

RISK ALERT

SEPTEMBER 2022 NO 4/2022

IN THIS EDITION

RISK MANAGEMENT COLUMN

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RISK MANAGEMENT COLUMN

How does your risk management measure up to your peers?

Legal practitioners applying for Fidelity Fund Certificates (FFC) must complete the prescribed risk management self-assessment questionnaire annually. The completion of the questionnaire is also required for compliance with the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) Master Policy (clauses XXIV and 23).

The questionnaire is aimed at assisting legal practitioners to assess the state of the risk management measures that have been employed within their practices. The questionnaire also:

- focusses the attention of the practitioner on the risk management measures that need to be implemented in the practice;
- provides a means of conducting a gap analysis of the controls that the firm has in place; and
- assists the firm to collate the information that may be required in the completion of the proposal form for commercial insurers and the completion of the application for a FFC.

The LPIIF uses the information to:

- assess the levels of risk awareness and risk management in practices;
- obtain underwriting related information; and
- formulate effective risk management interventions.



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The completion of the questionnaire should not be viewed as another tick-box exercise. You will get more value from the completion of the questionnaire if you use it for its intended purposes and provide accurate information. Have a look at the questionnaires that have you completed over the years in order to assess the maturity of your risk management measures and to make improvements where necessary. I often suggest to practitioners that the questionnaire can be handed to different people in the firm for completion in order to assess the management of risk across all areas of the firm. The questionnaires completed by different people in the firm can then be used by the firm in its internal discussions on risk management.

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DISCLAIMER

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



**Legal Practitioners'
Indemnity Insurance
Fund NPC**

Est. 1993 by the Legal Practitioners' Fidelity Fund



**LEGAL
PRACTITIONERS'
FIDELITY FUND**

SOUTH AFRICA

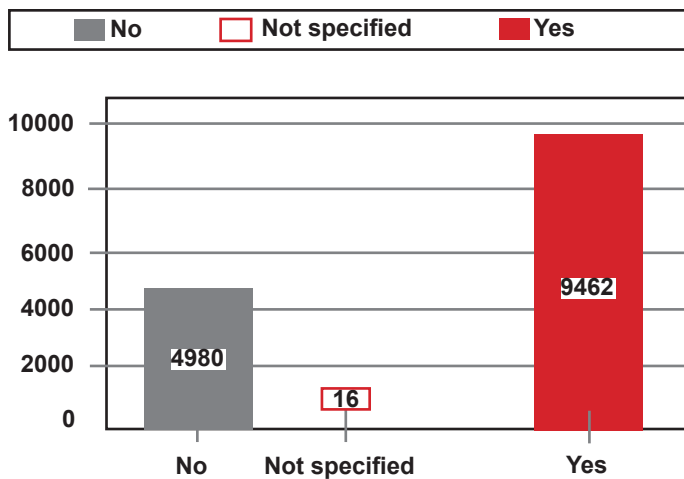
RISK MANAGEMENT COLUMN continued...

Have you compared how the information provided in your self-assessment compares with that provided when applying for your FFC, your proposal forms to commercial insurance market or even to your insurer when notifying a claim? Have you provided accurate information across all these platforms? The questionnaire can be obtained from various places including the LPIIF website.

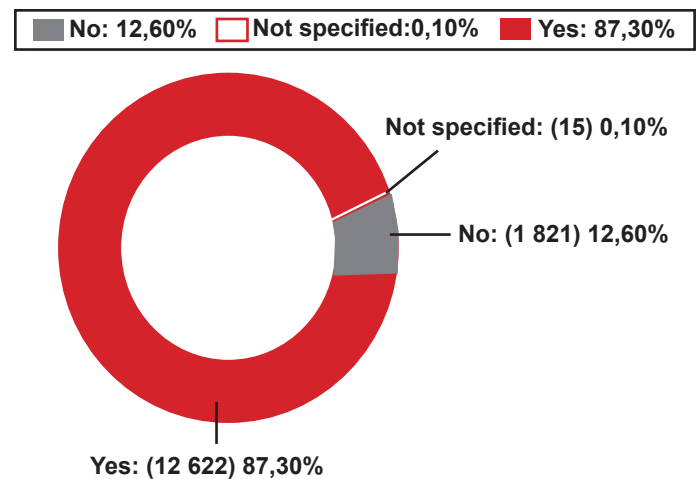
A report has been drawn from the FFC system collating all the answers provided by practitioners as at the date of that report. This snapshot can be utilised by legal practitioners to assess how their own risk management measures compare to the rest of the responses received. Some of the information makes for interesting reading. For example, more than 96% have reported having a verification system in

place for payments, yet many firms are still victim to cybercrime and the change in banking details scams. High compliance with internal measures to mitigate the risk of prescription is shown in the report yet prescription remains one of the main risks faced by the LPIIF.

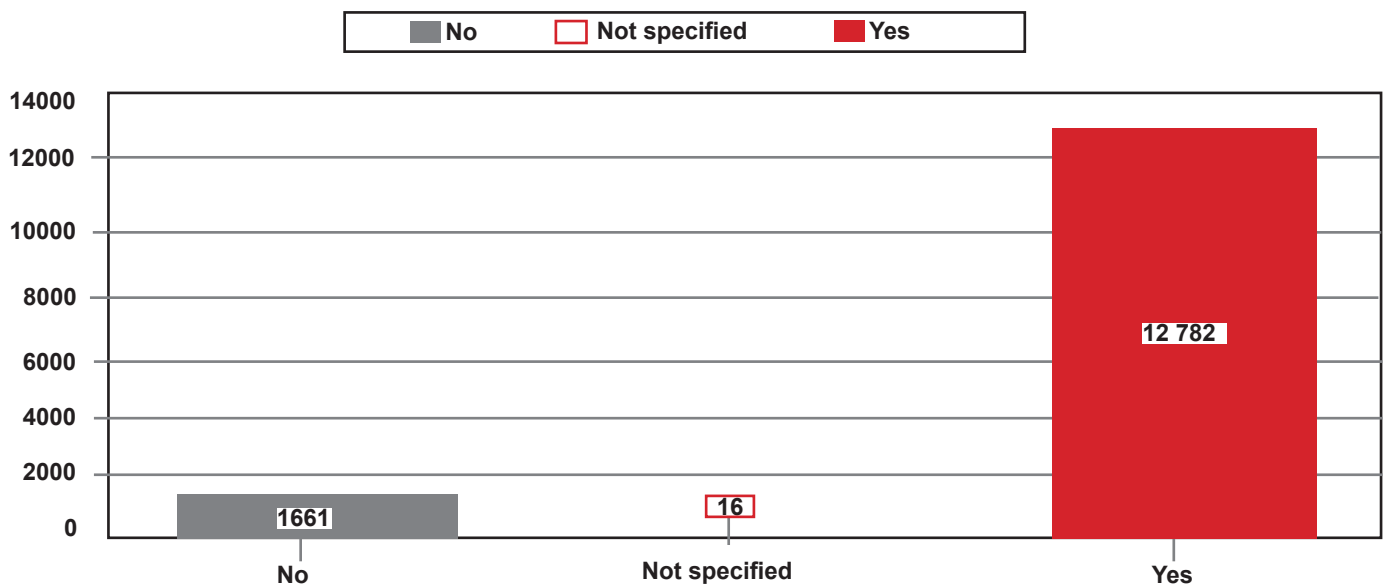
Do you have a dedicated risk management resource?



