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RISKALERT

MAY 2015 NO 2/2015

IN THIS EDITION

AIIF: Ann Bertelsmann, Risk Manager, Attorneys Insurance Indemnity Fund, 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900 Website: www.aiif.co.za • Twitter handle: @AIIFZA

Prescription Alert, 2nd Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 149 • Tel: (021) 422 2830 • Fax: (021) 422 2990 E-mail: info@aiif.co.za • Website: www.aiif.co.za

Attorneys Fidelity Fund, 5th Floor, Waalburg Building, 28 Wale Street, Cape Town 8001 • PO Box 3062, Cape Town, 8000, South Africa, Docex 154 • Tel: (021) 424 5351 • Fax: (021) 423 4819 E-mail: attorneys@fidfund.co.za • Website: www.fidfund.co.za

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Attorneys Insurance Indemnity Fund (NPC)
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RISK MANAGER'S COLUMN

Ann Bertelsmann, Risk Manager

I have pleasure in welcoming and re-introducing Sithembinkosi Joseph Kunene who rejoined the AIIF team in the position of Senior Legal Manager in February 2015. He was admitted as an attorney in 1991 and practised for eight years before joining the Attorneys Fidelity Fund as an Assistant Claims Manager. In 2001, Sithembi joined the AIIF team, first as Senior Legal Adviser and later becoming Claims Manager. In 2008, he decided to explore the field of professional indemnity broking, as Claims Manager in the Professional Services division of Glenrand MIB (now Aon). After going back into practice for a short while, he was persuaded to join the AIIF team again.

Sithembinkosi Joseph Kunene , Senior Legal Manager

WARNING! CONVEYANCING SCAM

For more information on this scam, please see *Risk Alert Bulletin* 1/2015, p 8 and 5/2014, p 5 or visit our website www.aiif.co.za. Also see Marius van Staden's article on page 7 below.
See also the LSSA's helpful guidelines on managing e-mails - http://www.lssa.org.za/upload/LSSA_Management_of_email_guideline_(2012).pdf

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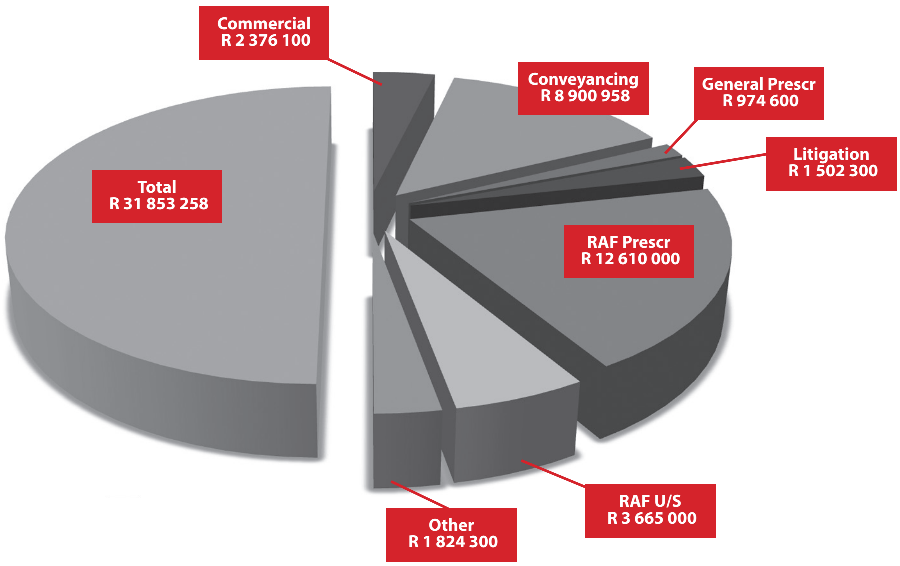
RISK MANAGER'S COLUMN continued...

As can be seen in Table 1 below, 2014 and 2012 have been particularly costly years insofar as the payment of practitioners' professional indemnity (PI) claims is concerned. Your PI insurer, the Attorneys Insurance Indemnity Fund (AIIF) has paid out claims with a total gross value of over R70.6 million in 2014 and R72. 3 million in 2012.

