

RISKALERT

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DISCLAIMER

Please note that the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.

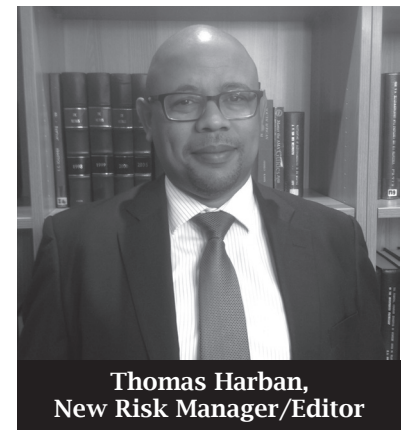
RISK MANAGER'S COLUMN

New Risk Manager/Editor

Dear Readers

It is with a mixture of excitement and mild melancholia that I put my final *Bulletin* to bed. By the time it reaches your desk, a new Risk Manager/Editor will be sitting at mine. Thomas Harban will move into this role when I retire at the end of July. Given Thomas's experience and involvement in the Attorneys Insurance Indemnity Fund NPC (AIIF) over the past seven years, I am fortunate to be able to hand over to him without any concerns.

Thomas graduated from the University of the Witwatersrand with BA and LLB degrees. He served articles at Fluxman Rabinowitz - Raphaely Weiner attorneys (now known as Fluxmans Inc.) where he practiced mainly in the area of commercial litigation. He was admitted as an attorney in November 1997 and after practising for a number of years, he took up the position of Legal Adviser at the office of the Auditor General. He joined us as a Claims Manager in 2009 and was



Thomas Harban,
New Risk Manager/Editor

promoted to General Manager in 2011. He can be contacted via e-mail at thomas.harban@aiif.co.za or on (012) 622 3928.

Many thanks to those of you who have taken the time and trouble to read the *Bulletin* and especially those of you who have written to or called us with your views, comments and queries over the years.

May you all have a claim-free future!

Ann Bertelsmann
www.aiif.co.za

New scheme policy

The policy for the 2016/2017 insurance scheme year, which came into force on 1 July 2016, was published in the July *Bulletin*. It can also be found on our website (www.aiif.co.za). If you have not already done so, please read it carefully to ensure that you are properly informed about your cover. If you have any questions, please contact Thomas Harban who will gladly assist you.



**Attorneys Insurance
Indemnity Fund (NPC)**

Est. 1993 by the Attorneys Fidelity Fund



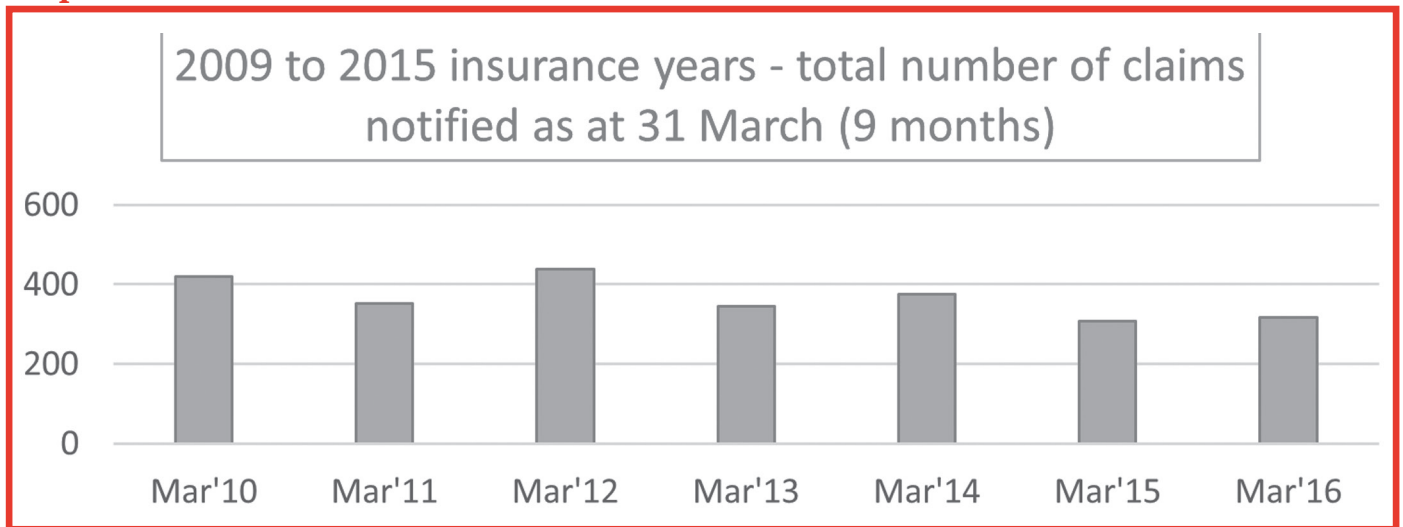
**Attorneys
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RISK MANAGER'S COLUMN continued...