Are all instructions recorded in a letter of engagement?



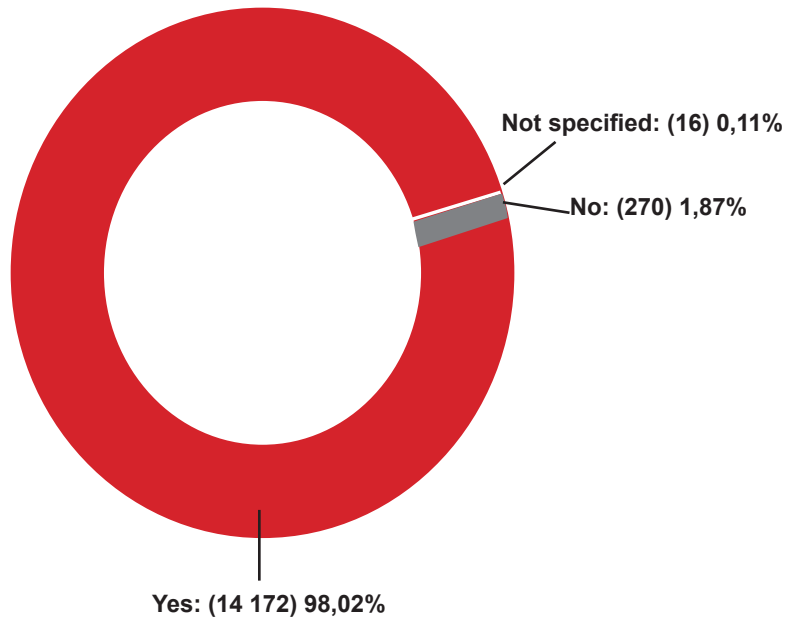
Does your practice screen prospective clients?



RISK MANAGEMENT COLUMN continued...

Do you assess whether or not you have the appetite, the resources and the expertise to carry out the mandate within the required time?

■ No: 1,87% □ Not specified:0,11% ■ Yes: 98,02%

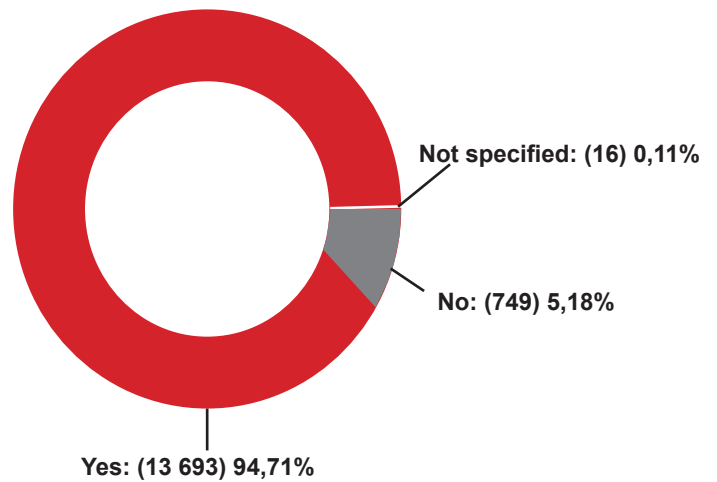
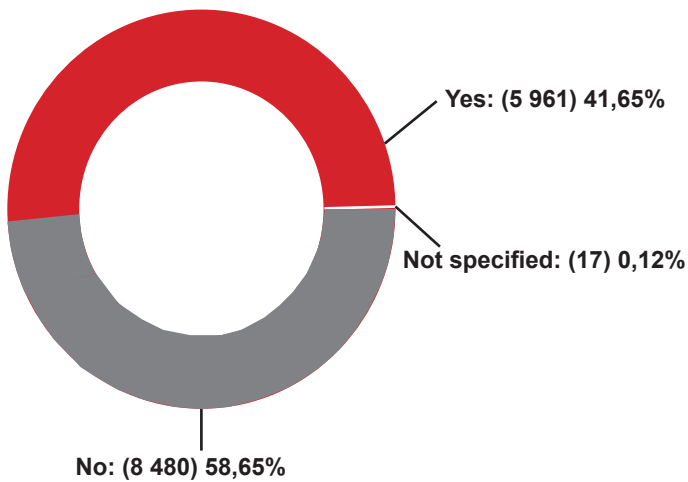


Has your firm registered all time barred matters with the LPIIF's Prescription Alert unit?

Are regular file audits conducted?

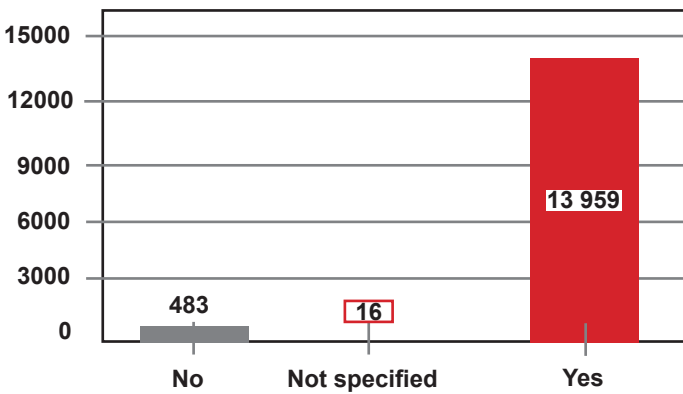
■ No: 58,65% □ Not specified:0,12% ■ Yes: 41,23%

■ No: 5,18% □ Not specified:0,11% ■ Yes: 94,71%

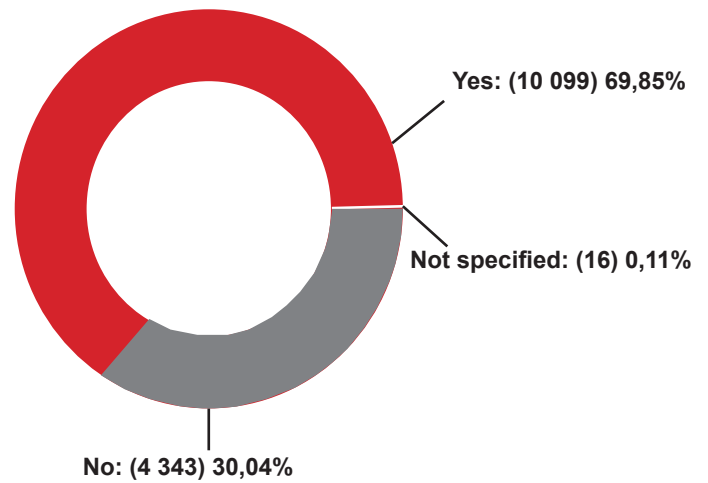


RISK MANAGEMENT COLUMN continued...