Table 1: Gross claims paid for the past 6 years

2014	2013	2012	2011	2010	2009
R70 647 050	R58 723 356	R72 320 035	R65 982 439	R45 945 792	R54 813 540

Graph 1: TOTAL INCURRED VALUES* BY CLAIM TYPE FOR 2014 INSURANCE YEAR (AS AT 31 DECEMBER 2014 - six months into the 2014 insurance year)



**The total incurred value is the sum of any reserve held and payments made (whether in respect of capital, interest, party and party and/or investigation costs).*

- Graph 1 shows the total-incurred value of claims falling into the 2014 year of insurance, as at 6 months. Although the number of claims has reduced slightly, when compared with the same period in the 2013 insurance year, the **R 31.8 million** total-incurred value of all claims notified in the 2014 scheme year as at 31 December 2014, is almost **R10 million** higher than the **R22.3 million** for the same period in the 2013 year. <u>This amounts to a **42% increase** in the value of claims year on year</u>. This is cause for some concern.

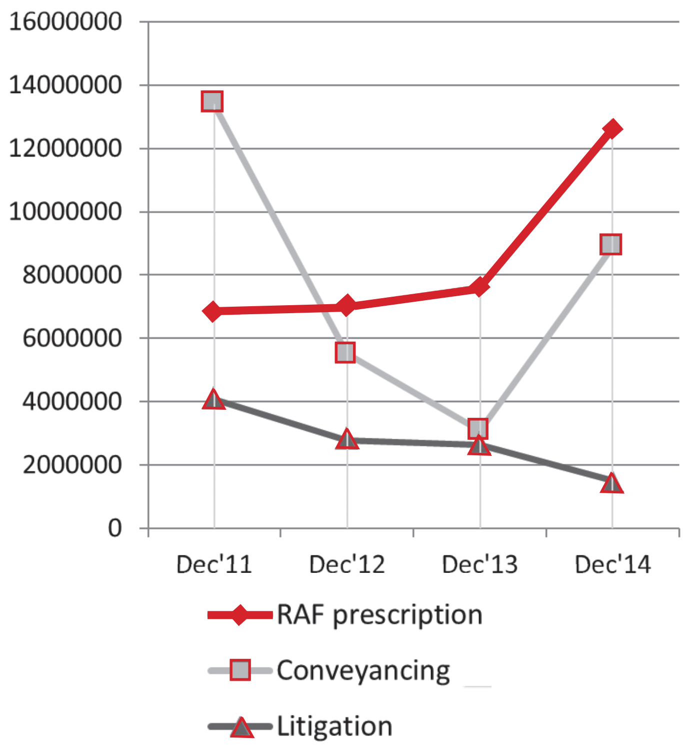
- What is more alarming, is the **R12.6 million** total-incurred value of *prescribed RAF* claims, which shows an <u>**increase of 66%**</u> on the **R7.6 million** for the same period in the 2013 insurance year. This figure represents around **40%** of the total incurred value of claims for the 2014 year of insurance as at 31 December 2014.

- *RAF under-settlements* are valued at **R3.6 million** as compared with **R1.5 million** for the same period in 2013. <u>RAF related claims therefore make up 50% of the value of all claims in the first six months of the 2014 year of insurance.</u>

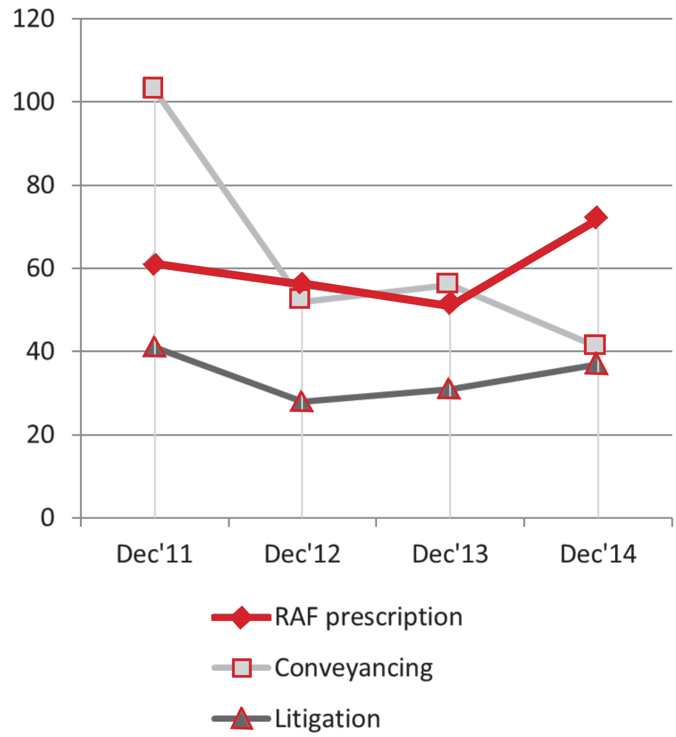
- Although the number of *Conveyancing* claims has reduced year on year, their value has increased to **R8.9 million** from **R3 million** in 2013.