Claims statistics from the Attorneys Insurance Indemnity Fund NPC (AIIF)

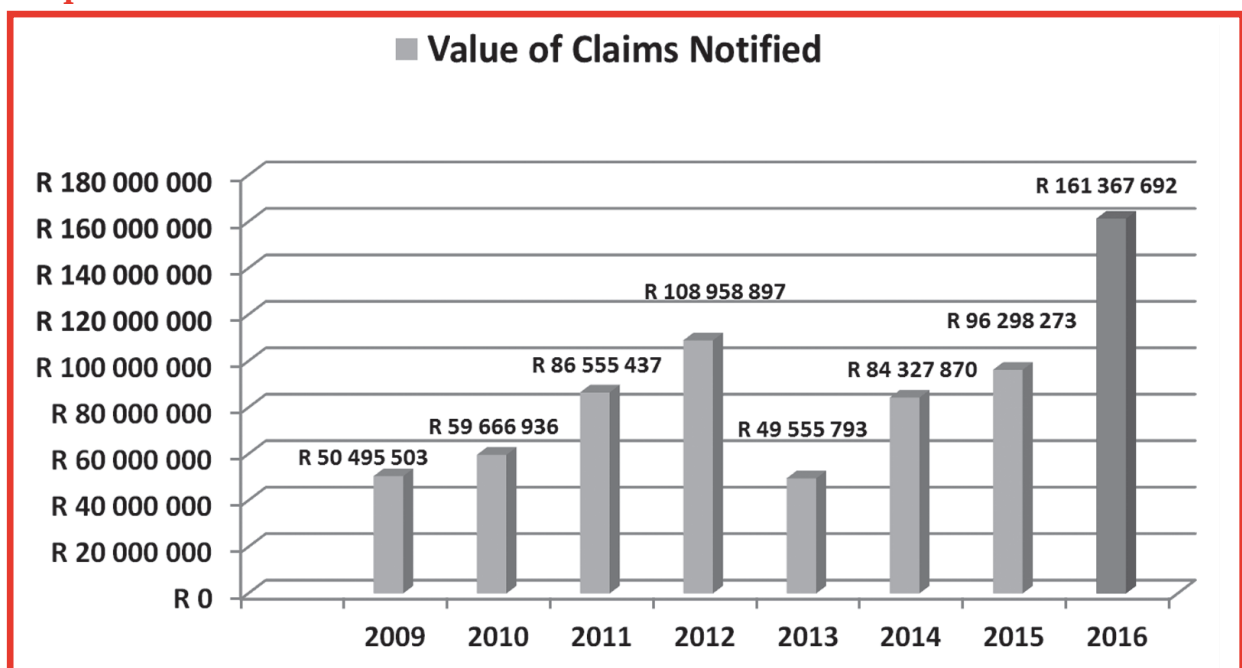
Graph 1



Graph 1 shows that the number of professional indemnity claims against practitioners has stabilised over the past few years. This is pleasing, especially considering the increasing number of practitioners and increasing awareness of their rights on the part of clients. However, the values of these claims are escalating – which is largely unavoidable.