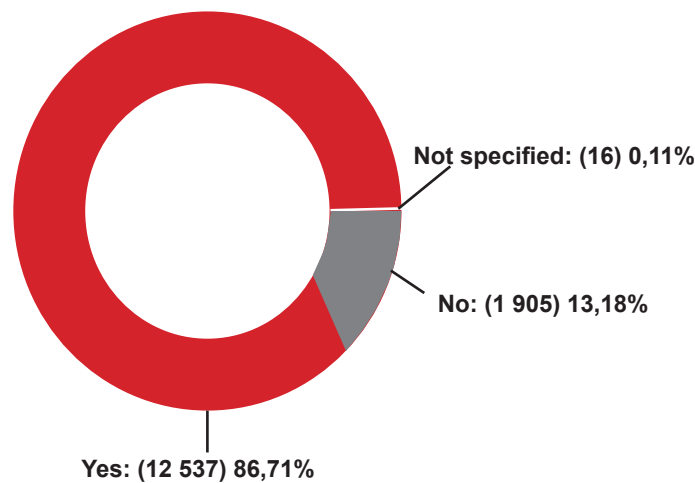
Is the proximity the prescription date taken into account when accepting new instructions and explained to clients?



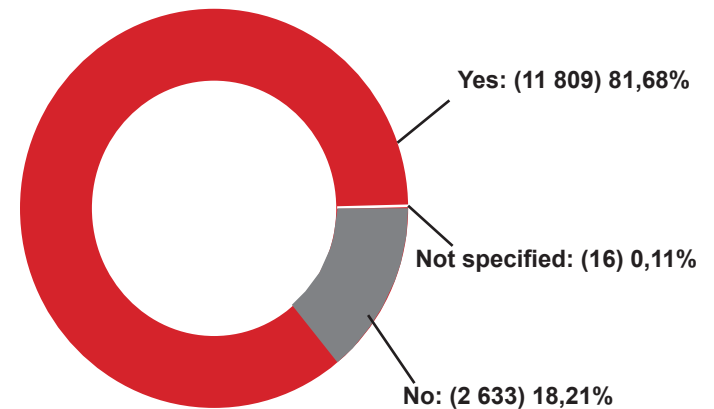
Is a peer review system implemented in the firm?



Is advice to clients always signed off by a partner/ director?

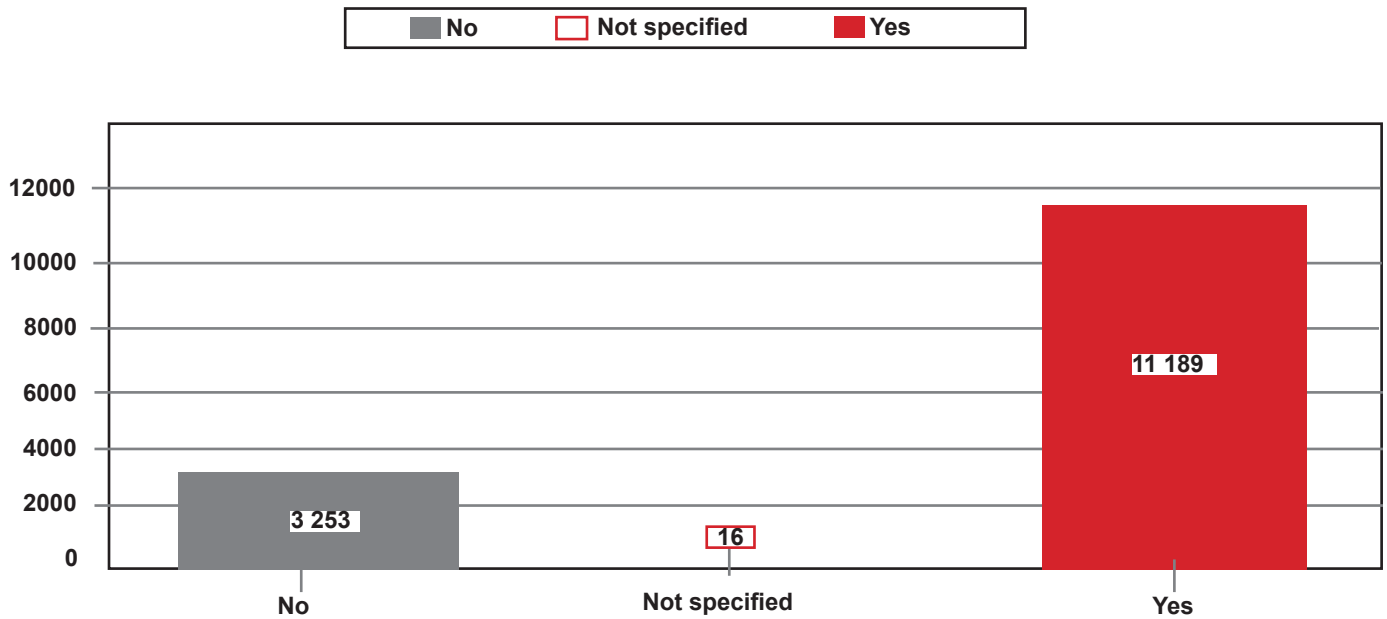


Do you have a dual diary system in place for professionals and support staff?



RISK MANAGEMENT COLUMN continued...

Do you have a formal handover process when a file is transferred from one person to another within the firm?

