

Is your firm at risk for claims by clients or third-parties?

By Ann Bertelsmann

If you are in the rare and fortunate position of never having had a professional indemnity claim against your practice, your answer to the above question would probably be 'no'. Most practices have, however, faced the stark reality of such a claim at one time or another.

Claims against attorneys are increasing

As can be seen from the graph below (table 1), the number of claims against the profession has increased alarmingly since 2007.

Possible reasons for the increase

This increase can only be partially attributed to a steady increase in the size of the profession. The Attorneys Insurance Indemnity Fund (AIIF) has identified the following other important reasons for the increase:

- An increasingly litigious and aware public and legal profession.
- An absence of effective management of the risks inherent in attorneys' practices (particularly where supervision of staff is concerned).

Who is most at risk?

It is a common misconception that smaller practices are more vulnerable to claims. Approximately 71% of claims are notified to the AIIF by practices consisting of one to three partners or directors. However, around 73% of the profession is made up of single practitioners so this does not seem to be the case. Practices of all sizes are equally at risk. Interestingly, again looking at our statistics, practices in all provinces are equally at risk.

Most risky areas of practice

Looking at table 2 it becomes clear that the majority of claims arise out of two areas of practice: Road Accident Fund (RAF) and conveyancing work.

Prescription (of RAF and other types of claims) is the single biggest threat to your practice.

There are numerous other causes of claims, the most frequent aside from prescription and lack of supervision are –

- diary problems;
- communication problems;
- failure to properly apply the Financial Intelligence Centre Act 38 of 2001 (FICA);
- unauthorised payment of trust funds;
- failure to properly investigate the facts;
- incorrect understanding or application of the law or taking on matters without necessary expertise;
- failure to check the accuracy of documents;
- delegation of responsibility to unqualified employees;
- failure to follow client's instructions or report to the client;
- suing clients for fees; and
- absence of file notes.

How can we protect our practices from this risk?

The answer to this question is two-fold:

- By having comprehensive insurance cover, in case a problem should occur.
- By implementing effective practice and risk management to prevent problems.

Insurance

Attorneys practising in South Africa enjoy an automatic, primary layer of professional indemnity cover through the AIIF. This provides a measure of cover for mistakes made by you and your employees in the conduct of the profession. It is currently provided at no cost to practitioners and is funded by the Attorneys Fidelity Fund (AFF).

Given the increase in the number and value of claims in recent years, this insurance is becoming unsustainable and eventually practitioners will have to contribute towards their cover. The AIIF is currently looking at new models to ensure its sustainability.

Your AIIF cover is currently limited to between R 1 562 500 and R 3 125 000 per year, depending on the size of your practice and it specifically excludes, *inter alia*, claims arising out of the theft of trust money. It is, therefore, essential that you consider obtaining additional cover in the open market, to ensure that your practice and the partners' or directors' personal estates are protected.

More information about the AIIF cover and a copy of the policy can be obtained on the website www.aiif.co.za.

Also, contrary to another popular misconception, the AFF is a fund of last resort and only provides protection against misappropriation of trust money to the public and not to the profession (see www.fidfund.co.za).

Risk management

This is a much more complex matter and cannot be looked at comprehensively in this short article. What follows are suggestions about where to begin.

- Recognising and understanding the risks that an attorneys' practice faces.

As a starting point, you need to ensure that you understand most of the biggest risks that your own practice faces. This is no simple matter. Firstly, a consideration of the risk areas mentioned above, may help. Secondly, you might get some direction by properly completing the AIIF's *Risk Management Self-Assessment Questionnaire* (which you can complete online or download from www.aiif.co.za).

- Producing a comprehensive risk-prevention plan to minimise these risks.

Once you know what the risks are, you are in a position to plan how to deal with and avoid them. In order for this plan to be effective your firm's business plan and mission statement as well as all the risks that you may have identified, such as conflicts of interest, inadequately qualified or trained staff, supervision problems, filing and diary issues, the nature of the work you do and billing issues should be taken into consideration.

Naturally every practice will have a unique plan. Ideally, to be effective and to promote 'buy-in', this plan should be developed in consultation with your partners or directors and staff.

Based on this plan, comprehensive Minimum Operating Standards or Standard Operating Procedures should be drawn up. These do not describe how the job is done, namely technical or legal skills, they describe the firm's rules for doing the job namely, procedural requirements, such as policies for protection of client information, FICA, conflicts of interest, billing, file order, file notes, the use of letters of engagement, correspondence, diarising of files and filing.

Such a document is of minimal value unless:

- It is reduced to writing.
- It is updated as times and circumstances change.
- It is freely available to all staff.
- Training is provided to ensure that the standards and procedures are understood.
- Regular supervision and audits are conducted to ensure implementation.
- There are sanctions for failure to comply.

Once these measures have been put in place, you should confidently be able to say a definite 'no' to the question posed in the headline of this article.

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