RISK MANAGER'S COLUMN continued...

Graph 2: 2011 to 2014 years by Rand VALUE as at December (6 months)



Graph 3: 2008 to 2013 years by NUMBER as at December (6 months)



GENERAL PRACTICE

In the August RAB (4/2014) page 2, we published an article entitled *"Let the Partner Beware"*. The following article by a British practitioner again highlights the need for extreme caution in choosing partners/co-directors and as importantly, the monitoring and checks and balances that need to be in place to protect yourselves against malpractice or theft.

Interventions: the innocent pay, too:

When a partner misbehaves, everyone around them can be tarnished.

There's a £90,000 hole in the client account.

You stumbled upon it yesterday evening, but convinced yourself that, after a hard day's grind, you'd probably made a mistake. You went home to sleep on it. Although not before leaving a voicemail for your partner, who's in Hong Kong, rustling up business. Or so he told you.

He didn't respond to the voicemail. And neither did he pick up when you called him again this morning. Which is worrying. There is definitely £90,000 missing. No mistake.

The two of you founded the firm 11 years ago. It's a niche practice, mostly corporate. Doing OK, too. Or was.

What they don't tell you at law school is the responsibility. The staff who depend upon the partners to pay their mortgages and clothe their kids. And put food on plates, for heaven's sake.

Eleven years' hard work down the drain. Clients left in the lurch. Your reputation in ruins. And those personal guarantees you signed – telecoms, IT, the all-bells-and-whistles new printer, the office lease – are swooping home, a dead weight, to roost.

You've got to make the phone call. And once you've made it, life will never be the same again. Joint and several responsibility: one of the joys of partnership.

GENERAL PRACTICE continued...

Yes. Joint and several responsibility. It doesn't seem fair, but it's the law. Creditors don't have to sue all the partners, or in your case both partners. They can go for the low-lying fruit. And who would you go for? The partner who's soon likely to be behind bars? Or the one who's out and about and still has assets? You, in a word.

The files and the computers are the first to go out the front door. You feel a kind of reckless relief, a weight lifted, an aching tooth drawn. Except it doesn't last, of course. Reality, not to be denied, is lurking in the in-tray and clamouring for your attention in the telephone's urgent trill.

The staff exits the building next. You've written them glowing testimonials, in the hope that prospective employers will take seriously the word of someone who only noticed that 90 grand was missing when it was too late to save the firm.

Self-pity beckons, but there are jobs to be done.

Gissa job, you say. You receive a polite refusal, the subtext of which is we wouldn't touch soiled goods like you with a 12-foot dingo stick.

You're no longer quite so busy and that's when the stress, with its ally depression, exacts its toll. You become the destination of choice for every passing bug.

You have an ambivalent attitude to the Law Society. It's on your side, you tell yourself, but you're scared of going there. Everybody knows what's happened, a voice inside your head whispers. They're talking behind your back, judging you, there's no smoke without fire.

So you maintain radio silence, which is a big mistake. You need friends now more than ever before. There will be no happy ending to this story, as you told a *Gazette* journalist over lunch last week. But maybe talking about it is the beginning of the healing process. Maybe.

This article is based upon a true story as told to the journalist. However, certain details have been changed to protect identities.

Jonathan Rayner,
Law Society Gazette staff writer

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Editor-in-chief Law Society Gazette

Risk Manager's note: This situation is not unique to the United Kingdom. Both the AFF and the AIIF regularly deal with matters where the innocent partner/s or director/s have to carry the can for the "rotten egg". Please see the article '*Let the partner beware!*' *Risk Alert Bulletin (4/2014)*, page 4.

The moral of the story is that practitioners should not lightly go into practice with others, even good friends. Make sure that you have a carefully- worded partnership agreement in place and do regular file and financial audits. Ensure that you have the necessary checks and balances in place.