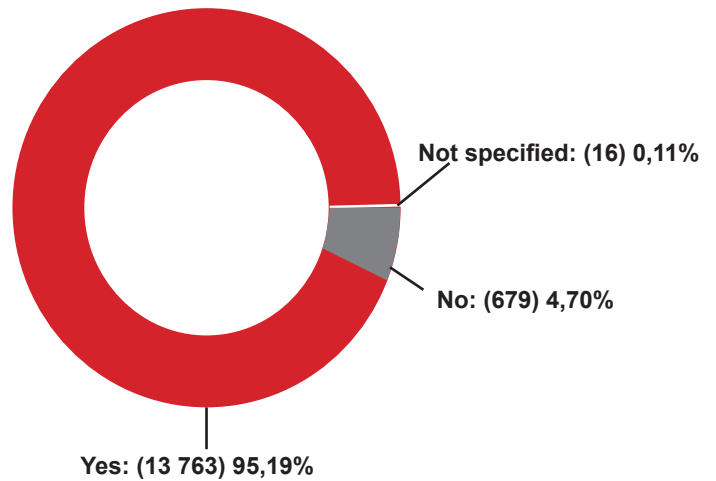
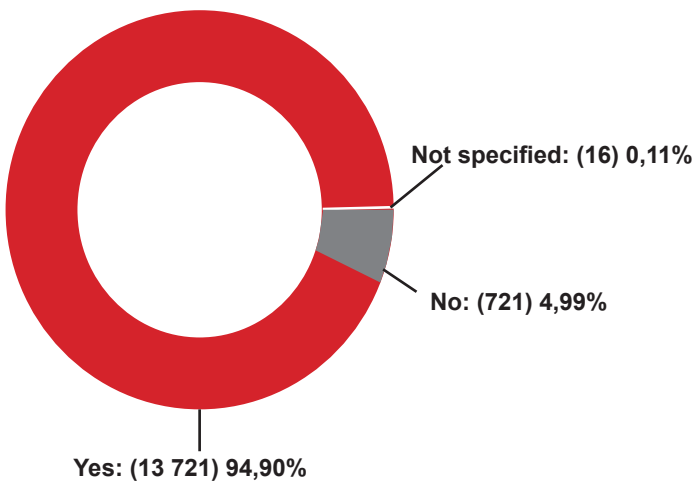


Is more than one contact number obtained for clients?

Are instructions, consultations and telephone discussions confirmed in writing?

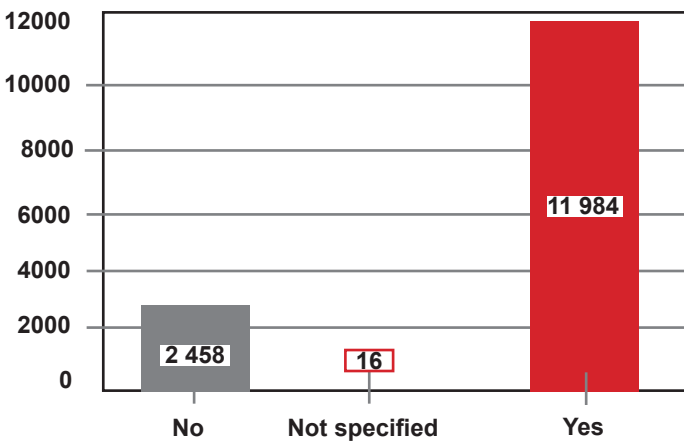
■ No: 4,99% □ Not specified:0,11% ■ Yes: 94,90%

■ No: 4,70% □ Not specified:0,11% ■ Yes: 95,19%

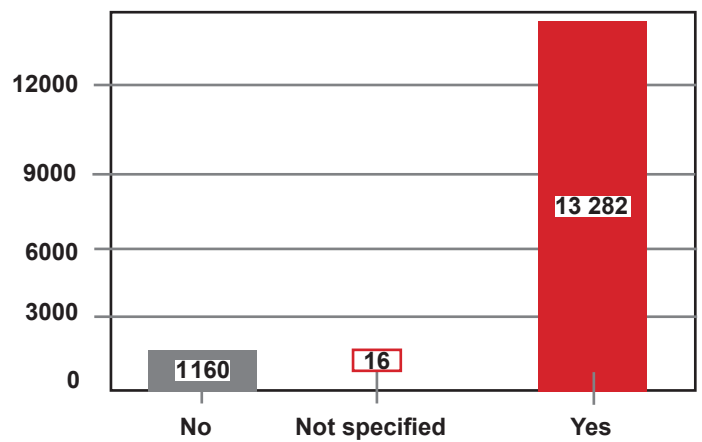


RISK MANAGEMENT COLUMN continued...

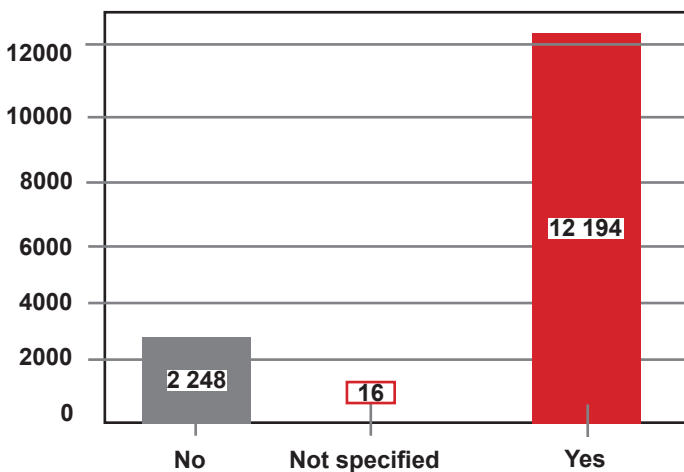
Does your firm have documented minimum operating standards/ standard operating procedures?



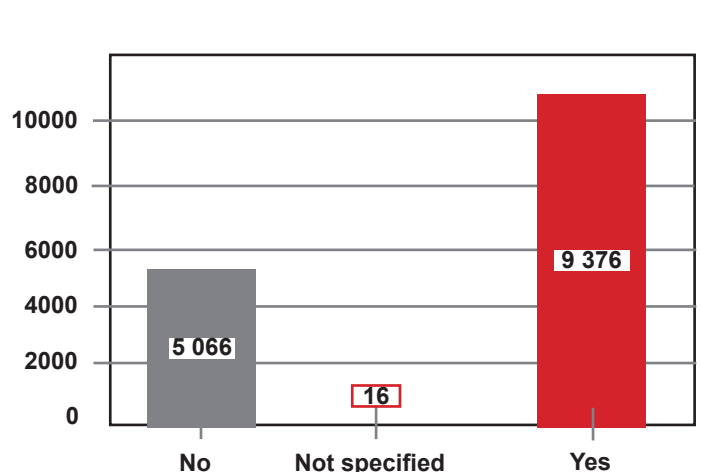
Does your practice have effective policies on uniform file order?



Is there a formal structure and process for supervision of staff and delegation of duties?

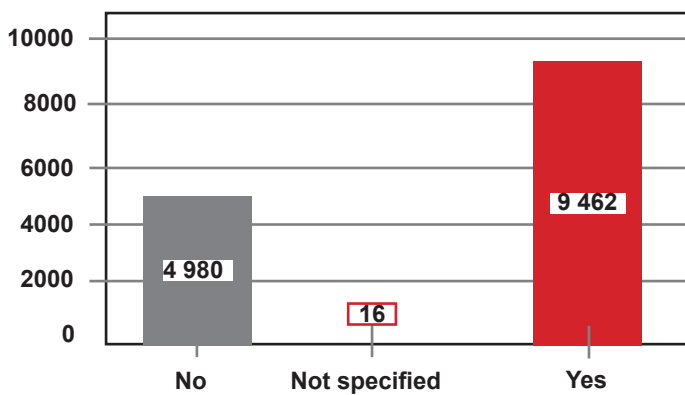


Do you have a formal training program in place?