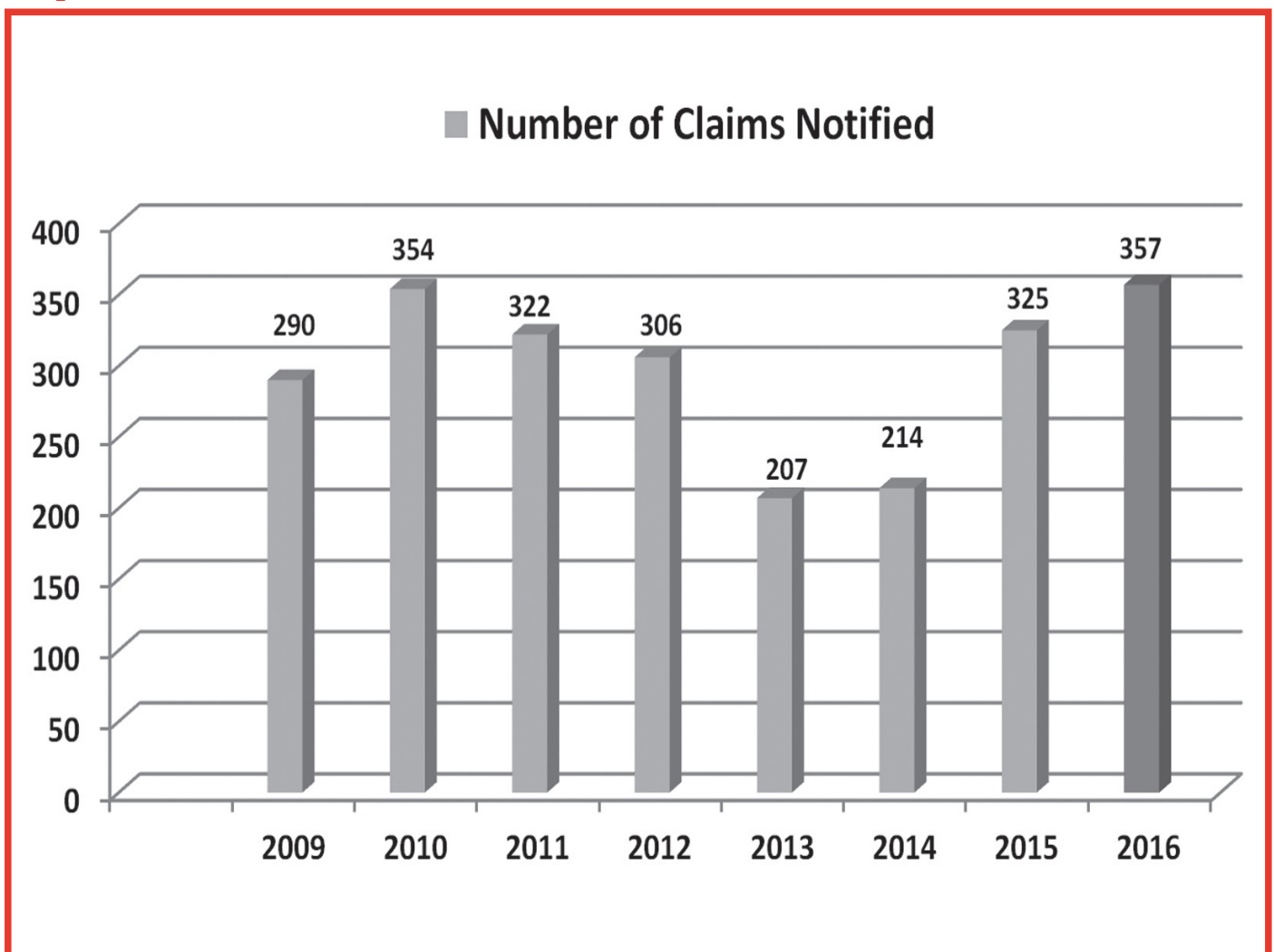
Claims statistics from the Attorneys Fidelity Fund (AFF)

Graph 2



RISK MANAGER'S COLUMN continued...

