whole person impairment ("WPI") was assessed at 8 percent.

The plaintiff had submitted three separate RAF4 forms in support of his claim for general damages based on the "narrative test". The RAF had not objected to the content of the forms.

Weiner, J delivered judgment in favour of the plaintiff on 18 August 2011. He also ordered that a rule nisi be issued, calling upon the RAF's senior claims manager and its attorneys to show cause why they should not be ordered to pay costs *de bonis propriis* on the attorney and client scale. The reason for this was the Court's dissatisfaction with the way in which preparation for trial had been conducted and the fact that the special plea had been raised and pursued.

The learned judge noted that the RAF had failed to follow the proper procedures in objecting to the RAF4 forms based on the narrative test, but had still persisted with its special plea that the WPI fell below 30%. He made reference to two earlier South Gauteng judgments of Claasens, J namely *Smith and Another v Road Accident Fund*, case no: 47697/09 and *Mianbo v Road Accident Fund*, case no:00322/10, in which the same issue had been raised in a special plea and dismissed by the Court. He noted that the firm of attorneys acting in the present case had acted for the RAF in those two matters as well.

Weiner, J expressed his displeasure with the way in which RAF matters were generally conducted by the RAF and its attorneys. He stated that "It borders on contempt of court that a firm of attorneys against whom several judgments have been granted on a particular issue continues to file the same plea and persists with it when it is not applicable in the particular circumstances of the case." He found that both the defendant and the defendant's attorneys had "failed to a material degree to promote the effective disposal of this litigation".

He ordered the defendant and its attorneys to pay the costs from 12 May 2011 to date, jointly and severally, the one paying the other to be absolved. He also directed the Registrar to send a copy of the judgment and order to the Law Society of the Northern Provinces, to investigate the conduct of the defendant's attorneys.

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Letters to the Editor

A practitioner wrote us the following letter:

RE: COVER FOR INSURANCE

1.We refer to the above matter and to our telephone conversation.

2. We wish to have clarity on 2 (two) issues:
2.1 Where as a practitioner I wish to involve you as my insurer for professional negligence, how do I get you involved in the proceedings;
2.2 Where I want to sue a colleague for professional negligence I know there are forms to be completed.

3. We await your urgent assistance.

We replied as follows:

Re: COVER FOR INSURANCE

I refer to your letter dated 25 October 2011, addressed to the Attorneys Fidelity Fund, and which has been forwarded to me for a response.

As a practitioner, you enjoy automatic cover for professional negligence, through the AIIF, provided that you are a practising attorney who is in possession of a Fidelity Fund certificate. You can find a copy of the Scheme Policy on our website at www.aiif.co.za. I attach a copy thereof for your convenience. You will be able to calculate your annual limit of indemnity and deductible by referring to Schedule A of the Policy.

Ad Paragraph 2.1
Because the cover is automatic, you do not have to specifically apply for it. If you had a claim against your firm, you would need to advise us in writing of this fact and we would be able to assist you further. In this regard, please see the conditions set out in clauses 6.1 and 6.10 of the attached Policy.

Ad paragraph 2.2
In the event that you wish to institute action for professional negligence against a colleague, you would need to serve either a letter of demand or summons on that colleague – as you would normally do for any other civil action.

You will note that clause 6.8 of the Policy stipulates that no rights against the insurer are given to any person other than the insured. Therefore, your client will not be entitled to make any claim against the insurer and does not have to complete any forms. (However, the insured attorney must complete the necessary claim forms in order to be indemnified – see clause 6.1 of the Policy).

I trust that this reply adequately addresses your enquiries.

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Risk Alert is your Bulletin so please tell us what you would like to see in it. Readers can send suggestions to ann.bertelsmann@aon.co.za

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