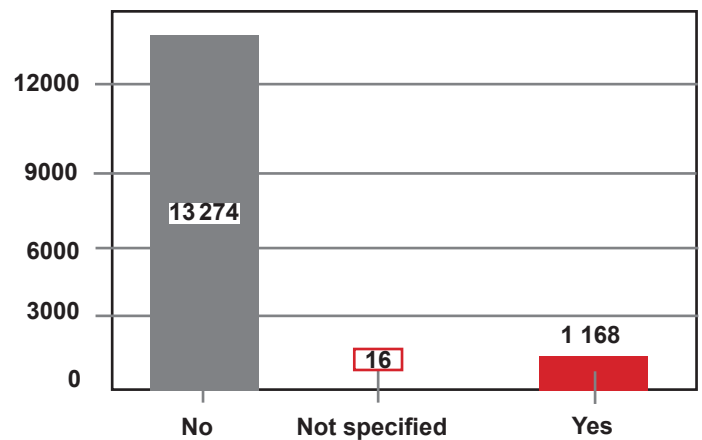


RISK MANAGEMENT COLUMN continued...

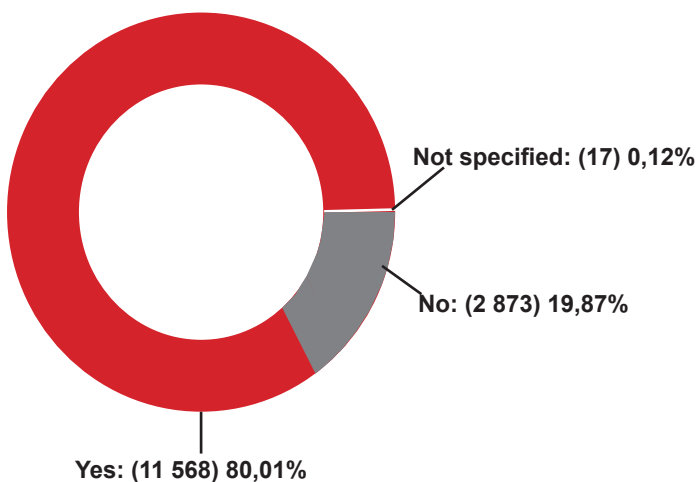
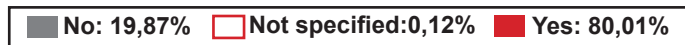
Does the training program include risk management training?



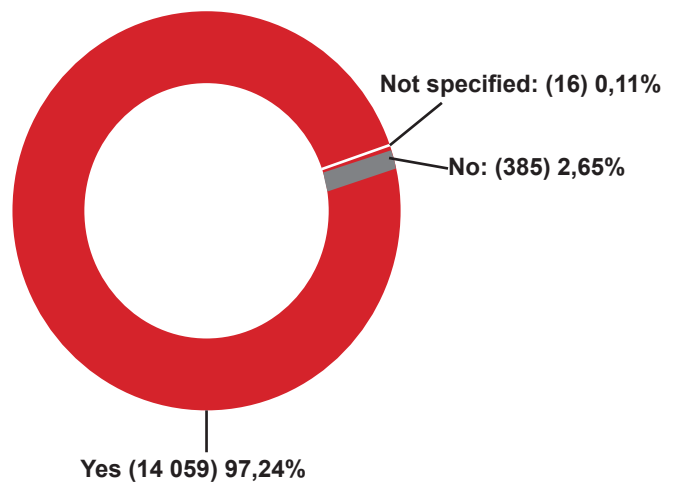
Do you have any executor bonds of security issued by the LPIIF?



Are background checks conducted on new employees?



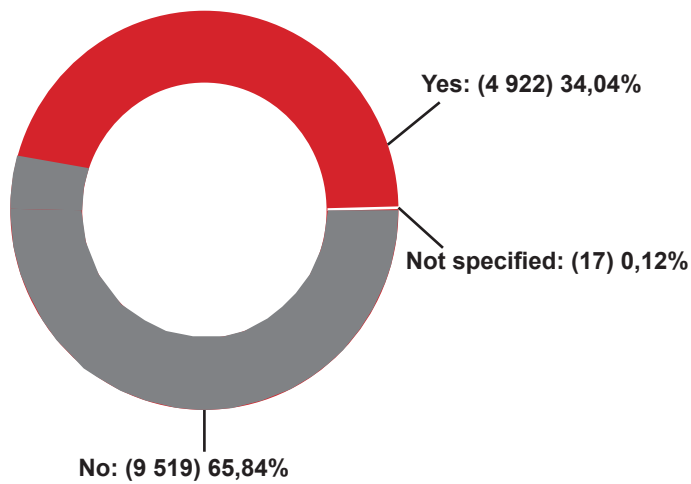
Are you aware of the risks associated with cybercrime?



RISK MANAGEMENT COLUMN continued...

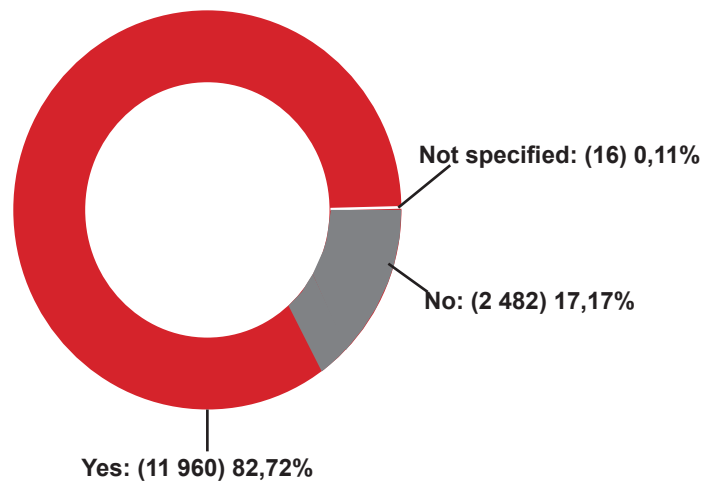
Does your practice have appropriate insurance in place to cover cyber related claims?

■ No: 65,84% □ Not specified:0,12% ■ Yes: 34,04%



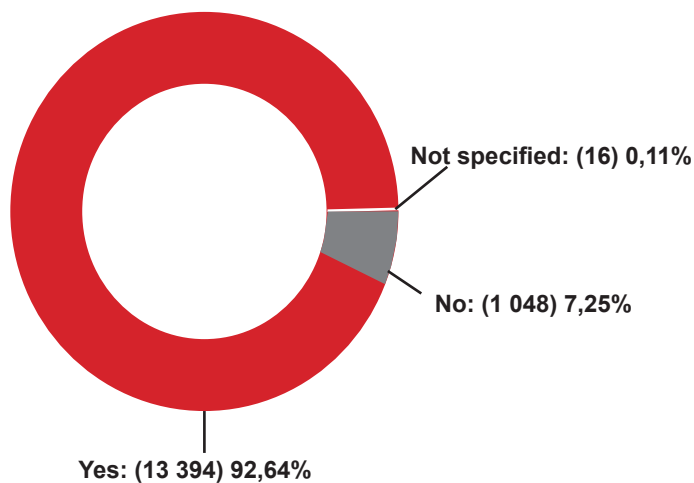
Does your practice have regular meetings of professional staff to discuss problem matters?

