

RISKALERT

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RISK MANAGEMENT COLUMN

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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.



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RISK MANAGEMENT COLUMN

A NOTE FROM THE EDITOR

This edition of the *Bulletin* will be published one month into the 2017/2018 AIIF insurance scheme year. The professional indemnity Master Policy and the Executor Bond policy for this scheme year were published in the July 2017 edition (3/2017) of the *Bulletin*. We trust that practitioners have taken time to carefully read both policies in order to understand the respective conditions. The AIIF team will gladly answer any queries regarding the policies.

The inception of the new policy year is an opportune time for practitioners to conduct a risk assessment and also complete the risk management self-assessment questionnaire. It will be noted that some of the questions in the risk management questionnaire are similar to those included in the proposal forms of most top-up insurers. The completion of the risk management should not be seen as a 'tick box' exercise but rather as an opportunity for the practitioners (and their staff) to focus their minds on the risks associated with their respective firms.

Since the cybercrime exclusion (clause 16(o)) was introduced on 1 July 2016, we have been notified of more than 50 claims cybercrime related claims with a total value exceeding R25 million.



**Thomas Harban,
Editor**

As these claims fall within the exclusion and have been rejected, the firms concerned will have to bear these losses themselves, should they not have appropriate cybercrime cover under another policy. We note with concern that despite the warnings in respect of cybercrime risks published by the AIIF and other bodies, many firms are still falling victim to the various scams. All staff must be alerted to the risks associated with cybercrime and appropriate measures must be put in place to avoid and/or mitigate the dangers of this risk materialising. On the AIIF website (www.aiif.co.za) a useful document compiled by Shadrack Maile on the interest risks for legal practices can be accessed.

Cover for the risks associated with cybercrime can be purchased in the commercial insurance market. There are a number of insurers who offer this type of

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cover and practitioners should enquire with their respective brokers and insurance underwriters in this regard.

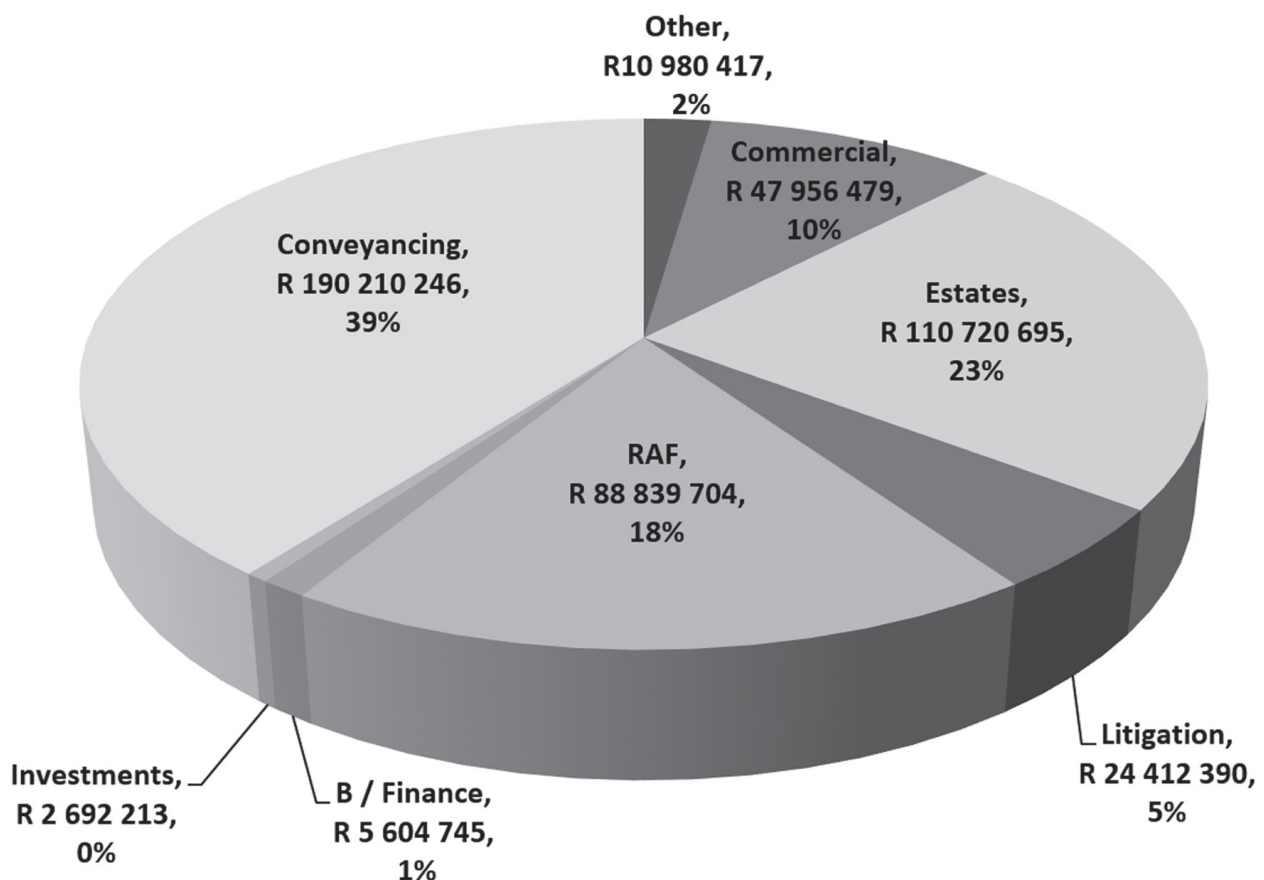
The high number of claims arising out of circumstances where practitioners and their staff have failed to apply basic procedures remains a serious cause for concern. We have re-

