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RISKALERT

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Attorneys Insurance Indemnity Fund (NPC)
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RISK MANAGEMENT COLUMN

IS YOUR PRACTICE READY FOR THE LEGAL PRACTICE ACT?

The publication of this edition of the *Bulletin* will coincide with the full implementation of the Legal Practice Act 28 of 2014 ('the Act').

Thomas Harban, Editor

It is trite that the regulatory regime under which the South African legal profession operates will undergo a fundamental change under the Legal Practice Act. Every legal practitioner will be affected by the Act and the new rules for the profession to be introduced under the new legislative and regulatory regime.

Some of the new concepts introduced in the Act and the rules are:

- Aligning the legislative framework of the legal profession with constitutional imperatives;
- Setting norms and standards for legal practitioners;
- Regulating the professional conduct of legal practitioners to ensure accountable conduct;
- Setting new requirements for continuing professional development (CPD); and
- Ensuring the accountability of legal practitioners to the public.

RISK MANAGEMENT COLUMN continued...

It remains to be seen how the concept of ensuring accountability of legal practitioners to the public will affect the legal duty of practitioners and their liability for claims. Compliance with the Act and the rules will require that practitioners study the provisions of the legislation carefully and, where necessary, make changes to the manner in which their practices are structured and legal services are rendered to the public. For example, with regards to fees charged in respect of legal services, the provisions of sections 35(7) to (12) must be complied with and the agreements with clients must be documented in a written document and signed by the parties. The areas covered in the rules include:

- Accounting;
- The need for internal controls;
- Reports to the Legal Practice Council in the event of non-compliance;
- The responsibility for ensuring compliance;
- The reporting requirements;
- Reports of dishonest or irregular conduct; and
- The rules applicable to investment practices.

The rules in general and the accounting and investment rules in particular must be read within the broader legislative compliance environment, including the compliance with the Financial Services and Intermediaries Act 37 of 2002 (the FAIS Act), the Financial Intelligence Centre Act 38 of 2001 and good governance practices.

Practitioners must take account of the changed legislative requirements in assessing the risk environment in which their practices are conducted. The article by Simthandile Myemane is this *Bulletin* explains the importance of correctly designating investment accounts in the changing regulatory environment.

Effective risk management in a law firm is often said to be a matter of the application of principles of common sense. However, there are common errors made in legal practices which could lead to professional indemnity claims against firms as demonstrated in the contribution by Marius van Staden and Stephen Leinberger. There are a number of important lessons to be learned from the cases referred to – sometimes the 'war stories' from the cases highlighted provide the best lessons.

It is hoped that the new regulatory regime will be positively embraced by the profession and that the dawn of the new regulatory era will usher in a new attitude to risk management in legal practices. All the articles in this edition of the *Bulletin* make reference to the Act.

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PRACTICE MANAGEMENT

THE INCREASED IMPORTANCE OF CORRECTLY DESIGNATING INVESTMENTS ACCOUNTS

Article by:
Simthandile K Myemane
Practitioner Support Manager
of the Attorneys Fidelity Fund

The importance of correctly assigning various trust account investments in a law firm will become more stringent under the Legal Practice Act 28 of 2014 ('the LPA'). The following sections explore the differences in the various investments accounts that legal firms can open, and the reasons why correct assignment of the investments account has become even more important.

In terms of the current Act, the Attorneys Act 53 of 1979, a legal firm can open trust investment accounts, referred to as trust savings or interest bearing accounts, in terms of two sections of the Act, s78(2)(a) and s78(2A). Legal firms will continue to open these types of trust investment accounts under the LPA in terms of s86 (3) and s86 (4), respectively.

Legal firms do from time to time deposit client's monies in investments when they do not provide legal services, have concluded a mandate that was received from the client and/or also invest on behalf of their own staff. These types of investments are not the investments authorised by rules 55 and 56 of the draft rules. These types of investments are subject to different legislation, the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act'). Below are a few scenarios to demonstrate such investments:

- A client, ex client or member of staff of a law firm deposits money with the legal firm purely for purposes of investment of the funds, with no legal services rendered to the client or member of staff by the firm. This also applies to clients of a law firm where there are ongoing legal service provided, but monies not intended for the specific legal service being rendered, are deposited for purposes of investment on behalf of the client.

- A legal firm may provide legal services to a client in a matter e.g. litigation, conveyancing. The mandate is concluded by the firm, and the legal firm accounts to the client as required. The client, for some reason or another, instructs the firm to hold on to the funds until further notice. Such monies that the legal firm continues to hold on behalf of the client, with no ongoing legal services provided, should be invested in terms of the rules, and not in terms of the section to the Act.

The Attorneys Fidelity Fund (the Fund) provides protection for the investments made in terms of the Act (s) in case of theft or misappropriation of funds entrusted to the attorney. However, the Fund does not provide any cover for theft or misappropriation of client money invested in terms of the rules.