■ No: 17,17% □ Not specified:0,11% ■ Yes: 82,72%



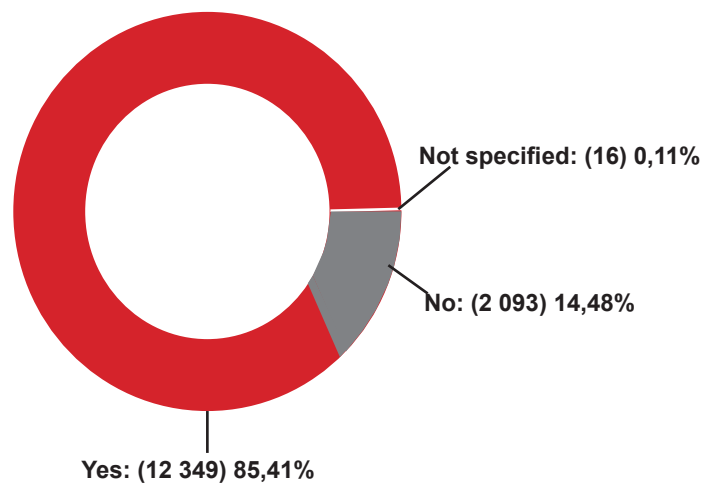
Does your practice have formal policies on file storage and retrieval?

■ No: 7,25% □ Not specified:0,11% ■ Yes: 92,64%



Have you read the Master Policy and are you aware of the exclusions?

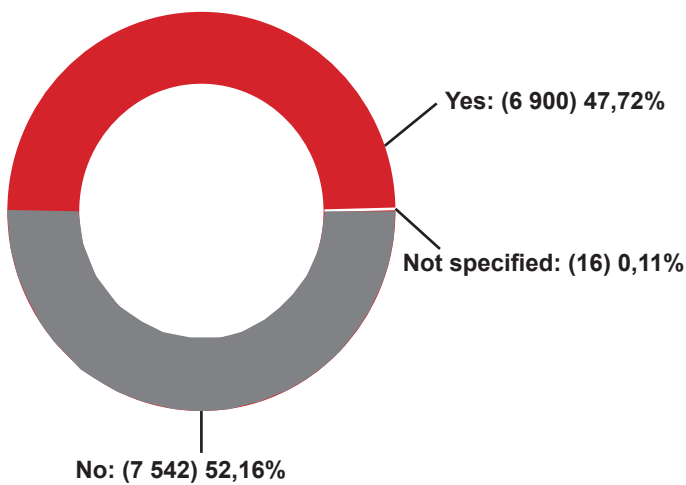
■ No: 14,48% □ Not specified:0,11% ■ Yes: 85,41%



RISK MANAGEMENT COLUMN continued...

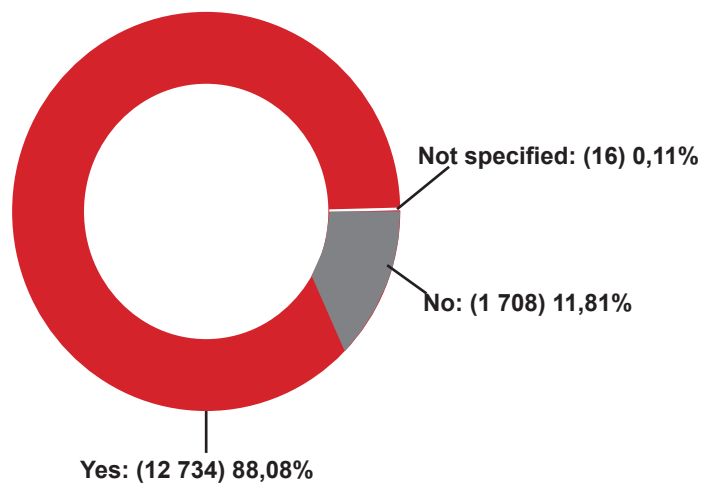
Would your firm like to receive risk management training?

■ No: 52,16% ■ Not specified:0,11% ■ Yes: 47,72%



Have you and your staff had regard to the risk management information published on the LPIIF website?

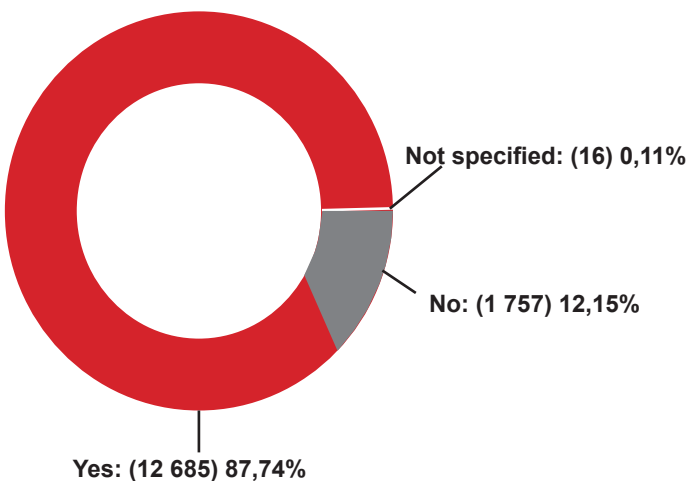
■ No: 11,81% ■ Not specified:0,11% ■ Yes: 88,08%



In respect of the financial functions, has an adequate system been implemented which addresses:

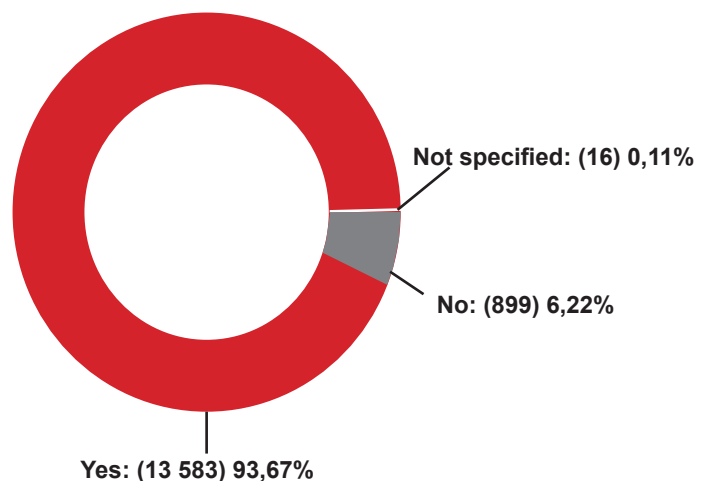
Segregation of duties?