FILE AUDITS/REVIEWS – a practical guide

Value of file reviews/audits

Having a system of file audits should be seen by all role players as something positive and non-negotiable. It is not micromanagement, victimisation, checking up or criticism – it is one of the most important risk management processes. Handled properly it should:

1 Ensure that staff comply with your practice's Minimum Operating Standards (MOS) as well as the standards set by your Law Society or Regulator;
2 Provide a safety net for detecting errors and also detecting and deterring unethical or inappropriate behavior;
3 Identify weaknesses and support the learning and development of staff being reviewed and even those doing the reviewing;
4 Provide a basis for performance appraisal of the work of the individual;
5 Provide valuable information for your practice's risk management assessments.

How many and which files should be reviewed?

Clearly every single file cannot be reviewed, but it is suggested that a reasonable number would be one or two per month per staff member. Files can be chosen at random and also on the basis of particular concerns where risks are indicated. The files of staff at all levels should be reviewed – including those of senior partners or directors.

GENERAL PRACTICE continued...

Tip: Ensure that you set aside sufficient time for reviews and delegate the task to some less senior staff – particularly in respect of the procedural part of the review.

What the audits/reviews should cover

Both qualitative and procedural issues can be covered. Peers or colleagues and even support staff can review the procedural issues, leaving only the qualitative assessment to the supervisor. An external reviewer could also be used.

For example, ensure that:

1 The Financial Intelligence Centre Act has been complied with;
2 The letter of engagement is complete and has been signed by the client;
3 The mandate has progressed without unnecessary delays;
4 There is regular communication with the client;
5 The file is properly maintained in accordance with your practice's MOS, with file notes on all attendances. (The file should tell the full story of the progression of the matter to someone unfamiliar with the matter.)
6 The practice's billing policies have been complied with;
7 The accounting in relation to the matter is in order;
8 Any trust deposits have been dealt with in compliance with the practice's own rules and those of the Regulator/ Law Society.
9 The law has been correctly applied to the facts;
10 There are no prescription issues and there have been no oversights in the handling of the matter.
11 The appropriate checklist for the type of matter (if any) has been complied with (for example RAF claims or conveyancing).

A **checklist** should be used to ensure that all important aspects are reviewed. Any necessary remedial actions should be recorded. A core checklist can be used and modified forms can be created for different practice areas. There is no one size fits all solution and each practice will need to develop its own form. (A generic, precedent checklist can be requested from the AIIF's Risk Manager - e-mail: ann.bertelsmann@aiif.co.za)

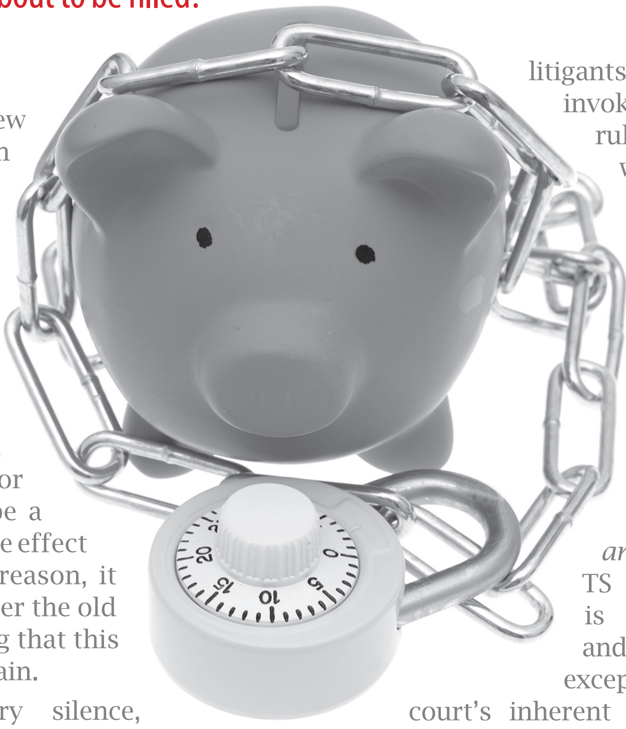
After the audit

Immediate concerns should be addressed with the fee-earner as soon as possible. There should be a follow-up to ensure that any remedial actions have been carried out.

The results should be recorded and the records maintained. These may also then be used to improve the practice's risk management interventions and training and also for the purposes of input in performance appraisals.