Graph 3



As can be seen from Graph 3, claims made against the AFF, arising out of the misappropriation of trust money seem to be on the increase in the past two years. As seen in Graph 2, the value of these claims also continues to grow at an alarming rate, **with conveyancing matters being the source of 45% of the value.**

The Claims Executive of the AFF, Jerome Losper, reports that between 1 January 2016 and 30 April 2016, the AFF paid out 131 claims worth over **R30 million.**

AIIF RISK MANAGEMENT INTERVENTIONS

The AIIF has been in existence since 1993, but it was only in 2009 that the position of full-time Risk Manager was created to deal specifically with claims-related risks, both internally and externally.

Internally we currently have a rigorous process for dealing with claims, to ensure that all compensation paid is justified and fair. Our legal advisers are all admitted attorneys and must comply with strict minimum operating standards (MOS) in dealing with claims and payments. File audits, forensic investigations and several levels of authorisation ensure that there is no room for errors and fraud.

Externally things are more complicated. Legal practitioners generally have little insight in to what can go wrong in practice and have little interest in spending precious billable hours learning about, planning and implementing risk and practice management strategies. Working with claims against attorneys has certainly opened my eyes - our challenge is to open theirs!

So firstly, we need to educate and inform the profession. Cover is automatic and we therefore have little or no interface with our insured attorneys - until they have to report a claim to us. Since the AIIF is a non-profit company and does not currently charge a premium to the profession, funds for expensive campaigns and communications are not available.

How do we communicate with the profession?

As the diagram on page 5 below shows graphically, we communicate with the profession in the following ways:

- By publishing the *Risk Alert Bulletin* five times a year as an



insert in De Rebus. Current and past copies of the Bulletin can be found on our website (www.aiif.co.za). There is both a subject and a date index to assist practitioners to find specific articles. We value communication with our insureds and invite you to submit articles or letters for publication in the *Risk Alert Bulletin*.

- Through *Prescription Alert* (PA). This is a computerised back-up diary system, made available to practitioners free of charge. You can register your firm and your individual matters on this diary system. Please contact Lunga Mtiti (021) 422 2830 for more information. PA also offers a risk toolkit, newsflashes on various topics of interest and a helpline. They will also put you on a mailing

list to receive electronic copies of the *Bulletin*.

- Through our *Website*. A lot of work has gone into our site - so please do not forget to use it. There are sections for registering with PA, obtaining information about and forms for executor bonds, obtaining copies of your past and current professional indemnity master policy and contact details for all departments. The Risk Management section gives access to a wide range of information and articles. One such article is "*Risk Management Tips*" which deals with various aspects of risk management. Even though it is lengthy, we believe it is worth reading. Readers will also have access to "*Red Flag Areas in Conveyancing*", "*Litigation do's and Don'ts*", "*Minimum Operating*

AIIF RISK MANAGEMENT INTERVENTIONS continued...