■ No: 12,15% ■ Not specified:0,11% ■ Yes: 87,74%



Checks and balances?

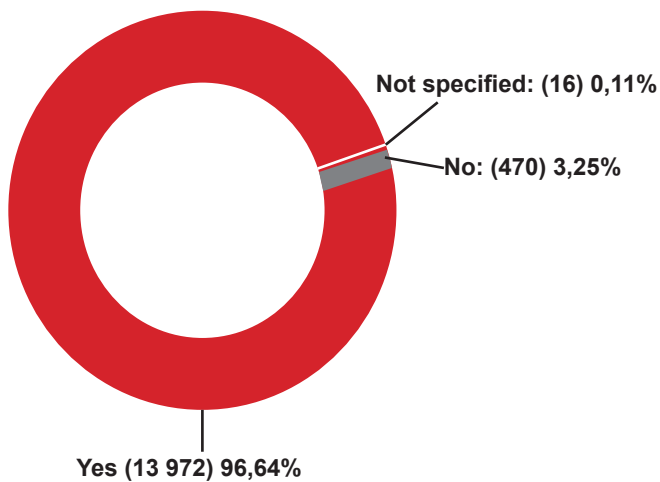
■ No: 6,22% ■ Not specified:0,11% ■ Yes: 93,67%



RISK MANAGEMENT COLUMN continued...

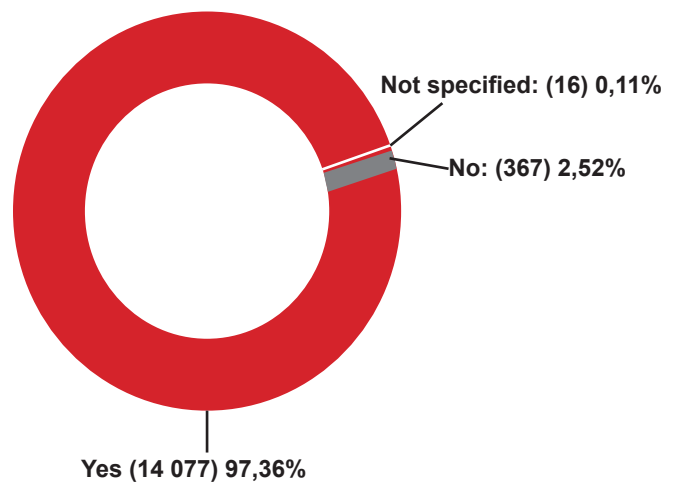
The internal controls prescribed by Rule 54.14.7 with regards to the safeguarding of trust funds

■ No: 3,25% ■ Not specified:0,11% ■ Yes: 96,64%



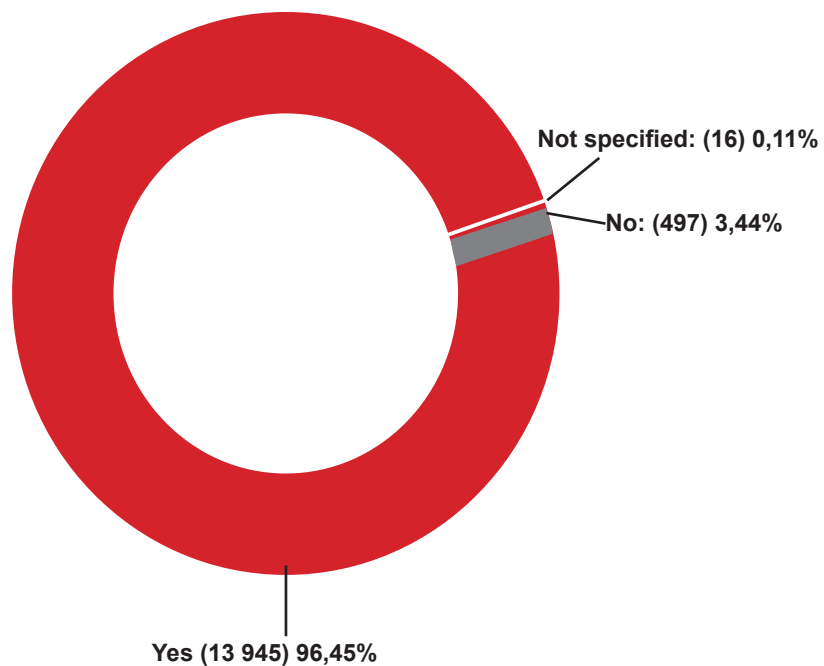
Compliance with FICA and the investment rules?

■ No: 2,52% ■ Not specified:0,11% ■ Yes: 97,36%



The verification of the payee banking details, and any purported changes as required by Rule 54.13?

■ No: 3,44% ■ Not specified:0,11% ■ Yes: 96,45%



RISK MANAGEMENT COLUMN continued...

Risks posed by recent insurance-related events on law firms

Introduction

In the past 3 years South Africa has witnessed unprecedented devastation because of various events. The strength and resilience of businesses have been tested to the greatest degree. The impact of these events naturally affects operations of the law firms – just as they affect other businesses in other sectors and industries. These insurance-related events have triggered various types of insurance policy responses and have led to a spike in insurance claims. The scale of devastation obviously differs from event to event.

From this, there are many lessons for the law firms which can assist in mitigating the risk of such losses in the future. In light thereof, this article will briefly zoom into some of these insurance events and the types of insurance policies that can be placed to protect the business entities against similar events, the possible risks and harm that may have been caused by the occurrence of thereof, and lessons and contingencies necessary to implement, going forward.

Events

Although COVID-19 broke out in the latter part of 2019 and was declared a pandemic by the World Health Organisation on 1 March 2020 (see “WHO Declares COVID-19 a Pandemic” by Domenico Cucinotta and Maurizio Vanelli, accessible at <https://pubmed.ncbi.nlm.nih.gov/32191675/>), the raging effects and implications of same are still seriously felt to this day. All indications are that this is still going to be the case for the foreseeable future. Many law firms have been massively affected by the pandemic and its aftermath. Most firms’ struggles were compounded by the Road Accident Fund’s (RAF) decision not to renew panel attorneys’ contracts (see *Mabunda Incorporated and Others v Road Accident Fund*, *Diale Mogashoa Inc v Road Accident Fund* (15876/2020) [2020] ZAGPPHC 118 (30 April 2020) and *Road Accident Fund and Others*

v Mabunda and Others (15876/2020; 17518/2020; 18239/2020) [2020] ZAGPPHC 386; [2021] 1 All SA 255 (GP) (18 August 2020)). On 15 August 2022 the Supreme Court of Appeal will hear arguments in the matters flowing from the challenges to the RAF’s decision to terminate the appointment of its panel attorneys. Regrettably, these 2 (two) occurrences coincided.