On the next double page spread is a comparison of the various investment accounts:

PRACTICE MANAGEMENT continued...

Characteristics	Attorneys Act (current)		Legal
	s78(2)(a) investments	s78(2A) investments	s86(3) investments
Description	Money not for a specific client, funds in the trust account	Money for a specific client for legal services rendered	Money not for a specific client, funds in the trust account
Mandate	No client mandate, at the discretion of the legal firm	Client mandate required prior to investment	No client mandate, at the discretion of the legal firm
Interest earned	Interest earned due to the Fund	Interest earned due to the client – legal firm entitled to a reasonable fee	Interest earned due to the Fund
	Interest may be paid over to the Fund or through its nominee annually, by the end of May	Interest due to client on early termination or completion of mandate	Interest accrued in respect of any period ending on the last day of February in each year shall, on or before the last day of May in that year, be paid to the Fund or its nominee
Protection by the Fund	Theft or misappropriation covered by the Fund	Theft or misappropriation covered by the Fund	Theft or misappropriation covered by the Fund
Other legislation / regulations	Uniform rules	Uniform rules	LPA rules
Accounting to client	No requirement – money not for a specific client	Accounting to client required upon early termination or completion of mandate	No requirement – money not for a specific client
Pooling of investments	Not applicable	No pooling – each client investment to be opened separately and endorsed in terms of the section	Not applicable
Accounting records	Legal firm to maintain accounting records	Legal firm to maintain accounting records	Legal firm to maintain accounting records

PRACTICE MANAGEMENT continued...

Practice Act (future)	Uniform Rules (current)	LPA Rules (future)
s86(4) investments	**Rule 36 investments**	**Rule 55 investments**
Money for a specific client for legal services rendered	Money for a specific client, no legal services rendered	Money for a specific client, no legal services rendered
Client mandate required prior to investment	Client mandate required prior to investment or as soon as possible after investing funds for that client	Client mandate required prior to investment or as soon as possible after investing funds for that client
5% of interest earned due to the Fund (s86(4)(b)– legal firm entitled to a reasonable fee	Interest earned due to the client – legal firm entitled to a reasonable fee	Interest earned due to the client – legal firm entitled to a reasonable fee
5% of interest accrued on money deposited during the course of a calendar month or on maturity shall be paid over to the Fund or its nominee on or before the last day of the next succeeding calendar month	Frequency of interest payment agreed with client	Frequency of interest payment agreed with client
Theft or misappropriation covered by the Fund	Client enjoys no protection for theft or misappropriation – legal firm to inform the client upfront	Client enjoys no protection for theft or misappropriation – legal firm to inform the client upfront
LPA rules	FAIS Act	FAIS Act
Accounting to client required upon early termination or completion of mandate	Accounting to client required at least annually on income earned or other charges made by the legal firm in carrying out the mandate	Accounting to client required at least annually on income earned or other charges made by the legal firm in carrying out the mandate
No pooling – each client investment to be opened separately and endorsed in terms of the section	No pooling – each client investment to be opened separately	No pooling – each client investment to be opened separately
Legal firm to maintain accounting records	Legal firm to maintain separate accounting records	Legal firm to maintain separate accounting records

PRACTICE MANAGEMENT continued...

What could go wrong?

A legal firm can easily assign an investment to an incorrect section, and this has happened. In terms of the current legislation, interest earned on both investments made in terms of s78 (2A) and in terms of the rules is due to the client, with the law firm entitled to a reasonable fee for administering the investment.

However, in terms of the LPA, an investment in terms of the rules may be incorrectly designated as a s86 (4) investment. As already reflected in the comparison table above, 5% of interest earned on a s86(4) investment will be due to the Fund (s86(4)(b)) with theft or misappropriation arising out of these investment enjoying protection by the Fund. On the other hand, no portion of an investment in terms of the rules is due to the Fund, and theft or misappropriation thereof enjoys no protection by the Fund. With this understanding, incorrectly designated investments made in terms of the rules may result in 5% of interest earned paid over to the Fund or through its nominee.

As already indicated, there is no protection by the Fund for such investments. Should this incorrect designation happen, resulting in a portion of the interest paid over to the Fund, the onus will be on the law firm to correct, and to recover the incorrectly paid interest, which process will involve a lot of administration and expose the firm to potential liability. Legal practitioners are therefore cautioned to ensure proper opening of the accounts, and designation thereof, in order to avoid any mistakes that could result in intensive administrative processes.

Conclusion

Law firms should ensure that staff vested with the responsibility to open and administer the various investments are well empowered in understanding the differences and impact of these investments. Sufficient oversight should also be provided to staff so vested with the responsibility to ensure that mistakes are picked up and corrected in time. The ultimate responsibility for correctness of the transactions lies with the legal practitioners in a firm.