ceived a number of requests to publish practical risk management tools and, in response thereto, we publish a precedent for file audits. This file audit precedent was previously published by the AIIF. The precedent can be adapted by practitioners for their particular needs.

Suggestions from the profession for topics to be covered in the Bulletin are always welcome (as are contributions in the form of articles).

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LATEST CLAIM STATISTICS



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The pie chart on page 2 gives a classification of contingent claims against the Attorneys Fidelity Fund (AFF).

(The segment labelled “other” is made up of administrations, collections, criminal, matrimonial and insolvency related claims.)

The Claims Executive at the AFF, Jerome Losper, reports that as at 31 May 2017 the AFF had 1189 claims on record with a combined value of R481, 416, 889.

There are some similarities in the AFF statistics with the claims notified to the AIIF. As at 31 March 2017, the value of outstanding claims against the AIIF was actuarially assessed at a value in excess of R475 million. The AIIF team is currently dealing with over 2022 active claims. Prescribed RAF claims, under settled RAF claims, conveyancing and general litigation

claims make up the largest categories of claims notified to the AIIF.

It will be noted that 23% of the AFF claims relate to misappropriation of deceased estate related funds. The claims notified to the AIIF in respect of the bonds of security issued to executors of deceased estates also mainly arise out of the misappropriation of estate related funds. Practitioners practising in this area should thus take extra caution in the management of estate related funds.

In so far as conveyancing transactions are concerned, practitioners must take precaution in the handling of the funds not only during the course of the transaction but also post the finalisation thereof. It will be noted that bridging finance related claims as well as cybercrime related claims mainly arise out of conveyancing related transactions. Inadequate supervision

of staff and a failure to develop and apply minimum operating standards are some of the underlying causes of the increase in conveyancing related claims. Conveyancers must also take particular care in defining the scope of their mandates- it has been found that many claims arise from an act or omission which takes place in the firm after the conveyancing transaction (the transfer of the legal title or the registration of the real right in immovable property) has taken place. Practitioners who hold funds post the conclusion of the conveyancing transaction, without any current underlying instruction to carry out any legal services, may then be holding for pure investment purposes. Investment related claims are excluded from the AIIF policy (clause 16 (e)) and also fall within the limitation of the AFF’s liability (section 47 of the Attorneys Act 53 of 1979).

GENERAL PRACTICE

PRESCRIPTION

As noted above, prescription related claims are a continued cause of concern for the AIIF. Over the last few years, we have published a number of articles giving suggestions of measures that practitioners could implement in order to mitigate the risk of claims prescribing in their hands. The AIIF has also made the Prescrip-

tion Alert system available to practitioners for the registration of time-barred matters. Please send an email to alert@aiif.co.za or to lunga.mtiti@aiif.co.za in order to register with the Prescription Alert unit. A system of supervision and regular file audits will also mitigate the risk of prescription.

It must never be assumed that the

prescription period is three years in all cases.

In a recent judgement (**Kruger v Minister of Health and others** [2017] JOL 38009 (FB)), the Free State Division of the High court considered an application for condonation of a failure to comply with sections 3(2) and 4 of the Legal Proceedings Against

GENERAL PRACTICE continued...