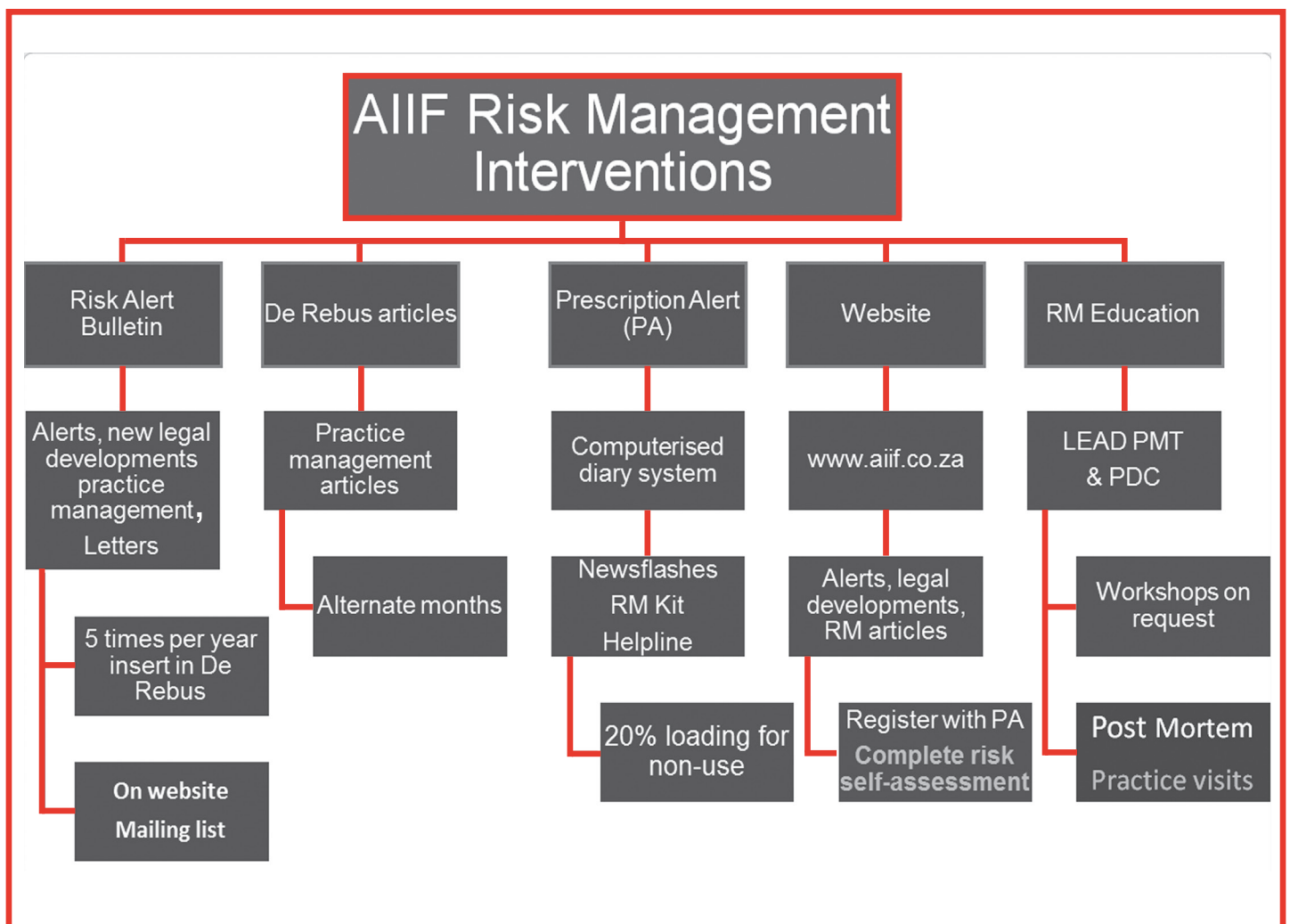
Standards", *"File Audits*", *"General Prescription Tips*" and a prescription table. There is also a sub-section with specific RAF prescription and under-settlement information, legislation and judgments as well as information on current scams that affect the profession. A risk self-assessment questionnaire can be downloaded or completed online. (Annual completion of this questionnaire is obligatory prior to a claim being admitted.)

- We are also committed to further educating the profession on risk management. To this end, we work closely with LEAD in providing workshops for the profession. We draft materials for and run the compulsory Practice Management Training workshops for the module Risk Management and Insurance.
- When requested, we conduct *ad hoc* workshops for individual or groups of firms and law societies.

We are also willing to come out to individual practices to address staff on risk management issues, if required.

Practitioners are most welcome to contact our offices with any queries or requests for risk management advice. Of course we cannot provide any legal advice.

Ann Bertelsmann
www.aiif.co.za



CONVEYANCING

FICA (Financial Intelligence Centre Act 38 of 2001)

The main objective of FICA is to combat financial crimes like money laundering and tax evasion.

All accountable institutions listed in terms of Schedule 1 must comply with FICA. Attorneys are listed as an accountable institution.

FICA requires attorneys to:

1. Identify and verify the client by comparing the information with the verifying documents provided by the client, such as the green bar coded Identity Document or Identity card;
2. Keep client records for at least 5 years from the date of conclusion of the matter – these records may be kept electronically;
3. Report suspicious and illegal transactions; and
4. Appoint a compliance officer, to implement internal rules and provide training.

If an attorney does not comply with FICA, it is regarded as a criminal offence and severe penalties may be imposed on the responsible employee or the firm. These penalties include imprisonment not exceeding 15 years or a fine not exceeding R100,000,000 (one hundred million rand). The penalty will depend on the seriousness of the non-compliance with the obligation or the crime committed.

