

NEWSLETTER

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TRUST ME, I AM AN ATTORNEY

Attorneys are automatically indemnified through the Attorneys Insurance Indemnity Fund (AIIF). The AIIF provides an annual aggregate Limit of Indemnity. In recent times the following has become apparent:

- The AIIF Limit of Indemnity has proven in many instances **insufficient** as claims **exceed the AIIF Limit of Indemnity**, and
- Attorneys are not aware of the **exclusions under the AIIF policy**.

It is imperative that attorneys reassess their potential risks and mitigate such risks by ensuring that they have additional insurance in excess of the AIIF (Top Up) and arrange other insurance where the AIIF does not provide cover (Difference in Conditions).

Cover and Claims – Professional Indemnity Insurance

There has been a surge in professional indemnity claims against attorneys in the last few years. Research has shown that prescription claims continue to present the highest number of claims however, claims trends relating to errors made by attorneys in the Litigation and Conveyancing space are increasing in number and value.

The AIIF's Limit of Indemnity (see: www.aiif.co.za/policy) is determined by the number of partners a firm consists of at the time the error was committed. A firm

of 1 to 6 partners has an aggregate Limit of R 1 562 500.00 which has time and time again proven insufficient to satisfy claims instituted against a professional. A lack or insufficient Top Up cover could result in a practitioner being financially exposed in the event that the AIIF's limit is expunged. An attorney should ensure that the Top Up cover in place is commensurate to the work that they carry out and the risk that they are exposed to in the areas of practice.

Furthermore cybercrime, like all areas of business, has invaded the attorney world of practice. The AIIF has as from 1 July 2016 excluded cyber related risks. The effect of this exclusion is that if the attorney does not have Difference in Conditions cover to specifically cover such eventuality, the attorney would be required to cover the claim from his / her own pocket.

Some of the exclusions in the AIIF policy (see: www.aiif.co.za/policy) that attorneys should take cognizance of are:

- Liability arising from cybercrime;
- Claims by an entity in which the insured has a material interest;
- Liability arising out of the intentional giving of an unqualified and binding undertaking, the fulfilment of which is dependent on the act of someone else.

All attorneys should have a look at their insurance (AIIF, Top Up and Difference in Conditions) to ensure that they are properly insured and to ensure that they PROTECT their reputation, pockets and their client's interests.

Cover and Claims – Misappropriation of Trust Funds Cover

Misappropriation of trust monies has become extremely prevalent. In light thereof it is extremely important for attorneys to have Misappropriation of Trust Funds Cover in addition to PI Cover.

Misappropriation of Trust Funds insurance provides broadly cover for theft and misappropriation by any principal or employee of trust money as defined in the Attorneys Act. An attorney should also consider coverage for the theft of any money or property belonging to the attorney or for which the attorney is responsible for.

This form of cover is essential as misappropriation could result in a practitioner's entire personal estate being at the disposal of the creditors in the event of there being theft perpetrated.

How can claims be prevented – Risk Management

It has been noted that attorneys have little insight into the risks that they face within their practice. They furthermore spend little time learning, planning and implementing a risk management strategy which if done correctly, can most certainly reduce the number of claims.

Attorneys should ensure that they have a comprehensive Minimum Operating Standard (MOS) that can assist in reducing the risk of claims. The following inter alia should be included in the MOS:

- **Supervision of Staff** – Lack of supervision is the primary reason for claims. Ensure that rules in this regard are in place;
- **File Audits** – Conduct regular file audits. This can alert one to potential problems or internal deficiencies;
- **Communication with clients & Staff** – Communicate with your clients on a regular basis and keep records of communication;
- **Diary Systems** – Ensure that you have an effective diary system in place. This will prevent claims from prescribing;
- **System of Delegation** – Have strict rules relating to delegation;

- **File Notes** – Keep records of all attendances;
- **Letters of Engagement** – This essentially sets out the terms and conditions of the contract between the attorney and his client. This will cover the scope of work;
- **Training** – Vocational training for staff is vital;
- **FICA** – An attorney is required to have policies in place to deal with FICA. For example banking details cannot be amended by means of an e-mail.
- **Payments** – It is crucial to have a robust protocol with embedded separation of duties when making any payment or receiving funds. This must also include a thorough process of identifying third parties to whom payments are made or received from to ensure they are who they say they are and that bank details are independently confirmed. Auditors can help with this process.

Many claims arise due to an attorney’s failure to consider and or have proper structures in place to deal with the above. Consideration and implementation of the above can reduce errors / omissions on the part of the attorney.

[Who can I contact to obtain further information regarding Professional Indemnity Insurance cover?](#)

Leppard Underwriting provides PI cover to Attorneys. Should you require further information please direct your query to Vanessa@leppard.co.za or contact us on 011 459 1640.

PRACTICAL EXAMPLES OF CLAIMS

1. The Plaintiff was injured in a motor vehicle accident on or around 2009. At the time of the accident the Plaintiff was a passenger in the vehicle. The Plaintiff instructed the attorney (insured) to pursue a claim with the Road Accident Fund (RAF). The insured failed to lodge the claim with the RAF timeously and the claim prescribed. After considering all the medico legal report the claim was computed in the amount of R 1 608 869.00 excluding costs. The claim exceeded the AIIF’s Limit of Indemnity and Top Up picked up the claim that exceeded the primary insurers Limit of Indemnity.

2. The attorney (insured) specialized in conveyancing matters. He incurred a legal liability to his clients as a result of proceeds from the sale being made erroneously to the incorrect person. The insured was a victim of a cyber crime and was negligent in failing to carry out his FICA duties in inter alia establishing that the bank details provided in the fraudulent e-mail was that of his clients.
The claim was excluded by the AIIF in terms of their new policy and the Top Up insurer paid the claim in the amount of R 447 471.66.

3. An employee of the attorney (insured) acted outside her scope of employment and negotiated settlements agreements with defendants out of her own accord. The “settlement” amounts that were paid by the defendants were paid into

the employees account. The employee's intentional and unlawful actions culminated in a loss of over R 1.3 million. The attorney became aware of the theft after his client advised that the defendant had confirmed that the settlement amount was paid into trust.

This was an example of cover extended by virtue of the Misappropriation of Trust Funds Insurance.

4. An attorney (A) received instructions from his client that he would be receiving an amount of R 3.1 million into his trust account where after he will be instructed how to disburse the funds. The funds were received into trust by a third person (B) who happened to also be an attorney.

B was part of an elaborate fraud scheme. He believed that he was investing in a scheme for the purchase of gold bullion.

B at no time advised A (attorney) that he (B) was the depositor or the reason for the payment.

A paid the monies (3.1 million) received to various parties on the instructions of his client.

After B realized he was a victim to a fraud, he sued attorney A for his money.

The court held that Attorney A had a legal duty to deal with the money without negligence. The judgment confirms that an attorney has a duty to identify persons who deposit money into their trust account and to dispose of such funds only in accordance with such instructions.

The court however found that A was liable for 60% of the claim and that B was liable for 40% of the claim. B's liability was based on the fact that he mistakenly relied on the assurances provided by A's client and a reasonable person would not have accepted those assurances on such an important issue from someone he knew over the telephone.

Fatima Ebrahim