Legal firms involved with investments in terms of the rules should also ensure compliance with all applicable legislation and regulations, including, but not limited to, registering with the Financial Sector Conduct Authority (FSCA) and obtaining a Financial Services Provider (FSP) licence.

OBSERVATIONS OF ATTORNEYS' PRACTICE PITFALLS AND PREVENTION OF PROFESSIONAL NEGLIGENCE CLAIMS

Article by:
By Marius van Staden and Stephen Leinberger, Savage Jooste & Adams Inc

Introduction:

Our firm serves on the Attorneys Insurance Indemnity Fund NPC ('the AIIF') panel of attorneys.

This article canvasses risk management considerations, with the benefit of hindsight, in particular considering certain matters that our office has handled, matters that raised mental alerts and inform risk management measures. While some of the problems are novel, others are common. Naturally, the common problems are the biggest problems, and the most preventable ones.

Attorneys, rightly or wrongly, are often sued for professional negligence. Apart from the obvious disastrous consequences of the attorney's conduct for the client herself, there is the capital exposure to the profession, the cost exposure to the AIIF for claims that could, in any event, have been avoided, and the negative impact on the reputation of the profession as a whole, that is concerning.

With the introduction of the Legal Practice Act 28 of 2014 attorneys should, now more than ever before, ensure that they render an effective service to the public. The consequences, should they not, impact on the whole profession. With the trade union function of the statutory regulatory bodies disappearing, the attorneys' protagonist voice is being limited and negative professional behaviour and publicity may receive disproportionate publicity.

We as attorneys must ask ourselves what our profession means, what it stands for, and uphold those values. Being an attorney is not merely a process of garnering fees to make a living. It is much more than that. It is serving the public according to a time-honoured set of values. If we do not serve the public, we do so at our peril.

With this in mind, we now turn to a discussion of specific problems, encountered by our office in handling claims, which could have been avoided. In order to protect attorney and client privilege we do not mention the names of the cases or the parties involved. We also emphasise that our comments on the values of the profession do not reflect on any of these cases. We rather regard these cases as a springboard in order to reflect on these values.

What precludes an attorney from issuing summons?

In Case A, an instruction was taken over from the insured-defendant before issue of summons against the Road Accident Fund ("the Fund"). Summons was then not issued and the defendant was sued on the basis that he allegedly did not cooperate and provide his file contents, which precluded the plaintiff from issuing summons against the Fund. The court found against the plaintiff, and ordered *de bonis propriis* costs against the plaintiff's attorney, who also testified in the matter.

The pith of the problem the court found with the plaintiff's case was this: What exactly precluded the plaintiff's attorney from issuing summons against the Fund? If an attorney extracts proper instructions in consultation with his or her client, he or she either knows, or is able to determine, when a cause of action arose, where geographically, and who is responsible.

That is usually all that is required for an attorney to issue summons, particularly against the Fund. Furthermore, these are instructions that one can take at the very first consultation with a client.

First and foremost, therefore, an attorney should perform the essentials of his or her mandate, taking instructions, when meeting with his client for the first time. "Taking instructions" means literally that; the attorney is told what happened and asks clarifying questions. Taking instructions does not only mean accepting a client's mandate.

Under-settlement against best advice:

In some cases, attorneys settle an action on the express instructions of the plaintiff, who indicated that he or she wanted the money immediately. In Case B, the attorney advised the plaintiff that he should consult an expert so that the attorney could properly assess the claim, but the plaintiff was insistent that the matter be settled without the conclusion of the expert report, and it was accordingly settled. The attorney's advice was not reduced to writing and the plaintiff issued summons against the attorney shortly thereafter.

The court *a quo* found that the attorney was negligent. The matter is on appeal, and the appeal court will have to make some decisive findings on the extent of an attorney's mandate. Had the attorney reduced his advice to writing, it would have assisted the court *a quo's* task. The oft repeated lesson to be learned is this: reduce your advice to writing. It not only creates certainty, but also serves as part of your testimony.

In Case C, the attorney settled on the express instructions of the plaintiff's mother, who was severely indigent, and required the funds on an urgent basis. The attorney relied on the mother to sign a disclaimer. Years later the attorney was sued by a *curator ad litem* on behalf of the plaintiff (now an adult), the mother having passed away in the interim.

An attorney must be doubly careful when the client is a minor, and must act in the best interests of the minor, even though instructions emanate from a guardian. An attorney cannot be excused for having taken instructions from the parent, where settlement may not be in the interests of the ultimate client, the minor. If the parent acts contrary to the attorney's advice, or not in the best interests of the minor, it is best that a curator *ad litem* be appointed.