Ann Bertelsmann Legal Risk Manager
Ann.bertelsmann@aiif.co.za

Security for costs:
another lacuna in the Companies Act about to be filled?



Unlike its predecessors, the new Companies Act 71 Of 2008 is silent on the issue of whether a plaintiff company can be called upon to put up security for a defendant's costs. This has led to myriad court challenges, often yielding contradictory results, but it appears as though certainty may be in sight. Besides the commercial value of being able to recover some of the costs of litigation, bringing an application for security for costs from a plaintiff company can be a powerful strategic tool as it often has the effect of frustrating the litigation. For this reason, it was an oft invoked tool of defence under the old legislation – it is therefore unsurprising that this issue has become hotly contested terrain.

Against the backdrop of statutory silence, litigants have been forced to invoke the common law rules regulating security which, up to now, were only applied to natural persons. In this regard, the principle regarding natural plaintiffs is that "nobody but a peregrinus [non-resident] could be called upon, under any circumstances, to give security for costs" (*Mears v Pretorius Estate and Market Co. Ltd* 1907 TS 951 at 956). The rule is not however absolute and courts do recognise exceptions based upon the court's inherent jurisdiction to prevent

GENERAL PRACTICE continued...

an abuse of its process (*Ecker v Dean* 1937 AD 254 at 259). In this regard, there are cases where the court has ordered a "resident" natural plaintiff to put up security where it was satisfied that the litigation was vexatious or reckless (*Giddey NO v JC Barnard and Partners* 2007 (5) SA 525. Vexatious proceedings are ones brought with no reasonable prospect of success and/or for the purpose of annoying the other party). Various judges, sitting alone, in the North Gauteng High Court have ruled on various applications as follows:

–A company can never be called upon to put up security under the common law (*Siemens Telecommunications (Pty) Ltd v Data Genetics (Pty)Ltd* 2013 (1) SA 65 (GNP)).

–A plaintiff company may be called upon to put up security if the defendant can demonstrate "something more than mere insolvency or impecuniosity" on the part of the plaintiff company (*Ngwenda Gold (Pty) Ltd and Another v Precious Prospects Trading AD (Pty) Ltd and Another* (GSJ case No 2011/31664, 14 December 2011)).

– To prevent an abuse of process, a court may exercise its inherent discretion to order security to be put up by a plaintiff company(*Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 (GP); *Nielson v Rautenbach NO & Others* 2014 (3) SA 17 (GNP); *Nielson v Rautenbach NO & Others* 2014 (3) SA 17 (GNP); *Haitas and Others v Port Wild Props* 12 (Pty) Ltd 2011 (5) SA 562 (GSJ)).

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RAF MATTERS

ADJUSTMENT OF STATUTORY LIMIT IN RESPECT OF CLAIMS FOR LOSS OF INCOME

The amount referred to in subsection 17(4) (c) of the Road Accident Fund Act has been adjusted to **R227810.00,** with effect from 31 January 2015.

BOARD NOTICE 6 OF 2015

CONVEYANCING

THE CONVEYANCER'S MANDATE

Attorney Marius van Staden, Savage Jooste and Adam Attorneys

To err is human but to really foul things up requires a computer (Farmers' Almanac for 1978, Capsules of Wisdom)

Every transfer of property generates money. Value is given by the purchaser to acquire ownership of property. On registration the loan taken out against the mortgage bond registered over the property is redeemed and the balance of the purchase price is paid to the seller. More often than not the amounts involved are extensive. The average home-owning citizen's house is his largest investment.

The terms of the conveyancer's mandate not only involve effecting transfer of immovable property on behalf of the seller but also to deal with the proceeds thus generated. What is the nature of a conveyancer's mandate insofar as he is instructed to pay the proceeds of the sale into a bank account nominated by the seller upon registration occurring? Must the conveyancer have failed to take reasonable care and acted in a negligent fashion before he can be held liable for not carrying out his client's instructions?

At the inception of the transfer process the seller not only instructs his conveyancer to execute transfer of ownership on his behalf but also to pay the proceeds of the sale into a bank account nominated by the seller. In this process instructions might be furnished by way of e-mail. Electronic communication has taken charge of everyday communication, also insofar as the average client instructs his conveyancer or attorney.