All clients must be FICA'ed when assisted in the planning or execution of the following:

1. Buying or selling of immovable property and business undertakings;
2. Representation in financial or



Natasha Lodewyks

3. real estate transactions;
3. Opening or managing bank accounts, investments or securities;
4. Creation, operation or management of a company or close corporation or a similar structure outside the republic;
5. Creation, operation or management of a trust or similar structure outside the republic except in the cases where the trust is established by a testamentary writing (will) or court order;
6. Disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property;
7. A client deposits R100 000 or more over a period of 12 months in respect of attorney fees incurred in the course of litigation.

If the client does not fall into one of these categories, the

client is exempted. However a FICA Exemption Form (drafted in accordance with the firm's internal policies) must be completed.

In order to FICA a client, the attorney must:

1. Obtain information and documents from the client to that verify what the client says is true and correct;
2. Submit the documents to the FICA officer for FICA verification;
3. In the case of repeat clients, the client will have to be FICA'ed the first time, thereafter the FICA officer will only need to confirm verification;
4. Where a correspondent gives instructions, the only requirement is to obtain a letter from the correspondent confirming that their client has been FICA'ed; and
5. All the above documents are to be kept with the FICA officer.

To summarise, if there is certainty that the value of the client's account will never exceed R100,000 **over a 12 month period**, the client is exempted from the FICA process, however an Exemption Form will still need to be completed. If there is any uncertainty regarding the value of the client's account, the client must be FICA'ed. It is the responsibility of each attorney to FICA clients and comply with FICA in order to avoid penalties being imposed.

Natasha Lodewyks
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GENERAL PRACTICE

In the age of internet, e-mail and instant messaging, we have become accustomed to instant results. This rings true for business as well as communication. E-mail is more and more the mode of communication in daily business transactions. Our courts are becoming more accepting of these electronic communications. We see the development of case law, where documents are considered to have been properly served and courts will give judgments by default where service through social media is proven. (This electronic service can include service by Facebook and WhatsApp).

As a society we have become so eager to finalise transactions that we seldom, if ever, check whether we have the correct e-mail address. A small change such as a full stop or an extra letter, a “.com” as opposed to “.co.za” may be the difference between sending your email to the right person, or assuming that you have received the mail from the right person.

Furthermore, many managers/ business owners have delegated their communication functions to administrative staff. Often, these members of staff are not permanent or are regularly rotated, therefore not being alive to changes and the inherent risks in the absence of communication management.

It appears that our society's need for instant gratification or its over-eagerness to respond immediately to all e-mail enquiries/communication, pose a threat to our financial well-being and the protection of privacy. One of the main threats in this regard at present is **Spoofing**.

Spoofing: In laymen's terms, is where the e-mail address appears at face value to be that of one person, whereas it is in fact a similar e-mail address - but communication is sent to a completely different person.

Financial transactions and the risk of phishing and spoofing

E-mail **spoofing** is commonly used for spam and phishing emails in order to mislead the recipient as to the origin of the message.

Phishing e-mails contain a link to a website which appears to be that of a service provider often visited by the user, enticing the user to enter personal details into the site, causing the recipient to obtain unfettered access to banking accounts, client information and the like, through the use of the user's username and password information. In some instances the information will be used to gain access to the mailing account of a user and monitor their communications, which a third party then uses to intercept communication, mainly relating to financial transactions.

Other applications that may be sneaked onto a user's devices via the above methods include Malware (this is normally embedded within an attachment to the e-mail received).

Tips:

- Antivirus: Antivirus programmes assist with detecting known Malware activity as well as specific items that may be residing on your device.
- Always ensure that your antivirus programmes are up to date. This is not an item any company should be saving on - get the best in the market.
- Do not click on links in an e-mail unless you are completely sure of the source.
- Have security measures in place for all financial transactions - ensure that you have a secondary process in place to confirm banking details before any changes are made or any funds paid.