If a client does not accept an attorney's advice, an attorney can of course withdraw as attorney of record, but this can have grave consequences for a plaintiff, especially at advanced stages in litigation. See generally *Food & Allied Workers Union v Ngcobo and Another* 2013 (12) BCLR 1343 (CC), which serves as authority for the proposition that mandatories may only withdraw if they do so timeously, so as not to prejudice their mandator.

The lesson from all of this is that, when advising a client, if there are indications that the settlement would not be in the best interest of the client, it is important for an attorney to either refer the client to an expert or, if the client refuses, to create a paper trail reflecting the attorney's advice not to settle. Even the latter, however, will not protect the attorney against liability if the ultimate client is a minor. Ultimately an attorney must act in the best interests of his client, even at the risk of losing the client.

File audit, instruction taking and proactivity:

In Case D the action became dormant and "died a natural death" in the of-

PRACTICE MANAGEMENT continued...

fice of an attorney, for want of instructions. The mortality of the file took its course and the file was ultimately destroyed. Many years later the attorney was sued for allowing the claim to prescribe. The obvious difficulty facing the attorney was establishing the facts surrounding the matter, having closed the file with no available documentation.

Even if the attorney does not hear from the client, and believes the client has lost interest in the matter, he should still go to the trouble of contacting the client, before destroying his file. This may of course not always be possible. However, in such case then the attorney should not destroy the file.

It must be noted that courts take a hard stance against defendant attorneys who allege that they could not obtain instructions from their clients. In this regard see *Mazibuko v Singer* 1979 (3) SA 258 (W) and *Mlenzana v Goodricke & Franklin Inc* 2012 (2) SA 433 (FB). It is of utmost importance that an attorney should confirm instructions and, as previously mentioned, maintain a paper trail. It is, furthermore, of utmost importance that attorneys report to clients on a regular basis.

Attorneys must be proactive, should conduct a proper regular audit of files so as to apprise themselves of developments, or lack of developments, be clear about their instructions, and must report to clients on a regular basis. This will have the effect of taking proper instructions and avoiding prescription. Reviews should be conducted on all files and, where necessary and appropriate, consideration should be given to closing files with the knowledge of the clients.

Protection of funds:

In case E, an attorney settled a claim against the Fund on behalf of a plaintiff who had sustained a severe brain injury in a motor vehicle accident, which brain injury rendered him incapable of managing his own affairs. Albeit that an expert had informed the attorney that the plaintiff was incapable of managing his own affairs, the attorney failed to act on the expert advice, and failed accordingly to appoint a *curator bonis*.

The result was that the plaintiff squandered his funds, and after the plaintiff's new attorney arranged for the appointment of a *curator bonis*, summons was issued against the erstwhile attorney for professional negligence. The erstwhile attorneys' failure to take the necessary steps to protect the funds paid to the plaintiff amounted to a breach of mandate.

Ultimately, the attorney was liable for the figure which represented the difference between what remained of the plaintiff's funds and what had been squandered by the plaintiff.

Attorneys must be diligent and fastidious, and pay close attention to detail. Attorneys must take all steps necessary to protect their clients' interests according to the highest standards of the profession, which may include protecting their clients against themselves, in circumstances where brain damaged clients may be their own worst enemies.

Late presentation of neuropsychiatric sequelae:

In Case F, the attorney was sued for under settlement. The Fund was conceptually an alternative defendant, on account of the fact that the plaintiff was incapable of managing his own affairs, was incapable of furnishing instructions to the attorney, and the attorney accordingly had no authority to settle the action against the Fund. The claim against the Fund in the original matter accordingly remained "open". The plaintiff accordingly had a choice which defendant to sue, the Fund or the attorney.

The lesson to be learned is this: If there are any indications whatsoever of cranial injury, and neuropsychiatric *sequelae*, an expert must be briefed long prior to the quantum assessment stage, even perhaps before issuing summons or concluding settlement, to provide a recommendation as to whether the plaintiff is capable of handling his or her own affairs. Obviously, the appointment and report of an appropriate expert could have the effect that it shows that the claim has not become prescribed.

An attorney can only take instructions from a client who has the mental capacity to furnish instructions. When a client does not have that capacity, due to brain injuries incurred in an accident, the attorney is not mandated to act on behalf of the client and reach a valid settlement. A settlement reached under such circumstances can be set aside and summons issued anew against the Fund. Further, by the very serious nature of a brain injury which incapacitates a client, the quantum of the client's claim would be high. Attorneys should be extremely cautious when there is any suggestion of a brain injury, rather consult appropriate experts and have a curator ad litem appointed if the reports show a lack of capacity.

Conclusion:

These are general observations of matter dealt with by us. It is hoped that this article does not serve the purpose of criticising practitioners, but rather alerting them to possible practice pitfalls. Prevention is, after all, better than cure. As professionals we should recommit ourselves to serving the public in accordance with the time-honoured values of the profession.