However, the more reliance there is on electronic banking systems and electronic communication to take instructions from clients, the greater is the possibility of fraud occurring in the chain of events. A worrisome development in electronic communication is the hijacking of e-mails, with the attorney/conveyancer being under the impression that he is receiving instructions from his client but, unbeknown to him, these "*instructions*" are emanating from a fraudster. The fraudster uses the same e-mail address, or virtually the same address, as that of the client and the conveyancer is under the impression that he is being "*instructed*" by the client.

Can the conveyancer be held liable where his client instructs him at the inception of the transfer process to pay the proceeds of the conveyancing transaction into a certain bank account and a fraudster hijacks the electronic communications immediately before registration of transfer, "*instructing*" the conveyancer to pay the proceeds of the transaction into a different bank account and the conveyancer acts upon these "*instructions*"? What if this occurs without negligence of the conveyancer or the client himself was negligent by making it possible for fraudsters to hijack his electronic communications?

The contract between an attorney (also where he acts as conveyancer) and that of his client is one of mandate, with some features which are peculiar to this particular kind of agency (see *Goodricke & Son v Auto Protection Insurance Co,* 1968 (1) SA 717 (A); *Mort NO v Chiant,* 2001 (1) SA 464 (C)).

It is a term of the mandate that the attorney will exercise the skill, adequate knowledge, and diligence expected of an average practising attorney (see *Mouton v Mynwerkersunie* 1977 (1) SA 119 (A); *Slomowitz v Kok* 1983 (1) SA 130 (A)).

Mandate being a contract and breach being possible without the defaulting party having to be negligent, an attorney is not always bound only to take reasonable care. Depending on the circumstances his duty may simply be to perform the terms of his mandate and he may be liable where he did not perform same, without the issue of a lack of reasonable care or negligence entering into the picture.

This was emphasised by Oliver J, in *Midland Bank Trust Co Ltd v Hett,*

GENERAL PRACTICE continued...

Stubbs & Kemp [1978] 3 ALL ER 571 (Ch), where he indicated that when considering a claim against a solicitor it may be necessary to look further than merely failing to act with reasonable care:

The classic formulation of the claim in this sort of case as 'damages for negligence and breach of professional duty' tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner … But, of course, … (a) contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one. If I employ a carpenter to supply and put up a good quality oak shelf for me, the acceptance by him of that employment involves the assumption of a number of contractual duties. He must supply wood of an adequate quality and it must be oak. He must fix the shelf. And he must carry out the fashioning and fixing with the reasonable care and skill which I am entitled to expect of a skilled craftsman. If he fixes the brackets but fails to supply the shelf or if he supplies and fixes a shelf of unseasoned pine, my complaint against him is not that he has failed to exercise reasonable care and skill in carrying out the work but that he has failed to supply what was contracted for.

Where a conveyancer receives fraudulent "*instructions*" from a third party to deal with the proceeds of the conveyancing transaction in a certain manner and acts upon them, he fails to carry out his client's instructions, by failing to deal with the proceeds of the transaction in the manner instructed by his client at the inception of the transaction. As such the conveyancer would be liable to his client, not for performing his mandate in a negligent fashion, but simply for not performing his mandate. This would be the case even if the client himself was negligent by making it possible for fraudsters to hijack his electronic communications.

Conveyancers must therefore tread carefully when they seemingly receive changed "*instructions*" to deal with the proceeds of a transaction. They should first and foremost satisfy themselves that these "*instructions*" emanate from their client. If not, and even if they are not negligent in acting upon such "*instructions*", they can be held liable for any loss suffered by the client.

Attorney Marius van Staden,
Savage Jooste and
Adam Attorneys

Please see the LSSA's useful guidelines on **management of e-mails:**
http://www.lssa.org.za/upload/LSSA_Management_of_email_guideline_(2012).pdf

LETTERS TO THE EDITOR

Dear Ms Bertelsmann

In the most recent Risk Alert Bulletin (Dec 2014) mention is made of a system of file audits.

Please elaborate on this and provide suggestions on how to design and implement such a system.

Name withheld.

Thanks for your interest in finding out more about risk management interventions. I believe that file reviews are particularly valuable and help to keep your "finger on the pulse". In response to your enquiry, I will publish a short article on file audits/reviews in the Risk Alert Bulletin.
In the meantime, I attach some precedent checklists from Australia and England and a preliminary discussion of the topic.
I hope this helps. Please contact me if you need further information.

See the article on file audits on page 4.