- Do not simply make use of the “reply” button, unless you are satisfied that the mail will be sent to the correct recipients. This is especially true for e-mails requesting personal information from an unusual source.
- Be wary of the “autocomplete” functionality with financial transactions.
- With financial transactions, always cross check e-mailing details carefully.
- Ensure that your in-house IT policies as well as financial processes are in writing and all staff understand and comply with them - especially rotating and new staff.
- Double check the signatures for all financial transactions against the e-mail address utilised.
- The majority of financial institutions will address you by your company or personal name and not a generalised greeting (Dear Sir/ Madam)
- Be suspicious of any e-mail that asks you for personal information such as your username, password or bank details.

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GENERAL PRACTICE continued...

Settlements : A claim case study:

B Bank vs Company X

A attorneys instituted an action out of the High Court, for the recovery of money owing by Company X in respect of six different loan agreements with B bank. The parties entered into negotiations and settlement was eventually reached. The parties agreed that all amounts owing on the six accounts would be paid in full, in two instalments.

A attorneys thereafter attended to the drafting of the settlement agreement which read as follows:

"Company X shall pay an amount of:

1. *R..... by close of business on 31 March 2014*
2. *R..... by close of business on 30 April 2014*

All payments are to be made directly into account number 12345."

Although the oral settlement agreement included payment of the full amounts owing on all six accounts, it transpired that, when drafting the settlement agreement, A attorneys had only included the amount owing in terms of the one account (account number 12345).

Company X has of course, snatched at the bargain and is refusing to make payment in respect of the other five accounts, as had been agreed verbally.

A attorneys must now apply for rectification and if unsuccessful, they may face a claim.

Lesson learnt:

Take care to ensure that the terms of any settlement reached between the parties are accurately reflected in the written agreement – whether the agreement is drafted by you or the representative of the other party

LETTERS TO THE EDITOR

I write to you under circumstances in which I wish I did not have to. We discovered about a month ago, after a request from our client for an update on a matter that, the file was nowhere to be found and worse still, we have no electronic records of anything being done in the matter but for acknowledging receipt of the instruction to client.

It is a 3rd party recovery matter for Company X and the claim, unfortunately for us, prescribed in December last year. We have sent a letter of demand to the 3rd party, whose attorneys have responded to advise that the claim has prescribed. I will forward full details when submitting the claim formally.

The reason for my mail is that Company X want us to lodge a claim in respect of this matter with yourselves. I just wanted to know how I go about doing so in circumstances where they have not sued us. Do they need to issue summons or send us a letter of demand or does our admission of fault and their request to lodge the claim suffice?

Please advise on the procedure going forward.

(Name withheld)

Our Senior Legal Adviser replies as follows:

In terms of clause 22 of the policy the Insured must give immediate written notice to the Insurer of any circumstance, act, error or omission that may give rise to a **Claim**. There is therefore an obligation on an Insured to notify the Insurer as soon as he/she becomes aware of a possibility of a **Claim** even though the client has not given any intimation that a **Claim** would be made.

The AIIF policy is a claims-made policy. The policy applicable to the **Claim** or a possible **Claim** will depend on the date on which: (1) the AIIF is notified of the possible **Claim**; or (2) a **Claim** is made against the Insured, whichever date is the earliest.

The AIIF policy defines a **Claim** as a written demand for compensation from the Insured, which arises out of the Insured's provision of Legal Services. (For the purposes of this definition, a written demand is any written communication or legal document that either makes a demand for or intimates or implies an intention to demand compensation or damages from an Insured) (Clause VI). It is clear from this

definition that no formal summons or letter of demand is needed to activate the policy, a simple written communication from the client intimating his intention to bring a **Claim** will suffice.

This means that, although an Insured has notified the AIIF of only the possibility of a **Claim**, the insurer will register the potential claim in the insurance year in which it has been notified, but will not pay compensation without a **Claim** (as defined) having been made against the insured, by a third party.

It is important to note that the Insured should not, without the prior written consent of the Insurer, admit, deny or settle a **Claim** (clause 24). Should an Insured fail to comply with this clause the Insurer will be entitled to reject the Insured's application for indemnity.

Written notice of any new **Claim** must be given to the AIIF by sending full details of this **Claim** to claims@aiif.co.za.

Zelda Olivier
zelda.olivier@aiif.co.za