Most businesses which had appropriate insurance policies in place at the time could successfully claim from their insurers for business interruptions emanating from the COVID-19 pandemic. When COVID-19 broke out, insurers- in various jurisdictions worldwide- were notified of a plethora of business interruption claims. This ignited fierce litigation, worldwide. In some jurisdictions, the courts found in favour of favoured the insureds and, as a result, insurers made huge payments. South Africa was not spared from such litigation and local insurers, similarly, had to indemnify the business interruption losses where their insureds had taken out applicable policies. A prominent case in this regard is the *Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another* (255/2021) [2021] ZASCA 141; [2022] 1 All SA 376 (SCA) (7 October 2021). Having insurance cover for business interruption and loss of income would have enabled the law firms to have their losses indemnified by the insurers.

The other major occurrence was the July 2021 civil unrest. The effect of the losses from that event are still being felt in some sectors. The extent of destruction is evident from the fact that the payments by the South African Special Risk Insurance Association (SASRIA) are still ongoing – over a year since after the historic event. The July 2021 civil unrest may have affected law firms in KwaZulu-Natal and some parts of Gauteng. The destruction included infrastructure, buildings and office equipment. For the affected law firms, if any, this could mean the halting of business operations, the destruction



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of office space, looting of office equipment and loss and damage to office files and documents. Legal services to the clients cannot be rendered while the firm is not able to operate. For those law firms to have been able to successfully claim from SASRIA, like other insureds, they would need to have had SASRIA cover extension on their insurance policies. In the absence of the said extension, the relevant legal practices would need to bear all the resulting losses themselves.

In addition to the above, there were many other big events, including major fires that erupted in the Western Cape causing severe destruction and bringing some businesses to a sudden halt. From this, there could possibly be claims related to business interruptions, loss of income/profit, loss or destruction of property damage due to fire etc.

All these occurrences may have affected some legal practitioners. For example, the Western Cape fires may have affected service of court documents and the operations of some firms. Therefore, insurance policies for interruption of business stemming from fire could potentially be triggered, and the potential for professional indemnity claims may have loomed.

Cyberattacks, depending on the nature and extent, could result in significant losses for law firms and the operations

RISK MANAGEMENT COLUMN continued...

of the affected firms could have been interrupted in some instances. The *Fourie v Van der Spuy and De Jongh Inc. and Others* (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019) matter is an example of a successful claim brought against a law firm as result of losses suffered due to a cyber related incident. The events which led to this case occurred prior to those highlighted above.

KwaZulu-Natal has been hit twice by heavy rains and flooding in recent months. The extent of damage caused by these has been extensive, leading to total closure of some businesses, major delays in the delivery of services, etc. It is no surprise that the government declared a State of Disaster in that province as a result. These would also have caused major inconvenience and harm to law firms. Office buildings may have been washed away, there was inability to access the workspace and to meet deadlines and office furniture and equipment may have been destroyed. To mitigate against the losses from these events, the law firms concerned would need to have placed insurance cover to protect themselves against damage caused by flooding and heavy rains, loss or destruction of property, business interruption, loss of income and the increased cost of doing business in order to be indemnified for the resultant losses.

Risks for the law firms

The most obvious risk that comes with failure to meet deadlines is prescription of matters. Depending on the circumstances of each matter and how the affected legal practitioners responded thereto, there may be no escaping prescription despite it being caused by unforeseen event. Also, depending on the nature of the underlying matter, the liability may exceed the applicable cover provided by Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) Master Policy, in which event the law firm has to take the responsibility for the balance if it did not have appropriate top-up insurance in place (for more, see “Who does the LPIIF insure and for how much” in the November 2020 edition of the Risk Alert Bulletin). Where physical office files have been destroyed, critical

(case-affecting) documents may have been destroyed and/or crucial deadlines missed. Once more, depending on how the legal practitioner responds to the event, there may be a lawsuit against the law firm for professional liability. Where the office building has been damaged and office equipment destroyed, physical evidence stored in the office may also be compromised or damaged in the process. Moreover, a law firm does not only have obligations towards its clients, but it also has business-related obligations. Thus, damage of office equipment also hinders firms from executing mandates, which may attract liability following on the breach of business related contracts. Also, destruction means interruption to the business, then loss of income and, ultimately, failure to pay the creditors. This, in turn, may trigger desperation on the part of the legal practitioners. Out of desperation, they may resort to unethical activities, thereby opening themselves up to disciplinary action by the Legal Practice Council (LPC). For example, one may be tempted to unlawfully misuse trust funds as stop-gap measure, or to accept instructions in areas of law where the practitioner does not have the appropriate expertise.

These are but some of the risks that may flow from the recent events and, which all the legal practitioners need to be aware of and guard against.

All industries, businesses and sectors have been affected by these events. However, given the high ethical standard and stature with which the legal profession is held, it becomes necessary for all the relevant role players (and legal practitioners, in particular) to resist every temptation to be involved in activities that can threaten their hard-earned careers.

Lessons to be learnt

From the events highlighted above, it is evident that law firms, like other businesses, need to have appropriate insurance covers in place to cover all foreseeable risks. Given the unpredictability of occurrence of different risks, it is incumbent upon law firms to enhance their protection by taking out wide-ranging types of insurance policies. In addition

to insurance policies, it is necessary to have necessary contingency plans and internal measures in place to, firstly, reduce the likelihood of the risk occurring, and, secondly, to mitigate the impact of the risk if it does occur. It is, of course, almost impossible to implement contingencies for every possible risk that may materialise. However, where foreseeable and feasible, it is critical to implement contingency plans and risk mitigation measures. Furthermore, law firms should have crisis-management policies in place. This is inextricably intertwined with the point above relating to the implementation of contingency plans. A legal practitioner needs to be accountable and honest to all the relevant stakeholders – clients, service providers, the insurers (including, of course, the LPIIF where applicable), and the LPC. Honesty and accountability not only save time and costs for investigation but also boost confidence in the concerned practitioner and the profession as a whole. Moreso, it can be considered as a manner of retaining clients who have suffered losses as a result of the event. This is because the clients are more likely to return for the services of a practitioner who is accountable and honest enough to take responsibility than the one who attempts to be evasive and dodge the consequences. For more on integrity in the legal profession, please see “Integrity as a lifelong commitment in the legal profession” by Mtho Maphumulo in the June 2020 edition of the Risk Alert Bulletin.

This is not an exhaustive list of “take outs” from the recent occurrences, as closer scrutiny of each of the events can reveal further lessons.

For most businesses, including law firms, taking out appropriate insurance policies is often not regarded as a priority. However, events in the past few years should be enough to change this attitude. Having broader insurance policies in place does not necessarily negate the possibility of the law firm being held legally responsible for certain losses, but, it is one of the most effective contingency and risk transfer measures (the risk is transferred to the insurer) that can be put in place.