Certain Organs of State Act 40 of 2002 (the Legal Proceedings Act). The plaintiff in that case had undergone a medical procedure at a state hospital in the Free State on 22 February 2008. Summons was only issued (in the North Gauteng High Court) three years later in which damages were claimed on the grounds of alleged professional negligence by the medical professionals. The action was defended and the a special plea filed to the effect that the court lacked jurisdiction as there had been a failure to give notice of the claim as prescribed by section 3(2) of the Legal Proceedings Act. The matter was transferred from the North Gauteng High Court to the Free State Division on 17 September 2013. On 8 May 2014 the plaintiff gave the notice as required by the Legal Proceedings Act to the defendants of his intention to institute the action for damages and the basis of such action. A day later a letter was sent to the defendants requesting condonation of the non-compliance with section 3 of the Legal Proceedings Act. The defendants did not agree to the condonation and six months later the plaintiff brought an application for condonation.

Some of the points arising out of this case (of which practitioners should take note) are that:

- There was no explanation of the time lapse between the dates of issue of the summons (17 June 2011), the issue of the section 3 notice (8 May 2014) and the launching of the condonation application (November 2014);
- The court found that there was a need to explain the delay taking



steps to proceed with the claim after the plaintiff ascertained in March 2011 that his paralysis was permanent;

- The applicant had to apply for condonation as soon as it became necessary to do so (in this case the condonation application was only filed almost three and a half years after the institution of the action and three years after the plaintiff became aware of the need to apply for condonation). The court found

the delays to be unreasonable;

- In the condonation application, the plaintiff had failed to sufficiently deal with his prospects of success in the case;
- The service of the summons in the North Gauteng High Court would not have enabled the plaintiff to prosecute his case to finality due to a lack of jurisdiction and thus would not have interrupted prescription.

GENERAL PRACTICE continued...**FILE AUDIT PRECEDENT**

The file audit precedent below can be adapted by practitioners for their particular needs.

File Ref:		File Handler:	
Client name:		Date reviewed:	
Type of matter:		Reviewer :	

1. FILE OPENING

Yes, No or N/A		Remedial action needed?	Comments
	1.1 File opening procedures correctly followed?		
	1.2 Evidence of conflict check?		
	1.3 FICA documents complete?		
	1.4 Risk assessment? - Referred matter?		
	1.5 Full client particulars and alternative contacts?		
	1.6 Signed and complete letter of engagement / mandate? -Fees/costs/deposit discussed? -Scope of work? -client's objectives? -preferred method of correspondence? -strategy? -Name & status of contact person in the practice? -Instructions, action and advice confirmed to client?		
	1.7 Comprehensive written record of first consultation		
	1.8 Appropriate deposit taken?		

GENERAL PRACTICE continued...

	1.9 Key dates calculated & recorded accurately? - prominently placed?		
	1.10 Related files identified - cross referenced?		
	1.11 Referred matter? -obligations complied with?		
	1.12 Case strategy and working plan apparent?		

2. CONDUCT OF MATTER

Yes, No or N/A		Remedial action needed	Comments
	2.1 File organised & maintained according to MOS?		
	2.2 Matter been progressed with minimal delays?		
	2.3 Client regularly kept up to date on progress?		
	2.4 Work carried out in accordance with mandate & working plan?		
	2.5 Legal advice correct in terms of the facts and law?		
	2.6 Any ethical problems?		
	2.7 Letter of engagement updated for changes in mandate?		
	2.8 All discussions, instructions & advice recorded in writing?		
	2.9 Timeous responses to client's calls and correspondence?		
	2.10 Any client complaints? -Any complaints dealt with satisfactorily?		

GENERAL PRACTICE continued...

	2.11 Time recorded accurately?		
	2.12 Billing complies with MOS? -regular, accurate accounting to client? - Timeous payments from client?		
	2.13 Counsel/experts instructed appropriately?		
	2.14 Evidence that file diarised for appropriate periods?		
	2.15 Financial aspects in order? -trust money dealt with i.t.o internal and external rules? -money invested i.t.o the rules? - written instructions from depositor for investment and disbursement? -payment out of trust i.t.o internal and external rules? -anti fraud and anti money- laundering rules complied with?		
	2.16 Correct file closing & archiving procedures followed? -Appropriate file closing letter to client? -Original documents returned to client?		

3. [Department] – specific matters

Yes, No or N/A	Checklist for specific matters eg RAF, conveyancing etc.	Remedial action needed?	Comment

GENERAL PRACTICE continued...

4. Reviewer Comments

5. Remedial actions

Action required	Due Date
1.	
2.	
3.	
4.	

The remedial actions were completed onand the review is now complete.

Signed :
(Reviewer)

Signed :
(File Handler)

Date:

Place one copy of this form on the file and forward a copy to the Risk Manager/Senior Practitioner